June 6, 2016

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th St., SW, Room TW-A325
Washington, DC 20554

RE: CG Docket No. 02-278

Dear Ms. Dortch:

The National Council of Higher Education Resources (NCHER) is a national, nonprofit trade association representing a nationwide network of higher education assistance agencies which administer education programs that make grant and loan assistance available to students and parents to pay for the costs of postsecondary education. Our membership includes organizations under contract with the U.S. Department of Education to service and recover outstanding loans made under the Federal Direct Loan Program and organizations that service and recover outstanding loans made under the Federal Family Education Loan Program.

NCHER is responding to the May 6, 2016 Notice of Proposed Rulemaking (the "Notice") seeking comments on the Federal Communication Commission's (the "Commission's") proposal to prescribe regulations to restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service for the purpose of collecting a debt owed to or guaranteed by the United States. Section 301 of the Bipartisan Budget Act of 2015 (the "Budget Act") excepts from the Telephone Consumer Protection Act's (TCPA) consent requirement calls made solely to collect a debt owed to or guaranteed by the United States. The Commission's implementation questions include areas such as "which calls are covered by the phrase 'solely to collect,' how [to] restrict the number and duration of such calls, and how to implement such restrictions." The Notice states that the Commission believes that "three call [attempts] per month provides adequate opportunity to convey necessary information about debt, repayment, and other matters the caller wishes to communicate without consent of the called party." Our comments demonstrate that this arbitrary limit will be harmful to millions of federal student loan borrowers who want and need timely and accurate information to better manage their debt to avoid delinquency and default and to rehabilitate their defaulted loans. Our comments are made within the context of what is in the best interests of federal student loan borrowers and the federal student loan programs.

A three call attempt per month per delinquency restriction would represent a missed opportunity to help student and parent borrowers, and is far too restrictive to meet the goals of President Obama's Student Aid Bill of Rights – namely to ensure that "every borrower has the right to quality customer service, reliable information, and fair treatment, even if they struggle to repay their loans." Live communication is key to borrowers understanding their rights, and a three call attempt per month restriction will largely nullify meaningful borrower contact.

NCHER believes that the unique nature of federal student loans – including the availability of multiple repayment plans that help distressed borrowers manage their debts and a generous rehabilitation program that allows defaulted borrowers to remove their loans from default – justifies a set of rules specifically for this industry. We urge the Commission to consider adopting a separate set of rules specifically to assist federal student loan borrowers.

In a more global context, NCHER would support action by the Commission to reduce the number of truly harassing auto-dialed calls. According to many attorneys general and consumer groups, the bulk of these calls are from foreign-based callers.[1] We believe the Commission's efforts should be properly focused on stopping these types of calls, which already violate the TCPA, while finding ways to allow legitimate calls that assist student loan borrowers stay out of delinquency and default.

Thank you for the opportunity to provide comments on this important matter. If you have questions or need additional information, please contact me at 1100 Connecticut Avenue NW, Suite 1200, Washington, DC, 20036-4110, or by calling (202) 822-2106.

Sincerely,

James P. Bergeron
President

[1] Testimony by The Honorable Greg Zoeller, Attorney General, State of Indiana, before the Senate Committee on Commerce, Science, and Transportation hearing titled "The Telephone Consumer Protection Act at 25: Effects on Consumers and Business," May 18, 2016.

NCHER Response to the Federal Communications Commission's Notice of Proposed Rulemaking Regarding the Exemption under the Telephone Consumer Protection Act – CG Docket No. 02-278

Paragraph 8: The Notice seeks comment on the phrase "solely to collect a debt," specifically on how to interpret "solely," "collect," "delinquent," and "default," including distinguishing between "default caused by non-payment and a default resulting from a different cause under the terms of the debt instrument."

FCC Proposal: To ensure that debtors do not receive non-consented calls before failing to make a timely payment, "solely to collect a debt" means only those calls made to obtain payment after the borrower is delinquent on a payment.

NCHER Response: NCHER believes that there is nothing in the Budget Act suggesting a narrow interpretation of what calls are covered. In fact, parsing the individual words of the statute ignores its plain reading that provides an exception for calls that are made for the purpose of collecting a debt and for no other purpose. We recommend that "solely" be defined to mean that any telephone discussion with the borrower initiated under this rule be limited to content regarding the debt owed to or guaranteed by the United States. We believe that the term "collect" should be defined as any activity designed to help the borrower understand the rights, responsibilities, and benefits inherent in the federal student loan program, and include communications during periods when student loan repayment is imminent but not yet required (e.g. during the "grace period" after graduation but before repayment is required, or near the end of authorized periods of deferment or forbearance). We urge the Commission to change its proposed rule that covered calls are only those "made to obtain payment after the borrower is delinquent on a payment," as this time frame is too late to prevent damage to the consumer's credit profile and fails to allow the borrower to receive timely information to choose the repayment plan best suited for the borrower's unique circumstances. For example, the U.S. Department of Education recently instructed its contracted loan servicers to initiate calls to borrowers during the process of completing applications for Income Driven Repayment programs. Most of these borrowers are not in delinquency or default, yet many need assistance to navigate through the application and approval process so they can obtain a low monthly payment that will keep them from falling into loan delinquency. Restricting calls to borrowers who have already fallen into loan delinquency or default could create a barrier between borrowers and the repayment plan that will best meet their needs.

