Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Consumer and Government Affairs Bureau Seeks Comment on Akin Gump Strauss Hauer & Feld LLP Petition for Expedited Clarification or Declaratory Ruling	)	CG Docket No. 02-278
	)	CG Docket No. 05-338
	)	DA/FCC #: DA-19-159
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	
	)	

To: The Commission

COMMENTS OF EDUCATIONAL TESTING SERVICE

Educational Testing Service ("ETS") submits these comments in response to the Consumer and Governmental Affairs Bureau's Public Notice[1] seeking comment on Akin Gump Strauss Hauer & Feld LLP's petition for expedited clarification or declaratory ruling to clarify the definition of "sender" under the facsimile advertising provisions of the Telephone Consumer Protection Act of 1991 ("TCPA"). For the reasons explained below, the Commission should hold that, to qualify as the "sender" of a fax under the TCPA and its accompanying regulations, one must send (or cause to be sent) that fax. And to determine whether one "caused" a fax to be sent, the Commission should look to ordinary principles of agency law.

[1] "Consumer and Governmental Affairs Bureau Seeks Comment on Akin Gump Strauss Hauer & Feld LLP Petition for Expedited Clarification or Declaratory Ruling," DA 19-159 (rel. Mar. 7, 2019).

SUMMARY

The TCPA makes it "unlawful for any person within the United States … to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement."[2] By its terms, this section imposes liability on those who "use" a fax machine "to send" a fax advertisement. But what happens if Company B sends a fax advertising Company A's products—say, because Company A hired Company B to send faxes, because Company B owns the rights to market and distribute Company A's products, or because Company B just happens to sell Company A's products? In those and other such scenarios, did Company A "use" a fax machine to "send" the fax? Did Company B? Did both?

Absent clear guidance from the Commission, federal courts have divided over how to apply the TCPA and the Commission's regulations in this context.[3] Because of that confusion, Akin Gump Strauss Hauer & Feld LLP asks the Commission to clarify that "a fax broadcaster is the sole liable 'sender'" where it "both commits TCPA violations and engages in deception or fraud against the advertiser (or blatantly violates its contract with the advertiser) such that the advertiser cannot control the fax campaign or prevent TCPA violations."[4]

Educational Testing Service agrees with that outcome, but writes to explain more broadly how the Commission should interpret the statute, its accompanying regulations, and the Commission's prior statements to clarify this area of the law more broadly. In particular, the

[2] 47 U.S.C. § 227(b)(1)(C); *see also* 47 C.F.R. § 64.1200(a)(4) ("No person or entity may … [u]se a telephone facsimile machine … to send an unsolicited advertisement to a telephone facsimile machine"); *id.* § 64.1200(f)(10) (defining "sender" to mean "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement").

[3] *See, e.g.*, Insights Ass'n, Inc. et al., *Petition for Declaratory Ruling*, at 23–25, CG Dkt. No. 02-278 (filed Oct. 30, 2017) (discussing the disagreement); RingCentral, Inc., *Petition for Expedited Declaratory Ruling*, at 19–25, CG Dkt. No. 02-278 (filed July 6, 2016) (same).

[4] Akin Gump Strauss Hauer & Feld LLP, *Petition for Expedited Clarification or Declaratory Ruling*, at 3, CG Dkt. Nos. 02-278, 05-338 (filed Feb. 27, 2019) ("Akin Gump Petition").

Commission should hold that Company A may be held liable for a fax actually sent by Company B if and only if, under ordinary principles of agency law, Company A may be said to have "caused the subject faxes to be conveyed" or to have "dispatched them" through Company B's services.[5] This interpretation makes sense of the TCPA's text, fits with the Commission's regulations, and places TCPA liability where it ought to rest—with the entity responsible for violating the law.

