



# Anti-Hawking Consumer Contact Policy

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## Section A: Introduction

### 1. Purpose

The purpose of this policy is to provide staff of Decode Capital with the correct procedures to contact retail clients for the purpose of offering relevant financial products.

From 5 October 2021 onwards, ASIC's updated Regulatory Guide 38 to include new provisions to reflect the hawking prohibition based on recommendations from the 2019 Royal Commission on Misconduct in the Banking, Superannuation and Financial Services Industry.

Under the new regulation and ASIC guidance, Decode Capital must not offer financial products for issue or sale if the offer is made in the course of, or because of, unsolicited contact. It is necessary for Decode Capital to obtain clear, positive and voluntary consent of the client in order to contact them for the purpose of offering relevant financial products for issue or sale. The consent applies to both the form of contact as well as the financial product that the consumer may be contacted in relation to.

### 2. Aims

This policy aims to explain Decode Capital's obligations under the updated Regulatory Guide 38, and provide a flowchart to assist Decode Capital in complying with the updated Regulatory Guide when contacting retail clients to offer financial products.

### 3. Definitions

Unsolicited contact refers to contact by telephone, face-to-face contact, or any other real-time interaction in the nature of a discussion or conversation to which the consumer did not consent (RG 38.7).

Real-time interactions are defined as ones where the offeror and consumer respond to each other continuously in real time or interact with the expectation of both parties providing an immediate response to each other (RG 38.38). This includes both verbal and written communications.

A breach of the Hawking prohibition is defined in s992A(1)(b) of the *Corporations Act 2001* as involving an offer made 'because of' or 'in the course of', unsolicited contact. This means that offers, requests and invitations made outside of a real-time interaction can still fall under the prohibition (RG 38.51). In other words, the prohibition applies to all unsolicited contact, regardless of the medium used (RG 38.51), and cannot be circumvented by using third parties (RG 38.37).

The Explanatory Memorandum states that 'because of' means that there is a causal nexus between the unsolicited contact and the offer. The following events may be considered examples of breaking the casual nexus between unsolicited contact and offer (RG 38.53-54):

- The consumer obtains personal advice (and the appropriate Statement of Advice) on the product;
- The consumer takes active steps to consent to further contact regarding the offer and has had a reasonable opportunity to consider any information in they have been provided.

The following circumstances are generally unlikely to break the casual nexus (RG 38.56):

- The consumer obtains general advice;
- The consumer receives a prospectus or PDS; or
- The offeror provides a disclaimer to the consumer or obtains a declaration from the consumer, to the effect that the offer is not because of the initial unsolicited contact.

Positive consent refers to either consent sought through standalone communication or interaction that demonstrates the consumer's decision, or within a broader discussion or larger document, consent that is clearly brought to the attention of the consumer in a way that allows for an express decision by the consumer (RG 38.66).

Voluntary consent is consent given by a consumer who is not forced, pressured or manipulated into doing so, or induced to contact the offeror so that the consumer could receive a benefit such as another service or taking up another opportunity (RG 38.68). This includes eliciting consumer's consent by asking leading questions.

Clear consent is provided when the consumer demonstrates that they understand they are consenting to be contacted for the purpose of being offered, or invited to apply or purchase for, a financial product (RG 38.70)). Consent must not be vague or ambiguous.

Consumers cannot give consent beforehand where they initiate real-time interactions. In this case, the Explanatory Memorandum provides that the fact that the consumer initiated the contact means that they understand the nature of the contact to which they are consenting.

Certain products may be considered 'reasonably within the scope' of the consumer's consent if:

- The consumer has consented to contact for products of a particular type or with particular features, and the product is of that type or has those features;
- The consumer asks for a product with a particular purpose or function fulfilled by the product in question;
- A reasonable person would consider the product to be within the scope of the consumer's consent, such as when the product:
  - Covers the risks that the consumer consented to be contacted about;
  - Has the same purpose or function as the product that the consumer consented to be contacted about;
  - Is so closely related to the product that the consumer consented to be contacted about that the consumer would reasonably expect to be offered such a product, which may be:
    - Directly related to the other product or service, or assets secured by that product;

- Directly related to the purposes for which the other product or service is commonly supplied, or for which assets secured by that product are commonly supplied.

## Section B: Obligations

### 1. Scope of the Prohibition

As an issuer of or adviser on a financial product, Decode Capital understands that the hawking prohibition applies where Decode Capital seeks to contact a prospective retail client about a financial product, or an existing client about a new financial product that the client does not already hold.

### 2. Obtaining Clear, Positive and Voluntary Consent

The extent of Decode Capital's obligations in respect to the updated Regulatory Guide 38 is acquiring clear, positive and voluntary consent that covers the relevant financial products to be offered, and ensuring that all contact made in relation to offering financial products falls within the scope of the consent given.

Decode Capital understands that it must specify the products of interest in order to obtain clear consent.

