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New CASL FAQ On Meaning of "Sender" Applied to ESPs

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One of the issues under Canada's Anti-Spam Legislation (CASL) that we have focused on over the past few years is the concept of who is a "sender" for the purposes of CASL. This is relevant mostly for identification purposes -- if a service provider is the sender, they would have to be identified as such in emails sent through their system.

This is not a good approach, for many reasons, and we have offered our position on this issue to Industry Canada and the CRTC and asked them to provide clarity. The CRTC provided somewhat of a response in guidelines that were published in 2012, but it was ultimately not helpful.

Fortunately the CRTC published the following guidance on their [FAQ page](#) yesterday, which is more helpful:

"You must identify yourself and the persons on whose behalf a commercial electronic message (CEM) is sent. When a CEM is sent on behalf of multiple persons, then all of these persons must be identified in the CEM. However, where it is not practicable to include this information in the body of a CEM, then a hyperlink to a webpage containing this information is acceptable as long as the webpage is readily accessible at no cost to the recipient of the CEM. The link to the webpage must be clearly and prominently set out in the CEM. Also, not every person who is involved in the sending of a CEM must be identified. Rather, only the persons who play a material role in the content of the CEM and/or the choice of the recipients must be identified. For example, an email service provider that provides a service to its clients to send emails, where the email service provider has no input on the content of the message, nor on the recipient list, does not need to be identified in the CEMs sent by clients using its service. Bear in mind however, that though the email service provider does not need to be identified in this scenario, it still shares its responsibilities with its clients in terms of ensuring that the CEMs are sent with valid consent (either express or implied) and contain an unsubscribe mechanism. Both the email service provider and its clients are sending, causing or permitting to send CEMs, and as such, they both have obligations under CASL."

This may not take us quite as far as we'd like to be, as there is still room for interpretation. For example, this leaves some uncertainty when a service provider does have input on the content of the message or the choice of recipients, even though the client has the final decision (I would still argue that identification should not be necessary). However, it at

least clearly recognizes that the ESP is not the sender for the purposes of CASL by default, and may be of assistance to members who are being told by their clients that they are the sender and need to be identified as such. I think the CRTC felt the need to leave some room to conclude that an ESP is the sender in some cases, so they avoided closing the door on the possibility (but that is just my view).