

## CASL update #2 - revised anti-spam regulations released

With the release of its revised draft regulations (January 5, 2012), Industry Canada has largely completed the picture for compliance requirements and timing of Canada's Anti-Spam Law (CASL). The revised draft regulations, issued on January 4th (the [Industry Canada Regulations](#)), indicate a number of additional categories of exemptions from the law, which for the most part had been previewed informally by Industry Canada earlier in 2012 (see [McMillan Bulletin – July 2012](#)), and indicate that broader exemptions from the scope of CASL – such as grandfathering of PIPEDA-compliant consents – will not be provided for. Industry Canada has stipulated a short, 30-day, period for comments. Additionally, in connection with releasing its revised draft, Industry Canada has given a strong indication that the law will not come into force until early 2014, or possibly late 2013.

The compliance picture has been further filled in by the CRTC's release, in October 2012, of two Information Bulletins ([CRTC 2012-548](#), [CRTC 2012-549](#)), providing the CRTC's interpretation and guidance respecting procedural requirements and documentary forms for obtaining express CASL consents.

### the Industry Canada 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 commercial electronic messages ("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.

## exclusions and exemptions – expanded and added

As discussed in previous McMillan Bulletins ([October 2011](#), [July 2012](#)), CASL provides a number of specifically-defined exclusions and exemptions that permit certain messages to be sent without full CASL compliance. The Industry Canada Regulations expand the previously proposed definitions for excluded categories of CEMs and add a number of new categories. In all cases these expanded or new categories of exclusions respond to stakeholder submissions made to Industry Canada since the publication of its initial draft regulations.

## personal relationships

The revised regulations adjust the previously proposed definition of "personal relationship", to permit digital relationships. Under subsection 6(5) of CASL, a sender who is in a "personal relationship" with a recipient may send that person a CEM without complying with any of the consent and content requirements of the law. The requirement of the previously proposed definition, of a face-to-face in person meeting, would have excluded relationships developed through electronic media – an inconsistency in a law intended to enhance the efficiency of commercial electronic activities.

Under the new, revised definition, considerations such as whether the parties have met in person are stipulated only as factors in determining whether the relationship is "personal". The revised definition states that a personal relationship must be based on a direct, voluntary and two-way communication and that it is reasonable to conclude that it is "personal" taking into consideration all relevant factors including sharing of interests, experiences, opinions and information as evidenced in the communications, as well as the frequency of the communications and whether there was an in person meeting. However, the revised definition implies some complications. Whereas the previously proposed definition was fairly black-and-white (required an in-person meeting and, within the previous two years, a two way communication), the revised definition, while providing for more flexible criteria, leaves open to analysis whether a particular relationship has sufficient qualifying indicia to establish it as "personal".

While much of the concern voiced regarding Industry Canada's initially proposed definition focused on the fact that digital relationships were excluded, marketers approached it from the perspective of referral marketing. They looked at the personal relationship exemption as potentially enabling "refer-a-friend" marketing programs, using viral and social media marketing techniques, without requiring consent under CASL.<sup>1</sup>

While the revised definition does provide more flexibility in defining friend relationships, it is not clear exactly what criteria must be met to satisfy the required threshold and for this reason, marketers may have some pause. It is hoped that the CRTC can provide some useful guidance in this regard.

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<sup>1</sup> It should be noted that refer-a-friend promotions require PIPEDA-compliant consents in any case; there must be consent, express or implied, permitting a marketer to collect and use the friend's personal information for contact purposes.

