

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Expedited Declaratory Ruling	)	CG Docket No. 02-278
From RTI International	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	

**REPLY COMMENTS OF RTI INTERNATIONAL**

RTI International (“RTI”), through its counsel, respectfully submits these reply comments in response to the November 19, 2014, Public Notice released by the Federal Communications Commission (“FCC” or “Commission”) Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding.<sup>1</sup> The Public Notice seeks comment on RTI’s Petition for Expedited Declaratory Ruling (the “Petition”), which asks the Commission to confirm that the Telephone Consumer Protection Act (“TCPA”) does not restrict research survey calls made by or on behalf of the federal government.<sup>2</sup>

As discussed in the Petition, the plain language of the TCPA and the FCC’s TCPA rules demonstrate that the TCPA does not apply to calls made by or on behalf of the federal government.<sup>3</sup> Both only restrict “persons” from certain calling activities, and the federal

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<sup>1</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by RTI International*, Public Notice, DA 14-1671 (rel. Nov. 19, 2014) (“Public Notice”).

<sup>2</sup> *Id.*; see also RTI International, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 29, 2014) (“Petition”).

<sup>3</sup> See Petition at 5-8.

government is not a “person” as defined therein.<sup>4</sup> In addition, the TCPA’s legislative history confirms that Congress did not intend to restrict federal government research survey calls.<sup>5</sup> It shows, for instance, that Congress did not consider federal government calls to be a problem when it crafted the TCPA.<sup>6</sup> In addition, restricting research calls by or on behalf of the federal government would unreasonably limit the ability of government agencies to perform their statutorily mandated functions, such as collecting data on the level and patterns of substance abuse as required by the Public Health Service Act.<sup>7</sup>

These reply comments focus on two parties’ comments in this proceeding. The Marketing Research Association (“MRA”) supports the Petition and suggests that the FCC should find that the TCPA does not restrict any research survey calls to wireless telephone numbers (*i.e.*, not just research survey calls made by or on behalf of the federal government).<sup>8</sup> Joe Shields opposes the Petition and asserts that derivative immunity does not apply, the federal government is a “person” under the TCPA, and few federal research surveys are mandatory.<sup>9</sup> As explained below, there are compelling reasons to find that the TCPA does not apply to any research survey calls, as suggested by MRA, and at a minimum does not apply to such calls by or on behalf of the federal government. Meanwhile, Joe Shields’ arguments do not withstand scrutiny and should be rejected.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 9-12; *see also* National Survey on Drug Use and Health, About the Survey, [https://nsduhweb.rti.org/respweb/project\\_description.html](https://nsduhweb.rti.org/respweb/project_description.html) (last visited Jan. 12, 2014).

<sup>8</sup> *See* Comments of the Marketing Research Association, CG Docket No. 02-278, at 3 (filed Dec. 23, 2014) (“MRA Comments”).

<sup>9</sup> *See* Comments of Joe Shields, CG Docket No. 02-278 (filed Dec. 23, 2014) (“Joe Shields Comments”).

**I. There Are Compelling Reasons to Find That The TCPA Does Not Apply to Any Research Survey Calls.**

RTI agrees with MRA that there are compelling reasons to find that the TCPA does not apply to any research survey calls. For instance, as MRA points out, public sentiment helps inform a number of public policies but is a “moving target” that is perpetually in flux.<sup>10</sup> To accurately assess such sentiment, research survey calls must be placed.<sup>11</sup>

In addition, the need to reach wireless subscribers has never been greater. The percentage of “wireless-only” households goes up each year, and currently the majority of both adults aged 18-34 and those living in poverty reside in such households.<sup>12</sup> In some states, more than half of the residents live in wireless-only households.<sup>13</sup> To avoid underrepresenting these states and other key demographic populations when collecting data, researchers must be able to contact individuals on their wireless telephones.<sup>14</sup> In addition, researchers 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.<sup>15</sup> To the extent that the Commission has determined that some private research survey calls may be subject to the TCPA,<sup>16</sup> it should provide an exemption for such calls.

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<sup>10</sup> MRA Comments at 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 8-9; Petition at 10-11.

<sup>13</sup> See Center for Disease Control and Prevention, Wireless Substitution: State-Level Estimates from the National Health Interview Survey, 2012 (Dec. 18, 2013), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr070.pdf> (last visited Jan. 12, 2015).

<sup>14</sup> See Petition at 10-11.

<sup>15</sup> See *id.* at 11.

<sup>16</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 41 (1992); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 ¶ 28 (2012).

