

April 29, 2019

**VIA ECFS**

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

**Re: Notice of Ex Parte Presentation – Nationstar Mortgage, LLC d/b/a Mr. Cooper - Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 - CG Docket No. 02-278, Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of DC Circuit's ACA International Decision - CG Docket No. 18-152**

Dear Ms. Dortch:

On April 25, 2018, Dana Dillard, Executive Vice President for Corporate Social Responsibility of Nationstar Mortgage, LLC d/b/a Mr. Cooper (“Mr. Cooper” or “Company”), along with Paul C. Besozzi and Eric J. Troutman, outside counsel for Mr. Cooper, met with Patrick Webre, Chief, Consumer and Governmental Affairs Bureau (“CGB”); Mark Stone, Deputy Chief, CGB; Kurt Schroeder, Chief, Consumer Policy Division & Information Access & Privacy Office (“CPD”) of CGB; Kristi Thornton, Associate Chief, CPD (by telephone), Karen Schroeder, Attorney Advisor, CGB; and Christina Clearwater, Attorney Advisor, CGB, to discuss Mr. Cooper’s positions on key Telephone Consumer Protection Act (“TCPA”)-related regulatory issues currently being considered by the Commission and affecting the Company’s ability to help its customers.

More specifically, after outlining the background and nature of the Company’s business, the discussions focused on (a) the ongoing challenges to its efforts legitimately to communicate with its customers while complying with the TCPA; (b) recommended actions on two key issues directly affecting those efforts: (i) the definition of an automatic telephone dialing system (“ATDS”) and the (ii) standards for the revocation of consent; and (c) the misapplication of robocall data to legitimate American businesses attempting to contact their customers in light of

data sources that demonstrate that as little as 2.1% of unwanted “robocalls” come from such callers.<sup>1</sup>

More specifically, during the meeting the Company discussed the following with the FCC Staff:

1. **Background** – Mr. Cooper is a major presence in the U.S. mortgage-servicing marketplace, with 3.3 million customers, over eighty-five percent (85%) of which are acquired. The Company is the third largest non-bank mortgage service entity in the U.S., servicing one out of every fourteen mortgages in the U.S. Sixty percent (60%) of the mortgages that it services are Freddie Mac or Fannie Mae loans. During the housing crisis, the Company was extensively involved in handling default loans for both of these and other government lending agencies.

The Company consistently employs a “customer centric” philosophy. Through its extensive experience in servicing mortgage loans, Mr. Cooper knows that early communication with customers who show signs of financial distress is key to helping them to stay in their home. The earlier the Company reaches the customer the more potential solutions it has to offer. Technology plays a key role in effectively communicating with these customers.

To reach out effectively to the Company’s large number of customers about all manner of issues relating to their mortgages (e.g., missed payments, possible insurance lapses, etc.), Mr. Cooper employs live agents and sophisticated automated technology that, when a customer picks up the phone, quickly allows the live agent to initiate conversation on the call. The equipment includes built-in features to ensure compliance with federal and state time-of day and other calling requirements. Although the Company employs pure manual dialing in certain instances, in the Company’s extensive experience, using automated technology affords the optimal chance for Mr. Cooper to reach and potentially help a larger number of its customers more quickly.

2. **Key Challenges** – Mr. Cooper follows a TCPA-compliance-minded approach to customer outreach, including concerted efforts to obtain prior consent from each of its customers to use its automated technology to call them. Nevertheless, since the Company is servicing many loans originated by other entities, obtaining that consent, particularly to call wireless phones, is a challenge. Yet during a natural disaster such as the California Wildfires and Hurricane Harvey, when these customers may need help and have questions, wireless phones are frequently the only lifeline. Again, use of the Company’s automated technology is the most effective vehicle for successful outreach. Although Mr. Cooper scrubs wireless numbers, the Company’s efforts to reach existing customers have continued to expose it to plaintiffs’ TCPA class action lawsuits. In the current environment, these lawsuits may be based solely on no more than a single errant call.

