

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 (e.g. a member of the public). All responses from organisations and individuals acting in a professional capacity (e.g. 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:

A glossary which contains more detail on key terms should be included. For example, in relation to 'direct marketing' and 'service-based' communications there should be greater focus given to explaining these two types of communications and having this information contained within one section as well as throughout the draft code.

Whilst the draft code includes an introduction that clearly defines who needs to read and comply with the guidance, if any type(s) of business or entity is exempt from the guidance this should also be stated (see responses to the remaining questions below).

Each core section should also contain its own introduction which should clearly call out what type(s) of company/communications it covers – almost a 'read this if...' approach. This would ensure that the relevance of each section is easily understood, and time is not spend reading sections that are not relevant to all.

It would be helpful if section and paragraph numbers could be added for ease of reference

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?

Whilst the definition of “direct marketing” is clearly set out in legislation, we would welcome some further guidance / clarity within the Code on what the term “advertising or marketing material” is intended to cover and, importantly, what is out of scope. The draft code includes a broad description: *“promotion of aims and ideals, as well as advertising goods or services”*.

Exactly what types of communications could fall foul of the “aims and ideals” element of the definition is in our view ambiguous. This is especially the case in relation to certain regulated sectors such as financial services and pensions. Without the draft code providing further guidance around how this element of the definition should be interpreted there is a risk that organisations operating in certain regulated sectors (i.e. corporate trustees of pension schemes and providers of financial services) do not easily understand what types of communications might be caught by this very broad definition.

Regulatory guidance issued by the Pensions Regulator also sets an expectation that trustees should regularly communicate with members so they are informed of their options and can plan for retirement, it is unclear if these types of communications would be in scope of this guidance.

By way of example, the Pensions Regulator states in regulatory guidance for DC schemes that:

“good member communications, provided at the right time and in the right format, are vital if members are to engage and make decisions that lead to good outcomes in retirement. Members will need to make informed choices when they reach retirement and trustees have an important role in preparing members to make these choices. You might consider having an overarching and ongoing objective to prepare members for the choices they’ll have to make at retirement, and to check that the communications that you (or your administrators or other service providers) send to members contribute towards meeting that objective wherever possible”

It would be helpful to understand how companies can comply with guidance from other regulators such as the Pensions Regulator / the Financial Conduct Authority perhaps by an expansion to the guidance provided on page 21 – particularly to make it clear if this applies to trustees of pension schemes (and to what extent).

If the intention is for certain types of organisations or certain types of communications to be exempt (wholly or partially) this should be clearly stated. More detailed, sector specific examples/case studies should be provided and explained through the use of accompanying guidance.

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:

As per our response to Q2, the draft code should provide clarification on the term 'direct marketing', specifically in relation to "aims and ideals" and what would/ would not be caught by this element of the definition for different types of organisations (for example, corporate trustees of pension schemes).

Whilst the draft code provides some useful examples throughout, overall these are too limited and generic, and the draft code would benefit from more comprehensive case studies. For example, a focus on the pensions sector/not-for-profit sector would be useful as this is where the assessment of "aims and ideals" becomes more challenging based on our experience.

The draft code could focus more on the ultimate intention of a communication - i.e. its purpose, why it might be important to send such communications, what the benefit to individuals might be and whether this allows for a more permissive interpretation of the definition of direct marketing. In the current draft, the focus is limited to whether or not the activity falls within the broad definition of direct marketing rather than looking at wider factors.

As drafted, the code applies equally to non-for-profit businesses such as ours operating within the pensions sector as a corporate trustee, other non-for-profit organisations such as charities, certain public bodies and truly commercial entities selling goods and/or services. Clearly, the aims and ideals of these organisations are not all the same, nor is the impact of their communications the same. For example, there is an expectation from pension scheme members to receive information about their pension benefits and options and indeed there is a desire to receive this information electronically (according to feedback from member surveys).

Our view is that there should be some acknowledgement given to the differences between certain sectors and the different types of communications that individuals might benefit from receiving. We believe that pension trustees are different, as the purpose of our communications are solely for the benefit of the members. Therefore, they should not be within the scope of the Code. Nor should we be prevented from issuing digital communications to members as a result of PECR.

