

**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)

COMMENTS OF NAVIENT CORPORATION



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June 6, 2016



Navient @Navient

9/22/15

Nine times out of 10, when we speak with struggling federal student loan customers, they avoid default. cards.twitter.com/cards/18ce545g...

1



Erica Idokogi
@erica_darwin



@Navient Very True! Answer their calls! It's worth it

9/22/15, 6:44 PM



Marija
@marija127



Follow

@Navient just had a wonderful experience with Amber.. She was SO helpful, came up with a solution, and got me back on track :) thank you!



tara.
@taraasaurusrex



Follow

i literally am crying from relief and joy thanks to the lovely @Navient rep that just helped me get on the correct repayment plan THANK YOU



Justin Meli
@JustinMelINY



 Follow

Never in my life did I think I'd write this, but thank you [@Navient](#) for making dealing with student loans a decently pleasant experience!!

Hannah Baggott
@hannahbaggott



 Follow

Huge thanks to [@Navient](#) for an affordable payment plan & not making fun of me when I admitted to hiding from them. [#studentloans](#)

“I would get so nervous any time the phone rang because it was always something about my loans. I finally had a wakeup call. I knew the loans weren’t going anywhere, and I knew if I continued to ignore them, my stress level would go up and my financial stability would go down. I decided that if I got my finances in control I would be able to control all aspects of my life.”

-- Navient borrower



Jennifer Costley

@jennlynn831821



 Follow

I never really post about this, but I have to say I've always had such positive experiences with [@Navient](#) [#hatestudentloans](#) [#lovenavient](#)



Katie Noon ▸ **Navient** ✓

January 29 · 🌐

Big Bank: Nope, you owe us money , we need it now.

Big Bank 2: We need you to pay up first and then we will help...sort of help.

Navient: We understand times are hard. Let's lower your payments right now and start over.

Thank you for being awesome.



rae

@SunRae__



 Follow

I just want to shout out Navient for being so understanding when it comes to my student loans. You guys are always so nice. Thank you!



EXECUTIVE SUMMARY

Congress' recent passage of the Bipartisan Budget Act of 2015 (the "Bipartisan Budget Act") addressed important topics related to federal student loans. While there were many issues discussed in the Notice of Proposed Rulemaking ("NPRM"), borrowers would benefit from more emphasis on the importance of contact and the impediments that the Telephone Consumer Protection Act ("TCPA") imposes to reaching and helping struggling and at-risk borrowers. Given the complexity of the student loan system and the numerous options available to borrowers in repayment, this discussion is critically important.

The FCC has a unique opportunity in this proceeding to help federal student loan borrowers avoid the negative effects of delinquency and default. We encourage the Commission to thoughtfully consider the data in these comments as it continues its important work regarding the TCPA and the Bipartisan Budget Act.

Our Shared Goal in Helping Borrowers. Navient is the nation's largest student loan servicer and a partner to millions of federal student loan borrowers. Navient does not set or even influence the interest rates, terms, or penalties for federal student loans (those are set by Congress) or tuition and enrollment fees (those are set by colleges and universities). Instead, our role is to work with borrowers after they have selected the school of their choice and incurred a debt. We help borrowers navigate the overly complex array of repayment options as they work towards successfully repaying their loans. There are now more than 50 options available to borrowers, including deferment, forbearance, and forgiveness, with 16 repayment programs (nine of which are based on income, as discussed below).

Navient is a dedicated partner to the federal student loan program, with a track record of fostering borrower success. Overall, federal student loan borrowers who enter repayment and

have Navient as their servicer are **38 percent less likely** to default than borrowers who use other federal student loan servicers. We are one of the businesses “trying to do the right thing and play by the rules.”¹ We too understand the frustration that comes when the phone rings and the voice on the other line is a prerecording claiming that we just won a “free” cruise.² But federal student loan servicers are different from telemarketers offering a free cruise.

Calls and text messages from student loan servicers are proven, effective methods that help millions of Americans. And one thing has become crystal clear from our years of experience: live contact with borrowers is key to helping them navigate the multitude of options and the complexity of the repayment system. **More than 90 percent of the time that we have a live conversation with a federal loan borrower, we are able to resolve a loan delinquency.**

We already have consent to autodial nine out of 10 of the federal student loan borrowers whose loans we service today, and they are far more likely to be current. But reaching the remaining 10 percent of borrowers has been challenging, and they are far more likely to default.

Our Concerns with the FCC’s Proposals. Fortunately, Congress took swift action to allow federal student loan servicers to broaden their outreach to help borrowers in need while also maintaining important consumer protections. In no uncertain terms, Congress exempted from the TCPA calls to collect debts owed to or guaranteed by the United States.

Like many other stakeholders, Navient supports Congress’ and this Administration’s efforts to help borrowers in need while also ensuring the timely repayment of billions of dollars of outstanding federal debt. Many of the FCC’s proposals in the *NPRM*, however, stray far from Congress’ intent and are contrary to the plain language of the amended TCPA, Administration

¹ See 2016 TCPA Hearing, Statement of Sen. John Thune, Chairman, S. Comm. on Commerce, Science, & Transportation.

² See *id.*

efforts to help student loan borrowers, and sound fiscal policy. And the Commission’s proposed call attempt limits are arbitrary, unsupported, and unjustified.

If adopted, the proposals would undoubtedly turn the amendment on its head, essentially requiring callers to obtain “prior express consent” to place calls that are exempt from the “prior express consent” requirements (*e.g.*, by limiting covered calls to only those to telephone numbers provided by the borrower). They could also create new class action liability exposure for both servicers and the federal government. And porting over the “one call attempt” approach from the *2015 TCPA Declaratory Ruling and Order* would leave callers perpetually and unavoidably exposed to TCPA liability for every call that they make pursuant to the exemption. Cynics might say that the proposals are intended to incentivize callers *not* to place exempt calls.

Most importantly, the proposals would fail to provide any meaningful support for the borrowers most in need, including low-income, minority, and other at-risk individuals.

This outcome is surely not what Congress intended, at least not for federal student loan borrowers. Instead, Navient proposes the following:

The purpose of the call or text should control whether the call is exempt, not whether a debt is past due to a particular degree, who receives the call, or whether a number has been reassigned. The FCC’s discretion under the Bipartisan Budget Act is very limited. There are important instances when outreach to borrowers who are current on their loans is key, such as to: (1) borrowers who are approaching deadlines or changes in status; (2) borrowers desiring information on income-driven repayment enrollment; (3) borrowers approaching IDR reenrollment deadlines; and (4) borrowers whose loans were previously defaulted and are now restored to current status through loan rehabilitation or consolidation.

The Commission also lacks the authority to adopt limitations based on the called party or calls to reassigned numbers. Borrower relationships can last 10 to 20 years or even longer, increasing the need to contact references and other non-borrowers, as well as the potential for the borrower's number to change or be reassigned over time. Congress was aware of these situations and chose not to carve them out of the exemption.

There is also no need to impose any new requirements on calls to residential lines.

The exemption cannot be interpreted to result in more restrictive obligations on federal debt collection calls than what existed before Congress amended the TCPA.

Limiting the number of exempted calls to three per month, regardless of whether a call results in a live conversation, is far below the number of calls needed to have a meaningful impact on at-risk borrowers. Every additional call to a student loan borrower carries with it significant benefits. For example, in a single month, Navient was able to help an estimated 20,000 borrowers avoid delinquency or default as a result of calling each borrower one additional time.

Moreover, the FCC's proposal is far more restrictive—and unnecessarily so—than the three calls per week that the National Consumer Law Center urged the Consumer Financial Protection Bureau to allow in the context of the Fair Debt Collection Practices Act. The proposed limit is also contrary to recent Department of Education requirements that servicers contact some borrowers more than three times per month.

If the Commission does impose a three call per month limit, it should at a minimum only count calls that result in a live conversation with the borrower and adopt separate limits for text communications. It also should not adopt limits on the duration of live conversation calls or free-to-end-user text messages.

The FCC's proposal effectively eliminates the exemption enacted by Congress and is contrary to Congress' clear directive in passing the Bipartisan Budget Act (and contrary to the Administration's longstanding efforts to include an exemption as part of the budget). In the end, the FCC's rules—if adopted—would hurt, rather than help, borrowers and other taxpayers.

Congress had good reasons for adopting the TCPA in 1991, but preventing federal student loan servicers such as Navient from helping student loan borrowers avoid delinquency and default was not one of them. The Bipartisan Budget Act's amendments to the TCPA open the door for servicers to help borrowers avoid delinquency and default while supporting responsible use of federal taxpayer dollars. We encourage the Commission to keep these goals in mind as modifies its proposals to implement of Section 301 of the Bipartisan Budget Act and the TCPA.

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COMMENTS OF NAVIENT CORPORATION

Navient Corporation (“Navient”)³ respectfully submits these comments in response to the *Notice of Proposed Rulemaking* (“*NPRM*”) released by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.⁴ In the *NPRM*, the Commission seeks comment on how to implement Congress’ clear directive that calls “made solely to collect a debt owed to or guaranteed by the United States” are exempted from the “prior express consent” requirements of the Telephone Consumer Protection Act (the “TCPA”).⁵ As explained below, the *NPRM* proposes several harmful rules that either conflict with the plain language of the Bipartisan Budget Act of 2015 (the “Bipartisan Budget Act”)⁶ or are unsupported and unjustified based on facts and data. These proposals threaten the delivery of timely, beneficial information proven to help federal student loan borrowers avoid the negative consequences of delinquency and default. Navient urges the Commission to thoughtfully consider the data and arguments in these comments and reverse course away from adopting the damaging rules and policies proposed in the *NPRM* for the student loan context.

³ Navient Corporation is the nation’s largest student loan servicer. More information about Navient is available at <https://www.navient.com/about/who-we-are/>.

⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, FCC 16-57 (rel. May 5, 2016) (“*NPRM*”).

⁵ *Id.* ¶ 1.

⁶ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584 (2015).

I. THE FCC CAN EITHER HELP MILLIONS OF STUDENT LOAN BORROWERS OR CLOSE OFF A VITAL DOOR TO FEDERAL ASSISTANCE.

The FCC has a unique opportunity in this proceeding to help several at-risk segments of federal student loan borrowers avoid the negative effects of delinquency and default. To assist the Commission in understanding the impact of its proposed rules on federal student loan servicing, we are providing additional details about the federal student loan program, the critical role that Navient and other federal student loan servicers play, and the importance of live conversations with borrowers.

Our years of experience, extensive portfolio, and borrower relationships have made one thing perfectly clear: **live conversations are critical to helping student loan borrowers avoid a future default or rehabilitate an existing default.** More than 90 percent of the time that Navient has a live conversation with a borrower, it is able to resolve a loan delinquency. If we are able to speak to a borrower in real-time, we can counsel the borrower on the more than 16 repayment options—some of which involve monthly payments as low as \$0 per month—or the 32 deferment, forbearance and forgiveness options available to the borrower.

Congress spoke clearly when it passed common-sense reform exempting calls made to collect debts owed to or guaranteed by the United States from the scope of the TCPA. As the Department of the Treasury (“Treasury”) has observed, “[t]imely and efficient collection of delinquent debts helps fund government operations, maintain key programs, and reduce the Federal deficit,” and it is “very important to continue to find ways to cost-effectively collect debt owed to the government while . . . providing debtors with due process and the opportunity to repay debt in accordance with their financial ability to pay.”⁷ The Commission’s *NPRM*

⁷ See U.S. Dept. of the Treasury, *Fiscal Year 2014 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies* i (May 2015),

proposals present a real threat to the ability of all student loan servicers to extend their outreach to a segment of borrowers most in need, and to meet Congress' imperative to improve the collection of federal debt.

A. Navient Provides Essential Services to Millions of Student Loan Borrowers.

- *Federal student loan servicers help borrowers avoid delinquency and default, and they do not set or influence tuition, enrollment fees, interest rates, loan terms, or non-payment penalties.*
- *Seventy-two percent of 2016 college graduates are worried about paying off college-related debt, but the good news is that there are dozens of federal assistance options available.*

Navient has been a leader in student loan management and servicing for more than 40 years. We provide a critical service to the federal government, working with the United States Department of Education (the “Department”)⁸ to service student loan accounts. And we are a partner to the millions of borrowers whose loans we service.

As the nation’s largest student loan servicer, Navient supports 12 million borrowers and has \$300 billion in assets under its management. As of December 31, 2015, Navient held \$96.5 billion in Federal Family Education Loan Program (“FFELP”) student loan assets.⁹ FFELP

<https://fiscal.treasury.gov/fsservices/gov/debtColl/pdf/reports/debt14.pdf> (“*Treasury Fiscal Report*”).

⁸ The Department is the overwhelming holder of federal debt—accounting for 75 percent of all federal non-tax debt.

