

Before the  
Federal Communications Commission  
Washington, D.C. 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	)	

**ORDER**

**Adopted: November 15, 2016**

**Released: November 15, 2016**

By the Chief, Consumer and Governmental Affairs Bureau:

**I. INTRODUCTION**

1. With this Order, we deny a petition filed by Mortgage Bankers Association (MBA)<sup>1</sup> seeking an exemption from the prior-express-consent requirement of the Telephone Consumer Protection Act (TCPA).<sup>2</sup> Specifically, applying Commission precedent and in light of the record, we find that MBA has not shown, as a threshold matter, the exempted calls would be free of charge to called parties. Separately, we find that MBA has not shown that it should be able to make or send non-time-sensitive robocalls, including robotexts, to consumers without first obtaining consumer consent.<sup>3</sup> We thus deny MBA’s request.

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<sup>1</sup> See *Mortgage Bankers Association Petition for Exemption*, CG Docket No. 02-278 (filed June 16, 2016) (Petition).

<sup>2</sup> The TCPA is codified at 47 U.S.C. § 227.

<sup>3</sup> Section 227(b)(2)(C) of the Communications Act (the Act) 47 U.S.C. § 227(b)(2)(C) gives the Commission authority to exempt from the TCPA’s consent requirement robocalls to a number assigned to a wireless service that are not charged to the consumer, subject to conditions the Commission may prescribe to protect consumers’ privacy rights. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Cargo Airline Association Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, 29 FCC Rcd 3435, 3438, para. 9 (2014) (*Cargo Airline*) (granting exemption when finding “that CAA has identified means to ensure the notifications are not charged to consumers, and a set of conditions on the notifications that, with the modifications we describe here, are consistent with the TCPA’s privacy goals.”)

## II. BACKGROUND

### A. The TCPA and the Commission's Implementing Rules

2. As the Commission noted in its *2015 TCPA Declaratory Ruling*, “Congress enacted the TCPA in 1991 to address certain [calling] practices thought to be an invasion of consumer privacy and a risk to public safety.”<sup>4</sup> The TCPA, therefore, reflects Congress’ recognition of the potential costs and privacy risks imposed on wireless consumers from the use of autodialer equipment, which can generate large numbers of unwanted calls.<sup>5</sup> The Commission has traditionally sought to reasonably accommodate individuals’ rights to privacy and the legitimate business interests of callers.<sup>6</sup>

3. The TCPA and the Commission’s rules prohibit robocalls<sup>7</sup> to wireless telephone numbers and other specified recipients except when made: (1) for an emergency purpose; (2) solely to collect a “debt owed to or guaranteed by the United States”; (3) with the prior express consent of the called party; or (4) pursuant to a Commission-granted exemption.<sup>8</sup> The Commission has concluded that this protection encompasses both voice and text calls, including short message service (SMS) calls and text calls made using Internet-to-phone technology, including an interconnected text provider.<sup>9</sup>

4. Section 227(b)(2)(C) of the Act supplies the Commission’s authority to exempt from the consent requirement robocalls to a number assigned to a cellular telephone service that are not charged to the consumer, subject to conditions the Commission may prescribe “as necessary in the interest of the privacy rights [the TCPA] is intended to protect.”<sup>10</sup> The Commission has repeatedly acknowledged that

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<sup>4</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, WC Docket No. 07-135, 30 FCC Rcd 7961, 7967, para. 4 (2015) (quoting Pub. L. No. 102-243, § 2(9) (1991)) (*2015 TCPA Declaratory Ruling*).

<sup>5</sup> *See, e.g.*, 137 Cong. Rec. H11307 (Daily Ed. Nov. 26, 1991) (noting that telephone subscribers found automated calls to be a particular nuisance and an invasion of privacy).

<sup>6</sup> *See, e.g.*, *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 7964 n.6; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8754, para. 3 (1992).

<sup>7</sup> The Commission has used the term “robocalls” to refer both to calls placed using an automatic telephone dialing system (autodialer) and to prerecorded- or artificial-voice calls. *See, e.g.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1831, para. 1 (2012) (*2012 Report and Order*).

<sup>8</sup> *See* 47 U.S.C. § 227(b)(1), (b)(2)(C); 47 CFR § 64.1200(a)(1).

<sup>9</sup> *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (*2003 TCPA Order*); *see also Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a “call”); *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8017, para. 108.

