

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau	)	CG Docket No. 18-152
Seeks Comment on Interpretation of the	)	
Telephone Consumer Protection Act in Light	)	
of the D.C. Circuit's <i>ACA International</i>	)	
<i>Decision</i>	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**COMMENTS OF THE STUDENT LOAN SERVICING ALLIANCE; NAVIENT CORP.;  
NELNET SERVICING, LLC; AND PENNSYLVANIA HIGHER EDUCATION  
ASSISTANCE AGENCY**

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June 13, 2018

## Executive Summary

In 2016, the Federal Communications Commission (“FCC” or “Commission”) released two items with great bearing on student loan servicers’ ability to help at-risk and disadvantaged federal student loan borrowers. First, the Commission clarified in the *Broadnet Declaratory Ruling* (“*Broadnet*”) that the Telephone Consumer Protection Act (“TCPA”) “does not apply to calls made by or on behalf of the federal government in the conduct of official government business, except when a call made by a contractor does not comply with the government’s instructions.” Second, the Commission adopted rules to implement Section 301 of the Bipartisan Budget Act of 2015 (“BBA”), which exempted calls “made solely to collect a debt owed to or guaranteed by the United States” from the TCPA’s “prior express consent” requirements.

Key revisions to both of these decisions can support federal policies to help federal student loan borrowers avoid the negative effects of delinquency and default. Congress intended for the BBA to help individuals repay their federal debts, and no single group of individuals stands to gain more from Congress’s amendments to the TCPA than at-risk and disadvantaged federal student loan borrowers. The important role that student loan servicers play in keeping at-risk borrowers out of delinquency and default was highlighted throughout the FCC’s federal debts proceeding, with many commenters providing data demonstrating the positive outcomes of telephone outreach and how live contact with borrowers is critical to achieving Congress’s objectives.

**First, the Commission should confirm that federal contractors are immune from TCPA liability when they comply with the federal government’s directions.** The Supreme Court’s decision in *Campbell-Ewald Co. v. Gomez* demonstrates that a federal contractor is not liable for a TCPA violation when it acts on behalf of the federal government and complies with the government’s instructions, regardless of agency status. And contrary to the FCC’s finding in

the *2016 Federal Debts Order*, the BBA amendments do not authorize the agency to impose TCPA requirements on the federal government or its contractors. Indeed, the FCC’s prior interpretation of the BBA as a “blank check” to regulate all federal debt collection calls to wireless numbers – including calls by the federal government and its contractors – was a remarkably broad invocation of authority that drew sharp dissents from then-Commissioner Pai and Commissioner O’Rielly. The BBA amendments also do not completely overlap with *Broadnet*, which applies based on the caller’s identity rather than the call’s purpose.

**Second, the Commission should reconsider the rules adopted in the *2016 Federal Debts Order* that are arbitrary, capricious, or an abuse of discretion.** As explained in detail in our Petition for Reconsideration filed in the Commission’s federal debts proceeding, the rules adopted in 2016 go beyond limiting the “number” and “duration” of calls and will hinder parties from assisting borrowers and collecting federal debts. For example, the one-sided record demonstrates that the FCC erred by allowing only three call attempts per month under the exemption, by excluding certain calls to individuals other than the borrower, and by failing to acknowledge that the consent requirements for exempt calls were removed by Congress. Moreover, a debt “owed to or guaranteed by the United States” properly includes all of the federal student loan programs, and calls “solely to collect a debt” should include all calls to collect a federal student loan for which repayment has begun and certain calls before that period begins.

**Third, the Commission should exempt state governments and their contractors from TCPA liability.** State governments need to be able to communicate with their citizens about important issues and use cost-effective ways of doing so, just like the federal government. Similarly, the longstanding interpretive assumption that the definition of “person” does not

include states applies here as well. Addressing this regulatory limbo will provide certainty to states and allow them to better serve their citizens, including by preventing delinquency and default on student loans.

**In addition, the Commission should clarify key issues related to the definition of the term “automatic telephone dialing system” (“ATDS” or “autodialer”), calls to reassigned numbers, and consent revocation.** Doing so will allow the Commission to continue to protect consumers, support legitimate business practices, and eliminate unnecessary confusion. The FCC should clarify that equipment qualifies as an ATDS only if it possesses both of the enumerated functions contained in the statutory definition: storing or producing numbers to be called, using a random or sequential number generator; and dialing those numbers without human intervention. It should also limit the definition of the phrase “has the capacity” to the actual, present capacities of equipment, which tracks the language’s plain meaning and would help reduce unnecessary and costly litigation, and clarify that the TCPA applies only to calls that are actually made using the ATDS functionality.

For calls to reassigned numbers, the Commission should adopt a reasonable framework that both protects consumers against unwanted calls and good-faith callers against unwarranted class action litigation exposure. As the D.C. Circuit observed, the one-call approach taken by the FCC in 2015 was unrealistic and unsupportable as a factual matter. The Commission should conclude that “called party” refers to the “intended recipient” of the call and allow callers to demonstrate that they intended to reach a subscriber based on a variety of facts and reasonable steps. Finally, to support reasonable opt-out methods, the FCC should provide examples that would be deemed “reasonable” as a safe harbor and confirm that parties are free to reach an agreement over the use of particular opt-out methods.

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**I. INTRODUCTION.**

The Student Loan Servicing Alliance (“SLSA”); Navient Corp. (“Navient”); Nelnet Servicing, LLC (“Nelnet”); and the Pennsylvania Higher Education Assistance Agency (“PHEAA”)<sup>1</sup> respectfully submit these Comments in response to the Federal Communication Commission (“FCC” or “Commission”) Consumer & Government Affairs Bureau’s *Public Notice* in the above-captioned proceedings.<sup>2</sup> The *Public Notice* seeks comment on issues regarding the “interpretation and implementation of the Telephone Consumer Protection Act [“TCPA”] following the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *ACA International v. FCC*.”<sup>3</sup>

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<sup>1</sup> Great Lakes Higher Education Corp. (“GLHEC”) participated in prior filings on behalf of its former affiliate, Great Lakes Education Loan Servicing Inc. (“GLELSI”). GLHEC sold its interest in GLELSI to Nelnet effective February 1, 2018.

<sup>2</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, Public Notice, CG Docket Nos. 18-152, 02-278 (rel. May 14, 2018) (“*Public Notice*”).

<sup>3</sup> *Id.*; see *ACA Int’l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

As discussed below, the Commission should clarify when federal contractors are not subject to the TCPA. For example, federal contractors should be immune from TCPA liability when they comply with the federal government's directions, consistent with the Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*. The Bipartisan Budget Act of 2015's ("BBA") amendments to the TCPA do not authorize the Commission to regulate the calling activities of the federal government or its contractors, contrary to what the FCC found in its *2016 Federal Debts Order*. The BBA amendments also do not completely overlap with the FCC's *2016 Broadnet Declaratory Ruling* ("*Broadnet*").

