



*Submitted via ECFS* <http://www.fcc.gov/ecfs/>.

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20054

**RE: In the Matter of Petition for Declaratory Ruling filed by the Federal Housing Finance Agency CG Docket No. 02-278, CG Docket No. 05-338**

Dear Ms. Dortch:

The Mortgage Bankers Association<sup>1</sup> (MBA) respectfully submits these comments to the Federal Communications Commission (Commission) in strong support of Federal Housing Finance Agency (FHFA)'s request to make clear that mortgage servicers should not incur TCPA liability for doing the necessary and vital outreach to homeowners following a natural disaster.

*1. MBA Supports FHFA's Petition as Mortgage Servicer Communications Are Vital to Federal Disaster Recovery Efforts.*

Mortgage servicers play a crucial role in the day-to-day management of mortgage loans and in recovery efforts by providing payment relief options to borrowers whose ability to make their mortgage loan payments is compromised as a result of a natural disaster. FHFA and the Government Sponsored Entities (GSEs) have been working to provide borrowers with disaster relief options following the recent disasters in Texas, Florida, Puerto Rico and California — including payment forbearances, loan modifications and other forms of relief or necessary information<sup>2</sup>. The same efforts are being undertaken by the Federal Housing Administration (FHA), the Veterans Administration (VA) and the Department of Agriculture Rural Housing Service (RHS)<sup>3</sup>. Mortgage servicers are the communication conduit and delivery mechanism for the information and relief necessary for borrowers to recover and rebuild following disasters.

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<sup>1</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: [www.mba.org](http://www.mba.org).

<sup>2</sup> For example, see the [consumer flyer](#) posted jointly by FHFA, Fannie and Freddie.

<sup>3</sup> FHA options for homeowners after a disaster can be found [here](#). VA options can be found [here](#). RHS options can be found [here](#).

Specifically, the GSEs along with the FHA, VA, and USDA Rural Housing Service provide disaster payment forbearance programs for borrowers who are unable to make their loan payments immediately following a declared disaster. Generally, an initial 90 day forbearance period is offered but this can be extended up to 12 months based on borrower need. Servicers typically check in with borrowers during a disaster forbearance period every 30 days to assess their financial needs. For borrowers needing deeper, longer term payment assistance, the GSEs along with the FHA, VA, and USDA Rural Housing Service also provide loan modification options that are designed to be receptive to the individual circumstances of impacted borrowers. Servicers in contact with borrowers can better develop a relief and recovery plan within the guidelines of federal programs. In some cases, increasing payment relief is dependent on contact with the borrower, as outlined for developing a forbearance plan via Fannie Mae. Borrowers receive other benefits from communicating with servicers and entering workout options, such as required waiver of late fees and suspension of negative credit reporting. Protections and relief options offered by the GSEs and other government programs expand when contact between servicers and borrowers is achieved.

Mortgage servicers also are often the mechanism for providing insurance disbursements when there is significant damage, as is likely to be the case for some homeowners following a disaster. The mortgage servicer typically receives the claim check from the insurance company and releases the funds for the borrower to make the repairs in periodic disbursements following inspections to confirm that repairs have been made. This system is in place to prevent fraudulent contractors or other malignant actors from cheating consumers out of their insurance payment as well as to protect the mortgage servicer by ensuring the disbursed funds are used for repairs.

Clearly mortgage servicers and the communications they are able to establish with borrowers following a disaster are crucial. Absent information about forbearance eligibility, homeowners may pass up on an opportunity that would allow them to save their home. Foreclosures are also avoided if a servicer is able to offer information about modifications if the economic injury or loss is severe enough to require more relief than a temporary payment forbearance. Failure to coordinate the disbursement of insurance funds results in delayed repairs for a homeowner or damaged and blighted properties prolonging community recovery. For all of these reasons, it is imperative that the Commission facilitate telephonic communications between mortgage servicers and borrowers and to remove artificial, unnecessary barriers. Requiring prior express consent is a known barrier.

