

**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)
	)	

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

**I. INTRODUCTION**

A. Nelnet, Inc. submits these comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”) released May 6, 2016.<sup>1</sup> The purpose of the NPRM is to implement the recent amendments to the Telephone Consumer Protection Act included in the Bipartisan Budget Act of 2015 (“BBA amendments”), which except autodialed calls “made solely to collect a debt owed to or guaranteed by the United States” from the TCPA’s consent requirement.<sup>2</sup> Pursuant to the express language of the Budget Act amendments, the scope of this NPRM is limited to implementing regulations that “restrict or limit the number and duration” of such calls.<sup>3</sup>

B. Nelnet has been servicing federal student loans for more than 30 years. As a Title IV Additional Servicer working under contract with Federal Student Aid, Nelnet services nearly six million Direct Loan borrowers representing \$150 billion in federal assets. Nelnet also services an additional one million borrowers, representing \$25 billion in federally guaranteed assets, as part of the Federal Family Education Loan (“FFELP”) program.

C. Nelnet and other federal student loan servicers are responsible for a range of loan services, including processing loan applications, informing and educating borrowers about their loans, helping borrowers select the best repayment plan within their budget, and even facilitating temporary cessation of payments, all in an effort to avoid the consequences of delinquency and default and to more efficiently and effectively collect these federal assets.

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<sup>1</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278 (released May 6, 2016) (“NPRM”).

<sup>2</sup> Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584, § 301(a)(1) (codified at 47 U.S.C. § 227(b)(1)).

<sup>3</sup> *Id.* at § 301(a)(2) (codified at 47 U.S.C. § 227(b)(2)(H)).

D. The NPRM requests comment on a variety of issues that are addressed in Nelnet's specific comments below. As a threshold matter, however, there are two problems with the NPRM:

E. First, the Supreme Court's recent holding in *Campbell-Ewald v. Gomez* confers immunity from TCPA liability to any federal government contractor performing work as directed by the government.<sup>4</sup> Thus, student loan servicers such as Nelnet are already shielded by *Campbell-Ewald* from liability under the TCPA. Neither the statutory exception provided for in the Budget Act amendments nor the implementing rules the NPRM seeks to impose apply to Nelnet or other entities that are already immune from liability under the TCPA under *Campbell-Ewald*.

F. Second, to the extent the Budget Act amendments and the NPRM do apply, Nelnet believes that the NPRM fails to effectuate the unequivocal policy objectives of the Budget Act amendments, which the White House has explained include "ensur[ing] that all debt owed to the United States is collected as quickly and efficiently as possible":

**Provide authority to contact delinquent debtors via their cell phones.**—The Budget proposes to clarify that the use of automatic dialing systems and prerecorded voice messages is allowed when contacting wireless phones in the collection of debt owed to or granted by the United States. In this time of fiscal constraint, the Administration believes that the Federal Government should ensure that all debt owed to the United States is collected as quickly and efficiently as possible and this provision could result in millions of defaulted debt being collected. While protections against abuse and harassment are appropriate, changing technology should not absolve these citizens from paying back the debt they owe their fellow citizens. The proposal would also allow the Federal Communications Commission to implement rules to protect consumers from being harassed and contacted unreasonably. This proposal would result in PAYGO savings of \$120 million over 10 years.<sup>5</sup>

G. The Budget Act amendments have been long supported by the Obama Administration and have been included in each of the last four budgets proposed by the President.<sup>6</sup> As the NPRM acknowledges, student loan debt amounts to \$1.3 trillion and comprises a significant portion of the total debt owed to the United States.<sup>7</sup> More than 80% of outstanding student loans are guaranteed by or directly owed to the Department of Education, and one in four student loan borrowers are at least 90 days behind on their payments.<sup>8</sup>

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<sup>4</sup> *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663, 672 (2016).

<sup>5</sup> *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2016*, at 128, available at <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/spec.pdf>.

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

<sup>7</sup> NPRM ¶ 6, n. 24.

<sup>8</sup> *Id.*

H. One clear purpose of the Budget Act amendments, then, is to facilitate the repayment of student loan and other debts owed to or guaranteed by the United States as a means of protecting federal assets. Toward that end, the Budget Act amendments are intended to and should authorize use of the full range of communication strategies that the federal government itself would undertake to service and collect its debts, including the use of automated and predictive dialing technology and artificial and prerecorded voice messages to contact borrowers through the communication channels that borrowers prefer (*e.g.*, contact via cell phone calls and text messages).<sup>9</sup> Moreover, allowing early, effective, and frequent contact will *reduce* the frequency of borrower delinquency and default.

I. The NPRM's narrow and seemingly arbitrary approach, however, fails to implement the Budget Act amendments as intended and could actually impede the ability of federal student loan servicers to regularly and proactively inform and educate borrowers of their repayment options to keep them out of delinquency or default altogether, and thereby rehabilitate their defaulted loans and preserve their credit.

