



August 8, 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 Stage Stores, Inc. (CG Docket No. 02-278)

To whom it may concern:

The American Financial Services Association (“AFSA”) supports the Petition for Expedited Declaratory Ruling (“Petition”)¹ filed by Stage Stores, Inc. (“Stage Stores”). The Petition asks the Federal Communications Commission (“Commission”) to clarify the applicability of the Telephone Consumer Protection Act (“TCPA”)² and the Commission’s related rules³ to “a marketing text message sent to a wireless number for which the caller obtained prior express consent but where the wireless number has been reassigned from the consenting consumer to another person” without the caller having notice or knowledge of the change.⁴

The TCPA and related rules prohibit autodialed non-emergency calls to cellular telephone numbers without the prior express consent of the called party. AFSA agrees with Stage Stores that there should be an exception to, or a safe harbor from, liability in these instances, “provided the caller updates its records and ceases calls to that wireless number within a reasonable time period after being informed that the number has been reassigned.”⁵ An exception or safe harbor is crucial because there is no way for the caller to know that the number has been reassigned, unless notified by the consumer. It is unreasonable to hold companies liable for a TCPA violation when the company has done all it can to comply with the law.

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.

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 *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, filed by Stage Stores, Inc. on June 4, 2014.

² 47 U.S.C. §227.

³ 47 C.F.R. § 64.1200.

⁴ *Petition* at 1.

⁵ *Petition* at 4.

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 or sending text messages to wireless telephone numbers using an automatic telephone dialing system (“ATDS”) or an artificial or prerecorded voice, as specified by the TCPA and the FCC’s rules.

However, sometimes wireless telephone numbers for which AFSA members have obtained prior express consent are reassigned from one subscriber to another. Thus, AFSA members may call or text a phone number for which they had obtained prior express consent, but reach a person who was reassigned that number and who had not given consent. AFSA members cannot completely avoid calling or texting reassigned wireless telephone numbers because there is no public wireless telephone number directory, and individuals may change their phone numbers without notifying callers beforehand. In short, there is *no way* for a company to avoid violating the law in the case of reassignments. Absent some kind of database that companies can access to scrub out reassigned numbers, companies should not be held liable for calling a number for which the company had received prior express consent. AFSA members have no incentive to keep calling consumers that have received a reassigned telephone number, they simply cannot completely avoid calling reassigned wireless telephone numbers without a public wireless telephone number directory or notification from the consumer.

It could be useful for callers and consumers if wireless carriers lengthened the amount of time between deactivation of a cell number and the reassignment of that number. It would also be helpful if wireless carriers established and maintained a cell reassignment database, showing the cell number and date reassigned. Companies could apply for access to this database to check for reassignment and update internal dialing strategies.

Companies, such as Stage Stores, are now facing expensive class action lawsuits on the grounds that they did not have “prior express consent” to call the reassigned number. Penalties of up to \$1500 per violation of the TCPA have provided plaintiff’s attorneys with fodder for lawsuits that enrich the attorneys rather than compensate their clients. In several TCPA class actions, companies settled for millions of dollars. Each class action member only received a few dollars, while the attorneys walked away with millions.⁶ Instead of receiving compensation from class action litigation, consumers will experience rising costs as businesses struggle to make up the massive legal fees incurred during TCPA litigation. Even when companies prevail, the cost of defending a TCPA class action most often exceeds \$100,000, which may be devastating for small and mid-size companies. In addition, the growing litigation could be a perverse incentive for subscribers not to notify callers that a telephone number has been reassigned.

Stage Stores writes in the Petition, “Resolution of the controversy and uncertainty surrounding TCPA liability for reassigned numbers is necessary to disincentivize frivolous putative class action litigation against companies which exercise good faith in complying with the TCPA. ...

⁶ Erin Hoffman, Eileen Hunter, and Aaron Van Oort. “Recent Developments in TCPA Litigation,” *Faegre Baker Daniels*, April 5, 2013. http://www.minncle.org/attendeemats/30313/10_VAN%20OORT.pdf.

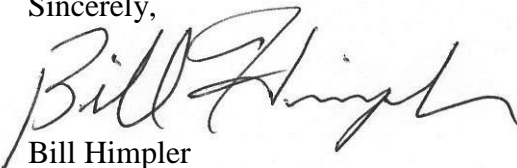
Congress surely did not envision imposing exorbitant TCPA class action liability on callers under these limited circumstances.” We strongly agree with Stage Stores and so urge the Commission to use its authority to issue a declaratory ruling confirming that parties are not liable under the TCPA for calls or texts to telephone numbers that have been reassigned without the caller’s knowledge, as long as the caller previously obtained valid prior express consent to place calls or send texts to that telephone number.

AFSA members comply with the requirements of the TCPA that they obtain express consent from the subscriber to a cell phone service before calling their assigned number. The calling party has notice of the number assigned to the party being called and their expressed consent to being called. However, when a number is reassigned and no notice thereof is given to the party to whom express consent was granted, it is unfair to penalize a caller 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, and the desires of consumers are expressed when they consent to receiving calls from a particular party. However, Congress did not intend to set a trap for those who comply with the law.

* * *

We look forward to working with the FCC 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 fluid and cursive, with the first name "Bill" being larger and more prominent than the last name "Himpler".

Bill Himpler
Executive Vice President
American Financial Services Association