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# CASL One Year Later: What US Companies Need to Know about Enforcement under Canada's Anti-Spam Law

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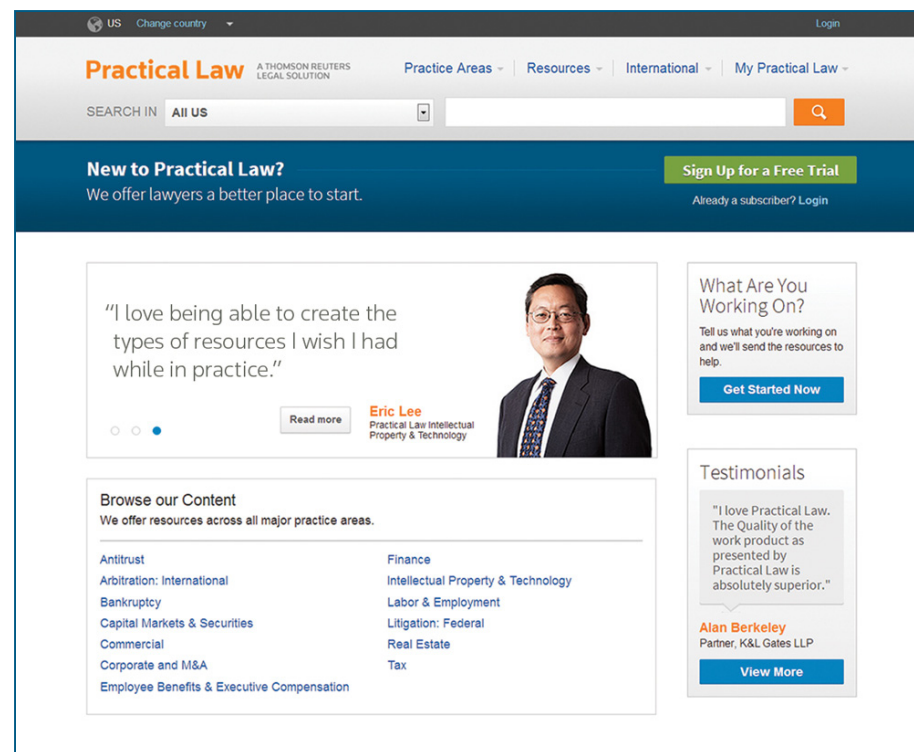
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## Agenda

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- Application of Canada's Anti-Spam Law (CASL) to US Businesses
- High-level CASL Refresher
- Enforcement and Penalties
- Recent Enforcement Actions
- Possible Defenses and Demonstrating Due Diligence
- Comparing CASL to US Law

