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Opt-in not an option: How to comply with the new anti-spam law

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Canada's new anti-spam law (the CASL) is expected to come into force later this year. This Act is designed to create a safer online environment for individuals and businesses in Canada.

From a business perspective, it will change how some routine daily activities – such as distributing commercial electronic messages (CEM) to customers – are executed.

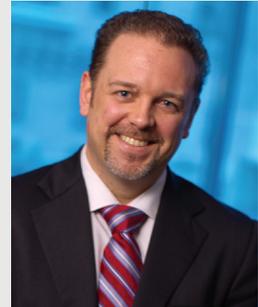
Currently, a majority of businesses rely on implied consent when they send CEM to customers. If the customer doesn't opt out then consent is considered to be implied.

CASL will mark Canada's movement from an opt-out to an opt-in system for the receipt of CEM, requiring express consent from the recipient. While specific exceptions and transitional provisions will provide time to adapt, it is never too early to prepare for the new regime.

What do companies need to do to ensure they are compliant with CASL, and its express consent requirement provisions?

Firstly create a compliance team that will be responsible for understanding CASL and how it affects your business. CASL will affect companies' electronic communications with customers in many ways, including how customers consent to receiving CEM, the content included in CEM, and how they can contact the company to follow-up or unsubscribe.

The second step is to review your customer database and ensure people have consented to receive communication from you. While businesses may rely on implied consent from existing business relationships during the transition period, it is never too early to seek express consent and become compliant. Companies should then keep a record of this express consent, whether written or oral, including the date and time it was given, as they bear the burden of proof in the event of a dispute.



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When seeking consent via a website, companies have traditionally used a pre-checked box that gives consent to receive CEM. This will no longer be acceptable. The accept box must be unchecked by default so the consumer actively chooses to subscribe. Compliance teams will need to amend this function before the law comes into force.

There are exceptions to the express consent requirement, which will make CASL less onerous than first anticipated. For example, companies can send CEM without express consent if the sender has a family or personal relationship with the recipient, is responding to the recipient's inquiry, or recipient's email address is openly available. In addition, the new regulations under CASL will allow for third-party referrals, allowing businesses to expand their contacts without having to seek additional consents.

Businesses also need to ensure that their customer communication, whether via email, text message or social media, complies with specific form and content requirements under CASL. These includes the unsubscribe mechanism which must be "clearly and prominently" displayed in the CEM, and be quick and easy for consumers to use.

Businesses and their compliance teams will have to put a system in place to ensure all outgoing communications continue to comply. The administrative fines under CASL will be up to \$10 million for businesses, so it is important to understand what this new law means for your business and implement the necessary changes. After all, it is not just the CRTC that will be able to enforce CASL, but recipients of unwanted emails will themselves have standing to bring an action.

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