



 **Pitblado**^{LAW}



Construction Association of Nova Scotia Anti-Spam Webinar

Brian Bowman – December 9, 2013



Monty Python



I DON'T LIKE SPAM!



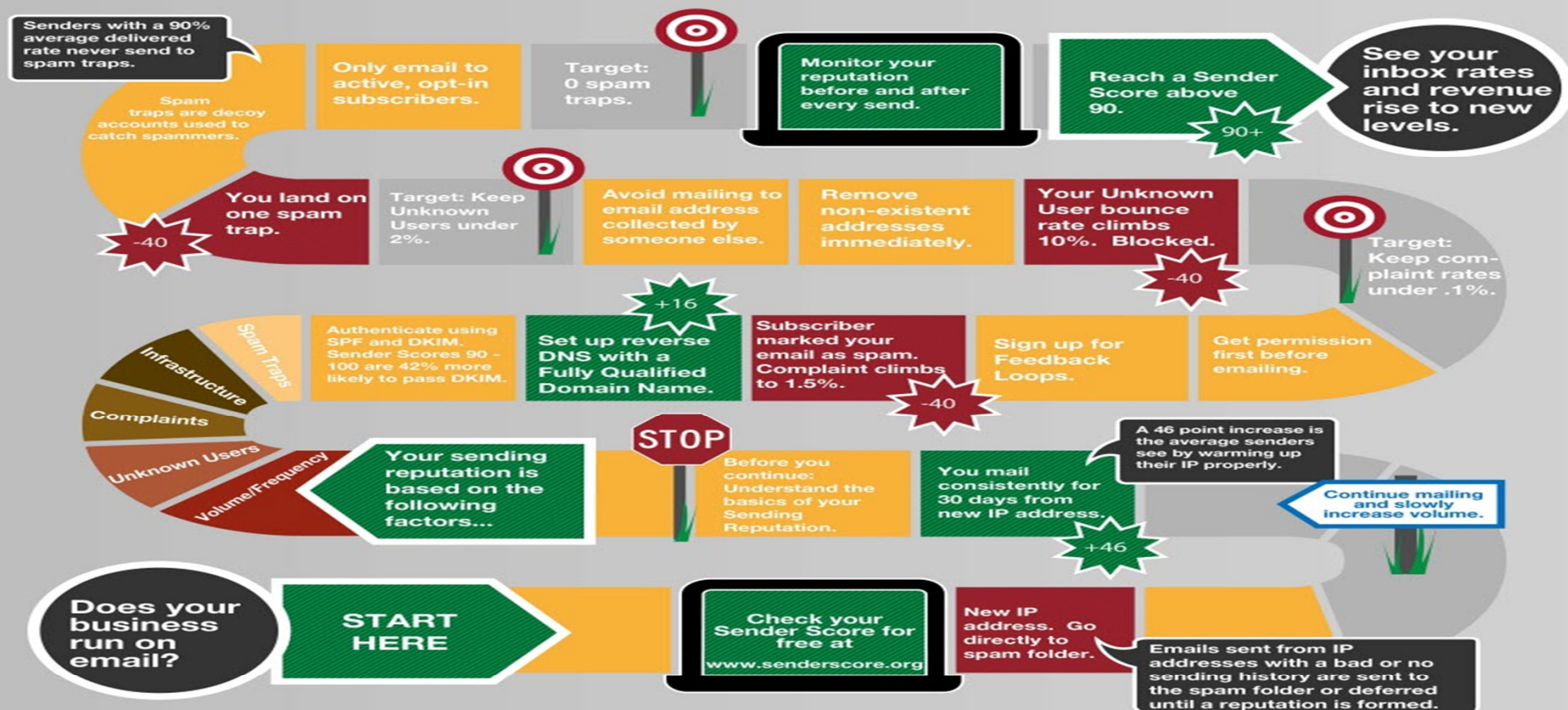
I DON'T LIKE SPAM!

