

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
Petition for Declaratory Ruling Regarding)
Revocation of Prior Express Consent for)
Non-Telemarketing Calls) CG Docket No. 02-278
)
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)

REPLY COMMENTS IN SUPPORT OF PETITION FOR EXEMPTION

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The Mortgage Bankers Association (“MBA”) seeks an exemption from the prior express consent requirements of the Telephone Consumer Protection Act (“TCPA”) for residential mortgage servicing calls because these communications help consumers. They are critical to ensuring borrowers understand their available options to avoid foreclosure and its damaging repercussions. A host of federal and state requirements mandate these communications because of the undisputed benefits of these calls and their importance to the borrower.

Those who have written in opposition to the proposed exemption focus on two main themes: (1) mortgage servicers are not required to “robocall” borrowers to comply with federal and state requirements; and (2) mortgage servicers should not have unlimited authority to call borrowers. While MBA appreciates these comments, neither is correct nor justifies denying the Petition.

I. MORTGAGE SERVICING COMMUNICATIONS ARE NOT “ROBOCALLS” AS COMMONLY UNDERSTOOD.

The communications that MBA seeks to exempt are not “robocalls” as that term is commonly understood. As the National Consumer Law Center (“NCLC”) highlights in its Comment Letter, the federal and state requirements for mortgage servicers to place outbound calls to borrowers require servicers “to have conversations with them, to ask questions, and to

provide responsive information.”¹ This is the exact type of communication the MBA seeks to facilitate through its Petition – live communications between borrowers and their mortgage servicers that are often required by federal regulators.² NCLC goes on to conclude that “[r]obocalls are not conducive to those real exchanges of information” and that mortgage servicers may comply with federal and state obligations without making a “robocall.” However, this characterization of MBA’s Petition as seeking an exemption for “robocalls” is misplaced and ignores regulatory requirements to initiate outbound communications.³

“Robocalls” are most commonly understood as calls delivering a prerecorded message when there is no live caller with whom to engage in a dialogue. That is how commenters like the NCLC use this phrase to oppose the Petition. However, as the Commission is well aware, the TCPA requires prior express consent to initiate a call to a cell phone using an “automatic telephone dialing system” or an artificial or prerecorded voice message. Further, the scope of the “automatic telephone dialing system” definition is broad, and includes equipment that has the “potential capacity” to store or produce telephone numbers to be called using a random or

¹ Comment Letter of the National Consumer Law Center and Americans for Financial Reform, Center for Responsible Lending, Consumer Action Consumer Federation of America, Consumers Union, Financial Protection Law Center, Legal Services of New Jersey, Indiana Legal Services, Inc., Jacksonville Legal Aid, Inc., National Association of Consumer Advocates, National Association of Consumer Bankruptcy Attorneys, and U.S. PRIG (Collectively “NCLC”), at p. 7.

² For example, the government sponsored enterprises (“GSEs”) provide best practices to communicate and build trust, including the following: “Build trust with the borrower within the first 10-15 seconds by establishing empathy and a desire to help identify and discuss with the borrower ... the most appropriate options for delinquency resolution.” “Hello my name is ____ and I am with _____. I see that you are behind in making your mortgage payments and I would like to talk more and see if there is anything we can do to help you get back on track.” *Communicating with Borrowers: Collections and Loss Mitigation Reference Guide*, Freddie Mac (July 2015)

³ As noted in our Petition, multiple federal agencies require mortgage servicers to place outbound calls to borrowers, including the Consumer Financial Protection Bureau (“CFPB”), United States Department of the Treasury (“Treasury”), United States Department of Veterans Affairs (“VA”) Federal Housing Administration (“FHA”), and the United States Department of Agriculture and Rural Development (“USDA”). *See* 12 C.F.R. § 1024.39(a); HAMP Handbook, 2.2.1 (01/06/16); 38 C.F.R. § 36.4278(g); FHA Single Family Housing Policy Handbook, 4000.1(III)(A)(2)(h); USDA Single Family Housing Guaranteed Loan Program Technical Handbook at § 18.3. Outbound calls are also required by the GSEs and by many states. *See* Fannie Mae Servicing Guide, D2-2-02 (12/16/2015); Freddie Mac Servicing Guide, 9101.2 (3/2/2016); Cal. Civ. Code § 2923.5(a)(1)(A), (a)(2); Cal. Civ. Code § 2923.5(e)(2)(A); Conn. Gen. Stat. § 8-265e(a); D.C. Mun. Regs. tit. 26-C § 2710.18; Idaho Code § 45-1506C(4)(a); Nev. Rev. Stat. § 107.510(1)(b), (2); Nev. Rev. Stat. § 107.510(5)(b); R.I. Gen. Laws § 34-27-3.2(f); Wash. Rev. Code § 61.24.031(5)(b)(i); Wash. Rev. Code § 61.24.031(1)(a)(i-ii), (1)(b).

sequential number generator and to dial such numbers. In its July 2015 Omnibus Declaratory Ruling, the Commission declined to define the contours of the definition of an “automatic telephone dialing system” providing as an outer bound only that equipment must have more than a mere theoretical potential to satisfy the definition, with the example being a rotary telephone.⁴

