Dear Jack & Frank,

Thank you both very much for meeting with myself and the Minister for Pensions and Financial Inclusion this week. I found it very useful to hear your views on our proposed approach to banning certain types of cold calling. Let me be very clear: I want to introduce an effective ban on pensions cold calling as soon as possible, given the profoundly damaging impact pension scams can have on people’s lives. Equally, I am committed to introducing an effective ban on claims management cold calling, given the level of nuisance calling that comes from this industry.

I believe we are in agreement on our aspirations for these bans, and also on many of the most important elements of the bans’ design and implementation. Indeed, significant parts of the government’s proposed pensions cold calling amendment were based on the amendment recommended by the Work and Pensions Select Committee.

However, I said I would follow up on one specific point on the pensions cold calling ban you raised during the meeting - the question of why the FCA should not enforce a ban, as they do with mortgages cold calling. I also want to address a second point that came up - whether it would be appropriate to reference banning the commercial use of data on the face of the Bill. I will take these in turn.
1. The ICO as an enforcement body

Mortgages cold calling

Firstly, in our meeting you raised the specific point that the FCA already enforces a cold calling ban for mortgages, and questioned why a similar ban could not be established for pensions cold calling. I committed to looking into this issue more closely. It is true that the FCA enforces a mortgages cold calling ban. However I believe the nature of today’s pensions cold calling activity means that an equivalent ban would not be effective. The FCA’s predecessor, the Financial Services Authority (FSA), initially established the mortgages cold-calling ban in 2004 in response to instances of high pressure sales tactics by firms which were in the process of becoming regulated by the FSA: mortgage lenders and intermediaries.

It was appropriate and effective for the FSA (and now the FCA) to enforce this mortgages cold calling ban themselves because the firms doing the cold calling were to be FSA (FCA) regulated firms. However, this is not the case with pensions cold calling, where many of the calls are being made by unregulated lead generators. The FCA would therefore not be able to enforce a ban against these firms, significantly limiting its impact. An ICO-enforced ban, on the other hand, would cover these firms, and therefore be more effective. As I have set out at length below, however, I still believe the FCA will have an important role to play in enforcing the cold calling bans.

Why the ICO is well-placed to enforce cold-calling restrictions

As I stated in our meeting, I believe that the ICO is best placed to enforce the pensions cold calling ban. When we consulted on the details of the ban last year, respondents were supportive of the ICO enforcing the ban, given its experience of regulating unsolicited direct marketing activities. The ICO already enforces restrictions on the activity of cold calling under the Privacy and Electronic Communications Regulations (PECR), as well as restriction on the use of data from such calls under the Data Protection Act (DPA). I sincerely believe it is best that the pensions and claims management cold calling bans are enforced through this existing framework.

You raised a concern about the effectiveness of ICO enforcement of cold calling. I agree it is critical that the bans we put in place are properly adhered to so that vulnerable consumers are protected. However, I am confident the ICO has sufficient powers to enforce these bans. Through PECR and the DPA, it is able to fine offenders up to £500,000, and last year it issued 29 civil monetary penalties, totalling £2.83 million. Recent evidence suggests this action is working, with both the ICO and Ofcom recently reporting that the number of complaints about direct marketing has fallen for two years in a row.

Perhaps the most important point, however, is that a ban enforced by the ICO will cover any organisation in any sector which engages in pensions or claims management cold calling. This includes unregulated firms engaging in lead generation activity – the source of much cold calling activity – who would otherwise be outside the remit of an FCA-enforced ban. For this reason, I believe the ICO is better-placed to enforce these bans than the FCA.
The role of the FCA

However, I agree with you that the FCA will have an important role to play if these bans are to succeed. You mentioned in our meeting the important role the FCA has played in tackling bad practice in light of the issues faced by British Steel workers in Port Talbot, and I recognise the need for the FCA to be involved here.

My officials have been in contact with their counterparts in the FCA and the ICO, and I hope I can reassure you on this point. When the bans are introduced, the FCA will work closely with the ICO where breaches of the rules by FCA regulated firms are identified. The two organisations already work closely together on a range of issues and have a shared memorandum of understanding underpinning this. And the FCA has an existing power to put due diligence rules in place relating to how firms acquire leads for new customers – to identify whether firms have proper measures in place to avoid acquiring such details illegally.

Where FCA regulated firms breach ICO regulations, the FCA can already take significant action against such firms if this is deemed a proportionate regulatory response. For instance:

- Breaches can be considered when the FCA assesses the firm’s suitability to carry on regulated activity under its Threshold Conditions (the minimum standards for authorisation). This means that, in principle, the FCA could refuse to grant permission to, or remove permission from, firms which have committed serious breaches to carry on regulated activities.
- If the firm’s breaches meant the firm no longer satisfied the FCA’s Threshold Conditions, the FCA could use its own-initiative requirement or variation of permission powers. This would allow the FCA to limit a firm’s activities, for instance by preventing it from undertaking certain activities or taking on new business.
- Finally, under the Senior Managers’ regime the FCA can take into account breaches of non-FCA requirements when deciding whether to grant approval for a Senior Manager. The FCA could also consider removing existing approval for a Senior Manager where such a breach had occurred.
2. Banning the commercial use of data from cold-calling

In our meeting, you also raised the importance of banning the commercial use of data obtained through illegal cold calls. It is important that the bans are successful, and to ensure this, I agree we must remove the ability for firms to profit from this activity. However, I do not believe that we need to amend the bill to enable this, as the bans we introduce will already be complemented by existing and forthcoming data protection legislation which will achieve this aim.

Specifically, under the DPA, firms are required to process, or handle, personal data in accordance with the law. Where personal data is obtained through an unlawful cold call, the further use of that data - for example, using the leads to make further calls in the future - would be contrary to the DPA. Importantly, this is a duty on both the buyer and seller of the data in question. And this remains the case even if the recipient of the call purported to give consent to such further calls whilst on the call, which I recognise could otherwise be an easy work-around for scammers.

There are strict punishments in place for breaches of this data processing. The ICO can fine up to £500,000 for breaches of the DPA, and the maximum punishment for this kind of illegal activity is about to increase. Under the General Data Protection Regulation and the Data Protection Bill that is currently going through Parliament the existing £500,000 limit will be raised to approximately £17m – or 4% of a company’s turnover, whichever is higher.

Finally, I recognise the risk of scammers circumventing the bans by contracting out cold calling to overseas lead generators. However, the ICO is clear that firms deliberately constructing their processes to take advantage of activities they would be expected to know was unlawful in the UK – such as pensions cold calling - could not be said to be processing data fairly and lawfully under the DPA. The ICO has arrangements with international regulators across Europe and beyond to enable enforcement in cases like this. These arrangements extend across Europe and beyond, to a range of countries from Mexico to the Republic of Korea and from Nigeria to the USA, to minimise the risk of consumers being harmed by this workaround.
3. Full ban on claims management cold calling

At the meeting, you made clear that Labour consider a full ban in relation to claims management cold calling to be desirable. I understand that there are likely to be limited circumstances in which an individual would want to give consent to receiving unsolicited calls in relation to claims management. However, the EU’s ePrivacy Directive, which PECR implements, requires member states to operate either an opt-in or opt-out regime in relation to live unsolicited direct marketing calls. ‘Regulated professionals’, such as lawyers or financial advisers, can be subject to higher standards by their professional regulatory bodies. Claims management companies do not fall into this category, which is why clause 34 makes live direct marketing calls relating to claims management an opt-in model, effectively banning cold calling unless prior consent has been given.

I hope you find this information useful and that it reassures you about our approach to banning cold calling.

with very best regards

JOHN GLEN