J. According to the President, “[h]igh-quality, borrower-focused servicing helps more borrowers successfully repay their federal student loans.”<sup>10</sup> Further, the needs of borrowers are best met by “find[ing] the most innovative and effective ways to communicate with borrowers, leverag[ing] the latest research identifying key factors that influence borrower repayment, and keep[ing] actual borrower behavior in mind so they stay in repayment and avoid default.”<sup>11</sup> These steps help borrowers because they help set and adjust a borrower’s repayment plan at an affordable rate, and “[e]very borrower has the right to an affordable repayment plan.”<sup>12</sup>

K. Firm in its mission to helping borrowers avoid default, Nelnet strives to provide borrowers with superior servicing performance, affordable repayment plans and options, and effective delinquency and default prevention campaigns. Effectively contacting borrowers is critical to accomplishing these objectives and requires the data-driven intelligence that automated dialing technology and prerecorded voice messages provide. Borrowers should never face delinquency or default because they lack adequate information about the myriad repayment options available to them.

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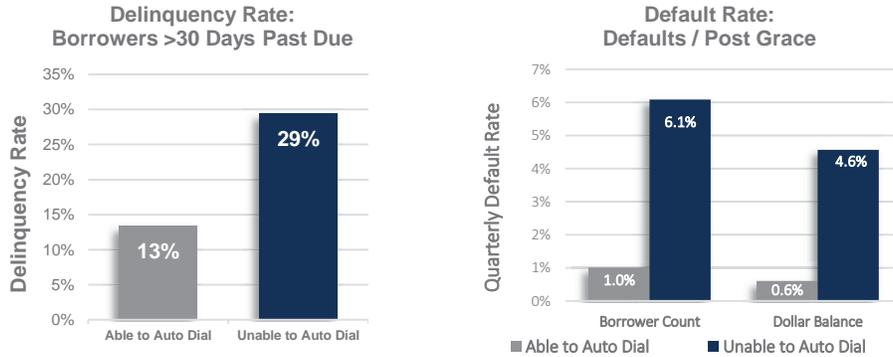
<sup>9</sup> See *Analytical Perspectives*, *supra* note 3: “The Budget proposes to clarify that the use of automatic dialing systems and prerecorded voice messages is allowed when contacting wireless phones in the collection of debt owed to or granted by the United States. . . . While protections against abuse and harassment are appropriate, changing technology should not absolve these citizens from paying back the debt they owe their fellow citizens.”

<sup>10</sup> *White House Fact Sheet, Presidential Memorandum, Student Aid Bill of Rights* (March 10, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/03/10/fact-sheet-student-aid-bill-rights-taking-action-ensure-strong-consumer->.

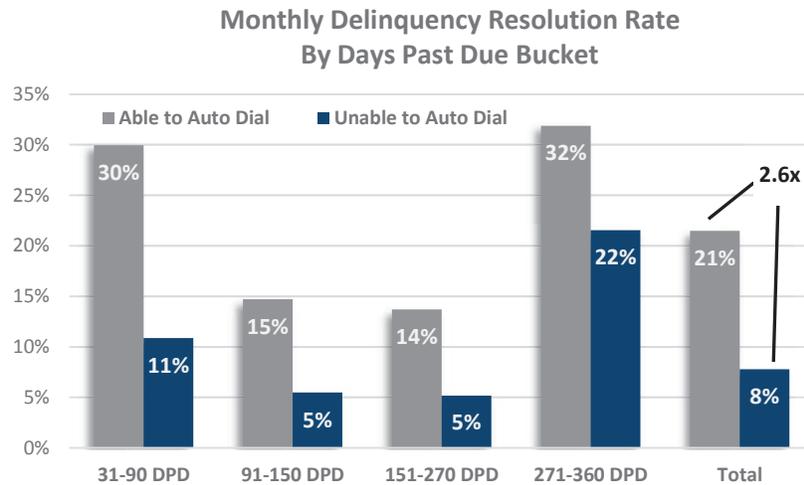
<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

L. For instance, borrowers who Nelnet can autodial have delinquency rates less than half of those who Nelnet cannot autodial (13% versus 29%). Likewise, borrowers who Nelnet can autodial have a default rate six times lower than those who Nelnet cannot autodial (1.0% versus 6.1%):<sup>13</sup>



M. Within every stage of delinquency, the borrowers Nelnet can autodial resolve at considerably higher rates:

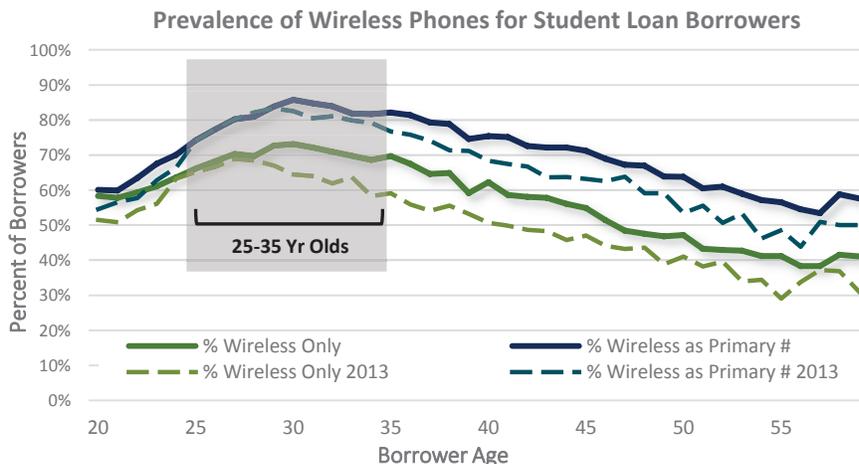


N. Effectively contacting a borrower is critical to carrying out successful delinquency and default prevention campaigns. Because most borrowers with accounts more than 30 days past due will not self-resolve, each interaction is a pivotal opportunity to find a solution and bring the loan current. Nelnet has repeatedly found that fewer contacts lead to fewer resolutions for borrowers and an increased likelihood that borrowers will lapse into delinquency or default.