[5] *Health One Med. Ctr., Eastpointe P.L.L.C. v. Mohawk, Inc.*, 889 F.3d 800, 801 (6th Cir. 2018); *see Paldo Sign & Display Co. v. Wagener Equities, Inc.*, 825 F.3d 793, 797 (7th Cir. 2016) ("[A]gency rules are properly applied to determine whether an action is done 'on behalf' of a principal." (quoting 47 C.F.R. § 64.1200(f)(10)).

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I. TO QUALIFY AS THE "SENDER" OF A FAX, THE DEFENDANT MUST HAVE DISPATCHED THAT FAX OR MUST HAVE CAUSED IT TO BE DISPATCHED

A. The Plain Text of the Statute Requires This Interpretation of "Sender"

As explained, the TCPA makes it unlawful to "use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement."[6] "[T]o be liable under this provision, a defendant must 'use' a fax machine or other device 'to send … an unsolicited advertisement.'"[7] The central part of this provision—the verb "to send"—"has two relevant meanings."[8] First, the word means "[t]o cause to be conveyed by an intermediary to a destination." Second, the word means "[t]o dispatch, as by a communications medium."[9] Ordinary usage confirms these dictionary definitions—one "sends" a letter when one drops it in mailbox, just as one "sends" a message when one broadcasts it over the radio. Under the TCPA's plain text, then, a defendant cannot be held liable unless it "caused the subject faxes to be conveyed [or] . . . dispatched them in [some] way."[10]

This condition is obviously satisfied where Company A uses its own fax machine to send a fax advertising its own goods or services; there, Company A "sent" the fax in the same sense that the radio broadcaster "sent" its message. But of course, someone may "cause" a fax to be conveyed or dispatched in less direct ways; if Company A hired Company B to send faxes in a particular manner to particular recipients, it "sent" those faxes in the same sense that someone who paid FedEx to overnight a letter "sent" a letter. This result makes legal as well as semantic sense.

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[6] 47 U.S.C. § 227(b)(1)(C).

[7] *Health One*, 889 F.3d at 801 (quoting 47 U.S.C. § 227(b)(1)(C)).

[8] *Id.* (quoting American Heritage Dictionary 1642 (3d ed. 1992)).

[9] *Id.* (quoting American Heritage Dictionary 1642 (3d ed. 1992)).

[10] *Id.*

Under agency law, "a principal is subject to liability upon a transaction conducted by his agent, whom he has authorized or apparently authorized to conduct it in the way in which it is conducted, as if he had personally entered into the transaction." Restatement (Second) of Agency § 140 cmt. a. Thus, Company A also "sends" a fax where, under ordinary principles of agency law, it may be said that Company B sent it on Company A's behalf.[11]

Two cases show how this standard works in practice. In *Health One*, Mohawk Medical sent unsolicited faxes advertising drugs sold by it but manufactured by Bristol-Myers Squibb and Pfizer. One of the recipients sued the manufacturers, alleging that they "sent" the faxes for TCPA purposes because their products were advertised in those faxes. The Sixth Circuit disagreed: "Bristol and Pfizer neither dispatched the faxes nor caused them to be sent," and therefore no amount of "legal alchemy" could transform them into "senders" for purposes of TCPA liability.[12] Similarly, in *Paldo Sign*, a fax broadcaster offered its services to a company, promising that it would not send any faxes until the company had signed off on the advertisements. After one of the company's employees mistakenly sent a check to the broadcaster, the broadcaster sent out thousands of faxes without first clearing the list of recipients or the text of the message. The Seventh Circuit affirmed a verdict in the company's favor: "agency rules are properly applied to determine whether an action is done 'on behalf' of a principal," and the jury reasonably found that the broadcaster acted without actual or apparent authority in sending the faxes as it did.[13] In neither of these cases could it be reasonably said that the defendants "dispatched" the faxes in question, nor could it be said that they caused those faxes to be dispatched, so they were not liable.

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[11] *See Health One*, 889 F.3d at 802.

[12] *See id.* at 802.

[13] 825 F.3d at 797 (quoting *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 938 (7th Cir. 2016)); *see id.* at 797–98.