⁹ See Navient Corp., Annual Report (Form 10-K), at 4 (Feb. 25, 2016). Prior to July 1, 2010, the federal government issued federal student loans through the FFELP and the Direct Student Loan Program (“Direct Loans”). Under FFELP, banks and other financial institutions provided the funds for federal student loans, which the federal government subsidized and guaranteed. Direct Loans, as the name implies, are issued directly by the Department to students without the involvement of a private lender. As of July 1, 2010, FFELP ended and the federal government began issuing 100 percent of all federal student loans through the Direct Student Loan Program. Both FFELP and Direct Loans are guaranteed by the federal government. For Direct Loans, the federal government will contract with third-party servicers like Navient to manage billing and collection for the loan. Servicers are compensated by the Department pursuant to a scaling incentive structure based on how many days an account is delinquent. The federal government pays contracted servicers *more* for accounts that are *fewer* days delinquent, consistent with

student loans are originated by private lenders and guaranteed by the federal government and generally have similar terms and conditions to Direct Student Loans.¹⁰ As of the same date, Navient serviced 6.3 million accounts under its contract with the Department.¹¹ Further, Navient works with the Department and with federal guaranty agencies to help borrowers who have defaulted on their loans find a pathway out of default. Since 2012, Navient has helped more than 150,000 defaulted student loan borrowers successfully rehabilitate their loans, eliminating the default from their credit report and returning the loan to good standing.

Importantly, our role in the process occurs at a late stage. We do not set or influence the interest rates, terms, or non-payment penalties for federal student loans (those are set by Congress), and we do not set or influence tuition rates or enrollment fees (those are set by colleges and universities).

Instead, we help borrowers navigate the complex array of repayment options as they work towards successfully repaying their loans. This service is particularly important to delinquent borrowers and others who are at high risk of default. Federal regulations provide students with many tools to avoid defaulting, including an extended period of time to try and become current on delinquent student loan obligations. In most cases, borrowers do not have to make payments to become current and can access plans that reduce their payments to as low as \$0. Once a federal student loan borrower defaults, however, the penalties can be extraordinarily swift, harsh, and long lasting.

federal policies to reduce delinquency and default. See <https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing>.

¹⁰ See, e.g., U.S. Dep't of Educ., *Student Loans Overview: Fiscal Year 2014 Budget Proposal*, at S-3, S-4, <https://www2.ed.gov/about/overview/budget/budget14/justifications/s-loansoverview.pdf>.

¹¹ See Navient Corp., Annual Report (Form 10-K), at 4 (Feb. 25, 2016).

Our relationships with student loan borrowers have also grown over the years as more and more students borrow money to attend college. For example, many turned to post-secondary education when unemployment soared during the recession. Many of these students relied on federal loans far more often now than they did a decade ago, resulting in a substantial increase in the number of federal student loan borrowers, from **28.3 million** in 2007 to **41.8 million** in 2016.¹² The total value of outstanding federal student loans has more than doubled during that time, from **\$516 billion** in 2007 to **more than \$1.2 trillion** in 2016.¹³ At the outset of repayment, student loan borrowers often report that they do not feel that they have the financial tools they need to address their college-related debt. A recent survey found that 72 percent of 2016 college graduates are worried about paying off college-related debt, and 42 percent believe their debt will negatively affect their credit scores.¹⁴ More than half of graduates said they will likely defer their student loans after graduation.¹⁵ Of the respondents who reported feeling insecure about their financial future, 55 percent said that student loans were their leading concern.¹⁶

B. Servicers Work with Borrowers Over an Extended Period of Time to Avoid Default, but if a Default Does Occur, the Consequences are Dire.

- *A federal student loan “debt” is incurred at the time the loan is originated.*
- *The debt is technically in “default” after 270 days of non-payment but generally is not transferred to collections until 360 days, or one full year, of non-payment.*

¹² See Dept. of Ed., Fed. Student Aid Data Ctr., *Federal Student Aid Portfolio Summary*, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> (last visited June 6, 2016).

¹³ See *id.*

¹⁴ EDELMAN INTELLIGENCE AND EXPERIAN INFORMATION SOLUTIONS, EXPERIAN COLLEGE GRADUATE SURVEY REPORT 17 (Apr. 2016), <http://www.experian.com/blogs/ask-experian/2016/05/13/graduates-and-credit/>.

¹⁵ *Id.* at 19.

¹⁶ *Id.* at 11.

- *Under federal law, defaulting borrowers are subjected to significant additional fees, garnishment of wages without the need for a court order, offset of federal tax refunds and loss of eligibility for financial assistance.*

Federal student loan default is an extensive process that occurs after a significant period of delinquency. A borrower becomes delinquent on a federal student loan when they miss a payment,¹⁷ at which point Navient and other federal student loan servicers begin extensive outreach efforts. Navient reaches out to a delinquent borrower through phone calls, letters, text, and e-mail communications to inform the borrower of the 16 different repayment options in which the borrower may be eligible to participate, including Income-Driven Repayment (“IDR”) plans that can set monthly payments as low as \$0 per month based on the borrower’s income, as well as the 32 deferment, forbearance, and forgiveness options available today.

A borrower is considered “seriously delinquent” after three months of non-payment and is at that time reported to the major credit reporting agencies.¹⁸ Navient continues to attempt to contact seriously delinquent borrowers to help get them back on track and eliminate the loan delinquency. In mid-to-later stages of delinquency, Navient’s communication channels include an integrated inbound – outbound calling system and free-to-end-user SMS text communications. Notably, text communications account for approximately 17 percent of Navient’s federal student loan accounts becoming current in later stages of delinquency.

After 271 days of non-payment, the loan is technically in default.¹⁹ Under the terms of most promissory notes, the balance of the loan becomes due in full, and the Department can initiate involuntary payment programs such as offset or administrative wage garnishment.

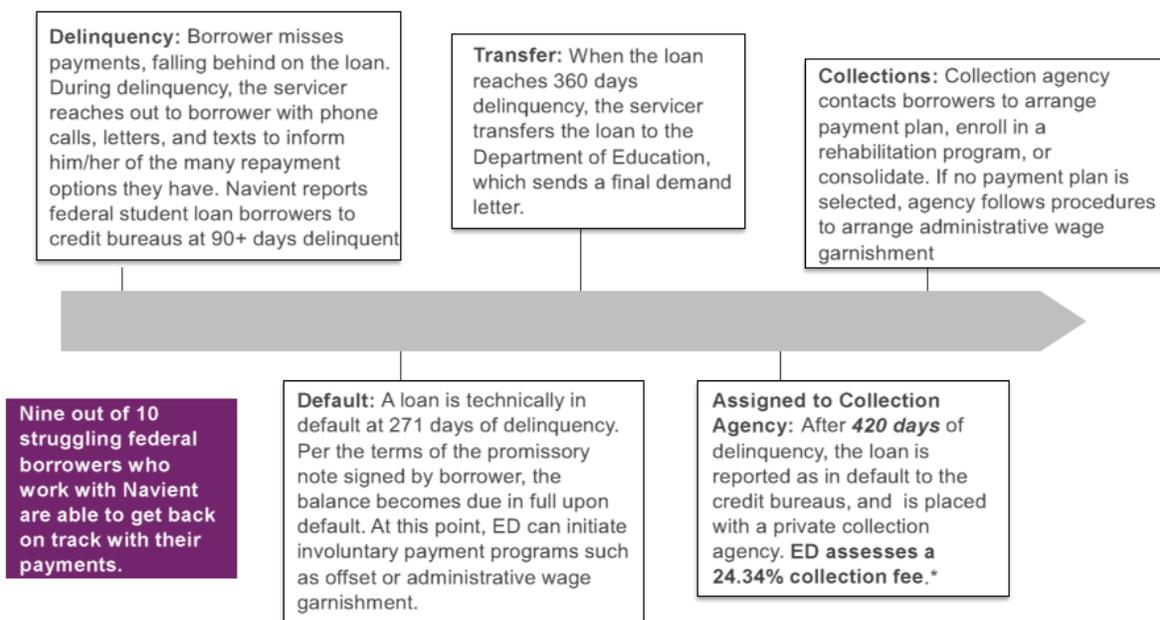
¹⁷ See, e.g., FSA, *Understanding Default*, <https://studentaid.ed.gov/sa/repay-loans/default> (last visited June 4, 2016) (“*Understanding Default*”); 34 C.F.R. § 682.411(b).

¹⁸ Nearly 12 percent of federal student loan borrowers were seriously delinquent in the first quarter of 2016. See Dept. of Ed., Fed. Student Aid Data Ctr., *Direct Loan Portfolio by Delinquency Status*, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> (last visited June 6, 2016).

¹⁹ See *Understanding Default*; 34 C.F.R. § 682.411.

Navient continues to contact borrowers leading up to 360 days of delinquency, when the loan is transferred from Navient’s servicing platform to the Department’s Default Collection Management System (“DCMS”).²⁰ In the 360 days between the time the loan first becomes delinquent and when it is turned over to the Department, we make between 230 and 300 attempts to contact the borrower through letters, calls, texts, USPS packages and emails to inform the borrower of his or her options to avoid default and remedy the delinquency.

Defaulting Is a Lengthy Process With Numerous Opportunities to Change Course



Once a borrower defaults, however, Congress has imposed unique collection tools that make default particularly detrimental to federal student loan borrowers. Under federal law,

²⁰ See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, FEDERAL STUDENT LOANS: EDUCATION COULD DO MORE TO HELP ENSURE BORROWERS ARE AWARE OF REPAYMENT AND FORGIVENESS OPTIONS, GAO-15-663, at 15 (Aug. 2015), <http://www.gao.gov/assets/680/672136.pdf>. (“GAO Report”).

defaulting borrowers are subjected to significant additional fees,²¹ garnishment of wages without the need for a court order,²² offset of federal tax refunds²³ and loss of eligibility for federal financial assistance.²⁴ Bankruptcy relief from federal student loan debt is extremely difficult to obtain.²⁵ These penalties are nearly always preventable if the servicer can speak to the delinquent borrower.

C. Navient’s Proven Approach to Assisting Borrowers, Reducing Delinquency, and Avoiding Default Depends on Live Contact.

- *More than 90 percent of the time that Navient has a live conversation with a federal loan borrower, it is able to resolve a loan delinquency.*
- *For nearly one out of every five of its borrowers, Navient only reaches the right point of contact for the loan after more than 50 calls.*

Navient leads the education finance industry in developing effective and innovative loan servicing techniques and preventing federal student loan defaults. Indeed, federal student loan borrowers entering repayment whose loans are serviced by Navient are **38 percent less likely** to default than borrowers who use other loan servicers.²⁶ Navient has recorded the lowest serious delinquency and default rates of the major servicers for the Department of Education. If all other major federal servicers performed at Navient’s level, 300,000 (nearly 20%) fewer borrowers would have defaulted in 2015.

Navient’s default rate is lower than other servicers’ because of sophisticated analysis of its forty years of student loan data, including for example by designing outreach strategies based

²¹ 31 U.S.C. § 3717 (2016).

²² *Id.* § 3720D.

²³ *Id.* § 3720A.

²⁴ *Id.* § 3720B.

²⁵ *See* 11 U.S.C. § 523(a)(8) (2016).

²⁶ This includes all of Navient’s federal student loan borrowers, including FFELP and Direct Loan Program borrowers. *See* U.S. Dep’t of Educ., Three-year Official Cohort Default Rates for Schools (FY 2012) (Sept. 28, 2015), <http://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html>.

on a borrower's likelihood of serious delinquency. We invest significant time and effort into counseling borrowers and empowering them to select the best plan for their financial future.

Here is one testimonial from a borrower in California on her experience working with Navient to obtain several loan deferments and managing to pay off her debt:²⁷



Terrie L., California

It's a true saying, "You never stop learning, and education lasts a lifetime." Since graduating from college I have done many things that utilize what I learned in college. My degree in communications is something I use in every part of my life.

Paying off my student loan was a long and tough road. It is by far one of my biggest accomplishments in my life. I had to defer my student loan a few times due to layoffs at work and financial hardship. These were indeed set-backs, they cost me a few years from meeting my goal of paying off my loan.

As soon as I got back to work, I got back on track. You worked with me on many occasions to make my payments manageable and I thank them for that. I paid off my loan by consistently paying extra when I could. It felt so good to pay my student loan in full, it was such a weight lifted off my shoulders. I wish all of our new grads great success with paying their loans off.

Depending on the borrower's circumstances, a borrower can become eligible (or ineligible) for different deferment, forbearance, forgiveness and repayment options. Joining the military, becoming a teacher, or suffering through a natural disaster are just a few of the circumstances that can alter a borrower's loan status.