The Commission should also reconsider the rules adopted in the *2016 Federal Debts Order*. A debt "owed to or guaranteed by the United States" includes all federal student loan programs, and the phrase "solely to collect a debt" should include all calls to collect a federal student loan for which the repayment period has begun, as well as certain calls before that period begins. Meanwhile, the rules adopted in 2016 hinder parties from collecting federal debts and should be revised. The Commission is only authorized to limit the "number and duration" of exempt calls, and the one-sided record demonstrates that it erred in allowing only three call attempts per month under the exemption. Moreover, the exemption should cover certain calls to individuals other than the borrower. And the Commission's rules should recognize that Congress removed the consent requirement for exempt calls.

In addition, the Commission should confirm that state governments and their contractors are exempt from TCPA liability. Like the federal government, state governments need to communicate with their citizens about important issues, may be budget constrained, and should be allowed to use cost-effective methods of communication. Also like the federal government,



state governments often need to rely on private third-party contractors to make these communications.

Finally, the Commission should clarify key autodialer, reassigned number, and consent revocation issues to protect consumers, remove unnecessary confusion, and support legitimate business practices. First, the Commission should interpret “automatic telephone dialing system” (“ATDS” or “autodialer”) to include only equipment that uses a random or sequential number generator to store or produce numbers and dials those numbers without human intervention. Second, the Commission should also adopt a reasonable reassigned numbers framework that protects consumers against unwanted calls and good-faith callers against unwarranted class action litigation exposure. Third, the Commission should support reasonable opt-out methods.

## **II. THE COMMISSION SHOULD CLARIFY WHEN FEDERAL CONTRACTORS ARE NOT SUBJECT TO THE TCPA.**

### **A. Federal Contractors Should Be Immune From TCPA Liability When They Comply With Federal Directions.**

In *Broadnet*, the Commission held that the federal government and federal contractors acting within the scope of their agency are not “persons” for purposes of the calling restrictions set forth in Section 227(b)(1) of the TCPA. At the time, then-Commissioner Pai concurred that the federal government is not a person but dissented from the finding that federal contractors are not persons.<sup>4</sup> He indicated, however, that federal contractors were entitled to some form of derivative immunity, the precise contours of which, he wrote, should be left to the courts.<sup>5</sup>

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<sup>4</sup> See *Broadnet et al.*, Declaratory Ruling, 31 FCC Rcd. 7394 (2016) (“*Broadnet*”), Statement of Commissioner Pai Approving in Part and Dissenting in Part. It is essentially undisputed that the federal government is not a “person” under the TCPA. Had Congress wanted to extend the TCPA to the federal government, it could have by merely defining “person” to expressly include the government. It, however, did not. There is simply no indication the federal government intended to waive its sovereign immunity and be subject to the TCPA. The FCC need not and should not revisit this issue.

<sup>5</sup> *Id.*

The question of derivative immunity for federal contractors need not, however, be left wholly to the courts.<sup>6</sup> The Supreme Court has spoken with sufficient clarity on the standard for derivative immunity from the TCPA for federal contractors that the Commission may incorporate that standard into its TCPA framework. For example, in *Campbell-Ewald Co.*, the Supreme Court reiterated longstanding precedent that a federal contractor that performs work “authorized and directed by Congress” and performs “as the Government directed” enjoys derivative immunity.<sup>7</sup> Relying on this formulation of immunity—which does not include a requirement that a specific agency relationship has been established—the Professional Services Council (“PSC”) urged the Commission to reconsider *Broadnet* and find that contractors making calls “on behalf of the Government and in accordance with the terms of the contract and government directives are immune from TCPA liability.”<sup>8</sup> It is not entirely clear whether PSC is advocating that the FCC exclude federal contractors from the definition of “person” based on the *Campbell-Ewald* standard or whether PSC intended that the Commission incorporate derivative immunity into its TCPA rules. But either way, the Commission should make clear that a federal contractor is not liable for a TCPA violation when it acts on behalf of the federal government

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<sup>6</sup> The Commission should clarify that any test it adopts to exclude federal contractors from TCPA liability also excludes federal subcontractors that meet the test’s requirements.

<sup>7</sup> *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673 (2016) (citing *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18 (1940)).

<sup>8</sup> Professional Services Council, Petition for Reconsideration, CG Docket No. 02-278 at 8 (filed Aug. 4, 2016). As PSC explained in detail in its petition, derivative immunity for federal government contractors does not require an agency relationship. *Yearsley v. W.A. Ross Const. Co.* is the Supreme Court’s seminal decision on derivative immunity. 309 U.S. 18 (1940). Yet, nothing in *Yearsley* or its progeny requires an agency relationship as a prerequisite for derivative immunity. Notably, a recent Fourth Circuit Court of Appeals opinion applied the *Yearsley* doctrine of derivative immunity and *Campbell-Ewald* and concluded that a federal government contractor is not liable for alleged TCPA violation. *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640 (4th Cir. 2018). The court did not impose an agency relationship requirement. Therefore, to the extent the FCC relied on *Campbell-Ewald* and other cases involving derivative immunity as the basis for imposing an agency requirement under *Broadnet*, that reliance was unnecessary. See *Broadnet* ¶¶ 20-22.

exercising validly conferred authority and it complies with the government’s instructions, regardless of agency status.<sup>9</sup>

**B. The BBA Amendments Do Not Authorize the Commission to Impose TCPA Requirements on the Federal Government or Its Contractors.**

In 2016, the FCC interpreted the BBA amendments as a “blank check” to regulate comprehensively all federal debt collection calls to wireless numbers, *including* calls placed by the federal government (even though there is no real dispute that the federal government is not a “person” under the TCPA) as well as calls by federal contractors that the Commission had also just determined in *Broadnet* are not “persons.” That conclusion reflected a remarkably—and unreasonably—broad invocation of authority, and it directly conflicts with the Supreme Court’s admonition that “[t]he United States and its agencies, it is undisputed, are not subject to the TCPA’s prohibitions because no statute lifts their immunity.”<sup>10</sup> The Commission’s conclusions drew strong dissents from then-Commissioner Pai and Commissioner O’Rielly. As Chairman Pai summarized, “[t]he Commission’s approach is unlawful and makes a dog’s breakfast of the

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<sup>9</sup> In its petition for reconsideration of *Broadnet*, NCLC makes dire predictions for the *Broadnet* ruling that are unsupported. National Consumer Law Center *et al.*, Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278 at 4, 11 (filed July 26, 2016). For instance, NCLC inexplicably asserts that government contractors “can target consumers by calling randomly-generated numbers or numbers obtained from database vendors.” *Id.* at 4. Further, and again without explanation, NCLC states “[g]overnment contractors could even make robocalls to emergency rooms, police and fire departments, poison control centers, and the like.” *Id.* at 4. Government contractors—such as loan servicers—do not randomly or indiscriminately place calls. They make calls for specific reasons, to specific persons, and pursuant to government requirements and instructions. And there is no evidence or indication that there has been a flood of calls by government contractors following *Broadnet*. Because *Broadnet* protects only calls made in accordance with government instructions, contractors are incentivized to and will continue to follow government directives. *Broadnet* simply does not encourage or allow arbitrary or abusive calls from government contractors.

