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

Comments of the National Consumer Law Center

on behalf of its low-income clients and the following

Center for Responsible Lending
Consumer Action
Consumer Federation of America
Consumers Union
Justice in Aging
National Association of Consumer Advocates
National Association of Consumer Bankruptcy Attorneys
National Center for Law and Economic Justice
National Fair Housing Alliance
National Legal Aid and Defender Association
Public Citizen
U.S. PIRG

and

Western Center on Law & Poverty, California
Jacksonville Area Legal Aid, Inc., Florida
Atlanta Legal Aid Society, Inc., Georgia
Legal Aid Foundation of Chicago, Illinois
Legal Aid Society of Southwest Ohio
Legal Services of New York
MFY Legal Services, New York
North Carolina Justice Center
South Carolina Appleseed Legal Justice Center
Virginia Poverty Law Center
West Virginia Center on Budget and Policy
Mountain State Justice, West Virginia

June 6, 2016

I. Introduction

These comments are submitted by the National Consumer Law Center[1] on behalf of its low-income clients and the list of national and state organizations stated above on page one. These comments are submitted in response to the Federal Communications Commission's Notice of Proposed Rulemaking[2] (NPRM) initiating the implementation of section 301 of the Bipartisan Budget Act.[3] Section 301 creates an exception from the requirements of the Telephone Consumer Protection Act[4] (TCPA) regarding consent when robocalls[5] are "made solely to collect a debt owed to or guaranteed by the United States."[6]

On behalf of the millions of consumers whom we represent, we thank the Commission for proposing these thoughtful consumer protections to accompany the new regulation that will allow robocalls and texts without consent to debtors' cell phones. The Commission appropriately recognizes that robocalls are a significant intrusion into the lives of those called and, through its proposed regulation, seeks to produce a balanced system of permitting these unconsented robocalls. There is much to like in the Commission's proposal.

We applaud the Commission's proposals to ensure that consumers retain important controls over their ability to stop unwanted robocalls, even when the calls are made to collect debts owed to the United States government. Because of the significant harm caused by robocalls from debt collectors, we are very supportive of the consumer protections proposed by the Commission in this NPRM. As these robocalls to cell phones will be permitted without the consumers' consent, these protections are very important. We particularly support the following elements of the proposed protections:

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1 The National Consumer Law Center (NCLC) is a nonprofit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at state utility commissions, the FCC and FERC. We publish and annually supplement nineteen practice treatises that describe the law currently applicable to all types of consumer transactions, including *Access to Utility Service* (5th ed. 2011), covering telecommunications generally, and *Federal Deception Law* (2d ed. 2016), which includes a chapter on the Telephone Consumer Protection Act.

2 *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, FCC 16-57, CG Docket No. 02-278 (Rel. May 6, 2016), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-57A1.pdf.

3 Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 [hereinafter Budget Act].

4 47 U.S.C. § 227.

5 We are using the term "robocalls" to refer to calls made with either an automatic telephone dialing system ("autodialer") or with a prerecorded or artificial voice, or with both. *See In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7694, ¶ 1 n.1 (2015) [hereinafter 2015 TCPA Declaratory Ruling and Order].

6 Budget Act § 301(a)(1)(A) (amending 47 U.S.C. § 227(b)(1)(A)); *see also id.* at § 301(a)(1)(B) (amending 47 U.S.C. § 227(b)(1)(B) to read, in part, that artificial- or prerecorded-voice calls cannot be made to a residential telephone line without the consent of the called party unless the call is "made solely pursuant to the collection of a debt owed to or guaranteed by the United States"). The Commission has interpreted the TCPA to apply both to voice calls and to text messages. 2015 TCPA Declaratory Ruling and Order at 8016-17, ¶ 107.

a) Robocalls will be permitted to be made only to the debtors themselves, not to family, friends and others;

b) The protections of the rule will apply to texts as well as to calls to cell phones;

c) Callers will be required to honor a request for the robocalls to stop;

d) Callers will be required to notify consumers of their right to request that calls stop;

e) The calls will be permitted only after 8 a.m. and before 9 p.m.;

f) Calls will be made only to collect debts currently owed to or guaranteed by the United States; and

g) Only one "wrong number" call, such as to a reassigned number, will be allowed.

The Commission has also proposed two other very important provisions that we think are good, but that need to be improved:

h) The Commission has proposed that the number of permitted calls be limited to three per month per loan. This is a good start, but because many consumers have multiple loans—often eight to ten student loans for each borrower—we recommend that the number of calls or texts permitted to be made without consent should be limited to three calls *per servicer or collector*. Without this limitation, consumers who have eight to ten outstanding loans, as many do, could be receiving between 24 and 30 robocalls per month to their cell phones.

i) The permitted status of the debts that are subject to this rule should be expanded a bit. We propose that servicers be permitted to call either if the debt is delinquent or if the consumer is delinquent in responding to a requirement to arrange for a payment plan or forbearance program.

Also we strongly urge the Commission to place the consumer protections in the text of the regulation itself, as consumers will then be empowered to enforce these rules. If the protections are described only in the general discussion that precedes the regulation, it will be very difficult for individuals, compliance attorneys or courts to research and find the rules. The public should be able to look at the rule and easily see the applicable protections.

In these comments, we address the following topics:

I. Consumers' problems with robocalls generally;

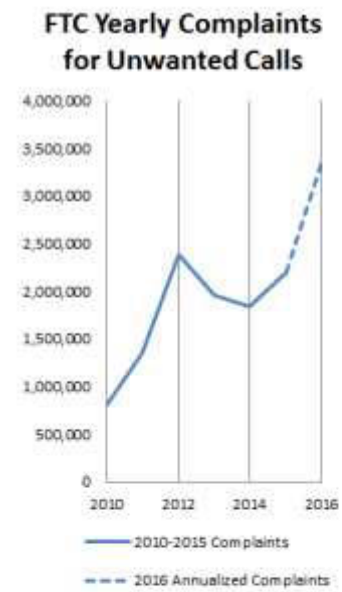
II. The need for close regulation of calls to collect federal debt;

III. Answers to the questions raised in the Notice of Proposed Rulemaking; and

IV. Specific recommendations for amendments to the regulation.

I. Consumers' problems with robocalls.

"If robocalls were a disease, they would be an epidemic."[7] An average of 184,000 complaints per month about robocalls were made to the Federal Trade Commission (FTC) in 2015.[8] Indeed, some estimate that 35 percent of all calls placed in the U.S. are robocalls.[9] The problem is escalating: the FTC reported more than 2.2 million complaints about unwanted robocalls in 2015—over two and a half times as many complaints as there were in 2010.[10] More than half of these calls occurred after the consumer had already requested that the company stop calling.[11] Indeed, in the first four months of 2016, the complaint numbers have spiked again, increasing to an average of over **279,000 a month, which will produce a yearly rate of over 3.3 million complaints.**[12]



Congress passed the Telephone Consumer Protection Act in 1991 in direct response to "[v]oluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes."[13] Yet 25 years later, the complaints are still pouring in. Robocalls are very inexpensive to make. Both legitimate callers and bad actors can discharge tens of millions of robocalls over the course of a day at a fraction of a penny per call.[14] The problem of unwanted and harassing robocalls is growing worse.

1. Privacy concerns. The Telephone Consumer Protection Act is an essential privacy protection law, intended to protect consumers from the intrusions of unwanted automated and prerecorded calls to cell phones. With the exception for calls to collect the federal government debts

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7 *Rage Against Robocalls,* Consumer Reports (July 28, 2015) [hereinafter *Rage Against Robocalls*], *available at* http://www.consumerreports.org/cro/magazine/2015/07/rage-against-robocalls/index.htm.

8 Federal Trade Commission, National Do Not Call Registry Data Book for Fiscal Year 2015, at 5 (2015) [hereinafter FTC's Do Not Call Registry], *available at* https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2015/dncdatabookfy2015.pdf.

9 *Rage Against Robocalls*.

10 FTC's Do Not Call Registry at 4.

11 FTC's Do Not Call Registry at 5.

12 The 2016 figures for robocall complaints to the FTC's Do Not Call Registry were supplied by the FTC's Bureau of Consumer Protection on May 12, 2016. The 2016 annualized complaint figure was determined by averaging the total number of complaints received in the first four months and then multiplying that monthly average by twelve.

13 *Mims v. Arrow Fin. Servs., L.L.C.*, 132 S. Ct. 740, 744 (2012).

14 *See, e.g.,* Call-Em-All Pricing's website, https://www.call-em-all.com/pricing (last accessed May 13, 2016), which quotes pricing from a high of 6 cents per call to $7.50 per month "for one inclusive monthly fee. Call and text as much as you need."

addressed in this rulemaking, the TCPA permits these calls *only if* the consumer has given "prior express consent" to receive them.[15] Calls for emergency purposes are excluded from this prohibition. When it enacted the TCPA in 1991, Congress found that automated and prerecorded calls are "a nuisance and an invasion of privacy, regardless of the type of call . . ."[16] They are no less a nuisance and an invasion of privacy today.

2. Heavy impact on struggling households. Many people in the United States today rely exclusively on a cell phone as their only means of communication. These consumers include:

- Close to 70 percent of adults aged 25-29 and over 67 percent of adults aged 30-34;
- Nearly 60 percent of persons in households below the poverty line;
- 59 percent of Hispanics and Latinos, and 46 percent of African Americans.[17]

Many, if not most, of the households living below the poverty line rely on pay-as-you-go, limited-minute prepaid wireless products. These wireless plans have been growing in use, especially among low-income consumers and consumers with poor credit profiles.[18] They provide a fixed number of minutes, and often a fixed number of texts. After these limits are exceeded, consumers must purchase a package of new minutes periodically to maintain their service. Consumers in such plans are often billed for incoming calls in addition to outgoing calls, making them very sensitive to repetitive incoming calls—especially calls that they do not want.

While there is no way to determine exactly how many individual prepaid users there are, an article authored in 2013 indicated that about one third of U.S. cell phone owners now opt to pay as they go.[19] This works out to be over <u>62 million people</u> in the U.S. using limited minute prepaid plans.[20]

Additionally, there are an estimated <u>13 million Americans</u> who maintain essential telephone service through the federal Lifeline Assistance Program.[21] Most of these Lifeline participants have

15 47 U.S.C. § 227(b)(1)(A)(iii).