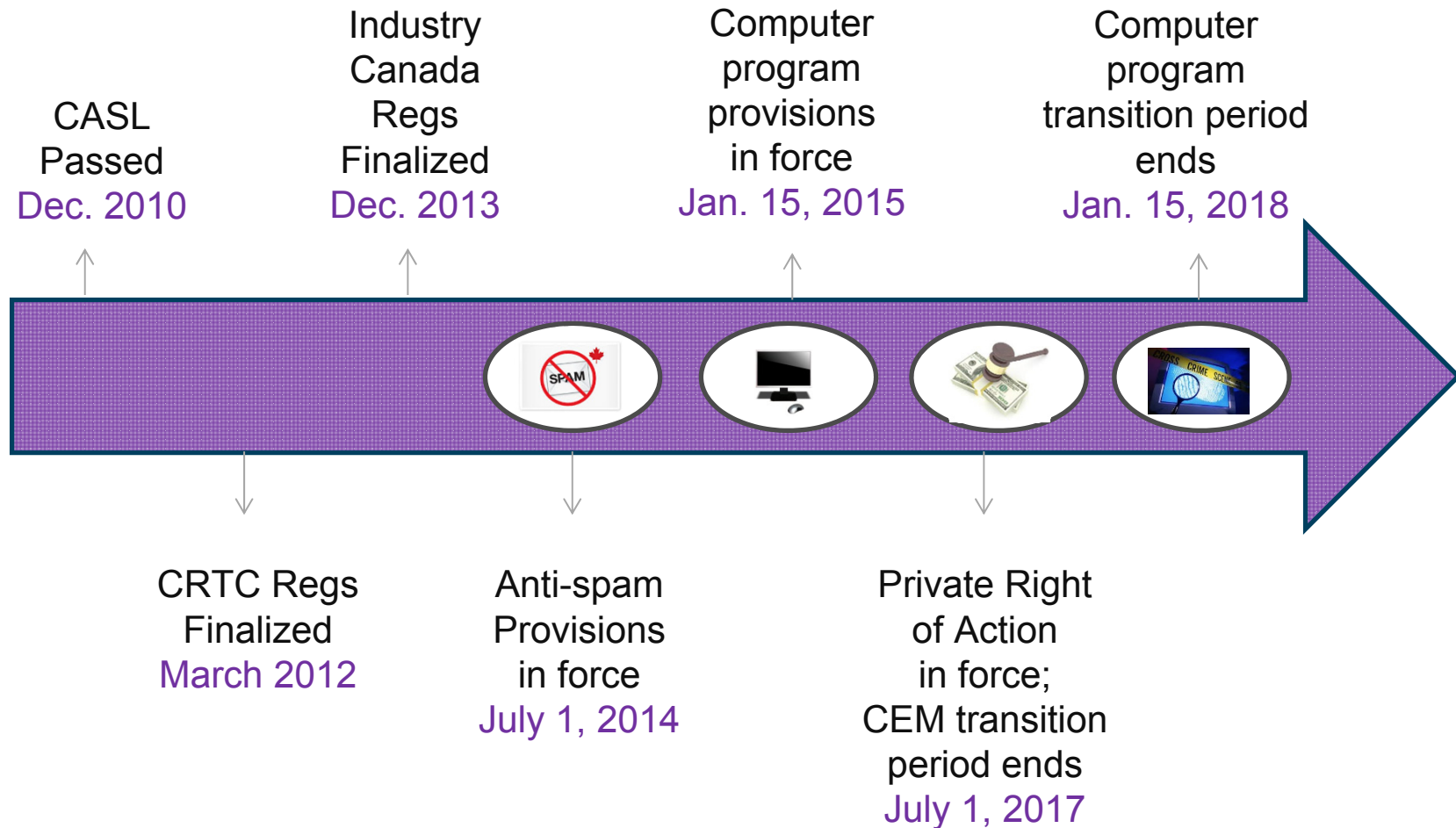
## Application of CASL to US Businesses

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CASL applies to any individual or organization that sends, or causes or permits to be sent, a commercial electronic message if a computer system located in Canada is used to send or access the message, unless the message is subject to an exception specified in CASL.

# High-level CASL Refresher

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## High-level Refresher of CASL (*cont'd*)

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- Key Prohibitions

1. Sending a commercial electronic message to an electronic address, unless:
  - ✓ an **exemption** applies; or
  - ✓ **consent** (express or implied) has been obtained; and
  - ✓ **form and content** requirements are met
2. Installing computer programs without obtaining express consent
3. Altering transmission data without obtaining express consent
4. Collecting e-addresses using computer programs without consent (e-mail harvesting)
5. Sending CEMs containing false and misleading messages

## Anti-spam Provisions: Key Definitions

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- What is a commercial electronic message (CEM)?
  - A message sent by any means of telecommunication (e.g., text, sound, voice or image) that has as its purpose, or one of its purposes, to encourage participation in a commercial activity
  - An electronic message that requests consent to send a CEM

## Anti-spam Provisions: Key Definitions (*cont'd*)

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- What is commercial activity?
  - Any conduct that is of commercial character, whether or not the person who carries it out does so with the expectation of profit



## Anti-spam Provisions: Key Definitions (*cont'd*)

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- What is an “electronic address”?

