



U. S. Department of Justice

Civil Division

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Washington, D.C. 20530

November 15, 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 rules of a November 10, 2011 *ex parte* meeting between representatives of the U.S. Department of Justice ("DOJ") and Commissioner Mignon Clyburn and Angela Kronenberg of the Federal Communications Commission ("FCC"). The DOJ attendees were 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 attorney Lisa Hsiao.

1. FCC Should Hold Sellers Primarily Liable under the TCPA

DOJ first explained that 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 to do so would comport with the statutory language, with FCC's 1995 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. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 F.C.C.R. 12391, 12407 (1995) ("1995 Order"); *see, e.g., Bridgeview Healthcare Ctr. Ltd. v. Clark*, No. 09-CV-05601, 2011 U.S. Dist. LEXIS 112698 (Sept. 30, 2011); *Spillman v. Dominos Pizza, LLC*, No. 10-349-BAJ-SCR, 2011 U.S. Dist. LEXIS 17177 (M.D. La. Feb. 21, 2011); *Glen Ellyn Pharmacy v. Promius Pharma*, No. 09 C 2116, LLC, 2009 U.S. Dist. LEXIS 83073 (N.D. Ill. Sept. 11, 2009); *Worsham v. Nationwide Ins.*

*Co.*, 777 A.2d 868 (Md. App. 2001); *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468 (Ga. App. 2000).

To impose primary liability on sellers also advances the purpose of the TCPA: to protect consumers from unwanted telephone calls. By holding liable those who benefit from illegal telemarketing practices, the primary liability approach appropriately incentivizes sellers and the outside entities that telemarket for them to comply with the law.

## 2. FCC Should Not Import Agency Law Into The TCPA

The meeting participants next addressed whether agency law should govern the TCPA's liability provisions. DOJ strongly opposed this course of action, stating that agency principles dictate liability in contract and tort law, but are ill-suited to the context of illegal telemarketing. 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 do nothing more than encourage sellers to structure their relationships with outside sales entities so as to avoid making them "agents." It would not encourage them to structure their relationships so as to prevent unwanted telephone calls to consumers. The direct result of this would be to discourage sellers from imposing any oversight or telemarketing enforcement measures on those outside entities, likely leading to an *increase* in unwanted telephone calls to consumers.

DOJ expressed confidence that the FCC would not be misled by DISH Network's ("DISH") position that the factors outlined in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), should be the single test for the federal common law of agency. This argument is flawed in several respects. First, the factors applied in *Reid* resolved whether the appellee Reid was an *employee*, not solely whether he was an agent. That issue is absent here. It is well settled that independent contractors can be agents despite their non-employee status, *see Fisher v. Townsends, Inc.*, 695 A.2d 53, 61 (Del. 1997) (collecting cases), and a seller cannot absolve itself of TCPA liability by simply labeling its sales entities "independent contractors," *see, e.g., Bridgeview Healthcare Ctr.*, 2011 U.S. Dist. LEXIS at \*12; *Worsham*, 777 A.2d at 877-78; *Hooters*, 537 S.E.2d at 472. Furthermore, *Reid* arose in a very different context. The question of whether Reid was an employee determined whether he possessed a copyright under the Copyright Act, while this proceeding involves who is liable for violating the federal telemarketing laws.

## 3. Alternatively, the FCC Should Provide Its Own Telemarketing-Specific Guidance on the Question of Secondary Liability for Sellers

If the FCC seeks to incorporate agency law concepts into the TCPA, DOJ urged that the Commission avoid adopting wholesale this ill-suited set of agency law principles into the

determination of TCPA liability. Rather, the FCC's guidance on this issue should direct fact finders to consider telemarketing-specific factors in determining whether a seller is liable for its outside sales entity's illegal telemarketing calls. DOJ noted that it provided some possible factors on pages 5-6 of its October 26, 2011 *ex parte* letter memorializing DOJ's meeting with Commissioner Genachowski's office and FCC's staff attorneys. These suggestions track some agency law concepts used to determine secondary liability without incorporating agency law, for the reasons discussed above.

DOJ emphasized that its suggested factors were not intended as an exhaustive or exclusive list of the evidence that fact finders should consider in determining whether a seller is secondarily liable. Rather, these factors are merely representative examples that mirror those used by the courts in TCPA cases to analyze whether the circumstances justify holding a seller liable. The FCC's considerable experience and expertise in the telemarketing arena have doubtless given the agency additional, possibly alternative factors and types of evidence that could be included in the FCC's ultimate ruling. The factors suggested by the Federal Trade Commission's comments also deserve serious consideration.

Should the FCC determine that sellers can only be secondarily liable, DOJ urges that the guidance be crafted to answer the two overarching questions of (1) whether the seller stands to benefit from the outside entity's telemarketing conduct and (2) whether the seller is best positioned to control—and prevent—any illegal conduct in that regard.

