



## Canada's Anti-Spam Legislation and Non-Canadian Credit Unions

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### Overview

[Canada's Anti-Spam Legislation](#)<sup>1</sup> (CASL) likely applies to credit unions located outside of Canada (non-Canadian credit unions) that send "Commercial Electronic Messages" (CEMs) to recipients located in Canada. Most provisions of CASL take effect July 1, 2014. CASL requires senders of CEMs to obtain consent from recipients located in Canada by that date in order for the sender to continue sending CEMs to the recipient unless "implied consent" exists, i.e. it is an "opt-in" system. CEMs received in Canada without either the recipient's express or implied consent violate CASL.

CASL's definition of "CEM" includes commercial emails as well as other forms of commercial electronic message, such as commercial SMS text messages and some commercial social media messages, which are received in Canada. The law also envisions enforcement actions against spammers located outside of Canada. These enforcement actions could involve the cooperation with non-Canadian governments' anti-spam authorities.

Although CASL includes "implied consent" grandfather clauses that should apply to a credit union's members as of the date CASL takes effect (July 1, 2014), non-Canadian credit unions should be aware of CASL's safe harbor for senders of CEMs in "Foreign States," its content and unsubscribe requirements, and CASL's requirement to get affirmative CEM opt-ins from new members or other persons that do not fall under CASL's "implied consent" provisions.

In order for CASL to apply to an electronic message sent by a non-Canadian credit union, the following conditions must likely be met:

1. The electronic message must be a "CEM" as defined by CASL, meaning that it must be a commercial message (see section 1 of this summary, below, for CASL's definition of "CEM"), CASL §§ 1(2), 6,
2. The CEM must either be "accessed" using a computer system in Canada (i.e. received by someone located in Canada) or sent from a computer system in Canada, CASL § 12, and
3. The non-Canadian credit union does not reasonably believe that the recipient is located outside of Canada in a jurisdiction on Canada's Electronic Consumer

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<sup>1</sup> *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 (Dec. 15, 2010), available at [http://lois-laws.justice.gc.ca/eng/AnnualStatutes/2010\\_23/FullText.html](http://lois-laws.justice.gc.ca/eng/AnnualStatutes/2010_23/FullText.html).



Protection Regulations<sup>2</sup> (ECPR) [List of Foreign States schedule](#). ECPR § 3(f). See section 2 (“Foreign State Exemption”) and Annex A of this summary, below, for more details.

**Grandfather Clause for Credit Union’s Members as of July 1, 2014:** People who are members of the credit union as of July 1, 2014 are likely grandfathered, i.e. considered to have given “implied consent” to receive CEMs under CASL § 10(9)(a) based on an “existing business relationship,” as long as they remain members of the credit union. CASL §§ 10(9)(a), (10)(d), (14)(a).

The content and unsubscribe features of CASL still apply to these “implied consent” emails (see section 3 of this summary, below, for details on the content and unsubscribe requirements).

**Transitional Period of “Implied Consent” for Certain Non-Members:** In addition, CASL’s “implied consent” provisions give senders an additional three years—or until July 1, 2017—to obtain an affirmative CEM opt-in if they had an “existing business relationship” or “existing non-business relationship” with the recipient prior to July 1, 2014 even if that relationship does not continue indefinitely. CASL’s definition of “existing business relationship” under the transitional provisions likely includes:

- (a) People who were members of the credit union as of July 1, 2014 but left the credit union’s membership after that date;
- (b) Non-members who were members and/or bought a product or service from the credit union between July 1, 2012 and to July 1, 2014; or
- (c) Non-members who made an inquiry or application to the credit union between January 1, 2014 and July 1, 2014. CASL § 66.

The content and unsubscribe features of CASL still apply to these “implied consent” emails (see section 3 of this summary, below).

Additional provisions of CASL will be phased in over the next three years:

- Provisions prohibiting the unsolicited installation of software are scheduled to take effect on January 15, 2015; and
- A private right of action allowing consumers to sue alleged spammers in Canadian courts is scheduled to take effect on July 1, 2017.

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<sup>2</sup> *Electronic Consumer Protection Regulations (Canada’s Anti-Spam Legislation)* 81000-2-175 (SOR/DORS) (Dec. 4, 2013), available at <http://fightspam.gc.ca/eic/site/030.nsf/eng/00273.html>.



