



HM Treasury

Regulations to ban pensions cold calling: consultation response

October 2018

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ISBN 978-1-912809-00-4
PU2192

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Chapter 1

Introduction

- 1.1 Pension scams can have devastating consequences, such as the loss of an entire pension fund. On top of this, the chances of recovering these savings are very low, leaving most victims without the means to fund their retirement. Cold calling is the most common method used to initiate pension fraud. The serious consumer detriment caused by pensions scams means that the government has chosen to intervene directly to implement a pensions cold calling ban.
- 1.2 The government first consulted on the policy through the Pensions Scams consultation¹ launched in December 2016, and outlined its approach in the response² published in August 2017. In July 2018 the government sought comments on draft regulations to implement the ban through a further consultation.³
- 1.3 In total the 2018 consultation received 40 responses from pensions firms, Independent Financial Advisers (IFAs), professional bodies, industry groups, consumer groups, charities and individual members of the public. In line with responses to the first consultation on pensions scams, respondents to this second consultation overwhelmingly supported the proposed policy.
- 1.4 Some respondents suggested the scope of the ban should be widened to include other forms of unsolicited communication on pensions, though many noted that delivering the pensions cold calling ban as quickly as possible should be a priority and must not be delayed. Responses on the scope of the ban are outlined in Chapter 2.
- 1.5 The majority of respondents support the government's overall approach to the regulations outlined in the consultation document. Where respondents had comments, they were technical in nature and contributed to tightening and improving the draft regulations to ensure they meet their policy objectives. The responses to the government's consultation questions are summarised in Chapter 3. A summary of the amendments to the draft regulations the government is taking forward, and suggested amendments

¹ <https://www.gov.uk/government/consultations/pension-scams/pensions-scams-consultation#banning-cold-calling-in-relation-to-pensions>

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638844/Pension_Scams_consultation_response.pdf

³ <https://www.gov.uk/government/consultations/ban-on-cold-calling-in-relation-to-pensions/ban-on-cold-calling-in-relation-to-pensions-consultation-on-regulations>

which were not taken forward, is provided at Annex B. The updated draft regulations, which the government intends to lay before Parliament in Autumn 2018, are included at Annex A and the original draft regulations consulted on in July 2018 are included at Annex C.

- 1.6 Although this consultation sought views specifically on the draft regulations to ban pensions cold calling, many respondents gave their views on how to tackle pensions scams more widely, including requiring people to seek advice before transferring their pensions, and restricting unregulated investments. Chapter 4 outlines some of the key suggestions, and the government's current activity to tackle pensions scams.
- 1.7 Respondents also gave views on the monitoring and enforcement of the ban and of pensions scams more broadly, and the consumer experience of reporting a scam. Chapters 5 and 6 outline current activity and plans in this area.
- 1.8 Chapter 7 outlines next steps, including the timeline for laying the regulations in autumn 2018, the plan of the government and partners for communicating the ban, and plans for guidance to support industry to keep within the regulations.

Chapter 2

The policy

- 2.1 The policy is to ban pensions cold calling, or unsolicited direct marketing calls relating to pensions products and services. Guidance on unsolicited direct marketing is published by the Information Commissioner’s Office (ICO).¹
- 2.2 The Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR) are regulations which sit alongside the Data Protection Act 2018 and the General Data Protection Regulations.² They give people specific privacy rights in relation to electronic communications. The ICO is able to use its powers to issue civil monetary penalties of up to £500,000 for breaches of the Regulations. The government intends to use this existing framework as the basis for the ban, and update the regulations so as to create a specific provision prohibiting pensions cold calling. A similar ban, on cold calls relating to claims management services, was implemented through the Financial Guidance and Claims Act 2018 by amending PECR,³ so there is a consistent approach to both bans.
- 2.3 The intention is to amend regulation 21 of PECR,⁴ which creates an opt-out model for marketing calls, so as to disapply it to pensions cold calls to individuals. Such calls will instead be governed by the opt-in regime created by new regulation 21B. This will prohibit cold calling in relation to pensions unless the caller is authorised by the Financial Conduct Authority (FCA), or is the trustee or manager of an occupational or personal pension scheme, and:
- a) the recipient of the call consents to such calls being made by the caller on that line; or

¹ ICO guidance on direct marketing can be found here - <https://ico.org.uk/media/for-organisations/documents/1555/direct-marketing-guidance.pdf>

² Paragraph 58 of schedule 20 to the Data Protection Act 2018 provides that the repeal of the Data Protection Act 1998 does not affect its operation for the purposes of PECR.

³ The ban on cold calling by Claims Management Companies (CMCs) provides an exemption where the receiver of the call has given specific consent to receiving direct marketing from the organisation making the call. However, unlike the proposed pensions cold calling ban, it does not include a “soft opt-in” i.e. an exemption where the receiver of the call is an existing customer of the organisation making the pensions cold call. The pensions cold calling ban also differs in that it specifies that only callers authorised by the Financial Conduct Authority (FCA), or the trustee or manager of an occupational or personal pension scheme, are exempted from the pensions cold calling ban.