Our extensive experience with millions of borrowers demonstrates that live conversations between a borrower and a servicer are critical to keeping borrowers on track and out of delinquency. More than 90 percent of the time that Navient has a live conversation with a federal loan borrower, it is able to resolve a loan delinquency. Conversely, 90 percent of

²⁷ See Customer Stories – Navient, <http://www.navient.com/about/customers/stories/> (last visited June 5, 2016).

borrowers who default on their federal student loans do not have a live telephone conversation with us, despite our efforts to reach them.

Further, Navient has also found that simply curing the delinquency and expecting a borrower to fill out the paperwork to apply for an IDR plan is often not sufficient. Although many repayment options can be accessed from a borrower's account, the application for IDR repayment plans must be done in paper or through an on-line application via the Department's website. Navient has found that previously delinquent federal student loan borrowers who indicate a desire that they would like to enroll in an IDR plan are far more likely to complete the enrollment process if they receive follow-up calls to remind them to complete the enrollment process.

For delinquent federal student loan borrowers, we almost always need to make multiple phone call attempts before we have a live conversation with the borrower and are able to get them on the right track. For half of student loan borrowers, Navient only reaches the right point of contact after more than 15 calls.²⁸ **Indeed, for almost one in five borrowers, Navient has to make more than 50 calls over several months before it reaches the right point of contact and has a conversation with the loan borrower.** As another way of looking at it, only 10 percent of the federal student loan calls Navient places reach the right point of contact, who is then able to have a conversation with one of our representatives.

For example, Navient recently helped a borrower avoid default by enrolling in an IDR plan with a reduced monthly payment of \$18.²⁹ The borrower enrolled and withdrew from a

²⁸ See *Ex Parte* Letter from Mark W. Brennan, Counsel to Navient Corp. to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 2-3 (filed Mar. 11, 2016).

²⁹ See Press Release, Navient, Navient CEO Shares Student Loan Borrower Stories, Advocates for Policy Ideas to Address Student Debt (May 26, 2016), <http://news.navient.com/releasedetail.cfm?ReleaseID=973049>.

state university several times, and when her loan became due she missed her first payment.³⁰ Navient contacted the borrower after she missed her first payment, but we did not receive a response.³¹ Navient attempted to contact the borrower again after she missed her second payment, again, without receiving a response.³² It was only at **nine months past-due** that the borrower spoke with a Navient team member and learned about how IDR plans work and how to apply.³³ This borrower was on a path to default, and likely would have but for her having a live conversation with a Navient team member and learning more about IDR.

Based on direct feedback, a number of borrowers that Navient works with on a day-to-day basis appreciate Navient's efforts to keep them on track. As one borrower recently told Navient:

I would get so nervous any time the phone rang because it was always something about my loans. I finally had a wakeup call. I knew the loans weren't going anywhere, and I knew if I continued to ignore them, my stress level would go up and my financial stability would go down. I decided that if I got my finances in control I would be able to control all aspects of my life.

Similarly, some of Navient's borrowers report the benefits of outreach on social media, and we have included several examples of their comments throughout this filing.

Navient has assisted these borrowers in finding a repayment plan that allows them to bring their loans out of default and back to current status. All told, Navient engages in more than 170 million communications annually to educate borrowers on repayment options. Navient's work has also benefited the federal government and taxpayers in the amount of millions of dollars, while enabling borrowers to avoid some of the negative consequences of student loan default.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

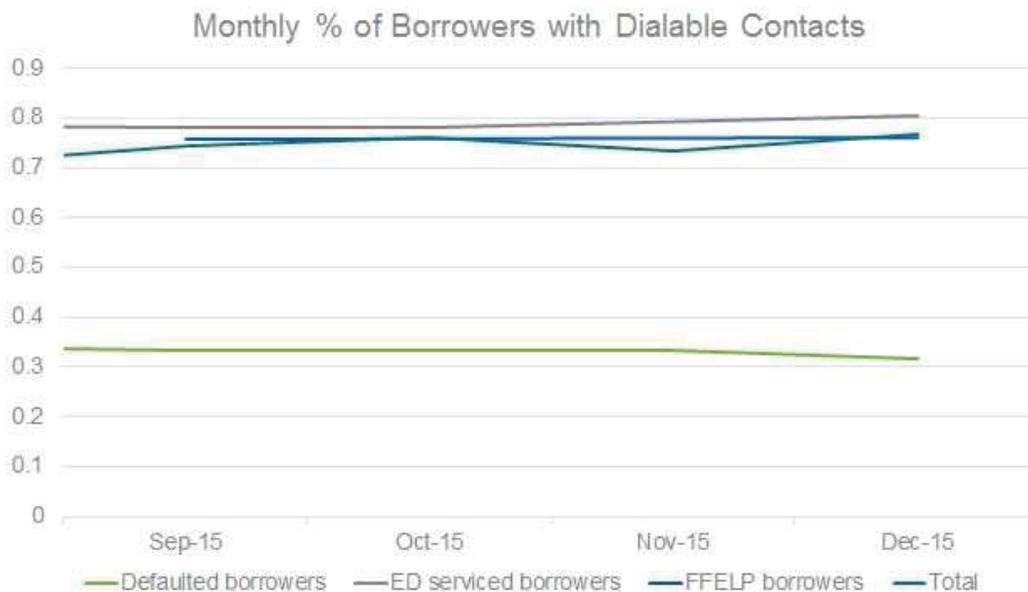
Although Navient is able to reach many student loan borrowers before default, there are some who do not respond to outreach or whom Navient cannot contact. Defaulted borrowers are far less likely to be “dialable” in that they have either a landline or a cellphone that they have provided consent to call. While 93 percent of Navient’s up-to-date federal student loan borrowers are dialable, only 57 percent of borrowers who end up defaulting fall into this category.

When a borrower does not make payments for 360 days—one full year—they are transferred to a default collections system. For Department loans, the borrower is transferred to the DCMS, at which point the Department reaches out to the borrower to make one more attempt to resolve the default prior to transferring the borrower to a collections agency and reporting the loan as defaulted to the credit bureaus. For FFELP loans, the process is similar but the loan is transferred to a federal guaranty agency which acts as the federal government’s agent in managing the defaulted FFELP loans. Importantly, under both Direct Student Loans and FFELP, there are options for a borrower to both resolve the default and remove it from their credit report through the loan rehabilitation program. This program allows borrowers to make 9 out of 10 monthly payments, based on income, with payments as low as \$5. Once the borrower makes the ninth payment, the loan is considered “rehabilitated” and is transferred back to a servicer and the default is removed from credit bureaus.

The challenge for helping defaulted borrowers is that often there is limited contact information, and the consent may not transfer when the loan is transferred from one servicer to another, so agencies reaching out to these borrowers must start over in locating the borrower and reaching them. As a result, less than half of defaulted borrowers are reachable on their phones and right party contact is extremely low. The importance of the Bipartisan Budget Act provision

is that it brings down the barriers to reaching these most distressed borrowers—those in default—and helps them on a pathway to resolve their default, restore their eligibility for federal financial aid, and begin to repair their credit.

Borrowers in default are hardest to reach...



The FCC’s own data reinforces the fact that student loan servicing calls are not the issue driving TCPA complaints. Based on available FCC data, **fewer than 400 consumer complaints out of the almost 350,000 phone call complaints** lodged with the FCC between October 31, 2014 and May 2016 were related to a call from Navient – in other words, less than 20 complaints per month.³⁴ Considering that Navient represents approximately 25 percent of the student loan servicing market, this data suggests that calls regarding federal student loans are not behind the hundreds of thousands of TCPA complaints that the FCC receives each year.

³⁴ Approximately 184,000 of the 350,000 consumer complaints lodged with the FCC related to phone calls included a caller ID telephone number for the calling party.



Kami Schattauer I had a very nice man named Ivan call me and help me out today. He helped defer my loans for a year. I know some people may not have the best experience with you folks, but I sure have. Thanks for helping me get through school Navient!

Unlike · Reply · Message · 1 · January 11 at 8:22pm



Germeen G.
Your life manager



Following

Not communicating is huge. Now I speak to my student loan services all the time. I'll be happy when I no longer need to. Lol #bossmoves2016



Christopher Hendrix-Buxton M.S. Thank you Navient for managing my student loans and helping me 2 learn the meaning of responsibility.

Like · Reply

II. THE BIPARTISAN BUDGET ACT IS A CLEAR STATEMENT FROM CONGRESS THAT THE FEDERAL GOVERNMENT’S INTEREST IN COLLECTING ITS DEBT IS A PRIORITY AND THAT CALLS MADE TO COLLECT THESE DEBTS ARE AN IMPORTANT TOOL FOR ASSISTING VULNERABLE BORROWERS.

Congress enacted the TCPA in 1991 to protect individuals’ privacy rights while also permitting legitimate business interests and commercial freedoms of speech.³⁵ Congress’ primary motivation for adopting the TCPA was to curb abusive telemarketing calls.³⁶ The House Report on the legislation, for example, notes that “[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy” and that “[m]any consumers are outraged [at] the proliferation of intrusive, nuisance calls to their homes from telemarketers.”³⁷ Among other things, the TCPA until recently made it unlawful to use an automatic telephone dialing system (“autodialer”) or an artificial or prerecorded voice to call a telephone number assigned to a cellular telephone service without the “prior express consent” of the called party (absent an emergency).³⁸

In 2015, Congress amended the Communications Act to exempt calls made “solely to collect a debt owed to or guaranteed by the United States” from this technology-based “prior express consent” restriction.³⁹ In relatively few words and using clear and concise language, Congress took decisive action to override prior Commission decisions that limited calls to collect federally owned or guaranteed debt. As discussed in more detail below, Congress amended the statute to reflect the Department’s many recommendations about the importance of live contact with federal student loan borrowers and new strategies to reach them,⁴⁰ and after several requests

³⁵ See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9).

³⁶ See S. Rep. No. 102-178, at 2 (1991); H.R. Rep. No. 102-317, at 2 (1991).

³⁷ H.R. Rep. No. 102-317, at 2 (1991).

³⁸ 47 U.S.C. § 227(b)(1).

³⁹ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(2)(H), 129 Stat. 584 (2015).

⁴⁰ See, e.g., *infra* Sections II.B-D.

from President Obama to implement “common sense debt collection reforms” that would make it easier to collect federal debts.⁴¹

Congress acted at a time when federal student loans account for approximately 75 percent of all delinquent non-tax debt owed to the federal government and 40 percent of all non-tax debt written off by the federal government. Furthermore, Congress’ amendment is a reaction to student loan borrowers’ growing reliance on wireless telephones as their sole source of communications. Low-income and minority borrowers, in particular, rely more heavily on wireless devices and are also at greater risk of defaulting on their student loans. Ultimately, Congress prioritized collecting federal debts (and assisting these borrowers in avoiding delinquency and default) over other concerns that would otherwise suggest a need to obtain “consent” from callers for exempted calls.

A. Federal Student Loans Have Become the Federal Government’s Largest Non-Tax Financial Liability.

- *The Department of Education holds over \$1 trillion in federal student loans, nearly 75 percent of the U.S. Government’s total outstanding non-tax debt. In addition, the Department of Education guarantees \$220 billion in FFELP loans held by lenders.*
- *In the first quarter of 2016, the total value of federal student loans in default grew to \$121 billion.*

Federal student loan debt constitutes the majority of the United States’ outstanding non-tax debt. In Fiscal Year 2014, the federal government held or guaranteed over **\$1.2 trillion** in non-tax receivables (current and delinquent), of which **\$139.3 billion** worth was delinquent.⁴²

⁴¹ See, e.g., OFFICE OF MANAGEMENT AND BUDGET, FISCAL YEAR 2014 BUDGET OF THE U.S. GOVERNMENT 144 (Apr. 10, 2013); OFFICE OF MANAGEMENT AND BUDGET, FISCAL YEAR 2013 BUDGET OF THE U.S. GOVERNMENT 166 (Feb. 13, 2012).

⁴² NPRM ¶ 6 (citing *Treasury Fiscal Report*).

The Department was by far the largest creditor agency, holding **\$874.3 billion** of all non-tax receivables, or nearly 75 percent of the government’s total outstanding non-tax debt.⁴³

Unfortunately, Fiscal Year 2014 recorded the same approximate ratio of *delinquent* Department debt to total federal non-tax debt.⁴⁴ **The Department held \$102.6 billion out of the \$139.3 billion total of federal non-tax delinquent debt in Fiscal Year 2014.**⁴⁵ And close to 40 percent of all federal debt write-offs that were “closed out” in Fiscal Year 2014 were from programs administered by the Department.⁴⁶ In the first quarter of 2016, nearly one in five recipients of a Direct Loan currently in repayment was 31 or more days delinquent,⁴⁷ and **the total value of federal student loans in default grew to \$121 billion.**⁴⁸

Navient plays a critical role in collecting federal student loan debts. As Treasury has observed, “[t]imely and efficient collection” furthers a number of important aims, including by “fund[ing] government operations, maintain[ing] key programs, and reduc[ing] the Federal deficit.”⁴⁹ Thus, as Treasury further explains, “it is very important to continue to find ways to cost-effectively collect debt owed to the government while, at the same time, providing debtors with due process and the opportunity to repay debt in accordance with their financial ability to pay.”⁵⁰

⁴³ *Treasury Fiscal Report* at 4.

