

THE EMAIL MARKETER'S ULTIMATE CHECKLIST FOR



CANADA'S ANTI-SPAM LAW UPDATE



THE BASICS: CANADA'S ANTI-SPAM LAW UPDATES

On July 1, 2014, the updates to Canada's Anti-Spam Law (CASL) go into effect. This legislation is currently considered one of the toughest anti-spam legislations in the world. Naturally, you're wondering what this means for your email marketing, and specifically, what changes you'll have to make to be compliant.



The topics we'll cover in this resource to prepare for the CASL update include:

- ✓ Who is affected
- ✓ What is required
- ✓ The penalties for violation
- ✓ Any exceptions to the law
- ✓ How long the transition time will be

After addressing these issues, we'll also take a look at some special case examples and answer questions email marketers across many industries submitted to our director of deliverability.

CASL is coming and there's no time to lose understanding the updates.

Note: In this guide, we are primarily addressing the CASL update as it applies to email marketing; however, the law does make provisions for SMS, IM and installation of computer software.

TABLE OF CONTENTS

- 5 WHO IS AFFECTED
- 7 CONSENT REQUIREMENTS
- 9 PENALTIES
- 10 EXCEPTIONS AND EXEMPTIONS
- 12 TRANSITION TIMELINE
- 13 SPECIAL CASES AND EXAMPLES
- 14 YOU'VE GOT QUESTIONS, WE'VE GOT ANSWERS
- 18 ADDITIONAL CASL RESOURCES

WHO IS AFFECTED



The first question you have to answer before delving into what CASL means for your specific organization is if the legislation applies to your company at all. For some organizations, CASL doesn't matter and the updates coming in July won't change anything. For other businesses, the changes make a big difference.

Here's how you know if the updates to this legislation apply to you: CASL affects all commercial electronic messaging (CEM) sent from, or accessed by, a mail server housed in Canada. Check here if:

- ☐ **Your organization is based in Canada**
- ☐ **Your ESP or email provider is based in Canada**
- ☐ **Your recipients live in Canada (or have an email address ending in .ca)**

On the other hand, if you can check **all** of these boxes, you aren't going to be impacted by the law at all:

- ☐ **Your organization has no physical presence in Canada**
- ☐ **Your ESP or email provider is based outside Canada**
- ☐ **You have no Canadian subscribers**

Checking one or more of these boxes should be straightforward for you. However, where it can get tricky is knowing whether or not you have subscribers located in Canada.



The best way to determine if any of your subscribers are located in Canada is by analyzing your lists for specific email addresses. Canadian email addresses will always end with the .ca suffix. At times, it may be precluded a two-letter provincial extension, e.g. .ab.ca for Alberta and .nb.ca for New Brunswick.

It doesn't stop with email addresses, though. CASL also applies if subscribers' physical addresses are in Canada. The items listed below are mutually exclusive, meaning if one exists but the other doesn't, you still need to investigate.

- ☐ **Any subscriber's billing address is in Canada**
- ☐ **Any subscriber's mailing address is in Canada**

So if you're a retailer, and someone with a Canadian home or billing address purchases a product or service from you, you must verify whether or not the person lives in Canada, even if he or she doesn't have a Canadian email address.

Additionally, if you're capturing subscribers' credit card or bank data to use in processing a payment, CASL may apply to you. If you can check the box below, then you must comply with the new CASL updates coming in July 2014.

- ☐ **Any subscriber's financial institution is in Canada**

CONSENT REQUIREMENTS

By now, you should have determined if your organization is affected by the CASL update.

Since many email marketing programs will be impacted, we're going to cover what you need to do if you're in that boat.

First, the main tenet of CASL requires you gain affirmative consent to send any email to a subscriber. This means you can't send any messaging without the subscriber first opting in.

This consent falls into two categories according to Canadian legislation: express consent and implied consent.

☐ Express consent

- ✓ The subscriber opted in through a compliant opt-in form to receive marketing messages from your organization.
- ✓ This consent never expires unless revoked by subscriber.

