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November 17, 2014

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

RE: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, GC Docket No. 02-278; Petition for Rulemaking of Consumer Bankers Association (CBA)

Dear Ms. Dortch:

By this letter, Santander Consumer USA, Inc. (“Santander”)<sup>1</sup> respectfully submits these comments to the Federal Communications Commission (“FCC”) in support of the Petition for Rulemaking filed by Consumer Bankers Association (the “CBA Petition”)<sup>2</sup> in the above-referenced docket. Specifically, the FCC should confirm that the “called party,” for purposes of the Telephone Consumer Protection Act (“TCPA”) prohibition on non-telemarketing informational calls to mobile telephone numbers, is the intended recipient of the call. Additionally, as discussed in further detail below, the FCC should review the CBA Petition in conjunction with the Santander Petition<sup>3</sup> and issue a ruling granting both petitions at the same time.

#### The Relief the CBA Seeks Is Needed To Allow Businesses to Comply with the TCPA

Santander, consistent with the practice of several businesses across the country, contacts its customers for a variety of reasons that are directly related to the customer’s account. These calls include information about a payment options, loss mitigation and repossession alternatives, and other transactional information. Santander makes these non-telemarketing calls with the purpose of reaching a specific customer who provided the telephone number to Santander in connection with the credit transaction.

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<sup>1</sup> Santander is a leading company in the automotive finance sector, originating and servicing retail installment contracts, vehicle leases, and dealer loans, as well as financial products and services related to motorcycles, RVs, and watercraft. Santander is dependent on the lawful use of modern telephone technology to communicate with its customers throughout the duration of its customer relationships. These communications include calls made by Santander to the telephone numbers its customers have provided in connection with their accounts.

<sup>2</sup> See Consumer Bankers Association, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 19, 2014).

<sup>3</sup> See Santander Consumer USA, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed July 7, 2014).

Under the FCC's guidance, the customer's provision of the telephone number constitutes "prior express consent" under the TCPA. However, as the FCC is well aware, wireless telephone numbers can be reassigned from one subscriber to another without notice to anyone who previously received "prior express consent" to call the number. As a result, anyone may call a telephone number for which prior express consent had been obtained from the intended recipient, but may reach a person who was reassigned that number, thereby exposing the caller to TCPA liability.<sup>4</sup>

Businesses cannot avoid calling reassigned wireless telephone numbers. Under the current state of the law and despite the best efforts of businesses to comply with the TCPA and the FCC's regulations, businesses face significant liability when a consumer's wireless number is reassigned to a new subscriber. Santander urges the FCC to grant the CBA Petition to allow businesses a meaningful opportunity to comply with the TCPA, while preserving its intended goals. The threat of TCPA litigation arising from calls to reassigned numbers, among other things, discourages important, time-sensitive informational communications that are legally mandated, improve money management, reduce avoidable fees, and promote customer service.

Santander supports the CBA's position that, by confirming that only intended recipients are "called parties," the FCC will: 1) prevent potential chilling of beneficial consumer communications; 2) shield consumers from higher costs stemming from institutions' increased litigation and compliance expenses; 3) quash frivolous litigation that is inundating courts and creating inconsistent law; and 4) allow small businesses to grow and nonprofits to reach their goals without the threat of litigation. To avoid unfair and unanticipated TCPA liability when a caller cannot know in good faith that the wireless number for which it has consent to call has been reassigned, the FCC should clarify that "called party" means, and has always meant, the intended recipient who provided consent to the caller.<sup>5</sup>

#### The FCC Should Address the CBA Petition Contemporaneously with the Santander Petition

The CBA Petition seeks clarity regarding the scope of "prior express consent" once a telephone number has been reassigned to a new subscriber. The clarification CBA seeks is related to the clarification Santander seeks in the Petition for Declaratory Ruling it filed on July 10, 2014. Both petitions address the caller's potential liability for placing calls to telephone numbers for which the caller obtained "prior express consent." Both situations – alleged revocation and reassignment – impose practical compliance challenges and subject businesses to significant litigation exposure. These uncertainties and risks warrant immediate attention and response from the Commission. Addressing both issues contemporaneously would provide certainty with respect to a business's obligations after obtaining the consumer's "prior express consent."

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<sup>4</sup> See generally, Comments of the American Financial Services Association at 1-2, CG Docket No. 02-278 (filed Mar. 10, 2014) ("AFSA Comments").

<sup>5</sup> See Comments of Santander Consumer USA, Inc., CG Docket No. 02-278 at 5-6 (filed Mar. 10, 2014).

The lack of clarity with respect to revocation of prior express consent and reassigned numbers has led to a recent explosion in the number of TCPA lawsuits, as plaintiffs' lawyers continue to invent new theories of liability that Congress and the FCC never intended to allow.<sup>6</sup> Businesses of all sizes cannot grow with the looming litigation risks and increasing compliance costs due to the current interpretations of the TCPA. Even when businesses reasonably believe they have prior express consent, any call exposes the business to TCPA liability if the customer claims verbal revocation of consent or if the telephone number has been reassigned. This exposure exists each day of the relationship, even if the caller verifies its customer's telephone numbers routinely. To remedy this pervasive problem, the FCC should clarify that callers can rely on the prior express consent of the intended party for calls to wireless numbers as requested by the CBA and Santander Petitions.

For the foregoing reasons, the FCC should grant the CBA Petition and Santander's Petition and clarify and confirm that the "called party" is the intended recipient of the call, and that a caller may designate one or more of the following methods approved by the Commission that the consumer must use 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.

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<sup>6</sup> Comments of Time Warner Cable Inc., CG Docket No. 02-278 at 2-3 (filed Mar. 10, 2014) ("TWC Comments") (internal citations omitted). "A recent survey of TCPA litigation found that TCPA suits [were] up a whopping 70 percent between 2012 and 2013, and that well over a third of the plaintiffs filing TCPA suits during that period were repeat players that had sued under consumer statutes before. A separate study by the U.S. Chamber of Commerce found that, even as the number of TCPA lawsuits has soared in recent years, it is rare these days to see TCPA litigation brought against its original intended target—abusive telemarketers. Instead, the Chamber's study explains, essentially every American business, from large to small, now finds itself at risk of having to defend against a TCPA lawsuit alleging statutory damages thousands of times in excess of any conceivable actual 'damage' associated with the mere receipt of a phone call."

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Sincerely,

**McGlinchey Stafford**

A handwritten signature in black ink, appearing to read "Burton D. Brillhart", with a long horizontal flourish extending to the right.

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