May 21, 2020

Via ECFS

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

Re: Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling, Clarification, or Waiver Filed by the American Bankers Association et al., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Apr. 6, 2020)

Dear Ms. Dortch:

The American Bankers Association (ABA), 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[1] (collectively, the Associations) appreciate the opportunity to submit this reply comment in support of the petition we filed on March 30, 2020 (Petition).[2] In the Petition, the Associations ask the Federal Communications Commission (Commission) to issue an expedited declaratory ruling, clarification, or waiver stating that phone calls and text messages placed by banks, credit unions, and other customer-facing financial service providers using an automatic telephone dialing system (autodialer) or prerecorded or artificial voice on matters related to the COVID-19 pandemic are "call[s] made for emergency purposes," and therefore, may be placed without the consent of the called party under the "emergency purposes" exception to the Telephone Consumer Protection Act's (TCPA) consent requirement (Emergency Purposes Exception).[3]

[1] The Appendix includes a description of each trade association.
[2] Petition for Expedited Declaratory Ruling, Clarification, or Waiver Filed by the American Bankers Association et al., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Mar. 30, 2020), https://www.aba.com/advocacy/policy-analysis/aba-trades-urge-fcc-to-facilitate-covid-19-related-calls [hereinafter, Petition].
[3] 47 U.S.C. § 227(b)(1)(A) (2018).

The record in this proceeding demonstrates broad support for the Petition and the need for the Commission to act immediately. Business groups, consumer groups, the Bureau of Consumer Financial Protection (Bureau), and Commissioner Michael O'Rielly all have expressed support for the Commission taking favorable action on the Petition to facilitate the consumer-benefitting, informational calls that financial institutions seek to make to assist consumers in connection with the COVID-19 pandemic. These calls must be placed using automated means, not manual dialing. However, because of the threat of class-action litigation, financial institutions are reluctant to contact those consumers for whom the institution does not have documented consent to call, depriving millions of consumers of important and time-sensitive COVID-19-related informational messages.[4]

Commissioner O'Rielly described the Petition as "[v]ery reasonable,"[5] and urged the Commission to act with "urgency," calling on the Commission to rule on the Petition prior to the closing of the comment period.[6] The Bureau expressed its support for including within the Emergency Purposes Exemption a limited number of financial institutions' automated COVID-19-related calls that offer forbearance, payment deferrals, fee waivers, extension or relaxation of repayment terms, or loan modifications on loans secured by homes or vehicles.[7] In a subsequent action, the Bureau emphasized (in the context of open-end credit) the importance of communications from financial institutions to consumers: "[o]pen end non-home secured creditors may communicate *proactively* with consumers to provide helpful information and resources. . . . Communicating in advance with consumers, before they may encounter unexpected problems, may help educate them with respect to common problems and potential resources to help solve such problems."[8]

Similarly, six consumer advocacy organizations led by the National Consumer Law Center (NCLC), "urge[d] the Commission . . . as expeditiously as possible" to exempt limited numbers of automated calls from financial institutions that offer forbearance, payment deferrals, fee waivers, extension or relaxation of repayment terms, or loan modifications on loans secured by

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[4] In a prior *ex parte* letter filed in this docket, ABA submitted data from three large banks that quantifies the millions of customers who are not receiving time-sensitive, informational messages from the bank because the bank has not obtained documented consent from the customer. *See* Letter from Jonathan Thessin, Am. Bankers Ass'n, to Marlene Dortch, Sec., Fed. Commc'ns Comm'n, CG Docket Nos. 02-278, 18-152 (filed Nov. 4, 2019), https://www.aba.com/advocacy/policy-analysis/letter-to-fcc-telephone-consumer-protection-act; *see also* Letter from Gail Enda, Pres. & CEO of Am. Airlines Fed. Credit Union, to Marlene Dortch, Sec., Fed. Commc'ns Comm'n, CG Docket Nos. 02-278, 18-152 (filed May 17, 2019), https://ecfsapi.fcc.gov/file/10517208119940/Dortch%20Letter.pdf (describing how the threat of litigation has forced the credit union to use inefficient methods of communication, depriving members of important notifications during emergencies such as natural disasters).

[5] Michael O'Rielly, (@mikeofcc), Twitter (Apr. 2, 2020, 10:29 AM), https://twitter.com/mikeofcc/status/1245720132984492044.

[6] Michael O'Rielly, (@mikeofcc), Twitter (Apr. 7, 2020, 9:18 AM), https://twitter.com/mikeofcc/status/1247514009332580360.

[7] Letter from Kathleen Kraninger, Dir., Bureau of Consumer Fin. Prot., to Ajit Pai, Chairman, Fed. Commc'ns Comm'n (Apr. 27, 2020), https://www.aba.com/-/media/documents/notices/cfpb-letter-tcpa-04272020.pdf.

