

# Investment Industry Association of Canada

## Canadian Anti-Spam Legislation Primer

### Frequently Asked Questions

#### **OVERVIEW**

##### **1. What is CASL?**

CASL refers to Canada's new anti-spam legislation.

The legislation sets out a strict, consent based regime for the sending of electronic messages, including email, text messages, and other forms of electronic communications.

CASL also contains provisions relating to the installation of computer programs and the alteration of transmission data (CASL, [ss. 7 and 8](#)).

In addition, CASL contains amendments to the *Competition Act* (CASL, [ss. 70 - 81](#)) regarding misleading representations and deceptive marketing practices in electronic messages and amendments to the *Personal Information Protection and Electronic Documents Act* (CASL, [ss. 82 - 87](#)) regarding electronic address harvesting and the collection of personal information through unlawful access to computer programs.

CASL's rules are set out in the [Act](#) and Regulations issued by each of [Industry Canada](#) and the [Canadian Radio-television and Telecommunications Commission](#) (the "CRTC").<sup>1</sup> Links to CASL, the Regulations, and CRTC guidance documentation is set out in [Appendix 1](#) to this Toolkit.

##### **2. When does CASL come into effect?**

CASL comes into effect in stages.

On July 1, 2014, the provisions in CASL relating to the sending of "commercial electronic messages" (or CEMs) come into force.<sup>2</sup> This means that all email, text messages and other electronic messages that are CEMs and sent by an organization on or after July 1, 2014 must comply with the requirements under CASL. Amendments to the *Competition Act* relating to false and misleading representations in electronic messages also come into force on July 1, 2014.

On January 15, 2015, the provisions in CASL relating to the installation of computer programs will come into force.<sup>3</sup>

CASL contains a private right of action, which will come into force on July 1, 2017.<sup>4</sup>

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<sup>1</sup> [Electronic Commerce Protection Regulations](#) (CRTC), SOR/2012-36 ("CRTC Regulations") and [Electronic Commerce Protection Regulations](#) (Industry Canada), 81000-2-175 (SOR/DORS) ("IC Regulations").

<sup>2</sup> [CASL, Canada Gazette Part II, Vol. 147, No. 26, SI/TR/2013-127.](#)

<sup>3</sup> [CASL, Canada Gazette Part II, Vol. 147, No. 26, SI/TR/2013-127.](#)

<sup>4</sup> [CASL, Canada Gazette Part II, Vol. 147, No. 26, SI/TR/2013-127.](#)

### 3. What are the potential penalties under CASL?

The consequences for violating CASL are potentially severe.

#### Administrative Monetary Penalties

Under CASL, the CRTC can issue administrative monetary penalties of up to \$1 million for individuals and \$10 million for businesses for a violation. (CASL, [s. 20](#)). A single email or text message sent in contravention of CASL is a violation.

In determining the amount of any penalty, the CRTC must take into account several factors, including:

- The nature and scope of the violation (CASL, [s. 20\(3\)\(b\)](#));
- The person's history with respect to a previous violation under the Act (CASL, [s. 20\(3\)\(c\)](#));
- Any financial benefit the person obtained from the violation (CASL, [s. 20\(3\)\(e\)](#));
- Whether the person has voluntarily paid compensation to a person affected by the violation (CASL, [s. 20\(3\)\(e\)](#)); and
- The person's ability to pay the penalty (CASL, [s. 20\(3\)\(f\)](#)).

#### Private Right of Action

The private right of action under CASL will enable individuals to apply to the court for an order against those they believe to be liable for a contravention of CASL (CASL, [s. 47\(1\)](#)).

- For a violation of the CEM provisions, a court may order payment of \$200 for each violation up to \$1,000,000 for each day on which a contravention occurs (CASL, [s. 51\(b\)\(i\)](#)).
- For a violation of the provisions relating to installation of computer programs and the alteration of transmission data, up to \$1,000,000 for each day on which a contravention occurred (CASL, [s. 51\(b\)\(ii\)](#)).
- For a violation of the provisions under the *Competition Act* relating to false or misleading representations in commercial electronic messages, \$200 for each violation, up to \$1,000,000 for each day on which the conduct occurred (CASL, [s. 51\(b\)\(vii\)](#)).

A court may also order compensation for actual losses or damages suffered or expenses incurred by an individual in respect of a violation of the Act (CASL, [s. 51\(a\)](#)).

In addition to persons who are found to directly violate the Act, the potential liability under CASL's the private right of action broadly extends to persons who "aid, induce, procure or cause to be procured" any act contrary to the Act (CASL, [s. 51\(b\)\(v\)](#)).

### 4. Is there directors' and officers' liability under CASL?

Yes. Under CASL, an officer or director of a corporation that commits a violation will be liable for the violation if they directed, authorized, assented to, acquiesced in or participated in the commission of the violation, whether or not the corporation is proceeded against (CASL, [s. 31](#)).

