

CASL Update #4 – Final Anti-Spam Regulations and In-Force Date Published

On December 5, 2013, *Industry Canada published its final Electronic Commerce Protection Regulations* and announced that the in-force date for Canada's *Anti-Spam Legislation (CASL)* will be July 1, 2014. The timing, essentially a six-month window to required compliance, is shorter than generally expected (Industry Canada had indicated previously a likely 12-month delay following finalization of the regulations), with the result that businesses and other organizations will now need to shift their CASL-qualifying activities into high gear. As well, the message is that the overall compliance requirements will not be changed substantially from what we have understood:

- an opt-in consent regime with no grandfathering of consents otherwise compliant under the *Personal Information Protection and Electronic Documents Act (PIPEDA)*;
- specific exceptions for permitted commercial electronic messages (CEMs);
- limited scope for implied consent to send a CEM;
- requirements that all CEMs contain specified sender contact information and an unsubscribe mechanism.

While the regulations contain certain additional specific exceptions, such as for charities' and political parties' fundraising activities, as well as refinements to certain of the previously indicated

exceptions, the thrust is consistent with the federal government's consumer protection strategy: protecting Canadians from spam.

The now final regulations reflect Industry Canada's review and response to comments received and consultations conducted with stakeholders during the 10 months following its release of draft regulations in January 2013. Those draft regulations had, in turn, reflected revisions to an earlier draft of the regulations (June 2010).

At each stage of these successive draft, and now final, versions of the Industry Canada Regulations, the government has sought to satisfy significant business and, more recently, non-profit sector concerns with the law. However, the "ban-all, subject to exceptions" approach, while potentially assisting many organizations in achieving compliance, leads to a patchwork quilt of rules which underscores the need to obtain opt-in consent in any event so as to ensure compliance outside of the specified exceptions.

The changes to the Industry Canada Regulations from the January 2013 draft are quite limited, although they do contain some helpful additional provisions, as well as certain "tweaks" which are mostly helpful but in some instances may complicate compliance. Of equal importance to these adjustments are the comments (presumably emanating from Industry Canada) contained in the **Regulatory Impact Analysis Statement** (RIAS) that accompanies the regulations. Here, unusually, the RIAS, which typically is intended to summarize the impacts – both positive and negative – of new legislation, in this case seeks to provide interpretations and compliance guidance. The RIAS is helpful in explaining the rationale behind some of the changes from the previous draft version – as well as changes that were not made. The interpretive guidance indicated, while helpful to understand, however cannot be considered as having any binding effect, as might be the case with guidelines or policy statements issued by the CRTC as the agency responsible for enforcing CASL. The RIAS indicates that Industry

Canada and the CRTC intend to issue, jointly, guidance information respecting CASL.

The CASL Regulations

CASL contemplates two sets of regulations, one from Industry Canada and another from the CRTC. The CRTC finalized its [regulations](#) on March 7, 2012. Those regulations specify the required form and content of CASL-compliant CEMs as well as the form and content for requests for consent ([McMillan Bulletin – July 2012](#)).

The Industry Canada Regulations are intended to address potential exclusions and exceptions from the law, by either providing definitions for exemption categories specified in the law or supplementing them with additional categories. In addition, the regulations stipulate a number of other definitions and procedural conditions and as well computer programs that may be installed without a user's separate consent.

No Grandfathering of PIPEDA Consents

The most significant information learned from the Industry Canada Regulations is that there will be no "grandfathering" of consents obtained under PIPEDA. PIPEDA permits both implied and express consent; under CASL implied consent is available only in limited specifically-defined circumstances.

This qualification, which had been advocated almost unanimously across the stakeholder spectrum from the early days of the proposed legislation, was rejected by Industry Canada. No PIPEDA consent grandfathering will complicate compliance under the law for businesses and not-for-profit organizations, small and large. The reason for this is that, as the potentially broad application of the law and its patchwork quilt of exceptions becomes more clearly understood, most organizations will realize that their only confident option for compliance will be express, opt-in consent. PIPEDA grandfathering would have qualified email contact lists understood

to be compliant under that law, but which will not be CASL-compliant unless either they:

(a) continue, on an on-going basis, to qualify under one of CASL's situation-specific exceptions; or

(b) were obtained with express consent prior to CASL's coming into force.

