

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**Comments Opposing the Petition for Exemption**

**Filed by**

**National Consumer Law Center  
on behalf of its low-income clients**

**and**

**Americans for Financial Reform, Center for Responsible Lending, Consumer Action  
Consumer Federation of America, Consumers Union,  
Financial Protection Law Center,  
Legal Services of New Jersey, Indiana Legal Services, Inc.,  
Jacksonville Area Legal Aid, Inc.,  
National Association of Consumer Advocates,  
National Association of Consumer Bankruptcy Attorneys,  
and  
U.S. PIRG**

**Submitted August 26, 2016**

**I. Introduction**

Pursuant to the Public Notice<sup>1</sup> issued by the Consumer and Governmental Affairs Bureau, the National Consumer Law Center (NCLC)<sup>2</sup> files these comments opposing the petition of the Mortgage

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<sup>1</sup> Public Notice by Consumer and Governmental Affairs Bureau Seeking Comment on Mortgage Bankers Association Petition for Exemption from Prior Express Consent Requirement for Autodialed and Prerecorded Calls to Wireless Numbers. CG Docket No. 02-278 (Rel. Aug. 3, 2016), *available at* <https://ecfsapi.fcc.gov/file/0803246612725/DA-16-883A1.pdf>.

Bankers Association<sup>3</sup> [hereinafter MBA petition] to make robocalls<sup>4</sup> without prior express consent that are not charged to the called party. We file these comments on behalf of our low-income clients, Americans for Financial Reform, Center for Responsible Lending, Consumer Action, Consumer Federation of America, Consumers Union, Financial Protection Law Center (Wilmington, N.C.), Legal Services of New Jersey, Indiana Legal Services, Inc., Jacksonville (Fl.) Area Legal Aid, Inc., National Association of Consumer Advocates, National Association of Consumer Bankruptcy Attorneys, and U.S. PIRG.

The MBA seeks an exemption that would allow it to make unlimited robocalls for debt collection and other general servicing purposes relating to home mortgages. Its request is not limited to calls related to default, delinquency, or the need to assist the consumer in avoiding the loss of the home.<sup>5</sup>

We oppose this proposal and ask that the Commission deny the request. Mortgage servicers already call consumer-debtors far more than they should, routinely violating consumers' requests to stop calling their cell phones. As illustrated in the examples provided in these Comments, as well as in other comments filed with the Commission, robocalls from mortgage servicers need to be further limited, not further expanded.

## **II. Mortgage Servicers Blatantly Violate the Telephone Consumer Protection Act (TCPA).**

Below are just nine examples of many, many cases of mortgage servicers harassing consumers by making dozens, and sometimes hundreds, of unwanted robocalls, even after repeated requests to

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<sup>2</sup> The National Consumer Law Center (NCLC) is a nonprofit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace.

<sup>3</sup> Petition for Exemption, CG Docket 02-278 (filed June 16, 2016) [hereinafter MBA petition], *available at* <https://ecfsapi.fcc.gov/file/60002303090.pdf>.

<sup>4</sup> We are using the term “robocalls” to refer to calls made with either an automatic telephone dialing system (“autodialer”) or with a prerecorded or artificial voice, or with both. *See* In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961, 7964, ¶ 1 n.1 (2015) [hereinafter 2015 TCPA Declaratory Ruling and Order].

<sup>5</sup> The request includes calls related to “all actions, including all communications.” MBA petition at 13 (emphasis added).

stop. The callers in these cases are major national mortgage servicers or mortgage creditors servicing their own loans:

1. **Strelecki v. HSBC Mortgage Services, Inc.**<sup>6</sup> Despite a request to stop the calls, over 125 calls were made to a cell phone used by a child of the subscriber.
2. **Hiles v. Ocwen Loan Servicing, L.L.C.**<sup>7</sup> The complaint alleges that the defendant made at least 128 calls to the plaintiff's cell phone between December 2014 and May 2015. Additionally, according to the attorney representing the plaintiff: "Ocwen auto-dialed our client 491 times between 12/17/14 and 5/7/15 (after revocation and notice of attorney representation). In discovery, we just found an earlier written revocation (12/9/13), and are fighting to receive call records dating back to at least that time. Going back another year, there are likely 600 plus additional calls."
3. **Adams v. Nationstar Mortgage, L.L.C.**<sup>8</sup> The complaint refers to "at least 50" calls made between April 2014 and July 2015. During telephone conversations with agents and employees of Nationstar, the consumer-plaintiff repeatedly informed them that he had already been evicted from the home and that they needed to collect the mortgage payment from the purchaser of the property. Yet the calls persisted.
4. **Hood v. U.S. Bancorp.**<sup>9</sup> The complaint alleges that the defendant made at least 73 calls to the plaintiff's cell phone between August 2014 and the time the complaint was filed in October 2015. The plaintiff's attorney notes that the defendant called the plaintiff at least three times after 9:00 pm.
5. **Lancaster v. Bank of America, N.A.**<sup>10</sup> The complaint alleges that the plaintiff received almost daily robo-dialed calls on her cell phone for over a decade about the subject property (after the plaintiff was divorced from her husband, filed a quitclaim deed to the property, declared chapter 7 bankruptcy, and received a discharge) despite numerous attempts to explain that she had no legal interest in the property and requests for them to stop contacting her. A civil contempt hearing was filed against Bank of America regarding the violation of the discharge injunction, and a separate TCPA case was filed.
6. **Thompson v. Caliber Home Loans, Inc.**<sup>11</sup> The complaint alleges that the defendants placed at least 68 calls to the plaintiff's home phone and at least several hundred calls to her cell phone between March 2012 and April 2015. On at least one occasion, the defendants called the plaintiff's cell phone over 5 times in fewer than 90 minutes and up to 10 times in a single day.

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<sup>6</sup> Case No. 3:16-cv-00739-MEM (M.D. Pa. filed May 3, 2016).

<sup>7</sup> Case No. 8:16-cv-00808-VMC-MAP (M.D. Fla. filed Apr. 4, 2016).

<sup>8</sup> Case No. 2:15-cv-09912-DMG-KS (C.D. Cal. filed Dec. 28, 2015).

<sup>9</sup> Case No. 3:15-cv-01191-HLA-PDB (M.D. Fla. filed Oct. 5, 2015).

<sup>10</sup> Case No. 4:15-cv-00562-FJG (W.D. Mo. filed July 24, 2015).

<sup>11</sup> Case No. 1:15-cv-21616 (S.D. Fla. filed April 29, 2015).

All of the calls were made after the defendants had actual notice that the plaintiff was represented by counsel and after they were asked to stop making the calls.

7. **Simmons v. Ditech Financial, L.L.C.**<sup>12</sup> The complaint references “at least 536” calls made between April 2014 and January 2015. The plaintiff is a single mother trying to pay her first and second mortgages (both serviced by Ditech). The plaintiff repeatedly informed Ditech that she did not want to be called on her cell phone. She was represented by a lawyer when the calls were made, and Ditech had been informed of this fact but continued to call anyway. Some of the calls were made between 9:00 pm and 8:00 am.
8. **Keeney v. Wells Fargo Bank, N.A.**<sup>13</sup> The complaint alleges that the servicer called the plaintiff “hundreds of times.” It also states that the servicer, despite lacking prior express consent to call the plaintiff’s cell phone, placed at least 500 calls. The servicer made the calls despite knowing that the plaintiff was represented by counsel. The plaintiff requested that the calls stop, and he also directed the servicer to contact his counsel. The servicer was “repeatedly” served with “motions, notices, and other documents” by counsel, yet failed to stop making the calls.
9. **Hart v. Ocwen Loan Servicing, L.L.C.**<sup>14</sup> The complaint references hundreds of calls made between April and August 2013. The calls were “repeatedly and continuously” made “multiple times a day, several times a week.” All of the calls were made after the defendants had actual notice that the plaintiff was represented by counsel and that the debt had been discharged in bankruptcy. The plaintiff made numerous requests for the calls to stop, yet the calls persisted.