## **5. Is an organization liable for violations of its employees and agents?**

Yes. An individual, corporation, organization or association is liable for a violation that is committed by their employee, agent or mandatary acting within the scope of their employment or authority (CASL, [ss. 31, 32 and 33](#)).

## **6. Does CASL contain any provisions that limit an organization's liability?**

Yes. CASL contains a due diligence defence.

Specifically, CASL provides that a person must not be found to have contravened CASL if they exercised due diligence to prevent the contravention or conduct (CASL, [s. 54\(1\)](#)).

Practically, whether an organization will be deemed to have established a due diligence defence will vary significantly depending on the organization and circumstances in question. The steps an organization has taken to comply with CASL will be of assistance in establishing a due diligence defence. See the checklist of CASL compliance steps in the Appendix to this Toolkit.

## **7. How will CASL be enforced?**

Three federal regulatory authorities are responsible for enforcing CASL:

- [Canadian Radio-television and Telecommunications Commission](#) (“CRTC”);
  - The CRTC is the primary enforcement body responsible for CASL. Under CASL, the CRTC can investigate and enforce violations of the Act relating to commercial electronic messages, and has the authority to levy the administrative monetary penalties described above.
- [The Competition Bureau](#); and
  - The Competition Bureau is responsible for enforcement of the provisions relating to false or misleading representations and deceptive marketing practices.
- [The Office of the Privacy Commissioner of Canada](#) (“OPC”).
  - The OPC is responsible for enforcement of the provisions relating to the unlawful collection of personal information through electronic address harvesting as well as the collection of personal information through unlawful access to computer programs.

## **8. If my organization complies with PIPEDA/provincial privacy legislation, will we be compliant with CASL's electronic messaging provisions?**

Once CASL comes into force, organizations will need to carefully consider the application of both privacy legislation and CASL on the sending of electronic messages.

In short, CASL's consent, notice and unsubscribe provisions are in most instances stricter than federal and provincial privacy legislation. To the extent there is a conflict between a provision of CASL and PIPEDA, the provisions in CASL will take precedence (CASL, [s. 2](#)).

In many instances, a company whose practices comply with federal or provincial privacy legislation will have to take certain additional steps and implement measures designed to ensure compliance with CASL.

The critical difference between the consent frameworks in CASL and PIPEDA is that, in a number of respects, CASL is far more prescriptive and strict in circumstances when an organization seeks a valid express consent, and more prescriptive in terms of the unsubscribe requirements for the withdrawal of a consent.

Moreover, unlike PIPEDA where organizations have a fair degree of flexibility when obtaining a valid implied consent for the sending of messages for secondary marketing activities, CASL contains limited, prescribed, highly technical and often time-limited circumstances that organizations can rely upon implied consent to send a CEM.

## **COMMERCIAL ELECTRONIC MESSAGE PROVISIONS (CEMs)**

### **9. What types of electronic messages are subject to CASL?**

The scope of CASL is very broad, and a wide range of messaging activity is technically caught by the Act.

CASL's application provisions are quite technical. In essence, CASL applies to the sending of "commercial electronic messages" (CEMs) to an electronic address.

A message would be a CEM if it (i) is an electronic message and (ii) one of its purposes is to encourage participation in a commercial activity (CASL, [s. 1\(2\)](#)).

#### Electronic Messages and Electronic Accounts

The concepts of an "electronic message" and "electronic account" under the Act are very broad, and capture any message sent by way of telecommunications, including a text, sound, voice or image message to an email account, instant messaging account, telephone account or any similar account (CASL, [s. 1\(1\)](#)).

Practically, this would include:

- emails;
- text messages;
- refer-a-friend communications; and
- emerging forms of electronic messaging.

#### Commercial Activity

As noted above, an electronic message will be deemed a CEM if one of its purposes is to encourage participation in a commercial activity (CASL, [s. 1\(2\)](#)).

The definition of commercial activity is exceptionally broad, and includes any transaction, act or conduct of a commercial character, whether or not it is carried out with the expectation of profit (CASL, [s. 1\(1\)](#)).

A CEM would include any electronic messages sent with any of the following purposes:

- to offer for sale a product, good or service (CASL, [s. 1\(2\)\(a\)](#));
- to offer a business or investment opportunity (CASL, [s. 1\(2\)\(b\)](#));
- to advertise or promote a product, good, service, business or investment opportunity (CASL, [s. 1\(2\)\(c\)](#)); or
- to promote a person as doing any of these things (CASL, [s. 1\(2\)\(d\)](#)).

In sum, the concept of a Commercial Electronic Message is exceptionally broad in scope. Based on the wording of the act, a Commercial Electronic Message would cover a broad array of electronic messages typically sent by an organization, including electronic messages with solicitations for products and services, marketing and promotional content, as well as messages with any other content that it would be reasonable to conclude is for a purpose of encouraging participation in a commercial activity.

