



U.S. Department of Justice

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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 January 10, 2012 *ex parte* meeting between representatives of the U.S. Department of Justice (“DOJ”) and Angela Giancarlo of the office of Federal Communications Commission (“FCC”) Commissioner Robert McDowell. The DOJ attendees were Acting Deputy Assistant Attorney General for the Consumer Protection Branch Maame Ewusi-Mensah Frimpong, Consumer Protection Branch Deputy Director Kenneth Jost, and Consumer Protection Branch trial attorney Lisa Hsiao.

DOJ began by explaining the context in which this proceeding arose. According to the Federal Trade Commission (“FTC”), DISH Network, LLC (“DISH”) has been one of the leading subjects of Do-Not-Call complaints, with consumers filing tens of thousands of complaints with the FTC over the past eight years. The FTC investigation into those complaints resulted in this suit by the United States and the States of California, Illinois, North Carolina, and Ohio, which seeks to hold DISH responsible for thousands of Do-Not-Call telemarketing violations committed since 2003 by DISH and its authorized dealers. Having successfully petitioned the district court to refer the TCPA claims in the suit to the FCC, DISH now seeks a ruling that would absolve it of liability for the telemarketing violations committed by the dozens of outside dealers who sell DISH’s products and services.

In light of this background, DOJ urged the FCC to follow its prior precedent of interpreting the TCPA to impose primary liability on a seller for illegal telemarketing calls made *on its behalf* by outside sales entities. The TCPA contemplates liability for anybody who stands to benefit from the illegal telemarketing, including the telemarketer who made the call, as well as the seller whose products and services are being marketed. DOJ noted that, contrary to the position advanced by DISH and other commentators, the TCPA's language does not require a formal "agency" relationship between the seller and the outside telemarketer to hold the seller liable. Such a reading of the law would conflict with FCC's prior ruling that the entity on whose behalf the illegal call was made is ultimately liable, and with the cases 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*, Case No. 09-CV-05601, 2011 U.S. Dist. LEXIS 112698 (Sept. 30, 2011); *Spillman v. Domino's Pizza, LLC*, Case No. 10-349-BAJ-SCR, 2011 U.S. Dist. LEXIS 17177 (M.D. La. Feb. 21, 2011); *Glen Ellyn Pharmacy v. Promius Pharma, Case 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).

Moreover, DISH's interpretation of the statute would insulate sellers from liability beyond the protections afforded them by the TCPA's safe harbor provisions. The TCPA already explicitly includes measures by which entities like DISH may protect itself from liability. DISH now urges the FCC to create further protections not contained in the statute itself. DISH's doing so is further indication that DISH's view of the law fails to advance the language, structure, and intent of the statute. Had Congress wished to create the protections DISH now wants, it knew full well how to do so.

The meeting also addressed whether agency law should play any role in interpreting the TCPA in this context. DOJ strongly opposed importing agency law principles here. This proceeding provides FCC with the opportunity to use its extensive expertise to interpret the TCPA in the fact-specific context of how the telemarketing industry actually operates, and thereby to provide a measure of certainty and predictability to litigants and courts in TCPA cases.

DOJ explained that agency law developed for the purpose of establishing legal principles to facilitate and encourage persons to act through agents where necessary. Agency concepts, therefore, are designed to *enable* agents to act on behalf of principals and to *encourage* third-parties to rely on those agents' representations as if they were made by the principals. Moreover, agency law principles developed in the context of contract and tort disputes, and are better suited for those contexts than for telemarketing violations. In contract and tort disputes, the victim-plaintiff usually knows or can determine the identity of the purported "agent." In the telemarketing context, this is rarely the case: most telemarketers who violate the telemarketing

laws use technology to mask their identities. Therefore, prohibiting all suits against the purported “principals,” and permitting suits only against the purported “agents,” would effectively bar most TCPA consumer actions.

DOJ also warned that agency law is highly malleable. Importing agency law without heed to how it applies in the telemarketing context creates significant risks of inconsistent adjudication in TCPA cases. This is especially so because agency law is in flux, with multiple – often competing – formulations advanced by litigants and adopted by courts. As in *Charvat v. Echostar Satellite, LLC*, 269 F.R.D. 654 (S.D. Ohio 2010), some courts have applied state agency law to determine whether a seller is liable for violative calls made by its outside telemarketers. Some commentators, such as DISH, favor applying the “federal common law of agency.” But that common law developed in contexts (such as ownership of copyright under the Copyright Act and employment law) which are factually far removed from telemarketing. Further, in those contexts, agency law was being applied for a very different purpose, and certainly not one analogous to the primary goal of the TCPA: to protect consumers.

While it is unnecessary and ill-advised for FCC to import agency law into the TCPA, principles from this area of law could certainly inform the FCC’s declaratory ruling regarding when the TCPA will hold a seller liable for telemarketing calls made on its behalf by an outside entity. To provide the clearest guidance to industry, consumers, and courts, such liability should not be determined by applying agency law, but instead should be decided by looking to the nature of the relationships that exist between sellers and the outside entities that telemarket on their behalf. DOJ suggested several factors in its *ex parte* letters dated October 26, 2011, November 15, 2011, and November 30, 2011.

DOJ appreciates the opportunity to meet with Ms. Giancarlo. In DOJ’s view, 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 factors similar to those addressed in DOJ’s prior *ex parte* letters.

Regards,



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