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NEW CANADIAN ANTI-SPAM REGULATIONS IMPOSE TOUGH RESTRICTIONS ON U.S. BUSINESSES

Its name is verbose. Its reach is broad. Compliance with it is Kafkaesque. But any business that sends out mass e-mail communications should pay close attention to this new Canadian anti-spam statute.

The "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" (the Act), went into effect on July 1, 2014. Although its goal is to root out unsolicited e-mail spam, the "commercial electronic messages" regulated by the Act can include a vast array of messages that most people would consider entirely innocuous. The Act covers e-mails sent to anyone in Canada, dictates strict content and consent requirements and, when violated, can impose penalties of up to $10 million.

A business must comply with the Act whenever it sends a commercial electronic message to a person in Canada. Such a message is one that "has as one of its purposes… to encourage participation in a commercial activity." A "commercial activity" includes any "act or course of conduct that is of a commercial character, whether or not the person who carries it out does so in the expectation of profit." Far from covering only explicit advertising, this broad definition can encompass all kinds of business communications, including general updates, newsletters and other routine notifications.

The Act is based on an opt-in philosophy. The default assumption is that a recipient does not want to receive commercial electronic messages. Accordingly, such messages can only be legally sent if a recipient has consented, either implicitly or explicitly. A catch-22 situation arises, however, when soliciting explicit consent, because the very act of asking for such consent can itself be considered a commercial electronic message regulated by the Act. There are several ways in which consent can be implied, the most generally applicable of which involves recipients who have purchased goods or services from the sender within the past two years.

Even after a sender has received consent from a recipient, the communication remains subject to certain content requirements, including a clear indication of who is sending the communication, a means for the recipient to readily contact such person, and a user-friendly mechanism that allows the recipient to unsubscribe from all further communications from the sender. In

addition to potentially massive fines – damages of up to $200 per occurrence and penalties of up to $10 million – the Act creates a private right of action on the part of any person who has received non-compliant communications.

The Act is new. It is too soon to tell how zealously it will be enforced and who the primary targets will be. In the meantime, all businesses, including those located in the United States, need to understand the risks involved with sending mass e-mail communications of any nature to people located in Canada. For many businesses, the most advisable approach for the time being may be the most draconian – removing all Canadian recipients from their e-mail distribution lists.

If you have concerns about your company's email distribution policies, please contact the author, Daniel T. Janis, or one of the attorneys in our Business Law Practice.

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