

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

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

APPLICATION FOR REVIEW

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APPLICATION FOR REVIEW

Pursuant to 47 U.S.C. § 155(c)(4) and 47 C.F.R. §§ 1.104(b) and 1.115, the Mortgage Bankers Association (“MBA”) seeks review by the full Federal Communications Commission (“Commission”) of the Order issued by the Consumer and Governmental Affairs Bureau (the “Bureau”) on November 15, 2016, summarily denying MBA’s Petition for Exemption from the “prior express consent” requirements under the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, for certain non-telemarketing residential mortgage servicing calls¹ to cellular telephone numbers (the “Petition”).

SUMMARY OF THE FILING

MBA submits this Application to allow the full Commission the opportunity to consider the request for an exemption recommended by another federal agency with jurisdiction that will benefit millions of American homeowners. The Order was an inappropriate exercise of delegated authority because the Petition presented a novel legal issue of first impression deserving of full Commission consideration, not a minor or routine matter or one that is settled in nature for the Bureau to decide.

¹ The references to “calls” within this application for review are intended to include text messages, consistent with the Commission’s interpretation of the TCPA. *See Declaratory Ruling & Order, Rules and Regs. Implementing the Tel. Cons. Prot. Act of 1991*, 30 FCC Rcd. 7961 (2015).

This unprecedented exercise of delegated authority resulted in a legally and factually unsupported ruling. The Bureau denied the Petition on the ground that the MBA failed to demonstrate its members could make free-to-end-user calls. However, the free-to-end-user nature of the calls is a statutory prerequisite to any exemption granted under 47 U.S.C. § 227(2)(C). The petitioner does not bear any burden of proving its ability to make free-to-end-user calls. Even if this showing was a threshold requirement, it was satisfied.

The Bureau also found mortgage servicing calls are not sufficiently time-sensitive to warrant an exemption. This finding is unsupported by the record and conflicts with prior rulings by the Commission.

For all of these reasons, MBA urges the Commission to reverse the Order and grant an exemption from the prior express consent requirements of the TCPA for mortgage servicing calls as requested in the Petition.

QUESTIONS PRESENTED

Pursuant to 47 C.F.R. § 1.115(b), MBA submits the following questions for review:

1. Whether the Bureau's Order was an inappropriate delegation of authority to decide a new or novel legal issue?
2. Whether the Bureau created a new legal standard without precedent or support when it interpreted the TCPA to mandate, as a threshold requirement, that a petitioner demonstrate it can make free-to-end-user calls to obtain an exemption under 47 U.S.C. § 227(b)(2)(C)?
3. Whether the Bureau ignored the record and publicly available information in denying the Petition because MBA failed to show that its members are capable of making free-to-end-user calls?
4. Whether the Bureau erred in summarily denying the Petition because the mortgage servicing calls MBA sought to exempt are not sufficiently "time-sensitive" despite specific explanation from another federal agency with relevant jurisdiction to the contrary?

PROCEDURAL BACKGROUND

On June 16, 2016, MBA filed its Petition asking the Commission to exempt from the “prior express consent” requirements under the TCPA non-telemarketing residential mortgage servicing calls² to cellular telephone numbers. To date, the Commission has exercised this authority with respect to certain communications made by package delivery services, healthcare providers and financial institutions.³

MBA filed its Petition following comments by the Federal Housing Finance Agency (“FHFA”) in support of this exemption. In a comment letter regarding the Bipartisan Budget Act of 2015,⁴ FHFA explained the need for relief from the prior express consent requirements under the TCPA to facilitate effective communications between mortgage servicers and borrowers. FHFA 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.**”⁵ For these reasons, FHFA urged the Commission for an exemption, stating:

FHFA recommends that the Commission exercise regulatory authority to exempt entities that service 1-4 unit residential mortgage loans from prohibitions against the use of automatic telephone dialing systems or artificial or prerecorded voices when calling a delinquent borrower for the purpose of servicing that borrower's mortgage. This exemption would enable servicers to manage delinquent mortgage loans in accordance with the CFPB regulations and Fannie Mae and

² Consistent with the Petition, the references to “calls” within this Application are intended to include text messages.

³ See *Cargo Airline Association Petition for Expedited Declaratory Ruling Rules and Regs. Implementing the Tel. Cons. Prot. Act of 1991*, Order, 29 FCC Rcd 3432 ¶ 20 (2014); *Declaratory Ruling & Order, Rules and Regs. Implementing the Tel. Cons. Prot. Act of 1991*, 30 FCC Rcd. 7961 (2015).

⁴ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (Budget Act).

⁵ 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).

Freddie Mac servicing requirements, where applicable, without potential for conflict with the TCPA requirements.⁶

Ten days later, MBA filed its Petition.

