

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	Notice of Proposed Rulemaking
)	(FCC 16-57)
)	

**REPLY COMMENTS OF NELNET, INC. TO
NOTICE OF PROPOSED RULEMAKING (FCC 16-57)**

I. INTRODUCTION

1. Nelnet, Inc. submits these reply comments pursuant to the Commission’s Notice of Proposed Rulemaking (“NPRM”) released May 6, 2016.¹ The purpose of the NPRM is to implement the recent amendments to the Telephone Consumer Protection Act (“TCPA”) included in the Bipartisan Budget Act of 2015 (“BBA amendments”).

2. Like Nelnet’s comments, the comments submitted by other companies and organizations in the higher education space articulate the disconnect between the intent of the BBA amendments to help federal student loan borrowers while also ensuring the timely repayment of billions of dollars of outstanding federal student loan debt and the NPRM’s proposals that, among other things, restrict the applicability of the BBA amendments to an arbitrary number of three post-delinquency calls per month, allow borrowers to unilaterally stop all calls, and impose without authority the same one-call window for reassigned and other wrong numbers that the Commission enacted in its 2015 Omnibus Order – all of which are contrary to both the intent and plain language of the BBA amendments, and in many instances create actual or potential conflicts with existing federal laws and requirements.²

3. The comments submitted by consumer advocacy groups, on the other hand, are largely supportive of the NPRM and in line with consumer protests against unwanted

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking (FCC 16-57), CG Docket No. 02-278 (released May 6, 2016).

² *Compare Comments of Nelnet, Inc.*, CG Docket 02-278 (June 6, 2016) *with Comments of American Association of Community Colleges*, CG Docket 02-278 (June 6, 2016); *Comments of College Foundation, Inc.*, CG Docket 02-278 (June 10, 2016); *Comments of Education Credit Management Corporation*, CG Docket 02-278 (June 3, 2016); *Comments of Iowa Student Loan*, CG Docket 02-278 (June 6, 2016); *Comments of National Council of Higher Education Resources*, CG Docket 02-278 (June 6, 2016); *Comments of Navient Corp.*, CG Docket 02-278 (June 6, 2016); *Comments of New Hampshire Higher Education Assistance Foundation*, CG Docket 02-278 (June 1, 2016); *Comments of Pinnacle Recovery, Inc.*, CG Docket 02-278 (June 10, 2016); *Comments of Student Loan Servicing Alliance*, CG Docket 02-278 (June 6, 2016); *and Comments of United Negro College Fund, Inc.* CG Docket 02-278 (June 6, 2016).

telemarketing calls.³ This is not surprising considering the NPRM’s proposals are taken almost verbatim from a series of March 2016 *ex parte* meetings that consumer advocacy groups had with Commission staff when they pitched ten “essential principles of consumer protection that the FCC should adopt for calls to collect government debt,” virtually all of which were incorporated into the Commission’s NPRM, including: “limiting the exemption . . . to calls made after a debtor has become delinquent”; “limiting calls to be made only to the debtor and not the debtor’s relatives, friends, or acquaintances”; “limiting the number of calls to three per month per delinquency”; “giving consumers the right to stop the calls, and requiring callers to inform debtors of this right”; treating “calls to reassigned numbers . . . the same as under the [2015] Omnibus Order (in other words, only one mistake is allowed)”; counting a call as “every time that the debt collector causes the consumer’s phone to ring – whether or not the debt collector actually speaks to the consumer or leaves a voice mail message”; and prohibiting “calls before 8 AM or after 9 PM.”⁴

4. This one-size-fits-all playbook mischaracterizes the BBA amendments as a loophole to the TCPA and unjustifiably relies on worst-case scenarios, hyperbolic language, and pejorative terminology. These groups also fail to acknowledge that the expanded contact opportunities federal student loan servicers are seeking are not telemarketing calls, but rather are pro-consumer in that such contact opportunities between servicers and borrowers help borrowers avoid delinquency and reduce default.⁵

