Moss & Barnett

June 6, 2016

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWA325
Washington, DC 20554

Re: Response of Continental Service Group, Inc. d/b/a ConServe
Notice of Proposed Rulemaking—TCPA
FCC-16-57; CG Docket No.: 02-278

Dear Ms. Dortch:

The Federal Communications Commission ("Commission") Notice of Proposed Rule Making FCC-16-57 ("NPRM") seeks comment on the implementation of a provision of the Bipartisan Budget Act of 2015 (the "Budget Act")[1] that excepts certain "robocalls" that are "made solely to collect a debt owed to or guaranteed by the United States"[2] from the Telephone Consumer Protection Act's[3] consent requirement. In its NPRM, the Commission states: "we recognize and seek to balance the importance of collecting debt owed to the United States and the consumer protections inherent in the TCPA."[4]

Continental Service Group, Inc. d/b/a ConServe ("ConServe") is a private collection agency ("PCA") and a federal contractor that provides collection services to the U.S. Department of Education ("ED") and the U.S. Department of the Treasury, Bureau of the Fiscal Service ("Fiscal Service"). ConServe offers the following information for the Commission's consideration.

I. Introductory Remarks.

1: Not All Covered Calls Are "Robocalls."

ConServe objects to the general characterization of all calls, which may be made with the assistance of certain types of telephone equipment as "robocalls," unfairly equating the business of debt collection with telemarketing and other sales practices where the caller and intended recipient typically lack an existing business relationship. Debt collection differs markedly from telemarketing and similar sales businesses. Debt collection is a unique and vital part of the credit cycle and should not be given the attribution of being robotic, random or not necessitating any human involvement. Debt collectors do not randomly dial telephone numbers or otherwise place calls with the intention of no human involvement.

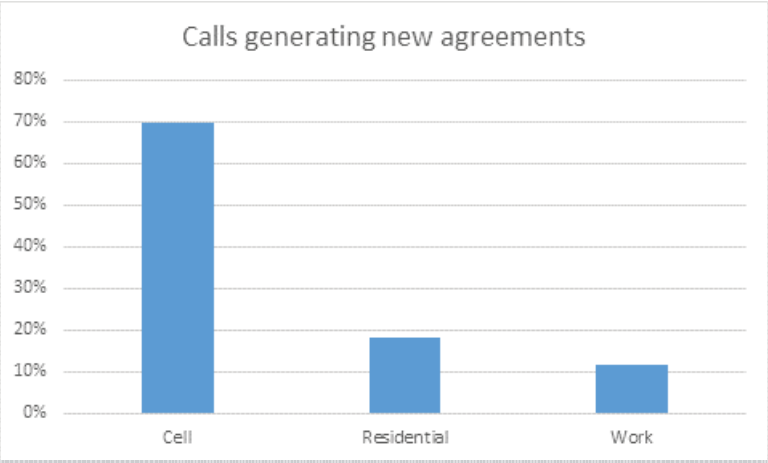
2: Verbal Communication with Federal Borrowers is Essential.

1 Bipartisan Budget Act of 2015, Pub. L. No. 114-74, §§ 301 *et seq.*, 129 Stat. 584.
2 Pub. L. No. 114-74, § 301(a)(1)(A)-(B), 129 Stat. 584.
3 47 U.S.C. §§ 227 *et seq.*
4 81 Fed. Reg. 31889-31895 (May 20, 2016)

Loan rehabilitation and other beneficial loan repayment programs (such as the "reasonable and affordable program") are tools for resolving borrower defaults. It is ConServe's duty to educate borrowers of those tools, collaborate with borrowers to determine which tool is best, and assist borrowers with use of the selected tool. Verbal communication is essential to these efforts. The earlier we reach the Borrower the less time the Borrower is in default or under the pressures of forced repayment through administrative remedies.

The federal government's PCA contracts mandate that PCAs do more than merely demand payment from a borrower. Rather, PCAs are required to collaborate with each borrower, and ED and Fiscal Service do not offer PCAs the ability to accomplish these directives solely by use of letters or other written communication. PCAs are contractually obligated by the federal government to engage in verbal communication with borrowers. This is a reflection of both ED and Fiscal Services' view that verbal communication is a critical component of the collaboration between borrower and PCA.

More than 70% of ConServe's "right-party" contacts in connection with ED borrowers generating any agreements are made to a cell phone.