16 TCPA, Pub. L. No. 102–243, 105 Stat. 2394 (1991) (§§ 12-13).

17 *See* Stephen Blumberg & Julian Luke, U.S. Dep't of Health and Human Services, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey*, July-December 2014, at 6 (June 2015).

18 Federal Communications Commission, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Eighteenth Report, WT Docket No. 15-125, ¶¶ 44, 73, 95-96 (Dec. 23, 2015).

19 Marc Lifsher, *More cellphone users switch to prepaid plans* (Feb. 22, 2013), *available at* http://phys.org/news/2013-02-cellphone-users-prepaid.html.

20 Marrying that statistic to the Pew Research Center's estimate that, as of October 2014, cell phone ownership among adults was approximately 90 percent means that roughly 218,223,738 million adults own cell phones. *See* http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/. Twenty-nine percent of that number is 63,284,884.

21 *See* Universal Service Administrative Company, LI08 Lifeline Subscribers by State or Jurisdiction - January 2015 through December 2015, *available at* http://www.usac.org/about/tools/fcc/filings/2016/q2.aspx.

service through a prepaid wireless Lifeline Program, which most commonly limits usage to only 250 minutes a month for the entire household.[22]

This means that there are over 75 million Americans who have limited minutes and texts on their cell phone plans. A flood of unwanted calls would be devastating for households struggling to afford essential telephone service. Voluminous unwanted calls use up the minutes on which the entire household depends to access health care, transportation, and other essential services, to find jobs or accept work assignments, to respond to family emergencies, to call police or fire departments, and to avoid social isolation.

3. Robocalls can threaten public safety. Cell phones accompany people wherever they go, including in cars. Drivers may not be able to resist the imperious ring of the wireless telephone, and the ringing itself is distracting even if the driver does not take the call. Receiving cell phone calls while driving threatens public safety. The National Highway Traffic Safety Administration found that cell phone use contributed to 411 (or 14 percent of all) fatalities in distraction-related crashes in 2013.[23] More robocalls will inevitably lead to more distracted drivers and, inescapably, more accidents.[24]

4. Texts are as intrusive as calls. The TCPA's prohibitions against unwanted communications apply to both phone calls and texts,[25] as well they should, because text messages are just as intrusive and costly to consumers as phone calls. And, particularly for low-income consumers using prepaid wireless plans, the unwanted texts deplete the limited text allowances on which they rely.

As noted in a recent Gallup study: "[t]exting, using a cellphone and sending and reading email messages are the most frequently used forms of non-personal communication for adult Americans."[26] As Americans' use of texts as a regular means of communication increases, unwanted texts become more and more invasive. People now respond to text messages in the same reflexive way they respond to calls—the beep of a text demands an immediate acknowledgment. As a result, autodialed texts that arrive in droves interrupt, annoy and harass consumers just as robodialed calls do. And these unwelcome texts use up precious limits for consumers whose cell phone plans impose restrictions, such as those consumers on prepaid or Lifeline plans.

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[22] *In re* Lifeline and Link Up Reform and Modernization, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, WC Docket Nos. 11-42, 09-197, 10-90, ¶ 16 (Rel. June 22, 2015).

[23] *See* U.S. Dep't of Transportation, Traffic Safety Facts, Research Note (Apr. 2015), *available at* http://www.distraction.gov/downloads/pdfs/Distracted_Driving_2013_Research_note.pdf (last accessed June 3, 2016).

[24] *See id.* (citing 3,154 deaths and 424,000 injuries from distracted drivers in 2013, and noting that text messaging, because of the visual, manual, and cognitive attention required from the driver, is "by far the most alarming distraction"). *See also Injury Prevention & Control: Motor Vehicle Safety: Distracted Driving*, Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/motorvehiclesafety/distracted_driving/ (last updated Mar. 7, 2016) ("Each day in the United States, more than 9 people are killed and more than 1,153 people are injured in crashes that are reported to involve a distracted driver.").

[25] *See In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 Report and Order, 18 FCC Rcd. 14014 (2003) (¶ 165).

[26] Frank Newport, *The New Era of Communication Among Americans,* Gallup (Nov. 10, 2014), *available at* http://www.gallup.com/poll/179288/new-era-communication-americans.aspx.

5. Tens of millions of Americans will be impacted by this regulation. Our best estimate of the total number of people who will be directly affected by the robocalls made without consent pursuant to this proposed regulation is over <u>61 million people.</u> This number includes those people who have:

- **Federal Student Loans.** The total number of unduplicated recipients of federal student loans (including Direct loans, Federal Family Education loans, and Perkins loans) was 41.8 million as of Q1 2016.[27]

- **Federally Guaranteed Mortgages.** As of September 2015, there were a total of 4,934,260 mortgages with an explicit guaranty from the U.S. government, including the Federal Housing Administration, the U.S. Department of Veterans Affairs, and certain other departments to a lesser extent. This number includes both current and performing mortgages (4.4 million) as well as delinquent mortgages (474,000).[28]

- **Small Business Loans.** The Small Business Administration (SBA) offers several kinds of guaranteed loan programs, as well as direct business loans and disaster loans. For Fiscal Year 2015, the SBA approved over 80,000 loans.[29]

- **Agriculture Loans.** The U.S. Department of Agriculture (USDA) offers various kinds of loan programs, including direct and guaranteed loans for single/multi-family housing, community facilities, and business programs. The USDA's Rural Development loan programs serve 306,552 borrowers through direct programs and 942,367 borrowers through guaranteed programs, as of Fiscal Year 2015.[30]

- **IRS Taxpayer Delinquent Accounts.** The number of taxpayer delinquent accounts subject to collection activities has grown each year since 2004.[31] As of September 30, 2015, a total of 13.3 million taxpayer accounts were subject to IRS delinquent collection activities.[32] These accounts are now subject to robocalling by private debt collectors (see discussion in section II.6, *infra*, about the special issues related to these collections).[33]

II. The need for close regulation of calls to collect federal debt.

1. Consumers who owe debts in collection are distressed. Studies have shown—and

27 U.S. Dep't of Education, Federal Student Aid Portfolio Summary (May 2016), *available at* https://studentaid.ed.gov/sa/about/data-center/student/portfolio.

28 Office of the Comptroller of the Currency, OCC Mortgage Metrics Report, Third Quarter 2015 (Feb. 2016), *available at* http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/mortgage-metrics/mortgage-metrics-q3-2015.pdf.

29 U.S. Small Business Administration, Number of Approved Loans by Program (Feb. 2016), *available at* https://www.sba.gov/sites/default/files/WDS_Table3_ApprovalCount_Report.pdf (displaying the total number of approved loans by program as of the end of December 2015).

30 "U.S. Dep't of Agriculture, Office of Inspector General, Rural Development's Financial Statements for Fiscal Years 2015 and 2014, at 23, *available at* http://www.usda.gov/oig/webdocs/85401-0005-11.pdf.

31 Internal Revenue Service Data Book, SOI Tax Stats - Delinquent Collection Activities, Table 16 (2015), *available at* https://www.irs.gov/uac/SOI-Tax-Stats-Delinquent-Collection-Activities-IRS-Data-Book-Table-16.

32 Internal Revenue Service Data Book 43 (2015), *available at* https://www.irs.gov/pub/irs-soi/15databk.pdf.

33 *See* 26 U.S.C. § 6306 (amended by Pub. L. No. 114-94, 129 Stat. 1312 (Dec. 4, 2015)).

executives in the credit industry have repeatedly admitted—that the major causes of serious consumer delinquency are unemployment, illness, and marital problems. Moreover, the credit industry's overextension of credit, particularly high-cost credit, greatly inhibits debtors' ability to repay.

When Congress wrote the federal Fair Debt Collection Practices Act[34] (FDCPA) it explicitly recognized that most delinquency is not intentional. Just the opposite is the case. Most overdue debts are not the fault of the consumer:

> One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are "deadbeats." In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is miniscule. Prof. David Caplovitz, the foremost authority on debtors in default, testified that after years of research he has found that only 4 percent of all defaulting debtors fit the description of "deadbeat." This conclusion is supported by the National Commission on Consumer Finance which found that creditors list the willful refusal to pay as an extremely infrequent reason for default.
>
> The Commission's findings are echoed in all major studies: <u>the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.</u>[35]

The FDCPA, along with other laws protecting debtors from abuse and harassment, is based on this recognition, rather than on the myth that draconian collection tactics are justified by the existence of substantial numbers of debtors who sought out credit without the intention or wherewithal to repay.[36]

There are clear, objective, and widely recognized causes of delinquency and default on consumer debt. Unemployment is widely recognized as the leading cause of the failure to pay credit card debt.[37] Excessive medical debt is also widely seen as cause for the non-payment of other bills.[38]

2. Debt collectors are *known* for abusive calling patterns. The people with whom debt collectors generally communicate are not simply choosing not to pay. Rather, debt collectors are dealing with people who are truly struggling to pay their debts, for whom choosing to pay one debt will often mean that other debts or necessities will go unmet.

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[34] 15 U.S.C. §§ 1692-1692p (2010).

[35] S. Rep. No. 95-382, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. Code Cong. & Admin. News. (Aug. 2, 1977) (emphasis added).

[36] David Caplovitz, Consumers in Trouble: A Study of Debtors in Default ch. 11 (1974). *See also* Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America (1989).

[37] Sumit Agarwal & Chunlin Liu, *Determinants of Credit Card Delinquency and Bankruptcy: Macroeconomic Factors*, 27 Journal of Economics and Finance 1 (2003).

[38] *See,* e.g., Theresa Tamkins, *Medical Bills Prompt More than 60% of Bankruptcies*," CNN Original Series, June 5, 2009.

This statement is supported by estimates indicating that this regulation under consideration will not generate significant revenue for the federal government. As pointed out by Consumerist, the Congressional Budget Office projects that debt collection robocalls will raise, at most, $500,000 per year over the next ten years.[39]

The collection industry routinely makes multiple calls a day.[40] For example, the industry recommended to the Consumer Financial Protection Bureau (CFPB) that six calls a day should not be considered abusive.[41] And the CFPB has found that credit card issuers regularly authorize from 4 to 15 calls per day.[42]

Many people find these calls enormously stressful. The calls are highly intrusive. Multiple collection calls interfere with daily life. The calls themselves, the dread of future calls, and the fear of the dissemination of personal, embarrassing information to friends, neighbors, co-workers and employers permeate the lives of consumers struggling to make ends meet. Indeed, in some cases, aggressive collection efforts have caused such significant emotional distress as to cause physical illness.[43] Multiple calls may also push consumers to make payments to the loudest or most persistent debt collector just to end the harassment, even for debts they do not owe.[44] Such payments will often be at the expense of paying the rent or meeting other, more important financial obligations.