II. THE HIGHER EDUCATION COMMENTERS OVERWHELMINGLY SUPPORT AN EXPANSIVE DEFINITION OF COVERED CALLS AND REJECT ARBITRARY LIMITS ON THE NUMBER AND DURATION OF CALLS AND TEXTS

5. Nelnet’s comments explain the unique role federal student loan servicers play to inform and educate borrowers about the affordability of their repayment options. In fact, because of the number and variety of repayment plans, Nelnet believes it could reduce the default rate to nearly zero if only it could speak with each and every borrower to explain the myriad options available to them. Information of this kind is so important that in June 2014, the President issued a Presidential Memorandum, titled *Helping Struggling Federal Student Loan Borrowers Manage Their Debt*, to educate struggling federal student loan borrowers on the

³ See *Comments of Americans for Financial Reform*, CG Docket 02-278 (June 6, 2016); *Comments of Consumers Union*, CG Docket 02-278 (June 6, 2016); *Comments of MFY Legal Services, Inc.*, CG Docket 02-278 (June 6, 2016); *Comments of National Consumer Law Center*, CG Docket 02-278 (June 6, 2016); *Comments of Institute for College Access & Success*, CG Docket 02-278 (June 6, 2016).

⁴ See *Ex Parte Letter Filed By Margot Saunders on behalf of National Consumer Law Center, Consumers Union, Americans for Financial Reform, Institute for College Access & Success, et al.*, CG Docket 02-278 (March 28, 2016). The only recommendation not explicitly included in the NPRM is requiring callers “to have mechanisms in place to ensure the caller has a ‘reasonable expectation that the called party is the debtor’ and . . . [to be able] to document the basis for this expectation and produce it when there is a challenge to calls being made to wrong numbers.” *Id.*

⁵ See, e.g., *Comments of National Consumer Law Center* at pp. 16-20. The National Consumer Law Center also claims that over 61 million people will be directly affected by the BBA amendments, including 41.8 million student loan borrowers – a number that is highly exaggerated and inflated as it assumes that no one has given prior express consent to be called on their cell phones. *Id.*

repayment options available to them to manage their debt through the Department of Education.⁶ The President also formed an interagency task force among the Department of Education, Department of Treasury, the Office of Management and Budget, and the Domestic Policy Council, which released an August 2015 report recommending “a suite of technology-enabled communication and enhanced, ‘higher-touch’ servicing requirements for those at risk of default” and “contacting student loan borrowers at certain key times prior to delinquency, including by text message.”⁷

6. The other higher education commenters echo and amplify this important policy point. For example, the United Negro College Fund describes the disproportionate impact student loan debt has on African-American students – *i.e.*, more debt compared to Hispanic or Asian students and increased likelihood for default on student loans than their peers – and emphasizes the need for more students to take advantage of affordable repayment plans such as pay as you earn and other income-based or income-contingent plans:

Too many federal student loan borrowers are hampered in paying their loan debt because they must navigate a confusing array of over ten repayment options that they do not understand or they simply are not aware of these options. . . . For these reasons, we recommend that the [FCC] permit the use of auto dialer technology to be used by loan servicers to contact borrowers to advise them of their repayment options, even if their loans are in good repayment status. As income-driven repayment options are severely underutilized by borrowers, maximizing the ability of loan servicers to make early contact with borrowers to provide information on repayment options before delinquency is paramount.⁸

7. Like Nelnet, the higher education commenters unanimously support a definition of covered calls that includes calls made by federal student loan servicers to borrowers irrespective of the status of the loan so long as such calls are for the purpose of informing or educating borrowers of their rights, responsibilities, and repayment and reinstatement options, including calls made in connection with deferments, forbearance, changes in repayment status, upcoming deadlines, or regulatory requirements.⁹ Building on Nelnet’s argument that communications between servicers and borrowers are proactive, pro-consumer, and not harassing, the American Association of Community Colleges explains that such “early, frequent,

⁶ *Presidential Memorandum, Helping Struggling Federal Student Loan Borrowers Manage Their Debt* (June 9, 2014), available at: <https://www.whitehouse.gov/the-press-office/2014/06/09/presidential-memorandum-federal-student-loan-repayments>.

