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DRAFT MOBILE MESSAGING SERVICES CODE

1. We welcome the opportunity to provide comments on the draft Mobile Messaging Services Code (the "Draft Code"), and view the Draft Code as a positive development for the mobile messaging industry in New Zealand.

2. Our comments on the Draft Code are as follows:

Consent - Sections 16 (Chargeable Messaging Services – Customer Consent & Initiation) and 18 (Chargeable Subscription Services – Customer Consent & Initiation)

3. We note that an opt-in via the use of a unique password/pin (which is sent by an SMS-MT to a handset) entered into a web/WAP page would constitute valid consent under sections 16 and 18 of the Draft Code.

4. Based on our experience in other jurisdictions, we believe that such a mechanism would not be ideal for the following reasons:

- (a) Web opt-ins do not provide the same level of attribution that SMS-MOs would. If evidence of consent is required to resolve a dispute, Content Providers would only be able to provide the IP address of a web opt-in, and probably the date and time the unique password/pin was entered into the website. An IP address however does not positively link the consent to a Customer.
- (b) An SMS-MO will provide a higher degree of attribution. An SMS-MO containing a subscription keyword would clearly indicate that the consent was sent from the Customer's handset. All stakeholders would then be able to use the SMS-MOs to quickly resolve complaints which allege that no consent was provided.

5. It is pertinent to note that in other jurisdictions (e.g. Australia, Malaysia, Singapore and Hong Kong), web opt-ins alone would not constitute express consent. It is also

noteworthy that Australia had accepted such web opt-ins in the past¹, but has since revised its regulatory framework to require that SMS-MOs form the basis of consent².

Information Provided to Consumers – Section 8.1.4 (Advertising); Section 18.4 (Confirm Subscription Request Message)

6. We believe that it would be useful for the following pieces of information to be included in any advertising:
 - (a) the name of the Content Provider; and
 - (b) the customer care hotline/helpline.
7. With the introduction of the name of Content Provider in advertisements, Customers will be able to clearly determine who the provider of the service is. This is especially useful since Content Providers may frequently change brand names in connection of their services. Customers may also be able to make an informed decision as to whether they wish to obtain content from (and essentially enter into a contract with) that particular Content Provider. We note that this is partly addressed by Section 19.1.2 of the Draft Code where it refers to the obligation of messages containing sufficient information to enable the Customer to identify the originator of the Message. We suggest that the Draft Code go further to require that the name of the Content Provider be included in all advertisements.
8. We note that it is a requirement to include the helpline number in television/video commercials (section 9.2 of the Draft Code). However, this is not a requirement for other mediums of advertising (e.g. print, WAP, web-based, SMS, radio). Incorporating the customer care hotline into any advertisement would be useful as it provides an additional location for Customers to obtain the customer care hotline. This will be especially useful for Customers if the advertising is done via print or SMS as copies of such advertisements may be retained by the Customer for future reference.
9. Again, it is pertinent to note that other jurisdictions require such information to be reflected in any advertisement. For example, in Australia, the helpline must be displayed in all advertisements³. In Singapore, the name and the helpline must be displayed in all advertisements⁴. In Malaysia, the name of the provider must be displayed in all advertisements⁵.

¹ Section 3.1 of the Guidelines to the Mobile Premium Services Industry Scheme.

² Section 5.1 of the Mobile Premium Services Code (C637:2009)

³ Section 3.1.2 of the Mobile Premium Services Code (C637:2009)

⁴ Section 2.2.1(b) of the Premium Rate Services Code

⁵ Section 8.8 of the Guidelines on the Provision of Mobile Content and Services



10. In relation to Section 18.4 of the Draft Code, the name of the Content Provider should be included in the Confirm Subscription Request Message for the reasons mentioned above.

STOP Commands – Section 20.2.1 (“STOP” and other Key Words)

11. Section 20.2.1 states that Content Service Providers may choose to recognize other Key Words in addition to “STOP”. We propose that further clarification be made to indicate that Content Service Providers will not be faulted for not acting on words other than “STOP”. As there are many words that are synonymous with the word “STOP”, it is not practical to act on all these possible words. If additional STOP commands must be complied with, this should be an exhaustive list so as to promote certainty for all stakeholders.

Suggested format of Messages

12. We note that suggested Message formats have been provided (e.g. in relation to the \$30 Expenditure Notification, confirmation of chat room/chat service, Confirmation Subscription Request Message). We propose that these suggested Message formats be made compulsory.
13. While we acknowledge that most jurisdictions do not mandate any particular message format, we are of the view that this has the benefit of providing certainty for all stakeholders that only the mandated format will be accepted, and will prevent crucial information being placed at the end of a Message. This will also reduce the number of disputes between stakeholders as to whether a particular message format complies with the requirements in the Draft Code.

The Role of Aggregators

14. The definition of Content Service Providers currently encompasses aggregators who merely facilitate the carriage of a Content Provider’s premium service content, and who have no input or control over the production of the content.
15. This has the peculiar result of placing on aggregators, obligations which are at odds with reality. For instance, Content Service Providers are required to maintain human moderators for chat rooms (section 6.5 of the Draft Code) and Content Service Providers are required to maintain the Customers’ consent for a period of 2 years (section 15.1.2 of the Draft Code). Aggregators typically are not involved in the actual delivery of a chat service and are not involved in moderating the service. Further, aggregators are not involved in maintaining the web-site and collating and storing web opt-ins. These are matters which the Content Provider will be solely involved in and responsible for.



16. We are of the view that a distinction should be made between the Content Provider and aggregators, and that the primary obligation of compliance with the Draft Code should rest with the Content Providers. The Mobile Premium Services Code in Australia makes such a distinction between Content Providers and aggregators, and this framework has served the industry well in Australia. We would suggest a similar approach be adopted for the Draft Code.

17. If you should have any queries on the points raised, please do not hesitate to contact Derek Ho at derek.ho@sybase.com.

Yours sincerely,

SYBASE AUSTRALIA PTY LIMITED

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