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39 Chris Morran, *Government's Own Budget Analysis Shows that Allowing Debt Collection Robocalls is Pointless,* Consumerist, Oct. 28, 2015, *available at* https://consumerist.com/2015/10/28/governments-own-budget-analysis-shows-that-allowing-debt-collection-robocalls-is-pointless/.

40 *See, e.g.,* CashCall, Inc. v. Morrisey, 2014 WL 2404300 (W. Va. May 30, 2014) (84,371 calls to 292 consumers) (unpublished); Meadows v. Franklin Collection Serv., Inc., 414 Fed. Appx. 230 (11th Cir. 2011) (approximately 300 calls over a two and a half year period); Rucker v. Nationwide Credit, Inc., 2011 WL 25300 (E.D. Cal. Jan. 5, 2011) (approximately 80 phone calls in one year); Krapf v. Nationwide Credit, Inc., 2010 WL 2025323 (C.D. Cal. May 21, 2010) (four to eight calls daily for two months).

41 Letter from Patrick Morris, Chief Executive Officer, ACA International, to Monica Jackson, Consumer Financial Protection Bureau, at 40 (Feb. 27, 2014), *available at*: http://www.acainternational.org/files.aspx?p=/images/31323/aca-anpr-comments.pdf ("Although the FDCPA does not define a specific call frequency to a consumer, ACA supports a standard to limit the number of collections call attempts to no more than six times per day per unique debt . . .").

42 Consumer Financial Protection Bureau, The Consumer Credit Card Market 249 (Dec. 2015), *available at* http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf.

43 *See, e.g.*, Latimore v. Gateway Retrieval, L.L.C., 2013 WL 791258, at *2 (N.D. Ga. Feb. 1, 2013), *report and recommendation adopted*, 2013 WL 791308 (N.D. Ga. Mar. 4, 2013) (stress from collection call threatening plaintiff with jail caused gastro esophageal reflux disease symptoms to reactivate); Gilmore v. Account Mgmt., Inc., 2009 WL 2848278, at *11 (N.D. Ga. Apr. 27, 2009), *report and recommendation adopted as modified*, 2009 WL 2848249 (N.D. Ga. Aug. 31, 2009), *aff'd in part, vacated in part*, 357 Fed. Appx. 218 (11th Cir. 2009) (awarding damages to plaintiff who experienced chest pains after repeated collection calls and other FDCPA violations); Margita v. Diamond Mortgage Corp., 406 N.W.2d 268 (Mich. Ct. App. 1987) (stress from telephone collection efforts including phone calls aggravated paroxysmal atrial tachycardia); Turman v. Central Billing Bureau, Inc., 568 P.2d 1382 (Or. 1977) (affirming tort verdict; blind consumer rehospitalized with anxiety and glaucoma complications after repeated collection calls); GreenPoint Credit Corp. v. Perez, 75 S.W.3d 40 (Tex. App. 2002) (affirming jury verdict of $5 million in compensatory damages against debt collector; elderly consumer suffered severe shingles-related sores, anxiety, nausea, and elevated blood pressure due to repeated telephone and in-person harassment over a debt she did not owe).

44 *See, e.g.,* Federal Trade Commission, *FTC Takes Action to Stop Phantom Debt Scam That Targeted Spanish-Speaking Consumers Nationwide*, Oct. 23, 2014, *available at* http://www.ftc.gov/news-events/press-releases/2014/10/ftc-takes- action-stop-phantom-debt-scam-targeted-spanish-speaking (describing more than $2 million in payments made by consumers on non-existent debts due to aggressive collection tactics); Rachel Nolan, *Behind the Cover Story: Jake Halpern on Debt, HBO and His Mother*, New York Times, Aug. 18, 2014, *available at*

Excessive phone calls from debt collectors are a recurrent source of consumer complaints to regulatory agencies. In its March 2015 report regarding the FDCPA, the CFPB noted that 53 percent of complaints about the communication tactics used when collecting debts were due to "frequent or repeated calls."[45]

The FDCPA intends to prevent harassment as a means of pushing to people to pay debts, even ones they rightly owe. The reason is that consumers should be able to make rational assessments of how to pay their bills; paying a debt collector for a three-year old credit card debt when doing so will leave insufficient funds to feed one's children that month is a consequence the FDCPA seeks to avoid.

Debt collectors generally increase the number of contacts as time passes. Collection efforts generally begin with a series of form letters and then graduate to phone calls from collection agency employees. The industry's technological capabilities, along with the perverse incentives it provides its employees, often ensure that these calls are frequent, abusive, and escalating in number. In particular, the collection employee is often eligible for salary incentives based on the amount collected. Collectors use automated dialing systems that will place hundreds of calls per day.[46]

3. The complaints about debt collection show that the *wrong people* are called routinely. The CFPB's Annual Report for 2015 shows that 40 percent of debt collection complaints involved continued attempts to collect debts not owed, which include complaints that the debt does not belong to the person called.[47] Almost one fifth of all the complaints related to debt collector communication tactics.[48]

Similarly, a 2009 survey conducted by the Scripps Survey Research Center at Ohio University shows that 30 percent of respondents were being called regarding debt that was not their debt.[49] And according to statistics from the Federal Reserve, one in seven people in the United States is being

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http://6thfloor.blogs.nytimes.com/2014/08/18/behind-the-cover-story-jake-halpern-on-how-his-mom-inspired-an-investigation-into-debt-collection/ (describing how Jake Halpern's mother paid off an insistent debt collector for a debt that she did not owe in order to get the collector to stop harassing her).

45 Consumer Financial Protection Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2015 (Mar. 2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb-fair-debt-collection-practices-act.pdf.

46 Bankruptcy Law Network, *Debt collectors using auto-dialers face big fines* (Sept. 2015), *available* at http://www.bankruptcylawnetwork.com/debt-collectors-using-auto-dialers-face-big-fines/ (noting that the average consumer debt collector employee places 200 collection calls per day, or 50,000 calls per year); *see also* CallFire, *How Will An Automatic Dialer Solution Improve Collections?* (advertising the ability to "Call multiple numbers at once without dialing," "Get connected only when a live person answers," and "Leave automated messages on answering machines), *available at* https://www.callfire.com/common-uses/collections.

47 Consumer Financial Protection Bureau, Consumer Response Annual Report 16 (January 1 – December 31, 2015) *available at* http://files.consumerfinance.gov/f/201604_cfpb_consumer-response-annual-report-2015.pdf.

48 *Id.*

49 Marcia Frellick, *Survey: Debt collection calls growing more frequent, aggressive*, Creditcard.com, Jan. 28, 2010, *available at* http://www.creditcards.com/credit-card-news/debt-collectors-become-more-aggressive-break-law-1276.php.

pursued by a debt collector, a substantial percentage of whom report being hounded for debts they do not owe.[50]

4. Student loan collectors and servicers repeatedly violate debt collection and other consumer protection laws. Despite the history of consumer abuses by the collection industry, the United States government hires collectors not only to collect money, but also to communicate with borrowers about options to address student loan debt and to help borrowers resolve their debt. Unfortunately, debt collectors are not adequately trained to understand and administer the complex borrower rights available under the Higher Education Act. There have been numerous borrower complaints about abuses by debt collection agencies to the Department of Education.[51] In fact, in 2014, separate reports by the Government Accountability Office (GAO) and the Department of Education's Office of the Inspector General (OIG) found that Department of Education oversight of its collection agencies was woefully insufficient. Specifically, OIG found that, as a result of its inadequate supervision, the Federal Student Aid office failed to ensure its collection agencies abided by federal debt collection laws and the terms of the agencies' contractual agreements.[52]

Although the government must balance the need to collect student loans with the need to assist borrowers, the current system heavily favors high-pressure collection and debt collector profits to the detriment of financially distressed borrowers seeking the help they so desperately need.[53]

According to the FTC, in fiscal years 2011 and 2012 consumers filed almost 10,000 complaints against the 22 companies that contract with the Department of Education.[54] Between March 2011 and March 2012, the Better Business Bureau (BBB) received 1,430 complaints against the 22 collection agencies.[55]

In July 2013, the FTC settled charges against Expert Global Solutions and its subsidiaries for a civil penalty of $3.2 million.[56] This was the largest settlement the FTC had ever reached against a

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[50] *See* David Dayen, *Someone Else's Debt Could Ruin Your Credit Rating,* New Republic, Mar. 31, 2014, *available at* http://www.newrepublic.com/article/117213/debt-collector-malpractice-someone-elses-debt-could-ruin-your-credit.

[51] *See* Deanne Loonin and Persis Yu, Pounding Student Loan Borrowers: The Heavy Costs of the Government's Partnership with Debt Collection Agencies, National Consumer Law Center (Sept. 2014), *available at* http://www.nclc.org/images/pdf/pr-reports/report-sl-debt-collectors.pdf.

[52] U.S. Dep't of Education, Office of Inspector General, Handling of Borrower Complaints Against Private Collection Agencies 1, 11 (July 2014), *available at* https://www2.ed.gov/about/offices/list/oig/auditreports/fy2014/a06m0012.pdf.

[53] *Id.*

[54] For a breakdown of the complaints by collection agency, see Deanne Loonin and Persis Yu, Pounding Student Loan Borrowers: The Heavy Costs of the Government's Partnership with Debt Collection Agencies Appx. B, National Consumer Law Center (Sept. 2014), *available at* http://www.nclc.org/images/pdf/pr-reports/report-sl-debt-collectors.pdf.

[55] BBB records likely underestimate the true number of complaints because, among other reasons, borrowers must lodge complaints with the local BBB where the collection agency is located rather than the BBB in the borrower's location. Deanne Loonin and Jillian McLaughlin, Borrowers on Hold: Student Loan Collection Agency Complaint Systems Need Massive Improvement 3, National Consumer Law Center (May 2012).

