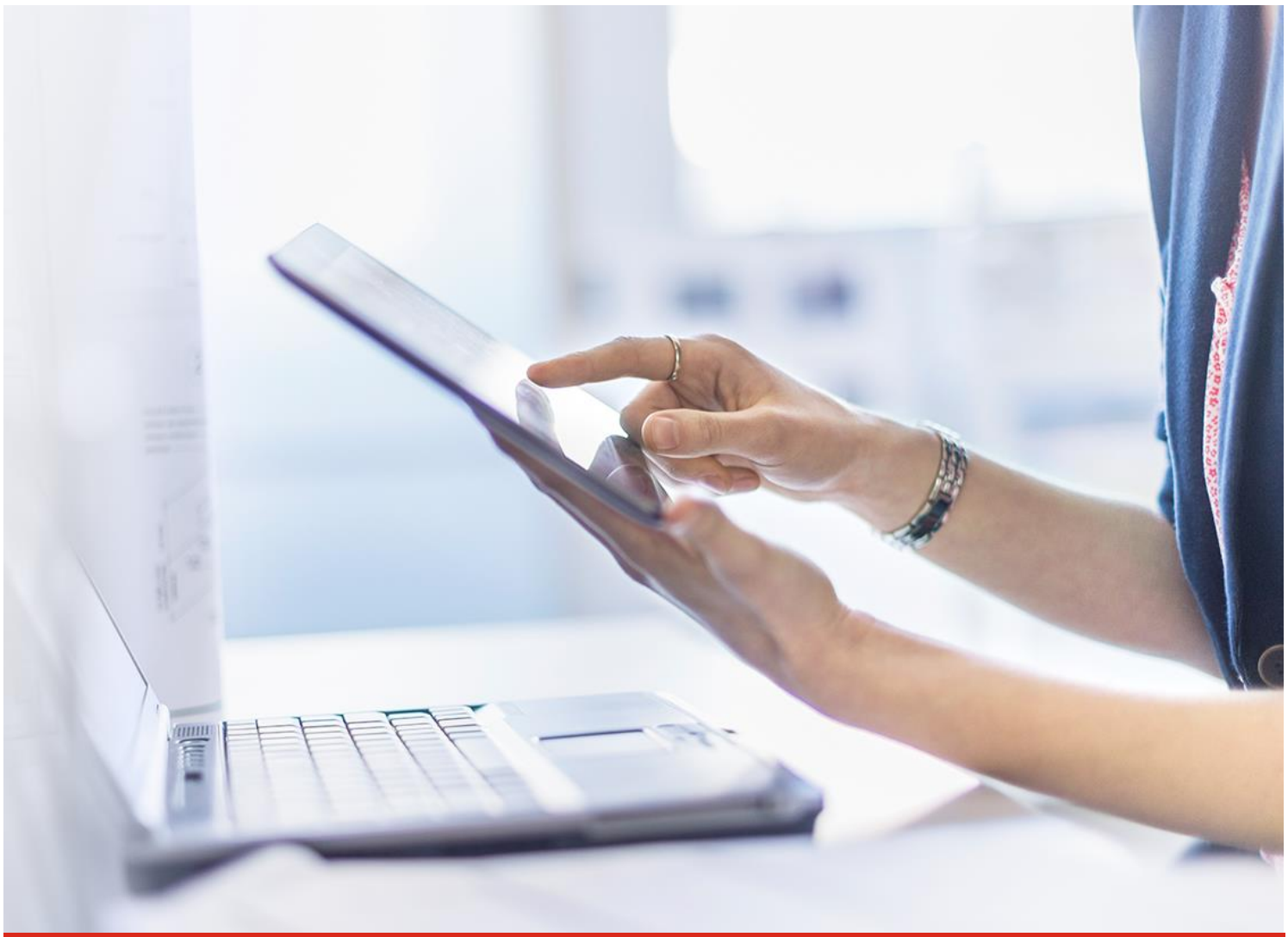

Review of the Canadian Anti-Spam Legislation

Rogers Communications Brief

October 17, 2017

ROGERS

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Review of the Canadian Anti-Spam Legislation
House of Commons Standing Committee on Industry, Science and Technology

