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October 11, 2018

**VIA ELECTRONIC DELIVERY**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Room TWA325  
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentations  
CG Docket No. 02-278**

Dear Ms. Dortch:

On October 9, 2018, the following individuals met separately with Zenji Nakazawa, Public Safety and Consumer Protection Advisor to Chairman Pai, and Arielle Roth, Wireline Advisor to Commissioner O'Rielly: Winfield P. Crigler, Executive Director, Student Loan Servicing Alliance ("SLSA"); Lucia Lebens, Vice President of Government Relations and Public Policy, Navient Corp. ("Navient"); Mark W. Brennan and Wesley Platt of Hogan Lovells US LLP, Counsel to Navient; and Rich Benenson and Al Mottur of Brownstein Hyatt Farber Schreck, LLP, Counsel to Nelnet Servicing, LLC ("Nelnet"). At the meetings, we discussed the Petition for Reconsideration of the Commission's August 11, 2016 Report and Order ("*Order*")<sup>1</sup> filed by Great Lakes Higher Education Corp. ("Great Lakes"), Navient, Nelnet, the Pennsylvania Higher Education Assistance Agency ("PHEAA"), and SLSA.<sup>2</sup>

During the meetings, we encouraged the Commission to reconsider the *Order* and properly implement Congress's amendments to the TCPA, which exempt federal debt collection calls from the "prior express consent" requirement. Many key stakeholders, including federal agencies, have provided extensive data in the record supporting the need for additional telephone outreach to student loan borrowers. As the extensive data in the record demonstrates, calls and text messages from student loan servicers are proven, effective methods that can help millions of borrowers avoid further delinquency and default.

By reconsidering the *Order* as requested, the Commission can advance Congress's goals of helping student loan borrowers get the information they need while promoting the timely repayment of billions of dollars of outstanding federal student loan debt. Borrowers have more than 50 options available to them, including deferment, forbearance, and forgiveness, with 16 repayment programs.<sup>3</sup>

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<sup>1</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 31 FCC Rcd 9074 (2016) ("*Order*").

<sup>2</sup> Great Lakes, Navient, Nelnet, PHEAA, and SLSA, Petition for Reconsideration (filed Dec. 16, 2016) ("*Petition*"); see also Great Lakes, Navient, Nelnet, PHEAA, and SLSA, Consolidated Reply (filed Feb. 13, 2017) ("*Consolidated Reply*"). Unless otherwise noted, all filings referenced in this document are in CG Docket No. 02-278.

<sup>3</sup> See, e.g., Navient Comments at iv.

Having a conversation with student loan borrowers is the key to helping them navigate these options and the complexity of the repayment system.

**The increasingly one-sided record demonstrates that the Commission should allow more than three call attempts per month under the exemption.** Servicers, federal agencies, and other commenters have provided a wealth of empirical evidence, and it all points to a substantially higher limit. For example, Nelnet showed that attempting up to 10 calls per month leads to 42% more live contacts compared to attempting three calls per month.<sup>4</sup> Navient showed that 40 or more calls attempts are required to reach 25% of delinquent federal student loan borrowers, and that it is able to resolve delinquencies more than 90% of the time it has a conversation with a borrower.<sup>5</sup> Navient also showed that successful enrollment in income-driven repayment (“IDR”) plans can be increased by 50% by contacting the cell phones of previously delinquent borrowers.<sup>6</sup> In addition, Navient provided a chart showing that a number of government entities require more than three call attempts per month to borrowers.<sup>7</sup>

The Department of Education (“Department”) warned specifically that three call attempts per month “would not afford borrowers sufficient opportunity to be presented with options to establish more reasonable payment amounts and avoid default.”<sup>8</sup> The Bureau of Consumer Financial Protection (“BCFP”) proposed significantly higher limits in its debt collection rulemaking.<sup>9</sup> And the BCFP Student Loan Ombudsman also released an annual report after the *Order’s* release that explained that current student loan outreach efforts “may be insufficient to assist a substantial share of borrowers.”<sup>10</sup>

In addition, the Treasury Department recently released a report describing a pilot program to service defaulted student loan debt, which explained that live contact “is critical to identifying and enrolling in a repayment option” and that borrowers “were often unaware of, or confused about, their repayment options.”<sup>11</sup> Revised data from the Department also highlights the need for and importance of additional borrower outreach, showing that at least half of all students at more than 1,000 colleges and trade schools had defaulted or failed to pay down at least \$1 on their debt within seven years – far more than the Department had previously estimated.<sup>12</sup> Moreover, the Education Finance Council (“EFC”) found that live contact with a student loan borrower led to the resolution of

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<sup>4</sup> See Nelnet Comments at 14 (filed June 6, 2016). Based on this, Nelnet estimates that attempting 10 calls per month would help an additional 389,000 of its borrowers, which is just a fraction of all federal student loan borrowers, resolve delinquencies each year. See Consolidated Reply at 4.