O. When it comes to how borrowers are contacted, the trend is predominately toward borrowers mostly or solely using their cell phones. Nelnet, like all federal student loan servicers,

<sup>13</sup> Unless otherwise footnoted, the borrower data referred to throughout these comments is from an internal study Nelnet conducted in the last fiscal quarter of 2014. In addition, Nelnet is using the phrase “autodial” for convenience purposes. Nelnet’s systems are not “automatic telephone dialing systems” under the TCPA.

services a young, mobile demographic with distinctive communication styles, patterns, and behavioral preferences. A large and increasing number of borrowers use cell phones as their only or primary means of phone communication. The default-susceptible borrower population aged 25 to 35, in particular, show a significantly higher reliance on wireless communication. Strikingly, 70% of student loan borrowers with Nelnet list their only number as a cell phone number, and 82% list a cell phone number as their primary number:



P. Many cell phone-only borrowers prefer text messaging as a communication channel; yet very few are able to receive the service since they are not willing to navigate the opt-in process. In Nelnet’s borrower surveys, 21% of all borrowers expressed interest in receiving important communications via text and 11% listed it as a preferred method, but only 1.1% have enrolled.

Q. Nelnet’s borrower data comports with broader population statistics that show a growing plurality of Americans aged 18 or older live in households with only cell phones and no landline phone.<sup>14</sup> In 2015, 47.7% of adults were in a wireless-only household (compared to 36.5% in 2012).<sup>15</sup> The demographic segments most likely to live in wireless-only households are: Hispanics (60.5%); in poverty (64.3%), aged 25 to 29 (72.6%); living with nonrelatives (78.8%); and renters (68.8%).<sup>16</sup>

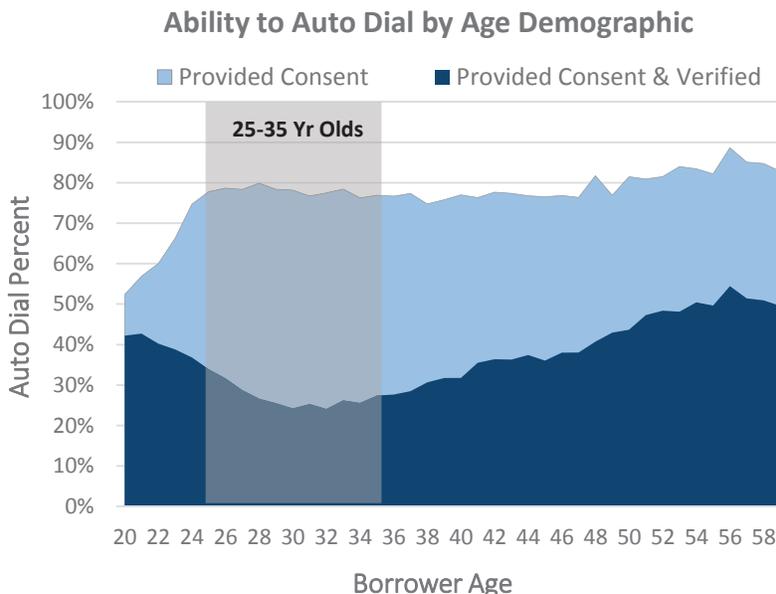
R. As previously explained, borrowers in the 25- to 35-year-old age group account for a large percent of annual defaults and exhibit the highest use of wireless communication. However, only 28% of that population can be contacted via more effective autodial communications (dark blue area in the shaded area in the graph below). As cell phone use

<sup>14</sup> Department of Health and Human Services, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey* (Jul.–Dec. 2015), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201605.pdf>.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* at 2–3.

becomes even more prevalent, Nelnet expects that increased difficulty reaching borrowers will continue to drive a high default rate:



S. The inability of federal student loan servicers to autodial affects borrowers and the federal government alike. The fiscal impact autodialing has on the Department of Treasury amounts to over \$565 million quarterly and over \$2.2 billion annually in defaulted federal student loan debt for which federal student loan services were unable to use data-driven intelligence that automated dialing technology and prerecorded voice messages to reach borrowers with critical information and education that could have prevented default or that could rehabilitate the borrower out of default and to keep the borrower out of debt collection:

Able to Auto Dial Default Rate:	0.6%	<b>On an Annual Basis,</b>
Unable to Auto Dial Default Rate:	4.6%	<b>TCPA contributes up to</b>
Unable to Auto Dial: Q4 2014 Defaults:	\$651,520,108	<b>\$2,261,900,761</b>
<b>Qtrly Impact, Difference in Rate x Volume:</b>	<b>\$565,475,190</b>	<b>in extra defaults</b>

T. While the NPRM purports to protect borrowers from unsolicited and unwanted marketing and advertising calls, its unnecessarily restrictive approach does not address the technological or demographic changes occurring among federal student loan borrowers. These proposed rules also fail to account for the unique nature of student loans. Nelnet urges the Commission to adopt a separate set of rules incorporating the broad immunity already granted under *Campbell-Ewald* and specifically addressed to assist student loans servicers like Nelnet to engage timely, accurate, and fair communications with borrowers regarding the myriad plans available to distressed borrowers so they can manage their debts or rehabilitate their loans for their benefit and for the benefit of the federal government.

