

## Impact of New Misleading Advertising Rules on Electronic Messages

So much attention has been focused on the electronic message and computer program provisions of Canada's Anti-Spam Law (CASL) that there is a risk of overlooking some subtle but meaningful provisions in the legislation dealing with misleading advertising.

In a development that could have a real impact on how businesses engage in email marketing, CASL amends the Competition Act to prohibit false or misleading representations made in commercial electronic message, by making it an offence (a new Section 52.01) and a new reviewable practice (a new Section 74.011) to make:

- any representation in an electronic message that is false or misleading in a material respect;
- any false or misleading representation made in a "locator", which is a name or other information used to identify the source of data in a computer system (a URL is an example); or
- any false or misleading representation in the sender information or subject matter of an electronic message

The first bullet above is merely an application of the current general prohibition on misleading representations to electronic messages. However, the latter two bullets create unique and specific requirements regarding representations made in the locator, sender information and subject matter of an electronic message. Importantly, there is an absence of any materiality threshold in these provisions. This means that any false or misleading representations made in the sender information, subject line or any locator in an electronic message are captured, regardless of its impact on a recipient or the degree of misrepresentation involved.

While it is difficult to imagine an instance where a legitimate business would deliberately include false locator or false sender information in an email, it is not so uncommon to see representations made in the subject line that are intended to be read in context of the body of the email. For example, the subject line may offer free or discounted products or services, and the recipient must open the email to review the full terms and conditions of the offer, which could qualify the representation made in the subject line.

If such an email is reviewed under the pre-amendment version of the Competition Act, (i) the representation in the subject line would have to be false or misleading in a material respect to raise any issues, and (ii) the representation should arguably be considered together with the body of the email as part of the general impression test. However, because the amendments create a standalone prohibition for false or misleading representations in the subject line of an email, with no materiality qualifier, the subject line might be reviewed by the Competition Bureau in isolation from the body of the email. Without the additional context of the body of the email, the subject line may be seen as false or misleading.

To address the compliance challenges created by the new rules, businesses will need to revisit their electronic marketing campaigns. This will include considering whether the sender information, subject line or any locator in an electronic message is false or misleading when viewed in isolation from the rest of the email.

For more information about how Osler can help you with your compliance activities, please contact:

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