<sup>10</sup> 47 U.S.C. § 227(b)(2)(C).

autodialed or prerecorded- or artificial-voice telephone calls to wireless devices are increasingly intrusive, inconvenient, and potentially unsafe,<sup>11</sup> and therefore has only exercised this exemption authority in very limited and narrow circumstances—*e.g.*, for time-sensitive messages relating to certain healthcare and financial transaction notifications.<sup>12</sup>

## B. MBA Petition

5. On June 16, 2016, MBA filed a Petition asking the Commission to exempt from the prior-express-consent requirement non-telemarketing residential mortgage servicing calls to wireless telephone numbers.<sup>13</sup> While not an exhaustive list of the types of “mortgage servicing” calls it would make, MBA provides several examples of specific calls it might make if the exemption were granted, namely to determine the reasons and nature of a delinquency and to counsel homeowners on their obligations and potential options.<sup>14</sup> Specifically, MBA cites to, among other communications, determining whether a borrower has abandoned or vacated a property, discussing missing documentation needed to complete a loss mitigation application, and/or determining the homeowner’s current perception of their financial circumstances and ability to repay the debt.<sup>15</sup> According to MBA’s Petition, the mortgage market is the single largest for consumer financial products and services in the United States and mortgage servicers are responsible for numerous day-to-day management responsibilities that necessitate contacts with borrowers.<sup>16</sup> MBA states that, in the case of a mortgage default, it is important that mortgage servicers be able to speak to delinquent borrowers as early as possible so that the mortgage servicer can communicate the borrower’s options.<sup>17</sup>

6. MBA asserts that the benefits of mortgage servicing calls far outweigh potential privacy interests.<sup>18</sup> MBA maintains that the exemption is necessary to ensure that the TCPA does not restrict mandated, timely communications with residential mortgage borrowers that are required by other federal

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<sup>11</sup> *2003 TCPA Order*, 18 FCC Rcd at 14115, para. 165; *2012 Report and Order*, 27 FCC Rcd at 1839-40, para. 25; *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 7967, para. 4.

<sup>12</sup> *Cargo Airline*, 9 FCC Rcd at 3438, para. 20; *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 7989, para. 45, 30 FCC Rcd at 8023, para. 125.

<sup>13</sup> *See supra* n.1; *see also* Petition at 2-4.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* 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.” *Id.* at 13.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.* at 8-9.

<sup>18</sup> *Id.* at 6.

and state laws or regulations.<sup>19</sup> To illustrate this point, MBA includes in its Petition a chart of various federal agencies and state regulators and the mortgage servicing contacts that each requires, which include both telephone calls and in-person contacts.<sup>20</sup> MBA also notes that Congress recently directed the Commission to adopt rules to except from the consent requirement calls made solely to collect a debt owed to or guaranteed by the United States.<sup>21</sup> It argues that its requested exemption is necessary to ensure that calls to borrowers are treated uniformly in terms of the prior express consent needed to make the call, regardless of whether the federal government or a private entity owns or insures the mortgage loan.<sup>22</sup>

7. Finally, MBA acknowledges the Commission's mandate to protect the privacy interests of consumers and suggests conditions for the proposed exempted free-to-end user mortgage servicing calls.<sup>23</sup> The suggested conditions specify that mortgage servicers must state the name and contact information of the mortgage servicer; calls must not include any telemarketing, cross-marketing, solicitation, or advertising content; text messages and prerecorded calls must be concise; an easy means of opting out of future messages must be offered; and any such opt-out requests must be honored promptly.<sup>24</sup>

8. The Commission sought comment on the issues raised in the Petition.<sup>25</sup> Nine consumer groups and individual consumers filed comments in opposition to MBA's Petition.<sup>26</sup> Several commenters contend that mortgage servicers and their agents often violate the TCPA by making frequent harassing calls to consumers, that the calls do not cease even after repeated requests, and that an exemption would further erode consumer privacy.<sup>27</sup> Commenters also note that there is no regulatory mandate that mortgage servicers utilize an autodialer to make the calls required by other statutes and regulations, and

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<sup>19</sup> *Id.* at 7-11.

<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.* at 3-4; *see also* Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 § 301(b).

<sup>22</sup> Petition at 4, 6.

<sup>23</sup> *Id.* at 12.

