



**U.S. Department of Justice**

Consumer Protection Branch  
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October 25, 2011

*Filed Electronically*

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

Re: Notice of *Ex Parte* Presentation, U.S. Department of Justice, CG Docket No. 11-50, DISH Network, LLC Petition for Declaratory Ruling Concerning The Telephone Consumer Protection Act ("TCPA")

Dear Ms. Dortch:

This letter provides the notice required by Section 1.1206 of the Commission's rulings of an *ex parte* meeting between representatives of the U.S. Department of Justice ("DOJ") and representatives of the Federal Communications Commission ("FCC"). The DOJ attendees included Acting Deputy Assistant Attorney General for the Consumer Protection Branch Maame Ewusi-Mensah Frimpong, Consumer Protection Branch Director Michael Blume, Consumer Protection Branch Deputy Director Kenneth Jost, and Consumer Protection Branch trial attorneys Lisa Hsiao, Patrick Runkle, and Sang Lee. The FCC attendees were Sherrese Smith, Legal Advisor to Chairman Genachowski, William Freedman and Kurt Schroeder of the Consumer & Governmental Affairs Bureau, and Laurence Bourne and Jacob Lewis of the Office of General Counsel.

DOJ first established its position that the FCC should interpret the TCPA as imposing primary liability on a seller for illegal telemarketing calls made on its behalf by outside sales entities. DOJ contended that this position comports with the statutory language, with FCC's prior ruling that the dealer on whose behalf the illegal call or fax was sent is ultimately liable, and with the court decisions following this ruling. This position also advances the TCPA's policy of holding liable those who benefit from illegal telemarketing practices, thus incentivizing sellers and the outside entities that telemarket for them to comply with the law.

The meeting participants next addressed whether agency law has any role to play in interpreting the TCPA's liability provisions. DOJ stated that agency principles serve to ascribe liability in contract and tort law, and are ill-suited to the context of telemarketing statutory and regulatory violations. DOJ also mentioned that agency law is highly malleable and subjective in its application, which will lead to inconsistent adjudication in TCPA cases. Further, importing agency law into the TCPA would give sellers a roadmap for avoiding liability and encourage

them to design their relationships with outside sales entities so as to avoid making them agents. The direct result of this would be to discourage sellers from imposing any oversight or telemarketing enforcement measures on those outside entities.

Finally, DOJ addressed how FCC could interpret the TCPA's seller liability provisions without explicit reference to agency law principles, and with sufficient specificity to address the types of practices that commonly occur in the telemarketing context. Such a framework might allow a TCPA consumer plaintiff to establish a presumption of seller liability with certain allegations, and then provide factors that would permit a seller to rebut that presumption. Examples of factors that could be considered in determining liability would include: (1) whether the seller gives the outside sales entity access to information and resources that the seller controls; (2) whether the seller is aware that the outside sales entity has used or will use telemarketing to market its products and services; and (3) whether the seller has a telemarketing compliance program that effectively prevents telemarketing violations. DOJ urged that the FCC avoid requiring TCPA plaintiffs to prove the type of direction and control commonly associated with agents or to prove that the seller made some manifestation to the plaintiff.

DOJ files this notice to comply with FCC's *ex parte* requirements and intends to supplement this notice with a more detailed filing in the near future.

Regards,

A handwritten signature in blue ink, appearing to read "Lisa K. Hsiao".

Lisa K. Hsiao