We also draw the Commission’s attention to the letter-comments filed in this proceeding by consumer rights attorney Pete Barry<sup>15</sup> opposing MBA’s Petition for Exemption. He points out that he has “represented thousands of low-income consumers” in his career, and “handled hundreds of cases involving original creditors, such as the banker members of” the MBA. He explains that “[t]he calls from these banks come in sometimes before 8:00 a.m. and go on until after 9:00 p.m. No matter how many times my clients tell these banks to stop calling their cellular phones, the banks more often than not persist in robo calling.”<sup>16</sup> He then points out that MBA’s “members have already granted themselves a *de facto* exemption by flooding [his] clients’ cellular telephones with unconsented and unwanted robo

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<sup>12</sup> Filed in the Fourth Circuit, Duval County, Florida.

<sup>13</sup> Case No. 8:14-cv-00269-SDM-AEP (M.D. Fla. filed July 25, 2014).

<sup>14</sup> Case No. 8:13-cv-02066-MSS-AEP (M.D. Fla. filed Aug. 9, 2013).

<sup>15</sup> Letter from Peter Barry, Barry & Helwig, L.L.C., to Marlene Dortch, FCC Secretary (Aug. 16, 2016) (re: Mortgage Bankers Association Petition for TCPA Exemption), *available at* <https://ecfsapi.fcc.gov/file/10817759418684/20160816MortgageBanksPetition.pdf>

<sup>16</sup> *Id.*

calls, regardless of what this Commission has previously ordered. This is not just one person’s biased opinion—your own complaint database statistics bear this out.”<sup>17</sup>

The root of the problems described above is autodialing. The use of autodialers makes calls so inexpensive that it is more cost-efficient for mortgage servicers to continue making the calls, even after the consumer has told them to stop, than it is to take the trouble to change the autodialing system and make the calls stop. Manually dialed calls are slightly more expensive to make, yet it is this cost factor that helps protect the consumer from harassing numbers of calls. The cost factor helps provide the servicer with a stronger incentive to make only those calls that will be effective and efficient.

### III. Mortgage Servicers are Not Required to Robocall Consumers.

The MBA petition repeatedly claims that the reason mortgage servicers need unlimited free-to-end-user (FTEU) calls to mortgage debtors is because of various requirements imposed on servicers to call borrowers in an effort to help them avoid default and foreclosure.<sup>18</sup> But the request for unlimited calls is not limited to these calls made to avoid default and foreclosure. The request seeks permission to call borrowers at any time for any non-marketing call related to the servicing of the mortgage loan.<sup>19</sup>

However, even if the request were limited to calls designed to help the homeowner avoid foreclosure, it would still not be appropriate to allow more robocalls without consent. Consumers hate robocalls. An average of 184,000 complaints about robocalls were made to the Federal Trade Commission (FTC) every month in 2015.<sup>20</sup> Indeed, some estimate that 35 percent of all calls placed in

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<sup>17</sup> *Id.* at 2.

<sup>18</sup> MBA petition at 8-9.

<sup>19</sup> “MBA requests that for the purposes of this exemption the Commission define ‘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.’” MBA petition at 13 (emphasis added).

<sup>20</sup> Federal Trade Commission, National Do Not Call Registry Data Book for Fiscal Year 2015, at 5 (Nov. 2015) [hereinafter FTC’s Do Not Call Registry].

the U.S. are robocalls.<sup>21</sup> The problem is escalating: the FTC reported more than 2.2 million complaints about unwanted robocalls in 2015—over two and a half times as many complaints as there were in 2010.<sup>22</sup> More than half of these calls occurred after the consumer had already requested that the company stop calling.<sup>23</sup> During the first four months of 2016, the complaint numbers have spiked again, increasing to an average of over 279,000 a month, which will produce a yearly rate of over 3.3 million complaints.<sup>24</sup>

Consumers find prerecorded robocalls particularly aggravating, because they cannot communicate with the caller—even to say that the caller has called a wrong number. But they also object to the “dead air” and abandoned calls that result from the use of autodialers, as well as the sheer volume of calls that autodialers make possible. Non-robocalls are far more likely to be effective and successful in establishing a connection and facilitating the exchange of information, which is, after all, the underlying reason for mortgage servicers’ calls.

