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MORTGAGE BANKERS ASSOCIATION

June 16, 2016

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

RE: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, GC Docket No. 02-278

Dear Ms. Dortch:

The Mortgage Bankers Association ("MBA") is pleased to submit these reply comments to the Federal Communications Commission (the "Commission") in response to its May 6, 2016, Notice of Proposed Rulemaking ("NPRM"), which proposes to except from the Telephone Consumer Protection Act's ("TCPA") prior express consent requirements certain calls "made solely to collect a debt owed to or guaranteed by the United States."

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. MBA works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to 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 over 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.

The mortgage market is the single largest market for consumer financial products and services in the United States.[1] Because of the size and significance of this market to the American economy, residential mortgages are heavily regulated at the federal and state levels. This carefully crafted regulatory scheme includes a number of outbound telephone call

[1] 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).

requirements to mortgage borrowers at different times throughout the duration of their loan. Congress and federal regulators have determined that these calls benefit the consumer.

MBA members need to contact their customers to comply with these various federal and state laws, regulations, and requirements that mandate outbound calls to borrowers. These outbound calls include information 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, the potential ramifications from a mortgage default mandate that mortgage servicers are able to speak to a delinquent borrower as early as possible to explain available options.[2] More and more of these calls are made to cell phone numbers because 90% of Americans now own cell phones and nearly half of American households are "wireless only."[3] Given the volume of mortgage borrowers, the number of required calls, and the compliance benefits[4] associated with the technology, mortgage servicers often use telephone dialing equipment that could be construed in the broadest sense as having the capacity to store or produce telephone numbers using a random or sequential number generator and the capacity to dial those numbers.[5] Using telephone equipment that is definitively "manual," if that is possible, is not practical, feasible or efficient. As the Federal Housing Finance Agency ("FHFA") noted in its Comment Letter, "*efficient* and early resolution of a delinquency to avoid foreclosure is the key to ensuring a borrower does not lose his or her home."[6]

Congress included in the Bipartisan Budget Act of 2015[7] an amendment (the "Budget Act Amendment") to the TCPA that excepts from the prior express consent requirements certain calls "made solely to collect a debt owed to or guaranteed by the United States" (the "Exemption").[8] In doing so, Congress highlighted the importance of collecting these debts owed to or guaranteed by the United States Government. The Commission then issued its NPRM on May 6, 2016, to implement the relevant TCPA provisions of the Budget Act Amendment.

By this letter, MBA respectfully submits these reply comments to support the Exemption because frequent communication and early intervention are essential to helping struggling homeowners resolve delinquencies and remain in their homes. The benefits of proactive and successful loss mitigation strategies go beyond the borrower to help their communities avoid

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[2] *See* Comment Letter of Quicken Loans Inc., at pp. 2-3 (June 6, 2016).
[3] *See* Comment Letter of Quicken Loans Inc., at p. 2 (June 6, 2016).
[4] For example, telephone equipment that can record telephone calls and/or that controls the times in which outbound calls may be made to certain area codes or consumer zip codes could be reconfigured to include additional functionality, thereby exposing the equipment to characterization as an "automatic telephone dialing system."
[5] 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(2); *see also* Declaratory Ruling & Order, Rules and Regs. Implementing the Tel. Cons. Prot. Act of 1991, 30 FCC Rcd. 7961 (2015).
[6] Comment Letter of the Federal Housing Finance Agency, at p. 2 (June 6, 2016) (emphasis added).
[7] Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (Budget Act).
[8] 47 U.S.C. §§ 227(b)(1)(A), (b)(1)(B).

blight and maintain home values. For these reasons, MBA urges the Commission to: (1) confirm the Exemption applies to residential mortgage loans owned, insured or guaranteed by any federal agency and any government-sponsored enterprise; and (2) ensure any substantive regulation of these communications is consistent with other federal and state laws and does not obstruct these important communications. MBA also supports the comment letter filed by its member, Quicken Loans Inc.[9]

I. Residential Mortgage Loans Owned, Insured, or Guaranteed by Federal Agencies and Government Sponsored Enterprises are Debts "Owed to or Guaranteed by the United States."

The Commission seeks comment on what constitutes a debt "owed to" the United States and a debt "guaranteed by" the United States.[10] With respect to residential mortgage loans, the Commission's final rule should include loans owed to, guaranteed, or insured by the Federal Housing Administration ("FHA"), the United States Department of Veterans Affairs ("VA"), the United States Department of Agriculture ("USDA"), and the Government National Mortgage Association ("Ginnie Mae"), along with government-sponsored enterprises ("GSEs," which include (1) the Federal National Mortgage Association ("Fannie Mae") and (2) the Federal Home Loan Mortgage Corporation ("Freddie Mac")).

A. Background of the Federal Housing Agencies and GSEs

The history of these federal housing agencies and the GSEs dates back to the early 1930s and the country's response to the Great Depression. Each agency and GSE plays a different and important role in our country's housing market by owning, insuring or guaranteeing mortgage loans. All of those loans fall within the Exemption.

FHA, which is part of the United States Department of Housing and Urban Development ("HUD"), provides mortgage insurance on qualifying loans made by FHA-approved lenders.[11] FHA mortgage insurance provides lenders with protection against losses as the result of homeowners defaulting on their mortgage loans.[12] 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.

