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Financial Services & Products ADVISORY ■

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New Federal Budget Deal Provides TCPA Relief for Federal Loan Servicers

For years now, the federal Telephone Consumer Protection Act (TCPA) has been a looming threat to U.S. businesses. Although the TCPA was initially passed "to develop the necessary ground rules for cost-effective protection of consumers from unwanted telephone solicitations," it has turned into a boon and popular choice for the plaintiffs' bar due to its inflated per-violation penalties. Businesses that place calls that violate the TCPA could owe the called party $500 or, in instances where the violation was willful or knowing, $1,500 per call.

And despite its enactment as an anti- "telephone solicitation" statute, it has been invoked and deemed to apply to debt collection phone calls. For debt collection calls under the statute, before a party may make such a phone call (or send a text message) to a cell phone using an automatic telephone dialing system (ATDS) or place a call to a cell phone or residential number using an artificial or prerecorded voice, the caller must have the "prior express consent" of the called party.

In 2013, the FCC made the TCPA more onerous by issuing new rules that heightened the level of consent required for telemarketing calls. After the new rules were enacted, callers placing telemarketing calls or text messages to cell phones using an ATDS or placing telemarketing calls to cell phones or residential phones using an artificial or prerecorded voice must have the "prior express *written* consent" of the called party. Based on a 2003 FCC order, "prior express written consent" is likely required for calls or texts to a distressed borrower that discuss loss mitigation alternatives and introduce an additional financial product or service to the borrower that is not required by law.

As part of the bipartisan budget deal that President Obama signed last week, however, Congress gave a partial reprieve from the TCPA to certain businesses. In the new budget, Congress included amendments that exempt calls made by an ATDS or using an artificial or prerecorded voice "solely to collect a debt owed to or guaranteed by the United States" from TCPA liability:

> SEC. 301. DEBT COLLECTION IMPROVEMENTS.
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> (a) In General.—Section 227(b) of the Communications Act of 1934 (47 U.S.C. 227(b)) is amended—
>
> (1) in paragraph (1)—
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> (A) in subparagraph (A)(iii), by inserting ", unless such call is made solely to collect a debt owed to or guaranteed by the United States" after "charged for the call"; and

(B) in subparagraph (B), by inserting ", is made solely pursuant to the collection of a debt owed to or guaranteed by the United States," after "purposes"; and

(2) in paragraph (2)—

(A) in subparagraph (F), by striking "and" at the end;

(B) in subparagraph (G), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following:

"(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States."

(b) Deadline For Regulations.—Not later than 9 months after the date of enactment of this Act, the Federal Communications Commission, in consultation with the Department of the Treasury, shall prescribe regulations to implement the amendments made by this section.

While the amendments are not specific to mortgage servicers, they provide a welcome change to entities that service and collect loans owed to or guaranteed by the United States, which should include FHA, VA and USDA loans. There is some speculation that the amendments may also cover government-sponsored enterprise loan servicing while the loans are in conservatorship. Unlike in other debt collection efforts, which have been major targets of TCPA lawsuits in recent years, prior express consent will no longer be required to place these calls using an ATDS or an artificial or pre-recorded voice. Prior express consent, however, would still be required for debt collection efforts of non-government loans, which may make it challenging for servicers to avail themselves of this new exception.

The new exemption from the TCPA was signed into law and made effective November 2, 2015. Within nine months, the FCC, with the assistance of the Treasury Department, will enact new rules regarding the number and duration of calls made to cell phones to collect a debt owed to or guaranteed by the United States and establish a date when those new rules go into effect.

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Nanci L. Weissgold
202.239.3189
nanci.weissgold@alston.com

David Carpenter
404.881.7881
david.carpenter@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333