

FEDERAL COMMUNICATIONS COMMISSION (FCC) REGULATIONS

The Federal Communications Commission (FCC) regulates many of the telecommunications survey and marketing researchers use through the rules under the Telephone Consumer Protection Act (TCPA), which directed the FCC to balance the fair practices of telemarketers with consumer privacy concerns.

Although some TCPA provisions apply only to commercial and sales-related communications—for example, the Junk Fax Prevention Act (JFPA), the National Do Not Call Registry, and restrictions on call abandonment and time of day—they still impact researchers. However, the TCPA restrictions on “war dialing,” artificial or prerecorded messages, and cellular phone calling apply to all callers, including survey researchers.

Junk Fax Prevention Act (JFPA)

The federal JFPA amends earlier fax regulations in the TCPA to reduce the amount of unsolicited facsimile advertisements sent to businesses and residences. The law does not apply to researchers faxing surveys, collecting data via fax, or recruiting respondents via fax. The FCC defines unsolicited fax advertisements as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person’s prior express invitation or permission, in writing or otherwise.” Of course, survey researchers that fax unsolicited advertisements seeking to sell their services are bound by the JFPA.

However, individuals and businesses may send unsolicited fax advertisements to other business or residential subscribers where an *established business relationship* is present; this relationship is defined as “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.” Alternatively, fax advertisements can be sent if the recipient gives prior express consent.

All fax advertisement senders must provide a clear and conspicuous opt-out notice on the first page of the ad, and a telephone number, fax number, and a cost-free mechanism (including a toll-free telephone number, local number for local recipients, toll-free fax number, Web site address, or email address) to opt out of faxes. These numbers and cost-free mechanism must permit consumers to make opt-out requests 24 hours a day, 7 days a week.

Although survey research is outside the scope of the JFPA, professional organizations generally recommend that all researchers adopt fax policies addressing respondent opt-out requests to promote respondent cooperation.

Do-Not-Call (DNC) Registry

The FCC TCPA rules first required that companies maintain their own internal do-not-call registries; subsequently, the TCPA was amended to create a federal DNC registry operated by the Federal Trade Commission in conjunction with the FCC. Telemarketers and sellers are required to search the registry at least once every 31 days and drop from their call lists the phone numbers of consumers who have registered.

Calls placed to registered lines are allowed with prior written consent or under established business relationship rules similar to those of the JFPA.

The DNC registry does not apply to survey research calls; however, a researcher that accesses the DNC registry, for whatever reason, becomes legally bound by it—that is, responsible for scrubbing their calling lists of registrants, just like a telemarketer.

Call Abandonment

The TCPA prohibits telemarketers from abandoning more than 3% of all telemarketing calls that are answered live by a person. A call is considered abandoned if it is not connected to a live sales representative within 2 seconds of the called person’s completed greeting. Although these restrictions apply only to telemarketing calls, professional associations recommend that researchers strictly limit their call abandonment rates.

Time of Day Restrictions

The TCPA restricts the time of day for sales and fund-raising calls to between 8:00 a.m. and 9:00 p.m.

(local time for the called consumer). Although researchers are exempt from such restrictions, professional associations generally recommend abiding by these restrictions as a best practice.

War Dialing

War dialing is the practice of using automated equipment to dial telephone numbers, generally sequentially, and software to determine whether each number is associated with a fax line or voice line. The TCPA prohibits anyone from doing so. However, the restriction only applies if the purpose of the call is to determine whether the line is a facsimile or a voice line. For example, calling a number already known to be a voice line for the purpose of determining if it is a working or nonworking number could be outside the scope of the TCPA.

Artificial or Prerecorded Messages

The TCPA prohibits telemarketing calls to any residential phone using an “artificial or prerecorded voice to deliver a message without the prior express consent of the called party.”

Although that does not apply to survey researchers, the TCPA requires all artificial or prerecorded messages to disclose (at the beginning of the call) the identity of the business, individual, or other entity initiating the call, and if a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated.

Messages must state clearly the telephone number (other than that of the auto-dialer or prerecorded message player that placed the call) or address of such business, entity, or individual. Furthermore, the telephone number provided during the disclosure may not be a 900 number or any other number for which charges exceed local or long-distance transmission charges.