The implied precept that debtors, including student and parent borrowers, do not want to receive any non-consented calls assumes they are aware of the potential for such calls and the useful information that the calls would convey. This, of course, is not the case as the whole point of the calls is to make students and parents aware of their rights and options under the law. In fact, it is widely accepted that student loan borrowers want and need timely and accurate information in order to make the best decisions regarding managing their student loan debt. It is wrong to automatically assume that borrowers must be "protected" from receiving such information.

Regarding the definitions of "delinquency" and "default," federal student loan rules state that "delinquency on a loan begins on the first day after the due date of the first missed payment that is not later made."[2] The Higher Education Act of 1965, as amended, defines default with delinquencies of "(1)

[2] §682.411(b)(1)

270 days in the case of a loan which is repayable in monthly installments, or (2) 330 days in the case of a loan which is repayable in less frequent installments.[3]

Further, in a January 26, 2016 Ex Parte filing with the Commission, NCHER (in conjunction with the Education Finance Council (EFC), and Student Loan Servicing Alliance (SLSA)), argued that:

> *…the plain meaning of the term "collect" is "to obtain payment on,"[4] which is the purpose of such federal student loan calls. Indeed, the Supreme Court has found on multiple occasions that, in ordinary English, a person "collects" a debt by attempting to obtain payment on it.[5] The Fifth Circuit has even observed that "the term 'collect' could be extended from demanding payment [of an amount owed] to merely receiving it."[6]*
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> *The U.S. Department of Education's federal student loan rules also confirm that calls "to collect" a debt occur both before and after default. For example, the Department's rules governing the Federal Family Education Loan Program (FFELP) defines the term "collection activity" to include "making an attempt to contact the borrower by telephone to urge the borrower to begin or resume payment" and "any telephone discussion or personal contact with the borrower so long as the borrower is apprised of the account's past-due status."[7] They also require lenders to undertake a number of "collection efforts" when a loan is delinquent, including sending "collection letters" and attempting to contact borrowers by telephone.[8] Similarly, the Department's rules governing the Federal Direct Loan Program specify that borrowers are responsible for "collection charges before default," which include "costs incurred . . . in collecting installments not paid when due."[9]*

Paragraph 9: The Notice seeks comment on whether or not debt servicing calls are covered under the new statute. The Commission notes that "debt servicing calls may provide a valuable service by offering information about options and programs designed to keep at-risk debtors from defaulting or becoming delinquent on their loans. Helping a debtor avoid delinquency or default can preserve the person's payment history and credit rating, and help maintain eligibility for future loans." The Commission also notes that "servicing calls will create conditions for debtors that allow debts to be more readily collected by the United States." The Notice seeks comment on "what initiating event should enable a creditor or entity acting on a creditor's behalf to begin making covered calls to convey debt servicing information;" how to avoid types of calls consumers would not want, such as marketing calls; and asks if delinquency should "also be the initiating event for debt servicing calls."

FCC Proposal: Servicing calls should be included in covered calls.

NCHER Response: NCHER agrees that servicing calls should be included in the definition of "covered calls" and commends the Commission for recognizing that student and parent borrowers would benefit

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[3] Higher Education Act of 1965, as amended, Sec. 435(l)
[4] *See, e.g.*, Black's Law Dictionary 263 (6th Ed. 1990).
[5] *See, e.g.*, *Heintz v. Jenkins*, 115 S.Ct. 1489, 1491 (1995); *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1130 (2015).
[6] *Pilalas v. Cadle Co*., 695 F.3d 12, 16 (5th Cir. 2012).
[7] *See* 34 C.F.R. § 682.411.
[8] *See id*.
[9] *See id*. §§ 685.202(e), 685.207(a)(1).

from receiving timely and accurate information about “options and programs designed to keep at-risk debtors from defaulting or becoming delinquent on their loans.” This is particularly true with respect to federal student loans, where a potentially confusing array of repayment, deferment, and forbearance options exist to help borrowers avoid delinquency and default and better manage their debt.

We believe origination of a student loan should be the initiating event that allows the servicer to begin making covered calls. Borrowers need to understand their total loan indebtedness with each new loan origination, the likely monthly payment amount, the total cost of the loan, and their rights and responsibilities under the federal loan program. Federal student loan servicers do not make marketing calls, so in the student loan context, defining servicing calls as covered calls will not result in unwanted telemarketing calls. As stated in our response to Paragraph 8, we believe that waiting until a borrower is delinquent on a loan is too late to prevent damage to the borrower’s credit report and fails to allow the borrower to receive timely information to choose the repayment plan best suited for his or her unique circumstances.

Paragraph 10: The Notice seeks comment on the definition of “servicing,” asking if servicing calls include calls informing debtors how to reduce payment amounts; consolidate, modify, or restructure loans; change payment dates; or other matters indirectly related to seeking payment, and if servicing calls only refer to calls made by the creditor and those entities acting on the creditor’s behalf.

FCC Proposal: Permissible “servicing” calls only refer to calls made by the creditor and those entities acting on behalf of the creditor.