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[9] *See* Comment Letter of Quicken Loans Inc. (June 6, 2016).
[10] *See* ¶¶ 11-12 of NPRM.
[11] U.S. Department of Housing and Urban Development: *The Federal Housing Administration*, *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/fhahistory (last accessed June 7, 2016).
[12] *Id*.

The VA mortgage loan was designed to help eligible servicemembers, veterans, and surviving spouses become homeowners by offering long-term housing financing.[13] VA loans are originated by qualified lenders and are guaranteed by the VA.[14]

The USDA Single Family Housing Guaranteed Loan Program allows approved lenders to provide low- and moderate-income households the opportunity to own homes in eligible rural areas.[15] Similar to VA loans, these loans are guaranteed by the USDA.[16]

Ginnie Mae is a government owned corporation within HUD that guarantees timely payment of principal and interest on privately issued mortgage-backed securities ("MBS") collateralized by FHA, VA, or other government insured or guaranteed mortgages.[17]

Similar to the federal housing agencies and Ginnie Mae, the GSEs were created to increase homeownership levels throughout the United States.[18] Today, the GSEs expand access to homeownership by purchasing mortgage loans and guaranteeing and securitizing them.

The structure of Fannie Mae has changed since its inception in 1938, including conversion of the entity from a government agency to a public-private mixed ownership corporation (1954) to a private corporation (1968). Fannie Mae initially was created to purchase, hold, and sell FHA-insured loans to provide lenders with cash to fund new home loans. Although its current operations are not limited to FHA-insured loans, today, Fannie Mae continues its original mission by buying loans that banks and other lenders originate so they can fund new loans, providing vital liquidity to the market. Fannie Mae accomplishes this mission by pooling the loans it purchases into MBS that it guarantees.

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[13] U.S. Department of Veterans Affairs, *Home Loans: Eligibility*, *available at* http://www.benefits.va.gov/homeloans/purchaseco_eligibility.asp (last accessed June 7, 2016).
[14] *Id*.; *see also* VA Pamphlet 26-7, Revised; *Chapter 3: The VA Loan and Guaranty*. The VA guarantee is structured differently than USDA and FHA mortgage loans. However, these loans are "guaranteed by the United States" and including them within the Exemption aligns with the goal of not only providing affordable housing finance to American's servicemembers and their families but helping to keep them in those homes long-term.
[15] United States Department of Agriculture, *Rural Development: Single Family Housing Guaranteed Loan Program*, *available at* http://www.rd.usda.gov/programs-services/single-family-housing-guaranteed-loan-program (last accessed June 7, 2016).
[16] *Id*.
[17] U.S. Department of Housing and Urban Development: *Ginnie Mae I Mortgage Backed Securities*, *available at* http://portal.hud.gov/hudportal/HUD?src=/hudprograms/Ginnie_Mae_I (last accessed June 7, 2016); *see also* Section 306(g) of the National Housing Act (12 U.S.C. 1721(g)).
[18] *See, e.g.*, Green, Richard K. and Watcher, Susan M., *The American Mortgage in Historical and International Context*, Journal of Economic Perspectives Volume 19 Issue 4 (2005), *available at* repository.upenn.edu/cgi/viewcontent.cgi?article=1000&context=penniur_papers&sei-redir=1#search="The+american+mortgage+in+historical+and+international+context, p. 95 (last accessed June 7, 2016); *see also* Federal Housing Finance Agency, *Office of the Inspector General: History of the Government Sponsored Enterprises*, *available at* http://fhfaoig.gov/LearnMore/History (last accessed June 7, 2016).

Freddie Mac was created in 1970 primarily to purchase long-term mortgages from thrifts, increasing their capacity to fund additional mortgages and reducing their interest rate risk. It accomplished this goal by issuing MBS that it guarantees. Like Fannie Mae, Freddie Mac's ownership structure changed to a private corporation (1989), and its current operations are not limited to purchasing mortgage loans insured or guaranteed by the federal government.

In 2008, Congress created the Federal Housing Finance Agency ("FHFA") to consolidate supervision of Fannie Mae, Freddie Mac and the Federal Home Loan Banks. Shortly thereafter, the FHFA placed Fannie Mae and Freddie Mac into conservatorship. At the same time, the United States Department of the Treasury ("Treasury") entered into Senior Preferred Stock Purchase Agreements ("PSPAs") with Fannie Mae and Freddie Mac, which provide Treasury with a super-majority (79.99%) ownership interest in both Fannie Mae and Freddie Mac.[19] In 2012, these PSPAs were amended to direct Fannie Mae and Freddie Mac to pay their profits to Treasury quarterly instead of the 10 percent fixed-rate dividend included within the original PSPAs (this is referred to as "profit sweeps").[20] As a result of these profit sweeps, Fannie Mae and Freddie Mac lack capital, cannot rebuild their capital bases, and are operating on a remaining, finite line of capital from taxpayers. As currently structured, for any loan owned or guarantee extended by the GSEs, the United States is the ultimate and effective owner and guarantor.[21] Accordingly, all of these mortgage loans are subject to the Exemption.

[19] Fannie Mae Senior Preferred Stock Purchase Agreement with Treasury (September 2008), http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-9-26_SPSPA_FannieMae_RestatedAgreement_N508.pdf; Freddie Mac Senior Preferred Stock Purchase Agreement with Treasury (September 2008), http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-9-26_SPSPA_FreddieMac_RestatedAgreement_508.pdf .

