

RECENT DEVELOPMENTS REGARDING THE CANADIAN ANTI-SPAM LAW

Three years ago on July 1, 2014, the Canadian Government enacted the Canadian Anti-Spam Law (“CASL”), regulating the sending of commercial electronic messages (“CEMs”) and other activities such as unsolicited installation of computer programs and email harvesting.

WCB published an [update](#) as to the initial passing of that law. Recently, the three year transition period during which U.S. nonprofit organizations could continue to send CEMs based solely on a broader form of “implied” consent has ended. Now, as of July 1, 2017, there are new CASL requirements for how U.S. based nonprofits can communicate with businesses or individuals in Canada. In order to send CEMs, organizations need either “express” consent from Canadian recipients – either orally or in writing (written consent can be electronic) – or a higher (or more narrowly defined) level of implied consent.

Background

CASL applies to all CEMs (i.e. email, texts) organizations send in connection with a “commercial activity.” A covered CEM will contain a message encouraging recipients to take part in some type of commercial activity, including the promotion of products, services, people/personas, companies, or organizations. In order for the entity inside – or outside – Canada to send such communication, consent is required from the individual recipient. Under CASL, entities sending the CEMs only needed a broader form of “implied” consent to communicate with businesses and individuals in Canada up until June 30, 2017. Implied consent could be satisfied by an entity’s existing and continuing business relationship with the recipient.

Implied v. Express Consent

Since the transition period ended, entities may still rely on implied consent, but in more narrowed conditions. Subject to certain conditions and limitations, implied consent may be satisfied when an entity has an existing business or non-business relationship with the CEM recipient within the last two years; or an email address has been conspicuously published or disclosed to the sender such as on a business card or has been posted online. As of July 1, 2017, for a nonprofit organization, implied consent applies to CEMs sent by a charity registered in Canada to any person who made a donation or did volunteer work for that charity in the past two years, and to CEMs sent by an association, club, or voluntary organization to its current members and those who ceased being a member within the past two years. If those more narrow conditions do not apply, then express consent is required.

In order to receive express consent, U.S. nonprofits must provide recipients with: (1) the name of the person or organization seeking consent; (2) a mailing address and either a phone number, voice message system, email address or website where recipients can access an agent for more information; (3) a statement identifying the person on whose behalf consent is being sought; (4) the identity and contact information of any third-party or affiliate used to obtain consent; (5) a free unsubscribe mechanism that lets recipients electronically opt-out of

communications; and (6) the ability to opt-out of all types of communications sent by either your organization or a third-party partner.

Exempt Messages

It is important to note that not all messages are CEMs covered by CASL. Therefore not all messages require either informed or express consent. For instance, U.S. based organizations may not need express consent for: (1) CEMs sent between family and friends (i.e. an established personal relationship); (2) CEMs to an employee, consultant, or person associated with the entity's business; (3) responses to a current customer, or someone who has inquired in the last six months; (4) CEMs sent on behalf of a registered charity or political organization under Canada's Income Tax Act for the purposes of raising funds or soliciting contributions; (5) CEMs solicited or sent in response to complaints, inquiries, requests; or (6) CEMs sent due to a legal obligation or to enforce a right.

Compliance with CASL

Organizations that do not comply with the CASL risk serious penalties, including criminal charges, civil charges, and personal liability for company officers and directors of up to \$1 million, and penalties up to \$10 million for businesses.

As such, U.S. based nonprofits should determine if they are sending covered CEMs to Canadian individuals or businesses and, if so, take steps to comply with the CASL.

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