<sup>10</sup> *Campbell-Ewald*, 136 S. Ct. at 672.

TCPA.”<sup>11</sup> On reconsideration, the FCC should properly confine the scope of the BBA amendments and exclude from the TCPA’s calling restrictions not only the federal government but also federal contractors.

The BBA amended three provisions of the TCPA to create an exemption for calls to collect federal debts. As amended, Sections 227(A)(iii) and (B) bar making certain calls without the prior express consent of the called party “unless the call is made solely to collect a debt owed to or guaranteed by the United States.” In Section 227(b)(2)(H), Congress then provided the Commission with limited authority to adopt rules that limit the “number and duration” of exempt federal debt calls. The preface to Section 227(b)(2)(H) unambiguously limits the FCC’s rulemaking power to “prescrib[ing] regulations to implement the requirements of this subsection.”<sup>12</sup> Accordingly, the FCC may make rules that implement only the requirements in Section 227(b)(1), which is limited to calls made by “persons.”<sup>13</sup>

The FCC nevertheless unreasonably treated Section 227(b)(2)(H) as a separate grant of authority to overturn sovereign immunity. The text of the BBA amendments does not remotely approach the requisite “clear intent” to abrogate sovereign immunity, and none of the parties who commented on our Petition for Reconsideration,<sup>14</sup> which raised this very point, even attempted to defend this interpretation of the Commission’s jurisdiction. Further, the FCC’s

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<sup>11</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 31 FCC Rcd. 9074 (2016) (“*2016 Federal Debts Order*”), Dissenting Statement of Commissioner Ajit Pai (“Pai Dissent”).

<sup>12</sup> See 47 U.S.C. §§ 227(b)(1), (2); *2016 Federal Debts Order*, Pai Dissent and Dissenting Statement of Commissioner Michael O’Rielly (“O’Rielly Dissent”). These requirements apply only to “persons.” See 47 U.S.C. § 227(b)(1). Section 227(b)(2)(H) is not a *requirement*; it simply provides that the Commission “may” adopt limitations on number and duration of debt collection calls. See *2016 Federal Debts Order*, Pai Dissent and O’Rielly Dissent.

<sup>13</sup> See *2016 Federal Debts Order*, Pai Dissent and O’Rielly Dissent.

<sup>14</sup> See *Great Lakes Higher Education Corp. et al.*, Petition for Reconsideration, CG Docket No. 02-278 (filed Dec. 16, 2016) (“Petition”).

interpretation allows it to place more stringent restrictions on the collection of federal debt than private debts—directly contrary to Congress’s intent in passing the BBA. The entire purpose of the amendments was to reduce barriers to communicating with borrowers of federal debt to help ensure timely repayment and collection of such debts.

The BBA amendments also do not provide authority for the Commission to impose TCPA-based call limitations on federal contractors, either because they are not “persons” as found in *Broadnet* or because they derive immunity from the sovereign. Just as the federal government may not be held liable, federal contractors acting on its behalf and consistent with federal direction cannot be held liable. The Commission should reverse the *2016 Federal Debts Order*’s unlawful assertion of jurisdiction based on a misreading of Section 227(b)(2)(H) and conclude that the TCPA’s call limitations, in particular those adopted by the Commission in implementing the BBA, do not apply to federal contractors that comply with the federal government’s instructions.

**C. The BBA Amendments and *Broadnet* Do Not Completely Overlap.**

Not all servicers of federal student loans are federal contractors. Only when the federal government owns the loans and retains private entities to service those loans is there a contractual relationship. Typically, when the federal government guarantees a federal student loan owned by another entity, such as a private lender, financial institution, state government, or school, the servicer is not acting pursuant to federal contract. For instance, this is the case for loans made under the Federal Family Education Loan Program (“FFELP”) or the Federal Perkins Loan Program that are owned by third-party lenders but ultimately guaranteed by the federal government.

Where the student loan servicer is acting on behalf of the federal government pursuant to a contract to service a loan owned by the federal government (such as for loans made under the William D. Ford Federal Direct Loan Program or FFELP loans purchased by the federal government from third parties), the servicer is no more subject to the TCPA's limitations than is the federal government itself, as explained above. When a student loan servicer, however, is servicing a loan guaranteed, but not owned by the federal government, it must rely on the protections afforded by the BBA amendments. Thus, it is critically important that the Commission reconsider the overly restrictive calling requirements adopted in the *2016 Federal Debts Order* and grant our pending Petition for Reconsideration.<sup>15</sup>

### **III. THE COMMISSION SHOULD RECONSIDER THE RULES ADOPTED IN THE 2016 FEDERAL DEBTS ORDER.**

#### **A. The Commission Should Clarify Key Terms in the BBA Amendments.**

The FCC should clarify the meaning of the phrases “a debt owed to or guaranteed by the United States” and calls “solely to collect a debt” in the ways that best facilitate the timely payment of federal debt. Absent such clarification, important and time-sensitive communications to federal student loan borrowers will continue to be chilled by the risk of TCPA liability.