We do not disagree that mortgage servicers are required to make the contacts outlined in the MBA petition. Indeed, in our advocacy with respect to mortgage servicing we have encouraged these requirements.<sup>25</sup> We do disagree, however, that these contacts are required to be made by robocalls. Indeed, the entire point of every single one of the requirements the MBA cites is for the servicer to talk to the homeowner to provide relevant information regarding foreclosure avoidance options

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<sup>21</sup>*Rage Against Robocalls*, Consumer Reports (July 28, 2015), available at <http://www.consumerreports.org/cro/magazine/2015/07/rage-against-robocalls/index.htm>

<sup>22</sup> FTC’s Do Not Call Registry at 4.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> The 2016 figures for robocall complaints to the FTC’s Do Not Call Registry were supplied by the FTC’s Bureau of Consumer Protection on May 12, 2016. The 2016 annualized complaint data was determined by averaging the total complaints received in the first four months and then multiplying that monthly average by twelve.

<sup>25</sup> See, e.g., Comments to the Consumer Financial Protection Bureau regarding 12 CFR Parts 1024 & 1026 [Docket No. CFPB-2014-0033] Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act and the Truth in Lending Act by the National Consumer Law Center on behalf of its low-income clients and Americans for Financial Reform, Center for Responsible Lending, National Association of Consumer Advocates, National Association of Consumer Bankruptcy Attorneys, and National Fair Housing Alliance) at 43 (Mar. 16, 2015), available at <http://www.nclc.org/images/pdf/rulemaking/comments-servicing-cfpb-march16-15.pdf>.

available to this homeowner. The actual language of each of the requirements for servicers to contact homeowners shows that servicers are required to have conversations with them, to ask questions, and to provide responsive information. Robocalls are not conducive to those real exchanges of information.

For example:

- **CFPB Servicing Rules.** The primary requirement imposed on all mortgage servicers by the Consumer Financial Protection Bureau (CFPB), requires “live contact.”<sup>26</sup> Prerecorded calls would not meet these requirements. Autodialed live calls might qualify, but would still result in the “dead air,” abandoned calls, and excessive numbers of calls to which consumers object.
- **Federal Housing Administration Single Family Housing Rules.** The FHA requires mortgage servicers to “determine whether the Borrower is occupying the Property, ascertain the reason for the delinquency, and inform the Borrower about the availability of Loss Mitigation Options.”<sup>27</sup> Again, prerecorded and artificial voice calls clearly will not allow servicers to perform this function adequately. While autodialed calls appear to be contemplated in the regulation,<sup>28</sup> nothing in the regulation suggests that they should be made to cell phones without consent.
- **Veterans Affairs Mortgage Servicing Rules.** These rules require that the servicer establish contact and actually talk to homeowners to help them avoid default.<sup>29</sup>

Servicers can comply with every one of these requirements without making a single robocall.

Indeed, non-robocalls are likely to be far more effective than robocalls in meeting the goals of these

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<sup>26</sup> 12 C.F.R. § 1024.39(a) (“Live contact. A servicer shall establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency and, promptly after establishing live contact, inform such borrower about the availability of loss mitigation options if appropriate.” (emphasis added)).

<sup>27</sup> Federal Housing Administration (FHA) Single Family Housing Policy Handbook 4000.1 III.A.2.h.v.A.

<sup>28</sup> Mortgagees are required to have policies in place to “reduce the call abandon rate and minimize the call wait time.” *Id.*

<sup>29</sup> 38 C.F.R. § 36.4278(g).

requirements. Consumers are unlikely to stay on the line for more than a second if, when they answer the call, they hear dead air or a recorded voice.

The TCPA already allows mortgage servicers to robocall consumers' cell phones—if they have the consumer's prior express consent. This provision represents a careful balancing between the desire of businesses to call consumers and the high value consumers place on privacy, control over their cell phones, and the avoidance of interruption, distraction, and annoyance. The MBA petition provides no explanation as to why mortgage servicers cannot—or should not have to—obtain consumers' consent. Presumably, consumers who “welcome” mortgage servicers' calls on their cell phones, as the MBA claims,<sup>30</sup> will consent to receive such calls, and those who do not want such calls—such as the consumers whose cases are described earlier in these comments—will not consent and would not be at all happy about receiving calls after having declined to consent. It is clear that the MBA views having to obtain consumers' consent to receive robocalls on their cells phones as an annoyance, but this is the TCPA's key protection for cell phone users and the Commission should continue that protection.