In our support of this petition, MBA notes that many of the harms that FHFA is rightly seeking to avoid—foreclosure on homeowners impacted by disasters, damaged properties causing community blight and economic dislocation in hard-hit communities—are also present in the daily operations of mortgage servicers. As with the need to provide information and relief pursuant to the requirements of federal disaster response programs, mortgage servicers are subject to many regulations (by the same parties discussed in the disaster relief context) that require that they make contact with their borrowers, oftentimes through outbound telephone calls. These requirements were promulgated by federal regulators with relevant jurisdiction who came to the conclusion that early contact with borrowers was one of the best ways to address mortgage delinquencies. This is illustrated by data that demonstrates the length of mortgage delinquency is one of the most relevant

factors to whether a borrower can perform on a loan modification and remain in their home.<sup>4</sup> As the Commission is aware, the FHFA placed so much importance on these calls that it called for an exemption from the *current* prior express consent regime for all mortgage servicing calls.<sup>5</sup> The MBA agrees with FHFA on the need for that exemption — which would have the benefit of also covering disaster related communications — and the importance of avoiding foreclosures given the associated harms it can cause consumers and communities.<sup>6</sup> Accordingly, MBA filed a Petition for Exemption and subsequent Application for Review to facilitate these communications between mortgage servicers and borrowers to try to mitigate these harms whatever the circumstances that cause them to arise. At a minimum, the Commission should clearly confirm that mortgage servicers have prior express consent to initiate calls to borrowers regarding disaster-related information on telephone numbers provided by the borrower.

*2. The Commission Should Exempt All Mortgage Servicing Calls from the Prior Express Consent Requirements, Not Just Affirm That a Servicer Has Consent to Call Borrowers on the Telephone Numbers They Provide.*

The Public Notice for Comment characterized the FHFA request for relief as follows:

“Among other things, FHFA asks the Commission **to clarify that calls made by mortgage holders to borrowers in disaster-affected areas, where the called individual previously provided the phone number, fit “within the scope of consent”** under the Telephone Consumer Protection Act...”

MBA respectfully suggests that the appropriate relief for FHFA would be an exemption from the prior express consent requirements for mortgage servicing calls made pursuant to the circumstances outlined in the FHFA petition, consistent with MBA’s Petition for Exemption and Application for Review. As far back as the implementing regulations for the TCPA in 1992, the Commission has stated that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”<sup>7</sup> In the ACA Declaratory Ruling, the Commission clarified that a party who provides his wireless number to a creditor as part of a credit application “reasonably evidences prior express consent by the cell phone subscriber to be contacted at the number

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<sup>4</sup> Only the amount of payment reduction provided by the modification was more significant than the length of the pre-modification delinquency. Scott, Walter. “Treatment Effects of Subprime Mortgage Modifications Under the Home Affordable Modification Program.” Page 28, March 2015

<sup>5</sup> 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) (emphasis added).

<sup>6</sup> “The financial losses associated with foreclosure are substantial. For homeowners, credit ratings are damaged, which affects their ability to move on to a new home and lessens their ability to get loans for other purchases. Poor credit ratings may also negatively influence terms and prices for services such as insurance and may impede efforts to get jobs, because some employers access credit ratings for new hires. The net worth for homeowners in foreclosure decreases, since they lose their home as an asset along with any accumulated equity and the tax advantages of homeownership. In the mid-1990s, the Family Housing Fund in Minneapolis estimated the average family lost \$7,200 through foreclosure. Current estimates are most likely higher, as figures are adjusted for inflation and recent decreases in housing values further erode equity and negate previous financial investments in the foreclosed home. One observer noted, ‘foreclosure can wipe out the homeowners’ savings and leave them owing debt on homes they no longer own.’” G. Thomas Kingsley, Robin Smith, and David Price, Urban Institute, “The Impact of Foreclosures on Families and Communities.” May 2009, pg. 14 (citations omitted).

<sup>7</sup> 1992 *TCPA Order*, 7 FCC Rcd at 8769, para. 31.

regarding the debt.<sup>8</sup> Construing Commission guidance, courts have held that a debtor consents to calls about an existing debt when he provides his telephone number in connection with that debt.<sup>9</sup> As such, the important relief FHFA requests would be significantly limited if the effect of the petition is solely the ratification of current practice and authority.

Alternatively, FHFA's petition might also be understood to seek relief under the TCPA's statutory emergency purposes exemption.<sup>10</sup> Indeed, the FHFA request for relief indicates as much: "however, many Enterprise mortgage servicers are reluctant to use available auto dialer technology to reach their borrower's cell phones due to the TCPA's prohibitions *even though such calls are permitted when made for 'emergency purposes.'*" FHFA's comments highlight the impact TCPA litigation has on the delivery of critical mortgage servicing communications.

