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Watch This (Email) Space: New Private Right of Action for Misleading Representations

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As 2016 draws to a close, almost everyone is consumed with preparing for the coming holiday season. However, businesses advertising in Canada would be wise to take a few moments this holiday season to start planning for next summer. Beginning in July 2017, private parties will be able to sue for contraventions of section 74.011 of the *Competition Act* (Act), which prohibits misleading representations contained in various portions of electronic messages. As discussed below, this new private right of action and the class actions that inevitably follow will significantly impact a variety of digital marketing efforts in Canada.

Summary

Section 74.011 of the Act prohibits misleading or false representations in any “electronic message” (e.g., email, text messages, social media posts, websites, and apps), including in the subject line, the sender information and any URLs or metadata that the message contains. The section applies to a person who sends such a message as well as a person who causes or permits such a message to be sent. This means that an advertiser may be liable for messages sent on its behalf by an agency, affiliate marketer or even a blogger.

From July 2017 onward, any person “affected” by misleading representations in an electronic message will be able to apply, either individually or as a class, to a court for an order against the persons responsible. Directors and officers can be held personally liable, and companies can be liable for the conduct of their employees. If a court finds that conduct contrary to section 74.011 has occurred, it can order that the applicant receive compensation for any actual loss or damages or expenses incurred, as well as statutory damages of \$200 *for each occurrence* of the conduct to a maximum of \$1 million *for each day* on which the conduct occurred. Although the intended meaning of each “occurrence” is unclear, private plaintiffs may well argue that each email sent constitutes an occurrence – so that one email sent to 5,000 recipients could result in the daily statutory maximum being reached.

Implications

Businesses advertising in Canada should review their digital marketing efforts well before July 2017 and in particular:

- Review existing digital marketing practices, including emails and all other forms of electronic messages (on websites, in texts) for any possible compliance issues, including those engaged in by agencies, affiliate marketers and other third parties working with the advertiser.
- Avoid “catchy” subject lines or locators that, viewed on their own, could be misleading.
- Move bolder claims from the subject line to the body of the message, where further disclosure can be provided and any representations will be reviewed using a materiality threshold.
- When sending electronic messages to Canadian consumers, ensure that advertised promo codes, pricing and sales are in fact accessible to Canadian customers as advertised.
- In light of the due diligence defence, ensure that any existing compliance program addresses digital marketing efforts and is comprehensive and credible.

For more details, please see below.

Overview of Section 74.011 of the *Competition Act*

When Canada's anti-spam legislation (widely referred to as "CASL") was introduced in July 2014, the implementing legislation also contained several important amendments to the deceptive marketing practices provisions in the Act.

Significantly, the CASL amendments introduced section 74.011 of the Act, which prohibits misleading representations in various parts of an electronic message, as well as an equivalent criminal offence found in section 52.01 of the Act (which applies when such misleading representations are made recklessly or knowingly). An "electronic message" is not, however, limited to emails, but is broadly defined as "a message sent by any means of telecommunication, including a text, sound, voice or image message." Preliminary guidance issued by the Bureau regarding CASL emphasizes the broad application of the new provisions, stating that "all means of telecommunications are captured under the new law, including Short Message Services (SMS or text messaging), social media, websites, uniform resource locators (URL) and other locators, applications, blogs, and Voice over Internet Protocol (VoIP)."

Section 74.011 contains three distinct subsections, each addressing different aspects of electronic messages:

- Subsection 74.011(1) prohibits sending or causing to be sent any misleading or false representation that appears in the "subject matter information" or "sender information" of electronic messages.
- Subsection 74.011(2) prohibits sending or causing to be sent any representation in an electronic message that is false or misleading in a material respect.
- Subsection 74.011(3) prohibits false or misleading representations that are found in the "locator" of an electronic message. The locator will include the URL as well as the metadata of the message. A URL could potentially be misleading if the message is designed to appear to be coming from another source (e.g., from a bank by using a URL that is very close to that of the bank).