<sup>24</sup> *Id.* at 12-13.

<sup>25</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Mortgage Bankers Association Petition for Exemption*, CG Docket No. 02-278, Public Notice, 2016 WL 4140603 (CGB 2016).

<sup>26</sup> *See* Mark Ankorn Comments; Peter Barry Comments; Robert Biggerstaff Comments; Burke Law Offices, LLC Comments; William Howard Comments; Patrick Maulpin Comments; National Consumer Law Center (NCLC) Comments; Gerald Roylance Comments; Beth Terrell Comments.

<sup>27</sup> *See* NCLC Comments at 3-4 (citing nine civil cases where mortgage servicers are alleged to have violated the TCPA); Peter Barry Comments at 1 (alleging that, "the mortgage bankers represented in the Petition are some of the worst violators of the TCPA"); Burke Law Offices, LLC Comments at 9 (citing six civil cases where mortgage servicers are alleged to have violated the TCPA); Beth Terrell Comments at 2 (noting that one consumer alleged to have received 117 calls from their mortgage servicer in one day); Mark Ankorn Comments at 1-2; Robert Biggerstaff Comments at 2; William Howard Comments at 3.

that effective, less intrusive options exist for communicating with borrowers.<sup>28</sup>

9. Four commenters, comprising mortgage servicers and affiliated groups, support MBA's Petition.<sup>29</sup> These commenters generally reiterate the arguments raised in the Petition and support MBA's contention that an exemption is necessary to comply with federal- and state-mandated servicing requirements and to protect mortgage servicers from numerous lawsuits alleging TCPA violations.<sup>30</sup>

10. Two parties, Patrick Maulpin and MBA, filed reply comments.<sup>31</sup> Patrick Maulpin argues that despite MBA's focus on live communications facilitated through a robocall, MBA intends the exemption to allow for pre-recorded calls and that the specified exemption conditions do not sufficiently protect consumer's privacy.<sup>32</sup> In its reply comment, MBA notes that mortgage servicers cannot realistically comply with outbound call requirements by placing manually dialed calls.<sup>33</sup> MBA also claims that mortgage servicing communications are not "robocalls" as commonly understood, namely artificial- or prerecorded-voice messages, and that an exemption is necessary to allow mortgage servicers to use an automatic telephone dialing system to connect live callers to a called party.<sup>34</sup>

### III. DISCUSSION

11. We deny MBA's request to exempt mortgage servicing calls to wireless phone numbers from the TCPA's prior-express-consent requirement. MBA has not demonstrated that it can make these calls free to the end user. Furthermore, we find the public interest in, and the need for the timely delivery

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<sup>28</sup> See NCLC Comments at 5-8; Beth Terrell Comments at 4-5.

<sup>29</sup> See American Banker Association Comments; American Financial Services Association Comments; HopeNow Comments; Quicken Loan Inc. Comments. In an *ex parte* filing, Quicken Loan Inc. repeated their support for the Petition. *Ex Parte* Letter from Gary Weingarden, senior counsel, Quicken Loans Inc., to Marlene H. Dortch, Secretary, FCC, in Docket No. 02-278 (filed October 20, 2016).

<sup>30</sup> See American Banker Association Comments at 7-9; American Financial Services Association Comments at 1-2; HopeNow Comments at 2; Quicken Loan Inc. Comments at 2.

<sup>31</sup> Patrick Maulpin Reply Comments; MBA Reply Comments.

<sup>32</sup> Patrick Maulpin Reply Comments at 1.

<sup>33</sup> MBA Reply Comments at 4-5. In two *ex parte* filings, MBA reiterated many of the same arguments that it raised in its Petition and reply comments. *Ex Parte* Letter from Lauren E. Campisi, McGlinchey Stafford, counsel for MBA, to Marlene H. Dortch, Secretary, FCC, in Docket No. 02-278, at 1-5 (filed October 6, 2016); *Ex Parte* Letter from Lauren E. Campisi, McGlinchey Stafford, counsel for MBA, to Marlene H. Dortch, Secretary, FCC, in Docket No. 02-278, at 1-5 (filed October 19, 2016).