The result of this broad definition without clear boundaries is a spike in litigation alleging TCPA violations by callers based solely on the alleged use of an “automatic telephone dialing system” without use of any prerecorded message. The caller is not immune from liability even when the call is initiated by a live person and when the caller believes it has prior express consent to initiate the call. The result is that a statute enacted in 1991 — before the widespread use of cell phones — aimed at curbing telemarketing abuses is being used to reap tremendous statutory penalties for calls initiated by mortgage servicers pursuant to federal and state requirements to place those calls. Often, these actions do not seek to compensate consumers for actual damages; they are brought solely to collect statutory penalties. These lawsuits are so profitable that they have created professional TCPA plaintiffs. At least one plaintiff admitted to purchasing as many as 35 cell phones specifically to manufacture lawsuits.⁵ Companies who try their best to comply with these requirements have no comfort that they will not be the next defendant in one of these actions.

Mortgage servicers are particularly exposed to these risks. Mortgage servicers are often not the originating lender and may change multiple times during the term of the loan (which may last as many as 30 years). While such transfers are important to ensuring liquidity in the

⁴ See, e.g., *Manuel v. NRA Group, LLC*, 2016 WL 4158797 (Aug. 5, 2016); *Estrella v. LTD Fin. Servs., LP*, No. 8:14-cv-2624-T-27AEP, 2015 WL 6742062 (M.D. Fla. Nov. 2, 2015); *Gaza v. LTD Fin. Servs., LP*, No. 8:14-cv-1012-T-30JSS, 2015 WL 5009741 (M.D. Fla. Aug. 24, 2015); *Bates v. Dollar Loan Center, LLC*, 2014 WL 60472 (D. Nev. Jan. 7, 2014); *Nelson v. Santander Consumer USA, Inc.*, 2013 WL 1141009, at *3 (W.D. Wis. March 8, 2013); *Ploch v. FirstSource Advantage, LLC*, 2012 WL 5384876, at *4 (E.D. Mo. Nov. 1, 2012); *Dobbin v. Wells Fargo Auto Finance, Inc.*, 2011 WL 2446566 (N.D. Ill. Jun. 14, 2012); *Mudgett v. Navy Federal Credit Union*, 2012 WL 870758 (E.D. Wis. Mar. 13, 2012).

⁵ See *Stoops v. Wells Fargo Bank NA*, No. 3:15-83, 2016 WL 3566266 (W.D. Pa. June 24, 2016).

mortgage market and result in lower rates to consumers, they can increase the risk that a mortgage servicer may not be able to demonstrate consent to the satisfaction of a court, particularly when a borrower claims to have verbally revoked consent and there is no evidence supporting that assertion.⁶ These risks are exacerbated by the number of calls mortgage servicers are required to place and the population of borrowers required to receive these calls. Further, the uncertainties and ambiguities of what constitutes an “automatic telephone dialing system,” revocation of prior express consent, and the lack of actual knowledge of the reassignment of telephone numbers make it almost impossible for mortgage servicers to implement compliance systems that conform to the requirements of both the TCPA and federal and state regulations.

Exposing mortgage servicers to uncapped statutory penalties for each call attempt made to a borrower pursuant to federal and state requirements contravenes the demonstrated public policy in favor of these calls. It impedes critical communications. And ultimately, it hurts consumers.

Suggesting that mortgage servicers can comply with these outbound call requirements by placing manually dialed calls is neither realistic nor a desirable outcome for consumers. As noted above, short of using a rotary telephone mortgage servicers have no comfort that their calls are outside the scope of the TCPA, even when a human initiates the call or when all ten digits of a telephone number are dialed.⁷ Even if there were welcome and necessary certainty as to what constitutes a manually dialed call, limiting mortgage servicers’ use of modern telephone equipment again impedes these critical communications and creates additional compliance

⁶ See, e.g., *Hitchman v. Nat'l Enter. Sys., Inc.*, 12-61043-CIV, 2014 WL 912363, at *3 (S.D. Fla. Mar. 10, 2014).; *Soulliere v. Cent. Florida Inv., Inc.*, 8:13-CV-2860-T-27AEP, 2015 WL 1311046, at *6 (M.D. Fla. Mar. 24, 2015) (denying defendants’ Motions for Summary Judgment by finding an issue of material fact as to whether plaintiff revoked consent when the plaintiff merely alleges verbal revocation or testifies in her deposition that she orally revoked consent).

⁷ See cases cited *supra* note 4.

exposure, such as misdialed numbers, controls on the timing and frequency of telephone calls, and the inability to monitor and record telephone calls, among others. It is not realistic to require a mortgage servicing employee to enter each ten digit telephone number to reach the millions of mortgage borrowers they are required to call each day just to avoid liability under the TCPA. That does not support the purpose of the Act, protect privacy interests or advance consumer interests. It simply hampers the ability of borrowers to have meaningful conversations with those that can explain their accounts, answer questions, help them cure delinquencies, create manageable repayment opportunities in the event of a financial issue, receive homeownership counseling, and keep their families in their homes.

