



FACT SHEET

Charitable Fundraising Services

Introduction

This Fact Sheet is designed to assist charities and other providers in achieving compliance with the PhonepayPlus Code of Practice. It also includes guidance on legal compliance from PhonepayPlus' legal advisers – Bates, Wells & Braithwaite.

Charities and other providers seeking clarity about the application of any Code provision to a particular service are strongly advised to contact the PhonepayPlus Executive **before** starting to operate the service. They may also want to take legal advice where necessary.

Background

This Fact Sheet sets out the key legal and regulatory requirements for charities that are already using premium payment, and those that are considering using it as a future source of revenue. It also explains who PhonepayPlus is, and how we can help charities looking to carry out fundraising activities using premium phone-paid services.

About PhonepayPlus

PhonepayPlus is the organisation (previously known as ICSTIS) that regulates premium phone-paid services in the UK – the goods and services that we can buy by charging the cost to our phone bills and mobile pre-pay accounts. The money paid by users for these services is shared between the phone network carrying the service and the organisation(s) providing the content.

Under the Communications Act 2003, Ofcom has responsibility for the regulation of premium rate services. In December 2007, Ofcom confirmed that PhonepayPlus will act as the agency which carries out the day-to-day regulation of the PRS market on its behalf.

PhonepayPlus regulates the promotion, content and overall operation of services using its Code of Practice. PhonepayPlus also regulates all services offered on 0871/2/3 numbers.

About BWB

The London office of Bates Wells & Braithwaite (BWB) is widely regarded as the leading charity, social enterprise and not-for-profit law firm in the country. It is recognised as such by its clients and by the two leading guides to the legal profession – the Legal 500 and Chambers UK. Caritas Data's independent annual directory, "Top 3000 Charities" ranks the firm in first place. BWB is listed as acting for 87% more charities than the firm in second place.

BWB does not only act for large charities – it acts for charities of all sizes including new start-ups and community groups and a range of activities which includes arts organisations and education charities to religious charities, health charities and third world aid and development

charities. Across the board, BWB advises over 2000 charities.

The PhonepayPlus Code of Practice

The Code sets out the rules with which all providers of phone-paid services must comply. Among other things, the Code requires:

- clear and accurate pricing information
- honest advertising and service content
- appropriate and targeted promotions

You can find the full Code on the PhonepayPlus website – www.phonepayplus.org.uk.

In addition to the general rules that apply to all phone-paid services, the Code contains requirements that apply to specific types of service. Charities should take special note of Section 7.9 of the Code which sets out the specific rules governing all fundraising and charitable promotions as follows:

"Service providers should be aware that the scope of such services is limited by legislation relating to charities.

The promotional material for fundraising (whether or not for charitable purposes) and charitable promotions must make clear:

- a either the total sum per call or the amount per minute which will be paid to the beneficiary,*
- b the identity of the beneficiary,*
- c any restrictions or conditions attached to the contribution to be made to the beneficiary."*

Prize competitions and lotteries – the law

It is important to understand the legal nature of the promotion that is being proposed. The main scenarios from a fundraising perspective could be:

Donation e.g. a supporter might be asked to text a number and told that out of the £1 charge, say, 75 pence will be paid to the charity. There is no draw or competition element to this promotion, so it is not necessary to see whether the promotion is caught by the Gambling Act 2005. However, this promotion still might involve the promoter (i.e. the telecom intermediary) acting as a commercial participator or a professional fundraiser: see below.

Lottery. In order for this to be a lawful promotion it must be run through a non-commercial society, which is either registered with the Gambling Commission or with a Local Authority. (Please note that there are some exemptions for exempt lotteries, which do not have to be registered but these are unlikely to apply to a lottery which uses premium rate services). A non-commercial society is one which is either a charity; or established for sport, athletics or a cultural activity (offering participation in or support to those activities); or set up for any other non-commercial purpose.

The Gambling Act 2005 provides (at Section 14) a definition of a lottery. The definition is that:

- people are required to pay in order to participate;
- prizes are awarded to some participants; and
- the prizes are allocated by a process which relies wholly on chance, or, they are allocated by a series of processes, the first of which relies wholly on chance.

Prize allocation cannot be dependent on any further payment after the participation fee has been paid.

The Gambling Act 2005 goes on to confirm that a participation fee is exactly that, and that it does not matter how it is described, whether it is paid in money or monies worth, or indeed when it is paid or to whom. It includes paying for goods and services at a price or rate which reflects the opportunity to participate in the arrangement.

Unless the promotion qualifies under the Gambling Act 2005 as a Small Society Lottery, the charity must obtain a Lottery Operating Licence from the Gambling Commission. If premium rate services are to be used to play the lottery, then the charity will also require a Remote Lottery Operating Licence. In respect of Remote Licences, technical standards (as well as licence conditions and codes of practice) must be complied with.