## II. SPECIFIC COMMENTS

Nelnet offers the following specific comments to the NPRM subject to and without waiving its general objections to the NPRM that: (1) neither the statutory exception provided for in the Budget Act amendments nor the implementing rules the NPRM seeks to impose can apply to Nelnet or other entities that are already immune from liability under the TCPA under *Campbell-Ewald*; and (2) the narrow scope of the Budget Act amendments authorizes the NPRM to regulate when a call is a covered call to which the exception applies and the appropriate restrictions the number and duration of such calls but no more:

8. *NPRM Paragraph 8.* The NPRM requests comment on the parameters of the phrase “solely to collect a debt,” including the proposal to interpret the phrase to mean “only those calls made to obtain payment after the borrower is delinquent on a payment,” the alternate proposal to interpret the phrase to mean only those calls “made after the debtor is in default,” and any other alternate approaches.<sup>17</sup> *Nelnet’s Comment to Paragraph 8:*

a. The ability of federal student loan servicers to contact borrowers well in advance of delinquency – and certainly well before default – is critical in keeping borrowers on track and out of distress. Therefore, Nelnet disagrees with the premise that federal student loan borrowers should be protected from receiving non-consent calls “before failing to make a timely payment.” Nelnet and other federal student loan servicers aim to keep borrowers on a timely repayment schedule. As the loan servicer, it is Nelnet’s responsibility to counsel borrowers and help them find the best repayment option that works within their budget.

b. The proposed rules are in conflict with certain requirements imposed on student loan servicers like Nelnet by the Department of Education. Federal Student Aid (“FSA”) and the White House have embarked upon a campaign to get more students enrolled in income-based payment plans. FSA is focused on increasing the completion rate of applications received by servicers, and the Department of Education has supported that campaign through its own marketing efforts designed to drive application volume. Under these programs, Nelnet is required make certain mandatory reminder and follow-up calls to borrowers that have begun but have not completed the application process. These programs, then, requires mandatory calls to borrowers who are not delinquent, in contrast with the proposed rules.

c. Taking these considerations into account, Nelnet proposes that, with respect to federal student loan servicers, the phrase “solely to collect a debt” should be interpreted to mean calls made regarding a federal student loan for which the repayment period has begun and for the life of the loan. The repayment period of most federal student loans begins six months after the borrower has graduated or has ceased to be enrolled at least half-time as a student. Allowing early contact aligns with the goal of the Budget Act amendments to protect federal assets by reducing delinquency and default rates of borrowers. Nelnet further believes that the term “collect” should be defined to include any communications designed to inform or educate the borrower of his or her rights, responsibilities, and repayment and reinstatement options, including calls made in connection with deferments, forbearance, changes in repayments statutes, or impending deadlines due to regulatory requirements.

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<sup>17</sup> NPRM ¶ 8.

9. *NPRM Paragraph 9.* The NPRM requests comment on the proposal to include loan servicing calls in covered calls, as well as whether delinquency should “also be the initiating event for debt servicing calls and, if not, what the trigger event should be.”<sup>18</sup> *Nelnet’s Comment to Paragraph 9:*

a. Nelnet appreciates the NPRM’s recognition of the importance of helping borrowers avoid delinquency and default for purposes of preserving the borrower’s payment history, credit rating, and eligibility for future loans. Nelnet agrees that loan servicing calls provide a valuable service by offering information about options and programs designed to keep at-risk borrowers from becoming delinquent or defaulting on their loans, which allows debts to be more readily collected by the United States. For these reasons, Nelnet believes loan servicing calls should be included in covered calls.

b. Nelnet proposes that for servicers of federal student loans, the trigger event be tied not to delinquency but rather to the date the repayment period begins and for the life of the loan. These calls do not market or advertise, but instead solely and exclusively provide information and education about that loan for the benefit of the student borrower.

c. In many cases, borrowers are not aware of the unique assistance that is available to them or feel too embarrassed about their situation to reach out on their own. Therefore, the Department of Education rules require student loan servicers to inform borrowers of the special programs available to them for short- and long-term economic hardship, ranging from temporarily postponing payments to sustainable income-based repayment plans that adjust to the borrower’s earnings. Because it is almost always in the borrower’s best interest to find an alternative solution to default, which triggers collection, covered calls should include any and all servicing calls made by servicers of federal student loans.

10. *NPRM Paragraph 10.* The NPRM requests comment on the definition of “servicing” for purposes of considering whether loan servicing calls should be included in covered calls.<sup>19</sup> *Nelnet’s Comment to Paragraph 10:*

a. The NPRM must maintain the legal distinction between servicers and debt collectors to prevent conflict with the Fair Debt Collection Practices Act. The FDCPA prohibits “debt collectors” from taking certain actions in attempting to collect a debt.<sup>20</sup> “Debt collectors” are specifically defined as “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”<sup>21</sup>

b. Significantly, the FDCPA expressly excludes certain entities such as student loan servicers from this definition, providing that “debt collector” does not include “any

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<sup>18</sup> NPRM ¶ 9.

<sup>19</sup> NPRM ¶ 10.

<sup>20</sup> 15 U.S.C. § 1692(e).

