

FCC Clarifies That Government Contractors Must Obtain Prior Express Consent Under the TCPA

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On December 14, 2020, the Federal Communications Commission (FCC or Commission) released an Order on Reconsideration (Order) clarifying that federal, state, and local contractors must obtain prior express consent from consumers before making robocalls under the Telephone Consumer Protection Act (TCPA). Specifically, the Order concludes that such contractors are “persons” under the statute and are therefore subject to its restrictions on robocalling. Similarly, the Commission finds that local governments are also “persons” and must obtain consent before placing calls that would otherwise have violated the TCPA. In contrast, the Commission determines that due to their sovereignty under the U.S. Constitution, federal government and state governments are exempt from the TCPA’s prior express consent requirement. In so doing, the Commission partially reversed the *Broadnet Declaratory Ruling (Broadnet)*, partially granted the National Consumer Law Center (NCLC) Petition, and denied the Professional Services Council (PSC) Petition, both described in more detail below. The FCC lauds this decision as the latest in a series “of significant steps to combat unwanted calls by empowering consumers and voice service providers to block them.”

This action comes amongst a flurry of TCPA developments over the past 6 months, including (1) the Supreme Court decision invalidating of the government debt-collection exception; (2) the P2P Declaratory Ruling; and (3) the recent autodialer SCOTUS oral arguments. The Order significantly impacts government contractors, who are made subject to the TCPA’s consent restrictions. However, government contractors may still interpose a derivative sovereign immunity

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Background

The TCPA requires that “any person” making autodialed or prerecorded/artificial voice robocalls under the TCPA obtain prior express consent from consumers.¹ After receiving petitions for clarification from three stakeholders between 2014 and 2015 concerning the definition of the term “person,” the Commission concluded in its 2016 *Broadnet Declaratory Ruling* that the term “person” does not include the federal government. Accordingly, under *Broadnet*, federal government officials acting in their capacity did not need to obtain express consent before making calls regulated under the TCPA. Moreover the *Broadnet Declaratory Ruling* found that federal government contractors were immune from the TCPA “when the contractor has been validly authorized to act as the government’s agent and is acting within the scope of its contractual relationship with the government, and the government has delegated its prerogative to make autodialed or prerecorded- or artificial-voice calls to communicate with its citizens.”² Specifically, the Commission concluded that federal government contractors’ TCPA exemption is based on the agency rule that “when a principal is privileged to take some action, an agent may typically exercise that privilege on a principal’s behalf.”³ The *Broadnet Declaratory Ruling* did not address calls made by state or local governments or their contractors.

Following the consequential *Broadnet Declaratory Ruling*, NCLC and PSC each filed petitions seeking reconsideration. The NCLC Petition argued that, among other things, federal contractors are “persons” under the TCPA and that the *Broadnet Declaratory Ruling* misinterpreted the Supreme Court’s holding in *Campbell-Ewald Co. v. Gomez* on that point.⁴ The PSC Petition took issue with the *Broadnet Declaratory Ruling* to the extent that it required federal government contractors to meet an agency requirement to invoke TCPA immunity when making calls. Specifically, the PSC Petition asked the Commission to provide TCPA immunity to federal contractors “without regard for whether a common-law agency relationship exists” because “government contractors acting on behalf of the federal government and in accordance with the terms of a contract often are not considered agents of the government.”⁵ After seeking renewed comment on both petitions in 2018,⁶ the Commission issued this recent Order, which is briefly summarized below.

Federal Contractors are Subject to the TCPA

The Order concludes that a federal government contractor is a “person” because the TCPA’s definition includes an “individual, partnership, association, joint-stock company, trust, or corporation.”⁷ Reasoning that a contractor always falls into one of these definitional categories, the Order notes that federal contractors may either obtain express consent to make calls regulated under the TCPA, or may invoke derivative immunity through federal common law principles. Although the Order acknowledges that requiring a government contractor to establish immunity or exemption “imposes some burden,” it concludes that the burden is outweighed “by increasing the effectiveness of TCPA privacy right protections.”⁸

The Order rejects arguments opposing the NCLC Petition on the basis that the decision will impair robocalls made by federal government contractors seeking to inform citizens. Rather, the Order argues that Congress “already weighed the balance between the privacy rights the TCPA is designed to protect and the ease and

cost of robocalling” and would have included an exemption for federal contractors if it intended to do so.⁹ Additionally, the Order notes that the TCPA explicitly exempts emergency calling, which constitutes the most critical calls that the government can make.