**Enforcement Outside of Canada:** The [Canadian Radio-television and Telecommunications Commission](#) (CRTC), Canada's broadcasting and telecommunications regulator, has administrative enforcement authority under CASL with respect to the sending of non-compliant CEMs. CASL anticipates CRTC working with other countries' anti-spam authorities (e.g., the US's Federal Trade Commission) and international organizations to enforce CASL and other nations' anti-spam laws globally.

CRTC can also impose administrative money penalties up to CAN\$ 1 million for individuals and CAN\$ 10 million for businesses. Fortunately for non-Canadian credit unions, most countries do not enforce other countries' governments' taxes, fines, or penalties in their own courts unless required to do so by treaty.

CASL's private right of action is a bigger concern for non-Canadian credit unions, however, because foreign judgments obtained by private individuals are usually enforceable in another jurisdiction's courts. Once CASL's private right of action takes effect on July 1, 2017, Canadian courts are likely to take an expansive view of their jurisdiction regarding alleged CASL violations and allow proceedings against alleged CASL violators located outside of Canada.

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### **1. "Commercial Electronic Message" ("CEM")**

CASL section 6 states that "it is prohibited to send or cause or permit to be sent to an electronic address" a CEM unless:

(A) The recipient has given express or implied consent to receive the CEM (see sections 3, 4, and 5 of this summary, below, for more details); and

(B) The CEM conforms to CASL's content and unsubscribe requirements (see section 3 of this summary, below, for more details). CASL § 6(1).



CASL section 12 states that a “person contravenes section 6 only if a computer system located in Canada is used to send or access the electronic message.” CASL § 12(1).

Canadian law defines “access” as “to program, to execute programs on, to communicate with, to store data in, to retrieve data from, or to otherwise make use of any resources, including data or programs on a computer system or a computer network.” CASL § 82.

CASL defines “CEM” as:

“[A]n electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that:

“(a) offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;

“(b) offers to provide a business, investment or gaming opportunity;

“(c) advertises or promotes anything referred to in paragraph (a) or (b); or

“(d) promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c), or who intends to do so.” CASL § 1(2).

CEMs therefore can include emails, SMS text messages, social media messages, and other forms of electronic communications.

CASL also defines “CEM” to include an “electronic message that contains a request for consent to send a” CEM. CASL § 1(3).

Since the definition of CEM includes electronic messages asking the recipient to opt-in to receiving CEMs, it is therefore not likely lawful after July 1, 2014 for credit unions to send electronic messages asking the recipient to opt-in to receiving CEMs unless “implied consent” or another CASL exemption applies. For details on “implied consent” see sections 4, 5, and 6 of this summary, below.

## **2.” Foreign State” Safe Harbor**

A sender does not violate CASL if the sender reasonably believed that the recipient would access the CEM outside of Canada in a jurisdiction on the ECPR [List of Foreign States schedule](#) (the ECPR List of Foreign States is included in Annex A of this summary, below),



and the CEM was in compliance with that jurisdiction’s “substantially similar” anti-spam law. ECPR § 3(f).

This exemption likely applies if the non-Canadian credit union has no information about a member that would indicate that the member is located in Canada—such as if the member has a non-Canadian address, a non-Canadian phone number, an email address without a conspicuously Canadian email domain names (e.g., “.ca”), etc.—so long as the CEM complies with the anti-spam law in force in the non-Canadian credit union’s jurisdiction, and that jurisdiction is listed on the CASL List of Foreign States reprinted in Annex A of this summary.

For example, a credit union located in the United States of America (US) sends a commercial email that complies with the US’s [CAN-SPAM Act](#)<sup>3</sup> to a member who has a US mailing address on file with the credit union, has a US phone number on file with the credit union, has a .com email address on file with the credit union, and who showed a driver’s license issued by a US state as identification when he or she joined the credit union.

In this scenario, the US-based credit union does not likely violate CASL even if the member happens to be in Canada when he or she accesses the commercial email because:

- (a) The credit union had a reasonable basis to believe that the member was located in the US; and
- (b) The commercial email complied with the US’s CAN-SPAM Act (a law “that addresses conduct that is substantially similar to conduct prohibited” by CASL in a country on the CASL “Foreign States List” reprinted in Annex A of this summary).