On August 3, 2016, the Bureau issued a Public Notice requesting and setting deadlines for comments to the Petition.⁷ The Commission received a total of thirteen comment letters regarding the Petition, four in favor of the Petition and nine from consumer groups and individual consumers in opposition.⁸ MBA responded to the comments opposing the Petition in its reply comment letter.⁹

Those who wrote in opposition to the Petition focused on two main misconceptions that MBA clarified in its reply comment letter: (1) the Petition does not seek to exempt “robocalls” as that term is commonly understood; and (2) the Petition does not seek unlimited authority to call mortgage borrowers.¹⁰ First, commenters incorrectly designated the types of calls subject to the proposed exemption as “robocalls” in their opposition to the Petition. “Robocalls” are most commonly understood as calls delivering a prerecorded message when there is no live caller with whom to engage in a dialogue. However, MBA seeks an exemption to facilitate live communications between mortgage borrowers and their servicers using modern telephone equipment that may have the “potential capacity” to satisfy the broad definition of an “automatic telephone dialing system.” It is these live communications that are currently subject to the prior

⁶ Comment Letter of the Federal Housing Finance Agency to the Proposed Regulation Implementing the Bipartisan Budget Act of 2015, at p. 3 (June 6, 2016) (emphasis added).

⁷ Public Notice, Federal Communications Commission, *Consumer and Governmental Affairs Bureau Seeks Comment on Mortgage Bankers Association Petition for Exemption from the Prior Express Consent Requirement for Autodialed and Prerecorded Calls to Wireless Numbers*, CG Docket No. 02-278 (August 3, 2016), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-16-883A1.pdf.

⁸ See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Mortgage Bankers Association Petition for Exemption*, Order, CG Docket No. 02-278, at pp. 4-5 (November 15, 2016) (“Order”).

⁹ Reply Comments of the Mortgage Bankers Association in Support of Petition for Exemption (September 19, 2016).

¹⁰ *Id.*, at p. 1.

express consent requirement under the Commission’s broad definitions interpreting the TCPA. Second, 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, and this exemption would not leave mortgage servicing communications unregulated with unlimited authority to call borrowers. In addition to this comprehensive regulatory framework, MBA proposed additional conditions on the exemption similar to the exemptions granted for package delivery notifications and healthcare and financial institution communications. The Commission previously determined granting exemptions for calls that are subject to less significant or no substantive regulation (like package delivery notifications and certain healthcare and financial institution communications) does not override consumer privacy interests. The exemption MBA seeks will facilitate communications between mortgage servicers and borrowers who may be at risk of losing their homes while protecting fundamental privacy interests in line with other types of communications.

MBA met with the Bureau on October 4, 2016, to discuss the Petition.¹¹ MBA also met with the office of Chairman Tom Wheeler on October 18, 2016, regarding the Petition.¹² Finally, on November 15, 2016, MBA met with the office of Commissioner Michael O’Rielly.¹³

That same day, on November 15, 2016, the Bureau issued its Order summarily denying the Petition under delegated authority without allowing full consideration of this important issue of first impression before the Commission.¹⁴ The Bureau denied the Petition on the ground that “MBA has not shown, as a threshold matter, the exempted calls would be free of charge to called

¹¹ See Notice of *Ex Parte* Meeting (October 6, 2016).

¹² See Notice of *Ex Parte* Meeting (October 19, 2016).

¹³ See Notice of *Ex Parte* Meeting (November 19, 2016).

¹⁴ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Mortgage Bankers Association Petition for Exemption*, Order, CG Docket No. 02-278 (November 15, 2016).

parties” and that mortgage servicing calls are not sufficiently time-sensitive to warrant the requested exemption as compared to package delivery notifications, healthcare and certain financial institution communications.

This Order is an unprecedented use of delegated authority by the Bureau to rule on a new and novel issue of first impression for a narrowly tailored and limited exemption within the Commission’s authority that was urged by another federal agency. For this reason alone, it deserves to be reversed and thoroughly considered by the full Commission. Further, the stated basis for denial – failure to demonstrate the capability to make free-to-end-user calls – is legally and factually unsupported. Finally, despite the Bureau’s cursory conclusion, mortgage servicing calls are just as or more urgent and time-sensitive than package delivery notifications, healthcare and other financial institution communications for which the full Commission has previously provided similar exemptions.

MBA respectfully requests that the Commission reverse the Bureau’s Order and grant the requested exemption.

ARGUMENT

I. THE ORDER IS AN INAPPROPRIATE USE OF DELEGATED AUTHORITY.

Section 5 of the Federal Communications Act generally authorizes the Commission to delegate its functions, including to internal bureaus.¹⁵ By regulation, the Commission has delegated authority to its staff “to act on matters which are *minor or routine or settled in nature* and those in which immediate action may be necessary.”¹⁶

The Petition seeks an exemption that was recommended publicly by another federal agency with relevant jurisdiction to ensure the TCPA does not conflict with or impede the objectives of a patchwork of carefully crafted outbound call requirements by various federal and state regulators. The ultimate objective of these outbound call requirements is to preserve homeownership, which has proven to be of critical importance to individual borrowers, families, neighborhoods, municipalities and our national economy.

