



COMMENTS OF THE MARKETING RESEARCH ASSOCIATION (MRA)

Before the Federal Communications Commission (FCC)

May 21, 2010

In the Matter of Proposed Rule on Telephone Consumer Protection CG Docket No. 02-278

MRA submits these comments in response to the Commission's Proposed Rule. We address issues specifically related to survey and opinion research telephone calls to cell phones.

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INTRODUCTION

The Marketing Research Association (MRA), a non-profit national membership association, is the leading and largest association of the survey and opinion research profession. MRA promotes, advocates and protects the integrity of the research profession and strives to improve research participation and quality.

The research profession is a multi-billion dollar worldwide industry, comprised of pollsters and government, public opinion, academic and goods and services researchers,

whose companies and organizations range from large multinational corporations to small or even one-person businesses.

Survey and opinion research is the scientific process of gathering, measuring and analyzing public opinion and behavior. On behalf of their clients -- including the government (the world's largest purchaser), media, political campaigns, and commercial and non-profit entities -- researchers design studies and collect and analyze data from a small but statistically-balanced sample of the public. Researchers seek to determine the public's opinion regarding products, services, issues, candidates and other topics. Such information is used to develop new products, improve services, and inform policy.

Research information is not normally looked at by individual answers. Instead, each person's answers are combined with those of many others reported as a group to the client who requested the survey. Moreover, most research companies destroy individual data records at the end of the study, and names and contact information of participants are separated from the answers if additional tabulation of the results is conducted. Again, all of the personally identifiable records are usually destroyed after the study is completed or the validation check has been made, and all of a respondent's personally identifiable information is kept strictly confidential. In fact, confidentiality is the bedrock of the research process (and the resultant industry codes and guidelines, like the MRA Code of Marketing Research Standards). Legitimate survey and opinion researchers never divulge the identity, personal information or individual answers of a research participant unless specifically granted permission to do so by the participant.

Survey and opinion research is thus sharply distinguished from commercial activities like sales lead generation. In fact, MRA and other associations prohibit sales or fundraising under the guise of research (referred to as "sugging" and "frugging") and any attempts to influence or alter the attitudes or behavior of research participants as a part of the research process. Quite to the contrary, professional research has as its mission the true and accurate assessment of public sentiment in order to help individuals, companies and organizations design products, services and policies that meet the needs of and appeal to the public.

Automatic telephone dialing systems are an essential tool of survey and opinion research. Almost every telephone research call requires the use of an automated dialing system, in order to reduce both the time it takes to dial a number manually (a significant cost) and the chance of calling the wrong number. Automatic dialing also synchs better with the industry standard "computer-assisted telephone interviewing" (CATI)¹ software that helps researchers execute and conduct calls.

MRA submits these comments to urge the Commission to revise its Proposed Rule and reject the change from requiring "express prior consent" to use an "automatic telephone dialing system" to contact a cell phone, to requiring "express *written* prior consent". Absent full rejection, the Commission must exempt Bona Fide Survey and Opinion

¹ CATI is a method of collecting data in which interviewers use computer technology to assist in administering a survey over the telephone to survey participants.

Research² calls to cell phones from the more restrictive consent standard in the Proposed Rule.

BACKGROUND

Current FCC Rules³ implementing the Telephone Consumer Protection Act (TCPA)⁴ prohibit the use of an “automatic telephone dialing system” to contact “any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call” without “express prior consent” on the part of the party being called.

The Proposed Rule would change the consent standard to “express **written** prior consent” and an arduous process of acquiring and determining that consent⁵.

ARGUMENT

A. Added time and cost of research studies

Survey and opinion researchers already encounter significant public apathy with respect to research participation. Research “response” rates have been falling for the last couple of decades, driving up the cost of and time involved in achieving the required number and strata of participants to reach representative samples for most research studies.

Research response rates would be suppressed even further by the Proposed Rule -- not necessarily because consumers do not want to participate, but because they will be

² MRA developed a legal definition of research, in consultation with the broader research profession: the term “Bona Fide Survey and Opinion Research” means the collection and analysis of data regarding opinions, needs, awareness, knowledge, views, experiences and behaviors of a population, through the development and administration of surveys, interviews, focus groups, polls, observation, or other research methodologies, in which no sales, promotional or marketing efforts are involved and through which there is no attempt to influence a participant’s attitudes or behavior.

