

DAVIES CASL FAQs

WHAT IS CASL?

DAVIES

→ Do I need to be familiar with anything apart from the statute?

Yes. In addition to CASL itself, the relevant regulatory regime includes associated regulations and compliance and enforcement bulletins. Together, these materials set out the scope for what organizations must understand about their new obligations.

→ Where can I get a copy of the relevant materials?

The government's fightspam.gc.ca website sets out the relevant legislation, regulations and various bulletins/guidelines.

→ Does the whole law come into force on July 1, 2014?

No. CASL's provisions regarding commercial electronic messages (CEMs) and misleading advertising come into force on July 1, 2014. Certain provisions relating to computer programs and spyware come into force on January 1, 2015. The provisions providing for a private right of action for non-compliance will come into force on July 1, 2017. There is also a special three-year transition period for relying on implied consents.

→ Do I only need to worry about CASL?

No. Provisions of the *Competition Act*, as well as the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") and similar provincial privacy legislation also apply to your CEMs.

→ What provisions of the *Competition Act* do I need to worry about?

As a result of amendments contained in CASL, the *Competition Act* could apply if your CEM contains "false and misleading" representations (whether or not material) in the sender information, subject line or locator (e.g., URL) of an electronic message. In addition, the *Competition Act* also prohibits a person from sending representations in the body of the message that are false or misleading and that are likely to influence a person to purchase the product advertised. The penalties for violating these provisions can be substantial, especially if it can be proven that the false or misleading representations were made "knowingly" or "recklessly". Potential penalties may include jail time, significant monetary penalties and orders prohibiting similar conduct in the future.

→ What do I need to know about privacy legislation?

You should be aware of the requirements of PIPEDA and similar provincial legislation (where it exists). These laws govern the collection, use and disclosure of personal information in the course of commercial activities, including promotional activities (whether electronic or not). Among other things, PIPEDA and the equivalent provincial laws require that the knowledge and consent of individuals are required for the collection, use and disclosure of their personal information, and require that organizations establish an appropriate administrative structure to ensure that the principles of the legislation are implemented.

DOES CASL APPLY TO MY BUSINESS?

DAVIES

1. GENERAL

→ To whom does CASL apply?

CASL applies to any “person” that sends a CEM. A “person” includes individuals, corporations and many other types of entities.

CASL also applies to persons that aid, induce, procure or cause to be procured any act in violation of CASL.

→ Does CASL apply to foreign companies?

Yes. CASL applies where a computer system in Canada is used to send or access a CEM. Thus, CASL applies to foreign companies that send CEMs to individuals located in Canada. You cannot use foreign affiliates or subsidiaries to try to avoid CASL's application.

→ What is a CEM?

The definition of CEM is very broad and includes any electronic message that encourages participation in a commercial activity. Generally speaking, any electronic message sent in order to induce the recipient to buy something is a CEM. Similarly, any electronic message sent asking someone for permission to send them a CEM is also a CEM.

→ What is an electronic message?

An electronic message is any type of message sent electronically, including a text, sound, voice or image. E-mails, SMS texts, instant messages and messages sent over social media (e.g., Facebook, Instagram, Twitter, Pinterest) are all electronic messages.

→ What if my message doesn't promote anything, but it contains a link to a webpage that does?

Your message could be considered a CEM. In addition to the text of the message, the content of any website links contained in the CEM will be considered when determining whether the message is commercial in nature.

→ What if my CEM is meant to serve various purposes, only one of which is to encourage participation in a commercial activity? Am I caught by CASL?

Yes. CASL applies even if only one of the reasons you send a CEM is to promote a commercial activity.

→ Is an electronic receipt a CEM?

A receipt is not a CEM if it is sent by the person/ company with whom the recipient has conducted a transaction. That is because messages intended to complete a transaction that is already underway (rather than intended to promote other commercial activity) are not CEMs. However, if a receipt is sent by a third party on behalf of the entity with which the recipient completed the transaction, that third party receipt may be a CEM. Accordingly, depending on your business processes, you might want to secure a customer's consent to receiving third party receipts at the time a transaction

is completed. Additionally, a receipt could be a CEM if it contains advertisements for other products and not just information relating to a transaction.

