Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Mortgage Bankers Association	)	
Petition for Exemption	)	

COMMENT OF BURKE LAW OFFICES, LLC IN OPPOSITION TO THE MORTGAGE BANKERS ASSOCIATION'S PETITION FOR EXEMPTION

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Only a few years ago, decreased oversight and reprehensible lending practices helped cause the worst financial crisis in this country since the Great Depression:

> In the fall of 2008, America suffered a devastating economic collapse. Once valuable securities lost most or all of their value, debt markets froze, stock markets plunged, and storied financial firms went under. Millions of Americans lost their jobs; millions of families lost their homes; and good businesses shut down. These events cast the United States into an economic recession so deep that the country has yet to fully recover.[1]

American taxpayers – consumers – bailed the Mortgage Bankers Association's ("MBA") members and mortgage investors out to the tune of hundreds of billions of dollars. It is particularly perverse that the mortgage servicing industry should now seek extra-special deregulation of any kind; not to mention the type of blanket exemption to use equipment that Congress has found to be a nuisance, costly public safety hazard[2] to make calls to people who don't want to be called in this manner.

As fiduciaries for American homeowners, mortgage companies should ostensibly have *uniquely intimate* relationships with their customers. The MBA's request that mortgage servicing companies be exempted from having to obtain consent before making robocalls, which are *uniquely impersonal*, is antithetical to this notion, and suggests a familiar nonchalance as to American consumers' well-being, and tunnel-vision toward their own bottom-line.

Burke Law Offices, LLC respectfully requests that the Federal Communications Commission ("Commission" or "FCC") deny the MBA's Petition for a "mortgage servicing"

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[1] Permanent Subcommittee on Investigations, United States Senate, *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse* (April 13, 2011), at page 1. Pages 17-33 discuss the background of how mortgage lenders' "High Risk Lending Practices" contributed to the crisis. Page 75 takes WaMu as a case study, and calls its lending practices "Shoddy." Pages 37-38 describe how failures in "Oversight of Lenders" contributed to the crisis. Pages 161-242 describe how "Regulatory Failures" including failures concerning oversight of mortgage banks, e.g. page 231-237, caused this global travesty.

[2] MBA Pet. at 12.

exemption to the prior express consent requirement for autodialed or prerecorded voice calls to cell phones under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.[3]

Just last year, this FCC affirmed that the TCPA and its rules "empower consumers to decide which robocalls and text messages they receive[.]"[4] Putting the power back into the hands of consumers to stop unwanted calls to their phones was a major impetus for Congress enacting the TCPA in the first place.[5] The MBA Petition flouts that Congressional intent and consumer interest, urging the Commission to endorse open-season for harassing and unwanted mortgage collection and other calls. Indeed, there is no meaningful differentiation between the calls the MBA asks the Commission to exempt and the types of calls that have been the subject of prior Commission consideration and orders, and there exists no reason that informational mortgage-related calls should not have to be made with "prior express consent" just like all other calls, and telemarketing mortgage-related calls be made with "prior express written consent."

A. Congressional Intent Is Best Supported by Adhering to the Language of the TCPA.

The TCPA's language is unambiguous. In line with Congressional intent to ban all unsolicited autodialed and prerecorded voice calls to cell phones,[6] the TCPA does just that—it explicitly prohibits "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system

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[3] Petition for Exemption ("MBA Petition"), CG Docket 02-278 (filed June 16, 2016) (available at https://ecfsapi.fcc.gov/file/60002303090.pdf).

[4] *In re Rules & Regs. Implementing the TCPA* ("*FCC 2015 Ruling*"), CG Docket No. 02-278, at ¶ 1 (July 10, 2015) (available at https://ecfsapi.fcc.gov/file/60001120392.pdf).

[5] *E.g.*, Pub. L. No. 102-243 § 2(12) ("Banning such automated or prerecorded telephone calls …, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.").

[6] S. Rep. No. 102-178, at *6, 1991 U.S.C.C.A.N. 1968, 1974 (1991) ("The bill would accomplish the following: … 1. Emergency and Cellular lines: ban all autodialed calls, and artificial or prerecorded calls, to emergency lines and paging and cellular phones.").

or an artificial or prerecorded voice ... to any telephone number assigned to a ... cellular telephone service[.]"[7] Congress provided no exemption for "mortgage servicing" calls, and the FCC would be doing a great disservice to consumers and Congress' intent by creating one.

The protections the TCPA was designed to ensure will soon be eviscerated if exemptions are granted on an industry-by-industry basis pursuant to the incessant and self-serving petitions filed by high-priced, organized, and connected trade groups and giant multinationals. If Congress had intended to carve out a special exemption for "mortgage servicing" calls, it would have done so—as it recently did with respect to the collection of government debt.[8] We ask that the Commission deny the MBA's exemption request, and let consumers decide for themselves what calls they want to receive by requiring meaningful, clearly and unmistakably-provided consumer consent to receive autodialed calls.

