Phoenix Group response to Information Commissioner's Office Consultation: Direct Marketing Code (the Draft Code) – 4 March 2020

1.0 Overview of Phoenix Group

1.1 Phoenix Group welcomes the opportunity to respond to the Information Commissioner's Office (ICO) consultation. Phoenix Group is the largest specialist consolidator of heritage life assurance funds in Europe. Our main focus has traditionally been on closed life fund consolidation where we specialise in the acquisition and management of closed life insurance and pension funds. We call this our Heritage Business.

1.2 Alongside this, we have an Open Business which manufactures and underwrites new products and policies to support people saving for their future in areas such as workplace pensions and Self-Invested Personal Pensions (SIPPs). This Open Business is underpinned by a strategic partnership with Standard Life Aberdeen plc following our acquisition of Standard Life Assurance Limited in 2018. We also have a market leading brand - SunLife - which sells a range of financial products specifically for the over 50s market.

1.3 In total the Group has 10 million policyholders and £245 billion of assets under administration and we have operations in the United Kingdom, Ireland and Germany. The Group has four operating life companies which hold policyholder assets and a distribution business, SunLife.

2.0 Phoenix Group Response

2.1 We are supportive of the Draft Code's aims to provide practical guidance and promote good practice around direct marketing in general. However, we are concerned some important clarifications and updates from the ICO create a contradiction with the expectations of the Financial Conduct Authority (FCA) notwithstanding their joint 2019 Memorandum of Understanding (MOU).

2.2 To ensure we cover all of our relevant feedback, as well as the specific feedback on the Draft Code you have requested, we have structured our response as follows:

- Section 3: Key Concerns
- Section 4: General Observations
- Appendix 1: Consolidation of Phoenix Group questions to the ICO
- Appendix 2: Responses to ICO consultation questions

3.0 Key Concerns

3.1 'Regulatory Communications' and 'Service Messages'

3.1.1 We have significant concerns the requirements of the Draft Code restrict 'regulatory communications' to those without ***any*** encouragement or promotion, given ***solely*** for the benefit of the individual **and** the ***only*** motivation is to comply with the regulatory requirement (p.21). We believe this 3-part definition is overly strict and will lead to customer detriment or firms risking censure to comply with competing regulation.

3.1.2 Previous ICO determinations on establishing if a message was direct marketing or a 'service message' highlighted the need for there to be more than just a ***minimal*** amount of promotional material for a 'service message' to establish marketing. This was quantified in the EE Monetary Penalty notice as late as June 2019: "*if a message includes any **significant** promotional material… that message is no longer a service message"*. The Draft Code (p.20) removes this previous threshold altogether so that where "*the service message **has elements** that are direct marketing then the marketing rules apply, even if that is not the main purpose of the message"*. Whilst other aspects of the Draft Code suggest tone, content and context are the key factors; this statement draws a starker line and implies communications which contain **any** promotional reference establish direct marketing overall.

3.1.3 As an FCA regulated firm we are required to comply with the FCA's rules and high level principles which place a strong focus on delivering the right customer outcomes and ensure customers are kept appropriately informed during the lifecycle of their, often long-term, product. Such objective and relevant information is not prescribed but rather part of a wider outcomes-based approach to regulation. Whilst there are some specific rules governing the content and format of such communications, the majority of activity conducted by firms, such as ourselves, is done to meet the overarching principles and expectations the FCA outline via their less formal guidance – for example via commentary on thematic reviews and speeches. It requires firms to adopt an approach which works for their particular products and consumer target markets.