#### **1. A debt “owed to or guaranteed by the United States” includes all federal student loan programs.**

The *2016 Federal Debts Order* considered but did not resolve the meaning of the phrase “a debt owed to or guaranteed by the United States,” leading to some ambiguity about when a

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<sup>15</sup> Attempting to service a mix of owned and guaranteed federal student loans on a single call raises further complications under *Broadnet*, which does not permit “multi-use” calls “in which some portion of the call would be performed on behalf of the federal government while the remaining portion of the call would be performed on behalf of a non-governmental client.” See *Broadnet* n.97. The Commission should confirm that calls (1) made by a servicer under contract with the federal government to service a loan owed to the federal government *that also* (2) discuss student loans owed to another entity but guaranteed by the federal government are not the type of multi-use calls subject to restriction.

loan should be viewed as “guaranteed.” There is no dispute that the BBA exemption applies to Direct Loans owned by the federal government. And, the majority of courts have held that FFELP loans guaranteed by the federal government are covered by the BBA amendments, given the amendment’s plain language.<sup>16</sup> At least one federal district court, however, has concluded that the FFELP loans at issue were “merely insured by the United States and therefore do not fall within the newly added exception.”<sup>17</sup> The court went on to conclude that the BBA amendments apply “solely when the calls are made during a period in which the United States’ obligations as the ultimate guarantor or debtee have been triggered and are active.”<sup>18</sup>

The Commission should adopt the reasoning of the majority of courts and conclude that the BBA exemption is not limited to calls about loans for which a lender or guaranty agency is actively seeking reimbursement from the federal government but instead applies to calls during the entire lifespan of a federally guaranteed loan. Such an interpretation would also be consistent with the BBA amendments’ instruction to authorize the full range of communication strategies that the federal government itself would undertake to service and collect its debts—including in particular the Department of Education (“Department”), which is generally described in the relevant federal statute and regulations as a guarantor.<sup>19</sup>

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<sup>16</sup> See, e.g., *Hassert v. Navient Sols., Inc.*, 232 F. Supp. 3d 1049, 1052 (W.D. Wis. 2017) (“Because FFELP loans are debts ‘guaranteed by the United States,’ calls made to collect these debts are not prohibited by the TCPA after the 2015 amendments.”); *Weaver v. Navient Sols., Inc.*, No. 5:16-CV1304, 2017 WL 3456325, at \*3 (N.D. Ohio Aug. 11, 2017) (“Plaintiff expressly concedes that she took out loans to finance her education, and the promissory notes themselves are identified as loans under the . . . (‘FFEL’) Program. . . . Therefore, the loans are ‘debt[s] owed to or guaranteed by the United States.’”); *Whalen v. Navient Sols., LLC*, No. 417CV00056TWPDM, 2018 WL 1242020, at \*1 (S.D. Ind. Mar. 9, 2018).

<sup>17</sup> *Henderson v. United Student Aid Funds, Inc.*, No. 13CV1845 JLS (BLM), 2017 WL 766548, at \*3 (S.D. Cal. Feb. 28, 2017).

<sup>18</sup> *Id.* at \*5.

<sup>19</sup> See, e.g., 20 U.S.C. § 1078(c)(2)(C) (describing “any loan insured under the loan insurance program as may be guaranteed by” the Department of Education); 34 C.F.R. § 682.100(b)(2) (stating that the department “guarantees lenders against losses” on loans made under the “Federal Insured Student Loan”

The Commission should take this opportunity to resolve any ambiguities and confirm that “a debt owed to or guaranteed by the United States” expressly includes all federal student loan programs, including for example the Direct Loan, Federal Family Education Loan, Federal Perkins Loan, and Health Education Assistance Loan programs, even if the lender or guaranty agency has not yet turned to the Department for repayment of the loans.<sup>20</sup> Such clarification would substantially assist servicers of federal student loans with programs that ensure effective and TCPA-compliant outreach to borrowers.

**2. The phrase “solely to collect a debt” should include all calls to collect a federal student loan for which the repayment period has begun, as well as certain calls before that period begins.**

The *2016 Federal Debts Order* defined calls “solely to collect a debt” to exclude many pre-delinquency periods. That conclusion is unsupported by the plain language of the BBA amendments and will ultimately lead to greater rates of delinquency and default. As Commissioner O’Rielly recognized, “any call to a borrower about the loan should be considered a call made solely to collect the debt.”<sup>21</sup>

As a legal matter, the amendments do not contain the temporal restriction created by the *2016 Federal Debts Order*. As a factual and practical matter, federal student loan servicers’ ability to call borrowers well in advance of delinquency is critical in keeping borrowers on track and out of financial distress. Interpreting “solely to collect a debt” to include calls that occur during any post-graduation “grace period” and for the entire repayment period gives full effect to the plain language of the phrase.

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program, which is among the loan programs that the department refers to as “Federal Guaranteed Student Loan” programs).

<sup>20</sup> See *Hassert*, 232 F. Supp. 3d at 1052.

<sup>21</sup> *2016 Federal Debts Order*, O’Rielly Dissent.



**B. The 2016 BBA Rules Hinder Parties from Collecting Federal Debts and Should Be Revised.**

The FCC’s 2016 BBA rules are impermissibly broad because they go beyond limiting the “number and duration” of calls placed. The three-call attempt-per-thirty-day limit is not supported by any data in the record; the limits on who may be called contradict the text and intent of the statute and exceed the FCC’s authority; and borrowers should not be allowed to unilaterally stop federal loan servicing calls, which help to ensure the timely collection of federal debt by educating borrowers on their many repayment options.

**1. The BBA only authorizes the Commission to limit the “number and duration” of exempt calls.**

The FCC only has authority to implement rules concerning the “number and duration” of calls subject to the BBA exemption. Specifically, Congress amended Section 227(b)(2) of the TCPA to allow the FCC to “restrict or limit the *number and duration of calls* made . . . to collect a debt owed to or guaranteed by the United States.”<sup>22</sup> Despite its limited authority, the Commission in 2016 adopted a host of other rules that are invalid and must be removed.

The FCC’s rules are an abuse of discretion to the extent that they surpass the “number and duration” of federal debt collection calls. Congress plainly did not authorize the FCC to impose any other restrictions. For example, restricting who may be called is not limiting the “number” or “duration” of calls. Neither is requiring certain things to be said during servicing calls. Moreover, nowhere do the BBA amendments provide the Commission the authority to grant consumers the right to stop servicing calls or to mandate that servicing calls and texts include complex opt-out mechanisms.<sup>23</sup>

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<sup>22</sup> 47 U.S.C. §§ 227(b)(2)(H).

<sup>23</sup> Specifically, the Commission does not have authority to mandate that prerecorded or artificial voice federal debt collection calls “include an automated, interactive voice- and/or key press-activated opt-out mechanism so that debtors who receive these calls may make a stop-calling request during the call by

These unlawful restrictions are inconsistent with Congress’s instructions and interfere with its objectives in passing the amendments. For example, federal student loan servicers can far more effectively help at-risk and disadvantaged student loan borrowers when they are able to most efficiently contact the endorsers, relatives, references, and others in the delinquent borrowers’ loan files as part of due diligence efforts (as required by the Department in many cases).<sup>24</sup> The *2016 Federal Debts Order* asserts that federal contractors could manually dial these other contacts, but, as Commission O’Rielly aptly pointed out, “that is both unworkable, given the number of calls that must be made, and contrary to the intent of the law, which was to enable lenders to use modern dialing equipment as part of their efforts to collect debts on behalf of the federal government.”<sup>25</sup> Further, the FCC’s rules hamstring federal loan servicers’ ability to comply with the Department’s call requirements.

