EXPLANATORY MEMORANDUM TO

THE PRIVACY AND ELECTRONIC COMMUNICATIONS (AMENDMENT) (NO. 2) REGULATIONS 2018

2018 No. 1396

1. Introduction

1.1 This Explanatory Memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument restricts firms from making unsolicited direct marketing calls to individuals regarding their pensions schemes, with two tightly drafted exemptions. These are where the individual being called has given consent to the caller to receive direct marketing calls in relation to pensions, and where the recipient of the call has an existing client relationship with the caller such that they would reasonably envisage receiving direct marketing calls in relation to pensions. The exemptions only apply where the caller is authorised by the Financial Conduct Authority (FCA), or is the trustee or manager of an occupational pension scheme or a personal pension scheme.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

3.3 The Department has reached this view because the powers under which this instrument is made cover the entire United Kingdom and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 The Economic Secretary to the Treasury has made the following statement regarding Human Rights:

"In my view the provisions of The Privacy and Electronic Communications (Amendment) (No.2) Regulations 2018 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument is being made to implement a ban on pensions cold calling using the powers created through section 21 of the Financial Guidance and Claims Act 2018. It does so by way of an amendment to the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the 2003 Regulations), which regulate privacy and data protection in the electronic communications sector in the UK.

6.2 The 2003 Regulations were made to implement the provisions of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector in the UK. They were made using the power in section 2(2) of the European Communities Act 1972. Directive 2002/58/EC is one of a family of five Directives which formed the original European Electronic Communications Framework and were implemented within the UK by the Communications Act 2003, the Wireless Telegraphy Act 2006, and the 2003 Regulations.

6.3 The 2003 Regulations have previously been amended on several occasions. Most recently Regulation 21 was amended to ban cold calling about claims management services.

6.4 Regulation 21 of the 2003 Regulations permits pensions cold calling except where the recipient of the call has previously notified the caller that such calls should not be made or is listed on the register of the Telephone Preference Service. Regulation 2(2) of these Regulations amends regulation 21 of the 2003 Regulations so as to disapply it to pensions cold calling.

6.5 Regulation 2(3) inserts a new regulation 21B into the 2003 Regulations. Paragraph (1) of new regulation 21B prohibits pensions cold calling to individuals (as opposed to firms) except in the circumstances permitted by the Regulations. An organisation that breaches the prohibition 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 requiring an organisation to take specified steps to comply with the law and issuing a monetary penalty notice for up to £500,000. Failure to comply with an enforcement notice is a criminal offence.

6.6 Paragraphs (2) and (3) of new regulation 21B permit pensions cold calling where the caller is a trustee or manager of an occupational or personal pension scheme or a firm authorised by the FCA and where: (1) the recipient of the call has given specific consent to receiving calls from the organisation making the call; or (2) the recipient of the call (a) is an existing customer of the organisation making the call (and the caller has not established that relationship in order to benefit from this exemption); (b) expects to receive pensions cold calls from that organisation; and (c) has been given the opportunity to refuse to provide contact details for the purpose of receiving such cold calls.

6.7 Paragraph (5)(a) defines pensions cold calling to include: (1) marketing a product or service to be acquired using funds currently or previously held in an occupational or personal pension scheme (including the transfer of funds from one pension scheme to another); (2) advising the recipient of the call to withdraw or transfer money from an occupational or personal pension scheme; and (3) offering advice to enable the assessment of the performance of an occupational or personal pension scheme.

7. Policy background

What is being done and why?

7.1 The policy objective of the parent Act, the Financial Guidance and Claims Act 2018, is to ensure that members of the public are able to access free and impartial money guidance, pensions guidance and debt advice. The policy objective of the Financial Guidance and Claims Act 2018 includes provision for the connected purpose of introducing a ban on pensions cold calling by secondary legislation.

7.2 For most people in the UK, their pension savings will be their largest financial asset. Because of the size of individual pension pots, and because people do not have to engage with their savings until much later in life, pension savings are an attractive target for fraudsters. Pension scams can cost people their life savings, and leave people facing retirement with limited income, and little or no opportunity to build their pension savings back up.

