

June 15, 2015

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VIA ELECTRONIC DELIVERY

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

Re: Notice of Ex Parte Presentation – CG Docket No. 02-278

Dear Ms. Dortch,

On June 12, 2015, I (Al Mottur) of Brownstein Hyatt Farber Schreck, counsel to Nelnet, received a call from Nicholas Degani (Legal Advisor, Office of Commissioner Pai) requesting information concerning the Federal Communication Commission’s authority to exempt student loan servicing calls and text messages from application of the Telephone Consumer Protection Act of 1991 (“TCPA”). The purpose of this letter is to respond to that request.

First, the plain language of the TCPA should exempt student loan servicing calls and text messages made by the federal government because the federal government is not subject to the TCPA. The TCPA makes it unlawful for a “person” to make certain types of calls or text messages,¹ and the federal government is not a “person” as the term is defined for purposes of the TCPA.²

¹ See 47 U.S.C. § 227(b)(1) (making certain kinds of calls or text messages “unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States”).

² The Communications Act (in which the TCPA is codified) defines a “person” as an “individual, partnership, association, joint-stock company, trust or corporation.” 47 U.S.C. § 153(39). The federal government falls outside the plain meaning of the statute, and nothing in the congressional record for the TCPA indicates any intent to reach beyond the ordinary meanings of individual, partnership, association, joint-stock company, trust, or corporation to include the federal government. Moreover, Congress separately defined the “United States” in the same statute (*id.* at § 153(58)), further indicating that the federal government is not a “person” to which the TCPA applies. The Commission’s rules and regulations implementing the TCPA similarly exclude the federal government. See 47 C.F.R. § 64.1200 (imposing delivery restrictions on a “person or entity”); see also *Rules & Regulations Implementing the Truth in Caller ID Act of 2009*, Report and Order, 26 FCC Rcd 9114 ¶ 16 n.39 (2011) (clarifying that the Commission’s rules are intended to cover “those within the scope of the definition of ‘person’ in the Communications Act”).

Second, the exemption should extend to student loan servicing calls and text messages made by servicers on behalf of the federal government because, as the Commission has long recognized, “calls placed by a third party on behalf of [a] company are treated as if the company itself placed the call.”³

As demonstrated by the Commission’s prior decisions interpreting the TCPA, the underlying premise at work here is based on agency principles. For example, the Commission has previously concluded that the telephone solicitation exemption for tax-exempt nonprofit organizations includes calls and text messages made by a third-party agent on a nonprofit’s behalf.⁴ Likewise, the Commission has previously determined that the exemption for established business relationships (“EBR”) extends not only to a third party hired by a seller to market services and products to individual consumers with whom the seller has an EBR,⁵ but also to a third party working as an exclusive agent for the seller.⁶

Student loan servicers act on behalf of the federal government because servicers: (i) service a relationship that was established between the borrower and the federal government pursuant to an executed contract; (ii) perform services according to the authorization and direction of the federal government, such as that found in statutory or regulatory guidelines and requirements; (iii) perform services within the scope of that authorization and direction; (iv) and are subject to auditing and performance reviews by the federal government.

For these reasons, student loan servicing calls and text messages made by or on behalf of the federal government should be exempt from the application of the TCPA, and it is within the Commission’s authority to make this type of determination.

³ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of State Farm Mutual Automobile Insurance Company for Clarification and Declaratory Ruling*, Declaratory Ruling, 20 FCC Rcd 13664 ¶ 7 (2005).

⁴ See *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391 ¶¶ 12-13 (1995) (“Calls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the call. Accordingly, we revise our rules to clarify that telephone solicitations made by or on behalf of tax-exempt nonprofit organizations are not subject to our rules governing telephone solicitations.”); see also *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 128 (2003) (“We reaffirm the determination that calls made by a for-profit telemarketer hired to solicit the purchase of goods or services or donations on behalf of a tax-exempt nonprofit organization are exempted from the rules on telephone solicitation.”).

⁵ See *2003 TCPA Order* at ¶ 118 (“We recognize that companies often hire third party telemarketers to market their services and products. In general, those telemarketers may rely on the seller’s EBR to call an individual consumer to market the seller’s services and products.”).

⁶ See *2005 State Farm Declaratory Ruling* at ¶ 1 (“Specifically, we clarify that State Farm’s ‘exclusive agents’ may rely on the [EBR] exemption of the [TCPA] to make telephone solicitations on behalf of State Farm to consumers on the national do-not-call list.”).

Please contact me if you have any questions regarding this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Al Mottur". The signature is fluid and cursive, with the first name "Al" being more prominent than the last name "Mottur".

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