Against the backdrop of over 20 years of regulatory oversight affirming that "it is unlawful to make *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number,"[9] the Commission has recently permitted a few industry-specific exemptions to the TCPA's § 227(b)(1)(A) prohibitions, including as to package delivery services and the healthcare and financial industries.[10] The FCC's decision to acquiesce to a few industry exemptions has, not surprisingly, opened the door to even more industry petitions for exemptions, as we see here with the MBA Petition. As a result, the regulatory landscape risks shifting from a straightforward rule paralleling the TCPA's language prohibiting the initiation of *any* non-emergency autodialed or prerecorded call to a cell

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[7] 47 U.S.C. § 227(b)(1)(A)(iii).

[8] Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584; 47 U.S.C. § 227(b)(1)(A), (B).

[9] *In re Rules & Regs. Implementing the TCPA* ("*FCC 2003 Order*"), CG Docket No. 02-278 ¶ 165 (July 3, 2003) (available at https://ecfsapi.fcc.gov/file/6514382493.pdf) (emphasis in original).

[10] *Cargo Airline Ass'n Pet. for Expedited Declaratory Ruling*, 29 FCC Rcd 3432 ¶ 20 (2014); *FCC 2015 Ruling*, 30 FCC Rcd 7961 ¶¶ 138, 146.

phone without prior express consent, to one with ever-more complex conditions, each chipping away at consumers' right to choose for themselves which robocalls they receive. Respectfully, the creation of a special exemption for "mortgage servicing" calls is not only unnecessary; it will cause direct harm to consumers whose privacy Congress empowered the Commission to protect.

Congress limited the Commission's authority to exempt from the requirements of 47 U.S.C. § 227(b)(1)(A)(iii)—if at all—only calls to cell phones for which there is no charge to the called party, and only upon "such conditions … as [are] necessary in the interest of the privacy rights this section is intended to protect[.]"[11] The privacy rights Congress intended to protect in enacting the TCPA are not advanced by allowing the TCPA proscriptions to be discarded one industry at a time, especially where the TCPA and the Commission's own rules already carefully balance consumer and commercial interests based on the same "prior express consent" requirement for which the MBA now requests an exemption.

The TCPA permits mortgage servicers (and anyone else, for that matter) to make calls using an autodialer or an artificial or prerecorded voice, as often as they like and regardless of content, so long as they have the called party's permission. And, of course, there is nothing stopping mortgage servicers from calling consumers *without* using automated technology. This careful balancing of interests based on consent is thus narrowly tailored to serve the significant government interest in protecting consumers from unwanted calls, while leaving open ample alternative channels for communication.[12] However, the content-neutral statutory language and intent becomes muddled when exemptions are added for communications specific to particular

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[11] 47 U.S.C. § 227(b)(2)(C).

[12] *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1011–12 (N.D. Ill. 2010) ("[T]he TCPA serves a significant government interest of minimizing the invasion of privacy caused by unsolicited telephone communications to consumers.... [T]he limitations on the prohibition of the use of equipment with certain capacities reflect that the restriction is not excessive in proportion to the interest it serves.").

industries. Consumers certainly aren't benefitted by being robbed of the right to determine for themselves what robocalls they want to receive, nor are the privacy rights § 227(b)(1)(A)(ii) was intended to protect being effectively implemented by giving a free pass to mortgage servicers subjecting consumers to unwanted or harassing calls. And unlike the Commission's basis for permitting prior exemptions, mortgage servicing calls do not contemplate the same level of *immediate* exigency as possible package theft, fraudulent banking account or identity theft activity, or medical lab results.[13]

Even further, the Commission has already explicitly ruled that mortgage servicers and other debt collectors must have "prior express consent" to make autodialed or prerecorded voice calls to cell phones. In denying a request initiated over a decade ago that similarly sought to exclude creditors and debt collectors from the consent requirement, the Commission "reiterate[d] that the plain language of section 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party[,]" holding:

> [T]he provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.... [P]rior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed…. Should a question arise as to whether express consent was provided, the burden will be on the creditor to show it obtained the necessary prior express consent. Similarly, a creditor on whose behalf an autodialed or prerecorded message call is made to a wireless number bears the responsibility for any violation of the Commission's rules. Calls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call.[14]

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[13] *Cargo Airline Ass'n Pet. for Expedited Declaratory Ruling*, 29 FCC Rcd 3432 ¶ 20; *FCC 2015 Ruling*, 30 FCC Rcd 7961 ¶¶ 129-138, 146.

