

Affiliate Marketing
A PhonepayPlus Discussion Document

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Comments welcomed by 26 May 2014

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Executive Summary

Digital marketing is now abundant; few companies can continue to flourish without a substantial digital presence. The premium rate services (PRS) industry is no different. Providers are increasingly turning to digital marketing as a means for consumers to engage with their service. Often this involves affiliate networks and their publishers, who are digital marketing partners that generate business for providers typically on a cost per acquisition (CPA) model¹.

Affiliate marketing has the potential to add value for providers and allow consumers to interact with services in a transparent and fair manner. In many cases, PRS providers use affiliate marketing in a compliant fashion. However, there are well documented risks associated with the naïve, reckless or negligent use of affiliate marketing.

Indeed, consumer harm caused by the misleading digital promotion of PRS remains significant. We estimate that a third of complaints received by PhonepayPlus are related to misleading affiliate promotions. As the regulator of the PRS industry, PhonepayPlus' aim is to ensure consumers can use premium rate services with confidence. This includes services marketed using affiliates and affiliate networks.

Despite this, PhonepayPlus' action against the non-compliant services that use affiliate marketing in a non-compliant manner has caused concerns in the industry. Providers complain that PhonepayPlus' action has hit the market hard, affecting business confidence. While PhonepayPlus' actions have not been universally welcomed, we do not believe they have been disproportionate.

We are keen to work together with stakeholders in a collaborative fashion to ensure that affiliate marketing can be used compliantly and not at the expense of consumer or business confidence. A vibrant, innovative and compliant industry, offering services that consumers knowingly choose to engage with, fits well with our aim that anyone can use premium rate services with confidence.

PhonepayPlus hopes that this paper contributes to improving the current situation. PhonepayPlus is of the opinion that there is an opportunity to work together with industry to ensure compliance and trust. We remain keen to engage in a dialogue about the compliant use of affiliate marketing. This does not involve revisiting an academic argument about responsibility and liability. The Code is clear. Level 2 providers are responsible for the promotion of their service.

A working group has been established with PhonepayPlus, AIME and representatives of the mobile Network operators under the auspices of the Mobile Broadband Group. This group has met to discuss how we can work together to introduce concrete steps to move this issue forward. In particular, the working group has considered two industry-led initiatives: an Early Warning System and an industry-led affiliate marketing code of best practice. The group will consider how PhonepayPlus can support these initiatives and feed-in information, where

¹ There are other models of affiliate marketing but the CPA model is particularly prominent in PRS.

appropriate. Once agreed by all parties, we will communicate the detail of any cooperation in due course.

Through this paper and other actions, PhonepayPlus aims to engender a positive, healthy dialogue with interested parties both in and outside the PRS industry. Although not a formal consultation, this paper asks a number of questions to which we welcome the thoughts of stakeholders both in and outside the industry. We also welcome comments beyond the scope of the questions posed. Details about how to respond or comment can be found at the end of the paper. We have no fixed deadline for comments, although we would welcome submissions within eight weeks. This, we believe, will help address any issues in a timely fashion and maintain momentum.

We are also launching this discussion paper to address some of the misgivings and to deliver a mutually supportive way forward that ensures consumers are protected and allows compliant members of industry to operate with confidence. In doing so, it sets out PhonepayPlus' current approach to regulation, discusses what 'good' might look like, develops the notion of an Early Warning System, suggests further sources of information that providers may turn to and how we believe we can work together to help ensure affiliate marketing can be used compliantly by the PRS industry.

This is not the end of our planned engagement. PhonepayPlus plans to actively engage with industry to advance this discussion paper and the questions that it poses.

Our Regulatory Approach to PRS and Affiliate Marketing

PhonepayPlus has long identified issues with misleading digital marketing through affiliates. As a result, we issued a compliance update in February 2012² that set out some concerns we had, particularly around the use of various practices and affiliate tactics. Despite this, complaints continued to rise and therefore PhonepayPlus then issued a consultation on draft Guidance in May 2013, followed by updated Guidance, which took on board feedback received in response to the consultation, in November 2013³.

The Code, which all providers must adhere to, makes it clear that Level 2 providers are responsible for the content and promotion of their services. While complex, affiliate marketing is no different. Responsibility for ensuring that promotions are compliant with the Code remains with the provider regardless of whether this is sub-contracted to a third party such as an affiliate marketer.

