Preparing for Canada’s Anti-Spam Legislation (CASL)

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Financial Executives International
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Discussion items

1. Introducing CASL: background
2. Understanding anti-spam requirements
3. Sending CASL-compliant messages
4. Deloitte’s market observations
5. Closing thoughts
What is SPAM?

Spam:
A luncheon meat by *Hormel Foods*

Electronic Spam:
The use of *electronic messaging* systems to send *indiscriminate* and *unsolicited* bulk messages
Is spam really that harmful???

90% of global email traffic is spam

over one trillion spam emails sent globally per day

One Canadian FSI reported that it deletes around 150,000 SPAM emails per hour during peak email times

The same Canadian FSI deletes approx. 2 million spam messages in a typical day

1 in 24 emails contains malware

1 in 445 emails are phishing emails
Industry Canada passed Bill C-28 in December 2010:

“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, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act (S.C. 2010, c. 23)”

….also known as “Canada’s Anti-Spam Legislation” (CASL) – there is no official short title…. 
So, what is CASL?

CASL is considered to be the **toughest anti-spam legislation in the world**

CASL creates an express, “opt-in” consent regime for electronic commercial communications, with very limited exceptions.

CASL regulates the following 4 areas:

- **Spam** – unsolicited commercial emails, including false, misleading or deceptive subject lines and headers
- **Spyware/malware** – installation of computer programs on another’s computer
- **Email address harvesting** – phishing, pharming or hacking
- **Network rerouting** – altering transmission data
What does CASL cover?

• **Applies to everyone**: businesses, non-for-profits, universities, hospitals, trade associations, corporations, banks, clubs, foreign individuals & companies, etc.

• CASL regulates “commercial electronic messages” (CEMs) sent to a customer or prospect without prior consent, including:
  – Emails
  – Text messages
  – Social media messages sent to an electronic address
  – Refer-a-friend campaigns

• **It does not apply to telephone or paper-based marketing** !!!

• **CASL has global reach**:
  – CEMs sent to Canada (except where message is meant for foreign reader or accessed while roaming in Canada)
  – CEMs sent from Canada, except to any one of the 116 foreign countries listed in the Industry Canada regulation which has their own anti-spam law
Who will oversee CASL?

Three government agencies will work together to enforce CASL:

<table>
<thead>
<tr>
<th>Agency</th>
<th>Responsibilities</th>
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<tr>
<td>The Canadian Radio-television and Telecommunications Commission (CRTC)</td>
<td>Manages basic spam complaints and issues administrative monetary penalties for CASL violations. Manages the anti-spam reporting centre.</td>
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<tr>
<td>The Competition Bureau</td>
<td>Handles fraud and misleading commercial messages.</td>
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<tr>
<td>The Office of the Privacy Commissioner</td>
<td>Ensures email addresses are not collected without consent.</td>
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</table>

The agencies recently issued a Memorandum of Understanding (MOU) for pursuing violations under CASL, including:

- Notifying, consulting, and sharing relevant information with each other with respect to enforcement activities, including with foreign jurisdictions.
- Conducting joint or parallel inquiries or investigations.
CASL has teeth…

<table>
<thead>
<tr>
<th>Penalty</th>
<th>Amount (Maximum)</th>
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<tbody>
<tr>
<td>• CRTC can levy administrative monetary penalties (AMPs)</td>
<td>• $10,000,000 for businesses</td>
</tr>
<tr>
<td>– Fines may be imposed per violation</td>
<td>• $1,000,000 for individuals</td>
</tr>
<tr>
<td>• The Competition Bureau can seek penalties under the Competition Act</td>
<td>• $10,000,000 for businesses</td>
</tr>
<tr>
<td></td>
<td>• $750,000 for individuals</td>
</tr>
<tr>
<td>• Provides a right to both businesses and consumers to sue civilly and</td>
<td>• maximum is $200 per violation, up to $1 million per</td>
</tr>
<tr>
<td>seek damages in court where CRTC does not initiate enforcement</td>
<td>day!!</td>
</tr>
<tr>
<td>proceedings</td>
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</table>