<sup>5</sup> See Navient Comments at 9-10, 42-43 (filed June 6, 2016).

<sup>6</sup> See *id.* at 34.

<sup>7</sup> See, e.g., Letter from Mark W. Brennan, Counsel, Navient, to Marlene H. Dortch, Secretary, FCC, App. A (filed Aug. 2, 2016); *Order*, O’Rielly Dissent.

<sup>8</sup> Letter from Ted Mitchell, Undersecretary, Department, to Marlene H. Dortch, Secretary, FCC, at 4 (filed July 11, 2016).

<sup>9</sup> BCFP, *Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered* (July 28, 2016), <http://bit.ly/2axWSZH> (“BCFP Proposal Outline”).

<sup>10</sup> The report recommended “[s]trengthening borrower communication” during critical periods, such as during a borrower’s transition from the rehabilitation process to an IDR plan. See BCFP, *Annual Report of the CFPB Student Loan Ombudsman* at 47 (Oct. 2016), <http://bit.ly/2kJFtCh>.

<sup>11</sup> Department of the Treasury, Bureau of the Fiscal Service, *Report on Initial Observations from the Fiscal-Federal Student Aid Pilot for Servicing Defaulted Student Loan Debt* (2016), <http://bit.ly/2gCCF3Q>.

<sup>12</sup> See, e.g., Andrea Fuller, *Student Debt Payback Far Worse than Believed*, WALL ST. J. (Jan. 18, 2017), available at <http://on.wsj.com/2l1LB5f>.

delinquency between 63 and 98% of the time, and that most of the time it takes only two calendar days to resolve a delinquency once live contact is established.<sup>13</sup>

Moreover, allowing additional call attempts would increase the practical effectiveness of reaching a borrower by allowing servicers the flexibility to attempt calls that match better a particular borrower's preferred calling windows. Borrowers are more likely to answer the phone in these circumstances, and, as a result, have a conversation with their servicer.

Meanwhile, no party has shown how the choice of "three" call attempts per month is supported by data or other empirical evidence in the record. Indeed, this limit lacks a rational basis and appears drawn from thin air. It is impossible to square with the data and input from numerous stakeholders, including other federal agencies. Worse, it will impede student loan servicers' ability to help borrowers. In contrast, a materially higher limit would help allow meaningful borrower contact and effective collection of federal debts.<sup>14</sup>

**The federal debts exemption also covers certain calls to numbers other than those provided by borrowers.** Many parties agree on this point, including the Association of Community College Trustees,<sup>15</sup> National Association of College and University Business Officers ("NACUBO"),<sup>16</sup> ACA Int.,<sup>17</sup> and National Consumer Law Center ("NCLC").<sup>18</sup> Such calls are made "solely to collect" a federal debt. Skip tracing and contacting individuals listed in a borrower's loan file, for example, are often a critical tool for locating borrowers,<sup>19</sup> and, in some cases, these activities are even required by the Department's rules.<sup>20</sup> The BCFP's debt collection proposals acknowledge the value of such calls and would allow up to six call attempts per week or one live communication with such individuals in some cases.<sup>21</sup>

Moreover, calls to reassigned or wrong numbers must be allowed under the exemption to avoid undermining Congress's intent. As Commissioner O'Rielly explained, the *Order's* "outright prohibition on misdialed calls and calls to entities other than the borrower, as well as the effective ban on calls to reassigned numbers do not balance the benefits and concerns as the revised order claims. They run counter to the law."<sup>22</sup> While we agree with NCLC that databases could help callers avoid some calls to reassigned numbers, callers currently have no viable means to entirely avoid reassigned numbers.<sup>23</sup>

**During the meetings, we also explained that the FCC took an impermissibly broad view of its jurisdiction under the amended TCPA.** The Commission interpreted the amendments as creating new, freestanding authority for it to regulate federal debt collection calls. This

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<sup>13</sup> Letter from Debra J. Chromy, President, EFC, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Feb. 1, 2017).

<sup>14</sup> See, e.g., Petition at 5.

<sup>15</sup> See Ass'n of Community College Trustees Reply Comments at 4 (filed June 21, 2016).

<sup>16</sup> See NACUBO Reply Comments at 2 (filed June 21, 2016).

<sup>17</sup> See ACA Int. Comments at 11 (filed June 6, 2016).

<sup>18</sup> See NCLC *et al.* Reply Comments at 9 (filed June 21, 2016) ("[W]e do not think it necessary for callers to be limited to calling the numbers originally provided by the debtors.")

<sup>19</sup> See, e.g., Navient Reply Comments at 23 (filed June 21, 2016).