<sup>34</sup> MBA Reply Comments at 1-3. While there is some confusion in the record about the definition of live autodialed calls, the Commission has been clear that, unless otherwise indicated, the term "robocalls" includes calls made either with an automatic telephone dialing system or with a prerecorded or artificial voice. See *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 7961 n.1.

of, the calls described by MBA do not justify setting aside the privacy interests of called parties.<sup>35</sup>

12. The Commission has granted free-to-end-user exemptions to the general prohibition on calls to wireless numbers pursuant to section 227(b)(2)(C) in limited circumstances.<sup>36</sup> In each case, the Commission emphasized three aspects of its analysis—whether the petitioner was clear that the messages would be free to the end user, whether the messages were time-sensitive or there is some other compelling public interest that supports timely receipt of these calls, and whether the caller could apply conditions to the exemption to preserve consumer privacy interests. Applying those factors here, we find that MBA’s proposed messages are not time-sensitive nor has MBA established that it can make the calls free-to-end-user.

13. We first consider whether MBA has stated in its Petition that it is capable of meeting the requirement pursuant to section 227(b)(2)(C) of the Act that the mortgage servicing calls will not be charged to the called party.<sup>37</sup> In its Petition, MBA acknowledges its members would be obligated under an exemption to refrain from charging the called party for the call, but it fails to provide any information on how its members would comply with this requirement.<sup>38</sup> Moreover, MBA fails to show that exempted calls would not count against any plan limits on the consumer’s voice minutes or texts.<sup>39</sup> We are therefore unable to find that MBA has shown that it is capable of meeting the statutory exemption provision’s requirement that calls will not be charged to the called party.

14. Second, even if MBA satisfied the “no charge” requirement, we find the public interest in and the need for the timely delivery of the calls described by MBA do not justify “setting aside a consumer’s privacy interests in favor of an exemption.”<sup>40</sup> The Commission has noted the necessity for *immediate* communication in its prior exemption analyses concerning financial institutions and healthcare providers.<sup>41</sup> Specifically, in the *2015 TCPA Declaratory Ruling*, the Commission granted American Bankers Association an exemption to allow financial institutions to make calls to wireless numbers where

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<sup>35</sup> See *supra* n.11.

<sup>36</sup> See *Cargo Airline*, 29 FCC Rcd at 3435-36, paras. 12-13; *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8023, para. 128-139, 30 FCC Rcd at 8030, paras. 125-146.

<sup>37</sup> 47 U.S.C. § 227(b)(2)(C).

<sup>38</sup> Petition at 3, 15. By contrast, in granting previous exemptions, the Commission noted that one petitioner “state[d] that ‘financial institutions will work with wireless carriers and third-party service providers to ensure that recipients of notices under the requested exemption are not charged for those messages’” and that another petitioner “state[d] that its members [were] capable of providing these calls by . . . using third-party solutions.” *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8024, para 127, 8030, para. 144.

<sup>39</sup> See *Cargo Airline*, 29 FCC Rcd at 3436, para. 12 (clarifying that the Commission, “interprets the TCPA’s ‘no charge’ requirement to preclude existing notifications that count against the recipient’s plan minutes or texts.”); *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8028, para. 39, 30 FCC Rcd at 8030, paras. 144.

<sup>40</sup> *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8025, para. 129.

<sup>41</sup> See *supra* n.37.

there was indication of fraudulent transactions or identity theft, concluding that these types of calls “are all intended to address exigent circumstances in which a quick, timely communication with a consumer could prevent considerable consumer harms from occurring or, in the case of the remediation calls, could help quickly mitigate the extent of harm that will occur.”<sup>42</sup> By contrast, the Commission found that robocalls regarding account communications, payment notifications and Social Security disability eligibility, while conveying information, lacked the requisite time-sensitivity to justify granting an exemption.<sup>43</sup> While the calls MBA describes may help and be welcomed by some consumers, we cannot agree with MBA that they are particularly time-sensitive.<sup>44</sup> The various federal agencies and state governments that MBA cites as requiring outbound mortgage servicing calls do not require telephone contact until a borrower is *at least* 20 to 36 days into the delinquency period.<sup>45</sup> Although the Commission has not precisely defined how time-sensitive messages must be, MBA’s evidence here strongly suggests that these messages lack the urgency of robocalls to alert consumers to possible fraudulent credit card transactions on their accounts or data breaches of their identity, when seconds or minutes count.<sup>46</sup>

