

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

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	
	)	
Petition for Reconsideration of Great Lakes	)	CG Docket No. 02-278
Higher Education Corp.; Navient Corp.;	)	
Nelnet, Inc.; the Pennsylvania Higher	)	
Education Assistance Agency; and the	)	
Student Loan Servicing Alliance	)	

**COMMENTS OF THE AMERICAN BANKERS ASSOCIATION AND  
CONSUMER BANKERS ASSOCIATION**

The American Bankers Association<sup>1</sup> and the Consumer Bankers Association<sup>2</sup> (the Associations) write in support of the petition for reconsideration of the Federal Communications Commission’s (Commission) August 11, 2016, Report and Order (Order)<sup>3</sup> filed by Great Lakes Higher Education Corp.; Navient Corp.; Nelnet, Inc.; the Pennsylvania Higher Education Assistance Agency; and the Student Loan Servicing Alliance (collectively, Petitioners). The Order implemented Section 301 of the Bipartisan Budget Act of 2015 (Budget Act or the Act), which exempts autodialed and prerecorded calls “made solely to collect a debt owed to or

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<sup>1</sup> The American Bankers Association is the voice of the nation’s \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

<sup>2</sup> Founded in 1919, the Consumer Bankers Association (CBA) is the trade association for today's leaders in retail banking - banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA’s mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

<sup>3</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order, 31 FCC Rcd 9074 (2016) (Order).*

guaranteed by the United States” from the Telephone Consumer Protection Act’s<sup>4</sup> (TCPA) prior express consent requirement (Exemption).<sup>5</sup>

The Exemption reflects Congress’s goal to help taxpayers recoup the \$139.3 billion of delinquent debt owed to or guaranteed by the United States.<sup>6</sup> The record developed during the rulemaking also demonstrates that borrowers trying to manage their finances responsibly are served best if they are able to have good communications with their lender. These communications may help the borrower avoid missed payments and fees, minimize negative impacts to a borrower’s credit report, take advantage of loan modification or other workout programs, and avoid default. Since the TCPA’s outdated restrictions on these communications apply to calls made to wireless phones, borrowers who are increasingly relying on mobile devices as the primary means by which they communicate with their financial services providers are put at a major disadvantage.<sup>7</sup>

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<sup>4</sup> Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq.

<sup>5</sup> Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 588.

<sup>6</sup> See U.S. DEPT. OF THE TREASURY, FISCAL YEAR 2014 REPORT TO THE CONGRESS ON UNITED STATES GOVERNMENT RECEIVABLES AND DEBT COLLECTION ACTIVITIES OF FEDERAL AGENCIES 1 (May 2015), *available at* <https://fiscal.treasury.gov/fsservices/gov/debtColl/pdf/reports/debt14.pdf>.

<sup>7</sup> Nearly 50% of U.S. households are now “wireless-only,” with that percentage rising to over 70% for adults between 25 and 29. STEPHEN J. BLUMBERG & JULIAN V. LUKE, U.S. DEPT. OF HEALTH & HUMAN SERVICES, CTR. FOR DISEASE CONTROL & PREVENTION, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY (2015), *available at* <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf> (Tables 1 & 2). Recently, the Federal Deposit Insurance Corporation found that customers with limited involvement with their bank *prefer* text messages to e-mails when receiving alerts from financial institutions because texts are faster, easier to receive, attention grabbing, and quicker and easier to digest. FED. DEPOSIT INS. CORP., QUALITATIVE RESEARCH ON MOBILE FINANCIAL SERVICES FOR UNDERSERVED CONSUMERS 21 (Oct. 30, 2015), *available at* <https://www.fdic.gov/about/comein/2015/come-in-2015.pdf>. The Bureau of Consumer Financial Protection has also concluded that alerts to cell phones help consumers, including low income consumers, access financial services and manage personal finances. BUREAU OF CONSUMER FIN. PROT., MOBILE FINANCIAL SERVICES: A SUMMARY OF COMMENTS FROM THE PUBLIC ON OPPORTUNITIES, CHALLENGES, AND RISKS FOR THE UNDERSERVED 10 (Nov. 2015), *available at* [http://files.consumerfinance.gov/f/201511\\_cfpb\\_mobile-financial-services.pdf](http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf).

