



January 26, 2015

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: Response to *Ex Parte* Presentation of the National Council of Higher Education Resources (“NCHER”), CG Docket No. 02-278

Dear Ms. Dortch:

These comments are submitted by the **National Consumer Law Center**,¹ on behalf of its low-income clients, as well as the following national advocacy organizations: **Americans for Financial Reform, Consumer Action, Consumer Federation of America, Consumers Union, the National Association of Consumer Advocates, Public Citizen, and U.S PIRG.**²

On July 31, 2014, the National Council of Higher Education Resources filed a notice of *Ex Parte* presentation seeking a content-based exception to the TCPA or an alternative request for the FCC to reverse the its prior orders so as to redefine an automatic telephone dialing system (“ATDS”). We urge the Commission to deny these requests because 1) student loan servicers and collectors have shown that more safeguards are required, not fewer; 2) the FCC does not have authority to create a content-based exemption; and 3) an exemption for student loan servicers and collectors is unjustified in any event.

¹ The **National Consumer Law Center (NCLC)** is a non-profit 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 the FCC and state utility commissions and publishes *Access to Utility Service* (5th edition, 2011) as well as NCLC’s *Guide to the Rights of Utility Consumers* and *Guide to Surviving Debt*.

² At the end of this letter we include a description of the national advocacy organizations supporting these comments.

1. Student Loan Collectors' and Servicers' Repeated Debt Collection Violations Show That More Consumer Safeguards Are Needed, Not Fewer.

Student loan collectors and servicers have frequently violate 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, 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).³ 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.⁴

Moreover, in recent 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. High-quality servicing can contribute to an individual borrower's ability to successfully repay their debt, especially through enrollment into affordable repayment plans.

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 surprises to loan modification challenges. 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. (Emphasis added.)⁵

³ See, Justice Department Reaches \$60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans, <http://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging>.

⁴ See FDIC Announces Settlement with Sallie Mae for Unfair and Deceptive Practices and Violations of the Servicemembers Civil Relief Act, <https://www.fdic.gov/news/press/2014/pr14033.html>. While this matter involved private student loans, rather than the federal student loans for which the industry is seeking a carve-out, the industry's alternate request for a redefinition of autodialer would allow autodialed calls for both private and federal student loans.

⁵ Testimony of Rohit Chopra, Assistant Director & Student Loan Ombudsman at the Consumer Financial Protection Bureau, Before the United States Senate Committee on the Budget, June 4, 2014.

Student loan collectors and servicers—including those who were represented at the July 29 meeting—have also frequently been subject to private suits for TCPA violations. For example, Nelnet—one of the servicers that sent a representative to the July 29 *ex parte* meeting with FCC staff—is currently a defendant in a TCPA action because it contacted third parties’ cell phones with pre-recorded messages. That case is *Cooper v NelNet*, 6:14-cv-00314-GKS-DAB (M.D. Fl.). Mr. Cooper does not have a student loan serviced by NelNet. Yet, he received the below pre-recorded call several times on his cell phone in addition to texts and other calls:

Hello, this is an important message for Leonor Vargas from NelNet, calling on behalf of the US Department of Education. We do not have a current address, phone number, or email on file for Leonor Vargas. Without current contact information, we are unable to provide important information about their student account. Please contact NelNet 24/7 at 888-486-4722 or visit us at www.nelnet.com. This matter requires your immediate attention. Thank you.

Similarly, Sallie Mae was the defendant in *Cummings v. Sallie Mae*, 12-cv-09984 (N.D. Ill.), a case in which the allegations were that Sallie Mae called people who were references for the students’ loans with pre-recorded debt collection messages. Sallie Mae had no relationship with these references in regards to the accounts that were the subject of the calls.

These examples demonstrate that student loan servicers and collectors are autodialing and delivering artificial voice messages to cell phones in violation of the TCPA, as well as violating other critically important consumer protections. Until the servicers and collectors begin complying with the rules and regulations to which they are currently subject, there should be no consideration of providing special dispensation for them to harass consumers on their cell phones, when they have no consent. The situation calls for stronger enforcement, not weaker protections.

2. The TCPA Does Not Provide Authority To Create Content-Based Exemptions

The TCPA provides the FCC authority to exempt messages on the basis of content only when there is no charge to consumer. This was the reason that the FCC was able to exempt calls made by telephone providers, as those calls are not included in any bucket of minutes. Specifically, the TCPA provides:

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission –

* * *

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service *that are not charged to the called party*, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect. (Emphasis added).⁶

⁶ 47 U.S.C. § 227(b)(2)(C)).

The exemption that the servicers seek would exceed this authority because an exemption is authorized only if the consumer is not charged from the call. Yet, the exemption is intended to cover calls to cell phones – for which consumers are charged.⁷

3. Exempting Student Loan Calls From The TCPA Would Be Unjustified Even If The FCC Had Authority To Do So

Even if the Commission had the authority to exempt student loan collection and servicing calls from the TCPA, it should not do so. The Commission should reject the student loan industry's arguments for giving it a special exemption from the TCPA for student loan collection and servicing calls.