➔ **What is an electronic address?**

An electronic address includes any type of address used in connection with the sending of an electronic message, such as an e-mail account, an instant messaging account, a telephone account or any similar type of account.

➔ **Does telemarketing involve sending a CEM?**

CASL does not currently apply to telemarketing (although the CRTC's Do-Not-Call List rules still apply). However, the government may change this at some point in the future.

➔ **If someone is a member of our Facebook, Twitter or similar social media pages, do we have consent to send them CEMs, either through those social media or by other means?**

Facebook, Twitter and similar social media posts that are not sent directly to someone (e.g., a post on your organization's Facebook wall or a tweet that is not a direct message) are not subject to CASL. However, messages sent to specific social media accounts must comply with CASL, including the requirement to have valid implied or express consent to send those persons CEMs.

➔ **Is a banner advertisement subject to CASL?**

No. A banner advertisement would not be subject to CASL because it is not sent to an "electronic address".

➔ **Are blog posts subject to CASL?**

No. Blogging or micro-blogging on a webpage or other medium are not subject to CASL provided the blog posts are not directed to an "electronic address".

➔ **What does it mean to send a CEM?**

A CEM is sent once transmission has been initiated. Note also that the requirement is only that the CEM be sent: the CEM does not need to be actually received by anybody.

2. EXEMPTIONS

➔ **Are there any exemptions from CASL?**

Yes. There are two types of exemptions. The first type exempts you from both the consent and form requirements in CASL. The second type exempts you only from the consent requirement, not the form requirement.

➔ **When would I be exempt entirely from complying with CASL?**

The following types of CEMs are not subject to CASL at all (no consent required and no content/form requirements):

- CEMs sent by a person who has a personal relationship or family relationship with the recipient;
- Inquiries or applications related to commercial activities and responses to the same;
- Internal organization and business-to-business communications concerning the affairs of the recipient organization;



- CEMs sent for the enforcement of legal rights;
- CEMs sent and received on electronic messaging services where the sender's information and the ability to unsubscribe from future messages is already available;
- CEMs sent to a limited-access, secure account, such as CEMs sent to a user on a bank website;
- CEMs sent to foreign recipients in compliance with local anti-spam laws; and
- CEMs sent by registered charities or political organizations for fundraising purposes.

➔ **When does a personal or family relationship exist?**

A personal relationship exists when the sender and recipient of a CEM have had direct, voluntary, two-way communications and it would be reasonable to conclude that those persons have a personal relationship.

A family relationship exists between a sender and recipient of a CEM who are related to each other through a marriage, common-law partnership or parent-child relationship if those individuals have direct, voluntary, two-way communications.

➔ **What is an inquiry or application related to commercial activities?**

A good example is an e-mail sent by a potential customer to a business seeking a quote or requesting services. Another example would be a complaint by a customer to a business about a product she/he purchased. Similarly, a response by that business to the customer would also be exempt. The responding business can include other information in its response to an inquiry or application that was not specifically requested by the customer, like a pricing list or a link to its website, as long as it would be reasonable for the customer to expect to receive that information as a result of their inquiry.

➔ **What constitutes an internal or business-to-business communication?**

The internal communications exemption applies to CEMs sent between employees or other representatives of the same organization where the message concerns the activities of the organization.

The business-to-business exemption applies to CEMs sent from employees or other representatives of one organization to employees or other representatives of another organization if those organizations have an existing relationship and the message concerns the activities of the recipient organization.

The concept of "existing relationship" was intentionally left undefined – presumably to allow for a flexible recognition of a variety of relationships (that are not simply business relationships).

➔ **What is the electronic messaging service exemption?**

CEMs sent and received on an electronic messaging service, such as a mobile application are also exempt from CASL if the sending party is identified and the platform already provides a readily accessible unsubscribe mechanism.

For example, if a consumer uses a messaging service such as BBM to communicate, such messages will be exempt as long as the platform provides the sender's profile and an unsubscribe option.