The RIAS makes clear that many PIPEDA-compliant consents will not be valid under CASL. However, helpfully, it also confirms that an express consent obtained prior to CASL (*i.e.* under PIPEDA) that addresses sending CEMs will be recognized as compliant with CASL.

The RIAS underlines that CASL's three-year transition period (see [McMillan Bulletin – July 2012](#)) is intended to enable organizations to obtain consent. However, to qualify under the transitional period a contact must fall within one of CASL's defined "implied consent" categories of an existing business or non-business relationship without reference to otherwise applicable time periods. If this condition is not met and the contact does not qualify under a specific exception, the organization will not be able *even to request consent* by way of a CEM once the law comes into force.

Exclusions – All CEM Compliance Requirements

The final regulations expand the list of specifically defined exclusions from all of CASL's CEM compliance requirements and provides adjustments to some of the previously identified exclusions.

Charities and Political Parties

The Industry Canada Regulations provide that CEMs sent by registered charities and political parties which have the primary purpose of seeking donations, or soliciting a contribution, (respectively), are not subject to CASL's consent and content

requirements.¹ Charities and not-for-profit organizations had made strong submissions arguing for complete exclusion from the law. Industry Canada's response is to provide an exception, limited to charities' communications that qualify as having fundraising as the primary purpose. The challenge for such organizations will be to ensure that the excepted communications meet the criterion. Fundraising likely extends to selling tickets for dinners and other galas – but does it include, for example, sale of merchandise? CEMs sent by many charities clearly will not be excepted – such as theatre subscription solicitations.

There is no blanket exception for non-charitable, not-for-profit organizations. However, fine-tuning adjustments to certain of the defined exceptions should assist such organizations in facilitating compliance (see below).

Communications Within or Between Organizations

The January 2013 draft regulations introduced an exception for messages sent within an organization or between employees or agents of two organizations, if the message concerns the "affairs" or "duties" of the employee of the organization, and the organizations have a "business relationship".

This exception has been refined to more clearly enable its application to non-business organizations. Now, the subject matter of an excepted message need only relate to the "activities" (as opposed to the "affairs" or "duties") of the organization and it will be sufficient for a connection between two or more organizations to constitute a "relationship" (as opposed to a "business relationship").

¹ CASL's content requirements stipulate that all CEMs must include specified sender contact information and an unsubscribe mechanism.

CEMs Sent by Foreign Entities

The January 2013 draft regulations provided that CASL's consent and content requirements would not apply to a CEM sent by a foreign entity if accessed by a computer in Canada, if the sender could not reasonably be expected to know that that would occur and the CEM related to products, or services, of an organization provided or located outside of Canada. The revised version of this exception eliminates these specific requirements and replaces them with an alternative, broader criterion: that the sender must simply believe that the message will be accessed in a foreign state that has a law substantially similar to CASL,² and it complies with that law.

This exception enables Canadian-based entities to send CEMs to foreign persons if those CEMs comply with the law of the state in which the foreign person is located. Clearly, the revised exception has a different and more broader focus than the initial draft version – which was explained as seeking to except CEMs addressed to foreigners temporarily travelling in Canada. Industry Canada's stated rationale for the revised provision is to "reduce regulatory duplication". However, many non-Canadian organizations that maintain multi-national email communication lists will need to consider whether the exception permits them to address another concern: the need of differentiating emails intended solely for Canadian residents from those that cannot be differentiated between Canadian and non-Canadian residents. The difficulty that has been voiced is that such organizations may not be able to isolate all email addresses related to persons resident in Canada (such as an address that ends in ".com") and therefore may, inadvertently send non-complying emails to such addresses.