⁴ Regulation 21 of PECR can be found here - <http://www.legislation.gov.uk/uksi/2003/2426/regulation/21/made>

- b) the recipient of the call has an existing client relationship with the caller, and the relationship is such that the recipient might reasonably envisage receiving pensions cold calls
- 2.4 The policy intent is for the exemptions to the ban to apply only to persons authorised by the FCA or the trustees or managers of occupational or personal pension schemes. This means that the exemptions to the ban do not apply to lead generation firms. The vast majority of pensions cold calling is undertaken by lead generation firms, meaning that the ban will make the vast majority of pensions cold calls illegal.
- 2.5 A few respondents sought clarification on whether third party administrators would be captured by the ban. The exemptions are not extended to third party administrators of pensions schemes because, for the most part, administrators are not undertaking pensions cold calls. Their activities would not be captured by the ban and so there is no need to include an exemption. Moreover, extending the exemptions to third party administrators could potentially create a loophole which scammers could seek to exploit.
- 2.6 A few respondents suggested there should be a specific exemption for calls from authorised advisers following referrals. The government has taken the decision not to provide any specific exemptions bar those outlined, in order to minimise workarounds to the ban. Carving out a specific exemption for referrals potentially opens loopholes which could be exploited by scammers. The ban necessarily captures all unsolicited direct marketing calls including from authorised advisers. Authorised advisers may only call individual consumers if one or both of the exemptions set out above apply. In practice, this means that, where a referral is made, the individual who has been referred will need to contact the firm directly in the first instance.
- 2.7 Respondents raised concerns about the risk of scammers cold calling consumers on one topic and then “bolting on” a discussion about pensions. Whether or not the primary purpose of a cold call is to discuss pensions, the ban will apply if pensions are discussed on the cold call.
- 2.8 Some respondents were also concerned about the risk of scam callers impersonating a caller authorised by the FCA or the trustees/ managers of occupational or personal pension schemes. The concern is that it will be difficult for consumers to know the difference between a call which fits the exemptions and one which doesn’t. Whilst the government acknowledges that impersonation does pose a risk, the technical exemptions to the ban are aimed at ensuring the ban does not have a disproportionate impact on the activities of industry. When it comes to communicating the ban, the message to consumers will be clear that all pensions cold calling is illegal.
- 2.9 Some respondents were concerned about the requirement on firms to give customers the opportunity to withdraw consent to receiving direct marketing calls at each communication, outlined at Paragraph 3(c) of the draft regulations.⁵ They were concerned that this requirement is not

⁵ The updated draft regulations, which the government intends to lay before Parliament in Autumn 2018, are included at Annex A.

standard practice and may require firms to check back through their correspondence with each client to check they have consent to contact them. However, the requirement is simply for firms to contact their existing clients offering them a simple means of refusing the use of their contact details for direct marketing, so there is an onus on the firm to ensure clients are not receiving calls they do not consent to.

Scope of the ban

- 2.10 A number of respondents suggested the government should go further than the pensions cold calling ban in order to tackle pensions scams more widely. For example, respondents suggested that the ban should cover all cold calls related to retail investments and savings.
- 2.11 As outlined in the government's previous response to the pensions scams consultation, the government does not consider a ban on cold calling in relation to all investment products to be proportionate at the moment. Cold calls in relation to pensions are a special case where levels of consumer detriment are uniquely high.
- 2.12 As the government's previous response highlighted, the ban will not be limited to transfers between pension schemes. It will also cover calls where fraudsters encourage individuals to release funds from their pension and transfer them into a bank account, before investing them in inappropriate products. This means that the proposed ban on cold calling in relation to pensions will capture many calls aimed at drawing consumers into activity that might ordinarily be classified as 'investment fraud'.
- 2.13 Looking to the future, the Financial Guidance and Claims Act 2018 includes a provision that the Secretary of State must keep under review whether a prohibition on unsolicited direct marketing in relation to consumer financial products and services other than pensions would be appropriate.⁶
- 2.14 Respondents also suggested that once the pensions cold calling ban is in place, scammers could revert to other methods of contacting individuals such as texts and emails, and social media. As outlined in the consultation document, the use of email and text message for direct marketing purposes is already restricted through PECR and the Data Protection Act 1998, which give people specific privacy rights in relation to electronic communications. Social media platforms must comply with the data protection principles (as well as any Terms of Service) when processing the personal data of its users, as well as the confidentiality of communications requirements in regulation 6 of PECR.
- 2.15 A few respondents also raised the issue of in-person introducers (or "factory gating"), where lead generators meet prospective clients in person and introduce them to unscrupulous financial advisers. Whilst not within scope of the regulations to ban pensions cold calling, the government recognises

⁶ Section 22 of the Financial Guidance and Claims Act 2018 - <http://www.legislation.gov.uk/ukpga/2018/10/section/22/enacted>

that this is an important issue and is in active discussions with the FCA to keep it under review.

- 2.16 A few respondents queried whether the ban covers automated calls. The proposed regulations to ban pensions cold calling covers all calls, including automated calls. Moreover, automated calls are already restricted under PECR. Regulation 19 of PECR prohibits automated direct marketing calls unless prior consent has been acquired. In a recent case, the ICO issued a fine of £350,000 to a company after receiving over 1,000 complaints that this company were making automated recorded messages.

