

April 23, 2020

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

This *ex parte* Notice relates to a telephone meeting between five staff members of the Federal Communications Commission: Patrick Webre, Mark Stone, Kurt Schroeder, Richard Smith, and Kristi Thornton, and Jonathan Thessin of the American Bankers Association (ABA), Margot Saunders of the National Consumer Law Center (NCLC), and Maureen Mahoney of Consumer Reports.

The subjects of the meeting were both the requests made by a coalition of financial trade associations representing lenders, led by the ABA, in a petition filed with the Federal Communications Commission (FCC or Commission) on March 30,¹ and those made in the April 9, 2020 Notice of *Ex Parte* filed by NCLC on behalf of its low-income clients and five other national consumer groups, in response to the ABA's petition.² The petition asks the Commission to confirm that phone calls and text messages placed by banks, credit unions, and other customer-facing financial services providers using an autodialer or prerecorded or artificial voice on matters related to the COVID-19 pandemic are "call[s] made for emergency purposes," and thus may be placed without the consent of the called party, pursuant to 47 U.S.C. § 227(b)(1)(A).³

¹ Petition for Expedited Declaratory Ruling, Clarification, or Waiver of the American Bankers Association, American Financial Services Association, Consumer Bankers Association, Credit Union National Association, Independent Community Bankers of America, Mortgage Bankers Association, and National Association of Federally-Insured Credit Unions, CG Docket No. 02-278 (Mar. 30, 2020), available at https://ecfsapi.fcc.gov/file/10330137314199/ABA_JointTrades_Petition_Emergency_Purposes_Exception_2020_03_30_final.pdf [hereinafter Petition].

² Notice of *Ex Parte* filed on behalf of the low-income clients of the National Consumer Law Center, and Americans for Financial Reform Education Fund, Consumer Federation of America, Consumer Reports, Consumer Action, and the National Association of Consumer Advocates regarding the Petition, CG Docket No. 02-278 (April 9, 2020), available at <https://ecfsapi.fcc.gov/file/10410571401794/Consumer%20Group%20Ex%20Parte%20on%20ABA%20petition%20on%20pandemic%20calls.pdf>. [hereinafter NCLC Notice of *Ex Parte*].

³ Petition at 4. As stated in the petition, these phone calls and text messages may include outreach to customers and members to offer payment deferrals, fee waivers, extension of repayment terms, or other delays in payment, modification, or forbearance on mortgage payments or other loans; to advise consumers of branch closings, service limitations, reduced hours, or the availability of remote banking or other remote access options; to warn consumers of potential fraud on the consumer's account; or otherwise to make consumers aware of programs, relief, and resources offered by the institution in response to the pandemic. These calls do not include calls that contain advertising or telemarketing or seek to collect payment on a debt.

The primary purpose of this meeting was to urge the FCC to act expeditiously on the requests made in the petition and in NCLC's filing, such as through the immediate issuance of an interim declaratory ruling. Both the financial trade associations and the consumer representatives agree regarding the importance of some of the calls specified in the ABA's petition, given the emergency conditions present during the COVID-19 pandemic, and that the value of these calls will diminish if the FCC does not provide relief until after the comment period ends.

ABA Request. Mr. Thessin for the ABA explained that the scope of the “emergency purposes” exception is broad and includes calls to protect the financial health and safety of consumers. The FCC’s regulations, promulgated after notice-and-comment rulemaking, define the term “emergency purposes” to mean “calls made necessary in *any* situation affecting the health and safety of consumers.”⁴ If the Commission had sought to limit its definition of “emergency purposes” to calls protecting only the *physical* health and safety of consumers, it easily could have done so by inserting the word “physical” into the definition. It chose not to do so. The Commission should not now narrow the definition of “emergency purposes” by limiting the relief it grants regarding the petition.⁵ Moreover, an event that has a detrimental impact on a consumer’s financial health, such as foreclosure, adversely affects the consumer’s physical health.⁶

Mr. Thessin also emphasized that the petitioners are seeking confirmation of the exemption status of a limited set of calls. As stated in the petition, these calls must be on “matters related to the COVID-19 pandemic.”⁷ The duration of the pandemic is finite. Thus, there will be a moment in time where institutions’ calls no longer are related to the COVID-19 pandemic and thus will not qualify for the exemption.

Consumer Groups’ Request. Ms. Saunders, on behalf of the consumer groups, explained that the consumer groups disagree with the financial trade associations on the scope of the interpretation of the “emergency” exception under the TCPA, as they believe the exception is limited to calls directly related to health and public safety issues.

