Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	))	CG Docket No. 02-278

RESPONSE COMMENTS OF THE NATIONAL COUNCIL OF HIGHER EDUCATION RESOURCES TO THE PETITION FOR RECONSIDERATION FILED BY GREAT LAKES HIGHER EDUCATION CORP., NAVIENT CORP., NELNET SERVICING LLC, PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, AND THE STUDENT LOAN SERVICING ALLIANCE

I. Introduction

The National Council of Higher Education Resources ("NCHER") is responding to the notice published in the *Federal Register* on January 17, 2017, asking for responses to a petition for reconsideration, filed by representatives of Great Lakes Higher Education Corporation, Navient Corp., Nelnet Servicing LLC, Pennsylvania Higher Education Assistance Agency and the Student Loan Servicing Alliance (collectively, the "Petitioners"), of the Federal Communications Commission's (the "Commission") Report and Order released on August 11, 2016 (the "Order"). NCHER is a national, nonprofit trade association representing 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 (the "Department") to service and recover outstanding loans made under the William D. Ford Federal Direct Loan Program and organizations that service and recover outstanding loans made under the Federal Family Education Loan Program ("FFELP").

The Order purports to implement the authority granted to the Commission by Section 301 of the Bipartisan Budget Act of 2015 (the "Budget Act Amendment"). The Budget Act Amendment exempts from the Telephone Consumer Protection Act's ("TCPA") prior consent requirement those calls made to a telephone number assigned to a cellular telephone service "solely to collect a debt owed to or guaranteed by the United States."[1] Our comments focus on the impact that the Order will have on student and parent borrowers and their families, and the collection of education loans owed to or guaranteed by the United States.

While the Budget Act Amendment grants to the Commission discretionary authority to prescribe regulations to restrict or limit the number and duration of such calls, the three-call attempt-per-thirty-day limit in the Order is arbitrary and so restrictive that it completely thwarts the intent of Congress. Further, the one-call attempt limit to reassigned numbers where the caller

[1] Section 301 of Public Law 114-74 amending Section 227(b)(2) of the Communications Act.

has no knowledge that the number has been reassigned, renders the Budget Act Amendment meaningless. Finally, the Order goes well beyond restricting or limiting the number and duration of calls and, thus, is impermissibly broad. For all these reasons, NCHER strongly supports the Petitioners request for reconsideration. We emphasize that the reconsideration request should cover those calls made to service federal student loans before default and calls made to collect federal student loans after a default occurs. Our comments demonstrate that the arbitrary limits contained in the Order will be harmful to millions of federal student loan borrowers who want and need timely and accurate information to better manage their student loan debt so they can avoid delinquency and default, and to rehabilitate loans that have defaulted.

II. The Legislative History of the Budget Act Amendment Is Important

It is important to keep in mind the statutory and regulatory context governing calling consumers on their cell phones. The TCPA makes it unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice … to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call."[2] The Commission, on July 10, 2015, issued a Declaratory Rule and Order that tightened this restriction by addressing various issues that had arisen over time. Among other things, the order included an expansive interpretation of what constitutes an "automatic telephone dialing system." In response to this rule and to lawsuits exposing student loan servicers and collectors to significant liability for trying to help struggling student loan borrowers, the Congress passed the Budget Act Amendment. The federal government through the Office of Management and Budget was the principal advocate behind the Budget Act Amendment and the proposal had been included in the four previous presidential budgets prior to its passage. The President's Budget for Fiscal Year 2016 states that,

> *"The Budget proposes to clarify that the use of automatic dialing systems and prerecorded voice messages is allowed when contacting wireless phones in the collection of debt owed to or granted by the United States. In this time of fiscal constraint, the Administration believes that the Federal Government should ensure that all debt owed to the United States is collected as quickly and efficiently as possible and this provision could result in millions of defaulted debt being collected."*[3]

Based on discussions that NCHER had with representatives of the Office of Management and Budget, the recommendation was made specifically with the intent of enhancing the effectiveness of the servicing and collection of federal student loans.

III. There is Consensus that More Effective Servicing and Collection of Student Loans Is Needed

Concerns around college affordability and student loan debt have risen over the last several years. On an almost daily basis, major media outlets discuss the burden that former

[2] 47 U.S.C. § 227(b)(1)(A).
[3] *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2016*, p. 128.

student and parent borrowers encounter in repaying their student loans and how it is affecting life decisions such as starting a family, buying a home, and saving for retirement. According to the Department, as of September 2016, 19.4 percent of Direct Loan borrowers in active repayment status were delinquent by 31 days or more.[4] Also, 11.3 percent of Direct Loan borrowers who entered repayment in FY 2013 had defaulted on their student loans by the end of September 2015.[5]