<sup>21</sup> 15 U.S.C. § 1692a(6).

person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person.”<sup>22</sup> Further, it is well-established by case law that student loan servicers who service loans before default are not subject to the FDCPA.<sup>23</sup> The NPRM should not interfere with or alter that.<sup>24</sup>

c. Servicing calls in the federal student loan market include those topics identified in the NPRM, and should be defined to include “calls informing debtors how to reduce payment amounts; consolidate, modify, or restructure loans; change payment dates; or other matters indirectly related to seeking payment,” as well as calls to inform borrowers about their rights, responsibilities, and repayment and reinstatement options rights under the federal student loan program.

11. *NPRM Paragraph 11.* The NPRM requests comment on the meaning of the phrase “a debt owed to or guaranteed by the United States.”<sup>25</sup> *Nelnet’s Comment to Paragraph 11:*

a. Given that the NPRM acknowledges that 80% of the \$1.3 trillion in student debt is guaranteed by or directly owed to the Department of Education,<sup>26</sup> Nelnet proposes that the meaning of the phrase “a debt owed to or guaranteed by the United States” should expressly include all federal student loan programs, including the Direct Loan, Federal Family Education Loan, and Federal Perkins Loan programs. Nelnet does not oppose use of the term “debt” as defined by the Debt Collection Improvement Act of 1996, so long as federal student loan programs are expressly added to the definition.

12. *NPRM Paragraph 12.* The NPRM requests comment on whether there are specific types of debts that are covered or not covered by the phrase “debt owed to or guaranteed

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<sup>22</sup> 15 U.S.C. § 1692a(6)(F)(iii).

<sup>23</sup> See, e.g., *Brumberger v. Sallie Mae Servicing Corp.*, 84 Fed. Appx. 458, 459 (5th Cir. 2004) (upholding district court’s decision that FDCPA did not apply in the absence of allegations that loans were in default at the time of servicing); *Edler v. Student Loan Mktg. Ass’n*, 1993 WL 625570, at \*2 (D.D.C. Dec. 13, 1993) (“Because [plaintiff’s] loans were not in default when EduServ began to service them, . . . the [FDCPA] is inapplicable to EduServ as a matter of law.”); *Coppola v. Conn. Student Loan Found.*, 1989 WL 47419, at \*2 (D. Conn. Mar. 22, 1989). This includes Nelnet. See, e.g., *Jackson v. Nelnet, Inc.*, 2011 WL 6934446, at \*3 (E.D. Tex. Dec. 6, 2011), report and recommendation adopted, 2011 WL 6934451 (E.D. Tex. Dec. 30, 2011) (“Nelnet asserts that it was the servicer of the loans and this began prior to any alleged default. The Court agrees. Nelnet would not be a debt collector under the FDCPA.”); *UNIPAC Serv. Corp.*, 519 N.W.2d at 799-800 (UNIPAC Servicing Corp. is Nelnet, Inc.’s former name).

<sup>24</sup> The NPRM uses the term “creditor” but does not expressly define the term. The NPRM’s use of the term “creditor” should not be synonymous with the definition of “creditor” under the FDCPA. The FDCPA defines a “creditor” as “any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.” 15 U.S.C. § 1692a(4) (emphasis added). Because Nelnet merely services student loans “owed to or guaranteed by the United States,” Nelnet is not a “creditor” under the FDCPA with respect to the federal student loans it services.

<sup>25</sup> NPRM ¶ 11.

<sup>26</sup> NPRM ¶ 6, n. 24.

by the United States,” and whether certain limits should be placed on the content of covered calls.<sup>27</sup> *Nelnet’s Comments to Paragraph 12:*

a. As described above, Nelnet proposes expressly including federal student loan programs in the defined meaning of the phrase “debt owed to or guaranteed by the United States.” Nelnet believes the language “guaranteed by the United States” was added specifically to include loans made under the FFELP.

b. In terms of content restrictions, as a federal student loan servicer, Nelnet strictly limits the content of its calls to information related to the student’s federal loans and do not include any advertising or marketing information. Nelnet believes this is a reasonable limit the NPRM could place on the content of covered federal student loan servicing calls.

13. *NPRM Paragraph 13.* The NPRM requests comment on “the person or persons to whom covered calls may be made and whether covered calls should be limited “to the cellular telephone number the debtor provided to the creditor, *e.g.*, on a loan application.”<sup>28</sup> *Nelnet’s Comment to Paragraph 13:*

a. First, Nelnet proposes that loan servicing calls should be defined to include calls made not only to the borrower, but also to any other party, such as a co-signer or co-maker. Second, Nelnet disagrees with the proposal that calls made by federal student loan servicers should be limited only to the phone number provided to the federal government by the borrower on the loan application. Because student loan borrowers are highly transitory and technologically progressive, the phone number they provide on their loan applications, which may be that of their parents’ home, has often changed by the time they enter repayment.<sup>29</sup>