⁷ *Recommendations on Best Practices in Performance-Based Contracting* (August 28, 2015) at p. 10, available at <http://www2.ed.gov/finaid/loans/repay/best-practices-recommendations.pdf>.

⁸ *United Negro College Fund* at p. 1.

⁹ *American Association of Community Colleges* at p. 1; *College Foundation, Inc.* at p. 1; *Educational Credit Management Corporation* at pp. 3-5; *Iowa Student Loan* at p. 1; *National Council of Higher Education Resources* at pp. 3-5; *Navient* at pp. 30-35; *New Hampshire Higher Education Assistance Foundation* at p. 1; *Pinnacle Recovery, Inc.* at p. 1; *Student Loan Servicing Alliance* at pp. 18-20; *United Negro College Fund* at p. 1.

and effective communications with borrowers” are imperative to preventing negative outcomes for borrowers:

Delinquency and default can have long-term consequences for student loan borrowers, with repercussions that are more severe than default on other types of credit. When students fail to repay their federal student loans and go into default, they not only face ruined credit, but also wage, tax refund, and social security garnishment. Defaulted borrowers also lose eligibility for additional federal student aid, which effectively bars them from re-enrolling in college.¹⁰

8. Nelnet and other federal student loan servicers are the first set of resources available to student borrowers designed to prevent the severe and potentially life-altering consequences that can accompany a borrower’s default on a federal student loan. It is always in the best interest of the borrower to find an alternate solution to delinquency or default, and federal student loan servicers such as Nelnet are the borrower’s lifeline to solutions that run from temporarily postponing payments to sustainable income-based repayment plans that tie monthly obligations to the borrower’s earnings. As stated by the American Association of Community Colleges:

Negative outcomes [of delinquency and default] can be prevented if student loan servicers have early, frequent, and effective communications with borrowers. Had these students known the numerous options available to them, they could have enrolled in a different repayment plan, or used deferment, thereby avoiding default. We recognize that student loan servicers have expertise in this area and that their outreach is vital to reducing default rates.¹¹

9. In the analogous context of home loans, the Consumer Mortgage Coalition observed that the point of reaching borrowers early is both to prevent a borrower from defaulting and to preserve the asset:

Early live discussions between mortgage servicers and defaulting borrowers or property owners has been an important part of government housing policy in this country for many years. This policy exists because it prevents foreclosures. . . . Immediate contact is critical. Distressed borrowers might not respond to written notices because they do not understand or believe that help is available, and they usually do not know how to qualify.¹²

10. As a practical matter, early outreach is also advantageous for borrowers who are approaching deadlines or a change in loan status, such as in advance of the deadline for annual

¹⁰ *American Association of Community Colleges* at p. 1.

¹¹ *Id.*

¹² *Comments of Consumer Mortgage Coalition*, CG Docket No. 02-278 (June 6, 2016) at p. 4.

recertification of income-driven repayment plans which requires the submission of income-verification documents, or for an at-risk borrower who has previously defaulted and has returned to repayment through loan rehabilitation.¹³ Accordingly, Nelnet’s comments are echoed by Navient: “The intent of the [BBA] amendments is to ensure that federal student loan borrowers are aware of their options regardless of whether or not they are delinquent.”¹⁴ Nelnet’s comments are also supported by the National Council of Higher Education Resources comments that “there is nothing in the [BBA amendments] suggesting a narrow interpretation of what calls are covered” and that “[r]estricting calls to borrowers who have already fallen into loan delinquency or default could create a barrier between borrowers and the repayment plan that will best meet their needs.”¹⁵

