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4 March 2020

Consultation on the draft Direct Marketing Code: communications by occupational pension scheme trustees

Dear Sir/Madam

Thank you for the opportunity to comment on the draft Direct Marketing Code.

We are responding on behalf of our pension scheme trustee clients, in our role as adviser to a significant proportion of trust-based occupational pension schemes in the UK, and also our corporate clients, who provide access to trust and contract based pension schemes for their employees.

We are responding to **Question 7** ("do you have any other suggestions for the direct marketing code?"), with a request that the Code explicitly confirms that:

- Communications by pension scheme trustees to members and prospective members are not direct marketing.
- In most normal circumstances, the communications employers make to their employees about their pension arrangements are also not viewed as direct marketing.

Why should the Code incorporate guidance for pension scheme trustees and for employers in relation to their pension schemes?

We are aware that some pension scheme trustees are strictly restricting any communication they make to members to factual information only, because they are concerned that any other

communication they make is forbidden by the Privacy and Electronic Communications Regulations 2003/2426 (“PECR”).

We understand that these concerns have been amplified by the draft ICO direct marketing code.

Pension scheme trustees assist members and prospective members by providing guidance regarding a range of issues facing them in relation to the scheme, including:

- The benefits of joining the occupational pension scheme sponsored by the employer.
- The benefit of increasing the member’s contributions to the scheme.
- The options available to the member, for example, when they cease to be employed by the scheme’s sponsor (that is, the employer who funds the scheme).
- The options available to the member when they approach retirement age.

Restricting member communications to solely factual information means that pension scheme trustees cannot provide assistance to members, such as letting them know all the options available to them at particular junctures in their career. Such a restriction significantly hinders members, who may fail to make appropriate retirement planning decisions as a result.

The PECR and the draft ICO code’s interpretation of “direct marketing”

- Regulation 22 of the PECR forbids direct marketing e-mails - “unsolicited communications for the purposes of direct marketing by means of electronic mail” - except, broadly, where there’s consent or the recipient is negotiating for, or has paid for, goods or services from the sender. Therefore, pension scheme trustees are restricted by the PECR in sending e-mail communications to members only where these can be treated as “direct marketing”.
- Direct marketing is defined in section 122(5) of the Data Protection Act 2018 as: “the communication (by whatever means) of advertising or marketing material which is directed to particular individuals”.

However, the draft ICO code may lead trustees to conclude that their communications are direct marketing and therefore restricted:

- The draft code seems to distinguish (on [page 15](#)) between direct marketing and a communication which is “more neutral and informative in nature – does it seek simply to provide information the individual needs in the context of the existing relationship?”. In the case of many pension scheme communications, whether from the trustee or employer, it

might be difficult to determine at any point in time what information a member “needs”, and what might be considered “promotional”.

- Although the ICO draft code is specifically about the restrictions and obligations that apply via data protection legislation and the PECR to those making direct marketing communications, it includes the following guidance regarding those to whom it is to apply: “This code applies if you process personal data for direct marketing purposes. *Direct marketing includes the promotion of aims and ideals as well as advertising goods or services* (my italics). Any method of communication which is directed to particular individuals could constitute direct marketing.”
- Pension scheme trustees might have concerns about the draft Code’s definition of “Who is this Code for”: “You will be caught by the direct marketing rules if you are using data with the intention to market, advertise, or promote products, services, *aims or ideals*. For example... *charities and third sector organisations fundraising or promoting their aims and ideals...*” (my italics).

Pension scheme trustees may, as a result, significantly restrict the information they provide to members via the medium of e-mail communication, as these might be seen as promoting the trustees’ aims or ideals.

For example, the trustees or employer may wish to communicate that joining or making increased pension contributions to the pension scheme is likely to be financially beneficial, but may fear that they cannot do so, unless they have obtained appropriate consents from each member and prospective member. (And if the trustees contact members and prospective members to ask them for consent to send what might be construed as direct marketing, it appears that request itself is for the purposes of direct marketing and therefore forbidden.)

The Code should confirm that communications by occupational pension scheme trustees to members and prospective members, and communications by employers to employees about the reasons why it could be advantageous to join its pension scheme, are not direct marketing.

Unless it is supplemented with clear messages for pension scheme trustees and employers, the draft Code will unhelpfully restrict their pension communications, and lead to poor outcomes for members and prospective members.

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Our view is that the Code should include a clear statement to trustees of occupational pension schemes, clarifying that their communications to members and prospective members regarding the scheme are not “direct marketing” communications and are therefore not forbidden without explicit recipient consent. It should also clarify that employers are also able to communicate with their employees about their pension arrangements, including telling employees why they should join the employer sponsored pension scheme, without requiring explicit consent to do so.

Note that

- Pension scheme trustees’ communications do not benefit the trustees, and in particular, trustees will not receive any financial benefit from promoting the pension scheme;
- The trustees have a fiduciary duty to act in the best interest of members;
- Employers also do not gain any financial advantage from their employees joining the pension scheme (in fact, quite the reverse).

Such a statement would be in line with guidance (“Guide for Employers and Trustees on providing support with financial matters without needing to be subject to regulation”) provided in 2017 by the two main regulators of pension schemes, the Financial Conduct Authority and the Pensions Regulator, regarding pension scheme trustees’ and sponsoring employers’ communications with members and prospective members. That guidance explains that employers and trustees can “help” employees and promote the occupational pension scheme, without being authorised by the FCA. In the context of FCA regulation, it helpfully confirms that “(i)information on the merits of participating in an occupational pension scheme... is not caught by the restrictions on promoting financial products”.

In addition, it would be helpful to pension scheme trustees and employers to include an explicit statement clarifying that their communications to members and prospective members regarding pension arrangements are not direct marketing in the electronic and telephone marketing section on the ICO site.

We would welcome the opportunity to discuss our response further with you if that would be helpful.

Yours faithfully



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