

ALERT

FCC Clarifies that a Seller May Be Held Vicariously Liable for the TCPA Violation of Its Telemarketing Firm

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In a declaratory ruling released on May 9, 2013, the Federal Communications Commission (FCC or Commission) clarified that the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, permits sellers to be held vicariously liable for violations committed by third-party telemarketers. The FCC's ruling provides important guidance to companies involved in telemarketing and clarifies an area of the law that had been hotly contested in the courts.

Sellers—companies promoting the sale of goods or services—often use third party telemarketing firms rather than conduct such campaigns using their own resources. Prior to the FCC's ruling, there was confusion whether sellers could be held liable for the telemarketing calls initiated on their behalf by third parties. This confusion had triggered litigation throughout the country on the meaning of the TCPA.

Section 227(b)(1)(B) makes it unlawful for any person within the U.S. to "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice without the prior express consent of the called party." In addition, Section 227(c)(5) allows a person to seek damages and injunctive relief if they have "received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the" FCC's do-not-call rules.

The FCC clarified that, under the TCPA, a seller cannot be held directly liable for a violation of the TCPA unless it initiates a call, but may be held vicariously liable under federal common law agency principles for a TCPA violation by a third-party telemarketer. The FCC

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rejected the argument that a seller could be held vicariously liable simply because a third-party telemarketer made a call that benefits the seller. Instead, a seller must take steps that give rise to an agency relationship. The Commission provided several examples of circumstances in which a seller could be held vicariously liable for a telemarketer's TCPA violation:

- Where the seller allows the outside sales entity access to information and systems that normally would be within the seller's exclusive control, including: access to detailed information regarding the nature and pricing of the seller's products and services or to the seller's customer information;
- Where the outside sales entity has the ability to enter consumer information into the seller's sales or customer systems, as well as the authority to use the seller's trade name, trademark and service mark;
- Where the seller approved, wrote or reviewed the outside entity's telemarketing scripts;
- Where the seller knew (or reasonably should have known) that the telemarketer was violating the TCPA on the seller's behalf and the seller failed to take effective steps within its power to force the telemarketer to cease that conduct.

The Commission concluded that vicarious liability principles advance the TCPA's goals and provide sellers with incentives to ensure their telemarketers comply with the TCPA.

The FCC's declaratory ruling can be found [here](#).