[14] *In re Rules & Regs. Implementing the TCPA* ("*FCC 2008 Ruling*"), CG Docket No. 02-278 ¶¶ 9-11 (Jan. 4, 2008) (available at https://ecfsapi.fcc.gov/file/6520027448.pdf).

This language was reaffirmed in the Commission's 2015 Declaratory Ruling,[15] which, in confirming the meaning of "called party" under the statute, further acknowledged the "host of issues consumers—both debtors and wrong number call recipients—face as to debt collection calls:

> [T]here is clear, unrebutted evidence that these calls pose a unique concern for consumers. Record evidence shows that when consumers complain about debt collection calls, a third of the time they complain that there is no debt to be collected, including that they never owed the debt. More than one of every five complaints is about communications tactics, including frequent or repeated calls; obscene, profane or other abusive language; and calls made after written requests to stop. And the record contains evidence, also unrebutted by Petitioners, that such calls sometimes lack a means for consumers to ask that they stop, and can even instruct the consumer to hang up if they are not the debtor, or that callers may have a policy to not speak to anyone other than the debtor....
>
> By clarifying that the caller's intent does not bear on liability, we make clear that such calls are exactly the types that the TCPA is designed to stop.[16]

These concerns apply regardless of the type of debt, including as to the "collection and loss mitigation activities" of the MBA's members,[17] and stand as reason alone to deny the Petition.

In short, the privacy interests implicated by the TCPA's prohibition of non-emergency autodialed or prerecorded voice calls to cell phones without the called party's prior express consent are best advanced by continuing to require consent for such calls. Mortgage servicers remain free to robodial consumers for whom they have consent to call, to call as many consumers as they want without automated technology, or to even contact consumers manually to obtain consent prior to proceeding with robodialing and mass text messages. The minimal burden of obtaining permission prior to using an autodialer or prerecorded voice message does not trump consumers' right to self-determine who can robocall their phones. The MBA's Petition should be denied.

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15 *E.g.*, *FCC 2015 Ruling*, at ¶¶ 52 n. 204, 141.

16 *FCC 2015 Ruling*, at ¶ 79.

17 MBA Pet. at 7.

B. The Commission's Current Interpretation of the TCPA Affords Consumers the Most Protection as to Both Privacy and Mortgage Servicing.

Remarkably, the MBA invokes the financial crisis, which deregulation and its members' greed caused, as a reason to deregulate.[18] But how "well" mortgage servicers communicate with homeowners depends on quality, not quantity, and permitting nonconsensual robocalls will only deteriorate mortgage servicers' communications. Moreover, the financial crisis, if anything, shows that when the mortgage service industry cuts corners, mortgage firms benefit and consumers foot the bill. The intent of the Consumer Financial Protection Bureau, Federal Housing Administration, Treasury Department, Department of Veterans Affairs, Department of Agriculture and Rural Development, and others in requiring that mortgage servicers have contact with borrowers within prescribed time periods displays an important policy in favor of meaningful, person-to-person or written communication that specifically addresses any issues of concern with particularity. Nonconsensual robocalls and mass-texts do not further these goals.

Indeed, common sense dictates that the example "mortgage servicing" calls the MBA identifies—e.g., "determin[ing] the reason for the delinquency and whether the reason is temporary or permanent in nature," "provid[ing] homeowner counseling information[,]" "address[ing] misconceptions or misinformation about the effect of not making payments and other bad advice from debt relief scams," etc.[19]—should <u>not</u> be made using automated calls or mass text messages, even if consent exists. Does the MBA really think its members are going to meaningfully "set payment expectations and educate the borrower on the availability of

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[18] MBA Pet. at 9-10 (quoting U.S. Dept. of the Treasury, *Making Contact: The Path to Improving Mortgage Industry Communication with Homeowners, A Report on the U.S. Department of the Treasury's Guidance on Homeowner Single Point of Contac*t, (Nov. 14, 2012) (available at https://www.treasury.gov/initiatives/financial-stability/reports/Documents/SPOC Special Report_Final.pdf).

[19] MBA Pet. at 8.

alternatives to foreclosure" through a 160-character text message or prerecorded robocall?[20] The contention is ridiculous. And some of these examples implicitly acknowledge that the calls are being made to persons other than any borrower who could possibly have consented to such calls, as in the case of calls "discuss[ing] options upon the death of a borrower."[21] It is preposterous to say that robocalls or texts to the next-of-kin do not invade the privacies the TCPA was designed to protect.

