

telephone calls made to market or sell the seller's goods or services. The FTC also urges the FCC to rule that the TCPA creates a statutory cause of action that imposes liability on a seller or a marketer for its violations, unless the seller or marketer can show that it satisfies the requirements set forth in the safe harbor. As described below, protecting consumers' privacy demands a uniform and comprehensive interpretation of "on behalf of." The plain meaning of the words "on behalf of," as well as the regulatory framework of the TCPA itself support this interpretation. Similarly, Congress's intent in passing the TCPA strongly militates against any attempt to import federal agency law and joint-venture law into the TCPA and its related rules. A more restrictive interpretation could jeopardize Congress's privacy-protection goals.

Background

The FTC is an independent administrative agency charged with promoting consumer protection, competition, and the efficient functioning of the marketplace. Our law enforcement authority in the consumer protection arena is primarily based on Section 5 of the Federal Trade Commission Act ("FTC Act"), which prohibits "unfair or deceptive acts or practices in or affecting commerce,"³ as well as various statutes and rules, including the Telemarketing Sales Rule ("TSR").⁴ As illustrated by the FTC's case against DISH Network,⁵ enforcing the Do Not Call provisions of the TSR is one of the FTC's core consumer-protection responsibilities in the arena of safeguarding Americans' privacy.

In 1991, Congress found that telemarketing had grown substantially and that calls seeking to sell products and services "can be an intrusive invasion of privacy."⁶ Congress further found that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations."⁷ A Congressional committee recognized that, "federal legislation [was] needed to both relieve states of a portion of their regulatory burden and protect legitimate telemarketers from having to meet multiple legal standards."⁸ Congress accordingly enacted the TCPA to give the FCC the authority to regulate interstate and intrastate telemarketing.⁹ Pursuant to the TCPA, the FCC in 1992

³ 15 U.S.C. § 45(a).

⁴ 16 CFR Part 310.

⁵ See fn.2, *supra*.

⁶ Pub. L. No. 102-243, §§ 2(4), 2(5), 105 Stat. 2394 (1991). See 47 U.S.C. § 227 notes.

⁷ *Id.*

⁸ H.R. Rep. 102-317 (1991), at 10.

⁹ See generally 47 U.S.C. § 227. Beyond empowering the FCC and the state Attorneys General to enforce the statute, see

from calling numbers on the Registry (or employing robocalls) unless they can demonstrate either that they comply with the safe-harbor provisions or that their calls fall within the “established business relationship” or “prior consent” exceptions. Both Rules impose liability on sellers and marketers who fail to fulfill those legal obligations.¹⁵ The Do Not Call Rules and the other complementary privacy-protecting provisions of both the FTC and the FCC’s regulatory regimes advance substantial government interests of protecting the privacy of individuals in their homes and protecting consumers against the risk of fraudulent and abusive solicitations.¹⁶

The FTC takes seriously its responsibility to enforce the TSR to protect consumer privacy and protect consumers against deceptive and unfair telemarketing practices. Since the National Do Not Call Registry was established in 2003, the FTC has filed 59 law enforcement actions alleging Do Not Call violations.¹⁷ Twenty-eight of those cases focused exclusively on violations of the Do Not Call and related privacy protection provisions of the TSR (as opposed to other provisions of the TSR which prohibit, among other activities, abusive and deceptive acts and practices). Virtually all of the Commission’s TSR enforcement actions result in permanent injunctions that prohibit defendants’ deceptive or abusive marketing or sales practices and in some cases ban defendants entirely from telemarketing. Overall, the FTC’s TSR enforcement actions have resulted in orders providing for more than \$540 million in consumer restitution or disgorgement of funds to the United States Treasury. In addition, through cases filed on its behalf by DOJ,¹⁸ the FTC has obtained civil penalty orders and equitable monetary relief totaling nearly \$31 million since 2003.

¹⁵ See 47 CFR § 64.1200(c)(2) and 16 CFR § 310.4(b)(3). See also *Report to Congress Pursuant to the Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws* at 1 (2003) (noting that the FTC and the FCC’s Do Not Call Rules are largely the same) (available at <http://www.ftc.gov/os/2003/09/dnciareport.pdf>).