7.3 The government decided to legislate to ban pensions cold calling because it was becoming increasingly clear that direct intervention was necessary to curb the threat of pension scams in the UK. Cold calling is one of the most common methods used to initiate pension fraud. In 2013, 97% of cases brought to Citizen's Advice involving pensions liberation scams stemmed from cold calling. Age UK found that 53% of people aged 65+ believe they have been contacted by fraudsters. Additionally, the 87% of unsolicited contact reported to the FCA was via telephone. The scale of the problem is not reflected in current statistics due to underreporting.

7.4 Research by the Money Advice Service suggests that there could be as many as 8 scam calls every second – the equivalent of 250 million calls per year. Citizens Advice have calculated that 10.9 million consumers have received unsolicited contact about their pensions since April 2015. There were 30,000 'Defined Contribution' scheme transfers in 2015/16, representing £1 billion of assets. Industry estimates suggest that fraudsters could be behind as many as one in 10 pension transfer requests.

7.5 This instrument implements a ban on unsolicited direct marketing calls in relation to pension schemes, with two exemptions. The exemptions only apply where the caller is authorised by the FCA, or is the trustee or manager of an occupational pension scheme or a personal pension scheme. Pensions cold calling is primarily undertaken by unregulated marketing firms which generate business leads for financial advice firms (also termed "lead-generators"). Therefore, restricting the exemptions only to the callers outlined has the effect of banning unregulated lead generators from undertaking pensions cold calling, without exception.

7.6 The government is clear that it does not want the ban to have an unnecessary or disproportionate impact on legitimate activities, and has therefore provided two exemptions.

7.7 The first exemption to the ban is where the person being called has given consent to the caller to receive direct marketing calls in relation to pensions. This exemption has been included so that individuals seeking information on pension products from an authorised financial services firm, or the trustee or manager of an occupational pension scheme or a personal pension scheme, are able to do so. The General Data Protection Regulation (GDPR) sets a high standard for consent.

7.8 The second exemption is where the person being called has an existing client relationship with the caller such that they would reasonably envisage receiving direct marketing calls in relation to pensions. This exemption has been included so that individuals are able to receive information about investment opportunities that may be of interest to them from firms with which they have an existing client relationship.

7.9 The definition of “direct marketing in relation to pension schemes” has been drafted widely so that it includes, but is not restricted to, a wide range of activities through which people could be encouraged to access funds held in, or previously held in, their pension scheme, in order to invest in inappropriate or scam investments. The intention behind providing a widely drafted definition is to try and ensure that the Regulations capture activities which authorities are aware are commonly undertaken to scam people, as well as new activities which may evolve or which authorities are not yet aware of.

7.10 Calls which are not generally considered to constitute marketing activities will not be affected by the ban. These include calls from a provider to the beneficiary of a deceased member’s fund and calls attempting to locate people who have lost touch with their pension scheme.

7.11 The Regulations enable the ICO to take enforcement action against those who contravene the Regulations, which HM Treasury believe will deter scammers from undertaking pensions cold calls. An organisation that breaches the prohibition may be liable to pay compensation to the victim and may be subject to enforcement action by the ICO under the Data Protection Act 1998. The ICO’s enforcement powers include serving an enforcement notice requiring an organisation to take specified steps to comply with the law and issuing a monetary penalty notice. Failure to comply with an enforcement notice is a criminal offence.

7.12 In addition, HMT believe the Regulations will raise awareness of the danger of scams by making it clear to industry and consumers that those who undertake unsolicited direct marketing calls in relation to pensions are breaking the law, unless they fit the tightly drawn exemptions outlined in the Regulation.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument does not consolidate previous instruments.

10. Consultation outcome

10.1 HMT has undertaken two consultations in relation to this ban. Respondents to both consultations overwhelmingly supported the ban.

10.2 The first consultation[1] was launched in December 2016 and lasted for a period of 10 weeks. This consultation sought views on the proposed policy of banning pension cold

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

calling, and received 111 responses. The government responded[2] in August 2017, outlining its commitment and approach to the ban.

