

Grappling with the Federal Regulatory Leviathan

By Howard Fienberg, PLC

A recent initiative from the White House got me excited, thinking it could be a great opportunity to alleviate the federal regulatory burden on survey and opinion research. Call me an optimist (and a public policy geek).

Shortly before the State of the Union address, President Barack Obama signed an Executive Order aiming to “improve regulation and regulatory review.” The idea was to have federal agencies examine existing regulations and proposed regulations, making sure that the costs of the regulations aren’t outweighing the benefits and that no regulations have outlived their usefulness.

Upon first consideration, the Executive Order appeared as an opportunity to obtain an exemption for survey and opinion research from the Telephone Consumer Protection Act’s (TCPA) restrictions on autodialed calls to cell phones – MRA’s perennial top lobbying priority.

Unfortunately, as a *Wall Street Journal* editorial quipped, the Executive Order was “less than meets the press release.” It turns out there were some serious caveats buried in the Order:

The Order does not apply to “independent regulatory agencies” like the Federal Trade Commission (FTC) and Federal Communications Commission (FCC). This is because the Order references a definition of federal agencies from a similar Order under President Bill Clinton’s Administration. So the FTC and FCC, the two federal entities with the most significant regulatory implications for survey and opinion research (with the FCC being the one responsible for the TCPA) are outside the scope of regulatory review under the Executive Order.

The order also specified that “[n]othing in this order shall be construed to impair or otherwise affect: (i) authority granted by law to a department or agency, or the head thereof...” This could exclude just about every rule promulgated by federal agencies, since I don’t think any have ever come out that didn’t claim some form of legal authority.

So this seemingly important White House initiative might be of no use to the research profession and is unlikely to result in any regulatory changes on most any front. The disappointment of such a toothless Order might lead you to think this problem is unique to the Obama Administration, but you would be wrong. The Order mirrors an initiative of the Clinton Administration and also hews closely to similar toothless initiatives under every Administration over the last couple of generations. Even President Ronald Reagan’s Executive Order 12291 excluded independent regulatory bodies from regulatory review. This exclusion from review emanates from concerns that the White House would overstep its constitutional authority by taking control of regulatory activities of independent agencies, since many courts view them as semi-legislative bodies rather than purely part of the executive branch.

In fact, this was one of MRA’s biggest concerns with last year’s data privacy legislation from Congressman Bobby Rush, the Best Practices Act (H.R. 5777): that Congress may have been avoiding making tough decisions by delegating them to an unelected bureaucracy. The Best Practices Act was extremely vague on most details and instead would have imbued the FTC with enormous power and authority to implement various goals, such as deciding what constitutes proper notice and consent and whether and how to expand an already overly-broad definition of sensitive information.

This is why MRA dedicates so much time and resources to tracking and analyzing proposed federal and state regulations, a mostly arcane mishmash of technical jargon and legal references that make the average piece of legislation look like appealing beach reading. So despite the

disappointment of this most recent White House initiative, we will soldier on, seeking to fix the regulations already plaguing the research profession and do what we can to halt those waiting in the wings.

For more information on legislation, regulation and lobbying, contact MRA’s Director of Government Affairs, Howard Fienberg, at howard.fienberg@mra-net.org.

Resources:

- ▶ Executive Order, January 18, 2011: <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>
- ▶ MRA Positions on Public Policy Issues: <http://www.mra-net.org/ga/policy.cfm>
- ▶ “Obama’s Rule-Making Loophole”. *The Wall Street Journal*. Jan. 24, 2011.
- ▶ Executive Order 12866, September 30, 1993: <http://govinfo.library.unt.edu/npr/library/direct/orders/2646.html>
- ▶ For more on the Best Practices Act, see MRA’s position paper - http://www.mra-net.org/ga/documents/positions/mra_issue_paper_-_data_privacy_hr5777.pdf - and MRA’s article in *Quirks* - <http://www.quirks.com/articles/2010/20101125-1.aspx>

Howard Fienberg, PLC is MRA’s director of government affairs.