⁴⁴ *Id.* at 8.

⁴⁵ *Id.*

⁴⁶ *Id.* at 18 (noting that Department write-offs accounted for \$2.31 billion of the total \$6.14 billion in federal debt write-offs for Fiscal Year 2014, or 37.9 percent).

⁴⁷ See Dept. of Ed., Fed. Student Aid Data Ctr., *Direct Loan Portfolio by Delinquency Status*, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> (last visited June 6, 2016).

⁴⁸ See Dept. of Ed., Fed. Student Aid Data Ctr., *Direct Loan and Federal Family Education Loan Portfolio by Loan Status*, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> (last visited June 6, 2016).

⁴⁹ *Treasury Fiscal Report* at i.

⁵⁰ *Id.*

B. Congress' Amendment Prioritizes the Repayment of Federal Debt and Acknowledges the Practical Realities of How Consumers Communicate and Manage their Finances in 2016.

The Bipartisan Budget Act's amendment to the TCPA reflects Congress' response to the growing amount of federal student loan debt. Through its amendment, Congress unequivocally prioritized the collection of federal debt above other competing interests underlying the TCPA when it removed calls made solely to collect federal debts from the purview of the TCPA's consent restrictions. Congress also afforded the FCC minimal discretion to adopt rules implementing this clear directive: the enabling legislation only permits the Commission to adopt regulations concerning the number and the duration of exempted calls, and only related to exempted calls to a telephone number assigned to a cellular telephone service.⁵¹

Congress' update to the TCPA is consistent with the growing trend of younger Americans living in wireless-only households. Today, federal student loan borrowers rely on cellular phones as their primary and often exclusive means of communicating. In the last half of 2015, close to three-quarters of young adults (ages 25-29) lived in wireless only households.⁵² Sixty-nine percent of adults ages 30-34 lived in wireless-only households.⁵³ Roughly a quarter of Navient's federal student loan borrowers are between the ages of 25 and 29 and, as a result, extremely likely to live in a wireless-only household. Because they do not use residential lines, a cell phone is often Navient's only means of speaking with most borrowers in these demographics.

⁵¹ See 47 U.S.C. § 227(b)(2)(H).

⁵² See STEPHEN J. BLUMBERG AND JULIAN V. LUKE, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JULY-DECEMBER 2015 2 (May 2016) ("*July-December 2015 Wireless Substitution*") (noting that 72.6 percent of adults aged 25-29 lived in households with only wireless telephones).

⁵³ *Id.*

Young adults are also increasingly using their smartphones for “information seeking and transactional” activities such as online banking and bill payment.⁵⁴ In fact, more than half of Navient’s borrowers use an online payment option. Student loan borrowers are one of the highest cohorts of consumers (second only to mobile phone subscribers generally) that subscribe to paperless statements and correspondence.⁵⁵ Navient’s account holders use paperless statements with particular vigor; 68 percent of Navient’s borrowers receive paperless statements, which is 58 percent more than other servicers’ borrowers.

C. Consistent with Congress’ Amendment, the Department of Education, Obama Administration and Other Observers Have All Recognized the Importance of Contacting Federal Student Loan Borrowers on Their Cell Phones.

- *In June 2014, President Obama directed the Secretary of Education to improve communication strategies to a variety of vulnerable borrowers—not just borrowers who have fallen behind on their loan payments.*
- *An interagency task force organized by the President recommended requiring student loan servicers to contact borrowers at certain key times prior to delinquency, such as 60 to 90 days prior to an anticipated change in repayment amount or while a borrower is still enrolled in school or is in grace.*
- *In 2015, the Department reported that student loan servicers can face difficulty finding borrowers and recommended that servicers be allowed to contact borrowers on their cell phones.*

Despite significant grace periods for federal student loan delinquencies and defaults, such delinquencies and defaults unfortunately do occur. In the aftermath of the most recent financial

⁵⁴ Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Center (Apr. 1, 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/> (“2015 PEW Smartphone Use”).

⁵⁵ *State of E-Bill Adoption*, Fiserv, Inc. at 4 (2014), <http://www.banknews.com/media/cms/pdfs/Fiserv%20Research%20Paper%20The%20State%20of%20Ebill.pdf>.

crisis, a greater number of Americans enrolled in colleges and universities once they became unemployed.⁵⁶

Since taking office, President Obama has directed federal agencies, including the Department, to take steps to improve collection of federal debts and help prevent student loan borrowers from becoming delinquent and defaulting. Several of President Obama's prior budget proposals included "common sense debt collection reforms that will significantly increase Federal collections from individuals and businesses that have failed to pay their taxes or repay Government loans," including TCPA exemption language similar to that ultimately passed by Congress.⁵⁷

As part of this effort, the Department has consistently recognized the importance of contacting borrowers to make sure they have adequate information and understand their student loan repayment options. According to U.S. Secretary of Education Arne Duncan, "[r]eaching out to borrowers to ensure that they have the information they need to manage their student loan debt is an important part of the administration's proposals to improve college value and affordability."⁵⁸ To that end, in November 2013 the Department announced an "augment[ed]" e-mail outreach program aimed at borrowers whose grace periods will end soon, who have fallen behind on their payments, have higher-than-average debts or are in deferment or forbearance

⁵⁶ See Bridget Terry Long, *The Financial Crisis and College Enrollment: How Have Students and Their Families Responded?*, in *HOW THE FINANCIAL CRISIS AND GREAT RECESSION AFFECTED HIGHER EDUCATION* (Jeffrey R. Brown & Caroline M. Hoxby eds., Univ. of Chi. Press 2014).

⁵⁷ See, e.g., OFFICE OF MANAGEMENT AND BUDGET, FISCAL YEAR 2014 BUDGET OF THE U.S. GOVERNMENT 144 (Apr. 10, 2013); see also OFFICE OF MANAGEMENT AND BUDGET, FISCAL YEAR 2013 BUDGET OF THE U.S. GOVERNMENT 166 (Feb. 13, 2012).

⁵⁸ Press Release, U.S. Dept. of Educ., U.S. Department of Education Announces Additional Efforts to Inform Student Borrowers of Repayment Options (Nov. 4, 2013), <http://www.ed.gov/news/press-releases/us-department-education-announces-additional-efforts-inform-student-borrowers-re>.

because of financial hardships or unemployment.⁵⁹ Through this e-mail correspondence, contacted borrowers would be prompted “to access resources designed to educate them on repayment options, apply for an income-driven repayment plan, or contact their federal student loan servicer for additional information.”⁶⁰

In June 2014, President Obama issued a Presidential Memorandum on helping struggling federal student loan borrowers manage their debt.⁶¹ The President observed that “too many struggling borrowers are still unaware of the options available to them to help responsibly manage their debt” and directed the Secretary of Education to investigate and implement several measures to improve communication with several categories of vulnerable borrowers:

Sec. 2. Improving Communication Strategies to Help Vulnerable Borrowers. By December 31, 2014, the Secretary of Education shall develop, evaluate and implement new targeted strategies to reach borrowers who may be struggling to repay their Federal student loans to ensure that they have the information they need to select the best repayment option and avoid future default. **In addition to focusing on borrowers who have fallen behind on their loan payments,** the Secretary’s effort shall focus on borrowers who have left college without completing their education, borrowers who have missed their first loan payment, and borrowers (especially those with low balances) who have defaulted on their loans to help them rehabilitate their loans with income-based monthly repayments. The Secretary of Education shall incorporate data analytics into the communications efforts and evaluate these new strategies to identify areas for improvement **and build on successful practices.**⁶²

President Obama followed up his memorandum by organizing an interagency task force to monitor trends in the student loan portfolio, budget costs and borrower assistance efforts. The Task Force released its *Recommendations on Best Practices in Performance-Based Contracting*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Memorandum on Helping Struggling Federal Student Loan Borrowers Manage Their Debt, 2014 Daily Comp. Pres. Docs. 440 (June 9, 2014), <https://www.whitehouse.gov/the-press-office/2014/06/09/presidential-memorandum-federal-student-loan-repayments> (“2014 Presidential Memorandum”).

⁶² *Id.* at 2 (emphases added).

in August 2015, which recommended standardizing “minimum service-level and borrower communication requirements.”⁶³

Specifically, the Task Force recommended requiring “certain standardized communications, a suite of technology-enabled communication, and enhanced, ‘higher-touch’ servicing requirements for those at risk of default, including those identified as being at greater risk of default at school separation and those who become delinquent.”⁶⁴ The Task Force observed that servicing borrowers at higher risk of default “requires more intensive servicing efforts to establish contact, convey critical and potentially complex information to borrowers regarding their options, and return borrowers to repayment.”⁶⁵

The Task Force also recommended requiring servicers to contact student loan borrowers at certain key times *prior to* delinquency, “such as 60 and 90 days prior to an anticipated change in repayment amount or while they are still enrolled in school or in grace. Borrowers nearing the end of their time in school, forbearance or deferment or nearing the IDR recertification deadline could also receive specialized communications.”⁶⁶ The Task Force noted that text messages “will ‘nudge’ borrowers who fail to check their account statements or miss other communication from [servicers]” and that the Administration had sought to amend the TCPA “to improve the ability of contractors to reach borrowers.”⁶⁷

The same month that the Task Force released its report, the U.S. Government Accountability Office published a report entitled “*Federal Student Loans: Education Could Do*

⁶³ U.S. Dep’t of Educ., *Recommendations on Best Practices in Performance-Based Contracting* 10 (Aug. 28, 2015), <https://www2.ed.gov/finaid/loans/repay/best-practices-recommendations.pdf> (“*Task Force Recommendations*”).

⁶⁴ *Id.* at 1.

⁶⁵ *Id.* at 5.

⁶⁶ *Id.* at 10.

⁶⁷ *Id.*

*More to Help Ensure Borrowers Are Aware of Repayment and Forgiveness Options.*⁶⁸ The report found that “[a]lthough [the Department] has a strategic goal to provide superior information and service to borrowers, the agency has not consistently notified borrowers who have entered repayment about the plans. As a result, borrowers who could benefit from the plans may miss the chance to lower their payments and reduce the risk of defaulting on their loans.”⁶⁹ GAO’s two recommendations based on its study both involved increased outreach to student loan borrowers. Specifically, the GAO recommended that the Department: (1) consistently and regularly notify all borrowers who have entered repayment of IDR plan options; and (2) examine borrower awareness of Public Service Loan Forgiveness and increase outreach about the program if needed.⁷⁰

Most recently, in October 2015 the Department released a report that recommended “allow[ing] servicers to contact federal student loan borrowers via their cell phones,” explaining that “[i]f servicers are able to contact a borrower, they have a much better chance at helping the borrower resolve a delinquency or default.”⁷¹ The report noted that “[m]any student loan borrowers, especially those that may just be graduating, move frequently in addition to no longer having landline phone numbers. As such, it can be difficult for servicers to find a borrower except by using a cell phone number.”⁷² The Department further recognized that “[w]ith phone numbers changing or being reassigned on a regular basis, it is virtually impossible for servicers to use auto-dialing technology” and urged Congress to change the law “to ensure that servicers

⁶⁸ See GAO Report.

⁶⁹ *Id.* at 1.

⁷⁰ *Id.* at 36-37.

⁷¹ U.S. Dep’t of Educ., *Strengthening the Student Loan System to Better Protect All Borrowers*, 16 (Oct. 1, 2015), <https://www2.ed.gov/documents/press-releases/strengthening-student-loan-system.pdf> (“2015 ED Report”).

⁷² *Id.*

can contact borrowers using modern technology and help them get into the right repayment plan and avoid the consequences of default or resolve their default.”⁷³

D. The Data Demonstrates that Servicers are Far More Likely to Reach Low-Income and Minority Borrowers, Who Are at Greater Risk of Default, On a Cell Phone.

- *African-American and Hispanic adults, as well as adults living in poverty, are more likely than non-Hispanic white adults to live in wireless-only households.*
- *African-American and Hispanic borrowers are at a greater risk of defaulting on their student loan obligations than non-Hispanic white borrowers.*
- *Historically Black Colleges and Universities have been able to reduce their student loan default rates through innovative outreach techniques and best practices, which include increased contact with borrowers.*

Congress’ amendment to the TCPA is designed to allow the Department and its servicers to more easily reach low-income and minority borrowers that are cutting the cord and who traditionally are in greater danger of defaulting on their student loans. For example, more than 60 percent (64.3%) of adults living in poverty live in households with only wireless telephones.⁷⁴ Hispanic adults (60.5%) and non-Hispanic black adults (48.5%) are more likely than non-Hispanic white adults (44.0%) to live in households with only wireless phones.⁷⁵ Further, U.S. Census Bureau data show that minority populations move in higher numbers than white populations.⁷⁶ As the Department recently noted, student loan servicers that do not have a current address for a borrower who has moved are more likely to be able to contact the person on their cell phone.⁷⁷

⁷³ *Id.*

⁷⁴ *See July-December 2015 Wireless Substitution at 2.*

⁷⁵ *Id.*

⁷⁶ Peter J. Mateyka, *Desire to Move and Residential Mobility: 2010-2011*, U.S. Census Bureau at 7 (2015), <http://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-140.pdf>.

