Information Commissioner's Office

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Oaklands Assist UK Ltd

Of: 15 Bowker Street, Radcliffe, Manchester M26 3DD

1. The Information Commissioner ("Commissioner") has decided to issue Oaklands Assist UK Ltd ("Oaklands Assist") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is being issued because of a serious contravention of regulations 21 and 24 of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

2. This notice explains the Commissioner's decision.

Legal framework

3. Oaklands Assist, whose registered office is given above (Companies House Registration Number: 10044714) is the organisation stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for the purposes of direct marketing contrary to regulation 21 of PECR.

4. Regulation 21 applies to the making of unsolicited calls for direct marketing purposes. It means that if a company wants to make calls

promoting a product or service to an individual who has a telephone number which is registered with the Telephone Preference Service Ltd ("TPS"), then that individual must have given their consent to that company to receive such calls.

5. Regulation 21 paragraph (1) of PECR provides that:

"(1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where-

(a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or

(b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26."

6. Regulation 21 paragraphs (2), (3), (4) and (5) provide that:

"(2) A subscriber shall not permit his line to be used in contravention of paragraph (1).

(3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.

(4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls

being made on that line by that caller, such calls may be made by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

(5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his—

(a) the subscriber shall be free to withdraw that notification at any time, and
(b) where such notification is withdrawn, the caller shall not make such calls on that line."

7. Regulation 24 of PECR provides:

"(1) Where a public electronic communications service is used for the transmission of a communication for direct marketing purposes the person using, or instigating the use of, the service shall ensure that the following information is provided with that communication –

...

(a) in relation to a communication to which regulation 21 (telephone calls) applies, the particulars mentioned in paragraph (2)(a) and, if the recipient of the call so requests, those mentioned in paragraph (2)(b).

(2) The particulars referred to in paragraph (1) are –

(a) the name of the person;
(b) either the address of the person or a telephone number on which he can be reached free of charge.

8. Under regulation 26 of PECR, the Commissioner is required to maintain a register of numbers allocated to subscribers who have notified them that they do not wish, for the time being, to receive unsolicited calls for direct marketing purposes on those lines. The TPS is a limited company set up by the Commissioner to carry out this role. Businesses who wish to carry out direct marketing by telephone can subscribe to the TPS for a fee and receive from them monthly a list of numbers on that register.

9. Section 11(3) of the DPA defines direct marketing as "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals". This definition also applies for the purposes of PECR (see regulation 2(2)).

10. Under section 55A (1) of the DPA (as amended by PECR 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) the Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that –

"(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person, and

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention."

11. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties that has been published on the ICO's website. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.

12. PECR implemented European legislation (Directive 2002/58/EC) aimed at the protection of the individual's fundamental right to privacy in the electronic communications sector. PECR were amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches the PECR regulations so as to give effect to the Directives.

13. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

Background to the case

14. Oaklands Assist first came to the attention of the Commissioner in June 2017, when a particular Caller Line Identity ("CLI") was identified in the ICO's 'Monthly Threat Assessment' as being the CLI used by one of the 'top 50' organisations responsible for generating complaints via the Commissioner's online reporting tool. It transpired that this same CLI appeared to be connected to a number of complaints made directly to the TPS.

15. Investigations carried out by the Commissioner with the relevant Communications Service Provider ("CSP") revealed that the organisation associated with this CLI traded by the name of Oaklands Assist.

16. Some of the complaints received by the Commissioner, and the TPS, contained comments such as the following:

- *"Caller was extremely abusive when asked how they got our details. Used profane language when hanging up. The same number has also called on numerous other occasions, sometimes just as a silent call, and then ring back within half an hour."*

- *"The stress of getting yet another call from this despicable company and to be on the phone to someone for some time who is rude, employing hard sale tactics and telling me my options now are a) say I've hurt myself and use there service to stop getting calls or b) change my business phone number which has taken time to build up or c) continue to be harassed by them and other companies like them - despite indicating that they understand they should not be calling me as I am a tps member. . . Is, well. . Infuriating, I have become depressed I think with the injustice I feel of my life being invaded, distruped [sic] and completely drained by theese [sic] cold callers. Exhausted of trying different tactics to avoid or stop these [sic] calls. It's effecting my relationships with other people now as when I think of what's happening to me it can annoy me for hours causing me to become noticeably adgitated. [sic] I feel pathetic and powerless and ashamed I'm being effected like this."*

- *"I asked this person why he was continually calling me and he said he wanted to claim for the money i was due for a supposed accident i had on 4th Dec, he was very abusive when i asked for his Director or CEO, he said he was the Director and he wouldn't put me on to anyone to complain, he said i led a sad life if i wanted to comlain [sic] about him trying to help me!"*

- *"I was on hands-free with my children in the car and although I was keeping my cool and asking him to remove my details he was angry and aggressive - not good for my kids to hear which is why I hung up. Sick of getting these calls"*

17. The Commissioner sent an initial investigation letter to Oaklands Assist on 24 August 2017 setting out her concerns regarding their compliance with PECR, and asking a number of questions in respect of their practices and policies.