CASL creates both **direct liability** (officers, directors, or agents are liable) and **vicarious liability** (officers, directors, agents are directly liable as are corporations for their employees)

**CASL provides a due diligence defense**
What are the timelines?

• Consultations began in 2004
• Over the past three years, the CRTC and Industry Canada (IC) have published and reviewed drafts of the regulations delaying the coming into force date

<table>
<thead>
<tr>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2017</th>
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<tbody>
<tr>
<td><strong>December 15, 2010</strong></td>
<td>CASL received Royal Assent</td>
<td><strong>March 28, 2012</strong></td>
<td>CRTC issued final set of regulations</td>
<td><strong>October 10, 2012</strong></td>
<td>CRTC issued guidelines</td>
<td><strong>December 4, 2013</strong></td>
</tr>
</tbody>
</table>

CASL will come into force in three phases:

– **July 1, 2014**: Anti-spam provisions take effect
– **January 15, 2015**: Installation of computer programs provisions take effect
– **July 1, 2017**: Private right of action takes effect
Who is CASL really targeting?

A 24-year-old who’s been dubbed “The King of Spam,” was arrested by US authorities in November 2010.

The U.S. Justice Department alleges that Nikolaenko earned hundreds of thousands of dollars using his “Mega-D” botnet, which infected more than half a million PCs and could send over 10 billion spam messages a day.

Source: The Toronto Star, Dec. 3 2010

A small business owner sent a promotional email to a prospect without express consent.

The customer was briefly annoyed by receipt of the email and quickly deleted it from their inbox.
Who is at risk?

Anyone who…

- Communicates electronically with any device, directly with consumers, customers or clients
  - Up to $10,000,000

- Sends electronic mail (email), SMS/MMS messages, or instant messaging (IM)
  - Up to $10,000,000

- Communicates externally, including via social media channels
  - Up to $10,000,000

- Electronically promotes or sells products or services or a brand directly or indirectly
  - Up to $10,000,000
Understanding CASL requirements
## Anti-spam rules

There are 3 simple rules to follow when sending CEMs:

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</thead>
<tbody>
<tr>
<td>Sender must have prior express or implied consent to send a CEM, unless the CEM is exempt</td>
<td>CEMs must identify the sender and provide contact information which must be valid for 60 days, unless exempt</td>
<td>Every CEM sent must include an opt-out/ unsubscribe, acted on within 10 days, unless exempt</td>
</tr>
</tbody>
</table>
Starting point: what is a “CEM”? 

CASL only applies to “Commercial Electronic Messages” (CEMs) sent to or from an electronic address within Canada that based on the message content, hyperlinks or contact information encourages participation in a commercial activity.

A message is “commercial” if one of its purposes is to sell, promote or advertise a product or service, even if the CEM includes link to a website where products and services are sold or advertised.

CEMs routed through Canada or accessed while roaming in Canada are out of scope.
There are some exempt communications…

- CEMs exchanged between family and friends
- CEMs exchanged within or between organizations, provided they have an existing relationship and CEM concerns the activities of an organization (except prospecting)
- CEMs providing a response to a request, inquiry or complaint (provided there is no upselling)
- CEMs sent consisting solely of an inquiry or application (business inquiry)
- CEMs sent to satisfy or enforce a legal obligation
- CEMs sent from messaging platforms (e.g. BBM messenger, LinkedIn) where the required identification and unsubscribe mechanisms are clearly published on the user interface
- CEMs sent and received within limited-access secure accounts (e.g. banking portals)
- CEMs sent to listed foreign countries
- CEMs sent by or on behalf of a registered charity for the primary purpose of fundraising
- CEMs sent by or on behalf of political parties seeking contributions
And in some cases, you don’t need to worry about consent...

