Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	**CG Docket No. 02-278**
Telephone Consumer Protection Act of 1991	)	
	)	
Petition for Expedited Declaratory Ruling	)	
of the Insights Association		

COMMENTS OF J.D. POWER

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I. INTRODUCTION

On behalf of J.D. Power, I am writing to express my support for the petition for declaratory ruling (the "Petition") filed with the Federal Communications Commission (the "Commission") on October 30, 2017 by The Insights Association ("Insights") and the American Association for Public Opinion Research ("AAPOR") (collectively, "Petitioners").

For fifty years, J.D. Power has been a global leader in market research and data analytics. Our aim is to amplify the voice of the consumer, provide actionable insights to our clients, and help brands improve the overall quality of their products and services. As a trusted, objective

source of information, it is critical that we strive to uphold the highest standards of the market research industry.

As described by Petitioners, if consumers suspect legitimate research work is merely a pretext to direct sales and marketing, the ability to conduct meaningful market research, and along with it, the business model of every reputable market research firm, will be materially eroded. Moreover, as a member of Insights, J.D. Power adheres to the Insights codes of ethics, each of which ban "sales under the guise of research," or "sugging."[1] The practice of sugging is also banned by the Federal Trade Commission's Telemarketing Sales Rule,[2] a ban for which the market research industry actively lobbied.[3] In other words, the line between research and marketing is taken seriously and policed closely. As Petitioners note, this is a line which goes all the way back to the drafting of the Telephone Consumer Protection Act ("TCPA"),[4] and which the Commission has consistently recognized for three decades.[5]

Continued guidance from the Commission on the issues discussed briefly below is critical to our industry. Indeed, given its vital role in linking businesses and consumers, medical

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[1] *See* Petition at 4; *MRA Code of Marketing Research Standards*, THE MARKETING RESEARCH ASSOCIATION, 3, ¶ 10 (October 2013), *available at* http://www.insightsassociation.org/sites/default/files/misc_files/ mra_code.pdf.; *Code of Standards and Ethics for Market, Opinion, and Social Research*, COUNCIL OF AMERICAN SURVEY RESEARCH ORGANIZATIONS, 8, ¶ 2(b) (September 2013), *available at* http://www.insightsassociation.org/sites/default/files/misc_files/casro_code_of_ standards.pdf.

[2] The Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq*.

[3] *See* Diane K. Bowers, *Sugging Banned at Last*, MARKETING RESEARCH, Vol. 7 No. 4, 40 (Fall 1995).

[4] H.R. Rep. No. 102-317 at 13 ("*House Report*") ("the Committee does not intend the term 'telephone solicitation' to include . . . consumer or market surveys, or other survey research conducted by telephone.").

[5] *See, e.g.*, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, ¶ 41 (1992) ("the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, [or] market surveys"); *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8038, ¶ 160, n. 543 (2015) ("2015 Order") ("We recognize the concern of MRA that consumers who use blocking technology will not only block unlawful robocalls but 'will potentially block all manner of non-telemarketing telephone calls, including calls for survey, opinion and marketing research purposes.'").

professionals and patients, and politicians and the public, market research survey work is critical to the efficient functioning of the American economy and democracy in general. Accordingly, J.D. Power appreciates the opportunity to comment.

II. A DECLARATORY RULING IS NECESSARY TO CORRECT THE INCREASINGLY POPULAR "ARGUMENT FROM THE PROFIT MOTIVE"

Despite the Commission's longstanding recognition of the line between research and marketing, a handful of decisions in recent years suggest that courts are increasingly willing to entertain arguments that any communication from a for-profit business is *ipso facto* a form of marketing, since businesses would not contact individuals except to "promote their wares,"[6] or to "increase future sales and revenue,"[7] or to "stimulate demand" for their products.[8]

As Petitioners noted, J.D. Power was a named defendant in the *Katz* case. Our company has witnessed firsthand, in other words, how the plaintiffs' bar can and does exploit courts' misunderstandings of the nature of market research, *and more importantly the difficulty some courts have in interpreting (or locating) the Commission's prior guidance on the difference between research and marketing for TCPA purposes*.

Despite the plaintiff's attempt in the *Katz* case to mischaracterize the nature of the communications at issue, in fact J.D. Power was conducting follow-up customer service calls on behalf of Honda. This is typical of the kind of work J.D. Power does and, more fundamentally, precisely the kind of legitimate business communication which, as the Commission has noted, the TCPA was *not* designed to inhibit.[9]

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[6] *See* Petition at 13; *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 847 F.3d 92, 95-96 (2d Cir. 2017).
[7] Order Re: Defendants' Joint Motion for Summary Judgment, *Samuel Katz v. American Honda Motor Co., Inc.*, No. 2:15-cv-04410, *4 (C.D. Cal. May 12, 2017).
[8] *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F.Supp.3d 482, 493 (W.D. Mich. 2015).
[9] *See, e.g.*, 2015 Order, 30 FCC Rcd. at 7964, ¶ 2; see also 2012 Order, 27 FCC Rcd. at 1844, ¶ 24 ("[I]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must

In light of cases like *Katz*, an explicit renunciation of this specious "argument from the profit motive" from the Commission will bring courts in line with the Commission's prior guidance and help restore further sanity to the TCPA litigation landscape.