**2. The one-sided record demonstrates that the Commission erred in allowing only three exempt call attempts per month.**

The FCC limited the number of calls allowed under the exemption to three attempts per 30 days. As explained in our Petition for Reconsideration, the Commission ignored the wealth of empirical evidence that commenters and federal agencies had provided, which all pointed to a

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pressing a single key.” *2016 Federal Debts Order* ¶ 41. Nor do the amendments allow the FCC to require text messages “include brief explanatory instructions for sending a stop-call request by reply text message and provide a toll-free number that enables the debtor to call back later to make a stop-call request.” *Id.* ¶ 33; *see also* Comments of the Student Loan Servicing Alliance (SLSA), CG Docket No. 02-278, at 30-31 (filed June 6, 2016) (“SLSA Comments”) (stating that “[t]he FCC does not have the authority to stop all calls to the consumer” because “[w]hile the FCC may limit the number [and duration] of calls, Congress did not confer the authority to stop the calls altogether”). Allowing borrowers to opt out of informational calls about their loans is inconsistent with other government requirements, such as the Department’s requirement that federal student loan servicers make certain reminder and follow-up calls to a borrower who is in the process of applying for a federal student loan irrespective of whether that borrower has provided consent. It is also inconsistent with the terms of the federal student loan agreements, and antithetical to Congress’s goal of keeping more borrowers out of delinquency and default.

<sup>24</sup> *See, e.g.*, Navient Comments at 36; 34 C.F.R. § 682.411(h).

<sup>25</sup> *2016 Federal Debts Order*, O’Rielly Dissent.

substantially higher limit.<sup>26</sup> Indeed, the decision lacks a rational basis and will stymie borrower contact.

Instead of explaining its three-call-attempt limit or supporting it with empirical evidence from the record, the FCC stated only that there was “no consensus” and that it must “engage in an exercise in line-drawing.”<sup>27</sup> Although the FCC must sometimes engage in line-drawing, here, the line was drawn in a place that contained no support in the record or relationship to the underlying problem.

Based on the evidence in the record, our Petition for Reconsideration showed that a “materially higher limit—such as three calls per week or 10 calls per month—would help effectuate meaningful communication with consumers and the efficient collection of debts owed to the federal government.”<sup>28</sup> Connecting with federal student loan borrowers can be particularly challenging, as many borrowers left their school years ago. Federal student loan borrowers have numerous diverse and flexible paths to repayment, but servicers must typically connect with borrowers several times to explain and enroll them in such programs.<sup>29</sup> Participants who critically evaluated the FCC’s proposed three-call-attempt limit also explained that the arbitrary limit would not allow callers to effectively connect with borrowers and proposed reasonable alternatives.<sup>30</sup> The FCC’s *2016 Federal Debts Order* recognized but failed to address their proposals.<sup>31</sup>

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<sup>26</sup> Petition at 4-10.

<sup>27</sup> *2016 Federal Debts Order* ¶¶ 34-35.

<sup>28</sup> Petition at 5-10.

<sup>29</sup> Reply Comments of Navient Corp., CG Docket No. 02-278, at iv (filed June 21, 2016).

<sup>30</sup> See, e.g., Reply Comments of Edfinancial Services, LLC, CG Docket No. 02-278, at 2 (filed June 20, 2016) (proposing a limit of nine call attempts per seven day period); Reply Comments of The National Association of College and University Business Officers, CG Docket No. 02-278, at 2 (filed June 21, 2016) (arguing that a limit of nine to ten calls per month is more appropriate than a limit of three); Reply

Federal student loan servicers provided detailed empirical evidence that supported their assertions that more calls were necessary to effectively collect on federal debt and educate borrowers on their repayment options.<sup>32</sup> Navient, for example, explained that “it is able to help resolve delinquencies and prevent default more than 90 percent of the time that it has a live conversation with a borrower.”<sup>33</sup> “Nelnet’s data demonstrates that ten dials per month or approximately 2.3 calls per week can be an appropriate dial rate with borrowers.”<sup>34</sup> The Student Loan Servicing Alliance recommended “at least 10-13 attempts per month in order to have a reasonable chance to speak to a borrower,” a number that consumer advocacy groups have previously supported.<sup>35</sup> Each interaction with a delinquent borrower is a critical opportunity to find a solution that brings the loan current. Not surprisingly, “fewer contacts lead to fewer resolutions for borrowers and an increased likelihood that borrowers will lapse into delinquency or default,”<sup>36</sup> which can have a detrimental and long-lasting impact on borrowers’ financial health. Nelnet demonstrated that “calling up to 10 times per month leads to 42 percent more live contacts compared to calling three times per month.”<sup>37</sup> This is important data and, respectfully, it should be considered.

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Comments of National Council of Higher Education Resources, CG Docket No. 02-278, at 2 (filed June 21, 2016) (arguing in favor of a limit of nine call attempts per seven day period).

<sup>31</sup> See *2016 Federal Debts Order* ¶ 33.

<sup>32</sup> Petition at 6-10.

<sup>33</sup> Petition at 6 (citing Navient Comments at 9-10).

<sup>34</sup> *Id.* (citing Nelnet Reply Comments at 5.)

<sup>35</sup> SLSA Comments at 26-28 (citing the National Consumer Law Center’s endorsement of a limit of three calls per week or approximately twelve calls per month); see also Navient Comments at 43 (noting that it “would take well over a year to reach [some borrowers] under the FCC’s proposal [who], during that time, could easily reach default status without having a conversation about their repayment, forbearance, and forgiveness options”).

<sup>36</sup> Petition at 7 (citing Comments of Nelnet, Inc., CG Docket No. 02-278 at 4 (filed June 6, 2016) (“Nelnet Comments”).

<sup>37</sup> Petition at 7 (citing Nelnet Comments at 14).

Data and reports that have become available since the *2016 Federal Debts Order's* release similarly demonstrate that additional telephone outreach to federal student loan borrowers is critical. For example, the Education Finance Council found that live contact with a student loan borrower led to the resolution of delinquency between 63 and 98 percent of the time, depending on the servicer, and that most of the time it takes only two calendar days to resolve a delinquency once live contact is established.<sup>38</sup> The BCFP Student Loan Ombudsman also released an annual report that explained that current outreach efforts “may be insufficient to assist a substantial share of borrowers navigating the default-to-IDR transition.”<sup>39</sup> In sum, the available data shows that a failure to make meaningful live contacts has concrete, negative consequences for borrowers.

