

Why Marketing Researchers Should Fear the FTC “on Steroids”

By Howard Fienberg

The Federal Trade Commission (FTC), tasked with regulating “unfair” or “deceptive” practices, has pretty broad purview in American consumers’ lives. What constitutes those two words is an ever-changing debate. However, new legislative language tacked onto a massive bill with next to no discussion or debate in Congress threatens to end the debate. It would not set the definitions in stone – instead, the FTC would get to define those terms however they see fit, whenever they feel like it, with minimal oversight, less warning and next to no input from the targeted industries and professions. Professions like yours.

The Wall Street Reform and Consumer Protection Act (H.R. 4173), the “financial reform” legislation passed by the House late last year, would give the FTC extraordinary legislative powers and authority – powers and authority stripped from the agency decades ago because of their rampant abuse.

A Brief History

In the 1970s, faced with the FTC attempting so many huge regulations on so many different industries and professions that the Washington Post called it “a great national nanny,” a Democrat Congress passed and later expanded the Magnuson-Moss Act. While the Act recognized the importance of the FTC’s breadth of authority, it also imposed significant deliberative procedures for whenever the FTC would seek to set a regulatory rule that “would define with specificity acts or practices which are unfair or deceptive acts or practices” under Section 5 of the FTC Act. Because the FTC’s reach is so broad, Congress felt it necessary to ensure that the agency discussed and debated regulatory changes with as many stakeholders as possible before setting or changing rules.

The Magnuson-Moss Act was the result of eight or nine different hearings over several years taking input and tes-

timony from many different stakeholders. This new legislation rolling back Magnuson-Moss (H.R. 4173) could become law with only one perfunctory hearing – a February hearing before the Senate Commerce Committee in which the only witnesses were FTC Commissioners.

Witnesses could not make the case for why such changes are needed. Justifications offered by current Chairman Jon Leibowitz fell flat because the FTC has either already been exercising that authority absent any specific legislating (e.g., privacy policies), is lined up to get that authority in pending legislation (e.g., data security), or has long since asked for and swiftly received that authority in law (e.g., abusive e-mail in CAN-SPAM, children’s privacy in COPPA and telephone record privacy in the CPNI laws).

What the New Provisions Would Mean

New legislative provisions in H.R. 4173 would give a three vote majority of FTC Commissioners the power to issue binding regulations across most areas of the economy, well beyond any existing specific statutory authority. The FTC could define specific acts or practices as “unfair” or “deceptive” with minimal consultation and debate, pursue and punish companies that allegedly provide “substantial assistance” to violators, and seek civil penalties against violators and their assistants.

The current Magnuson-Moss procedures the FTC follows today are quite different from the informal and expedited rulemaking that H.R. 4173 would allow. Currently, the FTC must offer an advance notice of proposed rulemaking when an act or practice to be regulated has been determined to be “pervasive,” Congress must be notified 30 days in advance of the notice being published in the Federal Register. Interested parties have a legal right to present comments, orally or in writing, and to dispute each others’ comments, in an open hearing and afterwards. If a rule gets issued, any interested party can petition for judicial review.

Productive?

Research Tracker® II is powerful, yet simple to use database software that tracks respondents, clients, jobs and participation.

- Organize all aspects of qualitative jobs
- Increase recruiter productivity
- Automate clerical tasks
- Improve quality control
- Optimize web site and email capabilities



Research Tracker® II

Productivity software for marketing research

To see Research Tracker® II in action, click the “Research Tracker” option on our website, then click “Take a Closer Look”

 **MDSS**

800-870-6377
www.mdssworld.com
kathy@mdssworld.com

For the most part, the FTC currently can only target “knowing” or “reckless” assistance in committing unfair or deceptive acts or practices. H.R. 4173 would allow the FTC to target companies that may have aided or abetted violations – whether or not such companies knew or could reasonably have known or prevented such aiding or abetting.

Currently, the FTC works with potential violators to bring them into compliance – administrative and consent orders are given a chance to have an effect before turning to fines and penalties. Under H.R. 4173, the FTC could go straight to fines and penalties. Further, instead of having to work with the Department of Justice for any litigation, the FTC could pursue these fines and penalties on their own, right away.

Impact on the Research Profession

No government agency has as wide a purview as the FTC. No government agency could possibly have the technical expertise to know the ins and outs of so many industries and professions, including survey and opinion research.

The key importance of the Magnuson-Moss procedures the FTC has to follow is that they prevent the agency from micro-managing your business – and swiftly putting you out of business with minimal notice and conversation. An unbridled FTC could put an end to the self-regulating nature of the research profession.

For example, look at current events for a possible scenario. Various political talking heads and politicians have been trashing automated telephone research because they don’t like the results being shown in public opinion polls. Without the Magnuson-Moss procedures, the FTC could, within about a month:

1. decide on their own what constitutes “good” research, without any public consultation or discussion;
2. decide that companies like Rasmussen and Public Policy Polling (PPP) may not be meeting “good” research standards;
3. declare that the suppliers of those companies’ samples are “aiding” or “abetting” their violations; and
4. swiftly levy civil penalties against the companies and suppliers without any involvement of the Department of Justice.

Participant recruitment by focus groups and online panels could be another ripe target for FTC action..

A series of complaints from participants denied the opportunity to participate in studies, no matter what the reason, could quickly launch new FTC rules:

- on how researchers run such research;
- setting a national legal standard for the makeup of a “representative” sample; and
- setting a national per-hour rate for research incentives.

Conclusion

Alert! readers may recall this topic from our column in the December 2008 issue, saying that the 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.”

As of early March, Senate Banking Committee Chairman Chris Dodd (D-CT) was working on changes to the House-passed legislation, but the FTC provisions remained unchanged. MRA is working with a broad coalition of dozens of allied organizations in our nation’s capital, trying to stop this new surge in FTC power which the Wall

Street Journal calls “one more club to beat up the private economy.” MRA has met with staff for Senators Claire McCaskill (D-MO), Blanche Lincoln (D-AR), and Arlen Specter (D-PA) and continues to discuss strategy with others on the Hill.

For more information on what former FTC Chairman Jim Miller called “the FTC on steroids,” or any other legislative/regulatory concerns, don’t hesitate to contact the research profession’s lobbyist at howard.fienberg@mra-net.org or 202-775-5170.

Disclaimer: The information provided in this message is for guidance and informational purposes only. It is not intended to be a substitute for legal advice. MRA advises all parties to consult with private legal counsel regarding the interpretation and application of any laws to your business.



Howard Fienberg is the Director of Government Affairs at MRA.

Will Lower Costs Help You?

- E Pre-Recruiting
- 100K+ Database
- Free Parking
- 10 years - Top Rated
- Commercial Kitchen
- Digital Audio
- 4 Luxury Suites
- 50 years in business

A huge investment in our database has resulted in significant efficiency gains. To help the economic recovery we are passing on these savings.

We have reduced our prices by 20%*

Call or email us for a quote.

* Discount applies only to projects held in our research center and may not be combined with other offers.



Chicago Facility - National Recruiting

**PRECISION
RESEARCH**



**bids@preres.com
847-390-8666
www.preres.com**