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<sup>1</sup> Hiya, a Seattle-based company that provides caller profile information to help consumers identify incoming calls and block unwanted ones, assembled these data. Mr. Cooper first raised this issue in a meeting with Commissioner Michael O’Rielly on March 26 and subsequently provided follow-up information at the request of his office. See Notice of Ex Parte Presentation, Nationstar Mortgage, LLC d/b/a Mr. Cooper, CG Docket Nos. 02-278 and 18-152, March 28, 2019; Notice of Ex Parte Presentation, Nationstar Mortgage, LLC d/b/a Mr. Cooper, CG Docket Nos. 02-278 and 18-152, April 1, 2019. The Company provided a copy of the latter filing during the discussion of the data issue and therefore a copy is attached hereto as Exhibit 1.

A second challenge is the processing of consent revocation requests. Under the current “any reasonable means” standard, the Company acts conservatively to honor literally any request (e.g., “don’t call me” written on the face of a mortgage payment voucher). When a called party states “don’t call me” in most cases there is no opportunity to validate that it is the actual customer who is giving the instruction. Moreover, there is usually no opportunity to find out what the customer actually means. For example, does it mean, “don’t call me” about anything relating to this account ever again? Does it mean “don’t call me” regarding the particular payment? Does it mean “don’t call me” on this phone number only? Does it mean “don’t call me” on other accounts Mr. Cooper might also be servicing? Where the “problem” that may have precipitated the “don’t call me” request is subsequently resolved during the call, what does that mean for future calls?

Interpreting the request in an overly broad manner will deprive a consumer of important and timely information in the future. But interpreting the request in an overly-narrow manner may lead to a lawsuit. Mr. Cooper—and servicers nationwide—should not be forced to assume that every such caller is actually their customer and then guess at a consumer’s intentions. Nor should they face suit from individuals claiming, *post hac*, that they revoked consent and making what they will of vague statements to support a lawsuit. Currently, Mr. Cooper must and does act extremely conservatively to avoid litigation and as a result, consumers missing payments after stating “do not call me” or words to that effect may subsequently face foreclosure proceedings without further telephonic notice—a development decidedly not in the interest of the customer or, for example, a guarantor of the loan.<sup>2</sup>

To address these challenges, the Company made two recommendations.

3. **The Definition Of An ATDS – A New Compromise Proposal** – Mr. Cooper fully supports the Commission’s ongoing efforts to stop and combat illegal, scam robocalls using spoofed telephone numbers. But the Company is not a “robocaller” that should be lumped into that classification. Rather, Mr. Cooper uses modern dialing technology to reach out to and serve existing customers holding mortgages that it is servicing at specific numbers to discuss specific account-related matters designed to help keep borrowers in their homes. The Commission must recognize that there are true pro-consumer calls that need responsibly to use such technology.

The Company fully agrees that automated technology with the capacity to store or produce telephone numbers to be called using a random and sequential number generator is an ATDS under the TCPA. However, the Company does not agree that any and all automated technology, including that to which a list of customer numbers is uploaded and numbers are called with human intervention and live agents prepared to field calls, must also be so classified under the TCPA.

The Commission has previously articulated that an ATDS is a dialer that can call thousands of numbers in a short period of time without “human intervention.”<sup>3</sup> The Ninth Circuit Court of Appeals has stated that an ATDS is a dialer with the capacity to call stored numbers

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<sup>2</sup> To ensure accurate recollection of the customer’s request, Mr. Cooper employs voice-to-text technology to conduct post-call audits, the purpose of which is to ensure that a verbal request to cease calls is properly reflected in the customer’s account records.

<sup>3</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7975 (2015).

“automatically.”<sup>4</sup> Neither of these formulations require the express statutory pre-requisites of random or sequential number generation and both pertain to the “automatic” function of a dialer—but neither define or provide guidance as to the meaning of the phrase.

Currently, the record on proposed ATDS formulations is fractured. TCPA reform advocates maintain that the statutory pre-requisites of random and sequential number generation are the hallmark of ATDS usage. While others advocate an opposing and extreme position that a call must be made via an agent dialing all ten phone numbers on a desk phone for a call to fall outside of statutory coverage.

Mr. Cooper again put forth a novel recommendation for the Commission to consider as a middle ground. The FCC should interpret the phrase ATDS to include dialers that randomly or sequentially generate numbers and dial them OR any system that dials automatically from a list without human intervention in that the system, as used, fails to achieve an abandonment rate of 3% or less of answered calls.