- Providing a quote or estimate for supplying a product or service in response to a request
- Facilitating/completing a commercial transaction
- Providing warranty, product recall or safety alert information about a product
- Providing notification of factual information about the ongoing use of a product/service or ongoing subscription/account/membership
- Providing information directly related to an employment relationship or related benefit plan
- Delivering a product, goods or a service (including upgrades)
There is a partial exemption for referral marketing

Only the first CEM can be sent to a prospective customer without prior consent on the basis of a third party referral (e.g. “suggest us” emails), so long as you:

• Have an existing personal, business or family relationship with person who made the referral
• Disclose the full name of the person who made the referral, and
• Clearly identify yourself as the sender, provide your contact information, and an unsubscribe
Otherwise, you need to get consent – but which kind?

- **Consent** – there are two types of consent:
  - *Implied*: meaning it would be reasonable to conclude you have someone’s permission to send them a CEM
  - *Express*: meaning someone actively gave you permission to send a CEM

- **Record keeping** – burden of proof is on you that you have consent
You can rely on implied consent

Organizations don’t require express consent to send a CEM if:

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Existing business or non-business relationship (EBR)</td>
<td>The CEM is sent in the context of an existing business or non-business</td>
<td>• Purchase/lease of a product/service</td>
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<tr>
<td></td>
<td>relationship within past two years</td>
<td>• Investment opportunity</td>
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<tr>
<td></td>
<td>Two year period begins on the day a purchase/donation is made or the</td>
<td>• Written contract</td>
</tr>
<tr>
<td></td>
<td>relationship ends. <em>Follow up replies may only be sent within six months</em></td>
<td>• Donation/gift</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• <em>Inquiry/application</em></td>
</tr>
<tr>
<td>Published electronic address</td>
<td>The prospect has conspicuously published his/her electronic address</td>
<td>Sending a CEM about a financial seminar to a CFO who has published</td>
</tr>
<tr>
<td></td>
<td>without any do not solicit claim, and the CEM relates to the recipient’s</td>
<td>his/her email address on LinkedIn</td>
</tr>
<tr>
<td></td>
<td>business role or functions</td>
<td></td>
</tr>
<tr>
<td>Business card</td>
<td>The prospect has voluntarily disclosed his/her electronic address</td>
<td>Exchanging business cards at a conference and sending an email to</td>
</tr>
<tr>
<td></td>
<td>without any do not solicit claim, and the CEM relates to the recipient’s</td>
<td>invite CFO to your financial seminar</td>
</tr>
<tr>
<td></td>
<td>business role or functions</td>
<td></td>
</tr>
</tbody>
</table>

*Implied consent under EBR expires in 2 years if an existing client doesn’t buy something new or renews their subscription, loan, account or contract, and in 6 months if a prospect doesn’t become a client*
Transitional period

Organizations have a three year grace period after July 1, 2014 to verify & confirm consent for parties with existing business relationships without regard to the two-year period

*If you have *(or had)* an existing business or non-business relationship that includes communication by commercial electronic message, you have 3 years to imply consent or upgrade to express consent!
Express consent – how do I get it?

If you cannot rely on an exemption or implied consent, you must get express consent prior to sending a CEM:

- Express consents for email communications (using a pre-checked box) obtained under PIPEDA obtained before July 1st will be grandfathered

When requesting consent, you must include the purpose for why you are seeking consent, together with:

- name of the sender and the third party who is seeking consent on your behalf (if different) indicating they are seeking consent on your behalf; AND
- a physical mailing address, AND
- a telephone number to an agent or a voice messaging system, OR
- an email address, OR
- a web address AND
- a statement indicating consent may be withdrawn

You can’t email or text asking for this permission after July 1st
Acceptable ways to get express consent

Checking a box to indicate consent in the form of “opt-in”, but pre-checked boxes in the form of an “opt-out” are not permitted

Typing an email address into a field to indicate consent

Requesting consent separately (or “unbundled”) from the general terms and conditions of use or sale

Now you need to document and prove it…

## Proof of consent

Requests for consent may be oral or in writing:

- **Oral consent** may be verified:
  - By an independent third party, or
  - Using a complete and unedited audio recording, among other methods

- **Written consent** may be:
  - **Paper-based** (e.g. filling out a consent form at the point of sale) or
  - **Electronic** means (e.g. checking a box on the web), provided that the date, time, purpose, and manner of the consent is stored in a database and can be verified.