[20] Third Amendment to Fannie Mae Senior Preferred Stock Purchase Agreement with Treasury (August 2012) http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2012-8-17_SPSPA_FannieMae_Amendment3_508.pdf; Third Amendment to Freddie Mac Senior Preferred Stock Purchase Agreement with Treasury (August 2012) http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2012-8-17_SPSPA_FreddieMac_Amendment3_N508.pdf.

[21] Other federal agencies have recognized the effective government ownership and control of the GSEs when implementing consumer protection regulations. For example, the CFPB exempted from the ability to repay requirements applicable to "qualified mortgages" any loan eligible for purchase, guarantee, or insurance by the GSEs, FHA, VA, or USDA. The CFPB treated GSEs like these federal agencies as long as the GSEs are in FHFA conservatorship. These exemptions were based on the current structure of the GSEs under conservatorship where the FHFA maintains significant control over each entity and each entity depends on Treasury for capital. Similar exemptions were provided for GSE loans to the risk retention requirements for "qualified residential mortgages." The Commission should follow this approach and not distinguish between mortgage loans owned, insured or guaranteed by the federal agencies and the GSEs.

B. Mortgage Loans Owned, Insured or Guaranteed by these Federal Agencies and GSEs are "Debts" under the Debt Collection Improvement Act of 1996.

In its NPRM, the Commission asked whether to adopt the definition of "debt" under the Debt Collection Improvement Act of 1996 ("DCIA").[22] MBA agrees that the DCIA confirms mortgage loans owned, insured or guaranteed by FHA, VA, USDA and the GSEs are "debts owed to or guaranteed by the United States" and are exempt from the prior express consent requirements under the TCPA.

The DCIA defines term "claim" or "debt" to mean any amount of property or funds that have been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency, including, without limitation, among other things, funds owed on account of ***loans made, insured, or guaranteed by the Government***.[23]

This definition confirms that the mortgage loans owned, insured or guaranteed by FHA, VA, USDA and the GSEs are "debts" for purposes of the Budget Act Amendment and are statutorily exempt from the prior express consent requirements of the TCPA. Any interpretation by the Commission that is more narrow or limiting not only frustrates the Congressional directive but also would be inconsistent with the DCIA.

C. Any Ambiguity Over the GSEs' Status Should be Construed in Favor of Inclusion in the Exemption.

As explained above, all mortgage loans purchased by the GSEs should be included within the Exemption. However, to the extent that there is any ambiguity in this analysis, it should be construed in favor of inclusion given the compelling government interest in ensuring mortgage borrowers receive these communications to avoid foreclosure.

As explained in greater detail below on pages 8 and 9, outbound calls to residential mortgage borrowers are mandated by various federal and state laws, regulations, and requirements. These outbound call requirements were carefully designed by federal agencies with primary jurisdiction and states to effectively communicate important information to residential mortgage borrowers to help borrowers avoid foreclosure and its grave financial consequences. Foreclosure has a devastating impact that harms the broader economy.[24] According to Americans for Financial Reform: "Each foreclosure leads to a drop of about 1 percent in the value of nearby homes. Using these estimates, the Center for Responsible Lending

[22] *See* ¶ 11 of NPRM.
[23] 31 U.S.C. §§ 3701(b)(1), (b)(1)(A).
[24] Americans For Fin. Reform, *We All Pay A Price For the Foreclosure Crisis*, ourfinancialsecurity.org (Feb. 28, 2011, 9:39 AM), http://ourfinancialsecurity.org/2011/02/we-all-pay-a-price-for-the-foreclosure-crisis/.

has calculated that over the 2009-2012 period foreclosures will cut house values by some $1.9 trillion in total."[25] Foreclosures also impose significant direct costs on local governments. It costs a city approximately $5,400 to secure and conserve a foreclosed property, but that cost jumps to $19,000 when the property is abandoned prior to foreclosure.[26] Consequently, mortgage servicing calls to borrowers have an undeniably positive micro- and macro-economic impact.

Effectively communicating with borrowers who are delinquent on their payment obligations is critical to keeping borrowers in their homes, protecting their credit histories, protecting neighborhoods from blight, and protecting our economy. The consequences of foreclosure are profoundly negative for homeowners, and our current housing market regulation encourages – and often requires – outbound calls, which are designed to ensure that borrowers are aware of their options to avoid foreclosure.[27]

In fact, in the wake of the 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: <u>unless mortgage servicers communicate successfully with at-risk homeowners, there can be no modification of a mortgage and no path to avoiding a foreclosure</u>."[28] The Commission should acknowledge Treasury's conclusion by deferring to those federal agencies with primary jurisdiction over housing finance and consumer financial services to substantively regulate these industries.

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

[25] *Id.*
[26] *Id.*
[27] "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).
[28] 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), *available at* https://www.treasury.gov/initiatives/financial-stability/reports/Documents/SPOC%20Special%20Report_Final.pdf (emphasis added).

performance of the loan modifications necessary to keep a consumer in their home.[29] Time matters in loss mitigation and discouraging telephone contact creates barriers to a borrower getting a modification or keeping their home.