Chapter 3

Drafting of the regulations

- 3.1 The majority of respondents agreed with consultation Questions 1, 2, 3 and 4:
- that the draft regulations achieve the aim of restricting all unsolicited direct marketing calls in relation to pensions, bar the exemptions outlined, without restricting legitimate non-marketing calls
 - that the proposed regulations capture the wide range of activities through which people could be encouraged to use their pensions savings in order to invest in inappropriate or scam investments
 - that the proposed regulations are sufficiently flexible and future proofed to prevent the evolution of scam pensions cold calls that circumvent the ban
 - that the proposed regulations prevent ‘workarounds’
- 3.2 A number of respondents caveated their support for the government’s draft regulations with the following couple of points. Firstly, respondents noted that scams are constantly evolving and though they agreed the regulations as currently drafted achieved our objectives, they felt the effectiveness of the ban should be monitored to understand its impact, and be updated or extended where necessary. The government has the flexibility to amend these regulations in secondary legislation. The government’s approach to monitoring and enforcement of the ban is outlined in Section 4. Secondly, respondents noted that a key factor in the success of the ban will be raising consumer awareness that pensions cold calling is illegal and encouraging people to put the phone down if they believe they are receiving an illegal pensions cold call. As outlined in Chapter 7, work is underway with partners across the public, private and charity sectors to identify the best ways to ensure news of the ban reaches as many people as possible.
- 3.3 A summary of the amendments to the draft regulations the government is taking forward, and suggested amendments which were not taken forward, is provided at Annex B.

Chapter 4

Wider activity to tackle pensions scams

- 4.1 Many respondents gave their views on how to tackle pensions scams more widely. This chapter outlines the key respondent comments, and gives a high-level summary of the government's current activity to tackle pensions scams.

Regulated advice

- 4.2 Some respondents felt that there should be a requirement for people to seek regulated advice before they can transfer funds out of a pension scheme, or that government should make it a requirement that only regulated advisers should be able to authorise transfers.
- 4.3 Under the Pensions Act 2015 for transfers from defined benefit (DB) pension pots, savers are required to seek financial advice from a regulated financial adviser before they can transfer or convert these benefits into defined contributions (DC) savings if the value of transfer value (which converts the benefits accrued into a cash sum) is valued at over £30,000.
- 4.4 The FCA's rules require firms advising on DB pension transfers to have specific permission to carry out this activity. Advice on pension transfers must be given, or checked by, a pension transfer specialist. A pension transfer specialist must follow the FCA's training and competence rules, and have the appropriate qualifications to perform the function.
- 4.5 Currently all savers with a DC pension pot have a statutory right to transfer to another pension scheme of their choice. Transferring DC pension savings to another pension scheme may be beneficial to some consumers. However, whether it is in their interest to transfer or take advice to inform that decision depends on the individual's circumstances. Introducing an advice requirement for all pension transfers would not be proportionate, given that the cost of financial advice must be considered against the value of the pension savings in question and the relatively lower risk of a DC transfer.
- 4.6 The government is clear that individuals should be trusted to manage their money in retirement. However, pension transfers are a complex area and it would be very difficult to determine who is well qualified to self-advise based on their reported intentions or knowledge. Regulated financial advice ensures all pension options are explored.
- 4.7 While financial advice can offer important support to savers when making decisions about their pensions, it may not be appropriate for everyone. In addition, the Money Advice Service (MAS) and the Pensions Advisory Service

(TPAS) offer free and impartial information and guidance to help people understand their options with pensions, including around pension transfers. The new Single Financial Guidance Body will merge the functions of MAS, TPAS and Pension Wise, and will make it easier for people to access information and guidance.

Transfers and the FCA/ TPR registers

- 4.8 Some respondents felt that the government should make it a requirement that pension providers are not allowed to transfer pension funds to firms that are not on the registers of the FCA or the Pensions Regulator (TPR).
- 4.9 Pension transfers must be to an HMRC registered pension scheme or to a qualifying recognised overseas pension scheme (QROPS), otherwise an unauthorised withdrawal charge will apply. HMRC seeks to protect the integrity of the tax relief system, and provide guidance¹ to pensions administrators on transferring a pension scheme member's savings.
- 4.10 In order to benefit from tax relief, UK pension schemes must register with HMRC. While HMRC does not maintain a public register of pension schemes, HMRC does publish a list of Recognised Overseas Pension Schemes (ROPS). The circumstances of a transfer may determine whether a ROPS is Qualifying for HMRC's purposes.
- 4.11 Any pension scheme with two or more members must register with TPR, but there is no published list of registered schemes. The vast majority of pension schemes in the UK are small single member schemes which are not required to register with TPR. A transfer to a scheme that is not registered with TPR may not automatically be an unauthorised transfer. The only schemes directly authorised by TPR are master trusts which are required to apply for authorisation from 1 October 2018.
- 4.12 The FCA's Conduct of Business rules (COBS) require that a firm act honestly, fairly and professionally in accordance with the best interests of its client. In addition, the FCA's rules require all regulated firms to have comprehensive systems and controls to enable them to identify, assess, monitor and manage money laundering risk.