### **3. CEM Content and Unsubscribe Requirements**

CASL’s content and unsubscribe requirements are similar in many respects to the requirements of other jurisdictions’ anti-spam laws. The US’s CAN-SPAM Act, for example, has similar requirements for disclosing the physical address and electronic address of the sender, as well as a similar unsubscribe function requirement. The CASL regulations require CEMs to have the following content:<sup>4</sup>

- “(a) the name by which the person sending the message carries on business, if different from their name, if not, the name of the person;

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<sup>3</sup> Controlling the Assault of Non-Solicited Pornography And Marketing Act of 2003 (CAN-SPAM Act), Pub. L. No. 108-187 (Dec. 16, 2003) (codified as amended at 15 U.S.C. §§ 7701-7713), *available at* <http://www.law.cornell.edu/uscode/text/15/chapter-103>; *see* 16 C.F.R. part 316 (“CAN-SPAM Rule”), *available at* <http://www.law.cornell.edu/cfr/text/16/part-316>.

<sup>4</sup> *Appendix to Telecom Regulatory Policy, Electronic Commerce Protection Regulations (CRTC) SOR/2012-183* (Mar. 28, 2012), *available at* <http://www.crtc.gc.ca/eng/archive/2012/2012-183.htm>.



“(b) if the message is sent on behalf of another person, the name by which the “person on whose behalf the message is sent carries on business, if different from their name, if not, the name of the person on whose behalf the message is sent;

“(c) if the message is sent on behalf of another person, a statement indicating which person is sending the message and which person on whose behalf the message is sent; and

“(d) the mailing address, and either a telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person sending the message or, if different, the person on whose behalf the message is sent.” CRTC § 4.

If it is not practical to include all of the above information in a CEM, the CEM may instead include a link to a web page where all of this information is posted. CRTC § 2(d)(2).

CASL also requires the CEM to have a conspicuously displayed unsubscribe mechanism meeting the following requirements:

“The unsubscribe mechanism referred to in paragraph 6(2)(c) must

“(a) enable the person to whom the commercial electronic message is sent to indicate, at no cost to them, the wish to no longer receive any commercial electronic messages, or any specified class of such messages, from the person who sent the message or the person — if different — on whose behalf the message is sent, using

“(i) the same electronic means by which the message was sent, or

“(ii) if using those means is not practicable, any other electronic means that will enable the person to indicate the wish; and

“(b) specify an electronic address, or link to a page on the World Wide Web that can be accessed through a web browser, to which the indication may be sent.” CASL § 11.

#### **4. CEM Consent Requirements**

A credit union’s CASL opt-in consent request may be in writing or oral, and must include:<sup>5</sup>

“(a) the name by which the person seeking consent carries on business, if different from their name, if not, the name of the person seeking consent;

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<sup>5</sup> *Id.*



“(b) if the consent is sought on behalf of another person, the name by which the person on whose behalf consent is sought carries on business, if different from their name, if not, the name of the person on whose behalf consent is sought;

“(c) if consent is sought on behalf of another person, a statement indicating which person is seeking consent and which person on whose behalf consent is sought; and

“(d) the mailing address, and either a telephone number providing access to an agent or a voice messaging system, an email address or a web address of the person seeking consent or, if different, the person on whose behalf consent is sought; and

“(e) a statement indicating that the person whose consent is sought can withdraw their consent.” CRTC § 4.

The recipient’s consent given to receive CEMs must:

- (1) Be an affirmative opt-in;
- (2) May be in writing or oral (but if oral, the consent must be verifiable);
- (3) Must be separate from other consents, not bundled with requests for consent for other things, and not use pre-checked boxes; and
- (4) An email asking the recipient to click on an electronic button to express consent is an acceptable method (although using a non-electronic consent form is also acceptable).

