



April 27, 2017

Secretary
Federal Communications Commission
445 12th St., SW, Room TW-A325
Washington, DC 20554

Re: CG Docket Nos. 02-278 and 05-338

I hereby submit the attached comments on behalf of the membership of the Insights Association, in response to the Petition from M3 USA for a Declaratory Ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard Fienberg", written in a cursive style.

Howard Fienberg, PLC, PPC
Director of Government Affairs
The Insights Association

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of M3 USA Corporation's)	
Petition for Expedited Declaratory Ruling)	
)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	CG Docket No. 05-338
)	

COMMENT ON M3 PETITION FOR EXPEDITED DECLARATORY RULING

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M3 USA, an Insights Association member, has petitioned¹ the Federal Communications Commission (FCC) to confirm that invitations to participate in marketing research studies do not constitute “advertising” under the TCPA. Like many other “legitimate businesses, M3’s survey invitations have become the target of abusive TCPA litigation threatening ruinous statutory damages,” said M3 in their petition. The lack of obvious clarity from the FCC on what constitutes advertising, M3 contends, results in “confusion in the courts, a cloud of uncertainty and intolerable risk for legitimate survey businesses, and the chilling of important and beneficial communications.”

The issues at stake here are considerable and apply not just to marketing research firms that contact potential research participants via fax or even just to firms that do phone research. In fact, it applies even more broadly to the larger proposition that marketing research is somehow a form of (or related to) marketing. This proposition, at best, represents a profound misconception about the nature of marketing research – and, at worst, is an attempt by the plaintiffs’ bar to distort long-held, bright-line distinctions between marketing and marketing research, with the cynical aim of expanding the number of TCPA lawsuits. Clarification from the FCC on the M3 petition will therefore help eliminate any such ambiguity moving forward.

The M3 petition called for FCC action “to dispel confusion over the proper application of the ‘pretext’ exception to informational survey faxes... provide needed clarity and certainty to market research survey companies, and close a regulatory loophole being exploited improperly to target informational communications for massive TCPA liability.”

The Insights Association supports this petition for the FCC to rule that:

1. “There is no presumption under the TCPA that faxes sent by for-profit businesses are pretexts for advertisements;
2. Informational faxes are not pretexts for advertisements under the TCPA unless the transmission promotes specific, commercially-available property, goods or services to the recipient of the fax;
3. Market research surveys do not constitute property, goods or services vis-à-vis the persons taking the surveys under the TCPA; and
4. Invitations to participate in market research surveys are not advertisements under the TCPA unless commercially-available property, goods or services are promoted in the fax itself or during the survey itself.”

In sum, the FCC should recognize that recipients of informational faxes used by research companies to recruit research participants are not being solicited to purchase anything – not any commercially-available property, good or service – either now or in the future, and as such this practice cannot constitute marketing and thus is outside of the TCPA’s legislative intent and regulatory interpretation.

Who we are

Launched in 2017, the Insights Association is the leading and largest nonprofit association representing the marketing research and analytics industry.² It was formed through the merger of two organizations with long, respected histories of servicing the industry: CASRO (founded in 1975) and MRA (founded in 1957). The Insights Association helps empower intelligent business

¹ <https://www.fcc.gov/ecfs/filing/10321896504076>

² Our membership includes both research/analytics companies/organizations, as well as the researchers and research departments inside of non-research companies/organizations.

decisions as a voice, resource and network advancing the companies and individuals engaged in this important work.

What is marketing research

Marketing research is the systematic, objective investigation and analysis of people's opinions, attitudes 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 small but statistically-balanced samples³ of the public. Researchers seek to determine the public's opinion and behavior regarding products, services, issues, candidates and other topics. Such information is used to develop new products, improve services, and inform policy. In this context, research itself does not intend to affect purchase behavior or cause even so much as the expenditure of a dime.