Unregulated investments

- 4.13 Some respondents stated that the government should outlaw the use of unregulated investments, and that the FCA should regulate these products. Investment in unregulated investments is more typical for savers with self-invested personal pensions (SIPPs) than for personal pensions. It is important to note that not all unregulated or non-standard investments are high risk; some are deemed non-standard because they are not capable of being liquidated in 30 days (e.g. commercial property). The FCA has set out that they would not want to ban sophisticated and high net-worth individuals

¹ <https://www.gov.uk/guidance/pension-administrators-member-transfers>

from making these investments should they wish to, based on sound advice and consideration.²

- 4.14 The FCA has set out that they would not necessarily want to ban sophisticated and high net-worth individuals from making these investments should they wish to, based on sound advice and consideration. This due diligence includes taking reasonable steps to ensure that a proposed underlying investment for a SIPP is a genuine asset, and is not part of a fraud or scam. The FCA believe suitable advice from financial advisers accompanied with effective due diligence checks by pension providers/SIPP operators is a more proportionate way of preventing harm to consumers rather than imposing a ban.

FCA ban on use of leads obtained from cold calling

- 4.15 A number of respondents suggested that the FCA should update its rules to include a ban on regulated firms buying leads obtained from cold calling, in order to remove a source of business for the lead generators who most commonly undertake cold calling and therefore remove the incentive to cold call. The government and the FCA will keep this proposal under review as the effectiveness of the ban is monitored. An authorised firm which accepts business from an introducer must meet the FCA's regulatory requirements. If customers are given unsuitable advice by an introducer, the authorised firm may be held responsible for this and may be subject to regulatory action. The FCA has alerted investment advisers and authorised firms to their responsibilities when accepting business from unauthorised introducers or lead generators.³

Pensions dashboard

- 4.16 A number of respondents sought an update on the pensions dashboard. In September 2018 the Minister for Pensions and Financial Inclusion published a written statement providing an update on pensions including the pensions dashboard.⁴ It stated that the government will facilitate an industry-led dashboard to harness the best of innovation. The Department for Work and Pensions has been assessing the feasibility for a pensions dashboard and will report on its findings shortly.

Update on other measures in the Pensions Scams consultation response

- 4.17 As outlined in the Introduction, the government launched a Pensions Scams consultation in December 2016 consulting on
- the pensions cold calling ban

² <https://www.parliament.uk/documents/commons-committees/work-and-pensions/Correspondence/180608-Megan-Butler-to-Chair-Self-invested-personal-pensions.pdf>

³ <https://www.fca.org.uk/news/news-stories/investment-advisers-responsibilities-accepting-business-unauthorised-introducers-lead-generators>

⁴ Find the written statement here - <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-09-04/HCVS933/>

- limiting the statutory right to transfer
- measures making it harder to open fraudulent pensions schemes

4.18 The government responded to the Pensions Scams consultation in August 2017. Updates on the two other measures in the Pensions Scams consultation are provided below.

Limiting the statutory right to transfer

4.19 The August 2017 Pensions Scams consultation response outlined the government's commitment to limiting the statutory right to transfer, which is aimed at preventing pension savings from being transferred to fraudulent schemes. In response to the July 2018 consultation on the pensions cold calling ban, a number of respondents expressed their support for this proposed measure.

4.20 The government welcomes respondents' support for its proposed measure and is committed to identifying and introducing suitable legislation, that will enable trustees of ceding schemes to ensure pension savings are transferred to safe destinations.

4.21 The government is grateful to industry and consumer groups for their contributions, whether as part of the original joint consultation, or in the ongoing work. This has informed plans for legislation that will prevent pension savings being transferred to fraudulent schemes. This may include seeking views on draft regulations to ensure the measure is proportionate, effective, and works in practice as intended. Once introduced this new measure will form part of a suite of preventive measures, aimed at disrupting pension fraud at every point of the process, and will help protect members at the crucial point where a scammer has persuaded them to transfer.

Measures making it harder to open fraudulent pensions schemes

4.22 The August 2017 Pensions Scams consultation response outlined the government's commitment to the requirement that all new pension scheme registrations be made through an active company, except in legitimate circumstances, and that HMRC be given discretion to register schemes with a dormant sponsoring employer. This requirement would also apply to existing pension schemes if they are registered with a dormant sponsoring employer, with the same discretion so that HMRC can decide not to de-register a scheme in legitimate circumstances. This change was legislated for in Finance Act 2018. The existing right of appeal if HMRC rejects a scheme registration applies to this new requirement.

