



WHITEPAPER

CANADIAN ANTI-SPAM LEGISLATION: Key Considerations for Email Marketers

DISCLAIMER

Please be advised that the following information is a representation of our interpretations of the Canadian Anti-Spam Legislation (CASL) and how it is applied to the email channel specifically. The law includes additional reference and provision specific to SMS, IM and computer software installation, which is not addressed here.

This document is to be used for informational purposes only and is not to be considered legal advice or consultation. The information contained herein provides email marketers with details to better understand CASL.

Organizations with operations involving Canada will need to ensure compliance with CASL's consent and email form/content requirements. We are not lawyers, and do not play them on TV, so please consult with your legal counsel on the specific application of CASL to your programs and channel practices.

Included on the following pages are questions marketers should be thinking about relative to CASL:

- Determining if you are affected
- Consent for new subscribers
- Consent for existing subscribers
- Documenting consent
- Email form and content compliance
- Considerations for Affiliate Marketers

CASL BASICS

July 1, 2014 marks the date CASL goes into effect — and given it is noted as one of the most stringent anti-spam laws the world over, it is important to understand the impact it has on the management and function of your email programs.

Anyone sending Commercial Electronic Messages (CEM) into or out of Canada is bound by CASL. As easy as that sounds, the interpretation of this statement varies widely. CASL prohibits the sending of CEMs without consent of the recipient and compliance with certain email form and content requirements. And the penalties for ignoring the new law are steep; up to \$10 million in administrative fines as well as an eventual private right of action, meaning that individuals can also sue for damages.

DETERMINING IF YOU ARE AFFECTED

Not all brands will be impacted by the legislation, but it is realistic to assume that many will be. For some organizations, the new CASL requirements will be inconsequential, but for others the impact could be significant.

CASL applies if you are sending CEMs from any computer located in Canada or when the CEM may be accessed using a computer system in Canada.

QUESTIONS TO CONSIDER

Is your organization based in Canada?

If yes, is your organization sending emails to recipients outside Canada?

Do you have subscribers that live in Canada?

Do you have email addresses ending in .ca?

Do you have subscribers with billing or mailing addresses in Canada?

CONSENT FOR NEW SUBSCRIBERS

CASL relies on consent, which means that you need to ensure and maintain that proper consent has been received in order to email your subscribers. It is easiest to start with the proper collection of consent for any new subscriber or customer joining your program on, or after, July 1, 2014.

Consent is defined in two ways, express consent and implied consent. Express consent means that the subscriber has provided you with permission to email them CEMs via a compliant opt-in form. Express consent carries no expiration date and only concludes when someone withdraws their consent.

To use the BlueHornet eMS you need to collect express consent via a CASL-compliant opt-in form. Please consult your legal department for guidance on this form as your organization is responsible for ensuring all subscribers have provided proper consent.

NOTE: PRE-CHECKED BOXES ARE NOT ACCEPTABLE UNDER CASL. THE POTENTIAL RECIPIENT **MUST** TAKE AFFIRMATIVE ACTION TO INDICATE CONSENT. E.g., an affirmative action includes providing an unchecked box that the subscribers needs check themselves.

QUESTIONS TO CONSIDER

Do you use a form field that requires subscribers to enter in an email address and click "submit" as a mechanism to subscribe to an email program?

Do your subscribers complete a form and check a box to say, "yes" I would like to receive email from your organization?

Do your subscribers check a box at the time of check-out/transaction to say "yes" I would like to receive email from your organization?

CONSENT FOR EXISTING SUBSCRIBERS

Like many brands, you have likely been building your email database for years, operating under opt-out rules as dictated by CAN-SPAM and other legislation. And while that may be fine for the majority of your database, when CASL applies, you need to make sure that you have proper permission from subscribers — documented and reference-able.

You may have to do a re-permission campaign to comply with CASL for subscribers who were not properly collected. If you have an existing business relationship with a subscriber on July 1, 2014 and you have sent CEMs to the subscriber, you have implied consent to continue sending CEMs to the subscriber until the subscriber withdraws consent or until July 1, 2017 (whichever is earlier). During this time you either need to obtain express consent or suppress at the conclusion of those three years.