11. In its comments, Nelnet fully describes the reasons why the NPRM’s proposed limits on the number and duration of calls are arbitrary, unsupported, and do not account for the realities of collecting federal student loan debts.¹⁶ First, the Commission’s proposed limit of three call attempts per month lacks any rational basis and is grounded only in the rhetoric of the consumer advocacy groups who lobbied the Commission staff in the months before the NPRM was released.¹⁷ Nelnet’s data, which demonstrates that ten dials per month or approximately 2.3 calls per week is the appropriate dial rate with borrowers, aligns with the comments of the Student Loan Servicing Alliance, which recommends “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.¹⁸ At a minimum, the rules must allow Nelnet and other federal student loan servicers to comply with current and future Department of Education requirements, such as making certain mandatory reminder and follow up calls to a borrower who is in the process of applying for or recertifying information for an income-based repayment plan. Federal student loan servicers cannot be expected to make a Hobbesian choice between violating the Department of Education’s rule or violating the Commission’s rules.

12. Second, the Commission should use caution and care in limiting the duration of covered calls or text messages that are designed to keep borrowers out of delinquency and default and that are limited in scope to information and education about the borrower’s loan status and repayment options. As Nelnet’s comments make clear, this is particularly critical

¹³ *Navient* at pp. 32-33.

¹⁴ *Id.* at p. 33.

¹⁵ *National Council of Higher Education Resources* at p. 3.

¹⁶ *See also National Council of Higher Education Resources* at pp. 11-13; *Navient* at pp. 42-52; *Student Loan Servicing Alliance* at pp. 25-29.

¹⁷ *See American Association of Community Colleges* at p. 1; *College Foundation, Inc.* at p. 2; *Educational Credit Management Corporation* at pp. 5-10; *Iowa Student Loan* at pp. 1-2; *National Council of Higher Education Resources* at pp. 7-15; *Navient* at pp. 35-52; *New Hampshire Higher Education Assistance Foundation* at pp. 1-2; *Pinnacle Recovery, Inc.* at pp. 1-2; *Student Loan Servicing Alliance* at pp. 25-33; *United Negro College Fund* at p. 2.; *see also Ex Parte Letter Filed By Margot Saunders on behalf of National Consumer Law Center, Consumers Union, Americans for Financial Reform, Institute for College Access & Success, et al.* at p. 3..

¹⁸ *Student Loan Servicing Alliance* at pp. 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* at p. 51 (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”).

when it comes to live operator calls. Nelnet's comments are supported by the other higher education commenters who correctly contend that "[w]here the borrower and the servicer are having a live conversation, there is a helpful interaction taking place, with the servicer trying to find a way to help the borrower stay current or become current."¹⁹ This is also true for limits on the duration of prerecorded and text messages, which could easily become unworkable and must be long enough to allow the servicer sufficient length not only to comply with all required disclosures but also provide sufficient remaining space for meaningful content.²⁰

13. As for the NPRM's proposal to allow consumers to have the right to stop covered calls and to be notified of such right, Nelnet's comments are supported by the National Council of Higher Education Resources, which notes that "[g]iving the consumer the ability to revoke the statutory authority to make a covered call without contravening the exception by effectively re-imposing a consent requirement, especially if that revocation applies to subsequent callers."²¹ Nelnet also agrees with the Student Loan Servicing Alliance 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."²² Similarly, and as pointed out in Nelnet's comments, allowing borrowers to opt out of receiving informational and educational calls about their loan is not only antithetical to keeping borrowers out of delinquency and default, but also inconsistent with the terms of the federal student loan agreements.