Additionally, the three-call attempt-per-month limit directly conflicts with the requirements of other federal agencies. Commissioner O’Rielly even attached to his dissent a chart that Navient submitted highlighting the numerous government entities that require more than three call attempts every 30 days.<sup>40</sup> And other federal agencies provided evidence demonstrating the need for placing more than three calls a month.<sup>41</sup>

Further illustrating the arbitrary nature of the FCC’s three-call-attempt limit is the fact that the Bureau of Consumer Financial Protection (“BCFP”) proposed far less restrictive calling limits on private debt collection calls—proposing up to six calls per week.<sup>42</sup> The BCFP did not propose to treat automated calls differently than manually dialed calls, suggesting that it does not

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<sup>38</sup> Letter from Debra J. Chromy, President, Education Finance Council, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Feb. 1, 2017).

<sup>39</sup> See Ombudsman Annual Report at 47.

<sup>40</sup> *2016 Federal Debts Order*, O’Rielly Dissent.

<sup>41</sup> See Petition at 8-9.

<sup>42</sup> See BCFP, Outline of Proposals Under Consideration and Alternatives Considered, at 26 (July 28, 2016), [https://files.consumerfinance.gov/f/documents/20160727\\_cfpb\\_Outline\\_of\\_proposals.pdf](https://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf).

view them as a unique threat to consumers. Significantly, the National Consumer Law Center (“NCLC”) also did not draw a distinction when it recommended allowing up to three debt collection calls per week (*i.e.*, approximately 12 calls per month). NCLC’s position on private debt calls is consistent with our proposed limit on calls to collect federal debt. Congress surely did not amend the TCPA to exempt federal debt collection calls from the prior express consent requirement in order for the FCC to subject such calls to tighter restrictions than calls placed on private debt. And no party has shown how the choice of three call attempts per month is supported by data or other empirical evidence in the record.

The Department of Education explained that myriad circumstances cause borrowers not to answer calls, and a three-call attempt limit will not “measurably increase the likelihood that [a loan servicer] would reach a borrower in order to provide them an opportunity to enroll in an income-driven repayment plan or take advantage of another federal student loan benefit.”<sup>43</sup> Because it takes servicers multiple attempts to reach a borrower before live contact is made, and then multiple live contacts to provide a borrower with the necessary information to resolve a delinquency or rehabilitate a default, three call attempts is simply not enough.

**3. The exemption should cover certain calls to individuals other than the borrower.**

Under the BBA amendments, the *purpose* of the call determines whether the exemption applies. Calls to numbers the caller did not know were reassigned, wrong number calls, and calls to friends, family, or references to locate the borrower are all still “made solely to collect a debt owed to or guaranteed by the United States.” For example, skip tracing and contacting individuals listed in a borrower’s loan file are often critical tools for locating federal student loan

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<sup>43</sup> See Letter from Ted Mitchell, Undersecretary, Department of Education, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 4 (July 11, 2016).

borrowers. The identity of the called party is only relevant to the extent prior express consent is required for the call. Calls subject to the BBA's exemption are expressly excluded from the prior express consent requirement. There simply is no other logical reading of the amendments.

Calls to individuals other than the borrower must be allowed to avoid undermining Congress's intent. As Commissioner O'Rielly explained, the *2016 Federal Debts 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>44</sup> The circumstances regarding calls to reassigned numbers are very different in this context than in the general TCPA context. Unlike the TCPA's prior express consent requirement, the BBA's exemption applies based on the purpose of a call. Moreover, callers must have a safe path to make the exemption meaningful. Callers will be effectively unable to rely on the exemption if only the first call to a reassigned number is protected due to the practical impossibility of determining if a number has been reassigned. Further, the D.C. Circuit found the one-call regime erroneous.<sup>45</sup>

#### **4. Congress removed the consent requirement for exempt calls.**

Calls that qualify for the BBA exemption are not subject to the prior express consent requirement, and by extension, borrowers do not have a right to opt out of such calls.<sup>46</sup> Allowing borrowers to stop exempt calls unilaterally would frustrate Congressional intent, which was to promote the efficient and effective collection of government debt and help borrowers avoid default. In amending the TCPA, Congress necessarily weighed the benefits of making federal debt collection calls without consent against the burden such calls could impose on borrowers,

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<sup>44</sup> *2016 Federal Debts Order*, O'Rielly Dissent.

<sup>45</sup> *See ACA Int'l*, 885 F.3d at 692.

<sup>46</sup> *See, e.g., Schneider v. Navient Solutions, LLC*, 16-CV-6760, at 9 (W.D.N.Y. 2018).

and it determined that the effective and timely collection of federal debt exceeded any possible consumer burden. The BBA amendments are intended to and should be construed to authorize the full range of communication strategies that the federal government itself would undertake to service and collect its debts. Allowing consumers to unilaterally stop autodialed or prerecorded calls would render the amendment essentially meaningless.

#### **IV. THE COMMISSION SHOULD EXEMPT STATE GOVERNMENTS AND THEIR CONTRACTORS FROM TCPA LIABILITY.**

State governments, like the federal government, need to effectively communicate with their citizens about important issues. As Commissioner O’Rielly recognized, “[t]he same justifications used in the Declaratory Ruling to exempt federal government calls would apply to state and local government calls.”<sup>47</sup> And just like the federal government, “state and local governments may also be budget constrained and have equally valid and urgent reasons to contact their citizens” and should be allowed to use cost-efficient methods of contacting the public “without the threat of costly litigation hanging over them.”<sup>48</sup> Similar to the federal government, states often need to rely on private third-parties to make these valid and urgent communications. The Commission should address this regulatory limbo and conclude that state governments and their contractors acting in conformance with state directives are exempt from TCPA liability.

Loan servicers contract with states and their agencies to service both federal and private loans owed to states. Servicers are required to service these loans for states in the same way that they service Direct Loans, for which they contract with the federal government directly. In

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<sup>47</sup> *Broadnet*, Statement of Commissioner Michael O’Rielly.

<sup>48</sup> *Id.*



addition, servicers contract with state schools to service federal Perkins Loans, which includes contacting at-risk borrowers.

The same legal framework that the Commission applied in *Broadnet* to exempt the federal government should apply to states. Like the federal government, states are immune from suit, and their contractors should enjoy the same protection. A state and its agencies are immune from suit absent consent or an express Congressional statement to the contrary.<sup>49</sup> As to the latter exception, “Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.”<sup>50</sup> “[E]vidence of congressional intent must be both unequivocal and textual.”<sup>51</sup> The TCPA’s definition of “person” plainly does not include states.

