

May 6, 2016

VIA ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWA325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
CG Docket No. 02-278**

Dear Ms. Dortch:

On May 4, 2016, Mark W. Brennan of Hogan Lovells US LLP, counsel to RTI International (“RTI”), spoke by telephone with Mark Stone from the Commission’s Consumer and Governmental Affairs Bureau to discuss RTI’s pending Petition for Expedited Declaratory Ruling (“Petition”).¹ In the Petition, RTI asks the Commission to confirm that the Telephone Consumer Protection Act (“TCPA”)² does not restrict research survey calls made by or on behalf of the federal government.³

As detailed in the record, the plain language of the TCPA and the Commission’s TCPA rules demonstrates that the TCPA does not apply to research survey calls by or on behalf of the federal government.⁴ Both restrict only “persons” from certain calling activities,⁵ and the federal government is not a “person” as defined in the Communications Act (in which the TCPA is codified).⁶ Moreover, the Supreme Court has repeatedly held that “the term ‘person’ does not include the sovereign” and that “statutes employing the [term] are ordinarily construed to exclude it.”⁷

¹ See RTI, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 29, 2014) (“RTI Petition”).

² 47 U.S.C. § 227.

³ See RTI Petition at 1.

⁴ See, e.g., Letter from Mark W. Brennan, Counsel, RTI, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed June 11, 2015); RTI Petition at 5-8.

⁵ See 47 U.S.C. § 227(b)(1); 47 C.F.R. § 64.1200(a).

⁶ See 47 U.S.C. § 153(39).

⁷ *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 *U.S. v. Cooper Corp.*, 312 U.S. 600, 604 (1941)); see also, e.g., *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 745 (2004); *U.S. v. Mine Workers*, 330 U.S. 258, 275 (1947).

Meanwhile, the Supreme Court's decision in *Campbell-Ewald Co. v. Gomez* supports the position that a federal government contractor that "performs as directed" is, like the federal government and its agencies, "not subject to the TCPA's prohibitions" with respect to its contracted activities.⁸ As the Supreme Court explained, federal government contractors who act on behalf of the United States "obtain certain immunity in connection with work which they do pursuant to their contractual undertakings."⁹ Consistent with the *Gomez* decision, such contractors should be protected against liability when they do not violate the federal government's "explicit instructions."¹⁰

During the meeting, I explained how autodialed or prerecorded calls are well within the scope of a contract to conduct federal research surveys absent "explicit instructions" to the contrary. RTI typically establishes a relationship with a federal entity through a request for proposal ("RFP") process and subsequent contractual agreement.¹¹ In some cases, the Office of Management and Budget ("OMB") also reviews and approves RTI's proposed calls and protocols.¹² The agreements between RTI and the federal entities often contemplate – and in some cases, require – certain calling activities even though they are not mentioned expressly in the contracts.

Thus, a federal government contract does not need to expressly discuss calling technologies or consent for calls placed under it to be placed "on behalf of" the federal government. For example, some federal research surveys conducted by RTI require random number sampling¹³ and must include wireless subscribers to yield usable and reliable data – the percentage of "wireless only" households is much greater for certain demographics and varies substantially across states.¹⁴ In addition, some federal research surveys require the use of computer-assisted technology for quality assurance.¹⁵ Generally, the contracts to conduct these surveys may require "calls" but may not expressly address the technologies that are to be used to place those calls. It is important for the FCC to clarify that calls made pursuant to these and similar contracts are "on behalf of" the federal entity, absent "explicit instructions" to the contrary, regardless of the technology used.

We discussed how the FCC can use its authority under the Communications Act and the TCPA to not only interpret the applicability of the TCPA to calls "on behalf of" the federal

⁸ See *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666, 672 (s2016).

⁹ *Id.* at 672.

¹⁰ *Id.* at 666, 672.

¹¹ See, e.g., Letter from Mark W. Brennan, Counsel, RTI, to Marlene H. Dortch, Secretary, FCC, CG Docket No 02-278, at 2 (filed Mar. 11, 2016) ("RTI March 11, 2016 Letter").

¹² See, e.g., Petition at 4; Office of Management and Budget, *Notice of Action* (June 10, 2013) <http://www.reginfo.gov/public/do/DownloadNOA?requestID=250551>.

¹³ For example, the National Intimate Partner and Sexual Violence Survey ("NISVS") is conducted by RTI and requires random number sampling. See, e.g., RTI Petition at 4-5; RTI March 11, 2016 Letter at 2. In two previous filings, RTI indicated that the National Survey on Drug Use and Health ("NSDUH") and National Survey of Child and Adolescent Well-Being ("NSCAW") also require random number sampling. See RTI March 11, 2016 Letter at 2; Letter from Mark W. Brennan, Counsel, RTI, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (filed Apr. 15, 2016). In fact, the NSDUH and NSCAW do not require random number sampling.

¹⁴ See, e.g., RTI March 11, 2016 Letter at 2.

¹⁵ See, e.g., Letter from Mark W. Brennan, Counsel, RTI, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Mar. 6, 2015).

government, but also to clarify what “on behalf of” means in that context and provide examples of calls that are placed “on behalf of” the federal government (e.g., RTI’s research survey calls made pursuant to contracts with the federal government).¹⁶ The FCC also has sufficient authority under the Communications Act and the TCPA to determine the appropriate “tests” for whether calls are “on behalf of” the federal government, as well as when each such test should be used.

There is a detailed, robust factual record before the Commission regarding research survey calls made pursuant to contracts with the federal government, and the FCC can specifically find that such calls are placed “on behalf of” the federal government.¹⁷ For other calls not detailed in the record, the FCC can find that such calls are “on behalf of” the federal government as long as they meet common law principles of agency. Importantly, the FCC does not need to take the same exact approach here that it did in the *2013 Dish Order* for vicarious liability¹⁸ – this is not a vicarious liability situation.

Pursuant to Section 1.1206(b) of the Commission’s rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Respectfully submitted,

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¹⁶ See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Second Order on Reconsideration, 20 FCC Rcd 3788 ¶¶ 28-31 (2005) (determining the circumstances under which calls by for-profit entities are, and are not, considered “on behalf of” tax-exempt nonprofit organizations).

¹⁷ For example, the FCC can find that calls are “on behalf of” a federal entity whenever: (1) the caller is under contract with the federal entity; (2) the contract includes calling activities (e.g., research surveys, government notifications or alerts, calls that notify applicants to a federal agency program that their submissions have been accepted or approved); (3) the content of the call is within the scope of the contract; and (4) the caller is not acting contrary to the government’s “explicit instructions.” Such calls are also within the scope of the contract with the federal entity, regardless of the technology used.

¹⁸ See *The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, Declaratory Ruling, 28 FCC Rcd 6574 (2013) (“*2013 Dish Order*”).