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

In the Matter of the	)	
	)	
Rules and Regulations Implementing	)	
	)	**CG Docket No. 02-278**
the Telephone Consumer Protection	)	
	)	
Act of 1991	)	

Reply Comments of Joe Shields on the Comments of the Coalition of Higher Education Assistance Organizations on the Consumer Bankers Association Petition for Declaratory Ruling

I hereby submit these reply comments on the comments filed by the Coalition of Higher Education Assistance Organizations (hereinafter "COHEAO") on the Consumer Bankers Association Petition for Declaratory Ruling. The commentor asks the Commission to convert a content neutral statute to a content based statute that would exempt non-marketing calls from the prior express consent of the called party requirement.

The original purpose of the TCPA was to regulate certain uses of technology that are abusive and potentially dangerous. The TCPA regulates these abuses by prohibiting certain technologies altogether, rather than focusing specifically on the content of the messages being delivered. Contrary to petitioners claim, Congress did foresee the changes in technology that would allow increased access to consumers and in response crafted the TCPA.

The TCPA is more than just telemarketing regulation; it is an important consumer protection statute. Opening cell phones to more calls through an EBR or similar exemption would drastically increase the amount of calls a consumer could receive. The

heightened cost-shifting, privacy, and safety concerns for cell phones justify a continued strict consent scheme with respect to such communications.[1]

"The TCPA is not only directed at telephone solicitations, it is also directed at autodialer calls to cellular phones, as reflected by the different subsections of § 227, which create separate causes of action for telephone solicitations and automated calls to cellular phones." *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 752 (W.D. Tex. 2011).

Commentor claims that consumers: "…are unable to receive information and assistance due to the unintended consequences of outdated Commission rules promulgated under the TCPA." The claim is a non-starter as students can easily provide prior express consent to the debt collection efforts of the commentor's members. But then who wants to provide prior express consent for automated debt collection calls? Further, and as pointed out above, the TCPA and the Commissions implementing rules are not out dated.

Commentor claims there is a legal uncertainty about the meaning of called party. As has been repeatedly pointed out to the Commission which the commentor ignores is the fact that the courts are unanimous on who the called party is. It is frivolous to continue to claim that an uncertainty exists when voluminous case law refutes the claim.

Commentors in this proceeding are trying to hold consumers, the TCPA and the Commission hostage. They are claiming that they will stop all consumer requested communications if the Commission does not create an exemption for their wrong number

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[1] *Heidtke, Daniel B. and Stewart, Jessica and Waller, Spencer Weber, The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology* (September 17, 2013). Loyola University Chicago School of Law Research Paper No. 2013-016.

calls. It is the policy of the United States not to negotiate with terrorists. This hostage taking of consumers, the TCPA and the Commission is no different than hostage taking by terrorists. The Commission should not negotiate with those that attempt to hold consumers, the TCPA and the Commission hostage.

Similar threats were made when the Commission sought comments on the National do-not-call registry:

> "**Without a doubt this will cause worldwide economic catastrophe**. I am not an alarmist. But mark my words, when I say the government backing and subsequent free marketing of this list **will plunge the world into depression.**" *Customer Inter@ction Solutions, What More Could "The Industry" Have Done? By Rich Tehrani, Group Editor-In-Chief, Technology Marketing Corporation*[2]

Obviously, those threats never came to pass. Making such threats is childish at best and is a disservice to consumers and the Commission. The Commission should not let themselves be coerced by those that are being rightfully sued for violating the TCPA.

The Commission must bear in mind that the effectiveness of the TCPA will ultimately be defined by its ability to protect consumers' cell phones. The Commission must also bear in mind that consumers are increasingly experiencing more illegal conduct on their cell phones from legitimate companies than by any other media. The blame is put on the widening use of cell phones. Such blame is misplaced. It is the use of automatic dialing technology that is to blame.

Being sued for violating the TCPA is not a valid reason to limit or neuter the TCPA. Neither is caller efficiency. Those that use technology responsibly can and do enjoy the efficiency that comes with technology. The Commission should not shift responsibility to comply with the TCPA from a business making automatic and

[2] http://www.tmcnet.com/call-center/0503/0503hp.htm

prerecorded calls to individuals receiving them. Doing so is not in the best interest of the public. "Adopting Defendant's position would shift responsibility from a business making automatic and prerecorded calls to individuals receiving them. The Court feels that the stronger public policy to be served by the TCPA is protecting individuals from such calls." *Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014).

Commentor claims that TCPA litigation is unjustified and counterproductive. This is a misrepresentation created by similar petitions and commentors supporting similar petitions. Contrary to commentors claims the intentional abuses of the TCPA by legitimate companies, such as the petitioner's members, are the cause for the increase in TCPA claims. In the year since federal courts were opened to private TCPA litigants, the number of TCPA cases filed increased by 34%. However, relative to other consumer protection statutes (e.g., FDCPA and FCRA), TCPA litigation remains a relatively low proportion of a federal court's docket[3].

The prospect of a large class action suit provides a significant deterrent, especially given the FCC's limited enforcement efforts. Class actions also bring attention to the TCPA and the illegality of conduct by legitimate companies. Increased attention to the statute increases compliance by industry members and increases awareness by consumers, which is important where enforcement is lacking.

As pointed out in earlier comments the Commission never hears from those businesses that comply with the TCPA. The Commission only hears from those being sued for violating the TCPA. Not surprisingly, the majority of those TCPA claims are not frivolous!

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[3] *Heidtke*

Commentor wants the Commission to open up cell phones so they can be treated like landlines. Cell phones are not like landlines. Consumers carry cell phones wherever they go. Unlimited calls that the commentor advocates will create safety issues and distractions for the called party. The risk to the called party far outweighs any benefits of a virtually irrefutable defense of an "intended called party" exemption.

The Commission should exercise its authority to protect the privacy and safety of cell phone users.

The Commission can and should deny the CBA petition.

Respectfully submitted,

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