

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

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Petition for Expedited Declaratory Ruling and/or	)	
Expedited Rulemaking of the Professional	)	
Association for Customer Engagement (PACE)	)	

**REPLY COMMENTS OF THE NATIONAL COUNCIL OF  
HIGHER EDUCATION RESOURCES**

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The National Council of Higher Education Resources (NCHER) is a trade association that represents a nationwide network of guaranty agencies, secondary markets, lenders, loan servicers, private collection agencies, schools and others that administer education loan programs that make loan assistance available to students and parents to pay for the costs of postsecondary education, including the Federal Family Education Loan (FFEL) Program and private education loans. Many of our members, including state agencies and state-designated authorities, also provide higher education access, outreach, and financial literacy programs. Some of our members service Federal Direct Loans.

I am writing on behalf of NCHER in response to the call for reply comments on a Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking (Petition) filed by the Professional Association for Customer Engagement (PACE) with the Federal Communications Commission (FCC or Commission). The Petition asks the Commission to, among other things, clarify (or determine in a rulemaking) that the “capacity” of a system, for the purpose of determining whether the system is an “automatic telephone dialing system” (ATDS) under the Telephone Consumer Protection Act (TCPA) and the FCC’s TCPA rules, means what the system can do at the time the call is placed, without additional modification.

NCHER supports the position taken by PACE in the Petition on this issue<sup>1</sup>, and associates itself with the initial supporting comments filed by the Chamber of Commerce of the United States of America, ACA International and Communication Innovators.<sup>2</sup> We believe the statutory analysis of the term “capacity” offered by PACE and those submitting supporting comments is compelling, and that the Commission should confirm that equipment must have the “present capacity” or “current ability” to store or produce, and dial, random or sequential numbers. In these Reply Comments, we want to point out that the arguments made by some opposing the Petition are misplaced, and that the growing benefits of informational calls to wireless consumers justify PACE’s requested clarification. In short, we strongly believe that the benefits to consumers that would flow from granting the clarification requested in the Petition far exceed any perceived inconvenience or harm to consumers, which in any case should be minimal.

While the dialing technology used by many NCHER members, including predictive and preview dialers, does not have the requisite “present capacity” or “current ability,” there remains some uncertainty as to whether the use of such systems to make non-telemarketing, informational calls is subject to the same restrictions that apply to ATDSs. This uncertainty should be removed. Furthermore, as discussed below, in addition to bringing communications into the 21st century and making employees more productive – goals we would hope the FCC shares – the use of modern dialing technology helps ensure better compliance with applicable consumer protections, such as calling time restrictions, and virtually eliminates the possibility of misdialled numbers.

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<sup>1</sup> NCHER recognizes that PACE also seeks confirmation that a dialing system is not an ATDS unless it has the capacity to dial numbers without human intervention. Though NCHER is sympathetic to the arguments raised by PACE on this issue, we are not now providing reply comments on this issue.

<sup>2</sup> NCHER also requests that the FCC grant the separate petition filed by Communication Innovators. We previously filed reply comments in support of that petition.

***Opponents' arguments are erroneous and misplaced.*** Addressing the opponents of the Petition first, they state that consumers should be provided with informed choice as to what calls they receive, and argue that allowing the requested clarification would impinge seriously on consumer privacy. We believe this argument is a red herring. In fact, consumer privacy is enhanced by the use of new technologies. Dialing systems eliminate the possibility of operator errors that result in calls to the wrong party, and they facilitate compliance with applicable calling restrictions (e.g. call time limits and call frequency restrictions). Non-telemarketing calls to wireless telephone numbers do not interfere with personal privacy. All of these calls can be made by manually dialing the cell phone number. And, in any case, a cell phone user can disconnect or send any call to voice mail by simply pressing a button or icon. In fact, this is easier to do than in the case of landlines (which are not even implicated in the TCPA provision in question). Based on experience, most cell phone users choose not to answer calls from unwanted or unknown callers, or even allow them to ring through.

Opposing commenters also argue that consumers would be exposed to a multitude of commercial telemarketing calls if the Commission grants the requested declaratory ruling. NCHER is not suggesting that consumers be exposed to bothersome spam and commercial solicitations. NCHER strongly supports the restriction on the use of ATDS technology for telemarketing purposes, which is what we believe was the intent of Congress when it enacted the TCPA.