[8] Compliance Aid, Bureau of Consumer Fin. Prot., Open-End (not Home-Secured) Rules FAQs related to the COVID-19 Pandemic 3 (May 13, 2020), https://files.consumerfinance.gov/f/documents/cfpb_faqs_open-end-rules-covid-19_2020-05.pdf (emphasis added). In addition, the Bureau encouraged financial institutions to "remind consumers [who received forbearance on a loan] as the forbearance period nears its end . . . ." *Id.* at 2.

homes or vehicles.[9] Although assistance for borrowers facing hardship is widely available, the borrower must request the relief in a timely manner under the recently passed CARES Act.[10] Financial institutions may wish to communicate with borrowers to advise them of the available relief. If the institution is not able to initiate communication, it could lead to a potential foreclosure or other negative credit consequences. As mortgage lender Quicken Loans stated, by granting the Petition, the Commission "would allow mortgage servicers to more effectively help clients stay in their homes."[11] These letters demonstrate that it is critical that the Commission exercise its authority to declare that financial institutions' COVID-19-related calls and text messages are exempt under the Emergency Purposes Exception.[12]

Organizations that represent millions of American businesses also expressed support for the Petition. The U.S. Chamber of Commerce, which represents the interests of three million businesses, "strongly supports" the Petition.[13] The Electronic Transactions Association, which represents over 500 companies that offer electronic transaction processing products and services, emphasized in its comment letter the importance of promoting fraud alerts during the COVID-19 pandemic, observing that "bad actors and unscrupulous callers . . . have increased their fraudulent and abusive practices" during the pandemic.[14] Similarly, Visa stated that it has "observed that bad actors are increasing efforts to exploit coronavirus fears or steal relief funds directly."[15]

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[9] *See* Letter from Margot Saunders, Senior Counsel, Nat'l Consumer L. Ctr., et al., to Marlene Dortch, Sec., Fed. Commc'ns Comm'n 1-2 (Apr. 9, 2020), https://ecfsapi.fcc.gov/file/10410571401794/Consumer%20Group%20Ex%20Parte%20on%20ABA%20petition%20on%20pandemic%20calls.pdf (*ex parte* letter submitted on behalf of the National Consumer Law Center, Americans for Financial Reform Education Fund, Consumer Federation of America, Consumer Reports, Consumer Action, and the National Association of Consumer Advocates).

[10] Coronavirus Aid, Relief, and Economic Security Act (CARES Act), H.R. 748, 116th Cong. §§ 4022 & 4023 (2020).

[11] Letter from William Emerson, Quicken Loans, to Marlene H. Dortch, Sec., Fed. Commc'ns Comm'n 2 (Apr. 20, 2020), https://ecfsapi.fcc.gov/file/10420010850514/FCCTCPA_JointTradesCOVIDPetition_QLLetter.pdf.

[12] President Trump also has directed Federal agencies, including the Commission and other independent regulatory agencies, to address the "economic emergency [resulting from the pandemic] by rescinding, modifying, waiving, or providing exemptions from regulations . . . that may inhibit economic recovery . . . ." The White House, Executive Order on Regulatory Relief to Support Economic Recovery, § 1 (May 19, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery/. Granting the Petition would further the aims of the Executive Order by promoting consumers' awareness of the relief available to them from their financial institution.

[13] Letter from Harold Kim & Tom Quaadman, U.S. Chamber of Commerce, to Marlene H. Dortch, Sec., Fed. Commc'ns Comm'n 1 (Apr. 8, 2020), https://ecfsapi.fcc.gov/file/104082610916526/200403_Comments_TCPA.COVID%20EmergencyRelief_FCC%20Final.pdf.

[14] Comments of the Electronic Transactions Ass'n, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 4 (Mar. 30, 2020), https://ecfsapi.fcc.gov/file/10423697419234/ETA%20Comments%20on%20Joint%20Trade%20Petition.pdf.

[15] Letter from Ky Tran-Trong, Visa, to Office of the Sec., Fed. Commc'ns Comm'n 2 (Apr. 29, 2020), https://ecfsapi.fcc.gov/file/10429172017242/Visa%20Comment%20on%20Joint%20Trades%20Petition%20for%20COVID%20Relief.pdf.

The COVID-19 pandemic is having a devastating impact on the U.S. economy. By some estimates, nearly 20% of Americans are unemployed,[16] which is twice the peak unemployment rate (10%) during the Great Recession of 2007 to 2009. Nearly 39 million people have filed for unemployment benefits over the past nine weeks.[17] Financial institutions continue to play a critical role in assisting consumers during this time and seek to place the calls and text messages described in the Petition — e.g., calls and texts to offer forbearance, payment deferrals, and other loan modifications; to advise consumers of branch closings, reduced hours, or the availability of remote banking options; and to warn consumers of potential fraud on the consumer's account.[18] For example, one bank would like to send text messages to advise customers that they may apply at the bank's website for mortgage relief offered by the bank. A second bank has an interest in advising customers of the bank's programs to help customers with short-term cash needs or trouble with making payments. A third bank would like to inform customers of assistance available, such as waived payment requirements and branch closures.