The TCPA was not created to obstruct these types of important, pro-consumer communications. MBA urges the Commission to heed Congress's directive and to take this opportunity to facilitate efforts to communicate with as many mortgage borrowers as possible.

II. Any Substantive Regulation of Exempted Calls Must be Consistent with other Federal and State Requirements.

The NPRM contains multiple proposals that would substantively regulate calls to collect a debt owed to or guaranteed by the United States that are more onerous than the TCPA's provisions applicable to telemarketing and conflict with other applicable federal and state laws, rules, and requirements. These substantive limitations are not necessary to implement the Budget Act Amendment, have not been sufficiently vetted, and should not be summarily adopted. Indeed, implementation of the proposals in the NRPM would deprive consumers of the benefits of loss mitigation and other calls Congress and federal regulators have determined are mandatory to benefit the consumer.

A. The Proposed Three Calls per Month Limit Directly Conflicts with other Federal and State Requirements.

The Commission proposes to restrict the number of attempted calls covered by the Exemption to "three per month, per delinquency only after delinquency."[30] This proposal directly conflicts with other federal and state laws, regulations and requirements that govern mortgage servicing.

A host of federal regulators, including the Consumer Financial Protection Bureau ("CFPB"), HUD, FHFA, Treasury and VA, have jurisdiction over residential mortgage loans. These federal agencies learned through the experience of the financial crisis that telephonic communications with borrowers are critical to maintaining homeownership and have implemented federal laws, regulations, and requirements other than the TCPA that require mortgage servicing calls to consumers at various times throughout a loan. As the Commission has acknowledged, there is significant value in debtors hearing from a live agent to discuss the debt and potential servicing options.[31]

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[29] 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*, p. 28 (March 2015).
[30] *See* ¶ 18 of NPRM.
[31] *Id*.

The following chart, a version of which was provided to the Commission prior to the release of its recent notice of proposed rulemaking, provides examples of federal and state outbound mortgage servicing call requirements.

Federal Agency / State Government	**Required Contact**
CFPB Mortgage Servicing Rules	Telephone or in-person contact by the 36th day of delinquency[32]
FHA	Telephone contact within 20th day of delinquency; at least 2 times per week until contact established or determine property is vacant or abandoned[33]
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[34]
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[35]
VA Mortgage Servicing Rules	Telephone contact no later than the 20th day of delinquency[36]
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[37]

[32] 12 C.F.R. § 1024.39(a).
[33] FHA Single Family Housing Policy Handbook, 4000.1(III)(A)(2)(h).
[34] Fannie Mae Servicing Guide, D2-2-02 (12/16/2015); Freddie Mac Servicing Guide, 9101.2 (3/2/2016).
[35] HAMP Handbook, 2.2.1 (01/06/16).
[36] 38 C.F.R. § 36.4278(g).
[37] 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	Telephone and / or in-person "initial contact" or due diligence required before issuing or recording a Notice of Default.[38] Due diligence requires telephone contact at the primary telephone number on file at least three times at different hours and on different days.[39]

MBA fully anticipates that the Commission will recognize these federal agency and state law requirements and will not promulgate a rule that limits the ability of servicers to communicate with the millions of American mortgage borrowers who benefit from these communications.[40]

As explained in its Comment Letter, "FHFA has worked collaboratively with the Consumer Financial Protection Bureau to develop extensive mortgage servicing regulations to protect borrowers. In 2013, the CFPB issued regulations addressing early intervention, continuity of contact and loss mitigation assistance for delinquent consumers. The CFPB servicing regulations and the servicing guidelines of Fannie Mae and Freddie Mac require services to contact delinquent borrowers at specified times in connection with loss mitigation efforts. **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**."[41] Limiting the scope of the Exemption and creating unnecessary restrictions on the timing and frequency of covered calls that conflict with other federal and state requirements also frustrates these efforts to protect consumers. MBA

[38] 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.

[39] 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).

[40] MBA echoes the concern shared by Commissioner O'Rielly over the apparent lack of coordination with Treasury as directed by Congress in the Budget Act Amendment. *See* Statement of Commission Michael O'Rielly Dissenting in Part and Approving in Part, at 24 ("The fact that the NPRM proposes three calls per month suggests that the FCC has either shirked its responsibility to consult with Treasury or that it is willfully disregarding other federal agency requirements.").

[41] Comment Letter of the Federal Housing Finance Agency, at p. 2 (June 6, 2016).

strongly urges the Commission to support the work of the CFPB and FHFA by facilitating these communications.

MBA also notes that there is no similar limit on the number of permitted telemarketing calls under the TCPA. It is inappropriate and wholly unnecessary to adopt a more restrictive requirement for calls specifically authorized by Congress than is applicable to telemarketers.

B. The Exemption Should Not be Tied to Delinquency or Default.

The Commission proposes to interpret the phrase "solely to collect a debt" to mean only those calls made to obtain payment after the borrower is delinquent on a payment.[42] MBA disagrees with this interpretation of the Budget Act Amendment and any attempt to narrow the scope of the Exemption.

First, Congress did not limit the Exemption to calls placed after an account reaches a certain period of delinquency. The Exemption only refers to calls to *collect* a debt. Many calls are placed to collect a loan that are not tied to any specific period of non-payment. There is no textual or other support for any attempt to narrow the Exemption created by Congress.