Chapter 5

Consumer experience of reporting a scam

- 5.1 A number of respondents sought an update on the consumer experience of reporting a scam. The government encourages consumers to report scams and agrees that the process of doing so should be easy and straightforward.
- 5.2 Action Fraud,¹ the UK's national fraud reporting centre, should be the first point of contact if consumers believe they have been the victim of fraud. All fraud cases are passed by Action Fraud to the National Fraud Intelligence Bureau (NFIB), which is overseen by the City of London Police, the police force that leads on fraud for the UK. The Action Fraud website also contains details of the different types of fraud, including pension scams.
- 5.3 The FCA's ScamSmart service² also provides details on investment and pension scams. If consumers, trustees, scheme providers or service providers suspect they have been contacted by an unauthorised firm carrying out an FCA-regulated activity, they can also report them using the FCA website.
- 5.4 Some respondents felt there should be a register of regulated firms, to ensure consumers can identify legitimate firms. The FCA already maintains the Financial Services Register³ which provides a public record of firms, individuals and other bodies that are, or have been, regulated by the Prudential Regulation Authority and/or the FCA. This register includes details of which regulated activities the firm can provide. The FCA also maintains an online warning list⁴ of known firms which are running scams or operating without authorisation. The Money Advice Service also provides a directory of retirement advisers authorised and regulated by the FCA.⁵
- 5.5 In terms of the reporting process, the ICO circulate a monthly report on enforcement activity and specific email reports for which consumers can sign up to receive further information.

¹ <https://www.actionfraud.police.uk/>

² <https://www.fca.org.uk/scamsmart>

³ <https://www.fca.org.uk/firms/financial-services-register>

⁴ <https://www.fca.org.uk/scamsmart/warning-list>

⁵ <https://directory.moneyadviceservice.org.uk/en>

Chapter 6

Monitoring and enforcement

Monitoring scams and the impacts of the ban

- 6.1 As outlined in Chapter 3, many respondents noted that scams are constantly evolving and felt the effectiveness of the ban should be monitored to understand its impact, and be updated or extended where necessary.
- 6.2 In 2012, the government established Project Bloom, a cross-government taskforce that brings together law enforcement, regulators, government and industry to share intelligence, raise awareness of scams through communication campaigns, and take enforcement action where appropriate. By bringing together the organisations best placed to tackle pension fraud, Project Bloom ensures that coordinated action can be taken to tackle pension scams. Project Bloom will work in partnership with the ICO in preparation for the ban and will monitor incoming volumes of complaints to measure effectiveness. In addition to the work of Project Bloom, Action Fraud and the NFIB support UK police forces by recording and analysing fraud reports nationally. Scam reports to the ICO are received by Action Fraud and are referred by the NFIB to the most appropriate partner i.e. either law enforcement or a regulator.

Enforcement of the ban

- 6.3 The ICO is the enforcement body for this ban. As outlined in the consultation document, the ICO will be unable to take action against firms located overseas, as they are outside the UK's jurisdiction, unless the calls are made on behalf of a UK company. Whilst there is no way for the ban to be extended to overseas callers, the ICO has arrangements with international regulators to enable enforcement action in circumstances where companies operating wholly abroad make calls into the UK that would be unlawful if made in the UK. Furthermore, any organisation based in the UK and acquiring personal data through others based abroad must ensure they comply with data protection legislation. The ICO operates simple online reporting systems for consumers as well as a helpline to report instances of unlawful marketing. So, when unscrupulous firms break these rules and make illegal calls, individuals can easily report these illegal cold calls to the ICO.
- 6.4 Some respondents suggested that the ICO should prioritise enforcement action against firms who exploit people in vulnerable circumstances. The ICO

has recently published its Regulatory Action Policy,¹ which makes specific reference to consideration of the distress and detriment and physical, psychological and financial harm to individuals. The ICO routinely undertakes reviews of those consumers affected by serious contraventions and these factors are taken into account as aggravating factors in penalty or other enforcement decisions.

- 6.5 The ICO's communication enforcement policy² stipulates that every fine and most other enforcement action is publicised by the ICO. The ICO have a track record of their enforcement activity, particularly for PECR-related contraventions, being picked up in national and local press. They also include an online monthly round-up of their PECR-related enforcement activity.³
- 6.6 The current maximum penalty amount for those who contravene the ban is £500,000. The government is keeping the level of penalty under review. Penalties can only be issued against the organisation (corporate body) and not against individual directors.

¹ <https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/draft-regulatory-action-policy/>

² https://ico.org.uk/media/about-the-ico/policies-and-procedures/1890/ico_enforcement_communications_policy.pdf

³ <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/whats-new/>

Chapter 7

Next steps

- 7.1 The government intends to lay regulations to ban pensions cold calling in parliament under the affirmative procedure and, subject to parliamentary approval, make the regulations and bring them into force as soon as possible thereafter.

Raising awareness of the ban

- 7.2 A key factor in the success of the ban will be raising consumer awareness that pensions cold calling is illegal and encouraging people to put the phone down if they believe they are receiving an illegal pensions cold call. Once the regulations have passed and in the lead up to the ban coming into force, the government will work with partners to proactively communicate the message that pensions cold calling will become illegal. Work is underway with partners across the public, private and charity sectors to identify the best ways to ensure news of the ban reaches as many people as possible.

Guidance

- 7.3 When the ban comes into force, the ICO will publish guidance to support industry to keep within the law. In addition, the ICO are producing a new statutory direct marketing code under DPA 2018 which will be consulted on in the coming year.

Annex A

Draft regulations to be laid in autumn 2018

This annex contains draft regulations to ban pensions cold calling, which the government intends to lay in parliament under the affirmative procedure in autumn 2018 and, subject to parliamentary approval, make and bring into force as soon as possible thereafter.