Despite this clear stance and the publication of Guidance and adjudications, complaints have remained high and related consumer harm has been widespread. Often harm is acute, complaints regularly relate to subscription-based services where cumulative spends can be significant. PhonepayPlus has therefore sought to take action against providers thought to be in breach of the Code. Based on the evidence put before it, the independent Code Compliance Panel Tribunals (the Tribunal) have adjudicated as deemed appropriate, finding some providers negligent or reckless in their use of affiliate marketing.

Our approach has been met with a degree of opposition. We believe that there have been some misconceptions about our approach. Most providers understand that, as the regulator of the PRS industry, we have to take action where appropriate but a number have argued that it has been disproportionate, prejudiced or inconsistent.

Our main aim is now is to move the discussion on to seek collaborative solutions with industry. However, we believe that it is worth addressing some misunderstandings that have arisen so that we can move forward on the basis of a more accurate understanding of our approach to affiliate marketing.

Misunderstanding 1: PhonepayPlus is against affiliate marketing

We recognise the value of digital marketing and of the affiliate model, especially for internet-based services. We also recognise that in an increasingly competitive market with downward pressure on margins, PRS providers need to promote their services in a way that is effective and efficient. We are supportive of affiliate marketing when it is done in a way that provides genuine value to businesses and consumers. We are only against it when it is done in a way

²http://www.phonepayplus.org.uk/~media/Files/PhonepayPlus/ComplianceUpdates/CU_Misleading_Digital_Marketing_16_02_2012.ashx

³<http://code.phonepayplus.org.uk/pdf/guidance-notes/digital-marketing-promotions.pdf>

that is non-compliant and causes consumer harm. Whilst we recognise that regulatory action against non-compliant marketing does have an impact on the revenues of the providers involved, we do not regard it as being counter to the interests of the market. We hope that this discussion paper and ongoing engagement with industry will help to provide a well understood and stable regulatory environment in which providers can make legitimate use of affiliate marketing with appropriate confidence.

Misunderstanding 2: PhonepayPlus' fines in relation to affiliate marketing are disproportionate because they are based on whole-service revenue rather than just the proportion of revenue derived from misleading marketing.

We recognise that misleading promotions will generally only affect a part of the service revenue. In all cases on affiliate marketing, the Executive has sought to provide the Tribunal with our best assessment of non-compliant revenue. The Tribunal has taken this into account and to the extent that service revenues are a factor in the level of fines, the Tribunal have based their assessments on non-compliant and not whole-service revenues. This is reflected in the fact that for the 2013/14 financial year to date⁴, average fines levied in cases featuring affiliate marketing are approximately half of those levied in cases not involving affiliate marketing. Indeed, in all but two of the affiliate related cases brought before the Code Compliance Panel in the 2013/14 financial year (to date), the Tribunal upheld breaches of the Code that were distinct from the marketing of the service. In short, more often than not in affiliate marketing related cases there have been problems with the underlying service as well as how it was marketed.

Further, in July 2013 PhonepayPlus initiated 10 Emergency Procedures against providers whose services were found to have been marketing their services using 'ransomware'. While we appreciate that these actions were not popular and affected market confidence, we believe that our actions were warranted in order to protect consumers from actual and potential harm.

Misunderstanding 3: In holding the Level 2 provider accountable for affiliate marketing, PhonepayPlus is acting in a way that is inconsistent with other regulators both in the UK and abroad.

The Advertising Standards Authority (ASA), under the CAP Code, holds the service provider primarily responsible for compliance as they are the principal beneficiary of the marketing material⁵. The Federal Trade Commission in the United States is also clear that advertisers have to place clear expectations on any affiliate it contracts with, actively monitor and manage their affiliate marketing programmes, promptly and completely investigate any complaints, halt payments where issues are suspected and refund complainants. We believe our position is consistent with both bodies.

⁴ The financial year to date, in this case, encompasses 1 April 2013 – 28 February 2014

⁵ Paragraph 1.8 of the Committee of Advertising Practice (CAP) Code states: "Marketing communications must comply with the Code. Primary responsibility for observing the Code falls on marketers. Others involved in preparing or publishing marketing communications, such as agencies, publishers and other service providers, also accept an obligation to abide by the Code."

Misunderstanding 4: There is a disincentive to follow PhonepayPlus' Guidance because those attempting to be compliant are still held to be in breach of the Code in the event of something going wrong.

