



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection
Division of Marketing Practices

August 3, 2011

Filed Electronically

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation, Federal Trade Commission, CG Docket
No. 11 - 50, Dish Network, LLC Petition for Declaratory Ruling
Concerning The Telephone Consumer Protection Act

Dear Ms. Dortch:

The undersigned hereby provides notice as required by Section 1.1206 of the Federal Communications Commission's ("FCC" or "Commission") rules that on August 1, 2011, Lois Greisman, Associate Director of the Division of Marketing Practices, Laura Kim, Assistant Director of the Division of Marketing Practices, and Russell Deitch, staff attorney with the Federal Trade Commission ("FTC"), met with Kurt Schroeder and Karen Johnson of the Commission's Consumer and Governmental Affairs Bureau and Laurence Bourne of the Commission's Office of General Counsel.

FTC staff began the meeting by discussing the importance of the Telephone Consumer Protection Act ("TCPA") and its implementing regulations, and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") and its implementing regulations, the Telemarketing Sales Rule ("TSR"). These laws and regulations advance the substantial government interest of protecting individuals' privacy in their homes, and protecting consumers against the risk of abusive telephone solicitations. FTC staff also noted that consumers have sought these protections in massive numbers – more than 200 million telephone numbers have been placed on the National Do Not Call Registry.

FTC staff reiterated the principle that a seller should be held liable even where another entity actually placed the phone call. In support of this position, the FTC staff pointed out that in 1995, the FCC itself stated in a Memorandum Opinion and Order that "rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations."¹ Additionally, FTC staff emphasized that the TCPA and its accompanying regulation contain statutory causes of actions that are clear and unambiguous. FTC staff pointed out that all of the elements of a cause of action are already set forth in the statute and regulation.

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, memorandum Opinion and Order 10 FCC Rcd 12391, 12397 ¶ 13 (1995).

FTC staff also noted that the regulation includes a safe harbor in that those who make telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable if they meet certain specified criteria set forth in the regulations. 47 C.F.R. § 64.1200(c)(2). In sum, the statute and its regulations already have struck the appropriate fair balance. Sellers are initially on the hook for violations, but there is a well-defined safe harbor to avoid liability. This careful balancing of consumer protections and seller protections should not be disturbed.

FTC staff further stated that the FTC has brought a number of cases against sellers that did not physically place the phone calls, without importing agency or apparent agency principles. FTC staff emphasized the benefits of both agencies taking consistent legal approaches, and the rationale for doing so includes the fact that both agencies are enforcing telemarketing laws designed to protect consumers from the same harms, both agencies jointly enforce the Do Not Call Registry, and the similarities between the TCPA, the Telemarketing Act, and their regulations.

FTC staff also explained why neither agency law nor apparent agency law should be imported into the statute or regulations. Neither the TCPA nor its implementing regulations mention curbs on the activities of “agents” or “principals.” Instead, as pointed out earlier in the meeting, the TCPA creates a statutory cause of action with specific elements clearly set forth in the text. The FTC staff members also raised serious concerns over the problems that would arise with importing agency or apparent agency law into the statute. First, importing agency principles would make litigation more difficult, expensive, and time-consuming. Second, FTC staff also emphasized that the TCPA has a private right of action, and any change in the law would greatly increase costs to individual consumers seeking to protect themselves. Finally, the FTC staff warned that some companies may simply outsource their marketing to others, and structure the contractual relationships in such a way as to avoid a Court finding that these contracts amounted to agency or apparent-agency relationships. If allowed by the FCC, this would leave a huge loophole in the TCPA and implementing regulations that would lead to substantial consumer harm.

FTC staff additionally commented on the meaning of the phrase “on behalf of.” FTC staff strongly urged that the language should be interpreted according to its plain meaning. The plain meaning is “in the interest of,” or “as a representative of.”² This is consistent with a federal court’s ruling rejecting Dish Network’s motion to dismiss where the court found that the plain meaning of “on behalf of” is “an act by a representative of,” or “an act for the benefit of, another.”³

During the meeting, FCC staff members raised the theoretical issue of whether a supplier could be held liable for the TCPA violations of a “big box” store marketing the supplier’s product or service. FTC staff responded that the FCC might choose not to resolve all questions or issues that may arise under the TCPA, especially with respect to factual scenarios that are not before the

² *Merriam-Webster’s Dictionary*, available at <http://www.merriam-webster.com/dictionary>.

³ *United States and the States of California, Illinois, North Carolina and Ohio v. Dish Network, LLC*, Case No. 09-cv-3073, Order (C.D. Ill. Order of November 4, 2009).

agency. Secondly, at a minimum, as the FTC stated in its Reply Comment, calls are made “on behalf of” a seller whenever that seller: (1) enters into contracts directly with consumers who choose to purchase the seller’s goods or services in response to telemarketing; (2) provides its services directly to those consumers; (3) collects money for those services from its consumers; (4) receives continuing revenue from such consumers; (5) compensates those who market its goods or services; and (6) is in a position to monitor its telemarketers.⁴ Obviously, there may be cases in which calls are made “on behalf of” a seller even in the absence of one or more of these factors.⁵

The FTC also pointed out undesirable outcomes that could result if a strained interpretation is applied here, rather than relying on the obvious meaning, on its face, of language used in the TCPA and its implementing regulation. These include the following:

- Sellers could hire telemarketers that are judgment proof or that go out of business when sued, which leaves no effective remedy or deterrent impact;
- Sellers may hire telemarketers who spoof or hide their identities, which makes enforcement difficult or impossible;
- Suing one dealer at a time could result in a “whack-a-mole” problem, with new dealers springing up to replace those targeted by law enforcement, perpetrating the same violations through different entities;
- Rules designed to allow consumers to make entity-specific do not call requests could be rendered ineffective; and
- In a large network of marketers, it would be difficult and inefficient for the law enforcers to identify which marketers are violating the law.

The FTC further emphasized that sellers are in the best position to monitor and enforce compliance with the TCPA and its regulations. It is therefore appropriate to retain the legal burden upon them to do so. Finally, the FTC staff encouraged the FCC to act promptly on resolving any issues relating to the scope and extent of its interpretation of the TCPA and its related regulation.

Regards,

Russell Deitch
Attorney, Division of Marketing Practices

⁴*Reply Comment of the Federal Trade Commission*, CG Docket No. 11-50, page 2.

⁵ *Id.* The FTC is of the view that the FCC reasonably could conclude that the “on behalf of” language in the TCPA, as supported by its plain meaning and public policy considerations, creates strict liability limited by the safe harbor. *Reply Comment of the Federal Trade Commission*, CG Docket No. 11-50, n. 2. Sellers also have commercially available means to reduce their liability. They can, for example, enter into indemnification agreements. *Id.*

cc: Kurt Schroeder
Karen Johnson
Laurence Bourne