

Post-Election Outlook for Survey, Opinion and Marketing Research

By Howard Fienberg, PLC

I'm a professional partisan – a full-time advocate for the survey, opinion and marketing research profession – so the aftermath of a nation-wide election is especially meaningful.



Here is what we know so far: there will be 80 or more new Members of Congress who we need to get to know and educate; Barack Obama is still president; Democrats still control the U.S. Senate and Republicans still control the House of Representatives; and a “fiscal cliff” still looms.

Most importantly, the research profession's interests in key policy areas are threatened, such as with privacy and data security, and the misclassification of respondents as employees of research companies instead of as independent

contractors. The outlook is more mixed (if not positive) for other issues, such as restrictions on calling cell phones, and the Physician Payments Sunshine Act.

How could these issues affect you? An emboldened FTC might decide that you did not adequately publicly describe every piece of data you were collecting from your online panelists, or did not meet the unexplained moving target of adequate data security for personal (but not particularly personally identifiable) information. Or the Labor Department might declare that every respondent to whom you paid

any amount of incentive is your company's employee. Regulatory micromanagement, fines, penalties and lawsuits could all be in your future.

Data privacy and data security

The intense scrutiny of private companies' data privacy and data security practices, creation of new and expanded privacy rules, and aggressive high-profile enforcement on privacy and data security concerns, all are likely to increase in President Obama's second term if recent history and statements

by government officials are reliable indicators.

The Federal Trade Commission (FTC) will be a hotbed of concern for research over the next four years. The agency has already demonstrated its unfriendly interest in the research business in its investigation of and costly settlement with marketing research company Compete, demonstrating that the FTC's statutory authority in the realm of "unfair or deceptive" practices are being interpreted in the broadest of fashions. I have it on good authority that the FTC has more than a few other investigations of research companies underway. Current Federal Trade Commission (FTC) Chairman Jon Leibowitz is generally expected to resign next year, but current Commissioners Julie Brill or Edith Ramirez, who share his interests and point of view on the FTC's approach to privacy, are likely to succeed him.

The National Technology and Information Administration (NTIA), which has been tasked with implementing President Obama's "Consumer Privacy Bill of Rights" through a multi-stakeholder process, will undoubtedly sport new leadership next year. How strongly the new leadership presses for results remains to be seen, but the Obama Administration certainly retains interest. Industry stakeholders like MRA have a sincere commitment to positive results, at least from the initial mobile apps privacy process (which can be followed closely on the MRA website), for fear that activists will seize upon failure to push for aggressive regulatory maneuvers instead.

The House Energy & Commerce Committee returns with the same leadership, but some key players will differ. The defeat of Commerce Subcommittee Chair Mary Bono Mack (R-CA) opens her position overseeing data security and privacy issues. The assumed departure of Communications Subcommittee Chair Greg Walden (R-OR) to head the National Republican Congressional Committee (NRCC) opens another, with oversight of the FCC and some privacy issues. In the mix for both positions are Lee Terry (R-NE) and Marsha Blackburn (R-TN), both generally favorable to the research profession and our interests. Whether Bono Mack's replacement continues to pursue data security legislation in the mold of the SAFE Data Act (which MRA successfully helped amend in 2011) remains to be

seen, but we assume that Terry or Blackburn would be less likely to favor excessive government regulation of privacy the way Bono Mack sometimes did.

Democrat Ranking Member Henry Waxman (D-CA) will return as well, and he and Ed Markey (D-MA) will continue to advocate for a heavy regulatory hand on privacy controls, such as: giving the FTC

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full authority to determine what constitutes personally identifiable information in a data security incident instead of focusing strictly on the sort of data susceptible to criminal abuse of consumers; or Rep. Markey's Mobile Device Privacy Act.

Democrat Chairman Jay Rockefeller (D-WV) will be back atop the Senate Commerce Committee. His privacy positions rarely favor the research profession, such as his Do-Not-Track Online Act, which has been explained by Committee staff as, "Hey, FTC, do something on do-not-track, whatever it takes, and please don't break the Internet." Opposite him as the new Ranking Member, replacing the retiring Kay Bailey Hutchison (R-TX), will be Jim DeMint (R-SC), arguably the most libertarian member of the Committee and advocate of a hands-off approach to most regulatory issues, including data privacy.

The Senate Judiciary Committee will continue to be a battleground for data security, with intense interest from Chairman Pat Leahy (D-VT) in passing comprehensive (and restrictive) legislation. Republican Ranking Member Chuck Grassley (R-IA) does not share those interests, but will be unlikely to have much impact. Privacy Subcommittee Chairman Al Franken (D-MN), as well as Richard Blumenthal (D-CT), are carving out leadership positions on sophisticated and exceptionally restrictive regulation of emerging privacy areas, such as mobile device privacy and data brokers. Opt-in is the minimum they will demand in order to collect, use or share data, and both Senators are interested in enforcing such data privacy restrictions through private class action lawsuits.

