Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Petition for Exemption of the Mortgage	)	
Bankers Association	)	

COMMENTS OF THE AMERICAN BANKERS ASSOCIATION

The American Bankers Association[1] writes in support of the petition filed by the Mortgage Bankers Association (MBA) to exempt residential mortgage-related calls from the Telephone Consumer Protection Act's (TCPA) prior express consent requirements.

With limited exceptions, the TCPA requires that a caller have the prior express consent of the called party before placing a phone call to a wireless number using an autodialer or prerecorded voice. The TCPA was originally enacted, in part, to reduce consumers' costs in a time when cell phones were considered a luxury item. While the TCPA's restrictions had merit in 1991, cell phones are now the primary means of communication for many consumers. With this change in consumer communications preferences, the prior express consent requirement harms mortgage borrowers by making it difficult for servicers to provide information regarding

[1] The American Bankers Association is the voice of the nation's $16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits, and extend more than $8 trillion in loans.

loan workouts and other foreclosure alternatives, as required by the Bureau of Consumer Financial Protection's (Bureau) mortgage servicing rules and the rules of housing regulators. We urge the Federal Communications Commission (Commission) to use its authority under the TCPA to exempt residential mortgage-related calls to wireless telephone numbers from the TCPA's prior express consent requirement, as requested by MBA's petition for exemption.

Exempting mortgage servicing calls from the TCPA would:

- Recognize the evolution of mobile technology and consumer expectations to receive calls and text messages on mobile devices;
- Facilitate critical communications between servicers and borrowers that help borrowers avoid negative financial impacts, including foreclosure; and
- Create a consistent and cohesive federal policy that aligns the Commission's requirements with mortgage servicing rules established by the Bureau and other federal housing agencies.

I. Consumers Expect the Convenience of Receiving Important Financial Information Through Mobile Devices, Including Information Regarding Their Mortgage

The proliferation of mobile devices has dramatically changed how Americans communicate. Borrowers increasingly expect the convenience of receiving important financial information through mobile devices, including information regarding their mortgage. Nearly 50% of U.S. households are now "wireless-only," with that percentage rising to over 70% for adults between 25 and 29.[2] Many low-income borrowers rely on their cell phone for Internet

[2] STEPHEN J. BLUMBERG & JULIAN V. LUKE, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CTR. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STATISTICS, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW

access and other communications because purchasing multiple devices (such as landlines and laptops) and paying duplicative monthly access fees can be prohibitively expensive and is no longer necessary given the wide availability of cellular networks. Recently, the Federal Deposit Insurance Corporation (FDIC) found that customers with limited involvement with their bank *prefer* text messages to e-mails when receiving alerts from financial institutions because texts are faster, easier to receive, attention grabbing, and quicker and easier to digest.[3] It is critical that servicers be able to reach borrowers through the telecommunications channels that borrowers prefer.

Despite the increasing popularity of wireless devices, borrowers who use these devices as their predominant means of communications are disadvantaged because they are unable to receive the same federally-required mortgage servicing protections via efficient calling technologies as borrowers with landline telephones, which are not subject to the same restrictions on incoming calls. An exemption to the TCPA's consent requirements for residential

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SURVEY, JANUARY-JUNE 2015 (2015), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf (Tables 1 & 2).

[3] FED. DEPOSIT INS. CORP., QUALITATIVE RESEARCH ON MOBILE FINANCIAL SERVICES FOR UNDERSERVED CONSUMERS 21 (Oct. 30, 2015), *available at* https://www.fdic.gov/about/comein/2015/come-in-2015.pdf. According to an "Unbanked MFS User" interviewed as part of the study, "[t]ext-its immediate. Email, you have to go in and actually be checking your email account." *Id.* at 21. Building on this research, the FDIC is exploring the potential for mobile banking to promote and support underserved consumers' banking relationships in part by increasing the communications and alerts sent to those underserved consumers that use mobile services. FED. DEPOSIT INS. CORP., FIL-32-2016, REQUEST FOR COMMENTS ON MOBILE FINANCIAL SERVICES STRATEGIES AND PARTICIPATION IN ECONOMIC INCLUSION DEMONSTRATIONS 3 (2016), *available at* https://www.fdic.gov/news/news/financial/2016/fil16032.pdf. The Bureau of Consumer Financial Protection also concluded that alerts to cell phones help consumers, including low income consumers, access financial services and manage personal finances:

> By enabling consumers to track spending and manage personal finances on their devices through mobile applications or *text messages*, mobile technology may help consumers achieve their financial goals. For economically vulnerable consumers, mobile financial services accompanied by appropriate consumer protections can enhance access to safer, more affordable products and services in ways that can improve their economic lives.

