

Big Changes to Canada's Anti-Spam Law Effective July 1

The Bottom Line

- *Although advertisers may not have to be concerned with private lawsuits at this time, they still must comply with CASL — and the Canadian Radio-television and Telecommunications Commission retains the authority to enforce the law, and has been actively doing so for the past three years.*
- *With the elimination of historical implied consent, advertisers must obtain express consent to send CEMs to such addresses or cease sending CEMs to people who do not provide express consent or who withdraw it.*

Enacted in 2014, Canada's Anti-Spam Law (CASL) set in motion significant changes to the law governing the collection and use of email and other electronic addresses in Canada, with certain provisions to become effective on July 1, 2017.

With that deadline upon us, the Canadian government has suspended the "private right of action" provisions just before they were to come into effect. In addition, July 2017 ends a transitional period for the use of "implied consent" stemming from historical, pre-July 1, 2014 relationships. "Implied consent" or "express consent" within the requirements established by CASL are required going forward.

CASL

As we described in a prior Alert (to read more, [click here](#)), CASL, which came into effect three years ago on July 1, 2014, generally prohibits individuals and businesses from sending commercial electronic messages (CEMs) without the recipient's consent, including messages to email addresses and social networking accounts, and text messages sent to a cell phone.

Beginning on July 1, 2014, advertisers could not send CEMs unless consumers had expressly opted-in or, in certain limited circumstances, had implied consent to receive CEMs from them. Under CASL, CEMs must include certain required contact information and a simple and cost-free way for recipients to unsubscribe.

CASL also provided for penalties for the most serious violations of up to \$10 million.

Moreover, CASL provided for a private right of action that would have allowed lawsuits to be filed against individuals and organizations for alleged violations of the legislation for the recovery of actual and statutory damages. These particular provisions were scheduled to come into force on July 1, 2017.

The Private Right of Action

Now, the Canadian government has announced that, in response to "broad-based concerns raised by businesses, charities and the not-for-profit sector," it has suspended the private right of action and it will *not* take effect on July 1, 2017.

In a statement, the government said that although Canadians deserved an “effective law” protecting them from “spam and other electronic threats,” businesses, charities and non-profit groups “should not have to bear the burden of unnecessary red tape and costs to comply with the legislation” and “should have reasonable ways to communicate electronically with Canadians.” The government added that it would ask a parliamentary committee to review the legislation.

Consent

As an “opt-in” law, CASL requires prior consent from a recipient before the first CEM is sent. CASL permits companies to send emails asking for recipients to provide “express” consent, only in cases where the company is already able to establish another form of consent recognized by the Act. In other words, emails asking for consent are “commercial” emails that themselves require consent to send.

As noted above, CASL also recognizes that consent can be implied in a narrow range of circumstances. These include cases where the recipient has made a purchase of goods or services from the company sending the message in the two years prior to the message, or where the recipient has an existing written contract with the sender, or such a contract expired in the prior two years, as well as certain other defined “existing business relationships.” CASL included a transitional provision that provided that if a company had such an “existing business relationship” as defined in CASL that existed prior to July 1, 2014 and the relationship included the sending of CEMs as of that date, CASL deemed those pre-existing implied consents to last for three years, until July 1, 2017.

Now that July 1, 2017 is here, such historical implied consents are no longer effective, and advertisers relying on them must obtain express consent prior to July 1 to continue sending CEMs to such addresses, or purge them from their lists. Advertisers must also be mindful to comply with the remaining provisions of CASL, as well as keep detailed records of their compliance and electronic marketing efforts so that they can prove they are compliant if investigated by the regulator.

This alert was co-authored by Christopher Oates, Associate, Gowling WLG (Canada) LLP

Related People

Gary Kibel
Partner
212 468 4918
gkibel@dglaw.com