Electronic Messaging Services

The final regulations add as new category of excepted communications, messages sent and received on an electronic

² The regulations include a defined list of states deemed to have such a law.

messaging service. Individual messages will be excluded provided that the recipient consents to receive messages, either expressly or by implication, and the user interface of the electronic messaging service includes CASL's required content information. Unique to this exception is that consent to receive the messages may be implied and that such implied consent is not limited to a defined category, in contrast to the limited, defined categories of implied consent otherwise applicable to CEMs ([McMillan Bulletin July 2012](#)).

While details have not been provided as to what may be considered an "electronic messaging service", this description may include web-based discussion forums, instant messaging platforms and apps (e.g., Facebook Chat, Yahoo Messenger, Google Hangouts) and websites with pop-up chat windows used by businesses for the purposes of sales promotions and customer assistance. By contrast, SMS text messages, and other technologies which transmit messages without the use of a user interface, would not be covered under this new exemption.

Personal and Family Relationships

Under s.6 of CASL "personal or family relationships", as defined by the regulations, are excepted from the consent and content requirements.

The January 2013 draft regulations helpfully brought the qualifying criteria for a "personal relationship" into the digital era by not requiring a face-to-face, in-person meeting in order to qualify. However, by stipulating a list of criteria,³ all of which would need to be considered – including whether such an in-person meeting had occurred, the proposed revision might have been interpreted as still requiring an in-person meeting. The revised version of this exception stipulates that qualification for a personal relationship

³ Sharing of interests, experiences, opinions and information evidenced in the communications; the frequency of communication; the length of time since the parties communicated; whether the parties have met in person.

need only consider *any*, as opposed to "all", of the stipulated criteria, thus making it more clear that an in-person meeting is not a requirement.

The significance of the definition for marketers is that it can enable referral marketing using "refer-a-friend" techniques using viral and social media platforms. Such potential application would have been severely limited if the requirement of an in-person meeting had applied.

The definition of a "family relationship", also an excluded category, while seemingly streamlined in a revised definition, appears to have been narrowed to exclude extended "blood relationship" family members who are not in an immediate parent-child relationship (e.g. grandparents/grandchildren). Instead, the definition now specifically refers to a relation through a marriage, common-law partnership or legal parent-child relationship. While it remains to be seen how this definition will be interpreted, there is a suggestion that this narrowing is a drafting error which should be rectified.⁴

Exemptions from Consent Requirement - Referrals

The January 2013 draft regulations introduced a new category of exception from CASL's consent requirement – third party referrals. It was intended to enable individuals to refer other individuals with whom they have a defined relationship (personal, family, business, non-business) to a professional or other individual supplier of a product or service with whom they also have such a relationship, who then could send a CEM to the individual without requiring their consent. The exemption is intended to apply to the initial CEM between the person receiving the referral and the CEM recipient, in which, presumably, a request for consent to future CEMs would be

⁴ See [Barry Sookman, December 4th Blog post](#). Alternatively, it could be argued that the new wording may permit a broader scope of relationships, to be based on a relation *through* the family connection. This may be why Industry Canada elected to use "through", rather than "by".

included. However, as written, the draft version of the exemptions did not clearly enable referrals to "organizations".

The version of the exception contained in the final regulations makes it clear that the referral may be to an organization or any other entity that falls within the Act's definition of "person" which includes both individuals and organizations. The exception is of relevance for referral marketing particularly since, in contrast to the personal relationship exception, which requires that the introductory communication be sent directly "friend-to-friend", there is no such requirement and the CEM may be sent directly by the product marketer. On the other hand, the personal relationship exception can apply to all CEMs sent by an organization to an individual whereas the referral exception applies only to the initial, introductory communication.

Industry Canada's publication of its final Industry Canada Regulations and its announcement of the July 1, 2014 in force date mean that the compliance picture for CASL is now substantially complete. Organizations should be taking focused measures to ensure that their email contact databases will not offend the law. Future guidance from interpretation bulletins will assist. However the now clear six-month compliance window dictates finalizing and executing compliance strategies without delay.

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[a cautionary note](#)

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