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By electronic delivery to:
http://www.fcc.gov/cgb/ecfs/

Ms. Marlene H. Dortch
Secretary
Federal Communications
Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CG Docket No. 11-50, Petitions for Declaratory Ruling Concerning the Telephone Consumer Protection Act Rules

Dear Ms. Dortch:

The American Bankers Association (ABA)[1] respectfully submits this comment letter to urge the Federal Communications Commission (Commission) to reject a broad "strict" vicarious liability standard under the Telephone Consumer Protection Act (TCPA) for telephone solicitations made on behalf of sellers by third parties as advocated in certain comment letters and notices of *ex parte* proceedings submitted in response to the Public Notice issued by the Commission's Consumer and Governmental Affairs Bureau, CG Docket No. 11-50, DA 11-594 (April 4, 2011). The Commission has the discretion to consider comments submitted outside the formal comment period, and ABA respectfully requests that it do so here. Holding sellers strictly and broadly liable for calls placed by third-party service providers is at odds with the statute and federal common law.

Contrary to statements in some of the comment letters, this is the Commission's first opportunity to consider the extent to which the TCPA's statutory language permits vicarious liability for calls "made" by another. The prior Commission orders cited in some of the comments, including those of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), merely confirm that a seller's *exemption* from liability extends to third parties who make telephone solicitations on behalf of the exempt entity. In its 1995 Order, for example, the Commission determined only that the exemption from the rules governing telephone solicitations enjoyed by tax-exempt nonprofit organizations extends to independent telemarketers when they make calls "on behalf of" tax-exempt nonprofit organizations. *See* 10 F.C.C.R. 12391, 12397 (Aug. 7, 1995). Likewise, in a 2005 Declaratory Ruling, the Commission determined that State Farm's

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[1] ABA represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $165 million in assets.

exclusive agents — although independent of State Farm — may nevertheless rely on State Farm's existing business relationship with its customers to exempt their telephone solicitations of those customers. *See* 20 F.C.C.R. 13664, 13667-68 (Aug. 17, 2005). Because the potential for a seller to be held liable for calls made by third parties was not at issue in any of these proceedings, isolated statements from the Commission's decisions should not substitute for the Commission's considered judgment on the issue in this proceeding.

Comment

1. Under the TCPA, does a call placed by an entity that markets the seller's goods or services qualify as a call made on behalf of, and initiated by, the seller, even if the seller does not make the telephone call (*i.e.*, physically place the call)?

ABA submits that the TCPA's statutory language unambiguously imposes direct liability only on the entity that "makes" the call (in the case of the cell phone provision, *see* 47 U.S.C. § 227(b)(1)(A)(iii)), or "initiates" the call (in the case of the residential landline provision, *see* 47 U.S.C. § 227(b)(1)(B)). There can only be one answer to the question "Who made the call?" It is the person or entity that made — physically placed — the call. Any other interpretation would run afoul of the statutory language, thereby contravening Congress's clear intent, and, respectfully, would appear to be results-oriented.

The phrase "on behalf of" in the question presented appears nowhere in the TCPA's liability provisions. Indeed, the only section of the statute that includes the phrase "on behalf of" is section 227(c)(5), which creates a private right of action for individuals to sue for violations of the Commission's do-not-call regulations. The comments submitted by the DOJ, the FTC, and others essentially ask the Commission to import "on behalf of" language into sections of the TCPA where Congress omitted it. As the Supreme Court has held, however, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *See Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Duncan v. Walker*, 533 U.S. 167, 173 (2001). The Commission should follow accepted canons of statutory construction — cannons in place long before Congress enacted the TCPA — in answering the questions presented here.

The Supreme Court has also rejected arguments analogous to the DOJ's and FTC's argument here that the Commission should stretch the meaning of the terms "initiate" and "make" in an effort to further a public policy underlying the statute. In MCI *v. AT&T*, for example, the Court rejected a strained interpretation of the Federal Communications Act of 1934 even though it was allegedly in keeping with the Act's purpose of promoting efficient telephone service. 512 U.S. 218, 234 (1994) (explaining that "our estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the [Act]" and "'such considerations address themselves to Congress, not to the courts'")

(quotation omitted). The Commission here should adhere to Congress's determination to impose direct liability only on the "maker" or "initiator" of a call.

This result reflects sound policy as well. The Commission should give effect to the limitations of the specific language Congress chose to employ in section 227(b) of the TCPA. Congress is free to revisit its decision in future legislation, but to date has not done so.

2. 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?

As discussed above, although the DOJ and the FTC ask the Commission to adopt a theory of vicarious liability that relies solely on a dictionary definition of "on behalf of," Congress omitted those words from the liability portions of the TCPA and did not otherwise expressly address vicarious liability. The path forward in these circumstances is clear: when, as here, a term is omitted from a statute, "congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text." *Clakamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447 (2003). Indeed, courts routinely apply common law principles of agency to fill in and define the contours of vicarious liability. For example, in *Nationwide Mutual Ins. Co. v. Darden*, the Supreme Court applied federal common law agency principles to interpret "employee" as used in the Employee Retirement Income Security Act. 503 U.S. 318, 323 (1992) (stating that "we do not find any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results"); *see also Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (employing analogous reasoning and using the federal common law of agency to interpret "employee" under the Copyright Act, which the Act failed to define).