18. Despite delivery of the letter being confirmed via Royal Mail, and a chaser email of 15 September 2017 being sent requesting a response and setting out the Commissioner's enforcement powers, no substantive response to the Commissioner's questions was forthcoming.

19. In an effort to compel Oaklands Assist to supply the necessary information to determine whether they had complied, or were complying with, the relevant data protection legislation, on 25 September 2017 the Commissioner served Oaklands Assist with an Information Notice, with delivery again being confirmed via Royal Mail.

20. As no response was forthcoming, on 16 January 2018 the Commissioner contacted Oaklands Assist further to indicate that they would now be considered for prosecution under s.47 DPA for failure to comply with the Information Notice. Following this, on 7 February 2018, Oaklands Assist provided a response to the Information Notice.

21. In their response Oaklands Assist claimed that they had very little of the information that had been requested. Crucially, they claimed not to have records of the numbers dialled; volumes of calls made; or details of where the data they used had been obtained from. No evidence was provided as to the training of staff; nor was there any proof provided of an adequate suppression system; contracts with third parties; or indeed any such due diligence at all.

22. In light of the response received, the Commissioner conducted further investigations with the relevant CSP to establish how many calls were

made within the period of contravention from the CLI attributable to Oaklands Assist. On 21 February 2018 it was confirmed that there were a total of 246,459 calls made between the period of 5 May 2017 and 12 July 2017.

23. Of these 246,459 calls, the Commissioner was able to filter the results to establish that, within the period of contravention, a total of 63,724 calls were made to subscribers who had registered with the TPS not less than 28 days prior to receiving a call. The Commissioner is satisfied that these 63,724 calls were all made for the purposes of direct marketing as defined by section 11(3) DPA.

24. The Commissioner has further been able to determine that, as a result of these direct marketing calls, a total of 59 complaints were made, with 28 of those being made directly via the ICO's online reporting tool, and a further 31 being made to the TPS.

25. The Commissioner has made the above findings of fact on the balance of probabilities.

26. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by Oaklands Assist and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

27. The Commissioner finds that Oaklands Assist contravened regulation 21 of PECR.

28. The Commissioner finds that the contravention was as follows:

29. Between 5 May 2017 and 12 July 2017, Oaklands Assist used a public telecommunications service for the purposes of making 63,724 unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the called line was a number listed on the register of numbers kept by the Commissioner in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR. This resulted in a total of 59 complaints being made to the TPS and the Commissioner.

30. The Commissioner is also satisfied for the purposes of regulation 21 that these 63,724 unsolicited direct marketing calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls, and they had not given their prior consent to Oaklands Assist to receive calls.

31. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

32. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by Oaklands Assist arising from the organisation's activities over a 2 month period, and this led to a substantial number of unsolicited direct marketing calls being made to subscribers who were registered with the TPS, and a significant number of complaints being made as a result.

33. The 63,724 unsolicited direct marketing calls made between 5 May 2017 and 12 July 2017 have been made from a CLI attributable to Oaklands Assist. These calls were not screened against the TPS

register, nor is there any evidence of consent being provided to Oaklands Assist from the individual subscribers. There is no evidence of any contractual terms between Oaklands Assist and their data provider, or of any due diligence checks being carried out to ensure the veracity of the data being obtained. In short, Oaklands Assist have failed to provide the Commissioner with any evidence to demonstrate an intention to comply with PECR.

34. Furthermore, there is evidence of repeat calls despite the requests of the recipients to be removed from Oaklands Assist's marketing lists, and the complaints themselves demonstrate that they suffered rude and potentially intimidating behaviour from the callers. Moreover, despite Oaklands Assist's claim that they always provide their company name, there is evidence from the complaints to suggest that the callers provided false company names to subscribers, for what the Commissioner can only determine to be an attempt to conceal the identity of Oaklands Assist when engaging in their direct marketing activity. This is contrary to the requirements of regulation 24 PECR.

35. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

36. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that Oaklands Assist's actions which constituted that contravention were deliberate actions (even if Oaklands Assist did not actually intend thereby to contravene PECR).

37. The Commissioner considers that in this case Oaklands Assist did deliberately contravene regulation 21 of PECR.

38. The Commissioner considers that the inadequacies outlined were more than matters of serious oversight. She has published detailed guidance for those organisations carrying out direct marketing explaining their legal obligations under PECR. This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by e-mail, by post, or by fax. Specifically, it states that live calls must not be made to subscribers who have told an organisation that they do not want to receive calls; or to any number registered with the TPS, unless the subscriber has specifically consented to receive calls.