Marketing research is thus sharply distinguished from commercial activities, like marketing, advertising and sales. In fact, the Insights Association and other research associations prohibit and attempt to combat sales or fundraising under the guise of research (referred to as “sugging” and “frugging”),⁴ “push polls,”⁵ 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.

There is a legal definition of bona fide research: “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.*” [emphasis added] This definition has been used at the federal level in the Research Fairness Act, proposed in 2012,⁶ and in amendments passed to a New Hampshire statute in 2014.⁷

Marketing researchers perform critical research to deliver insights to their clients; in the process, they sell nothing to research participants. Marketers, on the other hand, advertise and sell properties, goods or services directly to participants. These two functions are distinct and separate.

The case in question

On June 10, 2016, plaintiff Comprehensive Health Care Systems of The Palm Beaches filed a class action lawsuit against M3 – one of **fourteen** TCPA actions they filed from May 31 to June 10, of which all but three were voluntarily dismissed. This lawsuit was based on a single

³ A “sample” is a subset of a population from which data is collected to be used in estimating parameters of the total population.

⁴ <http://www.insightsassociation.org/issues-policies/best-practice/sales-under-guise-research-sugging>

⁵ <http://www.insightsassociation.org/issues-policies/best-practice/push-polls-deceptive-advocacy-persuasion-under-guise-legitimate-polling>

⁶ Research Fairness Act (H.R. 5915): <https://www.congress.gov/bill/112th-congress/house-bill/5915>

⁷ Title LXIII, Section 664:2 (XVII and XVIII), on push polling. <http://www.gencourt.state.nh.us/rsa/html/LXIII/664/664-2.htm>

received fax,⁸ which the plaintiff claimed “advertis[es] paid online surveys,” even though the fax was clearly just an invitation to participate in a survey.

The plaintiff in the M3 case appears to have exercised considerable alchemy to conjure a lawsuit, refiling it multiple times to tailor it differently, including trying to rope in unrelated aspects of the research company’s privacy policy and terms of use in justification of the suit. Unfortunately, the court denied M3’s third motion to dismiss the case, insisting that “the ultimate question of whether Defendant’s survey fax is merely a pretext for advertising its goods or services is a question of fact not suitable for disposition as a matter of law upon a motion to dismiss.” As a result, the parties are now in the very costly “discovery” stage of litigation.

While faxes are no longer widely used, they are still the dominant means of communication in the medical field. As a result, faxes remain a useful method, as M3 stated, “to inform healthcare professionals” about marketing research opportunities and help researchers “reach a broad, representative sample of prospective respondents.”

Research invitations like those in the M3 case “are generally tailored to the type of professional (i.e., general physicians, surgeons, oncologists, nurse practitioners, etc.) to obtain relevant and responsive information from qualified respondents. The surveys themselves serve important societal purposes and assist the healthcare community’s understanding of emerging and novel medical issues.”

The value of marketing research with healthcare professionals

While any research project can yield important insights, marketing research studies with healthcare professionals (often beginning with contact via fax) can be particularly valuable to clients, patients, healthcare professionals, and the public in determining and meeting their needs and preferences. Here are some of the ways, none of which constitute “sales, promotional or marketing efforts”:

- **Controlling health care costs:** Studies with doctors are an integral part of the goal to control costs. More and better marketing research results in cost savings as it can unveil potential flaws in drugs and treatment regimens before they pose a real risk to patients. Marketing research also helps focus scarce resources on effective and necessary product and service development, technical support and education.
- **Preventing medical errors:** Marketing research helps measure comprehension of materials and differentiation of names among physicians for drugs and devices, which can help prevent “medical errors.”
- **Ensuring patients get needed treatments:** Marketing research studies with healthcare professionals about their patients’ compliance with treatment regimens help determine what causes patients to avoid or cease treatment and how to encourage compliance – which in turn promotes health and longer life.
- **Simulations are safer:** The best way that medical device manufacturers can evaluate if healthcare professionals are using their equipment correctly is a simulation – a form of market research. It allows a full test of equipment without actually cutting someone open.
- **Checking adequacy of surgical training:** Marketing research studies sometimes discover a need for greater applied training for certain physician specialties.