## **5. “Implied Consent” for “Existing Business Relationships” and “Existing Non-Business Relationships”**

CASL has two sets of provisions regarding “implied consent” for “existing business relationships” and “existing non-business relationships:”

- A. CASL § 10 “Existing Relationship” Grandfather Clause without Sunset Date:** CASL section 10 allows implied consent for ongoing “existing business relationships” and “existing non-business relationships” in effect on July 1, 2014 until the relationship terminates—this provision likely applies to a credit union’s members until the member leaves the credit union’s membership. The CASL section 10 provision does not have a sunset date (other than that the “implied consent” ends when the existing relationship terminates); and
- B. CASL § 66 Three-Year Transitional “Existing Relationship” Grandfather Clause:** CASL section 66 includes “transitional provisions” for “existing



business relationships” and “existing non-business relationships” that are in existence on July 1, 2014, or within a specified period before that date, even if those business relationships are not continuous after July 1, 2014 (this provision is less relevant to credit unions because they usually only do business with their members, but can apply to non-member situations)

#### A. CASL § 10 “Existing Business Relationship” Grandfather Clause without Sunset Date

As noted above, CASL section 10 provides for “implied consent” in the case of an “existing business relationship” with its current customers as of July 1, 2014 —i.e. the credit union’s current members on that date—so long as the business relationship is ongoing. In the case of a credit union, this “implied consent” likely extends to the credit union’s existing members as of July 1, 2014 until the member leaves the credit union’s membership

CASL section 10(9)(a) states “[c]onsent is implied . . . if the person who sends the message, the person who causes it to be sent or the person who permits it to be sent has an existing business relationship or an existing non-business relationship with the person to whom it is sent . . . .” CASL § 10(9)(a).

CASL section 10(10) defines the term “existing business relationship” as follows:

“[E]xisting business relationship’ means a business relationship between the person to whom the message is sent and any of the other persons referred to in that subsection — that is, any person who sent or caused or permitted to be sent the message — arising from

“(a) the purchase or lease of a product, goods, a service, land or an interest or right in land, within the two-year period immediately before the day on which the message was sent, by the person to whom the message is sent from any of those other persons;

“(b) the acceptance by the person to whom the message is sent, within the period referred to in paragraph (a), of a business, investment or gaming opportunity offered by any of those other persons;

“(c) the bartering of anything mentioned in paragraph (a) between the person to whom the message is sent and any of those other persons within the period referred to in that paragraph;

“(d) a written contract entered into between the person to whom the message is sent and any of those other persons in respect of a matter not referred to in any of paragraphs (a) to (c), if the contract is currently in existence or expired within the period referred to in paragraph (a); or





“(e) an inquiry or application, within the six-month period immediately before the day on which the message was sent, made by the person to whom the message is sent to any of those other persons, in respect of anything mentioned in any of paragraphs (a) to (c).” CASL § 10(10).

CASL section 10(14)(a) clarifies that “an ongoing use or ongoing purchase under a subscription, account, loan or similar relationship” is on considered an ongoing business relationship until “day that the subscription, account, loan or other relationship terminates . . . .” CASL § 10(14)(a).

CASL section 10(11) clarifies that Canadian cooperatives are generally considered “businesses” for purposes of the “existing business relationship” provisions. *See* CASL § 10(11).

Non-Canadian credit unions’ relationships with their members are likely also “existing business relationships” within the meaning of CASL sections 10(10) and 66 because credit unions are cooperatives, even if the CASL section 10(11) clarification regarding cooperatives is specific to cooperatives chartered under Canadian federal or provincial law. *Compare* CASL §§ 10(10), 10(14)(a), 66 *with* CASL § 10(11).

It is a fairly common sense proposition that a membership agreement and share subscription between a credit union and its member likely qualifies as an “existing business relationship” under subsection 10(10)(d) as clarified by subsection 10(14)(a) that is ongoing until the member leaves the credit union by redeeming his or her membership share and closing his or her accounts.

A credit union therefore likely has implied consent under CASL § 10 from its existing members as of July 1, 2014 to receive CEMs until the member leaves the credit union’s membership. CEMs from the credit union, however, would still need to be compliant with CASL’s content and unsubscribe requirements, which are discussed below in section 3 of this summary.

Credit unions should also note that section 10 only likely applies to the members of the credit union as of July 1, 2014. Under CASL, the credit union is required to obtain affirmative consent to receive CEMs from people who joined the credit union after July 1, 2014.

### *B. CASL § 66 Three-Year Transitional “Existing Business Relationship” Grandfather Clause*

Section 66 of CASL (“Transitional Provisions”) also can also temporarily allow “implied consent” in the context of “existing business relationship” for up to three years even when the existing business relationship is not continuous per se.