It is true that the Code sets a strict liability standard for misleading promotions, so a provider can still be held to be in breach of the Code even if they have sought to follow the Guidance. A principal reason PhonepayPlus is engaged with the working group is to further ensure the whole industry has a clear understanding of what good practice is and that good practice can be turned into an industry led code of best practice. In practice, if a provider genuinely follows the Guidance, the proposed code of best practice and makes use of the proposed Early Warning System and can demonstrate that with appropriate evidence, then this is something that will be taken into account both by the Executive in considering how to deal with the case and also by a Tribunal (should an enforcement action be pursued) in terms of mitigation. We are aware that conscientious providers would like to engage in a genuine dialogue about how to approach affiliate marketing. We hope the following pages add to that dialogue. Again, we welcome views on the contents of this paper as well as other thoughts around this issue.

What does ‘Good’ look like?

PhonepayPlus has been asked by a number of providers to explain what we think a ‘good’ affiliate programme looks like. Whilst we are reluctant to prescribe exactly what we see as ‘good’ – this seems contrary to an outcomes-based approach to regulation – we are happy to engage in a discussion that adds clarity where appropriate and refines mutual expectations if necessary.

PhonepayPlus’ Guidance on Digital Marketing and Promotions suggested a number of steps providers should take to help ensure their affiliate marketing is compliant. The main aim of this document is to ensure consumers are protected from potential harm and to assist all companies marketing PRS digitally to comply with the Code. This, therefore, should represent the starting point for any provider.

In order to give greater clarity to providers, we have tried to elaborate on some key principles that an effective Due Diligence Risk Assessment and Control process should encapsulate. Like any Due Diligence Risk Assessment and Control process, PhonepayPlus believes that one involving affiliates should be auditable, ethical, systematic and transparent.

- **Auditable:** Providers need affiliate Due Diligence Risk Assessment and Control processes in place that meet the expectations set out in Guidance. This should include proper records of pre- and post-contract affiliate network Due Diligence Risk Assessment and Control undertaken by the provider.
- **Ethical:** Providers should approach any affiliate Due Diligence Risk Assessment and Control process in good faith. Affiliate Due Diligence Risk Assessment and Control should be central to a provider’s drive to ensure their products are marketed effectively, that they receive an appropriate return on investment and, most importantly, consumers are treated justly. Affiliate Due Diligence Risk Assessment and Control should always be a rigorous and genuine approach to preventing malpractice and harm.
- **Systematic:** We think that effective affiliate Due Diligence Risk Assessment and Control processes are ongoing and not ad hoc. Having clear processes in place that allow providers to monitor their affiliate marketing appropriately should be a cornerstone of any effective affiliate marketing programme. Given the risks associated with it, affiliate marketing is highly likely to be resource intensive for providers whether it is outsourced or not.
- **Transparent:** PhonepayPlus believes that transparency sits at the heart of any effective affiliate programme. According to the Affiliate Marketing Council, “affiliate marketing is a partnership and transparency is fundamental to it being a professional and ethical one.” Without transparency, ‘blind’ affiliate networks have no responsibility for, or interest in, delivering high quality, legitimate traffic. We also think that transparency with the regulator and vice versa is in all parties’ interests.

PhonepayPlus is aware that even with effective affiliate Due Diligence Risk Assessment and Control processes in place, issues can still slip through the net. We therefore think it is essential that providers also consider how to respond to issues as they emerge and therefore welcomes the proposed development of the Early Warning System, which should include a resolution register.

We have included a list of questions overleaf that may help providers frame their thinking around their affiliate Due Diligence Risk Assessment and Control responsibilities in relation to affiliate marketing. Split into three sections (pre-contract, post-contract and response), the list is designed to help providers consider how their affiliate marketing programmes meet the expectations of PhonepayPlus or could be improved. Again, these are intended as the basis for discussion and thought for any provider considering how best to meet the outcomes in the Code.

PhonepayPlus welcome stakeholders' thoughts on the principles and questions set out in this section. After all, these are intended to assist conscientious providers who wish to comply with the Code and therefore should be realistic.

Questions to consider as part of affiliate Due Diligence Risk Assessment and Control

Pre-Contract Due Diligence

- Who am I contracting with and what compliance record do they have?
- Is any proposed contract in my best interests?
- Does my affiliate understand my requirements and the requirements of the Code of Practice?
- Does my affiliate network take compliance seriously?
- Do the contractual payment terms and speed of payment potentially incentivise non-compliance?