[56] Federal Trade Commission, Press Release, World's Largest Debt Collection Operation Settles FTC Charges, Will Pay $3.2 Million Penalty (July 2013), *available at* http://www.ftc.gov/newsevents/press-releases/2013/07/worlds-largest-debt-collection-operation-settles-ftc-chargeswill (last visited May 2, 2014).

third-party debt collector. According to the complaint filed by the FTC, Expert Global Solutions and its subsidiaries violated the law by:

- Calling consumers multiple times per day;
- Calling even after being asked to stop;
- Calling early in the morning or late at night;
- Calling consumers' workplaces despite knowing that the employers prohibited such calls;
- Leaving phone messages that disclosed the debtor's name and the existence of the debt to third parties; and
- Continuing collection efforts without verifying the debt, even after consumers said they did not owe it.[57]

There are other examples of student loan collectors and servicers that have frequently violated the laws and regulations designed to protect consumers from overreaching, abuse and harassment. For example, consider the student loan servicer Navient's recent settlements with the FDIC and the Department of Justice. On May 13, 2014, Navient reached an agreement with the Department of Justice requiring it to pay $60 million to compensate student loan debtors for interest overcharges that violated the Servicemembers Civil Relief Act (SCRA).[58] On the same day, the FDIC announced a separate $96.6 million settlement with Navient for manipulating the allocation of students' payments in order to maximize late fees, misrepresenting and inadequately disclosing how borrowers could avoid late fees, and violating SCRA requirements.[59]

Moreover, in 2014 testimony to Congress about problems with student loans, the CFPB's Student Loan Ombudsman stated:

> Loan servicers are the primary point of contact on student loans for more than 40 million Americans. . . .
>
> As the recession decimated the job market for young graduates, a growing share of student loan borrowers reached out to their servicers for help. But the problems they have encountered bear an uncanny resemblance to the problems faced by struggling homeowners when dealing with their mortgage servicers. Like many of the improper and unnecessary foreclosures experienced by many homeowners, I am concerned that inadequate servicing has contributed to America's growing student loan default problem, now topping 7 million Americans in default on over $100 billion in balances.
>
> The Bureau has received thousands of complaints from borrowers describing the difficulties they face with their student loan servicers. Borrowers have told the Bureau about a range of problems, from payment processing errors to servicing transfer

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57 *Id.*

58 *See* Press Release, Justice Department Reaches $60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans (May 13, 2014), *available at* http://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging.

59 *See* Press Release, FDIC Announces Settlement with Sallie Mae for Unfair and Deceptive Practices and Violations of the Servicemembers Civil Relief Act (May 13, 2014), *available at* https://www.fdic.gov/news/news/press/2014/pr14033.html. While this matter involved private student loans, rather than the federal student loans for which section 301 provides a carve-out, the behavior of student loan servicers is relevant to the discussion.

> <u>surprises to loan modification challenges</u>. To ensure that we do not see a repeat of the breakdowns and chaos in the mortgage servicing market, it will be critical to ensure that student loan servicers are providing adequate customer service and following the law.[60]

Student loan collectors and servicers have also frequently been subject to private suits for TCPA violations. For example, Sallie Mae was the defendant in *Cummings v. Sallie Mae*,[61] a case involving allegations that Sallie Mae called people who were references for the students' loans with prerecorded debt collection messages. Sallie Mae had no relationship with these references in regard to the accounts that were the subject of the calls.

Moreover, student loan debt collectors themselves acknowledge both that they routinely call student loan debtors hundreds of times, and that these voluminous calls are often not successful in compelling debtors to begin making payments. Consider this story published on May 31, 2016 by Inside Arm, a trade group for debt collectors:

> Let me tell another story about a borrower we'll call Jennifer. This customer enrolled in a community college but then left school without a degree. Early on, she read a few of our emails that encouraged her to contact us to discuss her payment options, but otherwise did not engage. When she missed her first payment, we reached out several times. When she missed her second payment, we reached out, again several times. <u>In fact, during a 12-month period of missed payments, we attempted to contact her more than 250 times,</u> through email, letters, phone calls and text messages. After a year of zero payments, despite our multiple efforts, we could not reach her to help her.[62]

The bottom line is that even 250 attempted contacts do not guarantee success, and may even have made the situation worse.

This evidence demonstrates that the exemptions created by section 301 of the Budget Bill must be carefully balanced with consumer protections.

5. Borrowers with federal debt from for-profit colleges will be particularly hard hit by too many robocalls. There are numerous for-profit colleges that have been repeatedly investigated or sued for fraudulent activities that seriously harm consumers, especially low-income consumers. Just two examples are Corinthian[63] and ITT.[64] As the result of predatory practices, students who

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60 Hearing on the Impact of Student Loan Debt on Borrowers and the Economy Before the United States Senate Comm. on the Budget, 113th Cong., 2d Sess. (June 4, 2014) (testimony of Rohit Chopra, Assistant Director & Student Loan Ombudsman, Consumer Financial Protection Bureau) (emphasis added).

61 12-cv-09984 (N.D. Ill.)

62 Stephanie Eidelman, *Navient CEO Shares Rarely Heard Stories About Student Debt Payment*, Inside Arm, May 31, 2016 (emphasis added), *available at* http://www.insidearm.com/opinion/navient-ceo-shares-rarely-heard-stories-about-student-debt-payment/.

63 *See* Anya Kamenetz, *Corinthian Colleges Misled Students on Job Placement, Investigation Finds*, Higher Ed, Nov. 17, 2015, *available at* http://www.npr.org/sections/ed/2015/11/17/456367152/corinthian-misled-students-on-job-placement-investigation-finds. *See also* Annie Waldman, *How a For-Profit College Targeted the Homeless and Kids With Low Self-Esteem,* ProPublica, Mar. 18, 2016 (newly released emails and PowerPoints show firsthand Corinthian Colleges' predatory practices), *available at* https://www.propublica.org/article/how-a-for-profit-college-targeted-homeless-and-kids-with-low-self-esteem; Press Release, CFPB Sues For-Profit Corinthian Colleges for Predatory Lending Scheme (Sept. 16, 2014) (Bureau Seeks More than $500 Million In Relief For

attend for-profits often do not benefit from the education paid for with the federal student loans, and thus disproportionately default on their federal student loans.

The vast majority of students at these for-profit colleges have federal student loans. A 2012 report from the U.S. Senate's Health, Education, Labor and Pensions Committee, which examined 30 publicly traded for-profit colleges, found that these institutions were up to 450 percent more expensive than their public counterparts, and that 96 percent of students who attend for-profit colleges borrow in order to do so. [65]

Further, students who attend for-profit colleges are far less likely to be able to repay their loans, leading to greater default and serious financial consequences for former students. Nationally, the for-profit college sector generates nearly half of all student loan defaults, while enrolling only about 13 percent of all students.[66] These harmful practices most often impact vulnerable populations including low-income persons, people of color, and veterans, all of whom are overrepresented in enrollment at for-profit colleges. This is illustrated in an October 2014 Center for Responsible Lending research paper:

> We find that students who attend for-profit colleges are more likely to need to borrow for their education and tend to borrow more than their peers at public or private, non-profit schools. Unfortunately, this financial investment does not appear to pay off for many for-profit students, who graduate at lower rates, are more likely to default on their loans, and may face poor employment outcomes. African Americans and Latinos are at greater risk of the high debt burdens and poor outcomes caused by for-profit colleges because they are more likely to attend these schools than their white peers.
>
> [A]id received by recent veterans as part of the new Post-9/11 GI bill does not count towards the 90% limitation on federal aid [that for-profits receive]. As a result, for-profit colleges target their recruitment efforts toward current and former members of the military, whose additional grant aid can be counted towards the 10% of funds that are intended to come from private sources.[67]

Vulnerable populations with delinquent federal student loans from potentially fraudulent for-profit schools should not be further harassed by robocalls to their cell phones.

Borrowers of Corinthian's Private Student Loans), *available at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-for-profit-corinthian-colleges-for-predatory-lending-scheme/.

64 Danielle Douglas-Gabriel, *Is this the beginning of the end for ITT?* Washington Post, Oct. 19, 2015 (CFPB accused the company of providing zero-interest loans to students but failing to tell them that they would be kicked out of school if they didn't repay in a year; when students could not pay, ITT allegedly forced them to take out high-interest loans to repay the first ones), *available at* https://www.washingtonpost.com/news/grade-point/wp/2015/10/19/is-this-the-beginning-of-the-end-for-itt/

65 Staff of S. Comm. on Health, Education, Labor, and Pensions, For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success, 112th Cong., 2d. Sess. (2012), *available at* http://www.help.senate.gov/imo/media/for_profit_report/Contents.pdf.

66 Peter Smith & Leslie Parrish, *Do Students of Color Profit from For-Profit College? Poor Outcomes and High Debt Hamper Attendees' Future*, Center for Responsible Lending (Oct. 2014), *available at* http://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-for-profit-univ-final.pdf.

67 *Id.* at 5-6.

6. No calls at all should be allowed from debt collectors collecting IRS debt. Allowing robocalls to collect federal tax debt is an extremely problematic issue given the prevalence of scams in which the thief poses as an IRS collection agent. According to the Better Business Bureau, these scams occupy the number one spot on that agency's list of Top Scams for 2015.[68] A whopping 24 percent of the scam reports processed by the BBB last year dealt with impostors pretending to be either the IRS or its Canadian equivalent, and there were more complaints about tax impostor scams than the next three categories combined.[69]

This past January, the Treasury Inspector General for Tax Administration (TIGTA) reported that, since October 2013, it had received nearly 900,000 reports about impostors claiming to be calling from the IRS.[70] TIGTA reported that it knew of over 5,000 victims who had paid the scammers more than $26.5 million during that time period.[71]

To make matters worse, in December 2015 Congress added a new requirement to section 6306(b) of the Internal Revenue Code that forces the IRS to use private debt collectors to collect *all* "inactive" tax debts. This requirement potentially translates into millions of taxpayers who will have their accounts placed with private collectors.[72] If these private collectors are permitted to call consumers -- and worse, to robocall taxpayers without consent -- it will be especially difficult for consumers to determine the difference between real collectors for the IRS and scammers.

Allowing these calls will directly conflict with the explicit advice of the IRS,[73] FTC[74] and TIGTA[75] that the IRS does not initiate contact with taxpayers by phone. National Taxpayer Advocate Nina Olson aptly summed up the quandary when she stated:[76]

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68 Better Business Bureau, BBB Top Ten Scams of 2015: Tax Scam is #1, Dec. 14, 2015, *available at* https://www.bbb.org/top10scams/.

69 *Id.*

70 Press Release, TIGTA, J. Russell George Urges Taxpayers to Remain on "High Alert": Expanded Outreach Effort Announced to Prevent More Losses to IRS Impersonators (Jan. 20, 2016), *available at* https://www.treasury.gov/tigta/press/press_tigta-2016-01.htm.