The collectors and servicers contend that the ability to autodial student loan debtors' cell phones without their consent is essential because many in this population use cell phones rather than land lines. However, people who are having difficulty paying their student loans are likely to be struggling financially. Many are students who took out loans to attend fraudulent for-profit schools that did not prepare them for the promised jobs, and left them dealing with unemployment or underemployment and student loans.

These financially struggling debtors are more likely than others to have prepaid cell phone plans with a small number of minutes available that they rely on for essential communication regarding job searches, child care, and emergencies. Allowing collectors to make robodialed and prerecorded voice calls to borrowers' cell phones without their consent would drain away precious minutes under these prepaid plans. And, even if a student has a subscription plan rather than a prepaid plan, a deluge of autodialed calls can cause a student's call volume to exceed his or her monthly plan.

Moreover, the increasing use of cell phones – whether by student loan debtors or by others – is a reason to increase protections, not reduce them. As the FCC stated in 2012:

In addition, we note that the substantial increase in the number of consumers who use wireless phone service, sometimes as their only phone service, means that autodialed and rerecorded calls are increasingly intrusive in the wireless context, especially where the consumer pays for the incoming call.⁸

The collectors also contend that they need to be able to autodial student loan debtors' cell phones without their consent because they need to be able to send text messages, and “there is not a practicable way to ‘manually’ text.” First, text messages drain away minutes the same as voice calls. Second, it is untrue that there is no practicable way to ‘manually’ text – cell phone users constantly write text messages manually. It is true that it would be impossible to blanket the world with the same text messages over and over again without an autodialer, but that is exactly what the TCPA is designed to prohibit.

⁷ The Commission has already held that consumers are charged for purposes of the TCPA when a call drains time from the bucket of minutes under their cell phone plan. *See* In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC Report and Order, CG Docket No. 02-278 (Feb. 15, 2012) (“2012 Report and Order”) at paragraph 25.

⁸ *Id.*

The servicers and collectors also refer to a study by a “respected and independent economist” that purports to show that autodialing will enable millions of students to avoid default. We urge the FCC to give no weight to a study that reaches such an unlikely conclusion unless it is thoroughly peer-reviewed and made available to the public along with the data supporting it. But even if consumers would benefit from being autodialed by student loan debt collectors and servicers, Congress has already made the determination that the invasion of privacy, the draining of cell phone minutes, and the dangers of harassment outweigh those benefits. We note that this same argument could be made by any vendor, servicer, or collector – that consumers will benefit so much from learning about new offers, or being counseled about paying their debts, that the TCPA’s restrictions should be negated.

The collectors also contend that they should be able to autodial student loan debtors’ cell phones without their consent because they did not request or obtain consent for pre-2009 loans. It is simply bizarre to suggest that failing to obtain consent is a justification for an exemption from the consent requirement. Indeed, the consent requirement is the key principle and the key protection of the TCPA’s cell phone protections. The consent requirement means that it is the cell phone subscriber’s choice – not the choice of the merchant, the servicer, the debt collector, or the solicitor – whether to receive autodialed or artificial voice calls.

If servicers or collectors wish to autodial cell phones, or make artificial voice calls, they simply need to obtain the debtor’s consent via a manually dialed real-person call. The strenuous efforts they are making to relieve themselves of the requirement to obtain consent suggests that these student loan debtors do *not* want to receive autodialed or artificial voice calls – that their rights under the TCPA are important to them and should be honored, not negated. The fact that it is cheaper to blanket the nation with pre-recorded calls than manually dial them is not a reason to exempt student loan servicers and collectors from the TCPA’s requirements.

We very much appreciate the time and attention involved in considering our comments. If you have any questions, or would like any follow-up, please do not hesitate to contact Margot Saunders, counsel at the National Consumer Law Center, at msaunders@nclc.org, or 202 452-6253, extension 104.

Sincerely,

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Description of National Organizations Supporting These Comments

Americans for Financial Reform is an unprecedented coalition of over 250 national, state and local groups who have come together to reform the financial industry. Members of our coalition include consumer, civil rights, investor, retiree, community, labor, faith based and business groups.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers to advance consumer rights and promote industry-wide change.

The **Consumer Federation of America** is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education.

Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for telecommunications reform, health reform, food and product safety, financial reform, and other consumer issues. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

The **National Association of Consumer Advocates** (NACA) is a non-profit association of consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

The **National Consumer Law Center** (NCLC) is a non-profit 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 the FCC and state utility commissions and publishes *Access to Utility Service* (5th edition, 2011) as well as NCLC's *Guide to the Rights of Utility Consumers* and *Guide to Surviving Debt*.

Public Citizen is a national non-profit organization with more than 225,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

U.S. Public Interest Research Group (U.S. PIRG) serves as the Federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations that take on powerful interests on behalf of their members. For years, U.S. PIRG's consumer program has designated a

fair financial marketplace as a priority. Our research and advocacy work has focused on issues including credit and debit cards, deposit accounts, payday lending and rent-to-own, credit reporting and credit scoring and opposition to preemption of strong state laws and enforcement.