3.1.4 In many cases, these communications are designed to remind customers of the products they hold; which on the face of it may be easy to define as a service communication. However the nature of the products held within the financial services industry means there are generally options and financial decisions to consider. In overlaying the regulatory commitment of the FCA, as well as our own, to improve the financial stability of individuals as well as the industry as a whole means from a customer outcomes perspective we, as well as many firms in our sector, are using these communications to educate customers on their options and the benefits of taking further action. Some examples of these are detailed below:

- Confirming the level of life assurance they hold within a policy, encouraging them to assess whether this is enough and *confirm what they can do if they need more life cover*
- Provide a statement of pension benefits, confirming the current contributions being paid into the plan and highlighting *what the potential benefits for their long term retirement planning could be if they increased payments into their pension*
- Confirming the value of a forthcoming pension and highlighting the importance of considering their options for taking their retirement income which generally involve transferring money into *another product (these products are likely to be available from the same firm); and to highlight*

the importance of taking advice if they are unsure on what to do – again a service that can be provided by the firm

- A welcome letter confirming a policy has been issued as requested and providing all the necessary details for validation, *which also contains information on how to get details of other benefits they are eligible for as a policy holder – which could include preferential rates or access on other products and services*

In the examples above, we have highlighted the wording which we believe is key to help customers take proactive action to improve and address their financial needs and fulfil our FCA regulatory obligations, but which we believe under the 3-part definition of the Draft Code would be determined as marketing and therefore could only be used for those who have consented/not opted out.

3.1.5 In addition, there are expectations from the FCA to send out communications to customers informing them of better investment options available to them which could have a significant benefit to them. It is not necessarily against our interests for our customers to have better investment outcomes, indeed it is part of our organisational mission to improve outcomes for customers, but also we have to acknowledge that if the new investment option is one provided by our firm, it could not be classified as "*against our interests*"; again failing to fulfil the 3-part definition. 'Regulatory communications' do sometimes involve an amalgam of interests between organisation and consumers so the example in the Draft Code does not accurately reflect the current market position.

3.1.6 We believe Financial services firms will struggle to reconcile the tensions between the Draft Code with FCA rules, where engagement is restricted to a requirement to communicate only where we have consent or where an individual has not opted out, for example:

- Customers' interests - A firm must pay due regard to the interests of its customers and treat them fairly.

- Communications with clients - A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.
- The FCA's Insurance: Conduct of Business Sourcebook (ICOBS) 6.1.5 - A firm must ensure that a customer is given appropriate information about a policy in good time and in a comprehensible form so that the customer can make an informed decision about the arrangements proposed.
- Policy Statement (PS)16/12: Pension reforms - feedback on final rules and guidance states that *"it is for a firm to determine what is adequate in the context of their customers information needs".*
- Finalised Guidance (FG)16/8 Fair treatment of long-standing customers in the life insurance sector - A firm must ensure that closed-book customers are fully informed of the various options, features and guarantees that form part of their policies - both on an ongoing basis and in the lead up to policy events.
- Code of Conduct source book (COCON) rule 4 states that it would be a breach to *"provide inadequate information to a customer about a product or service".*

3.1.7 Tightening the proposed definition of what falls under direct marketing activities will likely create a binary approach to communicating with consumers. In financial services, where products may be complex and a consumer's financial competence relatively low, a non-marketing 'regulatory communication' may result in consumers being ill-informed about the options open to them to improve the performance of their long-term products and indeed their own financial position.

3.1.8 Phoenix believe that provision of pertinent facts at a timely and relevant point in a customer's lifecycle are fundamentally in the interest of the customer and allows us to highlight product features in the already purchased product and further options available which could improve customer outcomes. This is supported by customer research which tells us that customers do not understand the features of the product they have purchased and are generally lacking in awareness of financial products in the broader sense, therefore engagement and education is clearly necessary. Compliance with the

definition outlined in the Draft Code raises concerns these types of communications, which are undertaken to meet a regulatory principle or expectation but not a rule or requirement, and are highly unlikely to be against the interests of the firm due to the inevitable commercial benefit which comes from the underlying product being held with the firm, may be considered direct marketing and not 'service messages'.