- An email account
- A text messaging account
- An instant messaging account
- A telephone account
- Any similar account
  - LinkedIn InMail
  - Facebook
  - Twitter



InMail



## Enforcement and Penalties: Regulatory Penalties

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Nature of the Violation	Fine
Sending CEMs without consent or an exemption	Maximum per breach:
Failing to provide the prescribed identifying information	Cdn\$1,000,000 for individuals
Failing to include a functional unsubscribe mechanism	Cdn\$10,000,000 for corporations
Failing to effect an unsubscribe request within the prescribed period of time	

## Enforcement and Penalties: Factors that Determine the Penalty

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1. Purpose of enforcement
2. Nature and scope of violation
3. Previous undertaking
4. Financial benefits to violator
5. Cooperation with regulator
6. Training and compliance programs and practices
7. Ability to pay

## Enforcement and Penalties: Vicarious Liability

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- Officers and directors can be held liable for a CASL violation if they directed, authorized, assented to, acquiesced in, or participated in, the commission of the violation
- An organization can be held liable for a CASL violation by its employee/agent who is acting within the scope of his or her employment/authority
- Due diligence is a defense

## Enforcement and Penalties: Private Right of Action

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Nature of the Violation	Potential Damages
Sending CEMs without consent or an exemption  Failing to meet the form and content requirements  Failing to meet the unsubscribe requirements	Actual damages <u>plus</u> Cdn\$200 per contravention, to a maximum of Cdn\$1 million for each day on which the contravention occurred
Altering transmission data without express consent	Actual damages <u>plus</u> up to Cdn\$1,000,000 for each day on which the contravention occurred
Installing computer programs without consent	Actual damages <u>plus</u> up to Cdn\$1,000,000 for each day on which the contravention occurred
Email harvesting	Actual damages <u>plus</u> up to Cdn\$1,000,000 for each day on which the contravention occurred

## Enforcement and Penalties: Enforcement Actions Announced So Far

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- Recent enforcement actions show that the CRTC is looking at compliance with all aspects of the law
  - consent requirements
  - form and content requirements
  - unsubscribe mechanism

## Enforcement and Penalties: Enforcement Actions Announced So Far (*cont'd*)

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1. Access Communications
2. Compu-Finder
3. Plenty of Fish
4. Avis and Budget
5. Porter Airlines

... and more to come

## Enforcement and Penalties: Enforcement Actions Announced So Far (*cont'd*)

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### **Access Communications**

**Allegation:** Internet service provider unknowingly sent millions of malicious spam messages

**Enforcement Action:** CRTC investigated and worked with Access Communications to eliminate the malware

#### **Key takeaways:**

- co-operation with CRTC is a mitigating factor
- CRTC will look at all of the circumstances and will not necessarily impose a fine



## Enforcement and Penalties: Enforcement Actions Announced So Far (*cont'd*)

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### Compu-Finder

#### Allegations:

- CEMs sent without consent of recipients
- Unsubscribe mechanism did not function properly and was not valid for 60 days
- Unsubscribe requests were not complied with without delay and in any event not within 10 business days

## Enforcement and Penalties: Enforcement Actions Announced So Far (*cont'd*)

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### **Compu-Finder**

**Enforcement Action:** Cdn\$1.1 million fine

**Key takeaway:** CRTC is focusing on worst offenders

## Enforcement and Penalties: Enforcement Actions Announced So Far (*cont'd*)

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### Plenty of Fish

**Allegation:** CEMs sent to registered users with an unsubscribe mechanism that was not “*clearly and prominently*” set out and could not be “*readily performed*”

**Enforcement Action:** Entered into a voluntary undertaking to develop and implement a program to ensure compliance with CASL, including training and education program AND paid a Cdn\$48,000 fine

## Enforcement and Penalties: Enforcement Actions Announced So Far (*cont'd*)

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### Plenty of Fish

#### Key Takeaways:

- The anti-spam provisions are not only about “spam”
- Businesses need to review their unsubscribe mechanisms to ensure compliance with CASL

## Enforcement and Penalties: Enforcement Actions Announced So Far (*cont'd*)

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### Avis and Budget

#### Allegations:

- Sent CEMs containing misleading pricing information
- Additional fees imposed during the rental process
- Improper characterization of certain fees as taxes, surcharges and government fees

**Enforcement Action:** Competition Bureau is seeking Cdn\$30 million fine plus refunds for consumers

## Enforcement and Penalties: Enforcement Actions Announced So Far (*cont'd*)

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### Porter Airlines

#### Allegations:

- Some CEMs were sent without an unsubscribe mechanism
- In other instances, unsubscribe mechanism was not “clearly and prominently” set out
- Certain CEMs did not provide complete contact information as required by law

