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Annex 1

**Committee of Advertising Practice**  
(Non-broadcast)

## **Help Note on Mobile Marketing**

CAP Help Notes offer guidance for non-broadcast marketing communications under the British Code of Advertising, Sales Promotions and Direct Marketing (the CAP Code). For advice on the rules for TV or radio commercials, contact the Clearcast [www.clearcast.co.uk](http://www.clearcast.co.uk) for TV ads or the RACC [www.racc.co.uk](http://www.racc.co.uk) for radio ads.

These guidelines, drawn up by CAP in consultation with the PhonepayPlus (the regulator of phone-paid services in the UK) and the Mobile Marketing Association (MMA), are intended to help marketers, agencies and media interpret the rules in the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code). The guidelines neither constitute new rules nor bind the ASA Council in the event of a complaint about a marketing communication that follows them.

### **1. Background**

Mobile marketing is used increasingly by UK marketers for customer acquisition and retention activities. The following methods of communication are the main ones available to them:

- SMS (Short Message Service) text messaging. The most ubiquitous method of communication - almost all mobile devices are SMS “capable”. Usual space limit of 160 characters (including blank spaces) per message. Simple, low resolution, picture messages also available.
- MMS (Multi-media Messaging). Provides greater creative opportunities than SMS but mobile devices must be MMS “capable”. Text, static/animated images, sound clips and/or polyphonic ringtones can be sent.

- 3G. The most advanced technology currently available. Video clips can be sent to 3G mobile devices.

## **2. The law and codes**

2.1 Mobile marketers must comply with the law, particularly the Data Protection Act 1998 and the Privacy and Electronic Communications Regulations 2003, and with other compulsory codes, e.g. the CAP Code and the PhonepayPlus Code of Practice (including its guideline No. 20 on Premium Rate SMS).

2.2.1 Mobile marketers may be expected to comply with other appropriate best practice guidelines and trade association codes, e.g. the Direct Marketing Association (DMA) Code of Practice, the Institute of Practitioners in Advertising (IPA) Guidelines on Mobile Marketing, the MMA Code and the Information Commissioner's guidance on the Privacy and Electronic Communications Regulations.

## **3. The CAP Code**

3.1 The full text of the CAP Code is available on [www.cap.org.uk](http://www.cap.org.uk).

3.2.1 The CAP Code contains various sections of rules, including on general marketing (all marketing communications should be "legal, decent, honest and truthful"), sales promotions and database practice. Specific clauses are included, if relevant, in the guidance that follows.

## **4. Guidance**

### **4.1 Targeting and "soft opt-in"**

4.1.1 Clause 43.2a of the CAP Code states:

"Marketers should take all necessary steps to ensure that... marketing communications are suitable for those targeted".

4.1.2 Clause 43.2b states:

“Marketers should take all necessary steps to ensure that... marketing communications are not sent unsolicited to consumers if explicit consent is required”.

4.1.3 Clause 43.4c states:

“The explicit consent of consumers is required before... sending marketing communications by e-mail or to mobile devices, save that marketers may send unsolicited marketing about their similar products to those whose details they have obtained in the course of, or in negotiations for, a sale. They should, however, tell them they can opt-out of future marketing both when they collect the data and on each occasion they send out marketing and should give them a simple means to do so. Explicit consent is not required when marketing business products to corporate subscribers (see 1.3j), including to their named employees”.

This exemption is known as “soft opt-in”.

If possible, however, marketers are urged to seek explicit consent from everyone before sending mobile marketing.

4.1.4 Clause 1.3j states:

“a *corporate subscriber* includes corporate bodies such as limited companies in the UK, limited liability partnerships in England, Wales and N. Ireland or any partnerships in Scotland. It also includes schools, hospitals, Government departments or agencies and other public bodies. It does not include sole traders or non-limited liability partnerships in England, Wales and N. Ireland. See clause 43.4”.

4.1.5 The term “similar products” includes those that consumers would reasonably have expected to be marketed at the time that they gave, or agreed to the use of, their contact details. As such, marketers should take reasonable steps when collecting consumers’ contact

details to ensure that consumers are aware of the kind of products they deal in.

