Support MBA's Petition for Servicer Exemption from the TCPA

In 2015, the Federal Communications Commission (FCC) adopted a proposal intended to protect consumers from unwanted "robocalls," but instead exposes mortgage servicers to significant liability for making good faith attempts to contact delinquent borrowers about their possible home-retention options. Data following the housing crisis demonstrate that these calls are crucial to ensuring borrowers are informed of their options to stave off a foreclosure. Federal regulators require servicers to go to great lengths to establish borrower contact because it is the most critical step in foreclosure prevention. MBA has filed an Application for Review to exempt these calls from Telephone Consumer Protection Act (TCPA) coverage.

OVERVIEW

- The TCPA was enacted in 1991 to protect consumers against unwanted telemarketing calls to cellular telephones. At that time, the law could not comprehend the future in which cell phone usage has become increasingly widespread and many households now rely solely on cell phones as their primary means of communication. Today 65.7% of adults aged 25-29 are living in households with only cellular telephones.[1] Significantly, it is adults living in poverty (56.2%) or near poverty (46.1%) that are most likely to be living in households with only cell phones.[2]
- Although the rules are intended to apply to calls made by "autodialers," the FCC expanded the definition of autodialer to include any phone with *the potential* to automatically dial random or sequential numbers (even if it is not actually used that way). The FCC order applies equally to all calls to a cell phone number, regardless of the call's purpose. Thus, essentially any call that a servicer makes to a borrower's cell phone may be problematic given the scope of this revised definition. It is important to understand that the TCPA can impose liability in some cases for *person-to-person calls that are required by federal regulations.*
- It also allows only one call before it imposes strict liability for calls placed to numbers that—even without the caller's knowledge—have been reassigned from a person who previously gave consent or where the customary user of the phone has changed. This

[1] Department of Health and Human Services, National Center for Health Statistics, "Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2013." July 2014, p. 2.
[2] Id.

applies even if the call goes unanswered. After that one call, penalties may accrue starting at $500 per call.

- The FCC also did not follow the lead of the Consumer Financial Protection Bureau (CFPB) and designate a specific method of revoking consent.
- The FCC Omnibus Order had immediate and retroactive effect.

IMPACT

- Federal and state mortgage servicing rules require servicers to reach out to delinquent customers in an effort to avoid foreclosure. The CFPB, Federal Housing Administration and Fannie Mae and Freddie Mac (the GSEs) all have rules or requirements requiring early intervention or outbound outreach calls.
- The July 2015 FCC Omnibus Order has resulted in a flood of litigation. Analysis by the law firm Dorsey & Whitney demonstrates that TCPA suits have increased dramatically—from 354 in 2010 to over 4,949 in 2016.
- The mortgage servicing rules and requirements are intended to benefit consumers, yet the FCC Order discourages a primary and efficient means of providing that benefit. While the TCPA is generally thought of as a pro-consumer regulation, for homeowners that are struggling financially the FCC's recent interpretations may make the loss of a home or difficulties in resolving a delinquency more likely.

MBA'S POSITION / NEXT STEPS

- MBA filed a petition for exemption and subsequent Application for Review because frequent communication and early intervention are essential to helping struggling homeowners resolve delinquencies and remain in their homes. This exemption is necessary because of the importance of early intervention in delinquencies, the extensive national rules governing mortgage servicer conduct and the possible dire consequences of loss of a home for the borrower. The Federal Housing Finance Agency—conservator of the GSEs—agreed with this reasoning and has called for an exemption for mortgage servicers in a letter to the FCC.[3]
- Exemption from the TCPA is not a license for harassment or intrusive debt collection practices. The Federal Fair Debt Collection Practices Act and various state laws set limits on phone calls, as well as prohibit abusive debt collection conduct; these laws remain unaffected by this amendment.

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[3] Comment Letter of the Federal Housing Finance Agency to the Proposed Regulation Implementing the Bipartisan Budget Act of 2015, at p. 2 (June 6, 2016).