➔ **Am I free to send CEMs to people located outside of Canada without worrying about CASL?**

Yes, provided that you reasonably believe that the CEM will be accessed in one of the countries listed in the schedule to the Electronic Commerce Protection Regulations (Industry Canada) – access schedule [here](#) – and the CEM is sent in compliance with the law of the country it is to be accessed in.

Practically speaking, this exemption may be of little value because of the resources required to research the laws of foreign countries. Additionally, because CASL is generally viewed as more onerous than the anti-spam laws of most other countries, it may be easier to simply comply with CASL for all CEMs, regardless of where you send them.



→ I think that someone is unlawfully using my company's name/trademark. Can I send them an e-mail demanding that they stop without complying with CASL?

Yes. This would fall within the "enforcement of legal rights" exemption from both the consent and form requirements of CASL.

→ If I validly send a CEM to someone, can I encourage that person to forward the message to family or friends?

You should be careful in such circumstances. Unless the person who forwards the CEM can rely on the personal or family relationship exemption or has valid consent to forward the CEM (which you will likely not be able to validate), you could be held liable for having "aided, induced or procured" a violation of CASL. The CRTC has said that businesses can help to reduce potential liability in such circumstances by informing individuals who may forward their CEMs of the limitations of the personal and family relationships and asking them to acknowledge that they are not forwarding such CEMs to people who fall outside these exemptions. Doing so, however, does not entirely eliminate the risk to your business if such "refer-a-friend" programs ultimately fall outside of CASL.

→ My business runs a secure access website that allows us to send messages to customers which they access by logging into their accounts on our website. Are these messages subject to CASL?

No. You could rely on the exemption for CEMs sent to a limited-access, secure account.

→ My company has many subsidiaries. What consents are required and who should obtain them?

CASL requires that consent be obtained for each sender and does not extend consent to related companies or affiliates. You should examine closely whether there are any exemptions from CASL based on business-to-business relationships. If not, CASL requires that you disclose and obtain consent on behalf of each sender.

→ My company has many affiliates and partners, with whom we share our customer lists. What consents are required and who should obtain them?

For known parties with whom you are sharing customer lists, like affiliates of your company, the CRTC recognizes that in those cases, it may be difficult for a business to identify all such known parties in a single CEM or when seeking consent. To address this, only known parties that play a material role in the content of the message are required to be identified as senders or affiliates in consents and CEMs.

If a CEM is being sent by your company on behalf of multiple persons, all of those parties should be identified in a CEM. If it is not practicable to do so, a hyperlink in the CEM to a web page containing the names and contact information for each affiliate that is readily accessible at no cost to the recipient may be included instead.

→ My company may share customer/prospect lists with third parties that are currently unknown. Can I share my database with unknown third parties?

Yes. Your company may seek consent from customers to allow unknown and unnamed third parties to send their own CEMs to your customers. In that case, your original request for consent should specifically seek the consent of the recipient to receive information from third parties, and the third parties relying on your consent to send CEMs must identify you in the CEMs they send and provide a mechanism for recipients to unsubscribe from all third party CEMs.

You should have arrangements in place for all third parties to immediately notify you of an unsubscribe, and you must then in turn notify all third parties that relied on your consent that the recipient has unsubscribed from third party CEMs. You will bear responsibility for ensuring mechanisms are in place, and that unsubscribes, if requested, are given effect to across all third parties within the mandatory 10 business days.



CONSENT - DO I NEED IT? HOW DO I GET IT?

DAVIES

1. EXEMPTIONS FROM CONSENT REQUIREMENTS

→ When would I be exempt from CASL's consent requirements?

The following types of CEMs are exempted from CASL's consent requirement (but not the form requirement, discussed below):

- The first CEM sent following any referral by a person who has an existing business relationship, non-business relationship, personal relationship or family relationship with both the sender and recipient.
- CEMs that provide a quote for a product or service, if that quote was requested by the recipient.
- CEMs that facilitate, complete or confirm a commercial transaction that the recipient previously agreed to with the sender (e.g., the sending of a receipt).
- CEMs that provide warranty, product recall, safety or security information about a product or service that the recipient uses, has used or has purchased.
- CEMs that provide factual information about an on-going subscription or membership of the recipient or about a product or service offered under a subscription or membership.
- CEMs that provide information directly related to an employment relationship or related benefit plan in which the employee is currently involved or enrolled.
- CEMs that deliver a product or service, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction.

