

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

September 29, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Accepted/Files

SEP 29 2014

**Federal Communications Commission
Office of the Secretary**

Dear Ms. Dortch:

On behalf of RTI International ("RTI"), please find enclosed the original and four copies of RTI's Petition for Declaratory Ruling.

Should you have any questions regarding this filing, please do not hesitate to contact me.

Respectfully submitted,



Mark W. Brennan

Partner
mark.brennan@hoganlovells.com
D 202-637-6409

No. of Copies rec'd 0+4
List ABCDE

Before the
Federal Communications Commission
Washington, DC 20554

Accepted/Files

SEP 29 2014

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
RTI International Petition for Expedited) CG Docket No. _____
Declaratory Ruling Regarding Federal)
Government Research Survey Calls)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)

PETITION FOR EXPEDITED DECLARATORY RULING

Mark W. Brennan
Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004
Tel: (202) 637-6409
Fax: (202) 637-5910
mark.brennan@hoganlovells.com

Counsel to RTI International

September 29, 2014

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY1

II. BACKGROUND2

III. THE COMMISSION SHOULD CONFIRM THAT THE TCPA DOES NOT RESTRICT RESEARCH SURVEY CALLS MADE BY OR ON BEHALF OF THE FEDERAL GOVERNMENT.....5

A. The Plain Language of the TCPA and the FCC’s TCPA Rules Confirms That the TCPA Does Not Apply to Calls Made By or on Behalf of the Federal Government.5

B. The Legislative History of the TCPA Confirms That Congress Did Not Intend to Restrict Federal Government Research Survey Calls.8

C. Restricting Research Survey Calls Would Unreasonably Limit the Ability of Government Agencies to Perform Their Statutorily Mandated Functions.....9

IV. CONCLUSION12

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
RTI International Petition for Expedited Declaratory Ruling Regarding Federal Government Research Survey Calls)	CG Docket No. _____
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	

PETITION FOR EXPEDITED DECLARATORY RULING

I. INTRODUCTION AND SUMMARY

RTI International (“RTI”), pursuant to Section 1.2 of the Federal Communications Commission’s (“FCC’s” or “Commission’s”) rules,¹ respectfully submits this Petition for Expedited Declaratory Ruling regarding the applicability of the Telephone Consumer Protection Act (“TCPA”)² and the FCC’s TCPA rules³ to certain calls placed by or on behalf of the United States federal government.⁴ Specifically, RTI asks the Commission to confirm that the TCPA does not restrict research survey calls made by or on behalf of the federal government.⁵

As discussed below, the plain language of the TCPA and the FCC’s TCPA rules excludes calls made by or on behalf of the federal government. Specifically, the TCPA only makes it

¹ 47 C.F.R. § 1.2.

² 47 U.S.C. § 227.

³ 47 C.F.R. § 64.1200.

⁴ For purposes of this Petition, “federal government” is intended to include all legislative, judicial, and executive bodies of the United States government, including, but not limited to, all federal agencies, independent agencies, boards, bureaus, commissions, councils, and offices.

⁵ RTI requests only that the Commission confirm that the TCPA does not apply to research survey calls made by or on behalf of the federal government because, *inter alia*, the term “person,” as defined in 47 U.S.C. § 153(39), does not include the United States. RTI does not request that the Commission opine on issues of sovereign immunity.

unlawful for a “person” to undertake certain kinds of calling activities,⁶ and the United States falls outside the plain meaning of the statute’s definition of “person.”⁷ Underscoring this distinction, Congress defined “United States” as a separate term in the same section of the Communications Act that defines “person.”⁸ Court precedent and the Commission’s TCPA rules also reinforce the conclusion that the term “person” does not include the United States.

In addition, the legislative history of the TCPA confirms that Congress did not intend to restrict federal government research survey calls. Indeed, the legislative history of the TCPA focuses on problems arising from calls by non-governmental entities. Moreover, restricting these communications would unreasonably limit the ability of federal government agencies to perform their statutorily mandated research functions.

II. BACKGROUND

RTI is a leading independent, nonprofit research organization that conducts multidisciplinary research, development, and technical services. Founded in 1958, RTI has grown from a small number of scientists in North Carolina to today’s staff of more than 3,700 people working in 75 countries. RTI collaborates extensively with academic researchers at dozens of universities and continues to work closely with its founding universities: Duke University; the University of North Carolina; and North Carolina State University.