☐ Implied consent

- ✓ The subscriber has an existing business or non-business relationship with your organization.
- ✓ This consent expires after two years, but you can seek express consent during this time.

In reference to implied consent, an example of a business relationship would be someone who has made a purchase from you.

An example of a non-business relationship might be someone making a donation to you or volunteers if you're a non-profit.

It's important to keep records of express and implied consent for subscribers. According to CASL, in the event a subscriber complains, the sender (you) is required to provide proof of consent.



Let's dive into the specifics of express consent.

Express consent must be obtained via a CASL-compliant opt-in form. Wondering if your current form works or if you'll have to create a new one? Here's the goods on what the Canadian law requires you to include:

- ☐ **An affirmative action taken by the subscriber to sign up.**
 - ☐ Entering an email address and clicking submit.
 - ☐ Checking a box requesting emails and clicking 'Submit' or 'Continue'.

Note: A pre-checked box is not an affirmative action.

- ☐ **Clear indication the user is requesting – and knows he or she will receive - commercial email from you.**
- ☐ **A statement saying the user can unsubscribe at any time.**
- ☐ **The identity of the organization sending the email.**
- ☐ **At least one piece of contact information.**
 - ☐ Physical address (Yes, a P.O. Box works!)
 - ☐ Website address
 - ☐ Email address

The last part of consent requirements we're going to cover is message content. As with CAN-SPAM, CASL also requires certain elements be included in the body of any CEM. These include:

- ☐ **Clear identification of the sender (you).**
 - ☐ Identify all involved parties if sending on behalf of a third party, unless any party had no part in determining the target list or content.
- ☐ **A working method to contact the sender.**
 - ☐ Ditch the "No-reply" from address; doesn't comply with CASL.
 - ☐ A physical mailing address can be used.
 - ☐ A functional, regularly-monitored email address works best.
- ☐ **A working unsubscribe method.**
 - ☐ Must be functional for at least 60 days after the message is sent.
 - ☐ Must not incur any costs, e.g. subscribers charged when replying.
 - ☐ Can be either an electronic address (email) or a hyperlink.
 - ☐ Sender must process requests without delay (10-day maximum).

PENALTIES

If you've read this far into the resource and aren't concerned about CASL compliance, think again.

Penalties for violation of CASL will be painful for those who don't update their email marketing appropriately. What are these penalties, you ask?

- **Up to \$10 million in administrative fines per message sent, which is administered by the Canadian Radio-Television Commission (CRTC).**
- **Private rights of action**
 - Individual recipients can sue you for actual and punitive damages.
 - This right takes effect after the three-year transition period.

Although there are only two penalties in place for non-compliance with CASL, they're steep risks to take. And procrastinating won't do you any good either.

We'll cover the transition period for the updates a little later in this book, but the sooner you get started meeting CASL compliance, the better. It may take months for you to locate all your Canadian subscribers using CASL requirements, and you don't want the CRTC to catch you unprepared.



EXCEPTIONS AND EXEMPTIONS

Although the majority of emails you send will have to comply with CASL, there are a few types of messages exempted from the consent rules.

It's important to understand these exempted messages must clearly identify the sender and must include an obvious, accessible unsubscribe link.

If you're unsure whether your message is exempt from CASL or not, it's a good idea to include the send ID and unsubscribe link anyway.

The emails exempted from CASL include:

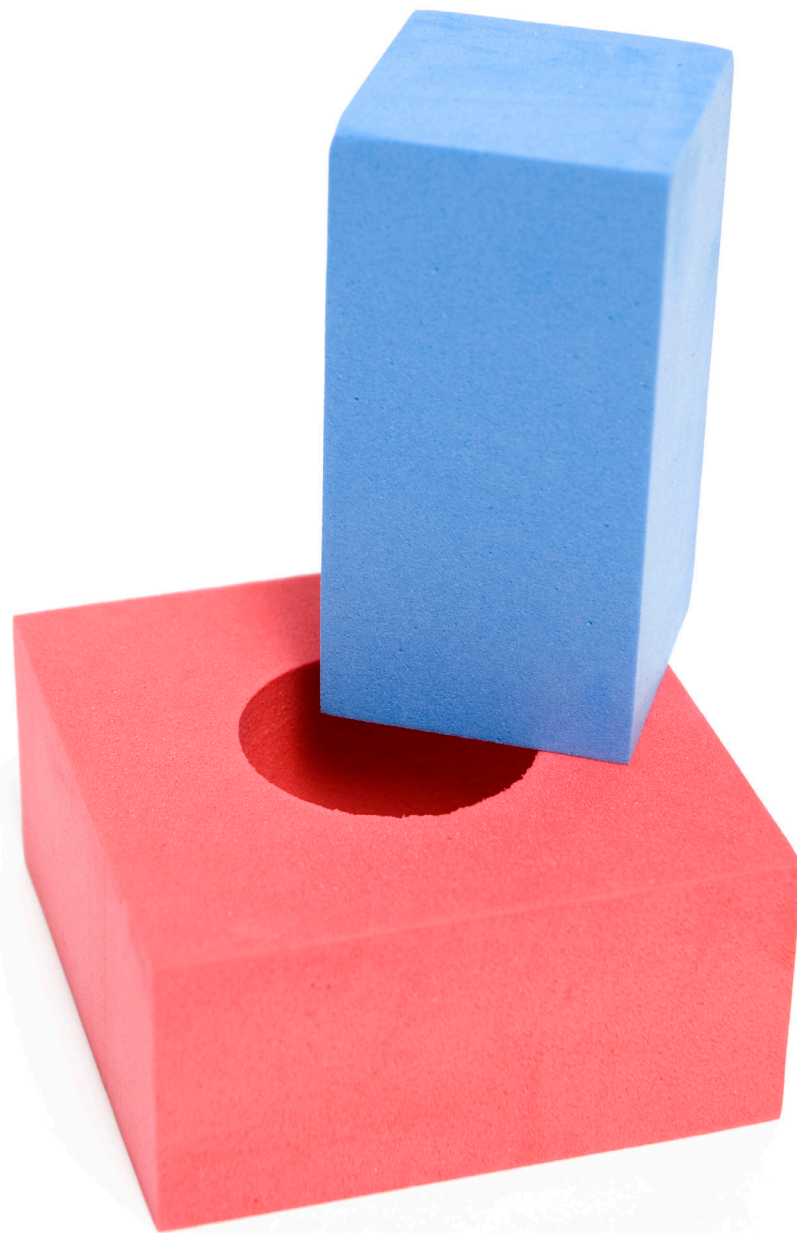
- ☐ **Non-commercial messages**
 - ☐ Purely informational and educational. No advertising or promotion whatsoever.
- ☐ **Quotes or estimates on products or services**
- ☐ **Transactional emails**
 - ☐ E.g. order confirmations, shipping notices, shipping confirmations
- ☐ **Warranty, safety, or recall information**
- ☐ **Informational messages such as...**
 - ☐ Ongoing use for purchases
 - ☐ Ongoing subscription, membership, or loan notifications
 - ☐ Employment-related updates
- ☐ **Messages directly delivering a product, good or service**
 - ☐ Updates and upgrades

Note: Opt-in confirmations are considered CEMs and are not exempted.

There are additional messages to which CASL doesn't apply. They are all straightforward and easy to apply to your emails. The exempted messages must be:

- ☐ **Between parties with a personal or family relationship**
 - ☐ Parties have had voluntary contact prior to the mailing.
- ☐ **Between businesses with an ongoing relationship**
 - ☐ The message must be directly related to the nature of the relationship between the businesses or the role of the sender/receiver.
- ☐ **Sent in response to a request.**
- ☐ **Enforcing a legal right or obligation.**
- ☐ **Sent via closed systems.**
 - ☐ Proprietary messaging systems, e.g. online banking inbox
 - ☐ Messaging systems where the ID and unsubscribe method are included within the platform, e.g. user profiles or when blocking users
- ☐ **Sent by registered charities raising funds.**
- ☐ **Sent by political candidates or organizations soliciting political contributions.**

Note: Even though these messages are allowed by CASL, they may not be allowed by ESPs or bulk mail providers.



