

Super-Sizing Regulation: The FTC Will Be In Your Face

By Howard Fienberg, MRA

Whether enforcing rules on the Children's Online Privacy Protection Act (COPPA) or hammering companies for unfair or deceptive practices when they violate their stated privacy policies, the Federal Trade Commission (FTC) looks over the shoulder of most of the survey and opinion research profession with a stern and unfriendly gaze. So far the FTC has been more bark than bite for the profession. However, in the next two years a new President and more powerful Democratic Congress will seek to expand the power and authority of the FTC, giving the agency a new set of razor-sharp teeth.

What is the FTC and Why Should You Care?

The FTC is a federal agency, established in 1914 by the Federal Trade Commission Act. It regulates various aspects of the collection, use and dissemination of Personally Identifiable Information (PII). Under the Telemarketing Sales Rule (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 13 years of age online. Under the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM ACT), the FTC regulates commercial e-mails. Furthermore, the FTC enforces some rules for consumer financial privacy thanks to the Gramm-Leach-Bliley Act (GLB). Finally, deceptive and unfair trade practices are regulated by Section 5 of the FTC Act, the law that originally established the agency.

FTC Power and Authority to Expand

Earlier this year, Daniel Inouye (D-HI), chairman of the Senate Commerce Committee, and Byron Dorgan (D-ND), chairman of the Senate Interstate Commerce, Trade and Tourism Subcommittee, introduced the Federal Trade Reauthorization Act (S. 2831). While it was not acted upon, it will be revisited in 2009-10. Senators Inouye and Dorgan have primary oversight authority over the agency.

The legislation would dramatically expand the scope and power of the agency and pose a potential threat to the entire survey and opinion research profession. S. 2831 would:

Let the Commission use "fast track" rulemaking procedures (bypassing their traditional methods, which have generally led to an open and deliberative process);

Give the FTC the power to launch civil action lawsuits without going through the Department of Justice, to seek civil penalties at the district court level and to go after anyone aiding and abetting an FTC violation (instead of just the violator alone);

Expand the Commission's authority to cover non-profits (it currently

only regulates for-profit companies), telecommunications carriers and financial services institutions;

Allow states to implement stricter telemarketing regulations for their own Do Not Call Registries than the Federal Registry, explicitly eliminating a pre-emptive aspect of the Telemarketing Sales Rule; and

Allow state attorney generals to bring cases under the FTC Act for civil penalties and injunctions against "bad actors."


The Current FTC is Pretty Tough Already

The FTC has brought dozens of successful cases against companies for having violated their stated privacy and data security policies under Section 5 of the FTC Act. This particularly includes companies that have suffered data breaches. A further-empowered FTC would be leveling these cases every day, and it is unclear how many research companies and organizations would be safe from prosecution.

Additionally, a recent court case – CollegeNet, Inc. v. XAP Corporation – expanded the FTC's power without legislation. CollegeNet sued a competitor for violating their own stated privacy policies, bringing charges under the Lanham Act, a trademark law prohibiting trademark infringement, trademark dilution and false advertising. The court determined this law focused on issues of business competition, but also covered issues of consumer protection, further expanding the scope of the FTC's influence.

Forecasting the FTC Future

Of course nothing is for certain. Representatives of both Presidential campaigns have indicated support for the FTC's current scope and mission. John McCain's camp stressed the self-regulatory approach and appeared uneasy with the concept of expanding the powers of the agency, while Barack Obama's camp has discussed a Chief Technology Officer position (a technology "czar") within the White House itself that would probably "coordinate" (i.e., usurp) much of the new authority envisioned for a reauthorized FTC (see "Privacy and Data Security Debate in Election '08" in the November *CMOR Shield*).

While the aftermath of the 2008 elections plays out and Congress and a new Administration get to work, MRA will continue to meet and talk with representatives of the FTC, Congress and the Administration, in order to protect the interests of the research profession. 

Howard Fienberg is the director of Government Affairs at MRA. He can be reached at howard.fienberg@mra-net.org.

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