Moreover, as with the federal government, there is a “longstanding interpretive presumption” that the definition of “person” does not include states.<sup>52</sup> The Supreme Court has repeatedly emphasized that the presumption is “particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before.”<sup>53</sup> The presumption “may be disregarded only upon some affirmative showing of statutory intent to the contrary.”<sup>54</sup> Nothing in the TCPA suggests that Congress intended to abrogate the states’ Eleventh Amendment immunity. Applying the plain text of the statute and the presumption of

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<sup>49</sup> *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984).

<sup>50</sup> *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

<sup>51</sup> *Id.* at 230.

<sup>52</sup> *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780 (2000).

<sup>53</sup> *Id.* at 781 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989)).

<sup>54</sup> *Id.*

immunity, a handful of courts have held that states and their instrumentalities are immune from suit under the TCPA.<sup>55</sup> The Commission should promptly do the same.

The policy reasons supporting exempting federal contractors from TCPA liability also apply with equal force to state contractors. Subjecting state contractors to the TCPA would significantly constrain states' ability to communicate with their citizens and would be contrary to the public interest in preventing delinquency and default on student loans, which damage borrowers, taxpayers, and the government. States often delegate their loan servicing responsibilities to third-parties and should be free to direct these contractors to use efficient and cost-effective methods for ensuring timely collections of state debts.

**V. THE COMMISSION SHOULD CLARIFY KEY AUTODIALER, REASSIGNED NUMBER, AND CONSENT REVOCATION ISSUES TO PROTECT CONSUMERS, REMOVE UNNECESSARY CONFUSION, AND SUPPORT LEGITIMATE BUSINESS PRACTICES.**

**A. The Commission Should Properly Interpret “Automatic Telephone Dialing System” to Include Only Equipment that Uses a Random or Sequential Number Generator to Store or Produce Numbers and Dials Those Numbers Without Human Intervention.**

The Commission should clarify that equipment qualifies as an ATDS only if it actually possesses “both of two enumerated functions” contained in the ATDS definition, namely (i) storing or producing numbers to be called, using a random or sequential number generator, and

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<sup>55</sup> See, e.g., *Threadford v. Bd. of Trustees of Univ. of Alabama*, No. 2:18-CV-00262-RDP, 2018 WL 2197554, at \*3 (N.D. Ala. May 14, 2018) (“[N]othing in the TCPA suggests that Congress intended to abrogate the states’ Eleventh Amendment immunity. Therefore, the TCPA does not abrogate Defendant’s Eleventh Amendment immunity, and the TCPA claim against Defendant is due to be dismissed.”); *Lambert v. Seminole Cty. Sch. Bd.*, No. 6:15-CV-78-ORL-18DAB, 2016 WL 9453806, at \*3 (M.D. Fla. Jan. 21, 2016) (concluding the TCPA cause of action was unavailable against the school board and finding “[c]onspicuously absent from this definition of ‘person’ is any mention of governmental entities, let alone a phrase that may reasonably be construed as encapsulating a sovereign. Accordingly, the Court is led to the inevitable conclusion that governmental entities fall outside the ambit of the TCPA’s cause of action.”).

(ii) dialing those numbers.<sup>56</sup> Such an approach would continue to protect consumers while remaining consistent with the statutory text of the TCPA, Congress’s intent, the D.C. Circuit’s decision, and contemporary consumer communications expectations.

The text of the TCPA requires that an ATDS have the capacity not only to “store or produce numbers to be called,” but also to do so “using a random or sequential number generator.”<sup>57</sup> The text expressly requires these elements in tandem because the phrase “using a random or sequential number generator” is most naturally read to refer to the means by which the equipment can “store or produce telephone numbers to be called.” Section 227(a)(1)(B) in turn requires that equipment does not qualify as ATDS unless it has the capacity to “dial *such* numbers,” *i.e.*, numbers that have been stored or produced using a random or sequential number generator. The Commission should confirm that equipment constitutes an ATDS only if it meets every component of the statutory definition.

The phrase “has the capacity,” as used in the TCPA, is best interpreted as encompassing the present-tense “ability” or “power” of a device, not the hypothetical future capability of the device if altered. An ordinary person would not say that equipment “has the capacity” to perform a particular function if the equipment cannot, in fact, perform that function. The D.C. Circuit also focused on how much alteration of equipment would be required to enable a device to function as an autodialer.<sup>58</sup> As the D.C. Circuit recognized, the *2015 Order’s* focus on hypothetical alteration or upgrading of equipment merely through additional software functions or app downloads created substantial ambiguity because nearly any modern computer hardware can be altered through software updates to create new capabilities, including altering or

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<sup>56</sup> 47 U.S.C. § 227(a)(1); *ACA Int’l*, 885 F.3d at 701.

<sup>57</sup> 47 U.S.C. § 227(a)(1)(A).

<sup>58</sup> *ACA Int’l*, 885 F.3d at 695-96.

upgrading an ordinary smartphone to create ATDS capabilities.<sup>59</sup> Consequently, the *2015 Order* also created a vast reach for the TCPA, without any indication that Congress intended such breadth (in fact, the D.C. Circuit noted that Congress may not have intended for certain TCPA provisions to remain as relevant as technologies evolved).<sup>60</sup>

The Commission can better tether the statute to the harms Congress was attempting to address by limiting the interpretation of the phrase “has the capacity” to the actual, present capacities of the equipment at the time of the call. Such an interpretation from the Commission would provide sorely needed clarity to callers and help reduce unnecessary confusion and costly litigation. For example, a caller would know if its equipment met the definition of ATDS by looking at the equipment’s actual functions, rather than having to hypothesize about potential future functions. This approach also would protect consumers by continuing to require consent for indiscriminate automatic dialing to randomly or sequentially generated numbers, the key activity Congress sought to restrict with the ATDS definition. In addition, it would support good-faith callers’ ability to meet consumer demand for time-sensitive information (without fear of unnecessary litigation) and leave undisturbed the plethora of other consumer protections, such as federal and state “do not call” laws for telemarketing.

The Commission also should confirm that equipment qualifies as an ATDS only if it can perform the requisite functions without human intervention. The etymology of “automatic” is from words meaning “self-acting,” and it is commonly defined and understood to mean an activity done involuntarily or mechanically, without control by another.<sup>61</sup> As the D.C. Circuit

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<sup>59</sup> *Id.* at 699.

<sup>60</sup> *Id.*

<sup>61</sup> *See, e.g.*, “Automatic,” Origin and Etymology, <https://www.merriam-webster.com/dictionary/automatic>.

noted, the interpretation that an autodialer must function without human intervention “makes sense given that ‘auto’ in autodialer—or, equivalently, ‘automatic’ in ‘automatic telephone dialing system,’ 47 U.S.C. § 227(a)(1)—would seem to envision non-manual dialing of telephone numbers.”<sup>62</sup> Accordingly, a call that entails human interaction (even a single click, analogous to speed dialing) is not “automatic” under the TCPA.