**10. I want to send a fax to a prospective client about an investment opportunity. Would this fax transmission be covered by CASL?**

No. While the message itself would be a CEM, CASL's consent and content/unsubscribe requirements do not apply to CEMs sent via fax to a telephone account (CASL, [s. 6\(8\)\(b\)](#)).

**11. Are telephone calls or voice mail messages covered by CASL?**

No. CASL's consent and content/unsubscribe requirements do not apply to interactive two-way voice communications, or to voice recordings sent to a telephone account (CASL, [s. 6\(8\)\(a\)](#) and [\(c\)](#)).

**12. Are transactional or service messages (i.e. no promotional/marketing content) sent by email or text message subject to CASL?**

Given the manner in which CASL is drafted, including the expansive scope of the definition of a commercial electronic message (see response to [Question 9](#) above), even transactional or service types of messages must be carefully considered before determining whether they are caught by CASL and, if so, how they will be classified.

Generally, if it is not "reasonable to conclude" that a particular "transactional or service" message in question is being sent to "encourage participation in a commercial activity", then the message may fall outside the scope of a CEM and would therefore not be subject to CASL.

However, [Section 6\(6\)](#) of CASL specifies that certain types of transactional messages are required to comply with the Act's notice and unsubscribe requirements described in response to [Question 29](#) and [Question 300](#). Companies will therefore have to carefully consider the content and nature of each type of service transaction message they send to determine whether they are CEMs and fall within the list of messages referred to in [Section 6\(6\)](#).

Note that consent is not required for CEMs that fall within the list of messages contemplated by [Section 6\(6\)](#).

[Section 6\(6\)](#) provides that the notice and unsubscribe requirements apply to a commercial electronic message sent solely to:

- Provide a quote or estimate (CASL, [s. 6\(6\)\(a\)](#));
- Facilitate, complete or confirm a commercial transaction (CASL, [s. 6\(6\)\(b\)](#));
- Provide warranty information, product recall information or safety or security information (CASL, [s. 6\(6\)\(c\)](#));
- Provide notification of factual information about an ongoing use or purchase of a product, goods or service offered under a subscription, membership, account, loan or similar relationship by the sender, or ongoing subscription, membership, account, loan or similar relationship of the recipient (CASL, [s. 6\(6\)\(d\)](#)); or
- Deliver a product, goods or service, including product updates or upgrades that the recipient is entitled to receive under the terms of a transaction that they have previously entered into with the sender (CASL, [s. 6\(6\)\(f\)](#)).

### **13. What are the general requirements relating to the sending of CEMs?**

CASL sets out a general prohibition on the sending of CEMs unless the recipient has provided express or implied consent (subject to limited exceptions). See response to [Question 24](#).

Most CEMs must also meet certain specified content requirements, including an unsubscribe mechanism. See response to [Question 29](#).

### **14. Is every commercial electronic message sent to an electronic address subject to CASL?**

No. CASL sets out a series of exemptions from both the consent and content/unsubscribe requirements under the Act. Many of the exemptions are drafted in a very technical fashion. As such, companies need to carefully consider whether a given type of CEM falls within an exemption on a case-by-case basis. See, for example, response to Questions [10](#), [11](#), [16](#), [18-21](#).

CASL also sets out a series of CEMs that are exempt from the consent requirement only. See response to [Question 25](#).

### **15. Can I send an email asking a prospect for their consent to send further commercial electronic messages?**

Under CASL, even an email or text requesting consent is considered to be a CEM to which the Act applies (CASL, [s. 1\(3\)](#)). As such, authority under CASL will be required in order to send a request for express consent to a prospect.

An organization may have authority under CASL to send a request for express consent in a number of different circumstances. For example, a request for express consent may be sent to an individual with whom an organization has an “existing business relationship” (see response to [Question 34](#)) or based on one of CASL’s B2B implied consent provisions (see response to [Question 34](#)).

**16. I want to send an email or text message to a friend or an immediate family member. Do I need consent under CASL before I send the email?**

CASL includes a specific exemption that provides relief for CEMs sent between friends and family members.

In order to rely on this exemption, the CEM must be sent by or on behalf of an individual to another individual with whom they have a “personal relationship” or “family relationship” (CASL, [s. 6\(5\)\(a\)](#)).

The definitions of these two terms are as follows:

- personal relationship: the sender and recipient have had direct, voluntary, two-way communication, and it would be reasonable to conclude that they have a personal relationship (IC Regulations, [s. 2\(b\)](#)); and
- family relationship: the sender and recipient are related to one another through a marriage, common-law partnership or any legal parent-child relationship and the individuals have had a direct, voluntary, two-way communication (IC Regulations, [s. 2\(a\)](#)).

**17. Our website uses “send to a friend” and “refer-a-friend” functionality. Can we continue to these features on our website?**

Organizations may be able to rely on the friends and family exemption set out above to send “send to a friend”/“refer-a-friend” communications through its website (e.g. where the organization provides individuals with an opportunity to forward a CEM to friends or family through the organization’s website).