Copyright 2003 by Randy Glasbergen.
www.glasbergen.com



**"It's not the most sophisticated Spam blocker
I've tried, but it's the only one that works!"**

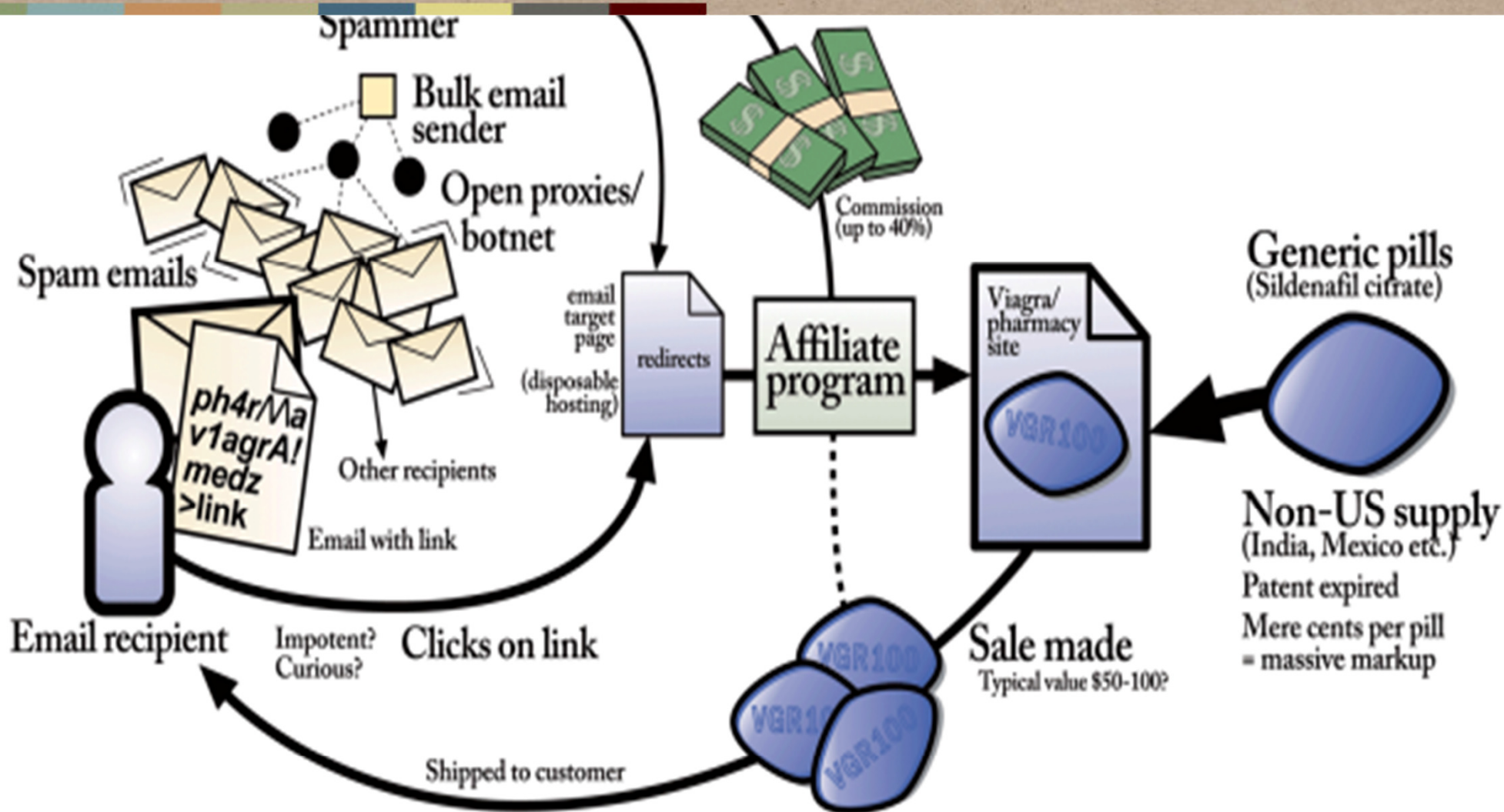
The Long and Winding Road: How Your Email Does (or Doesn't) Get to the Inbox



www.returnpath.net

Return Path's free online email reputation offering, SenderScore.org, comprises the world's most comprehensive database of email sender reputation. An IP's sender score is calculated by examining 130 million IP addresses and 20 trillion messages from ISPs and spam filter providers from around the world to help determine characteristic mailing patterns of spammers and legitimate email senders. All scores are based on a scale of 0 to 100, where 0 is the worst, and 100 is the best possible score. A score represents that IP address' rank as measured against other IP addresses, much like a percentile ranking. Think of it as a credit score for your email program. Everyone sees what the standards are, who is failing them, and what to do about it. In the end, a good email reputation becomes the critical deciding factor if your email reaches the inbox.