10.3 The second consultation[3] was launched in July 2018 and lasted for a period of 4 weeks. The consultation ran for a shorter period to reflect the fact that the policy had already been consulted on and the objective of this second consultation was to seek views on the draft Regulations to implement the ban. The second consultation received 40 responses. The consultation response was published on 29 October as a supplementary document to Budget 2018.[4]

10.4 Respondents to both consultations included pension firms, independent financial advisers, professional bodies, industry groups, regulators, consumer groups, and individual members of the public. During the course of both consultations government officials met with or conducted calls with stakeholders, and actively sought stakeholder views.

10.5 Respondents to both consultations overwhelmingly supported the ban. A large number of providers and trustees reported that their members had been affected by pension scams, and that many of these incidents were the result of a cold call. A small number of Independent Financial Advisers (IFAs) and lead generation firms replied to both consultations stating that they did not support the ban. They argued that consumers benefit from cold calling in relation to pensions: since consumers have a high level of inertia about pensions, it is important to contact them directly to encourage them to take action in relation to pensions, or seek financial advice. These respondents argued that cold calling therefore leads to improved retirement outcomes. However, these views were only reflected in a small number of consultation responses and not shared by all financial advisers who responded.

10.6 Many respondents argued that any potential benefits of cold calling are outweighed by the risks, because the consumer detriment from the scams resulting from cold calling is so high. Individuals can lose their entire life savings, leaving them without the means to fund their retirement. Some respondents also noted that there are sufficient opportunities for legitimate firms to generate business without cold calling.

10.7 The second consultation sought views on the draft Regulations to implement the ban. Respondents mostly agreed with the approach of the government's draft Regulations. Where respondents had reservations, it was mainly to do with the monitoring, enforcement and communication of the ban, and concerns about the limitations of UK law in restricting the activities of overseas callers. The consultation response addresses these responses and outlines current activity and plans in these areas. Other reservations concerned technical points on the drafting of the Regulations. Changes to the draft Regulations following respondent comments are covered in the consultation response published on 29 October as a supplementary document to Budget 2018.

11. Guidance

11.1 The ICO will issue guidance for industry on adhering to the pensions cold calling ban when the ban comes into force which is expected to be early in the new year subject to

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[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?

[4] https://www.gov.uk/government/consultations/ban-on-cold-calling-in-relation-to-pensions

the Parliamentary timetable. The ICO are also producing a new statutory direct marketing code under the Data Protection Act 2018 which will be consulted on in 2019.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies, except a small proportion of legitimate lead generation firms and small IFAs.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because, in line with Better Regulation guidance, the Treasury considers that the net impact on businesses will be less than £5 million a year. Due to this limited impact, a de minimis impact assessment has been carried out, which is published alongside this instrument at www.legislation.gov.uk.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No action is being taken to minimise the impact on small businesses. Firstly, it is the intention of the ban to prohibit the activities of some small businesses, as the intention of the ban is to restrict lead-generators from undertaking pensions cold calling, without exception. Although the ban's primary intention is to halt the activities of fraudulent firms, the ban covers legitimate lead generation firms as well as fraudulent firms. There is no easy way to exempt legitimate firms without compromising on the clarity of the ban and creating loopholes which can be exploited by scammers. Secondly, only a small minority of IFAs will be affected by the ban. Very few legitimate IFAs continue to rely on leads generated by pensions cold calling, given the stigma attached to this method of generating business.

14. Monitoring & review

14.1 Compliance with this legislation will be monitored by the enforcement body, the ICO.

14.2 These Regulations do not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, John Glen MP, Economic Secretary to the Treasury, has made the following statement:

"A review provision for these Regulations is not appropriate because the Impact Assessment has found that the impacts will be de minimis. It would therefore be disproportionate to include a statutory review provision with these Regulations. HMT will keep the effectiveness of the Regulations under review and compliance with this legislation will be monitored by the enforcement body, the ICO."

15. Contact

15.1 Josephine Suherman-Bailey at HM Treasury. Telephone: 020 7270 1944 or email: Josephine.Suherman-Bailey@hmtreasury.gov.uk can answer any queries regarding the instrument.

15.2 John Owen, Deputy Director for the ban on pensions cold calling at HM Treasury, can confirm that this Explanatory Memorandum meets the required standard.

15.3 John Glen MP, Economic Secretary to HM Treasury, can confirm that this Explanatory Memorandum meets the required standard.