A credit union reported that it is unable to send texts or place calls to its members regarding payment solutions because of the extensive and time-consuming due diligence required to mitigate potential litigation exposure under the TCPA. This due diligence includes confirming whether the member's number is wireline or wireless and determining whether the consent obtained from the member is sufficiently documented. The pandemic has further slowed this review process. The net result is less communication from the credit union to its members, who themselves have expressed frustration that the credit union is using antiquated communications technologies. It is imperative that financial institutions are able to call consumers to address the consumer's financial needs during the pandemic.

As the Associations asserted in the Petition and ABA stated in a separate *ex parte* filing,[19] financial institutions' calls and text messages to offer payment deferrals and other loan modifications and to warn consumers of potential fraud on the consumer's account protect and support consumers' financial health and safety.[20] Thus, these calls and texts clearly fall within the Emergency Purposes Exception. The Commission's regulations, promulgated after notice-and-comment rulemaking, define the term "emergency purposes" to mean "calls made necessary

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[16] *See* News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, The Employment Situation—April 2020, USDL-20-0815, at 1, 5 (May 8, 2020), https://www.bls.gov/news.release/pdf/empsit.pdf?mod=article_inline (listing the official unemployment rate as 14.7 percent, but noting that the "overall unemployment rate would have been almost 5 percentage points higher than reported" if workers who were recorded as employed but absent from work due to "other reasons" had been classified as unemployed on temporary layoff).

[17] *See* Fed. Reserve Bank of St. Louis, FRED Economic Data, https://fred.stlouisfed.org/series/ICSA (last visited May 21, 2020) (listing 38,636,000 total initial unemployment claims filed between the week ending on March 21, 2020, and the week ending on May 16, 2020).

[18] *See* Petition, *supra* note 2, at 4.

[19] *See id.* at 5; Letter from Margot Saunders, Nat'l Consumer L. Ctr., & Jonathan Thessin, Am. Bankers Ass'n, to Marlene Dortch, Sec., Fed. Commc'ns Comm'n 2 (Apr. 23, 2020), https://www.aba.com/advocacy/policy-analysis/aba-consumer-group-urge-fcc-to-act-expeditiously-to-facilitate-covid-19-related-bank-calls (stating ABA's request made to Commission staff regarding the scope of the Emergency Purposes Exception).

[20] Calls that advise consumers of branch closings, service limitations, reduced hours, or the availability of remote banking and other remote customer service options protect the physical health or safety of consumers and employees (as well as consumers' financial health and safety), by preventing unnecessary physical contact between consumers and employees. *See* Petition, *supra* note 2, at 5.

in *any* situation affecting the health and safety of consumers."[21] If the Commission intended 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.[22] Moreover, an event that has a detrimental impact on a consumer's financial health, such as foreclosure, adversely effects the consumer's physical health.[23]

The relief that the Associations request in the Petition would ensure that financial institutions may contact consumers with important, and time-sensitive, calls to protect the consumer's financial or physical health and safety. We urge the Commission to grant the Petition without delay.

Sincerely,

Virginia O'Neill
Executive Vice President
American Bankers Association

Celia Winslow
Senior Vice President
American Financial Services Association

Stephen Congdon
Assistant Vice President &
Regulatory Counsel
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Elizabeth Eurgubian
Deputy Chief Advocacy Officer &
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Michael Emancipator
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Justin Wiseman
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Mortgage Bankers Association

Carrie R. Hunt
Executive Vice President of
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National Association of Federally-Insured
Credit Unions

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[21] 47 C.F.R. § 64.1200(f)(4) (2018) (emphasis added).
[22] 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, *supra* note 2, at 6-7.
[23] *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 . . . .").

Appendix – About the Associations

The American Bankers Association is the voice of the nation's $18.6 trillion banking industry, which is composed of small, regional, and large banks. Together, America's banks employ more than 2 million men and women, safeguard $14.5 trillion in deposits, and extend more than $10.5 trillion in loans.

Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.

The Credit Union National Association, Inc. (CUNA) is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,500 federal and state credit unions, which collectively serve 115 million members nationwide. CUNA's mission in part is to advocate for responsible regulation of credit unions to ensure market stability, while eliminating needless regulatory burden that interferes with the efficient and effective administration of financial services to credit union members.

The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ nearly 750,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than $5 trillion in assets, nearly $4 trillion in deposits, and more than $3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America.

The Mortgage Bankers Association (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. Headquartered in Washington, D.C., the association 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, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

The National Association of Federally-Insured Credit Unions (NAFCU) advocates for all federally-insured not-for-profit credit unions that, in turn, serve 120 million consumers with personal and small business financial service products. NAFCU provides its credit union members with representation, information, education, and assistance to meet the constant challenges that cooperative financial institutions face in today's economic environment. NAFCU proudly represents many smaller credit unions with relatively limited operations, as well as many of the largest and most sophisticated credit unions in the nation. NAFCU represents 73 percent of total federal credit union assets, 52 percent of all federally-insured credit union assets, and 70 percent of all federal credit union member-owners. NAFCU's membership also includes over 190 federally-insured state chartered credit unions.