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Rt Hon Stephen Timms MP
Chair, Work and Pensions Committee
House of Commons
London
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11 June 2021

Our Ref: SA210520E

Dear Mr Timms

RE: Financial Promotions Online

Thank you for your letter of 19 May 2021 and for your ongoing support for measures to tackle online harm, including fraud.

As you know this is a key area of focus for us. I thought it would be helpful to briefly set out the size and nature of the problem as we see it, before turning to your specific questions. I am of course happy to discuss any of this with you further as the draft Online Safety Bill proceeds through pre-legislative scrutiny.

Our figures show that fraud now accounts for one-in-three crimes in the UK, costing up to £190 billion a year.[1] An estimated 86% of fraud is committed online[2] and this is a growing problem. In 2019, we issued 573 scam warnings. In 2020, that figure had grown to 1185, a 52% increase. Action Fraud has reported that victims of pensions-related scams who had worked their whole lives to build a retirement fund had lost £82,000 each on average.

Online platforms, such as search engines and social media platforms, are playing an increasingly significant role in putting consumers at risk of harm by exposing them to adverts for financial products. These range from scams and promotions of high-risk investments to false or misleading adverts, which can fall within or outside our jurisdiction.

There are few barriers to online scams. Fraudsters have unprecedentedly cheap access to an online population of consumers who find it difficult to differentiate genuine offers from the fraudulent. Online platforms do not always check the details of the people placing the adverts, so scammers are able to place adverts anonymously on an industrial scale, without fear of being caught. There are ads online for firms that don't exist, for firms that claim to be regulated but aren't, for firms that claim to be based in the UK but aren't, and for clones of legitimate authorised firms.

We liaise with online platforms, but negotiation and persuasion (as opposed to requirements imposed by legislation) are not always the fastest way to achieve meaningful change to protect consumers. In addition to other initiatives, in order to protect consumers from misleading and

[1] https://www.crowe.com/uk/croweuk/-/media/Crowe/Firms/Europe/uk/CroweUK/PDF-publications/Annual-Fraud-Indicator-report-2017
[2] Home Office, Fraud Review – Headline Findings, February 2020.

fraudulent adverts, we paid Google to promote our warnings. In 2020, we spent close to £500,000 on Google Adwords to warn consumers about high-risk investments. We also paid Google to promote adverts about specific unauthorised firms. This means Google received a fee from the scammer, and the regulator. We have also had to contact Google to inform them of adverts that not only breach our rules, but their own rules and policies.

Given this, we continue to believe the best way to protect consumers from illegal online scams is for financial harm to be included as an online harm in the government's proposed Online Safety Bill and we believe these provisions should include online advertising (responsible for the majority of fraudulent activity) as well as user-generated content. Without legislation, we are obliged to negotiate separately with every online platform, to persuade them to provide gateway protection to consumers. This will produce a patchwork of inconsistent approaches, take us considerable time and create gaps that can be exploited by scam advertisers.

Legislation can help avoid these gaps and ensures there is a level playing field for all online platforms and consistent, enforceable standards to protect consumers.

Turning to your specific questions expanding on my comments of 20 April.

What exemptions were removed when the UK left the EU?

Under UK law, a person is prohibited from communicating (or causing to be communicated) a financial promotion unless (i) the person is authorised by the FCA/PRA; (ii) the promotion has been approved by a person authorised by the FCA/PRA; or (iii) the promotion is communicated within an exemption in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (the 'Financial Promotions Order'). This is known as the 'financial promotion restriction'.

A general EU-derived exemption in the Financial Promotions Order broadly exempted electronic financial promotions from the scope of the prohibition where these were made from an establishment in an EEA state other than the UK. This exemption was a component of the UK's implementation of the E-Commerce Directive (the 'ECD'). Since 1 January 2021, following the end of the transition period, this exemption no longer forms part of UK law.

The Financial Promotions Order still contains another exemption which has its roots in the ECD. This exempts from the financial promotion restriction communications made by online intermediaries where the communication would fall within the scope of one of the three safe harbours in the ECD ('mere conduits', 'caching' and 'hosting'). Our view, however, is that this exemption does not apply when the intermediary has a significant role in optimising the content or actively determining which recipients receive particular promotions – most obviously in the case of paid for advertising.

As a result of this change, we are now looking at the operations of the major online platforms to determine whether they are now subject to the financial promotion restriction and, if so, whether they are compliant. Where they are not, we will take action to ensure that financial promotions on these platforms are lawfully communicated. We are also asking all major platforms to commit publicly that they will ensure compliance and the Committee's support on this initiative would be appreciated.

What new powers has this granted the FCA to tackle online fraud?

The change to the law described above has not given us any new powers. It has narrowed the scope of exemptions which are available to online platforms in respect of their communication of financial promotions. As I set out above, we are now looking at the operations of the major online platforms in light of this change.

Breach of the financial promotion restriction in section 21 of the Financial Services and Markets Act 2000 (FSMA) is a criminal offence. Where we take the view that platforms are failing to comply with that restriction, we will consider whether enforcement action is appropriate. We may also be able to take action where we identify breaches of other relevant legislation, including under the Proceeds of Crime Act 2002.