As a corporate trustee of a pension scheme, we need to ensure our members have the right information and tools to manage their pension and plan for their retirement. In this regard we believe that communications relating to this type of information should not be caught by the definition of direct marketing especially given the fact that corporate trustees are expected, in line with the Pensions Regulator guidance, to provide this information to pension scheme members. As an example, if USS were to suggest that members may want to review their retirement plans and consider saving more for retirement, we do not think this should be caught by the definition of direct marketing, as we are not trying to get them to behave in one way or the other, we're simply giving them the information they require to make sound financial decisions.

However, since the current definition of direct marketing is so broad and its application subjective, we can see how the ICO could determine that the majority of the communications we would like to send electronically to members could be caught by the current definition and therefore we have little comfort that a large portion of those communications would not be categorised as direct marketing. For example, if we were to email a member to let them know we have a new retirement planning tool that could help them plan for their financial future, this could arguably fall under the 'promotion of services' catch-all according to the current definition, despite the fact that the purpose of the communication is to ensure our members are better informed about their pension and therefore able to plan for their retirement more easily. In addition, if we were to email a member to let them know of a change to our Corporate Social Responsibility strategy that may ultimately impact how they manage their investments, this could be viewed as an example of promoting "aims and ideals". For example, a change to a corporate trustee's investment strategy could impact on how members decide to manage their DC scheme investments. An "ethical" change to an investment strategy could well be defined as promoting the "aims and ideals" of that corporate trustee, however, all that communication is actually doing is informing members of the change and allowing them to make a more informed decision about the funds in which they might wish to invest.

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

As the corporate trustee of a large occupational pension scheme, we need to provide our members with a vast range of information relating to their pension and how we manage it on their behalf. Additionally, employers auto-enrolment obligations present challenges in terms of obtaining consent at the 'point of joining' the pension scheme, as employees "join" the scheme prior to any form of communication between the employee and the trustee. Arguably, because of the fact that members are auto-enrolled ahead of receiving information about what this means, it makes it more important to communicate key pensions information such as investment options and retirement planning to members given the fact that they have not actively chosen to join the pension scheme.

The Pensions Regulator has issued guidance that trustees should communicate more effectively with their members. The challenge is that the Privacy and Electronic Communications Regulations place an obligation on obtaining consent before anything other than service-based and statutory communications can be issued electronically. This provides organisations like ours with a challenge as opt-in consent rates are typically low c. 5% and this would limit our ability to continue to communicate with our members digitally and fail to meet the expectations of the guidance issued by the Pensions Regulator. Since we cannot rely solely on website visits to ensure that members stay informed about their pension and take appropriate actions at the times that are right for them, we need to communicate with them proactively in the most appropriate way. In our opinion this challenge demonstrates that the assessment of direct marketing is more nuanced than what the draft code deals with. Clearer definitions and more specific guidance for different sectors should be included within the draft code prior to publication.

For example, the "What is 'advertising or marketing material'?" section of the draft code should be enhanced to include specific sector focused case studies/examples in order to play out the various scenarios which entities like ours face when looking to provide certain types of information to their customers/members/subscribers/donors. In these suggested case studies/examples, the draft code could show where the line should be drawn regarding an assessment of whether the communication would be captured by either element of the definition of direct marketing i.e. "aims and ideals" vs "advertising goods or services".

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:

Each section would benefit from the inclusion of a 'this applies to you if...'. This would allow the reader to skip ahead and navigate the document more efficiently.

The document in general is very text heavy and would benefit from being structured more effectively with more use of sub headings to break content up and help the reader better navigate the document. In addition, there is some repetition between sections. For example, collecting, storing and using data runs throughout the draft code and could be more clearly accessed in a 'data' section.

Visuals (for example decision trees) in some instances may also be useful in breaking up the content and aiding navigation and understanding of key sections; the section around 'What is advertising or marketing material' would benefit from this approach. The examples themselves would also work well as visual flows so you can clearly show at which point the communication branches into either service-based or marketing material.