D R A F T S T A T U T O R Y I N S T R U M E N T S

2018 No. 0000

ELECTRONIC COMMUNICATIONS

The Privacy and Electronic Communications (Amendment)

(No.2) Regulations 2018

Made - - - -

Coming into force - -21 days after the day on which they are made

The Treasury make the following Regulations in exercise of the powers conferred by section 21(1) to (4) of the Financial Guidance and Claims Act 2018(a) (“the Act”).

In accordance with section 21(5) of the Act, a draft of the instrument was laid before Parliament and approved by a resolution of each House of Parliament.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Privacy and Electronic Communications (Amendment) (No. 2) Regulations 2018 and come into force 21 days after the day on which they are made.

(2) In these Regulations, “the 2003 Regulations” means the Privacy and Electronic Communications (EC Directive) Regulations 2003(b).

Amendment of the 2003 Regulations

2.—(1) The 2003 Regulations are amended as follows.

(2) In regulation 21 (calls for direct marketing purposes), in paragraph (6), after the words “regulation 21A” insert—

“or 21B.”.

(3) After regulation 21A insert—

“Calls for direct marketing in relation to pension schemes

21B.—(1) A person must not use, or instigate the use of, a public electronic communications service to make unsolicited calls to an individual for the purpose of direct marketing in relation to occupational pension schemes or personal pension schemes, except where paragraph (2) or (3) applies.

(a) 2018 c. 10. See section 26(2) for the definition of “Secretary of State”.

(b) S.I. 2003/2426; amended by S.I. 2011/1208, 2016/524, 2016/1177 and the Financial Guidance and Claims Act 2018, section 35; there are other amendments not relevant to these Regulations.

- (2) This paragraph applies where—
- (a) the caller is an authorised person or a person who is the trustee or manager of an occupational pension scheme or a personal pension scheme; and
 - (b) the called line is that of an individual who has previously notified the caller that for the time being the individual consents to such calls being made by the caller on that line.
- (3) This paragraph applies where—
- (a) the caller is an authorised person or a person who is the trustee or manager of an occupational pension scheme or a personal pension scheme;
 - (b) the recipient of the call has an existing client relationship with the caller on the line and the relationship is such that the recipient might reasonably envisage receiving unsolicited calls for the purpose of direct marketing in relation to occupational pension schemes or personal pension schemes; and
 - (c) the recipient of the call has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of the recipient's contact details for the purpose of such direct marketing, at the time that the details were initially collected and, where the recipient did not initially refuse the use of the details, at the time of each subsequent communication.
- (4) A subscriber must not permit the subscriber's line to be used in contravention of paragraph (1).
- (5) In this regulation—
- (a) “authorised person” has the meaning given in section 31 of the Financial Services and Markets Act 2000^(a);
 - (b) “direct marketing in relation to occupational pension schemes or personal pension schemes” includes—
 - (i) the marketing of a product or service to be acquired using funds held, or previously held, in an occupational pension scheme or a personal pension scheme,
 - (ii) the offer of any advice or other service that promotes, or promotes the consideration of, the withdrawal or transfer of funds from an occupational pension scheme or a personal pension scheme, and
 - (iii) the offer of any advice or other service to enable the assessment of the performance of an occupational pension scheme or a personal pension scheme (including its performance in comparison with other forms of investment);
 - (c) “existing client relationship” does not include a relationship established at the instigation of the caller primarily for the purpose of avoiding the restriction in paragraph (1); and
 - (d) “occupational pension scheme” and “personal pension scheme” have the meanings given in section 1(1) of the Pension Schemes Act 1993^(b).

^(a) 2000 c. 8; section 31 was amended by the Financial Services Act 2012 (c. 21), section 11(1).

^(b) 1993 c. 48; section 1(1) was amended by the Pensions Act 2004 (c. 35), section 239, the Finance Act 2007 (c. 11), Schedule 27(3)(2), paragraph 1 and S.I. 2007/3014.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Privacy and Electronic Communications (EC Directive) Regulations 2003 (S.I. 2003/2426) (the “2003 Regulations”) so as to prohibit direct marketing in relation to occupational or personal pension schemes (“pensions cold calling”).

Regulation 2(2) of these Regulations amends regulation 21 of the 2003 Regulations, which establishes an opt-out regime for cold calling, so as to disapply it from pensions cold calling.

Regulation 2(3) inserts a new regulation 21B into the 2003 Regulations. Paragraphs (1) to (3) of new regulation 21B prohibit pensions cold calling except where the caller is a trustee or manager of a pension scheme or a firm authorised by the Financial Conduct Authority and—

- the recipient of the call has consented to receiving calls from the organisation making the call; or
- the recipient of the call is an existing customer of the organisation making the call, expects to receive pensions cold calls from that organisation and has been given the opportunity to refuse to provide contact details for the purpose of receiving such calls.

Paragraph (5)(b) defines pensions cold calling.