Aside from the legal question of whether the platforms themselves are in breach of relevant requirements, however, we believe platforms should be motivated to take action by the overwhelming public interest in reducing online harm.

Whether there are any such powers, or pre-existing powers, the FCA is not using because of a lack of resource, a lack of finalised regulations or legal ambiguity?

No – we will consider the use of all the powers available to us as part of our work to tackle online harm and fraud.

Whether there are any current powers which would benefit from further clarity provided through legislation?

We do not believe there is a lack of clarity on any specific powers.

There are however limits to what we can do to tackle online harm under the legal framework within which we work. For example, we do not have statutory powers to investigate fraud and gather evidence from unauthorised firms where there is no FSMA nexus. We cannot require the production of documents, information and the answering of questions, or gather evidence using Regulation of Investigatory Powers Act 2000 (RIPA) powers in the absence of an offence under FSMA (or equivalent legislation that grants us appropriate remit).

We also believe that the exemptions in the Financial Promotion Order for High Net Worth (HNW) and Sophisticated investors are a significant vulnerability in the financial promotion regime. The exemptions enable unauthorised firms to issue financial promotions to HNW and Sophisticated investors without having to comply with any of our rules, even the basic clear, fair and not misleading requirements. We have seen evidence that strengthening our rules has resulted in more firms using the exemptions to market high-risk investments to ordinary consumers, often online. We have also seen the exemptions being exploited by bad actors to target consumers with inappropriate high-risk investments or scams.

Leaving this aspect of the legislation unchanged will continue to result in significant consumer harm that the FCA is unable to mitigate. We believe both the ability to self-certify qualification for the exemptions, and the thresholds in the exemptions, need to be addressed. As the exemptions are set in legislation, any changes are a matter for Government and Parliament.

What new powers does the FCA want to be included within the Online Safety Bill?

We welcomed the Government's confirmation that certain types of user-generated online fraud will be brought within scope of the Bill. We very much hope, however, that it can be amended to cover paid-for advertising as well as it is online advertising that is the major source of the problems leading to very significant consumer harms. The outcome we want to see is that platforms have an obligation to identify and remove fraudulent content – regardless of its format.

We do not agree with the arguments made by some platforms that such a measure would undermine competitiveness of the UK technology sector as we do not consider a business model which acts as a gateway to large scale fraud against consumers constitutes a sustainable business model. We recognise that ultimately this is a matter for Government and Parliament to decide on.

For example, amendments could be made to ensure that the Duties of Care in the Bill encompass an obligation to prevent the communication of financial promotions which have not been approved for communication by an FCA-authorised firm. To fulfil this duty, online platforms and their senior managers would be required to implement measures including:

- Appropriate gateway systems and controls to prevent publication
- Steps to ensure fraudulent and misleading financial promotions are dealt with rapidly
- Processes that allow authorities to share intelligence on non-compliant financial promotions

This is one approach but we stand ready to work with officials and partner regulators to explore other options.

ScamSmart

I also thought you may be interested to see the latest figures from our ScamSmart pension fraud campaign – which ran between 1 July to 30 September 2020. Our aim was to provide consumers with the knowledge and tools to avoid pension scams. The campaign targeted those individuals most at risk, namely pension holders aged 45-65, and ran on TV, online video, radio, social media, paid search and was supported by PR.

I am pleased to say that the campaign has reached four out of five pension savers between 45-64, the group most at risk. This is mainly driven by strong TV recognition figures, with 77% reporting they recognise the ScamSmart TV campaign.

This has also prompted action, with 37% of the campaign target audience indicating that they would visit the ScamSmart website to check whether an organisation is legitimate in order to protect themselves against pension fraud.

We are currently working on the new burst of the ScamSmart Pensions campaign which will run from 5 Jul – 31 August 2021 across the same channels as last year, and I look forward to giving you an update on that campaign in due course.

Yours sincerely,

Nikhil Rathi

Nikhil Rathi
Chief Executive

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From the Chair

Nikhil Rathi
Chief Executive
Financial Conduct Authority

19 May 2021

Dear Nikhil,

Financial Promotions Online

You will be aware that the Work and Pensions Committee recommended in its report on pension scams that online providers should be covered by the regulatory framework for financial promotions. Though I am certain you will be responding or contributing to a response to our report, I would be grateful if you could clarify a few points for the Committee.

On 20 April 2021 you said that "Previously, online platforms were exempt from the financial promotions regime. This exemption was removed when we left the EU." On 29 April 2021 the FCA set out proposals to strengthen its financial promotion rules, which said "We strongly believe financial harm should be included within the Online Safety Bill, to ensure consistent, enforceable standards and greater protection for consumers". Your call reflects the Committee's strongly held view, set out in our recent report on Pension Scams.

Please would you write to the Committee outlining:

1. What exemptions were removed when the UK left the EU?
2. What new powers has this granted the FCA to tackle online fraud?
3. Whether there are any such powers, or pre-existing powers, the FCA is not using because of a lack of resource, a lack of finalised regulations or legal ambiguity?
4. Whether there are any current powers which would benefit from further clarity provided through legislation?
5. What new powers does the FCA want to be included within the Online Safety Bill?

Thank you for your help.

Yours sincerely,

Stephen Timms

Rt Hon Stephen Timms MP
Chair, Work and Pensions Committee