You have the onus to prove consent!
Two examples of getting express consent

1. **Written**
   *(e.g. at live information session or trade show)*
   - Sign-up sheet
     (enter your email address so we can contact you to provide you more information about our promotions and events)

2. **Electronic**
   *(e.g. online forms)*
   - Enter your email address above to be included in our mailing list and to learn more about XXX. You may withdraw your consent at any time.
   
   Please refer to our Privacy Policy or Contact Us for more information.
Messaging formalities: identify yourself!

Unless fully exempt, all CEMs must clearly and prominently identify the sender, include the sender’s contact information and an unsubscribe.

**Sender’s identity**
- Name of “person” sending the message
- If the message is sent on behalf of another person, the message must contain the name of that person and indicate that it is sent on their behalf

**Sender’s contact information**
- Mailing address and either:
  - a telephone number providing access to an agent or a voice messaging system, or
  - an email or web address of the person sending the message
- The contact information must remain valid for 60 days after the CEM was sent

CASL defines “person” as “an individual, partnership, corporation, organization, association…”
Don’t forget to **add the unsubscribe!**

- 2 methods of opting-out (e.g. via email or hyperlink), which must remain valid for 60 days and be acted on within 10 days
- From all or just some types of CEMs

Example of CASL-compliant unsubscribe

Thank you for making our season so bright
To you and yours, Happy Holidays!

Indigo
Enrich your life
Indigo Chapters Coles indigo.ca

Warm wishes from your friends at Indigo

Your security is important to us. For details, see our Privacy Policy.

You are receiving this email at name.surname@domain.com because you have subscribed to our email program or have purchased an irewards card in store. If you would like to update your email preferences, or unsubscribe, please click here. Please allow up to 7 business days for your request to be processed.

Please do not reply to this email. Questions or comment may be sent to promotions@indigo.ca

Indigo Books & Music Inc.
468 King Street West, Suite 500
Toronto, ON M5V 1L8
Third parties and shared consents

• CASL imposes “double disclosure” requirements on businesses that use third parties to send CEMs or obtain consent on their behalf. In both cases, businesses will need to include in CEMs

• The disclosure requirements for CEMs sent on behalf of multiple affiliates gets more complicated:

  “…only persons who play a material role in the content of the message or the list to whom the message is sent are required to be identified as "senders" or "affiliates" under section 6 of CASL. However, when a CEM is sent on behalf of multiple persons, such as affiliates, all of these persons must be identified in a CEM.”


• Where the consent is shared, an unsubscribe must be communicated to the originator of the consent and unsubscribe must be enabled from all third parties!
Sending CASL-compliant messages
Sending CASL-compliant CEMs

1. **Is it a CEM?**
   - Yes
   - No

2. **Is it fully exempt?**
   - Yes
   - No

3. **Has the electronic address been unsubscribed?**
   - Yes
   - No

4. **Do I have consent?**
   - Yes
   - No

5. **Did I include name, contact information and an unsubscribe?**
   - Yes
   - No

If the answer to any of the questions is "No," do not send. Otherwise, send.
Deloitte’s Market Observations
What is the impact of CASL?

Ensuring compliance with CASL – both immediately and over time – requires designing and implementing technology platforms that perform a variety of functions, including:

• Managing, tracking and storing consents and opt-outs
• Recording subscribe and unsubscribe histories
• Enhancing or creating consent management and preference centres
• Producing reports

All of the above information is needed for you to illustrate your due diligence.
Avoid the corporate broken telephone…