³ 47 CFR 64.1200

⁴ 47 U.S.C. 227

⁵ “§ 64.1200 (v) For purposes of paragraph (a)(1) of this section, a person or entity shall be deemed to have obtained prior express written consent upon obtaining from the recipient of the call an express agreement, in writing, that:

- (A) The person or entity obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the delivery of calls to the recipient using an automatic telephone dialing system or an artificial or prerecorded voice;
- (B) The person or entity obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;
- (C) Evidences the willingness of the recipient of the call to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
- (D) Includes the telephone number to which such calls may be placed in addition to the recipient's signature. For purposes of this provision, the term “signature” shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.”

reluctant to complete the extra burden of express written consent with signature, or because they do not understand the language of the request, and will turn away from participation rather than try to understand what is asked of them. This in turn will increase non-response bias and adversely impact the accuracy of research results.

Researchers seeking to include cell phone users in their study samples estimate that it costs 2 to 4 times as much as an ordinary telephone study. That multiplier effect could dramatically increase under the Commission's proposed written consent standard. And increased costs pose a particular threat to small businesses.

The increased time involved in cell phone research would be more than a problem of cost. Time-sensitive studies, like most political and public opinion polling, would be imperiled. In situations where timely data is as critical as accurate data, information will not be readily deliverable to companies, government agencies, and other entities that need to make swift decisions.

Most importantly, this equivalent of a tariff and delay on telephone research, in addition to causing problems outlined later in these comments, will ultimately be passed on to the individuals the Commission is trying to protect, in the form of:

- higher prices for goods and services;
- lengthier time before new or better goods and services are brought to the marketplace;
- delayed introduction of new or better public policies;
- a decreased amount of research ordered by companies, who might then bring less well-tested and researched products to market, harming consumers in the end because the goods did not fulfill consumer expectations.

B. Privacy and data security threat of added recordkeeping and data retention

The Commission admits that the proposed consent requirement “may entail additional recordkeeping requirements for covered entities to the extent that they would be required to obtain and keep records of consumers’ written consent”. In considering the compliance requirements, the FCC only discusses the burden as it may impact sales and telemarketing calls, which are already under significant recordkeeping requirements.

Given that the standard in research is to keep identifiable records only as long as necessary for the completion of a study, this will place serious new recordkeeping burdens upon the profession and increase risks to information security and confidentiality. The ability and expectation to provide confidentiality is a cornerstone of the research process, which the Proposed Rule would jeopardize.

C. Research calls are not the intended focus of the Proposed Rule or the TCPA

The Commission, in conforming their robocall rules with the Federal Trade Commission (FTC), is attempting to stay true to the Do Not Call Implementation Act (DNCIA) of 2007 mandate that the Commission “maximize consistency” with the FTC’s

Telemarketing Sales Rule (TSR). But there is no comparison between a telemarketing robocall and a research call to a cell phone, so it is unclear why the Commission would seek to “harmonize” regulation. Both the TSR and the DNCIA encompass telemarketing or sales calls only – not research calls, which are not commercial in nature. In fact, the Commission speaks almost exclusively of sales and telemarketing calls throughout the Proposed Rule, neglecting to mention or even consider the negative impact of the rules changes on non-commercial calls.

The Commission itself questioned its legal authority to make this change, introducing it by saying, “Assuming the Commission has the legal authority to adopt a written consent agreement”. Given that this change is buried in a rule focused on telemarketing and robocalls, it is unlikely that the FCC gave consideration to the negative impact the change would have on non-commercial calls.

The Proposed Rule would blur the important line differentiating sales from research. Requiring researchers to act like telemarketers will lessen the distinction between sales and research in the public’s mind and lessen the social, economic, and political value that research holds for all Americans.

Just as the Proposed Rule only focuses on telemarketing, so the Commission has, since the very beginning, always discussed the TCPA as targeting telemarketing. In fact, the legislative history of the TCPA set the standard for considering the TCPA as a law governing telemarketing. The Senate bill’s initial sponsor, Senator Hollings, stated that, “This bill is purely targeted at those calls that are the source of the tremendous complaints at the FCC and at the State commissions around the country – the telemarketing calls placed to the home.”⁶ Similarly, Senator Pressler stated that, “This legislation is the result of a House and Senate conference on comprehensive telemarketing legislation ... [p]eople are increasingly upset over this invasion of their privacy by unrestricted telemarketing ... [t]he primary purpose of this legislation is to develop the necessary ground rules for cost-effective protection of consumers from unwanted telephone solicitations.”⁷

The essential differentiation of research from marketing or sales would be severely harmed by the Proposed Rule. If nothing else, the Proposed Rule would turn simple requests to participate in research into cumbersome legalistic interactions more suited to commercial transactions (something which research is definitively not).

D. No demonstration of harm

The Commission has not demonstrated any harm from the existing consent standard that would demand raising the bar.