The Commission also should clarify that the TCPA applies only to calls that are actually made using the ATDS functionality. As Commissioner O’Rielly correctly noted in his dissent to the *2015 Order*, the TCPA’s prohibition to “make any call . . . using [an ATDS]” is best read as limited to scenarios in which equipment is, “in fact, used *as an autodialer* to make the calls.”<sup>63</sup> The statute defines ATDS based on specific functionality, so it is both reasonable and consistent with the text and structure of the TCPA to interpret the prohibition as applying only to the uses of that functionality. Moreover, requiring that the requisite functionality actually be used would help eliminate any lingering ambiguities about the meaning of the term “capacity” and would “substantially diminish” the problems presented by over-expansive definitions of ATDS.<sup>64</sup>

**B. The Commission Should Adopt a Reasonable Reassigned Numbers Framework that Protects Consumers Against Unwanted Calls and Good-Faith Callers Against Unwarranted Class Action Litigation Exposure.**

The TCPA allows callers to place autodialed or prerecorded calls to wireless numbers “with the prior express consent of the called party.”<sup>65</sup> Because telephone numbers are reassigned regularly, the Commission should conclude that the “called party” refers to the “intended

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<sup>62</sup> *ACA Int’l*, 885 F.3d at 703.

<sup>63</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; American Association of Healthcare Administrative Management, Petition for Expedited Declaratory Ruling and Exemption; et al.*, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (“*2015 Order*”), Statement of Commissioner O’Rielly Dissenting in Part and Approving in Part.

<sup>64</sup> *ACA Int’l*, 885 F.3d at 704.

<sup>65</sup> 47 U.S.C. § 227(b)(1)(A).

recipient” of the call, so that a caller may still reasonably rely on the “prior express consent” that was provided even if the recipient’s number was later reassigned without the caller’s knowledge.

Although the *2015 Order* claimed that a caller may “reasonably” rely on prior express consent when she has no knowledge of a reassignment, it concluded that the reasonableness of such reliance only lasts for the duration of one call attempt, regardless of whether the call was answered.<sup>66</sup> The approach lacked a reasoned basis and offered essentially no protection to good-faith callers. As the D.C. Circuit noted, the *2015 Order* provided no persuasive rationale why reasonable reliance ceases being reasonable after a single call attempt, and indeed the *2015 Order’s* conclusion is unrealistic and unsupportable as a factual matter.<sup>67</sup> A caller acting with the best of intentions and with the most reasonable of reliance may not learn in the first call that a number has been reassigned.

Under an “intended recipient” approach, callers could reasonably demonstrate that they intended to reach the prior subscriber based on a variety of facts and reasonable steps. Some examples (and there may be others) include: (1) subscribing to one of the third-party reassigned number verification services; (2) providing a mechanism for an individual to update his or her contact information; (3) seeking to confirm that an individual’s contact information remains accurate if the individual places an inbound call to the organization’s customer service line; (4) taking other steps to encourage or require (*i.e.*, through contractual provisions) an individual to notify the caller if his or her telephone number changes; or (5) adopting reasonable internal policies or procedures. Actual knowledge of the reassignment would terminate reasonable reliance on the “intended recipient’s” consent and could give rise to liability under the TCPA.

The Commission should also provide a safe harbor for callers that check a reassigned

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<sup>66</sup> See *2015 Order* ¶ 54.

<sup>67</sup> See *ACA Int’l*, 885 F.3d at 706-08.

number database. For example, if the FCC determines that “called party” means “intended recipient,” it should similarly find that when a caller checks one or more database(s) but nevertheless reaches a reassigned number inadvertently, the caller does not violate the TCPA because it has established that it “intended” to reach the prior subscriber (who had granted consent). This would be one clear example of “reasonable reliance” (but not the only example). If adopted, the safe harbor should allow for a reasonable amount of time prior to the call during which a caller can check the database to avoid requiring parties to check the database before every single call.

### **C. The Commission Should Support Reasonable Opt-out Methods.**

The D.C. Circuit upheld the Commission’s decision to allow a called party to revoke her prior consent “through any reasonable means clearly expressing a desire to receive no further messages from the caller.”<sup>68</sup> Although the Court upheld the Commission’s ruling in that respect, the Commission can help avoid the ambiguity and excessive litigation that has plagued the TCPA by adding guidance in two forms.

First, the Commission should provide specific examples of opt-outs that would be deemed reasonable as a safe harbor. A safe harbor could include, for instance, offering a mechanism to opt-out by phone, letter, or e-mail. Such an approach would avoid unnecessary litigation over the “reasonableness” of particular opt-out methods. Otherwise, callers may find themselves forced to show whether a particular method was reasonable under the “totality of the facts and circumstances,” a fact-intensive inquiry that may prove resistant to swift resolution.

Second, the Commission should confirm that parties are free to reach an agreement over the use of particular opt-out methods. If parties agree that a particular method is reasonable, that

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<sup>68</sup> See *ACA Int’l*, 885 F.3d at 692.

should be the end of the matter. Indeed, permitting parties to agree on a mechanism for withdrawing consent is preferable because it avoids ambiguity over whether a particular method will be interpreted as reasonable; it will be reasonable because the parties agreed that it was.

The Commission should also clarify that a consumer's unilateral attempt to revoke consent is invalid when consent is given as bargained-for-consideration in a contract. The Second Circuit reached a similar conclusion in *Reyes*, concluding among other things that “[i]t was well-established at the time that Congress drafted the TCPA that consent becomes irrevocable when it is integrated into a binding contract.”<sup>69</sup> So did the U.S. District Court for the Northern District of Ohio.<sup>70</sup>

## **VI. CONCLUSION.**

Congress specifically amended the TCPA for the first time in years to allow federal debt calls without prior express consent. It did so to help borrowers prevent and manage delinquency and avoid the negative effects of default. The FCC should revise the *Broadnet* decision and rules adopted in the *2016 Federal Debts Order* to support government policies that help federal student loan borrowers receive important, time-sensitive, none-marketing information. In addition, the FCC should clarify key autodialer, reassigned number, and consent revocation issues to eliminate unnecessary confusion and support legitimate business practices while protecting consumers.

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<sup>69</sup> See *Reyes v. Lincoln Automotive Fin. Servs.*, 861 F.3d 51, 58 (2d Cir. 2017).

<sup>70</sup> See *Barton v. Credit One Fin.*, Case No. 16CV2652 (N.D. Ohio 2018) (citing *Reyes* and finding that the plaintiff could not “unilaterally alter the terms of the agreement to claim that his oral consent was valid”).



Respectfully submitted,

*/s/ Winfield P. Crigler*

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June 13, 2018