71 *Id.*

72 The National Taxpayer Advocate reported that, in April 2014, there were just over five million taxpayers with delinquent accounts. Letter from Nina Olson, National Taxpayer Advocate, to the Honorable Ron Wyden, Chairman, Senate Committee on Finance (May 13, 2014).

73 Internal Revenue Service, *Phone Scams Continue to be a Serious Threat, Remain on IRS "Dirty Dozen" List of Tax Scams for the 2016 Filing Season* (Feb 2, 2016) *available at* https://www.irs.gov/uac/newsroom/phone-scams-continue-to-be-a-serious-threat-remain-on-irs-dirty-dozen-list-of-tax-scams-for-the-2016-filing-season.

74 Jon Morgan, Federal Trade Commission, *It's the IRS calling…or is it?* (Mar. 12, 2015) ("This has all the signs of an IRS imposter scam. In fact, the IRS won't call out of the blue to ask for payment, won't demand a specific form of payment, and won't leave a message threatening to sue you if you don't pay right away.")

75 Press Release, TIGTA, J. Russell George Urges Taxpayers to Remain on "High Alert": Expanded Outreach Effort Announced to Prevent More Losses to IRS Impersonators (Jan. 20, 2016), *available at* https://www.treasury.gov/tigta/press/press_tigta-2016-01.htm.

76 Joe Davidson, *Will scammers hide behind new law for private tax collectors?*, Washington Post, Dec. 20, 2015 (quoting Nina Olson), *available at* https://www.washingtonpost.com/news/federal-eye/wp/2015/12/20/will-scammers-hide-behind-new-law-for-private-tax-collectors/ .

> There has been a huge spike in the number of scam callers seeking immediate 'tax payments' from unsuspecting taxpayers in the last couple of years. The IRS has responded by emphasizing it doesn't make outbound calls of that kind. As this program starts up, there is a risk calls from private debt collectors will muddy that message. There is also a risk scammers will study the dynamics of the private collection agency calls and try to mimic them to fool taxpayers.

The ideal solution to this problem is for the Treasury Department to prohibit all calls, including robocalls in its contracts with private debt collectors. There is no requirement in new section 6306(b) of the Internal Revenue Code that the Treasury Department must allow private collectors to make calls (including robocalls) to taxpayers.

At a minimum, Treasury must develop measures to prevent scammers from exploiting the fact that private collectors are now calling about tax debts. For example, Treasury could require that private collectors must first send a letter informing taxpayers that an account has been placed with the collector, with a specific code in the letter.

7. Especially vulnerable populations should be protected from robocalls to collect debt they cannot pay.

We suggest that no debt collection calls be permitted to be made to people receiving Supplemental Security Income (SSI) benefits on the basis of old age or disability, and that Treasury not pass along information on debts owed by SSI recipients to debt collectors. Indeed, Treasury should not conduct any debt collection activity— robocalls or otherwise—against these debtors.

SSI recipients receive a maximum federal benefit of $733 a month and cannot have more than $2,000 in total available resources. If they have any other income, *e.g.* a Social Security benefit or a small pension, it is offset dollar for dollar against the SSI benefit after the $2,000 per month. Because of the inability of this population to pay off debts without suffering deprivation, Treasury regulations implementing the Treasury Offset Program (TOP) exempt SSI benefits from offset to recover government debts. It would make no sense to subject this vulnerable population to harassing phone calls, causing potential emotional distress when it has already been determined that these individuals do not have the ability to pay.

III. Answers to questions raised by the Commission in the Notice of Proposed Rulemaking.

Below we provide answers to selected questions posed in the NPRM.

8. *At what point is a call to collect a debt a covered call?* We turn first to the phrase "solely to collect a debt" and seek comment regarding the parameters of that phrase, including how we should interpret "solely" and "collect." Our proposal, to ensure that debtors do not receive non-consent calls before failing to make a timely payment, is to interpret "solely to collect a debt" to mean only those calls made to obtain payment after the borrower is delinquent on a payment. We seek comment on our proposal, including how we should interpret "delinquent" for these purposes, and any alternative approaches. We also seek comment on the alternative that covered calls may only be made after the debtor is in default, how we should define "default," and whether we should distinguish between default caused by non-payment and a default resulting from a different cause under the terms of the debt instrument.

As long as the other consumer protections apply (*i.e.,* the right to stop calls, a strict limit on the number of calls, documentation of the basis for believing the number belongs to the party intended to be called, *etc.*), we are proposing that calls be allowed under the exemption if

> (I) The debtor who owes the debt about which the call is made is delinquent in making payments, or delinquent in complying with requirements to obtain or maintain eligibility for a payment plan or other program relating to the debtor's obligations to pay the debt;

See proposed § 64.1200(a)(1)(iii)(I) in section IV, *infra*.

We do not think it is necessary for the Commission to define default, as we are proposing that delinquent status would be sufficient to trigger coverage under the rule. Delinquency is defined by the contract: typically, a debtor is delinquent upon being late by more than a certain number of days in making a payment or missing a deadline for performing some other obligation. Default may be defined as a delinquency that has continued for a certain period of time. For federal student loans, the circumstances constituting default are defined by Department of Education regulations.[77]

9. *Are debt servicing calls covered?* We note 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 potential value of these debt servicing calls, and the probability that servicing calls will create conditions for debtors that allow debts to be more readily collected by the United States, leads us to propose that servicing calls should be included in covered calls. We seek comment on this proposal and, if adopted, how to ensure it does not result in the types of calls consumers would not want, such as marketing calls. We seek 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. Our proposal, above, is that covered calls begin when a borrower is delinquent on a payment; should delinquency also be the initiating event for debt servicing calls, or should some other event trigger a caller's ability to make servicing calls under the exception? What should the trigger event be?

We agree that some debt servicing calls might be helpful even when the debtor is not yet delinquent in her payments. However, we think that calls under this exemption should be made only when the debtor is delinquent in *some obligation* that relates to making the payments. Specifically, we are contemplating the situation where a debtor is delinquent in meeting recertification requirements for a repayment plan (such as by providing documentation of income and family size) but still has a limited time period to recertify and avoid the adverse consequences of the delinquency.

Largely because of the importance of allowing student loan borrowers to ensure that they meet recertification requirements for forbearance or Income-Driven Repayment (IDR) plans, we are proposing this additional trigger for allowing these unconsented-to calls.

We agree that borrowers will experience significant adverse consequences when they miss deadlines to recertify their income and family size for IDRs. These debtors' consequences will include spikes in their monthly student loan bills that are likely to lead to their inability to make full payments, leading eventually to default, as well as capitalization of all accrued interest. In 2015, the

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[77] *See, e.g.,* https://myfedloan.org/manage-account/about-your-account/default-delinquency.shtml.

Department of Education provided data showing that over half of all borrowers in an income-driven plan do not recertify on time.[78]

There is a critical 10-day window between the formal deadline to recertify for an IDR[79] and the triggering of these adverse consequences. Under the IBR and PAYE repayment plans, if a borrower fails to provide income documentation *within ten days of the servicer's deadline*, payments are reset to the higher amount the borrower would have paid each month under a standard repayment plan.[80]

Similarly, under the REPAYE repayment plan, if a borrower fails to provide income documentation *within ten days of the servicer's deadline*, and the Department of Education is not able to determine the borrower's new monthly payment amount before the end of the borrower's annual payment period, the Department removes the borrower from the REPAYE plan and places the borrower on an alternative repayment plan with monthly payments that can be dramatically higher.[81] Also, under all three programs, if the borrower is *more than ten days late* in providing the documentation, any unpaid accrued interest will be capitalized.[82]

To help avoid these consequences, we are suggesting that servicers be allowed to make robocalls—subject to all the same limits on frequency, time of day, etc. that apply to other robocalls to collect federal government debt—when:

> (I) The debtor who owes the debt about which the call is made is delinquent in making payments, or delinquent in complying with requirements to obtain or maintain eligibility for a payment plan or other program relating to the debtor's obligations to pay the debt;

See proposed § 64.1200(a)(1)(iii)(I) in section IV, *infra.*

<u>10. We seek comment on the definition of "servicing" that should guide our analysis in this regard. Should 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? We propose that permissible "servicing" calls only refer to calls made by the creditor and those entities acting on behalf of the creditor. We seek comment on this proposal.</u>

We agree that, in robocalls made under this exception, servicers should be able to address the topics listed. But we reiterate that servicers should be allowed to make robocalls without consent only when the borrower is delinquent in making payments or in recertifying eligibility for a payment plan. Please see our response to Question 9, *supra*, on the issue of including servicers as permissible callers and our response to Question 11, *infra*, on the issue of the United States, as creditor, making the calls.

<u>11. "Owed to or guaranteed by the United States." We seek comment on the meaning of the phrase "a debt owed to or guaranteed by the United States." What is a debt "owed to" the United States and</u>

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78 This data is available at www.ed.gov.

79 Including Income-Based Repayment, Pay As You Earn, and Revised Pay As You Earn.

80 34 C.F.R. §§ 685.209(a)(5)(iii), 685.221(e)(3).

81 34 C.F.R. § 685.209(c)(4)(v), (vii).

82 34 C.F.R. §§ 685.209(a)(5)(iii)(B), 685.209(c)(4)(iii)(B).

a debt "guaranteed by" the United States? Does the phrase "owed to or guaranteed by" include debts insured by the United States? Should we look to or adopt the definition of "debt" in the DCIA? Why or why not?

We strongly agree that the calls should be permitted to be made only by the creditor itself—the United States Government—or entities acting on behalf of the United States. We propose that the final regulation include the following specific language defining permitted calls:

> (II) The call is made … only by the United States or a person who has contracted directly with the United States for the servicing or collection of this debt owed to or guaranteed by the United States;

See proposed § 64.1200(a)(1)(iii)(II) in section IV, *infra*.

Additionally, we note that there are several types of actors that should be excluded from the list of permissible callers. These include debt buyers and debt relief companies—none of whom are actually collecting the debts for the benefit of the United States, and thus clearly do not qualify under the statute. Further, as they are generally bad actors, the Commission should take care to exclude them.