TRANSITION TIMELINE

Although the updates to CASL take effect on July 1, 2014, there's a three-year built-in transition period for some provisions.

Therefore, all the provisions won't fully take effect until July 1, 2017. The implications:

- ✓ You have three years to get express consent from implied-consent subscribers.
- ✓ CRTC will penalize message content violations during the three-year transition period to set precedence.
- ✓ Private rights of action against email marketers aren't allowed during the initial three-year transition period for consent or message content violations.

Any express consent received prior to July 1, 2014 will be considered compliant with CASL, even if the newly-required elements were not included.

- ✓ In Canada, consent must have been compliant with the Personal Information Protection and Electronic Documents Act (PIPEDA) for this to apply.
- ✓ Outside Canada, consent must have been acquired in accordance with any applicable laws of that jurisdiction.



SPECIAL CASES AND EXAMPLES

There are some specific situations under CASL requiring email marketers to take special action.

One of these situations has to do with affiliate programs. Under CASL, senders are allowed to seek consent to send on behalf of third parties, such as affiliate programs.



However, the law places some restrictions on these activities:

- ❑ **Senders are allowed to request consent for unnamed third parties to send email.**
 - ✓ A rewards program (airline, rental car company, hotel, etc.) can request consent to send on behalf of “partners” to be named later.
- ❑ **All parties involved are held accountable for managing consent.**
 - ✓ If a user requests to unsubscribe from one affiliate, he or she must be unsubscribed from all affiliate emails, including the original sender.
 - ✓ It's okay to implement a preference site to give subscribers the opportunity to opt down –and not completely opt out - of all affiliate emails.
- ❑ **Recipients who have an existing relationship with a potential client can refer that client to a sender.**
 - ✓ The sender is allowed to send one CEM to the prospective client. The message must include the full name of the original recipient.

Note: Again, it's important to remember what is legal under CASL isn't necessarily allowed by ESPs or bulk mail providers.

YOU'VE GOT QUESTIONS, WE'VE GOT ANSWERS



WhatCounts Director of Deliverability Brad Gurley has been working to make sure emails get into inboxes for more than 10 years. He knows what's what about delivery rules and regulations and in the context of the coming CASL update, has spoken to experts in the Canadian law and even those who helped write it.

In a recent webinar, attendees submitted questions about CASL to Brad. Here are the answers!

Can I send out an unsolicited email survey for market info, product usage, etc.?

Whether this is legal under CASL would depend on whether the message can be deemed as “commercial.” Unsolicited commercial email is prohibited by CASL. However, most ESPs and bulk mail providers won't allow you to send unsolicited mail, regardless of its commercial designation.

Can we send an email to everyone in our Canadian database now requesting they subscribe to continue receiving future correspondence, and will that be considered valid?

If you received express consent prior to July 1, 2014, but do not have proof, do you need to obtain consent again to comply with CASL?

As long as express consent is received prior to July 1, 2014 and the method of consent gathering is compliant with applicable laws at that time (PIPEDA in Canada, specifically), those opt-ins would be considered valid under CASL.

Is there an exception for higher educational institutions?

There is no exception specifically relating to educational institutions. There are some “non-business relationship” clauses that may apply in some cases, but nothing specific to education.

Does express consent have to be in writing or can it be verbal (e.g. over the phone) or in person?

Express consent can be obtained verbally. However, it will be harder to prove verbal consent if there are any challenges.

If signing up for email on paper (such as at trade shows) do you still need to have a 'checkbox' to request email? Our current document only asks for name, email, phone and city.