Industry Canada has publicly stated that organizations can reduce their liability under CASL by providing individuals with the limitations defined for family and personal relationships (as set out above) ([RIAS](#)). As such, steps will need to be taken to help ensure that the organization can rely on the exemption to send refer-a-friend communications. For example, it may be helpful to provide notice to ensure that individuals only provide email (or other electronic) addresses of their friends or family, limiting the number of friends/family email addresses that can be provided, ensuring that only a single refer-a-friend email communication is sent.

**18. Is consent required under CASL to send an email in response to calls to our customer service line, such in response to inquiries, requests, complaints?**

No. CASL contains an exemption permitting an organization to respond to a request, inquiry, complaint or other solicitation without having to comply with either the consent or the content/unsubscribe requirements (IC Regulations, [s. 3\(b\)](#)).

**19. We are legally required to send certain notices, such as under IIROC or CSA rules. Does CASL apply to these types of electronic messages?**

CASL provides relief from the consent and content/unsubscribe requirements for messages sent for a range of legal purposes.

In particular, the requirements in CASL will not apply to messages sent to satisfy a legal obligation (IC Regulations, [s. 3\(c\)\(i\)](#)).

In addition, CASL contains other related exemptions from the consent and content/unsubscribe requirements, including in circumstances where the electronic message is being sent to:

- Provide notice of a right or legal obligation, court order or judgement (IC Regulations, [s. 3\(c\)\(ii\)](#));
- Enforce a right, legal obligation, court order or judgement (IC Regulations, [s. 3\(c\)\(iii\)](#)); or
- Enforce a right arising under a federal, provincial or municipal law of Canada or of a foreign state. (IC Regulations, [s. 3\(c\)\(iv\)](#))

**20. We have established a secure portal where we can send electronic messages to our clients. Are these messages subject to CASL?**

No, provided that the portal satisfies CASL's "closed messaging system" exemption under CASL (IC Regulations, [s. 3\(e\)](#)). By way of example, this exemption would appear to capture online message board accessible through an individual's online bank account.

In order to rely on this exemption, organizations must ensure that:

- the message is sent to a limited-access secure and confidential account; and
- the messages can only be sent to the account by the person who provides the account.

CEMs that are sent in reliance of this exemption are not required to comply with CASL's consent and content/unsubscribe requirements.

**21. Our advisors and other employees use various messaging platforms, including social media, to communicate with clients and prospects. Are these communications governed by CASL?**

As noted above, CASL applies broadly to "electronic messages", a technologically neutral term that would extend to messages sent via or within any electronic platform or medium.

Industry Canada has stated that CASL will not capture certain types of messages in the social media context. In particular, the RIAS states that "Where they are not sent to electronic addresses, ... publications on ... social media sites does not fall within the intended scope of the Act" (RIAS, [s. 8](#)).

In addition, CASL contains an exemption that would appear to permits CEMs to be sent on social media platforms. This provision, referred to as the "platform exemption", enables companies to send commercial electronic messages on an "electronic messaging platform" if three conditions are met (IC Regulations, [s. 3\(d\)](#)):

- First, the company that sends the message must make its contact information available;
  - The sender will have to ensure that certain contact information (i.e. the company name, mailing address and either a telephone number, email address or web



address) is available to the recipient on the platform, such as by way of a link in the message.

- Second, recipients must be able to unsubscribe from such messages;
  - The sender of the message will have to ensure that recipients have the ability to adjust their message settings to no longer receive (i.e. unsubscribe from) from the type of message in question, or the sender of the message; and
- Third, the recipients must have consented to receive the message either expressly or by implication.
  - Whether a recipient has consented “expressly or by implication” is highly fact specific, and will need to be considered on a case-by-case basis.

## **22. Our company advertises online. Are banner ads subject to CASL?**

CASL only applies to commercial electronic messages that are “sent” to an electronic address.

A common view has developed that a banner advertisement would not be “sent” to an electronic address for the purposes of the Act, as banner ads are “displayed” and not sent to an electronic address (within the meaning of that term of the Act). Moreover, online advertisements are displayed in association with an IP address. IP addresses, in and of themselves, don’t appear to fall within the definition of an “electronic address” (which requires an address used with some form of “account”) (RIAS, [s. 8](#)).

While not legally binding, the RIAS supports this view in part. It states: “Insofar as IP addresses are not linked to an identifiable person or to an account, IP addresses are not electronic addresses for the purposes of CASL. As a result, banner advertising on websites is not subject to CASL” (RIAS, [s. 8](#)).