RTI’s largest client is the federal government. In fiscal year 2013, 84% of RTI’s revenue came from federal government contracts and grants. RTI provides services to virtually every major U.S. government agency, including the Department of Health & Human Services

⁶ 47 U.S.C. § 227(b)(1) (prohibiting “any person within the United States” from making certain kinds of calls).

⁷ *Id.* § 153(39).

⁸ *Id.* § 153(58).

(“DHHS”), the U.S. Agency for International Development (“USAID”), the Department of Defense (“DOD”), the Department of Justice (“DOJ”), and the Environmental Protection Agency (“EPA”).

RTI provides the federal government with sophisticated survey services that generate data on a wide variety of topics. RTI has also developed rigorous methods for surveying the growing portion of the U.S. adult population that can no longer be reached through landline surveys.⁹ RTI continuously evaluates these methods and seeks to develop techniques that correctly identify selection probabilities, address measurement differences, combine estimates, and reduce total survey error. RTI’s calling methods also comply with standards promulgated by the National Institute of Science and Technology (“NIST”)¹⁰ and with the Federal Information Processing Standards.¹¹

As discussed in more detail below, RTI uses a “preview dialing” approach for its survey calls to wireless telephone numbers. Under this approach, RTI’s calling software individually presents a “case” (*e.g.*, a selected interview subject at a specific telephone number) on the computer screen of an RTI interviewer. The RTI interviewer reviews the data and then makes an individual decision to dial or not to dial according to the criteria established for the particular

⁹ Two out of five (41%) of all American homes are now wireless-only households. *See, e.g.*, Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2013, Center for Disease Control, *available at* <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf> (last visited Sept. 29, 2014).

¹⁰ National Institute of Science and Technology, U.S. Dep’t of Commerce, SP 800-37, Guide for the Security Certification and Accreditation of Federal Information Systems (2010), *available at* <http://csrc.nist.gov/publications/nistpubs/800-37-rev1/sp800-37-rev1-final.pdf> (last visited Sept. 29, 2014).

¹¹ Computer Security Division, U.S. Dep’t Commerce, Standards for Security Categorization of Federal Information and Information Systems, FIPS PUB 199 (2004), *available at* <http://csrc.nist.gov/publications/fips/fips199/FIPS-PUB-199-final.pdf> (last visited Sept. 29, 2014).

research task. If the RTI interviewer decides to call the interview subject, the interviewer must “click a button” to commence the call to the telephone number associated with the case. The call is not placed until a trained interviewer takes this action. Compared to manual dialing, preview dialing reduces the government’s costs, allows survey data to be more timely, and minimizes the potential for dialing errors that could interfere with the survey’s accuracy.

Despite its rigorous compliance methods, RTI was recently sued for survey calls made on behalf of a number of federal agencies, including the Centers for Disease Control and Prevention (“CDC”). The plaintiffs in the case against RTI alleged that RTI violated § 227(b) of the TCPA, which prohibits any “person” from using an “automatic telephone dialing system” (“autodialer”) or prerecorded voice to contact “any telephone number assigned to a . . . cellular telephone service” without the “prior express consent” of the called party.¹² RTI made the calls at issue in the lawsuit as part of the National Intimate Partner and Sexual Violence Survey (“NISVS”), an ongoing, nationally representative telephone survey that collects information about intimate partner violence. Federal agencies use the data generated from these survey calls to inform public policy and prevention strategies, and the data ultimately has the potential to make a significant impact on the lives of individuals affected by intimate partner violence.

When making the calls, the researchers told the interview subjects promptly that they were calling on behalf of the CDC to perform a research study. Both the federal Office of Management and Budget (“OMB”) and RTI’s institutional review board approved the survey protocol. Without clarification from the Commission that the TCPA does not apply to research survey calls made by or on behalf of the federal government, frivolous litigation like the suit

¹² 47 U.S.C. § 227(b)(1)(A)(iii).

against RTI will threaten the continued viability and efficacy of the NISVS and other government-funded research studies.

III. THE COMMISSION SHOULD CONFIRM THAT THE TCPA DOES NOT RESTRICT RESEARCH SURVEY CALLS MADE BY OR ON BEHALF OF THE FEDERAL GOVERNMENT.