In the credit union context—since members must always maintain at least one share with the credit union, thereby ensuring a continuous business relationship—the section 66 provisions are most relevant to former members and people who recently inquired about credit union membership or the credit union’s products and services.

Section 66 “existing business relationships” and “existing non-business relationships” to only three years from CASL’s effective date (i.e. only until July 1, 2017 because CASL’s effective date is July 1, 2014):

“A person’s consent to receiving commercial electronic messages from another person is implied until the person gives notification that they no longer consent to receiving such messages from that other person or until three years after the day on which section 6 comes into force [i.e. until July 1, 2017], whichever is earlier, if, when that section comes into force,

“(a) those persons have an existing business relationship or an existing non-business relationship, as defined in subsection 10(10) or (13), respectively, without regard to the period mentioned in that subsection; and

“(b) the relationship includes the communication between them of commercial electronic messages.” CASL § 66.

Since the CASL section 10 “implied consent” grandfather clause applies to people who were members on July 1, 2014 and remain members continuously thereafter, the section 66 three year “implied consent” provision will be most with respect to:

(a) People who were members of the credit union as of July 1, 2014 but left the credit union’s membership after that date;

(b) Non-members who were members and/or bought a product or service from the credit union between July 1, 2012 and to July 1, 2014; or

(c) Non-members who made an inquiry or application to the credit union between January 1, 2014 and July 1, 2014. CASL §§ 10(10), 66.

### C. “Existing Non-Business Relationships”

The CASL sections 10 and 66 grandfather clauses also apply to “existing non-business relationships” under the same rules as “existing business relationships” discussed above. The “existing non-business relationships” provisions are not likely applicable to credit unions but could be useful to credit union associations or other types of credit union-related not-for-profit organizations, even though this section is written to apply primarily to Canadian organizations.



CASL section 10(13) defines “existing non-business relationship” as “a non-business relationship between the person to whom the message is sent and any of the other persons referred to in that subsection — that is, any person who sent or caused or permitted to be sent the message — arising from:

“(a) a donation or gift made by the person to whom the message is sent to any of those other persons within the two-year period immediately before the day on which the message was sent, where that other person is a registered charity as defined in subsection 248(1) of the [Canada] Income Tax Act, a political party or organization, or a person who is a candidate — as defined in an Act of [Canada’s] Parliament or of the legislature of a [Canadian] province — for publicly elected office;

“(b) volunteer work performed by the person to whom the message is sent for any of those other persons, or attendance at a meeting organized by that other person, within the two-year period immediately before the day on which the message was sent, where that other person is a registered charity as defined in subsection 248(1) of the [Canada] Income Tax Act, a political party or organization or a person who is a candidate — as defined in an Act of [Canada’s] Parliament or of the legislature of a [Canadian] province — for publicly elected office; or

“(c) membership, as defined in the regulations, by the person to whom the message is sent, in any of those other persons, within the two-year period immediately before the day on which the message was sent, where that other person is a club, association or voluntary organization, as defined in the regulations.” CASL § 10(13).

Since subsections 10(13)(a) and (b) are limited to Canadian organizations, non-Canadian entities likely only can have “existing non-business relationships” pursuant to subsection 10(13)(c) and the regulations interpreting that subsection.

The CASL regulations clarify the terms “Club, association or voluntary organization” used in CASL section 10(13)(c) in a way that likely could apply to credit union associations or other types of non-Canadian not-for-profit organizations:

“For the purposes of paragraph 10(13)(c) of the Act, a club, association or voluntary organization is 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.” ECPR § 7(2).



The above definition of “club, association or voluntary organization” does not likely apply to credit unions (even if one views credit unions as not-for-profit organizations) because credit unions typically pay their members dividends on shares (or make similar payments to their members out of the credit unions’ income), and do not have the primary purpose of promoting amateur athletics in Canada.

The CASL regulations also clarify the meaning of the term “membership:”

“For the purposes of paragraph 10(13)(c) of the Act, membership is the status of having been accepted as a member of a club, association or voluntary organization in accordance with its membership requirements.” ECPR § 7(1).