The Commission has exercised its authority to grant such an exemption in three prior instances beginning in 2014. Unlike each of the three prior instances, the calls MBA seeks to exempt in this Petition are required to be placed by federal and state laws, rules or other requirements; are subject to a host of other consumer protection laws; and have clear, undeniable benefits to consumers.

Notwithstanding this strong record in support, the Bureau summarily denied the Petition in record speed (five months) without the opportunity for meaningful consideration or any input from the full Commission. In doing so, the Bureau exceeded the authority delegated to it by the Commission under 47 C.F.R. § 0.5(c) to act on matters which are minor or routine or settled in nature. As Commissioner Pai previously commented, “FCC decisions issued on the Bureau level

¹⁵ 47 U.S.C. § 155(c)(1).

¹⁶ 47 C.F.R. § 0.5(c) (emphasis added).

cut the Commissioners out of the decision-making process entirely. This is not how democracy works.”¹⁷

This exercise of delegated authority is particularly inappropriate given that the Commission has only recently exercised its authority to grant exemptions from the prior express consent requirements of the TCPA. Further, each petition for exemption is inherently fact-specific and presents new and novel issues which must be reviewed by the full Commission. Even more important here is the ultimate impact on consumers and their ability to receive these critical communications. The Bureau’s conclusion to disregard public comments from another federal agency vested with jurisdiction over the mortgage industry and simply deem these communications to be “non-time-sensitive” should be closely reviewed by the full Commission and reversed based on the clear record in support of the Petition.

II. THE FREE-TO-END-USER NATURE OF THE REQUESTED EXEMPTION IS A STATUTORY PREREQUISITE, NOT A THRESHOLD REQUIREMENT.

The Bureau denied the Petition on the basis that MBA failed to demonstrate that its members were “capable of meeting the requirement” that mortgage servicing calls will not be charged to the called party.¹⁸ In so finding, the Bureau interpreted the TCPA to require a petitioner to demonstrate that it can make free-to-end-user calls before consideration of the merits and substance of the requested exemption. This interpretation is without precedent and unfounded.

Congress authorized the Commission to exempt autodialed or prerecorded calls to cellular telephone numbers “that are not charged to the called party, subject to such conditions as

¹⁷ Joint Statement of Commissioners Ajit Pai and Michael O’Rielly on the Abandonment of Consensus-Based Decision-Making at the FCC (December 18, 2014).

¹⁸ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Mortgage Bankers Association Petition for Exemption*, Order, CG Docket No. 02-278, at p. 6 (November 15, 2016).

the Commission may prescribe as necessary in the interest of the privacy rights [the TCPA] is intended to protect.”¹⁹ The Commission first exercised this authority in its March 27, 2014, order granting an exemption for package delivery notifications.²⁰ The Commission then granted two additional exemptions for certain healthcare and financial institution communications in its July 10, 2015, TCPA Declaratory Ruling and Order.²¹ In each order, the Commission noted that the petitioner either stated its members were capable of sending free-to-end-user calls or that its members would “work with wireless carriers and third-party service providers” to ensure that the calls would be free-to-end-user.²² While the Commission noted these capabilities in prior orders, such a showing is not required for the Commission to exercise its authority under the TCPA and is certainly not required to evaluate the substance and merits of a Petition.

To construe this provision of the TCPA otherwise would effectively limit the Commission’s ability to grant exemptions based on currently available methods of communication and technology. The language of the statute is not so limiting. Congress authorized the Commission to exempt autodialed or prerecorded calls to cellular telephone numbers “that are not charged to the called party.” That authority is not dependent upon currently available technology or any threshold demonstration by the petitioner.

This interpretation is also counterproductive to encouraging new and emerging advances, services, and technology. Granting an exemption that would create a market for new types of free-to-end-user communications would be consistent with prior Commission actions. For example, as Commissioner Clyburn previously remarked, the Commission’s July 10, 2015,

¹⁹ 47 U.S.C. § 227(2)(C).

²⁰ *In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (March 27, 2014).

²¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, WC Docket No. 07-135, 30 FCC Rcd 7961, 8023, para. 125 (July 10, 2015).

²² *Id.*, at 8024 and 8030, paras. 127 and 144.

TCPA Declaratory Ruling and Order did not mandate the creation or participation by providers in a database of reassigned numbers but she (and it) encouraged voluntary participation in a comprehensive type of reassigned number database to mitigate against the risk of liability.²³ In other words, the Commission's order created a need for a new technology or service.