Debt buyers are entities that have purchased the debts from the United States. Debt buyers purchase debts for pennies on the dollar, and then try to extract as much as they can from consumers to collect on the debts they have purchased. [83] Since they own the debts and are entitled to keep the funds they collect, their collection activities will not benefit the U.S. Treasury, and they no longer fit the statutory language authorizing the exemption. These debts sold to debt buyers are no longer "owed to or guaranteed by the United States." Often debt buyers collect on debts with little documentation to ensure that they are collecting the correct amount from the correct consumer.[84]

The debt relief industry is active for all kinds of debts, including IRS debts, student loans, and mortgages. None of them provide real assistance to consumers, instead simply bleeding desperate consumers of needed funds by promising relief from debts that is never delivered.

For example, there is a "student loan debt relief" industry. Most of these companies are for-profit, although there are issues with a growing number of nonprofit organizations as well. In 2013, the National Consumer Law Center published a report documenting the results of its investigation of this growing industry.[85] The investigation revealed that student loan debt relief companies often violate key consumer laws, provide inaccurate and misleading information, and take student loan debtors' money without providing valuable services. Student loan debt relief companies target consumers by many means, including by telephone and text. These debt relief companies utilize all available tools to convince borrowers to work with the companies on their loans. Among their tactics

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[83]Federal Trade Commission, The Structure and Practices of the Debt Buying Industry 6 (Jan. 2013) ("Analysis of the prices debt buyers paid for debt purchased in more than 3,400 portfolios showed that the average price was 4.0 cents per dollar of debt face value."), *available at* https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

[84] *Id.* ("Buyers rarely received any information from sellers concerning whether a consumer had disputed the debt or whether the disputed debt had been verified – information that would bear on whether the consumer being contacted owes the debt and whether the amount being collected is correct.").

[85] National Consumer Law Center, Searching for Relief: Desperate Borrowers and the Growing Student Loan "Debt Relief" Industry (June 2013), *available at* http://www.nclc.org/issues/searching-for-relief.html.

are improperly claiming government affiliations and obtaining detailed loan information through data brokers and social media. Given their many misrepresentations, these companies are clearly not providing quality services in return for the money they are charging. Their practices severely compound the pain of vulnerable consumers seeking to find resolutions to difficult student debt problems.

It is vitally important that the FCC rules not facilitate these deceptive practices. The FCC should also work with the Departments of Education and Treasury to ensure that their servicers and debt collectors employ procedures that will protect borrowers against debt relief scammers or for-profit third party student loan "assistance" companies.

12. We also seek 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." Basic contract principles dictate that when an owner sells an item, it no longer belongs to the original owner, but to the purchaser. Likewise, the purchaser of a debt is owed the repayment obligation, not the prior obligee. For example, would a debt still be "owed to . . . the United States" if 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? Are there 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? Are there any other factors the Commission should consider in determining which types of debts should be included or excluded from this phrase for purposes of implementing the Budget Act amendments to the TCPA? If so, what are those factors? Consistent with the focus of the amended statutory language on debts "owed to or guaranteed by the United States," should we also require that the content of covered calls 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? Similarly, can we and should we 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?

The content of the covered calls should be limited to the discussion of the covered debts only. Callers should be forbidden from using any information obtained during a call to collect debts that are not owed to the federal government. This could be a significant problem, as collectors could use the name of the federal government and its extraordinary collection powers as a lever to elicit information from the debtor – such as the location of the debtor's bank account and the identify of the debtor's employer -- to use in collecting other debts. We therefore propose that:

> (VI) The call deals only with one or more debts currently owed to or guaranteed by the United States serviced by the caller, and information obtained during the call is used only for the purpose of collecting those debts;

See proposed § 64.1200(a)(1)(iii)(VI) in section IV, *infra*.

Please see our response to Question 11, *supra*, on the issue of coverage of calls by debt buyers who have purchased the debts from the United States.

13. *Who can be called?* We seek comment on the person or persons to whom covered calls may be made. We believe the most reasonable way to read the phrase "solely to collect a debt" is to include only calls to the person or persons obligated to pay the debt because it appears impossible that calls to non-debtors by their nature would directly result in collection from the debtor. We believe this

approach will ensure that a debtor's family, friends, and other acquaintances will not be subject to non- consent robocalls seeking information about the debtor. We seek comment on this proposal and the related question of whether we should limit covered calls to the cellular telephone number the debtor provided to the creditor, e.g., on a loan application.

We strongly support the Commission's proposal to limit the "persons to whom covered calls may be made" to the debtor. We agree that the *only* reasonable way to read the phrase "solely to collect a debt" is to exclude all calls to persons who do not owe the debt. Calls to third parties that seek information about the debtor's location do not seek (and, under the FDCPA, cannot seek) payment as part of the call. They are not calls to collect the debt – much less "solely" to collect it. Recent cases show that collectors already abuse non-debtors mercilessly in their attempts to find the actual debtors. In the case of *Cooper v. Nelnet*, Nelnet contacted third parties' cell phones with prerecorded messages 185 times.[86] Consumers find these calls extremely objectionable, and the Commission should not permit them to be covered by this regulation. To clarify this point, we propose that the regulation allow robocalls without consent only if:

> (II) The call is made only to the debtor . . . .

See proposed § 64.1200(a)(1)(iii)(II) in section IV, *infra*.

Furthermore, we urge the Commission to require that callers document the basis for calling the particular phone number. Without this requirement, there would be no reasonable way to ensure that callers are diligently limiting their calls to numbers for which there is a reasonable basis to believe they are reasonably accurate. Therefore we are recommending that the regulatory language include the following:

> (V) The caller has records demonstrating the basis upon which it believes that each call will be received by the debtor intended to be called;

See proposed § 64.1200(a)(1)(iii)(V) in section IV, *infra*.

14. We seek 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. Parties seeking debtors' current telephone numbers often use techniques such as skip tracing, which are not guaranteed to identify the debtor. We propose to exclude such calls from the exception to encourage callers to avoid robocalling unwitting individuals who have no connection to the debtor. Similarly, and consistent with our recent robocalls decision, we propose that 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. We seek comment on our proposals and any alternatives.

As stated in response to Question 13, *supra*, we strongly agree that only calls to debtors should be permitted. No calls to relatives, neighbors or references should be permitted, because such calls would be made only to *find* the debtor and not directly collect the debt.

[86] Cooper v. Nelnet, 6:14-cv-00314-GKS-DAB (M.D. Fla.).

We also strongly agree that the Commission's rules for reassigned numbers promulgated in its 2015 Omnibus Order[87] should apply here. In that Order, the Commission allowed callers only one call to determine whether a cell phone number had been reassigned to a new consumer.[88] It did this because if there were not a strict limit on these calls, callers would have no incentive to ensure that they are calling the person who provided consent to be called.

Wrong number calls generally are not a matter of one or even two calls, but usually result in many calls. Here are just a few examples involving a huge number of wrong number calls:

- *Dominguez v. Yahoo, Inc.*[89] – Yahoo sent 27,809 wrong number text messages in 17 months to this consumer, and refused to stop even after the consumer's many pleas.
- *Osorio v. State Farm Bank*[90] – 327 robocalls to the consumer's cell phone in 6 months, all seeking to collect on a debt owed by someone else.
- *King v. Time Warner Cable*,[91] – An automated system for debt collection calls involving zero human intervention or review resulted in 153 robocalls to a woman who had never been a customer. The calls continued even after she informed Time Warner of its error and asked it to stop calling, including 74 additional robocalls after she filed suit.
- *Moore v. Dish Network L.L.C*,[92] – 31 robocalls in 7 months to the cell phone of a low-income consumer using a Lifeline support phone, even after he repeatedly told the company it had the wrong number and to stop calling.

The industry benefits from these wrong number calls because it is cheaper to call all possible numbers than to incur the costs to determine the correct number. Thus the industry shifts the cost of ensuring that the right party is called from the caller to the called party. To change this dynamic, the industry must be incentivized to *stop* the wrong number calls. The experience reflected in the cases above shows that, without proper incentives to stop making wrong number calls, the industry will simply keep calling.

Many servicers and collectors communicate regularly with their debtors. Who better than the callers to ensure that they have the correct telephone number for their debtors? These callers have processes in place to maintain debtors' contact information. They can implement features in their customer communications to confirm that they are calling the correct number, for example, by making periodic live-voice calls, dialed by the caller.

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87 *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961, 8006-10, ¶¶ 85-92 (2015) [hereinafter 2015 TCPA Declaratory Ruling and Order].

88 *See id.*

89 629 Fed. Appx. 369 (3d Cir. 2015).

90 746 F.3d 1242 (11th Cir. 2014).

91 113 F. Supp. 3d 718 (S.D.N.Y. 2015), *appeal filed,* No. 15-2474 (2d Cir. Aug. 6, 2015).

92 57 F. Supp. 3d 639 (N.D. W. Va. 2014).

Notably, most cell phone providers do not reassign numbers for at least 30 days.[93] Autodialers are equipped to record "triple-tone" signals that identify a number that has been disconnected. A manual dialer will also hear a triple-tone. Once a triple-tone plays, the caller knows that the number is on track to be reassigned to a different person.[94]

The FCC's safe harbor for liability for one call is an appropriate balance between assisting callers to determine whether a number has been reassigned and opening the floodgates to unwanted calls to consumers. It is entirely appropriate that the same rule be applied to the calls covered under this regulation. We recommend that the following language be added to the regulation itself:

> (VII) The calls otherwise comply with the Commission's rules, including those relating to calls made to parties the callers do not intend to reach.

See proposed § 64.1200(a)(1)(iii)(VII) in section IV, *infra*.

<u>15. *Who may call?* We next seek comment on who may make the covered calls at issue. As amended, the relevant portion of the TCPA reads: "It shall be unlawful for any person . . . to make any call . . . using any [autodialer] or an artificial or prerecorded voice to any [wireless number] unless such call is made solely to collect a debt owed to or guaranteed by the United States." This provision is not clear as to who may make calls covered by the exception. We believe the most reasonable way to interpret this language is to include calls made by creditors and those calling on their behalf, including their agents. Is there a limiting principle to determining who should be deemed to be acting on behalf the creditor? We seek comment on our interpretation and whether we should interpret the statute to include other callers and, if so, who. Alternatively, should we 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?</u>

We agree that the rule should be limited to United States government creditors and those calling on their behalf and acting within the scope of their authority. To eliminate any ambiguity about whether a caller is calling on behalf of the government, we recommend that the regulation specify that a caller other than the government must be calling pursuant to a contract with the government for the servicing or collection of a covered debt.

Please see our response to Question 11, *supra*, for additional discussion of issues raised by this question.