Pitblado
We understand



How Viagra spam works

Industry Canada

Spam represents nearly 90 percent
of worldwide e-mail traffic



Source: <http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00569.html>

Industry Canada:

Once established, spam slows networks down, and spam-borne viruses and other malicious software (malware) are used to operate networks of "zombie" computers (botnets) without their owners' knowledge

Source: <http://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00569.html>



Symantec Intelligence Report: February 2013



- Spam – 65.9 percent of all e-mails (an increase of 1.8 percentage points since January)
- Phishing – One in 466.3 e-mails identified as phishing (an increase of 0.018 percentage points since January)

Source: http://www.symanteccloud.com/globalthreats/overview/r_mli_reports

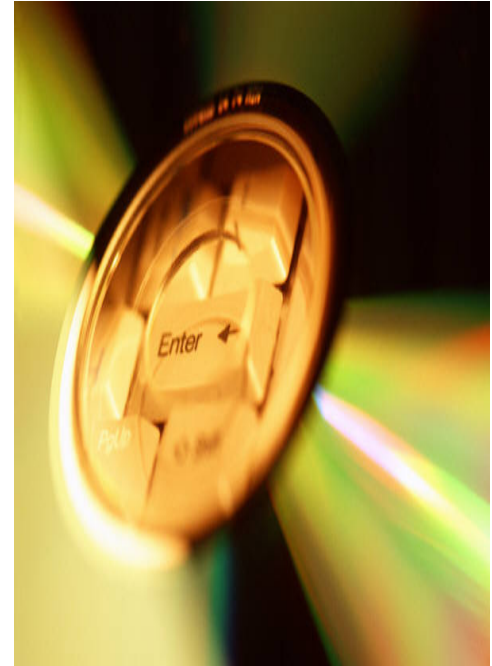
Symantec Intelligence Report: February 2013



- Malware – One in 408.2 e-mails contained malware (a decrease of 0.11 percentage points since January)

Source: http://www.symanteccloud.com/globalthreats/overview/r_mli_reports

- Spam accounted for 69% of all e-mail in 2012, down from 75% in 2011
- 30 billion spam messages are still sent on a daily basis

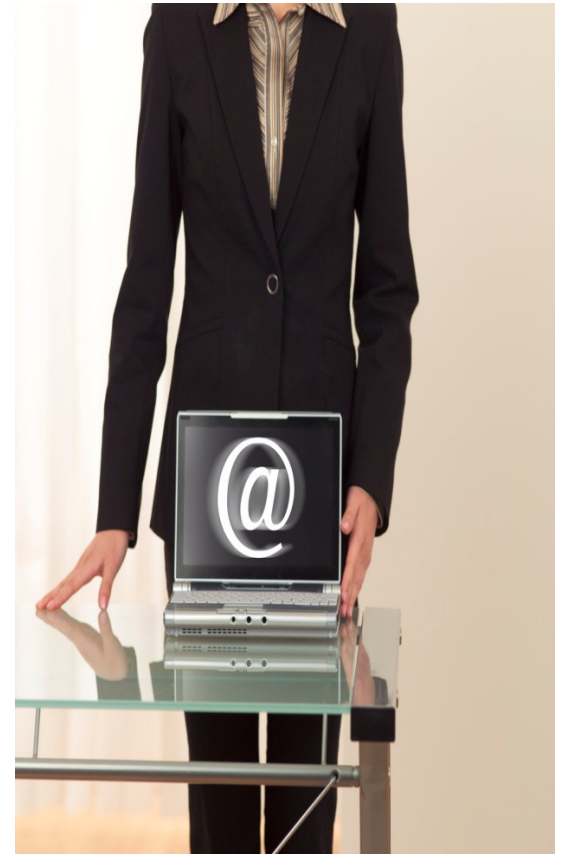


Source: http://news.cnet.com/8301-1009_3-57579847-83/targeted-cyberattacks-jump-42-percent-in-2012-symantec-says

Why is Spam a Problem?

