

Information Commissioner's Office

Consultation:

Direct Marketing Code

Start date: 8 January 2020

End date: 4 March 2020

Introduction

The Information Commissioner is producing a direct marketing code of practice, as required by the Data Protection Act 2018. A draft of the code is now out for public consultation.

The draft code of practice aims to provide practical guidance and promote good practice in regard to processing for direct marketing purposes in compliance with data protection and e-privacy rules. The draft code takes a life-cycle approach to direct marketing. It starts with a section looking at the definition of direct marketing to help you decide if the code applies to you, before moving on to cover areas such as planning your marketing, collecting data, delivering your marketing messages and individuals rights.

The public consultation on the draft code will remain open until **4 March 2020**. The Information Commissioner welcomes feedback on the specific questions set out below.

You can email your response to directmarketingcode@ico.org.uk

Or print and post to:

Direct Marketing Code Consultation Team
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

If you would like further information on the consultation, please email the [Direct Marketing Code team](#).

Privacy statement

For this consultation we will publish all responses received from organisations except for those where the response indicates that they are an individual acting in a private capacity (eg a member of the public). All responses from organisations and individuals acting in a professional capacity (eg sole traders, academics etc) will be published but any personal data will be removed before publication (including email addresses and telephone numbers).

For more information about what we do with personal data please see our [privacy notice](#)

Q1 Is the draft code clear and easy to understand?

Yes

No

If no please explain why and how we could improve this:

The basis for the response by the Society of Pension Professionals to all consultation questions is set out in Q1. Reference is made back to this in the other questions.

**INFORMATION COMMISSIONER'S OFFICE: CONSULTATION ON DRAFT DIRECT
MARKETING CODE OF PRACTICE – 08 JANUARY TO 04 MARCH 2020
RESPONSE BY THE SOCIETY OF PENSION PROFESSIONALS**

Ref: SPP LC/ ALS/ 28.02.20

INTRODUCTION TO THE SOCIETY OF PENSION PROFESSIONALS (SPP)

SPP is the representative body for a wide range of providers of advice and services to work-based pension schemes and to their sponsors. SPP's Members' profile is a key strength and includes accounting firms, solicitors, insurance companies, investment houses, investment performance measurers, consultants and actuaries, independent trustees and external pension administrators. SPP is the only body to focus on the whole range of pension related services across the private pensions sector, and through such a wide spread of providers of advice and services. We do not represent any particular type of provision or any one interest - body or group.

Many thousands of individuals and pension funds use the services of one or more of SPP's Members, including the overwhelming majority of the 500 largest UK pension funds. SPP's membership collectively employs some 15,000 people providing pension-related advice and services.

SPP's Legislation Committee has considered this consultation, whose membership includes representatives of pension lawyers, actuaries and consultants, pension administrators, and product providers

KEY COMMENTS

The SPP comments exclusively in relation to the application (or otherwise) of the draft Direct Marketing Code of Practice (the "**Code**") to the trustees of occupational pension schemes ("**OPSs**")

The SPP's firm view is that the activities of OPS trustees do not, or at least should not, be regulated as "direct marketing".

The SPP asks the ICO to confirm on a blanket basis, whether through the final Code or otherwise, that OPS trustee activity falls outside of "direct marketing". Failing that, we seek specific guidance, to make clear what sorts of activity would and would not amount to direct marketing. At the very least it should provide guidance for OPS trustees of employer-sponsored pension schemes that have no connection or association with a commercial pension scheme provider.

We have copied the Pensions Regulator and the Department for Work and Pensions. We would expect them to have an interest in the ability of OPS trustees to issue best-practice

communications to all OPS pension members (which go further than mere service messages, and which expressly promote member action) without restrictions in relation to express opt-ins or otherwise.

This consultation response and request for specific ICO guidance follows concerns expressed by SPP members and our trustee clients with the draft Code. There is concern in particular that, through the Code's examples in non-commercial spheres (e.g. regarding the communications of charities and public authorities), the ICO is widening the scope of "direct marketing" in ways which, on one reading, could catch activities of OPS trustees. This has important consequences, which are already causing some OPS trustees to consider action that may be against the best interests of pension scheme members, for example by scaling back educational communications that encourage members actively to review and potentially switch their pension scheme investments or to increase their cash contributions in order to build up greater retirement savings. Other trustees are considering reverting to paper communications, to avoid PECR's provisions applying. This also risks, amongst other things, preventing trustees from meeting the expectations expressly placed upon them by the Pensions Regulator through regulatory guidance, for example to encourage all members to review and increase their cash contributions. This is the case if, say, such "calls to action" (albeit for members' benefit) constitutes direct marketing by electronic means for which (as will very often be the case) the trustees had no express member opt-in.