This alternate formulation establishes a definition of what it means to dial “automatically.” It would assure that legitimate businesses can continue to use advanced and accurate technology to efficiently contact consumers, but require those businesses to assure enough man-power to field the calls it launches. It assures a positive consumer experience in that it reduces the number of abandoned calls consumers experience. It also harmonizes with existing telemarketing requirements regarding abandoned calls. See 47 C.F.R. § 64.1200(a)(7).

Mr. Cooper proposes that the FCC clarify that the caller have the burden of demonstrating it maintained the abandonment rate over the average of any 30-day period during which a challenged call was made. If a dialer is not operated within these limits then calls placed during that 30-day period are presumptively made using an ATDS—although that presumption might be rebutted by other acceptable evidence that the dialer did not function automatically and without human intervention. That is to say, the 3% abandonment rate affords a clear, but non-exclusive, methodology by which a caller can demonstrate it is not dialing “automatically” for purposes of the statute.

This compromise position would harmonize customer outreach with an existing telemarketing standard and provide a clearly defined target for legitimate businesses like Mr. Cooper who use such technology. Mr. Cooper hopes the Commission will give it serious consideration.

**4. Suggested Sanctioned Methods For Revoking Consent** – Mr. Cooper strongly urged that the Commission better empower consumers to advise callers of their contact preferences by encouraging and permitting callers to develop easy-to-use and well-disclosed channels to capture those preferences. Consistent with the *ACA Int’l* opinion, the Commission should clarify that where such easy-to-use and clear channels are created the failure to use those channels does not

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<sup>4</sup> *Marks. v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018).



afford a valid revocation of consent for all purposes by the consumer, although it may yet effectuate a more narrow revocation specific to the circumstances of the call.

In order to assure that a caller properly captures and heeds a consumer's consent preferences, it is necessary to know whether a consumer desires for calls to stop, *inter alia*, to all phone numbers, on all accounts, across all products, for all purposes or something narrower—such as for calls to stop to a single phone number for a single purpose. Hence, a request that calls stop in the debt collection context might mean that the consumer still desires to receive other forms of informational texts or alerts. A request that telemarketing calls stop might not mean that calls for informational purposes must end. It is in the best interest of consumers and callers for these contact preferences to be supplied, understood and honored.

To encourage companies to develop these easy-to-use and well-disclosed portals—such as websites and toll free numbers—Mr. Cooper urged the Commission to narrowly construe or reject any revocation effort made outside of those designated portals. In particular, where a business has provided such a portal, and a consumer yet states solely “stop calling”, or words to that effect, in response to an outbound phone call received from that business, that language should be treated solely as a narrow revocation of consent to be called solely on that number and solely for the purpose for which the call was placed.

By thus narrowly construing revocation efforts made through channels that do not assure a clear “meeting of the minds” between the parties, the Commission can incentivize business to create consumer-friendly contact preference portals, cut down on frivolous and concocted claims by Plaintiffs who “make what they will” of vague phrases in after-the-fact lawsuits, and better empower consumers to control how legitimate American businesses contact them—helping to restore confidence to consumers that they can trust calls from legitimate businesses reaching out to the consumer via authorized channels.

Mr. Cooper suggested that the burden of proving an “express and clear” revocation remain on the consumer in all instances, but that the business bear the burden of demonstrating that it offered a conspicuously disclosed and easy-to-use channel to record the consumer's specific contact preferences. For purposes of interpreting “easy-to-use” a website or toll free number would suffice.

These suggestions work in concert with contractual revocation provisions—which should remain enforceable—and would aid companies such as Mr. Cooper who are not in contractual privity with consumers and incentivize these companies to develop channels to capture and honor consumer contact preferences as set forth above.

For example, the Company suggested a web site where the customer could selectively indicate the subjects for which he/she was revoking consent and no longer wished to be called. Similarly, a customer could use a toll-free number then to allow Mr. Cooper to verify the caller as the customer and make a record on what items the customer did not want to be called. This would help avoid the scenario where the called party simply says “don't call me,” leaving Mr. Cooper without verification of customer's wishes and to operationally assume that it applies to any call.