We agree with Petitioners that, in the Order, the Commission committed material error by replacing Congress’ policy determinations with its own, rendering conclusions unsupported by the plain language of the statute and the record in the proceeding, and adopting rules outside the scope of its rulemaking authority. In addition, the Commission’s rules are inconsistent with legal mandates from other Federal agencies that are designed to facilitate loss mitigation and assistance to delinquent borrowers. The Commission also declined to clarify that the Exemption applies to loans owed to or guaranteed by Fannie Mae and Freddie Mac (the Enterprises)—entities that were chartered by Congress and over which the Federal government has ultimate control—or loans reinsured by the Federal government.

For these reasons, the Commission erred and should reconsider the Order. We urge the Commission to issue a new order that authorizes the full range of communication strategies that the Federal government itself would undertake to service and collect its debts. The order also should be in harmony with the servicing rules of other Federal agencies that *require* financial institutions to contact distressed borrowers to provide assistance.

#### **I. Congress Did Not Contemplate the Limitations in the Order**

We agree with Petitioners that the Commission has imposed limitations on the Exemption that contravene both the text and spirit of the Budget Act. Congress gave the Commission the authority only to “restrict or limit the *number* and *duration* of calls” made to a wireless number to collect on a debt owed to or guaranteed by the United States.<sup>8</sup> Despite these clear parameters, the Commission has imposed limitations that go far beyond these restrictions, including excluding calls to reassigned numbers and to persons other than the borrower, limiting the Exemption largely to post-delinquency calls, and limiting the number of call attempts regardless

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<sup>8</sup> Bipartisan Budget Act of 2015 § 301(a)(2)(C) (emphasis added).

of whether live contact was achieved. On these bases alone, the Order is arbitrary, capricious, and an abuse of discretion.

These restrictions also contravene the intent of Congress. In enacting the Exemption, Congress and the Administration sought to “ensure that all debt owed to the United States is collected as quickly and efficiently as possible . . . .”<sup>9</sup> The restrictions imposed on exempted calls contravene this intent because they make collection of this debt more difficult and less efficient. As discussed more fully below, calls to a person other than the borrower made in an effort to contact the borrower and calls to reassigned or wrong numbers are *precisely* the kind of calls for which the caller needs an exemption in order to assist consumers and collect Federal debt efficiently.

A. The Commission Erred in Limiting the Exemption to Calls Made to the Borrower

The Budget Act did not limit the Exemption to calls made to the borrower, nor did the Act authorize the Commission to impose such a restriction. A limitation on *whom* may be called does not concern the number or duration of exempted calls. As such, the Commission exceeded its statutory authority by exempting only calls made to the borrower or other person legally responsible for the debt.<sup>10</sup>

Moreover, this limitation contravenes the clear intent of Congress to facilitate repayment of debt owed to or guaranteed by the United States as “efficiently as possible.”<sup>11</sup> Clearly, calls to an individual who can help the lender or servicer locate the borrower will expedite repayment; thus they are calls made “solely to collect a debt” under the Budget Act. The Commission’s exclusion of these calls from the Exemption is not a plausible reading of the Budget Act.

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<sup>9</sup> OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2016: ANALYTICAL PERSPECTIVES OF THE U.S. GOVERNMENT 128 (2015) (hereinafter, OMB FY 2016 Analytical Perspectives).

<sup>10</sup> *Order* ¶ 21.

<sup>11</sup> OMB FY 2016 Analytical Perspectives, *supra* note 9, at 128.

## B. The Commission Erred by Excluding Calls Made to Reassigned Numbers

The Commission erred by excluding from the Exemption calls made to a “reassigned number,” or a number that belonged to a borrower but has been subsequently reassigned to another consumer unbeknownst to the caller.<sup>12</sup> Again, this limitation is not a restriction concerning the number or duration of exempted calls and, consequently, it is not permissible under the Act.

Moreover, the limitation is harmful to borrowers, as lenders will be discouraged from making exempted calls to help borrowers avoid delinquency and default, because these calls, if made unknowingly to reassigned numbers, may subject the lender to liability. Upon its reconsideration of the Order, the Commission should remove this limitation. With best practices and strict compliance procedures, lenders cannot completely avoid calling reassigned wireless telephone numbers. Telephone companies recycle as many as 37 million telephone numbers each year,<sup>13</sup> and there is no public wireless telephone directory to identify reassigned numbers.

The Commission is unpersuasive in asserting that the Order merely follows its treatment of reassigned numbers from the Declaratory Ruling and Order issued in July 2015.<sup>14</sup> Here, the Commission was tasked with implementing regulations regarding an Exemption enacted specifically to *permit* certain calls to be made without obtaining the called party’s consent. The Commission should not have construed the Exemption to impede a lender’s ability to make calls and undermine Congress’ goal of *facilitating* the collection of Federal debts.

