U.S. Department of Justice

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November 30, 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, 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 28, 2011 *ex parte* meeting between representatives of the U.S. Department of Justice ("DOJ") and Mark Stone and Lisa Hone from the office of Federal Communications Commission ("FCC") Commissioner Michael Copps. 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 attorneys Lisa Hsiao, Sang Lee, and Patrick Runkle.

1. FCC Has Authority to Interpret the TCPA to Determine the Circumstances in Which a Seller Is Liable for a Call Made on Its Behalf

DOJ emphasized that FCC's power to interpret the TCPA's liability provisions is not limited as suggested by DISH's November 16, 2011 *ex parte* letter. DISH previously took the position that FCC has primary jurisdiction over this issue and that FCC must interpret the "on behalf of" standard in the TCPA. DISH went so far as to push for a stay in pending district court litigation to demand that FCC do just that. *See* Defendant's Motion to Stay this Action Pursuant to the Doctrine of Primary Jurisdiction, or in the Alternative to Stay All Counts IV-XI to the Extent They Claim "On Behalf of" Liability and Refer That Issue to the Federal

Communications Commission, *United States et al. v DISH Network, LLC*, C.D. Ill. Case No. 3:09-cv-03073 (SEM) (BGC) d/e 67-68. DISH now contends that that the only course of action available to FCC is to confirm that Congress intended that unspecified, background vicarious liability principles govern how the TCPA applies to sellers marketing their services through outside sales entities.

Putting aside the fact that DISH's argument would turn this proceeding into an academic exercise,[1] the actual text of the TCPA reveals that DISH is incorrect. Section 227(c) gives FCC unbridled authority to make regulations that "the Commission determines are most effective and efficient to accomplish the purposes" of the do-not-call portion of the statute.[2] Certainly, this authorization permits FCC to interpret its own regulations to place primary liability on entities, such as DISH, that are in the best position to stop illegal telemarketing.

Furthermore, the cases DISH cites to support its position that FCC must confirm that agency law principles govern the liability analysis here are inapposite. In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), traditional agency principles were applied based on the explicit language of the relevant statute (the Copyright Act). No such language exists in the TCPA. Additionally, *Meyer v. Holley*, 537 U.S. 280 (2003), on which DISH also relies, holds that corporate officers may not be held vicariously liable for a corporation's wrongful acts under a statute that does not specifically make them individually liable. *Meyer* has no bearing here; no party to this proceeding suggests that DISH's corporate officers should be liable under the TCPA for DISH retailer misconduct. In sum, the TCPA does not invoke any of the common law principles that DISH now claims Congress mandated *sub silencio*.

2. FCC Should Hold Sellers Primarily Liable under the TCPA

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[1] Indeed, DISH's argument would set FCC up for a fall. Under *Chevron U.S.A. Inc. v. Natural Resource Defense Counsel, Inc.*, 467 U.S. 837 (1984), FCC is entitled to deference only if the statute is silent or ambiguous. *Id.* at 843. DISH argues that the TCPA itself is clear and unambiguous. By articulating this view, DISH has signaled that, if it does not agree with FCC's ruling in this proceeding, DISH will contend that FCC's declaratory ruling is not entitled to *Chevron* deference.

[2] It is true that Section 227(b)'s prohibitions on prerecorded calls lack similarly broad language. But Congress has repeatedly legislated with the aim of creating a consistent, harmonious regime to reduce all types of illegal telephone and facsimile solicitations. Furthermore, the statutory language of Section 227(b), which prohibits "any person" from placing prerecorded telephone solicitations, may easily be read to prohibit sellers from initiating prerecorded calls through third parties. Section 227(b), then, should not be read to limit FCC's authority to impose liability on sellers who market through third parties.

After confirming that FCC has the authority to interpret the statute to effectuate the statutory purpose, DOJ explained that FCC should impose 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.

3. FCC Should Not Import Agency Law into the TCPA

The meeting participants also addressed whether agency law should govern the TCPA's liability provisions. In response to questions from FCC representatives, DOJ confirmed that – unlike the Fair Housing Act or the Copyright Act referenced in the cases cited by DISH Network's ("DISH") *ex parte* letters to FCC – the TCPA contains no explicit or implicit language suggesting that agency law should be read into the TCPA. 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 would lead to inconsistent adjudication if applied 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.

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

If 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, 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 in its November 16, 2011 and October 26, 2011 *ex parte* letters. These suggestions borrow from agency law concepts used to determine secondary liability without incorporating agency law wholesale, for the reasons discussed above.

DOJ's suggested factors were not intended as an exhaustive or exclusive list of the evidence to be considered in determining whether a seller is secondarily liable. Rather, these factors are merely representative examples that mirror those the courts use in TCPA cases to analyze whether the circumstances justify holding a seller liable. The factors by the Federal Trade Commission's comments suggested also deserve serious consideration. Drawing on its experience and expertise in the telemarketing arena, FCC can lay out which factors to apply, how to apply them, and what weight to give each one.

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.

The meeting participants discussed whether adopting the foregoing types of factors and a pleading standard for TCPA plaintiffs required a formal rulemaking. DOJ noted that the TCPA itself gives FCC broad discretion to craft a legal standard for determining when a seller will be liable for calls made on its behalf, which would include defining what a plaintiff must plead to state a TCPA claim.

DOJ appreciates the opportunity to meet with Mr. Stone and Ms. Hone. 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 FCC is intent on crafting a secondary liability standard for sellers, FCC should consider adopting a rebuttable presumption approach (explained in DOJ's November 15, 2011 and October 26, 2011, *ex parte* letters) fashioned from factors specific to the telemarketing industry as described above.

Regards,

Lisa K. Hsiao
Trial Attorney, Consumer Protection Branch