



April 16, 2018

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**NOTICE OF EX PARTE**

Re: CG Docket No. 02-278, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, and CG Docket No. 17-59, Advanced Methods to Target and Eliminate Unlawful Robocalls

Dear Ms. Dortch:

Representatives from the Insights Association,<sup>1</sup> on behalf of the market research and data analytics industry, met with Jamie Susskind, chief of staff for FCC Commissioner Brendan Carr, on April 5, 2018, then with Amy Bender, legal advisor for FCC Commissioner Michael O'Reilly, on April 12, 2018.

We discussed: (1) Telephone Consumer Protection Act (TCPA) reform; (2) our petition on the differentiation of telemarketing from market research; and (3) call blocking and tagging.

The April 5 group included: Howard Fienberg, director of government affairs for the Insights Association; Bill McInturff, a member of the association's government affairs committee, and partner and cofounder of Public Opinion Strategies; and Stuart Pardau and Blake Edwards of the Law Offices of Stuart L. Pardau & Associates, consultants to the association. The April 12 group included only Fienberg and Pardau.

**TCPA Reform**

The FCC's 2015 TCPA regulations dramatically and detrimentally affect the cost, speed and quality of market research conducted via phone, and are in dire need of reform. Particularly as the market research and analytics industry faces an increasing number of costly TCPA class action lawsuits (usually filed by serial plaintiffs), the rules make it exceptionally challenging to contact the 67.6 percent of U.S. households reachable only via their cell phones.<sup>2</sup>

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<sup>1</sup> The Insights Association was formed through the merger of two trade organizations with long, respected histories of servicing the market research and analytics industry: the Marketing Research Association (MRA), founded in 1957, and the Council of American Survey Research Organizations (CASRO), founded 1975. Representing more than 4,000 members across the United States, the Insights Association is the leading nonprofit trade association for the market research and analytics industry, and the leader in establishing industry best practices and enforcing professional standards. The Insights Association's membership includes both research and analytics companies and organizations, as well as the researchers and research departments inside of non-research companies and organizations.

<sup>2</sup> See the Insights Association 1-page position paper: <http://www.insightsassociation.org/legal-article/tcpa-restrictions-using-autodialers-call-cell-phones>

Now that the DC Circuit Court has issued a decision in the ACA lawsuit against the FCC's 2015 TCPA rules, to which the Insights Association was an intervenor, we anxiously await swift and decisive FCC action to remedy the aspects rejected by the court.

- (1) The original 1991 law prohibited the use of an autodialer to call a cell phone without express prior consent from the party being called, but the 2015 FCC rules expanded the definition to include just about any piece of dialing equipment except a rotary dial phone. The rules must return the autodialer definition to the original statutory approach and intent, focusing on the use of abusive telemarketing technology, rather than on the vague potential future capacity to electronically dial a number.
- (2) The court rejected the 2015 "one-call-before-liability" standard for calling a reassigned cell phone number as arbitrary and capricious. The onerous and counterproductive requirement of presumed knowledge should be replaced by a standard of actual knowledge that the number being called has been reassigned to a new subscriber, different from the intended recipient from whom the caller had prior express consent. Any cell phone number may have been reassigned at any moment, upwards of 100,000 or more every day, and there is no reasonably fool-proof way to know. As Commissioner O'Reilly pointed out in his comments on the Second Notice of Further Proposed Rulemaking for a reassigned numbers database, "there may be less value or need in creating a new database, at least from a legal liability perspective," once the FCC fixes the reassigned number requirements. (The Insights Association will file more comments<sup>3</sup> on the database proposal soon.)
- (3) It is important for consumers to be able to revoke their consent to receive calls, but the 2015 rules took an overly broad and vague approach to how revocation of consent could be conveyed. Rather than requiring any consumer-facing person to be TCPA-trained to handle consent revocation, the court indicated that FCC needs a more standardized approach to providing consumers reasonable means for revocation.

### **The Insights Association / AAPOR Petition Clarifying that Market Research Is Not Telemarketing**

Seeking to clarify the long-recognized distinction between telemarketing and market research, the Insights Association and AAPOR filed a petition<sup>4</sup> with the Commission on October 30. We urge the FCC to address these concerns as soon as possible, either independently or as part of the broader TCPA rewrite.

As discussed in our meetings with Commissioners' staffs, our petition requested a declaratory ruling to clarify that: (1) communications should not be presumed to be marketing under the TCPA simply because they are sent by a for-profit company; (2) the presence in a communication, ancillary document or webpage that can be mischaracterized as "advertising" does not make the communication "dual-purpose"; (3) the FCC's "vicarious liability" regime does not apply to survey, opinion, and market research; and (4) survey, opinion, and market research studies are not goods or services provided to a research respondent, even if the studies involve an incentive for participation.

