



November 14, 2017

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:

On November 7, 2017, representatives from the Insights Association,¹ on behalf of the market research and analytics industry, met with Zenji Nakazawa, staffer for FCC Chairman Ajit Pai. We discussed: (1) Telephone Consumer Protection Act (TCPA) reform; (2) call blocking and tagging; (3) a database for reassigned cell phone numbers; and (4) a new petition the Insights Association filed last week with the American Association for Public Opinion Research (AAPOR) on the differentiation of telemarketing from market research.

The group included: Howard Fienberg, director of government affairs for the Insights Association; David Almy, the Association's CEO; Rob Stone, vice chair of the Association's board of directors, and a market research consultant; 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 Insights Association / AAPOR Petition: Market Research Is Not Telemarketing

Seeking to clarify the long-recognized distinction between telemarketing and market research, the Insights Association and AAPOR filed a petition² with the Commission on October 30.

As discussed in our meeting with Mr. Nakazawa, our petition requested a declaratory ruling 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

¹ 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.

² http://www.insightsassociation.org/sites/default/files/misc_files/insights_-_fcc_petition_10.30.17.pdf

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 firms; 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 are 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*.

Differentiating marketing research from telemarketing is essential to its conduct. 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.”

The Commission’s 2015 Order and TCPA Reform

Additionally, we anxiously await a decision from the court challenge of the FCC’s 2015 TCPA rules. The Insights Association is an intervenor in that case and hopes a ruling will be followed by swift and decisive FCC action.

The 2015 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 65.8 percent of U.S. households reachable only via their cell phones.³ For instance:

- (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 that definition to include just about any piece of dialing equipment except a rotary dial phone. The rules should be returned to their original statutory definition of an autodialer, focusing on the use of abusive telemarketing technology, rather than on the vague potential “capacity” to electronically dial a number.
- (2) The 2015 “one-call-before-liability” standard for calling a reassigned cell phone number is also onerous and counterproductive. It applies regardless of whether the caller learns of that reassignment (or whether the call even connects). 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.
- (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 FCC should adopt a more standardized approach, whereby companies and organizations could maintain a website or a toll-free number through which consent could be revoked.

³ See the Insights Association 1-page position paper: <http://www.insightsassociation.org/legal-article/tcpa-restrictions-using-autodialers-call-cell-phones>

Call Blocking and Tagging

The Insights Association filed comments⁴ with the FCC on July 31, 2017, endorsing the use of a white list to prevent legitimate dialers from being inadvertently blocked: "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."

We argued in our comments that 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. In our November 7 discussion with the Mr. Nakazawa, we explained the need to expand those requirements to call tagging systems as well. 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.

Perhaps unintentionally, the FCC may be helping to fuel the call blocking and tagging problem for the market research and analytics industry 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 complaint does not get automatically added to every black list in the U.S.

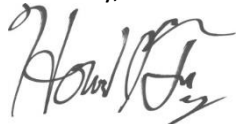
A Database for Reassigned Cell Phone Numbers

As the Insights Association explained in our August 28, 2017 comments to the FCC,⁵ the agency should establish a database of reassigned cell phone numbers, in conjunction with a safe harbor to protect legitimate businesses that access it. This would protect consumers and reduce unnecessary litigation while improving TCPA compliance by dialers and telephone sample providers.

Conclusion

We look forward to meeting with the Chairman's office on these issues again in the near future, as well as those of the other FCC Commissioners and the Consumer and Government Affairs Bureau.

Sincerely,



Howard Fienberg
Director of Government Affairs
Insights Association

⁴ <https://ecfsapi.fcc.gov/file/108010020309128/IA-Fcc-advanced-robocall-NPRMNOI-7-31-17.pdf>

⁵ <https://ecfsapi.fcc.gov/file/108280033930092/IA-Fcc-reassignednumbersNOI-8-28-17.pdf>