¹⁶ See, e.g., *Mainstream Marketing Servs., Inc. v. FTC*, 358 F.3d 1228, 1237 (10th Cir.), *cert. denied*, 534 U.S. 812 (2004) (“The government asserts that the do-not-call regulations are justified by its interests in 1) protecting the privacy of individuals in their homes, and 2) protecting consumers against the risk of fraudulent and abusive solicitation. See 68 Fed.Reg. 44144; 68 Fed.Reg. at 4635. Both of these justifications are undisputedly substantial governmental interests.”).

¹⁷ The FTC has an extensive record of robust law enforcement against fraudulent and abusive telemarketers. Since promulgation of the original TSR in 1995, the FTC has brought more than 300 cases aimed at halting various telemarketing frauds. The Commission’s anti-fraud TSR enforcement has targeted unauthorized debiting of consumers’ financial accounts and deceptive sales of various goods and services (e.g., work-at-home scams, advance-fee credit frauds, bogus government grant schemes,

As both agencies have recognized, uniform application of the Do Not Call Rules is beneficial to consumers and businesses alike. Accordingly, the FTC recommends that the FCC ensure that its approach to telemarketing enforcement remains consistent with the FTC's longstanding approach. Conformity in this regard is essential to promote key law enforcement goals and to effectuate Congress's mandate to create a federal standard for protecting consumers' privacy.

Analysis

The first question posed by the FCC's Public Notice asks whether, under the TCPA, a call placed by an entity that markets the seller's goods or services qualifies as a call made on behalf of, and initiated by, the seller, even if the seller does not make the telephone call. To comport with FCC precedent and to ensure that law enforcement approaches to combat telemarketing violations under TCPA parallel those under the Telemarketing Act, the answer to this question should be yes. To reach any other conclusion would thwart Congress's goals in passing legislation to combat telemarketing abuses.

FCC precedent establishes that an entity can be liable under the TCPA for a call made on its behalf even if the entity did not itself place the call. In 1995, the FCC stated in a Memorandum Opinion and Order (the "1995 Order") that "rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations."¹⁹ Thus, as the FCC has explained, "[c]alls placed by an agent of a telemarketer are treated as if the telemarketer itself placed the call."²⁰ The FCC's interpretation of its rules in the 1995 Order—that, for an entity to be liable for calls it did not place, the calls must have been placed "on behalf of" the entity—is consistent with the language of the TCPA, 47 U.S.C. § 227(c)(5), which establishes the private right of action for persons who have received more than one unlawful telemarketing call "by or on behalf of" the same entity. Thus, under those circumstances, the entity is properly deemed to have initiated the call through the person or entity that actually placed the call.

Subsequent FCC precedent confirms this interpretation. In a 2005 declaratory ruling that addressed telemarketing calls made by agents on behalf of an insurance company, the FCC "t[ook] th[e] opportuni

telemarketing rules and calls placed by a third party on behalf of that company are treated as if the company itself placed the call.”²¹ And, reflecting a similar understanding of the TCPA, the FCC has approved consent decrees that concluded investigations into possible TCPA violations by entities on whose behalf th 12 int05

The FCC's Public Notice also seeks comment on the question: "What should determine whether a telemarketing call is made 'on behalf of' a seller, thus triggering liability for the seller under the TCPA? Should federal common law agency principles apply? What, if any, other principles could be used to define 'on behalf of' liability for a seller under the TCPA?"²⁷

The FTC believes that the term "on behalf of" as used in the TCPA and the FCC's TCPA regulations is clear and unambiguous. As the Supreme Court has said, "absent sufficient indication to the contrary, Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'"²⁸ Similarly, if an undefined term in a regulation is clear and unambiguous, it is applied according to its plain meaning.²⁹ Accordingly, the term "on behalf of" should be accorded its common meaning.