- 4.1.6 A consumer who has not completed or negotiated a sale but has in some other way actively formed a relationship with the marketer, e.g. by interactive voting or responding to a prize promotion, may be sent one mobile communication asking for explicit consent to use their data for direct marketing purposes. Unless the consumer responds positively to that message, the marketer should not send any further direct marketing messages.
- 4.1.7 Marketers may obtain consumers' details from third parties, for example, by inviting existing contacts to supply details of friends or colleagues who would like to receive marketing messages. Marketers who obtain contact information from third parties must ensure that their source has obtained the new contact's explicit consent to receive messages from the marketer and that the new contact has not previously asked not to receive marketing.
- 4.1.8 Consumers may give explicit consent to receive direct marketing from a range of different companies about a range of different products. Such "third party opt-ins" are often collected by companies, referred to as "permission-holders", who profit from renting that data to interested "third party" marketers. See 4.3.2 below.

## **4.2 Opt-out (unsubscribe)**

4.2.1 Clause 43.9 of the CAP Code states:

"Consumers are entitled to have their personal information suppressed..."

4.2.2 Clause 43.4c states:

"...marketers may send marketing communications about their similar products to those whose details they have obtained in the course of, or in negotiations for, a sale. They should, however, tell them they

can opt-out of future marketing both when they collect the data and on each occasion they send out marketing and should give them a simple means to do so”.

- 4.2.3 Mobile marketers who have themselves obtained explicit consent from consumers need not tell them in every message that they can opt-out of (or unsubscribe from) having their data used for direct marketing purposes so long as they comply with 4.5.1 below.
- 4.2.4 Mobile marketers who do not have explicit consent must tell those whose details they have obtained in the course of, or in negotiations for, a sale that they can opt-out of having their data used for direct marketing purposes when they collect their data as well as every time, including the first, they send out future mobile marketing. They can use abbreviations so long as they are likely to be understood by the audience addressed. For example, the following is likely to be acceptable: “2STOPMSGSTXT’STOP’TO...”. They must allow consumers, with the minimum effort and at the minimum, unavoidable cost (see 4.7.3 below), to state they object to future direct marketing.
- 4.2.5 For opt-out requirements for third party/significantly different use marketers, see 4.3.4 and 4.3.5 below.

### **4.3 Third party/significantly different use**

- 4.3.1 Clause 43.3c of the CAP Code states:

“Except if it is obvious from the context, or if they already know, consumers should be informed at the time when personal information is collected... if it is intended to disclose the information to third parties, including associated but legally separate companies, or put the information to a use significantly different from that for which it is being provided, in which case an opportunity to prevent this should be given”.

- 4.3.2 Clause 43.4c, however, places on third party/significantly different use mobile marketers the more burdensome requirement of ensuring

that appropriate explicit consent has been provided. In the case of third party marketers, that consent should have been given to the permission-holder.

- 4.3.3 Retailers, dealers or other intermediaries who obtain data from their customers should not pass that data on to the manufacturer of the products that the customers bought without explicit consent to do so.
- 4.3.4 Third party/significantly different use mobile marketers must tell consumers that they can opt-out of having their data used for direct marketing purposes every time, including the first, they send out mobile marketing. They must allow consumers, with the minimum effort and at the minimum, unavoidable cost (see 4.7.3 below), to state they object to future direct marketing.
- 4.3.5 If, however, third party marketers send mobile marketing in communications that identify the original permission-holders, they need not tell consumers in every message they can opt-out of having their data used for direct marketing purposes so long as they comply with 4.5.1 below.

#### **4.4 Reacting to opt-outs**

- 4.4.1 On receipt of a mobile request to opt-out/unsubscribe, mobile marketers should suppress the relevant personal data (e.g. the mobile number) as soon as practically possible to ensure the consumer receives no further marketing communications. Mobile marketers should hold enough information, (though obviously not for direct marketing purposes), to ensure no further direct marketing is sent to opted-out consumers as a result of their data being re-obtained through a third party.

#### **4.5 Identity of mobile marketers**

- 4.5.1 Mobile marketing communications must contain at the very least the identity of the marketer and a valid address (e.g. a web address or text-back channel that allows consumers to send opt-out requests and access the full address). If necessary (see 4.2 above), mobile

marketers should tell consumers they can opt-out of having their data used for direct marketing purposes.

