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Managing the message

Canada's new anti-spam law sets a high bar

According to a recent Deloitte poll, only 13% of organizations say they understand CASL requirements and have begun to apply them to their business.

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New laws target electronic communications

Canada's Anti-Spam Law¹ (CASL), is coming into force in 2014, will be one of the toughest of its kind in the world. Texts, tweets, Facebook posts and emails will all fall under its purview. In fact, CASL and its regulations will apply to any electronic message sent in connection with a "commercial activity," even if it is sent without the expectation of making a profit. Simply encouraging participation in a commercial activity is enough to get caught by this Act.

Consent is a key feature of CASL. According to the new law, Canadian and global organizations that send commercial electronic messages (CEMs) within, from or to Canada need the permission of their recipients to send those messages, with very limited exceptions. This is in stark contrast to the US anti-spam law, which allows CEMs to be sent without permission until a recipient "opts-out".

The result? Organizations will need to amend their electronic marketing practices and update their customer relationship management databases to comply with CASL's stricter consent model.

Are you prepared to comply before CASL comes into effect?

Enforcement

A focus on enforcement

The Canadian Radio-Television Telecommunications Commission (CRTC), the Privacy Commissioner of Canada and the Competition Bureau will all play a role in enforcing CASL. In addition to sharing information among themselves, these agencies can coordinate with foreign jurisdictions to pursue violators.

Organizations that don't comply risk serious penalties:

- Up to **\$10 million per violation** for corporations
- **Criminal charges** for organizations that make false or misleading representations regarding the sender or subject of a CEM
- **Civil charges** enabling businesses and consumers to seek damages of \$200 per violation, to a maximum of \$1 million per day
- **Personal liability** for company officers and directors who knowingly infringe the law

- **Vicarious liability** for companies whose staff don't comply
- **Investigation** of spam messages, which recipients can send to a Government of Canada reporting centre. Activities related to phishing, email harvesting and the use of spyware/malware will also be investigated

“Private-sector bids closed [January 6] on helping the government to establish and operate a facility that observers say is desperately needed to meet international standards and eliminate Canada's reputation as a spammer haven.”

Montreal Gazette, January 5, 2012



More stringent rules on the way

Before CASL	After CASL
Organizations could send a CEM based on express or implied consent as long as the recipient had the option to opt-out	Organizations need express consent from recipients before sending a CEM using opt-in; implied consent applies in limited circumstances
You could add recipients to your list by simply pre-checking a box to opt-out	Recipients must indicate a positive and explicit consent by checking a box or typing an email address into a field
Organizations could bundle requests for consent with the general terms and conditions of use or sale	You need express consent separately for each act regulated by CASL, such as sending a CEM, altering transmission data in CEMs or installing a computer program on another person's computer, and that consent can't be bundled into the general terms and conditions of use or sale

According to a recent Deloitte poll, only 22% of organizations have a customer relationship management (CRM) system equipped to handle CASL.

Consent

What constitutes consent?

To send a CEM, organizations need to get express consent either orally or in writing – and the onus to prove consent rests with the sender of the communication. Oral consent can be verified by an independent third party or with a complete and unedited audio recording. Written consent can be paper-based (e.g. filling out a consent form at the point of sale) or electronic (e.g. checking a box on the web or an app), as long as you store the date, time, purpose and manner of consent in a database.

But there's a catch: once CASL comes into force, you can't send an electronic message requesting consent because it will be considered a CEM.

Beyond the basics

Although not a requirement of CASL, the CRTC expects organizations to confirm a recipient's consent if obtaining electronic consent. This type of "double opt-in" imposes an additional responsibility on organizations to not only obtain express consent, but to notify individuals that their consent has been obtained.

To comply with CASL, you must provide recipients with:

- The name of the person or organization seeking consent
- A mailing address and either a phone number, voice message system, email address or website where recipients can access an agent for more information, and which remains valid for at least 60 days after the CEM is sent
- A statement identifying the person on whose behalf consent is being sought
- The identity and contact information of any third party or affiliate used to obtain the recipient's consent
- A free unsubscribe mechanism that takes effect within 10 days maximum giving recipients two ways to electronically opt-out of communications, such as by email or hyperlink
- The ability to opt-out of all types of communications sent by either your organization or a third party partner (e.g. not just newsletter lists, but also invitations to seminars or any other type of CEM you send)

If you're seeking express consent, you also need to explain why you're contacting the prospect, in addition to including all the mandatory contact information and providing an unsubscribe mechanism.

If you can't include this information in a CEM, you'll need to provide a link to an easily accessible web page that clearly displays this information.