Once we make contact, 65% of the time borrowers are setup in a loan rehabilitation agreement. Of the borrowers who have provided contact information to ConServe, 50% list a cell phone number as the preferred contact point.[5] Unfortunately, ConServe only establishes contact with 24% of the borrowers who have accounts placed with it for collections. Our data shows that creating the contact is the barrier to Borrowers moving out of default and into a successful payment agreement.

The average duration of all PCA telephone calls with borrowers, regardless of what is discussed, is more than 10 minutes. Many calls involving the ED loan rehabilitation program, which require PCAs to give a series of disclosures, discuss required program information and obtain a financial statement, may frequently take nearly an hour to complete.

5 For the Period of October 2015 through May 2016. *See* similar results in the Letter from Mark Brennan, Counsel to Navient, to Marlene H. Dortch, FCC, CC Docket No. 02-278, at 2 (filed March 29, 2016)

The loan rehabilitation process for federal student loans takes 9 months, or longer.[6] Missed payments and incomplete financial documentation are barriers to a borrower's successful loan rehabilitation. Live contact, including subsequent reminders and follow-up calls, with borrowers is often vital to success.

While an outside observer may think that resolution of a borrower's account should take no more than a single call, this is not true for many, if not all, ED and Fiscal Service accounts. For example, financial information and documentation of the Borrower's income and expenses along with gathering other information for the (student) loan rehabilitation program may require many conversations and follow-up. Often on average around 50% of the consumers who enter the rehabilitation program need approximately ten (10) follow-up contacts. One in five borrowers, to continue in the program, have needed approximately fifty (50) follow-up calls (which were consented to).

II. Notice of Proposed Rulemaking.

The Commission contemplates in its NPRM the meaning of several words in the Budget Act Amendment in an effort to promulgate rules fair to consumers. While ConServe considers Borrower's privacy as the most important task under its contracts, limitations to the Amendment will not protect consumers any more than they are if the TCPA remained unchanged. Consumers will still be upset about debt collection and complain to the FCC regardless of the rules promulgated here, because even in the absence of contacts, consumers can and often are negatively affected by debt collection, particularly when it concerns federal debts.[7]

1. Covered Calls: Defining Debt, Default, Delinquency, Servicing, and Other Terms

In December 2015, following passage of the Budget Act Amendment, Fiscal Service defined the terms "debt," "default," "delinquency," "guarantee," and other terms contemplated in this NPRM.[8] These definitions should be adopted as the sole source for promulgating the regulations to implement the Budget Act Amendment.[9]

Ownership

As the issuer and guarantor of loans or other debts such as forfeitures and fines, federal agencies have a constitutional and statutory duty to attempt to collect debts owed to them [10] and further are required to collect debts aggressively.[11] To assist with this endeavor, some agencies, including ED and Fiscal Service, contract with PCAs. The debts are not sold, or otherwise conveyed, to PCAs; no pecuniary interest in a debt is acquired by federal contractors. The Federal Agency retains ownership of the debts.

"Debt"

Congress did not intend the term "debt" in the Budget Act Amendment to include only loans that are delinquent or in default, current or contingent. Section 227(b)(1)(A)(iii), as amended by the Budget Act, does not distinguish between a debt that is "delinquent" or "in default." The exemption instead depends

6 See for example, 34 CFR §685.211 Miscellaneous repayment options Wiliam D. Ford Program.
7 See Section II, 4 below.
8 U.S. Department of the Treasury, Bureau of the Fiscal Service, *Treatise on Federal Nontax Debt Collection Law* (Dec. 2015), https://fiscal.treasury.gov/fsservices/gov/debtColl/rsrcsTools/debt_dca_legal_treatise.htm (last accessed June 3, 2016).
9 U.S. Department of the Treasury, Bureau of the Fiscal Service, *Treatise on Federal Nontax Debt Collection Law* (Dec. 2015), part II, Chapter A, available at https://fiscal.treasury.gov/fsservices/gov/debtColl/rsrcsTools/debt_dca_legal_treatise.htm (last accessed June 3, 2016).
10 See U.S. Const. art. I, § 8, cl. 18 and art. IV, § 3, cl. 2; 31 U.S.C. § 3711(a)(1).
11 U.S. Department of the Treasury, Bureau of the Fiscal Service, Treatise on Federal Nontax Debt Collection Law (Dec. 2015), part II, Chapter A, available at https://fiscal.treasury.gov/fsservices/gov/debtColl/rsrcsTools/debt_dca_legal_treatise.htm (last accessed June 3, 2016).

upon the existence of a "debt…owed to the United States" and covered student loans give rise to federal debts as soon as the funds are disbursed to the borrower. *See* 31 U.S.C. § 3701(b)(1). Likewise, the unqualified use of the terms "debt" and "guarantee" reflects Congress' desire that the exemption apply not only to calls concerning *current* debts to the United States, but also *contingent* debts.