15. MBA argues that mortgage servicing calls are required under both federal and state laws and, given the volume of mortgage borrowers and the loan term of a typical mortgage, an exemption is necessary for mortgage servicers to effectively communicate with their customers.<sup>47</sup> While these calls may indeed be beneficial and desired by some consumers, mortgage servicers are free to autodial consumers without an exemption by simply relying on the prior express consent a consumer provides when including their wireless phone number on a mortgage application.<sup>48</sup> They may also obtain new consent by one of many available means, including by email. We agree with NCLC and other

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<sup>42</sup> *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8025, para. 132 (considering “the urgency associated with these calls, the unpredictable timing of the underlying problems, the financial repercussions associated with those problems, and the risk that consumers may not have fully understood information provided to them regarding consenting to these calls”).

<sup>43</sup> *See id.*, 30 FCC Rcd at 8031, para. 146.

<sup>44</sup> *See id.* at 9.

<sup>45</sup> Petition at 10-11.

<sup>46</sup> *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8025, para. 132.

<sup>47</sup> Petition at 5, 10-11, 14. MBA defines “mortgage servicing” for purposes of this exemption and the calls made pursuant to it 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.” Petition at 13.

<sup>48</sup> The Commission has clarified that a party who provides his or her wireless number to a creditor as part of a credit application “reasonably evidences prior express consent by the cell phone subscriber to be contacted at the number regarding the debt.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, 23 FCC Rcd 559, 564, para. 9 (2008).

commenters<sup>49</sup> that mortgage servicers have effective means, other than robocalls, to make contact with customers and that they must already stay in close contact with customers,<sup>50</sup> providing them ample opportunities to request express consent for robocalls. Further, MBA cites no federal or state law or regulation that requires such calls to be made using an autodialer; the calls could be made without using autodialer technology. Those calls that would fall within MBA's broad definition of "mortgage serving" calls appear to be feasible even without our setting aside the called party's privacy interests in favor of the caller's need to use a potentially intrusive type of calling equipment.

16. Finally, we disagree with MBA's argument that we should grant its request to harmonize the practices of callers making calls regarding the collection of a debt owed to or guaranteed by a private entity with those of callers making calls regarding the collection of a debt owed to or guaranteed by the United States.<sup>51</sup> The exception to obtaining the consent of the called party for calls to wireless numbers made solely to collect a debt owed to or guaranteed by the United States was created by Congress;<sup>52</sup> if it had intended the exception to apply universally, regardless of who owned or guaranteed a debt, it easily could have done so.

#### IV. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, sections 1.2 and 64.1200 of the Commission's rules, 47 CFR §§ 1.2, 64.1200, and the authority delegated in sections 0.141 and 0.361 of the rules, 47 CFR §§ 0.141, 0.361, that the Petition for Exemption filed by the Mortgage Bankers Association in CG Docket No. 02-278 on June 16, 2016, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Alison Kutler  
Chief  
Consumer and Governmental Affairs Bureau

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<sup>49</sup> See NCLC Comments at 3-8; Mark Ankcorn Comments at 1-2; Peter Barry Comments at 1; Robert Biggerstaff Comments at 2; Burke Law Offices, LLC Comments at 4, 8-9; William Howard Comments at 3; Gerald Roylance Comments at 3-4; Beth Terrell Comments at 2-4.

<sup>50</sup> See, e.g., 12 U.S.C. § 2605 (rules relating to the servicing of mortgage loans and administration of escrow accounts).

<sup>51</sup> Petition at 3-4.

<sup>52</sup> Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (Budget Act); Budget Act § 301(a)(1)(A) (amending 47 U.S.C. § 227(b)(1)(A)).

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**APPENDIX****List of Commenters**

The following parties have filed comments in response to the Public Notice issued in this matter (CG Docket No. 02-278):

<u>Commenter</u>	<u>Abbreviation</u>
American Bankers Association	ABA
American Financial Services Association	AFSA
Burke Law Offices, LLC	
Mark Ankorn	
<b>Mortgage Bankers Association</b>	<b>MBA</b>
Peter Barry	
Robert Biggerstaff	
Alexander Burke	
HopeNow	
William Howard	
Patrick Maulpin*	
National Consumer Law Center	NCLC
Quicken Loan Inc.	
Gerald Roylance	
Beth Terrell	

\* filing both comments and reply comments (bold - reply comments only)