Granting the relief requested in this Petition would recognize that facilitating communications between mortgage servicers and borrowers who may be at risk of losing their homes is just as, if not more, important than receiving data security breach notifications, doctor appointment reminders, and package delivery notifications.

II. THE PROPOSED EXEMPTION WOULD NOT LEAVE MORTGAGE SERVICING COMMUNICATIONS UNREGULATED.

MBA understands that consumers frequently complain about “robocalls” and the concern that granting an exemption could leave types of calls unregulated. Unlike other industries and types of calls for which the TCPA is the sole source of regulation, the timing, frequency and content of mortgage servicing communications are heavily regulated by multiple federal and state laws, regulations and requirements.⁸ Just as the Commission was able to overcome those concerns with respect to package delivery notifications and certain financial institution and healthcare communications, the record here warrants the proposed exemption.

⁸ See sources cited *supra* note 3; see also Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692a *et seq.*; CFPB’s Authority to Regulate Unfair, Deceptive, and Abusive Acts and Practices (“UDAAP”) Authority, Dodd-Frank Act, §§ 1002, 1031 & 1036(a), *codified at* 12 U.S.C. §§ 5481, 5531 & 5536(a); and similar state laws.

As the MBA has previously explained, mortgage servicing communications are regulated by a host of other federal and state laws that were specifically enacted to regulate these types of communications. For example, the federal Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692a *et seq.*, provides call time restrictions, cease communication rights and other substantive regulation of collections communications. The CFPB is currently revising the FDCPA and is likely to propose even more restrictions on the types or nature of contacts that are cited by commenters to this Petition. Mortgage servicers are also subject to the broad federal prohibitions against unfair, deceptive, and abusive acts and practices (“UDAAP”) and many similar state laws.

In addition to these specific laws and regulations, the MBA proposed reasonable conditions on the proposed exemption in line with other exemptions provided by the Commission. MBA suggested the following conditions for each free-to-end-user mortgage servicing call made pursuant to the proposed exemption:

1. voice calls and text messages must state the name and contact information of the mortgage servicer (for voice calls, these disclosures must be made at the beginning of the call);
2. voice calls and text messages must not include any telemarketing, cross-marketing, solicitation, or advertising content;
3. text messages and prerecorded calls must be concise, generally one minute or less in length for prerecorded voice messages and one message of 160 characters or less in length for text messages, unless a longer message is required by other applicable law, regulation or requirement;
4. mortgage servicers must offer within each message an easy means to opt out of future messages, including for telephone calls either an automated, interactive voice and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call or a toll-free number that the consumer can call to opt out of future calls, and text messages must inform recipients of the ability to opt out by replying “STOP,” which will be the exclusive means by which consumers may opt out of such messages; and
5. mortgage servicers must honor opt-out requests promptly.

While the TCPA was created to protect privacy interests, Congress made clear from the beginning that this goal must be balanced against the important need to allow businesses to communicate with their own customers. MBA appreciates the Commission’s mandate to protect privacy interests and requests a limited exemption from the prior express consent requirements consistent with those applicable to package delivery services, healthcare providers, and financial institutions. The mortgage servicing calls that would be subject to this exemption help millions of American borrowers.

III. THE PROPOSED EXEMPTION IS NECESSARY

It is important to remember that MBA filed this Petition following a request for this exemption by the Federal Housing Finance Agency (“FHFA”). In a comment letter regarding the Bipartisan Budget Act of 2015,⁹ FHFA explained the need for relief from the prior express consent requirements under the TCPA to facilitate effective communications between mortgage servicers and borrowers. In this letter, the agency explained: “**Requiring mortgage servicers to have the consumer’s express consent to be contacted or face potential liability under the TCPA adversely impacts outreach efforts for loss mitigation and homeownership preservation.**”¹⁰ For these reasons, FHFA urged the Commission for an exemption for mortgage servicing calls from the TCPA prior express consent requirements.

Nothing in the record of this Petition provides any support that should allow the TCPA, which was not enacted to regulate these communications, to have the unintended consequence of adversely impacting mortgage borrowers, loss mitigation communications or homeownership preservation. Indeed, it would be particularly unfortunate if the TCPA frustrated the efforts of the agencies to which Congress has delegated discretion to set policy regarding the best methods

⁹ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (Budget Act).

¹⁰ Comment Letter of the Federal Housing Finance Agency to the Proposed Regulation Implementing the Bipartisan Budget Act of 2015, at p. 2 (June 6, 2016).

of aiding mortgage borrowers in financial distress. MBA urges the Commission to remove these impediments, which would facilitate the ability of mortgage servicers to best fulfill their federal and state requirements and to communicate with borrowers, increasing the likelihood that they will avoid foreclosure and remain in their homes.

IV. CONCLUSION

For the reasons stated above and in its Petition and consistent with the FHFA's recommendation, MBA respectfully urges the Commission to provide a limited exemption from the consent requirements under the TCPA for mortgage servicing calls to cellular telephone numbers that are not charged to the called party and that do not contain an advertisement or constitute telemarketing.

Respectfully submitted,



By: _____

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