A. The Plain Language of the TCPA and the FCC's TCPA Rules Confirms That the TCPA Does Not Apply to Calls Made By or on Behalf of the Federal Government.

Neither the TCPA nor the Commission's TCPA rules apply to calls made by or on behalf of the federal government.¹³ The TCPA makes it unlawful for a "person" to undertake certain kinds of calling activities.¹⁴ The Communications Act (in which the TCPA is codified) defines a "person" as an "individual, partnership, association, joint-stock company, trust or corporation."¹⁵ Federal government agencies fall outside the plain meaning of the words in that list, and nothing in the congressional record for the TCPA indicates any intent to reach beyond the ordinary meanings of individual, partnership, association, joint-stock company, trust, or corporation to include the federal government. In addition, Congress separately defined the "United States" in the same section of the Communications Act.¹⁶ Furthermore, the Supreme Court has repeatedly held that "the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it."¹⁷

¹³ As discussed below in Section III.C., the Commission should confirm that research survey calls that an organization makes "on behalf of the federal government" include, at a minimum, calls that meet common law agency principles.

¹⁴ 47 U.S.C. § 227(b)(1) (making certain kinds of calls "unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States").

¹⁵ *Id.* § 153(39).

¹⁶ *Id.* § 153(58).

¹⁷ *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989); *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941),

Additional court precedent indicates that the term “person,” in the specific context of the TCPA, does not include the federal government. For example, the Supreme Court has found that “if [Congress’s] purpose was to include the United States, ‘the ordinary dignities of speech would have led’ to its mention by name.”¹⁸ Moreover, when a statute defines a term to include a detailed list of entities, as it does in the definition of “person” in the TCPA, courts typically find that Congress did not intend the term to apply to the United States if it is not included in the detailed list.¹⁹

Courts have also declined to expand a statute’s definition of “person” to include the United States where, as in the TCPA, there is evidence in the statute that Congress had the United States in mind when drafting the *statute* but did not include or encompass it expressly in the scope of the *clause* at issue.²⁰ In the TCPA, that evidence is within the same clause. Section

superseded on other grounds, 15 U.S.C. § 15a, as recognized in *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 745 (2004)); see also *United States v. Mine Workers*, 330 U.S. 258, 275 (1947). Indeed, “[t]here exists a ‘longstanding interpretive presumption’ to that effect.” Antonin Scalia and Bryan A. Garner, *Artificial-Person Canon: The word person includes corporations and other entities, but not the sovereign*, in *Reading Law* 273, 273 (2012) (citing *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000) (per Scalia, J.)).

¹⁸ *United States v. Cooper Corp.*, 312 U.S. at 605-06 (citing *Davis v. Pringle*, 268 U.S. 315, 318 (1925)); see also *United States v. Bonanno Organized Crime Family*, 879 F.2d 20, 23 (2d Cir. 1989) (holding that the United States is not a “person” with standing to seek treble damages under the Racketeer Influenced and Corrupt Organizations Act); *United States v. Tanker Lake George*, 123 F. Supp. 216, 223 (D. Del. 1954) (“Had Congress intended to include the United States within its definition, then, in the words of Justice Holmes, ‘[t]he ordinary dignities of speech would have led to the mention of the United States.’”).

¹⁹ See *United States v. Cooper Corp.*, 312 U.S. at 607 (“The very fact, however, that this sweeping inclusion of various entities was thought important to preclude any narrow interpretation emphasizes the fact that if the United States was intended to be included Congress would have so provided.”).

²⁰ See *Davis v. Pringle*, 502 U.S. at 318 (dismissing arguments that the term “person” should include the United States when the statute made express mention of the United States at the beginning of the section of the statute); see also *Tanker Lake George*, 123 F. Supp. at 223

227 of the TCPA applies to “any person within the United States.”²¹ First, although the clause makes sense if one replaces “person” with any of the terms expressly included in the definition of “person,”²² it would be nonsensical to replace it with the United States. Second, the clause makes direct reference to the United States, indicating that Congress had the United States in mind when drafting the clause and yet still did not include it within the definition of “person.”