Our desire is to facilitate legitimate non-telemarketing, informational calls that provide significant consumer benefits. Predictive and preview dialers connect live representatives with consumers while weeding out unproductive calls. They allow businesses with a legitimate need to contact larger numbers of specific customers and do so accurately, efficiently and cost-effectively while complying with Federal and state consumer protection laws. And we point out that other restrictions already exist to prevent abuse of certain types of informational calls – restrictions that in fact are a more effective governor than the TCPA. In the consumer finance sector, there are limits on the number of contacts that a debt collector can make.<sup>3</sup> A debt collector also must cease contact if requested to do so.<sup>4</sup> The Consumer Financial Protection Bureau (CFPB) has said that at least some of these restrictions found in the Fair Debt Collection Practices Act apply to all parties involved in the collection of consumer debts, not just debt collectors.<sup>5</sup> And we fully expect that the rules applicable to both creditors and debt collectors will be tightened further in an upcoming CFPB rulemaking.<sup>6</sup>

Opponents of the Petition also argue that consumers will be exposed to additional expense, as “[c]ell phone calls still – almost universally – create an expense to the cell phone owner.” While this is an exaggeration of the current state of the market,<sup>7</sup> the cell phone user

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<sup>3</sup> 15 U.S.C. § 1692d.

<sup>4</sup> *Id.* § 1692c(c)

<sup>5</sup> CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, July 10, 2013.

<sup>6</sup> See CFPB Advance Notice of Proposed Rulemaking; 78 Fed. Reg. 67848, Nov. 12, 2013.

<sup>7</sup> According to CTIA-The Wireless Association, the average revenue per minute of voice usage for wireless carriers in the U.S. in 2012 was three cents. Written Ex Parte Communication to FCC, GN Docket No. 09-51, WT Docket No. 13-135, p. 12.

does not incur any additional cost as the call in question could be made if dialed manually, and consumer protections exist as referenced above (call limits, cease calling requests).

***Facilitating non-telemarketing, informational calls – including calls made using predictive and preview dialers – will create substantial benefits for students and other consumers.*** While we believe any consumer harm or inconvenience is minimal, and can be controlled, the consumer benefit from informational calling can be substantial, as demonstrated by the calls made by NCHER members. NCHER members interact on a daily basis with students, families and student loan borrowers. Our members provide information for future college students while they are in middle or high school, with messages concerning how to choose the right college or university, the many ways to save and pay for college and the importance of borrowing responsibly. They contact high school seniors to discuss budgeting and the importance (and cost savings) of finishing certificate or degree programs on time (or even early). They also work with student loan borrowers to resolve issues that arise in the processing of their loans. Finally, our members contact student loan borrowers during and after college completion to provide critically important information about repayment plans, deferment options and the need to stay in contact with lenders and loan servicers.

Unfortunately, some borrowers will become delinquent on their loan obligations, and some will eventually default. Effective communication with these struggling borrowers is critical, providing the borrowers with the last line of defense before default and the best opportunity for those that do default to remove the record of the default. Even after a borrower defaults, he or she is provided one last opportunity to enter into a repayment agreement to avoid costly collection charges and the other negative ramifications of default.<sup>8</sup> Once again, timely communication is key.

Telephone communication is vastly superior to all other forms in providing timely assistance. According to the U.S. Department of Education’s Federal Student Aid (FSA) division,<sup>9</sup> the two key characteristics of student loan defaulters are as follows:

- Half had bad telephone numbers; and
- Most defaulters were not successfully contacted by phone during the 360-day collection effort leading up to default.

In fact, FSA has reported that it is able to avert “nearly 100 percent” of delinquent borrower defaults when the Department’s servicer is able to reach the borrower by telephone. Unfortunately, reaching the skyrocketing number of borrowers who use only wireless telephones is becoming more difficult. This makes it more difficult for callers from all industries to place non-telemarketing, informational calls to consumers, but even more so in the student loan market, where a much higher percentage of consumers (*i.e.*, students) are “wireless only.”

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<sup>8</sup> 34 CFR 682.410(b)(5)(ii) and (b)(6)(v).

<sup>9</sup> U.S. Department of Education, FSA, November 2010 presentation on delinquency management and default prevention – slide #55.

According to the Centers for Disease Control and Prevention (CDC), 38.2% of American households are now wireless-only, having abandoned their traditional land-line telephone.<sup>10</sup> However, the wireless percentages for individuals within the age groups that represent the vast majority of student loan borrowers are much higher, as provided by the CDC study:

- Ages 18-24: 53.2%;
- Ages 25-29: 62.1%;
- Ages 30-34: 56.7%.