Second, the Commission should not restrict covered calls to only delinquent debts because pre-delinquency calls are just as important to protecting consumers' credit, avoiding delinquency, and ensuring that debt will be collected. Limiting covered calls to post-delinquency scenarios would decrease the likelihood of recovering the debt[43] and frustrate the purpose of the Budget Act Amendment. Such a result would also be contrary to other aspects of the Commission's reasoning, as the Commission itself notes in the NPRM:

> [D]ebt servicing calls may provide a valuable service by offering information about options and programs designed to keep at-risk debtors from defaulting or becoming delinquent on their loans. Helping a debtor avoid delinquency or default can preserve the person's payment history and credit rating, and help maintain eligibility for future loans. The potential value of these debt servicing calls, and the probability that servicing calls will create conditions for debtors that allow debts to be more readily collected by the United States, leads us to propose that servicing calls should be included in covered calls.[44]

Instead, MBA urges the Commission to interpret the Exemption to all calls made in connection with the servicing of a covered loan as this was clearly the intent of Congress in

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[42] *See* ¶ 8 of NPRM.
[43] *See* Comment Letter of the Federal Housing Finance Agency, at p. 2 (June 6, 2016); Comment Letter of the American Bankers Association and Consumer Bankers Association, at p. 7 (June 6, 2016); Comment Letter of Quicken Loans Inc., at p. 3 (June 6, 2016).
[44] *See* ¶ 9 of NPRM.

passing the Budget Act Amendment. To ensure consistency with other applicable laws, the Commission should define "servicing" for purposes of the Exemption 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.[45]

Alternatively, at a minimum, any definition of "delinquency" or "default" must be consistent with other applicable definitions and, generally, should be consistent with mortgage servicing definitions. For example, the CFPB's upcoming amendments to the mortgage servicing rule propose the definition of delinquency as follows: "A borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a payment sufficient to cover principal, interest, and, if applicable, escrow, becomes due and unpaid, and the borrower remains delinquent until such time as the payment is made."[46] This would define a loan as delinquent one day after the payment due date. The Fair Debt Collection Practices Act ("FDCPA") also uses "default" as a trigger. Historically, the Federal Trade Commission ("FTC") interpreted "default" for purposes of the FDCPA to include any applicable federal or state definitions, any definition provided by the applicable contract or the creditor or servicer's guidelines for treating an account in default. The proposed regulations currently being developed by the CFPB are expected to address the meaning of "default" for purposes of the FDCPA. The Commission should not create a definition of "default" that may conflict with this upcoming regulation, which has been on the CFPB's regulatory agenda for more than three years.[47]

C. The Exemption Must Apply to Borrowers, their Authorized Representatives, and Successors

The Commission proposes to limit the Exemption to calls to borrowers.[48] MBA urges the Commission to confirm that the Exemption applies to any obligor of the loan, as well as any authorized representative and successor of any obligor.

Borrowers may authorize a non-obligor third party to communicate with the servicer regarding the loan and may direct the servicer to communicate exclusively with that third party. Borrowers who choose this approach, or who may be required to use this approach due to limitations on their personal ability to communicate by telephone, should not be disadvantaged or put at risk of not receiving these important communications. Similarly, in the event there is a succession of the interest of any borrower, that successor should be treated as the original borrower. Mortgage servicers are required to treat successors like borrowers for certain purposes

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[45] *See* 12 U.S.C. § 2605(i)(3); 12 C.F.R. § 1024.2(b).
[46] *See* Summary of CFPB Mortgage Servicing Proposed Rule http://files.consumerfinance.gov/f/201411_cfpb_summary_mortgage-servicing-proposed-rule.pdf (Nov. 20, 2014).
[47] CFPB Semiannual Regulatory Agenda, 81 Fed. Reg. 37411, 37412-37413 (June 9, 2016).
[48] *See* ¶ 13 of NPRM.

and the CFPB has proposed additional rules relating to the treatment of mortgage successors in interest.[49] MBA encourages the Commission to refrain from implementing any regulation that may conflict with the CFPB's upcoming rule or any other federal or state law, regulation or requirement.

D. The Commission Should Not Remove any Calls from the Scope of the Exemption.

The Commission proposes to exclude from the Exemption calls to persons the caller does not intend to reach, including calls to reassigned numbers.[50] As noted by Commissioner O'Rielly, this proposal would gut the Exemption.[51]

This proposal would be particularly unworkable for mortgage servicers. Mortgage servicers need meaningful relief from reassigned number liability. Mortgage servicers are required to place calls to the last known phone number of record, even if the borrower is not the current subscriber.[52] The one-call safe harbor provided in the Commission's July 2015 Omnibus Ruling does not provide businesses enough time to immediately identify those phone numbers that have been reassigned. Even when a business reasonably believes it has obtained the requisite prior express consent, calling a number provided by a customer will expose the business to TCPA liability when it has no knowledge that the number has been reassigned. Congress specifically decided to exempt these calls, so the Commission should not expose callers to liability where they did not have actual knowledge of the reassigned number.

E. The Exemption Does Not and Should Not Contain a "Stop Calling" Right

The Commission proposes that consumers should have a right to stop calls covered by the Exemption at any point the consumer wishes.[53] Further, the Commission has proposed that "stop-calling requests" should apply to a subsequent collector of the same debt. *Id*.