By summarily deciding the Petition on this ground, the Bureau denied the Commission the ability to consider the substance of the relief advocated by another federal agency – FHFA – and to more thoroughly evaluate whether the benefits to consumers of these communications outweighs the privacy protections intended by the TCPA. Usurping this opportunity and denying a more thorough and meaningful review will harm consumers who need to be informed of options to save their homes from foreclosure. Accordingly, MBA urges the Commission to reconsider and reverse the Bureau's finding that a petitioner for an exemption under 47 U.S.C. § 227(c) must demonstrate its capability of making free-to-end-user calls.

III. THE BUREAU IGNORED THE RECORD AND PUBLICLY AVAILABLE INFORMATION IN CONCLUDING MBA FAILED TO DEMONSTRATE THE CAPABILITY TO MAKE FREE-TO-END-USER CALLS.

The Bureau's focus on demonstration of the petitioner's capability to make free-to-end-user calls is a red herring. There is no statutory obligation for a petitioner to demonstrate such capability. Nor is there any standard for demonstrating such capability. The Bureau attempts to distinguish the Petition from the three prior requests for an exemption. This distinction is tenuous at best.

To the extent that there is any threshold requirement to demonstrate the petitioner's capability of making free-to-end-user calls, the Commission has previously found statements in *ex parte* meetings, general statements that entities who would be subject to the exemption “will

²³ *Id.*, at 8068 (Statement of Commissioner Mignon Clyburn).

work” to ensure calls are free-to-end-user and references to notices of *ex parte* meetings filed by other petitioners to satisfy this requirement.

Of the three prior requests for an exemption, the most detail any petitioner provided to the Commission regarding its ability to make free-to-end-user calls were in notices of *ex parte* meetings. One petitioner stated in a notice of *ex parte* meeting that its:

[R]epresentatives reported that there are several options available today to send free-to-end-user (‘FTEU’) text messages to wireless telephone numbers. For example, third-party solutions providers offer companies, for a fee, the ability to send FTEU text messages to subscribers of all four national U.S. wireless carriers. ... Solutions for other carriers may also be available, and any exemption should provide flexibility for CAA members to work with carriers and third parties to develop additional FTEU voice and text solutions.²⁴

These notices were filed more than one year after the filing of the petition and described two of thirteen separate *ex parte* meetings held regarding its petition, seven of which were with the Bureau or its staff. In the past, the Bureau has shown that it will take the time to carefully review a request for an exemption and obtain any information necessary to resolve and grant a petition. Unfortunately, MBA did not receive similar opportunities, as the Bureau swiftly moved to deny the Petition in record speed (five months from filing to denial).

The second petitioner simply referenced the language of the first petitioner and stated that entities covered by its proposed exemption “will work with wireless carriers and third-party service providers to ensure that recipients of notices under the requested exemption are not charged for those messages.”²⁵ The third petitioner merely stated in its petition that it was capable of using the technology referenced by the first petitioner in its notice of *ex parte*

²⁴ Notice of *Ex Parte* Meeting, Cargo Airline Association (CAA), CG Docket No. 02-278, at p. 2 (November 19, 2013).

²⁵ *American Bankers Association*, Petition for Exemption, CG Docket No. 02-278, at 17 (Oct. 14, 2014)

meetings.²⁶ There is nothing in the record to suggest that mortgage servicers are incapable of making calls using services and technology that the Commission knows are available in the marketplace.

In its Petition, MBA clearly requested an exemption for free-to-end-user mortgage servicing calls. MBA also answered questions from the Bureau in its single meeting prior to the issuance of the Order. To the extent there was any confusion, mortgage servicers are capable of making the same types of calls as package delivery services, healthcare providers and other financial institutions and will work with wireless carriers and third party service providers to ensure that any call made under the exemption is free-to-end-user and will not result in the call counting against any plan limits for voice calls or text messages. Otherwise, the call would not be subject to or protected by the requested exemption.

IV. THE BUREAU ERRED IN CONCLUDING MORTGAGE SERVICING CALLS ARE NOT SUFFICIENTLY TIME-SENSITIVE AND DO NOT OUTWEIGH PRIVACY INTERESTS PROTECTED BY THE TCPA.

Outbound residential mortgage servicing calls are critical to ensure borrowers understand available options to avoid foreclosure and its financially damaging repercussions. Given their importance and benefit to borrowers, these communications are mandated by multiple federal and state laws, regulations, and requirements. The Bureau marginalized the importance and consumer benefits of these communications and found because they were not required within seconds or minutes, they were not worthy of an exemption.

