



# Keeping the regulatory wolves at bay

When it comes to things to worry about in the marketing research realm these days, most of you likely have economic woes on your minds. For those on the client side, important projects are going unfunded and department staffs are being thinned. For vendors, clients aren't returning phone calls and budgets are drying up.

These are all certainly pressing issues, but there are a host of others to keep track of, some of which may affect the industry long after the economy starts improving. Thankfully for us, the Marketing Research Association (MRA) government affairs office is on the watch.

Formerly under the umbrella of the Council for Marketing and Opinion Research, which merged with the MRA in 2008, the office consists of Howard Fienberg, director of government affairs, and LaToya Rembert-Lang, state legislative director. Aiding their efforts are a host of MRA members who sit on the government affairs committee and its various subcommittees.

I spoke with Fienberg following the MRA's release of its top six legislative and regulatory issues facing the research profession in 2009. They are,

in rough order of potential to cause problems for the industry:

## 1. Cell phones

As more households and individuals go cell phone-only, concern is increasing over how this phenomenon will impact research and also how current laws may be changed to protect consumers from receiving unwanted calls on their cell phones.

The existing law, the Telephone Consumer Protection Act of 1991, stipulates that automatic dialing systems can't be used to contact consumers via cell phone without their prior consent. "We are working with the [Federal Communications Commission] and with Congress to get some regulatory relief from a law that is clearly outdated," Fienberg says. "It was never intended to impact anyone beyond the telemarketing industry but somehow it ended up impacting everybody. No one thought a whole lot about it at the time because there weren't as many people using cell phones but of course now nearly everyone has one. There is room for change in the law, it's just that we are in the midst of a very long process to make that change."

Lawmakers are generally sympathetic and are interested in having the law clarified, Fienberg says, but it's

unlikely that one of them wants to take credit for working to allow consumers to receive calls that they may find intrusive. "It's hard for a politician to stand up and say, 'We understand that we have kept you from being bothered by all these different telemarketing calls on your cell phone. Well, now we are going to change that so you can get calls on your cell phone from marketing researchers.' No one wants to be that person so it's going to require a bit more nuance."

## 2. Online privacy

Consumer advocates' fears over online behavioral advertising and tracking, in which non-personally identifiable information like cookies and IP addresses is used to deliver targeted advertising, have resulted in a raft of proposed federal and state regulations which could impact marketing research.

Keeping up with all of the proposed initiatives involves a tremendous amount of work. Part of the problem is that lawmakers often don't have a clear grasp of how aspects of the online realm really work, so they tend to draft measures that are exceptionally broad.

"We were concerned right away when the [Federal Trade Commission] said it wanted to hold a workshop to find out more about [online behavioral adver-

ting] because there was a chance that they might take it too far. Indeed when the FTC came up with its first draft of proposed principles for self-regulation, it drew a broad definition of what constitutes online behavioral advertising, one which could easily include the collection of information for strictly marketing research purposes, if it might eventually be used to target advertising.”

### **3. Marketing research incentives paid to doctors**

Rising up the list of concerns, Fienberg says, is the payment of incentives to doctors for participating in research. The practice, a near-necessity for any firm that wishes to monopolize a doctor’s time for the purposes of research, is in danger of being unfairly lumped in with the medical industry’s habit of showering doctors with gifts of travel, meals and tickets to sporting and cultural events.

“State legislators who were concerned that pharmaceutical and medical supply firms were purchasing influence with doctors wanted a way to shed some public light on the practice. They started small, in Minnesota and Vermont, with laws that required disclosure of how much was spent in total by these firms on gifts to physicians. Even those efforts, we found, were curtailing market research, because no one was separating research from the practice of gift-giving. So a lot of companies said, ‘We don’t want to worry about this so we will just stop doing research with doctors in these states.’ Then it got amped up because other states started considering legislation that would require public disclosure of how much and to whom these gifts were paid. And at the federal level, some talked about a Web site that would make this information even more public.”

At this point, the MRA government affairs office is working to get an exemption for marketing research at the federal level while also trying to educate lawmakers on the differences between gift-giving and incentive-paying.

### **4. Automated political advocacy calls**

They have subsided now that the election is over, but those annoying automated phone calls in which Politician A is raked through the mud

by someone representing Politician B are often confused with or lumped together with automated polls, Fienberg says. “We are constantly working at the state and federal level to remind people that an automated poll is not an automated advocacy call. It is collecting information; it is not distributing information.”

The office managed to beat back potentially negative bills in a host of states last year, he says, and are continuing to work on those fronts.

### **5. Push polls**

Rembert-Lang and Fienberg will attempt to build on their success last year in Louisiana, where the office was able to get an exemption for marketing research worked into a piece of anti-push-poll legislation. “It regulates deceptive persuasion calls and differentiates them from a poll,” Fienberg says. “It was the first time we managed to get in a specific definition of message testing, because that tends to be what comes up as a dispute. The most public ones over the last couple of years have been cases where it’s pretty apparent that company was testing a message to see how it would go. They were not trying to influence people’s opinion by saying something nasty. It is something that a lot of legislators are sympathetic to, so we are hoping we can replicate that kind of success in other states.”

### **6. Data security and data breach notification**

As state and federal lawmakers reexamine privacy issues related to health care and financial information and begin reworking regulations it is quite possible that someone will inadvertently make life more difficult for researchers.

“For example, there are new regulations coming into effect in 2009 in Massachusetts that require very stringent data encryption and all sorts of written information security plans for pretty much any organization that resides in the state or holds data on a state resident,” Fienberg says. “So that means that most any company that does any kind of national research will have to comply. We are going to do outreach to the research profession on what they should be planning to do because we are assuming everyone is

going to have to comply.”

Forty-four states already have requirements for the thresholds at which companies must notify consumers that their data has been breached, how they must do it and how soon, Fienberg says. The trouble is, they are all slightly different and use different definitions. So the government affairs office is working on a standard at the federal level that makes a distinction between sensitive and non-sensitive information and stipulates what must be done if a breach occurs and also protect the research industry in general.

### **House is on fire**

Don’t think these issues affect you? Think again. “Some people only become concerned when the house is on fire,” Fienberg says. “Well, the last time the house was on fire was when the Do-Not-Call Registry was being written in Congress and we came within about a hair’s breadth of having survey research calls included in the national do-not-call effort. Obviously that would have really put the nail in the coffin of telephone survey research. It has destroyed telemarketing. Telemarketing survives now because there is an industry of incoming sales calls where consumers telephone to get product information or make a purchase. I don’t think telephone research would survive if it was dependent on having people call in to take surveys.”

Near misses like that are why he is especially worried about the investigations into giving gifts to doctors. In the process of trying to do good, lawmakers could inadvertently wipe out a whole line of research.

While Fienberg lauds researchers for their creativity and their ability to adapt to new technologies, he acknowledges that those very attributes are what keeps the government affairs office on its toes. “We have all sorts of people doing interesting research online, for example, but we have to make sure that they are able to do it. I’m not sure how things will progress from a regulatory sense but I am trying to keep track of where the research profession is going and where the law is going. With luck, there won’t be another fire that threatens to burn down the house anytime soon.” | Q