Creating a "stop calling" right to receive covered calls frustrates the purpose of the Exemption and threatens to deprive consumers of important, beneficial calls. The Budget Act Amendment was drafted solely to allow calls to collect a debt owed to or guaranteed by the

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[49] *See* CFPB Bulletin 2013-12 (October 15, 2013); CFPB Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z); Proposed Rule, 79 Fed. Reg. 74175 (December 15, 2014); CFPB Semiannual Regulatory Agenda, 81 Fed. Reg. 37411, 37413 (June 9, 2016) (Stating the CFPB expects to issue a final rule this summer to clarify successor in interest requirements).
[50] *See* ¶ 14 of NPRM.
[51] *See* Statement of Commission Michael O'Rielly Dissenting in Part and Approving in Part, at 23, *citing* Mortgage Bankers Association, *How Consumers Benefit from Mortgage Servicing Calls and Are at Risk Under the TCPA*, at 12 (Feb. 2016) (MBA Presentation).
[52] HAMP Handbook, 2.2.1 (01/06/16) (requiring a minimum of four telephone calls to the last known phone numbers of record, at different times of the day, within 30 day period).
[53] *See* ¶ 20 of NPRM.

government *without* the consent of the called party. Creating a "stop calling" right inherently assumes consent is required to place the call. In the Budget Act Amendment, Congress directed the Commission to prescribe regulations implementing the amendments and vested the Commission with limited authority to substantively regulate covered calls.[54] Specifically, Congress noted the Commission "*may* restrict or limit the *number and duration*" of calls to cell phones covered by the Exemption.[55] Congress did not create a "stop calling" right within the Exemption nor did it authorize the Commission to create such a right. In fact, creating a "stop calling" right would substantively repeal, not implement, the Budget Act Amendment.

Even if the Commission were authorized to create a "stop calling" right, which MBA rejects, this right could only extend to calls that require prior express consent under the TCPA, namely calls to a cell phone made using an automatic telephone dialing system or an artificial or prerecorded voice message.[56] It could not extend to calls to collect a debt generally, including manually dialed calls or calls to a residential landline. Otherwise, the Commission would be amending the TCPA to create new rights that Congress chose not to provide.

It is important to note that omitting this "stop calling" right within the Exemption will not leave borrowers without a mechanism to stop unwanted collection calls. The FDCPA, federal and state prohibitions against unfair, deceptive and abusive acts and practices, and many state laws provide borrowers with a right to cease collections communications. The Commission should not duplicate these well-established protections.

If the Commission chooses to create a "stop calling" right for covered calls despite Congress's decision to exempt these calls from the prior express consent requirements, it should allow callers to designate the method for consumers to communicate "stop calling" requests. This would provide consumers with a simple, clearly defined way to effectively seek relief while at the same time allowing businesses to create a system to effectively identify, track, and comply with consumer requests and with the TCPA. Allowing callers to designate the method for the consumer to exercise any "stop calling" right strikes a necessary balance between protecting the privacy of consumers and allowing legitimate communications between business and their own customers. At the same time, it allows mortgage servicers to create a system to effectively identify, track and comply with consumer requests and with the TCPA.

This approach is also consistent with other provisions of the TCPA and FCC Orders, including the recent exemptions for certain financial institution, healthcare and package delivery communications, and the rules applicable to facsimile advertisements, as well as many other consumer protection statutes.[57] It would also be consistent with the CFPB's mortgage servicing

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[54] Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584, at § 301(b).
[55] 47 U.S.C. § 227 (b)(1)(H).
[56] 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).
[57] *See, e.g.*, Fair Debt Collection practices Act ("FDCPA"), 15 U.S.C. § 1692c(c) (requiring the consumer to notify a debt collector in writing of a cease communications demand); Servicemembers Civil Relief Act ("SCRA"), 50

rules, which allow mortgage servicers to designate an exclusive means by which consumers may assert errors, request information or submit "qualified written requests" regarding the servicing of their mortgage loans.[58] Specifically, the rules allow mortgage servicers to establish *an address* that a borrower must use to submit a *written* notice of error, request for information or qualified written request.[59] The designation of only a mailing address was intentional. When the CFPB originally proposed its rule, it contemplated allowing these notices and requests to be made by borrowers either orally or in writing.[60] However, in its final rule, the CFPB allowed consumers to submit these important requests for information and to notify servicers of alleged errors only if those requests and notices are submitted *in writing to the address designated by the mortgage servicer*.[61] The CFPB limited its final rule to a written process, which it concluded "strikes the appropriate balance between ensuring responsiveness to consumer requests and complaints and mitigating the burden on servicers of following and demonstrating compliance with specific procedures with respect to oral notices of error."[62] This same balance is required here if the Commission creates a "stop calling" right, despite Congress's clear intent in passing the Budget Act amendment.

The Commission further proposes that callers be required to inform debtors of their right to make a "stop-calling" request.[63] Any additional disclosure requirement at the beginning of a call increases the likelihood that the borrower will end the call without the benefit of the intended message. Without receiving important information about loss mitigation options, borrowers are

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U.S.C. Appx. § 527(b) (to receive interest rate reductions, servicemembers must provide the creditor written notice and a copy of the military orders for active duty); Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681s-2(a)(8)(D) (allowing a furnisher of consumer information to designate an address to which the consumer must submit a written dispute regarding the accuracy of information furnished to credit reporting agencies); Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693e(a) (authorizing financial institutions to require written confirmation from the consumer to stop payment of a preauthorized payment); Regulation Z, implementing the Truth in Lending Act ("TILA"), 12 C.F.R. § 1026.13(b) (allowing credit card issuers to designate an address to which consumers must send written notice of alleged billing errors).

