

## NEW YEAR, NEW REGULATIONS: REVISED REGULATIONS TO ANTI-SPAM LAW PUBLISHED

On January 5, 2013, revised draft regulations (the “Regulations”) to Canada’s anti-spam legislation (“CASL”) were published in the Canada Gazette, bringing the legislation one step closer to coming into force. CASL received Royal Assent on December 10, 2010 and is expected to be proclaimed into force sometime in 2013. Regulations were first published in 2011 and these current revisions represent the government’s response to the feedback it received from various stakeholders. The Regulations offer definitions for some key terms and concepts, and provide exemptions for certain business activities that were not meant to be subject to CASL. There is a 30-day consultation period for the public to submit their comments on the Regulations (deadline: February 4, 2013).

The key changes in the Regulations are:

- **Family and Personal Relationships:** Commercial electronic messages (“CEMs”) that are sent between persons with a personal or family relationship are exempt from CASL. The definition of “family relationship” is consistent with that in the *Income Tax Act*, and includes blood relatives and relatives by marriage. A “personal relationship” is defined as direct, voluntary, two-way communications between two persons where it is reasonable to conclude the relationship is personal. The assessment of whether a relationship is personal is based on a non-exhaustive list of factors. In the initial draft of the regulations, personal relationships were defined as relationships where there has been communication in the past 2 years and the parties have met in person, which definition was criticized as being too restrictive. In the Regulations, a recipient can always “opt out” of receiving CEMs from someone with whom they have a personal relationship (although, interestingly, this does not apply to family relationships).
- **New exemptions:** New exemptions have been added to address situations that were not intended to fall under the scope of CASL:
  - CEMs sent by employees, representatives and contractors within an organization or to another organization if the organizations have a business relationship, where the message concerns the business or that person’s role, function or duties in the organization.
  - CEMs sent in response to a request or complaint or that is otherwise solicited by the recipient.
  - CEMs sent by a person or computer located outside Canada, about products or services provided outside Canada, to someone that the sender did not know and could not reasonably have known, would be received in Canada. This exemption is meant to apply to foreign business activities where the recipient happens to be visiting Canada at the time he or she receives the CEM.
  - CEMs that are required by law or that are sent to enforce a legal right, such as product recall messages or electronic bank statements, or notices of a court order or judgment.
- **Referral marketing:** An individual is exempt from having to obtain consent for the first CEM he or she sends to an individual whom the sender has been referred to by a third individual who has a relationship (personal, family, business or non-business) with the recipient, and the CEM discloses the full name of the individual who made the referral. This allows an individual to send an initial message soliciting business from a potential referral, but the sender must obtain consent for further messages and the message must otherwise comply with the requirements of CASL.
- **Specified computer programs:** Consent is deemed to have been given for programs installed by telecommunications service providers to prevent illegal activities or to guard against security risks, and for network updates.

The Regulations did not change the provisions dealing with third party consents. These are CEMs sent by someone on behalf of a third party whose identity is unknown. The person who obtains consent on behalf of the third party is responsible for ensuring that the recipient can unsubscribe from messages and will be able to contact the sender to carry out that request. Industry Canada recognizes that this may require businesses to track consents as they are shared amongst different parties, but they regard this as a reasonable burden for businesses to bear.

The Regulatory Impact Analysis Statement (the "Statement") accompanying the Regulations point out the following:

- There are concerns that CASL's scope is overly broad and could apply to any messages sent in the course of a commercial activity, including confirmations of successful unsubscriptions or courtesy SMS messages sent to roaming customers. While Industry Canada did not take a position on whether such messages are in fact CEMs, they state that CEMs are limited to messages that encourage participation in a commercial activity. There has been concern from stakeholders that the definition of CEM in the legislation could include messages about roaming charges and data usage, since CEMs include messages that have, as its purpose *or one of its purposes*, to encourage participation in a commercial activity. This is an issue that could benefit from further clarification.
- Industry Canada is clear that consents obtained to comply with the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") do not satisfy the requirements of CASL. The Statement says, "CASL is intended to create a higher threshold for the collection and use of consent for the particular activities being regulated." This is important for businesses to understand as they must consider the requirements of CASL separately from their obligations under PIPEDA.

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