

## AUTHORS

Jeffrey S. Tenenbaum  
Stuart P. Ingis  
Michael A. Signorelli  
Tiffany M. Nichols

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June 2014

### Canada's New Anti-Spam Legislation: What Does It Mean for U.S. Nonprofits?

Under Canada's new Anti-Spam Law (CASL), as of July 1, 2014, for-profit companies and nonprofit organizations engaged in marketing and fundraising campaigns from within Canada or to recipients in Canada must acquire prior "express consent" from recipients *before* sending commercial electronic messages (CEM). Nonprofits that send CEM to Canadian recipients must ensure that all CEM conform to the new legal requirements.

#### CEM

The new law covers a range of CEM sent to an "electronic address" (*i.e.*, an address used in connection with the transmission of an electronic message to an email account, an instant messaging account, a telephone account, or any similar account) that encourage participation in a commercial activity – without regard to whether profit is expected – from within Canada or to recipients in Canada. The new law states that CEM include, among other things, messages that include offers to purchase, sell, barter, or lease a product, goods, a service, land, or an interest or right in land; or offers to provide a business, investment, or gaming opportunity.

Under the new law, the term CEM includes emails, text messages, and pre-recorded voice messages, such as marketing emails regarding publications or events.

#### How the CASL Uniquely Affects Nonprofits

Nonprofits should keep in mind that there are very limited exemptions provided under CASL. For instance, (Canadian) "registered charities" as defined in subsection 248(1) of the Canadian *Income Tax Act* (note that there are Canadian residency requirements to qualify as a "registered charity") that send CEM with the purpose of raising funds for the charity are specifically exempt from CASL's provisions. Therefore, charities that are not Canadian "registered" should not send CEM from within Canada or to Canadian recipients without acquiring prior consent unless the message falls under another exemption, such as sending an email to someone who has paid membership dues to the sender. Nonprofits sending CEM are otherwise subject to CASL. For example, a nonprofit that sends CEM (not subject to the exemptions described below) for a purpose involving commercial activity – such as new member recruitment, soliciting sponsors, advertisers or exhibitors, promoting participation in certification and accreditation programs, or possibly even soliciting contributions – would be subject to the requirements in CASL. Nonprofits also should be careful to ensure that even electronic newsletters, magazines and similar materials sent from Canada or to Canadian recipients do not contain language promoting commercial activity.

#### Express Consent

Subject to limited exemptions, the new Canadian law requires consumers' express consent to send CEM. According to [guidance provided by the Canadian government](#), express consent under the new law can be either written or oral, but the onus is on the person sending the CEM to prove that consent has been provided by the recipient.

The law will require the person seeking express consent to:

- state the purpose for which consent is being sought; and
- include prescribed information that identifies the person seeking consent or the person on whose behalf consent is being sought.

According to government guidance, if consent is obtained orally, there are two permissible forms of oral consent:

- consent that can be verified by an independent third party; or
- a complete and unedited audio recording of the consent that is retained by the person seeking

consent or a client of the person seeking consent.

According to the guidance provided by the Canadian government, consent obtained in writing may be in paper or electronic form. Further, the guidance states that consent may be demonstrated by checking a box on a webpage to indicate consent where there is a record of the date, time, and purpose of consent. In addition, the manner of the consent should be stored in a database. Another example of a consent mechanism provided by the Canadian government is filling out a consent form at a point of purchase.

Under the new law, emails seeking consent to send CEM are deemed CEM. Unless the sender has acquired a recipient's prior consent or can avail itself of an exemption, a sender should not seek consent via a CEM. The guidance states that the law also prohibits certain "opt-out" or negative option approaches, such as pre-checked boxes, for securing consent.

### **Requirements for CEM**

CEM sent from within Canada and to Canadian recipients must:

- be sent with express or implied consent from the recipient;
- clearly disclose the name of the sender or the person on whose behalf the message is sent;
- contain contact information, which must be valid for a minimum of 60 days after the message is sent, enabling the person to whom the message is sent to contact the sender or person on whose behalf the message is sent; and
- contain an unsubscribe mechanism.

