

FCC Issues Declaratory Ruling That the Federal Government and Contractors Acting Within Agency Scope Are Not Subject to the TCPA

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On July 5, 2016, the FCC issued a [Declaratory Ruling](#) in which it determined that the Telephone Consumer Protection Act (TCPA) “does not apply to calls made by or on behalf of the federal government in the conduct of official government business, except when a call made by a contractor does not comply with the government’s instructions.” The Commission based the decision upon its finding that the federal government is not a “person” as defined in section 227(b)(1) of the Communications Act, and therefore is outside the TCPA’s scope. The order specifically responds to petitions filed by three government contractors seeking such a ruling. The Commission further noted that its conclusion was bolstered by the Supreme Court’s recent ruling in *Campbell-Ewald Co. v. Gomez*, in which the Court held that derivative sovereign immunity may be available for government contractors under certain circumstances.

Background – The Petitions for Declaratory Ruling

The FCC’s declaratory ruling grants three petitions by government contractors seeking a statement by the FCC as to the TCPA’s applicability to calls made by or on behalf of the federal government. The petitioners are as follows:

- **RTI International** – RTI is a nonprofit organization that places survey research calls on behalf of federal government agencies, including the Centers for Disease Control. Its petition sought a declaratory ruling that the TCPA does not apply to research survey calls made by or on behalf of the federal government because the TCPA restricts calls made by a “person,” and federal government agencies fall outside the definition of “person” in the Communications Act.
- **National Employment Network Association** – NENA represents individual providers of employment services to beneficiaries receiving Social Security Disability Insurance and Supplemental Security Income payments due to a qualifying disability. Its members contract with the Social Security Administration (SSA) to “contact program-eligible beneficiaries to inform them about their options for returning to self-supporting employment.” NENA asked the Commission to clarify that, because its members’ contracts with the SSA require them to contact program-eligible beneficiaries, they “stand[] in the shoes” of the federal government and are “exempt from the TCPA’s restrictions on calls to wireless numbers.”
- **Broadnet Teleservices, LLC** – Broadnet is a provider of a technology platform that “enables members of government to communicate with citizens” (e.g., through a telephonic town hall). To alleviate concerns that Broadnet might need to obtain prior express consent from each

recipient of a call on a wireless phone, the company sought clarification that (1) federal, state, and local government entities do not meet the definition of “person” for TCPA purposes when the government and government officials are acting for official purposes, and (2) the TCPA does not apply to service providers working on behalf of government entities and officials.

In the declaratory ruling, the Commission generally found that calls of the type described in these three petitions would not be subject to the TCPA, but emphasized that, consistent with the Supreme Court’s [recent decision in *Campbell-Ewald v. Gomez*](#), “a call placed by a third-party agent will be immune from TCPA liability only where (i) the call was placed pursuant to authority that was ‘validly conferred’ by the federal government, and (ii) the third party complied with the government’s instructions and otherwise acted within the scope of his or her agency, in accord with federal common-law principles of agency.”

The Definition of a “Person” Under the TCPA

The Commission explained that section 227(b)(1) generally prohibits “any person within the United States, or any person outside the United States if the recipient is in the United States” from placing autodialed or prerecorded or artificial-voice calls to wireless telephone numbers without the recipients’ prior express consent. However, a “person” is defined under this section as including “an individual, partnership, association, joint-stock company, trust, or corporation.” The Commission concluded that because the term “person” did not expressly include the federal government, the prohibitions under this section do not apply to federal government agencies. It further determined that “subjecting the federal government to the TCPA’s prohibitions would significantly constrain the government’s ability to communicate with its citizens ... and to collect data necessary to make informed public policy decisions.” However, the Commission was clear that its interpretation applies only to the restrictions on autodialed and prerecorded calls under section 227(b)(1), and not necessarily references to “person” in other sections of the TCPA (i.e., regarding fax advertisements).

The declaratory ruling also states that “the term ‘person’ in section 227(b)(1) does not include a contractor when acting on behalf of the federal government, as long as the contractor is acting as the government’s agent in accord with the federal common law of agency.” The Commission asserted that this conclusion is reasonable because “[i]f the TCPA were interpreted to forbid third-party contractors from making autodialed or artificial- or prerecorded-voice calls on behalf of the government, then, as a practical matter, it would be difficult (and in some cases impossible) for the government to engage in important activities on behalf of the public.”

Concerns from the Commissioners

Despite adopting the declaratory ruling, three of the five Commissioners issued separate statements regarding the item in which they raised unique concerns about the implications of the decision.

First, Commissioner Jessica Rosenworcel pointed out that the Commission currently is in the process of adopting rules to implement the government debt collection exemption to the TCPA enacted as part of the 2015 Bipartisan Budget Act. She noted in her concurring statement “in effect, we prejudge the outcome of our narrower proceeding under the Bipartisan Budget Act by here providing a blanket exemption from the Telephone Consumer Protection Act to the federal government and its agents.”

Second, Commissioner Ajit Pai dissented in part from the ruling based on the Commission’s determination that “federal contractors are not persons under the TCPA.” According to Commissioner Pai, the Commission’s interpretation contradicts the plain meaning of the statute, and “it is odd to

suggest that a contractor's status as a 'person' could switch on or off depending on one's behavior or relationship with the federal government."

Finally, Commissioner Michael O'Rielly said in his statement that "[i]t is frustrating ... that Federal agencies will be exempt but the Commission leadership left unanswered whether state or local agencies may be subject to TCPA lawsuits."