

## CANADIAN ANTI-SPAM LAW IMPACTS U.S. NONPROFITS

Canada's anti-spam legislation (known as CASL) takes effect on July 1, 2014 and is much broader than the U.S. CAN-SPAM law because it requires an opt-in. In addition to regulating the sending of commercial electronic messages, CASL also regulates a broad range of activities, such as unsolicited installation of computer programs and email harvesting.

CASL applies when a computer system located in Canada is used to send or access a commercial electronic message ("CEM"). As a result, if a U.S. nonprofit organization sends a CEM to a member located in Canada, CASL applies. U.S. nonprofits which send emails to Canadian residents should take compliance with CASL seriously. The penalties for noncompliance are substantial (up to CDN \$10 million per violation), and employers can be held vicariously liable. After July 1, 2017, individuals will have a private right of action. CASL permits the Government of Canada to enter into an arrangement with foreign governments to share information about investigations and proceedings.

While the law goes into effect on July 1, 2014, there is a transition period of 3 years (ending on June 30, 2017), during which U.S. nonprofit organizations can continue to send CEMs to those with whom they have an existing business or non-business relationship. Therefore, nonprofits can send CEMs to current and past donors, members, supporters, and vendors during the transition period, as long as the Content Requirements (discussed below) are met.

### **Definition of Commercial Electronic Message (CEM)**

Generally, CASL prohibits the sending of a CEM unless 1) an exemption applies or the recipient has expressly or impliedly consented to receive the CEM; and 2) the CEM includes identification information and an unsubscribe mechanism. These requirements apply whether the emails are sent in bulk or to a single recipient.

A CEM is one that has a purpose of encouraging the recipient to participate in commercial activity. When determining whether a purpose is to encourage participation in commercial activity is determined by examining the content of the message; any hyperlinks in the message to website content or a database; and contact information in the message. A CEM would include an email containing a tagline that promotes a product or service or encourages the recipient to purchase that product or service. A commercial activity is any transaction, act or conduct or any regular course of conduct that is of a commercial character, *whether or not the person who carried it out does so in the expectation of profit*. Examples of commercial activity include offers to purchase, sell, or lease a product, goods, services, as well as promoting a person, including the public image of a person, as being a person who does anything referred to above, or who intends to do so.

Surveys, polling, newsletters, and messages soliciting charitable contributions, political contributions, or other political activities that do not encourage participation in a commercial activity are not included in the definition of CEM. There is an exemption for CEMs sent by or on behalf of a registered charity, as defined in Canada's *Income Tax Act*, where the primary purpose of the CEMs is to raise funds for the charity.

An “electronic message” is a message sent by any means of telecommunication, including text, sound voice, and image message to an “electronic address,” which includes email, instant messages, text messages, social networks, and other online forums or portals. A wall posting would not be an electronic message, but Facebook or LinkedIn messaging would be.

### **Three Requirements for Sending CEMs**

Before a US nonprofit may send a CEM into Canada, it needs to comply with three requirements.

1. Obtain consent;
2. Provide identification information; and
3. Provide an unsubscribe mechanism.

### **Consent**

There are two types of consent – express and implied. The three year transitional period applies to implied consent. During this three year period, consent to send CEMs is implied where there is an existing business or non-business relationship that includes the communication of CEMs. For those recipients with whom consent cannot be implied, consent requests must be sent prior to July 1, 2014, because sending a request for consent is itself a CEM.

While CASL applies to nonprofit organizations, consent may be implied where CEMs are sent to members of an association, club or voluntary organization, which meet additional requirements. When sending CEMs to members based on implied consent, a nonprofit organization must ensure that it is only sending to its members. "Membership" means the status of having been accepted as a member of a club, association or voluntary organization in accordance with its membership requirements.

After the three year transition period expires, an existing business relationship will be limited to those recipients who have purchased a product or service from the sender in the past 2 years, or has a contract that is ongoing or has expired in the past 2 years. In the nonprofit context, implied consent applies to messages sent by a registered charity to any person who made a donation or did volunteer work for that charity in the past 2 years, and to messages sent by an association, club, or voluntary organization to its current members and those who ceased being a member within the past 2 years.

Organizations should obtain express consent for several reasons. First, implied consent can expire. Second, it can be difficult for an organization to keep track of when a recipient’s consent expired and timely remove them from the database.

To obtain express consent, CASL requires that an organization clearly specify: (1) the purpose for which consent is sought; (2) the identity of the organization seeking consent, and the organization on whose behalf consent is sought (e.g., if on behalf of an affiliated

organization); (3) the contact information of the organization(s), including mailing address and telephone number, email address or web address; and (4) a statement that the recipient may withdraw consent by using the unsubscribe mechanism provided. For express consent to be valid, the recipient must give consent to receive the message, e.g., by signing a document or checking a box to indicate consent. A pre-checked box cannot be used because it presumes consent.

### **Identification Information**

All CEMs must contain the name of the sender and the sender's contact information – mailing address and telephone number, email address or web address. If an organization is sending the CEM on behalf of a third party, the sender must identify the person on whose behalf the message is being sent.

### **Unsubscribe**

All CEMs must contain a mechanism that permits the recipient to unsubscribe from future CEMs from the sender. This mechanism must be free and easy to use, and accessible via electronic means (e.g., email address or link to a website to unsubscribe). All unsubscribe requests must be effective within 10 business days.

### **Exceptions to Consent and Content Requirements**

CASL contains a number of exceptions that exempt certain CEMs from the consent requirement and/or the consent and content (identification and unsubscribe) requirements. The exceptions most applicable to U.S. nonprofits include emails sent within an organization by and among employees, representatives, consultants, and the message concerns the activities of the organization; sent between organizations, and their representatives and consultants, where the messages concern the activities of the organization to which the messages are sent, and the organizations have an ongoing relationship; and emails sent in response to a request, inquiry, or complaint.

### **Steps for U.S. Nonprofits**

U.S. nonprofits should review their compliance obligations and ensure that all CEMs have the required identification information and that there is a working unsubscribe mechanism. For anyone for whom consent cannot be implied, express consent should be obtained prior to July 1, 2014. During the 3 year transitional period, nonprofits should begin seeking express consent from its members, donors, and supporters to avoid having to track implied consent expiration dates.

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