## Enforcement and Penalties: Enforcement Actions Announced So Far (*cont'd*)

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### Porter Airlines

#### Allegations (*cont'd*):

- Unable to provide proof that it had obtained consent for each electronic address that received CEMs
- Some unsubscribe requests were not effected within 10 business days

## Enforcement and Penalties: Enforcement Actions Announced So Far (*cont'd*)

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### Porter Airlines

**Enforcement Action:** Entered into a voluntary undertaking to improve compliance program to ensure compliance with CASL, including increased training and education as well as improved corporate policies and procedures **AND** paid a Cdn\$150,000 fine



## Enforcement and Penalties: Enforcement Actions Announced So Far (*cont'd*)

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### Porter Airlines

#### Key Takeaways:

- CRTC is expecting those who send CEMs to be fully compliant with the law
- Proof of consent is required for each electronic address and reliance on general business practices is not sufficient to prove consent

## Enforcement and Penalties: CRTC Notices to Produce

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Method of obtaining consent in each case	Kind of consent obtained in each case	Date of consent obtained in each case
Nature of relationship in each case	All docs and data relating to policies / procedures to obtain and track consent and contact lists	Templates of CEMs
Contracts with third parties	Audited and unaudited financial statements	Credit facilities, amounts due to or from owners or shareholders

## Enforcement and Penalties: What if you receive a CRTC Notice of Violation?

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- Don't panic
- You have 30 days from the date of Notice of Violation to
  - submit written representations
  - pay the penalty, or
  - sign an undertaking
- You should review the notice carefully to determine what is being alleged