Consent can be implied – but only in certain circumstances

1 If your organization sends a CEM in the context of an existing business or non-business relationship.

An existing business relationship is one where the recipient has:

- bought or leased a product, good or service from your organization
- been involved in an investment or gaming opportunity with your organization
- entered into a written contract with your organization in the last two years
- made an inquiry or application to your organization in the last six months

An existing non-business relationship is one where the recipient has:

- made a donation or gift to a registered charity or political organization
- volunteered with the charity or political organization in the past two years
- been a member of the organization's club, association or not-for-profit volunteer association in the last two years

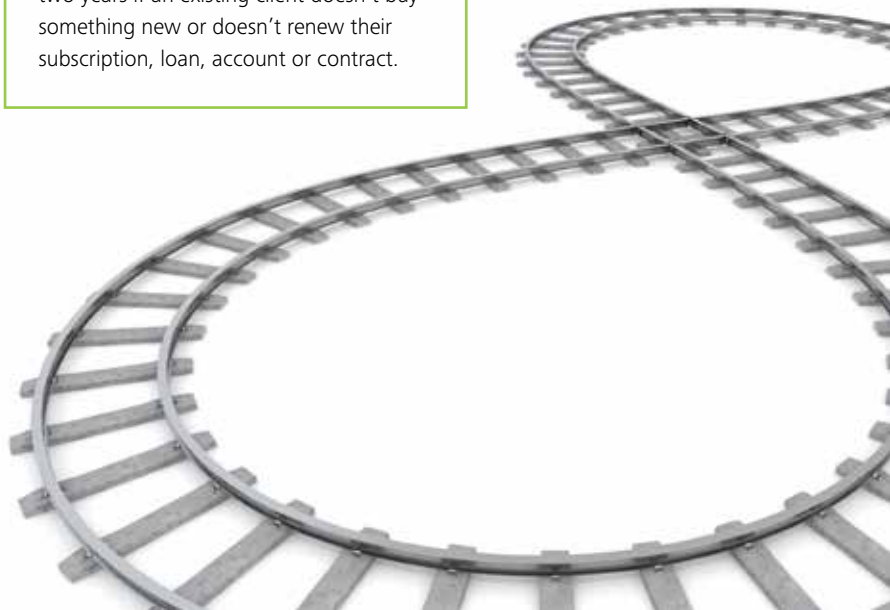
2 If recipients conspicuously publish their electronic contact information without indicating they don't want to receive communications.

This "publication exception" applies when you get an email address from a published directory, on a corporate website or through a social media site, as long as the CEMs you send are relevant to the recipient's business, role, functions or official duties (e.g. an invitation to a seminar or information on new industry rules).

3 If recipients voluntarily disclose their email contact information to the sender without indicating they don't want to receive communications.

This exception would apply if a recipient provides your organization with a business card, as long as the CEMs you send are relevant to the recipient's business, role, functions or official duties.

Implied consent expires in six months if a prospect doesn't become a client and in two years if an existing client doesn't buy something new or doesn't renew their subscription, loan, account or contract.



Exceptions & compliance

There are exceptions

In limited cases, you don't need express consent to send a CEM – although you still need to provide recipients with all mandatory information required by CASL. You don't need express consent where the CEM is solely intended to:

- Provide a quote or estimate in response to a request
- Facilitate or complete a commercial transaction
- Provide warranty, product recall or safety alerts about a product
- Provide factual information about the ongoing use of an existing product, service or good or an ongoing subscription, membership, account, loan or similar relationship
- Provide information about an employment relationship
- Deliver a product or service (including upgrades)

And CASL doesn't apply at all when sending CEMs to family or friends or when responding to inquiries or applications.

The key to compliance

Updating your electronic databases to manage consents and unsubscribe requests can be a complex task. But it also promises to yield rewards that extend far beyond compliance. As you update your digital marketing practices, you can establish more meaningful communications with your customers and prospects – ones that are solicited and anticipated in accordance with CASL.

Review your current state

Examine your current consents, unsubscribe methods and electronic communication practices, as well as cross-marketing initiatives with affiliates, to identify compliance gaps. Consider establishing an internal CASL working group comprised of individuals from marketing, event planning, IT, legal and privacy to identify enterprise-wide processes.

Develop an implementation plan

Depending on the extent of online marketing and business development your organization conducts, reaching a ready-state for CASL can take weeks or months. For example, if you have various teams who contact prospects in different ways (e.g. email, social media, event marketing), you may need to establish a central "do not email" list to enable recipients to opt-out of all CEMs across the organization.

Get express consent

Express consent never expires unless it's revoked, so it makes sense to convert your implied consents into express consents. This means getting consent from recipients on an opt-in basis. As an added benefit, going through this exercise lets you refresh older contacts and re-establish relationships.