→ If I send a CEM following a referral, are there any form requirements in addition to the general ones?

- Yes. CEMs relying on this exemption must also disclose the full name of the person who made the referral and must include a statement that the message was sent as a result of the referral.

→ Are refer-a-friend and similar marketing campaigns exempt under the above third party referral exemption?

Not typically. A business will often ask a person to refer a friend or contact, to whom the business will then send CEMs, without their express or implied consent. Where such "refer-a-friend" campaigns do not list the full name of the referrer or do not state that the CEM is being sent as a result of the referral, the refer-a-friend campaign would not fall within the third party referral exemption.

Other exemptions may be available, but in most cases, businesses will need to be careful about conducting "refer-a-friend" campaigns, and, at minimum, should provide details to the person from whom the referral is being requested as to what "personal relationships" and "family relationships" they can use to provide a referral in order to rely on implied consent, or will need to modify their practices to fit within the third party referral exemption or another exemption under CASL.

2. IMPLIED CONSENT

→ When do I have implied consent to send a CEM?

Consent to send a CEM can be implied if:

- There is an existing business relationship between the sender (or the person who permits it to be sent) and the recipient.
- There is an existing non-business relationship between the sender (or the person who causes it to be sent) and the recipient.
- The person to whom the CEM is sent has conspicuously published the electronic address to which the CEM is sent, the publication is not accompanied by a statement that the person does not wish to receive unsolicited CEMs, and the message is relevant to that person's business or role in a business. This is referred to as the "website" or a conspicuous publication exemption.
- The person to whom the CEM is sent has disclosed to the person who sends the message (or the person who permits it to be sent) the electronic address to which the CEM is sent, the disclosure is not accompanied by a statement that the person does not wish to receive unsolicited CEMs, and the CEM is relevant to that person's business or role in a business. This is referred to as the business card exemption.

→ If I have implied consent from a person, but ask them for express consent which they fail to give (e.g., they do not check the box), can I still assume that their implied consent applies?

Prior to July 1, 2014, the best practice is to include an unsubscribe mechanism in any request for express consent. After July 1, 2014, the unsubscribe mechanism must be included in any CEM. In any case, if the recipient has not unsubscribed, you could continue to rely on the implied consent for the relevant period.

(I) IMPLIED CONSENT FOR EXISTING BUSINESS RELATIONSHIPS

→ What is an existing business relationship?

- Generally speaking, there is an existing business relationship where the sender and recipient conducted business with each other (e.g., the recipient purchased a product from the sender or entered into a contract with the sender) within the two-year period immediately prior to sending the CEM.
- There is also an existing business relationship during the six-month period following an inquiry by the recipient to the sender (e.g., an inquiry about a product sold by the sender).
- In each case, the relevant time period refreshes and is renewed when there is a subsequent purchase or inquiry by the recipient.

→ What if a person purchases a product or service under a subscription or similar on-going relationship? When does the two-year period begin?

In this circumstance, the two-year period starts from the day that the subscription or similar on-going relationship ends. Consent is also implied during the period of the subscription or on-going contract.

➔ **What about existing business relationships that my company has on the day CASL comes into effect (July 1, 2014)?**

CASL contains special “transition” provisions such that if you have an existing business relationship with a person as of July 1, 2014, and that existing relationship included the sending of CEMs, then the existing business relationship will be deemed to continue for three years until July 1, 2017, unless the recipient withdraws his or her consent prior to that date.

➔ **My company is a manufacturer that sells through a distributor. Can we rely on there being an existing business relationship in order to send CEMs to the end customer?**

- If the end customer is an individual, then no, you do not have an existing business relationship with that person. If the end customer is another business, you may be able to rely on the exemption for business-to-business communications provided that you can demonstrate that you have a direct and existing relationship with that customer.