## **6. Other Key Exemptions**

CASL includes two types of exemptions:

(A) “Implied consent” exemptions allowing an exemption from CASL’s express consent requirements (including but not limited to the “existing business relationships” discussed in section 5 of this summary, above) but not exempting the CEM from CASL’s consent and ability to unsubscribe requirements and

(B) Exemptions from CASL’s content and unsubscribe requirements as well as its consent requirements discussed in section 3 of this summary, above.

### **A. Implied Consent Situations Other than “Existing Business Relationship” and “Existing Non-Business Relationship”**

In addition to the “existing business relationship” and “existing non-business relationship” provisions under CASL § 10(9)(a) discussed in section 5 of this summary, above, a recipient is presumed to have given “implied consent” to receive CEMs in the following situations (CASL’s content and unsubscribe requirements, discussed in section 3, above, still apply in this situation):

- Recipient has published his or her electronic address: The person to whom the message is sent has: (a) conspicuously published his or her email or other “electronic address” online or elsewhere; (b) without a statement saying that the person “does not wish to receive unsolicited” CEMs; and (c) “the message is relevant to the person’s business, role, functions or duties in a business or official capacity.” CASL § 10(9)(b).
- Recipient gave his or her electronic address to sender in connection with business or duties (“business card exemption”): “[T]he person to whom the message is sent has disclosed, to the person who sends the message, the person who causes it to be sent or the person who permits it to be sent, the electronic address to which the



message is sent without indicating a wish not to receive unsolicited commercial electronic messages at the electronic address, and the message is relevant to the person's business, role, functions or duties in a business or official capacity." CASL § 10(9)(c).

- Limited implied consent for first email following-up third-party referrals: CASL's prohibition on sending CEMs without an affirmative opt-in "does not apply to the first commercial electronic message that is sent by a person for the purpose of contacting the individual to whom the message is sent 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 who sends the message as well as any of those relationships with the individual to whom the message is sent and that discloses the full name of the individual or individuals who made the referral and states that the message is sent as a result of the referral." ECFR § 4.

### B. Exemptions from CASL's Consent, Content and Unsubscribe Requirements

CEMs are typically exempted from CASL's consent requirements (discussed above in sections 4 and 5, above) as well as its content and ability to unsubscribe requirements (which are discussed in section 3, above) in the following situations:

- CEMs sent within a personal or family relationship;
- Intra-business CEMs, such as one sent by an employee of an organization to another employee of that organization;
- Inter-business CEMs, such as if the two businesses have a business relationship and one sends a CEM that is related to that activity to the other;
- CEMs that are related to requests, inquiries, or complaints;
- CEMs sent to satisfy a legal obligation, provide notice of legal rights, or otherwise related to legal process;
- CEMs sent using a "limited-access secure and confidential account" message systems (such as an online banking system messages);
- A CEM "that is sent and received on an electronic messaging service if the information and unsubscribe mechanism that are required under subsection 6(2) of the Act are conspicuously published and readily available on the user interface through which the message is accessed, and the person to whom the message is sent consents to receive it either expressly or by implication;"
- CEMs sent by charities registered in Canada; and
- CEMs sent by on or behalf of a Canadian political party or political organization.



## **7. Enforcement**

There are at least three ways CASL in theory could be enforced against parties located outside of Canada:

### **A. Canada Working with Non-Canadian Governments to Pursue Violators:**

CASL anticipates the [Canadian Radio-television and Telecommunications Commission](#) (CRTC), Canada's broadcasting and telecommunications regulator, has the primary CASL enforcement responsibility and will be able to investigate, take action against, and set administrative monetary penalties for sending non-compliant CEMs. CRTC may work with other countries' anti-spam authorities (e.g., the US's Federal Trade Commission) and international organizations to enforce CASL and other nations' anti-spam laws globally, such as if a CASL violator is located in a non-Canadian jurisdiction.

**B. Enforcement of CRTC Judgments in Non-Canadian Courts:** Most countries do not enforce other countries' fines and civil penalties in their courts unless required by treaty. CRTC will issue civil money penalties up to CAN\$ 1 million for individuals and CAN\$ 10 million for business for CASL violations through an administrative procedure, however, and may seek to have those judgments enforced in foreign jurisdictions pursuant to treaties or other law.

