



Compliance and Enforcement Information Bulletin CRTC 2012-549

PDF version

Additional reference: Telecom Regulatory Policy 2012-183

Ottawa, 10 October 2012

Guidelines on the use of toggling as a means of obtaining express consent under Canada's anti-spam legislation

Introduction

1. On 15 December 2010, Royal Assent was given to *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 Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, S.C. 2010, c. 23 (the Act).
2. The Act gives the Commission the authority to regulate certain forms of electronic contact. Specifically, the Act prohibits the following:
 - the sending of commercial electronic messages (CEMs) without express or implied consent [paragraph 6(1)(a)];
 - the alteration of transmission data in electronic messages in the course of a commercial activity without express consent [paragraph 7(1)(a)]; and
 - the installation of a computer program on another person's computer in the course of a commercial activity without express consent [paragraph 8(1)(a)].

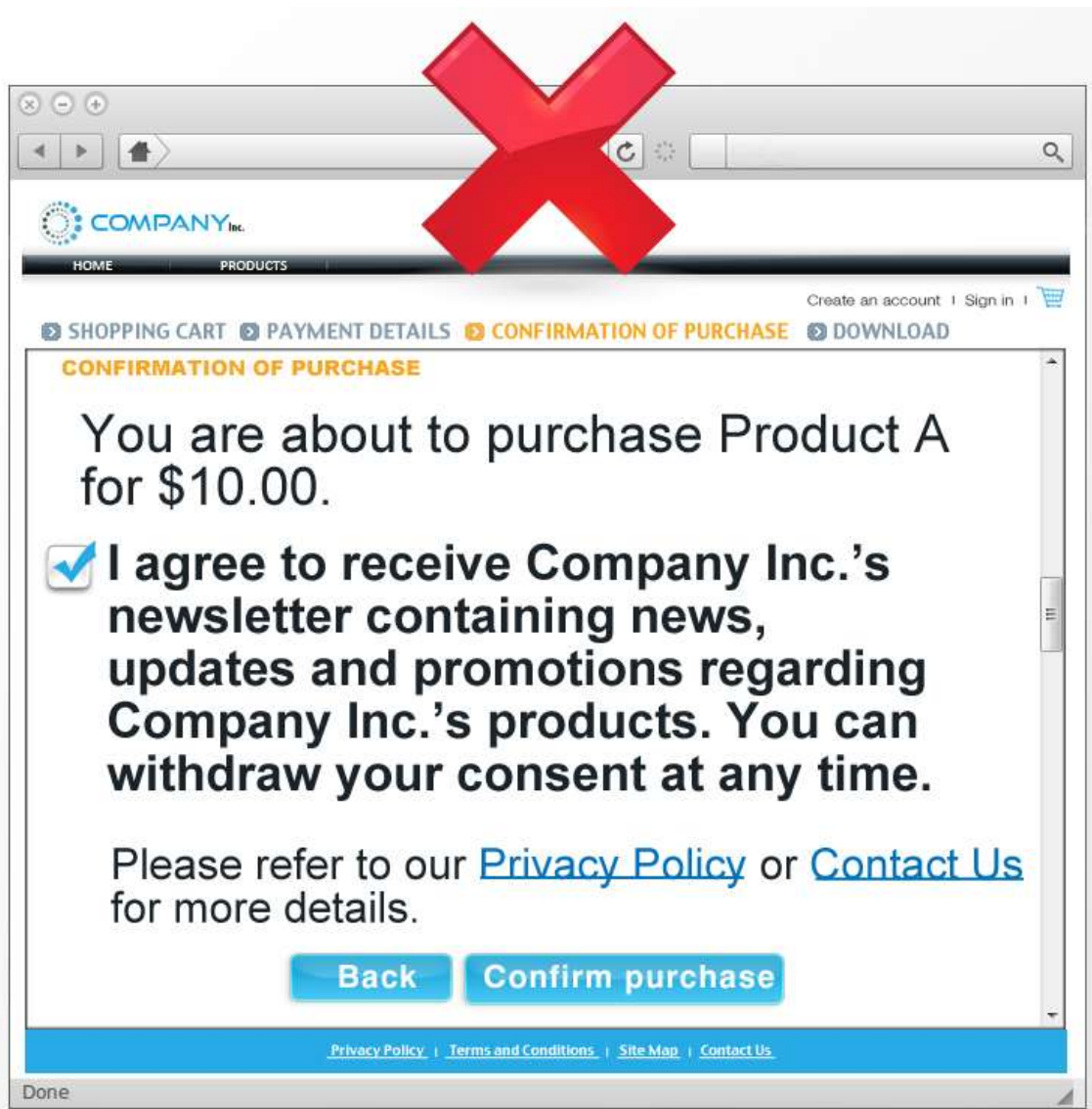
The fundamental underlying principle of the Act is that such activities may only be carried out with consent.

3. Section 10 of the Act, among other things, establishes the types of information that must be disclosed in order to obtain express consent pursuant to paragraphs 6(1)(a), 7(1)(a), and 8(1)(a) of the Act.