Moreover, the Order states that government contractors should be able to avoid TCPA liability if they are not the maker of the calls. For example, Broadnet provides “telephone town hall” calls on behalf of government callers. The Order clarifies that the Commission will determine the maker of the call on a case-by-case basis that analyzes the totality of the circumstances to determine “(1) who took the steps necessary to physically place the call; and (2) whether another person or entity was so involved in placing the call as to be deemed to have initiated it.”¹⁰ The Order notes that other relevant factors for making this determination include who determines: the message content, the recipients, and the timing of when the message is sent, among other factors.

State Governments – But Not State Contractors – Are Exempt from the TCPA

The Order also concludes that state government officials “in the conduct of official business” do not constitute “persons” under the TCPA.¹¹ The Order makes clear that this exemption does not extend to state officials making reelection campaign calls.¹² Similar to its rationale related to federal contractors, the Order concludes that state contractors are “persons” that must either obtain express consent or meet a statutory exemption to the TCPA. Although the Commission’s *Broadnet Declaratory Ruling* did not address state officials or contractors, the Order reasons that the TCPA and the Communications Act do not define state governments as “persons”; the legislative history of the TCPA implies that Congress did not intend to define state governments as “persons”; and “subjecting state governments to the TCPA’s prohibitions when conducting official business would significantly constrain their ability to communicate with their citizens.”¹³

Local Governments and Their Contractors Are Not Exempt from the TCPA

The Commission reasons that local governments, unlike federal and state governments, are considered “persons” under the TCPA because they are not “sovereign entities” as defined by the Supreme Court.¹⁴ Therefore, the Order notes that because local governments are not sovereign entities, they are not “subject to an interpretative presumption” that they are not “persons.”¹⁵ Additionally, the Order makes several arguments that the policy goals and the legislative history of the TCPA support treating local governments as “persons:”

- Local governments fall under the TCPA’s definition of “person” because the law has long treated local political entities, such as cities or towns, as municipal corporations. Further, municipal corporations, like private corporations, are not immune from suit.
- The TCPA does not explicitly exclude local governments, and Congress would have done so if it intended to because of the “common understanding of local government entities as corporations and not sovereign entities.”¹⁶
- To the extent that the TCPA’s definition of the word “person” is ambiguous, the “underlying goals and legislative history” of the statute demonstrate that Congress intended for local governments to be subject to its restrictions.¹⁷ Furthermore, the Commission notes that it interprets any ambiguity under the

TCPA to the benefit of the consumer.

Finally, the Order argues that the decision is also consistent with the Commission's ruling in the *Blackboard Declaratory Ruling*, which concluded that school callers making autodialed calls to parents were exempt from the TCPA when the subject of the call is related to matters "closely related to the school's mission."¹⁸ The Order reasons that this exemption would have been unnecessary if local governments were not subject to the TCPA. Further, the Commission clarifies that like federal and state contractors, local governments and their contractors may avail themselves of one of the TCPA's statutory exemptions to the consent requirement.

For more information about the Commission's Order on Reconsideration, or any of the many proceedings in this evolving and complex area, please reach out to a member of our team. We have a deep and experienced robocalling and robotexting bench. Our experts handle federal and state policy issues; compliance with federal and state requirements; complex TCPA issues, including political and charitable outreach; and TCPA enforcement actions and investigations.

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

2 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC Petition for Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd 7394, 7402, ¶ 17 (2016) (Broadnet Declaratory Ruling).

3 *Id.* n.79.

4 *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016); NCLC Petition at 2-3.

5 PSC Petition at 2-3.

6 *Consumer and Governmental Affairs Bureau Seeks Comment on Professional Services Council Petition for Reconsideration of FCC's Broadnet Declaratory Ruling*, CG Docket No. 02-278, 31 FCC Rcd 8931 (2016); *Consumer and Governmental Affairs Bureau Seeks Comment on National Consumer Law Center Petition for Reconsideration of FCC's Broadnet Declaratory Ruling*, CG Docket No. 02-278, 31 FCC Rcd 8725 (2016).

7 47 U.S.C. §§ 153(39), 227(b)(1); Order ¶ 14.

8 Order ¶ 15.

9 Order ¶ 17.

10 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7980-81, ¶ 30 (2015).

11 Order ¶ 22.

12 Order ¶ 26.

13 Order ¶¶ 22-25.

14 The U.S. Constitution establishes a system of dual sovereignty between the federal and state governments. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

15 Order ¶ 29.

16 Order ¶ 31.

17 Order ¶ 32.

18 *Blackboard, Inc. Petition for Expedited Declaratory Ruling, Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd 9054 (2016) (*Blackboard Declaratory Ruling*).