⁷⁷ *2015 ED Report at 16.*

The Bipartisan Budget Act amendment is pivotal to keeping minority and low-income students on track because these borrowers not only cut the cord in greater numbers, but also borrow for higher education in greater numbers. Eighty-six percent of African-American students borrow money to obtain a Bachelor's degree.⁷⁸ At public institutions, well over half (57%) of African-American Associate's degree recipients take out student loans.⁷⁹ Students from low-income families also tend to incur more debt during school than their wealthier peers.⁸⁰

Student loan literature has also found that, historically, students of color are more likely to default on student loans at higher rates, even after controlling for post-graduation earnings. For example, a 2007 study found that African-American students who graduated in 1992-93 had an overall ten-year default rate of 39 percent, over five times higher than white students (6.9%) and over nine times higher than Asian students (4%).⁸¹ Hispanic students had a ten-year default rate of 17.2 percent during the same period.⁸² Studies have also found that students that come from low-income homes are more likely to default.⁸³

Updated data suggests that default rates among these students are improving – primarily because of increased outreach. For example, as of September 2015, all 101 Historically Black Colleges and Universities (“HBCUs”) eligible to participate in the Federal Direct Loan and

⁷⁸ MARK HUELSMAN, DEMOS, *THE DEBT DIVIDE: THE RACIAL AND CLASS BIAS BEHIND THE 'NEW NORMAL' OF STUDENT BORROWING 2* (2015).

⁷⁹ *Id.*

⁸⁰ Jacob P.K. Gross, *et al.*, *What Matters in Student Loan Default: A Review of the Research Literature*, 39 J. OF STUDENT FIN. AID 1, 23 (2009) (“GROSS, ET AL.”).

⁸¹ Erin Dillon, *Hidden Details: A Closer Look at Student Loan Default Rates*, EDUCATION SECTOR (Oct. 27, 2007).

⁸² *Id.*

⁸³ GROSS, ET AL. at 23.

Federal Pell Grant programs had a three-year cohort default rate of less than 30 percent.⁸⁴

HBCUs “have deployed innovative approaches towards default management and reduction,” including increased contact with borrowers.⁸⁵

The clear evidence shows that outreach to at-risk borrowers is critical to helping them avoid delinquency and default. The best, and sometimes only, means of contacting low-income and minority borrowers is on their cell phones. Congress’ amendment to the TCPA can help to reduce the number of delinquencies and defaults among these groups of borrowers.

⁸⁴ See Historically Black Colleges and Universities – FSA, <http://www2.ed.gov/offices/OSFAP/defaultmanagement/dmd002.html> (last updated Sept. 30, 2015).

⁸⁵ *Id.*



Alec F. Rivera
@Alec_F_



Follow

I did some adulting today and spoke with [@Navient](#) on the phone about my student loans. That was much less terrifying than anticipated!



I just called to ask a question about my student loans, and the woman who answered my call was so helpful! She was able to answer all of my questions, and I feel much better about the status of my loans now. Thank you!



Dan Genia ▶ Navient ✓

1 hr · 🌐

Thank you Social Media team for helping me process my deferment. It was a frustrating, stressful process but now I can focus on advancing my situation without the pressure of my payments. A+ servicing

Love

Comment

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III. THE FCC'S PROPOSALS SHOULD BE REVISED BECAUSE THEY ARE INCONSISTENT WITH CONGRESS' PLAIN LANGUAGE AND MOTIVATION FOR ADOPTING THE AMENDMENT.

The text of Congress' amendment unambiguously provides that the *purpose* of a call (or text) controls whether the exemption applies. Although Congress authorized the Commission to consider whether it should restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a covered debt,⁸⁶ the FCC's discretion here is very limited.

Unfortunately, the *NPRM* eschews Congress' clear directive and the well-documented benefits of calling and texting student loan borrowers in favor of overly restrictive and unnecessary limitations on calls and texts to collect debts owed to or guaranteed by the United States. As discussed below, several aspects of the *NPRM* should be revised before the Commission issues final rules.

The Commission cannot adopt regulations that only exempt calls to borrowers that are delinquent (or are in default)⁸⁷ because past precedent and existing federal regulations make clear that there are several categories of calls that are made to collect federally guaranteed debts that student loan servicers make to non-delinquent borrowers. For the same reason, the Commission lacks the authority to adopt limitations based on the called party or calls to reassigned numbers. Indeed, the Commission's called party proposals also raise serious concerns under the First Amendment. The Commission's questions and proposals to limit calls to certain times of the day⁸⁸ and to limit calls to residential lines⁸⁹ also go beyond the bounds of the authority Congress granted the Commission. The Bipartisan Budget Act only permits the

⁸⁶ 47 U.S.C. § 227(b)(2)(H).

⁸⁷ *NPRM* ¶ 8.

⁸⁸ *Id.* ¶ 19.

⁸⁹ *Id.* ¶ 23.

agency to adopt rules related to the number and duration of calls made to a telephone number assigned to a cellular telephone service.

In addition, the Commission's proposal to limit the number of exempted calls to three per month, regardless of whether the call results in a live conversation,⁹⁰ suffers from several material flaws. For example, the Commission's proposal threatens to harm student loan borrowers that would benefit from receiving valuable information from Navient on their available options to avoid delinquency or to become current on their student loan obligations. If, however, the Commission does impose a three call per month limit, it should at a minimum only count calls that result in a live conversation with the borrower, and adopt separate limits for text communications. The Commission should also disavow proposals that limit the exemption to calls placed to the cellular telephone number provided to the creditor or limit the length or duration of exempted calls.⁹¹

A. Several Proposals in the NPRM Are Inconsistent with the Statute's Plain Language and Congressional Intent.

- *The statutory trigger for the exemption is whether a debt exists and whether the call is to collect on that debt. The FCC cannot adopt limitations based on whether a debt is past due to a particular degree or the identity of the called party.*
- *Congress knew that the Department's existing student loan rules expressly establish that calls to individuals other than student loan borrowers are necessary and appropriate collection activities when it adopted the Bipartisan Budget Act.*
- *The FCC cannot reasonably interpret the scope of its limited authority to include rules for calls to residential lines – or anything other than the number and duration of exempted calls to wireless numbers.*

⁹⁰ *Id.* ¶ 18.

⁹¹ *Id.* ¶¶ 13, 18.

An agency is constrained to follow unambiguous statutory directives from Congress.⁹² Here, the statute’s plain language makes the exemption’s applicability turn exclusively on the purpose of a call. The statute does not allow room for the FCC to artificially limit calls to collect debts only to instances when a borrower has become delinquent or entered default. Congress’ exemption similarly does not allow the FCC to cabin the exemption based on who is called. Rules limiting exempted calls to certain times of the day or *any* limits to calls to residential numbers would also be *ultra vires*.⁹³ Moreover, by expressly restricting the Commission’s discretion to adopt specific limitations as to the number and duration of exempted calls, Congress limited the Commission’s authority to act under its ancillary jurisdiction.

1. **Congress did not limit the exemption to cases of delinquency or default.**

The trigger for the exemption is not whether a debt is past due; the trigger is solely whether a call is “to collect” that debt.⁹⁴ For example, a borrower becomes obligated to repay a federal student loan as soon as the loan documents are signed, even though payments typically are deferred until six months after the student graduates or no longer attends school.⁹⁵ A federal student loan is therefore a debt “owed to or guaranteed by the United States” on the date the loan is executed. The Commission has no discretion to determine otherwise.

⁹² See, e.g., *City of Arlington v. Fed. Commcn’s Comm’n*, 133 S.Ct. 1863, 1868 (2013) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”) (internal quotations omitted); see also *MCI Telecoms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1990) (“[A]n agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear”) (citing cases).

⁹³ The *NPRM*’s proposal to impose an identity-of-caller limitation also conflicts with the purpose trigger contained in the statutory language. Navient agrees that calls from entities acting on behalf of the federal government as creditor—like debt servicers—can invoke the exemption. See *NPRM* ¶¶ 10, 15. But the statute permits third parties to make calls not because they are acting on behalf of the federal government *per se*; it is because they are making calls solely to collect a debt owed to or guaranteed by the federal government.

⁹⁴ See 47 U.S.C. §§ 227(b)(1)(A)(iii), (b)(1)(B).

⁹⁵ See generally 34 C.F.R. § 685.207.

The term “collect” is **not ambiguous** when referring to a debt: to “collect” means to receive or be paid.⁹⁶ The Supreme Court has confirmed on multiple occasions that a person or entity “collects” a debt by attempting to obtain payment on it.⁹⁷ Calls can be—and regularly are—made for the purpose of collecting a federal student loan *before* the borrower becomes delinquent or defaults on the loan. Such calls are now exempt from the TCPA’s consent requirements pursuant to the plain language of the amended statute.⁹⁸

The Department’s federal student loan framework also confirms that calls “to collect” a federal student loan can occur before payment has even begun—and well before a borrower becomes delinquent or defaults. For example, the Department’s FFELP rules define the term “collection activity” to include “making an attempt to contact the borrower by telephone to urge the borrower to begin or resume payment” and “conducting skip-tracing efforts . . . to locate a borrower whose correct address or telephone number is unknown to the lender.”⁹⁹ Similarly, the Department requires servicers to call federal student loan borrowers who submit an IDR application that is incomplete or requires additional information (regardless of whether those borrowers are currently delinquent).¹⁰⁰

⁹⁶ See, e.g., Oxford Dictionaries: Collect, http://www.oxforddictionaries.com/us/definition/american_english/collect (last visited June 1, 2016) see also, e.g., Black’s Law Dictionary 263 (6th Ed. 1990) (“To collect a debt or claim is to obtain payment or liquidation of it.”); Macmillan Dictionary: Collect, http://www.macmillandictionary.com/us/dictionary/american/collect_1 (last visited June 1, 2016) (defining “collect” to mean to get money from someone for a particular purpose).

⁹⁷ See, e.g., *Heintz v. Jenkins*, 115 S.Ct. 1489, 1491 (1995); *Direct Mktg. Ass’n v. Brohl*, 135 S.Ct. 1124, 1130 (2015).

⁹⁸ See 47 U.S.C. §§ 227(b)(1)(A)(iii), (b)(1)(B).

⁹⁹ See 34 C.F.R. § 682.411(l)(2)-(3). These rules also require lenders to undertake a number of “collection efforts” when a loan is delinquent, including sending “collection letters” and attempting to contact borrowers by telephone. *Id.*

¹⁰⁰ See FSA Business Operations Change Request Form 3571 (Feb. 25, 2016) (on file with author) (“*FSA CR 3571*”).

Meanwhile, federal policymakers' recent emphasis on the importance of outreach to certain non-delinquent federal student loan borrowers (described in detail above) reinforces why the exemption should not be so narrowly construed. For instance, in 2014, President Obama directed the Department to "develop, evaluate, and implement" new strategies for reaching federal student loan borrowers who are at greater risk of becoming delinquent.¹⁰¹ In 2015, the interagency task force consisting of the Department, Treasury, OMB, and the Domestic Policy Council found that higher-risk borrowers "require[] more intensive servicing efforts" and recommended mandating "certain standardized communications" to such borrowers before they enter delinquency.¹⁰² Also in 2015, the GAO recommended that the Department "consistently and regularly" notify federal student loan borrowers of certain repayment options, including those borrowers who had never missed a payment.¹⁰³

Congress' clear limits on the scope of the FCC's authority as only permitting restrictions on the number and duration of calls to cellular telephones further prevents the Commission from adopting additional restrictions using its ancillary jurisdiction under Title I of the Communications Act. As courts have recognized, "[t]he FCC is powerless to wield its ancillary jurisdiction . . . where 'there are strong indications that agency flexibility was to be sharply delimited.'"¹⁰⁴

Thus, although federal student loan servicers have no interest or need to call borrowers in general who are current on their loans, there are important instances when outreach is key:

- ***Borrowers who are approaching deadlines or changes in status:*** There are many instances, such as deferments, forbearances, and the grace period between school and

¹⁰¹ See 2014 Presidential Memorandum.

¹⁰² See Task Force Recommendations.

¹⁰³ See GAO Report at 36.