Unlike the existing prohibition on misleading representations found in section 74.01(1), subsections 74.011(1) and (3) do not require that the representation at issue be false or misleading in a "material respect." The practical implications of the absence of a materiality requirement for these provisions could be to allow private plaintiffs to allege that, for example, a catchy subject line in an email or blog posting is, on its own, misleading. For instance, a subject line of an email that refers to a specific savings claim (e.g., "X% off your purchase") where exclusions to the sale are disclosed in the body of the email could theoretically be the subject of a claim.

In addition, section 74.011 differs from the existing civil provisions relating to false or misleading representations in the following important respects: (i) there is no requirement that the representation be "made to the public"; and (ii) the electronic message is considered to be sent once its transmission has been initiated and it is "immaterial whether the electronic address to which the electronic message is sent exists or whether the electronic message reaches the intended destination." In other words, this provision applies whether or not the representation is made to the public, and any representation will be considered to be made the minute you hit "send".

Finally, making a representation under section 74.011 includes "permitting" a representation to be made. That is, a company that has permitted a third party to make a false or misleading representation could be held liable as if it had made the representation itself. This issue of liability for third-party representations may arise in the context of representations made by third-party bloggers and/or affiliate marketers working with the advertiser.

Scope of Private Right of Action

Under section 47(1) of CASL, after July 1, 2017, private plaintiffs who allege that they are "affected" by conduct that is reviewable under section 74.011 can apply to a court for an order against the person or persons responsible. Under section 52 of CASL, officers, directors or agents of a corporation can be held liable if they "directed, authorized, assented to, acquiesced in or engaged in the conduct," whether or not the corporation is sued. Furthermore, under section 53, a company is liable for conduct engaged in by its employees acting within the scope of their employment, whether or not the employees are sued.

If the court hearing the application determines that the respondent engaged in conduct contrary to section 74.011, it may issue an order requiring payment to the applicant of:

- compensation in an amount equal to the actual loss or damage suffered or expenses incurred; and
- \$200 for each occurrence of the conduct to a maximum of \$1 million *for each day* on which the conduct occurred.

Although the intended meaning of each “occurrence” of the conduct is unclear, in light of the daily maximum, private plaintiffs may well allege that every “occurrence” refers to each electronic message that was initiated; therefore, a single message to a distribution list of 5,000 could result in the maximum daily statutory penalty of \$1 million. It is the availability of statutory damages that is likely to attract class actions and if the available recourse were limited to actual losses or damages, fewer claims would be likely.

Given the potentially significant penalties, it’s important to remember that under section 54 of CASL, persons will not be found to have engaged in conduct contrary to section 74.011 if they can establish that they have exercised due diligence to prevent the conduct in question. On this issue, the Bureau and the courts have acknowledged that the presence of an effective and credible compliance program is an important factor in assessing whether a company has engaged in sufficient due diligence efforts.

Finally, under section 47(4) of CASL, the Commissioner of Competition must be served with a copy of any application brought under these provisions and will have the opportunity to intervene in any such proceedings. Given that, in a typical year, complaints under the misleading advertising provisions represent the largest proportion of complaints received by the Bureau, it is safe to assume that the Bureau will not have sufficient resources to intervene in every such proceeding. Although the process and cost involved in initiating an application (and presumably the cost consequences associated with losing an application) may act as a check against spurious applications, advertisers (particularly heavy advertisers) may find themselves defending against these allegations (including from competitors) more frequently.

Conclusion

The new private right of action that comes into force in July will not affect the conduct already proscribed by section 74.011 but will create another avenue for allegations of violations, as well as a new risk to be managed. The breadth of the provision makes it likely that legitimate advertisers will be caught in the private actions fray. As a result, companies advertising in Canada should think about adding a well-considered, robust compliance program to their holiday wish list as such compliance programs are soon to become more important than ever.

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