This is not new ground for the FCC. We have merely asking for clarity and reaffirmation of the FCC's existing rules. As explained in the petition, the FCC has "for more than two decades, and from many different angles, reinforced the notion that *market research and marketing are distinct activities*," and that research *does not constitute an "advertisement" or "telemarketing" under TCPA*.

<sup>3</sup> The Insights Association's last comments filed on the reassigned numbers database proposal:

<https://ecfsapi.fcc.gov/file/108280033930092/IA-Fcc-reassignednumbersNOI-8-28-17.pdf>

<sup>4</sup> [http://www.insightsassociation.org/sites/default/files/misc\\_files/insights\\_-\\_fcc\\_petition\\_10.30.17.pdf](http://www.insightsassociation.org/sites/default/files/misc_files/insights_-_fcc_petition_10.30.17.pdf)

Differentiating marketing research from telemarketing is essential to its conduct.<sup>5</sup>

### Call Blocking and Tagging

The FCC has started to help tackle the problem of “illegal robocalls” in several initiatives, but is doing so counterproductively in others. We support the FCC’s push to authenticate calls at the telecommunications service provider level, since illegal robocalls generally originate with scam artists overseas using technology to spoof caller identification. However, the rollout of blocking and tagging calls (i.e., marking some calls as “spam”) en masse at the providers’ level is hurting the calling ecosystem. Phone subscribers should certainly be able to exercise their own choices and determine numbers to block for themselves, but the blocking and tagging going on at the provider level has nothing to do with consumer choice.

These providers all operate in different fashions and use different algorithms and inputs to determine which numbers to block or tag, with no attention paid to: (1) how a caller can determine that the call they tried to place was blocked; (2) how a caller can find out that the phone number they are calling from has been designated as “spam” or otherwise subject to blocking or tagging; (3) what differentiates a call initiated by a human from a completely automated call, or how the providers can differentiate between an “illegal robocall” and any other call; (4) what lands a number on a black list; or (5) how callers can get black lists updated and address errors.

An increasing number of our members find that their phone numbers are being tagged and displayed by systems as “SPAM,” which is both derogatory and legally incorrect (since they are not commercial in nature), and likely discourages many potential respondents from participating in telephone surveys. The providers of call blocking and tagging services are neither transparent in their processes nor open to entreaties to correct such errors.

The Insights Association endorses the use of a white list to prevent legitimate dialers from being inadvertently blocked (or tagged as spam). As commented to the FCC last year:<sup>6</sup> “Whether the FCC chooses to establish a single white list for all providers, or to have providers keep their own white lists, voice service providers and call blocking service providers should be required to run origination numbers through that white list before blocking a number, and to regularly update both the white list and the numbers being blocked.”

Processes and mechanisms for vetting entities for the white list(s), and for updating numbers and challenging any mistakes, should be “as simple and clear as possible.” Likewise, the operator(s) of the white list(s) should be required to honor update requests and challenges in a set (and limited) timeframe.

Perhaps unintentionally, the FCC is helping to fuel the call blocking and tagging problem by releasing questionable complaint data every quarter. We respectfully request that the FCC reconsider these data dumps, or at least incorporate specific data for each call record, such that every call about which someone files a

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<sup>5</sup> Market researchers, as explained in the petition, are “an essential link between businesses and consumers, and between political leaders and constituents, by providing important insights about consumer preferences through surveys, analytics, and other qualitative and quantitative research. On behalf of their clients — including the government, media, political campaigns, and commercial and non-profit entities — researchers design studies and collect and analyze data from small but statistically-balanced samples of the public. Researchers seek to determine the public’s opinion and behavior regarding products, services, issues, candidates, and other topics. Such information is used to develop new products, improve services, and inform policy. In this context, research itself does not intend to affect purchase behavior or cause even so much as the expenditure of a dime.”

<sup>6</sup> <https://ecfsapi.fcc.gov/file/108010020309128/1A-Fcc-advanced-robocall-NPRMNOI-7-31-17.pdf>

complaint does not get automatically added to every black list in the U.S. Particularly since illegal robocalls generally use spoofed caller ID, how many legitimate callers or run-of-the-mill phone subscribers are being inadvertently blacklisted when some scam artist briefly uses their numbers for a scam call campaign?

Small steps can go a long way to fixing the problem, but a lot needs to be resolved at the provider level.

### **Conclusion**

We look forward to working with the FCC on these issues and answering any concerns or questions along the way.

Sincerely,



Howard Fienberg  
VP, Advocacy  
Insights Association