NCHER Response: NCHER agrees that servicing calls should refer only to calls made by or on behalf of the creditor; in the federal student loan context, this includes the U.S. Department of Education for loans made under the Federal Direct Loan Program and loans put or assigned to it that were made under the Federal Family Education Loan Program (FFELP) and the Federal Perkins Loan Program; authorized lenders and guaranty agencies for loans made under FFELP; colleges and universities participating in the Federal Perkins Loan Program; and in each case, entities or agents acting on their behalf, including third-party servicers, private collection agencies, and colleges and universities, in their roles of assisting in the collection of federal student loans to reduce student loan delinquency and default. Servicing calls in the federal student loan market include those topics identified in the Notice, namely “calls informing debtors how to reduce payment amounts; consolidate, modify, or restructure loans; change payment dates; or other matters indirectly related to seeking payment,” and may also include calls to inform borrowers about their rights and responsibilities under the federal student loan program.

Paragraph 11: The Notice seeks comment on the meaning of the phrase “a debt owed to or guaranteed by the United States,” focusing on what is a debt “owed to” the United States and a debt “guaranteed by” the United States. The Notice asks if the phrase “owed to or guaranteed by” includes debts insured by the United States and if the Commission should “look to or adopt the definition of ‘debt’ in the DCIA.”

FCC Proposal: There is no proposal for this issue.

NCHER Response: NCHER recommends that all loans authorized under the Higher Education Act of 1965, as amended, should be included in the definition of a debt owed to or guaranteed by the United

States. Federal student loans are either owned directly by the United States, as is the case under the Federal Direct Loan Program and a small subset of the Federal Family Education Loan Program; are guaranteed against default by the full faith and credit of the United States, as is the case under the Federal Family Education Loan Program; or funded, wholly or in part, by the United States, as is the case under the Federal Perkins Loan Program. Specifically, we believe the language "guaranteed by the United States" was added to the statute specifically to include FFELP loans authorized under Title IV, Part B of the Higher Education Act.[10] These loans are 100 percent reinsured by the U.S. Department of Education.

Paragraph 12: The Notice seeks comment on whether there are any circumstances under which a party other than the federal government obtains a pecuniary interest in a debt, such that the debt should no longer be considered to be "owed to . . . the United States." The Notice asks if the definition of "owed to" is impacted under scenarios such as "the right to repayment is transferred in whole or part to anyone other than the United States," or "a collection agency collects the funds and then remits to the federal government a percentage of the amount collected." The Notice further asks if there are specific types of debts that are covered or not covered by the phrase "debt owed to or guaranteed by the United States," such as federal student loans, Small Business Administration loans, and federally guaranteed mortgages. Finally, the Notice asks if the content of covered calls should be "limited to such debts, and that such calls not be permitted to include content concerning other debts or matters about which the caller may want to speak with the debtor," and if the Commission should place any limits on a covered caller "using or transferring (such as by sale) information (such as the debtor's location or phone number) obtained during covered calls in order to collect other debts or to address other matters."

FCC Proposal: There is no proposal for this issue.

NCHER Response: NCHER recommends that all loans authorized under the Higher Education Act of 1965, as amended, be included in the definition of a debt owed to or guaranteed by the United States. As noted in our response to Paragraph 11, we believe the language "guaranteed by the United States" was added specifically to include loans made under the FFELP.

Private collection agencies (PCAs) under contract with the U.S. Department of Education or one of its authorized guaranty agencies are retained simply to act on behalf of that creditor. While they often are compensated based on the amount collected through their efforts on behalf of the creditor, there is no assignment or other transfer of all or any rights or interests in or with respect to the debt itself, in accordance with federal law. There is no basis or justification for concluding that debts placed with a PCA have lost the status of being debts owed to or guaranteed by the United States.

NCHER recommends that the content of covered calls be limited to the debt owed to or guaranteed by the United States and should not include other content or matters unless brought up by the debtor. Further, we recommend that information obtained through a covered call should not be permitted to be sold or transferred, or used in any other way but to collect the covered debt.

[10] 20 U.S.C. 1071 et seq.

Paragraph 13: The Notice seeks comment on the person or persons to whom covered calls may be made and if the Commission should limit covered calls to the cellular telephone number the debtor provided to the creditor, e.g., on a loan application.

FCC Proposal: The phrase "solely to collect a debt" is to include only calls to the person or persons obligated to pay the debt.

NCHER Response: NCHER concurs with the proposal that the phrase "solely to collect a debt" is to include only calls intended for the person or persons obligated to pay the debt. We do not agree, however, that covered calls should be limited to the cellular telephone number the debtor provided to the creditor (e.g. on a loan application), as such a number is often no longer valid. NCHER recommends that covered calls are those made to the number the caller reasonably believes belongs to the debtor.

Paragraph 14: The Notice seeks comment on whether calls to persons the caller does not intend to reach, that is persons whom the caller might believe to be the debtor but is not, are covered by the exception. The Notice also seeks comment on its proposal that calls to a wireless number a debtor provided to a creditor, but which has been reassigned unbeknownst to the caller, are not covered calls and have a "one-call window" for the caller to learn of the reassignment, as stated in the Commission's 2015 declaratory ruling.

