

# Canadian Anti-Spam Law's Impact on U.S. Associations

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**Q** I understand Canada recently adopted new anti-spam legislation. Are there any implications for U.S. associations emailing Canadian members?

**A** Canada adopted new anti-spam legislation ("CASL") in December 2010, which took effect July 1, 2014. CASL regulates the sending of unsolicited commercial electronic messages ("CEM") to electronic addresses. Since CASL is more stringent than the U.S. CAN-SPAM Act, organizations that send CEM to both Canada and the United States must either segregate CEMs directed to Canadians or comply with CASL's requirements for all emails.

Under the CASL, anyone sending a CEM to an electronic address must: 1) obtain consent, 2) provide identification information, and (3) provide an unsubscribe mechanism. An electronic address is an email, telephone, instant messaging, or other similar account. CEMs are messages with the purpose of encouraging participation in a commercial activity.

Unlike the U.S. "opt-out" provision, CASL requires that a person actively "opt-in" or consent to receive CEMs. That major difference requires associations to implement new procedures before sending CEMs to Canadians.

## Consent

CASL provides two types of consent—express and

implied. Where there is an existing business or non-business relationship that includes CEMs, consent to send CEMs may be implied for a transitional period of 36 months beginning July 1, 2014. However, such implied consent will end during the transitional period if the recipient indicates that they no longer consent. Associations should use the transitional period to seek express consent for the continued sending of CEMs. If an organization obtained express consent before July 1, 2014, that consent remains valid until the recipient withdraws their consent.

Express consent can be obtained either in writing or orally. The organization or person sending the CEM is responsible for proving they have obtained proper consent to send the CEM. Unlike the U.S., express consent must be obtained affirmatively through an opt-in mechanism—as opposed to opt-out.

The CASL does not apply to non-commercial activity. Associations are not subject to CASL if their communications do not involve selling or promoting a product. Accordingly, dues statements, newsletters, and other membership materials and communications may be sent without restriction.

Further, consent may be implied where CEMs are sent to members of a nonprofit membership organization (i) that is organized and operated exclusively for social welfare, civic improvement, pleasure

or recreation or for any purpose other than personal profit; and (ii) so long as no part of its income is payable for the personal benefit of any member, proprietor or shareholder—unless that entity is an organization whose primary purpose is the promotion of amateur athletics in Canada. However, that implied consent only applies to members. Associations must make sure they have proper consent for CEMs sent to non-members. Remember, even if there is implied consent, all CEMs must comply with the CASL's other two requirements requiring identification information and an unsubscribe mechanism.

## Include Identification Information

The organization sending the CEM and the organization—if different—on whose behalf it is sent must be identified in the body of the CEM. When a CEM is sent on behalf of multiple organizations, they all must be identified in the CEM.

## Provide an Unsubscribe Mechanism

All CEMs also must include a "readily performed" unsubscribe mechanism that is available without delay, at no cost to the recipient, and readily accessible. The unsubscribe mechanism may offer the recipient a menu of choices allowing them to unsubscribe from all or just some types of CEMs that the organization sends.

## Violations

The maximum amount of an administrative penalty for violating the CASL is \$1 million per violation for an individual, and \$10 million per violation for a business—including an association. Further, an organization's directors, officers, and agents can be personally liable if they participated in the commission of the violation. CASL also provides for a private right of action for actual and statutory damages.

If you send CEMs to individuals or businesses in Canada, you are encouraged to consult with an attorney to ensure compliance with the CASL. For additional information on the CASL, go to <http://fightspam.gc.ca/eic/site/030.nsf/eng/home> or <https://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00521.html#q12>. 

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