



FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter I

[CG Docket No. 02-278; FCC 20-182; FRS 17356]

Government and Government Contractor Calls Under the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Adjudicatory ruling.

SUMMARY: In this document, the Commission finds that state government callers, like federal government callers, are not “persons” for purposes of the Telephone Consumer Protection Act (TCPA) because they are sovereign entities. The Commission also clarifies that a local government caller is a “person” subject to the TCPA. On reconsideration of the *Broadnet Declaratory Ruling*, the Commission reverses its previous order to the extent that it provided that a contractor making calls on behalf of the federal government was not a “person” subject to the restrictions of the TCPA. The Commission also clarifies that a state or local government contractor, like a federal government contractor, is a “person” and thus not exempt from the TCPA’s restrictions. This action was taken in response to petitions that sought clarification of these issues and removes any uncertainty on when governmental callers or contractors making calls on their behalf are required to obtain the prior express consent of called parties.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Order on Reconsideration, document FCC 20-182, released on December 14, 2020. The full text of document FCC 20-182 is available online at <https://docs.fcc.gov/public/attachments/FCC-20-182A1.pdf>. To request this document in accessible formats for people with disabilities (*e.g.*, Braille, large print, electronic files, audio format) or to request reasonable accommodations (*e.g.*, accessible format documents, sign language

interpreters, CART), send an email to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice).

SYNOPSIS

1. On reconsideration of the *Broadnet Declaratory Ruling*, the Commission reverses its previous order to the extent that it provided that a contractor making calls on behalf of the federal government was not a “person” subject to the restrictions in section 227(b)(1) of the TCPA. The Commission also clarifies that a state government caller making calls in the conduct of official government business is not a “person” subject to section 227(b)(1) of the TCPA, while a state or local government contractor, like a federal contractor, is a “person” and thus not exempt from the TCPA’s restrictions. Finally, the Commission clarifies that a local government is a “person” subject to the TCPA. As such, the Commission grants in part the National Consumer Law Center (NCLC) petition for reconsideration, denies the Professional Services Council (PSC) petition for reconsideration, reverses the Commission’s *Broadnet Declaratory Ruling* in part, and grants in part and denies in part Broadnet’s petition for declaratory ruling.

A. Federal Contractors are Subject to Section 227(b)(1) of the TCPA

2. The Commission finds that a federal government contractor is a “person” under section 227(b)(1). The term “person” as used in the TCPA and defined in the Communications Act (Act) expressly includes an “individual, partnership, association, joint-stock company, trust, or corporation” “unless the context otherwise requires.” Every federal contractor, including those acting as agents, falls within one of these categories. And, unlike the federal government itself, there is no longstanding presumption that a federal contractor is not a “person.” Nor does the Commission find any “context that otherwise requires” it to ignore the express language of the Act’s definition of the term “person” in this situation. Absent any applicable presumption to the contrary, the express definition of “person” as contained in the Act is controlling.

3. Federal government contractors may obtain consumers’ prior express consent to make calls covered by the TCPA. Such contractors may also qualify for forms of derivative immunity when making calls on behalf of the federal government—the Commission does not alter or impair the ability of contractors to invoke derivative immunity from liability when making calls on behalf of the federal

government.

4. In this document, the Commission finds that it incorrectly applied precedent on agency to federal government-contractor relationships in the *Broadnet Declaratory Ruling*. Specifically, the Commission grounded its decision in the *DISH Declaratory Ruling*, which pertained to a *non-governmental* “person” subject to the TCPA and whether it is vicariously liable for the actions of its *non-governmental* agents. As a result, the Commission finds that precedent does not bear on the issues here—which callers are TCPA “persons”—but instead involved principals and agents that were undoubtedly “persons.”

5. *Maker of the Call*. In this document, the Commission finds that a federal contractor may be able to avoid liability under the TCPA if it is not the “maker of the call.” The Commission previously clarified that a caller may be found to have made or initiated a call in one of two ways: first, by “tak[ing] the steps necessary to physically place a telephone call”; and second, by being “so involved in the placing of a specific telephone call as to be directly liable for making it.” The Commission stated that, in determining the maker of the call, it would consider “the totality of the facts and circumstances surrounding the placing of a particular call 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, considering the goals and purposes of the TCPA.”

6. In this document, the Commission states that it will continue to apply this analysis to assess TCPA liability of parties, including government contractors, on a case-by-case basis. Based on these fact-specific criteria, Broadnet states that its “government customers, and not Broadnet, make all decisions regarding whether to make a call, the timing of the call, the call recipients, and the content of the call.” It further states that its “government customer takes the steps physically necessary to initiate a telephone town [hall] call,” while Broadnet’s role is to “manage the technical aspects of the service and to ensure that its customers do not use the platform unlawfully.”