3.1.9 In particular we worry those individuals who are disengaged or considered vulnerable are the very individuals who are less likely to consent to direct marketing. Therefore applying such a rigid definition of 'regulatory communications' would severely limit the interactions a firm could lawfully conduct to ensure such vulnerable customers are equipped with relevant and timely information on their products and options.

3.1.10 Questions:

Q1: Can the ICO confirm if it was their intention to remove the ability to include minimal marketing elements in service communications and if their stance is that any element of marketing contained within a service communication will make that a marketing communication overall? (see 3.1.2)

Q2: Can the ICO revisit their guidance on service and regulatory communications to acknowledge that there are scenarios, particularly in the financial services sector, whereby service communications will require the addition of promotional content to ensure customers are appropriately engaged in their own product, the products and services that may be intrinsically linked to their own product and to ensure they are equipped to make sound and informed decisions about their own financial position and future? (see 3.1.3 – 3.1.5)

Q3: Can the ICO confirm if they have engaged with the FCA and outline how the FCA and ICO priorities will be addressed and aligned in relation to the issuance of regulatory and services messages, in acknowledgement of the expectations placed on FCA regulated firms to

seek opportunities to proactively engage with customers to improve their awareness of financial services and their own personal finances?

3.2 Legitimate interests

3.2.1 There are two areas in the Draft Code which highlight ICO views in relation to the use of legitimate interest which we would like to query:

3.2.2 The first is in relation to the section "*How does legitimate interests apply to direct marketing?*" (pp.34 – 35) where the ICO state consideration of the potential benefits of direct marketing to individuals is "*unlikely… to add much weight to* [the] *balancing test*" and therefore firms should "*avoid undue focus on presumed benefits to customers*".

3.2.3 As set out in 3.1 above, we believe (for FCA regulated firms) there are clear benefits for customers to receive information in relation to their financial matters, which may involve promoting supporting products, services or options, which can directly benefit them. Our view is this should be a key element of the balancing test and we would request the ICO revisit the Draft Code guidance on this.

3.2.4 The second is in relation to the section "*Can we target our customers or supporters on social media?*" (p.90) where the ICO state "*it is likely that consent is the appropriate lawful basis* [for advertising via custom audiences], *as it is difficult to see how* [custom audience tools] *would meet the three part test of the legitimate interest basis"*.

3.2.5 We would challenge this view given the marketing activity is being conducted with existing customers, just through another medium. Individuals have the opportunity to opt-out with both the firm and through their settings on the social media platform so arguably have more control than traditional marketing activities. As such, legitimate interest seems a viable option and one which appears to be the view of other regulators across Europe. We

would therefore seek additional views from the ICO to explain their position further.

3.2.6 Questions:

Q4: Will the ICO revisit their guidance in relation to the potential benefits marketing of products by the financial services sector can have on individuals and acknowledge that this is a valid consideration for the legitimate interest balancing test? (see 3.2.3)

Q5: Can the ICO provide additional explanations to support their views as to why legitimate interests is unlikely to be considered as an appropriate lawful basis for custom audience marketing activities? (see 3.2.5)

3.3 Tracing/data cleansing

3.3.1 We challenge some assumptions of the Draft Code in relation to the tracing of individuals in order to update personal details.

3.3.2 We note on p.40 of the Draft Code the ICO state "*there should be no need to take extreme measures to ensure people's contact details are up to date, such as using tracing services*". However, the FCA place high expectations on firms they regulate to take measures to trace their 'gone aways' (those with whom firms no longer have an up-to-date address) in order to ensure the engagement referred to in 3.1 above can be maintained. It is common for customers with long standing insurance products, such as pensions, to lose touch with the products they hold and the firms they hold them with.