#### **IV. Necessary Protections for Mortgage Servicing Calls**

We urge the Commission to reject the MBA petition completely. The petitioner has not made a case for abandoning the TCPA's protections for these non-emergency calls. The MBA's members can and should either obtain homeowners' consent to receive robocalls on their cell phones, or simply have a real human manually dial homeowners in order to comply with their regulatory requirements to converse with homeowners.

In the recent rules issued by the Commission implementing the Budget Act Amendments to the TCPA made by Congress in 2015,<sup>31</sup> the Commission found that consumers have a strong need to be protected from excessive calls from debt collectors: “We determine, based on consumer complaints

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<sup>30</sup> See MBA petition at 11.

<sup>31</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, FCC 16-99 (Rel. Aug. 11, 2016) [hereinafter Budget Act Amendments Rules], *available at* <https://ecfsapi.fcc.gov/file/08111407302175/FCC-16-99A1.pdf>.

and on support from the record, that restrictions on the number and duration of federal debt collection calls are appropriate and necessary.”<sup>32</sup>

If the Commission concludes, despite our urging, that it is necessary to allow mortgage servicers some exemption from the consent requirement through the exemption permitted for calls that are free to the end user (FTEU), it should apply all of the rules it recently adopted for servicing and collecting debt owed to the federal government for these calls as well. In other words, all of the limitations and restrictions applicable to the collection of government debt in 47 C.F.R. § 64.1200(j) would be applicable to these FTEU calls.

The MBA petition includes in its request calls made by servicers of mortgage loans owed to or guaranteed by the United States—servicers for the Federal Housing Administration, Veterans’ Affairs, and the Department of Agriculture—which are already covered by the Commission’s recently proposed rules issued pursuant to the Budget Act Amendments if the loan is in default. These calls already can be made without consent, subject to the extensive protections provided for these calls by the Commission. It would make little sense for there to be three sets of rules applicable to mortgage servicing, namely: a) the Budget Act Amendments Rules for servicing of defaulted loans owed to or guaranteed by the federal government; b) FTEU user rules for all mortgage servicing calls; and c) the rules applicable to calls made with the consent of the called party.

## **V. Conclusion**

On behalf of our low-income clients, Americans for Financial Reform, Center for Responsible Lending, Consumer Action, Consumer Federation of America, Consumers Union, Financial Protection Law Center, Legal Services of New Jersey, Indiana Legal Services, Inc., Jacksonville Area Legal Aid, Inc., National Association of Consumer Advocates, National Association of Consumer Bankruptcy

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<sup>32</sup> Budget Act Amendments Rules at 15, ¶ 32. “The [Consumer Financial Protection] Bureau’s examinations of debt collectors have also revealed excessive calling and consequent consumer harm.” *Id.* at 15, ¶ 32 n.102 (citing CFPB Comments).

Attorneys, and U.S. PIRG, we urge the Commission to reject the MBA petition. As the Commission itself has noted, robocalls represent one of the greatest sources of complaints made by consumers.<sup>33</sup>

The FTC buttressed the need to reduce robocalls, not permit more, when it said: “Robocalling increases the number of possible collection contacts, and any expansion in their use likely will magnify consumer harms arising from debt collection calls.”<sup>34</sup> We urge the Commission not to facilitate more of these calls, as providing an exception to the requirement for consent would do.

Respectfully submitted,

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<sup>33</sup> “TCPA complaints as a whole are the largest category of informal complaints the Commission receives.” Budget Act Amendments Rules at 4, ¶ 7.

<sup>34</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, CG Docket No. 02-278, Comment of the Staff of the Federal Trade Commission’s Bureau of Consumer Protection, 2016 WL 3748784, at \*2 (June 6, 2016).