# Possible Defenses and Demonstrating Due Diligence

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**You have consent**

- express
- implied

**There was an exemption to send the CEM**

**The CEM met all of the form and content requirements**

**Unsubscribe mechanism was clearly and prominently displayed**

**Unsubscribe mechanism was working**

**Unsubscribe can be readily performed**

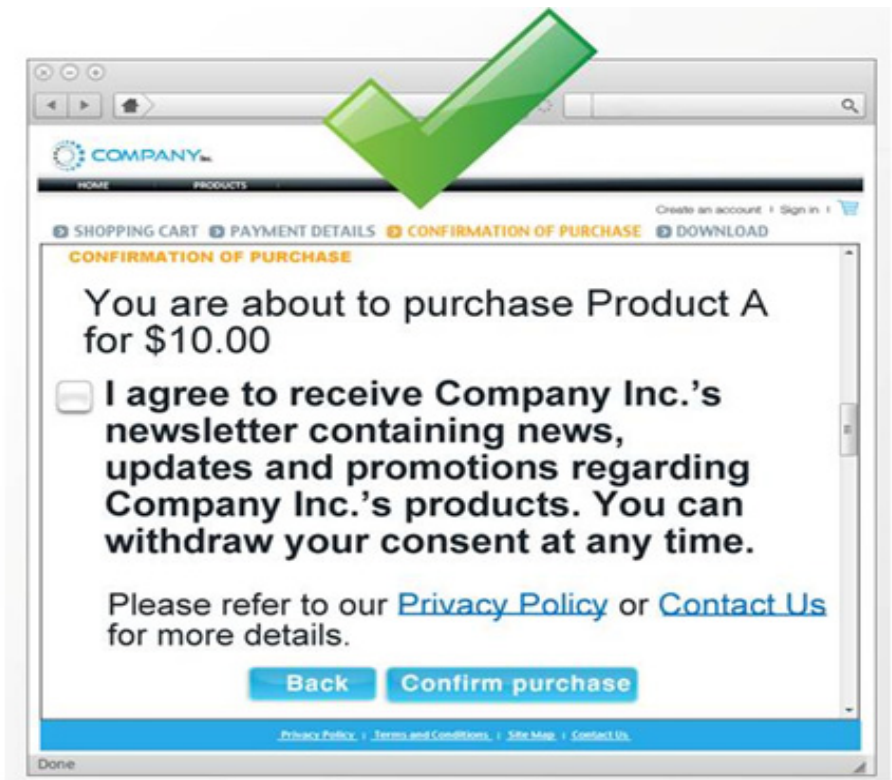
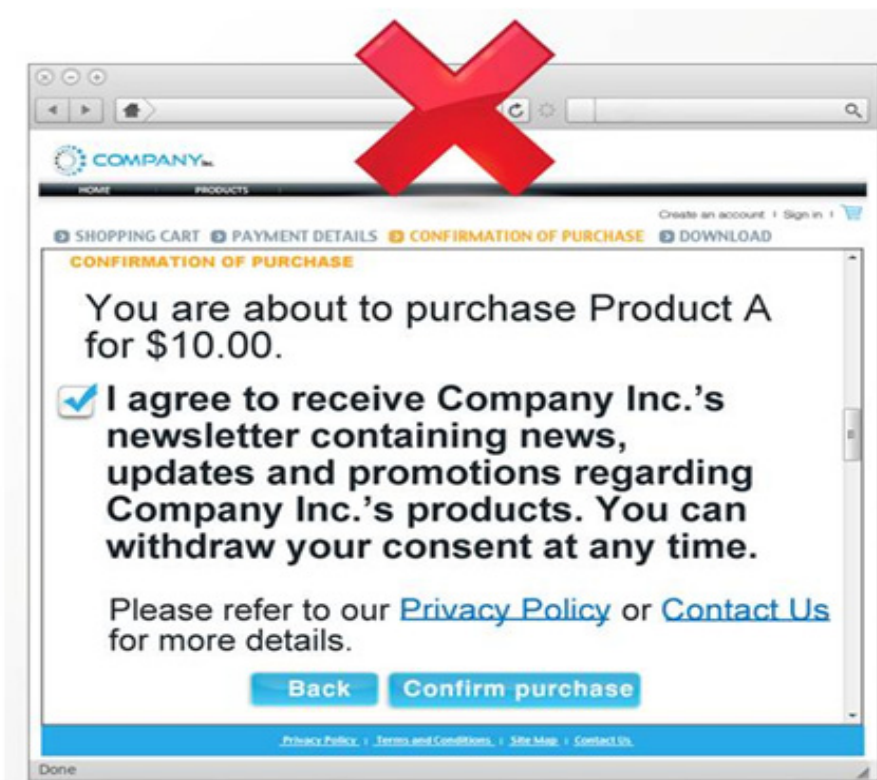
## You Have Express Consent

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- Requires active opt in
- Must be sought separately
- Sender must set out clearly and simply:
  - purposes for which consent is being sought
  - specific information about the person seeking consent and if applicable, the person on whose behalf consent is being sought
  - statement that the person can withdraw their consent at any time

# Express Consent

- Example used in Compliance and Enforcement Information Bulletin



# Express Consent

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- Example used in Compliance and Enforcement Information

The screenshot shows a web browser window with the address bar empty. The website header for 'COMPANY Inc.' includes navigation links for 'HOME' and 'PRODUCTS', and a shopping cart icon. Below the header, there are links for 'SHOPPING CART', 'PAYMENT DETAILS', and 'DOWNLOAD'. The main content area is titled 'TERMS & CONDITIONS' and contains three checkboxes with associated text:

- ☐ I accept the Terms and Conditions.
- ☐ I agree to the installation of Company Inc.'s Product A software. The function and purpose of Product A are to  **Lorem ipsum dolor sit amet, consectetur . To request removal or disabling of this computer program under [certain conditions](#), please contact us at this [electronic address](#).**
- ☐ I agree to receive Company Inc.'s newsletter containing news, updates and promotions regarding Company Inc.'s products. You can withdraw your consent at any time. Please refer to our [Privacy Policy](#) or [Contact Us](#) for more details.

At the bottom of the form is a 'Download' button with a downward arrow icon. The footer of the page contains links for 'Privacy Policy', 'Terms and Conditions', 'Site Map', and 'Contact Us'.