3.3.3 The FCA's thematic review into the treatment of long standing customer in the life insurance sector conducted in 2016, specifically focussed on how firms re-engage with their 'gone away' customers. They found firms were not doing enough to stay engaged and to locate customers when they became 'gone

aways'. The following is an extract from their document TR16/2 which reported on their findings from their review:

"*It is important that firms attempt to re-establish contact with customers who have 'gone away'. Examples are…..undertaking, as a minimum, electoral register and mortality checks, or using a third party to undertake this, in addition to leveraging their substantial databases, on the firm's behalf*"

3.3.4 Whilst this review was conducted pre-GDPR, FCA guidance has remained the same. As such we do not believe the view covered within the Draft Code is aligned to the expectations of the FCA which applies to the firms they regulate. We would therefore ask the ICO to revisit the comments in the Draft Code to reconcile the important need to use tracing services for e.g. long-term insurance products.

3.3.5 With regard to the processing of these updated contact details; firms may initially obtain up-to-date contact details via tracing activities and following genuine marketing research (which p.18 of the Draft Code states can be used to update any errors within a customer database). These activities will not have been conducted for the purpose of gathering details for a marketing campaign; however due to the long standing nature of the products customers hold with financial services firms, over time there will be activities undertaken where either 'service messages' or 'regulatory communications' are sent to deliver the engagement referred to in 3.1 above. The Draft Code wording implies this would be unfair and unlawful, however our view would be this would be appropriate if the right safeguards had been implemented e.g. a legitimate interest balancing test; appropriate transparency in the privacy notice and at intervals such as annual statements to remind customers of the processing activities. It would be helpful to understand whether the ICO confirm it agrees with this view, and if so, update the Draft Code accordingly.

3.3.6 Questions:

Q6: Will the ICO revisit their comments regarding the use of tracing services as a method for FCA regulated firms to help keep their customer data base up-to-date? (see 3.3.2 – 3.3.4)

Q7: Can the ICO confirm whether they agree with the view that firms could utilise the up-to-date contact details obtained from service/market research related activities for ancillary communications that form part of an ongoing customer relationship activities, providing the appropriate safeguards have been considered and implemented? (see 3.3.5)

4.0 General Observations

4.1 Definition of direct marketing

4.1.1 We note the definition of direct marketing in the Draft Code (p.13) is taken from the DPA 2018. However the reference to direct marketing in the summary (p.3) states "*direct marketing includes the promotion of aims and ideals as well as advertising goods or services*".

4.1.2 Firms in the financial services sector, will consider marketing as being aligned to the definition of a financial promotion which is:

"An invitation/inducement to engage in investment activity communicated in the course of business"

However, if you pull out commentary from the Draft Code and PECR, the definition for data protection purposes is far wider as referred to in the ICO summary (p.3). We would request the ICO consider documenting their definition of 'marketing' as a key defined term within the Draft Code. This would empower data protection practitioners and those engaged in developing communications for individuals to make robust and consistent decisions, without the need to refer to specific pages of the Draft Code.

Q8: Can the ICO produce a definition of 'Marketing' and include it within the Draft Code for ease of reference? (see 4.1)

4.2 Incentivised consent for marketing

4.2.1 Some element of incentivising an appropriate lawful basis for marketing is permitted – the Draft Code gives the example of joining a loyalty scheme, the whole purpose of which is to access money-off vouchers. However, p.33 of the Draft Code warns organisations "*not to cross the line"* with incentives and unfairly penalise those who refuse to consent to direct marketing.

4.2.2 It would be helpful to firms who are considering this activity to understand more clearly where the ICO views this red line, maybe with examples of what would not be considered appropriate by the ICO.

Q9: Can further examples be included of where incentivising the gathering of an appropriate lawful basis for marketing would be considered as inappropriate by the ICO within the Draft Code? (see 4.2)

4.3 Using special category data in direct marketing

4.3.1 On p.39, the Draft Code clarifies simply having a list of customer names will not trigger Article 9 even if those names are associated with a particular ethnicity or religion unless the names are specifically used to target marketing based on those inferences.

4.3.2 We would welcome additional detail to clarify what other types of processing would not trigger Article 9. For example whether it would trigger Article 9 if an organisation elected not to issue direct marketing to customers identified as vulnerable due to a health condition.