The Commission’s regulations implementing the TCPA, which apply to a “person or entity,” similarly exclude the United States.²³ In interpreting the term “person” in 47 U.S.C. § 227, the Commission made clear that it intended the addition of the term “entity” to the regulations implementing the term “person” to reach “the entities . . . within the scope of the definition of ‘person’ in the Communications Act.”²⁴ Attempting to read the federal government into the term “entity” would contravene established Supreme Court precedent and the Commission’s intent in enacting the TCPA rules – and would impermissibly expand the regulation beyond the scope authorized by statute. It would be similarly impermissible to expand the regulation to encompass calls by private entities acting on behalf of the federal government.

(holding that the term “citizen” as used in the phrase “citizen of the United States” did not include the United States).

²¹ 47 U.S.C. § 227(b)(1).

²² For example, “any joint stock company within the United States.”

²³ 47 C.F.R. § 64.1200.

²⁴ *Rules & Regulations Implementing the Truth in Caller ID Act of 2009*, Report and Order, 26 FCC Rcd 9114 ¶ 16 n.39 (2011).

B. The Legislative History of the TCPA Confirms That Congress Did Not Intend to Restrict Federal Government Research Survey Calls.

The goal of the TCPA is to limit telemarketing calls that endanger public safety, invade privacy, and shift marketing costs onto unwilling consumers.²⁵ Nothing in the legislative history provides any indication that Congress intended to impede communications from the federal government.

Indeed, it appears that Congress did not consider government calls to be part of the problem when it crafted the TCPA. The numerous debates and extensive legislative history leading up to the passage of the TCPA focus on examples of problematic calls from *non-governmental* entities. For example, members of Congress reported constituent complaints about sales calls tying up lines at a hospital or autodialed calls preventing them from getting a dial tone to reach 911. Calls made by or on behalf of government entities were not highlighted as a source of concern.

The FCC itself has recognized that Congress did not intend the TCPA to cover certain communications. For example, the Commission concluded that “neither [the] TCPA nor the legislative history indicates that Congress intended to impede communications between radio common carriers and their customers regarding the delivery of customer services by barring calls to cellular subscribers for which the subscriber is not [charged].”²⁶ The FCC should take similar action here where the TCPA and its legislative history demonstrate that the TCPA was not intended to reach calls by or on behalf of the federal government.

²⁵ See 137 Cong. Rec. S9840-02 (daily ed. July 11, 1991) (statement of Sen. Hollings) (Congress intended for the TCPA to “target[] calls that are the source of consumer complaints – telemarketing calls placed to the home.”).

²⁶ See *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 45 (1992).

C. Restricting Research Survey Calls Would Unreasonably Limit the Ability of Government Agencies to Perform Their Statutorily Mandated Functions.

A wide variety of federal statutes require survey research (directly or indirectly). For example, the Crime Victims with Disabilities Awareness Act requires that the National Crime Victimization Survey, conducted by the Bureau of Justice Statistics, measure disability using the procedures developed for the U.S. Census Bureau's American Community Survey.²⁷ As another example, the Public Health Service Act "requires annual surveys to collect data on the level and patterns of substance use."²⁸ The Personal Responsibility and Work Opportunity Reconciliation Act also mandated the National Survey of Child and Adolescent Well-Being, which reviews the well-being of children and families who have been the subjects of investigation by Child Protective Services.²⁹ The National Center for Health Statistics also relies on the National Hospital Discharge Survey, now a part of the National Hospital Care Survey, and its data on the nature and treatment of illness among the hospitalized population to produce its annual, congressionally mandated report to Congress.³⁰

Congress has mandated these and other research surveys because they advance scientific knowledge and public health and improve the efficiency of other government programs. For example, RTI has conducted the substance abuse survey described above, the National Survey on

²⁷ See Press Release, Bureau of Justice Statistics, First National Study on Crime Against Persons with Disabilities (Oct. 1, 2009), *available at* <http://www.bjs.gov/content/pub/press/capd07pr.cfm> (last visited Sept. 29, 2014).

²⁸ National Survey on Drug Use and Health, About the Survey, <http://bit.ly/1mYzyTF> (last visited Sept. 29, 2014).

²⁹ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 § 503, 42 U.S.C. § 628b.