## **23. We generate a lot of leads by way of referrals. How does CASL apply to messages sent in response to a referral?**

CASL contains a specific provision enabling the sending of CEMs in response to a referral (IC Regulations, [s. 4\(1\)](#)). This provision contains the following restrictions and requirements:

- The provision only applies to the first message sent in response to a referral.
- The referral must be made by an individual who has a relationship with both the sender and recipient.
  - Specifically, the “referral” must have an existing business relationship, existing non-business relationship, family relationship or personal relationship with (i) the sender of the message and (ii) the recipient of the message.
- There are specific notice requirements for an electronic message sent in reliance on this provision. Specifically, the electronic message must:
  - reference the full name of the individual or individuals who made the referral,
  - indicate that the message is sent as a result of the referral, and
  - comply with the content and unsubscribe requirements.

## **CONSENT, NOTICE, UNSUBSCRIBE REQUIREMENTS**

### **24. What type of consent do I need to send an electronic message?**

The first step is to confirm that the electronic message would fall within the definition of a “commercial electronic message”.

Assuming the message would be a CEM, the next step is to determine whether the sending of the CEM would fall within one of the CASL exemptions (see, for example, response to Questions [10](#), [11](#), [16](#), [18-21](#)).

If the CEM does not fall within one of the exceptions, consider whether the message is the type of “transactional message” that falls within the list of messages sent out in [Section 6\(6\)](#). If so, then no consent will be required to send the electronic message, but the notice and unsubscribe provisions will apply. See response to [Question 12](#).

Otherwise, organizations will need either (i) implied or (ii) express consent to send the CEM in question. See response to [Question 25](#) and [Question 27](#).

### **25. How do I obtain implied consent under CASL?**

Under CASL, implied consent only exists in limited, prescribed circumstances. A key “implied consent” circumstance arises where there is an existing business relationship (CASL, [s. 10\(9\)\(a\)](#)).

A sender of the CEM (or the person who causes or permits the message to be sent) will have an existing business relationship with the recipient of the message arising from several technically defined circumstances, including:

- A purchase or lease of a product, goods, a service, land or an interest or right in land by the recipient from the sender (or the person who caused or permitted the message to be sent) (CASL, [s. 10\(10\)\(a\)](#));
- The acceptance by the recipient of a business, investment or gaming opportunity offered by the sender of the message (or the person who permitted the message to be sent) (CASL, [s. 10\(10\)\(b\)](#));
- A written contract entered into by the recipient and the sender of the message in respect of a matter not referred to in (a) and (b) above (CASL, [s. 10\(10\)\(d\)](#)); and
- Any inquiry or application by the recipient about anything mentioned in (a) to (c) above (CASL, [s. 10\(10\)\(e\)](#)).

It is important to note that the above implied consents are time-limited. Implied consent may only be relied upon for 2 years after a purchase, acceptance of a business opportunity (CASL, [s. 10\(10\)\(a\)](#)), or the expiration of the contract or 6 months after an inquiry or application (CASL, [s. 10\(10\)\(e\)](#)).

Implied consent also exists in certain B2B contexts. See response to [Question 34](#).

## **26. What are the consent requirements for existing account holders?**

Assuming the individual entered into an agreement with the sender of the message, the sender will have an EBR with the account holder under CASL.

As such, an organization will be permitted to send CEMs to the account holder for the length of the agreement in respect of the account plus 2 years (CASL, [s. 10\(10\)\(d\)](#)).

## **27. What are the requirements for obtaining express consent under CASL?**

Assuming that an exception to the consent requirement does not apply, and the organization in question cannot rely on implied consent, express consent will be required to send a CEM.

CASL contains prescriptive requirements for organizations when seeking express consent, whether orally or in writing.

Requests for express consent must set out the following in “clear and simple” fashion (CRTC Regulations., [s. 4](#)):

- The purpose for which consent is sought.
- The name of the person seeking consent.
- Certain prescribed contact information including the mailing address, and either a telephone number, email address or web address of the sender.
- A statement indicating that the person whose consent is sought can withdraw their consent.
- If consent is sought on behalf of another person (including, for instance, an affiliate), the name of that other person must be provided as well as contact information (e.g. mailing address and one of either a telephone number, email address or web address) and a statement indicating which person is seeking consent and on whose behalf.

Note that the CRTC has stated that valid a positive or explicit indication of consent is required (i.e. no pre-checked boxes). In particular, the CRTC CASL FAQs indicate that:

*“Mechanisms such as an unchecked opt-out box, or a pre-checked opt-in box, cannot be used to obtain express consent. Express consent must be obtained through an opt-in mechanism; that is, the end-user must make a positive action to indicate that he or she provides consent. Therefore, a default toggling state that assumes consent on the part of the end-user cannot be used as a means of obtaining express consent under CASL. Further, silence or inaction on the part of the end-user cannot be construed as providing express consent.”* ([CRTC FAQ's](#)).