An organisation that breaches the prohibition on pensions cold calling may be liable to pay compensation to the victim and may be subject to enforcement action by the Information Commissioner’s Office (the “ICO”) under the Data Protection Act 1998. The ICO’s enforcement powers include serving an enforcement notice and issuing a monetary penalty notice. Failure to comply with an enforcement notice is a criminal offence.

A full impact assessment has not been produced for this instrument, as no significant impact on the private, voluntary or public sector is foreseen. A *de minimis* impact assessment is available from HM Treasury, 1 Horse Guards Road, London SW1A 2HQ and is published alongside this instrument at www.legislation.gov.uk.

Annex B

Details of amendments to the draft regulations following July 2018 consultation

B.1 This annex contains made a number of small technical changes the government made to the regulations based on respondents' feedback on the consultation.

Suggested changes to the regulations taken forward

- The phrase "trustee or manager of an occupational pension scheme or a personal pension scheme" has replaced the phrase "TPR-regulated person", reflecting the fact that the TPR regulates schemes and not persons.
- Wording has been inserted to make clear that the pensions cold calling ban applies to individual consumers and not to businesses, which was always the policy intention.
- In the context of the exemption for firms that have an existing client relationship with the recipient of the call, wording referring to the "instigator of the call" has been removed in order to prevent third parties from being able to make calls on behalf of firms with which the recipient has an existing client relationship.
- In order to remove the burden of having to demonstrate that the recipient did envisage receiving pensions cold calls in paragraph 3(b), the wording has been amended to "the relationship is such that the recipient might reasonably envisage receiving unsolicited calls".
- In order to avoid a scenario whereby scammers establish a relationship with a client by calling them about a topic other than pensions, only to persuade them to invest in a scam using their pension at a later stage once a relationship has been established, the regulations have been amended to include wording which says that client relationships cannot be established for the purpose of avoiding the restriction in paragraph (1). The caller's intention in establishing the client relationship is difficult to prove. However, the exemption is only available to FCA-authorized firms and trustees and managers of pension schemes, so the types of organisations most likely to seek to avoid the restriction in this way are already excluded from the exemption.

- In the definition of marketing in relation to pension schemes, the word “purchased” has been replaced with “acquired” in paragraph 5(b)(i) to make clear that the marketing of a product or service to undertake transfers to other schemes are included, as well as the marketing of a product or service to be purchased using funds held, or previously held, in a pension scheme. This is because a transfer to another scheme may not necessarily be considered a “purchase”, but it is the policy intention to include transfers.
- Wording on intentionality at paragraph 5(b)(ii) has been removed. This has the effect of amending one of the three non-exclusive examples of “direct marketing in relation to pension schemes” so as to remove the requirement to demonstrate that the caller’s offer of advice was intended to promote the transfer of funds from a pension scheme.
- Wording has been added in paragraph 5(b)(ii) to make it clear that the regulations apply not only to transfers between pension schemes but also the *withdrawal* of funds from pension schemes. This is in addition to the language already included on funds “previously held” at (5)(b)(i), which will also meet the policy intention to capture withdrawals from pensions.
- The phrase “FCA-regulated person” has been substituted for the phrase “authorised person” throughout the regulations. The earlier version of the regulations use the defined term “FCA-regulated person” and define it by reference to section 139A(9) of FSMA. However, respondents felt this was too broad a definition that would have captured many firms that we did not intend to benefit from the exemption. This definition has therefore been replaced with the definition of an “authorised person” as defined in section 31 of FSMA. These are firms that have been authorised by the FCA to carry out their activities and include only the well-established firms for which the exemptions were envisaged. This is consistent with the approach taken in s. 21 of FSMA, which prohibits financial promotions that are not made or approved by an authorised person. Financial advisers, pensions providers and most pensions administrators are likely to be “authorised persons”, although some pensions administrators may not be carrying out regulated activities. Calls that aren’t marketing activities would not be covered by the ban in any case, e.g. calls from a third-party administrator of an individual’s pension fund.

Suggested changes not taken forward

- Respondents suggested the inclusion of a time limit for consent to be valid so that scammers cannot rely on consent given a long time ago. A time limit was not included in the regulations because doing so would have the potential to set a precedent which impacts on wider data protection legislation and is a decision which goes beyond the scope of these regulations. The current situation is that there is no set time limit for consent under the General Data Protection Regulations (GDPR). The ICO guidance indicates that how long the consent lasts will depend on the context and advises firms to review and refresh consent as appropriate. In the absence of any time limits in the pensions cold calling regulations, each case will have to be considered on its own terms to determine whether consent to receiving a pensions cold call remains valid. If in

future a decision is taken to amend data protection legislation to create a time limit for consent, it will also apply to these regulations.

- Respondents suggested that the types of funds covered in the regulations should include retirement savings (such as the Lifetime ISA (LISA)) as well as pension schemes. Applying the regulations of savings vehicles beyond pensions schemes complicates the issue and could potentially take the scope of the ban beyond retirement savings. A LISA is not a pension scheme in the ordinary meaning of that term, and, had the regulations sought to create a definition of “pension scheme” that captured LISAs, there would have been a risk of creating ambiguity, with potential implications for other pieces of pensions legislation.
- Some respondents suggested that the legislation should define an existing relationship for the purpose of paragraph 3(b) and in particular specify that it is a pension-related relationship. However, in our view it is possible to rely on the ordinary meaning of “existing client relationship”. The relationship does not need to be pension-related, but it does need to be such as to create a reasonable expectation of receiving a pensions cold call.
- Some respondents suggested wording should be added to clarify that paragraph 5 is not an exhaustive list of activities. This suggestion was not taken forward as the current wording already indicates that the list of activities included is not exhaustive.