³⁰ Carol DeFrances and David Woodwell, Integration of the National Hospital Discharge Survey and the National Hospital Ambulatory Medical Care Survey into the National Hospital Care Survey, National Center for Health Statistics 1-2 (2012), *available at* https://fcsmsites.usa.gov/files/2014/05/DeFrances_2012FCSM_VIII-B.pdf (last visited Sept. 29, 2014).

Drug Use and Health, on behalf of the DHHS for more than 26 years. This study is the major source of data on substance abuse used by a variety of policy makers.³¹ The White House Office of National Drug Control Policy and the DOJ use the information generated by this survey to support prevention programs and monitor their drug control strategies. For example, the study generates data that helps determine whether or not drug prevention messages targeted at youth have been effective.³² Similarly, the Substance Abuse and Mental Health Services, an agency of the U.S. Public Health Service, uses the data to identify populations and geographic areas with particular substance abuse problems so that it may use federal resources efficiently for prevention and treatment programs.³³ In addition, the U.S. Department of Transportation has developed its prevention programs and materials on impaired driving using the survey's data on driving after alcohol and illicit drug use.³⁴

Survey researchers increasingly need to contact wireless telephone numbers to provide usable, reliable data. As the Commission is aware, two out of five (41%) American homes are wireless-only households.³⁵ Another 16.1% of householders are "wireless-mostly," meaning that they have both landline and wireless numbers but receive all or almost all calls on their wireless

³¹ National Survey on Drug Use and Health, About the Survey, <http://bit.ly/1mYzyTF> (last visited Sept. 29, 2014).

³² See U.S. Department of Health and Human Services, *Results from the 2011 National Survey on Drug Use and Health: Summary of National Findings*, available at <http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/nsduhresults2011.pdf> (last visited Sept. 29, 2014).

³³ National Survey on Drug Use and Health, Who Uses NSDUH Data, <http://bit.ly/1kIE61Z> (last visited Sept. 29, 2014).

³⁴ *Id.*

³⁵ See, e.g., Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2013, available at <http://1.usa.gov/1rMvgBV> (last visited Sept. 29, 2014).

telephones.³⁶ The percentage of wireless-only households is also higher for certain demographics that can be critical to reach for research purposes. For example, more than a majority of adults aged 18-34 live in wireless-only households (including nearly two-thirds of adults aged 25-29), as do more than a majority of adults living in poverty.³⁷ To avoid underrepresenting these and other key demographic populations, the federal government must be able to contact individuals on their wireless telephones.

Researchers also must be able to utilize advanced, efficient calling solutions and standardized calling methods to reduce the chance of human dialing errors that could interfere with the survey's accuracy. Unlike manual dialing, preview dialing technologies like those employed by RTI help ensure the consistency and reliability that scientific research demands.³⁸ In addition, compared to preview dialing and other innovative technologies, manual dialing is more time-intensive and increases surveys costs for the government. It could also delay a survey's completion date, jeopardizing time-sensitive research.

RTI encourages the Commission to confirm that research survey calls that an organization makes "on behalf of" the federal government include, at a minimum, calls that meet common law agency principles. Thus, the FCC should deem that an organization makes research survey calls "on behalf of" the government when, *inter alia*, it enters into an express agreement with the government to perform research surveys for the government's use or benefit. The FCC should also deem calls to be made "on behalf of" the federal government when an organization

³⁶ *Id.* at 3-4.

³⁷ *Id.* at 2-3.

³⁸ RTI does not consider its preview dialing system to be an autodialer. However, RTI is not asking the Commission to clarify whether preview dialing systems are autodialers.

makes the call with the apparent authority of the federal government or the government later ratifies the call.

IV. CONCLUSION

The plain language of the TCPA and the FCC's TCPA rules confirms that the TCPA does not apply to research survey calls made by or on behalf of the federal government. The legislative history of the TCPA also supports this reading, indicating that Congress did not intend to restrict the federal government. Nevertheless, meritless litigation threatens to hinder important federal government research programs that advance public health and inform public spending. RTI respectfully requests that the Commission act to preempt this threat by issuing a declaratory ruling confirming that the TCPA does not restrict research survey calls made by or on behalf of the federal government.

Respectfully submitted,



Mark W. Brennan
Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004
Tel: (202) 637-6409
Fax: (202) 637-5910
mark.brennan@hoganlovells.com

Counsel to RTI International

September 29, 2014