Q10: Can the ICO provide further examples of processing activities involving the use of special category data which would not trigger article 9? (see 4.3)

4.4 Disproportionate effort exemption from providing privacy information

4.4.1 The acknowledgement on p.49 that the disproportionate effort exemption can be relied upon if there's a proportionate balance between the effort involved in giving the privacy information and the effect of the processing on the individual is a very welcome, common sense approach. However we would welcome more detail on the factors to consider when conducting this balancing exercise, particularly in the context of invisible processing, which by its nature won't have any effect on the individual.

Q11: Can the Draft Code be updated to include more detail on the factors that could be considered when conducting the balancing exercise to determine if the disproportionate effort exemption for the provision of privacy notices is applicable? (see 4.4)

4.5 In-app messages and direct messaging on social media

4.5.1 The Draft Code states in-app messages and direct messages in social media "*are electronically stored messages*" and treated akin to email for the purposes of PECR. The definition in Regulation 22 of PECR refers to material being stored "*in the network or in the recipient's terminal equipment*". We would welcome more detail to explain why in-app messages are covered by this definition as this position doesn't look like it's supported by the legislation as currently drafted; in particular, whether in-app messages are considered to be stored in the network or in the device. The recently published European Electronic Communications Code does not broaden the rules on marketing to cover in-app messaging.

4.5.2 In addition, we believe the Draft Code would benefit from further detail on what is meant by direct messaging on social media. For example, a message sent to an inbox would be covered by PECR but an advertisement displayed

on an individual's Facebook news feed would not, so there is scope for clarification, using examples.

Q12: Can the ICO provide further detail to explain why in-app messages are covered by the PECR definition of 'electronically stored messages'? (see 4.5.1)

Q13: Can the ICO provide further detail on the definition of 'direct messaging' in the context of social medial, with examples to help firms assess the application of the definition to their activity? (see 4.5.2)

5.0 Summary

5.1 The Phoenix Group understand and support the ICO's desire to implement a practical code to provide clear guidance on how firms can comply with data protection legislation when undertaking direct marketing activities.

5.2 We also acknowledge our feedback contains a number of references to the FCA regulatory regime and expectations; this is not done to undermine the importance of the data protection requirements, nor the role of the ICO as the UK Data Protection Supervisory Authority.

5.3 We acknowledge each regulator will make rules and policies in pursuit of their statutory objectives, and we are aware of the MOU in place between the FCA and ICO.

5.4 Phoenix Group takes its data privacy obligations seriously and are committed to supporting the implementation of this Draft Code. It is not our intention to avoid the obligations placed upon us as a data controller of personal data for direct marketing. However, we are of the opinion that for the reasons outlined in our feedback, there are a number of areas that, without further clarification and refinement, could have a significant negative effect on the interests of the

consumer in the financial sector, as well as our ability as a regulated financial services firm, to comply with the FCA rules and expectations.

5.5 We would be grateful to understand where the ICO and FCA have collaborated on the Draft Code.

5.6 Representatives from the Phoenix Group would be happy to discuss the feedback provided above in more detail if that would assist the ICO.

Appendix 1: Consolidation of Phoenix Group questions to the ICO

Q1: Can the ICO confirm if it was their intention to remove the ability to include minimal marketing elements in service communications and if their stance is that any element of marketing contained within a service communication will make that a marketing communication overall? (see 3.1.2)

Q2: Can the ICO revisit their guidance on service and regulatory communications to acknowledge that there are scenarios, particularly in the financial services sector, whereby service communications will require the addition of promotional content to ensure customers are appropriately engaged in their own product, the products and services that may be intrinsically linked to their own product and to ensure they are equipped to make sound and informed decisions about their own financial position and future? (see 3.1.3 – 3.1.5)

Q3: Can the ICO confirm if they have engaged with the FCA and outline how the FCA and ICO priorities will be addressed and aligned in relation to the issuance of regulatory and services messages, in acknowledgement of the expectations placed on FCA regulated firms to seek opportunities to proactively engage with customers to improve their awareness of financial services and their own personal finances.