B. This Interpretation of "Sender" Is Consistent with the Commission's Regulations and Prior Statements

In addition to being compelled by the text of the TCPA, this interpretation fits with what the Commission has said about liability for junk faxes. The Commission defines the "sender" of a fax as "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement."[14] As the Sixth Circuit explained:

> Read in the context of the statute itself, the regulation . . . purports to allocate liability in cases where the party that physically sends (i.e., dispatches) the fax and the party that *causes* it to be sent are not one and the same. That situation typically arises when a person or company hires a fax broadcaster . . . . Both kinds of entities appear to meet the statutory requirement of "send": the broadcasters because they in fact dispatch the advertisements via fax, the hirers (for lack of a better term) because they cause the fax to be conveyed. In this statutory context, the regulation by its terms would allocate liability under § 227(b) first to the hirers, as the party "whose goods or services are advertised or promoted in the unsolicited advertisement[,]" or as the party who otherwise put the broadcaster up to sending the fax (i.e., "the person or entity on whose behalf" the junk fax was sent).[15]

As the Sixth Circuit also noted, "[t]he FCC itself reads the regulation the same way."[16] "[U]nder the Commission's interpretation of the facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent."[17] "In *most* instances, this will be the entity whose product or service is advertised or promoted in the message."[18] But "most instances" means just that: not all instances. Sometimes—for example, when agency law so dictates—a company will be sufficiently distanced from the creation and distribution of the fax that it makes no sense to say it "sent" the fax or caused it to be sent. In that situation, the party that actually sent the fax, not

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[14] 47 C.F.R. § 64.1200(f)(10).

[15] *Health One*, 889 F.3d at 802 (quoting 47 C.F.R. § 64.1200(f)(10)).

[16] *Id.*

[17] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25967, 25971 (2006) ("*2006 TCPA Order*").

[18] *Id.* (emphasis added).

the "innocent party" whose goods or services it promoted,[19] should be liable.[20] After all, in that case the broadcaster—not the other company—generated the illegal fax and any accompanying harm.

C. The Counterarguments Proffered Against This Position Are Mistaken

Some have argued for a different interpretation of the TCPA and its accompanying regulations, insisting that those regulations impose strict liability on anyone whose goods or services happen to be advertised via fax or that agency law principles play no role in determining whether someone may be held liable as a sender. Both positions are mistaken.

Take first strict liability. Some in the plaintiff's bar have argued that, given the disjunctive phrasing in the Commission's definition of "sender," the regulation covers two distinct categories of defendants: "the person or entity on whose behalf a facsimile unsolicited advertisement is sent" *and* those "whose goods or services are advertised or promoted in the unsolicited advertisement," whether or not the fax was sent on that person's behalf. In other words, a company could be held liable merely because its goods or services appeared in another, unrelated company's advertisements.[21]

That cannot be right. The statute imposes liability solely on one who "use[s] . . . a[] telephone facsimile machine . . . to send . . . an unsolicited advertisement."[22] It would "strip the

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[19] *Health One*, 889 F.3d at 802.

[20] The Commission has also concluded that *both* parties may be liable where each bears sufficient responsibility for the fax's unlawful distribution. *See 2006 TCPA Order*, 71 Fed. Reg. at 25971 (explaining that fax broadcasters will be liable along with the fax's proponent "if [the fax broadcaster] demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile advertisements"); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, 12407 (1995) (clarifying that fax broadcasters are generally not liable merely for sending a fax on another's behalf).

[21] *See, e.g.*, Dkt. 263, *Bais Yaakov of Spring Valley v. Houghton Mifflin Harcourt Publishers, Inc.*, No. 13-cv-4577 (S.D.N.Y.) ("*Bais Yaakov* Dkt.").

[22] 47 U.S.C. § 227(b)(1)(C).