To be clear, the SPP – for reasons detailed further below – considers that the situation of OPS trustees is properly and readily distinguishable from other categories of information providers. For example (and not exhaustively):

1. **Trustees administer employers' benefit promises.** Fundamentally, pensions are deferred pay. The SPP is not aware that communications by employers to employees are caught by direct marketing rules. Communications by trustees to scheme members are little different.
2. **The law already protects pension members.** Pension trustees are fiduciaries. They have legal duties to act in the financial interests of members. They have no other purpose or beneficiaries. The pension regulatory landscape, overseen by the Pensions Regulator, bolsters this protection regime. In other words, the law already protects members in respect of communications issued by trustees, in distinction to the commercial or other categories of information senders that the Code identifies.
3. **Communications are not for the benefit of trustees.** Not only must communications be for members' benefit generally, pension trustees (unlike other categories of sender identified by the Code) receive no commercial or other benefit from their communications. Importantly, no conflict of interest arises between the sender and the recipient. Even if one were to distinguish, at a scheme sponsor level, employer-sponsored schemes from those of a commercial master trust, say, the *trustees'* of all trust-based schemes have no commercial or other interests to promote. This is distinct from the commercial master trust organisation or provider within the overall arrangement, which is legally separate from the trustees, and which would of course wish to – and could (subject to PECR) – separately promote its commercial interests).
4. **Absence of "nuisance".** In addition to seeking to protect recipients from communications that could conflict with their interests, avoiding nuisance messages is clearly also at the heart of the direct marketing laws. Whilst few would argue that all OPS pension members welcome or read every word of pension communications, few if any would genuinely label communications *from trustees* as nuisance or spam.

For the reasons above and set out more fully below:

- The SPP's answers to each of Consultation Questions 1-5, *from the perspective of OPS trustee users*, is "no" (Is the draft code easy to understand? Does the draft code contain the right level of detail? Does the draft code cover the right issues about direct marketing? 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? Is it easy to find information in the draft code?).
- The answer to Consultation Question 6 is "no" (Do you have any examples of direct marketing in practice that you think it would be useful to include?).
- The answer to Consultation Question 7 is "yes – please see the request in this letter that the Code give a clear statement that OPS trustee activities are not direct marketing, or (as very much a less helpful outcome) examples to show what activity of OPS trustees is and is not caught by direct marketing rules". (Q7 is "Do you have any other suggestions for the direct marketing code"?).

FURTHER COMMENTS

We expand below on several of the themes from the summary above.

Reasons for seeking ICO guidance through the Code or otherwise

OPS trustees are not clearly outside the scope of direct marketing rules:

1. Certain examples in the Code cast the net wide in ways that cause OPS trustees concern. For example, pages 20-23 say the direct marketing provisions may apply to "regulatory communications", which will constitute direct marketing if "the communication [which is sent to meet a regulatory objective] actively promotes the initiative, by highlighting the benefits and encouraging consumers to participate" (p21). To make it more likely to fall outside direct marketing, it states that communications should be "in a neutral tone, without any encouragement or promotion; and (as well as being given solely for the benefit of the individual) be "against your [i.e. the sender's] interests" and "your only motivation is to comply with a regulatory requirement" (p21). On page 23, an example (about a GP surgery texting patients generally that flu jabs are available) the ICO notes "This is more likely to be direct marketing because it does not relate to the patient's specific care but rather to a general service that is available." This is in the section on public service communications, but its application by analogy to other areas like pension trustees is not free from doubt.
However, what about the pension scheme examples in the Appendix to this letter, which are by no means exhaustive? These include the Pensions Regulator telling their regulated OPS trustees "we expect trustees to ensure members are regularly informed that their level of contributions is a key factor in determining the overall size of their pension fund"? Trustees often remind members of the availability of the investment switching service on the scheme's member web platform. Trustees issue such communications solely for the benefit of members. However: they actively promote members increasing their cash pension contributions or reviewing and changing investments; they are not directed to the particular care of individual scheme members (they are addressed to all members); and they are not *against* the trustees interests' (which the SPP considers to be an extraordinarily high bar to meet).
2. The existence of an exception from the strict rules on live calls for direct marketing of pension schemes, which includes occupational pension schemes, makes clear that communications related to OPS's can at least in some situations amount to direct marketing.
OPS trustees would accept that the examples of direct marketing of pension