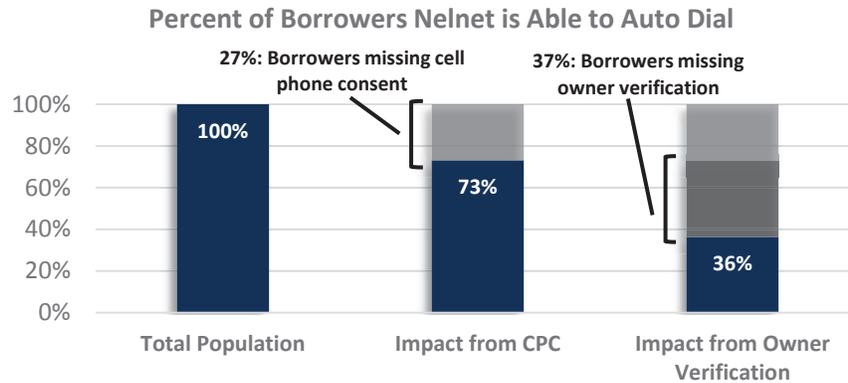
b. As a practical matter, under the NPRM’s proposal to restrict covered calls to the number the debtor provided to the creditor, Nelnet will remain unable to autodial 37% of borrowers. This means the early contact techniques that the Budget Act amendments seek to allow Nelnet to employ will apply only to the less than two-thirds of borrowers whose numbers have been verified:

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<sup>27</sup> NPRM ¶ 12.

<sup>28</sup> NPRM ¶ 13.

<sup>29</sup> As Commissioner O’Reilly points out, “under existing precedent, the act of providing a number *already* constitutes consent to be called at the number, except on unrelated matters.” NPRM p. 24 (emphasis added). Therefore, notwithstanding the consent exception provided by the Budget Act amendments, Nelnet *already* has consent to call a borrower regarding his or her loan at the number the borrower provided on the loan application, as well as at any other number the borrower has provided to Nelnet. Again, the purpose of the Budget Act amendments “is to enable companies [servicing federal student loans] to call consumers *without such consent* – at any number they think will reach the debtor.” *Id.* (emphasis added). Thus, the NPRM’s proposal to limit covered calls “to the cellular telephone number the debtor provided to the creditor, *e.g.*, on a loan application” does not further the objectives of the Budget Act amendments. Moreover, the NPRM’s proposal risks creating conflicts and confusion with existing FCC rulings concerning consent to be called under the TCPA.



c. There are other sources of reliable phone numbers, and Nelnet and other federal student loan servicers should be able to use these numbers when attempting to service a loan owed to or guaranteed by the federal government. For federal student loan servicing calls, then, Nelnet proposes allowing servicers of federal student loans to make calls to any phone number which the servicer has a good faith belief is the borrower’s number, including numbers located through techniques such as skip tracing and calling the borrower’s references, as required by the federal government in certain situations to retrieve a borrower’s number.<sup>30</sup>

14. *NPRM Paragraph 14.* The NPRM requests comment on “whether calls to persons the caller does not intend to reach, that is persons whom the caller might believe to be the debtor but is not, are covered by the exception”; the NPRM proposes excluding such calls from the exception and providing a creditor with “the same one-call window the Commission has found to constitute a reasonable opportunity to learn of reassignment.”<sup>31</sup> *Nelnet’s Comment to Paragraph 14:*

a. By continuing to impose the TCPA’s requirements regarding number reassignments and other wrong number calls, the NPRM’s proposal to limit covered calls to the cell number provided to the federal government by the borrower will eviscerate the policy objectives of the Budget Act amendments. The exception provided for in the Budget Act amendments is clear: if the purpose of the call is to collect federal debt, then the call is wholly exempt from the TCPA, including the TCPA’s treatment of calls to reassigned numbers.

b. From a practical perspective, verifying numbers remains unrealistic and one call does not provide an adequate opportunity to learn of a reassignment; for example, if no one picks up the phone when the servicer calls, the servicer believes they are calling the borrower. There is no database in existence that reliably verifies the continued accuracy of whether a borrower is the named subscriber associated with a given wireless number; there is no database that reliably accounts for business or family plans where the named subscriber

<sup>30</sup> For example, skip tracing is required for delinquent Federal Family Education Loans within ten days of receiving notification of an invalid phone number and once every 30 days until valid contact information is received. *See* 34 C.F.R. § 682.411(m).

<sup>31</sup> NPRM ¶ 14.

associated with a given wireless number may be different from the borrower; and there is no database that that includes every wireless carrier.

c. Further, a reassigned number presents to a servicer in the same way a distressed borrower presents (*i.e.*, both tend not to answer calls or to respond to text messages). In both scenarios, the called party is non-responsive and so appears to be a borrower having a stressful experience with their student loan. The default of a federal student loan comes with potentially significant consequences for the borrower. Servicers aim to resolve delinquent accounts before default, but when the called party is non-responsive it is impossible to tell if a reassigned number is a borrower under distress or is, in fact, not the borrower. Moreover, because the statutory and policy objectives are focused on the purpose of the call and not the result, there is no reason the NPRM should incorporate the 2015 Order on the reassigned one-call window. Instead, reassigned numbers should be covered by the NPRM's implementation of the consent exception provided for in the Budget Act amendments.

d. In addition, the NPRM's one-call window for reassigned numbers leaves entities acting on behalf of the federal government regarding debts owed to or guaranteed by the United States, including Nelnet and other servicers of federal student loans, exposed to legal risk and liability when: a number has been reassigned without their knowledge; a person other than the borrower who provided consent happens to answer the call; or the one permitted call goes unanswered and the servicer is prohibited from calling again. Until there is contact with the borrower, servicers have no way of knowing that they have called a wrong number.

e. The impact of imposing the NPRM's proposed one-call window on covered calls will be significant. Borrowers aged 25 to 35 move, adapt to new technology, and switch phone numbers at a higher rate than other borrowers. As a result, the need to verify phone ownership before even attempting a call will continue to restrict a large portion of phone numbers from being contacted via more effective autodial strategies. According to Nelnet's borrower data, 39.7% of borrowers had changes to their address and 28.6% had changes to a phone number in 2014. This represents millions of borrowers who Nelnet attempts to serve on behalf of the federal government.

f. If the Budget Act amendments do not apply to calls to reassigned numbers, then the NPRM's proposed one-call window should be triggered by the first live contact a servicer has with a called party who is not the borrower, which provides the servicer with notice that the borrower's number has been reassigned.