In 2005, 22% of computer users say they spend less time on e-mail because of spam

Source: https://www.trustwave.com/support/labs/spam_statistics.asp



The California legislature found that spam cost United States organizations alone more than \$13 billion in 2007, including lost productivity and the additional equipment, software, and manpower needed to combat the problem.

Source: <http://www.spamlaws.com/state/ca.shtml>



SPAM:

Causes consumers to miss legitimate e-mail messages because they are either lost in the flood of spam, mistaken for spam, or filtered out in the effort to manage spam.

Source: http://www.cippic.ca/spam#faq_problem-spam



SPAM:

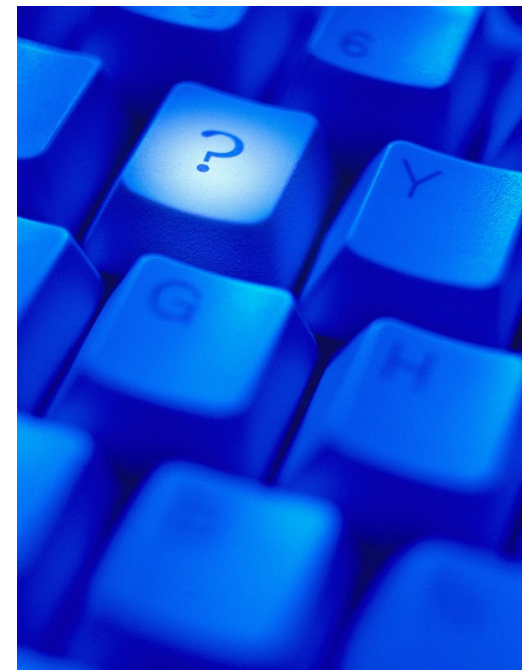
- Reduces the ability of businesses to rely on e-mail as a communications tool
- Costs businesses millions of dollars per year in lost productivity

Source: http://www.cippic.ca/spam#faq_problem-spam



Canadian Internet Policy & Public Interest Center:

The volume of spam has now reached the point at which it threatens the viability of e-mail as a reliable communications medium for businesses and consumers.



Source: http://www.cippic.ca/spam#faq_problem-spam

Most Common Source Countries of Spam (October, 2011)

1. India – 13.9%
2. Russia – 9.0%
3. Vietnam – 7.9%
4. South Korea – 6.0%
5. Finland – 6.0%
6. China – 4.7%
7. Brazil – 4.5%
8. United States – 3.2%



Source: http://www.cisco.com/en/US/prod/collateral/vpndevc/security_annual_report_2011.pdf

Most Common Source Countries of Spam (October, 2012)

1. India - 11.9%
2. Brazil - 7.9%
3. United States – 6.6%
4. **Canada – 5%**
5. Russian Federation – 4.6%
6. Vietnam – 4.1%
7. Peru – 4%
8. South Korea – 3.3%
9. Romania – 3%
10. Turkey – 2.9%



Source: <http://www.emailtray.com/blog/great-news-for-email-users-spam-rates-dropped-by-nearly-10-percent-in-october-2012/>

SMS = The next frontier

- 60% of U.S. adults say they've received spam SMS messages within last year
- 13% clicked on links in messages and 9% called phone numbers in them



Source: <http://www.csoonline.com/article/729394/sms-becoming-meaty-attraction-for-spammers>

- Anti-Spam laws in other countries
 - until recently, Canada **only** G8 country without specific anti-spam legislation
 - common element: targeting of “commercial electronic messages”
 - United States *CAN-SPAM Act*, Australia *Spam Act 2003* based on opt-out consent
 - EU *Directive on Privacy and Electronic Communications* requires opt-in consent





Who is being targeted by
Anti-Spam Law?



YOU!



OVERVIEW

*An 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, and to amend the Canadian Radio-television and Telecommunications Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act (the “**Act**”)*

OVERVIEW

- Canada's 1st comprehensive anti-spam law
- Designed to prohibit sending of unsolicited commercial electronic messages to recipients who have not consented to being sent such messages
- First provisions came into force April 1, 2011



OVERVIEW

- Purpose is encouragement of participation in commercial activity while providing adequate safeguards against unwanted spam
- Requires most “commercial electronic message” (CEM) senders to obtain consent from recipients before message is sent, subject to exemptions
- Message must be “commercial”



COMMERCIAL ELECTRONIC MESSAGES


- Message must be of “commercial character” to fall within scope of Anti-Spam Law
- Applies to electronic messages including:
 - offers to purchase or sell goods and products
 - offers to provide a business, investment or gaming opportunity
 - advertisements and promotions, including in relation to a person

COMMERCIAL ELECTRONIC MESSAGES

- Applies to more than just e-mail, very broad application
 - includes text, sound, voice or image messages
 - applies to smartphones and personal digital assistance
 - would also apply to some content published on social media (SM) sites

COMMERCIAL ELECTRONIC MESSAGES

Even Facebook direct messages may be covered!