# Implied Consent

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Existing  
Business  
Relationship

Existing Non-  
Business  
Relationship

Conspicuous  
Publication

Voluntary  
Disclosure

During  
Transition  
Period



## Full Exemption

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Personal/Family  
Relationships

Responses to  
Inquiries

Intra-business  
Messages

Inter-business  
Messages

Legal  
Obligations

e-Messaging  
Service

Secure &  
Confidential  
Accounts

Compliance  
with Law of  
Listed Foreign  
State

Charitable  
Fundraising

Political Parties  
& Candidates

## Exemptions: Exemptions from Consent

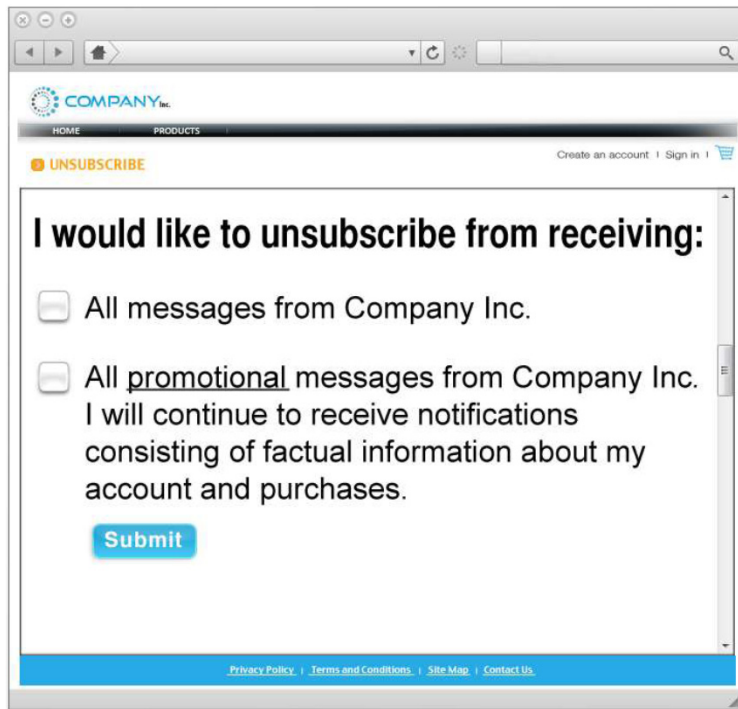
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- “Transactional messages” are specifically exempt from the requirement of obtaining consent, if they solely:
  - provide a requested quote or estimate
  - facilitate or confirm a previously agreed upon commercial transaction
  - provide factual information about an ongoing subscription/membership
  - provide information related to an employment relationship
  - deliver a product, good or service under a prior transaction
  - provide warranty/safety information
- First messages sent through a third-party referral if certain conditions are met
- Must still comply with form and content requirements

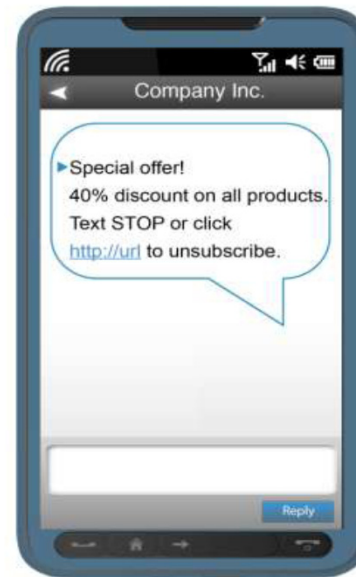
# Unsubscribe Mechanism

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- Examples used in Compliance and Enforcement Information Bulletin



A screenshot of a web browser displaying an unsubscribe form for "COMPANY Inc.". The browser's address bar shows "HOME" and "PRODUCTS". The form is titled "UNSUBSCRIBE" and includes a "Create an account | Sign in" link. The main heading is "I would like to unsubscribe from receiving:". Below this, there are two checkboxes: "All messages from Company Inc." and "All promotional messages from Company Inc. I will continue to receive notifications consisting of factual information about my account and purchases." A blue "Submit" button is at the bottom of the form. The footer contains links for "Privacy Policy", "Terms and Conditions", "Site Map", and "Contact Us".