(II) IMPLIED CONSENT FOR EXISTING NON-BUSINESS RELATIONSHIPS

➔ **What is an existing non-business relationship?**

- An existing non-business relationship can arise in a number of circumstances, including:
 - A donation or gift made by the recipient to the sender within the two-year period immediately before the day on which the message was sent, where the sender is a registered charity or political organization.
 - Volunteer work performed by the recipient for the sender, or attendance at a meeting organized by the sender, within the same two-year period, where the sender is a registered charity or political organization.
 - Membership by the recipient in the sender, where the sender is a not-for-profit club, association or voluntary organization. This consent terminates two years following the day the membership terminates.

➔ **What if the donation involves a subscription or similar on-going relationship?**

In this circumstance, the two-year period starts from the day that the subscription or similar on-going relationship ends. Consent is also implied during the period of the subscription.

➔ **What about existing non-business relationships that my company has on the day CASL comes into effect (July 1, 2014)?**

If you have an existing non-business relationship with a person as of July 1, 2014, and that existing relationship included the sending of CEMs, then the existing non-business relationship will be deemed to continue until July 1, 2017, unless the recipient withdraws his or her consent prior to that date.

(III) IMPLIED CONSENT FOR CONSPICUOUS PUBLICATION

→ If prospective clients post their e-mail addresses on their websites, do I have consent to e-mail them?

Yes, provided that there is no statement accompanying the published e-mail address stating that the person does not wish to receive unsolicited CEMs and the e-mail you send the person is relevant to the person's business or role in a business - e.g., seeking for that person to retain your services.

→ If a person publishes one electronic address, do I have consent to send CEMs to another electronic address used by that person if not similarly published?

No. You should only send a CEM to that person at the published electronic address (assuming the other criteria are met) unless you separately have obtained consent to send CEMs to other addresses used by that person.

(IV) IMPLIED CONSENT FOR BUSINESS CARDS/INFO

→ If a person hands me a business card containing her/his electronic address, can I send a CEM to any co-worker of that person?

No. The implied consent applies only to the person who gave you the business card.

3. EXPRESS CONSENT

→ When do I need express consent?

You need express consent when you cannot rely on: (1) an exemption from CASL's form and consent requirements; (2) an exemption from CASL's consent requirements; or (3) implied consent.

→ How can I obtain express consent?

- To obtain express consent to send CEMs to a recipient, you must clearly and simply set out the following information:
 - The purpose for which the consent is being sought;
 - The name of the person seeking consent and, if different, the person on whose behalf consent is sought;
 - If the consent is sought on behalf of another person, a statement identifying the person seeking consent and the person on whose behalf consent is sought;
 - If the person seeking consent and the person, on whose behalf consent is sought are different and carry on business by different names, the name by which those persons carry on business;
 - The mailing address, and either a telephone number, e-mail address or a web address of the person seeking consent or, if different, the person on whose behalf consent is sought; and
 - A statement indicating that the person whose consent is sought can withdraw their consent.



→ Does express consent have to be obtained in writing?

No. Express consent can be obtained orally or in writing (including electronically) but you must be able to demonstrate that you have obtained the consent, which may practically be more difficult with oral consents.

→ Do I have to keep records showing that I have express consent?

Yes. The sender of a CEM has the onus of proving that express consent exists, which means that adequate records must be kept.

Oral consent can be demonstrated by an independent third party verifying that consent was obtained, or with a recording evidencing the consent.

→ Can my request for consent to send a person CEMs be part of the same request for other consents (or acknowledgements of other terms and conditions)?

No. A request for consent to send CEMs must be separately and clearly identified. A person should, for example, be able to grant consent to general terms and conditions of sale while refusing to grant consent to receive CEMs.

→ If I obtain a general express consent to send marketing materials to a person, is that sufficient to send CEMs?

No. In order to satisfy the clearly and simply requirement, you should ensure that it is clear that the recipient may receive CEMs if they provide their express consent to receiving marketing materials.

→ Can I use an opt-out mechanism (e.g., pre-checked boxes on a webpage) to obtain express consent?

No. The use of pre-checked boxes or other opt-out mechanisms is not allowed. A person must be able to opt-in to receive CEMs in order to qualify as valid express consent, such as by actively checking a box or filling in their e-mail address for the purpose of receiving CEMs.