15. *NPRM Paragraph 15.* The NPRM requests comment on whether the Budget Act amendments should be interpreted "to include calls made by creditors and those calling on their behalf, including their agents."<sup>32</sup> *Nelnet's Comment to Paragraph 15:*

a. Nelnet agrees with the NPRM's proposal that such calls made pursuant to the Budget Act amendments should refer only to calls made by the federal government and those calling on behalf of the federal government, including their agents.

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<sup>32</sup> NPRM ¶ 15.

16. *NPRM Paragraph 16.* The NPRM requests comment on “whether and, if so, how, the Supreme Court’s recent decision in *Campbell-Ewald Co. v Gomez* should inform our implementation of the Budget Act amendments to the TCPA.”<sup>33</sup> *Nelnet’s Comment to Paragraph 16:*

a. The federal government is immune from liability under the TCPA, because: (1) the TCPA applies only to “persons”; and (2) the TCPA’s definition of “person” is an “individual, partnership, association, joint-stock company, trust or corporation” and not the government or its agencies.<sup>34</sup> *Campbell-Ewald* confirms that interpretation of the limits of the TCPA’s applicability and goes further to also shield federal government contractors from liability so long as: (1) the authority to carry out the work was validly conferred by Congress to the government; and (2) the contractor performed the work as the government directed.<sup>35</sup>

b. Put another way by the Supreme Court, a federal government contractor enjoys the same immunity from suit under the TCPA as the federal government except where: (1) the government’s authority “was not validly conferred”; (2) the contractor “exceeded [its] authority” under the contract; or (3) the contractor “knew or should have known that [its] conduct violated a right ‘clearly established’ at the time of the episode in suit.”<sup>36</sup>

c. The Budget Act amendments do not – and indeed cannot – change the TCPA’s definition of “person” and cannot modify or limit the scope of the TCPA immunity conferred by the Supreme Court in *Campbell-Ewald* on federal government contractors who perform their work as directed.<sup>37</sup>

17. *NPRM Paragraph 17.* The NPRM requests general comment on the need for restrictions on the number and duration of covered calls.<sup>38</sup> *Nelnet’s Comment to Paragraph 17:*

a. In Nelnet’s view, the NPRM’s proposal to restrict the number and duration of servicing calls is misguided and ineffective. Modern automated dialing technology improves the dial rate servicers of federal student loans are able to make with borrowers by rotating dial attempts through different time slots to: find a window when the borrower is available; identify the best numbers to call based on prior history; and provide valuable data to analyze which delinquency and default programs are most effective with certain groups of borrowers.

b. Restricting the number, content, or duration of loan servicing calls will reduce their efficacy. For instance, when a servicer and borrower are having a live conversation,

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<sup>33</sup> NPRM ¶ 16.

<sup>34</sup> See 47 U.S.C. § 153(39).

<sup>35</sup> “The United States and its agencies . . . are not subject to the TCPA’s prohibitions because no statute lifts their immunity.” *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663, 672 (2016).

<sup>36</sup> *Id.* at 673.

<sup>37</sup> See Federal Communications Commission, Informal Objections re Red Zebra Broadcasting Licensee, LLC, DA 14-1867, at 5–6 (Dec. 18, 2014) (explaining that the FCC must comply with the First Amendment precedent enunciated by the Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

<sup>38</sup> NPRM ¶ 17.

helpful information, education, and assistance are being provided to the borrower. A rule that cuts off, hamstring, or interrupts that live conversation impedes the goals of the Budget Act amendments rather than furthering them. In addition, hampering the data-driven intelligence that powers successful communication campaigns will result in less contact with borrowers, reduced account resolution, and elevated delinquency and default. Practical restrictions on servicers' calls are necessary, but such restrictions need to be chosen smartly and carefully, ideally using data from servicers and with a clear goal of preventing borrowers from falling into default.