The image shows a screenshot of a Facebook 'New Message' dialog box. At the top left, there is a 'Messages' header with a speech bubble icon. To the right is a 'Search Messages' input field. Below the header, there are three buttons: 'Mark as Unread', 'Report Spam', and 'Delete'. The main area of the dialog is titled 'New Message' in a blue header. It contains three input fields: 'To:', 'Subject:', and 'Message:'. At the bottom left, there is an 'Attach:' label followed by three icons: a folder, a camera, and a document. At the bottom right, there are two buttons: 'Send' and 'Cancel'.

CONSENT OBLIGATIONS

- Sender must obtain either *express consent* (“Opt-in”) or *implied consent* from recipient before CEM is sent
- Express consent requires sender to:
 - identify sender
 - provide contact information of sender
 - create unsubscribe mechanism for recipient

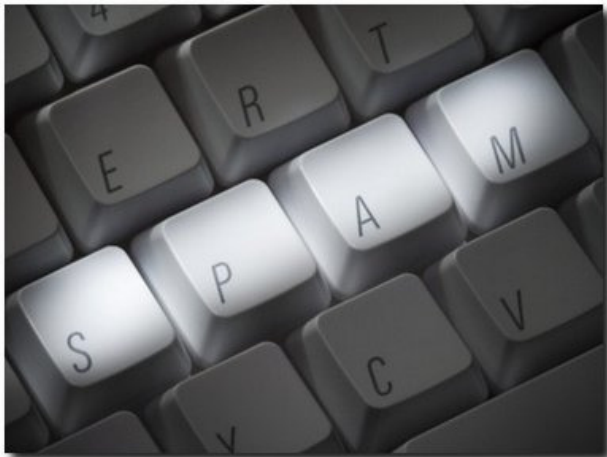


CONSENT OBLIGATIONS

- Implied consent may apply where:
 - existing business relationship
 - approved existing non-business relationship (ie. non-profit organization, political party) – important time limits apply
 - recipient has previously conspicuously published e-mail address
 - recipient has previously provided e-mail address to sender and message is relevant to recipient's business, role, function or duties in a business or official capacity

UNSUBSCRIBE MECHANISM

- CEMs must contain an unsubscribe (“Opt-out”) mechanism:
 - allowing recipient to opt out from receiving further messages
 - specifying where this indication can be sent



CONSENT EXEMPTIONS

- Exemptions include:
 - Existence of family relationship
 - Providing requested quotes or estimates
 - Commercial transaction dealings already agreed to be recipient
 - Warranties, product recall, safety or security information
 - Information about product upgrades related to previous transaction
 - Information directly relating to employment relations or benefit plan
 - Delivery of product, good or service from previous transaction

ANTI-SPYWARE PROVISIONS

- No spyware, malware, or “botnets”
 - Provisions attack surreptitious installation of computer programs
 - Also cannot cause electronic messages to be sent from third party computers without consent

ANTI-SPYWARE PROVISIONS

- What's a "Botnet"?
- Responsible for up to 80% spam!



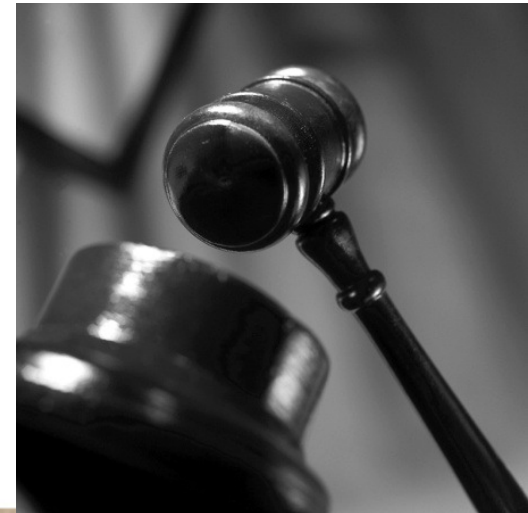
AMENDMENTS TO PIPEDA

- Expanded power for Office of the Privacy Commissioner of Canada



AMENDMENTS TO COMPETITION ACT

- Modernization, supply spam-fighting tools to Competition Bureau
 - easier for Competition Bureau to access court-ordered enforcement
 - new offence: false or misleading representations by electronic message