By the Bureau's own admission, "the *Commission* has not precisely defined how time-sensitive messages must be" to qualify for an exemption.²⁷ Again, this type of new legal

²⁶ *American Association of Healthcare Administrative Management*, Petition for Expedited Declaratory Ruling and Exemption, CG Docket No. 02-278, at 11 (Oct. 21, 2014).

guidance and policy interpretation is not appropriate for a decision by the Bureau through delegated authority and must be thoroughly considered by a full Commission.²⁸ Further, this new measure of urgency is inconsistent with prior exemptions granted by the Commission.

For example, the exemption granted for package delivery notifications did not require the calls to be made within seconds or minutes of the sender mailing a package. Rather, many packages are sent over the course of days. MBA also notes that package delivery services are not required by statute or regulation to call package recipients and are not required to use automatic telephone dialing systems to initiate any call. The same is true of medical appointment reminders (which to be effective occur days or weeks in advance, not seconds or minutes) and many other types of calls for which the Commission has provided an exemption. The Bureau's reliance on these arguments to deny MBA's Petition should not survive scrutiny by the Commission.

V. THE COMMISSION SHOULD GRANT THE EXEMPTION.

MBA seeks an exemption from the prior express consent requirements under the TCPA for residential mortgage servicing calls because these communications help consumers. The requirements to place these calls and their benefits to consumers are undisputed. These mortgage servicing calls facilitate live communications between borrowers and their servicers to 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. 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

²⁷ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Mortgage Bankers Association Petition for Exemption*, Order, CG Docket No. 02-278, at p. 7 (November 15, 2016) (emphasis added).

²⁸ 47 C.F.R. § 1.115.

communications, or homeownership preservation. It would be particularly unfortunate if the Bureau's cursory review of the Petition allowed the TCPA to frustrate the efforts of the agencies to which Congress has delegated discretion to set policy regarding the best methods of aiding mortgage borrowers in financial distress.

MBA urges the Commission to remove these impediments and reverse the Order, 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.

A. THE REQUESTED EXEMPTION FULFILLS THE GOALS OF THE TCPA AND OTHER FEDERAL AND STATE REQUIREMENTS TO CALL MORTGAGE BORROWERS.

The mortgage market is the single largest market for consumer financial products and services in the United States.²⁹ The CFPB, an agency Congress specially created to protect consumers, has acknowledged mortgage servicers “play a vital role within the broader market by undertaking the day-to-day management of mortgage loans on behalf of lenders who hold the loans in their portfolios or (where a loan has been securitized) investors who are entitled to the loan proceeds.”³⁰ These day-to-day management responsibilities include billing borrowers for

²⁹ *Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X); Final Rule*, Bureau of Consumer Financial Protection, 78 Fed. Reg. 10696, at 10699 (Feb. 14, 2013) (to be codified at 12 C.F.R. Part 1024).

³⁰ *Id.* (“As of June 2012, approximately 36 percent of outstanding mortgage loans were held in portfolio; 54 percent of mortgage loans were owned through mortgage-backed securities issued by Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), together referred to as the government-sponsored enterprises (GSEs), as well as securities issued by the Government National Mortgage Association (Ginnie Mae); and 10 percent of loans were owned through private label mortgage-backed securities. *Strengthening the Housing Market and Minimizing Losses to Taxpayers*, Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs SubComm. on Housing, Transp., and Cmty. Dev., (Mar. 15, 2012, 2:30 PM)(Testimony of Laurie Goodman, Amherst Securities), <http://www.banking.senate.gov/public/index.cfm/hearings?ID=53BDA60F-64C1-43D8-9ADF-A693C31EB56B>. A securitization results in the economic separation of the legal title to the mortgage loan and a beneficial interest in the mortgage loan obligation. In a securitization

amounts due, collecting and allocating payments, maintaining and disbursing funds from escrow accounts, reporting to creditors or investors, and contacting borrowers to pursue collection and loss mitigation activities (including foreclosures and loan modifications) with respect to delinquent borrowers.³¹

Mortgage servicers have a “direct and profound impact on borrowers”³² because they are the personal interface between borrowers and the owners of their loans. To fulfill their duties, mortgage servicers answer calls from borrowers and place outbound calls. These outbound mortgage servicing calls include calls to inform consumers about mortgage servicing transfers, options in the event of damage to the property (whether by fire, flood, earthquake, hurricane or other loss event), and options in the event of a default.

While all of these communications are important, mortgage servicers must be able to speak to a delinquent borrower as early as possible after a payment default to explain available options. These calls directly benefit borrowers by allowing the mortgage servicer to work with the borrower to, among other things:

- determine the reason for the delinquency and whether the reason is temporary or permanent in nature;
- determine whether the borrower has abandoned or vacated the property;
- determine the borrower’s current perception of their financial circumstances and ability to repay the debt;

transaction, a securitization trust is the owner or assignee of a mortgage loan. An investor is a creditor of the trust and is entitled to cash flows that are derived from the proceeds of the mortgage loans. In general, certain investors (or an insurer entitled to act on behalf of the investors) may direct the trust to take action as the owner or assignee of the mortgage loans for the benefit of the investors or insurers. *See, e.g., Adam Levitin & Tara Twomey, Mortgage Servicing*, 28 Yale J. on Reg. 1, 11 (2011).”