schemes in Regulation 21B¹ do, indeed, instinctively feel like “marketing”. That said, these examples are in marked contrast to the activity of non-commercial OPSs, and indeed in contrast to the activity of *the trustees* of commercial pension arrangements where – regardless of the objectives of the commercial sponsor – the *trustees* owe their duties only to the pension members. If the Regulation 21B examples reflect the ICO’s view of what is direct marketing in an occupational pension scheme context, this could usefully be expanded to set an appropriately very high bar for the sort of OPS trustee activity that that is and is not caught.

The Employment analogy

Trustees safeguard OPS assets and administer pension funds – including communicating with pension scheme members about their options – in essence to discharge the employee benefit obligation of the members’ current or former employers.

Employers will often inform employees of their options under a flexible benefits package. For example, they might be encouraged to consider increasing employee pension contributions to benefit from increased employer matching contributions. This is little different from the example actions that pension trustees encourage members to consider, either owing to their own desire to educate members and help improve their retirement outcomes, or at the instigation of the Pensions Regulator (see the examples in the Appendix). If such communications by employers are not caught, it is difficult to see a legal or policy reason why OPS trustee communications should be categorised differently.

Existing trust law and regulatory protections for OPS members

The Pensions Regulator has, as two of its statutory duties (a) to protect members’ benefits under occupational pension schemes, and (b) to promote good administration of work-based pension schemes.

The Regulator’s Guidance (and Codes) promote its statutory purposes. The Pensions Regulator does not reference its guidance in terms of “marketing” information or information requiring member opt-in: quite the reverse, in that the Regulator is targeting non-engaged members.

Communications do not benefit the trustees

The position is different from a charity, which seeks donations from the public to support the charitable purposes, *not* the purposes of the donor. In a pension scheme, members contribute to fund their *own* retirement benefits. Further, trustees do not (unlike a political party, say) issue communications to encourage donations or contributions to promote their own political or other purposes.

Nuisance

Alongside protecting recipients from messages which could conflict with their interests (or ultimately promote other interests), it appears that protecting recipients from unwanted messages. – nuisance, or spam – is key.

Trustees invariably send communications to meet one or more of the objectives of satisfying

¹ Regulation 21B says that direct marketing of pension schemes includes:

- marketing a product or service to be acquired using funds held for, or previously held in a pension scheme;
- offering advice or another service that promotes, or promotes consideration of, withdrawing or transferring funds from a pension scheme; or
- offering advice or another service to enable the assessment of the performance a pension scheme (including its performance in comparison with other forms of investment).

mandatory disclosure obligations or to meet best practice guidance from the Pensions Regulator or to be in line with trustees' trust law duties to act in best interests of the recipients. This is another facet of there being an absence of actual or potential conflict of interest. To put it another way, it can also be said that, whilst no one could reasonably say members welcome every letter or email from trustees or read every word, they do have a reasonable expectation to receive such communications and would not consider pension communications *from the trustees* to be issued for ulterior motives.

Impact if no guidance or exemption

Anecdotally, the SPP understands the potential scope for trustee activity to be seen as "direct marketing" is currently only on the radar of a small number of schemes. However, discussion following the draft Code's publication makes clear that awareness and concern is increasing. Trustees may well not be comfortable proceeding with anything other than minimum disclosure required by pension disclosure regulations, or at least not sending any communications that encourage any positive action by members, without clarity from the ICO that all trustee communications, or, at least those falling within "safe harbour" parameters, are not direct marketing.

Schemes may approach this differently. However, the SPP is aware of pension schemes that are already considering (and in some cases already implementing) one or more of the following.