What is toggling?

4. The Commission notes that toggling is a means of switching from one state to another. The Commission also notes that toggling has been used as an opt-out consent mechanism¹ when the default toggle state assumes consent on the part of a person. A common example of such toggling is a pre-checked box on a website. The pre-checked box puts the onus on the person whose consent is being sought to take action in order to indicate that he or she does not consent, generally by unchecking the box. Consequently, inaction on the part of the person whose consent is being sought is considered to be equivalent to that person's consent.

Figure 1: An example of toggling that assumes consent



¹ Opt-out consent mechanisms assume consent unless the person whose consent is being assumed takes action to indicate otherwise.

Can toggling be used as a means to obtain express consent under the Act?

5. The Commission considers that in order to comply with the express consent provisions under the Act, a positive or explicit indication of consent is required. Accordingly, express consent cannot be obtained through opt-out consent mechanisms.
6. The Commission therefore considers that a default toggling state that assumes consent cannot be used as a means of obtaining express consent under the Act for the purposes of sending CEMs [paragraph 6(1)(a)], altering transmission data in electronic messages in the course of a commercial activity (e.g. network re-routing) [paragraph 7(1)(a)], or installing a computer program on another person's computer in the course of a commercial activity [paragraph 8(1)(a)].

What are acceptable forms of obtaining express consent under the Act?

7. The Commission considers that since express consent requires a positive or explicit indication of consent, express consent can be obtained through opt-in consent mechanisms.² The Commission also considers that a CEM in the form of a subscription email, text message, or other equivalent form cannot be used to elicit express consent pursuant to subsection 1(3) of the Act
8. The Commission notes that following receipt of express consent, confirmation of this receipt should be sent to the person whose consent was being sought.

² Opt in consent mechanisms enable persons whose consent is being sought to positively and explicitly express their consent.

Figure 2: Acceptable express consent mechanisms – Checking a box to indicate consent