FCC Proposal: Calls to persons the caller does not intend to reach, that is persons whom the caller might believe to be the debtor, are excluded from the exception to encourage callers to avoid robocalling unwitting individuals who have no connection to the debtor. In addition, calls to a wireless number a debtor provided to a creditor, but which has been reassigned unbeknownst to the caller, are not covered by the exception, but have the same one-call window the Commission has found to constitute a reasonable opportunity to learn of reassignment.

NCHER Response: NCHER disagrees with the Commission's proposal to exclude from covered calls those that are made to numbers a caller reasonably believes belong to the debtor but which in fact are made to another party due to the reassignment of the number. Numbers are reassigned tens of millions of times each year.[11] The statutory focus is on the purpose of the call (i.e., making the call to collect a debt) not the result (i.e., who in fact is reached). It is counter-intuitive to believe that a loan servicer or collector has any interest in communicating with individuals who have no connection to the debtor when the purpose of the call is to collect the debt. The caller wishes to avoid making a wrong-party call as much as the wrong-party called wishes to avoid receiving it, but has no way to reliably determine whether a number has been reassigned. Covered calls should include calls to numbers the caller reasonably believes belongs to the debtor. NCHER further disagrees with the proposal that a "one-call window" to discover if a number has been reassigned constitutes a reasonable opportunity to learn of the reassignment. In a 21st century student loan servicing environment where it can take numerous call attempts to create a live contact, a one-call exemption is essentially meaningless. We recommend the Commission allow one live contact, not simply one attempt, to constitute a reasonable opportunity to learn of a reassigned number.

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[11] By one estimate, almost 37 million phone numbers are recycled each year, citing FCC data. Alyssa Abkowitz, Wrong Number? Blame Companies' Recycling, The Wall Street Journal (Dec. 1, 2011), available at http://www.wsj.com/articles/SB10001424052970204012004577070122687462582.

While understanding, without agreeing, that calls made to third parties for the purpose of seeking information to be used to make a call to the consumer (referred to by the Commission as "skip tracing") may be viewed as too attenuated to be deemed calls made to collect a debt when balancing privacy concerns (though certainly those calls are made "pursuant to the collection of the debt"), calls made for the purpose of engaging, not locating, the consumer suffer no such attenuation and should be accorded the full benefit of the exemption Congress provided in the Bipartisan Budget Act of 2015.

Furthermore, as noted above, it is clear from the Budget Act that Congress deemed the purpose of the call to be important to the existence of the exception. There are many instances, even aside from reassigned numbers, in which a call made for the purpose of collecting the debt may reach someone other than the consumer, including instances where a person other than the debtor answers his or her phone[12], where the consumer gave an incorrect number, or where the number provided was incorrectly transcribed. In each of these cases, the purpose of the call is to reach the debtor to collect the debt.

Paragraph 15: The Notice seeks comment on who may make the covered calls at issue, stating that the TCPA is not clear as to who may make calls covered by the exception. The Commission seeks comment on the existence of any limiting principles to determine who should be deemed to be acting on behalf of the creditor and whether it should interpret the statute to include other callers and, if so, who. Finally, the Commission seeks comment on whether it should interpret the statute to apply more narrowly to only the creditor or to the creditor and its agents acting within the actual scope of their authority.

FCC Proposal: Include calls made by creditors and those calling on their behalf, including their agents.

NCHER Response: NCHER agrees with the Commission's proposal that calls may be made by or on behalf of creditors. In the federal student loan context, this includes the U.S. Department of Education for loans made under the Federal Direct Loan Program and loans put or assigned to it that were made under the FFELP and the Federal Perkins Loan Program; authorized lenders and guaranty agencies for loans made under FFELP; colleges and universities participating in the Federal Perkins Loan Program; and in each case, entities or agents acting on their behalf, including third-party servicers, private collection agencies, and colleges and universities, in their roles of assisting in the collection of federal student loans to reduce student loan delinquency and default.

Paragraph 16: The Notice seeks comment on whether the Budget Act seeks to redefine the definition of "person" for purposes of enforcement of the TCPA.

FCC Proposal: There is no proposal for this issue.

NCHER Response: The Budget Act authorizes the Commission to craft regulations which "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." Despite this limited purpose and scope, the Commission invites comments on who is a "person" under the TCPA, and questions whether "the Budget Act amendments imply that the federal government is a person for TCPA purposes . . . ."

[12] Such a person is not someone who could have given consent in any event (see Soppet v. Enhanced Recovery- 7th Cir 2012) and the 2015 FCC Declaratory Ruling, which requires consent must be provided by the line subscriber to be effective.

Congress plainly defined the term "person" in the TCPA as limited to "an individual, partnership, association, joint-stock company, trust or corporation."[13] In contrast, Congress separately defined the term "United States" to mean "the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone."[14]

The definitions Congress assigned to the terms "person" and "United States" are clear and unambiguous. Beyond the fact that Congress neither requested nor suggested the Commission address this issue, as these terms have already been clearly defined within the TCPA itself, it would be inappropriate and beyond the authority of the Commission to impermissibly attempt to include the federal government within the term "person" when the statute separately defines "United States."[15]

Paragraph 17: The Notice seeks comment on the need for restrictions on covered calls, and references the high volume of consumer complaints regarding autodialed calls. In addition to seeking comments on the Commission's proposal (addressed in Paragraphs 18 and 19), the Notice seeks comment generally on what other actions the Commission should consider to reduce "unwanted debt collection robocalls to consumers."