→ Can I continue to use third party mailing lists that I obtained previously?

Yes, as long as you have a record of consent having initially been provided and your CEMs after July 1, 2014 meet the form requirements.

→ What if I want to sell e-mail lists to third parties? Can I obtain consent on their behalf without knowing/disclosing who those third parties are?

Yes. However, you must ensure that any CEM sent by the third party to a person who provided consent contains the sender's name and your company's name. The recipient also has to be given the ability to unsubscribe from the third party's CEMs (and the CEMs of all third parties). If that person subsequently withdraws consent from your company, you must notify all third parties using that consent and ensure that CEMs cease to be sent to that person within 10 business days.

→ If my company holds a contest, can we condition entry on obtaining express consent to receive CEMs?

No. The contest entry cannot be conditioned on consenting to receive CEMs.



→ If my business sells multiple products and markets them separately, can I bundle the obtaining of consent or do I need to obtain consent separately for each product?

You can bundle consent for all your products and services in one express consent if you so choose. However, if the consent is grouped, and someone unsubscribes, they would be unsubscribing for all CEMs relating to all of the products that were grouped. As a practical matter, your business may decide to establish “preference centres” for recipients to pick and choose which categories of CEMs they are consenting to receive (i.e., “yes” to sales and discount promotions on your clothing line but “no” to any other marketing materials). This will help maximize the chances of maintaining at least one point of contact with existing and prospective customers in respect of certain types of CEMs.

→ Do I have to get new consents for all the e-mail addresses on my mailing list?

If you have a record of how these consents were obtained (whether CASL-compliant or not), you do not need to re-acquire consent. If the consent is implied, it will be effective until July 1, 2017 due to CASL's special transition provisions. If the consent is express, even if the form of express consent obtained prior to July 1, 2014 was not CASL-compliant, it will remain valid unless and until revoked.



WHAT INFORMATION DO MY CEMS NEED TO CONTAIN?

DAVIES

1. GENERAL FORM REQUIREMENTS

→ Are CEMs required to contain specific content?

Yes. Unless an exemption from CASL applies, all CEMs must clearly and prominently contain the following information:

- The name of the person sending the message and if different, the person on whose behalf the message is sent.
- If the message is sent on behalf of another person, a statement identifying the person sending the message and the person on whose behalf the message is sent.
- If the person who sends the message and the person on whose behalf it is sent are different and carry on business by different names, the name by which those persons carry on business.
- The mailing address and either a telephone number, an e-mail address or a web address of the person sending the message or, if different, the person on whose behalf the message is sent.
- A mechanism allowing the recipient to unsubscribe from receiving future CEMs.

→ Our offices are moving soon. Which address should I use?

Contact information must be valid for 60 days. You should either include both addresses or ensure that you can be contacted at the address provided for the entirety of the 60-day period. If the mailing address and contact information for the sender(s) is kept current on your website, you can instead include a direct link to the web page containing that contact information, rather than including it directly in the CEM.

→ That's a lot of information! How can I disclose all of it if I send an SMS message (or other length-limited CEM) to someone?

If it is not practicable to include your contact information and an unsubscribe mechanism directly in the message, the information may be provided by a link to a webpage that is readily accessible and clearly and prominently sets out the required information.

2. THE UNSUBSCRIBE MECHANISM

→ I understand that I have to allow recipients of my CEMs to unsubscribe. But are there any requirements for how the unsubscribe mechanism operates?

Yes. An unsubscribe mechanism:

- Must be costless to the recipient of the CEMs and easy for that person to use.
- Should use the same electronic means by which the CEM was sent. If that is not practical, then another electronic means is sufficient.
- Should include an electronic address or link to a webpage to complete the unsubscribe request which is valid for at least 60 days after the sending of the CEM.

- Must be offered to the recipient in every CEM.
- Must allow any recipient that unsubscribes to stop receiving CEMs within 10 business days.

→ Can you provide an example of how this could be done in an e-mail?