Additionally the Company asked the FCC specifically to confirm that companies, particularly financial services companies, can validate the identity of a speaker using personal identifying information or via other reasonable means before it is required to honor a purported revocation of consent by an unverified call recipient. The Company explained that making changes on an account is not possible unless and until the customer's identity has been validated and the Company's agents know they are speaking with a person authorized to make such changes. The Commission should confirm, therefore, that a consumer who merely states "stop calling" and hangs up—without in any way verifying their identity—has not revoked consent in a "reasonable manner."

## **5. Misapplied Data On Collection Robocall Volumes**

True robocalls are a plague upon society. And those who seek to misplace blame for the robocall epidemic—mostly in a bid to enable more lawsuits and attendant attorney fee awards—are aiding and abetting the plague.

Mr. Cooper strongly disagrees with those who claim that legitimate American businesses, like Mr. Cooper, make the majority of robocalls. While numerous commenters—most notably the NCLC—claim that legitimate American businesses make the majority of robocalls, those claims turn on a questionable application of data produced by the YouMail Robocall Index.<sup>5</sup>

To a hammer everything looks like a nail, and to a robocall blocking app manufacturer, everything looks like a robocall. As YouMail's CEO Alex Quilici has explained in public remarks on the Squire Patton Boggs Unprecedented podcast, the Robocall Index does not attempt to determine whether a call was wanted or unwanted, legal or illegal, consented to or unconsented to. Indeed, the Robocall Index does not definitively determine how a call was placed at all; it essentially tracks nothing more than high-volume calling. And the Robocall Index data includes beneficial and desirable messages such as low balance alerts, fraud alerts, ATM withdrawal confirmation notices and many other forms of automated confirmation or alert messages that consumers desire. Undeniably these messages are sent disproportionately by American banks and finance companies that the NCLC, and others, impugn merely as "debt collectors." Thus the NCLC, and others, peddle a false narrative that the Robocall Index—juiced with figures that include innocuous alert messages—demonstrates that 19 of the 20 "top robocallers in the country" are debt collectors.

The truth looks much different, as demonstrated by the figures published by rival call blocking app manufacturer Hiya. According to Hiya's CEO's public comments—also on the Squire Patton Boggs Unprecedented podcast—Hiya's Robocall Radar also tracks robocalls, but seeks to use advanced algorithms studying consumer behavior to determine whether such calls are wanted or unwanted. Unlike the Robocall Index—which Alex Quilici confirms does not make "value judgments" regarding the calls it is tracking—the Robocall Radar is specifically designed to determine whether or not the calls being made are unwanted.

The Robocall Radar's figures are starkly at odds with the story being told by the NCLC and others. Its figures demonstrate that only 2.1% of unwanted robocalls are attributable to debt

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<sup>5</sup> See <https://robocallindex.com/>

collectors with the vast majority of unwanted calls being made by telemarketers, scammers and other spammers. Indeed as Hiya CEO Alex Algard told Unprecedented, Hiya's data demonstrates that consumers "see value" in servicing calls and commonly interact with callers to avoid more dire consequences such as foreclosure or repossession.

The Company urged the FCC not to accept the NCLC's false narrative at face value and to look beyond the numbers presented by the Robocall Index using the tools publically available to the FCC on TCPAWorld.com, Hiya.com and on the SPB Unprecedented podcast.

Specific data, analysis and commentary on these issues are available at:

<https://tcpaworld.com/2019/04/12/breaking-youmail-ceo-confirms-to-spbs-unprecedented-podcast-that-robocall-index-includes-wanted-calls-rival-hiya-index-notes-only-2-of-debt-collection-calls-are-unwanted/>

<https://tcpaworld.com/2019/04/16/digging-deeper-robocall-index-ceos-join-unprecedented-podcast-and-debunk-narrative-that-legitimate-businesses-are-behind-bad-robocall-epidemic/>

<https://tcpaworld.com/podcast/> (Episode 3)