## referrals – a new exception category

Unexpectedly, the Industry Canada Regulations create a new category of exception to the CASL consent requirements, specifically focusing on referrals. As written, the proposed exemption appears to permit individuals who provide services (e.g. doctors, lawyers) or other products (e.g. sole proprietors, partnerships) to contact a third party if that third party has been referred by a person with whom the individual has any of a personal, family, business or non-business relationship and any such relationship also exists between the third party and the individual making the referral. Qualifying for any particular relationship will require meeting the criteria stipulated in the Act or regulations (e.g. personal relationship, as discussed above). What is not clear is whether an individual acting as a representative of an organization (e.g. consultant, insurance agent, employee) can be considered to have a qualifying relationship with the individual making the referral. Industry Canada's commentary ([Regulatory Impact Analysis Statement](#)) suggests that this may be the case, by giving the example of an "agent" sending an introductory email in response to a referral.

The advantage offered by the new exception provision over and above the "personal relationship" exemption in respect of refer-a-friend programs is that under the proposed exception, the initial introductory communication may be sent directly to the "friend" by the person offering the services or products, whereas under the more general, "personal relationship" rule, the initial contact must be made friend-to-friend. However, the new referral exception has the limitation that only one (i.e. the initial) CEM that may be sent without consent whereas if a CEM is sent pursuant to the personal relationship exemption, there is no such restriction.

## other new exemptions

The Industry Canada Regulations propose four additional specific exemptions from the Act's consent and content requirements, as follows:

(i) Business-to-business communications: Messages sent within an organization or between the employees or other agents of two organizations are exempt if the message concerns the affairs of the receiving organization or the recipient's duties within that organization. It is noted that there is no definition of "organization" under CASL and the express terms of this proposed exemption appear not to address CEMs received by individuals acting in their own capacity such as within a partnership or sole proprietorship.

(ii) Responding to inquiries: A sender may respond to a request, inquiry, complaint or other solicitation by a recipient of a CEM. Absent this exemption, an inquiry to an organization could be made without complying with the consent and content requirements, but not the reply.

(iii) CEMs sent by foreign entities: A CEM is exempt if sent by a person or from a computer located outside of Canada relating to a product, service or organization also located or provided outside of Canada if accessed by a computer within Canada, if the sender did not know and could not reasonably be expected to know that the message would be accessed within Canada. Industry Canada indicates that this exemption is intended to apply individuals not normally resident in Canada but who may be travelling within Canada and receive CEMs from organizations outside of Canada. It may also respond to a concern under the law that international organizations may have with differentiating emails intended solely for Canadian residents and 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 identify all email addresses related to computers located in

Canada and therefore may, inadvertently, send non-complying emails to such addresses.

(iv) CEMs sent pursuant to legal obligations: CEMs sent in connection with a legal obligation or right, including notices and enforcement steps, are exempt. Exempt CEMs would include non-transactional information such as warranty information, legal notices and information sent pursuant to contractual arrangements.

### no broad-based exemptions or narrowing the scope of CASL

As noted, Industry Canada has made clear that there will be no broad-based exemptions under CASL for categories of communications for which prior consent is acknowledged (such as grandfathering of PIPEDA-compliant consents) or a broad exemption from the application of the law for CEMs sent in connection with the day-to-day operations of businesses, including for informational and marketing purposes. The government has reconfirmed its position that the thrust of the law will be to prohibit all CEMs unless they qualify under either one of the specifically defined exempt or excepted categories, or under one of the specifically defined categories for implied consent. A conclusion that must be drawn is that organizations that rely on electronic media to communicate with their customers, prospective customers and other contacts, while potentially being able to qualify on a fact specific basis under either an exemption or an implied consent category, cannot be confident that such qualification will remain effective over the longer term. Consequently, in order to avoid either inadvertent non-compliance or, more likely, putting in place elaborate data management procedures, they will need to resolutely pursue a strategy for capturing express CASL consents, as more fully discussed in previous bulletins (October 2011, July 2012).

## 30-day comment period

Organizations wishing to submit comments respecting the revised draft regulations have until February 5, 2013 to make submissions to Industry Canada. Submissions may be sent to Industry Canada electronically at [bruce.wallace@ic.gc.ca](mailto:bruce.wallace@ic.gc.ca).

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### a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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