While the federal student loan program is unique among consumer credit programs in that it allows students and parents to borrow large sums of money without showing credit-worthiness or an ability to pay, equally unique are the many program features designed to address personal circumstances and 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. They can make fixed payments based on a 10- to 30-year repayment period, graduated payments that increase over time, or payments based on a borrower's current income. While eligibility requirements differ for each income-driven repayment ("IDR") plan, a borrower's monthly payment can be as low as zero and the borrowers can have their balances that remain after a period (that varies from 10 to 25 years) forgiven. Unfortunately, many borrowers fall into delinquency and default without accessing these 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.[6]

Importantly, if a borrower defaults on a federal student loan, the Department's federal loan rehabilitation program allows him or her to "rehabilitate" that loan by making nine voluntary "reasonable and affordable" monthly payments over a 10-month period, where payments can be as low as $5 per month. Successful rehabilitation removes a loan from default status and erases the record of default 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. Student loan collectors and guaranty agencies must be able to reach and talk to struggling borrowers about the importance of the loan rehabilitation program as an effective tool to help get them back into good standing.

IV. Live Communication with the Borrower Is Needed

Many of the student and parent borrowers who are eligible for federal repayment plans are unaware of the options available to them under the law and successfully access these programs only if they can be reached by their loan servicer and engage in two-way conversations. This is where live communication is critical. The record for this proceeding reveals that individuals within the age groups of typical student loan borrowers are quickly abandoning traditional telephone landlines and moving exclusively to cellular telephones.

[4] https://studentaid.ed.gov/sa/about/data-center/student/portfolio.
[5] https://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html.
[6] Memorandum on Policy Direction on Federal Student Loan Servicing from Ted Mitchell, Under Secretary of Education, p. 14 (Rel. July 20, 2016).

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.[7] In its Notice of Proposed Rulemaking ("NPRM") carrying out the requirements in the Budget Act Amendment, the Commission stated that it sees "potential value … 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."[8] This was recently confirmed by a study conducted by one of NCHER's guaranty agency members who surveyed the results of its calls made to cure delinquencies. The preliminary results reveal that there were 31 percent more cures when the agency was able to contact, and establish live contact with, the borrower. Looking at it the other way, defaults were 60 percent higher when the agency was not able to contact the borrower.

The record for this proceeding also demonstrates that it frequently takes a number of call attempts to reach and have a live communication with a borrower. By preventing servicers and collectors from attempting to call a borrower more than three times within any 30-day period, the Order makes it extremely difficult to have a live conversation with a borrower. All parties involved in student loan servicing and collection pointed out this fact in their comments on the NPRM. Significantly, the Department went on record as saying that "to limit the number of covered calls to three per month per delinquency and only after delinquency has occurred, would not afford borrowers sufficient opportunity to be presented with options to establish more reasonable repayment amounts and avoid default, especially given that the proposal [in the Proposed Rule] limits the number of initiated calls, even if the calls go unanswered."[9] 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."*[10]

This recommendation by a leading consumer advocacy group, of course, is significantly more permissive than the Order.

For these reasons, NCHER supports the Petitioners' request concerning the Order's limit on the frequency of calls to collect federally-owned or -guaranteed debt, particularly federal student loans.

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[7] U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, (Rel. December 2015).

[8] Notice of Proposed Rulemaking on Implementing the Telephone Consumer Protection Act, p. 8. (Rel. May 6, 2016).

[9] Letter from Ted Mitchell, Undersecretary of Education to the Commission (Rel. July 11, 2016).

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

V. The Order Makes It More Difficult to Communicate with Direct Loan Borrowers

The Order makes it more difficult to communicate with student loan borrowers whose loans are owned by the federal government than would otherwise be the case. This fact is wholly inconsistent with what Congress intended when it passed the Budget Act Amendment. Today, 81 percent of all federal student loans are owned by the federal government.[11] These loans are mostly loans made under the William D. Ford Direct Loan Program administered by the Department and FFELP loans that were acquired by the Department, including FFELP loans acquired during the 2008-2009 economic crisis. In early 2016, the U.S. Supreme Court held that the United States and its agencies are not subject to the TCPA's prohibitions.[12] The Commission followed this decision by ruling in July 2016 that federal contractors authorized to act as the federal government's agent and acting within the scope of their contractual relationship with the federal government are not "persons" under the TCPA and thus are not covered by the statute's prohibitions.[13] This ruling is commonly referred to as the "Broadnet Ruling." Under the Supreme Court decision and the Broadnet Ruling, the Department's contractors, like all other federal government contractors, thought their activities were not subject to the TCPA's restrictions. However, due to the Order, these contractors are subject to TCPA restrictions that adversely impact their ability to perform their contractual obligations.