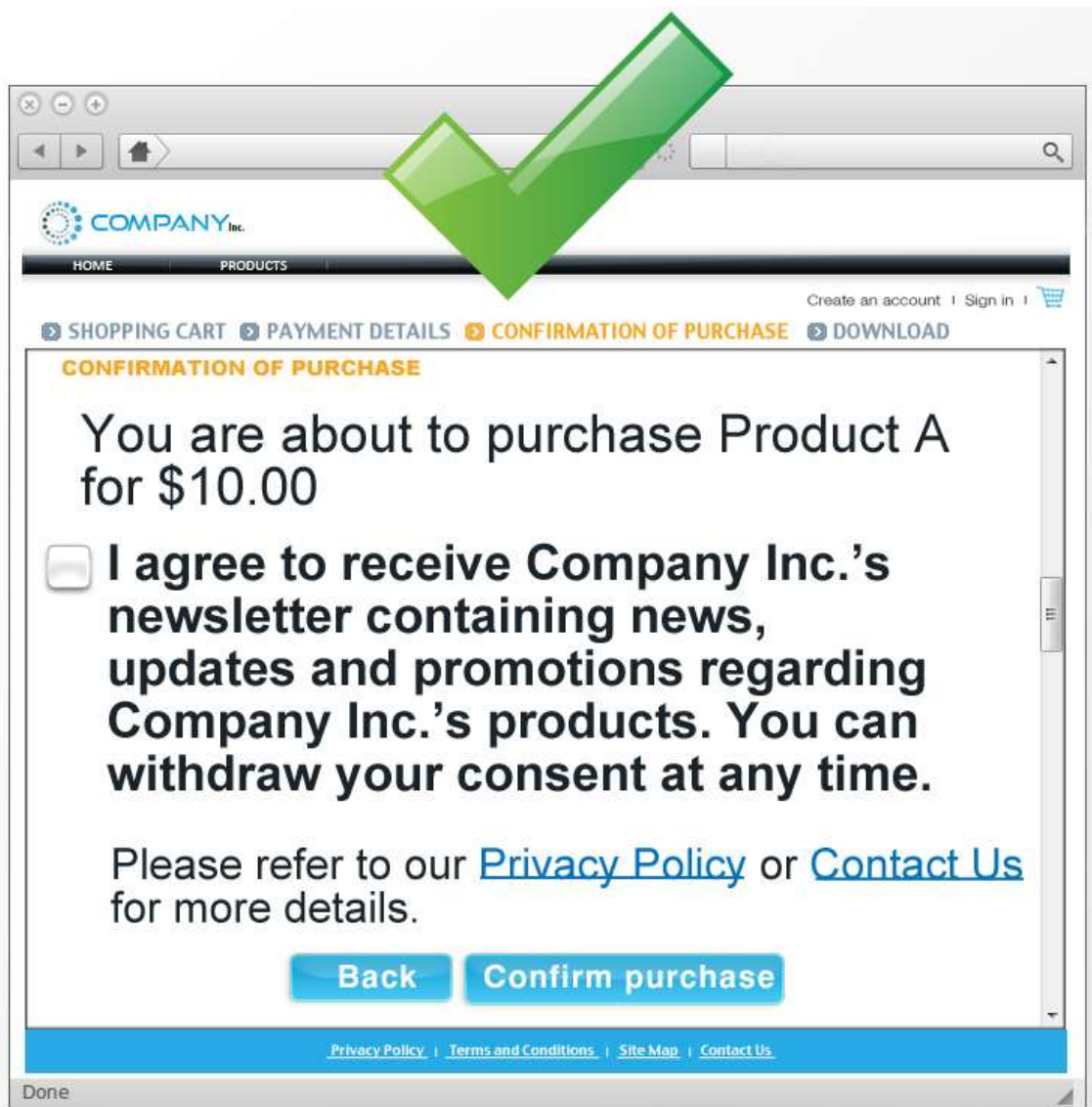
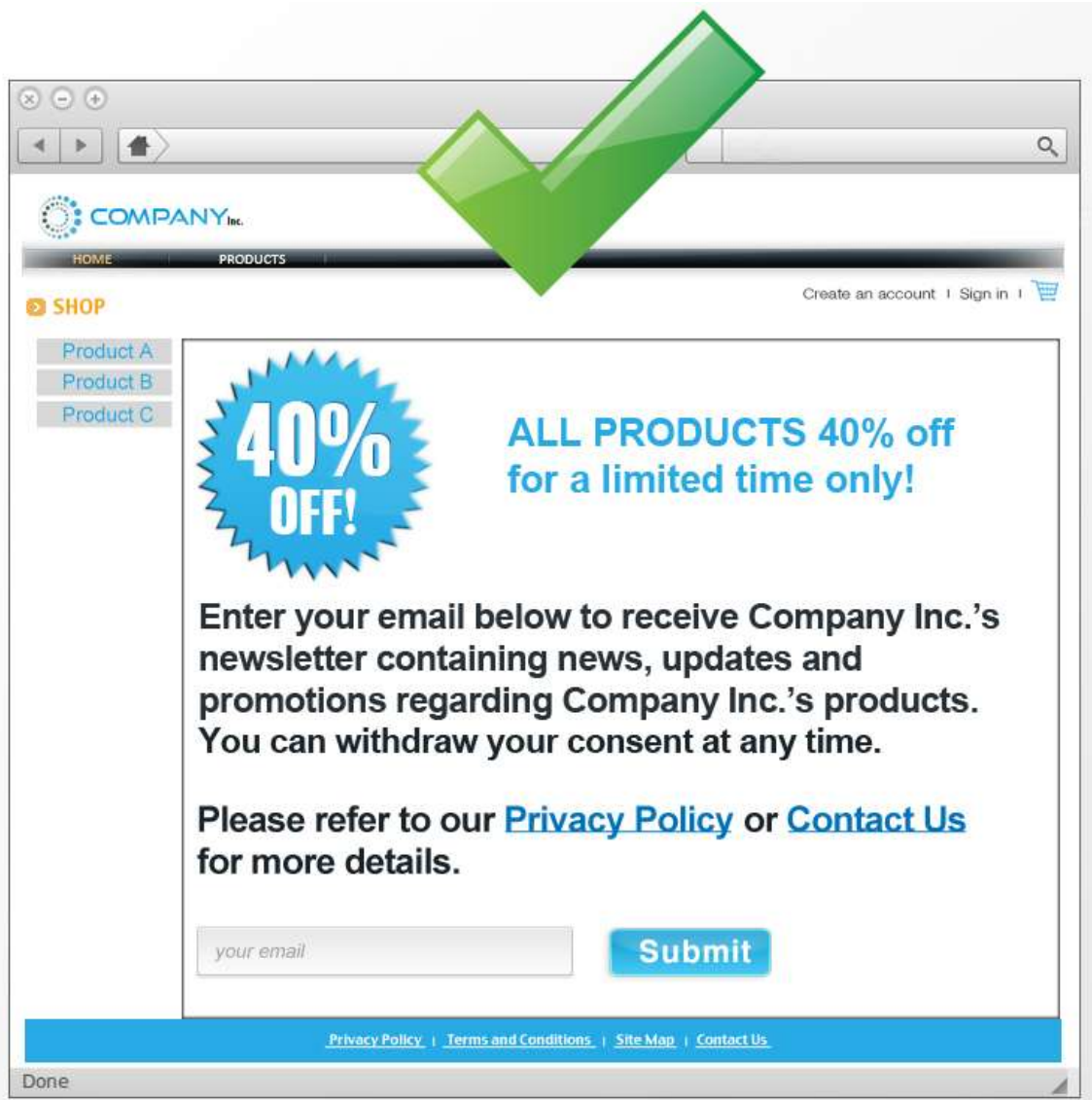


Figure 3: Acceptable express consent mechanisms – Typing an email address into a field to indicate consent



Secretary General