Post-contract Monitoring, Risk Assessment and Control

- Is my monitoring systematic and does it give me a good understanding of how my customers are being drawn to my service?
- Do I have the appropriate controls in place to ensure that any unusual activity is identified quickly?
- Am I analysing all aspects of this relationship, including customer complaints?
- Given the risks associated with affiliate marketing, can I demonstrate that my monitoring is sufficient, thus adequately mitigating those risks?

Response

- If I do identify an issue, do I have a clear process in place to resolve it quickly?
- Is this realistic and actionable?
- Is my affiliate capable of identifying, or indeed willing to identify, and deal with rogue traffic sources?

Further Advice – where to look

PhonepayPlus is not alone in believing that affiliate marketing can be done compliantly. Whereas our Guidance should be a starting point for any PRS provider, there is plenty of other information and help available that can also assist providers who wish to use affiliate marketing compliantly. We highly recommend that providers consult such sources regularly – many are updated frequently – to get both a sense of what they can and should be doing on an ongoing basis.

The Internet Advertising Bureau's [Affiliate Marketing Council](#) ('the Council') is a useful repository of information for any PRS provider using or intending to use affiliate marketing. Comprising more than 50 networks, agencies and merchants, the Council aims to promote education, best practice and self-regulation within the affiliate marketing industry. Where possible, we recommend that providers look to engage with networks that are members of this Group.

The largest UK affiliate network, Affiliate Window, has published a compliance white paper in 2014, which can be found [here](#). It demonstrates the value and importance of compliance in this space. It also notes a number of steps necessary to identify affiliate fraud that could also be employed by providers looking to ensure their marketing does not put them at risk.

Online and affiliate fraud detection experts Brand Verity have also published a [report](#) on affiliate fraud detection and prevention. Not only does it identify a number of practices that rogue affiliates employ but it also has a number of hints and tips on how to spot fraud and prevent ethical providers from being duped. It is highly recommended. Brand Verity also offers a variety of services that compliant-minded providers may consider as part of a systematic approach to any affiliate programme.

Brand Verity is by no means the only company offering advice and solutions to various problems. Search Monitor, CPA Detective and ScrubKit are US-based technologists offering various bespoke or plug-in solutions that may also assist conscientious providers who want to maximise their return on investment without harming consumers.

Providers may also look to other reference sources available. [Professor Ben Edelman](#) of Harvard Business School maintains a highly recommended blog about affiliate marketing and other related issues. In short, there is a good deal of information available that supports and builds on the Guidance we published in November 2013.

Looking Ahead and Next Steps

PhonepayPlus hopes that this paper contributes to improving the current situation and supports the efforts of the working group. PhonepayPlus is of the opinion that there is an opportunity to work together with industry to ensure compliance and trust.

As previously stated, a working group has been established with PhonepayPlus, AIME and representatives of the mobile Network operators under the auspices of the Mobile Broadband Group. This group has already met to discuss how we can work together to introduce concrete steps to move this issue forward.

In particular, the working group has considered two industry-led initiatives: an Early Warning System and an industry-led affiliate marketing code of best practice. The group will consider how PhonepayPlus can support these initiatives and feed-in information, where appropriate. Once agreed by all parties, we will communicate the detail of the cooperation in due course. PhonepayPlus is also happy to consider a wider working group should there be sufficient demand.

We hope to garner the thoughts and experiences of a broad group of stakeholders, including, but not limited to, providers using affiliate marketing. Responses to the following discussion questions are very much welcomed. Comments, however, should not be limited to the scope of the questions listed; we do welcome wider input.

Comments should be emailed to Jonathan Levack jlevack@phonepayplus.co.uk . We welcome comments within eight weeks from publication of this document (26 May 2014).

Questions for Discussion

1. What has your experience been of using affiliate marketing?
2. Did you find the finalised Guidance issued by us in November 2013 useful? Could it be improved? And, if so, how?
3. Are our expectations of what 'good' looks like right? Are the principles and expectations set out appropriate, clear and reasonable? If not, why not?
4. Are the questions listed on page 10 useful in helping frame your affiliate Due Diligence Risk Assessment and Control considerations? If not, why not?
5. What more could PhonepayPlus be realistically doing to build compliance in the marketplace? What can providers do?
6. What is industry doing to build trust in affiliate marketing? What more should be done by them?