FCC Proposal: There is no proposal for this issue.

NCHER Response: At the outset, NCHER notes that the types of complaints generally received by the Commission leading it to conclude that regulation is necessary relate to telemarketing activities, which are not relevant in the federal student loan context, and to harassment or "do not call" abuses already addressed and enforced under the Fair Debt Collection Practices Act; under unfair, deceptive, or abusive acts or practices (UDAAP) as defined by the Dodd-Frank Wall Street Reform and Consumer Protection Act; and under similar state laws. Therefore, we do not believe, at least in the context of federal student loan collections, that the severe limitations proposed by the Commission are necessary or appropriate, particularly given the very real risk of harm to the consumer if the Commission were to automatically characterize all calls to student loan borrowers as unwanted and unhelpful as it would result in the lack of ability to reach the consumer with essential information regarding their rights, responsibilities, and resolution opportunities. Nearly everyone agrees that student loan borrowers need timely and accurate information regarding the wide array of repayment and deferment options authorized under the federal student loan programs. The consumer protections built into the federal student loan programs are extensive and unique among consumer credit products. The payment of interest subsidies for low-income borrowers, a six-month grace period following graduation when no payments are due, and the ability to repay a loan based on a borrower's income – including zero dollars per month for low-income families – are just a few of the many provisions unique to the federal student loan program. But the program benefits are as confusing as they are numerous. It takes "live" communication with the borrower at many stages of the student loan life cycle to ensure that the borrower has a positive repayment experience. It serves no useful purpose, and is in fact harmful, to argue that all calls in the context of federal student loans, including debt collection calls, are harmful and unwanted.

[13] 47 U.S.C. § 153(39)
[14] 47 U.S.C. § 153(58)
[15] Decker v. Northwest Environmental Defense Center, 133 S.Ct. 1326, 1334 (2013) ("It is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they were promulgated.'")

In the January 26, 2016 Ex Parte filing with the Commission, NCHER (in conjunction with EFC and SLSA) provided specific examples about the confusing aspect of the federal financial aid system:

> *The federal student loan programs are unique among consumer credit programs because they allow students and parents to borrow large sums without showing credit-worthiness or an ability to pay. Equally unique are the many program features designed to address personal circumstances and to help distressed borrowers faced with loan collection. For example, payments on federal student loans can be deferred for borrowers who return to school, are unemployed, or are otherwise experiencing a financial hardship. Once in repayment, borrowers have a large number of options. These include fixed payments based on a 10- to 30-year repayment period, graduated payments that increase over time, and <u>six different plans that base payments on a borrower's current income</u>. Under the income-driven repayment ("IDR") plans, some borrowers will have no monthly payments, and some borrowers can have their remaining balances forgiven. Eligibility requirements differ for each plan, and federal law requires borrowers to update their financial and demographic data on an annual basis to stay enrolled in an IDR plan. Unfortunately, some borrowers fall into delinquency and default without accessing these increasingly complex options. When borrowers fall into delinquency, federal student loan servicers must be able to proactively reach out to them to make them aware of their options and to help them access the repayment plan that best suits their needs.*
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> *Multiple deferment and forbearance options are also available to distressed borrowers. Some federal student loans can also be discharged due to special circumstances such as disability, identify theft, and false certification of a loan application. Many of the borrowers who are eligible for deferment or discharge are unaware of the options available to them and successfully access these programs only if they can be reached by their loan servicer and engage in two-way conversations.*
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> *Finally, if a borrower defaults on a federal student loan, the federal loan rehabilitation program allows him or her to "rehabilitate" that loan by making nine "reasonable and affordable" monthly payments over a 10-month period.[16] Successful rehabilitation removes a loan from "default" status and erases the default status from the borrower's credit report. Individuals who rehabilitate their loans also regain all of their rights under the federal financial assistance programs, including eligibility for new loans and grants if they go back to school. Meanwhile, the payments can be as low as $5 per month.*

Further, NCHER believes the federal government should embark on a public service campaign in the student loan arena encouraging borrowers to "Take the Call." Doing so would allow borrowers to receive important information concerning their loans, better understand the borrower-friendly options and consumer protections inherent in the federal student loan programs, and more-successfully manage their debt. Put simply, a borrower who "takes the call" receives important information and also stops further calls unless requested by the borrower, two basic goals of the Commission's Notice. Such a campaign would also further the goals of President Obama's Student Aid Bill of Rights.[17]

[16] 34 C.F.R. § 682.405(b)(1)(iii).
[17] https://www.whitehouse.gov/the-press-office/2015/03/10/presidential-memorandum-student-aid-bill-rights

Paragraph 18: The Notice seeks comment on how the Commission should restrict or limit the number and duration of covered calls, including both collection calls and debt servicing calls. The Notice states the Commission believes three calls per month "provides an adequate opportunity to convey necessary information about the debt, repayment, and other matters the caller wishes to communicate without the consent of the called party and, in any case, affords callers an opportunity to obtain the debtor's consent to make additional calls beyond any limit we adopt." The Notice states the Commission sees "potential value, however, in debtors hearing from a live agent to discuss the debt and potential servicing options and seeks comment on whether and how we should encourage that approach." The Notice also seeks comment on the maximum duration of a voice call, and whether the Commission should adopt different duration limits for prerecorded- or artificial-voice calls than for autodialed calls with a live caller. The Notice also seeks comment on if there should be a limit on the length of text messages and what that limit should be. Finally, the Notice seeks comment on how to count debt servicing calls for purposes of the proposed three-call limit per month or any other limit on the number of calls.