Calling Cellular Phones

In only limited circumstances is it legal to call cell phones for survey research purposes.

Under the TCPA, automatic telephone dialing systems (including auto-dialers and predictive dialers) cannot be used to call a 911 line, an emergency line of a hospital, a doctor’s office, a health care facility,

a poison control center, a fire department, a law enforcement agency, a paging service, a cellular telephone, or any service where the called party is charged for the call, or in such a way that two or more telephone lines of a multi-line business are engaged simultaneously. The TCPA rules allow for such calls to cellular phones only in cases of emergency or where there is express consent of the called party. The FCC has acknowledged that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary Hence, [callers] will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached.” The TCPA restrictions apply to both intrastate calls (calls made and originating from within the same state) as well as interstate calls (calls from one state to another), and the FCC can impose monetary penalties for violation of this restriction.

This means that automatic dialing systems are prohibited from dialing cell phones, and there is no good faith exception for inadvertent calls to cell phones. But based on the current scope of the law, survey research calls to cell phones are not prohibited outright. If a researcher is not using an automatic system but calls cell-phone numbers manually or has consent from the called party to call his or her cell phone, that researcher may be outside the scope of the law’s restrictions.

Most random-digit dialing sample providers identify and remove numbers assigned to wireless carriers from their frames. To ensure the removal of landline phone numbers that have been ported to a wireless service, NeuStar as the North American Numbering Plan Administrator, the National Pooling Administrator, and the Local Number Portability Administrator licenses a database of these ported numbers that can be used for scrubbing.

Howard Fienberg

See also Cell Phone Sampling; Do-Not-Call (DNC)

Registries; Federal Trade Commission (FTC) Regulations; Number Portability; Random-Digit Dialing (RDD); Telephone Consumer Protection Act of 1991

Further Readings

Federal Communications Commission: <http://www.fcc.gov>
National Do Not Call Registry: <https://www.donotcall.gov>

FEDERAL TRADE COMMISSION (FTC) REGULATIONS

The Federal Trade Commission (FTC) regulates various aspects of telemarketing and the collection, use, and dissemination of personally identifiable information (PII). Under the Telephone and Consumer Fraud and Abuse Prevention Act (TSR), the FTC regulates telephone solicitation. The Children's Online Privacy Protection Act (COPPA) delineates how Web site operators (including researchers) may collect and use PII from children under the age of 13 online. Under the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM), the FTC regulates commercial emails. Further, the FTC writes the rules enforcing consumer financial privacy thanks to the Gramm-Leach-Bliley Act. Finally, deceptive practices are regulated according to the law that originally established the FTC.

Telemarketing and Consumer Fraud and Abuse Prevention Act (TSR)

This federal act, also known as the Telemarketing Sales Rule or TSR, established rules in 1994 to prohibit certain deceptive telemarketing activities, and it regulates sales and fund-raising calls to consumers, as well as consumer calls in response to solicitation by mail. The TSR also prohibits activities commonly known as *SUGing* and *FRUGing*. *SUGing* is the practice of selling under the guise of research, while *FRUGing* is fund-raising under the guise of research. Selling, in any form, is differentiated from survey research, and the FTC recognizes that in the TSR. Occasionally, survey research companies will offer an incentive or gift to the respondent in appreciation of his or her cooperation. Such an incentive or gift could be a cash donation to a charity, a product sample, or a nominal monetary award. But sales or solicitation is not acceptable or permitted in legitimate and professionally conducted survey research and violates federal law.

Telemarketers have various restrictions in the TSR but perhaps the best-known provisions relate to the National Do Not Call Registry. To enforce the law, the TSR allows consumers to bring private civil lawsuits in federal district courts.

Children's Online Privacy Protection Act (COPPA)

The federal COPPA, signed into law in 2000, applies to the online collection of personal information from children under the age of 13. The primary goal is to place parents in control over what information is collected from their children online. The rules spell out what a Web site operator must include in a privacy policy, when and how to seek verifiable consent from a parent, and what responsibilities an operator has to protect children's privacy and safety online. The rules cannot be sidestepped by simply including a disclaimer, making the collection of PII optional, or surreptitiously inviting children to falsify their age.