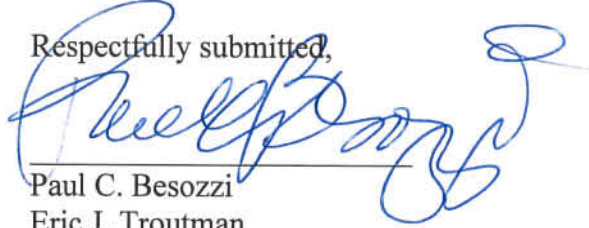
The fact is that Mr. Cooper reaches out to its customers for many reasons beyond just payment delinquency matters. Even in those cases, it is attempting to offer solutions that the customer might employ to resolve the problem. If the Company reaches a customer who indicates that payment will be made by a certain date, Mr. Cooper does not call again until that date. This is not robocalling and the FCC should not rely on flawed data in making decisions on these key TCPA issues.

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Mr. Cooper urged the Commission to act on these issues, as the one-year anniversary of the initiation of CG Docket No. 18-152 approaches. In doing so, the Commission should provide clear standards about these key issues so that companies that care about their customers are not continually exposed to class action lawsuits. The Company looks forward to having a continued dialogue on how to separate those true illegal robocallers from businesses, like Mr. Cooper, trying in good faith to provide services to their existing customers.

This notice is filed in accordance with Section 1.1206(b) of the Commission's rules.<sup>6</sup>

Respectfully submitted,



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Enclosures

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<sup>6</sup> 47 C.F.R. § 1.1206(b).



# EXHIBIT 1

April 1, 2019

**VIA ECFS**

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

**Re: Notice of Ex Parte Presentation – Nationstar Mortgage, LLC d/b/a Mr. Cooper - Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 - CG Docket No. 02-278, Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of DC Circuit's ACA International Decision - CG Docket No. 18-152**

Dear Ms. Dortch:

On March 28, 2019, Eric J. Troutman, outside counsel for Nationstar Mortgage, LLC d/b/a Mr. Cooper, in response to an inquiry from Arielle Roth, Wireline Legal Advisor to Commissioner Michael O'Rielly, had a telephone conference with Ms. Roth regarding certain statistics concerning "unwanted" robocalls developed by Hiya, a Seattle-based company that provides caller profile information to help consumers identify incoming calls and block unwanted ones, and other statistics relating to such calling.<sup>1</sup>

In addition to that discussion, Mr. Troutman provided Ms. Roth with the following references concerning such statistics and factual allegations re robocalling:

<https://tcपालand.com/unfair-attack-nclc-works-hard-to-convince-fcc-that-legitimate-american-businesses-are-to-blame-for-majority-of-robocalls-in-robust-tcpa-comment/>

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<sup>1</sup> The Hiya statistics were discussed in a meeting with Ms. Roth and Commissioner Michael O'Rielly on March 26, 2019. *See* Notice of Ex Parte Presentation, Nationstar Mortgage, LLC d/b/a, Mr. Cooper, CG Docket Nos. 02-278, 18-152, March 28, 2019, at p. 2, n.1.

<https://tcpaland.com/robocall-robocall-robocall-youmails-intrepid-ceo-alex-quilici-joins-wbd-ramble-podcast-to-discuss-what-the-robocall-index-actually-tracks/>

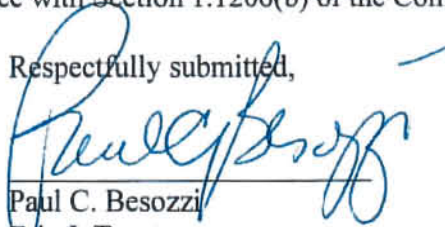
<https://tcpaworld.com/2019/03/13/fact-checking-john-olivers-robocall-bit-it-was-hilarious-but-was-it-accurate-tcpaworld-com-breaks-it-down/>

<https://tcpaland.com/fake-tcpa-news-questionable-youmail-robocall-data-relied-upon-by-mainstream-news-outlets/>

<https://tcpaworld.com/2019/03/18/robocall-fake-news-spreads-more-media-outlets-push-out-misleading-tcpa-articles/>

This notice is filed in accordance with Section 1.1206(b) of the Commission's rules.<sup>2</sup>

Respectfully submitted,



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cc: Arielle Roth

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<sup>2</sup> 47 C.F.R. § 1.1206(b).