³¹ *Id.*

³² *Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X); Final Rule*, Bureau of Consumer Financial Protection, 78 Fed. Reg. 10696, at 10699 (Feb. 14, 2013) (to be codified at 12 C.F.R. Part 1024).

- set payment expectations and educate the borrower on the availability of alternatives to foreclosure;
- provide homeowner counseling information;
- discuss options upon the death of a borrower;
- discuss missing documentation needed to complete a loss mitigation application; and
- address misconceptions or misinformation about the effect of not making payments and other bad advice from debt relief scams.

Effectively communicating with borrowers who are delinquent on their payment obligations is critical to keeping borrowers in their homes and protecting their credit histories. The benefits of proactive and successful loss mitigation strategies go beyond the borrower to avoid blight in neighborhoods and communities, maintain home values and protect our economy. The consequences of foreclosure are profoundly negative for homeowners, and our current housing market regulation encourages or requires outbound calls designed to ensure that borrowers are aware of their options to possibly avoid it.³³

The sort of timely, real-time interaction that occurs on a telephone call is particularly important. Length of delinquency is the second-most significant factor that drives the

³³ “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).

performance of the loan modifications necessary to keep a consumer in his or her home.³⁴ In fact, one mortgage servicer's internal review noted a 50% increase in borrowers who became current on their loan when the servicer made up to five calls in the two weeks prior to the customer becoming 60 days delinquent, compared to those customers who were not called during the same time period.³⁵ Time is of the essence in loss mitigation efforts, and discouraging telephone contact creates obstacles to a borrower getting a modification or keeping his or her home.

In the wake of the most recent housing crisis, Treasury highlighted the benefits of mortgage servicing calls: "The issue of how well mortgage servicers communicate with homeowners has been fundamental to our nation's ability to address the housing crisis. The reason is simple: unless mortgage servicers communicate successfully with at-risk homeowners, there can be no modification of a mortgage and no path to avoiding a foreclosure."³⁶

The federal agencies responsible for regulating residential mortgages learned through the experience of the financial crisis that telephonic communications with borrowers are critical to maintaining homeownership. A host of federal regulators have jurisdiction over residential mortgage loans, including the FHFA, Consumer Financial Protection Bureau ("CFPB"), Department of Housing and Urban Development ("HUD"), Department of Treasury ("Treasury"), Department of Agriculture ("USDA"), and Department of Veterans Affairs

³⁴ Only the amount of payment reduction provided by the modification was more significant 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

³⁵ Comments of Quicken Loans Inc. to the Commission's Notice of Proposed Rulemaking on the TCPA's Budget Act Amendment, CG Docket No. 02-278 (filed June 6, 2016), at page 3.

³⁶ U.S. Dep't 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 Contact*, (Nov. 14, 2012), https://www.treasury.gov/initiatives/financial-stability/reports/Documents/SPOC%20Special%20Report_Final.pdf.

(“VA”). These agencies require mortgage servicers to place outbound telephone calls to borrowers at various times throughout a loan. The following chart, which was provided to the Bureau and the Commission in the Petition, provides examples of these requirements.

Federal Agency / State Government	Required Contact
CFPB Mortgage Servicing Rules	Telephone or in-person contact by the 36th day of delinquency ³⁷
Federal Housing Administration (“FHA”)	Telephone contact within 20th day of delinquency; at least 2 times per week until contact established or determine property is vacant or abandoned ³⁸
Fannie Mae and Freddie Mac	Outbound contact attempts, including text and telephone, by the 36th day of delinquency; every 5 days until contact made, delinquency resolved or certain other events occur ³⁹
Treasury – Home Affordable Modification Program (“HAMP”)	Minimum of 4 telephone calls to the last known phone numbers of record, at different times of the day, within 30 day period ⁴⁰
VA Mortgage Servicing Rules	Telephone contact no later than the 20th day of delinquency ⁴¹
United States Department of Agriculture Rural Development (“USDA”)	Attempt telephone or written contact before the account becomes 20 days past due; USDA recommends making personal contact with a delinquent borrower until the delinquency is cured ⁴²

³⁷ 12 C.F.R. § 1024.39(a).

³⁸ Federal Housing Administration (“FHA”) Single Family Housing Policy Handbook, 4000.1(III)(A)(2)(h). FHA’s programs are designed to extend credit to lower/middle class Americans and first time home buyers, and in many cases, those who would find it difficult to find an alternative means of purchasing a home.