18. *NPRM Paragraph 18.* The NPRM requests specific comment on the proposal to restrict the number of covered calls to three per month, even if unanswered, absent the borrower's consent, and also requests specific comment on whether and how to encourage live agent calls.<sup>39</sup> *Nelnet's Comment to Paragraph 18:*

a. Nelnet's data demonstrates that 10 dials per month, which equates to roughly 2.3 calls per week is the appropriate dial rate with borrowers. This frequency is not overly burdensome, but allows servicers enough opportunity to do what is most important for borrowers – keep them out of delinquency and default.

b. Borrowers are overwhelmingly relieved to understand their options and to resolve their account, but these solutions only work when servicers are able to reach the borrower. While the first dials have the highest probability of success, each additional phone call or text attempt makes a significant difference. Texts are particularly effective with 15% of borrowers resolving their account or calling in to receive more information. Accordingly, Nelnet disagrees that the three-call limit proposed by the NPRM is workable because it takes numerous call attempts to identify the best number for a borrower, and feels strongly that the three-call limit will undermine the work of federal student loan servicers. In Nelnet's experience, the incremental value per dial is as follows:

	Frequency – Dials per Month										
	0	1	2	3	4	5	6	7	8	9	10
<b>Incremental Resolves/Dial</b>	<b>4.2%</b>	<b>3.8%</b>	<b>2.9%</b>	<b>2.0%</b>	<b>1.3%</b>	<b>0.9%</b>	<b>0.8%</b>	<b>0.6%</b>	<b>0.5%</b>	<b>0.4%</b>	<b>0.3%</b>
Cumulative Resolves	4.2%	8.0%	10.9%	12.9%	14.2%	15.0%	15.8%	16.3%	16.8%	17.1%	17.5%
Impact vs. No Dials	n/a	190%	258%	307%	336%	357%	375%	388%	399%	408%	415%
Impact vs. Reg. Effort	n/a	n/a	n/a	119%	130%	138%	145%	150%	155%	158%	161%

c. Nelnet agrees that live agent calls represent a critical and effective channel for borrower communication, and should not be limited in duration. Live agent calls represent the majority of Nelnet's calling activities, and Nelnet expects them to continue being vital to Nelnet's future strategies. At the same time, Nelnet does not want to limit other important communication tools at its disposal. Nelnet has found that some borrowers respond better to a blend of live calls and efficient messaging campaigns, and actually prefer the impersonal nature of messaging given the sensitive topic of debt. While Nelnet certainly encourages the use of live calls, it does not recommend taking alternative methods of communication off the table.

<sup>39</sup> NPRM ¶ 18.

19. *NPRM Paragraph 19.* The NPRM requests specific comment on the proposal to restrict call hours similar to those that apply to telemarketing calls, and whether there are other standards or precedents that should be followed for guidance.<sup>40</sup> *Nelnet's Comment to Paragraph 19:*

a. Nelnet agrees with reasonable restrictions regarding the time of day at which a call can be made, but disagrees with the proposal that the rules that govern telemarketers should apply to calls made by servicers of federal student loans. Servicing calls are not telemarketing calls and should not be treated as such. As a general matter, Nelnet endeavors to make calls at sensible times, but for a borrower who uses a cell phone Nelnet cannot determine which time zone the borrower is in. For example, if Nelnet calls a borrower who is believed to be in Boston but is actually residing in Hawaii not Boston, a call made at the reasonable time of 10 AM Eastern Time would be 6 AM Hawaii-Aleutian Time, an unreasonable time for most calls. To prevent an unintended barrier to accomplishing the goals of the Budget Act amendments, Nelnet proposes that servicers of federal student loans continue to be allowed to employ best practices that advance the goals identified by the President regarding innovative and effective communication with borrowers.<sup>41</sup>

20. *NPRM Paragraph 20.* The NPRM requests comment on the proposal to allow borrowers to stop covered calls at any time.<sup>42</sup> *Nelnet's Comment to Paragraph 20:*

a. Nelnet disagrees with the proposal to the extent it will allow borrowers to stop federal student loan servicing calls. Given that the purpose of servicing calls is to keep borrowers out of delinquency and default and that borrowers who are beginning to experience distress are likely to seek to stop calls as a means of avoidance, it would be antithetical to allow borrowers to prevent federal student loan servicers from providing education and information at a time when borrowers most need it.

b. Most importantly, though, allowing borrowers to opt out of receiving informational and educational calls about their loan is incongruent with mandated calls by the federal government, such as the Department of Education's requirement that federal loan servicers such as Nelnet make certain mandatory 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 for such calls.

c. In addition, allowing borrowers to opt out of receiving informational and educational calls about their loan is inconsistent with the terms of federal student loan agreements, which do not provide borrowers with a cease and desist mechanism for contact made by servicers before default. If a borrower is being contacted by a debt collector, the FDCPA's provisions regarding cease and desist apply.

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<sup>40</sup> NPRM ¶ 19.

<sup>41</sup> See *White House Fact Sheet*, *supra* note 7.

<sup>42</sup> NPRM ¶ 20.

21. *NPRM Paragraph 21.* The NPRM requests comment on the proposal that callers must inform borrowers of their right to stop calls.<sup>43</sup>

a. *Nelnet's Comment to Paragraph 21.* For the same reasons that Nelnet disagrees with the proposal to allow borrowers to stop covered calls from servicers of federal student loans, Nelnet disagrees with the proposal to require servicers to inform borrowers of any right to stop servicing calls.

### III. CONCLUSION

For the reasons set forth above, Nelnet requests the NPRM's proposals be revised to consider and accommodate the unique position Nelnet and other federal student loan servicers occupy to inform and educate borrowers about affordable repayment options to keep them out of delinquency or default altogether and to ensure the efficient collection of these federal assets.

Respectfully submitted,

Alfred E. Mottur  
Richard B. Benenson  
Brownstein Hyatt Farber Schreck, LLP  
1350 I Street, NW, Suite 510  
Washington, DC 20005  
202.872.5284 tel

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*Counsel for Nelnet, Inc.*

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<sup>43</sup> NPRM ¶ 21.