14. Central to Nelnet's comments is its objection to the NPRM's proposal to continue to impose the TCPA's requirements regarding number reassignments and other wrong number calls. The exception provided for in the BBA amendments could not be clearer: if the purpose of the call is to collect federal debt, then the call is wholly exempt from the TCPA, including how the TCPA treats calls to reassigned numbers. Because the statutory language concerns why the call is being made and not to whom the call is being made, there is no reason the Commission should incorporate the one-call window contained in its 2015 Omnibus Order. Instead, reassigned and other wrong number calls should be treated as covered calls that are fully exempt from the TCPA. The comments of the Student Loan Servicing Alliance, Navient, and the National Council for Higher Education Resources support Nelnet's position on this issue and help to make clear that the NPRM's proposal is without any statutory authority and would eviscerate the rule and the policy objectives underlying it:

We do not believe that the BBA gives the FCC the authority to apply the one-attempt "safe harbor" that applies to non-exempt calls to cellphones as enunciated in [the FCC's] July 2015 Order. The [BBA] is clear that if the

¹⁹ *Student Loan Servicing Alliance* at p. 28; see also *National Council for Higher Education Resources* at p. 13; *Navient* at p. 51.

²⁰ See *National Council for Higher Education Resources* at pp. 12-13.

²¹ *National Council for Higher Education Resources* at p. 14.

²² *Student Loan Servicing Alliance* at pp. 30-31.

purpose of the call is to collect federal debt, then the call is exempt from the TCPA.²³

Congress' exemption goes to the purpose of the call, not the number that has been dialed. A call's purpose remains "to collect" a federal debt even if it turns out that the number called has been reassigned. The same holds for subsequent calls to reassigned numbers. For example, a second or third call by a federal student loan servicer to a number that has been reassigned without [the servicer's] knowledge remains "to collect" a federal debt.²⁴

[I]t is clear from the Budget Act that Congress deemed the purpose of the call to be important to the existence of the exception. There are many instances, even aside from reassigned numbers, in which a call made for the purpose of collecting the debt may reach someone other than the consumer, including instances where a person other than the debtor answers his or her phone, where the consumer gave an incorrect number, or where the number provided was incorrectly transcribed. In each of these cases, the purpose of the call is to reach the debtor to collect the debt.²⁵

15. In addition, Nelnet and these commenters are all in agreement that the one-call window "is a death knell for the utility of the BBA exemption" because of "the litigious nature of the TCPA world we are operating in,"²⁶ and because of the reality that "[o]ne hundred thousand wireless numbers are reassigned each day" and that loan servicers "have no reliable way of knowing if a particular wireless number has been reassigned."²⁷

16. Last, Nelnet's comments regarding *Campbell-Ewald Co. v. Gomez* are supported by the comments of Navient and the Student Loan Servicing Alliance, who explain in their comments that the Commission's rules implementing the BBA amendments can recognize the basic framework of immunity set forth in the U.S. Supreme Court's decision in *Campbell-Ewald*, but cannot disturb it in any way.²⁸ Further, Nelnet maintains that the BBA amendments and their implementing rules can neither conflict with other laws or regulations nor modify the scope of TCPA immunity conferred by *Campbell-Ewald* on federal government contractors, such as Nelnet, who perform their work as directed.

²³ *Id.* at p. 23.

²⁴ *Navient* at p. 38.

²⁵ *National Council for Higher Education Resources* at p. 8.

²⁶ *Student Loan Servicing Alliance* at p. 24; *see also Navient* at p. 38 ("[T]he Department [of Education] highlighted this problem just last year, explaining that 'it is virtually impossible for servicers to use auto-dialing technology' given how often wireless numbers are reassigned.").

²⁷ *Navient* at p. 38.

²⁸ *Id.* at pp. 51-52; *Student Loan Servicing Alliance* at p. 25.