³⁹ Fannie Mae Servicing Guide, D2-2-02 (12/16/2015); Freddie Mac Servicing Guide, 9101.2 (3/2/2016).

⁴⁰ HAMP Handbook, 2.2.1 (01/06/16).

⁴¹ 38 C.F.R. § 36.4278(g).

⁴² USDA Single Family Housing Guaranteed Loan Program Technical Handbook at § 18.3.

Federal Agency / State Government	Required Contact
California, Nevada, and Washington State Pre-Foreclosure Rules	<p>Telephone and / or in-person “initial contact” or due diligence required before issuing or recording a Notice of Default.⁴³</p> <p>Due diligence requires telephone contact at the primary telephone number on file at least three times at different hours and on different days.⁴⁴</p>

In fact, when promulgating its mortgage servicing rule, the CFPB noted that “[c]onsumer advocacy groups were uniformly in favor of both an oral and written notice requirement.”⁴⁵ The CFPB also cited a joint comment letter from the Center for Responsible Lending, Consumer Federation of America, and Center for American Progress supporting the CFPB’s mortgage servicing rule’s early intervention requirements, including outbound calls with delinquent borrowers, because research shows that borrowers have a lower re-default rate the earlier they are reached in delinquency.⁴⁶ The CFPB further explained that “delinquent borrowers may not make contact with servicers to discuss their options because they may be unaware that they have options or that their servicer is able to assist them. There is a risk to borrowers who do not make contact with servicers and remain delinquent; the longer a borrower remains delinquent, the more

⁴³ Cal. Civ. Code § 2923.5(a)(1)(A), (a)(2); Nev. Rev. Stat. § 107.510(1)(b), (2); Wash. Rev. Code § 61.24.031(1)(a)(i-ii), (1)(b). Washington State requires “initial contact” by both telephone and letter. Further, although the Nevada statutes do not explicitly use the phrase “due diligence,” the outbound telephone call requirements are the same.

⁴⁴ Cal. Civ. Code § 2923.5(e)(2)(A); Nev. Rev. Stat. § 107.510(5)(b); Wash. Rev. Code § 61.24.031(5)(b)(i). Washington State requires telephone calls to both the primary and secondary telephone numbers on file. Other states require telephone or in-person contact prior to foreclosure. *See, e.g.*, Conn. Gen. Stat. § 8-265ee(a); D.C. Mun. Regs. tit. 26-C § 2710.18; Idaho Code § 45-1506C(4)(a); R.I. Gen. Laws § 34-27-3.2(f).

⁴⁵ 78 Fed. Reg. 10696, at 10788.

⁴⁶ *Id.* (citing Goodman, Yang, Ashworth, and Landy, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications*, Submitted to the Pew Charitable Trusts Conference on Strategies for Revitalizing the Housing Market (May 30, 2012)).

difficult it can be to avoid foreclosure.”⁴⁷ These are calls that delinquent borrowers welcome and need to possibly save their homes.

B. THE BENEFITS OF MORTGAGE SERVICING CALLS OUTWEIGH PRIVACY INTERESTS.

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. This balance is evident in the authority granted to the Commission to create certain exemptions from the consent requirements and the more recent amendment to the TCPA exempting from the consent requirements calls made solely to collect a debt owed to or guaranteed by the United States.

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. As noted above and consistent with other petitions for exemptions that have been granted by the Commission, MBA’s members are capable of using the same currently available services and technology for placing free-to-end-user communications and will work with wireless carriers and third party service providers to ensure called parties are not charged for any call, including ensuring that calls will not count against any plan limits on the consumer’s voice minutes or texts.

MBA suggests the following conditions for each free-to-end-user mortgage servicing call:

⁴⁷ *Id.* (citing, e.g., John C. Dugan, Comptroller, Office of the Comptroller of the Currency, *Remarks Before the NeighborWorks America Symposium on Promoting Foreclosure Solutions* (June 25, 2007), <http://www.occ.gov/news-issuances/speeches/2007/pub-speech-2007-61.pdf>; Laurie S. Goodman et al., Amherst Securities Group LP, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications* (June 19, 2012), at 5-6; Michael A. Stegman et al., *Preventative Servicing*, 18 Hous. Policy Debate 245 (2007); Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs* 11-12 (Freddie Mac, Working Paper No. 08-01, 2008)).

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.