'send' out of 'sender'" to read the Commission's regulations to impose liability on someone who neither "use[d]" a fax machine "to send" a fax nor caused a fax machine to be so used.[23] In addition to being wrong as a matter of statutory interpretation, such a reading also makes no sense as a matter of policy. Why would Congress or this Commission impose liability on someone who had nothing to do with sending an allegedly unlawful fax? What sense could there be in stringing companies up for massive statutory damages when, as everyone acknowledges, they did *not* send the fax (or cause it to be sent) in any ordinary sense of those terms? There is no reason to read the Commission's definition to reach this absurd result, particularly when the Sixth Circuit has already provided a plausible explanation for the same text.[24]

Notably, the Sixth Circuit itself has undercut the chief judicial support for a strict-liability reading. In *Siding & Insulation Co. v. Alco Vending, Inc.*,[25] and *Imhoff Inv., LLC v. Alfoccino, Inc.*,[26] that court arguably suggested in dicta that the second prong of the Commission's definition supported strict liability. But as *Health One* later explained, "[i]n both those cases the defendant in fact hired a fax broadcaster to send out the junk faxes."[27] As a result, "in neither case did [it] hold, or have occasion to hold, that an innocent party . . . could by some legal alchemy be held liable for having 'sent' the faxes."[28]

So too for the similarly misguided argument that courts applying the statute and its accompanying regulations should not look to agency law in determining one party's liability for

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[23] *Health One*, 889 F.3d at 802.

[24] If the Commission now believes, in contrast to its prior statements, that its regulations can *only* be read to impose strict liability, then it should revise its regulations, either *sua sponte* or upon a petition for rulemaking directed at that result. As explained, strict liability cannot be squared with the text of the statute.

[25] 822 F.3d 886 (6th Cir. 2016).

[26] 792 F.3d 627 (6th Cir. 2015).

[27] 889 F.3d at 802.

[28] *Id.*

faxes sent by another. The Eleventh Circuit has adopted something like that position,[29] but its reasons for doing so do not survive inspection. For support, it relied chiefly on a letter submitted by the Commission's Counsel. In that letter, the Commission explained that its decision in *In re Dish Network*—which applied agency principles to liability for calls placed in violation of the TCPA's ban on prerecorded calls or calls to numbers on the Do-Not-Call Registry[30]—"applie[d] only to liability for telemarketing calls and neither addresse[d] nor alter[ed] the Commission's pre-existing regulatory treatment of unsolicited facsimile advertisements."[31] From this, the Eleventh Circuit reasoned that agency-law principles are inapplicable because the Commission had previously held entities liable for faxes sent on their "behalf."[32]

The Eleventh Circuit's conclusion does not follow from its premises. To begin with, nothing in the Commission's statements about liability for faxes sent on one's "behalf" eliminates the possible application of agency-law principles; indeed, the whole point of agency law is to determine when someone may be held liable for another's actions taken on their behalf. Moreover, even though the Commission's letter makes clear that *Dish Network* should not be mindlessly extended to unsolicited fax advertisements, nothing in that letter demonstrates that agency-law principles are somehow *inappropriate* for that context. Again, the problem—both with unsolicited phone calls and unsolicited faxes—is to determine when Company A may be held liable even though it itself did not dial the protected number or hit "send" on the fax machine. Agency law principles properly shed light on both situations.

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[29] *See Palm Beach Golf Ctr.–Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015); *cf. Siding & Insulation Co.*, 822 F.3d at 894 (describing an "on-whose-behalf" standard).

[30] *See* 28 FCC Rcd. 6574, 6582–86 (2013).

[31] *Palm Beach*, 781 F.3d at 1254 (quoting the Commission's letter).

[32] *Id.* at 1255 (citing *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, 12407 (1995)).

Indeed, even the courts that have disclaimed the application of agency law have found themselves conducting an agency-like inquiry. For example, wary of strict liability, the Eleventh Circuit itself looked to a host of factors—such as whether the defendant hired the fax broadcaster, what instructions the company gave to the broadcaster, and what control it had over the content and form of the faxes that were sent—in applying its "on whose behalf" standard.[33] But of course, those are precisely the kinds of factors that courts consider when applying ordinary agency law. There is no reason to block agency principles at the front door just to let them in—and rightly so—through the side door under a different name with a less defined and more lenient standard.

