Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Petitions Seeking Rulings on | ) | CG Docket No. 11-50 |
| Certain Definitions under the Telephone | ) | |
| Consumer Protection Act of 1991 and its | ) | |
| Related Rules | ) | |

REPLY COMMENT OF THE
FEDERAL TRADE COMMISSION

The Federal Trade Commission ("FTC") appreciates this opportunity to provide a reply comment as part of the pleading cycle established by Public Notice DA 11-594 issued by the Federal Communications Commission ("FCC") in April 2011.

None of the comments filed to date provides a persuasive rationale for the FCC to depart from its own precedent, which establishes that a seller may be held liable for its marketer's violative calls even when the seller did not actually place those calls. Nor do any of the comments provide justification for adopting anything other than the plain meaning of "on behalf of" in the Telephone Consumer Protection Act ("TCPA") and its related rules. The FTC thus urges the FCC to adopt the plain meaning of "on behalf of"— a ruling that will promote uniformity in both agencies' approach to telemarketing enforcement and help effectuate Congress's goal of protecting consumers' privacy.

As detailed in the FTC's May 4, 2011 Comment, the plain meaning of the law and its regulations supports holding sellers liable for calls made for the seller's benefit. If the FCC were to construe "on behalf of" too narrowly, enforcers of the TCPA would be able to sue only the telemarketers who actually placed the calls. This would thwart law enforcement efforts in several different ways. First, as we have learned from our telemarketing law enforcement experience, sellers often hire telemarketers who are judgment-proof or will go out of business if sued, leaving no recourse for injured consumers. Also, sellers sometimes hire telemarketers who spoof or hide their identities, thereby making enforcement difficult or impossible. And finally, law enforcement would be forced to sue each marketer separately rather than to bring action against the seller whose product is being sold and who receives the benefit of the telemarketing. If sellers are not held liable for the ways in which their marketers promote sellers' goods or services, law enforcers will be unable to reduce effectively the number of privacy invasions resulting from Do Not Call and robocall violations.

DISH Network's Comment fails to justify a departure from these important legal and public policy reasons for holding sellers liable for calls made on their behalf.[1] Rather, DISH Network relies on its "big box" store hypothetical to argue that a seller should be absolved of liability for its marketer's violations unless there is an agency relationship between them. By pointing to a manufacturer's potential liability if a big box store telemarketed the manufacturer's goods in violation of the TCPA, however, DISH Network's Comment strays from the real issue at hand. At a minimum, calls are made "on behalf of" a seller whenever that seller: (1) enters into contracts directly with consumers who choose to purchase the seller's goods or services in response to telemarketing; (2) provides its services directly to those consumers; (3) collects money for those services from its consumers; (4) receives continuing revenue from such consumers; (5) compensates those who market its goods or services; and (6) is in a position to monitor its telemarketers. Obviously, there may be cases in which calls are made "on behalf of" a seller even in the absence of one or more of these factors.[2]

The FTC urges the FCC to act as soon as practicable in light of the fundamental right to privacy at stake as well as the importance of this ruling on telemarketing enforcement. The FTC is pleased to offer these comments as the FCC crafts TCPA-related policies that further Congress's intent to protect Americans' privacy.

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[1] Comments of DISH Network, LLC at 2-3, *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021346275. *See also* Comments of AT&T at 5-6, *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021346220; Comments of the American Teleservices Association at 3, *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021346243; Comments of DirecTV at 7-9, *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021346140; and Comments of DISH Network, LLC at 19-21, 25-26.

[2] The FTC is of the view that the FCC reasonably could conclude that the "on behalf of" language in the TCPA, as supported by its plain meaning and public policy considerations, creates strict liability limited by the safe harbor. *See* 47 CFR § 64.1200(c)(2) and 16 CFR § 310.4(b)(3). Sellers also have commercially available means to reduce their liability. They can, for example, enter into indemnification agreements with their marketers for any penalties or fines that sellers have to pay. Indeed, as the *Charvat* district court observed, DISH Network itself already "demands that the Retailers indemnify it for any loss incurred in connection with the agreement, including loss incurred as a result of the Retailers' marketing efforts." *Charvat v. Echostar Satellite, LLC*, 676 F. Supp. 2d 668, 676 (S.D. Ohio 2009), *referred to FCC on appeal,* 630 F.3d 459 (6th Cir. 2010).