**C. Private Right of Action (as of July 1, 2017):** Once CASL's private right of action takes effect on July 1, 2017, Canadian courts are likely to take an expansive view of their jurisdiction regarding alleged CASL violations and allow proceedings against alleged CASL violators located outside of Canada. Judgments obtained under the CASL private right of action from Canadian courts may be enforceable in courts outside Canada through existing enforcement of foreign judgments procedures for private claimants.

### **A. Canada Working with Non-Canadian Governments to Pursue Violators**

CASL contemplates CRTC and other Canadian authorities sharing information and coordinating investigations with non-Canadian governments ("foreign states") to pursue spammers globally.

Numerous CASL provisions authorize CRTC to share of information or otherwise coordination with foreign states' anti-spam authorities (e.g., the US's Federal Trade Commission). See CASL §§ 15(3), (4), 17(1), (4), 19(1), 60, 75, 77, 87.

While it is unclear how this will work in practice, CRTC may coordinate with foreign states' anti-spam authorities to pursue CASL violators who are located in those foreign states.



## B. Enforcement of CRTC Judgments in Non-Canadian Courts

Although CRTC has authority to assess administrative money penalties against CASL violators, most countries' courts do not enforce taxes, fines, or penalties assessed by foreign governments because of these judgments' revenue collecting and penal nature. *E.g.*, Restatement (Third) of Foreign Relations Law § 483, n.3 (1987) ("Unless required to do so by treaty, no state enforces the penal judgments of other states"); *see, e.g.*, *The Antelope*, 23 U.S. 66, 123 (1825) (Marshall, C.J.) ("The Courts of no country execute the penal laws of another").

Whether or not a court located outside of Canada would likely enforce a CRTC judgment and fine, however, is a question of treaty law and local law that is outside the scope of this summary.

Regardless of whether CRTC can get courts outside of Canada to enforce its judgments and fines, CRTC has administrative enforcement authority under CASL with respect to assessing fines to senders of non-compliant CEMs. CRTC can determine that a sender violated CASL and can impose administrative money penalties up to CAN\$ 1 million for individuals and CAN\$ 10 million for businesses through an administrative process. CASL § 20(4).

Under CASL's administrative money penalties process, CRTC first sends a "Notice of Violation" to the accused spammer that includes a specified civil money penalty as well as a detail of the alleged CASL violations. CASL § 22. The accused spammer may either pay the penalty or, "within 30 days after the day on which the notice is served," make "representations to the Commission" that he or she is not culpable for a CASL violation.

Anyone who does not respond to the CRTC within 30 days of the notice being served "is deemed to have committed the violation." CASL § 24(2). Also, anyone who pays the civil money penalty included in the Notice of Violation is deemed to have committed the violation as well. *Id.* CRTC can also proceed against a company's "officer, director, agent or mandatary" individually for the business's violations if the individual employee "directed, authorized, assented to, acquiesced in or participated in the commission of the violation." CASL § 31.

CASL requires CRTC to take into account the following factors "when determining the amount of a penalty:

"(a) the purpose of the penalty;

"(b) the nature and scope of the violation;

"(c) the person's history with respect to any previous violation under this Act, any previous conduct that is reviewable under section 74.011 of the Competition Act



and any previous contravention of section 5 of the Personal Information Protection and Electronic Documents Act that relates to a collection or use described in subsection 7.1(2) or (3) of that Act;

“(d) the person’s history with respect to any previous undertaking entered into under subsection 21(1) and any previous consent agreement signed under subsection 74.12(1) of the Competition Act that relates to acts or omissions that constitute conduct that is reviewable under section 74.011 of that Act;

“(e) any financial benefit that the person obtained from the commission of the violation;

“(f) the person’s ability to pay the penalty;

“(g) whether the person has voluntarily paid compensation to a person affected by the violation;

“(h) the factors established by the regulations; and

“(i) any other relevant factor.” CASL § 20(3).

Although most countries do not enforce other countries’ governments’ fines, taxes, and penalties, whether or not a court located outside of Canada would likely enforce a CRTC judgment and fine is a question of treaty provisions and local law.

### C. Private Right of Action (as of July 1, 2017)

Unlike government fines and penalties, local courts routinely enforce foreign judgments obtained by private individuals. Canada’s courts also generally view their legal jurisdiction expansively, and it is clear from the text of CASL that Canada intends the law to apply to spammers located outside of Canada.