MBA requests that for the purposes of this exemption the Commission adopt the long-settled regulatory definition of “mortgage servicing” as “all actions, including all communications, related to the receipt and application of payments pursuant to the terms of any loan or security agreement, execution of other rights and obligations owed under the loan or security agreement, the modification of any terms of the loan or security agreement, and any other loss mitigation options.”⁴⁸ The Commission should confirm that the definition includes calls made to borrowers by HUD-approved housing counselors.⁴⁹

⁴⁸ MBA proposes that this definition is consistent with the federal Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. §2605(i)(3), and its implementing regulation, Regulation X, 12 C.F.R. § 1024.2(b). *See* 12 U.S.C. §2605(i)(3)(defining servicing as “receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 10, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan”); 12 C.F.R. § 1024.2(b) (“*Servicing* means receiving any scheduled periodic payments from a borrower pursuant to a federally related mortgage loan, including amounts for escrow accounts under section 10 of RESPA (12 U.S.C. 2609), and making the payments to the owner of the loan or other third parties of principal and

The mortgage servicing calls subject to this exemption will help millions of American borrowers. As of December 31, 2015, the total amount of residential mortgage debt outstanding nearly approached \$10 trillion.⁵⁰ Of this total, nearly \$2.5 trillion was held by depository institutions, \$5 trillion was held by federal and related agencies, and just over \$2 trillion was held by private mortgage conduits, individuals and others.⁵¹ Since 2007, mortgage servicers have been able to create nearly 25 million solutions to avoid foreclosure.⁵² In the fourth quarter of 2015 alone, more than 35,000 mortgage loan modifications were completed by just eight national banks.⁵³

Mortgage servicers must be able to use modern, efficient telephone systems to place these calls given the volume of mortgage borrowers. Modern telephone systems ensure the accuracy of telephone numbers dialed (as opposed to manually dialed calls) and allow for additional compliance functions, including call recording and controls on timing and frequency. As the

interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case of a home equity conversion mortgage or reverse mortgage as referenced in this section, servicing includes making payments to the borrower.”).

⁴⁹ Mortgage servicers are required to send written notice to borrowers within 45 days of delinquency that, among other things, identifies a website address and the HUD toll-free telephone number where the borrower can access the CFPB or HUD list of housing counselors and organizations. 12 C.F.R. § 1024.39(b)(2)(v). These counselors work with borrowers to better understand their options to avoid foreclosure and assist borrowers with the process of applying for loss mitigation options.

⁵⁰ Board of Governors of the Federal Reserve System (US), Mortgage Debt Outstanding by Type of Property: One- to Four-Family Residences, federalreserve.gov (May 19, 2016 at 11:32 AM), <https://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm>.

⁵¹ *Id.*

⁵² *HOPE NOW Data Report: February 2016, Industry Extrapolations and HAMP Metrics*, hopenow.com (Feb. 2016) <http://www.hopenow.com/industry-data.php>.

⁵³ *OCC Mortgage Metrics Report, Fourth Quarter 2015*, OCC.gov (Mar. 30, 2016), <http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/mortgage-metrics/index-mortgage-metrics.html>. The eight national banks are Bank of America, JPMorgan Chase, CIT Bank (formerly OneWest), Citibank, HSBC, PNC, U.S. Bank, and Wells Fargo. As of December 31, 2015, the reporting banks serviced approximately 21.5 million first-lien mortgage loans with \$3.7 trillion in unpaid principal balances or 41% of all first-lien residential mortgage debt outstanding in the United States.

Commission is aware, the use of such equipment alone (without prerecorded messages or the use of random or sequential number generators) potentially triggers the consent provisions of the TCPA and has subjected mortgage servicers to a multitude of lawsuits alleging TCPA violations.⁵⁴ Given the significant statutory penalties and the costs of defending such actions, mortgage servicers face the potential for devastating monetary damages when attempting to comply in good faith both with the TCPA and other federal and state requirements to place outbound calls to borrowers. Exposing mortgage servicers to this type of liability is not consistent with the goals of the TCPA and threatens to chill the provision of critical communications that are proven to keep borrowers in their homes and are required by both the federal regulators and state legislatures that govern our housing market.

VI. CONCLUSION

For the reasons stated above and in the Petition and Reply Comment Letter, and consistent with the FHFA's recommendation, MBA respectfully urges the Commission to reverse the Bureau's Order and to provide a limited exemption from the consent requirements under the TCPA for autodialed and prerecorded 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.

⁵⁴ See e.g., *Cartrette v. Time Warner Cable, Inc.*, 157 F.Supp.3d 448, 455 (E.D.N.C. 2016); *Daubert v. NRA Grp., LLC*, 3:15-CV-00718, 2016 WL 3027826, at *13 (M.D. Pa. May 27, 2016), *reconsideration denied*, 3:15-CV-00718, 2016 WL 3916294 (M.D. Pa. July 20, 2016); *Manuel v. NRA Group, LLC*, 2016 WL 4158797 (Aug. 5, 2016); *Dominguez v. Yahoo, Inc.*, 629 Fed.Appx. 369, 372 (3d Cir. 2015) (noting that the Commission's 2015 Declaratory Ruling regarding the scope of an automatic telephone dialing system is "hardly a model of clarity").

Respectfully submitted,



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