

KIRKLAND ALERT

June 2014

Complying with Canada's New Anti-Spam Law

Effective July 1, 2014, Canada's new Anti-Spam Law (CASL) broadens liability for businesses sending marketing e-mails to consumers in Canada. Generally, the CASL prohibits sending commercial electronic messages (CEMs), which include emails, social networking messages, and text messages, unless the sender: (1) obtains the recipient's consent; (2) provides identification information; and (3) provides an unsubscribe mechanism.

In addition to the sending of CEMs, the CASL also affects activities such as installing computer programs without the owner's consent, altering the transmission of data in an electronic message to cause the message to be delivered to a different destination without consent, and collecting electronic addresses without permission.

Commercial Electronic Message (CEM)

A CEM is defined as an electronic message whose purpose, or one of its purposes, is to encourage participation in a commercial activity. This includes an electronic message that:

- (a) offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land; (b) offers to provide a business, investment, or gaming opportunity; (c) advertises or promotes anything referred to in paragraph (a) or (b); or (d) promotes a person, including the public image of a person, as being a person who does anything referred to in paragraphs (a) to (c), or who intends to do so.

Adding a request for express consent to an electronic message that fits the definition of a CEM does not disqualify that message as a CEM.

Consent

A sender of a CEM must have the recipient's consent. Under the CASL, there are two different types of consent — express and implied. Express consent can be obtained either in writing or orally, but may not be presumed. In other words, silence or inaction by the end-user cannot be construed as providing express consent. Implied consent only exists if: (1) the sender of the message has an existing business or non-business relationship with the recipient; (2) the recipient has conspicuously published or has caused to be conspicuously published the electronic address to which the message is sent; or (3) the recipient has disclosed to the sender the electronic address to which the message is sent without indicating a wish not to receive unsolicited commercial electronic messages.

An existing business relationship exists and consent is implied if the recipient has

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purchased or leased products or services in the last two years with the sender, a contract exists between the sender and recipient, a contract expired in the past two years, or if the recipient has made an inquiry or application to the sender in respect to business matters in the past six months. In order to determine if a business has implied consent it must review its prior business dealings with potential recipients. A non-business relationship exists if the sender and the recipient have a relationship that arises out of either a donation or gift within a two-year period prior to the CEM, the recipient performed volunteer work for any of the senders or the recipient is a member of the sender when the sender is a club, association, or voluntary organization.

Recognizing that this new consent requirement may require businesses to change their practices, the CASL includes a three-year grace period that begins July 1, 2014. During this period, if a sender has an already existing business or non-business relationship with a recipient, regardless of when that relationship may have last been active, then the sender has implied consent. The implied consent ends as soon as the recipient gives notification they no longer consent to receiving such a message.

Identification

Any CEM must identify the person or persons on whose behalf the CEM is sent, i.e., the senders. All persons who played a material role in the content of the CEM message must be included. However, an email service provider that has no input in the content of the CEM does not need to be identified. If it is not practicable to include all identification information in the body of a CEM, the sender may use a hyperlink to a webpage that contains this information as long as the webpage is readily accessible. This is often necessary when sending a text message.

Unsubscribe Mechanism

Any CEM must include an unsubscribe mechanism. An unsubscribe mechanism must be simple, quick, and easy for the end-user. A CEM may include an unsubscribe mechanism that allows a recipient to unsubscribe from all or just some types of CEMs. For example, if a CEM was sent as a text message, an acceptable unsubscribe mechanism is for the text message to state that the recipient can unsubscribe by texting the word "STOP."



This *Kirkland Alert* is only intended to provide a general overview of the CASL. Please contact Canadian counsel with further inquiries or questions on interpretations of the CASL. For more information on the CASL and the actual law, please visit Canada's Anti-Spam Legislation website, which can be found here: http://fight-spam.gc.ca/eic/site/030.nsf/eng/h_00230.html.

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