II. THE COURTS NEED THE COMMISSION'S GUIDANCE NOW

As shown above, there is a straightforward, commonsense way to interpret both the TCPA and its accompanying regulations.[34] But as also shown above, courts need more guidance from the Commission to reach that result.[35]

The Commission should provide that guidance now. ETS's own case is Exhibit A for the kind of sprawling, harmful litigation encouraged by the prevailing confusion about who qualifies as a "sender." ETS owns a service called Criterion, a software-based tool that educators use to assess students' progress in their writing abilities. ETS entered into an exclusive distribution agreement with Houghton Mifflin Harcourt Publishers, Inc. ("HMH"), giving HMH sole rights to market and distribute Criterion in the United States K-12 school market and forbidding ETS from marketing or distributing that product in its own right within that market.[36] Under that

[33] *Palm Beach*, 781 F.3d at 1258.

[34] *See supra* 1–2.

[35] *See supra* 3–4.

[36] *See Bais Yaakov of Spring Valley v. Educ. Testing Serv.*, No. 13-CV-4577, __ F. Supp. 3d __, 2019 WL 1244949, at *2–6 (S.D.N.Y. Mar. 18, 2019).

agreement, HMH promised that it would "comply with any and all applicable laws, regulations and other rules in the performance of its obligations . . . , including regulations relating to the marketing of the service."[37] While ETS retained the right to review HMH's use of ETS's logos and its description of the Criterion Service, it had no power to tell HMH how to market Criterion at all, let alone whether, how, or to whom it should send fax advertisements to do so.[38] Indeed, one HMH employee testified that, even if ETS had *insisted* that HMH not send fax advertisements, HMH would have proceeded anyway; after all, it had the contractual right to market the product however it saw fit.[39]

Exercising its authority under the contract, HMH ultimately chose to send faxes advertisements for Criterion and hired a fax broadcaster to do so.[40] Here, too, ETS was not involved; HMH obtained its list of intended recipients from a third party, and ETS did not know to whom the advertisements would be sent.[41] One landed in the inbox of repeat plaintiff Bais Yaakov, a school (and serial litigant) in New York that ultimately sued HMH. Only after failing to recover from HMH, Bais Yaakov sued ETS.[42]

No English speaker would say that ETS "sent" the fax that it did not create and could not stop. And no common-law lawyer would say that HMH acted as ETS's agent in sending the fax. Nonetheless, ETS recently lost its motion for summary judgment. According to the court, a reasonable jury could conclude that HMH sent the fax "on ETS's behalf" because the fax advertised Criterion and because ETS reviewed the use of its logo and the description of its

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[37] *See Bais Yaakov* Dkt 250-6, at § 11.3.4.

[38] *See Bais Yaakov*, __ F. Supp. 3d. __, 2019 WL 1244949, at *2–3.

[39] *See id.* at *2–4.

[40] *See id.* at *3–4.

[41] *See Bais Yaakov* Dkt. 250-11, at 69:11–70:10.

[42] *See Bais Yaakov*, __ F. Supp. 3d __, 2019 WL 1244949, at *8–9.

product before the offending fax was distributed.[43] As a result, ETS—a non-profit that should be spending its time and money on education, not lawsuits far removed from the central purposes of the TCPA—must face trial because of the ambiguity surrounding the Commission's regulations. The Commission should put an end to such suits—as well as the other vexatious claims noted by Akin Gump[44]—by clarifying that, to count as a "sender" under the TCPA or its implementing regulations, one must have "caused the subject faxes to be conveyed" or have "dispatched them," as determined by ordinary principles of agency law.

CONCLUSION

The Commission should grant Akin Gump's petition.

Respectfully submitted,

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[43] *See id.* at *22–23.

[44] *See* Akin Gump Petition at 9.