III. A DECLARATORY RULING IS NECESSARY TO CLARIFY PREVIOUS GUIDANCE ON "DUAL-PURPOSE" COMMUNICATIONS AND VICARIOUS LIABILITY

Petitioners raise two more points that are incredibly important to the market research and analytics industry. First, asking whether a communication is an "advertisement" or "telemarketing" under the TCPA does not entail analyzing *all* of a company's various public-facing communications, such as privacy policies or the websites of separate business units or affiliate companies. J.D. Power, for example, has its own consumer-facing website, and recently purchased the consumer-facing website of National Appraisal Guides, Inc. Is every communication from J.D. Power necessarily a "pretext" to follow-up sales or advertising, simply because somewhere in the broader body of J.D. Power communications there is some form of advertising? Not according to the TCPA.

I agree with Petitioners that the Commission need not proffer a kind of "four corners" test, limiting what courts can look at to the actual contents of a communication. However, I believe the Commission should instruct courts that a TCPA lawsuit is not an occasion for a wide-ranging fishing expedition to look for something somewhere else in a company's documents which suggests a grander sales or marketing plan is afoot. There should be some meaningful tether to the actual communication in question.

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be balanced in a way that protects the privacy of individuals yet permits legitimate telemarketing practices.").

Additionally, I support Petitioners' contention that the Commission's *Dish Network* decision was limited to telemarketing calls,[10] and echo their call for additional guidance on this score. As explained by Petitioners, the Commission has a variety of standards for third-party liability, but has also stated as a general proposition that its "rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations."[11]

IV. A DECLARATORY RULING IS NECESSARY TO CLARIFY COURTS' UNDERSTANDING OF MARKET RESEARCH UNDER THE TCPA

Finally, I would like to express my support for Petitioners' broader call for clarity regarding the market research business model. There are many good reasons for the Commission's longstanding recognition of the difference between researchers and marketers, but one is that, simply, survey respondents (or other recipients of research communications) are *not* a researcher's clients, and surveys are *not* goods or services with respect to that respondent.

The essential nature of these relationships (between researcher and respondent, and between researcher and client) do not change simply because the researcher offers a respondent some inducement to participate. J.D. Power (like virtually all market research companies), routinely offers gift cards, small amounts of cash, or some other small prize as inducements for survey participation. These inducements are necessary to ensuring robust participation (which benefits businesses as well as consumers), and these inducements are no more "goods" being offered to consumers than are the surveys themselves.

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[10] *In re Joint Petition filed by Dish Network, LLC*, 28 FCC Rcd. 6574, 6586-87 (2013) (the TCPA should "incorporate baseline agency principles of vicarious liability with respect to violations of section 227(b) to further the statute's primary purpose of protecting consumers from unwanted *telemarketing* invasions" (emphasis added)).

[11] 10 FCC Rcd. 12391, 12397 (1995).

As Petitioner has suggested, not only do the Commission's prior rulings echo this reality, the Sixth Circuit's decision in *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, in sharp contrast to other misguided court rulings, has also made this clear: "[T]he record instead shows that the faxes list the drugs in a purely informational, non-pecuniary sense: to inform Sandusky what drugs its patients might prefer, based on Medco's formulary—*a paid service already rendered not to Sandusky but to Medco's clients.*"[12]

V. CONCLUSION

In conclusion, and for the reasons discussed above, J.D. Power respectfully requests that the Commission adopt all four rulings requested by Petitioners: (1) communications are not presumptively "advertisements" or "telemarketing" under the TCPA simply because they are sent by a for-profit company; (2) the presence in an ancillary document or webpage of an element that might be considered advertising does not convert a communication into a "dual-purpose" communication; (3) survey, opinion, and market research firms are not subject to the Commission's vicarious liability regime as articulated in *Dish Network*; and (4) survey, opinion, and market research studies do not constitute goods or services *vis-à-vis* the survey respondent, and are not transformed into goods or services merely because they include some nominal inducement to participate.

As Petitioners note, the deluge of abusive TCPA litigation has chilled legitimate survey work — work which is designed to benefit both businesses and consumers. Because the situation is dire, and because we believe research work is so essential to a healthy relationship between businesses and the consuming public, and very much appreciate the opportunity to comment.

[12] *See* 788 F.3d 218, 222 (6th Cir. 2015) (emphasis added).