## **28. What is the difference between implied (e.g. opt-out) consent under PIPEDA/privacy legislation and CASL's implied consent provisions?**

Under privacy legislation, organizations have a fair degree of flexibility when obtaining a valid implied consent for the sending of messages for secondary marketing activities. The OPC has set out the following conditions it deems necessary for a valid implied consent under PIPEDA:

- The personal information must be demonstrably non-sensitive in nature and context.
- The information-sharing situation must be limited and well-defined as to the nature of the personal information to be used or disclosed and the extent of the intended use or disclosure.
- The organization's purposes must be limited and well-defined, and stated in a clear and understandable manner.
- The organization must establish a convenient procedure for opting out of, or withdrawing consent to, secondary purposes.

By way of example, assuming the above requirements are met, an implied consent under PIPEDA could be obtained by providing notice and an ability to opt-out at the time the electronic address is collected (e.g. pre-checked box).

By contrast, CASL contains limited, prescribed, highly technical and often time-limited circumstances that organizations can rely upon implied consent to send a CEM. See response to [Question 25](#).

**29. What information must be contained in commercial electronic messages to satisfy CASL's notice requirements?**

CASL requires most CEMs to contain prescribed contact information and an unsubscribe mechanism. For a list of messages that do not need to comply with these requirements, see response to [Question 24](#).

In particular, each message must set out clearly and prominently, the following contact information (CRTC Regulations, [s. 2](#)):

- The name by which the sender carries on business
- A mailing address
- One of either:
  - a telephone number with access to an agent or voice messaging system;
  - an email address; or
  - a web address

When sending out a message on behalf of another organization, the message must also include:

- The same contact information listed above for the other organization; and
- A statement indicating which organization is sending the message and which organization on whose behalf the message is sent.

(2) An unsubscribe mechanism (CASL, [s. 11](#) and CRTC Regulations, [s. 2](#)). See response to [Question 30](#).

### **30. Are there specific requirements for the unsubscribe mechanism itself?**

Yes. CASL requires that an unsubscribe mechanism must:

- be able to be “readily performed” (CRTC Regulations, [s. 3\(2\)](#));
- be free to the consumer (CASL, [s. 11\(1\)\(a\)](#));
- use the same electronic means by which the message was sent (unless not practicable) (CASL, [s. 11\(1\)\(a\)\(i\)](#));
- specify an email address or a link to a web page to which the unsubscribe request may be sent that is valid for a minimum of 60 days after the message has been sent (CASL, [s. 11\(1\)\(b\)](#)); and
- take effect within 10 days of the unsubscribe request being sent (CASL, [s. 11\(3\)](#)).

In addition to satisfying the above requirements, it will be very important for organizations to carefully draft their unsubscribe notices to clearly indicate what specific messages an individual is unsubscribing from receiving and, if applicable, what messages the individual may still continue to receive.

### **31. Does the unsubscribe mechanism have to be provided electronically?**

Yes, as CASL generally requires the unsubscribe mechanism to use the same electronic means by which the message was sent.

However, where it is not practicable for the unsubscribe message to be sent using the same electronic means by which the message was sent, an organization may use “any other electronic means that will enable the person to indicate the wish” to unsubscribe (CASL, [s. 11\(1\)\(a\)\(ii\)](#)).

### **32. Can express consent be obtained orally?**

Yes. Express consent can be obtained orally or in writing (CRTC Regulations, [s. 4](#)). However, organizations will need to ensure they have adequate procedures to track such consents ([CRTC Toggling Guidelines](#)).

### **33. Our affiliates currently send messages to our email marketing list. Can they continue to do so once CASL comes into force?**

Once CASL comes into force, assuming the affiliates’ otherwise do not have authority under CASL (e.g. by way of an existing business relationship with the recipient), an organization’s affiliates will be able to send messages to the organization’s email list in the following circumstances:

- (1) When seeking consent, the organization can obtain express consent on behalf of named affiliates (See [Question 27](#) for express consent requirements); or
- (2) When seeking consent, the organization can obtain express consent on behalf of unnamed affiliates in which case additional accountability obligations will apply to both the

organization and the affiliate relying on such consent, as set out below. (IC Regulations, [Section 5](#)).

### Unknown Third Party Rules

In short, the “unknown third party” provisions will impose requirements on both the organization obtaining consent and each affiliate authorized to use the list, as follows:

- Every message sent by an affiliate to an individual must specifically identify the organization who obtained the express consent;
- Every message sent by an affiliate must include an unsubscribe mechanism that allows the individual to withdraw their consent from:
  - the affiliate who sent the message;
  - the organization who obtained the consent; or
  - any other affiliate authorized to send messages.
- If an individual indicates to the organization/affiliate who sent a message a wish to withdraw their consent to receive such messages, that organization/affiliate must give effect to that unsubscribe without delay and, at most, within 10 business days after the request to withdraw consent was sent; and
- If an individual indicates that they wish to withdraw their consent to receive messages from an affiliate—or from any other affiliate authorized by the organization that obtained consent to send messages—the affiliate who sent the message must notify the organization that obtained consent without delay so that the organization can ensure the unsubscribe is given effect to within 10 days.

