



June 4, 2010

**The Honorable Rick Boucher**  
Chairman, Communications Subcommittee  
amy.levine@mail.house.gov

**The Honorable Cliff Stearns**  
Ranking Member, Communications Subcommittee  
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**SUBJECT:** Draft Data Privacy Bill Comments

Dear Chairman Boucher and Ranking Member Stearns,

On behalf of the Marketing Research Association (MRA), I wanted to submit these comments regarding your draft data privacy bill.

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.

We appreciate the opportunity to share the concerns of the research profession regarding this draft legislation. However, we noticed that the public discussion, and the released executive summary, focused only on online privacy -- and online advertising in particular. For example, the executive summary refers to “meaningful privacy protections for Internet users”, promoting “greater use of the Internet”, and “encouraging the trend toward cloud computing”, and notes that “Online advertising supports much of the commercial content, applications and services that are available on the Internet today without charge”. Press coverage followed that meme. This resulted in most people assuming that the draft bill only concerned online behavioral advertising, which has been the ongoing focus of the Federal Trade Commission (FTC) and others.

To the contrary, we discovered that this draft bill is a broad data privacy bill, not an online privacy bill, and impacts far more than advertising and commercial enterprises. We are concerned that this late revelation combined with the short time allowed for review and comment provides insufficient time and opportunity to get feedback from the

full and diverse realm of the research profession. In particular, the impact of Sec. 3 (d) and Sec. 2 (2) (5) (I) on online behavioral tracking for research purposes requires further exploration and discussion, as does the impact of Sec. 3 (b) on research sampling companies.

Therefore, MRA looks forward to meeting with you and your staff to discuss these comments in greater depth and to bringing experts from within the research field to explore and further explain the impact of the draft bill on research practice and innovation and how we can assist you in improving this bill.

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## **1. Introduction and Summary: Survey and Opinion Research & Privacy**

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 analyzed by individual answers. Instead, each person's answers are aggregated with the responses 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 marketing, advertising and sales. 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.

MRA has developed a legal definition of survey and opinion 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.

## **2. Sensitive Information**

MRA is concerned that the definition of “sensitive information” in the draft bill may be too broadly constructed. This is, of course, one of the most contentious areas in any data privacy debate because the definition of “sensitive” is ultimately in the eye of the beholder. The draft bill heightens the tension by requiring opt in for the collection of sensitive information.

Unfortunately, the definition of sensitive information in the draft bill is so broad that it includes “(B) race or ethnicity”, one of the most commonly used categories of demographic data in all research. While “(C) religious beliefs” and “(D) sexual orientation” are not as standard, they are still relatively common demographic questions in survey and opinion research.

Other categories in the draft bill’s definition are open to question. While MRA understands the concern for privacy of medical records, the definition of “(A) medical records, including medical history, mental or physical condition, or medical treatment or diagnosis by a healthcare professional” could be construed to mean far more than actual records of a doctor or hospital. If a telephone survey were to ask a research participant, “Have you ever suffered from one of the following illnesses”, would the resulting data constitute a medical record according to your draft bill? How about responses to a question such as, “How are you feeling today? Are you feeling better or worse than

yesterday?” Such questions are quite common in research studies and would seem to run afoul of the draft bill’s restrictions on sensitive information.

MRA also would like clarification on “(E) financial records” to ensure that it does not include data on a research participant’s individual or household income – again, one of the most common categories of demographic data in any research study.

### **3. Privacy Notice Delivery for Data Collection by Phone**

As drafted, Sec. 3 (a) (2) (A) (ii) presents a nearly impossible challenge to survey and opinion research conducted over the telephone.

MRA recognizes and agrees with the need to provide some form of opt out and to have a privacy policy available for research participants -- indeed, research best practices include both. Sec. 3 (a) (2) (A) (i) seems reasonable, lines up with the California Online Privacy Protection Act of 2003 and is practical for most online research studies. However, Sec. 3 (a) (2) (A) (ii) would make research conducted over the telephone, or recruitment of research participants by telephone, extremely impractical.

Making a copy of the privacy notice “available to an individual in writing before the covered entity collects any covered information from that individual” would mean mailing potential research participants a copy of the privacy notice in advance of contact. Even that action would require some data collection, because the researcher would need to know the individual’s name and mailing address in order to send the notice. This would dramatically increase the cost of a research study and the time required to complete it. 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.