BUREAU OF CONSUMER FIN. PROT., MOBILE FINANCIAL SERVICES: A SUMMARY OF COMMENTS FROM THE PUBLIC ON OPPORTUNITIES, CHALLENGES, AND RISKS FOR THE UNDERSERVED 10 (Nov. 2015), *available at* http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf (emphasis added).

mortgage-related calls would correct this imbalance and place borrowers who use wireless devices on the same footing as those who use landline telephones.

II. The Requested Exemption Would Help Borrowers Avoid Foreclosure by Facilitating Important Communications Between Servicers and Borrowers

Calls made pursuant to existing mortgage servicing regulations and related requirements are consumer-protecting communications designed to establish live contact with the borrower. It is well-established that the earlier a servicer is able to communicate with a financially distressed borrower, the more likely the servicer will be able to offer the borrower a loan modification, forbearance, interest rate reduction, or other alternative that will help limit avoidable interest charges, negative credit reports, and possibly foreclosure. The Commission should facilitate these important calls by exempting them from the TCPA.

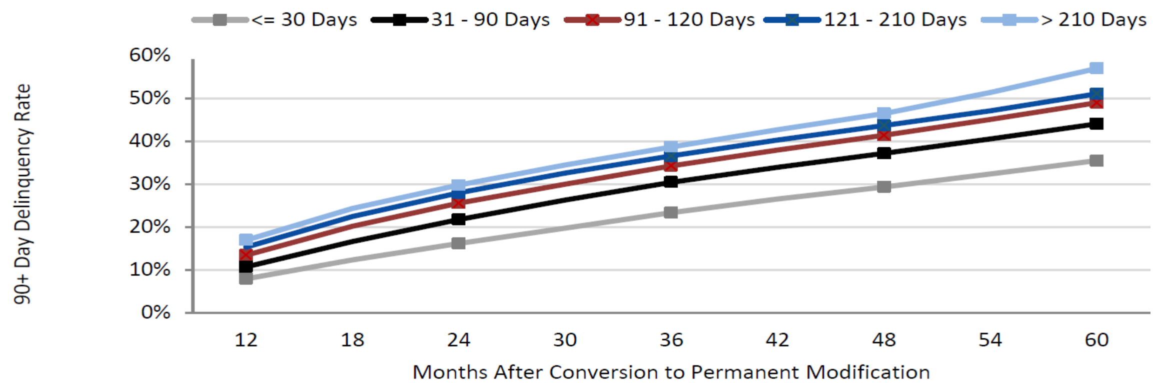
Benefits of Live Contact. When a borrower is delinquent on mortgage payments, the Bureau's mortgage servicing rules require servicers to connect the borrower with a *live agent* for the purpose of educating the borrower about options offered by a creditor to help the borrower to avoid foreclosure. During live contact, servicers advise borrowers of alternatives or programs that may be available to help them enter into more cost-effective repayment plans or become current on loan payments, including potential modification to the loan.[4]

[4] *See* 12 C.F.R. § 1024.41(c)(2)(ii) (describing loss mitigation procedures); BUREAU OF CONSUMER FIN. PROT., SUMMARY OF THE FINAL MORTGAGE SERVICING RULES 4 (Jan. 17, 2013), *available at* http://files.consumerfinance.gov/f/201301_cfpb_servicing-rules_summary.pdf ("[Servicer] personnel should be accessible to the borrower by phone to assist the borrower in pursuing loss mitigation options, including advising the borrower on the status of any loss mitigation application and applicable timelines.").

Unfortunately, many borrowers do not contact their servicer proactively when they face financial difficulties. Such inaction is risky because the longer a borrower remains delinquent, the more difficult it can be to avoid foreclosure.[5] However, by telephoning a delinquent borrower (i.e., establishing "live contact"), servicers are able to begin working with the borrower to help keep them in their home. Once a borrower defaults due to nonpayment, foreclosure is likely because it is doubtful that a borrower will submit a timely and complete loss mitigation application or reinstate the loan at this point.