### **Unsubscribe Mechanism**

The CEM must have a means for the recipient to unsubscribe from receiving CEM from the sender, at no cost to the recipient. Further, the unsubscribe mechanism should:

- allow the recipient to unsubscribe through the same mechanism with which the CEM is sent;
- remain operable for at least 60 days after the CEM is sent; and
- honor the recipient's request to unsubscribe or withdraw within 10 business days after the unsubscribe option is exercised.

### **Implied Consent and Exemptions**

There are several circumstances under which the law allows CEM to be **sent without the prior express consent** of the recipient:

- If a recipient has an existing business<sup>1</sup> or non-business relationship<sup>2</sup> with the sender, prior consent is implied until July 1, 2017, unless the recipient sends notification to the sender that he would like to unsubscribe before that date.
- If the recipient conspicuously publishes his email address, or discloses it to the sender, without stating that he does not wish to receive CEM, and the CEM is related to the individual's professional or official capacity, the CEM will have implied consent.
- If the recipient has purchased products or services from the sender, made a donation to the sender, paid membership dues to the sender, or performed volunteer work for the sender within two years of the CEM being sent, consent is implied.
- Purely transactional messages sent in response to a request, as long as those messages do not contain any advertising or promotional material, are exempt.
- Messages between organizations concerning the activities of the recipient organization, messages from telecommunication service providers, two-way voice communications, and law enforcement and public safety messages are exempt.
- Messages sent by or on behalf of registered charities (as defined in subsection 248(1) of the Income Tax Act) for the purpose of raising funds for the charity are exempt.
- Messages sent by or on behalf of a political party, political organization, or a person who is a candidate (as defined in an Act of Parliament or the legislature of a province) for publicly elected office, with the primary purpose of soliciting contributions (as defined in subsection 2(1) of the Canada Elections Act), are exempt.
- Prior consent is not required if the entity sending the CEM is referred by an individual with whom that entity has a prior business or non-business relationship, family relationship, or personal relationship. The individual providing the reference must have a relationship with the recipient, and the message must (1) disclose the full name of the individual or individuals who gave the referral, and (2) state that the message is being sent as a result of the referral.

Notably, the regulations also provide that if an entity reasonably believes that it is sending a CEM that will be accessed in a foreign state **listed in the schedule**, and that the CEM is in compliance with that

foreign state's laws for regulating CEM, that entity will not be held liable for violating CASL.

### **Penalties**

The law authorizes the Canadian Radio-Television and Telecommunications Commission to designate a person to carry out enforcement of the new law. The law imposes penalties for violations. The maximum, per violation penalty is \$1 million Canadian dollars for individuals and \$10 million Canadian dollars for any other person (*e.g.*, partnership, corporation, organization, association, trustee, administrator, executor, liquidator of a succession, receiver or legal representative). CASL also provides a private right of action, beginning July 1, 2017, that will allow individual plaintiffs to sue a person that they allege have been non-compliant with the law for actual losses up to \$200 Canadian dollars per violation (not to exceed \$1 million Canadian dollars for each day on which there was a violation), and other damages.

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Given the complexities involved in making sure that your nonprofit is in compliance with CASL, as well as the penalties associated with non-compliance, it is strongly recommended that your organization evaluate and ensure compliance with the new law prior to July 1, 2014.

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<sup>1</sup> "Existing business relationship" means a relationship arising from the purchase or lease of a product, good, or service; a business investment or gaming opportunity; a written contract in effect or having expired within 2 years of the date the CEM is sent; or an inquiry or application within a six-month period before the CEM is sent.

<sup>2</sup> "Non-business relationship" means a relationship arising from a donation or gift made by the recipient within a two-year period before the CEM is sent; volunteer work performed by the recipient within 2 years of the date the CEM is sent; or membership by the recipient in the sender's organization within 2 years of the date the CEM is sent.