Annex C

Draft regulations consulted on through July 2018 consultation

This annex contains draft regulations to ban pensions cold calling, which the government consulted on through the July 2018 consultation. These are therefore an old version of the regulations which have since been updated following respondents' feedback on the consultation.

- (a) the caller on the line is an FCA-regulated person or a TPR-regulated person; and
 - (b) the called line is that of an individual who has previously notified the caller that for the time being the individual consents to such calls being made by, or at the instigation of, the caller on that line.
- (3) This paragraph applies where—
- (a) the caller on the line is an FCA-regulated person or a TPR-regulated person;
 - (b) the recipient of the call has an existing client relationship with the caller or instigator of the call and the relationship is such that the recipient envisages receiving unsolicited calls for the purpose of direct marketing in relation to pension schemes; and
 - (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of the recipient's contact details for the purpose of such direct marketing, at the time that the details were initially collected, and, where the recipient did not initially refuse the use of the details, at the time of each subsequent communication.
- (4) A subscriber must not permit the subscriber's line to be used in contravention of paragraph (1).
- (5) In paragraph (1) the reference to direct marketing in relation to pension schemes includes a reference to (i) the marketing of a product or service to be purchased using funds held, or previously held, in a pension scheme; (ii) the offer of any advice or other service intended to promote, or promote the consideration of, the transfer of funds out of a pension scheme; and (iii) the offer of any advice or other service to enable the assessment of the performance of a pension scheme (including its performance in comparison with other forms of investment).
- (6) In this regulation—
- (a) "FCA-regulated person" has the meaning given in section 139A(9) of the Financial Services and Markets Act 2000(a);
 - (b) "pension scheme" means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people (i) on retirement, (ii) on having reached a particular age, or (iii) on termination of service in an employment; and
 - (c) "TPR-regulated person" has the meaning given in section 355(1) of the Financial Services and Markets Act 2000.

(a) 2000 c. 8, as amended by the Financial Services Act 2012 (c. 21), section 24(1).

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Privacy and Electronic Communications (EC Directive) Regulations 2003 (S.I. 2003/2426) (the “2003 Regulations”) so as to ban cold calling in relation to pensions.

Regulation 3 amends regulation 21 of the 2003 Regulations so as to disapply it to pensions cold calling. Regulation 21 of the 2003 Regulations permits cold calling except where the recipient of the call has previously notified the caller that such calls should not be made.

Regulation 4 inserts a new provision into the 2003 Regulations banning cold calling in relation to pensions, subject to the following two exemptions: (1) where the receiver of the call has given specific consent to receiving contact from the organisation making the call; and (2) where the receiver of the call is an existing customer of the organisation making the pensions cold call.

Annex D

Impact assessment

D.1 This annex contains a summary of the findings of the impact assessment for the pensions cold calling ban.

D.2 Question 5 of the consultation asked:

What will be the quantifiable impact of the ban on the legitimate business of firms which undertake pensions cold calling?

How many legitimate pensions cold calls are taking place?

How many legitimate pensions cold calls lead to a successful transaction and what is the average value of these transactions?

How many legitimate pensions cold calls will be captured by the ban?

D.3 The intention of the ban is to restrict the activities of fraudulent financial advisers which go on to scam their clients and the lead generation firms that pass leads on to those fraudulent financial advisers. Pensions cold calling is the most common method used to initiate pension fraud and is primarily undertaken by lead generation firms.

D.4 Although the ban's primary intention is to halt the activities of fraudulent firms, the ban covers legitimate firms as well as fraudulent firms as it bans *all* lead generators from pensions cold calling outright. There is no easy way to exempt the small number of legitimate firms without compromising on the clarity of the ban and creating loopholes which can be exploited by scammers.

D.5 There are two types of legitimate businesses which will be affected by this legislation: small lead generation marketing firms and small financial advice firms which use the services of lead generation firms to gain new clients. Larger advice firms do not tend to use the services of lead generation firms because they already have an established client bank.

D.6 The majority of respondents stated that they didn't have quantifiable data on the impact of the ban on the legitimate business of marketing firms which undertake pensions cold calling, but the view of the majority of respondents was that there would be no impact or that the impact would be marginal.

D.7 In line with responses to both consultations, the government's Impact Assessment has found that the impacts on legitimate businesses will be marginal. Once the ban comes into force, the small proportion of IFAs that use lead generation firms will need to stop using the services of these firms.

They will continue to have other marketing options available to them to gain business. Lead generation firms will no longer be able to undertake pensions cold calling. If a lead generation firm relies heavily on contracts with IFAs to generate pensions leads through cold calling, they will need to adapt their business model.

HM Treasury contacts

This document can be downloaded from
www.gov.uk

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