COPPA applies to operators of commercial Web sites or online services directed to children under the age of 13 that collect personal information from children, operators of general audience sites that knowingly collect personal information from children under 13 years of age, and operators of general audience sites that have a separate children's area and that collect personal information from children under 13 years of age.

PII under COPPA includes full name; physical address; email address; Social Security number; phone number; screen name revealing an email address; persistent identifier, such as a number held in cookie, which is combined with personal information; and information tied to personal information, such as age, gender, hobbies, or preferences.

The FTC applies a sliding scale approach to the practice of collecting PII from children. It balances the level of information sought from a child and the level of information needed from the child's parent. Information that the Web site operator will keep for internal purposes requires simpler consent methods than information that might be externally shared with the public or a third party.

Although COPPA applies only to children under 13, professional research and marketing associations generally recommend that researchers seek parental consent for any respondents under the age of 18.

Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM)

The federal CAN-SPAM Act, signed into law in 2003, established commercial email distribution requirements,

penalties for violation of the law, and consumers' rights to opt out of future emailings.

The law bans false or misleading header information, meaning that emails must contain accurate "From" and "To" fields and routing information, including the originating domain name and email address. It also prohibits deceptive subject lines. Commercial email must be identified as an advertisement or solicitation and include the sender's valid physical postal address, as well as explicitly state that recipients can opt out of future emails.

The law requires not only that emails include a method for recipients to opt out but also that senders strictly honor such requests within 10 days, and for at least 30 days after sending the commercial email. In addition, CAN-SPAM prohibits the sale or transfer of the opted-out email address.

The CAN-SPAM Act applies to those that distribute commercial email messages. However, survey research emails may be covered under the false or materially misleading header provision—usually not an issue for the profession, give the ethical nature of research contacts. However, researchers using email to solicit business or sell goods or services are bound by the law. Survey researchers that are recruiting or inviting respondents to participate in a survey are not legally required to abide by the opt-out provisions or email identification provisions of the CAN-SPAM Act because recruiting and taking surveys are not commercial or sales-related activities. However, as part of best practices, researchers are encouraged by professional associations to include opt-out notices in all email distributions, regardless of whether the message is commercial or noncommercial in nature.

The Gramm-Leach-Bliley Act

The federal Gramm-Leach-Bliley Act, signed into law in 1999, includes provisions regulating the privacy and security of consumer financial information, which are overseen by the FTC and a variety of financial regulatory agencies.

The law restricts the disclosure of consumers' "nonpublic personal information" by "financial institutions" and requires explicit notices to customers about information-collection and information-sharing practices. The Gramm-Leach-Bliley Act allows for consumers to opt out of having their information shared with third parties, and all financial institutions

are required to provide notice and opt-out opportunity before they may disclose information to nonaffiliated third parties (with certain caveats).

The FTC defines the term *financial institution* as any institution engaged in the business of providing financial services to customers who maintain a credit, deposit, trust, or other financial account or relationship with the institution. An institution must be "significantly engaged" in financial activities to be considered a financial institution.

Thus, for researchers to acquire customers' PII from financial institutions, the institutions must either (a) provide customers notice of such disclosure and their ability to opt out of it or (b) utilize an exception in the law. Under this exception, the financial institution is still required to provide notice to its customers about its information-sharing practices, but PII can be disseminated without the opt-out provision to third parties who provide services for the financial institution—for example, survey researchers conducting research for the financial institution. To take advantage of this exception, survey researchers would have to enter into a contractual agreement with the financial institution to keep the PII confidential.

Deceptive Practices

The FTC regulates survey researchers in a broad way—breaking promises can mean breaking the law. Violating stated privacy policy can be actionable under Section 5 of the original FTC authorization act (15 U.S.C. §§ 41–58) as an unfair or deceptive trade practice, as well as under similar laws at the state level.

Howard Fienberg

See also Council for Marketing and Opinion Research (CMOR); Do-Not-Call (DNC) Registries; Email Survey; Federal Communications Commission (FCC) Regulations; FRUGing; Informed Consent; Internet Surveys; Privacy; SUGing

Further Readings

Council for Marketing and Opinion Research: <http://www.cmor.org>
 Federal Communications Commission: <http://www.fcc.gov>
 Federal Trade Commission: <http://www.ftc.gov>
 National Do Not Call Registry: <https://www.donotcall.gov>