Meanwhile, there is an even greater need for the Commission to clarify that the TCPA does not apply to research survey calls made *by or on behalf of the federal government*, as evidenced by a recent letter from Congressional Representatives Price, Butterfield, and Ellmers.<sup>17</sup> In that letter, they explain that “[t]he goal of the TCPA has never been to impede communications from the federal government” and that “[w]ithout clarification, additional litigation may threaten policymakers’ access to important data.”<sup>18</sup> Consequently, they urge the FCC to grant the Petition to prevent the TCPA from “being applied inappropriately by those who claim that its provisions restrict research survey calls placed by or on behalf of the federal government.”<sup>19</sup>

Moreover, no exemption or rulemaking is needed for the FCC to confirm that the TCPA does not restrict calls made by or on behalf of the federal government. Instead, it can grant the Petition by confirming, for example, that the term “person,” as used in the TCPA, does not include the federal government.<sup>20</sup>

## **II. The *Gomez* Case is Not Relevant to RTI’s Petition.**

Joe Shields asserts that the Commission should deny the Petition because RTI is not entitled to sovereign immunity.<sup>21</sup> He suggests that this conclusion draws support from the Ninth Circuit’s opinion in *Gomez v. Campbell-Ewald Co.*, which declined to extend derivative sovereign immunity to a defendant that had sent text messages “on behalf of” the U.S. Navy (“Navy”) that were contrary to the Navy’s policies and outside the scope of the defendant’s

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<sup>17</sup> See Letter from Rep. David Price, Rep. G.K. Butterfield, and Rep. Renee Ellmers to FCC Chairman Tom Wheeler, CG Docket No. 02-278 (filed Jan. 8, 2014) (attached).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See Petition at 1, 5-7.

<sup>21</sup> Joe Shields Comments at 5.

authorization.<sup>22</sup> However, derivative sovereign immunity has nothing to do with RTI's Petition. The Petition seeks confirmation only that the TCPA does not restrict research survey calls by or on behalf of the federal government (because, *e.g.*, the TCPA restricts calls by "persons" and the federal government is not a "person" as defined therein).<sup>23</sup> It does not ask the FCC to opine on sovereign immunity.<sup>24</sup>

Additionally, a critical factual difference distinguishes *Gomez* from the scenario at the crux of the Petition. In *Gomez*, the defendant employed calling practices that were "contrary" to the Navy's policies and outside the scope of its authorization.<sup>25</sup> In particular, a Navy policy permitted text messages only to persons who had opted in to receive them, and the agency had authorized the defendant to send text messages only to such individuals.<sup>26</sup> Yet, despite that policy and the scope of its authorization, the defendant caused text messages to be sent to individuals who had not opted-in to receive such messages.<sup>27</sup> In contrast, the Petition does not seek relief for parties that have placed calls "on behalf of" a federal agency that are either contrary to that agency's policies or outside the scope of the party's authorization.<sup>28</sup> Thus, *Gomez* is not only irrelevant to the Petition, but also easily distinguishable.

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<sup>22</sup> *Id.*; *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014).

<sup>23</sup> *See* Petition.

<sup>24</sup> *See id.*

<sup>25</sup> *See Gomez*, 768 F.3d at 881 ("The record contains sufficient evidence that the text messages were contrary to the Navy's policy permitting texts only to persons who had opted in to receive them.")

<sup>26</sup> *See id.* at 874

<sup>27</sup> *Id.*

<sup>28</sup> *See* Petition.

### III. The Federal Government is Not a “Person” Under the TCPA.

Joe Shields cites two inapposite cases to support his erroneous claim that the term “person” includes the federal government as used in the TCPA.<sup>29</sup> First, he points to a Supreme Court statement that “[e]very sovereign State . . . is an artificial person.”<sup>30</sup> However, that statement was made more than 150 years ago and pertains to the United States’ rights under common law rather than the meaning of the term “person” in a federal statute.<sup>31</sup>

Second, he notes that the United States once argued before the Supreme Court that the term “person” should include the federal government where “its wider application is consistent with, and tends to effectuate, the public policy evidenced by the statute.”<sup>32</sup> However, the Supreme Court *declined to apply the United States’ proposed approach in that case*. Instead, it considered only the relevant statute’s text, context, and legislative history, and concluded that the term “any person” did not include the federal government.<sup>33</sup> In addition, the Court noted that that “[w]ithout going beyond the words of the section, the use of the phrase ‘any person’ is insufficient to authorize an action by the Government.”<sup>34</sup> “Since, in common usage, the term ‘person’ does not include the sovereign,” the Court explained, “statutes employing the phrase are ordinarily construed to exclude it.”<sup>35</sup>

Moreover, public policy supports a finding that the term “person” in the TCPA does not include the federal government. For reasons articulated below and in the Petition, research

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<sup>29</sup> See Joe Shields Comments at 4-5.

<sup>30</sup> *Id.* at 4.

<sup>31</sup> See *Loftin Cotton v. U.S.*, 52 U.S. 229 (1850).

<sup>32</sup> Joe Shields Comments at 4.

<sup>33</sup> *U.S. v. Cooper Corp.*, 312 U.S. 600 (1941).

<sup>34</sup> *Id.* at 606.

<sup>35</sup> *Id.* at 604; see also, e.g., *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 745 (2004); *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64 (1989); *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979).

surveys by or on behalf of the federal government advance important Congressional objectives and, in many cases, are even required by federal law.