III. THE CONSUMER ADVOCACY COMMENTERS ARE SUPPORTIVE ONLY OF THOSE ASPECTS OF THE NPRM THAT WOULD UNDERMINE THE BBA AMENDMENTS

17. Predictably, the consumer advocacy commenters seek to constrain the applicability of the BBA amendments as much as possible.²⁹ For instance, the consumer advocacy commenters all support restricting calls and texts “to the debtors themselves, not to family and friends”; allowing “[o]nly one wrong number call, such as to a reassigned number”; counting “each initiated call . . . as one call”; and limiting “the number of calls or texts permitted to be made without consent . . . to three calls per servicer or collector [per month].”³⁰ Further, the majority of consumer advocacy commenters request that covered calls be defined to include only those calls and texts made “if the debt is delinquent or if the consumer is delinquent in responding to a requirement to arrange for a payment plan or forbearance program.”³¹

18. Again, these consumer advocacy groups fail to account for the pro-consumer benefits of contact by student loan servicers prior to a delinquency.³² Although the National Consumer Law Center concedes that “some debt servicing calls might be helpful even when the debtor is not yet delinquent,” it maintains that the BBA amendments should apply “only when the debtor is delinquent in some obligation that relates to making the payments.”³³ That trigger would do virtually nothing to help reduce delinquencies in the first instance.

19. Moreover, in reciting consumers’ general problems with the abusive telemarketing calls the TCPA aims to curb, the consumer advocacy commenters fail to acknowledge that the plain language of the BBA amendments unambiguously overrides the TCPA when it comes to calls and texts made for the sole purpose of collecting federal student loan and other government debt.³⁴ Acting at a time when federal student loans have become the largest category of outstanding non-tax government debt, and after several requests by the President to implement reforms to make it easier to collect federal debts, Congress ultimately prioritized the BBA amendments over other TCPA concerns.³⁵

20. The inflexibility of the approach taken by the consumer advocacy groups treats service calls as the same as collection calls and ignores the critical value federal student loan servicers provide when they counsel borrowers with information about their loans and the

²⁹ See citations to comments in note 3, *supra*.

³⁰ *Americans for Financial Reform* at p. 2; *Consumers Union* at p. 4; *MFY Legal Services, Inc.* at p. 2; *National Consumer Law Center* at p. 3; *Institute for College Access & Success* at pp. 2-3.

³¹ *Consumers Union* at p. 4; *MFY Legal Services, Inc.* at p. 2; *National Consumer Law Center* at p. 3; *Institute for College Access & Success* at p. 3.

³² Included in these pro-consumer communications are the strategies federal student loan servicers must sometimes use to locate the borrower, including skip tracking and calling the borrower’s references. As Nelnet’s comments explain, these techniques are required by the federal government in certain situations, such as for delinquent Federal Family Education Loans.

³³ *National Consumer Law Center* at p. 17.

³⁴ See, e.g., *National Consumer Law Center* at pp. 4-7 (detailing “[c]onsumers’ problems with robocalls” generally).

³⁵ See *Navient* at pp. 15-27.

numerous repayment, deferment, forbearance, and forgiveness options available to borrowers.³⁶ Thus, Nelnet disagrees with the hardline position of these commenters in tying covered calls to delinquency and otherwise limiting service calls. Their position would frustrate the ability of federal student loan servicers to implement proactive communication strategies that help borrowers avoid delinquency or default, harming consumers and undermining the intent of the BBA amendments.

IV. CONCLUSION

21. In sum and for the reasons set forth above, Nelnet's comments are supported by the other companies and organizations in the higher education space that unanimously advocate for an expansive definition of covered calls and reject arbitrary limits on the number and duration of calls and texts. Nelnet disagrees with the comments submitted by consumer advocacy groups, however, because such comments are supportive only of those aspects of the NPRM that would undermine the BBA amendments. Accordingly, Nelnet urges the Commission to reconsider the proposals in the NPRM that are contrary to the plain language of the BBA amendments and the clear intent of Congress and the President to help federal student loan borrowers while also ensuring that outstanding federal student loan debt is repaid, and instead asks the Commission to adopt a separate set of rules that applies specifically to federal student loan debt and that fully reflects the empirical data, practical considerations, and legal arguments that Nelnet and other higher education commenters have brought to the Commission's attention.

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³⁶ See *Navient* at pp. 2-14.