

## ALERTS

### Associations And Foundations Law Alert - Canada's New Anti-Spam Law Becomes Effective July 1, 2014

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The Canadian Anti-Spam Law (CASL) and its corresponding regulations become effective on July 1, 2014. CASL was enacted "to promote the efficiency and adaptability of the Canadian economy" by regulating commercial electronic messages (CEMs), the transmission of data in electronic messages, and the installation of computer programs on another person's computer in the course of a commercial activity.

CASL applies to nonprofit organizations (NPOs) that send electronic messages into or from Canada. Failure to comply with the law can carry penalties of up to \$1,000,000 for violations by individuals and \$10,000,000 for violations by corporations. In short, CASL requires NPOs which send CEMs in Canada to: 1) obtain consent; 2) provide disclosure; and 3) provide a way to opt-out. As such, associations and charities will need to evaluate their electronic communication practices.

#### CASL Only Applies to CEMs in Canada

CASL will apply to CEMs that are either sent from, or accessed on, a computer system in Canada, except where a CEM is sent by a person who reasonably believes the message will be accessed in a "foreign state" listed in the law - provided that the CEM conforms to the spam law of that state.

In order to be a CEM, at least one of the message's purposes must be to encourage the recipient to participate in a commercial activity, e.g., buy a product or service, however an expectation of profit is not required. CASL excludes certain messages from both the content and consent requirements, including CEMs sent:

- To friends or to family
- Within or between organizations that have a relationship where the message relates to the affairs of the organization
- By a registered charity (see definition below) and political parties for fundraising purposes
- Pursuant to a legal obligation or requirement
- Within a limited-access and confidential account

The following are not considered CEMs under CASL: interactive two way voice communications; messages sent via facsimile to telephone accounts; and voice recordings sent to a telephone account.

#### Consent

## RELATED PEOPLE



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## RELATED INDUSTRIES

Associations and Foundations

The most significant requirement of CASL is that recipients in Canada must consent to receiving CEMs. Consent may be in the form of express consent or implied consent.

For express consent, the request must:

- Identify the request for consent in a “positive or explicit” manner – person would need to perform an affirmative act such as checking a box – pre-checked boxes or an opt out system are not acceptable;
- State the purpose for which the consent is sought;
- Identify and provide the business name of the person seeking consent and, if different, identify and provide the business name for the person on whose behalf consent is sought;
- Provide the mailing address for the sender and one or more of the following: telephone number, website or email address for the person or entity seeking the consent; and
- State that consent may be withdrawn.

While consent may be given orally or in writing, written consent is strongly recommended as the sender has the burden of proof as to whether someone provided the required consent. Once the consent has been obtained, the NPO should retain records of all consents provided by Canadian accounts.

Implied consent may exist where:

- There is an existing business or non-business relationship between the sender and the recipient.
  - An existing business relationship exists where either the recipient purchased a product within the last two years or the recipient and sender have a certain form of an existing written contract or the recipient made an inquiry or application within the last six months. This form of consent is valid for two years and can be continuously renewed with subsequent purchases, contracts, or inquiries.
  - A non-business relationship may exist where either a donation or a gift was made by a person to a registered charity, a political party, organization or candidate within the last two years or a person has performed volunteer work for the CEM sender or attended a meeting of the sender within the last two years and the sender is a registered charity, political organization, party or candidate or the recipient is or has been a member, during the last two years, of the sender and the sender is an association, club or volunteer organization. \*This form of consent is only valid for a three year transition period, ending July 1, 2017.
- Recipient has conspicuously published its address or disclosed it to the sender and has not previously opted out of receiving CEMs and the email is relevant to the recipient’s business, role, functions,

or duties.

## Disclosure and Opt-Out

In addition to the consent requirement, all CEMs must be sent from a valid email address, identify the person who sent the message, including a mailing address and either an email address or telephone contact, and must allow for an option to unsubscribe from future CEMs from the sender.

## Guidance for Associations

### *Members & Previous Members*

While CASL does apply to CEMs sent by NPOs such as associations, the regulations provide that consent to receive CEMs is implied during the transitional period by virtue of membership in the NPO. "Membership" means the status of having been accepted as a member of a club, association or voluntary organization in accordance with its membership requirements. In order to qualify as a club, association, or voluntary organization, the NPO must meet the following requirements:

- a non-profit organization,
- organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than personal profit, and
- no part of its income is payable for the personal benefit of any member, proprietor or shareholder unless that entity is an organization whose primary purpose is the promotion of amateur athletics in Canada.

