



**CFA Society
Toronto**

CANADA'S ANTI-SPAM LEGISLATION

AN OVERVIEW AND GUIDELINES FOR BOARD MEMBERS AND VOLUNTEERS OF THE TORONTO SOCIETY OF FINANCIAL ANALYSTS

JULY 31, 2014



Disclaimer

The information referred to and contained herein (the “Information”) is being provided solely for the benefit of the board members and volunteers of CFA Society Toronto and no other individuals may rely upon this Information. The Information is intended to provide an overview of Canada’s Anti-Spam Legislation¹ (commonly referred to as “CASL”) and provides general guidelines related to compliance with CASL. The Information is believed to be accurate as of July 31, 2014.

CFA Society Toronto, its directors, officers, agents, including without limitation Dickinson Wright LLP, (“we”) make no claims, promises or guarantees about the accuracy, completeness or adequacy of the Information. No person should act or refrain from acting in reliance on the Information without first obtaining appropriate legal advice. This guidance document was prepared for informational purposes only and does not constitute legal or other professional advice and does not create a solicitor-client and / or attorney-client relationship.

We assume no liability whatsoever with respect to the Information. The recipient of this Information acknowledges and agrees to this disclaimer.

Overview

- Canada’s Anti-Spam Legislation came into effect on July 1, 2014. CASL is widely viewed as having some of the toughest and broadest implications of any similar legislation among the G8 countries. CASL will immediately have a significant impact on how companies and organizations conduct business and, in particular, communication activities in Canada.
- The primary purpose of CASL is to significantly reduce the negative impact of spam on the Canadian economy.
- CASL places restrictions and requirements on:
 - o **Commercial electronic messages** (“CEM”), broadly defined as a message sent by any means of telecommunications, including a text, sound, voice or image message (such as emails), where the message is of a commercial character (whether or not the person does so in the expectation of profit);
 - o **Altering transmission data** in an electronic message so that the message is delivered to a destination other than or in addition to that specific by the sender; and
 - o **Installation of computer programs** which cause an electronic message to be sent from that computer system.
- To send CEM from a computer system or accessed by a computer system located in Canada the sender must either have the consent of the recipient or be subject to an exception to have consent.
- Consent can either be “express” or “implied”. Express consent is superior in that it is valid unless and until it is revoked by the individual who initially provided the express consent. Implied consent relates to a relationship between the sender and the recipient and is only valid for a specific period of time,

¹ An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act (S.C. 2010, c. 23)

the length of which is dependent upon the relationship between the sender and the recipient and relative to a specific date. For example, implied consent is generally valid for a period of 6 months from the date the recipient inquires about event registration.

- **Express consent** is consent received from the recipient in response to a request for express consent which request satisfied specific requirements. The request must clearly state (1) the purpose or purposes for which the consent is being sought, (2) prescribed information identifying the sender and, if applicable, the person sending the request on behalf of the sender, and (3) any other prescribed information. There are specific requirements related to how an individual must indicate their express consent (for example, if a box is to be checked by the individual the box cannot be pre-checked).
- As noted above, **implied consent** is consent received from the recipient as a result of a relationship between the recipient and the sender. Implied consent may exist in the following relationships:
 - o There is an “existing business relationship” between the sender and the recipient, arising from:
 1. the purchase (or bartering) of a product, good or service between the parties within the past 2 year period immediately before the date the CEM was sent;
 2. the acceptance by the recipient of a business investment or gaming opportunity offered by the sender within the period referred to above;
 3. a contract related to (1) or (2) above, which existed at some point within the period referred to above; or
 4. an inquiry or application between the parties within the past 6 month period immediately before the date the CEM was sent;

An example of an “existing business relationship” relevant to CFA Society Toronto would be where an individual sends an email inquiry to CFA Society Toronto with respect to obtaining her CFA designation or membership in CFA Society Toronto. In such a case, CFA Society Toronto would be able to send CEM to that person within a six month period commencing on the date the email inquiry was received by CFA Society Toronto.