Impact of Early Intervention on Re-default Rates. A key lesson from the recent financial crisis is that early intervention reduces re-default rates. One study found that repayment plans established when a loan was 30 days late had a re-default rate that was 27 percent lower than plans established when a loan was 60 days late.[6] Similarly, data from July 2016 released by the Federal Housing Finance Agency and the Department of the Treasury show a positive relationship between the number of months before a delinquent loan is modified and the re-default rate on that loan:[7]

[5] Fannie Mae and Freddie Mac have aligned their loan modification incentives with the number of days the mortgage loan is delinquent when the borrower enters a trial period plan.
[6] Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs*, at tbl. 2 (Freddie Mac, Working Paper No. 08-01, 2008), *available at* http://www.freddiemac.com/news/pdf/interventions_in_mortgage_default.pdf.
[7] THE DEP'T OF THE TREASURY, FED. HOUS. FIN. AGENCY, & U.S. DEP'T OF HOUS. & URBAN DEV., GUIDING PRINCIPLES FOR THE FUTURE OF LOSS MITIGATION: HOW LESSONS LEARNED FROM THE FINANCIAL CRISIS CAN INFLUENCE THE PATH FORWARD 16 (July 25, 2016), *available at* https://www.treasury.gov/press-center/press-releases/Documents/guiding-principles-future-of-loss-mitigation.pdf.



Accordingly, regulators, policymakers, and servicers agree that it is of utmost importance that lenders make live contact with borrowers as early as possible to assess the borrower's financial situation and provide information about potential loss mitigation options.[8] Therefore, the FCC should reduce impediments to communications between lenders and borrowers by exempting mortgage-related calls from the TCPA's prior express consent requirements.

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[8] *See* Kristopher Gerardi & Wenli Li, *Mortgage Foreclosure Prevention Efforts,* 95 Fed. Reserve Bank of Atlanta Econ. Rev., 1, 8–9 (2010), *available at* https://www.frbatlanta.org/research/publications/economic-review/2010/vol95no2_foreclosure-prevention-efforts.aspx; Michael A. Stegman *et al., Preventative Servicing is Good for Business and Affordable Homeownership Policy,* 18 Housing Policy Debate 243, 274 (2007), *available at* http://clas.wayne.edu/Multimedia/DUSP/files/L_Ding/PreventiveServicing_Ding_2007.pdf; Freddie Mac, *Foreclosure Avoidance Research II: A Follow-Up to the 2005 Benchmark Study* 8 (2008), *available at* http://www.freddiemac.com/service/msp/pdf/foreclosure_avoidance_dec2007.pdf; Freddie Mac, *Foreclosure Avoidance Research* (2005), *available at* http://www.freddiemac.com/singlefamily/service/pdf/foreclosure_avoidance_dec2005.pdf; Office of the Comptroller of the Currency, *Foreclosure Prevention: Improving Contact with Borrowers* (June 2007), *available at* http://www.occ.gov/topics/communityaffairs/publications/insights/insights-foreclosureprevention.pdf; John C. Dugan, Comptroller, Office of the Comptroller of the Currency, *Remarks Before the NeighborWorks America Symposium on Promoting Foreclosure Solutions* (June 25, 2007), *available at* http://www.occ.gov/news-issuances/speeches/2007/pub-speech-2007-61.pdf.

III. The TCPA's Consent Requirements are Inconsistent with Well-Established Mortgage Servicing Policy and Existing Regulatory Requirements

An exemption for residential mortgage-related calls would help harmonize the TCPA with the mortgage servicing rules of federal agencies that require financial institutions to contact distressed borrowers.

Collectively, these mortgage servicing requirements (described below) reflect the well-established public policy goal of initiating conversations with financially distressed borrowers early in the delinquency in order to prevent foreclosure.

- Bureau's Mortgage Servicing Rules. Servicers must make a "good faith effort" to establish "live contact" with delinquent borrowers within 36 days of delinquency, which often requires more than three initiated calls.
- FHA. Servicers must call delinquent borrowers a minimum of two times per week until contact is established or the servicer determines that the mortgaged property is vacant or abandoned.
- VA. Servicers must make an effort to establish live contact with a borrower, provide financial counseling, and assess potential alternatives for relief. These efforts often require that a number of calls be initiated.
- Home Affordable Modification Program (HAMP). Servicers must make a minimum of four telephone calls to delinquent borrowers at the borrower's last known phone numbers of record (at different times of the day) over a period of at least 30 calendar days.
- National Mortgage Settlement. The National Settlement adopted HAMP's requirement that a minimum of four calls be placed over a 30-day period.