VI. The Order's Restrictions on Calls to Reassigned Numbers Renders the Budget Act Meaningless

We disagree with the part of the Order that permits only one call attempt to a reassigned number where the caller reasonably believes the number belongs to the debtor, but which in fact is made to another party due to the reassignment of the number. Over 100,000 numbers are recycled daily.[14] The exemption in the Budget Act Amendment focuses 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 desires to avoid making a wrong-party call as much as the wrong-party called desires to avoid receiving it, but has no way to reliably determine whether a number has been reassigned. Covered calls should include calls to numbers that the caller reasonably believes belongs to the debtor. We further disagree with the Commission's position 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. In fact, a "one-call window" would nullify any benefit from the Budget Act Amendment. Due to the frequency of number reassignments, callers need to assume that a number may be a reassigned number and, thus, to be safe, can assume they can only make one call attempt. We

[11] https://studentaid.ed.gov/sa/about/data-center/student/portfolio.
[12] Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 666, 672 (2016).
[13] In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Declaratory Ruling by Broadnet Teleservices LLC, National Employment Network Association, RTI International, Declaratory Ruling, FCC 16-72, CG Docket No. 02-278 (Rel. July 5, 2016).
[14] Order, p. 57 (O'Rielly Dissent).

recommend the Commission allow one live contact, not simply one attempt, to constitute a reasonable opportunity to learn of a reassigned number.

VII. Order Is Broader than the Budget Act Exemption

The Budget Act Amendment authorizes the Commission to issue regulations that "may restrict or limit the number and duration of calls made to a cellular telephone service to collect a debt owed to or guaranteed by the United States."[15] The Order, however, covers a number of topics that are outside of this grant of regulatory authority. It limits who may be called when collecting a debt owed to or guaranteed by the federal government, provides an opt-out for consumers, and requires those collecting the debt to notify the called party of the right to opt out. The Order should be reconsidered because these provisions lie outside the authority to craft rules granted to the Commission by Congress.

VIII. NCHER Requests that the Order Make Clear that FFELP Loans Are Covered by the Relief Granted by the Budget Act Amendment

The federal government through the Department operates two principal federal student loan programs, the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan Program. While no new FFELP loans have been made since July 1, 2010, there is still more than $238 billion in FFELP loans held by private lenders and guaranty agencies. By including the term "guaranteed by the United States" in the Budget Act Amendment, Congress explicitly intended for calls made to borrowers with FFELP loans to be covered by the exemption. The Federal Family Education Loan Program, formerly called the "Guaranteed Student Loan Program," includes a guaranty that is 100 percent backed by the Department. However, because parties that are servicing and collecting on FFELP loans do not directly contract with the United States, some have asked whether the Budget Act Amendment applies to these loans. In conversations with the Office of Management and Budget about this particular topic, top officials stated that it was their intention that FFELP loans were to be covered and that this is precisely why the language included in the President's budget was modified to that which was included in the Bipartisan Budget Agreement. However, the question remains, given footnote 54 to the Order. This ambiguity should be corrected.

IX. NCHER Requests that the Reconsideration Cover Default Collections As Well As Servicing

The Petition suggests that the Commission consider modifying the Order for student loan servicers. While we support this request, NCHER requests that any modification of the Order also cover calls to collect defaulted loans owed to or guaranteed by the federal government. As pointed out above, organizations collecting defaulted student loans have tools to help struggling borrowers. A successful federal loan rehabilitation, for example, would result in removal of the default from the borrower's credit record, and allow the borrower to qualify for additional federal student aid. The total monthly payments from the borrower can be as low as $45 over a nine-month rehabilitation period. As is the case with loan servicing, it is critical to have live communication with the borrower to make him or her aware of the federal loan rehabilitation

[15] Section 301(a)(2) of Public Law 114-74 amending Section 227(b)(2) of the Communications Act.

program, assist him or her in processing the paperwork necessary to enroll in the program, and holding intensive follow-up sessions to ensure that he or she is properly managing their student loan debt over the 10-month period.

X. Conclusion

The Petitioners have made a compelling case for reconsideration of the Order. Reconsideration is necessary to fulfill Congress' directive to enable additional outreach to struggling student loan borrowers and the efficient collection of federal debts. The three-call attempt-per-thirty-day limit in the Order is arbitrary and is so restrictive that it completely thwarts the intent of Congress, and the one-call attempt limit to reassigned numbers where the caller has no knowledge that the number has been reassigned renders the Budget Act Amendment meaningless. We have previously argued 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 federal loan rehabilitation program that allows defaulted borrowers to remove their loans from default, justifies a set of rules specifically for this industry. The Petitioners, who are servicers of federal student loans or their representatives, suggest that the Commission might consider modifying the Order for federal student loan servicers. We request that any modification to adopt a separate set of rules should also apply to calls to collect defaulted federal student loans.

For the reasons set forth above, NCHER believes the reconsideration request is in the public interest and supports the Petitioner's request.

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