## **B2B COMMUNICATIONS**

### **34. Does CASL apply to emails or text messages sent to other businesses, including for prospecting purposes?**

CASL contains various provisions that provide certain relief for B2B communications.

#### Business Relationship Exemption

There is a broad exemption from B2B exemption that would apply to messages sent between organizations. A commercial electronic message that falls within this provision is exempt from CASL’s consent, notice and unsubscribe requirements. Industry Canada has indicated that the exemption was intended to ensure that “regular business and non-business communications” are not unnecessarily regulated under the Act. ([RIAS](#))

This exemption specifically applies if (IC Regulations, [s. 3\(a\)](#)):

- The message must be sent by an employee, representative or consultant of one organization to an employee, representative or consultant of another organization;
- the organizations must have a “relationship”; and
- the message concerns the activities of the organization to which the message is sent.

Notably, the term “relationship” is not defined under CASL. Clearly, the concept of a “relationship” is broader than the defined term of “existing business relationship”, so it would presumably capture a range of circumstances where organizations send (or would send) messages on the basis of a wider range of associations or connections among organizations. To rely on this exemption, organizations will have to consider, on a case-by-case basis, whether there are sufficient factors to demonstrate a bone fide relationship between the sender and recipient organizations, and the factors would include (as indicated by Industry Canada as set out above) the regularity of communications in the circumstances.

### B2B Implied Consent Provisions

CASL also provides for implied consent under provisions commonly referred to as the “Conspicuously Published” and “Business Card” exemptions, respectively.

Under the “Conspicuously Published” exemption, CASL deems there to be implied consent where the recipient has:

- conspicuously posted their electronic address, and
- the publication is not accompanied by an indication that he or she does not wish to receive unsolicited messages, and
- the message is relevant to the recipient’s business, role, functions or duties in a business or official capacity (referred to as the “Business Card Exception”) (CASL, [s. 10\(9\)\(b\)](#));

Under the “Business Card” exemption, CASL deems there to be implied consent if the recipient has disclosed their electronic address to the sender without indicating a wish not to receive unsolicited messages. In addition,

- the message is relevant to their business, role, functions or duties in a business or official capacity (referred to as the “Conspicuously Published Exception”) (CASL, [s. 10\(9\)\(c\)](#)).

Messages sent pursuant to the Business Card Exception or the Conspicuously Published Exception must still comply with the content/unsubscribe requirements under CASL.

### **35. Are emails and text messages sent between employees of the same company covered by CASL?**

If the emails or text messages are not a commercial electronic message, then they will not be subject by CASL.

If such messages fall within the definition of a CEM, CASL contains an exemption that may cover such messaging. Specifically, CASL has an exemption from the consent and content/unsubscribe requirements for messages sent by an employee, representative, consultant to another employee, representative, consultant of an organization as long as the message concerns the “activities” of the organization (IC Regulations, [s. 3\(a\)](#)).

While the scope of the term “activities” is not defined, the RIAS specifically contemplates that it applies to messages that would relate to activities of the organization ancillary to or beyond its core business (RIAS, [s. 8](#)).

**36. I collected business cards at a recent event I attended. Am I permitted under CASL to email these individuals?**

If you received an individual's business card at an event/trade show and the individual did not indicate that they do not want to receive unsolicited CEMs, you are considered to have implied consent to email these individuals provided the message is relevant to the person's business, role, functions or duties in a business of official capacity. However, the messages must comply with the content/unsubscribe requirements set out under CASL. See the Business Card Exemption set out in response to [Question 34](#) above.

**EXTRATERRITORIAL APPLICATION OF CASL**

**37. Does CASL apply to emails sent by our US parent company to our Canadian clients?**

CASL applies to commercial electronic messages that are sent from or accessed on a computer system located in Canada (CASL, [s. 12](#)).

As such, subject to a due diligence defence, to the extent a US company sends CEMs that are accessed on a computer system in Canada, the requirements under CASL will apply.

In order to establish a due diligence defence in the circumstances, it will be necessary to show, at minimum, that the company took reasonable steps to ensure that emails would not be accessed in Canada. Options in this regard may include scrubbing for .ca email address or domain names of Canadian ISP providers, removing email addresses that are associated with recipients whose residential mailing addresses are known to the US parent company, or tailoring website content/sign-up processes by IP address.

**38. We send marketing emails to individuals in other countries. How does CASL apply to these types of messages?**

CASL contains an exemption from the consent and content/unsubscribe requirements for messages that are sent from Canada to one of 116 countries listed in the Industry Canada Regulation (IC Regulations, [s. 3\(f\)](#) and [Schedule](#)).

In order to rely on this exemption, the person sending the message must reasonably believe that the message will be accessed in one of these countries and the message must conform to the applicable anti-spam law of the foreign state.