¹⁰⁴ See *EchoStar Satellite L.L.C. v. Fed. Commc'ns Comm'n*, 704 F.3d 992, 999 (D.C. Cir. 2013) (quoting *Fed. Commc'ns Comm'n v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979)).

repayment, where a borrower may be approaching a new payment status. Some of these borrowers—especially those at risk of delinquency—benefit from early outreach to make sure they are aware of their repayment options. One example of an at-risk borrower is one who has previously defaulted and has returned to repayment through loan rehabilitation. Navient reaches out to these borrowers early—before delinquency—to make sure that they stay on track and are able to access the right repayment plan for them.

- ***Income-driven repayment enrollment:*** IDR is a great option for many borrowers, but they must apply on-line at the Department or fill out a paper application to enroll in an IDR plan. The Department requires federal servicers to call borrowers whose applications are incomplete or denied to help them complete their application, regardless of their delinquency status. In addition, Navient calls previously delinquent borrowers who have indicated that they plan to enroll in IDR but for whom we have not received a complete application. Neither of these outreach attempts to borrowers without consent would be allowed under the FCC’s proposed rule.
- ***IDR reenrollment:*** Borrowers are required to reenroll annually in IDR plans. Navient places reminder calls to borrowers whose annual reenrollment deadline is approaching to make sure they submit their paperwork before their payments increase.
- ***Prior default scenarios:*** Borrowers whose loans were previously defaulted and are now restored to current status through loan rehabilitation or consolidation.

The intent of the Bipartisan Budget Act’s amendments is to ensure that federal student loan borrowers are aware of their options regardless of whether or not they are delinquent. It was certainly not the legislation’s intent to prevent reaching out at key times before—or after—delinquency to help a borrower stay on track.

Case in Point: Income-Driven Repayment Calls. Data collected by Navient confirms that calls to non-delinquent borrowers can be highly effective at furthering Congress’ and the Department’s goals. As indicated above, the Department has committed to “provid[ing]” additional assistance” to borrowers who attempt to enroll in an IDR plan, including by requiring servicers to call borrowers who must provide additional information to complete enrollment.¹⁰⁵

¹⁰⁵ See FSA CR 3571.

The Department has done so because servicers cannot complete (or renew) IDR plan enrollments on their own. Borrowers themselves must take the extra step of verifying their income via a paper form or the Department’s website.¹⁰⁶ Because of this extra step, borrowers who want to enroll in an IDR plans frequently fail to complete the process or, at the end of the year, lose eligibility by failing to update their income information. In fact, the Department found that nearly 60 percent of the borrowers who were enrolled in an IDR plan failed to timely recertify between October 2013 and November 2014.¹⁰⁷

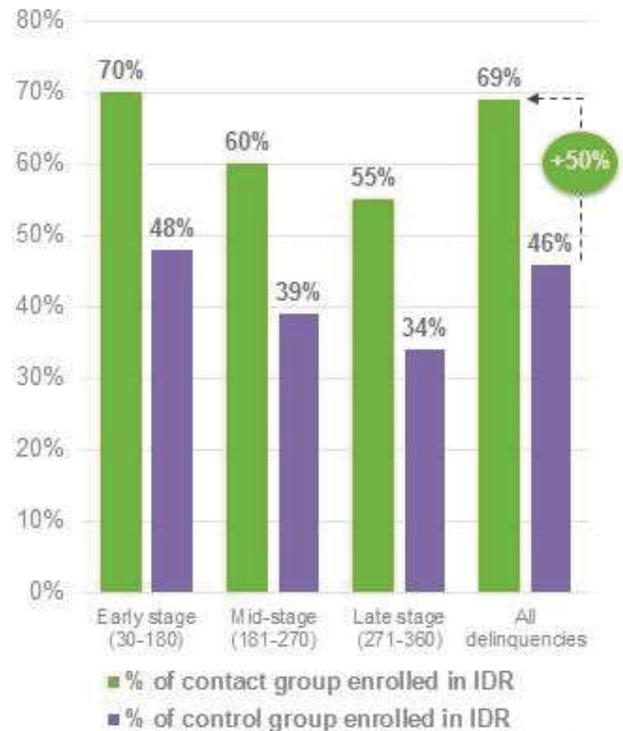
Navient recently tested the effect of telephone outreach to help previously delinquent borrowers (who had since become current on their loans) get through this extra step to complete the IDR plan enrollment process. As illustrated below, Navient found that contacting these borrowers on their cell phones **increased successful IDR plan enrollment by 50 percent.** For borrowers who had previously been in the latest stage of delinquency (271 or more days delinquent), Navient’s outreach **increased successful IDR plan enrollment by 62 percent.** These findings demonstrate that calls to non-delinquent borrowers’ cell phones can be particularly effective at helping them navigate the complex array of repayment options—consistent with the Department’s requirements, the GAO’s and the Task Force’s recommendations, and Congress’ intent.

¹⁰⁶ See 34 C.F.R. § 682.215(e).

¹⁰⁷ See U.S. Dep’t of Educ., Sample Data on IDR Recertification Rates for ED-Held Loans, <http://www2.ed.gov/policy/highered/reg/hearulemaking/2015/payee2-recertification.pdf>. If borrowers fail to timely recertify their eligibility to participate in an IDR plan, any unpaid interest on their loans will capitalize and their monthly payments will increase – sometimes substantially.

Case Study: Delinquent Borrowers Successfully Enroll in IDR Plans More Often When Contacted On Cell Phones

- Delinquent borrowers may cure their delinquency through contact but then must take extra steps to successfully enroll in IDR plans.
- IDR enrollment cannot be done in a borrower's account; it only be done by paper or through studentloans.gov.
- Previously delinquent borrowers frequently do not complete their IDR enrollment.
- In a recent pilot, Navient tested follow-up outreach (phone) for delinquent borrowers who agree to sign up for IDR.
 1. Follow-up text phone call to borrowers with consent to contact on cell phones to assist them in completing their IDR application.
 2. No follow-up was done where there was no consent (this group served as the control group).
- Findings: **Reaching borrowers resulted in 50% increase in IDR enrollment rates overall.**
 - Overall, 69% of previously delinquent borrowers with follow-up contact successfully enrolled in IDR compared to only 46% of the control group.
 - For late stage delinquencies, IDR enrollment rates increased 62% with follow-up contact (55% versus 34%).



2. **The Commission lacks the authority to prescribe limits based on the called party or whether a number has been reassigned.**

The *NPRM*'s proposal to strictly limit "[w]ho can be called" also conflicts with the plain language of the statute and clear intent of Congress.¹⁰⁸ The statute does not say that only the debt holder can be called under the exemption; it says that calls may be placed without first obtaining "prior express" consent if they are "solely to collect" a federal debt. Congress' refusal to cabin the scope of who may be called under the exemption—and its decision to allow the FCC to restrict only the number and duration of such calls—are sound policy choices that reflect the practical realities of the federal student loan environment.

¹⁰⁸ See *NPRM* ¶¶ 13-14.

Calls placed “solely to collect” a federal student loan are placed to individuals other than the borrower in a number of circumstances. For example, Navient has found that calling a contact reference listed on a borrower’s student loan application or a borrower’s close relative can be the most effective conduit for reaching some borrowers. Similarly, obtaining telephone numbers through skip-tracing is sometimes the only way to reach certain borrowers. Contacting relatives and skip tracing are important tools in the student loan context – a decade or more may have passed since the time that the student first took out the loan, and the passage of time can increase the likelihood that, in many instances, the telephone number originally provided for the loan may no longer be current.

The Department’s rules reflect these practical realities. For example, the Department’s rules require FFELP lenders to contact every “endorser, relative, reference, individual, and entity” identified in a delinquent borrower’s loan file as part of their due diligence efforts.¹⁰⁹ They also require FFELP lenders to “diligently attempt to locate the borrower through the use of effective commercial skip-tracing techniques” when they do not otherwise have current contact information for the borrower.¹¹⁰ Moreover, the Department has even defined the term “collection activity” to include “[c]onducting skip-tracing efforts . . . to locate a borrower whose correct address or phone number is unknown.”¹¹¹

The Commission’s only proposed justification for excluding skip-tracing calls from the exemption is “to encourage callers to avoid robocalling unwitting individuals who have no connection to the debtor.”¹¹² As an initial matter, the Commission lacks discretion to adopt rules that are contrary to Congress’ clear intent. Congress is presumed to act with knowledge of

¹⁰⁹ See 34 C.F.R. § 682.411(h).

¹¹⁰ See *id.*

¹¹¹ See *id.* § 682.411(l)(3).

¹¹² *NPRM* ¶ 14.

existing regulations,¹¹³ and the Department’s rules explicitly establish that calls to individuals other than student loan borrowers are necessary and appropriate collection activities. The *NPRM* provides no legal justification for straying from Congress’ clearly stated intent. Moreover, there is no valid legal or policy reason to encourage callers to skip trace or contact references using non-autodialed, non-prerecorded methods while prohibiting such activities entirely when using an autodialer or prerecorded voice.

As mentioned above, Congress’ clear limits on the scope of the FCC’s authority also prevent the Commission from adopting additional restrictions under the TCPA or using its ancillary jurisdiction under Title I of the Communications Act.¹¹⁴

In addition to exceeding the authority to act that Congress delegated to the Commission in this context, limiting who can be called under the exemption is also unnecessary from a policy perspective. As a practical matter, Congress’ allowing entities to contact parties other than the borrower is unlikely to result in a significant number of additional calls. For example, Navient will attempt to contact the references listed on a federal student loan borrower’s application *only* if it does not possess current contact information for the borrower herself, which generally happens with fewer than 10 percent of its federal student loan borrowers.

Calls to Reassigned Numbers. The FCC’s proposal to limit the scope of the exemption to one call to reassigned wireless numbers fails for the same reasons. Again, 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, the purpose of the

¹¹³ See, e.g., *Morgan v. Principi*, 327 F.3d 1357, 1361 (Fed. Cir. 2003) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 698-99 (1979) (“Congress is presumed to legislate against the backdrop of existing law.”)).

¹¹⁴ See *EchoStar*, 704 F.3d at 999.

second or third call by a federal student loan servicer to a number that has been reassigned without its knowledge remains “to collect” a federal debt.

One hundred thousand wireless numbers are reassigned each day.¹¹⁵ Despite reasonable due diligence, Navient and others have no reliable way of knowing if a particular wireless number has been reassigned.¹¹⁶ As a result, servicers have no “safe path” for relying on the exemption to help federal student loan borrowers learn about their options. In fact, the Department 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.¹¹⁷

Moreover, even if a third-party service that could reliably identify reassigned wireless numbers were available for purchase, its efficacy would be quite limited because Congress has never required callers to subscribe to such a service. Additionally, the cost of doing so could be prohibitive for smaller organizations and thus undermine Congress’ exemption.

3. The *NPRM*’s proposals to limit calls to residential lines are also beyond the scope of the FCC’s authority.

The Commission cannot adopt substantive limits on exempted calls to residential lines.¹¹⁸ The Commission’s authority to adopt limits on the number and duration of calls only applies to calls to “telephone number[s] assigned to a cellular telephone service.”¹¹⁹ Whether or not the Commission decides that this language should apply to any service that is the “functional

¹¹⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8090 (2015) (“*2015 TCPA Declaratory Ruling and Order*”).

¹¹⁶ See, e.g., United Healthcare Services Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 3 (Jan. 16, 2014); Rubio’s Restaurant, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 4-5 (Aug. 11, 2014).

¹¹⁷ *2015 ED Report* at 16.

¹¹⁸ *NPRM* ¶ 23.

¹¹⁹ 47 U.S.C. § 227(b)(2)(H).

equivalent” of cellular telephone service from a consumer perspective,¹²⁰ the FCC cannot reasonably expand the scope of its authority to include rules for calls to residential lines.

Under the plain language of Section 227(b)(1)(B), autodialed calls to residential lines are permissible separate and apart from any exemption created by FCC rule or order.¹²¹ The Commission has also previously exercised its statutory exemption authority so as to not require prior express consent for prerecorded debt collection calls to residential lines.¹²² It would be unreasonable to now use the Bipartisan Budget Act, which is intended to facilitate additional outreach to the smaller share of at risk borrowers, to somehow adopt new limitations on such calls to landlines and end up with a result completely opposite of Congressional intent – increased delinquencies and defaults.

B. Certain Proposals Also Raise First Amendment Concerns.

The Commission’s reassigned number proposal raises troubling First Amendment issues. The validity of the FCC’s general position on reassigned numbers and a one-call window as articulated in the *2015 TCPA Declaratory Ruling and Order* is currently being litigated in the United States Court of Appeals for the D.C. Circuit.¹²³ As the petitioners in that case point out, the First Amendment forbids laws that would have a chilling effect on free speech.¹²⁴ Laws that hold speakers strictly liable transgress this limitation because they make individuals “more reluctant to exercise” their right to free speech.¹²⁵ The Commission’s general position on reassigned numbers violates this limitation for a straightforward reason: it will result in callers

¹²⁰ *NPRM* ¶ 26.

