

Preparing for *Canada's*  
*Anti-Spam Legislation*  
(CASL)

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## Discussion items

- CASL background
- Regulatory oversight
- Fines and penalties
- New anti-spam provisions
- Implications
- Next steps: CASL preparedness
- Appendix: scoping exercise

# CASL background

- Industry Canada passed *Bill C-28 – Fighting Against Internet and Wireless Spam Act* into law in December 2010, also known as *Canada’s Anti-Spam Law (CASL)* which is expected to come into force in winter 2013
- Once in force, it will prohibit spam (unsolicited commercial emails, including false, misleading or deceptive subject lines and headers), spyware, (installation of computer programs on another’s computer) and email address harvesting, phishing and pharming
- CASL is considered to be the toughest anti-spam legislation in the world
- Creates an express, “opt-in” consent regime involving any online communications for marketing purposes, with very limited exceptions
- Applies to all “commercial electronic messages” (CEMs) including emails, text messages, and social media messages sent from within or to Canada
- Requires changes to marketing practices and for communicating electronically with both existing and potential customers and other businesses

# Regulatory oversight

- Under Industry Canada's supervision, the following three federal agencies will work together to oversee and enforce CASL:

**The Canadian Radio-television and Telecommunications Commission (CRTC)**



- Investigating the sending of CEMs and installation of software without consent (e.g. manage basic spam complaints)

**The Competition Bureau**



- Addressing misleading representations (claims) and deceiving marketing practices in the electronic marketplace (e.g. handle fraud and misleading commercial messages)

**The Office of the Privacy Commissioner of Canada**



- Overseeing the collection of personal information through illicit access to people's computer systems and "electronic address harvesting" (e.g. ensure email addresses are not collected without consent)

- It is within these three agencies' powers to exchange information among themselves, as well as with foreign jurisdictions, for the purposes of pursuing violations under CASL
- Industry Canada recently launched Spam Reporting Centre to field complaints and accept forwarded spam that can be used as evidence to assist in enforcement proceedings

# Fines and penalties

- Creates both direct and vicarious liability
  - (e.g. holds directors and officers directly liable for violations of the corporation as well as employers for the violations committed by their staff)
- Violations of CASL can result in significant monetary penalties, civil liability, and reputational damage
  - Examples of potential violations include sending CEMs without express or implied consent, or sending a CEM that does not identify the sender or provide a compliant unsubscribe mechanism

Penalty	Amount (\$)
<ul style="list-style-type: none"><li>• CRTC can levy Administrative Monetary Penalties (AMPs)<ul style="list-style-type: none"><li>– Fines may be imposed for up to 10 days</li></ul></li></ul>	<ul style="list-style-type: none"><li>• \$10,000,000 for businesses</li><li>• \$1,000,000 for individuals</li></ul>
<ul style="list-style-type: none"><li>• The Competition Bureau can seek penalties under the Competition Act</li></ul>	<ul style="list-style-type: none"><li>• \$10,000,000 for businesses</li><li>• \$750,000 for individuals</li></ul>
<ul style="list-style-type: none"><li>• Provides right to both business and consumers to sue civilly and seek damages in court where CRTC does not initiate enforcement proceedings</li></ul>	<ul style="list-style-type: none"><li>• up to \$1 million</li></ul>

**CASL provides a due diligence defense**

# New anti-spam provisions

Identity of sender
<ul style="list-style-type: none"> <li>Name of business or person conducting business (if different).</li> <li>If the message is sent on behalf of another business, the e-mail must contain the name of that business or person</li> </ul>
Sender's contact information
<ul style="list-style-type: none"> <li>Mailing address and either a telephone number providing access to an agent or a voice messaging system, an email or web address of the person sending the message (valid for 60 days)</li> <li>Information must allow recipient to readily contact the sender</li> </ul>
Unsubscribe Mechanism
<ul style="list-style-type: none"> <li>2 methods of opting-out of receiving future communications, (email or hyperlink) which must be "readily performed" (without difficulty or delay) and acted on within 10 days, at no cost to individual</li> <li>Both hyperlink and email address must be valid for 60 days</li> </ul>

CASL prohibits businesses from sending CEMs without express consent, unless CEM is fully exempt from the Act or can qualify under the "no consent" or "implied consent" category.

Unless fully exempted, all CEMs must clearly and prominently identify the sender, include the sender's contact information and provide an unsubscribe mechanism.

A request for consent must be verbal or in writing and contain prescribed information (e.g. identity of the sender, contact information and option to withdraw consent), including purpose for consent.