## **Appendix 1**

### Legislation and Regulations

- [\*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\*](#), R.S.C. 2010, c. 23 (“CASL”)
- [\*Electronic Commerce Protection Regulations\*](#) (CRTC), SOR/2012-36 (“CRTC Regulations”)
- [\*Electronic Commerce Protection Regulations\*](#) (Industry Canada), 81000-2-175 (SOR/DORS) (“IC Regulations”) and [\*Regulatory Impact Analysis Statement\*](#) (“RIAS”)

### Guidance

- [\*Compliance and Enforcement Information Bulletin CRTC 2012-548\*](#), Guidelines on the Interpretation of the Electronic Commerce Protection Regulations (“CRTC ECPR Guidelines”)
- [\*Compliance and Enforcement Information Bulletin CRTC 2012-549\*](#), Guidelines on the use of toggling as a means of obtaining express consent under Canada's anti-spam legislation (“CRTC Toggling Guidelines”)
- [\*Frequently Asked Questions\*](#), CRTC (“CRTC FAQ’s”)
- The Federal Government’s Website –  
<http://fightspam.gc.ca/eic/site/030.nsf/eng/home>

## **Appendix 2**

### **Compliance Steps and Due Diligence Considerations**

The following is a list of compliance steps and due diligence considerations that organizations may consider and tailor appropriately for their CASL compliance initiative.

\* \* \*

#### **Current and Future Electronic Messages:**

- Develop inventory of electronic messages that you currently send, cause or permit to be sent (or intend to in the future)
  - Inventory all messages sent to an “electronic address”:
    - Email
    - Telephone
    - Instant message
    - Other similar accounts (e.g., social media, online message centres)
  - Categories include:
    - Promotional messages
    - Transactional messages
    - Informational messages
    - Day-to-day/business-to-business messages
    - Internal communications
    - Messages sent to meet legal obligations
  - For each category of electronic address, identify sources of the electronic addresses, for example:
    - Consumers
    - Publicly available lists
    - Trade shows/business cards
    - Contests
    - Call centre
    - Third party list brokers
    - Partners
    - Other

- For each message or message category identified under #1 above, assess whether CASL applies:\*
- Is the message a “commercial electronic message”?
- Is the message sent to recipients in Canada?
  - From within Canada?
  - From outside Canada?
- Is the message sent from Canada to recipients outside Canada?
- Do any exemptions from both the consent and identity, content and unsubscribe requirements apply (e.g., personal or family relationship, response to complaint or inquiry)?

\* Requires resolving “key” interpretations issues (e.g., meaning of “commercial electronic message”, scope of business relationship exemption)

- If CASL applies to the messages identified under #1 above, determine:
  - Whether express consent will be required
  - Whether implied consent will exist
  - Whether an exception to the consent requirement will apply
  - Whether the emails will need to comply with CASL’s identity, contact and unsubscribe rules
- Develop templates for requesting written consent
- Develop scripts for requesting oral consent
- Develop email templates that comply with CASL’s identity, contact and unsubscribe rules
- Implement processes to track expiration of implied consents

**Existing Databases:**

- Determine whether CEMs have been sent to the electronic address
- Determine whether and what authority you have to continue to send messages to electronic addresses in your existing databases:
  - Whether express consent (e.g., notice with an unchecked box) to send CEMs been obtained and documented
  - Whether implied consent exists and can be proven (e.g., eligible existing business relationship)
  - Whether an exemption from the consent and content/unsubscribe requirements applies
  - Whether an exception to the consent requirement applies

- Whether messages must comply with CASL's identity, contact and unsubscribe rules
- Determine approach to grandfathering of existing express consents
- Scrub existing databases if no consent or exception to consent applies
- Consider seeking "fresh" consent for scrubbed addresses (if goal is to send CEMs to them)
  - If request to be made by email, do so before July 1, 2014
- For implied consents, ensure transition period is triggered (before July 1, 2014)
- Develop processes to track expiration of transition periods for implied consents
- Ensure emails comply with CASL's identity, contact and unsubscribe rules on a go-forward basis

**Additional Compliance Steps:**

- Develop approach for acquiring and using third party mailing lists (if applicable)
- Develop approach for refer-a-friend marketing programs (if applicable)
- Develop protocol for participating in or running affinity programs (if applicable)
- Develop protocol for complying unnamed third party rules (if applicable)
- Review/update database management practices to demonstrate compliance with CASL (e.g. process for recording express consent, tracking implied consent timelines, etc.).
- Ensure unsubscribe mechanism meets the requirements under CASL.
- Review and update external notices (e.g., privacy policy)
- Review and update relevant internal policies
- Develop and implement training and education plan (e.g. employee, staff, consultant, etc.)
- Develop and implement internal governance model
- Manage compliance with applicable service providers
  - Review and revise existing agreements
  - Revise templates and contracting processes for new agreements
  - Develop and implement monitoring and reporting mechanisms