

## Canada's New Anti-Spam Act Moves Forward

By Ralph Kroman

Canada's new "Anti-Spam Act" was passed in December 2010, but has not yet come into force. The greatest impact on Canadian businesses will be that sending electronic messages which encourage participation in a commercial activity will require express or implied consent from the recipient. Commercial electronic messages include e-mail, social networking accounts and text messages.

The consent requirement introduces an entirely new regime in Canada which will be one of the most onerous in the world. In order to rely upon implied consent, the technical rules contained in the *Anti-Spam Act* and its regulations must be followed.

If express or implied consent to a message is obtained, the message must comply with certain form and content requirements including an unsubscribe mechanism.

Industry Canada issued initial draft Regulations in July of 2011 for consultation. The Regulations have been revised and the deadline for businesses to submit comments on them is February 4, 2013. The proposed Regulations, together with Industry Canada's Regulatory Impact Analysis Statement, are available [here](#).

The CRTC passed Regulations under the *Anti-Spam Act* in final form last year and therefore the Industry Canada Regulations supplement the CRTC Regulations.

On the whole, the Industry Canada Regulations "fine tune" matters under the *Anti-Spam Act*. For most businesses, the proposed Regulations will not make a big difference regarding compliance with the *Anti-Spam Act* when it becomes law.

For example, the Industry Canada Regulations include certain exemptions for commercial electronic messages that are sent within a business, or sent between businesses that are already in a business relationship, where the messages are sent by an employee, representative, contractor or franchisee and are relevant to the business, role, function or duties of the recipients.

Further exemptions are available for messages that are solicited or sent in response to complaints and requests, and for messages sent due to a legal obligation or to enforce a legal right.

Foreign entities outside of Canada are granted some relief because an exemption is proposed for messages relating to an organization located outside of Canada and accessed in Canada. The sender must not know or reasonably expect that the messages would be accessed in Canada. Industry Canada intends that this exemption applies to visitors to Canada.

It is important for everyone to review their current practices with respect to commercial electronic messages in order to ensure

compliance when the *Anti-Spam Act* becomes law. Once the *Act* comes into force, a three-year transitional period will apply where broader provisions will be in place with respect to pre-existing relationships. It is quite possible that a business will have recipients on its electronic mailing list who will not qualify under the transitional provisions and therefore express consent to the receipt of commercial electronic messages will be required.

No official announcement has been made regarding the date on which the new *Anti-Spam Act* will become law – it might be late in 2013 or early 2014.

We will continue to monitor the *Anti-Spam Act* and any regulations, and will issue a subsequent newsletter when the date that the *Act* will become law is known.

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