Make it stick

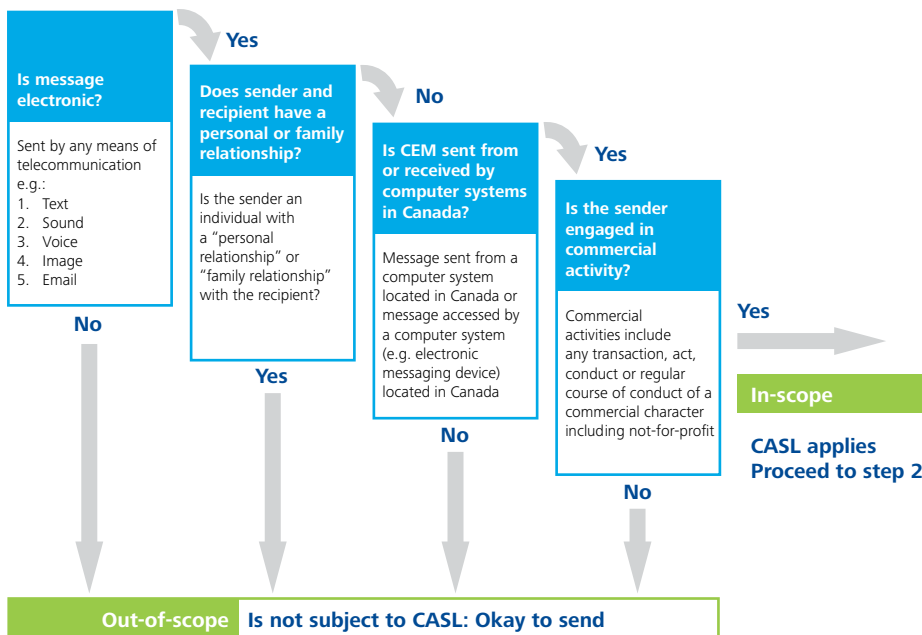
To ensure ongoing compliance, consider appointing a CASL officer to oversee compliance, review online communications, monitor consent and business contact practices, train staff to understand their responsibilities and implement appropriate procedures and policies. Training is particularly critical for organizations that send out different CEMs by region or business unit. By taking this step, organizations may be able to rely on the “due diligence” defense to avoid liability under CASL.

According to a recent Deloitte poll, 71% of organizations expect it will take a medium to high effort for their compliance and marketing teams to comply with CASL.

Does CASL apply to you?

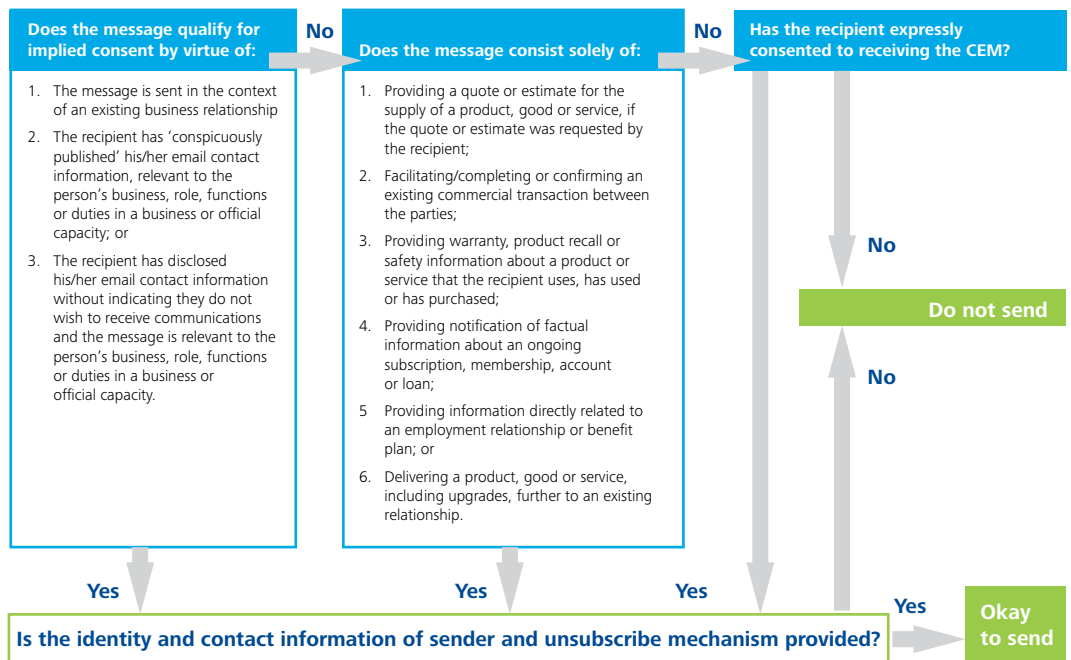
Step 1

Inventory of customer and prospect touchpoints and related CEMs



Are your messages safe to send?

Step 2



Get it right, right now

As Canada's regulators crack down on spam and other forms of commercial electronic messages, organizations in every sector will be affected. To avoid monetary penalties, civil liability and the risk of reputational damage, it makes sense to comply with CASL early.

The key is to start obtaining consents now, before your CEMs are deemed spam once CASL comes into force in 2014. In most cases, this means getting "new" or "refreshed" consents from individuals on an opt-in basis. The clock is ticking. Be sure to respond quickly.

Contacts

Deloitte can help you get ready for CASL before this new law comes into force.

To find out how, please contact:



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Endnotes

- 1 "An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities," S.C. 2010, c.23

This POV summarizes the anti-spam requirements under CASL, which incorporates the draft regulations passed by Industry Canada in the summer of 2011 and the draft regulations finalized by Canadian Radio-Television and Telecommunications Commission (CRTC) in March 2012, as well as recent CRTC implementation guidelines published in October 2012. However, Industry Canada is expected to release a second version of draft regulations exempting certain activities from being deemed spam, which will be subject to a 30-day public consultation period before they are registered. Organizations should review these final regulations once registered to ensure overall compliance.

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