39. The Commissioner's direct marketing guidance also makes clear that organisations acquiring marketing lists from a third party must undertake rigorous checks to satisfy themselves that the personal data was obtained fairly and lawfully, that their details would be passed along for direct marketing to the specifically named organisation in the case of live calls, and that they have the necessary consent. The Commissioner has been provided with no evidence that any such checks were undertaken, rather they have relied on assurances of the data's veracity at the point of purchase which would fail to satisfy the Commissioner's requirement for due diligence. Moreover Oaklands Assist have indicated that they do not maintain records of any kind, and so can provide no details of the data purchase.

40. Further and alternatively the Commissioner has also gone on to consider whether the contraventions identified above were negligent.

41. She has considered whether Oaklands Assist knew or ought reasonably to have known that there was a risk that these contraventions would occur. She is satisfied that this condition is met, given that Oaklands Assist relied on direct marketing due to the nature of its business, and the fact that the issue of unsolicited calls has been widely publicised by the media as being a problem. Furthermore, Oaklands Assist have provided no evidence of any contract with their data provider, indeed they have indicated that they are unable to recall even who this provider is. It is reasonable for the Commissioner to find that a failure to enter into a contract for the handling of personal data, might at the very least result in a risk that such a contravention would occur.

42. Secondly, the Commissioner has gone on to consider whether Oaklands Assist failed to take reasonable steps to prevent the contraventions. Again, she is satisfied that this condition is met. Reasonable steps in these circumstances would have included carrying out adequate screening of the data against the TPS register, maintaining adequate records for calls made, asking its third party data provider for evidence that the subscribers had consented to receiving calls from Oaklands Assist, screening the data against the TPS register itself regardless of any assurances that might have been given by the providers of the data, and ensuring that it had in place an effective and robust suppression list. Given the volume of calls and complaints, it is clear that Oaklands Assist failed to take those steps.

43. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met

The Commissioner's decision to issue a monetary penalty

44. In addition to the above, the Commissioner has also taken into account the following aggravating features of this case:

- Oaklands Assist were almost thoroughly uncooperative and failed repeatedly throughout the investigation to engage with the Commissioner, responding only towards the end when there was an indication that criminal proceedings would be initiated against them;

- When Oaklands Assist did respond they provided vague and obstructive answers, which failed to address any of the Commissioner's concerns;

- The Commissioner has had to object to Oaklands Assist being struck off the register with Companies House following their apparent cessation of business in light of the Commissioner's investigation, thus demonstrating Oaklands Assist's efforts to escape regulatory action.

45. For all of the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. She is also satisfied that section 55A (3A) and the procedural rights under section 55B have been complied with.

46. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made on behalf of Oaklands Assist in this matter. Those representations disclose no information which materially affects the facts of the case as the Commissioner understands them to be, nor do they absolve Oaklands Assist of responsibility for the contravention as stated.

47. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

48. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.

49. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The making of unsolicited direct marketing calls is a matter of significant public concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. This is an opportunity to reinforce the need for businesses to ensure that they are only telephoning consumers who want to receive these calls.

50. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

51. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£150,000 (one hundred and fifty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

52. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **29 October 2018** at the latest. The

monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.

53. If the Commissioner receives full payment of the monetary penalty by **26 October 2018** the Commissioner will reduce the monetary penalty by 20% to **£120,000 (one hundred and twenty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

54. There is a right of appeal to the First-tier Tribunal (Information Rights) against:

(a) the imposition of the monetary penalty
and/or;
(b) the amount of the penalty specified in the monetary penalty notice.

55. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.

56. Information about appeals is set out in Annex 1.

57. The Commissioner will not take action to enforce a monetary penalty unless:

- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;

- all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
- the period for appealing against the monetary penalty and any variation of it has expired.

58. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland

Dated the 26th day of September 2018.

Signed [redacted]

Stephen Eckersley
Director of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Information Commissioner's Office

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice or variation notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.

2. If you decide to appeal and if the Tribunal considers:-

   a) that the notice against which the appeal is brought is not in accordance with the law; or

   b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

   the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

   GRC & GRP Tribunals
   PO Box 9300
   Arnhem House
   31 Waterloo Way
   Leicester
   LE1 8DJ

   a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.

b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.

4. The notice of appeal should state:-

a) your name and address/name and address of your representative (if any);

b) an address where documents may be sent or delivered to you;

c) the name and address of the Information Commissioner;

d) details of the decision to which the proceedings relate;

e) the result that you are seeking;

f) the grounds on which you rely;

g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;

h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.

5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.

6. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).