Decode Capital understands the consumer expressly states its intention to be contacted regarding the offer of the relevant financial products in order to provide positive consent e.g. on a form or agreement, the consumer ticks a box next to a term specifying that the consumer agrees to be contacted regarding the offer of a specific financial product or class of financial products.

Decode Capital understands that the consumer must not be pressured or manipulated into giving consent in order to give voluntary consent.

Decode Capital will not rely on consent if it becomes evident during the contact that the ongoing consent being relied upon is no longer clear, positive or voluntary. This includes the consumer:

- Having no recollection of providing consent to a meeting;
- Alleging that they did not provide consent; or
- Expecting the contact to be about a different type of product or a different topic.

### 3. Scope of Consent

Decode Capital understands that consent given for contact must be for the purpose of offering, or requesting or inviting a consumer to apply for:

- A particular financial product that is the subject of the offer, request or invitation; or
- A financial product reasonably within the scope of the consumer's consent.

#### 4. Duration of Consent

Decode Capital may only rely on consent provided by consumers for a six-week period. If a medical examination is needed before a product is issued or sold, the consumer may agree for up to a twelve-week period.

Decode Capital understands that there cannot be agreements to extend these periods, but that consumers can provide new consent.

Consumers may vary or withdraw their consent at any time prior to contact. Decode Capital comply with any variation or withdrawal of consent where the identity of the person seeking variation or withdrawal is reasonably ascertainable. Where the consent is varied, Decode Capital will seek to confirm that the consumer's consent remains clear, positive and voluntary prior to relying on it.

Decode Capital understands that it cannot rely on the original consent once it has been withdrawn or materially varied, and that variation will not restart the six-week period unless it amounts to new consent.

### Section C: Procedure

The following flowchart does not apply to off-market offers to purchase financial products, as are regulated by Part 7.9 (Division 5A) of the *Corporations Act 2001* (Cth).

1. Is Decode Capital's intention to contact a prospective retail client about a financial product, or an existing client about a new financial product that they do not already hold?
  - a. Yes -> Proceed to 2.
  - b. No -> The hawking prohibition does not apply.
2. Will the proposed contact take the form of a real-time interaction, or is it being made *because of* previous real-time interaction with the client?
  - a. Yes -> Proceed to 3.
  - b. No -> The hawking prohibition does not apply.
3. Will an offer or invitation to apply for the financial product be made to the client *during or because of* the proposed contact?
  - a. Yes -> Proceed to 4.
  - b. No -> The hawking prohibition does not apply.
4. Is Decode Capital making the offer or invitation in the course of providing personal advice?
  - a. Yes -> The hawking prohibition does not apply as Decode Capital is required by law to act in the client's best interests (RG 38.20).
  - b. No -> Proceed to 5.
5. Is the financial product offered exempt, or is Decode Capital acting on behalf of an entity that has been exempted by ASIC from the hawking prohibition?
  - a. Yes -> The hawking prohibition does not apply.
  - b. No -> Proceed to 6.
6. Has Decode Capital obtained clear, positive and voluntary consent from the client for the specific purpose of contacting them regarding the financial product (including products that reasonably fall within the scope of the consent)?
  - a. Yes -> Proceed to 7.

- b. No -> Decode Capital must obtain the client's clear, positive and voluntary consent in relation to the relevant financial product. Then proceed to 7.
7. Has the client withdrawn their consent?
  - a. Yes -> Decode Capital must re-obtain the client's clear, positive and voluntary consent in relation to the relevant financial product. Then proceed to 8.
  - b. No -> Proceed to 8.
8. Has the client varied their consent?
  - a. Yes -> Check to see if the consent still covers the relevant financial product. If it does, proceed to 9. If it does not, Decode Capital must re-obtain the client's clear, positive and voluntary consent in relation to the relevant financial product. Then proceed to 9.
  - b. No -> Proceed to 9.
9. Did the client provide their consent more than 6 weeks ago, or a longer period not exceeding 12 weeks where there was a need for a medical certificate?
  - a. Yes -> Decode Capital must re-obtain the client's clear, positive and voluntary consent in relation to the relevant financial product. Then proceed to 10.
  - b. No -> Proceed to 10.
10. Decode Capital may contact the client using the form of contact consented to, and make an offer or invitation in relation to the financial product that the client consented to or a financial product that falls reasonably within the scope of the client's consent.

## Section D: Exemptions

Products listed as exempt in Regulatory Guide 38.23-33 are as follows:

- Basic banking products
- Listed securities
- Certain offers of products to existing clients (i.e. existing products not needing renewals)
- Off-market unsolicited offers (regulated by Div 5A of Pt 7.9 *Corporations Act*)
- Offers, requests or invitations made as a result of a specific statutory requirement
- Other exemptions (RG 38.32)
  - Crowd-funded sourcing offer
  - Financial product made under an eligible employee scheme
  - Medical indemnity insurance provided to a medical professional as defined in the *Medical Indemnity Prudential (Supervision and Product Standards) Act 2003*
  - Interest in a scheme in the nature of an insolvency litigation funding scheme/litigation funding arrangement
- Products and entities in Table 1 of the RG 38 appendix