AMENDMENTS TO COMPETITION ACT



- Penalties include **imprisonment**

PENALTIES

- **Canadian Radio-television Telecommunications Commission (CRTC)** given broad powers, including:
 - demand production and preservation of documents
 - seek *ex parte* warrants for investigatory searches



PENALTIES

- Detailed penalty regime for contravention of offences
- Severe penalties for engaging in prohibited activities, including (for each violation):
 - fines up to \$1 million for individuals
 - fines up to \$10 million for organizations



PENALTIES

- Private Right of Action
 - also available to victims of misleading electronic messages under Competition Act and data mining of personal information under PIPEDA
 - remedy is to apply to court for compensation for damages
 - offender also fined: maximum of \$1 million for each day of contravention

REGULATIONS

CRTC Regulations

- Proposed by CRTC, not yet in force
- Key features of Regulations:
 - more information to be included in CEMs
 - form of CEMs
 - information to be included in request for consent
 - specified functions of computer programs

REGULATIONS

Information to be Included in CEMs (“Regulation 2”)

- Subsection 6(2) of Act says CEM must be in prescribed form:
 - information that identifies sender and person on whose behalf CEM sent
 - information enabling recipient to readily contact one of these persons
 - unsubscribe mechanism

REGULATIONS

- Regulation 2 **adds** requirements for info that must be included in CEM:
 - name by which sender carries on business (if different from their name)
 - same applies with respect to CEMs sent out on behalf of another person (i.e. must include name by which person on whose behalf CEM sent carries on business)
 - where CEM is sent on behalf of another person, must have statement identifying sender **and** person on whose behalf CEM is sent
 - mailing address plus either phone number or e-mail/web address of sender, or person on whose behalf CEM is sent (if different)

REGULATIONS

- If not practicable to include all this info in unsubscribe mechanism, then may be posted on webpage that is:
 - readily accessible by recipient of CEM at no cost to them
 - clearly and prominently referenced in CEM

REGULATIONS

Form of CEMs (“Regulation 3”)

- Info referred to in Regulation 2 must be set out clearly and prominently!

REGULATIONS

- Unsubscribe mechanism as required under the Act must be able to be readily performed
 - Subsection 6(2)(c) of Act requires unsubscribe mechanism to:
 - enable recipient of CEM to indicate at no cost to them that they wish to no longer receive any CEM using either the same means by which the CEM was sent or any other equally effective electronic means
 - specify electronic address or link to a www page that can be accessed through a web browser, to which indication may be sent

REGULATIONS

Information to be Included in a Request for Consent (“Regulation 4”)

- Makes express consent requirements in Act more onerous
- Subsection 10(1) deals with obtaining of consent for unsolicited CEMs, altering transmission data and installation of computer programs

REGULATIONS

- Regulation 4 requires person seeking consent to:
 - clearly state purpose for which consent is sought
 - identify person seeking consent
 - disclose any other prescribed information
- With respect to installation of computer program on another person's computer, function and purpose of computer program to be installed must be provided

REGULATIONS

- Consent must be obtained either **orally** or in **writing** and must be sought separately for each act
 - i.e. each time person seeks to send unsolicited CEM, alter transmission data or install computer program on another person's computer

REGULATIONS

- Also requires that a request for consent must include:
 - name by which person seeking consent carries on business (if different from their name) or name of person seeking consent
 - if consent sought on behalf of another person, name of that person or their business name
 - if consent sought on behalf of another person, statement identifying person seeking consent as well as person on whose behalf it is sought

REGULATIONS

- Further requirements...
 - mailing address and either phone number or e-mail or web address of person seeking consent (or, if different, person on whose behalf consent sought)
 - also phone number must provide access to either agent or voice messaging system
 - a statement indicating that consenting individual may withdraw consent

REGULATIONS

Specified Functions of Computer Programs (“Regulation 5”)