Q4: Will the ICO revisit their guidance in relation to the potential benefits marketing of products by the financial services sector can have on individuals and acknowledge that this is a valid consideration for the legitimate interest balancing test? (see 3.2.3)

Q5: Can the ICO provide additional explanations to support their views as to why legitimate interests is unlikely to be considered as an appropriate lawful basis for custom audience marketing activities? (see 3.2.5)

Q6: Will the ICO revisit their comments regarding the use of tracing services as a method for FCA regulated firms to help keep their customer data base up-to-date? (see 3.3.2 – 3.3.4)

Q7: Can the ICO confirm whether they agree with the view that firms could utilise the up-to-date contact details obtained from service/market research related activities for ancillary communications that form part of an ongoing customer relationship activities,

providing the appropriate safeguards have been considered and implemented? (see 3.3.5)

Q8: Can the ICO produce a definition of 'Marketing' and include it within the Draft Code for ease of reference? (see 4.1)

Q9: Can further examples be included of where incentivising the gathering of an appropriate lawful basis for marketing would be considered as inappropriate by the ICO within the Draft Code? (see 4.2)

Q10: Can the ICO provide further examples of processing activities involving the use of special category data which would not trigger article 9? (see 4.3)

Q11: Can the Draft Code be updated to include more detail on the factors that could be considered when conducting the balancing exercise to determine if the disproportionate effort exemption for the provision of privacy notices is applicable? (see 4.4)

Q12: Can the ICO provide further detail to explain why in-app messages are covered by the PECR definition of 'electronically stored messages'? (see 4.5.1)

Q13: Can the ICO provide further detail on the definition of 'direct messaging' in the context of social medial, with examples to help firms assess the application of the definition to their activity? (see 4.5.2)

Appendix 2: Responses to ICO consultation questions

Q1	**Is the draft code clear and easy to understand?** Yes: The layout and wording used in the Code are clear and easy to follow, however there are points of clarification which we have highlighted in our feedback response which we believe would help firms understand its application in some areas.
Q2	**Does the draft code contain the right level of detail? (When answering please remember that the code does not seek to duplicate all our existing data protection and e-privacy guidance)** No: While the draft code generally contains the right level of detail we believe there are crucial details missing from a number of sections or matters that need to be clarified in order for firms to apply it appropriately and consistently, in particular: - Service and regulatory communications - Legitimate interests - Tracing/data cleansing - Custom audience advertising
Q3	**Does the draft code cover the right issues about direct marketing?** No **If no please outline what additional areas you would like to see covered:** We welcome efforts to incorporate new technology and how the current law applies to them; and to provide information on service related communications (to help assess what is direct marketing by default). However, for the reasons outlined in our full response, we believe there are additional considerations and supporting detail needed to help ensure this Code covers all issues which are pertinent to financial services firms – the sector which we are representing in our feedback.
Q4	**Does the draft code address the areas of data protection and e-privacy that are having an impact on your organisation's direct marketing practices?** No:

	As stated in our full response, we have significant concerns over the need to balance FCA rules and expectations V the ICO data protection guidance and legislation, which at the moment do not seem to support each other. This is a key area of focus of the Phoenix Group and one which would look to the ICO to provide additional support and guidance to help us navigate and ensure we can fulfil the requirements of both regulatory regimes.
Q5	**Is it easy to find information in the draft code?** Yes
Q6	**Do you have any examples of direct marketing in practice, good or bad, that you think it would be useful to include in the code** No, although we have included examples of communications which we believe currently may be viewed as direct marketing if the Draft Code was applied, but for which we believe there is a strong rationale that would justify them as service related communications.
Q7	**Do you have any other suggestions for the direct marketing code?** Yes, we have incorporated these within our full response (see appendix 1 for summary of questions/considerations for the ICO)