A: Anytime you use a paper signup, you want to make it as clear as possible the recipient is signing up for promotional emails. Including a check box to receive promotional emails would be a good option. You could also include a prominent note saying that they are signing up for promotional emails.

The most important thing to remember is if there are any complaints, you as the sender will be required to provide proof of a valid, CASL-compliant opt-in. So you're only helping yourself by making the opt-in process as clear as possible.

Can we leave our opt-in forms uncompliant if we just omit all known Canadian addresses from our sends?

You can, but you may be opening yourself up to CASL violations. If you collect any data that might indicate a user is in Canada (physical or billing address, email domain name, credit card issuer, etc.), that might constitute a "reasonable expectation" that the user would be accessing the message in Canada. I'd strongly advise consulting legal counsel as to the proper course of action.

How do you recommend dealing with customers who reside in the United States, but work for Canadian-headquartered companies?

If a subscriber's employer is based in Canada, and the employer is providing the email address used to access the message, any mail sent to that address would likely be subject to CASL.

How can we prove consent if the signup form they used is now gone from the web?

Thorough record-keeping. Log the IP address, date, and time the opt-in was captured, as well as the specific URL of the page. If you have all that information, and the opt-in was obtained before CASL came into effect, you are likely to be in a good position in the event of a complaint. If a sign-up form goes offline after CASL's effective date, you should still keep the same information. In addition, though, it might be a good idea to keep a cached copy or screenshot of the form on file if that's feasible.

We have approximately 20,000 email customers, but no ability to track the data history of their opt-ins. Would we need to obtain express consent for all?

If you don't know the opt-in status or history of your subscribers, then you should send a new opt-in request prior to July 1, 2014 to ensure compliance with CASL.

If an ESP or organization is based in the United States, but has a satellite office in Canada, are they subject to CAN-SPAM, CASL, or both?

All mail sent from, or accessed by, a mail server housed in Canada is subject to CASL. Does the organization have mail servers in Canada? Do any of the recipients access mail through a server located in Canada? If the answer to either of those questions is yes, then the mail is subject to CASL. As for CAN-SPAM, the requirements of that law are actually less stringent than CASL. So if you are CASL compliant, you are likely CAN-SPAM compliant, as well.

If you include an unsubscribe link in a transactional email (such as an order confirmation), is that unsubscribe effective for any future transactional emails, or only from commercial emails?

That depends on the options you provide. If there's only one unsubscribe option, then that user should be unsubscribed from all mailings from your organization, commercial or transactional. It's probably a better idea to include options allowing them to unsubscribe from either transactional or commercial mail, or both. That way, you can honor the specific wishes of the subscriber as to what emails he or she wants to receive.

According to CASL, confirmation emails should include the ID of the sender and an unsubscribe method. Does this include follow-up emails regarding a purchase?

We would recommend including the ID of the sender and an unsubscribe method in every email if possible. The law certainly leaves room for interpretation, so it's better to be safe than sorry. A couple of examples were provided in our webinar (hotel confirmation and refund/cancellation emails), so we'll give some thoughts on those.

A hotel stay confirmation is part of a commercial transaction, so we believe it could be considered a CEM. In that case, it should include the ID of the sender and an unsubscribe method. The same would be true for the refund/cancellation email. However, there could be an exception if notice of the refund or cancellation is fulfilling a legal obligation or is informing the recipient of their legal rights.

For an agency that uses an ESP, does our agency name need to appear on the email as well as the ESP and the company we are sending on behalf of?

If your agency determines either who to send the mail to, or the content of the message, then your agency should be identified in the message. Most ESPs do not perform either of these functions, so it is unlikely the ESP would need to be identified there.

What is a recommended method for obtaining express consent after implied consent has been obtained?

When a guest stays at our hotel, we note in their confirmation letter that we will include them in future promotional emails and give them a link with an option to unsubscribe, but I don't think that qualifies as getting express consent.

