



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Division of Marketing Practices

October 20, 2011

Filed Electronically Only

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 Rules of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.1206. On October 18, 2011, Federal Trade Commission ("FTC") employees Lois Greisman, Associate Director of the Division of Marketing Practices, Roberto Anguizola, Assistant Director of the Division of Marketing Practices, and Russell Deitch, staff attorney, met with Kurt Schroeder, Karen Johnson and William Freedman of the FCC's Consumer and Governmental Affairs Bureau, and Jacob Lewis and Lawrence Bourne of the FCC's Office of General Counsel.

FTC staff discussed 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"), in advancing the substantial government interest of protecting individuals' privacy in their homes, and protecting consumers against the risk of abusive telephone practices. 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 also addressed the following question put forward in the FCC's Public Notice: "What should determine whether a telemarketing call is made 'on behalf of' a seller, thus triggering liability for the seller under the TCPA?" FTC staff indicated that the TCPA and its accompanying regulations form a statutory cause of action whose elements should be accorded their plain meaning. For example, the FCC should use the plain meaning of the term "on behalf of" in the TCPA Act which is "in the interest of," "as a representative of," or "for the benefit of." This interpretation appropriately places liability on the seller who benefits from the actions of others, including but not limited to, telemarketers and authorized dealers. In support of this interpretation, FTC staff quoted from the FCC's 1995 Memorandum Opinion and Order in which

the FCC said its “rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations.”¹

FTC staff also pointed out that all of the elements of a cause of action are already set forth in the statute and regulation and that the FCC need not read agency principles into the statute or rules. FTC staff noted that the regulations include 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 so doing, the statute and regulation strike a fair balance: Sellers initially are responsible for Do Not Call violations, but can avoid liability under a well-defined safe harbor.

FTC staff further noted that the TCPA, related regulations and common business practices strike a balance between protecting consumers from pre-recorded calls and imposing seller liability. The TCPA prohibits any person from initiating pre-recorded calls to residential phone lines without the express prior consent of the consumer.² 47 U.S.C. § 227(b)(1)(B). At the same time, however, sellers can limit their exposure by having an existing business relationship with the consumer, having prior express consent of the consumer, or entering into an indemnification agreement with the telemarketer to reimburse the seller for any penalties arising from violations.

FTC staff further stated the FTC has brought a number of cases against sellers that did not physically place the phone calls, and has not imported agency or apparent agency law. FTC staff emphasized the benefits of both the FCC and the FTC 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. Also, the similarities between the TCPA, the Telemarketing Act, and their related regulations favor a consistent approach.

FTC staff also raised specific concerns about the problems that likely would arise from importing agency or apparent agency law into the TCPA. These include:

- It would make litigation more difficult, expensive and time consuming for the States and the FCC, and perhaps create a particular hardship for private plaintiffs;
- Without clear and detailed guidance from the FCC, it leaves open the question as to what factors establish agency or apparent agency;
- It gives sellers a potential roadmap to avoid liability;

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

² Both sellers and telemarketers can initiate calls. For example, a seller placing calls through its employees initiates calls. Also, a seller can initiate a call by providing financial incentives, directly or indirectly, to a telemarketer or dealer, who physically places the call.

- Companies could outsource their marketing to others, and structure contractual relationships in such a way as to avoid a court finding that their dealers are agents;
- 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 when new dealers spring up in their place and engage in the same violations;
- 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 can be difficult and inefficient for the government to identify which of a seller's marketers are violating the law.

Alternatively, FTC staff discussed that should the FCC choose to incorporate agency principles into the TCPA, it should do so in a way that (1) advances the substantial privacy and consumer protection interests at issue, (2) takes into account the nature of telemarketing and the ways that violations occur, and (3) provides guidance for the courts. FTC staff noted that a rigid application of agency concepts such as control, direction, authority, manifestation, or ratification likely would pose enforcement challenges, particularly given the numerous marketing techniques in today's global marketplace.

Referring to *Goodman v. Federal Trade Commission*, 244 F.2d 584, 591 (9th Cir. 1957) and *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation*, 456 U.S. 556, 568 n. 6 (1982), FTC staff noted that courts have recognized it is acceptable to disregard common law definitions to advance the goal of a federal statute. As such, staff urged that any decision by the FCC to incorporate agency principles should advance the goals of the TCPA to protect consumer privacy and to protect consumers from abusive calls.³

By way of example, in discussing apparent authority and the Restatement's definition that "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations" Restatement (Third) of Agency § 2.03 (2006), FTC staff indicated that the FCC should provide clear guidance that the manifestation element is not limited to a situation where a seller communicated directly to a third party. Requiring direct communication between the principal

³ FTC staff further indicated that the FCC should provide clear guidance about the nature and scope of any agency principles it might refer to as relevant to its interpretation, noting that such guidance was important given its assertion of primary jurisdiction and the issues presented to it by two different courts.

and the third party may create a significant loophole in the TCPA whereby sellers with attenuated marketing structures and numerous authorized dealers could avoid liability for telemarketing violations solely because the seller did not speak directly with consumers. Such an approach would undermine consumer privacy.

Similarly, FTC staff noted that rigid application of any “ratification” requirement in determining whether sellers should be held liable could undermine the TCPA’s consumer protection goals. For example, FTC staff indicated that if a seller accepts customers or revenue from a marketing campaign that includes telemarketing violations, the seller should be found to have ratified the unlawful conduct connected to that marketing campaign. In that scenario, the seller benefits from the telemarketing campaign, and can best monitor for and bear the costs of any violations. FTC staff added that a rigid approach to ratification could enable a seller to argue it lacked knowledge of any violations and should not be held liable. As such, even though the seller is best situated to monitor its marketers’ activities and protect consumer privacy, it could employ an “ostrich defense” in an attempt to shield itself, which even if unsuccessful, would ultimately raise hurdles and costs to enforcing the law.

Finally, citing to its Reply comment, the FTC staff recommended that the FCC provide guidance to the courts about the nature and scope of seller liability under the TCPA if the FCC does not adopt the plain meaning of the statute.⁴ In addition to the factors identified in its Reply, FTC staff noted that another factor would include whether the telemarketer, dealer or person uses the seller’s trademark. The factors identified by the FTC are derived from agency law and public policy rationales. FTC staff noted that there may be cases in which a seller is liable for calls placed by another entity even in the absence of one or more of these factors, and that other factors may be applicable.

Regards,

s/Russell Deitch

Russell Deitch
Attorney, Division of Marketing Practices

cc: Kurt Schroeder
Karen Johnson
William Freedman
Jacob Lewis
Lawrence Bourne

⁴ The factors are whether: (1) a seller enters into contracts directly with consumers who choose to purchase the seller’s goods or services in response to telemarketing; (2) a seller provides its services directly to those consumers; (3) a seller collects money for those services from its consumers; (4) a seller receives continuing revenue from such consumers; (5) a seller compensates those who market its goods or services; and (6) the seller is in a position to monitor its telemarketers.