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Legal Information Bulletin: Canada's Anti-Spam Legislation

GETTING PREPARED FOR CASL: ITS IMPACT ON BUSINESS ACTIVITIES AND CORRESPONDENCE

Canada's *Anti-Spam Legislation (CASL)* is coming into force on July 1, 2014. The purpose of this law is to help regulate commercial conduct by prohibiting certain commercial activities that are performed through electronic means. It will impact a wide range of businesses and also certain messages sent by individuals, non-profit organizations and other types of organizations.

Specifically, CASL will prohibit:

- sending commercial electronic messages ("CEM's") without the recipient's consent;
- altering transmission data in electronic messages;
- installing computer programs without express consent;
- using false or misleading representations online in the promotion of products or services; and
- collecting electronic addresses by the use of computer programs or the use of such addresses without consent.

STOP! CONSENT REQUIRED TO SEND CEM'S AS OF JULY 1ST.

CEM's are electronic messages that, having regard to the content of the message, serve to encourage commercial activity. (see definitions at right)

Section 6 of CASL prohibits the sending of CEM's, unless the sender has either express or implied consent from the recipient; in addition, CEM's must also contain the identity and contact information of the sender and a functional and simple unsubscribe mechanism.

Express consent requires a clear request statement, followed by a positive indication of consent from an individual. A request for consent may not be bundled as one of several conditions within a contract - it must stand alone. Alternatively, implied consent may be available in a number of cases, however, the onus is on the sender to ensure they have implied consent before sending and be able to prove they received it.

SUMMARY OF KEY TERMS

Commercial activity means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, whether or not the person who carries it out does so in the expectation of profit....

Electronic messages include e-mails, instant messages, text messages, direct messages on social networking sites and other types of messages involving text or images.

Commercial electronic messages (CEM's) having regard to content, hyperlinks or contact info contained in the message, a message where one is able to reasonably conclude that one of the purposes of the message is to encourage participation in a commercial activity, including:

- offering to buy, sell or lease products, goods or services, or any interest in land
- offering to provide a business investment or gaming opportunity, advertisement or promotion of such offers,
- promoting a person who does or intends to do any of the above,
- an electronic message that requests the recipient's consent for the sender to send CEM's to the recipient is, in itself, a CEM, per section 1(3) of legislation.

Penalties and Consequences

CASL provides for significant administrative monetary penalties:

- Fines up to \$10 million for businesses in breach;
- Fines up to \$1 million for individuals in breach;
- Potential personal liability for officers, directors or agents of corporations;
- Vicarious liability for certain violations of employees and agents; and
- Private law right of action for violations which could result in class action lawsuits. (Note: Suspended until July 1, 2017)

Remember: A due diligence defence to a CASL violation requires the sender to prove it undertook due diligence to comply before the offending message was sent.



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Certain limited types of messages are exempt under the Act:

Types of Exempt Messages: It is also important to note that certain types of CEM's have a complete exemption from the requirements of CASL – these include (not a complete list):

- Response to Customer-Initiated Messages: Commercial messages sent to a person engaged in a commercial activity and consists solely of a response to an inquiry or application related to the activity (i.e. a message sent confirming a transaction or relating to a transaction which the customer initiated) or a response to a customer-initiated inquiry or complaint;
- Intra-Business CEM's: sent by an employee, representative, contractor or franchisee of an organization to an employee, representative, contractor or franchisee of the same organization that concerns the affairs of the organization;
- Inter-Business CEM's: sent by an employee, representative, contractor or franchisee of an organization to an employee, representative, contractor or franchisee of another organization if the organizations have an existing business relationship and the CEM concerns the affairs of the organization to which the message is sent or the recipient's role, function or duties within that organization;
- Messages involving legal rights: to satisfy a legal obligation or enforce or provide notice of existing or pending legal rights;
- CEM's to someone with whom the sender is in a personal or family relationship including those related by blood, marriage or common-law partnership or adoption - note that a personal relationship requires proof of a prior personal relationship with a history of prior two-way communications. (this does not apply to businesses)

ACTION PLAN: Start collecting the required consents now!

- Adopt a system that allows your business to obtain and record the consent of your customers/clients to receive CEM's in a format that is easily accessible and auditable in the future and includes evidence of the method of consent and date of consent;
- Review all present databases and systems used to send CEM's, the type of messages being sent and the type of consent already obtained to determine the type of CASL consent required;
- Begin seeking express consent of all your customers/clients in the required form (prior to July 1st!);
- Create a CASL compliance policy, educate all members of your organization and assign appropriate parties to monitor;
- Adjust the form of all CEM's to ensure they contain the prescribed identifying and unsubscribe information; and
- Identify exceptions and/or implied consents if you wish to rely upon them, where applicable, and how these will be tracked (since many are time limited).

Important Note!

With limited exceptions, e-mails seeking consent from others to send CEMs will be prohibited as of July 1, 2014 unless you can rely on a form of implied consent!

Need Help?

For compliance advice for your organization contact David Lyons at Leners LLP by phone at 519.640.6383 or by email at dlyons@leners.ca



Important Note: This bulletin is for informational purposes only and may not be relied upon as legal advice.