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May 24, 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 24, 2016, Mark W. Brennan and Wesley B. Platt of Hogan Lovells US LLP, counsel to RTI International (“RTI”), met telephonically 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 RTI and others have previously explained,⁴ 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.⁵ 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.”⁶ Consistent with the *Gomez* decision, such contractors should be protected against liability when they do not violate the federal government’s “explicit instructions.”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 May 23, 2016); Letter from Joshua M. Bercu, Counsel, Broadnet Teleservices LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed Feb. 29, 2016).

⁵ See *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666, 672 (2016).

⁶ *Id.* at 672.

⁷ *Id.* at 666, 672.

In particular, autodialed or prerecorded calls are well within the scope of a contract to conduct federal research surveys absent “explicit instructions” to the contrary. For example, RTI typically establishes a relationship with a federal entity through a request for proposal (“RFP”) process and subsequent contractual agreement.⁸ The Office of Management and Budget (“OMB”) also reviews and approves some of RTI’s proposed calls and protocols.⁹ 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.

It is important for the FCC to indicate that calls made pursuant to these and similar contracts are within the scope of the agency relationship with the federal entity regardless of the technology used to place the calls, absent “explicit instructions” to the contrary. For example, some federal research surveys conducted by RTI require random number sampling¹⁰ 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.¹¹ In addition, some federal research surveys require the use of computer-assisted technology for quality assurance.¹² The contracts to conduct such surveys often require “calls” but may not expressly address consent or the technologies that are to be used to place those calls.

During the meeting, we discussed the need for the FCC to identify examples of calls that are within the scope of an agency relationship with the federal government (e.g., RTI’s research survey calls made pursuant to contracts with federal agencies). There is a detailed, robust factual record before the Commission regarding research survey calls made pursuant to contracts with the federal government. The FCC should specifically find that such calls are within the scope of the agency relationship with the federal government or are otherwise granted the protections discussed in *Gomez*.¹³ Importantly, the FCC should confirm that, absent “explicit instructions” to the contrary from the federal government, the technology used to place a call does not take the call outside of the scope of the agency relationship between the federal government and the contractor.

⁸ 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”).

⁹ 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>.

¹⁰ 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.

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

¹² See, e.g., Letter from Mark W. Brennan, Counsel, RTI, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Mar. 6, 2015).

¹³ For example, the FCC can find that calls are within the scope of the caller’s agency relationship with a federal entity or are otherwise granted the protections discussed in *Gomez* when: (1) the caller is under contract with the federal entity; (2) the contract includes calling activities (e.g., research survey calls, government notifications or alerts, or calls that confirm that an application to a federal program has 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 agency relationship with the federal entity, regardless of the technology used.

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,

/s/ Mark W. Brennan
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cc: Mark Stone