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<sup>12</sup> Order ¶ 25.

<sup>13</sup> Alyssa Abkowitz, *Wrong Number? Blame Companies’ Recycling*, Wall Street J. (Dec. 1, 2011), available at <https://www.wsj.com/articles/SB10001424052970204012004577070122687462582>.

<sup>14</sup> Order ¶ 26 (referencing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, at ¶¶ 71-92 (2015)).

C. The Commission Erred in Limiting the Exemption to Calls Made to Numbers Provided by the Customer or Obtained from an Independent Source if not Reassigned

In the Order, the Commission limited the Exemption to calls made to a wireless number that was (1) provided by the borrower, or (2) obtained from an independent source *if* the number “actually” is the borrower’s telephone number.<sup>15</sup> Neither limitation concerns the number or duration of exempted calls. As such, these limitations are not allowable under the Act, and the Commission abused its discretion by imposing them.

The first limitation—restricting calls to numbers “provided by” the borrower—would also contravene the purpose of the Exemption, which is to enable lenders and servicers of Federal debt to call borrowers *without* prior express consent. Under the Commission’s existing interpretation of express consent, the “provided number” condition would limit exempted calls to borrowers that have already provided their mobile number to the lender—or consented—rendering the Exemption largely superfluous.<sup>16</sup>

The second limitation—that exempted calls are permitted to numbers obtained from an independent source only if the number actually is the debtor’s telephone number—provides minimal, if any, relief to callers. As described above, telephone companies recycle millions of telephone numbers each year, and there is no way for a lender to know with certainty that a

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<sup>15</sup> *Order* ¶ 23.

<sup>16</sup> In many cases, such as acquisition of a loan from another creditor or servicer, the caller’s records simply will not show how a customer’s number was obtained. Even where the lender’s records show that a number was acquired from the borrower, a “provided number” condition effectively shifts to the lender the burden of proving that fact in the event of a challenge. Class action attorneys might readily assemble a purported class of borrowers who received and benefited from calls subject to the Exemption, but who do not remember furnishing their numbers to the calling lender. Such claims might survive summary judgment and impose substantial litigation costs on lenders, regardless of their merit, driving up the cost of consumer credit, while frustrating the purposes of the Budget Act to encourage and facilitate borrower communications and collections.

customer's number has not been reassigned. Consequently, lenders will be reluctant to subject themselves to potential liability for calling numbers independently sourced.

D. The Commission Erred in Limiting the Exemption to Calls Made After the Borrower Is Delinquent or the Amount or Timing of Payments Has Changed

The Commission overstepped its authority in limiting the Exemption to calls made *after* the borrower is delinquent or following a “time-sensitive event that affects the amount or timing of payments due,” or for 30 days prior to such an event.<sup>17</sup> These limitations do not concern the number or duration of exempted calls and thus exceed congressional intent.

We agree with Petitioners that the Commission's definition of calls made “solely to collect a debt,” which excludes many pre-delinquency calls, is short-sighted and will ultimately lead to greater rates of delinquency and default. Communications between lenders and borrowers *prior* to delinquency are critical for a borrower to avoid delinquency and are made frequently for reasons unrelated to non-payment. For example, pre-delinquency calls are made to inform borrowers of servicing address changes, changes in payment amount, property tax increases, and insurance obligations. Moreover, the earlier a servicer is able to communicate with a financially distressed borrower, the more likely the servicer will be able to offer a loan modification, forbearance, interest rate reduction, or other action that will help the borrower avoid default.<sup>18</sup> For these reasons, it is critical that the Exemption's triggering phrase “solely to collect a debt” be

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<sup>17</sup> *Order* ¶ 18.

<sup>18</sup> See 12 C.F.R. § 1024.41(c)(2)(ii) (describing loss mitigation procedures); BUREAU OF CONSUMER FIN. PROT., SUMMARY OF THE FINAL MORTGAGE SERVICING RULES 4 (Jan. 17, 2013), available at [http://files.consumerfinance.gov/f/201301\\_cfpb\\_servicing-rules\\_summary.pdf](http://files.consumerfinance.gov/f/201301_cfpb_servicing-rules_summary.pdf) (“[Servicer] personnel should be accessible to the borrower by phone to assist the borrower in pursuing loss mitigation options, including advising the borrower on the status of any loss mitigation application and applicable timelines.”). One study found that repayment plans established when a loan was 30 days late had a default rate that was 27 percent lower than plans established when a loan was 60 days late. Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs*, at tbl. 2 (Freddie Mac, Working Paper No. 08-01, 2008), available at [http://www.freddiemac.com/news/pdf/interventions\\_in\\_mortgage\\_default.pdf](http://www.freddiemac.com/news/pdf/interventions_in_mortgage_default.pdf).

interpreted to apply to all calls to borrowers after the repayment period has begun and for the life of the loan. Allowing early contact aligns with the goal of the Budget Act amendments to protect Federal assets by reducing delinquency and default rates of borrowers.