QUESTIONS TO CONSIDER

Was subscription captured as the result of a purchase?

Was subscription captured using a pre-checked box?

Do you have proper documentation validating receipt of consent from your subscribers?

DOCUMENTING CONSENT

Documentation must be maintained to validate consent from a subscriber. The onus is on the person who claims that they have consent to prove that they have such consent. Express consent is the clearest measure of consent and is the best way to comply with the consent requirements of CASL. Organizations using the BlueHornet eMS are required to obtain express consent to send emails subject to the CASL requirements.

EMAIL FORM AND CONTENT COMPLIANCE

CASL highlights specific requirements for obtaining consent, as well as the information that must be expressed within the body of the email itself.

QUESTIONS TO CONSIDER

Do the name and contact information for each of: (1) the person/entity that sent the CEM, and (2) any person/entity on whose behalf the CEM was sent appear in all your email communications? All contact information must be current and correct for at least 60 days after the CEM was sent.

Does your email contain a statement identifying the person/entity who sends the CEM and the persons/entities on whose behalf the CEM is sent?

Do you clearly and prominently display a means to unsubscribe from future CEMs, at no cost, using the same means that the CEM was sent; AND an electronic address or link to a webpage where the recipient may unsubscribe from future CEMs?

Are you processing unsubscribe requests without delay and no later than 10 business days from the date the request was made?

Do you have a working email reply function that does not say "do not reply"?

For all messages subject to CASL, all users of the BlueHornet eMS are required to include a valid unsubscribe mechanism and the proper contact information for the parties identified in the content of an email.

CONSIDERATIONS FOR AFFILIATE MARKETERS

Affiliate marketers may be required to take some specific actions, especially as it relates to seeking consent for partners. Please seek counsel from your legal team to best ensure you are meeting the guidelines and restrictions provided in CASL that may impact your email programs.

QUESTIONS TO CONSIDER

Do I name all partners and affiliates that will be featured in my email communications?

Do my email messages feature contact information for all brands featured in my email communications?

Do I allow subscribers to identify specific partners and affiliates they prefer not to receive messaging about?

Frequently Asked Questions

What information would be beneficial to document consent?

Examples of beneficial information include, but are not limited to, date/time stamp of the consent event, source IP used for registration, email confirmation and/or the URL of the sign-up page.

Must the valid mailing address be a Canadian address or will the address of the corp HQ in the US (or other country) suffice?

It does not have to be a Canadian address – only a valid mailing address that will be active for at least 60 days following the reference in the email. PO Boxes are also acceptable.

Does the corporation/individual have to be located inside Canada in order to be fined?

No.

What about at tradeshows where people leave a business card: do I now have consent to add them to my email list?

You may have implied consent to send the person a CEM, assuming (1) the message relates to the recipient's role, functions or duties in an official or business capacity; and (2) the recipient has not made a statement when handing you the business card that they do not wish to receive CEMs at that address. You should always remember that the responsibility is on the sender to prove they received consent so all consent should be clear and properly documented.

If a subscriber's email address replies with auto-responders to a newsletter via email to update their email address, is there implied consent?

It is not a reasonable assumption that just because an auto responder is sent to update an email address amongst friends and colleagues, that it assumes consent. We would say no, but feel free to discuss with your internal legal counsel.

What do we need to do for consent with our existing subscribers?

If you have been receiving valid, express consent and you have basic records to support that fact then you should meet the requirements. If you are unsure if consent is express or you know it is not, then you may want to send a re-permission campaign to obtain that



express consent as quickly as possible. Ideally this would occur before the July 1, 2014 date. Consult with your legal department on the validity of this approach after July 1.

What about time spans for honoring opt outs? Is CASL like CAN-SPAM?

An unsubscribe request must be given effect without delay and no later than 10 business days of the date the request was made, all without further action on behalf of the subscriber.

I know there's been a lot of talk about Blackberry devices because their email runs through Canada. Will this affect emails sent to the US and other countries?

For CASL to apply, a computer system located in Canada must be used to send or access the CEM. Simply routing a CEM through Canada should not be enough to engage the CASL requirements.

Who can bring suit and when?

CASL creates a private right of action commencing on July 1, 2017 for any affected individual or organization.