

# PUBLICATION

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## Canada's Embattled Anti-Spam Law Marks End of Grace Period Despite Uncertain Future

July 13, 2017

**On July 1, 2017, an important grace period terminated for Canada's Anti-Spam Law (CASL), which initially took effect on July 1, 2014. The beginning of this month marked the end of the two-year grace period for entities to rely on "implied consent" as a basis for sending commercial electronic messages to potential customers, donors, clients or the like. Going forward, entities will need to obtain express consent from all email recipients, or expunge "stale" contacts to avoid potential violations of CASL. A private right of action against offenders that was also set to become available on July 1, 2017 has been put on hold indefinitely subject to Canadian government review.**

CASL applies to U.S. companies, including U.S. non-profit corporations, that send email or other electronic messages to recipients in Canada, whether or not the entity is actually aware that one or more recipients is in Canada. This post points out CASL requirements through the lens of a U.S. non-profit, but all companies with geographically wide customer bases or email distribution should review CASL requirements to ensure that they comply before the end of the grace period this weekend.

CASL applies to any electronic message sent to a recipient in Canada if that electronic message qualifies as a Commercial Electronic Message (CEM). A CEM is a message that encourages participation in a commercial activity. CEM includes all types of electronic messages including email, text messages, or audio or video messages sent electronically. By way of example, the following types of electronic messages commonly sent by non-profits may qualify as CEM: (1) emails or other electronic messages soliciting donations; (2) emails or other electronic messages soliciting ticket sales to a paid fundraising event; (3) emails or other electronic messages soliciting sponsorship; (4) emails or other electronic messages soliciting new members, or participation in events; (5) emails or other electronic messages advertising another entity's commercial products or services; or (6) electronic newsletters or event updates including any of the above types of messaging.

For any emails or other electronic messages which may fall into any of the above categories of CEM, or any other type of messaging that can reasonably be characterized as "encourage[ing] participation in commercial activity," and which may be sent to a recipient in Canada, the sender should ensure that the message complies with the following consent and content requirements.

### Consent Requirements for CEM

Prior to sending any CEM that may be transmitted to a recipient in Canada, the sender should receive *and document* consent from *each* recipient of the message in one of the following forms:

#### **A) Express consent** (*g.*, *electronic mailing list subscribers*):

This could be in the form of recipient sign-up for an electronic mailing list or listserv. In order to serve as express consent, all of the following conditions must be present:

1. An indication at the time of sign-up that the sender is seeking the recipient's consent to send the recipient future emails/electronic messages;

2. Notice of an unsubscribe option or other statement indicating that the recipient can withdraw their consent to receive future emails;
3. The sender's legal name and mailing address;
4. Either a website, email address or phone number at which the sender can be reached.

**B) Implied consent** (*g., recent donors*):

This would exist if the recipient and the sender have an "existing business relationship." However, implied consent only lasts for two years from the end of the most recent "business relationship" and must be renewed after that timeframe if the sender wishes to continue to send CEM to these recipients. Prior to July 1, 2017, implied consent did not have a time limit; that is, an entity could send CEM to its entire list of former customers, donors, or volunteers regardless of how long the relationship had been "stale."

By way of example, implied consent may be found for any recipient that has:

5. Made a donation to the sender/non-profit *within the past two years*;
6. Paid a registration fee for an event held by the sender/non-profit *within the past two years*;
7. Volunteered for the sender/non-profit *within the past two years*;
8. Purchased products or services from the sender/non-profit *within the past two years*; and/or
9. Entered into a contract with the sender/non-profit *within the past two years*.

**Content Requirements for CEM**

Any CEM that may be transmitted to a recipient in Canada must include the following:

10. An unsubscribe mechanism;
11. The sender's legal name and mailing address; and
12. Either a website or email address at which the sender can be reached.