**Onus to prove consent is on sender**

Exemptions
<ul style="list-style-type: none"> <li>CEMs exchanged between family and friends</li> <li>Responses to inquiries</li> <li>B2B CEMs within same industry</li> <li>CEMs sent to employees within an organization</li> <li>CEMs required to be sent by law</li> </ul>
No Consent
<ul style="list-style-type: none"> <li>Providing quote in response to request</li> <li>Facilitating/completing commercial transaction</li> <li>Providing warranty, product recall or safety alert about a product</li> <li>Providing information about ongoing use of a product</li> <li>Delivering a product or service (including upgrades)</li> </ul>
Implied Consent
<ul style="list-style-type: none"> <li><b>An existing business</b> or non-business <b>relationship</b> exists (e.g. product purchase, written contract, gift)</li> <li>Recipient has voluntarily provided his/her email address (<b>business card exception</b>)</li> <li>Recipient has prominently published his/her email address (<b>publication exception</b>)</li> </ul>

# Implications

- **Build and/or update electronic databases** to manage the soliciting, tracking and documenting of consents and withdrawals of consent/unsubscribe requests to receiving CEMs
- **Review/revise current unsubscribe methods** to conform with the new requirements
- **Review cross-marketing initiatives** with affiliates
- **Train employees** on how to adhere to the new requirements regarding the creation, dispatch and management of CEMs

## Next steps: preparing for CASL

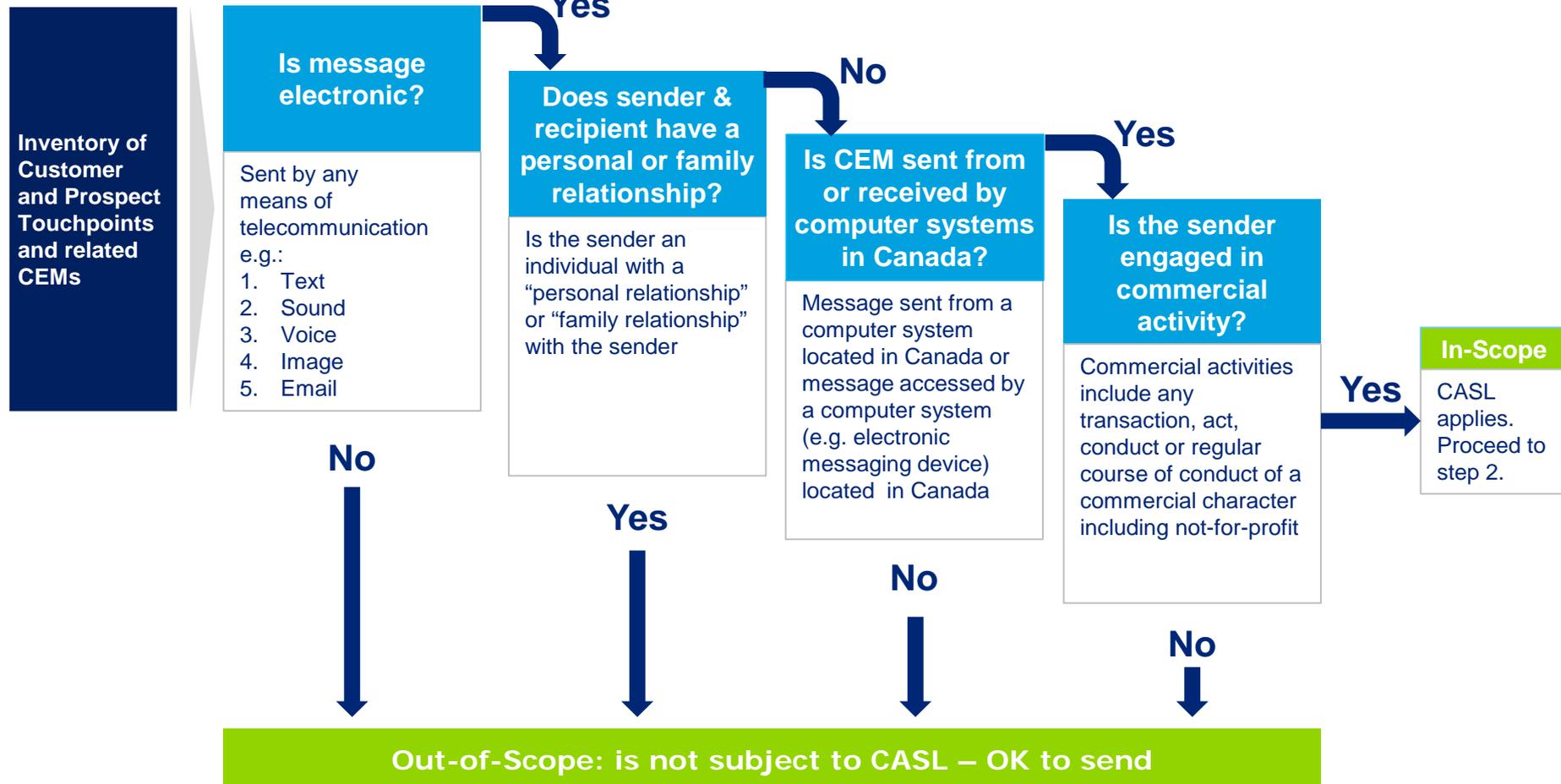
- The benefits of complying early:
  - There is no grandfathering of existing consents
  - Obtain consents from prospects before CASL comes into effect
    - Sending a CEM without express consent will be prohibited, even for purposes of seeking consent (unless exemption or implied consent applies)
    - Three year transitional period after CASL comes into force only applies to existing business relationships, allowing CEMs and requests for consent to be sent during this period
  - In many cases, businesses will need to obtain “new” or “refreshed” consent from individuals on an opt-in basis
  - An assessment/inventory of both business and IT processes will be required to ensure consent preferences are CASL compliant
  - Deloitte can assist with CASL readiness assessments, training and awareness workshops