¹²¹ 47 U.S.C. § 227(b)(1)(B).

¹²² *NPRM* ¶ 22.

¹²³ *See ACA Int’l et al. v. Fed. Comm’n’s Comm’n*, D.C. Cir. Case No. 15-1211; *2015 TCPA Declaratory Ruling and Order* ¶¶ 71-97.

¹²⁴ *See ACA Int’l et al.*, Joint Brief for Petitioners, at 46 (filed Nov. 25, 2015), available at <http://www.acainternational.org/files.aspx?p=/images/7066/document.pdf> (“Petitioners’ Joint Brief”); *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

¹²⁵ *See* Petitioners’ Joint Brief at 46; *Smith v. California*, 361 U.S. 147, 151 (1959).

being held strictly liable for attempts (after the first one) to engage in free speech through a wireless telephone number that the caller does not—and cannot—know has been reassigned from a consenting recipient to someone else.¹²⁶

The Commission’s proposed position on calls to reassigned numbers in this situation raises similar First Amendment concerns.¹²⁷ It would likewise have a chilling effect on calls under the exemption, given the strict liability that a caller would face for inadvertently calling a reassigned number. As Commissioner O’Rielly put it, “[t]hat decision alone may gut the relief” that Congress sought to provide.¹²⁸ In addition, promulgating a one-call limit for calls to reassigned numbers is far less defensible from a First Amendment perspective in the present context than in the context of the *2015 TCPA Declaratory Ruling and Order*. In the present context involving only calls “to collect” a federal debt, the statutory language makes clear that the caller’s intent—*i.e.*, the purpose of the call—determines whether the exemption applies. Moreover, the Commission will not be interpreting the term “called party” here as it did in the *2015 TCPA Declaratory Ruling and Order*. The term is not applicable when a call is exempt from the TCPA’s consent requirements.

The First Amendment implications extend beyond reassigned numbers. It would also raise troubling First Amendment challenges if the Commission finalized a rule that resulted in strict liability for calls “to collect” a federal debt that reach someone who is not associated with the debt. For example, suppose that a federal student loan borrower who consents to receive calls accidentally provides a wrong number on their loan application and then fails to correct the error when their servicer attempts to confirm the contact information via traditional or electronic

¹²⁶ See, e.g., *2015 TCPA Declaratory Ruling and Order* ¶ 80 (clarifying that “the caller’s intent does not bear on liability”).

¹²⁷ See *NPRM* ¶ 14.

¹²⁸ See *NPRM*, Statement of Commissioner Michael O’Rielly.

mail. The servicer would be strictly liable for any autodialed or prerecorded calls placed to the student—even though the servicer attempted in good faith to rely on the exemption, did everything in its power to assure that the person it called was the person it intended to call, and had no incentive to reach someone else. Such a result is, unfortunately, also foreseeable under the rules proposed in the *NPRM* and would also chill free speech by making servicers reluctant to place the very calls that Congress sought to encourage.

C. The *NPRM*'s Proposed Three Calls or Texts Per Month Limit is Arbitrary, Unsupported, and Unjustified, as are the FCC's Other Proposed Limitations.

- *Every additional call to a student loan borrower carries with it significant benefits. In a single month, Navient was able to help more than 20,000 borrowers avoid delinquency or default as a result of calling each borrower a second time.*
- *A three-call-attempt-per-month limit is contrary to recent Department requirements that servicers contact some borrowers more than three times per month.*
- *The Commission should not adopt limits on the duration of live conversation calls or free-to-end-user text messages. In Navient's experience, it takes several potentially lengthy calls to explain a borrower's repayment, deferment or forbearance options and to get the borrower back on track, but the substance of these calls vary based on the borrower's unique circumstances.*

As discussed above, Congress has allowed the FCC to limit only the number and duration of calls placed under the exemption.¹²⁹ Any limits that the FCC adopts must be both reasonable and supported by the record in this proceeding.¹³⁰ The *NPRM*'s proposals are neither.

The proposal to limit the number of calls or texts placed under the exemption to three per month is unjustifiable and contrary to the data that was available to the Commission when it adopted the *NPRM*.¹³¹ Limiting the exemption's scope to calls placed to a number provided by the borrower to the creditor similarly obfuscates Congress' intent and threatens to render the

¹²⁹ See 47 U.S.C. § 227(b)(2)(H).

¹³⁰ See, e.g., *California v. Fed. Commc'ns Comm'n*, 905 F.2d 1217, 1230 (9th Cir.1990).

¹³¹ See, e.g., *Ex Parte* Letter from Mark W. Brennan, Counsel to Navient Corp. to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 2-3 (filed Mar. 11, 2016); *NPRM* at Statement of Commissioner Michael O'Rielly Dissenting in Part and Approving in Part.

exemption meaningless. As mentioned above, student loan borrowers often take 10-20 years to pay off their student loans, and, as time passes, it becomes less and less likely that the telephone number provided in a loan application will remain a valid number through which the borrower can be reached. Finally, adopting artificial limits on the length or duration of exempted calls and texts would harm borrowers and prevent creditors from providing borrowers with valuable information.

1. **The *NPRM*'s proposal to limit the number of calls or text messages to three per month guts the statute's purpose, has no rational basis, and fails to account for the realities of collecting student loan debts.**
 - a. **Three calls or texts per month is an insufficient amount of contact, and adopting this limit will put at-risk borrowers in greater danger of defaulting on their student loans.**

The FCC incorrectly speculates in the *NPRM* that three calls per month “provides an adequate opportunity to convey necessary information about the debt, repayment, and other matters.”¹³² The Commission’s assumption about the efficacy of three calls per month has no basis in the record and is contrary to data provided in nearly a dozen recent filings that were available to the Commission when it adopted the *NPRM*.¹³³ Indeed, the *NPRM*'s proposed limit of three calls per month appears to lack *any* rational basis. The FCC seems to have plucked it “out of thin air.”

Navient’s extensive experience with federal student loan borrowers demonstrates that the FCC’s assumption is simply not true. For example, it takes Navient more than 15 call attempts to reach a right point of contact for approximately half of its delinquent federal student loan

¹³² *NPRM* ¶ 18.

¹³³ See, e.g., Letter from Timothy M. Fitzgibbon, Sr. Vice President, National Council of Higher Education Resources, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 2 (filed Apr. 5, 2016).

borrowers.¹³⁴ For 25 percent of its delinquent federal student loan borrowers, it takes Navient 40 or more call attempts before it reaches a right point of contact.¹³⁵ And 20 percent of Navient’s federal student loan borrowers require more than 50 calls to reach a right point of contact. These borrowers would take well over a year to reach under the FCC’s proposal and, during that time, could easily reach default status without having a conversation about their repayment, forbearance, and forgiveness options.

Even one additional call per month produces tangible benefits for student loan borrowers. Navient recently analyzed the results of calling a subset of its borrowers more than one time per day. Specifically, during each of the last three months of 2015, when Navient called federal student loan borrowers a second time on the same day, 22,873 of these “second” calls each month on average resulted in Navient connecting with a right party contact.¹³⁶ Based on Navient’s track record of resolving delinquencies 90 percent of the time it reaches a right party contact, **an estimated 20,586 borrowers avoided delinquency or default as a result of this one additional call per borrower each month.**

The free-to-end-user exemptions that the FCC cites in support of its proposed Bipartisan Budget Act limit are not analogous to the current circumstances and in fact **support more frequent calls.**¹³⁷ For example, the exemption the FCC granted based on AAHAM’s request allows for a maximum of three free-to-end-user voice calls or text messages *per week*.¹³⁸ Federal student loan borrowers would benefit from a similar call limit. Like AAHAM’s members, federal student loan servicers place calls to “provide vital, time-sensitive information [that

¹³⁴ *See Ex Parte* Letter from Mark W. Brennan, Counsel to Navient Corp. to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 2-3 (filed Mar. 11, 2016).

¹³⁵ *Id.*

¹³⁶ Navient tracked calling data during the last three months of 2015.

¹³⁷ *NPRM* ¶ 18.

¹³⁸ *2015 TCPA Declaratory Ruling* ¶ 147.

consumers] welcome, expect, and often rely on to make informed decisions.”¹³⁹ Servicers’ calls are often time-sensitive and help federal student loan borrowers avoid delinquency or default.¹⁴⁰ For example, federal student loan servicers may attempt to contact a borrower near the end of the borrower’s six-month grace period, especially when the borrower has higher than average debt or other risk factors that cause a servicer to flag the borrower as possibly needing additional assistance to avoid delinquency or default. Three calls or text messages per month are not enough to deliver pertinent information to borrowers in a timely manner.

Consumer advocates have also publicly urged regulators to allow more than three calls per month. For example, in the context of the Fair Debt Collection Practices Act, NCLC urged the Consumer Financial Protection Bureau to limit calls from debt collectors to **three per week**.¹⁴¹ NCLC noted that Massachusetts state regulations limit phone calls, text messages and voicemails for the purpose of collecting a debt to two per week, and Washington limits “communications” to collect a debt to three per week.¹⁴² There is no valid legal or policy reason to act more restrictive here, particularly in light of Congress’ clear directive to facilitate such calls for federal debts.

Both the Commission’s prior precedent and analogous state regulations have resulted in far less onerous restrictions than the three-calls-per-month the Commission has proposed in the *NPRM*. The Commission has not set forth any evidentiary basis for its proposed limit, and such

¹³⁹ *Id.* ¶ 145.

¹⁴⁰ It is also incongruous for the Commission to cite to this exemption to support its proposed limits on collection calls for federal debts since it *excluded* collection calls from the scope of AAHAM’s exemption. *Id.* ¶ 146.

¹⁴¹ APRIL KUEHNHOFF AND MARGOT SAUNDERS, NATIONAL CONSUMER LAW CENTER, DEBT COLLECTION COMMUNICATIONS: PROTECTING CONSUMERS IN THE DIGITAL AGE 4 (June 2015), available at <http://bit.ly/1LQxpDK>.

¹⁴² *Id.* at 3-4.

a restriction is unreasonable based on the myriad benefits of calls and text messages to student loan borrowers.

Moreover, the Bipartisan Budget Act amendment to the TCPA will not vastly expand the number of individuals servicers will contact. Navient currently enjoys a relatively high consent rate for contact with its servicing borrowers. If other federal student loan servicers have comparable consent rates, the Bipartisan Budget Act's amendments would only open the door to communications with about 8 million student loan borrowers to make them aware of their loan options.

Claims to the contrary are overstated. For example, the National Consumer Law Center ("NCLC") recently testified before the Senate Committee on Commerce, Science and Transportation that the Bipartisan Budget Act amendment would impact 41.8 million federal student loan borrowers.¹⁴³ But NCLC did not account for the number of student loan borrowers who have already provided prior express consent. Moreover, NCLC appeared to confuse the scope of the exemption when it included figures related to private student loans, which are not subject to the Bipartisan Budget Act exemption.¹⁴⁴

- b. **Any limit on the number of calls and texts, if adopted, should accommodate existing federal debt collection requirements and best practices for student loans, some of which already require servicers to call borrowers more than three times a month.**

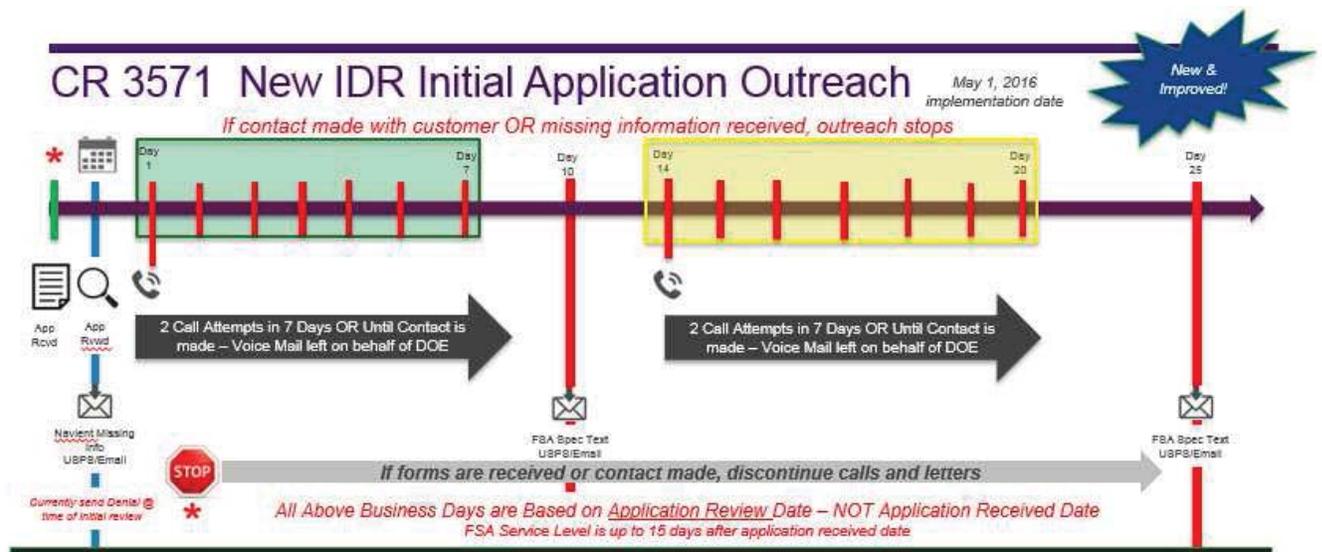
If the FCC does adopt a per-call attempt limit, it should adopt creditor-specific limits, such as different limits for calls made pursuant to a specific statutory requirement, contractual provision or request from the federal entity to which the debt is owed. Many federal agencies have developed best practices and other guidelines for reasonably engaging in debt collection

¹⁴³ See *The Telephone Consumer Protection Act at 25: Effects on Consumers and Business: Hearing Before the S. Comm. on Commerce, Science, & Transportation*, 114th Cong. 15 (2016) (statement of Margot Saunders, Of Counsel, National Consumer Law Center).