- Fannie Mae and Freddie Mac Servicing Requirements. Servicers must attempt to contact a delinquent borrower at least every fifth day at varying times throughout the day.
- Office of the Comptroller of the Currency (OCC) Consent Agreements. The OCC approved bank compliance plans that included procedures for telephoning delinquent borrowers to inform them about loss mitigation options.

Federal housing regulators have significant experience and expertise in determining the types of communication that are most effective in conveying information that will help troubled borrowers obtain an interest rate reduction, forbearance, or other assistance with their loan. By granting an exemption to the TCPA's consent requirements for residential mortgage-related calls, the Commission will ensure that servicers can implement these policy directives with respect to all borrowers.

IV. The TCPA's Consent Requirements Prevent Servicers from Calling Distressed Borrowers in a Manner that is Efficient and Without Significant Compliance Risk

If an exemption is not granted, mortgage servicers will continue to face a choice between two options for contacting distressed borrowers that each have adverse consequences for consumers. First, the servicer could forego the use of efficient dialing technology and instead manually dial borrowers using devices that are not autodialers. This approach is difficult and costly to implement, particularly in light of the Commission's conclusion that an autodialer includes telecommunications devices that have the "potential ability" to function as an autodialer.[9] Moreover, the use of manual dialing technologies increases the risk of inadvertent regulatory violations. For example, to ensure compliance with the Fair Debt Collection Practices Act's (FDCPA) prohibition against harassment or abuse, financial institutions program autodialers with restrictions on the frequency of collection calls and the hours at which those calls are placed. With these technologies, the FDCPA's consumer protections are observed more efficiently than would be the case if the associated calling decisions were made by human agents.[10] Similarly, autodialers ensure that heavy volumes of time-critical notifications can be made. If a servicer is forced to call borrowers manually using inefficient communication technologies, not all borrowers will receive a needed call and costs will increase.

Second, the servicer could seek, obtain, and rely upon the borrower's consent to make autodialed calls to establish live contact. However, the ongoing flood of TCPA class action law suits, alleging that automated calls were placed to mobile devices without the recipients' prior express consent, has severely hampered the willingness and ability of servicers to contact consumers' mobile devices by automated means.[11] Even when a borrower has furnished a mobile telephone number to the institution making the automated call, plaintiffs' attorneys may assert that the consumer providing the number did not specifically consent to receive fraud and identity theft alerts. For this reason, servicers that attempt to reach customers in the most timely and reliable fashion may be forced to defend class action suits alleging that they violated the TCPA by sending automated messages to mobile devices without the recipients'

[9] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, at ¶ 19 (2015).
[10] Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p. Automated calling also is used to avoid collections calls to federal disaster areas.
[11] *See* U.S. Chamber of Commerce Institute for Legal Reform, *The Juggernaut of TCPA Litigation* (Oct. 2013).

prior express consent. This legal risk increasingly discourages our members from relying on consent.

Providing an exemption for residential mortgage-related calls would solve these problems, to the benefit of borrowers. Servicers could make efficient calls to distressed borrowers, avoiding excessive compliance and litigation risk and minimizing costs to borrowers.

V. MBA's Petition Proposed Conditions on Exempted Calls that Protect Borrowers' Privacy Interests

MBA's petition proposed five conditions on calls made under the proposed exemption that will protect borrowers' privacy interests. The conditions require the servicer to identify itself on the call, omit any telemarketing material from the call, leave messages that are no longer than one minute or 160 characters, provide a means for the borrower to opt out of future calls, and honor opt-out requests promptly.

These conditions are nearly identical to conditions that the Commission imposed on a separate exemption granted to financial institutions in the Commission's Declaratory Ruling and Order issued on July 10, 2015. ABA supports the adoption of these conditions as they will protect borrowers' privacy interests.

VI. Conclusion

As recognized by multiple entities within the federal government, communication between lenders and borrowers is necessary to manage finances and avoid default. The rules of the other federal agencies embody this principle by requiring that lenders place multiple calls to achieve live contact with the borrower. The Commission should facilitate these important communications by granting MBA's request for an exemption to the TCPA's consent requirements for residential mortgage-related calls.

Respectfully submitted,

Jonathan Thessin
Senior Counsel, Center for Regulatory Compliance
American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
202-663-5016
jthessin@aba.com

September 2, 2016