Because the TCPA imposes direct liability only on the "maker" or "initiator" of a call, a seller can be liable for a call placed by a third party — if at all — only in circumstances where vicarious liability for statutory violations attaches under federal common law. The federal common law of agency is the body of law that has developed precisely to answer the question "when is one liable for the wrongful acts of another." Thus, if the Commission concludes that section 227(b) may encompass vicarious liability for calls placed by third parties, it should look to the federal common law of agency to define the scope and contours of that liability. *Cf. Reid*, 490 U.S. at 740 (interpreting undefined statutory term using federal common law agency principles, rather than state law, and stating that "this practice reflects the fact that 'federal statutes are generally intended to have uniform nationwide application'") (quotation omitted).

The DOJ and the FTC also argue — contrary to established precedent — that vicarious liability under the TCPA should be expanded because it is a strict liability consumer protection statute. Here again, however, the Supreme Court has prescribed a different

approach. The Court has held that strict liability statutes should be interpreted narrowly precisely because they impose liability without regard to fault. *See, e.g., Gollust v. Mendell*, 501 U.S. 115, 122 (1991) ("Because the statute imposes 'liability without fault within its narrowly drawn limits,' we have been reluctant to exceed a literal, 'mechanical' application of the statutory text in determining who may be subject to liability, even though in some cases a broader view of statutory liability could work to eliminate 'an evil that Congress sought to correct.'" (internal citations omitted)). The Court has made clear in multiple cases that the common law rather than broad invocations of a statute's purpose should inform the interpretation of undefined statutory terms. *See Darden*, 503 U.S. at 321 (reversing court of appeal's interpretation of statutory term that was based on the "declared policy and purpose" of the statute and the congressional statement of purpose); *see also Wells*, 538 U.S. at 447 (rejecting approach of court of appeals that "paid particular attention to the 'broad purpose of the ADA'" (internal citations omitted)). Because the TCPA imposes strict liability on anyone who "makes" or "initiates" a call in violation of section 227(b), the boundaries of vicarious liability under the statute should not extend beyond an application of the statutory language informed by the common law.

Applying the principles of agency to vicarious liability under the TCPA strikes the proper balance between the interests of sellers and consumers. As an initial matter, consumers always retain the right to sue the actual wrongdoer regardless of the standard for vicarious liability. There is no reason to presume, as some comments imply, that this avenue for redress is inadequate in all or even most cases.

Furthermore, under settled principles of agency law, a seller can be vicariously liable for the conduct of those who market its goods or collect amounts owed to it when the relationship between them makes it fair to impose liability. At its core, the common law of agency focuses on the principal's authority and ability to direct and control the acts of the agent. As explained in the Restatement (Third) of Agency, "[t]he common-law definition of agency requires as an essential element that the agent consent to act on the principal's behalf, as well as subject to the principal's control." Restatement (Third) of Agency § 1.01 cmt. g (2006). The relevant inquiry entails more than merely asking whether the principal will benefit as a result of an agent's actions. *Id.* cmt. g ("Performing a duty created by contract may well benefit the other party but the performance is that of an agent only if the elements of agency are present."). Rather, in determining whether a party is an agent, the Restatement looks primarily to "whether the principal controls or has the right to control the manner and means of the agent's performance of work." *Id.* § 7.07 (providing when an employee qualifies as an agent). Or, as the Supreme Court has put the point, the critical inquiry, among other factors, is "the hiring party's right to control the manner and means by which the product is accomplished." *Reid*, 490 U.S. at 751.

In short, whether a seller is liable for the acts of a third party turns upon the specific nature of the relationship between those parties as informed by well-established common law agency principles. Congress, of course, is free to chart a different course by amending the TCPA. Unless or until that happens, however, the proper outcome here from both a legal and policy perspective is for the Commission to determine the scope of vicarious liability under section 227(b) against the backdrop of the common law principles of agency in place at the time of the TCPA's enactment. Not only does that result give effect to Congress's intent, it also accords fully with the reasonable expectations of parties whose conduct is governed by the TCPA.

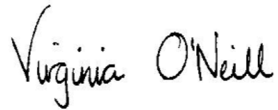
Based on the foregoing, federal common law agency principles should govern any questions of vicarious liability under the TCPA, and the Commission should adhere to this well developed standard of liability in the face of Congressional silence on the question presented. If the Commission disagrees, however, it should not adopt the expansive definition of "on behalf of" liability advocated by the DOJ and FTC. Rather than create liability for *any* entity that "benefits" from the call of a third party — without regard to the relationship between the entities in question — the Commission could choose to subject any liability to an affirmative defense for entities that have implemented reasonable practices and procedures to prevent violations of the TCPA.

For example, the Commission could create a safe harbor for an entity that institutes corporate policies and training programs regarding TCPA compliance, maintains records identifying third parties that communicate with consumers, or informs third parties of telephone numbers for which there is no consent to call. Such a "due diligence" defense would benefit consumers by providing a positive incentive for sellers to encourage third-party service providers to comply with the law, while protecting sellers from being held strictly liable for the acts of others beyond their control.

The establishment of such a defense would also reflect a policy choice that is fully consistent with the policies justifying the "safe harbor" Congress and the Commission implemented in section 227(c)(5). *See* 47 U.S.C. § 227(c)(5) (providing an affirmative defense for a defendant that "has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the [do-not-call] regulations"); 47 C.F.R. § 64.1200(c)(2) (providing that "[a]ny person or entity making telephone solicitations (or on whose behalf telephone solicitations are made)" will not be liable for a violation of the do-not-call regulations if it can demonstrate that the violation was the result of error and the entity meets certain standards as part of its routine business practice).

ABA appreciates the opportunity to submit this letter and would be pleased to discuss it or provide additional comments if the Commission would find it helpful. If you have any questions about these comments or desire further input, please contact me at 202-663-5073 or voneill@aba.com.

Respectfully submitted,



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