#### **4.6 Mobile promotions**

4.6.1 Promotions with prizes (e.g. competitions, prize draws and instant win offers) are subject to the Lotteries and Amusements Act 1976 (as amended). Promoters usually seek to avoid running illegal lotteries by running skill-based prize competitions (often using tiebreakers to identify the winners) or by offering free entry if the chanced-based prize promotion might encourage purchase (NB providing only a premium rate mobile route to enter a prize draw would not constitute free entry, see 4.7.4 below, though providing only a text-back channel charged at a minimum, unavoidable cost probably would). Promoters should take legal advice before embarking on such promotions.

4.6.2 The CAP Code contains a section on sales promotions. Clause 34.1, on Significant Conditions for Promotions, is particularly relevant. In summary form, it states:

“Promotions should specify clearly before any purchase (or before or at the time of entry/application, if no purchase is required):

- a how to participate, including significant conditions and costs, and any other factors reasonably likely to influence consumers’ decisions or understanding about the promotion
- b the start date, in any comparison referring to a special offer if the special offer has not yet begun
- c a prominent closing date, if applicable...Prize promotions and promotions addressed to or targeted at children always need a closing date...
- d any proof of purchase requirements...
- e the minimum number and nature of any prizes, if applicable...
- f geographical, personal or technological restrictions such as location, age or the need to have access to the internet. Promoters should state any need to obtain permission to enter from an adult...

- g ...if there is likely to be limitation on the availability of promotional packs...
- h the promoter's full name and business address, unless this is obvious from the context...

Participants should be able to retain the above conditions or have easy access to them throughout the promotion...”.

- 4.6.3 Clause 35.9 includes additional conditions that marketers running prize promotions should specify before or at the time of entry (e.g. any restriction on the number of entries, how and when winners will be announced/notified of results and the criteria for judging competition entries).
- 4.6.4 Mobile promoters should include in the promotion relevant significant conditions and any other major factors reasonably likely to influence consumers' decisions to respond to the promotion. Marketers may use abbreviations if they are likely to be understood by the audience addressed.
- 4.6.5 If necessary, mobile promoters should state how consumers can request (or where they can view) additional conditions. Consumers should be able to retain those conditions or have easy access to them throughout the promotion.
- 4.6.6 Mobile promoters should not claim consumers have won a prize if they have not. Mobile promoters should distinguish clearly between gifts offered to all or most consumers and prizes offered only to a few winners.

#### **4.7 Premium rate mobile marketing**

- 4.7.1 Mobile marketers must comply with the PhonepayPlus Code of Practice (particularly its guideline No. 20 on Premium Rate SMS).
- 4.7.2 Mobile marketing communications must include a clear statement of the total charge to consumers for responding via a premium rate mobile route or for receiving future mobile communications charged

at a premium rate. The latter, often called “reverse-charged” or “reverse-billed” services, may require a clear statement of both the premium rate charge plus a reference to the fact that consumers’ normal network tariffs will apply.

- 4.7.3 Consumers opting-out of future direct marketing must not be charged at a premium rate.
- 4.7.4 Consumers whose only method of entering a prize draw is via a mobile facility must not be charged at a premium rate.

## **4.8 Marketing to children**

- 4.8.1 Clause 47.1 of the CAP Code states:

“For the purposes of the Code, a child is someone under 16. The way in which children perceive and react to marketing communications is influenced by their age, experience and the context in which the message is delivered; marketing communications that are acceptable for young teenagers will not necessarily be acceptable for young children...”.

Clauses 47.2, 47.3, 47.4 and 47.5 contain important specific rules about marketing to children.

- 4.8.2 Verifiable and explicit consent should be obtained from a parent/guardian before communicating via mobile with children.
- 4.8.3 A statement informing children of the requirement for parental/guardian consent must be given at the point where the personal information is requested. This statement should be clear, prominent and in a language which a child can easily understand. It should also include an explanation of the purposes for which the data are collected (i.e. marketing purposes) and how consent may be given.

Advice on specific marketing communications is available from the Copy Advice team by telephone on 020 7492 2100, by fax on 020 7404 3404 or by email on [copyadvice@cap.org.uk](mailto:copyadvice@cap.org.uk). The CAP website at [www.cap.org.uk](http://www.cap.org.uk) contains a full list of Help Notes as well as access to the AdviceOnline database, which has links through to relevant Code rules and ASA adjudications.

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