You're correct about your current model: It doesn't constitute express consent. Express consent requires the subscriber take action to subscribe. The current method only requires the user not take the action of opting out. The best method of obtaining express consent will vary depending on your situation, but in most cases a website opt-in form is recommended. The form should be compliant with the CASL requirements, and you'll want to keep records of the source IP address as well as the date and time of the opt-in.

Does the three-year transition period apply to contacts who have given express consent?

No. Express consent is permanent and doesn't expire. It can only be revoked by the address owner requesting to be unsubscribed.

What do we have to do with existing lists?

That will depend on the status of your lists. If you have received express consent from all your existing contacts and you have at least basic records of when and how that was acquired, you likely won't need to take any action with those contacts. However, if you are unsure of the opt-in status of your users, or have no records of them opting in, it may be necessary to run an opt-in campaign prior to the July 1 effective date.

What would be an example of proof of consent?

That will depend on the CRTC's judgment. However, in the case of a web opt-in, having the source IP address used along with date and time of the sign-up and the URL of the page would likely be a good starting point. Any sign-ups not received via the web may be more difficult to contest. For verbal opt-ins, a recording of the exchange would probably be ideal. For paper sign-ups, keeping the paper form on file is likely the best method of record-keeping.

Would filling out a "Request for Information" form that includes entering an email address count as an opt-in, or would a check box also have to exist?

No check box is required, but the form has to be CASL-compliant. It must inform the user he or she is requesting promotional emails and he or she can unsubscribe at any time. If the form is simply a request for information or a quote for a particular product or service, it isn't considered express consent. The sender would only be allowed to send messages in response to the particular request, and only for a period of six months.

For loyalty clubs, would monthly statements be included in the exemptions?

Most likely, if the statement doesn't include advertisements. If it does include any solicitations or links to purchase, we strongly recommend it follows CASL's provisions.

For transactional emails, can replying to the email count as an unsubscribe method? Or could people send an email to unsubscribe@companynewsletter.com to unsubscribe (as an example)?

CASL mandates the unsubscribe link be valid and working, and be specifically called out within the email. Either an email address or a link to an unsubscribe form should be included, with wording instructing the user how to unsubscribe (i.e. "email unsub@example.com to unsubscribe from all mailings," etc.). One thing to note here is if you only provide one unsubscribe method, you must assume that user wants to unsubscribe from all mailings. So the best practice would be to use a link or links that provide options on what messages to stop receiving.

We hope these questions and answers have helped clarify Canada's Anti-Spam Law update coming in July.

Have another specific question related to the law and email marketing? Email Brad at bgurley@whatcounts.com.

ADDITIONAL CASL RESOURCES

To recap, here are the six steps you need to take when updating your email marketing for compliance with the coming CASL regulations:

- ☐ Determine if the law applies to your email marketing.
- ☐ Get express consent from Canadian subscribers.
- ☐ Understand the penalties associated with non-compliance.
- ☐ Decide if you're exempted from the law.
- ☐ Plan according to the transition timeline.
- ☐ Verify if your company is a special case, and take steps to comply with the law if you are.

Use the checklists in this resource to follow each of these steps and accurately update your email marketing to comply with the July 1 CASL updates.

If you'd like to hear Brad speak about the coming CASL update, you can download the recording and slides of our webinar [Canada's Anti-Spam Law Update: What It Means for You](#).



ABOUT WHATCOUNTS

WhatCounts loves email. That's because it's the only marketing channel providing a substantial ROI when marketing professionals deliver smart, personalized messages to their target audiences.

Each day our team partners with over 800 customers to leverage email, social media, mobile design, and the web to drive revenue. We provide enhanced data, flexible deployment options, content automation and professional services.

We're headquartered in Atlanta, GA, with offices in Seattle, Sydney, Baltimore, and other regional locations. Find out more about why we love email at www.whatcounts.com.



3630 Peachtree Rd.
Suite 900
Atlanta, GA 30326



404.995.8600



404.995.8611



www.whatcounts.com



866.804.0076 (toll free)



sales@whatcounts.com



WHATCOUNTS