Beyond the physical restrictions of automated technology, where consumers regularly hang up upon hearing a prerecorded message and text messages can be ignored, only person-to-person communication ensures that an intended message is received, understood, and addressed by the intended party in a way that automated calling technology, by its nature, cannot. To loosen restrictions by permitting mortgage servicers to robocall or send mass texts to consumers regardless of consent, as a way to "check the box" on borrower contact requirements, will undermine the intent of government agencies in requiring meaningful borrower communications in the first place. The TCPA should, instead, continue to supplement these efforts at effective communication by hopefully curtailing the extent to which inadequate prerecorded messages and text messages take the place of what should be substantive person-to-person or written communications.

And while the MBA tries to sugarcoat the perceived benefits of *some* mortgage servicing calls, the reality is that many consumers do not want to receive them, and many are not as "pro-consumer" as the MBA would have the Commission believe. Under the current law, consumers that do want such calls can consent to receiving them, and MBA members can robocall and text them as much as they like.

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[20] *Id.*

[21] *Id.*

However, nonconsensual calls from mortgage servicers can often be a harassing, unpleasant experience, and present grave privacy concerns. Indeed, it is not uncommon for mortgage servicers to have the wrong contact information, for example, resulting in numerous unwanted wrong number calls regarding someone else's mortgage on account of the use of automated dialing technology. These consumers would have no recourse under the MBA's proposed exemption. And even where mortgage servicers do have the right person, their calls are frequently unwanted, as attested to in the following:

- In *Figueroa v. Carrington Mortgage Servs. LLC*, No. 15-2414 (M.D. Fla.), the consumer alleged that the mortgage service defendant made approximately 200 autodialed calls to his cell phone in violation of the TCPA, including after he asked that it stop, some of which occurred more than once a day or on multiple days in a row.

- In *Carnes v. IndyMac Mortgage Servs.*, No. 10-3005 (D. Minn.), the consumer alleged that the mortgage servicer made more than 30 autodialed calls attempting to collect a mortgage debt, including after the consumer informed the defendant she had filed for Chapter 7 bankruptcy and requested that it stop calling.

- *In Conklin v. Wells Fargo Bank, N.A.*, No. 13-1246 (M.D. Fla.), the consumer alleged that the mortgage servicer defendant continued to communicate directly with him about a foreclosure despite being informed that he was represented by counsel, including by prerecorded voice message to his cell phone, in violation of both the TCPA and Florida Consumer Collection Practices Act.

- In *Jackson v. HSBC Mortgage Servs., Inc.*, No. 14-1240 (N.D. Ala.), the consumer plaintiff alleged that a mortgage servicer began falsely claiming that her mortgage payment was unpaid and proceeded to harass her for several months through, among other things, repeated autodialed telephone calls, sometimes multiple times a day and even after she requested that the calling stop.

- In *Harrington v. Roundpoint Mortgage Servicing Corp.*, No. 15-322 (M.D. Fla.), the plaintiff alleged that the mortgage servicer defendant repeatedly and harassingly called him when he fell behind on his mortgage payments, after obtaining his cell phone numbers through a third-party skip-trace (i.e., without "prior express consent").

- In *Jordan v. Nationstar Mortgage LLC*, No. 14-787 (N.D. Cal.), four consumers alleged that the mortgage servicer defendant violated the TCPA by making autodialed calls to their cell phones without consent, including after being asked to stop or where no amount was due or a mortgage even in existence, with one consumer being told that the defendant could keep calling because the calls were "courtesy calls," as opposed to solicitations.

The consumer privacy rights Congress sought to protect in enacting the TCPA will be undermined by granting the MBA's Petition. Mortgage servicing calls are neither so immediately exigent nor desired such that Congress' careful balance of consumer privacy and commercial communication interests should be disturbed by excusing the need for basic consent prior to the use of an autodialer or prerecorded voice technology. And where many mortgage servicing calls are not only unwanted, but harassing and abusive, it would be a sure failing of the TCPA's purpose to put the onus on consumers to opt-out of such calls—requests which, as in the examples above, the mortgage servicing industry has proven itself often unwilling to honor in practice. Consumer rights are best protected by requiring such calls be consensual,[22] and the MBA's Petition should therefore be denied.

CONCLUSION

For the foregoing reasons, we respectfully request that the Commission deny the Mortgage Bankers Association's petition.

[22] This commenter believes that "prior express consent" within the context of 47 U.S.C. §227(b)(1)(A)(iii) should be clearly and unmistakably stated, and would urge the Commission to require substantial and knowing consent to receive autodialed or prerecorded message calls. Mortgage lenders and other "informational" callers have predictably begun the practice of asking whether a phone number is a "good number" during a benign telephone conversation or similar exchange, and use this type of exchange to justify survey or debt collection robocalls. In our view, there is no good reason not to require the requester-of-consent during these types of telephone exchanges to *disclose* that it will be using robocalls. Without such disclosure, consent cannot be "express," and is not meaningful.

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Respectfully submitted,

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