FCC Proposal: Restrict the number of covered calls to three per month, per delinquency only after delinquency, regardless of whether the caller leaves a prerecorded or artificial-voice message or whether the call is an autodialed call resulting in a live conversation. The limit on the number of calls should be for any initiated calls, even if unanswered by a person.

NCHER Response: While believing such restrictions are not necessary in light of the above, NCHER supports reasonable restrictions on the number of covered calls. However, we strongly disagree with the proposal to limit covered calls to three attempts per month per delinquency, and only after the loan is delinquent. It is widely known that individuals within the age groups of typical student loan borrowers are quickly abandoning traditional telephone landlines and moving exclusively to cellular telephones. According to a recent study from the Centers of Disease Control and Prevention, nearly one-half of American homes (47.4 percent) had only wireless telephones during the first half of 2015, an increase of 3.4 percentage points since the first half of 2014. The percentage is even higher for those age brackets more likely to have student loans - more than two-thirds of adults aged 25–29 (71.3 percent) and aged 30-34 (67.8 percent) live in households with only wireless telephones.[18]

It is also widely known that live contact with student loan borrowers leads to positive resolutions, a fact seemingly acknowledged by the Commission. The U.S. Department of Education stated in a recent report that, "If servicers are able to contact a borrower, they have a much better chance at helping that borrower resolve a delinquency or default. Many student loan borrowers, especially those that may just be graduating, move frequently in addition to no longer having landline phone numbers. As such, it can be difficult for servicers to find a borrower except by using a cell phone number."[19]

A limitation on the number of attempts to contact, without reference to whether or not actual contact is made, would, at least in the student loan context, effectively nullify the exception granted by the Budget Act. In the federal student loan space, limiting covered calls to three attempts per month will result in countless unnecessary delinquencies and defaults and significant consumer harm.

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[18] U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics - Released 12/2015

[19] "Strengthening the Student Loan System to Better Protect All Borrowers," U.S. Department of Education, October 1, 2015, p.16.

Instructive to this point, and compelling, is the experience of Navient, one of the nation's largest student loan servicers and a Direct Loan servicer under contract with the U.S. Department of Education. In a recent Ex Parte to the Commission, Navient wrote:

> *80 percent of Navient's first live contacts with delinquent borrowers only occurred after six or more call attempts (i.e., it reached only 20 percent of the delinquent borrowers with fewer than six call attempts), and more than half of its live contacts with borrowers required more than 15 call attempts (i.e., it reached less than half of the borrowers with fewer than 15 call attempts). For 25 percent of the delinquent borrowers with whom Navient had a live contact, it took 40 or more call attempts to reach the live contact.*[20]

The takeaway is clear: call attempts lead to live contacts, and live contacts lead to successful resolutions. Unfortunately, far too many borrowers fail to have any meaningful contact with their student loan servicer, and the Commission's proposed rule will not facilitate such contact, as was intended by the Congress when it passed the Bipartisan Budget Act of 2015. Industry experience shows that the majority of student loan defaulters never make their first payment or have a single conversation with their servicer.

NCHER commends the Commission for seeing "potential value in debtors hearing from a live agent to discuss the debt and potential servicing options." As noted above, live communication is the key to helping borrowers understand their rights. We believe that a three call attempt per month restriction would, in most cases, foreclose meaningful borrower contact. The unique nature of federal student loans, including multiple repayment plans that help distressed borrowers manage their debts and a generous rehabilitation program that removes loans from default, justifies a set of rules specifically for this industry.

For all these reasons, NCHER proposes the following for federal student loans:

1) Regardless of whether a successful contact has been made, call attempts may not exceed nine in any consecutive seven-day period;
2) No further call attempts are allowed in the same week once a successful contact is made, which is defined as a live conversation with the borrower;
3) No more than three call attempts per day are permitted without consent of the person that owns the phone number called;
4) No more than one voice message may be delivered to the person called in any consecutive seven-day period;
5) No more than one text message may be sent to the person called in any consecutive seven-day period;
6) All contact attempts must be made between the hours of 8:00 a.m. and 9:00 p.m. in the time zone of the individual being called; and
7) Nothing in the rule limits or prohibits calls or texts requested or agreed upon by the consumer.

