

Mobile Marketing

Advertising Guidance (non-broadcast)

Legal, decent, honest and truthful



Foreword

The Committee of Advertising Practice (CAP) offers guidance on the interpretation of the UK Code of Advertising (the CAP Code) in relation to non-broadcast marketing communications.

The Broadcast Committee of Advertising Practice (BCAP) offers guidance on the interpretation of the UK Code of Broadcast Advertising (the BCAP Code) in relation to broadcast marketing communications.

Advertising Guidance is intended to guide advertisers, agencies and media owners how to interpret the Codes but is not a substitute for those Codes. Advertising Guidance reflects CAP's and/or BCAP's intended effect of the Codes but neither constitutes new rules nor binds the ASA Councils in the event of a complaint about an advertisement that follows it.

For pre-publication advice on specific non-broadcast advertisements, consult the CAP Copy Advice team by telephone on 020 7492 2100, by fax on 020 7404 3404 or you can log a written enquiry via our [online request form](#).

For advice on specific radio advertisements, consult the [Radio Centre](#), and for TV advertisements, [Clearcast](#).

For the full list of Advertising Guidance, please [visit our website](#).

Regular CAP Help Notes offer guidance for non-broadcast marketing communications under the UK Code of Non-broadcast 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 for TV ads or the RACC 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 UK Code of Non-broadcast 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.

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.

The law and codes

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).

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.

The CAP Code

The full text of the CAP Code is available on www.cap.org.uk.

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.

Guidance

Targeting and “soft opt-in”

The CAP Code states:

- 10.4.1 “Marketers must do everything reasonable to ensure that ... marketing communications are suitable for those they target”.
- 10.4.2 “ Marketers must do everything reasonable to ensure that ... marketing communications are not sent unsolicited to consumers if explicit consent is required” .
- 10.13.3 “The explicit consent of consumers is required before... sending marketing communications by electronic mail (excluding by Bluetooth technology) but marketers may send unsolicited marketing about their similar products to those whose data they have obtained during, or in negotiations for, a sale. Data marketers must, however, tell those consumers they may opt-out of receiving future marketing communications both when they collect the data and at every subsequent occasion they send out marketing communications. Marketers must give consumers a simple means to do so”.

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

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

Part III j of the Introduction states:

“a corporate subscriber includes corporate bodies such as limited companies in the UK, limited liability partnerships in England, Wales and Northern 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 Northern Ireland. See rule 10.14”.

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.

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.

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.

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.

Opt-out (unsubscribe)

The CAP Code states:

- 10.5** "Consumers are entitled to have their personal information suppressed...".
- 10.13.3** "...marketers may send unsolicited marketing about their similar products to those whose data they have obtained during, or in negotiations for, a sale. Data marketers must, however, tell those consumers they may opt-out of receiving future marketing communications both when they collect the data and at every subsequent occasion they send out marketing communications. Marketers must give consumers a simple means to do so".

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.

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, to state they object to future direct marketing.

Third party/significantly different use

The CAP Code states:

10.9.3 “Unless it is obvious from the context, or if they already know, consumers must be informed in a clear and understandable manner and at the time personal information is collected . . . if the marketer intends 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; if so, an opportunity to prevent that from happening must be given”.

10.13.3, 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.

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.

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, to state they object to future direct marketing.

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.

Reacting to opt-outs

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 reobtained through a third party.

Identity of mobile marketers

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.

Mobile promotions

Promotions with prizes (e.g. competitions, prize draws and instant win offers) are subject to the Gambling Act 2005. 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 chance-based prize promotion might encourage purchase (NB providing only a premium rate mobile route to enter a prize draw would not constitute free entry, 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.

The CAP Code contains a section on sales promotions.

- 8.17** on Significant Conditions for Promotions, is particularly relevant. In summary form, it states: "Before purchase or, if no purchase is required, before or at the time of entry or application, promoters must communicate all applicable significant conditions. Significant conditions include:
- 8.17.1** How to participate, including significant conditions and costs, and other major factors reasonably likely to influence consumers' decision or understanding about the promotion
 - 8.17.2** Any free-entry route should be explained clearly and prominently
 - 8.17.3** The start date, if applicable
 - 8.17.4** Closing date
 - 8.17.4.a** A prominent closing date, if applicable, for purchases and submissions of entries or claims. Closing dates are not always necessary, for example: comparisons that refer to a special offer (whether the promoter's previous offer or a competitor's offer) if the offer is and is stated to be "subject to availability"; promotions limited only by the availability of promotional packs (gifts with a purchase, extra-volume packs and reduced-price packs) and loyalty schemes run on an open-ended basis
 - 8.17.4.b** Unless the promotional pack includes the promotional item or prize and the only limit is the availability of that pack, prize promotions and promotions addressed to or targeted at children always need a closing date. **8.17.4.c**

Promoters must be able to demonstrate that the absence of a closing date will not disadvantage consumers
 - 8.17.4.d** Promoters must state if the deadline for responding to undated promotional material will be calculated from the date the material was received by consumers

- 8.17.4.e Unless circumstances outside the reasonable control of the promoter make it unavoidable, closing dates must not be changed. If they are changed, promoters must do everything reasonable to ensure that consumers who participated within the original terms are not disadvantaged”
- 8.17.5 Any proof of purchase requirements
- 8.17.6 Promoters must specify the number and nature of prizes or gifts, if applicable. If the exact number cannot be predetermined, a reasonable estimate of the number and a statement of their nature should be made. Promoters must:
 - 8.17.6.a distinguish those prizes that could be won, including estimated prize funds, from those prizes that will be won by someone by the end of the promotional period and
 - 8.17.6.b state whether prizes are to be awarded in instalments or are to be shared among recipients
- 8.17.7 Geographical, personal or technological restrictions such as location, age or the need to access the Internet. Promoters must state any need to obtain permission to enter from an adult or employer
- 8.17.8 The availability of promotional packs if it is not obvious; for example, if promotional packs could become unavailable before the stated closing date of the offer
- 8.17.9 Promoter's name and address

Unless it is obvious from the context or if entry into an advertised promotion is only through a dedicated website containing that information in an easily found format, the promoter's full name and correspondence address must be stated.

8.28 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).

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.

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.

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.

Premium rate mobile marketing

Mobile marketers must comply with the PhonepayPlus Code of Practice (particularly its guideline No. 20 on Premium Rate SMS).

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.

Consumers opting-out of future direct marketing must not be charged at a premium rate.

Consumers whose only method of entering a prize draw is via a mobile facility must not be charged at a premium rate.

Marketing to children

Rules 5.1 and 5.2 of the CAP Code contain important specific rules about marketing to children.

Verifiable and explicit consent should be obtained from a parent/guardian before communicating via mobile with children.

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 you can log a specific written enquiry via our online request form <http://www.copyadvice.org.uk/Advice/Bespoke-Copy-Advice.aspx>. The Copy Advice website at www.copyadvice.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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