Any potential harm from cell phone users receiving possibly unwanted research calls is likely to be very small. First of all, there are far fewer legitimate research surveys than

⁶ 137 Cong. Rec. S9874 (daily ed. July 11, 1991) (statement of Sen. Hollings)

⁷ 137 Cong. Rec. 518317 (daily ed. November 26, 1991) (statement of Sen. Pressler)

there are potential telemarketing calls or robocalls (legal or otherwise). The expense of conducting research limits the potential number of cell phone users who may be called for research studies. Second, since common research practice entails an introduction that explains the purpose of the call, research participants can make a quick decision -- usually within one minute -- as to whether or not they want to participate.

The Commission claims that the Proposed Rule enhances the agency's efforts to protect "both consumers and industry from erroneous claims that consent was or was not given, to the extent that the written consent requirement may provide more verifiable proof of consent", but MRA is unaware of any cases of a cell phone user contesting the express prior consent for a bona fide survey and opinion research call to their cell phone. This is distinctly different from continuing consumer complaints of commercial or political robocalls.

Finally, as far as the cell phone user is concerned, technology makes automated dialing virtually indistinguishable from manual dialing. The average ear will never notice the difference.

E. Negative impact on representativeness of survey and opinion research

Preliminary results from the National Center for Health Statistics' (NCHS) July-December 2009 National Health Interview Survey (NHIS)⁸ indicate that the number of American households that are cell phone only or cell phone mostly continues to skyrocket. One of every four American homes (24.5%) had only cell phones during the last half of 2009 --an increase of 1.8 percent since the first half of 2009. In addition, one of every seven American homes (14.9%) still had a landline telephone but received all or almost all calls on their cell phones.

These data mean that almost 40% of American households can only be reached on their cell phones. Without following arduous (in many cases impossible) procedures to obtain consent, such numbers must be separately identified, sampled and then dialed manually. Because of the added cost in time and resources, many studies will inevitably miss this 40% of American households -- and data indicate that this 40% of households are by no means identical to the rest.

The cell phone only population is more likely to be younger, include more renters, consist of a higher proportion of non-Whites, and have lower income as compared to the entire U.S. landline population.⁹ Therefore, these populations will be under-represented in

⁸ Blumberg SJ, Luke JV. "Wireless substitution: Early release of estimates from the National Health Interview Survey, July-December 2009." National Center for Health Statistics. May 2010. Available online: <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005.htm>

⁹ Ibid. and

- Blumberg, Stephen J. and Julian V. Luke. 2007. "Wireless Substitution: Early Release of Estimates Based on Data from the National Health Interview Survey, July – December 2006."

- Blumberg, Stephen J. and Julian V. Luke. 2007. "Coverage Bias in Traditional Telephone Surveys of Low-Income and Young Adults," Public Opinion Quarterly 71: 734-749

critical research areas, like political polling, unemployment measures, health care access, and most importantly, in certain key health indicators.

The higher prevalence of some key health indicators among the cell phone only population is the reason that NCHS started regular measurement of them versus cell phone mostly and landline households in the first place. For example, take the following indicators, excerpted from the latest NCHS report:

- The prevalence of binge drinking (i.e., having five or more alcoholic drinks in 1 day during the past year) among wireless-only adults (34.5%) was nearly twice as high as the prevalence among adults living in landline households (18.7%). Wireless-only adults were also more likely to be current smokers than were adults living in landline households.
- Compared with adults living in landline households, wireless-only adults were more likely to report that their health status was excellent or very good, more likely to experience serious psychological distress, and less likely to have ever been diagnosed with diabetes.
- The percentage without health insurance coverage at the time of interview among wireless-only adults under 65 years of age (29.2%) was more than twice as high as the percentage among adults in that age group living in landline households (13.8%).
- Compared with adults living in landline households, wireless-only adults were more likely to have experienced financial barriers to obtaining needed health care, and they were less likely to have a usual place to go for medical care. Wireless-only adults were also less likely to have received an influenza vaccination during the previous year.
- Wireless-only adults (50.6%) were more likely than adults living in landline households (36.1%) to have ever been tested for human immunodeficiency virus (HIV), the virus that causes AIDS.

Hurdles facing survey and opinion research with the cell phone only and cell phone mostly populations are further exacerbated by the prepaid cell phone market. Cell phone numbers assigned to prepaid plans change subscribership frequently, making it more challenging to reach such users in a timely fashion. CTIA-The Wireless Association estimates that 1 in 5 Americans with a cell phone had a prepaid plan at the end of 2009, compared with 15% in 2007.¹⁰ CTIA also claims that some markets have up to 30% of subscribers in prepaid plans.

It is unlikely that these populations would wish to be disenfranchised from research studies (which serve as an ombudsman for the American public). The federal government goes to great lengths to ensure that all citizens are represented equally in the decennial Census. So why should the Commission seek to impose a tariff on research, inducing coverage bias and making these populations less likely to be represented? The Commission has a responsibility to avoid causing this outcome.