NCHER does not necessarily oppose a limit on the length of automated voice or text messages, as long as any rule regarding such messages permits the sender to comply with any required disclosures for

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[20] Letter from Mark Brennan, Counsel to Navient, to Marlene H. Dortch, FCC, CC Docket No. 02-278, at 2-3 (filed Mar. 11, 2016) (*Navient Mar. 11 Letter*).

debt collection attempts[21] and gives sufficient remaining space for meaningful content from servicers, and proposes the following regarding the duration of covered calls for federal student loans:

1) Voice or prerecorded messages cannot exceed 60 seconds;
2) Such calls resulting in live conversation regarding the servicing or collection of federal student loan debt are not limited in duration as this would curtail the ability to properly explain the various unique and often complex options available to resolve federal student loan delinquency and default, and to gather the factual information needed to help the consumer reach the option best suited for his or her individual circumstance; and
3) Nothing in this rule would preclude the called party from unilaterally ending the telephone contact.

We also note that the National Consumer Law Center (NCLC), in an Ex Parte letter dated June 6, 2015 [sic] and posted on the Commission's Electronic Comment Filing System on June 12, 2014, recommended that:

> *The FCC should limit collection calls to three calls per week, voicemail messages to one per week, and call-backs to once per week unless the consumer gives specific consent at the time of the call."*[22]

This recommendation by a leading consumer advocacy group, of course, is significantly more permissive than the Commission's proposal. We also note that this recommendation was written to apply across industry sectors. While NCHER recommends more contact attempts be allowed to better serve student loan borrowers (as detailed above), we believe the Commission's final rule certainly should be no more restrictive than that laid out in the NCLC recommendation in its 2014 Ex Parte letter to the Commission.

Paragraph 19: The Notice seeks comment on whether the Commission should look to other standards or precedents for guidance, such as restricting calls to the hours of 8:00 a.m. to 9:00 p.m. (local time at the called party's location), similar to the rule that now applies to telemarketing calls. The Notice asks if the Commission should consider any limits on the number of calls pursuant to the Fair Debt Collection Practices Act, how the Commission should take account of any limits adopted by the Consumer Financial Protection Bureau, and if there are other standards or precedents, including restrictions that might exist under either federal or state debt collection laws, the Commission should consider. The Notice also seeks comments regarding whether calls covered by the Budget Act exception should be subject to other laws and rules that more generally govern debt collection and, if so, how the Commission should harmonize any overlapping requirements.

FCC Proposal: There is no proposal for this issue.

NCHER Response: NCHER concurs with restricting calls to the hours of 8:00 a.m. and 9:00 p.m. in the time zone of the individual being called, based on the best information available as to the debtor's location. The Commission should work with the Consumer Financial Protection Bureau (CFPB), the U.S. Department of Education, and other federal agencies to harmonize overlapping rules and requirements

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[21] Foti v. NCO Financial Systems, Inc., 424 F.Supp.2d 643, 653 (S.D.N.Y. 2006) (citing 15 U.S.C. §1692g).

[22] June 6, 2015 [sic] Notice of Ex Parte Presentation signed by Margot Saunders, Keith Keogh and Ellen Taverna, posted June 12, 2014, p.12.

to the extent possible, including rules the CFPB may draft when regulating the Fair Debt Collection Practices Act and due diligence requirements and performance metrics that the U.S. Department of Education may include in its servicing and collection contracts such that its contractors conduct regular communication with borrowers in the repayment of their federal student loans or in the collection of defaulted debt.

In addition, if the Department of Education requires its servicers and collectors to assist in conducting experiments or pilots to text borrowers in regard to improving borrower communication for loan repayment, these messages should not count toward the limitation on the frequency of calls. We also believe that any rules developed by the Commission in this rulemaking on calling times should preempt any competing state or local government laws or regulations.

Paragraph 20: The Notice seeks comment on the Commission's proposal that consumers should have a right to stop such calls at any point the consumer wishes. The Notice also seeks comment on if the amended law allows the Commission to require that a caller limit covered calls to the first of (1) a specific number (perhaps within a set period of time) or (2) until the consumer says "stop." The Notice also seeks comment on the Commission's proposal that stop-calling requests should apply to a subsequent collector of the same debt. Finally, the Notice seeks comment if the Commission should require that callers making covered calls record any request to stop calling and provide a record of such a request to subsequent callers along with other information about the debt.

FCC Proposal: Consumers should have a right to stop covered calls at any point the consumer wishes, and that stop-calling requests should apply to a subsequent collector of the same debt.

NCHER Response: As addressed elsewhere in our response, NCHER believes it makes sense to hold callers to a reasonable limit on the number of call attempts over a set period of time, even without a specific request from the called party to cease communication. We see this as being a general rule, rather than being specific to an individual debtor. Within that limit, and with respect to calls in progress, consumers always have the option to end a call by disconnecting. We would hope, of course, that this be done in a manner that provides for the scheduling of future calls.

Giving the consumer the ability to revoke the statutory authority to make a covered call without consent contravenes the exception by effectively re-imposing a consent requirement, especially if that revocation applies to subsequent callers. More importantly, such an "opt-out" provision essentially ensures that distressed borrowers will not receive timely and important information that can help them avoid delinquency or get out of default. Further, the Fair Debt Collection Practices Act, as well as UDAAP considerations and similar state laws, already prohibit continued calls after a consumer request calls stop.