- o There is “an existing non-business relationship” between the sender and the recipient, arising from:
 1. a donation or gift to a registered charity, political party, or a candidate to publicly elected office within the past 2 year period immediately before the date the CEM was sent;
 2. performance of volunteer work for a registered charity; political party, or a candidate to publicly elected office within the period referred to above; or
 3. membership in a club, association or voluntary organization, within the period referred to above (note that this period begins on the day that the membership terminates);

Current Regulations define “a club, association or voluntary organization” as a non-profit organization that is organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than personal profit, if no part of its income is payable to, or otherwise available for the personal benefit of, any proprietor, member or shareholder of that organization unless the proprietor, member or shareholder is an organization

whose primary purpose is the promotion of amateur athletics in Canada. CFA Society Toronto falls into this category.

- o The recipient has conspicuously published or disclosed to the sender the electronic address to which the CEM will be sent, the recipient has not indicated their desire not to receive such CEM and the CEM relates to the recipient's business, role, function, duties or official capacity.
- **Exceptions** to obtain consent are provided for the following situations (note that additional conditions may apply):
 - o CEM between individuals where there is a personal or family relationship (as defined in the CASL regulations);
 - o CEM sent to an individual engaged in a commercial activity where the CEM consists solely of an inquiry or application related to that commercial activity;
 - o CEM sent by an employee, representative, consultant or franchise of an organization to (1) another such person within the same organization or (2) another such person within a separate organization where the organizations have a relationship, and the CEM concerns the activities of the organization of the recipient;
 - o CEM sent solely (1) in response to a request for a quote or application; (2) to facilitate, complete or confirm a commercial transaction where the recipient previously agreed to enter into the commercial transaction; (3) to provide warranty, product recall, safety or security information related to a product, good or service purchased; and (4) to provide factual information related to memberships, accounts, loans, or similar relationship; and
 - o the first CEM sent for the purpose of contacting the recipient following a referral by any individual who has an existing business relationship, an existing non-business relationship, a family relationship or a personal relationship with the person sending the CEM as well as one of those relationships with the recipient (CEM must also disclose the full name of the individual or individuals who made the referral and state that the CEM is sent as a result of the referral) (the so-called "Refer a Friend" exception).
- Even where a sender has express or implied consent and in some cases where an exception exists, the CEM must still contain the following specific required content:
 - o The identity of the sender and, if different, the person on whose behalf the CEM is sent;
 - o Information enabling the recipient to readily contact one of the above individuals; and
 - o An "unsubscribe" mechanism, which must be valid for at least 60 days and effect an unsubscribe request "without delay" (not later than 10 days post request).
- Non-compliance with CASL can have severe implications for an organization, including its directors, officers and agents. Fines for non-compliance can be as high as \$1,000,000 for individuals and \$10,000,000 for organizations. Board members and volunteers can be held to be personally liable for non-compliance with CASL where such individual "directed, authorized, assented to, acquiesced in or participated in the commission of the violation, whether or not the corporation is proceeded against."

- Fortunately, CASL also provides for a “due diligence” defence for non-compliance, where a person establishes that “they exercised due diligence to prevent the commission of the violation.” As such, it is extremely important for organizations and individuals to be familiar with CASL and to establish proper protocols to ensure compliance with CASL.
- Compliance with CASL can be broken down into the following initiatives:
 - o **Understand CASL:** ensure the organization and key individuals understand CASL. Education of the organization’s key individuals, including board members, volunteers and those employees whose actions will impact CASL compliance, is crucial.
 - o **Organizational Audit:** determine which activities in which the organization engages require CASL compliance and perform a detailed review of such activities.
 - o **Establishment of CASL Protocols:** establish organizational protocols related to complying with CASL both initially and on an on-going basis, including the tracking of consents and unsubscribe requests.
 - o **On-going Review:** establish a review system to periodically: (1) audit the organization’s CASL compliance activities; (2) re-educate key individuals on CASL; and (3) ensure current protocols reflect “best practices”.
- Perhaps the most important elements of establishing CASL protocols are: (1) determining the permission your organization has to send CEM to specific individuals (express consent, implied consent or a valid exception); (2) establishing a proper system to request, receive and record such permission and unsubscribe requests; and (3) creating and maintaining a robust, accurate and current database of individuals regarding their contact information and related permission / unsubscribe requests. Database management and record keeping are extremely important in ensuring compliance with CASL.