Via email: indu@parl.gc.ca

Review of the Canadian Anti-Spam Legislation – Rogers Brief

On September 29, 2017, the Standing Committee on Industry, Science and Technology opened its review of the Canadian Anti-Spam Legislation (CASL), inviting Canadians to comment on the scope, substance, and enforcement of the CASL, along with relevant technological developments. The following comments in response to the above-noted review, are filed on behalf of the Rogers Group of Companies ("Rogers").

Regards,

Deborah Evans
Associate Chief Privacy Officer
Corporate Affairs

Attach.

Introduction

Rogers welcomes the opportunity to provide input into the review of the Canadian Anti-Spam Legislation (CASL). In our experience, CASL may have had some effect in reducing the receipt by Canadians of unsolicited commercial emails from legitimate Canadian businesses, although it is unclear what effect, if any, the law has had on the most damaging and deceptive types of spam, which originates from criminal organizations, largely based outside the country. It has also provided businesses with a framework to ensure they can effectively communicate with their customers, although presents challenges to reaching out to prospective customers. CASL has managed to strike a balance between giving customers more power to control what commercial electronic messages (CEMs) they receive while also giving companies enough latitude to ensure continued customer engagement. This is particularly important at a time when driving greater participation in the digital economy is a key public policy priority.

Consent is the key facet of CASL and in a world that is increasingly reliant on digital experiences and technologies, this legislation has benefited Canadians by giving them more control over the messages they receive, at least from Canadian businesses. The requirements for obtaining consent and providing simplified unsubscribe options ensures that consumers can decide when the relationship with an organization starts and ends. Like all companies committed to CASL, since the legislation was introduced we have established internal processes to fulfill our regulatory obligations. In doing so we have invested millions in implementing an automated CASL Compliance Regime. It is structured around 6 components Strategy, Governance, Policies, Training, Audit, and Reporting to ensure that we have embedded a culture of CASL compliance and awareness company-wide.

In reflecting on the last 3 years since CASL came into force, there are certain elements of the legislation that could benefit from further clarification.

The following comments in response to the Standing Committee on Industry, Science and Technology's Review of CASL, are filed on behalf of the Rogers Group of Companies ("Rogers").

Comments on the Statutory Review of CASL

This review by the Industry Committee, is a valuable opportunity to ensure the legislation can give greater certainty to consumers and provide added clarification for businesses interpreting CASL. It is important that the committee's study reviews the legislation more generally, rather than restrict its study to Private Right of Action (PRA) specifically. The legislation itself contains a mandatory review within three years, so it is crucial that all aspects of CASL are considered under this study.

Substance

Rogers considers that CASL had some effect in achieving its desired goal of increased consumer protection. From our perspective, the legislation must remain neutral and flexible to ensure that Canadian business can

continue to thrive in an increasingly competitive global marketplace. This review provides an opportunity to review what in CASL has worked well, what could benefit from further clarity, and what has not worked well.

In reviewing the legislation, and based on Rogers' experience, there are concerns with the application of Subsection 6(6). This subsection states that service type emails (for example– a message to tell you that your mobile device is roaming) are exempt from CASL's consent requirements, however, purport to require that such messages include an unsubscribe mechanism. In Rogers' view, there is no reason why legislation law created to regulate electronic commercial activity should be applied to non–commercial messages. Furthermore, these types of "notification messages" do not fall within the statutory definition of a CEM, so should not be subject to the message form and content requirements: Subsection 6(6) of the Act conflicts with the definition of a CEM, and may have the unintended effect of greatly expanding the definition of CEM itself.