<sup>20</sup> See 34 C.F.R. § 682.411(h), (m).

<sup>21</sup> BCFP Proposal Outline at 28.

<sup>22</sup> Order, O'Rielly Dissent.

<sup>23</sup> See, e.g., Consolidated Reply at 6; NCLC Opposition at 16-17.

interpretation contradicts the statutory text and Congress's intent, leads to absurd consequences, and ignores the principle of sovereign immunity.<sup>24</sup> Chairman Pai explained in his dissent that the interpretation "is unlawful and makes a dog's breakfast of the TCPA."<sup>25</sup> Commissioner O'Rielly called it "absurd."<sup>26</sup> None of the parties who commented on the Petition even attempted to defend this interpretation, and even NCLC called it a "rather absurd and strained reading of the Budget Act Amendment."<sup>27</sup>

The FCC similarly exceeded its authority by adopting rules that impose limits other than on the "number" and "duration" of exempt federal debt collection calls. Although the Commission characterized its rules in the *Order* as limiting only the "number" and "duration" of calls,<sup>28</sup> the rules are in fact far broader in scope. For example, the rules restrict who may be called under the exemption, require calls and text messages to include certain disclosures, and create an opt-out requirement.<sup>29</sup> As explained in the Petition, the Commission's rules are an abuse of discretion to the extent that they extend to elements beyond of the "number" and "duration" of calls under the new exemption.<sup>30</sup>

**The Commission should also confirm that the federal debts exemption covers Federal Family Education Loan Program ("FFELP") loans, which are federally guaranteed.** FFELP loans fall squarely within the exemption, although some confusion exists about this point. For example, a federal district court recently interpreted a footnote in the *Order* (which discussed mortgage debts) to mean that that Congress's exemption covers FFELP loan calls only when the federal government's obligations as the guarantor have been triggered and are active.<sup>31</sup> This cannot be the correct outcome, as it all but ensures that the affected borrowers would fall further into delinquency and potential default, thereby triggering the government's obligations anyway.

**We also explained that the Commission should confirm that the TCPA does not apply to federal contractors that comply with government directions.** In light of the overwhelming consensus that the federal government is not a "person" as that term is defined in the Communications Act, it also appropriate to interpret that term, in the context of the TCPA to exclude federal contractors, as the Commission found in *Broadnet*.<sup>32</sup> Moreover, robust case law shows that derivative immunity extends to federal contractors regardless of agency status.<sup>33</sup> The Budget Act Amendments also do not authorize the Commission to impose TCPA requirements on the federal government and its contractors, and these amendments and *Broadnet* do not completely overlap.<sup>34</sup> Meanwhile, state governments, like the federal government, need to be able to use cost-effective ways of communicating with their citizens and are presumed to not be included in the definition of the term "person."<sup>35</sup>

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<sup>24</sup> See, e.g., *Petition* at 16-21.

<sup>25</sup> *Order*, Pai Dissent.

<sup>26</sup> *Order*, O'Rielly Dissent.

<sup>27</sup> See NCLC Comments at 61 (filed June 13, 2018).

<sup>28</sup> See, e.g., *Order* ¶¶ 1-2, 5, 10, 30-49, 61; 47 U.S.C. § 227(b)(2)(H).

<sup>29</sup> See *Order* ¶¶ 38-41, 44.

<sup>30</sup> See *Petition* at 19-21.

<sup>31</sup> See *Henderson v. United States Aid Fund*, 2017 WL 766548 (S.D. Cal. Feb. 28, 2017); *Order* ¶ 19 n.54.

<sup>32</sup> *Broadnet et al., Declaratory Ruling*, 31 FCC Rcd. 7394 (2016) ("*Broadnet*").

<sup>33</sup> See, e.g., *SLSA et al. Comments* at 3-8 (filed June 13, 2018).

<sup>34</sup> See *id.* at 3-8.

<sup>35</sup> See *id.* at 18-20.

Finally, we noted the trend in TCPA class action cases of designating certain groups that participate in the Commission's TCPA proceedings as recipients of "*cy pres*" settlement funds.<sup>36</sup> When considering the record in this and other TCPA proceedings, the Commission should appropriately weigh the fact that such groups seem to benefit financially from the filing of TCPA lawsuits.

Pursuant to Section 1.1206(b) of the Commission's rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

Respectfully submitted,

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cc: Zenji Nakazawa  
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<sup>36</sup> See, e.g., *Willett et al. v. Redflex Traffic Systems, Inc. et al.*, Order Approving Settlement, 13-CV-1241 (D.N.M. Oct. 24, 2016) (approving a settlement agreement under which an organization appears to have received approximately \$650,000 in *cy pres* funds earmarked specifically for TCPA advocacy at the FCC).