CASL and CFA Society of Toronto

- The most likely implications of CASL upon CFA Society Toronto relate to the sending of CEM.
- CFA Society Toronto regularly sends CEM from a computer system located in Canada to computer systems located in Canada. As such CFA Society Toronto must comply with CASL.
- CFA Society Toronto primarily sends CEM to the following individuals: (1) members; (2) non-members (for example individuals whose CFA membership has lapsed); (3) candidates; (4) current suppliers (organizations and individuals with which CFA Society Toronto has a business relationship); (5) potential suppliers (including potential sponsors, speakers, affinity partners, and advertisers); (6) volunteers (including directors, committee members and students); and (7) the CFA Institute and other CFA societies.
- It is evident that CFA Society Toronto will be permitted to send CEM to some of these individuals based upon an exception (such as providing factual CFA membership information to members) and implied consent (such as non-members whose CFA Society Toronto membership has lapsed within the past 2 year period and volunteers who have performed volunteer work for CFA Society Toronto within the past 2 year period).

- It is also evident that CFA Society Toronto will not be permitted to send CEM to some of these individuals without obtaining express consent (such as non-members, volunteers, etc. whose relationship with CFA Society Toronto has ended more than 2 years ago and potential sponsors, speakers, affinity partners and advertisers with whom CFA has never had a relationship).
- Prior to July 1, 2014, CFA Society Toronto engaged in an email program to solicit express consent from non-members. It is important to note that post July 1, 2014 even CEM solely requesting express consent cannot be sent to non-members without implied consent or a valid exception. This program to obtain express consent will greatly reduce the potential for non-compliance based upon expiry of implied consents or limitations related to exceptions.
- CFA Society Toronto needs to engage in a database audit and ensure that its database is purged of individuals for whom CFA Society Toronto has not received consent nor possesses a valid exception. Depending upon the content of the CEM, it may also be important that that database indicate which type of CEM (with respect to content) can be sent to these individuals. For example, potential advertisers should not be sent CEM related to joining CFA Society Toronto if it does not relate to the individual recipient's business or role.
- Board members and volunteers of CFA Society Toronto need to be careful to ensure that the emails they send out comply with CASL. Where these individuals send CEM other than through CFA Society Toronto's CEM system, these individuals should:
 1. Only send CEM on behalf of CFA Society Toronto to the following recipients:
 - a. Individuals for whom the sender (Board member or volunteer) has existing express or implied consent (relative to the subject matter of the CEM);
 - b. Individuals with whom the sender has an existing personal or family relationship (defined below); or
 - c. Individuals for whom CFA Society Toronto has express consent, implied consent or an exception to obtain consent (for these individuals the sender will have to check with CFA Society Toronto prior to sending the CEM).
 2. Where the recipient of the CEM is an individual mentioned in sections (1)(a) or (c) above, the content of the CEM must comply with CASL content requirements and as such the sender shall forward a CASL-compliant CEM which will be provided by CFA Society Toronto (such as forwarding an email from CFA Society Toronto).
 3. Where the recipient of the CEM is an individual mentioned in section 1(b) above, the content of the CEM does not need to comply with CASL content requirements and the sender can draft his or her own CEM.