# Records Retention

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**CEM policies  
and procedures**

**All unsubscribe  
requests and  
actions**

**All evidence of  
express  
consent**

**CEM recipient  
consent logs**

**CEM scripts**

**Campaign  
records**

**Staff training  
documents**

**Other business  
procedures**

**Official  
financial  
records**

## Conclusion: What Can You Do if You Are Investigated by the CRTC?

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1. Control the message and monitor media coverage
2. Investigate
3. Fight or provide an undertaking
4. Look out for potential class action litigation

## Comparing CASL to US Laws

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	CASL	CAN-SPAM Act	TCPA
Messages covered	<p>Commercial electronic messages that encourage participation in commercial activity, including:</p> <ul style="list-style-type: none"> <li>- Emails</li> <li>- Text messages</li> <li>- Instant messages</li> <li>- Direct messages through social media sites</li> </ul>	Commercial email messages	Text messages
Scope	Applies where <i>one</i> of the purposes of the message is commercial	Applies where <i>primary</i> purpose of email is commercial	Where an advertisement or constitutes telemarketing

## Comparing CASL to US Law (cont'd)

	CASL	CAN-SPAM Act	TCPA
Consent regime	Requires express opt-in consent (unless exemptions apply or there is implied consent)	Opt-out	Requires prior express written opt-in consent for advertisement or telemarketing (unless exemptions apply)
Identification requirements	Sender  Person on whose behalf message is sent  Prescribed contact information	Sender's postal address	Sender
Unsubscribe requirements	Valid for 60 days after message sent  Sender must give effect to unsubscribe mechanism within 10 business days	Valid for at least 30 days after message sent  Sender must give effect to opt-out within 10 business days	Right to revoke consent at any time and by any reasonable method  Industry practice

## Comparing CASL to US Law (cont'd)

	CASL	CAN-SPAM Act	TCPA
Penalties/enforcement	<p>Administrative monetary penalties of Cdn\$1 million for individuals and Cdn\$10 million for corporations</p> <p>Private right of action coming into effect July 1, 2017: Cdn\$200 per breach up to Cdn\$1 million per day <u>plus</u> actual damages and expenses</p> <p>Employer liability</p> <p>Vicarious liability for directors and officers</p>	<p>Violation as unfair or deceptive act or practice under Federal Trade Commission Act:</p> <ul style="list-style-type: none"> <li>- Injunctive relief</li> <li>- Civil penalties up to US\$16,000 per email in violation</li> </ul> <p>Other federal and state regulator enforcement</p>	<p>Forfeiture penalties, including up to US\$16,000 per violation</p> <p>Private right of action:</p> <ul style="list-style-type: none"> <li>- Injunctive relief</li> <li>- US\$500 per violation or US\$1,500 for willful or knowing violation</li> </ul> <p>State regulator enforcement</p>
Federal Regulator	<p>CRTC</p> <p>Competition Bureau</p> <p>Office of the Privacy Commissioner of Canada</p>	Federal Trade Commission	Federal Communications Commission



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# Questions

## Relevant Practical Law Resources Available with a *Free Trial* to Practical Law

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- Canada's Anti-Spam Legislation and Its Impact on US Businesses
- CAN-SPAM Act Compliance
- TCPA Litigation: Key Issues and Considerations
- Expert Q&A: Far-reaching Declaratory Ruling on the TCPA

## About the Speakers

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**Jillian Swartz** has been practicing for almost 20 years in the areas of mergers and acquisitions, private equity and venture capital investments, joint ventures and corporate reorganizations. She delivers practical business law advice to a broad range of clients, from entrepreneurs and start-ups to multi-national companies in the technology, not-for-profit, healthcare, infrastructure and manufacturing sectors. She regularly advises Canadian and international clients on Canada's anti-spam law and has presented and written extensively in both Canada and the United States on this emerging area of law.

**Melissa Krasnow's** practice focuses on privacy, advertising and marketing, corporate governance and transactional matters, including counseling on the CAN-SPAM Act and the Telephone Consumer Protection Act. A significant part of her regulatory and transactional practice is cross-border in nature and she frequently collaborates with Canadian counsel on these matters, including on Canada's Anti-Spam Law.

**Erica Kitaev** joined Practical Law from BakerHostetler LLP, where she was a partner with a focus on privacy and data security. She is a co-author of West Academic Publishing's *Privacy Law in a Nutshell, Second Edition*, and has taught privacy law as an adjunct professor at the University of Denver's Sturm College of Law.