⁸ Evidence of the M3 faxes, from their petition:
<https://ecfsapi.fcc.gov/file/10321896504076/Group%20Exhibit%20A.PDF>

- **Improving acceptance and adoption of needed drugs and devices:** Marketing research studies of how doctors will accept and adopt new drugs and medical devices are crucial to the development of new lifesaving drugs and devices. If a drug or device has poor odds of acceptance or adoption, the manufacturer may not invest in producing it, but may learn from the research how to counteract those deficiencies with an improved product.
- **Role-playing research yields results:** Marketing research studies involving doctor-patient role playing can garner unexpected findings vital to more than just the studies' sponsors. For example, studies have discovered that physicians often don't describe all available options to patients, even though they claim to do so in conventional research surveys.
- **Case example of eliminating side effects for patients:** Marketing research with doctors led to the reformulation of a drug to deal with its side effects. The drug fights blindness, but resulted in burning red eyes for many users. Marketing research revealed that these side effects, which were not being perfectly reported, were keeping many patients from taking the drugs (on the required schedule, or sometimes at all). Reformulation removed the side effects, saved the drug, and saved many people's sight.

What makes a fax an advertisement and what is pretext

The Junk Fax Prevention Act (JFPA) and TCPA restrict "unsolicited advertisements" by fax.⁹ The FCC defines an "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services."

The mere mention in a fax of a property, good or service cannot automatically be construed as an unsolicited advertisement for their purchase. If this were the case, any mention in any fax of any property (such as any physical mailing address listed in a fax's footer), good (such as any medical device or drug including generics, including any of their components), or service (such as any procedure any physician may provide) would be out of bounds, which of course is an absurd result.

Crossing the line can have serious financial consequences, especially in the case of a class action lawsuit.¹⁰ Of course, the trial lawyers who specialize in this area are powerfully incentivized to maximally broaden these definitions and thus their financial potential because most TCPA lawsuit targets would much prefer to settle the suit in advance of the case ever going to trial.¹¹

Perhaps recognizing this difference, in the FCC's 2006 Junk Fax Order, the agency ruled that "messages that do not promote a commercial product or service... are not unsolicited advertisements under the TCPA."

⁹ "It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States...to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement" (47 U.S.C. § 227(b)(1)). The TCPA, together with the FCC rules, also require that an unsolicited advertisement contain an "opt-out" notice.

¹⁰ The TCPA statute awards claimants the greater of actual damages or statutory damages, up to \$500 per violation. The statutory limit goes up to \$1,500 per violation if the conduct is deemed "willful" or "knowing" (47 U.S.C. § 227(b)(3)). While \$500 or even \$1,500 may not seem significant, aggregated over thousands of plaintiffs (or more) in the class action context, TCPA damages can quickly reach millions of dollars.

¹¹ TCPA class actions are thus a volume business.

Bona fide research would only be covered if it were a "pretext" for advertising although if it were really a pretext for advertising, it would not be bona fide. Unfortunately, the FCC has not yet clarified what would constitute "pretext" in this or other cases. While we in the marketing research and analytics industry can easily figure out the difference between real and fake research, the courts have not yet fully come around to clarify the distinctions, and the plaintiffs' bar has taken quick advantage. The conflating of bona fide marketing research activities with marketing or sales has considerable and negative consequences for our industry.¹² A clear line must be drawn and plaintiffs must not be allowed to try to confuse the two activities.

Recent court rulings on what constitutes an advertisement have not been definitive.

For instance, the Sixth Circuit ruled in 2015 (*Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*) on whether a fax listing medicine available from a health plan qualified as an advertisement under the TCPA. The court decided that just because a "sender might gain an ancillary, remote, and hypothetical economic benefit later on does not convert a noncommercial, informational communication into a commercial solicitation" and "the fax itself must at least be an indirect commercial solicitation, or pretext for a commercial solicitation."