Bob Goodlatte (R-VA) will replace Lamar Smith (R-TX) as chairman of the House Judiciary Committee opposite Ranking Member John Conyers (D-MI). The Committee should look more closely at privacy and data security than it has for the last few years with Goodlatte, a technology policy maven, in charge.

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Misclassification of respondents as employees of research companies

The 2nd Obama Administration could prove most harmful to the research profession through decisions made at the Department of Labor and the Internal Revenue Service (IRS). Both agencies during the last four years have been skeptical about, if not hostile to, independent contractor status for respondents. Labor in particular has insisted during audits of research companies that respondents were employees of the research companies, instead of independent contractors, assuming they were given any amount of respondent incentives to participate. For example, this would mean that you owe some of your respondents overtime wages, failed to pay many of them the federal minimum wage, and violated youth employment law by conducting

a survey amongst 12-year-olds, even though you had their parents' explicit consent

The continuing risk of regulators misclassifying respondents was MRA's motivation to create and introduce the Research Fairness Act (H.R. 5915) in Congress, which would clarify in Federal labor law that respondents are independent contractors instead of research companies' employees. Unfortunately, prospects for passage of the Research Fairness Act in the next Congress are not great. Our best hopes are that hearings on this and related issues, defensive actions from Members of Congress, and growing support for the Act, will help keep Labor and the IRS at bay.

The House Education & Workforce Committee will be led again by Chairman John Kline (R-MN) and he has been relatively supportive of independent contractor status. By contrast, Democrat Ranking Member George Miller (D-CA) is exceptionally hostile to independent contractor status, although his staff so far has not opposed the Research Fairness Act. Chairman Kline wants to reform the Fair Labor Standards Act (FLSA), a law the Research Fairness Act seeks to amend, so we may be able to advance it that way in the House.

Chairman Dave Camp (R-MI) will be back to chair the House Ways & Means Committee. While he has been generally supportive of independent contractor status, Democrat Ranking Member Sander Levin (D-MI) has generally been unfriendly to independent contractor status, and Committee member Jim McDermott (D-WA) is the leader in opposing it. Republican staff and Members have generally indicated that they will fight against independent contractor status getting hurt in tax or "fiscal cliff" legislation.

In the Senate, Finance Committee Chairman Max Baucus (D-MT) has not been particularly focused on independent contractor status and Ranking Member Orin Hatch (R-UT) has always been a champion of it. The lead Democrat in the campaign against independent contractor status has been, and will continue to be, Committee member John Kerry (D-MA), unless he joins the Obama Administration as Secretary of State.

Meanwhile, Health, Education, Labor & Pensions (HELP) Committee Chairman Tom Harkin (D-IA) has been very hostile to independent contractor status and would be unlikely to ever allow the

Research Fairness Act to be considered by his Committee. New Ranking Member Lamar Alexander (R-TN) is broadly supportive of protecting independent contractor status.

This obviously is one area – among many – where elections have distinct consequences.

MRA doesn't shy away from the dark clouds. We are in the nation's capital, solidifying old friendships and building new ones. With your help, we can educate and influence the legislators and regulators who would otherwise crush the research profession through misguided regulations and enforcement actions. Together, we can help protect the research profession and help it to prosper.

Calling cell phones

There's little reason to expect dramatic changes to the Telephone Consumer Protection Act (TCPA), the law prohibiting most research calls to cell phones. With the 2011 failed attempt in the House of Representatives to modernize the TCPA, it could be many years before any elected politician considers trying again. However, MRA's success this year in beating back a Federal Communications Commission (FCC) proposal to make the TCPA even more restrictive for survey research has led to a series of requests for clarification from the FCC that may yet lead to an easing of the TCPA's burden on research through the more quiet and mercurial regulatory process.

Physician incentives and "Sunshine"

The Physician Payments Sunshine Act, part of the Affordable Care Act (a.k.a., "Obamacare"), requires disclosure of all manner of payments between pharmaceutical and medical device manufacturers and health care professionals. Thanks to MRA's dogged campaign in 2008-2010, with assistance from PMRG, respondent incentives were excluded from disclosure in the Sunshine Act. Unfortunately, at the federal level, some researchers still appear to be bumping up against overly-conservative compliance departments within their industry clients – compliance departments that somehow still don't comprehend that marketing research incentives are excluded from the transparency scheme.

MRA will be seeking an advisory opinion from the federal implementing authority, the Centers for Medicare and Medicaid Services (CMS), to clarify the exclusion for respondent incentives. Also on the positive side, the Sunshine Act has fueled, directly and indirectly, our successful efforts to beat back comparable legislation at the state level and to repeal it in Maine and Washington, DC.

The next four years

Four years ago, the morning after election day, with MRA conference attendees barely having had time to cheer or mourn the results, I warned of "dark clouds" gathering for the profession on research-related policy issues. We grappled with some of those issues well and emerged in decent shape (e.g., the Physician Payments Sunshine Act), but the dark clouds for privacy are as worrisome as ever. Most importantly, there were policy issues not even on anyone's radar at the time, like respondent misclassification, that will be front and center for at least the next four years.

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