In response to FCC requests that DOJ provide guidance as to how to apply these factors, DOJ notes that the FCC may wish to state in its guidance that evidence on some of these factors would be entitled to more weight than others. For example, a showing that the outside sales entity has access to information and systems that the seller controls—such as the sales entity's ability to consummate a sale of the seller's goods or services, or the ability to access the seller's computer systems—might well be dispositive of seller liability, because such evidence would demonstrate a very close relationship between the seller and the outside sales entity. Similarly, proving that the seller knew that the outside entity committed telemarketing violations but allowed it to continue telemarketing, effectively ratifying the outside entity's illegal telemarketing conduct, might be determinative of seller liability. By contrast, the other factors might be merely relevant, but not dispositive, as to whether the relationship between the seller and the outside sales entity was sufficiently close to hold the seller liable for the outside entity's illegal calls.

The following table sets forth the first two groups of suggested factors and forms of evidence discussed in the October 26 *ex parte* letter (“whether the seller allows the outside sales entity access to information and systems that the seller controls” and “whether the seller is aware that the outside sales entity has used or will use telemarketing to market its products and

services”). It also suggests the weight each, if answered affirmatively, might receive in determining whether a seller is liable.<sup>1</sup> Evidence that should be entitled to some weight is “relevant;” evidence that should be entitled to more weight is “highly probative.”

Suggested Factor	Evidence	Suggested Weight
Whether the seller allows the outside sales entity access to information and systems that the seller controls		
	Whether the outside sales entity has the ability to cause the seller to deliver a product or service directly to the consumer	Highly probative
	Whether the outside sales entity is authorized to use the seller’s trademark and service mark	Relevant
	Whether the outside sales entity received from the seller detailed information regarding the nature and pricing of the seller’s products and services	Relevant
	Whether the outside sales entity possesses detailed customer information likely obtained from the seller	Relevant
	Whether the outside sales entity has the ability to access and enter consumer information into the seller’s sales or customer systems	Highly probative

<sup>1</sup> The timing of when a fact finder might apply the third group of factors, which evaluate the existence and efficacy of the seller’s TCPA compliance program, differs depending on whether the TCPA plaintiff has been able to identify, through discovery, the entity who made the call. See discussion *infra*.

Whether the seller is aware that the outside sales entity has used or will use telemarketing to market its products and services		
	Whether the seller is aware of the outside sales entity's ability to telemarket or history of telemarketing	Highly probative
	Whether the seller approved, wrote, or reviewed the outside sales entity's telemarketing scripts	Relevant
	Whether the seller has approved or consummated any sales made via telemarketing by the outside sales entity	Highly probative
	Whether, if the outside sales entity was not authorized to telemarket, the seller learned that the entity was telemarketing and allowed it to continue	Highly probative
	Whether the seller monitors the outside sales entity's telemarketing calls	Relevant
	Whether the seller received complaints that the outside sales entity made illegal calls marketing the seller's goods or services, but took no effective steps to ensure that the seller would not obtain customers through illegal telemarketing	Highly probative

DOJ explained that these and other similar factors could be used in cases where the TCPA plaintiff can identify both the caller and the seller as well as in cases where a TCPA plaintiff cannot identify, through discovery, the identity of the caller, and thus knows only who the seller is. Where the plaintiff can identify the caller, the fact finder would use these factors to evaluate the nature of the relationship between the caller and the seller and determine whether the seller is secondarily liable. If, under those circumstances, the fact finder finds the caller and/or the seller liable, the factors relating to the efficacy of the seller's compliance program

would apply to determine whether treble damages should be awarded under 47 U.S.C. § 227(b)(3), (c)(5), and (g)(1). Where the plaintiff is unable to identify the caller, DOJ's factors would be used to evaluate the general nature of the seller's relationships with all of its outside sales entities, and the compliance program factors would be applied to determine whether the seller's program was sufficiently robust that it was unlikely that the illegal call came from someone acting on behalf of the seller.

DOJ appreciates the opportunity to meet with Commissioner Clyburn and her staff. Imposing primary liability on a seller best advances the TCPA's purpose and permits the statute, FCC regulations, and FCC rulings to be read consistently. A wholesale importation of agency law into the TCPA would not only be inappropriate, but also would likely increase the number of TCPA violations and render effective enforcement more difficult. If the FCC is intent on crafting a secondary liability standard for sellers, the FCC should consider adopting a rebuttable presumption approach (explained in DOJ's October 26, 2011, *ex parte* letter) fashioned from factors specific to the telemarketing industry as described above.

Regards,



Michael Blume

Director, Consumer Protection Branch