If the Commission concludes, nonetheless, that a "stop calling" request is required, and because of the opportunity for the consumer to benefit from communications concerning their federal student loans, we believe any request should be time limited - perhaps to one month in duration - but be renewable.

Paragraph 21: The Notice seeks comment on the proposal that requires callers to inform debtors of their right to make a request to stop calls, including when and how callers should provide such notice. The Notice also seeks comments on ways to opt out of further calls under the TCPA - i.e., any reasonable method, including orally or in response to a text message, and if the Commission should require callers making artificial- or prerecorded- voice calls to include an automated, interactive voice- and/or key press-activated opt-out mechanism for stopping future excepted calls.

FCC Proposal: Require callers to inform debtors of their right to stop calls.

NCHER Response: As explained above, NCHER does not believe the consumer should be given the right to revoke application of the statutory exception granted by Congress and, therefore, there should not be a notification as to that "right." However, if the Commission elects to provide consumers with such a declaration, we suggest that callers establish a uniform procedure for debtors to stop future collection calls covered by the rule, such as through an 800 number or an email address, and that consumers be required to use that method to register an opt-out request. We also agree that the final rule could require that callers making artificial- or prerecorded- voice calls include an automated way for consumers to request that future excepted calls be stopped (subject to any time limit on such requests).

To the extent that notifications must be provided in text messages, the same size limitations as raised above should be considered.

Paragraphs 22 and 23: The Notice confirms that under current rules, artificial- or prerecorded-voice calls to residential lines that are made for the purpose of collecting a debt are currently not subject to the prior express consent requirement and that the Commission has also found that debt collection calls do not constitute telemarketing. Accordingly, the consent exception under the Budget Act currently does not affect whether artificial- or prerecorded-voice calls to residential lines for the purpose of collecting a covered debt require prior express consent. The Notice nonetheless proposes to revise the Commission rule concerning artificial- or prerecorded-voice calls to residential lines to reflect the exception contained in the Budget Act, but at the present time does not believe it is necessary "to determine the exact contours of the statutory exception for covered calls to residential lines, including, for example, determining the specific impact of the somewhat different language in the Budget Act amendments with regard to covered calls to residential lines and to wireless numbers." The Notice seeks comment on whether the Commission should consider any additional issues concerning covered calls e.g. should any limits on the number and duration of covered calls also apply to covered calls to residential lines, even though such calls would not have required prior express consent even before the Budget Act amendments to the TCPA?

FCC Proposal: Revise the rule concerning artificial- or prerecorded-voice calls to residential lines to reflect the exception contained in the Budget Act.

NCHER Response: NCHER concurs that the consent exception under the Bipartisan Budget Act of 2015 does not affect whether artificial- or prerecorded-voice calls to residential lines for the purpose of collecting a covered debt require prior express consent. The Commission has already concluded that debt collection calls do not adversely affect privacy rights and do not transmit unsolicited advertisements and, as such, are exempt from TCPA prohibitions with respect to landlines[23]. As noted above, there is no record that these calls adversely affect privacy rights.

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[23] See 47 USC 227(b)(2)(B)(ii); 47 CFR 64.1200(a)(20(iii); Report and Order (Rules and Regulations Implementing the TCPA of 1991) 7 FCC Rcd 8752 (1992) FCC 92-443) par 39; Mem Opinion and Order 8.7.95 Docket 92-90 at par 17.

The Budget Act was passed by Congress, with support from the Obama Administration, to facilitate better communication with those with debt owed to or guaranteed by the United States. It should not be used as authorization to limit legitimate calls that currently can be made under the law, including debt that has no connection to the collection of debt owed to or guaranteed by the United States.

Paragraph 28: The Notice seeks comment on the proposal that covered calls must be in compliance with all other legal requirements—for example, the requirement that artificial- or prerecorded-voice calls contain certain identifying information—in order for the Budget Act consent exception to apply, and whether and how compliance with other legal requirements should affect the application of the Budget Act exception.

FCC Proposal: Covered calls must be in compliance with all other legal requirements—for example, the requirement that artificial- or prerecorded-voice calls contain certain identifying information—in order for the Budget Act consent exception to apply.

NCHER Response: NCHER recognizes that, in addition to the TCPA, there are a number of federal and state laws and regulations that impact the servicing and collection of federal student loans. Like the TCPA, each has its own enforcement mechanism. The TCPA specifically provides that it does not preempt any state law that imposes more restrictive intrastate requirements on, or which prohibits, the use of automatic telephone dialing systems or the use of artificial- or prerecorded-voice messages. We would expect those agencies with enforcement authority (and programmatic expertise) would do their job. Compliance with these other requirements should not affect the application of the Budget Act exception.

As to other Commission requirements, we note that 47 USC 227(d)(3)(a) and implementing regulations at 47 CFR 64.1200(b)(1) require identification of the entity placing artificial- or prerecorded-voice messages. However, the Commission interprets these rules to provide that, so long as the call is made for the purposes of debt collection, identification of the registered name of the entity responsible for the call is not required if doing so conflicts with federal or state laws, such as the Fair Debt Collection Practices Act.[24] NCHER does not believe there is any basis for a change in this interpretation.

[24] See FCC Second Order on Reconsideration February 18 2005 FCC docket 02-278 at par 37.