[58] *See* 12 C.F.R § 1024.35(c); 12 C.F.R. § 1024.36(b); 12 U.S.C. § 2605(e).

[59] *Id.*

[60] 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal; Proposed Rule, 77 Fed. Reg. 57200, 57309 - 57310 (Sept. 17, 2012) (amending 12 C.F.R. § 1024).

[61] *See* 12 C.F.R § 1024.35(c); 12 C.F.R. § 1024.36(b); 12 U.S.C. § 2605(e). The CFPB acknowledged its final rules were guided by commenters who explained that applying these requirements to oral notices would create new burdens regarding tracking and monitoring. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696, 10738 (Feb. 14, 2013) (amending 12 C.F.R. § 1024). These commenters "further stressed that a written process would provide more clarity and certainty as to the nature of the error the borrower asserted and the communications from the servicer to the borrower during the conversation." *Id.* Finally, the commenters explained that "written notices of error would help avoid situations in which the borrower and servicer have differing recollections as to the content of the borrower's notice of error and the servicer's response during the conversation. Absent a written record, commenters said, servicers would need to record conversations with borrowers to minimize the significant litigation risk … [and] recording conversations could be especially costly for small servicers and would require the borrower's consent in many jurisdictions." *Id.*

[62] *Id.*

[63] *See* ¶ 21 of NPRM.

at a greater risk of losing their homes. As the FHFA noted in its Comment Letter, "efficient and early resolution of a delinquency to avoid foreclosure is the key to ensuring a borrower does not lose his or her home."[64] MBA urges the Commission to make these communications more efficient and not include unnecessary disclosures or other requirements. This type of proposed disclosure also would be more restrictive than the rule currently applicable to all calls. This proposal also runs counter to the intent of Congress in drafting the Budget Act amendments, which is to provide protection to certain businesses attempting to collect a debt owed to or guaranteed by the United States.

F. The Commission Should Not Limit the Duration or Length of Covered Calls

The Commission seeks comment on the maximum duration of a voice call and on the length of text messages.[65] No such limitation is necessary to implement the Exemption or appropriate with respect to these communications.

Once a mortgage servicer is able to contact a delinquent borrower, there should be no limitation on the duration of that conversation. These telephone conversations often inform the borrower of a number of loss mitigation options to keep the borrower in his or her home. Placing an arbitrary limit on the duration of these calls would hurt consumers by reducing the amount of information they would receive to avoid foreclosure.

Any such limitation would also frustrate the ability of servicers to comply with other applicable federal and state laws and regulations. As noted above, mortgage servicing is highly regulated at the federal and state levels. These regulations include affirmative disclosure and content requirements for consumer communications. For example, the GSEs provide call scripts to be used by mortgage servicers and encourage open-ended questions to best identify viable loss mitigation options to keep the borrower in his home.[66] Any length or duration limitation that does not carefully consider each of the potentially applicable laws again threatens to moot the benefits of the Exemption and further impede the exchange of important information to borrowers.

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[64] Comment Letter of the Federal Housing Finance Agency, at p. 2 (June 6, 2016).
[65] *See* ¶ 18 of NPRM.
[66] An example of a call script is: "*Hello my name is ________ and I am with _________. I see that you are behind on your mortgage payments and I would like to talk more and see if there is anything that we can do to help you get back on track.*" Freddie Mac Communicating with Borrowers: Collections and Loss Mitigation Reference Guide, *Best Practices for Communicating and Building Trust with the Borrower* (April 2016), *available at* http://www.freddiemac.com/learn/pdfs/service/communwborr_collect_loss.pdf. The guidance goes on to encourage open-ended questions, like "What are your intentions on retaining ownership?" and "Is your financial hardship temporary or permanent?"

However, if there must be a maximum duration, MBA urges the Commission to adopt a limitation that applies only to prerecorded voice and text message and that will not apply if a longer message is required by other applicable law, regulation or requirement.

G. The Commission Should Not Limit the Use or Transfer of Information Obtained During Covered Calls.

The Commission asks whether any limits should be placed on using or transferring (such as by sale) information (such as the debtor's location or phone number) obtained during calls.[67] This suggested prohibition is not needed to implement the Budget Act Amendment or to protect privacy interests and is too broad.

Mortgage servicers are required in many circumstances to use and transfer information obtained during calls for loss mitigation and other lawful mortgage servicing purposes. This type of transfer of information would be required if the servicing rights to the mortgage were transferred to another servicer following the telephone call. The CFPB mortgage servicing rules require information be maintained within the borrower's account file and be transferred to any new servicer of the loan. Limiting the use or transfer of information could frustrate the transfer of the loan servicing to a servicer that specializes in working with borrowers in distress, making it more likely that a borrower would lose his or her home, which could result in the government suffering the exact losses the Budget Act Amendment was passed to limit. This type of limitation could also impact the ability of a servicer to communicate information to the creditor and with its agents, including its own attorneys. While this suggestion appears to target entities who may sell information for marketing purposes, the expansive language as suggested could prevent servicers from performing activities required by law and is not in the best interests of consumers.