Free Prize Draws and Competitions: the essential difference between a free prize draw and a lottery is that no one makes any payment to take part in a free prize draw. Schedule 2 to the Gambling Act 2005 gives details of what is to be treated as amounting to “payment to enter” and sets out two types of promotions. The first is where there is only one entry route. The entry route will be deemed to be “free” if the method of communication required (e.g. post, telephone or other) is at the “normal rate”. For example, if it is by telephone there can be no additional payment, over what it would normally cost. It is irrelevant to whom the payment is made. Even if the promoter makes no charge but the telecoms company makes an additional charge, this will constitute payment. The second route is if there is a “free” alternative entry route, which is publicised effectively, involves payment at no more than the “normal rate” and the system for allocating prizes does not distinguish between those using either route.

A genuine prize competition as defined by the Gambling Act 2005 as one where the participants have to exercise skill and judgment, or knowledge, that is likely to:

- prevent a significant proportion of people from participating; or
- prevent a significant proportion of participants from winning a prize.

If either of these barriers (to entry or to success) can be shown, the process is not a lottery and does not require any licence (or other permit or exemption). The tests laid down in the Gambling Act 2005 are intended to be practical ones.

Legal considerations

As well as providing a service that complies with the PhonepayPlus Code of Practice, any charity contemplating using premium rate as means of fundraising should also consider the following:

Duties of Trustees: the charity's trustees will need to consider whether running promotions using premium rate services is permitted by the charity's constitution - i.e. under its powers. Most modern charities should have the power to raise funds, but see below regarding trading. The Charity Commission has stressed that trustees are under an obligation to consider the effect of any campaigning activities on the charity's reputation, and to ensure that any such activities are in the best interests of the charity. It is therefore important, quite aside from any regulatory regime, that the premium rate service is run in a transparent and honest manner so as to ensure that the charity does not become associated with any damaging adverse criticism. When third parties are used, precautions such as checking references, holding payments on trust and/or any other appropriate measures should be taken. Compliance with the Charities Act 1992 (as amended by the Charities Act 2006) will also be required (see below).

Trading company: Generally speaking fundraising activities that make use of premium rate services will not be classified as a donation or primary purpose trading and therefore should be routed through the charity's trading company.

There are a couple of exceptions to this as follows:-

- Donations via text/calls if the promoter or intermediary is not getting a benefit from the promotion (e.g. use of the charity's logo etc). In this case the amount raised by the service provider *may* be able to be paid by means of gift aid. *Some or all* of the amount paid by the supporter to the service provider *may* be subject to VAT.
- Lottery promotions can be run through the charity, as by concession, the profits from a lottery are exempt from corporation or income tax.

Charities Act 1992 (as amended by the Charities Act 2006)

A premium rate service provider that raises funds for a charity may either be a commercial participator or a professional fundraiser under the Charities Act 1992. In essence a commercial participator is someone who encourages purchases of goods and services on the grounds that some of the proceeds will go to a charitable institution, or that a donation will be made to a charitable institution. A premium service provider will be a professional fundraiser if they are wholly or mainly engaged in facilitating fundraising promotions for charities or if they are paid to solicit money for charity.

An example of a premium rate service provider acting as a commercial participator would be if the service provider encouraged the purchase of a ringtone on the basis that 10% of the purchase price would go to charity. An example of a premium rate service provider acting as a professional fundraiser would be if the service provider encouraged donations by SMS.

Commercial Participators and Professional Fundraisers are required by law to enter into a written agreement with the charity, which includes certain mandatory provisions. The prescribed requirements are laid down in the Charitable Institutions (Fund-Raising) Regulations 1994.

Regulation 2 provides that the agreement between the charitable institutions and a professional fundraiser shall be in writing and shall be signed by or on behalf of the charitable institution and the professional fundraiser. It must cover some specific terms.

A professional fundraiser agreement has to specify:

- the name and address of each of the parties to the agreement;
- the date on which the agreement was signed by or on behalf of those parties;
- the period for which the agreement is to subsist;
- any terms relating to termination of the agreement prior to the date on which the period expires;
- any terms relating to the variation of the agreement during that period;
- a statement of its principal objectives and the methods to be used in pursuit of those objectives;

- if there is more than one charitable institution party to the agreement, provision as to the manner in which the proportion in which the institutions which are so party are respectively to benefit under the agreement is to be determined;
- provision as to the amount by way of remuneration or expenses which the professional fundraiser is to be entitled to receive in respect of things done by him in pursuance of the agreement and the manner in which that amount is to be determined.

In addition to the standard requirements laid down in Reg 2 of the Charitable Institutions (Fund-Raising) Regulations 1994, Reg 5 provides that a professional fundraiser or a commercial participator who is party to an agreement under s.59:

“Shall, on request and at all reasonable times, make available to any charitable institution which is a party to that agreement any books, documents or other records (however kept) which relate to that institution and are kept for the purposes of the agreement.”