The common meaning of "on behalf of" is "in the interest of"³⁰ or "as a representative of" or "for the benefit of."³¹ This definition is plain and unambiguous.³² A solicitation is therefore "on behalf of" an entity if it is in the entity's "interest," in its "aid," or for its "benefit." There is no requirement that the person making the solicitation be the entity's "agent." Thus, the issue of whether the marketer's efforts are "on behalf of" the seller, which efforts might have triggered a TCPA violation, turns upon whether the marketer's solicitations are in the seller's "interest" or "aid" or for the seller's "benefit."

Importantly, this common definition also ensures that sellers will not be rewarded for turning a blind eye to those who market sellers' goods or services and whose marketing efforts inure to sellers' benefit. The seller alone is in the best position to monitor the manner in which its products are marketed because it knows who is marketing and because it benefits most substantially from those marketing activities. A seller's simple ploy of creating and maintaining an attenuated relationship with the marketer that induces sales of the seller's products—and creates a revenue stream

²⁷ The Sixth Circuit Court of Appeals noted in *Charvat v. EchoStar Satellite, LLC*, that the FCC has not defined the term "on behalf of" with respect to the TCPA and its related rules and that the FCC supported referral of the issue under the "primary jurisdiction" doctrine. 630 F.3d 459, 465-468 (6th Cir. 2010).

²⁸

running directly to the seller—should not insulate that seller from liability for invading consumers' privacy rights under the TCPA.

or group of marketers, but the overall number of Do Not Call violations would not decrease.

The FTC and states have sought to stop invasions of consumers' privacy in the litigation against DISH Network, LLC, and in prior enforcement actions against other sellers who operate through similar networks of purportedly "independent" marketers. By interpreting "on behalf of" to hold sellers liable for marketers' violative telephone calls made to market the sellers' goods or services, the FCC's approach will be consistent with current law-enforcement efforts and will effectuate Congress's consumer-protection goals.

As the Tenth Circuit Court of Appeals wrote when it upheld the national Do Not Call Rules in 2004:

The national do-not-call registry offers consumers a tool with which they can protect their homes against intrusions that Congress has determined to be particularly invasive. Just as a consumer can avoid door-to-door peddlers by placing a "No Solicitation" sign in his or her front yard, the do-not-call registry lets consumers avoid unwanted sales pitches that invade the home via telephone, if they choose to do so.³³

A comprehensive interpretation of "on behalf of" will have at least two beneficial effects to further Congress's goal. First, it will effectuate consumers' desire to protect their privacy and avoid telemarketing calls by encouraging sellers to oversee how their goods and services are marketed. If sellers know that they will face liability for telemarketing violations made on sellers' behalf, sellers will be much more likely to heed consumers' telemarketing complaints and discipline the marketers whose activities generate those complaints. Second, it will help to ensure that the FTC and the FCC can effectively protect consumers' privacy by holding both sellers and their marketers liable for violations of Do Not Call and Robocall Rules. A clear and comprehensive interpretation of "on behalf of" is critical for effective TCPA enforcement.

To rely on federal common-law precedents based on agency and/or joint-venture principles would be to import into the TCPA standards that have no place in this statutory cause of action. Indeed, there is no basis for adopting a standard incorporating common law agency principles, such as inquiry into the principal's control over the purported agent's activities. Neither the TCPA nor 47 CFR § 64.1200 contains any reference to these common-law standards. If Congress had intended for common law standards to determine an entity's liability for violating the TCPA, it could

³³ *Mainstream Marketing Servs., Inc. v. FTC*, 358 F.3d 1228, 1233 (10th Cir.), *cert. denied*, 534 U.S. 812 (2004).

easily have omitted the “on behalf of” phrase and defined how “agents” could expose their “principals” or how “joint venturers” could expose each other to such liability. Similarly, in promulgating rules pursuant to the TCPA, there would have been little reason for the FCC to spell out a detailed safe harbor, such as that found in 47 CFR § 64.1200(c)(2), if federal common-law principles already limited who might be liable. Limiting the reach of TCPA liability by applying such principles would be contrary to the statute’s broad consumer-protection and privacy goals.

Conclusion

The FTC is pleased to share its experience in enforcing consumer protection laws and rules governing telemarketing and to assist the FCC in crafting policies to help protect Americans’ privacy and to safeguard consumers from unfair and deceptive telemarketing practices.