¹⁴⁴ *Id.* at 16.

that distinguish these callers from fly-by-night operations. It would be inappropriate for the FCC to adopt the same set of rules for entities that have a direct relationship with a federal agency and that operate based on well-established best practices on the one hand, and wholly unaccountable entities on the other hand.

Case in Point: Department Requests. A recent Department Change Request illustrates that other federal agencies at times require or request more frequent calling than the FCC proposes to allow under the exemption. In the Change Request, the Department requires federal student loan servicers to place more than three calls per month to some borrowers. Specifically, the Change Request requires servicers to attempt to call a borrower at least two times within the first seven calendar days after a borrower attempts to enroll in an IDR plan.¹⁴⁵ Starting on Day 14 after the borrower submits a new IDR application, the servicer is required to contact the borrower at least two more times within seven days, assuming the servicer has not already made contact with the borrower or the borrower has not submitted the missing information.¹⁴⁶ Below is a flow chart laying out servicers' new obligations under the Change Request:



¹⁴⁵ See FSA CR 3571.

¹⁴⁶ *Id.*

Any limits that the Commission ultimately adopts should ensure that Navient and other servicers can accommodate existing and future federal agency requirements and policies.

If the Commission does move forward with its unsupported proposal to limit the number of exempted calls to three per month as a baseline, it should at the very least reward responsible actors like Navient by affording greater flexibility to agencies that have adopted best practices or guidelines and to entities calling on these agencies' behalf.

c. **There is no rational basis for including attempted but unanswered calls, and unanswered text messages, in any call limitation.**

Federal student loan servicers can only adequately counsel students on the various repayment options available to them through a direct conversation with the borrower. Only a direct conversation enables a servicer to review the borrower's current circumstances and determine the borrower's best available option. For example, even assuming a borrower knew of the 32 different forbearance, deferment and forgiveness options at the time the borrower took out the loan, the borrower is unlikely to remember that these options exist when the borrower later becomes eligible to take advantage of the option.

Therefore, federal student loan servicers' primary goal is to speak to a student loan borrower at least once before the borrower falls into serious delinquency or suffers default. Unfortunately, many of the calls through which Navient attempts to have a live conversation with a right point of contact and inform a borrower of his or her options go unanswered.

A rule limiting the number of *conversations* to three per month is not as detrimental to student loan borrowers as a rule limiting the number of *call attempts* to three per month. Including unanswered calls or calls that result in a "busy" signal in a limit would significantly curtail student loan servicers' abilities to assist borrowers without any real corresponding benefit. On the one hand, an attempted call does not result in a mobile phone subscriber incurring

charges for minutes of use, so there is no impact on the borrower from a financial perspective. On the other hand, reducing the number of opportunities for a servicer to have a live conversation with its borrowers will cause the number of students hit with the federal government's harsh default penalties to increase.

The Commission's justification for including unanswered calls is that "many consumers may choose not to answer calls from unfamiliar numbers."¹⁴⁷ But the Commission cannot rely solely on unsubstantiated speculation regarding consumer preferences as a valid justification for its proposal when Congress itself removed the consent requirement for calls made to collect debt owed to or guaranteed by the United States. Accordingly, the FCC should not adopt a rule that includes within the definition of a "call" for purposes of the exemption attempted contacts that do not result in a live conversation.

d. The Commission should adopt different rules for text communications than for calls.

While the Commission has interpreted the TCPA to apply to both voice calls and text messages,¹⁴⁸ it should not lump together voice calls and text communications for purposes of limiting the number of calls allowed under the exemption. If it chooses to limit texting at all, the Commission should adopt different rules for text communications, especially those that are free-to-end-users or reach reassigned wireless numbers.

Text messaging is the most widely used smartphone feature—in fact, it is now used more than voice calling.¹⁴⁹ Text messaging is also an effective and non-intrusive means of outreach, especially for younger student loan borrowers. Meanwhile, the cost of text messages have dropped consistently over the past decade, and most mobile wireless service plans now offer

¹⁴⁷ *NPRM* ¶ 18.

¹⁴⁸ *See NPRM* ¶ 1, n.3 (citing *2015 TCPA Declaratory Ruling and Order* at 8016-17 ¶ 107).

¹⁴⁹ *2015 PEW Smartphone Use* at 8.

unlimited SMS messaging as part of a mobile calling, texting, and broadband subscription. In addition, many of the text messages servicers send federal student loan borrowers can be free. Navient, for example, sends free-to-end-user text messages to delinquent federal student loan borrowers in some instances. Several providers include unlimited text messaging as part of their Lifeline offerings as well.¹⁵⁰

Navient urges the Commission not to limit the number of free-to-end-user text messages that can be placed under the exemption. These communications do not cause consumers to incur any charges, and they are self-limiting in the sense that senders have a natural incentive to avoid sending too many: the costs add up. If, however, the Commission determines that a numerical limit on the number of text communications is necessary, it should adopt a separate limit for text communications that allows servicers to employ at least three text communications per month independently of any limit on voice calls.¹⁵¹

Moreover, the FCC's presumption that a caller will have an opportunity to learn of a number reassignment after one "call"¹⁵² is unreasonable in the context of voice calls, but it is even more unreasonable in the case of text messages. Servicers can determine whether the number on file for a borrower is the right point of contact for a federal student loan if they have a live conversation, but no such opportunity exists in the case of an automatically delivered text communication. Thus, to the extent the Commission ports over its general "one call attempt"

¹⁵⁰ See, e.g., Lifeline Cellphone Service Provider | Assurance Wireless, <http://www.assurancewireless.com/Public/Welcome.aspx> (last visited June 4, 2016); Lifeline Program Plans | US Cellular, <https://www.uscellular.com/plans/lifeline/index.html> (last visited June 4, 2016); GCI, <https://www.gci.com/wireless/lifeline> (last visited June 4, 2016).

¹⁵¹ A message should count as one "text communication" regardless of the number of individual characters the communication contains. For instance, a single communication could be delivered to the end user in a "string" of more than one, 160-character SMS messages.

¹⁵² *NPRM* ¶ 13.

window for reassigned numbers or a similar framework, it should adopt separate rules for text messages sent under the exemption.

2. **The Commission lacks any rational basis for limiting the exemption to calls placed to the cellular telephone number provided to the creditor.**

In the *NPRM*, the FCC seeks comment on whether it should limit covered calls to the cellular telephone number the borrower provided to the creditor,¹⁵³ a proposal that would eviscerate the amendment’s benefits. As Commissioner O’Rielly noted:

[T]he act of providing a number already constitutes consent to be called at the number, except on unrelated matters. In this case, if a number was provided by a debtor to a creditor, then no further exemption from the TCPA consent requirements is needed for a creditor to call the debtor at that number. Rather, the point of this statutory exemption is to enable companies to call consumers *without* such consent¹⁵⁴

Commissioner O’Rielly is correct – the Commission has on multiple occasions confirmed that the provision of the number within the context of a transaction constitutes “prior express consent” for calls to that number.¹⁵⁵ And courts across the country have concluded the same.¹⁵⁶ In the student loan context, the provision of the number undoubtedly constitutes “prior express consent” for calls regarding the loan.

The FCC cannot “write in” a consent requirement when Congress has expressly removed it, particularly where, as here, the actual revisions to the statute were to *exempt these calls from the prior express consent requirement*. The Commission’s proposal to only allow federal debt

¹⁵³ *Id.*

¹⁵⁴ *NPRM*, Statement of Commissioner Michael O’Rielly Dissenting in Part and Approving in Part; *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 31 (1992); *Baird v. Sabre, Inc.*, 2016 WL 424778 (9th Cir. Feb. 3, 2016).

¹⁵⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, Declaratory Ruling, 23 FCC Rcd 559, 564 (2008).

¹⁵⁶ *See, e.g., Hill v. Homeward Residential, Inc.*, 799 F.3d 544, 551 (6th Cir. 2015).

callers to contact the telephone number the borrower provided in its loan application would gut the substance of the exemption.

3. **Limiting the length or duration of exempted calls and texts is unworkable and would unnecessarily suffocate the flow of valuable information.**

The Commission should not limit the duration of live calls or the length of text messages placed under the exemption.¹⁵⁷ The length of Navient’s conversations with borrowers differ based on a range of factors, including the borrower’s financial circumstances, how far along the borrower is in the collection process, and other considerations that are unique to the borrower and come up only during the course of the conversation. It generally takes several substantive calls to explain a borrower’s repayment, deferment, or forbearance options and to get the borrower back on track. Similarly, text communications often need to include a number of pieces of information to be helpful to a student loan borrower – for example, when they need to make important decisions regarding the potential use of forbearance.

If the Commission adopts such a limit, however, it should take into account the varying needs of different federal creditors. Specifically, it should decline to apply the limit to federal student loan creditors and their servicers. A “one size fits all” rule is especially ill-suited in this context, where some federal loan programs (*i.e.*, the student loan program) are far more complex than others and include far more protections for borrowers that must be communicated to allow those borrowers to be fully aware of their options.

4. **The Bipartisan Budget Act’s amendments do not suggest that the federal government is a “person” under the TCPA.**

The Commission asks whether the Bipartisan Budget Act’s amendments imply that the federal government is a “person” and whether the Supreme Court’s decision in *Campbell-Ewald*

¹⁵⁷ *NPRM* ¶ 18.

Co. v. Gomez should inform its implementation of the amendments.¹⁵⁸ First, the amendments do not imply that the federal government is a person under the TCPA. The Supreme Court has consistently and repeatedly held that the term “person” does not include the sovereign.¹⁵⁹ Consequently, the term is construed to exclude the sovereign absent clear Congressional intent to the contrary.¹⁶⁰ Such intent is not present here, as evidenced – for example – by the use of the word “imply” in the *NPRM*’s question. Meanwhile, just as before the Bipartisan Budget Act was adopted, the federal government remains excluded from the definition of “person” in the Communications Act (in which the TCPA is codified).¹⁶¹

The Supreme Court’s decision in *Gomez* confirms this interpretation. As the Supreme Court explained after the Bipartisan Budget Act had been adopted, “the United States and its Agencies . . . are not subject to the TCPA’s prohibitions.”¹⁶² The Supreme Court similarly explained that federal government contractors who “perform as directed” (*i.e.*, those who do not violate their “explicit instructions”) obtain “certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.”¹⁶³ The rules the Commission adopts in this proceeding could recognize this basic framework, but they cannot disturb it.

¹⁵⁸ *Id.* ¶ 16.

¹⁵⁹ *See, e.g., Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64 (1989); *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979) (*quoting U.S. v. Cooper Corp.*, 312 U.S. 600, 604 (1941)); *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 745 (2004); *U.S. v. Mine Workers*, 330 U.S. 258, 275 (1947).

¹⁶⁰ *See id.*

¹⁶¹ *See* 47 U.S.C. § 227(b)(1); 47 C.F.R. § 64.1200(a).

¹⁶² *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666, 672 (2016).

¹⁶³ *Id.* at 666, 672.

IV. CONCLUSION

The Bipartisan Budget Act's amendments represent an opportunity to help consumers who are often prevented from receiving important, time-sensitive, non-marketing information. We commend the Commission for acting quickly to implement its changes. As explained above, however, several of the *NPRM's* proposals conflict with the amended statute's plain language and the clear intent of Congress, are bad policy in the student loan context, or are unsupportable based on the record in this proceeding. These proposals threaten to undermine Congress' efforts to facilitate the delivery of timely, beneficial information that has been proven to help federal student loan borrowers avoid the negative consequences of delinquency and default. Navient urges the Commission to reconsider these proposals and, instead, adopt rules that fully reflect the empirical data, practical considerations, and legal arguments that Navient and others have brought to its attention.

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