

Your Electronic Communications to Canada May Now Be Illegal

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Canada's Anti-Spam Legislation (CASL) took effect July 1. The act bans commercial electronic messages (CEMs) sent to parties in Canada without consent and the installation of certain functions on computers in Canada without the knowledge and consent of the owner. The penalties are severe –the legislation provides for up to \$1 million per violation for an individual, and up to \$10 ten million per violation for a corporation. Company directors can also be held personally liable for damages. While CASL does not ban CEMs, it requires that (1) prior consent be obtained, (2) identifying information be provided about the sender in the CEM, and (3) an ability to unsubscribe be available. Under the newly effective act, a commercial electronic message (CEM) is defined to include electronic messages sent to encourage commercial activity. A message communicated electronically by telecommunication, text, email, sound, voice, or image is an electronic message. Social media messages including those sent through Facebook, Twitter, and Instagram also may constitute CEMs. The sender of a CEM is obligated to prove the recipient gave consent. An "opt-out" method of consent is inadequate. Instead, the CEM recipient must affirmatively "opt in" to receiving the messages. It is suggested that businesses keep a record of recipients' consent to combat violation claims. A CEM to Canada must contain the message sender's name and contact information. Also required is a specified method to unsubscribe from further CEMs. An "unsubscribe" link in an email or the option to reply "STOP" to a SMS message is likely sufficient. Canada's new legislation does provide for exemptions. For the next 36 months only, consent is implied if there is an "existing business relationship" and the CEM pertains to that relationship. During this period, businesses are encouraged to obtain express consent from their existing clients to continue to send CEMs. However, if an existing client opts out during the transition period, consent is no longer implied. Danger lurks for "stale" business relationships. The implied consent only lasts for two years after the "existing business relationship" ends. After this period of time, express consent is needed. Consent is also implied if a recipient willfully publishes or provides its email address, phone number, etc. without a notice not to spam. Additionally, if an employee of one company sends a message to an employee of another company, and a business relationship exists between them that is reflected in the communication, CASL does not apply. Some third-party referrals, messages sent in response to an inquiry or complaint, and those sent to enforce a legal right or obligation are exempted as well. Concerns about how to comply with the act have been

raised. Companies may want to remove Canadian clients from their distribution lists until they obtain express consent. An email sent to request consent is considered a CEM. Parties seeking consent may resort to the postal service to obtain consent to send CEMs to potential clients. Complaints concerning unsolicited communications to Canadian parties may be investigated by the Canadian Radio-Television and Telecommunications Commission to determine if the CEM violates CASL. For the next three years governmental enforcement of the act is exclusive. After that, a private right of action is permitted. For more information about Canada's Anti-Spam Legislation, visit the website at: <http://fightspam.gc.ca/>

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