## **II. The Commission’s Limit of Three Call Attempts Is Incompatible with Well-Established Mortgage Servicing Policy**

In the Order, the Commission limited the number of exempted calls that may be made to three initiated calls per 30-day period.<sup>19</sup> We agree with the Petitioners that this limitation is not supported by the record,<sup>20</sup> incompatible with existing regulatory requirements, and grossly insufficient for lenders to provide necessary guidance and assistance to borrowers.<sup>21</sup>

The requirements of other agencies underscore the need to establish “live” contact with a borrower. The Commission’s limit of three call *attempts*—regardless of whether those attempts result in live contact—is inconsistent with these other agencies’ legal requirements, which recognize that a distressed borrower cannot be helped if live contact is not established. Below is a non-exhaustive list of current requirements that conflict with the Order’s limitations.<sup>22</sup>

- Bureau’s Mortgage Servicing Rules. Servicers must make a “good faith effort” to establish “live contact” with delinquent borrowers within 36 days of delinquency, which often requires more than three initiated calls. In addition, the Commission’s prohibition on making exempted calls to non-borrowers is at odds with the Bureau’s regulations mandating that contact be made, under certain circumstances, with borrower agents.

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<sup>19</sup> *Order* ¶ 35.

<sup>20</sup> Pet. for Recons. 4-12.

<sup>21</sup> The Commission’s claim that lenders may make additional calls with the customer’s consent or with non-automatic equipment disregards the purpose of the exemption to permit calls on government-related debt as “efficiently as possible.” OMB FY 2016 Analytical Perspectives, *supra* note 9, at 128.

<sup>22</sup> For more detailed descriptions of agency requirements, see the appendix to ABA and CBA’s comment letter to the Commission’s proposed rule. Letter from Jonathan Thessin, Am. Bankers Ass’n, & Kate Larson, Consumer Bankers Ass’n, to Marlene Dortch, Bureau of Consumer Fin. Prot. 13-18 (June 6, 2016), *available at* <http://www.aba.com/Advocacy/commentletters/Documents/cl-TCPA2016June.pdf> (hereinafter, ABA/CBA 2016 Comments).



- Federal Housing Administration. Servicers must call delinquent borrowers at least *two times per week* until contact is established or the servicer determines the mortgaged property is vacant or abandoned.
- Department of Veterans Affairs. Servicers must make an effort to establish live contact with a borrower, provide financial counseling, and assess potential alternatives for relief. These efforts often require that more than three calls be initiated.
- National Mortgage Settlement. A *minimum of four calls* must be placed over 30 days.
- Fannie Mae and Freddie Mac Servicing Requirements. Servicers must attempt to contact a delinquent borrower at least every fifth day at varying times throughout the day.
- U.S. Department of Education (DoE) Guidance. DoE’s directive that lenders contact distressed student loan borrowers on borrowers’ cell phones may put lenders at odds with the Commission’s three-call limit on such communications.<sup>23</sup>

### **III. The Commission Exceeded its Statutory Authority by Limiting Federal Debt Collection Calls not Encompassed by the Exemption**

Congress provided the Commission with the authority to impose number and duration restrictions on exempted calls only. We agree with Petitioners that the Commission has exceeded that limited authority by imposing restrictions on *all* Federal debt-related calls, even calls made *that would fall outside* of the exemption. The Commission’s approach contravenes Congress’ clear intent by making exempted and non-exempted calls to collect on a Federal government-related debt *more* difficult to make, in important respects, than calls to collect on other types of debt. Moreover, Congress has assigned the Bureau of Consumer Financial Protection—not the Commission—with the responsibility to regulate debt collection calls. We urge the Commission

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<sup>23</sup> Under the section titled *Allow Servicers to Contact Federal Student Loan Borrowers via their Cell Phones*, the DoE asserts “[i]f servicers are able to contact a borrower, they have a much better chance at helping that borrower resolve a delinquency or default. . . . With phone numbers changing or being reassigned on a regular basis, it is virtually impossible for servicers to use auto-dialing technology. . . . Congress should change the law to ensure that servicers can contact borrowers using modern technology and help them get into the right repayment plan and avoid the consequences of default or resolve their default.” U.S. Dept. of Educ., *Strengthening the Student Loan System to Better Protect All Borrowers* 16 (Oct. 1, 2015), available at <https://www2.ed.gov/documents/press-releases/strengthening-student-loan-system.pdf>.

to issue a new rule that stays within congressionally drawn lines of authority and facilitates, rather than impedes, Federal debt-related calls.