# Appendix:

## Scoping Exercise

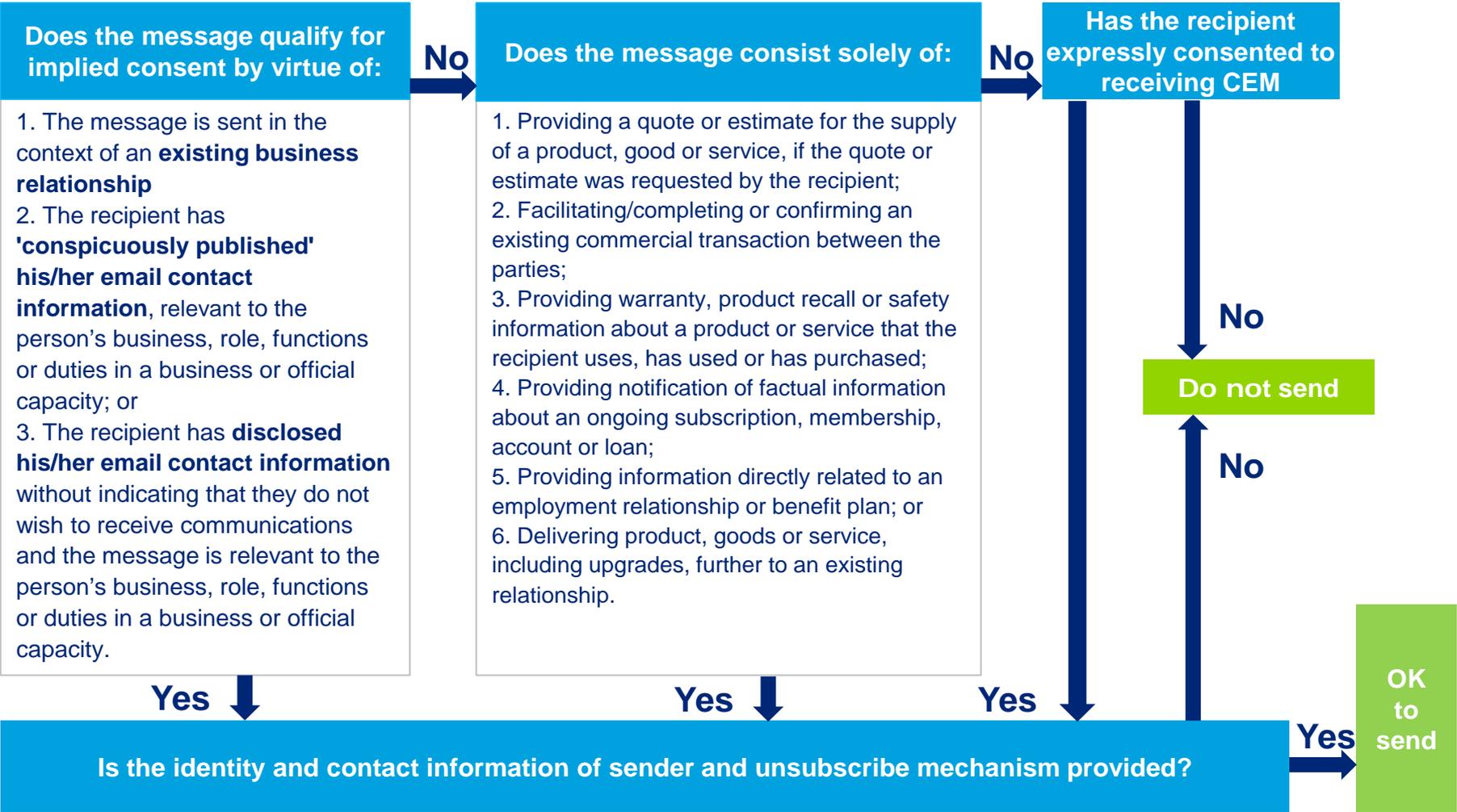
# Step 1: Scoping

Determine which CEMs across business lines are in scope and subject to CASL



# Step 2: Scoping

Next, assess which contacts fit into implied, express, no consent category



**Deloitte.**