"Personal relationship" means the relationship between an individual who sends a message and the individual to whom the message is sent, if those individuals have had direct, voluntary, two-way communications and it would be reasonable to conclude that they have a personal relationship, taking into consideration any relevant factors such as the sharing of interests, experiences, opinions and information evidenced in the communications, the frequency of communication, the length of time since the parties communicated or whether the parties have met in person.

"Family relationship" means the relationship between an individual who sends a message and the individual to whom the message is sent if those individuals are related to one another through a marriage, common-law partnership or any legal parent-child relationship and those individuals have had direct, voluntary, two-way communication.

- Board members and volunteers of CFA Society Toronto also need to request and document the steps that have been taken within CFA Society Toronto to comply with CASL. Board members should document these actions in Board meeting minutes and volunteers should document these actions in a memo to file. This is particularly important with respect to being able to avail themselves of a due diligence defence in the event of non-compliance by an individual within CFA Society Toronto.
- Recommended steps (best practices) for CASL compliance include the following:
 - o Appointing an individual to oversee CASL compliance (act as “point person”).
 - o Hiring qualified lawyers / consultants to oversee a CASL audit.
 - o Reviewing the CASL audit report and implementing its recommendations.
 - o Providing CASL educational materials to directors, officers and agents of CFA Society Toronto, including all employees (and their supervisors) whose duties will involve activities related to CASL compliance.
 - o Establishing protocols related to CASL compliance:
 - Database audit and scrubbing (creation of an “approved contact list”);
 - Database formatting (to facilitate functionality re on-going CASL compliance);
 - CEM formatting (ensuring valid permission exists for all intended recipients and CASL content requirements – create a “script” for CEM);
 - Documentation for consents, exceptions and unsubscribe requests;
 - Creation of a CASL training manual or CFA Society Toronto CASL Policy (educating board members, volunteers and staff on CASL and the importance of following the CEM formatting and documentation detailed immediately above and the record keeping detailed below);
 - Periodic audits of and updating to the above;
 - Establishment of initial and on-going training program regarding the above; and
 - Detailed record keeping regarding each of the points listed above.

Quick CEM checklist for board members and volunteers

- Where a board member or volunteer sends a CEM, he or she should first confirm:
 - o Is the recipient of the CEM on the current and up-to-date “approved contact list”? (remember, while express consent does not expire (can only be “withdrawn”), there are limitation periods with respect to implied consent)

- o Is the content of the CEM properly formatted re: subject matter, identification of sender, and unsubscribe mechanism? (remember, even with consent or exceptions to obtain consent, CEM must still be properly formatted)
- o If the “Refer a Friend” exception is being relied upon, is the CEM the first CEM being sent to the recipient and does the content of the CEM include the required wording regarding disclosure of the full name of the referring individual and the fact that the CEM is being sent as a result of the referral?

Reference Materials: Links

- Canada’s Anti-Spam Legislation: <http://laws-lois.justice.gc.ca/PDF/E-1.6.pdf>
- Electronic Commerce Protection Regulations: <http://laws-lois.justice.gc.ca/PDF/SOR-2013-221.pdf>
- Electronic Commerce Protection Regulations (CRTC): <http://laws-lois.justice.gc.ca/PDF/SOR-2012-36.pdf>
- Government of Canada - Justice Laws Website for CASL: <http://laws-lois.justice.gc.ca/eng/acts/E-1.6/index.html>
- CRTC Guidelines to help businesses develop corporate compliance programs: <http://www.crtc.gc.ca/eng/archive/2014/2014-326.pdf>
- Government of Canada CASL Pictograms:
 - Does Canada’s New Anti-Spam Law Apply?
 - 4 Tips for Contacting Your Clients Electronically
 - 3 Things to Think About When Sending Messages



**CFA Society
Toronto**

CANADA'S ANTI-SPAM LEGISLATION (CASL)

Overview and Guidelines for Board Members and Volunteers

I acknowledge with my signature that I have received the CASL overview and guidelines and will abide by the guidelines outlined in the eight page document.

Print Name _____

Signature _____

Date _____