These tech-savvy consumers want – in fact, demand – real-time information to be put at their disposal, something that cannot be provided through other communication channels such as the U.S. Postal Service. Yet provisions of the TCPA, aimed specifically at telemarketers and not providers of non-marketing-related information, make it difficult if not impossible to provide real-time information using today’s technology because there is some uncertainty over whether the systems used by our members, including but not limited to predictive and preview dialers, are ATDS’s under the TCPA and the FCC’s TCPA rules. This uncertainty has led to extensive litigation, some involving student loan participants. This is why it is critically important that the Commission clearly and specifically allow the use of predictive and preview dialing technology to make non-telemarketing, informational calls to consumers. In fact, the Obama Administration also supports the use of predictive dialers and recorded messages to cellular telephones when seeking to recover student loans and other debts owed to the federal government.<sup>11</sup>

Consider the type and content of information that student loan borrowers need in order to best manage their debt and avoid the costly pitfalls of default. For example, lenders, servicers and guaranty agencies provide information on:

- Available repayment plans, including the Obama Administration’s new “Pay as You Earn” income-based repayment plan;
- Available deferment or forbearance options when borrowers have difficulty making their monthly payments; and
- Budgeting and money-management strategies to help borrowers better manage their financial resources and obligations.

And for borrowers who have defaulted on their loans, they can provide:

- Information on ways to get out of default and regain eligibility for Federal financial aid, including information on loan rehabilitation – the only process through which a borrower can remove the record of default from his or her credit report; and
- Additional options for borrowers who have recently defaulted to avoid the costly collection charges required by Federal regulation.

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<sup>10</sup> Centers for Disease Control and Prevention - Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2012.

<sup>11</sup> President Obama’s FY 2014 Budget, Analytic Perspectives, p. 153.

Clearly, borrowers benefit from receiving these informational calls, and they can only be efficiently made using advanced dialing technology. To borrow a phrase used by President Obama during a 2012 debate, requiring lenders and servicers to manually dial calls would take us back to “horses and bayonets.”<sup>12</sup>

***Restricting the use of modern technology to reach student loan borrowers on their wireless telephones will result in numerous, unnecessary student loan defaults.*** According to a July 2013 study on the student loan market, approximately 12 million student loan borrowers will default over the next decade simply because they cannot be contacted by their servicers in a timely manner.<sup>13</sup> This unfortunate and avoidable outcome will force these borrowers to be subject to stiff penalties, including but not limited to:

- Credit report damage (7-year minimum);
- Wage garnishment;
- Seizure of federal and state tax refunds;
- Loss of state occupational licenses;
- Difficulty qualifying for mortgage loans;
- Difficulty obtaining car loans and other consumer credit;
- Legal action in federal district court;
- Loss of eligibility for federal student financial aid, making it difficult if not impossible to return to school to enhance credentials and employability;
- Inability to rent an apartment; and
- Punitive collection costs.

A growing percentage of borrowers are seriously delinquent on their student loans. According to the Federal Reserve Board of New York, for the second quarter of 2013, 10.9 percent of student loan borrowers were more than 90 days delinquent.<sup>14</sup> Average borrower indebtedness also continues to rise. Sixty percent of students who earned bachelor’s degrees in 2011-2012 from public and nonprofit institutions at which they began their studies graduated with debt, with average indebtedness of \$26,500.<sup>15</sup>

Unfortunately, defaults on federal loans are also on the rise. The FFY 2011 two-year cohort default rate is 10.0%, up from 9.1% the previous year, and the FFY 2010 three-year cohort default rate is 14.7%, up from 13.4% the previous year.<sup>16</sup> Clearly, a growing number of student-borrowers need the critically important default prevention and debt management information that is provided by their lenders, servicers and guaranty agencies. This information must be efficiently delivered for it to reach the maximum number of consumers in a timely manner. This can only be achieved using advanced calling technologies, which includes using predictive and preview dialers to contact consumers on their wireless devices.

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<sup>12</sup> Comment by President Obama during Third Presidential Debate - October 21, 2012

<sup>13</sup> Modifying the TCPA to Improve Services to Student Loan Borrowers and Enhance Performance of Federal Loan Portfolios – Quantria Strategies, LLC – July 2013

<sup>14</sup> Federal Reserve Bank of New York – Quarterly Report on Household Debt and Credit, Second Quarter of 2013.

<sup>15</sup> Trends in Student Aid 2013 – The College Board, p.4.

<sup>16</sup> U.S. Department of Education Cohort Default Rate Data, released September 30, 2013.

Based on the comments above, NCHER strongly recommends that the Commission clarify its rules to confirm that the “capacity” of a system for the purposes of determining whether it is an ATDS under the TCPA means “present capacity” or “current capacity” to store or produce, and dial, random or sequential numbers. Thank you for the opportunity to provide comments on this important matter. If you have questions or need additional information, please do not hesitate to contact me at 202-822-2106.

Respectfully submitted,

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