#### **IV. Many Federal Research Surveys Are Required by Congress.**

As explained in the Petition, a wide variety of federal statutes either directly or indirectly require survey research, and restricting the calls made to conduct this research would unreasonably limit the ability of government agencies to perform their statutorily mandated functions and keep them from furthering critical public interest objectives.<sup>36</sup> Congress has mandated these efforts to, among other things, advance scientific knowledge and public health and improve the efficiency of other government programs.<sup>37</sup>

For example, research surveys required by the Personal Responsibility and Work Opportunity Reconciliation Act help ensure the well-being of children and families previously investigated by Child Protective Services.<sup>38</sup> Similarly, research surveys required by the Public Health Services Act help the White House Office of National Drug Control Policy and the Department of Justice determine, among other things, whether or not drug prevention messages targeted at youth have been effective.<sup>39</sup> Moreover, even if a statute does not expressly require federal research survey calls to be placed to wireless subscribers, it may require random samplings to be useful.<sup>40</sup> Key demographic populations, such as adults aged 18-34 and those living in poverty, would be underrepresented if researchers could only contact residential

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<sup>36</sup> See Petition at 9-12.

<sup>37</sup> See *id.* at 9.

<sup>38</sup> See *id.*; 42 U.S.C. § 628b.

<sup>39</sup> See Petition at 9; National Survey on Drug Use and Health, About the Survey, [https://nsduhweb.rti.org/respweb/project\\_description.html](https://nsduhweb.rti.org/respweb/project_description.html) (last visited Jan. 7, 2014).

<sup>40</sup> See Petition at 10-11.

telephone numbers.<sup>41</sup> Additionally, even if a statute does not require federal research survey calls to be automated, timeliness and cost concerns support a clarification that such calls are not restricted under the TCPA.<sup>42</sup> Advanced calling solutions help ensure timely results, and they also help reduce the chance of human dialing errors that could materially interfere with a survey's accuracy.<sup>43</sup>

Joe Shields characterizes the statement that research surveys are required by federal law as “demonstrably false” and “ludicrous.”<sup>44</sup> However, Joe Shields appears to confuse: (1) being required to *conduct* a survey with (2) being required to *respond* to a survey. In particular, Joe Shields cites a passage from an abstract presented at the American Association for Public Opinion Research's 2012 Annual Conference.<sup>45</sup> When read in context though, that passage pertains only to legal obligations associated with responding to surveys. For instance, the passage plainly states that most surveys are not “mandatory” only in the sense that they do not allow those conducting them to rely on statements like “Your Response is Required by Law” to encourage participation.<sup>46</sup> Likewise, the abstract itself is categorized in a larger document under the heading of “Issues in Survey Non-Response.”<sup>47</sup> Federal law requires a number of research surveys (as discussed above), even if responses to those surveys are not always required by law.

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<sup>41</sup> *Id.*

<sup>42</sup> *See* Petition at 11.

<sup>43</sup> *Id.*

<sup>44</sup> Joe Shields Comments at 7.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; *see also* American Association for Public Opinion Research, 2012 Conference Abstracts, at 68-69, *available at* <http://bit.ly/1FpT4mT> (last visited Jan. 7, 2015) (“AAPOR Conference Abstracts”).

<sup>47</sup> *See* AAPOR Conference Abstracts at 68.

For the reasons discussed above and in RTI's Petition, the Commission should confirm that the TCPA does not restrict research survey calls made by or on behalf of the federal government.

Respectfully submitted,

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January 12, 2015

**Congress of the United States**  
**Washington, DC 20515**

January 8, 2014

The Honorable Tom Wheeler  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Dear Chairman Wheeler:

We write to request the Federal Communications Commission (“FCC”) declare the Telephone Consumer Protection Act (“TCPA”) does not restrict research survey calls made by or on behalf of the federal government.

In 1991, TCPA was enacted by Congress to address a growing concern over telemarketing calls and certain practices found to be an invasion of consumer privacy. It includes a number of provisions that make it unlawful for a “person” to use automated telephone systems to place certain types of calls, including calls to wireless telephone numbers. Unfortunately, this law is now being applied inappropriately by those who claim that its provisions restrict research survey calls placed by or on behalf of the federal government. One nonprofit organization, RTI International, has already been sued by a litigant who claimed that the research survey calls it placed on behalf of federal agencies violated the TCPA. Similar suits may follow.

The goal of the TCPA has never been to impede communications from the federal government, especially those that gather data for important government research. The Communications Act defines a “person” as an “individual, partnership, association, joint-stock company, trust or corporation,” and federal government agencies fall outside the plain meaning of each of these terms. The Supreme Court has repeatedly held that the term “person” does not include sovereign entities, and the FCC’s own regulations implementing the TCPA that apply to a “person or entity” similarly exclude the United States.

Without clarification, additional litigation may threaten policymakers’ access to important data, much of which is statutorily mandated. This would reduce the likelihood of informed public policy decisions and make it harder for lawmakers to effectively allocate limited government resources.

Therefore, we respectfully urge the FCC to grant RTI International’s Petition for Expedited Declaratory Ruling (CG Docket No. 02-278) and confirm that the TCPA does not restrict research survey calls made by or on behalf of the federal government. These efforts, which help advance the public interest, should not be impeded by the misapplication of a federal statute enacted to address a completely different type of calling activity.

Sincerely,



DAVID PRICE  
Member of Congress



G.K. BUTTERFIELD  
Member of Congress



RENEE ELMERS  
Member of Congress