

Northern Border Security: Impact of Canada's Anti-Spam Law on American Businesses

When you think of countries leading the cyber-security charge, chances are that Canada is not the first name on your list. That could change very soon. By 2014, Canada will have implemented – and could be enforcing – the most sweeping anti-spam legislation in the world. Why should Americans care? Because *any* commercial electronic message (i.e., email, text messages, instant messages, social media messages, and even installation of computer programs) sent from the U.S. and accessed in Canada is subject to new consent and disclosure requirements that are far more strict than their American counterparts.

Ten years ago, the U.S. Congress enacted the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”) in an effort to curb the epidemic of unsolicited commercial email – i.e., spam – in this country. Under the CAN-SPAM Act, which is largely criticized as being under-enforced, spam is acceptable as long as the email contains an opportunity for the recipient to “opt-out” of future emails. The new Canada Anti-Spam Legislation (“CASL”) is much more stringent, which will make compliance that much more burdensome.

Under CASL, the focus is upon prior consent. That is, unless a few select exemptions apply, you – the American sender – must have the Canadian recipient's consent *before* you send them a commercial electronic message, and you have the burden to prove that consent, whether explicit or implied. Thus, CASL requires “opt-in” authorization, which forces you to make specific disclosures about your identity and contact information, why you are requesting consent, and the recipient's ability to withdraw that consent at any time. Although most of these disclosures are probably good marketing practices anyway, none of them are required by the CAN-SPAM Act.

Again, why should Americans care? First, Canadian regulators can impose administrative monetary penalties against American senders (up to a maximum of \$10,000,000), which regulators can seek by court order in Canada or by enforcing a foreign judgment in the U.S. Second, CASL creates a private cause of action that imposes statutory damages, and will most likely be brought by way of costly class actions. Third, and perhaps most important, an American business can send a commercial electronic message that is in full compliance with the CAN-SPAM Act and yet *still* run afoul of CASL.

(continued on next page)

If you or your organization send business-related electronic communications to Canada, it is time to take a closer look at what you are sending and whether you have documented consent to send it. Preferably before the Canadian government decides to take a closer look at you.

	<p>Jason M. Van Dam Attorney at Law</p> <p>For more information or questions, please contact Jason at 419-249-7900 or by email at jvandam@rcolaw.com</p>
---	--

This publication is designed to provide general information prepared by professionals in regard to the subject matter covered. Although prepared by professionals, this publication should not be utilized as a substitute for professional service in specific situations. If legal advice or other expert assistance is required, the services of a professional should be sought.



Toledo
Four SeaGate, Ninth Floor
Toledo, Ohio 43604
419-249-7900/phone
419-249-7911/fax

Findlay
220 W. Sandusky Street
Findlay, Ohio 45840
419-423-4321/phone
419-423-8484/fax

Waterville
204 Farnsworth
Waterville, Ohio 43566
419-878-2931/phone
419-878-4727/fax

Monroe
23 East Front Street, Suite 101
Monroe, Michigan 48161
734-457-1092/phone
734-457-1094/fax

Tecumseh
105 Brown Street, Suite 100
Tecumseh, MI 49286
517-423-5404/phone
517-423-5647/fax