- Pertains directly functions in relation to installing of computer programs on another person's computer.
- Functions include:
 - collecting personal information stored on an individual's computer system
 - interfering with the owner's or an authorized user's control of the computer system

REGULATIONS

- Functions cont.
 - changing or interfering with installed settings, preferences or commands without knowledge of owner or an authorized user of computer system
 - changing or interfering with data stored on computer system
 - causing an individual's computer system to communicate with another computer system, or other device, without authorization of owner or authorized user of computer system
 - installing computer program that may be activated by a third party without knowledge of owner or authorized user of computer system

REGULATIONS

- Adds additional requirement that when using computer program which performs any of above functions, person seeking consent must bring program's material elements to attention of person whose consent is sought
 - 'Material elements' not really defined in the Act or the Regulations, taken to mean what program consists of including nature and purpose and reasonably foreseeable impact on computer

REGULATIONS

- Also person seeking consent must obtain acknowledgement in writing from person giving consent that information has been brought to their attention

COMPLIANCE

Initial questions and things to consider:

- Does the Anti-Spam Law apply to you?
- Do you need consent, and if you do, how do you get it?
- What content needs to be included in your CEMs?

COMPLIANCE

Senders must obtain consent to send CEMs and include prescribed content in CEMs. But there are exceptions ...

COMPLIANCE

Type of Message	Consent Required?	Include Required Content?
Not a CEM	No	No
CEM exempted from Anti-Spam Law	No	No
CEM exempted from consent requirements	No	Yes
Implied consent exception applies to CEM	Yes (but deemed to have been obtained)	Yes
CEM that requires express consent	Yes	Yes

COMPLIANCE

Does the Anti-Spam Law apply?

- Must be a CEM – if it's not a CEM, the Anti-Spam Law won't apply to it
- “Electronic message” includes e-mail, texts, Facebook messages, Twitter, Instagram, etc.
- Commercial purpose required (need not be sole or predominant purpose)

COMPLIANCE

Does the Anti-Spam Law apply?

- Some CEMs are exempted from the Anti-Spam Law, even though they are CEMs
- CEMs that are exempt do not require consent
- No need to include prescribed content, either

COMPLIANCE

CEMs Exempt from the Anti-Spam Law

Personal or family relationship	Sent to recipient about recipient's commercial activities
Between employees inside same organization	Between employees of different organizations, about existing business relationship
Response to commercial solicitation, request or complaint from recipient	Sent to visitor to Canada
Sent to satisfy legal obligations or to enforce legal rights	



COMPLIANCE

You've determined you're sending a CEM that is not exempt from the Anti-Spam Law.

Do you need consent, and if you do, how do you get it?

COMPLIANCE

The Anti-Spam Law permits some CEMs that are not exempt from the Anti-Spam Law to be sent without obtaining the recipient's consent.

The CEM must still contain the prescribed requirements (more on those later), but the sender can skip the consent requirement.

COMPLIANCE

CEMs for Which Consent is not Required

Providing a quote or estimate requested by recipient	Concerns ongoing subscription, membership or account
Facilitates commercial transaction	Delivering product or service previously contracted for by recipient
Information about warranties, recalls, safety or security	Third party referral
About employment relationship or related benefit program related to recipient	

COMPLIANCE

If no consent exemption applies, consent is required.

Two types of consent: implied consent and express consent.

The Anti-Spam Law provides that consent can be implied in certain circumstances. If so, sender need not obtain express consent.

COMPLIANCE

Implied Consent Arises If:

Existing business relationship between sender and recipient

- Purchases of products
- Business opportunities
- Bartering

All occurring within the last two years

Existing non-business relationship between sender and recipient

- Charities, political parties, qualifying associations
- Recipient has donated to, volunteered or had membership with sender in last two years

Recipient “conspicuously published” its electronic address, without indicating it does not wish to receive unsolicited CEMs (the website exemption)

Recipient provides electronic address to sender, without indicating it does not wish to receive unsolicited CEMs (the business card exemption)

COMPLIANCE

If you need consent, and implied consent is inapplicable, you need express consent.

Can be obtained orally, or in writing.

