

December 8, 2017

Via ECFS

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

Re: Request for Comment on Federal Housing Finance Agency Petition for Clarification or Declaratory Ruling, CG Docket No. 02-278

Dear Ms. Dortch:

The American Bankers Association¹ (ABA) writes in support of the Petition for Clarification or Declaratory Ruling (Petition) filed by the Federal Housing Finance Agency (FHFA). In the Petition, FHFA seeks an exemption from the Telephone Consumer Protection Act's (TCPA) prior express consent requirement for mortgage servicing calls made during a disaster or other emergency (collectively, disasters).²

I. Background

With limited exceptions, the TCPA requires that a caller have the prior express consent of the called party before placing a phone call (or sending a text message) to a wireless number using an autodialer or prerecorded voice.³ Under the Commission's interpretations of the TCPA, when a customer voluntarily provides a phone number as part of an application or in response to an oral request by a financial institution, the customer has consented to be called at that number.⁴

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

² Petition for Clarification or Declaratory Ruling of the Federal Housing Finance Agency, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket 02-278 (filed Nov. 15, 2017), available at <https://www.fcc.gov/ecfs/filing/1115017146557>.

³ 47 U.S.C. § 227(b)(1).

⁴ See Report and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket 02-278, 7 FCC Rcd 8752, 8769 ¶ 31 (1992) (concluding 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"); Declaratory Ruling, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket 02-278, 23 FCC Rcd 559, 564 ¶ 14 (2008) (concluding that "the provision of a cell phone number to a creditor, e.g., as part of a credit application,

Thus, a borrower who has provided his or her number to a lender as part of the mortgage origination process, or at another time in connection with the mortgage, has consented to be called at that number.

The TCPA includes an exemption from the consent requirement for calls made for “emergency purposes.”⁵ In addition, the TCPA authorizes the Commission to exempt, at its discretion, certain categories of calls from the consent requirement if the call or message is made without charge to the called party.⁶ FHFA seeks clarification that mortgage servicing calls made during a disaster satisfy the requirements of the “emergency purposes” exemption or are otherwise exempt from the TCPA’s consent requirement.

II. Mortgage Servicers Have an Urgent Need to Communicate with Borrowers During a Disaster

Financial institutions often have a critical need to communicate important and time-sensitive messages to their customers during and immediately after a disaster. Among financial institution representatives, mortgage servicers have a particularly acute need to establish contact with mortgage borrowers during a disaster situation. For example, servicers may want to advise borrowers that they may forego making a mortgage payment without penalty. Knowledge that borrowers may forego making a payment during the disaster can free needed funds for emergency expenses related to the disaster. In addition, servicers may want to remind borrowers to file an insurance claim, to offer contact information for other questions or needs, or to alert borrowers to the risk of fraudulent schemes targeted at disaster victims. All of the non-telemarketing messages described above serve borrowers’ interests and can be conveyed most efficiently and reliably by automated calls to borrowers’ telephones.

In addition, borrowers forced to move during a disaster cannot be reached on a residential wireline phone, leaving a text or call to the borrower’s cell phone as one of the few and perhaps the only efficient and timely means of communication available.⁷ Under these circumstances,

reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt”).

⁵ 47 U.S.C. § 227(b)(1)(A).

⁶ *Id.* § 227(b)(2)(C).

⁷ To the extent that a borrower has access to both a cell phone and e-mail, alerting consumers by a voice call or text message to a cell phone is far superior than using e-mail. Research shows that 98% of text messages are opened, and 90% are read within 3 minutes of delivery. Only 22% of e-mailed messages are read. Aine Doherty, *SMS Versus Email Marketing*, BUSINESS 2 COMMUNITY (July 28, 2014); Cheryl Conner, *Fifty Essential Mobile Marketing Facts*, FORBES (Nov. 12, 2013, 11:40 PM), *available at* <https://www.forbes.com/sites/cherylsnappconner/2013/11/12/fifty-essential-mobile-marketing-facts/#283a177c7475>.

mortgage servicers seek to contact borrowers at any number the servicer has in its files for the borrower, including numbers the servicer does not have documented consent to call.

An exemption for mortgage servicing calls made during a disaster would encourage servicers to send important disaster-related messages to borrowers without having to weigh the regulatory risk of sending such messages. For example, mortgage servicers and other callers face significant regulatory risk that they will call a reassigned number—that is, the phone number of a consumer who consented to receive the call but whose number has subsequently been reassigned to another consumer. Under the Commission’s 2015 Declaratory Ruling and Order, a caller is subject to liability under the TCPA for calls made in good faith to reassigned numbers after the first call attempt.⁸ An exemption from the TCPA’s consent requirement for mortgage servicing calls made during a disaster situation would eliminate the risk of calling a reassigned number and increase the likelihood that borrowers receive the important communications that servicers seek to send.⁹

III. Conclusion

Mortgage servicers seek to place important, pro-consumer calls and texts to mortgage borrowers during a disaster situation, including to advise that the borrower may temporarily forego making mortgage payments, to provide information on filing an insurance claim, and to warn of disaster-related fraudulent schemes. We support FHFA’s request for clarification that mortgage servicing calls made during a disaster situation satisfy the requirements of the “emergency purposes” exemption to the TCPA’s consent requirement or are otherwise exempt from that requirement.

Sincerely,



Jonathan Thessin
Senior Counsel, Center for Regulatory Compliance

⁸ Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket 02-278, 30 FCC Rcd 7961, 7999-8000 ¶ 72 (2015).

⁹ ABA urges the Commission not to require, as a condition of the requested exemption, that exempted calls be placed only to phone numbers provided by the customer. Such a condition would significantly limit the benefit to borrowers of the exemption, as described in the Petition for Reconsideration filed by ABA in this proceeding, regarding the Commission’s exemption for fraud- and data breach-related calls made by financial institutions. See Petition for Reconsideration of the American Bankers Association, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket 02-278 (filed Aug. 8, 2015), available at <https://ecfsapi.fcc.gov/file/60001121060.pdf>.