Most countries have existing laws on their books requiring their local courts to enforce foreign judgments. The United States Code, for example, allows judgments issued in Canada or other non-US courts to be enforced in US federal court. *See* 28 U.S.C. § 2467 (“Enforcement of foreign judgment”).

Some countries require the foreign judgment to meet minimum rule-of-law standards and also only enforce foreign judgments where the defendant has significant contacts with the foreign jurisdiction. In the United States, for example, a person must have at least “minimum contacts” with Canada for a Canadian judgment to be enforceable in US courts and sending spam electronic messages to Canada without other connections to Canada (such as conducting other commercial activities in Canada besides sending CEMs) may not be enough to establish “minimum contacts” over a US defendant.





Most other jurisdictions' courts, however—including Canada's courts—do not have a “minimum contacts” limitations or similar restrictions on how they view a court's jurisdiction. Jurisdictions without a “minimum contacts” or similar requirements may be likely to enforce a Canadian judgment even if the defendant had no connections to Canada other than sending unauthorized CEMs to Canadian recipients.

## **Conclusion**

CASL will hopefully have limited impact on non-Canadian credit unions—even though CASL likely applies to non-Canadian credit unions that send CEMs to recipients located in Canada—but there are compliance risks for non-Canadian credit unions that disregard CASL's requirements.

Although CASL includes “implied consent” grandfather clauses that should apply to a credit union's members as of the date CASL takes effect (July 1, 2014), non-Canadian credit unions should be aware of CASL's safe harbor for senders of CEMs in “Foreign States,” its content and unsubscribe requirements, and CASL's requirement to get affirmative CEM opt-ins from new members or other persons that do not fall under CASL's “implied consent” provisions.

Also, even if a local courts do not enforce CASL's administrative penalties in the non-Canadian credit union' jurisdiction (which likely depends on the treaties in force between the jurisdiction and Canada), non-Canadian credit unions can still be subject to CASL enforcement actions.

Non-Canadian credit unions that violated CASL may be subject to an administrative enforcement action brought by local anti-spam authorities based on a complaint from CRTC about CASL violations, or, after July 1, 2017, being sued in Canada s under CASL's private right of action and having that proceeding's judgment enforced in local courts.

For more information, please contact World Council's VP and Chief Counsel Michael Edwards ([medwards@woccu.org](mailto:medwards@woccu.org)).



## Annex A—CASL “List of Foreign States”<sup>6</sup>

- Albania
- Antigua and Barbuda
- Argentina
- Armenia
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Bhutan
- Bosnia
- Botswana
- Brazil
- British Virgin Islands
- Bulgaria
- Burkina Faso
- Burma (Myanmar)
- Cambodia
- Cameroon
- Cayman Islands
- Central African Republic
- Chile
- China
- Colombia
- Costa Rica
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Dominica
- Dominican Republic
- Ecuador
- Estonia
- Finland
- France
- Gambia
- Georgia
- Germany
- Ghana
- Greece
- Grenada
- Guatemala
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Ireland
- Israel
- Italy
- Jamaica
- Japan
- Jordan
- Kazakhstan
- Kenya
- Latvia
- Liechtenstein
- Lithuania
- Luxembourg
- Macedonia
- Malaysia
- Malta
- Mauritius
- Moldova
- Montenegro
- Morocco
- Mozambique
- Namibia
- Nepal
- Netherlands
- New Zealand
- Norway
- Pakistan
- Peru
- Philippines
- Poland
- Portugal
- Puerto Rico
- Qatar
- Romania
- Russia
- Saint Lucia
- Saint Vincent and the Grenadines
- Saudi Arabia
- Serbia
- Sierra Leone
- Singapore
- Slovakia
- Slovenia
- South Africa
- South Korea
- Spain
- Sri Lanka
- Sweden
- Switzerland
- Tanzania
- Thailand
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turks and Caicos
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States of America
- United States Virgin Islands
- Venezuela
- Vietnam
- Zambia

<sup>6</sup> *Electronic Consumer Protection Regulations (Canada’s Anti-Spam Legislation)* 81000-2-175 (SOR/DORS) (Dec. 4, 2013), available at <http://fightspam.gc.ca/eic/site/030.nsf/eng/00273.html>.