<table>
<thead>
<tr>
<th>What the compliance team says</th>
<th>What the marketing team says</th>
<th>What senior leadership hears</th>
</tr>
</thead>
<tbody>
<tr>
<td>“CASL requires obtaining consent before sending CEMs”</td>
<td>“We already have client permission obtained from the recent Facebook contest”</td>
<td>“We’re good to go”</td>
</tr>
<tr>
<td>“Fines under CASL can be as high as $10 million”</td>
<td>“The ROI on the new Twitter campaign is half a million, but will increase traffic to the website by 20%”</td>
<td>“The campaign will generate revenue. A fine is real only if a customer complains”.</td>
</tr>
<tr>
<td>“CASL allows CEMs to be sent 2 years after a purchase is made or an account, subscription or contract is terminated”</td>
<td>“We have 2 years to send communications to customers. Let’s keep these relationships warm and not worry about details now”.</td>
<td>“We don’t need to change course. We have 2 years to make sure we are meeting compliance requirements.”</td>
</tr>
</tbody>
</table>
Market observation #1
Conducting a comprehensive inventory of CEMs

Deloitte observations
- Most organizations are conducting comprehensive inventories of all their outbound electronic communications
- Rather, some businesses are “bucketing” their outbound CEMs based on:
  - Message types (e.g., Promotional, transactional, legal, informational, client-initiated, business-to-business communications, etc.)
- The inventory will determine your consent approach

Questions for consideration post July 1st
- Will there be a need, go-forward, to re-inventory (e.g., Review and update) electronic communications as marketing strategies evolve and/or change?
Market observation #2
Obtaining and tracking consents

Deloitte observations

- For most large organizations, consent does not span across the entire organization, each business unit must capture their own consent
- The philosophy around converting implied consents to express consents within the 3 year transitional window has “relaxed”
- Many organizations will continue to rely on implied consent

Questions for consideration post July 1st

- How will businesses authenticate customers who provide consent via online channels?
Market observation #3
Data management systems

Deloitte observations

- Most large organizations are centralizing their consent and unsubscribe databases into a single repository
- Most organizations are managing unsubscribe at the specific electronic address level (vs. customer)
- For some organizations, consent and unsubscribe checks will remain a manual process

Questions for consideration post July 1st

- Will all lines of business be on boarded at once? Will some be phased in?
- What technologies/solutions be manual or automated and how will the manual work around be handled?
Market observation #4
Vendor Management

Deloitte observations

• Most large organizations are still in the process of rationalizing their vendor list
• Most large organizations have not yet reviewed and revised their vendor contracts or agreements
• Some organizations are re-analyzing the risks vs. rewards for their business partners in light of CASL

Questions for consideration post July 1st

• How will CASL affect the purchase of marketing lists and your relationship with vendors?
• What is the most effective way to manage unsubscribe requests for messages sent by business partners/vendors?
• Are organizations requiring an unsubscribe from both?
Closing thoughts
Preparing for CASL: Immediate steps

1. Designate a CASL working group to review your current CEM processes and identify compliance gaps.
2. Develop an implementation plan.
3. Reach out to contacts in your database in an effort to turn implied consent into express consent, if this is your consent management strategy (remember – there are two types of consent you can rely on, and the choice is yours!).
Customizing technology

Your company’s platform will need to take your specific situation into account. Just building an unsubscribe mechanism, for example, includes numerous factors to consider:

• Will you keep a federated or centralized unsubscribe database?
• How will you implement the granularity of the unsubscribes from certain products and services?
• Will the process be manual or automated for July 1st?
Demystifying CASL

• **CASL will not eliminate spam** – it will reduce it

• Fundamental structure under CASL is a **higher consent threshold** and legal requirement to **respect opt-out request**

• The **burden of CASL will fall on legitimate businesses** and the impact will be **disproportionate** to small business owners

• Majority of the **costs associated with implementing CASL** will be on the technology required to **consolidate, track and manage consents and unsubscribe requests**

• **Pitch the positive**
  - While CASL violations can result in significant monetary penalties, civil liability and reputational damage, it also represents an opportunity to “clean up” your CRM system
  - CASL is also an opportunity to standardize the means by which you obtain client consent and respect customer unsubscribes
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