Providing an unsubscribe mechanism for service messages gives consumers the impression that they can opt out from receiving these messages. This is misleading as many service messages are sent for reasons of legal compliance. This confusion can lead to a negative consumer experience and is a potential complaint driver. Rogers recommends removing Subsection 6(6) from the legislation in an effort to limit the scope of CASL specifically to commercial electronic messaging, perhaps issuing instead guidance material indicating, for greater certainty, what types of messages are not CEMs. This would be a positive step forward in removing ambiguity for consumers and business.

Enforcement

To be competitive in today's marketplace, companies must be focused on providing a great customer experience. While no company is perfect in this regard, we all aspire to be. This customer experience includes CASL compliance as it paves the foundation for how our consumers interact with us. To date, enforcement activity seems to be targeted at well–intended Canadian companies trying to comply with the Act rather than fraudulent spammers.

The current structure of CASL empowers the CRTC to enforce compliance through a range of remedies, including the use of Administrative Monetary Penalties (AMPs). Rogers acknowledges that AMPs are necessary for enforcing compliance in the more egregious cases. The current enforcement model is however flawed. In particular, it lacks any framework for assessing penalties based on the magnitude of the violation. Further, AMPs are not always an appropriate measure and the CRTC should use all available enforcement tools such as warning letters and citations, prior to formal investigations, in particular with regards to well–intended companies making all attempts to comply with the Act.

To improve the current enforcement provisions, Rogers recommends a tiered assessment model for administering penalties. In the case of the first violation of CASL, where an organization's act of non–compliance is an unintended information system error, the CRTC should issue a warning letter or citation. This would be a more

appropriate way to tackle infringements that are inadvertent and should not be considered material.

When an AMP is required, there should be an established framework to determine the level of the fine based on the proportionality of the violation, where the AMP increases with the magnitude and frequency of the infringement. For example, a deliberate malware dissemination would warrant a much higher penalty than sending a CEM without consent or sending a CEM that omits a required field by mistake. For every subsequent violation of the same nature, the fines would grow in severity.

An enforcement system based on proportionality would greatly benefit Canadian companies, providing them with greater certainty and transparency when sending out CEMs. It would also leave room for unintended errors, and finally it would act as a major deterrent to anyone contemplating illegal spam activity.

Scope

With the changes outlined above, Rogers believes that Canadian consumers will be well-protected by the regulatory bodies tasked with enforcing CASL – at least with respect to legitimate Canadian businesses. With that in mind, Rogers supports the June 7, 2017, decision by the Federal Minister for Innovation, Science & Economic Development to indefinitely suspend CASL' Private Right of Action (PRA) provisions. CASL as drafted provides sufficient protections for consumers. Any further penalty regimes, like the Private Right of Action, are unnecessary and do not represent a proportionate response to the stated objective of CASL- increased consumer protection.

The current laws sufficiently protect Canadians from spam. There is no demonstrated need for a parallel regime, which essentially puts the assignment of penalties in the hands of private actors. If the PRA proceeds, it has the potential to create an environment that encourages consumers to pursue businesses that may have experienced an un-intended information system error rather than targeting the legitimate spammers, many who fall outside the jurisdiction of CASL. This is particularly a concern with respect to the "statutory damages" aspect of the PRA, where plaintiffs can claim up to $200 for each violation, without proving damages. The intention of the legislation is to protect Canadians from spam without hindering business. For that reason, Rogers recommends eliminating the PRA provisions of the Act.

Conclusion

Based on our experience and review of the legislation, most Canadian companies have learned to live with CASL, and the law have brought some discipline to the electronic marketing practices of Canadian companies, but it does require some targeted clarifications. In summary, we propose:

- removing Subsection 6(6) from the legislation in an effort to limit the scope of CASL specifically to commercial electronic messaging
- first-time offenders should be issued warning letters or citations if the violation was the result of an unintentional error

- penalties should be based on framework of proportionality where fines increase with the severity and frequency of the infringement.
- the Private Right of Action (PRA) provisions in the Act should be removed as they are unnecessary

We thank the Committee for the opportunity to provide these comments in this very important review.