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:

The examples in the draft code are helpful but they are limited in nature and do not play out of the full range of scenarios that organisations may encounter based on the types of communications they might wish or need to send. A wider selection of scenarios/case studies should be provided, for example within a decision tree where detailed analysis could be carried out. Perhaps a linked on-line tool to allow users to assess whether PECR/GDPR/DPA 2018 applies would assist users in their understanding of the core considerations of the draft code.

For example:

As the Corporate Trustee of a large occupational pension scheme changes in our investment strategy can occur and can be significant. A recent, relevant example of this was in relation to our decision to allow for a number of funds in the defined contribution section of the scheme to invest in Illiquid assets. This decision aligns with what members had said about their long-term investment goals and is in line with views expressed by the Minister for Pensions and Financial Inclusion, outlining his views in the Department for Work & Pensions' 'Investment Innovation and Future Consolidation: A Consultation on the Consideration of Illiquid Assets and the Development of Scale in Occupational Defined Contribution schemes'.

The challenge then is how to communicate this to our members. It is clearly possible to classify this as a "service based" communication for those members who are invested in the relevant funds. However, it is unclear what would be permissible under PECR regarding emailing the remainder of our membership which in this case is the larger cohort.

Informing the entirety of our members would provide them with the information beneficial to review and support their savings goals but as it stands, the draft code remains unclear as to whether this type of member-wide communication could be classified as a 'promotion of services'.

In addition, it is equally unclear whether communicating a change to our investment strategy or a change in fund structure could be interpreted as an attempt to promote our "aims and ideals" or the promotion of "new" products. Here, it should be noted that occupational pension schemes remain impartial to the investment decisions of their members and occupational pension schemes aims and ideals are largely governed by legislation or regulatory guidance. In our case, we do not have any commercial purpose other than to ensure that the pension promises made to our members are met. The only beneficiaries of the services we provide are our members and their families, and therefore communications that we send to enable our members to be better informed and to make better decisions about their retirement should, in our view, not be considered to fall within the scope of the draft code.

In addition, since the subject matter of our communications is often technical and complex, tone takes on even greater importance. If the subject matter of our communications were to be communicated in the tone that the draft code appears to suggest is permitted, it would risk failing to engage scheme members and could potentially act as a blocker to them making the decisions that are right for them.

Indeed, using 'tone' as a measure for whether a communication constitutes 'marketing' is firstly highly subjective and more significantly, could have a major negative impact on our ability to engage members in their retirement planning, thereby impacting the outcomes their respective savings strategies achieve.

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

Fundamentally, the draft code fails to define advertising and marketing. Even under the heading “What is advertising or marketing material?”, which suggests that there will be an answer, it states: ‘The DPA 2018 and PECR do not clarify what is meant by ‘advertising or marketing material’. Therefore, it is impossible for an organisation to justify the activities it undertakes in this regard.

Simply stating that it is “not just commercial marketing... [but also] promotion of aims and ideals” and repeating this 12 times throughout the document feels very short-sighted; no matter how often it is repeated between page three and page 78, this phrase fails as an adequate ‘catch-all’ because it does not take into account that the aims and ideals of some organisations are intrinsically linked to their statutory duties. In the case of a pension scheme trustee, the only beneficiaries of direct communication are scheme members – the trustee, in accordance with its fiduciary duties, must act:

- “in the best interests of the pension scheme members”
- “impartially, prudently, responsibly and honestly”

It is both this impartiality and acting in the best interests of members that ensures a pension scheme trustee’s direct communication with scheme members is neither advertising nor marketing. The draft code makes no reference to the beneficiary of direct communication. Indeed, where direct communication takes the form of “commercial marketing” or the “promotion of aims and ideals”, it is clear that the ‘marketer’ is the beneficiary. However, when the organisation that is communicating does not benefit from the advertising / marketing – when it is legally bound to be impartial and operate in the best interests of the recipients of its communications – and the sole purpose of its communications are to benefit the recipient of those communications, any activities in this regard cannot reasonably be construed as marketing.

The direct marketing code must define ‘advertising’ and ‘marketing’ effectively and it must provide clarity for specific sectors for which “commercial marketing” and “promotion of aims and ideals” do not apply and, ideally, considering who benefits from the communications activity.

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:

Universities Superannuation Scheme Limited

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