- Scaling back "best practice" member email communications to members who have not opted-in to electronic marketing (which means the majority of members, at present). Such members would then only receive the minimum disclosures legally required by trustees and not the level of communication expected by the Pensions Regulator. This would create a "two tier" membership, to the detriment of those on minimum disclosure
- Alternatively, they might potentially scale back to minimum required disclosures for all members. This would be to avoid: (a) the time and cost of producing two different forms of communications; (b) maintaining and monitoring two lists of the "in" and "out" members for email communications; and (c) conceivably, complaints from "paper members" who do not receive the fuller and better electronic version seen by others.
- Reverting to paper-based disclosures, to which the opt-in requirements applicable to electronic communications under PECR do not apply. This would allow "best practice" communications to be issued to all. However, it would reverse the administrative efficiencies and innovations of recent years in electronic communications; it would disengage members who prefer electronic communications; and, of course, this paper approach would represent a retrograde step for sustainability.

Interest of the Pensions Regulator and Department for Work and Pensions

We suspect the Pensions Regulator will be interested, should the ICO's position be that members must opt in to best-practice member communications that go beyond purely factual or service statements.

To the extent there is an issue (and the SPP is clearly keen to avoid this outcome), the DWP may be interested to know, both generally, and in case legislative amendment is required to provide an exception for OPSs so they can continue to act as trustees, and the Pensions Regulator, consider best promote the interests of pension scheme members.

NEXT STEPS

The SPP would be happy to discuss this further with the ICO

Copy to:

Pensions Regulator

Department for Work and Pensions

28 February 2020

SPP Legislation Committee

Contacts:

[REDACTED]@the-spp.co.uk

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APPENDIX - INFORMATION REQUIRED / ENCOURAGE BY THE PENSIONS REGULATOR

Example 1:

“We consider it best practice to include in the annual benefit statement:

- statements which highlight the relationship between member contributions and good member outcomes
- information about the member’s rights in respect of flexible benefits, including which benefits are available directly from the scheme”

tPR: Guide 6 Communicating and reporting (accompanying Code of Practice 13: Governance and administration of occupational trust based schemes providing money purchase benefits)

<https://www.thepensionsregulator.gov.uk/en/trustees/managing-dc-benefits/6-communicating-and-reporting#3b2a702ef058428b817f2ce4dd3a560f>

Example 2:

“Post retirement communications

Where your scheme offers retirement options other than using pension savings to buy a lifetime annuity, e.g. flexi-access drawdown, you need to consider what information you provide to members to continue supporting them to make good decisions.”

tPR: Guide 6 Communicating and reporting

Example 3:

“We expect trustee boards to ensure that members are regularly informed that their level of contributions is a key factor in determining the overall size of their pension fund.

We expect trustee boards to make members aware of their right to transfer their benefits to another scheme at any age, in order to access their benefits in a variety of different ways, other than by purchase of an annuity, regardless of whether or not the scheme itself offers flexible access to benefits. Trustee boards are required to inform members of their right to purchase an annuity on the open market.”

tPR Code 13: Governance and administration of occupational trust-based schemes providing money purchase benefits

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)

Yes

No

If no please explain what changes or improvements you would like to

see?

Please see our response to Q1.

Q3 Does the draft code cover the right issues about direct marketing?

Yes

No

If no please outline what additional areas you would like to see covered:

Please see our response to Q1.

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?

Yes

No

If no please outline what additional areas you would like to see covered

Please see our response to Q1.

Q5 Is it easy to find information in the draft code?

Yes

No

If no, please provide your suggestions on how the structure could be improved:

Please see our response to Q1.

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

Yes

No

If yes, please provide your direct marketing examples :

Q7 Do you have any other suggestions for the direct marketing code?

No

About you

Q8 Are you answering as:

- An individual acting in a private capacity (eg someone providing their views as a member of the public)
- An individual acting in a professional capacity
- On behalf of an organisation
- Other

Please specify the name of your organisation:

The Society of Pension Professionals

If other please specify:

Q9 How did you find out about this survey?

- ICO Twitter account
- ICO Facebook account
- ICO LinkedIn account
- ICO website
- ICO newsletter
- ICO staff member
- Colleague
- Personal/work Twitter account
- Personal/work Facebook account
- Personal/work LinkedIn account
- Other

If other please specify:

Thank you for taking the time to complete the survey