<u>17. *Need for restrictions.* In considering the need for restrictions on covered calls, we note the volume of consumer complaints, as set forth above. These factors, along with Congress' explicit statement that the Commission "shall prescribe regulations to implement the amendments made by" the Budget Act, and Congress' authorization that the Commission "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," lead us to propose that we do so here. We seek comment on our proposal and on what types of number and duration restrictions we should adopt for the covered calls. Apart from our specific proposals and questions below, we seek comment generally on what other actions we should consider to reduce unwanted debt collection robocalls to consumers.</u>

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[93] *See* Numbering Resource Optimization, CC Docket No. 99-200, Report and Order, 15 FCC Rcd. 7574, 7590, ¶ 29 (2000).

[94] *See* 2015 TCPA Declaratory Ruling and Order at 38 n.303.

Please see our extensive explanations of the problems caused by unwanted robocalls to consumers and the problems caused by debt collection activities in sections I and II of these comments, *supra*.

18. *If adopted, the nature of restrictions.* We seek comment on how we should restrict or limit the number and duration of covered calls, including both collection calls and debt servicing calls. Consistent with the conditions we have adopted when granting exemptions to permit certain free-to-end- user robocalls to be made without consent of the called party, and 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, we propose to restrict the number of covered calls to three per month, per delinquency only after delinquency. We believe 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. We propose that the limit on the number of calls should be for any initiated calls, even if unanswered by a person, because many consumers may choose not to answer calls from unfamiliar numbers. These limits would apply to autodialed, prerecorded, or artificial voice calls to wireless numbers. In the case of autodialed calls, the limits apply whether they use a prerecorded or artificial voice or instead attempt to connect the called debtor with a live agent. We see potential value, however, in debtors hearing from a live agent to discuss the debt and potential servicing options and seek comment on whether and how we should encourage that approach. We seek comment on these proposals. We also seek comment on the maximum duration of a voice call, and whether we should adopt different duration limits for prerecorded- or artificial-voice calls than for autodialed calls with a live caller. Should there be a limit on the length of text messages? What should that limit be? We also seek comment on how to count debt servicing calls for purposes of our proposed three-call limit per month or any other limit on the number of calls.

A. Allowable number. We completely agree with the Commission's proposal to limit the allowed robocalls to three per month. As described in sections I and II, *supra*, robocalls invade consumers' privacy, use up cell phone minutes they need, and create dangers due to distraction. And, when used as a debt collection tool, telephone harassment can lead to negative consequences for consumers—such as using the rent money to pay lower-priority debts—that consumer protection laws are designed to prevent. Moreover, as illustrated by the story from Inside Arm in which the student loan borrower did not respond to 250 contacts,[95] too many calls can also be counter-productive.

B. The Commission's proposal would limit only unconsented-to robocalls, but not the many other ways that collectors and servicers can communicate with debtors. The Commission's proposed limit of three robocalls without consent per month is an appropriate number of allowed calls. When considering these limits, it is important to keep in mind that the calls made pursuant to this regulation are without consent, and are likely to comprise only a portion of the many other calls and contacts that debt collectors have with the debtors from whom they are collecting. All of the following contacts will fall outside this regulation, and will still be possible for collectors to make under appropriate circumstances:

- Robocalls to cell phones with consent (presumably collectors will be able to obtain consent to future calls through both the calls they make pursuant to this regulation and other contacts they have with borrowers – such as email, U.S. mail, payments made, online queries by the debtors, and more);

[95] *See* section II.4 of these comments, *supra.*

- Hand-dialed calls to cell phones;
- Calls to residential lines and work phones;
- U.S. mail correspondence;
- Email correspondence; and
- Internet queries by the debtor.

The number of calls, and possibly all contacts, from the collector to the debtor may be limited by the CFPB once it issues its long-awaited rule on debt collection.[96] However, the only issue in this proceeding is the number of unconsented-to robocalls to cell phones for the collection of federal debt. Given especially how many other forms of contacts collectors can still have with debtors, three per month is a logical and appropriate limit.

C. The limit of three calls should apply to each *servicer or collector calling*. The Commission proposes that the limit of three calls per month be applied to each *loan*. We believe that three unconsented-to robocalls per loan per month will lead to far too many calls, especially in the student loan collections arena. Most student loan borrowers take out two loans each semester, sometimes more. As a result, many student loan borrowers who complete a four-year course of study have eight to ten different loans. A borrower who is delinquent on one loan is likely to be delinquent on all of them. Allowing three robocalls per month for each loan would allow 30 calls per month *without consent* to a borrower with ten student loans.

Under the regulations for the Higher Education Act, all loans (with a few exceptions) held by a single servicer must be repaid under the same repayment plan.[97] Therefore, there is no utility to allowing a servicer to make additional robocalls based upon the number of loans a borrower has with that servicer, because for most borrowers all the loans will be treated the same.

Our preference would be for the limit on unconsented-to robocalls to be applied to each *debtor,* but we understand that this limit might be difficult to coordinate among different servicers or collectors. However, the limit should at least be applied to each *servicer or collector*, so that a caller collecting on multiple loans is limited to a total of three robocalls per month.

Even applying the limitation to each servicer, for many borrowers there will still be a multiplicity of robocalls permitted under this regulation, because many borrowers have multiple loans with multiple servicers. Many different companies service federal student loans, including the four large companies that currently service most Direct loans and six additional smaller nonprofits, and a still larger set of companies that continue to service Federal Family Education Loans (FFEL) loans (a major federal student loan program that ended disbursements in 2010).[98] Adding to complications for borrowers, the Department, at times, has transferred some existing loans from one servicer to another.

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[96] Press Release, CFPB Considers Debt Collection Rules (Nov. 6, 2013), a*vailable at* http://www.consumerfinance.gov/about-us/newsroom/cfpb-considers-debt-collection-rules/.

[97] 34 C.F.R. § 682.209(a)(6)(xii) (FFEL) ("For purposes of this section, a lender shall, to the extent practicable require that all FFEL loans owed by a borrower to the lender be combined into one account and repaid under one repayment schedule"); 34 CFR 685.208(a)(4) (Direct) ("All Direct Loans obtained by one borrower must be repaid together under the same repayment plan, except" the enumerated loans involving Parent PLUS loans).

[98] *See, e.g.,* U.S. Dep't of Educ., Top 100 Current Holders of FFELP Loans for 2014 and 2013, *available at* http://www.fp.ed.gov/attachments/publications/Top100CurrentHolders2014.pdf.

Student loan borrowers who attend only one school will typically have only one servicer that services all of their federal student loans (aside from Perkins loans, which are serviced by the school). This is particularly true for new borrowers who have only Direct loans, as the Department of Education, to the extent practicable, attempts to have new Direct loans serviced by the servicer already holding that borrower's other loans. Despite the Department of Education's desire to pair one borrower with one servicer, many student loan borrowers nonetheless wind up with multiple different companies servicing their federal student loans simultaneously. This is particularly true for borrowers who have FFEL loans and those who attended more than one school, because the Department does not coordinate FFEL loans to ensure that each borrower has only one servicer. Thus, a student who takes out a FFEL loan with one lender and then attends a different school that refers students to a different FFEL lender is likely to have multiple servicers. Many borrowers attend multiple schools, either because they transfer, seek additional degrees, or do not complete a program and later enroll in another program. Similarly, a student who took out FFEL loans prior to 2010 and then took out Direct loans after the FFEL program was discontinued may have different servicers for her FFEL and Direct loans. For these reasons, we strongly urge the Commission to limit the number of allowed calls to three per month per servicer or collector.

D. The limit should apply to all initiated calls. As explained in section II.2, *supra*, consumers can find it harassing and often emotionally devastating to be chased by a debt collector who calls often. Every time the phone rings can cause anxiety. Whether or not the collector leaves a message on voice mail does not assuage this harassment. Therefore, we strongly support the Commission's proposal to apply the limit on allowable robocalls to each call initiated.

E. The limit on voice calls. Long-winded messages on voice mail can eat up precious minutes for those 75 million consumers who have limited minutes on their cell phone plans. Therefore, we recommend that voice mail messages be no more than 30 seconds. The Commission should, however, make sure that the 30 second parameter allows sufficient time for the caller to inform the consumer of the right to request that the robocalls cease.

Since consumers who answer a prerecorded call can hang up at any time, we do not see a need to limit the length of the prerecorded message for answered calls. We also agree with the Commission that there should not be a limit on the length of calls during which the consumer speaks to a live person. Of course, the consumer should be allowed to terminate the call at any time.

F. Additional limits on prerecorded calls. We agree that live calls are more likely to be effective and are somewhat less onerous than prerecorded calls. However, while prerecorded calls are indeed hated (they were the subject of 2.2 million complaints to the FTC last year),[99] autodialed live calls are no panacea. Automated calls, in which live callers pick up the line when someone answers, lead to "dead air" calls. As detailed in the Commission's 2003 Order, there are many problems with these calls.[100] Consumers often feel harassed or aggravated by "dead air" calls. Many describe the burdens these calls impose on individuals with disabilities, who often struggle to answer the telephone. Hang-ups and "dead air" calls can also be frightening for the elderly.[101] Nonetheless, we all agree that live calls are much preferable to prerecorded calls.

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[99] *See* discussion in section I of these comments, *supra.*

[100] *See In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 Report and Order, 18 FCC Rcd. 14014 (2003) (¶ 147).

[101] *Id.*

Our recommendation is that callers should be incentivized to place live calls rather than prerecorded calls. To provide that incentive, we recommend that no more than one prerecorded call per month be permitted, with the other two contacts being either automated calls or texts.

Our recommendations regarding all of the issues addressed in Question 18 are included in our proposed language:

> (IV) No more than three calls per month are made to each debtor from whom the caller is seeking to collect debts covered by this subsection, and provided that each call causing either the debtor's phone to ring or for which a voice mail message is created counts as one call, no voice mail message is more than 30 seconds, and no more than one of these calls is a call using a prerecorded message or an artificial voice.

See proposed § 64.1200(a)(1)(iii)(IV) in section IV, *infra*.