¹⁰ Niraj Sheth and Roger Cheng. "As Growth Slows, Phone Rivals Start Dialing Prepaid Services." Wall Street Journal. May 14, 2010. Page B1.

F. Government agency study requirements

Many federal government agencies, seeking to avoid the coverage bias discussed above, require the inclusion of cell phone only and cell phone mostly households in the research studies they conduct or commission. The Commission would thus be making most federal research studies cost more and take longer to complete.

G. Practical examples of the impact of consent standard

There are various circumstances in which researchers are able to achieve express prior consent currently, but would be unlikely or unable to do so under the consent standard set by the Proposed Rule:

- One way in which research organizations are contacting a cell phone number with an automatic dialer is when an individual has provided a cell phone number in response to a request for contact information for survey participation (sometimes after being contacted by mail in a survey based on address-based sampling¹¹). It is a reasonable presumption that the provision of a number under such circumstances constitutes consent to be contacted, since the giving of the number itself occurs during cooperation with a survey.
- Research Company X conducts customer satisfaction survey research using Interactive Voice Response (IVR), having received the explicit permission of the research participants. However, that permission does not come in writing. Each potential participant who calls a contact center is asked, prior to landing with an agent, “May we call you back on this number, using our automated system, to conduct a short survey about your experience with this call to our contact center” If they press 1 for Yes, that currently constitutes permission. Research participants in this case are plainly agreeing, via their own action, to being called. This technology and line of research is crucial to Research Company X, but more importantly to their clients, including many Fortune 1000 companies. Without it they would have to rely on older, more expensive, biased methods to metric their centers and agents.
- Many survey and opinion researchers use lists of addresses as sampling frames from which to select random samples (known as address-based sampling¹²).

¹¹ “Address-based sampling (ABS) involves the selection of a random sample of addresses from a frame listing of residential addresses. The technique was developed in response to concerns about random-digit dialed (RDD) telephone surveys conducted in the United States because of declining landline frame coverage brought on by an increase in cell phone only households and diminishing geographic specificity as a result of telephone number portability.” - Link, M (2008). Address Based Sampling in P. Lavrakas (Ed.). Encyclopedia of survey research methods. Vol. 1. (pp. 7-8) Thousands Oaks, CA: Sage

¹² “Address-based sampling (ABS) involves the selection of a random sample of addresses from a frame listing of residential addresses. The technique was developed in response to concerns about random-digit dialed (RDD) telephone surveys conducted in the United States because of

Sometimes surveys are then conducted by mail. Other times, researchers attempt to find phone numbers for the addresses. If a phone number is found, the researchers contact the households by phone for a telephone survey. Those addresses for which telephone numbers are not found (including nearly all cell phone only households) are sent a postcard or other mailing introducing the survey and asking research participants to mail back their telephone number so that they may participate. That telephone number may be that of a cell phone. At present, the return of the postcard with a cell phone number is considered consent to dial that phone number with an automatic dialer.

- When researchers manually dial cell phone numbers to request survey participation, the potential research participant may ask to be called back at a certain time (e.g., in an hour or next Tuesday). After receiving such a request, a researcher using an automatic dialing system, in conjunction with a CATI system, is actually better able to ensure that the potential participant's wishes are respected.
- At the end of a telephone survey, a researcher may ask for permission to contact the research participant again in the future -- with another request for survey participation, for validation purposes¹³, or as part of a longitudinal study¹⁴. The participant may provide a cell phone number as the best way to initiate that contact.

declining landline frame coverage brought on by an increase in cell phone only households and diminishing geographic specificity as a result of telephone number portability.” - Link, M (2008). Address Based Sampling in P. Lavrakas (Ed.). Encyclopedia of survey research methods. Vol. 1. (pp. 7-8) Thousands Oaks, CA: Sage

¹³ Validation involves a research supervisor following up with the participant, ensuring that the interviewer received and reported the data accurately and treated the participant appropriately.

¹⁴ “A longitudinal study is a correlational research study that involves repeated observations of the same items over long periods of time — often many decades.... But because of the repeated observation at the individual level, they have more power than cross-sectional observational studies, by virtue of being able to exclude time-invariant unobserved individual differences, and by virtue of observing the temporal order of events.... Longitudinal studies allow social scientists to distinguish short from long-term phenomena, such as poverty.” –

http://en.wikipedia.org/wiki/Longitudinal_study

CONCLUSION

For all the reasons elaborated in these comments, MRA respectfully requests that the Commission revise the Proposed Rule to either: (i) limit the written consent standard to telemarketing robocalls alone; or (ii) categorically exclude Bona Fide Survey and Opinion Research calls (as defined in Footnote 2) from the written consent standard.

Sincerely,



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