This impact is undeniable and mortgage servicers' concerns are well-founded. Analysis by the law firm Dorsey & Whitney demonstrates that TCPA suits have increased dramatically, from 354 in 2010 to over 4,949 in 2016.<sup>11</sup> This increased litigation—often by "professional" plaintiffs who specialize in exploiting the statute<sup>12</sup>—has introduced unquantifiable risk for businesses that must contact their consumers. In light of established precedent that these servicers have consent when the cellphone number is provided to them, the FHFA petition is seeking to overcome understandable wariness with triggering the TCPA framework *at all*.<sup>13</sup> An exemption from prior express consent or, alternatively, through the "emergency purposes" provision will best provide the important relief that FHFA is seeking from the Commission.

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<sup>8</sup> *ACA Declaratory Ruling*, 23 FCC Rcd at 564, para. 9.

<sup>9</sup> See, e.g., *Hill v. Homeward Residential, Inc.*, 799 F.3d 544, 552 (6th Cir. 2015); *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1122 (11th Cir. 2014); *Sartori v. Susan C. Little & Associates, P.A.*, 571 Fed.Appx. 677, 683 (10th Cir. 2014).

<sup>10</sup> 47 USC §227(b)(1)(A)

<sup>11</sup> Troutman, Eric. HAPPY HALLOWEEN!: Nothing Better than Scary TCPA Statistics to Freak You Out This Halloween, October 31, 2016. Available at <https://consumerfinancialserviceslaw.us/happy-halloween-nothing-better-than-scary-tcpa-statistics-to-freak-you-out-this-halloween>.

<sup>12</sup> The United States Chamber of Commerce has discussed this issue extensively before the Commission. See, U.S. Chamber Comments on Communication Innovators' Petition for a Declaratory Ruling (filed Nov. 15, 2012 in CG Docket No. 02-278); U.S. Chamber Comments on PACE's Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking (filed Dec. 19, 2013 in CG Docket No. 02-278); U.S. Chamber Comments on United Healthcare's Petition for Expedited Declaratory Ruling (filed Mar. 10, 2014 in CG Docket No. 02-278); U.S. Chamber Comments on ACA International's Petition for Rulemaking (filed Mar. 27, 2014 in CG Docket No. 02-278); U.S. Chamber and Institute of Legal Reform Comments on American Association for Justice's Petition for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules (filed Feb. 18, 2015 in CG Docket No. 02-278, CG Docket No. 05-338).

<sup>13</sup> We note that this is an increasingly problematic situation given the omnipresence of cell phone communication in modern life. As the Commission is aware, the growth of cellphone adoption in the United States has been staggering. In 2010, nearly twenty years after the TCPA's passage, 62% of Americans owned a cellphone. By 2016 that number has risen to 95%. Since the early 1990s, mobile phones have evolved from an expensive luxury item to a necessity and the *primary* means of communications for many in this country. This is demonstrated by the growing numbers of people that rely solely on their cellular phone for telephone communication. This population has expanded from a tiny minority to a near majority of the population. Today 55.3% of children and 46.7% of adults live in households that only have wireless service—and that trend has been steadily increasing. See the Mortgage Bankers Association comments on "Possible Revision or Elimination of Rules Under the RFA"; DA/FCC: DA-16-792, CB Docket No. 16-251.

MBA appreciates the opportunity to offer comments in support of the FHFA's petition, especially considering the critical partnership between our mortgage servicer members and FHFA to aid in disaster recovery. For the reasons outlined above, MBA urges the Commission to, in the short term, grant FHFA's Application for Declaratory Ruling while it considers our Application for Review seeking to prevent these same negative outcomes from harming borrowers and communities nationwide. Please direct any questions regarding these comments to Justin Wiseman, Associate Vice President and Managing Regulatory Counsel, at (202) 557-2854 or [JWiseman@mba.org](mailto:JWiseman@mba.org).

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Pete Mills". The signature is fluid and cursive, with a large initial "P" and "M".

Pete Mills,  
Senior Vice President  
Residential Policy and Member Services  
Mortgage Bankers Association