



September 2, 2014

Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: *Petition for Expedited Declaratory Ruling Filed by Santander Consumer USA, Inc. (CG Docket No. 02-278)*

To whom it may concern:

The American Financial Services Association (“AFSA”)¹ supports the Petition for Expedited Declaratory Ruling (“Petition”)² filed by Santander Consumer USA, Inc. (“Santander”). The Petition asks the Federal Communications Commission (“Commission”) to clarify certain aspects of the Telephone Consumer Protection Act (“TCPA”).³ Specifically, Santander is asking the Commission to “clarify and confirm that ‘prior express consent’ to receive non-telemarketing calls and text messages to cellular telephones sent using an automatic telephone dialing system (‘ATDS’) and/or an artificial or prerecorded voice message cannot be revoked.”⁴

Alternatively, Santander asks that if the Commission decides that the TCPA includes a right to revoke prior express consent, the Commission should clarify that the caller may require consumers to use one or more of the following methods to effectively revoke prior express consent: (1) in writing at the mailing address designated by the caller, (2) by email to the email address designated by the caller, (3) by text message sent to the telephone number designated by the caller, (4) by facsimile to the telephone number designated by the caller, and/or (5) as prescribed by the Commission hereafter as needed to address emerging technology.

AFSA asks the Commission to grant Santander’s Petition and rule that prior express consent cannot be revoked. If the Commission declines to do so, the Commission should rule that prior express consent can only be revoked in the five ways mentioned above. Prior express consent should not be allowed to be revoked verbally.

AFSA members contact their customers for a variety of reasons – to tell the customer that there is a fraud alert on an account, that a payment is due, that a work-out plan is available, that a lease is almost up, or with some other account servicing message. The most expedient and effective

¹ AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its more than 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

² *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, filed by Santander Consumer USA, Inc. on July 10, 2014.

³ 47 U.S.C. § 227.

⁴ *Petition* at 1.

way to reach many of these customers is to call or text them on their cell phones, especially if they travel or work out of town and may not receive mail for a period of time. If it is not the only way to reach the customer, it is likely the way that the customer prefers to be contacted.

AFSA members obtain the required prior express consent from their customers before placing calls to wireless telephone numbers using an ATDS or an artificial or prerecorded voice, as specified by the TCPA and the Commission's rules. Some courts have held that prior express consent is revocable, despite the fact that neither the text of the TCPA nor the Commission's regulations or prior rulings have expressly granted consumers a right to revoke consent

These cases have led to a huge increase in TCPA litigation. AFSA members and other companies are now facing expensive lawsuits on the grounds that the consumer verbally revoked prior express consent. Penalties of up to \$1500 per violation of the TCPA have encouraged this surge of lawsuits in which the attorneys bringing the case are rewarded, but consumers see little benefit. Even when companies prevail, the cost of defending a TCPA class action most often exceeds \$100,000.

As the Petition states, "In these cases, it is undisputed that the consumer provided 'prior express consent.' The only issue is whether the consumer's allegation that he or she 'verbally revoked' consent, often without any documentary or other corroborating evidence, is sufficient to establish a violation."⁵ In other words, these cases boil down to a "he said / she said" situation, which is unfair to businesses complying with the law. Absent action from the Commission, companies trying to avoid these lawsuits would have to record all phone calls, and even all in-person conversations at branch offices, to prove that at no point did the consumer revoke consent. Obviously, this solution would be so expensive as to be completely impractical.

Furthermore, a Commission ruling permitting verbal revocation could create compliance problems for the financial services industry by negating provisions included in standard contract forms. Standard contract forms state that: (1) the customer agrees to calls via an ATDS or prerecorded messages to a wireless number; and (2) the contract cannot be modified except in a writing signed by the creditor.

Thus, we ask the Commission to either affirmatively state that the TCPA does not contain a right to revoke consent or that if a consumer wishes to revoke consent she must do so in one of the five ways listed above and described in the Petition.

Allowing callers to designate the method for revoking consent is consistent with the TCPA and other consumer protection statutes. "In fact," as the Petition states, "the TCPA allows for a similar procedure in connection with telemarketing communications in the form of opt-out procedures."⁶ The Petition also mentions the Consumer Financial Protection Bureau's ("CFPB") recent mortgage servicing rule.⁷ AFSA commented on the rule when it was proposed and argued that the proposal to allow borrowers to give oral notice of an error or request for information would be extremely difficult for compliance. Although the CFPB did not make very many

⁵ *Petition* at 4.

⁶ *Petition* at 10.

⁷ *See* 12 C.F.R. § 1024.35 (c); 12 C.F.R. § 1024.36(b); 12 U.S.C. § 2605(e).

substantial changes to the proposed rule, the CFPB did change this provision and stated that borrowers must make a written request.

It is unfair to penalize a company who believes in good faith before making a call that it has complied with the TCPA. Congress enacted the TCPA intending to protect consumers from undesired calls on their cell phones, not to set a trap for those who comply with the law.

* * *

We look forward to working with the Commission on this Petition. Please contact me by phone, 202-466-8616, or e-mail, bhimpler@afsamail.org, with any questions.

Sincerely,

A handwritten signature in black ink that reads "Bill Himpler". The signature is written in a cursive, flowing style.

Bill Himpler
Executive Vice President
American Financial Services Association