If the individuals qualify as members and the organization meets the above requirements, the NPO can send CEMs to its Canadian members without having to obtain any new consent. Note: the CEMs must only be sent to current members or individuals who have been members during the last two years. The NPO must still comply with the disclosure and opt-out requirements of CASL.

### *Non-Members*

For Canadian non-members (who have not been members during the two years prior to the CEM date), the NPO will need to meet all three requirements for CEMs in order to comply with CASL unless the NPO can establish that the non-member has an existing business or non-business relationship with the NPO such as made a purchase from the NPO, volunteered for the NPO, made a contribution to the NPO or attended a conference of the NPO. While the NPO likely already meet the disclosure and unsubscribe requirements, the affirmative consent requirement will necessitate a change in practice in order to obtain express consent for Canadian non-members to receive CEMs.

## Guidance for Charities

CASL specifically exempts charitable fundraising activities conducted by registered charities. The definition of a "registered charity" is

- a charitable organization, private foundation or public foundation,

within the meanings assigned by subsection 149.1(1), that is resident in Canada and was either created or established in Canada, or

- a branch, section, parish, congregation or other division of an organization or foundation described in paragraph (a), that is resident in Canada and was either created or established in Canada and that receives donations on its own behalf that has applied to the Minister in prescribed form for registration and that is at that time registered as a charitable organization, private foundation or public foundation.

If the NPO meets these requirements, then the CEM will fall within this exception if the CEM has as its primary purpose raising funds for the charity.

As many U.S. based charitable and other 501(c)(3) NPOs may not be able to meet the “registered charity” requirements, such NPOs will need to defer to the implied consent categories noted above to ensure that recipients are current (or previous within the last two years) members, donors or volunteers. For potential donors outside of this scope, consent will need to be obtained.

## Frequently Asked Questions

*What do we do now before July 1?*

Check your marketing lists for Canadian addresses, segregate those addresses from the rest, identify which are current members or have been members within the last two years, and flag non-members within the two year window. For non-members who are beyond two years and for which no other implied consent exists, obtain express consent before July 1, 2014 or remove them from your marketing lists.

*What do we do on July 1 or thereafter?*

For those individuals residing in Canada for which the NPO cannot establish either express or implied consent, such individuals may only be contacted by telephone or mail to obtain their consent to receive CEMs. The sending of a request for consent via email after July 1 would be considered a violation of the law. In order to establish oral consent was given by an individual, the NPO would need to keep record such that an independent third party could verify the consent or have a complete and unedited audio recording of the individual’s consent.

*How specific do we need to get when we describe the kinds of communications we’ll be sending on the opt-in form?*

The form should include a broad description of the various types of communications the NPO may send. The NPO does not need to provide a specific list; rather, it may merely say messages relating to the products and services of the NPO or third party products which the NPO may be of interest to you or something similar would be acceptable to include in the opt-in email.

*Is there an expiration date for express consent given to a NPO?*

There is no timeline associated with express consent. Once it has been obtained, it is valid until the individual withdraws it. However, there are time limits for implied consent.

*When a member's membership status expires, can we contact the prior member to renew?*

Assuming that the individual was a member within the last two years, the NPO would have the ability to contact the previous member based on the pre-existing, non-business relationship. In addition, there is an exception to the consent requirements under CASL which says that the NPO can send a message that provides notification of factual information about the ongoing membership of a person to whom the message is sent, provided the NPO includes the disclosure and opt-out information and does not include other commercial content within such emails.

*Does the NPO need to receive consent for people who volunteer for the NPO?*

There is a valid argument that volunteers would have an existing "non-business" relationship with the NPO and therefore consent is implied as noted above, subject to the time limits of the transitional period. The NPO must still include, in its CEMs, an opportunity for the volunteer to opt-out of CEMs and contact information for the sender. These requirements apply only to CEMs and would not apply to messages specifically dealing with the individuals' involvement on the committee or with the project.

*Is implied consent provided by a member company applicable to employees of the company in their individual capacity?*

Unfortunately, CASL is not particularly clear on this point. Some of the governmental agency comments on the CASL have stated that there may be persons within organizations that are able to provide consent on behalf of all of the employees or members of an organization. However, there has been no level of clarity as to the level of individuals in the organization who is able to provide such consent and therefore adding employees of a member organization to a mailing list would be with some risk. The safer approach would be to have the employers expressly consent which would be an unambiguous consent. The individual that is acting on behalf of the organization would be providing his consent as the representative of that organization.

*Can the NPO send CEMs to current sponsors and exhibitors in Canada?*

If the NPO and the recipient have an existing business relationship, consent is implied provided the recipient company has purchased a product or service within the two years prior to the sending of the email.

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