A valid unsubscribe mechanism in an e-mail could, for example, include text in the body of the e-mail stating that if a person wishes to unsubscribe they may do so by clicking on a hyperlink to a webpage that then allows the user, with one click, to confirm that they wish to unsubscribe from receiving all or some types of messages from the sender

For example: "If you do not wish to receive electronic messages from XYZ Inc. in the future, please [click here](#). Please be advised that this may restrict our ability to send messages to you in the future."

→ Can you provide an example of how this could be done in an SMS message?

In the case of an SMS message, a user could be given the option to reply with the word "STOP" in order to unsubscribe, or could be allowed to click on a hyperlink that takes the person to a webpage where they can confirm that they wish to unsubscribe.

→ How soon must I stop sending CEMs after a person unsubscribes?

If a person unsubscribes, you must stop sending them CEMs within 10 business days and with no further action required on the part of the recipient that is unsubscribing.

→ My CEMs are exempt from CASL's consent requirements. Do I still need to include an unsubscribe mechanism even though the recipient does not need to consent to my sending the CEM?

Yes. Even though no consent is required, CASL still requires in these circumstances that all form requirements be met, including the requirement to include a valid unsubscribe mechanism.



ENFORCEMENT - WHY SHOULD I BE CONCERNED ABOUT CASL?

DAVIES

→ Who enforces CASL?

The Canadian Radio-television and Telecommunications Commission (CRTC) is the key regulatory authority responsible for enforcing CASL's anti-spam provisions.

→ How are violations of CASL brought to the CRTC's attention?

Consumer complaints will likely be an important source of information for the CRTC. The CRTC has also been granted broad investigatory powers, such as the right to obtain search warrants or to compel the production of information.

→ What are the penalties for violating CASL?

The maximum financial penalty the CRTC can seek for a violation of CASL's form or consent requirements is \$1 million for individuals and \$10 million for all other persons per occurrence. Alleged violators can also voluntarily enter into undertakings with the CRTC, which may provide for the payment of a fine and impose other conditions.

→ Can directors and officers be liable for violations by a company?

Yes. Directors, officers or agents of a company that commit a violation of CASL may be held personally liable if they directed, authorized, assented to, acquiesced to or participated in the commission of the violation unless they can show that they exercised due diligence to prevent the commission of the violation.

→ How can a director or officer show that they exercised due diligence to prevent the commission of the violation?

Due diligence may be demonstrated by, for example, developing internal compliance policies, implementing internal compliance reviews or audits, and conducting regular compliance training. It will also be important to maintain records of these processes and procedures to evidence due diligence.

→ Can employers be liable for the actions of their employees?

Yes. An employer is vicariously liable for violations of CASL committed by employees acting within the scope of their employment.

→ Can I avoid the various penalties under CASL by entering into voluntary undertakings with the CRTC?

In part. CASL contemplates that businesses faced with a complaint or investigation for non-compliance can enter into voluntary undertakings with the CRTC. Importantly, entering into a voluntary undertaking with the CRTC for non-compliant acts may be beneficial as it precludes private rights of action by complainants under CASL (but not under other legislation such as the *Competition Act*) and also precludes, for the same conduct in question, notices of violation being issued against you and cancels previously issued notices of violation. However, voluntary undertakings may still impose burdensome conditions on your business practices and/or substantial fines for non-compliance. Also, those undertakings will be made public and, accordingly, for some businesses, the reputational damage that could be caused by a voluntary undertaking may be a reason not to pursue that route.

→ Do I need to be concerned about other regulatory enforcement possibilities?

Yes. The Commissioner of Competition can bring proceedings under the *Competition Act* if any aspect of a CEM is misleading. For example, a false or misleading subject line could lead to enforcement proceedings even if the content of the CEM is accurate and even if the false or misleading aspect of the subject line is not “material”.

Proceedings can also be brought under PIPEDA and similar provincial privacy legislation if you do not satisfy the requirements under those laws concerning proper collection, use and disclosure of personal information in the course of your commercial activities.

→ Apart from regulatory enforcement, can I be sued by private parties if I don't comply with CASL?

Yes. After July 1, 2017, private parties will be able to sue for breaches of CASL by senders of CEMs. You could be liable to a penalty of up to \$1 million per day per occurrence in addition to actual damages.