<u>19. Should the Commission look to other standards or precedents for guidance? For example, should the Commission restrict 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? Should the Commission consider any limits on the number of calls pursuant to the Fair Debt Collection Practices Act if it adopts such limits here? How should the Commission take account of any limits adopted by the Consumer Financial Protection Bureau? Are there other standards or precedents, including restrictions that might exist under either federal or state debt collection laws, the Commission should consider? Are calls covered by the Budget Act exception subject to other laws and rules that more generally govern debt collection and, if so, how should we harmonize any overlapping requirements?</u>

The FDCPA will govern only a small percentage of the calls that will be made under this regulation, as the Act applies only to collectors who obtain the debt to collect after it is in default.[102] However, the CFPB has indicated that it intends to promulgate rules governing creditors collecting their own debts that should also cover servicers who are not collectors covered by the FDCPA.[103]

We certainly agree that limiting the time for these robocalls to after 8 a.m. and before 9 p.m. is a wise and appropriate consumer protection. It mirrors the protection applied to calls covered by the FDCPA,[104] and is included in other regulations issued by the Commission.[105] Our proposed language for the regulation includes this limitation. Additionally, callers should be required to make the calls during these times based on the debtor's current area code and zip code. In other words, if the original area code indicates an east coast time, but the caller has the debtor's address and it indicates that the debtor is now residing on the West Coast, the caller should be required to make the calls between 8 a.m. and 9 p.m. Pacific Standard Time.

> (II) The call is made only to the debtor, is not made before 8 am or after 9 pm in the time zone reflected by the debtor's current area code and current zip code, and is made only by the United States or a person who has contracted directly with the

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102 15 U.S.C. § 1692a(6).

103 *See* Consumer Financial Protection Bureau, Advance Notice of Proposed Rulemaking, 78 Fed. Reg. 67848-01, 2013 WL 5973809 (Nov. 12, 2013).

104 15 U.S.C. § 1692a(c)(1).

105 *See, e.g.,* 47 C.F.R. § 64.1200(c)(1).

United States for the servicing or collection of this debt owed to or guaranteed by the United States;

See proposed § 64.1200(a)(1)(iii)(II) in section IV, *infra*.

Industry callers have argued that, because other laws and regulations require contacts at several points in the collection process, the limits imposed on calls covered by the TCPA are inappropriate and require callers to make a Hobson's choice about which laws they will follow.[106] We do not dispute that there are a myriad of other laws and regulations that require callers to contact consumers by phone. The key here is that these are requirements for *contact*. They do not require contact by *robocall*. No one has an inalienable right to make robocalls. *If* the callers have consent from the debtor, they may satisfy these other requirements by robocalling the debtor's cell phone. Otherwise the callers should not be permitted to call cell phones unless the calls relate to the collection of a federal debt, in which case the regulation at issue here will come into play.[107] There are no rules or regulations that require contacts by robocall.

20. *Consumer ability to stop covered calls.* The Commission has determined that an ability to stop unwanted calls is critical to the TCPA's goal of consumer protection. That right may be more important here, where consumers need not consent to the calls in advance in order for a caller to make the calls. We propose, therefore, that consumers should have a right to stop such calls at any point the consumer wishes. We seek comment on our proposal. For example, does the amended law allow 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"? We propose that stop-calling requests should apply to a subsequent collector of the same debt. We seek comment on this proposal and how we might ensure that a request to stop such calls be honored if later transferred to other collectors. Should the Commission 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?

As the calls made pursuant to this regulation are to be made without consent, there will be no consent to revoke. This means that the only way consumers will have the right to control incoming robocalls to their cell phones is if the Commission provides them with an affirmative right to stop the calls. **The Commission's proposal to provide this right to stop calls is a critically important part of its proposed regulation**. The regulation should require that callers ensure that there is a mechanism to record debtors' requests for calls to stop, and that callers must then ensure that no more robocalls are made to those debtors' cell phones unless they obtain consent from the debtors. This protection is fully within the Commission's statutory authority. Requiring calls to stop after the consumer so requests constitutes a limit on the number of calls that can be made, and Congress explicitly authorized the Commission to limit the number of calls.

The Commission should make clear that a consumer's request to stop the robocalls must be honored immediately—as soon as the debtor (or called party) says to stop calling. It would not make

[106] Hearing on The Telephone Consumer Protection Act at 25: Effects on Consumers and Business Before the United States Senate Comm. on Commerce, Science and Transportation, 114th Cong., 2d Sess. (May 18, 2016) (testimony of Monica Desai, Partner, Squire, Patton Boggs) (citing, as an example, the CFPB's Early Intervention Rule).

[107] In the 2015 TCPA Declaratory Ruling and Order, the Commission exempted certain banking calls, allowing three voice calls or text messages per event over a three-day period; and it exempted certain health care calls, allowing one message per day, up to a maximum of three voice calls or text messages combined per week from a specific health care provider. 2015 TCPA Declaratory Ruling and Order at 8027-28, 8032, ¶¶ 138, 147.

sense to have the right to stop the calls, but then have that right not be applicable until the allowed number of calls had already been made. Such a rule would vitiate this essential consumer protection.

And the Commission is absolutely correct to consider requiring that a debtor's request to stop the calls must be applicable to, and transmitted to, subsequent collectors. We have repeatedly insisted to the CFPB that it is essential that collectors pass along to subsequent collectors information about the collection process.[108] Moreover, the callers themselves must be responsible for ensuring that a previous collector has *not* received a request to stop the calls from the debtor. Placing the onus on the callers to ensure that previous collectors of the debt have passed on to them all relevant information about the collection history of the debt, as well as the debt itself, is the best way to ensure that the collection and servicing industry maintain records that comply with these consumer protections.

These requirements track those applicable to robocalls made to consumers' cell phones with consent. As clarified in the Commission's 2015 Order, callers must allow consumers to revoke consent by any reasonable method.[109] This directive requires that callers develop mechanisms to track consumers' revocation of consent. It also requires, of course, that callers maintain records of the revocation of consent. Once this information is recorded, it will be easy for servicers and collectors to pass it on to subsequent contractors.

To accomplish all of these goals, we propose that the regulation includes the following specific language:

> (III) Each call includes a message at the outset of the call that the debtor has the right to request that these calls stop, with, in the case of a call that delivers a prerecorded or artificial-voice message, an automated, <u>interactive voice- and/or key press-activated opt-out mechanism</u>, and the caller makes no calls to a debtor after such a request has been made to the caller or to previous persons collecting the subject debt;

See proposed § 64.1200(a)(1)(iii)(III) in section IV, *infra*.

<u>21. We also propose, so that consumers fully understand any right we adopt to stop calls, to require callers to inform debtors of their right to make such a request. We seek comment on this proposal and on when and how callers should provide such notice. For example, should the permissible ways to opt out of further calls under the TCPA—i.e., any reasonable method, including orally or in response to a text message—apply here? Should the Commission 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?</u>

This proposal to require callers to inform debtors of the right to stop robocalls is also a critical consumer protection. The Commission's regulation should specify that this information must be provided *at the outset* of the call.

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[108] *See* National Consumer Law Center, Recommendations to the CFPB Regarding Debt Collection Problems 2 (Apr. 2013) ("Collectors should not be able to launder the debt of defenses simply by selling it to another collector who can then restart the harassment. Instead, all information related to the collection of the debt, should be required to accompany the debt, and subsequent collectors should be held responsible for failing to abide with previous requests."), *available at* http://www.nclc.org/images/pdf/debt_collection/recommendations-to-CFPB-Debt-Collection.pdf,

[109] 2015 TCPA Declaratory Ruling and Order at 8027-28, 8032, ¶ 47.

We urge the Commission, as it has suggested, to require artificial voice and prerecorded message calls to include an automated, <u>interactive voice- and/or key press-activated opt-out mechanism for stopping future calls</u>. Otherwise, consumers are likely to find the right to stop the calls difficult or impossible to implement.

Informing consumers of the right to stop these robocalls and providing an easy mechanism to do so will also protect servicers and collectors. Such action will provide an opportunity for consumers who have received a wrong number call to stop the calls immediately. It will thus serve as one more method by which the industry can identify wrong number calls and avoid making more than one call to a wrong number.

IV. Specific recommendations for amendments to the regulation allowing the calls.

It is critical that the Commission's important consumer protections for debt collection robocalls made without consent be memorialized in the regulation itself. This action will enable everyone to understand clearly and exactly what the rules are governing these calls.

The following is our recommended language for the regulation, including all of the consumer protections that we have described in these comments. Our proposed changes are presented in bold.

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

...

(iii) 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, unless such call is made solely to collect a debt currently owed to or guaranteed by the United States **and complies with the following requirements:**

(I) The debtor who owes the debt about which the call is made is delinquent in making payments, or delinquent in complying with requirements to obtain or maintain eligibility for a payment plan or other program relating to the debtor's obligations to pay the debt;

See answers to questions 8 and 9, *supra*, for an explanation for the reasons for this language.

(II) The call is made only to the debtor, is not made before 8 am or after 9 pm in the

time zone reflected by the debtor's current area code and current zip code, and is made only by the United States or a person who has contracted directly with the United States for the servicing or collection of this debt owed to or guaranteed by the United States;

See answers to questions 11, 13, 15, and 19 for an explanation for the reasons for this language.

(III) Each call includes a message at the outset of the call that the debtor has the right to request that these calls stop, with, in the case of a call that delivers a prerecorded or artificial-voice message, an automated, <u>interactive voice- and/or key press-activated opt-out mechanism</u>, and the caller makes no calls to a debtor after such a request has been made to the caller or to previous persons collecting the subject debt;

See answers to questions 20 and 21 for an explanation for the reasons for this language.

(IV) No more than three calls per month are made to each debtor from whom the caller is seeking to collect debts covered by this subsection, and provided that each call causing either the debtor's phone to ring or for which a voice mail message is created counts as one call, no voice mail message is more than 30 seconds, and no more than one of these calls is a call using a prerecorded message or an artificial voice;

See answer to question 18 for an explanation for the reasons for this language.

(V) The caller has records demonstrating the basis upon which it believes that each call will be received by the debtor intended to be called;

See answers to question 13 for an explanation for the reasons for this language.

(VI) The call deals only with one or more debts currently owed to or guaranteed by the United States serviced by the caller, and information obtained during the call is used only for the purpose of collecting those debts; and

See answer to question 12 for an explanation for the reasons for this language.

(VII) The calls otherwise comply with the Commission's rules, including those relating to calls made to parties the callers do not intend to reach.

See answer to questions 14 for an explanation for the reasons for this language.

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

...

(v) Delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 15 CFR 160.103;

(vi) Is made solely pursuant to the collection of a debt owed to or guaranteed by the United States.

Respectfully submitted,
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