- If in writing, store date, time, purpose and manner of consent in database
- If orally, retain copy of audio recording or have independent third party verify consent

COMPLIANCE

Your consent request must contain the following:

- Name of person seeking consent
- Name of person on whose behalf the message is sent, if applicable
- Statement indicating which person is seeking consent and which person on whose behalf consent is being sought (if applicable)
- Contact information about sender, or person on whose behalf the message has been sent
- Statement that indicates recipient can withdraw consent to receive CEMs, in the future.

COMPLIANCE

Sample consent language might indicate:

Please type in your e-mail address below if you would like to receive e-mail and e-newsletters about products and services from ABC Ltd.

This e-mail is being sent to you by ABC Ltd. You can contact us at 123 Anywhere Street, Citytown, Province, A1A 1A1, or by e-mail at info@abcltd.com. Please visit our [Privacy Policy](#) for more information. <<**Underlined text links to a web page that contains the Privacy Policy**>>

You can stop receiving e-mail and newsletters about our products and services at any time, by [clicking here](#). <<**Underlined text links to a web page that contains an unsubscribe mechanism**>>

COMPLIANCE

CEMs that are subject to the Anti-Spam Law must contain prescribed content:

- Information about the Sender
- An unsubscribe mechanism

COMPLIANCE

CEMs must include the following information about the sender:

- Name
- If CEM sent on behalf of a third party, name of person sending CEM and name of person on whose behalf it was sent
- Sender's contact information (and contact information for person sending CEM on third party's behalf, if applicable)

Can place this information in the CEM, or on a website that can be accessed by link from CEM (good for SMS)

COMPLIANCE

CEM must also contain an unsubscribe mechanism:

- Easy to spot and use
- Must take effect within 10 days after unsubscribe request received
- Can direct recipient to a separate website, in order to process unsubscribe request

COMPLIANCE

Sample unsubscribe mechanism might indicate:

UNSUBSCRIBE

[Click here](#) to unsubscribe from receiving messages from ABC Ltd.

<<Underlined text links to a web page that contains the following>>

I would like to unsubscribe from receiving:

☐ All electronic messages from ABC Ltd. Please be advised that this may restrict our ability to send messages to you in the future.

☐ All promotional electronic messages from ABC Ltd. I will continue to receive notifications consisting of factual information about my account and services that ABC Ltd. already offers to me.

COMPLIANCE

Alternative unsubscribe mechanism embedded entirely within CEM:

UNSUBSCRIBE

If you do not wish to receive electronic messages from ABC Ltd. in the future, please reply by e-mail with your name <<**and other identifying information, such as an e-mail address**>> to unsubscribe@abcltd. <<**a dedicated e-mail address could be set up to receive unsubscribe requests**>> Please be advised that this may restrict our ability to send messages to you in the future.

COMPLIANCE

Best Practices, Trips and Traps

- Engaging third party service providers
 - Use an agreement, and address the Anti-Spam Law
 - Due diligence – can they comply, and will they?
 - Protect yourself – assess and apportion risk resulting from noncompliance

COMPLIANCE

Best Practices, Trips and Traps

- “Conspicuous publication” ... don’t get spammed!
 - You can be sent CEMs if you post an e-mail address on your website and fail to indicate you don’t want to be spammed
 - Indicate that your posting of your e-mail address does not indicate your consent to receiving unsolicited CEMs, for the purpose of the Anti-Spam Law

COMPLIANCE

Best Practices, Trips and Traps

- What about your current consents?
 - You may have collected consent to send customers marketing and promotional materials, under PIPEDA
 - Not clear if this will be effective consent, for the Anti-Spam Law
 - CRTC takes the position that express consent may not be opt-out consent, so we know previous opt-out consent won't be effective

COMPLIANCE

Best Practices, Trips and Traps

- What about charities and NFPs?
 - Clear the Anti-Spam Law will apply to these organizations, if they send CEMs
 - Is a request for a donation a CEM?
 - Determine if the “existing non-business relationship” implied consent provisions apply
 - Organization must be a charity, political party or qualified association – definitions from *Income Tax Act*

COMPLIANCE

Best Practices, Trips and Traps

- Audit and manage your Anti-Spam Law compliance
 - What kind of electronic messages are you sending, and are they CEMs?
 - Do you need consent, and do you have it? Make a plan to obtain required consent
 - Develop your unsubscribe mechanism
 - Create policies and train your staff

Thank you.

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 **Pitblado**^{LAW}

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