7. The Commission finds that Broadnet is not the maker of the call, but rather that Broadnet’s government client is the maker of the call because that government client is so involved in placing the call as to be deemed to have initiated it.

B. State Governments and State Government Contractors

8. The Commission clarifies that state government callers in the conduct of official business likewise do not fall within the meaning of “person” in section 227(b)(1), while state contractors, like their federal counterparts, are “person[s]” under that provision. As the Commission has noted, there is a “longstanding interpretive presumption” that the word ‘person’ does not include the sovereign . . . [except] upon some affirmative showing of statutory intent to the contrary.” The Supreme Court has confirmed that this presumption is applicable to state governments. Moreover, neither the TCPA nor the Communications Act defines “person” to include state governmental entities.

9. This clarification is limited to calls made by state government callers in the conduct of official business and does not exempt other types of calls made by state officials, such as those related to campaigns for re-election. Nevertheless, the Commission encourages state governments to make efforts to honor consumer requests to opt out of such exempted calls to minimize any consumer privacy implications.

10. The Commission states that it is limiting its interpretation of “person” as excluding state governments to the specific statutory provision before it: section 227(b)(1) of the TCPA. As in the *Broadnet Declaratory Ruling*, the Commission makes no finding with respect to the meaning of “person” as used elsewhere in the Act.

11. For the same reasons the Commission found federal contractors are “persons” under section 227(b)(1) of the TCPA, the Commission now finds that contractors acting on behalf of state governments are likewise “persons.” Such contractors fall within the express language of the Communications Act’s definition of “person” and it finds no compelling argument to the contrary. As with federal contractors, this ruling leaves it to the courts to apply the body of existing immunity law to state contractors and to make determinations of derivative immunity on a case-by-case basis.

C. Local Governments and Local Government Contractors

12. The Commission clarifies that local government entities, including counties, cities, and towns, are “persons” within the meaning of section 227(b)(1) and are, therefore, subject to the TCPA. Specifically, the Commission finds that the definition of “person” encompasses local governments

because they are not sovereign entities and have generally been treated as persons subject to suit. In addition, the Commission finds that, even if the definition of “person” is ambiguous as applied to local governments, the underlying policy goals and legislative history of the TCPA support a finding that TCPA restrictions apply to local government entities.

13. The law has long recognized that a municipal corporation is a local political entity, such as a city or town, formed by charter from the state. Municipal corporations, like private corporations, have been “treated alike in terms of their legal status as *persons* capable of suing and being sued.” “The archetypal American corporation of the eighteenth century [was] the municipality,” and local governments generally are incorporated under state law and operate pursuant to a charter outlining their incorporation. The Commission further notes that all states have adopted some form of municipal corporate structure and that the federal government often treats incorporated and non-incorporated areas similarly.

14. The Commission finds that the lack of any clear indication that Congress intended to exclude local governments from the TCPA is evidence that Congress intended such government entities to fall under its purview.

15. The Commission further finds that the underlying goals and legislative history of the TCPA separately show that Congress intended local governments to be subject to the law’s restrictions. Congress’ intent to prohibit nuisance calls to consumers is instructive in the Commission’s interpretation of any ambiguity within the statute. Because of Congress’ clear intent to protect consumers, the Commission interprets any ambiguity to the benefit of the consumer.

16. The Commission also clarifies that a local government contractor is a “person,” as that term is used in section 227(b)(1) of the TCPA. Because local governments and their contractors are “persons,” they are subject to section 227(b)(1) of the TCPA and must abide by the requirements contained therein, including obtaining prior express consent when making autodialed or artificial or prerecorded voice calls to certain types of telephone numbers such as wireless numbers.

17. As with other “persons” subject to the TCPA, local governments and their contractors may avail themselves of the TCPA’s exemptions to the prior express consent requirement, such as calls

made for “emergency purposes.” Nothing in the Commission’s decision impedes the ability of local governments or contractors to make emergency calls to wireless telephone numbers when such calls are necessary to protect the health and safety of citizens. The Commission has recently confirmed, for example, that government officials and public health care authorities, as well as a person under the express direction of such organizations and acting on its behalf, can make automated calls directly related to the imminent health or safety risks arising out of the COVID-19 pandemic without the prior express consent of the called party.

Federal Communications Commission.

Marlene Dortch,
Secretary, Office of the Secretary.

Editorial Note: The Office of the Federal Register received this document on December 28, 2020.

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