By Reg 5(2), the records have to be kept in legible form.

Under section 60 of the Charities Act 1992, (as amended by the Charities Act 2006) the service provider if a commercial participator must state the “actual amount” which is going to the charity or the “estimated amount” which is “calculated accurately as is reasonably possible in the circumstances”. If a professional fundraiser, the service provider must state the “actual amount” of its remuneration or the estimated amount as defined above.

A percentage of profits (e.g. 10% of profits) cannot be an “estimated amount”. In addition, as stated above, paragraph 7.9 of PhonepayPlus Code makes it clear that there will be a breach of the Code unless the promotional materials specify certain information.

Complying with other regulator’s requirements

In addition to the PhonepayPlus Code (see above), if the premium rate service is advertised in the print or broadcast media, it will be subject to the various industry regulatory codes (the Committee of Advertising Practice Codes for broadcast and non-broadcast media) administered by the Advertising Standards Authority (ASA). As well as general rules relating to honesty, truthfulness and clarity these regimes contain specific provisions relating to donations, charitable advertising and charity-linked promotions (i.e. where a third party runs a promotion claiming that it will benefit a registered charity). Rule 8.33 of the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (which is due to come into force on 1 September 2010) states that charity promotions must:

- (a) name each charity or cause that will benefit and be able to show the ASA or CAP the formal agreement with those benefiting from the promotion
- (b) if it is not a registered charity, define its nature and objectives
- (c) specify exactly what will be gained by the named charity or cause and state the basis on which the contribution will be calculated
- (d) state if the promoter has imposed a limit on its contributions
- (e) not limit consumers’ contributions. If an amount is stated for each purchase, there should be no cut-off point for contributions. If a target total is stated, extra money collected should be given to the named charity or cause on the same basis as contributions below that level
- (f) be able to show that targets set are realistic

- (g) not exaggerate the benefit to the charity or cause derived from individual purchases of the promoted product
- (h) if asked, make available to consumers a current or final total of contributions made
- (i) not directly encourage children to buy, or exhort children to persuade an adult to buy them, a product that promotes charitable purposes

Rule 16 of the UK Code of Broadcasting Advertising (also due to come into force in September 2010) further states (among other things) that charity promotions must not:

- (a) misrepresent the charity, its activities or the benefits of donated funds or exaggerate the scale or nature of the cause it claims to support
- (b) suggest that anyone who does not support the charity will lack proper feeling or fail in a responsibility
- (c) disrespect the dignity of those on whose behalf an appeal is being made
- (d) address fund-raising messages to children or produce messages likely to be of particular interest to them.

The Code goes on to say that advertisements that include an offer to donate money to charity must:

- (a) not depend on sales reaching a given level or be subject to a similar condition. If a target total or an amount for each purchase is stated, any extra money given to the charity must be donated on the same basis as contributions below that level
- (b) identify the charity that will benefit and state the basis on which the contribution will be calculated and, where more than one charity is involved, the advertisement but should be accompanied by a statement listing the charities and the proportions in which they will benefit.

Pre-empting, Preventing, Protecting

PhoneyPayPlus focuses on pre-empting and preventing problems - the key, it believes, to effective long-term consumer protection and a dynamic, growing industry. PhoneyPayPlus wants to have the right measures in place to engender an industry-wide culture of compliance where services are offered responsibly and consumers get a fair deal.

For this reason, PhoneyPayPlus has set up a specialist Compliance team to assist all parties in the phone-paid services supply chain. So if you are a charity already carrying out fundraising activities using premium phone-paid services, or are looking to do so in the future, the Compliance team is available to offer you expert, speedy and free advice and support about all aspects of your existing and future services.

How PhoneyPayPlus can help you

As well as checking promotional material, we can provide advice on the content and overall operation of your fundraising services. As we are not able to offer advice on matters of legality, we will always ask you to seek independent legal advice before operating your service.

Obtaining our advice before operating your service should help to ensure that you don't become the subject of a PhoneyPayPlus investigation. It should also help you avoid having to make costly changes to promotional material or scripts.

We are bound by confidentiality and data protection laws, as set out in our Code of Practice, so any information supplied to us about your service will be kept in confidence.

Contacting us

For more detailed information about how the PhonepayPlus Compliance team can help you, please feel free to contact the team either:

By email: compliance@phonepayplus.org.uk

By phone: 08450261060*

By fax: 08450261061*

(* Calls provided by BT will be charged at up to 4 pence per minute at all times. A set-up fee of up to 6 pence per call applies to calls from residential lines. Mobile and other providers' charges may vary.)

Further information about the work of the Compliance team can also be found on the PhonepayPlus website at www.phonepayplus.org.uk/output/for-business.aspx

Contacting Bates Wells & Braithwaite London LLP – the Charity team

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