The Budget Act amended paragraph 227(b)(2) of title 47 to authorize the Commission, in a new subparagraph (H), to “restrict or limit the number and duration” of cell phone calls subject to the Exemption—i.e., calls made “to collect a debt owed to or guaranteed by the United States.”<sup>24</sup> Significantly, that grant of authority is circumscribed by the prefatory phrase in existing paragraph 227(b)(2): “In implementing the requirements of *this subsection*, the Commission . . . .”<sup>25</sup> Thus, the Commission’s authority to impose restrictions or limitations on exempted calls applies *only* to calls made under this “subsection”—227(b)—i.e., calls exempted from the subsection’s prior express consent requirements because the calls are “made solely to collect a debt owed to or guaranteed by the United States.”<sup>26</sup> Yet the Commission’s restrictions on Federal debt-related calls “apply even if the calls are not ‘calls made solely to collect a debt’ under 227(b)(1).”<sup>27</sup> That construction of the Budget Act is not plausible, and the Commission erred in holding such.<sup>28</sup>

#### **IV. The Commission Erred in not Clarifying the Exemption’s Application to All Types of Government Obligations**

The terms of the Exemption do not restrict the types of debt “owed to or guaranteed by the United States” to which the Exemption applies.<sup>29</sup> Therefore, the Exemption should be interpreted to include all loans or other debt (1) insured, guaranteed, coinsured, or reinsured, in whole or in part, by the U.S. government or any agency or instrumentality thereof, directly or

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<sup>24</sup> 47 U.S.C. § 227(b)(2)(H).

<sup>25</sup> *Id.* § 227(b)(2).

<sup>26</sup> *Id.* § 227(b)(1)(A)(iii).

<sup>27</sup> *Order* ¶ 31.

<sup>28</sup> The Commission erred also in limiting calls made by entities that are not “persons” under the TCPA, including the Federal government. Such limitations are also beyond the authority granted to the Commission in subparagraph 227(b)(2)(H).

<sup>29</sup> Bipartisan Budget Act of 2015 § 301(a)(1).

indirectly; or (2) as to which the U.S. government or any agency or instrumentality thereof may become obligated, directly or indirectly, to reimburse a third party for all or part of a default or loss claim arising thereunder or relating thereto.

Despite the Exemption's broad statutory language, the Commission failed to determine whether the Exemption is applicable to loans owed to or guaranteed by the Enterprises,<sup>30</sup> even though these loans clearly are guaranteed by the United States: the Enterprises are in conservatorship, under the ultimate control of the Federal government, and financially supported by taxpayers.<sup>31</sup> The Commission should also clarify that loans reinsured by the Federal government, such as Federal Family Education Loan (FFEL) Program loans, are encompassed by the Exemption because they carry the full faith and credit guaranty of the Federal government.

## **Conclusion**

Congress passed the Budget Act's Exemption to the TCPA to facilitate important communications with respect to loans owed to or guaranteed by the Federal government. However, the Order impairs, rather than facilitates, these communications by improperly imposing restrictions that are contrary to congressional intent, the statutory text, and the record of the proceeding. In essence, the Commission has treated the amendments as a blank check to regulate Federal debt collection calls to wireless numbers, and in so doing, it has adopted rules that contravene legal mandates from other Federal agencies.

The Commission should reconsider all of the rules that are arbitrary, capricious, an abuse of discretion, or otherwise unlawful or contrary to the public interest and congressional intent. We urge the Commission to issue a new rule that helps achieve, rather than undermine, the Budget Act's purpose to facilitate important communications between lenders and borrowers that

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<sup>30</sup> *Order* ¶ 19 n.54.

<sup>31</sup> For a more detailed explanation of the Exemption's applicability to Fannie Mae and Freddie Mac loans, see ABA/CBA 2016 Comments, *supra* note 22, at 4-6.

promote the timely repayment of billions of dollars of outstanding debt owed to or guaranteed by the Federal government.

Respectfully Submitted,

s//Jonathan Thessin

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