

CASL

Many firms lack understanding of CASL rules, compliance, survey shows

By Tom Venetis

(May 29, 2017, 6:09 AM EDT) -- A survey of over 200 Canadian companies has highlighted gaps in how many understand what is required of them under the Canadian Anti-Spam Law (CASL) and whether they have compliance strategies in place to make sure they don't run afoul of the legislation.



David Elder, Stikeman Elliott

CASL came into effect July 1, 2014, and establishes rules for the sending of commercial electronic messages and the installation of computer programs. CASL also prohibits the unauthorized alteration of transmission data. Fines can be imposed on individuals and companies for breaking CASL rules.

The Bridging the Gaps in Understanding and Compliance survey was conducted by Fasken Martineau and the Direct Marketing Association of Canada. It surveyed both large-sized companies and smaller and mid-sized firms across the country.

The survey found that even after three years of CASL being in force, companies still lack understanding about key elements of the legislation and many companies lack appropriate compliance policies with CASL. These include having written CASL compliance policies, employee training and regular compliance audits.

"Of significant concern is that many fundamental aspects of CASL are still not well understood — such as the types of messages governed by CASL, whether the sending of certain commercial electronic messages requires consent or an exemption, and how express consent can be obtained," the survey noted. "Of equal concern is the apparent lack of appropriate policies and procedures, including record keeping programs, within many organizations to support and evidence compliance with CASL."

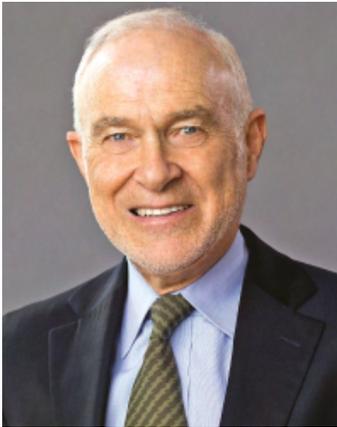
Some of the key findings in the survey found that 64 per cent of companies said they did not know that a CASL-compliant message requires more than just consent and a working unsubscribe mechanism; and 63 per cent said they were unaware that the CRTC can impose an administrative monetary penalty of up to \$10 million for each violation of CASL. Some 30 per cent did not know that directors can be personally liable for CASL violations by their organization, and 40 per cent did not appreciate that officers can be personally liable. A surprising 64 per cent said they either did not have, or didn't know if they had, a formal written CASL policy, and 60 per cent said that their organization does not audit CASL compliance.

David Elder, a counsel with Stikeman Elliott, said he was surprised by the findings.

"Certainly the clients that I represent are aware of CASL and are aware of the need for explicit consent; and they are certainly aware of the fact that there are very heavy financial penalties for non-compliance," said Elder. "It may be that the results skew differently when you move away from large businesses and look at smaller and mid-sized businesses where it would not surprise me that [CASL] would not be much on their radar."

Elder suspected that many smaller businesses may believe that CASL does not apply to them as they have direct and often long-standing personal relationships with their clients. "CASL does not seem to make a lot of intuitive sense to many small business people. In many cases, they are surprised by the obligations that they have to fulfil in order to be CASL compliant," he added.

"The CRTC has already pursued smaller companies and even individuals," said Andrew Nunes, partner and vice-chair of the technology law group at Fasken Martineau. "If smaller companies are trying to avoid the costs of compliance, the cost of non-compliance may well be greater, not to mention the potential reputational damage. While it is true that the CRTC will effectively take the size of the company into consideration when determining what an appropriate administrative monetary penalty is, size does not really matter as much as some may think."



David Young, David Young Law

David Young, principal at David Young Law, said he was not surprised by what the survey found, specifically that many businesses do not have regular and comprehensive audits for CASL compliance.

"An important reason for having such compliance programs in place is to be able to mount a due diligence defence under CASL," said Young. A due diligence defence means that if a company can show that it did everything it could to comply with CASL, used all the tools available to ensure CASL compliance and did regular compliance checks, the company may be forgiven if a breach of the CASL rules happens, he added.

This is going to be important as starting July 1, individuals and organizations will be able to bring forth a private right of action before the courts against businesses or people that contravene certain provisions of CASL.

"CASL allows companies to reduce or even avoid liability for a breach by showing that they took reasonable measures to prevent it," explained Derek Lackey, president of the Direct Marketing Association of Canada. "The report outlines a number of advisable practices, drawn from CRTC guidance, undertakings with companies and notices of violation. These include deploying a CASL compliance program that involves a documented CASL policy, personnel training and periodic audits.

"Our survey results show that many companies are not adopting these simple measures — creating unnecessary exposure to liability for those companies, and potential personal liability for their directors and officers. This liability can be significant: the maximum administrative monetary penalty for a CASL violation is \$1 million per violation in the case of an individual, and \$10 million per violation in the case of an organization," said Lackey.

Young recommended that companies of all sizes take an "all hands on deck" approach when it comes to CASL compliance and to make sure the appropriate programs are in place to regularly audit for compliance.