Meanwhile, the Second Circuit ruled this year (*Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*) on whether or not the invite to a seminar was an advertisement under the TCPA. In deciding in favor of the plaintiff, the court said:

"Businesses are always eager to promote their wares and usually do not fund presentations for no business purpose. The defendant can rebut such an inference by showing that it did not or would not advertise its products or services at the seminar, but only after discovery... Requiring plaintiffs to plead specific facts alleging that specific products or services would be, or were, promoted at the free seminar would impede the purposes of the TCPA."

As M3 pointed out in their petition, the Sixth Circuit placed "the onus on the plaintiff to establish how a given fax is pretext for an advertisement," while the Second Circuit "would apparently have District Courts presume that any fax sent by a for-profit entity is pretext for an advertisement."

M3 asserted that the plaintiffs' "extremely broad interpretation of the term 'pretext' stretches the TCPA beyond its legitimate aims," resulting in "legitimate businesses, including market research companies like M3," being "forced to settle putative class action lawsuits rather than endure the costs and risks attendant on even specious TCPA claims."

Conclusion

The marketing research and analytics industry operates in an environment of significant public apathy with respect to research participation, and falling research "response" rates, which drive up the cost of and time involved in achieving the required number and strata of participants to reach viable representative samples for most research studies. Impediments to research, including justifiable fears of class action litigation, make it even harder to reach and involve research participants (increasing non-response bias), complicate the ability to share and learn from data, and adversely impact the accuracy of research insights.

¹² Such conflation of marketing research activities with marketing or sales serves no public purpose.

M3 has petitioned the FCC for a “limited ruling” that invitations “to participate in blinded research are not advertisements under the TCPA where (i) no property, good or service is advertised on the fax itself and (ii) no property, good or service is advertised in the survey itself. In other words, M3 seeks a declaratory ruling that a blinded research survey is not, in and of itself, a ‘property, good or service’ vis-à-vis the recipient of the survey invitation.”

In M3’s case, the plaintiff has grossly argued that participation in a stand-alone research survey (in which M3 does not receive any income from the fax recipient either now or in the future) constitutes a “property, good, or service” being sold, and that survey invitations promote a marketing research company’s business. The plaintiff tries to make this case, even though the research respondent is not actually a client or potential client of the research firm sending the communication, and thus there is no sale to “advertise” to the recipient of the communication.

However, the even bigger threat comes from the plaintiff’s essential presumption “that any fax sent by a for-profit company is presumed to be an advertisement or pretext for an advertisement,” as stated in the M3 petition. To understate, this is an absurd bridge too far, pursued solely for financial gain. That argument “poses an extremely dangerous risk to legitimate businesses that routinely communicate via fax,” such as the medical profession.

Ultimately, the Insights Association urges the FCC to limit the applicability of “pretext,” as M3 requested, to situations “where, for example, in a survey or seminar, specific properties, goods or services are marketed to the fax recipient during the survey or at a follow on seminar.” The FCC should clarify that an invitation to participate in bona fide research, since it does not “advertise on the face of the fax, nor invite participation in surveys where properties, goods or services are advertised,” can thus not serve as “pretext” for any advertisement under the TCPA.

We look forward to working with the FCC to help clarify the four points from the M3 petition¹³ and answering any questions or concerns.

¹³ As stated earlier, M3 USA requested the FCC to clarify that: 1. “There is no presumption under the TCPA that faxes sent by for-profit businesses are pretexts for advertisements; 2. Informational faxes are not pretexts for advertisements under the TCPA unless the transmission promotes specific, commercially-available property, goods or services to the recipient of the fax; 3. Market research surveys do not constitute property, goods or services vis-à-vis the persons taking the surveys under the TCPA; and 4. Invitations to participate in market research surveys are not advertisements under the TCPA unless commercially-available property, goods or services are promoted in the fax itself or during the survey itself.”