MRA respectfully requests an addition to help clarify how a privacy notice could be made “available” in the context of data collection for research purposes over the telephone. For example:

**(iii) MANUAL COLLECTION OF INFORMATION BY PHONE FOR RESEARCH PURPOSES.-If the covered entity collects covered information by phone for bona fide survey and opinion research purposes<sup>1</sup>, the covered entity shall instruct an individual on where to find the privacy notice required by this**

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<sup>1</sup> This would require a new definition be added in Sec. 2: BONA FIDE SURVEY AND OPINION RESEARCH.- 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.

section on the Internet, per subsection (i), or offer to send a copy of the privacy notice by mail to an individual, before the covered entity collects any covered information from that individual.

#### **4. Disclosure of Data to Unaffiliated Parties**

Sec. 3 (b) presents potentially serious difficulties for survey and opinion research business models.<sup>2</sup>

The only way to plausibly conduct research while complying with this part of the draft bill would be to conduct all aspects of a research study within one big all-inclusive research company. Unfortunately, very little research, whether conducted in person, over the phone, or online, is or can be conducted entirely within a single organization.

Although no personally identifiable data is shared with the clients requesting a study without the consent of the research participants, identifiable data must be transferred between various companies involved in conducting the study in order to complete the work. The average research study requires multiple organizations that divide the labor: one company is hired by a client to conduct a study and it contracts with others to get the study completed. For instance, one company might do the recruitment of research participants or provide the “sample”, another would collect the data, yet another might translate any responses from foreign languages, one more would process and analyze the data -- all before the original hired company puts together the study results (presenting aggregate de-identified data) into a report for the client.

As previously explained, researchers take great care to protect the privacy of data, but this provision of the draft bill would be impractical given most research business models.

This raises more questions about Sec. 3 (b), such as, once an individual has opted in to data transfer with unaffiliated parties, does each transfer after that original transfer require opt in? And who would be responsible for securing that opt in? Also, what are the obligations of “affiliates” in onward data transfer outside of the affiliation?

MRA respectfully requests an additional subsection (4) in Sec. 3 (b):

**(4) EXEMPTION FOR INFORMATION SHARED AS PART OF BONA FIDE SURVEY AND OPINION RESEARCH.**-The consent requirements of this subsection shall not apply to the disclosure of covered information as part of a bona fide survey and opinion research<sup>3</sup> study, provided that-

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<sup>2</sup> The exemption in subsection (A) (3) might possibly cover the sharing of covered information with unaffiliated parties for research purposes, but it would require further elucidation on the meaning of “first party transaction”<sup>2</sup>, which seems strictly limited to commercial transactions, either online or in a store.

<sup>3</sup> See Footnote 1.

- (A) only aggregate information will be shared with the end user who requested or sponsored the study; and
- (B) all unaffiliated parties to whom covered information is disclosed agree to use such covered information solely for the purpose of conducting the bona fide survey and opinion research study and not to disclose the covered information to any other person.

## **5. Impact on Other Laws**

MRA is concerned by how this draft bill could practically impact other laws. It remains unclear how Sec. 10 on preemption will impact state laws on specialized kinds of data, such as student data or mental health data. It also remains unclear how data would be handled when it goes from being part of an activity covered by one of the other laws listed in Sec. 11, such as HIPAA, to being covered by this draft bill.

A more specific and explicit explanation will be important moving forward.

## **6. Conclusion**

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 viable representative samples for most research studies. That is part of what informs MRA’s concerns with this draft legislation -- that the challenges identified above will make it harder to reach research participants, increase non-response bias and adversely impact the accuracy of research results.

This wouldn’t just impede bona fide survey and opinion research. It would ultimately result in higher costs for research -- costs which would be passed on to the individuals you are 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; and
- a decreased amount of research ordered by companies, who might then bring less well-tested and researched products and services to market, harming consumers in the end because the goods and services did not fulfill consumer expectations or needs.

These challenges would also pose a threat to the American economy, with domestic companies weakened in the global marketplace by attempts to use intuition and guess-work in place of tested research methods.

Since the bill was presented publicly as targeting online privacy generally, and online advertising practices more specifically, I look forward to working with you and your staff

to more appropriately tailor this draft legislation to protect individuals in the intended commercial contexts and prevent unintended consequences from impeding the conduct of bona fide survey and opinion research.

I hope to speak with you and your staff at your earliest convenience.

Sincerely,



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