The Commission should not place further restrictions on calls specifically exempted from the TCPA by Congress. Moreover, the TCPA does not contain this type of limitation for telemarketers. Any regulation the Commission issues to implement the Budget Act Amendment should not be more restrictive than the rule applicable to telemarketing.

H. The Exemption Is Not Limited to Telephone Numbers Provided by the Borrower.

The Commission seeks comment on whether it should limit covered calls to the cellular telephone number the debtor provided to the creditor.[68] The TCPA already exempts calls made with the prior express consent of the debtor. Creditors obtain this consent when the consumer includes his or her phone number on a loan application or otherwise provides the telephone

[67] *See* ¶ 12 of NPRM.
[68] *See* ¶ 13 of NPRM.

number during the course of the loan. If the Commission limits covered calls only to phone numbers the debtor provides to the creditor, it would moot the intention of Congress in the Budget Act Amendment to further exempt calls made to collect a debt owed to or guaranteed by the United States. As Commissioner O'Rielly explained: "The point of this statutory exemption is to enable companies to call consumers without such consent—at any number they think will reach the debtor—because Congress has determined that the clear benefit of making the calls outweighs the minimal inconvenience of the person wrongly dialed."[69] Instead, MBA urges the Commission to include calls related to the servicing of the loan made to any obligor, authorized representative, or successor.[70]

I. The Exemption Should Apply to Creditors and Their Agents

The Commission acknowledges the most reasonable way to interpret who may make covered calls is to include "creditors and those calling on their behalf, including their agents."[71] MBA approves of the Commission's approach to including both creditors and their agents as covered callers under the Exemption.

This interpretation is essential for mortgage servicers to dispatch their duties under a host of federal and state laws, regulations, and requirements to call mortgage borrowers. Congress created the Exemption for *debts* owed to or guaranteed by the United States, regardless of who may place the call. A more narrow approach could effectively moot the amendment as the United States is immune from liability under the Act.[72] This type of interpretation would run counter to the cardinal rules of statutory construction.

J. The Commission Should Limit Its Rule and Avoid Duplication of Other Federal and State Regulations.

Given the significant regulation of this industry generally and the short window within which the Commission must act, MBA urges the Commission to take a more judicious approach to implementing the Budget Act Amendment, leaving the primary federal regulators to impose substantive protections on the timing, duration and content of collections communications. Specifically, the Commission has inquired whether it should consider other standards or precedents, including restrictions that might exist under either federal or state debt collection laws.[73] These additional regulations, such as the ones limiting call times based on the location of the called party, are unnecessary because they are already regulated by servicing and debt collection laws such as the FDCPA and UDAAP authority of the CFPB. Also, as noted above,

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[69] *See* Statement of Commission Michael O'Rielly Dissenting in Part and Approving in Part, at 24.
[70] *See supra* at p. 12.
[71] *See* ¶ 15 of NPRM.
[72] See the United States Supreme Court's recent decision in *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016).
[73] *See* ¶ 19 of NPRM.

the CFPB is currently in the midst of rule writing on debt collection. The Commission should not craft any rule that would conflict with the CFPB's rule, which is 3 years in the making.

MBA also recommends that the Commission refrain from issuing rules that are not necessary to implement the Budget Act Amendment, including any further regulation of calls to residential landlines. If the Commission were to implement additional rules regulating calls to residential landlines without prior notice and comment, it would exceed the scope of the NPRM and raise additional issues under the Administrative Procedure Act.

Many residential mortgages are owed to or guaranteed by the United States and fall within this Exemption. However, other residential mortgages are not owed to or guaranteed by the United States, regardless of how the Commission interprets that phrase. These loans include, for example, residential mortgages made and retained by local banks or credit unions that service the loans throughout their duration. Borrowers generally have no control over the identity of the owner of their loan, whether the owner may sell their loan, or who their servicer may be at any point during the term of their loan. Further, borrowers do not consider at origination that their choice of loan product may limit the type of communications and assistance they may receive in the event of financial hardship.

Consistent with the FHFA's recommendation[74] and to ensure the TCPA does not impact mortgage servicing calls to *any borrower*, not just those whose mortgage loans are owed to or guaranteed by the United States, MBA is also filing a Petition for Exemption. The exemption sought within this petition will confirm all mortgage borrowers receive these important pro-consumer communications.

MBA appreciates the opportunity to submit these reply comments and to work with the Commission to ensure the TCPA does not obstruct the ability of mortgage borrowers to receive beneficial communications and to preserve homeownership. Please feel free to contact us with any questions.

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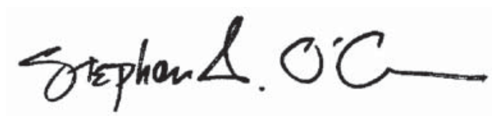
[74] *See* Comment Letter of the Federal Housing Finance Agency, at p. 3 (June 6, 2016) ("FHFA recommends that the Commission exercise regulatory authority to exempt entities that service 1-4 unit residential mortgage loans from prohibitions against the use of automatic telephone dialing systems or artificial of rerecorded 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 Freddie Mac servicing requirements, where applicable, without potential for conflict with the TCPA requirements.").

Sincerely,



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