While the consumer groups do not agree that all of the calls included in the ABA’s petition fall under the TCPA’s emergency exception allowing automated calls⁸ to be made without consent,

⁴ 47 C.F.R. § 64.1200(f)(4) (2019) (emphasis added).

⁵ ABA also asserts that, to the extent that the Commission desires to grant the relief sought in the petition without addressing the scope of the “emergency purposes” exception, it could do so by granting a temporary waiver of the Commission’s definition of “emergency purposes,” as suggested in the petition. *See* Petition at 6-7. The consumer groups do not agree that the Commission has the legal authority to issue such a temporary waiver.

⁶ *See* Alexander C. Tsai, *Home Foreclosure, Health, and Mental Health: A Systematic Review of Individual, Aggregate, and Contextual Associations*, PLoS One (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4388711/>. (32 out of 35 relevant studies reviewed by the author (91%) “concluded that foreclosure had adverse effects on health or mental health . . .”).

⁷ Petition at 4.

⁸ 47 U.S.C § 227(b)(1)(A)-(B).

some of calls described in the ABA's petition (as outlined in NCLC's Notice of *Ex Parte*)⁹ do clearly fall under the emergency exception. Importantly, these calls provide consumers with vital notice about how to protect their homes and vehicles from foreclosure or repossession during the pandemic.

Due to the current national emergency, calls relating to loan modifications or forbearances for payments due on loans secured by homes and vehicles directly impact the health and safety of consumers and their families, as the loss of either a home or a car puts the consumer and her family at a significantly greater risk of contracting the coronavirus. Automated calls from lenders informing consumers of forbearance or deferral options, which provide a means to avoid foreclosure or repossession are of immense value to consumers. These calls provide critical information about how consumers can avoid losing their homes or vehicles even when they cannot make the required payments. As a result, the calls directly relate to the health and physical safety of the recipients. Allowing these emergency calls benefits borrowers without undermining the fundamental consumer protection purposes of the TCPA.

Fraud Alerts. While the consumer groups do not agree that the emergency exception for automated calls covers fraud alerts, they do agree that fraud alerts are important for the reasons articulated in the Commission's 2015 Omnibus Order.¹⁰ The concern expressed in the ABA's petition that the condition imposed on the exemption limiting the alerts only to wireless numbers provided by the customer,¹¹ can be addressed by expanding the permissible ways in which institutions can obtain numbers to be called for the fraud alerts exempted in the 2015 Order. Specifically, customer numbers obtained by the institution that were 1) supplied by a family member or other cardholder on the account, 2) captured when the consumer called the institution, or 3) were included in records included with accounts purchased from other institutions, can be reasonable means of obtaining numbers to which fraud alerts can be directed. In each of these three sets of circumstances, there is a very high likelihood that the number belongs to the customer, even though the customer did not directly provide the number to the institution.

⁹ As described in NCLC's Notice of *Ex Parte*, these calls include during the declared national emergency, limited numbers of automated calls from the described institutions for the purposes of alerting their customers to the callers' offers of the following specified kinds of relief related to the COVID-19 pandemic (none which would include debt collection or marketing messages):

- Forbearance on loans secured by homes or vehicles;
- Payment deferrals on loans secured by homes or vehicles;
- Fee waivers on loans secured by homes or vehicles;
- Extension or relaxation of repayment terms on loans secured by homes or vehicles;
- Loan modifications on loans secured by homes or vehicles; and
- Other programs, relief and resources provided to assist debtors in response to the current pandemic relating to loans secured by homes or vehicles.

¹⁰ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, 30 F.C.C. Rcd. 7961, 8027 ¶ 138 (F.C.C. July 10, 2015), *appeal resolved*, ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 Declaratory Ruling, but leaving this portion undisturbed).

¹¹ Petition at note 32.

Although the Commission should not delay issuing an interim ruling on the financial trade associations' petition, both the ABA and the consumer groups agree that the Commission should, at its earliest opportunity, modify the 2015 Order's exemption to also permit fraud alerts placed to numbers obtained by the institution through one of the three means described above.

If there are any questions, please contact Margot Saunders at the National Consumer Law Center (NCLC), msaunders@nclc.org (202 452 6252, extension 104) or Jonathan Thessin of the American Bankers Association, jthessin@aba.com (202 663 5016). This disclosure is made pursuant to 47 C.F.R. § 1.1206.

Thank you very much.

Sincerely,

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