By applying the Debt Collection Improvement Act of 1996 ("DCIA") definition of "debt," the implementation questions concerning that term are rendered moot. Pursuant to the DCIA, a "claim" or "debt" is "any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal Agency…includ[ing], without limitation…funds owed on account of loans made, insured, or guaranteed by the Government…."[12]

"Debts" in the DCIA definition *includes all debts, whether current or delinquent, matured or unmatured, liquidated or unliquidated, and federal tax or federal nontax*.[13] There is no indication that Congress intended the term "debt" in the Budget Act Amendment to include only those obligations that are delinquent or in default. Indeed, Congress has already defined the term "debt" to include that which is both delinquent and in default.[14]

Because data shows Government and Servicer inability to establish communication with borrowers results in increased federal borrower default rates, the Budget Act Amendment purposely sought to expand the ability of federal agencies to collect amounts owed. Adopting narrower definitions of the term "debt" would improperly narrow the federal government's ability to collect debts owed to it.

2: Are Debt Servicing calls covered by the Amendment?

ConServe generally agrees with the Commission's statements in Question 9, except that covered calls should include those made upon the first missed loan payment, even prior to the date of delinquency (as defined in the loan agreement).[15] Federal borrowers need information regarding available repayment programs that cannot be disseminated by letters alone and this information must be provided to them at the earliest possible instance in order for the government to achieve its objective of reducing loan defaults.[16]

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12 31 U.S.C. § 3701(b)(1)(A).

13 *See* U.S. Department of the Treasury, Bureau of the Fiscal Service, *Treatise on Federal Nontax Debt Collection Law* (Dec. 2015), part II, available at https://fiscal.treasury.gov/fsservices/gov/debtColl/rsrcsTools/debt_dca_legal_treatise.htm (last accessed June 3, 2016); *United States v. State Bank of NC*, 31 U.S. 29, 35 (1832); *United States v. Coppola*, 1994 U.S. Dist. LEXIS 16848, *38 (E.D.N.Y. 1994). (interpreting precursor to 31 U.S.C. § 3713 and finding that priority must be accorded to debts whether matured or unmatured); *Viles v. Comm'r of Internal Revenue*, 233 F.2d 376, 379-80 (6th Cir. 1956) (interpreting precursor to 31 U.S.C. § 3713 and finding that priority must be accorded even if the tax debt had not been formally assessed and liquidated); *United States v. Snyder*, 207 F. Supp. 189, 191 (E.D. Pa. 1962) (United States could recover overpayments of annuity made to decedent).

14 *See e.g.*, 31 U.S.C. § 3701(b)(1) (a "debt" is "any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency."); U.S. Department of the Treasury, Bureau of the Fiscal Service, *Treatise on Federal Nontax Debt Collection Law* (Dec. 2015), Part II, available at https://fiscal.treasury.gov/fsservices/gov/debtColl/rsrcsTools/debt_dca_legal_treatise.htm (last accessed June 3, 2016)

15U.S. Department of the Treasury, Bureau of the Fiscal Service, *Treatise on Federal Nontax Debt Collection Law* (Dec. 2015), part II, Section II, Chapter B, available at https://fiscal.treasury.gov/fsservices/gov/debtColl/rsrcsTools/debt_dca_legal_treatise.htm (last accessed June 3, 2016).

16 Defaulted student loan debt presents a significant risk to U.S. economic growth and threatens the ability of borrowers to secure housing, start their own businesses, and save for retirement. *See* June 4, 2014, Written Testimony of Rohit Chopra, Assistant Director and Student Loan Ombudsman of the Consumer Financial Protection Bureau, before the Committee on the Budget, available at http://www.Consumerfinance.gov/about-us/newsroom/written-testimony-of-rohit-chopra-before-the-committee-on-the-budget/ (last accessed May 30, 2016). These challenges only worsen when a borrower is not apprised of government programs designed to benefit the borrower before default. *Id*. (noting that, at the time, more than seven million student loan borrowers were in default, and that the CFPB "has received thousands of complaints" from borrowers describing the difficulties they face.)

The plain meaning of the text of the Budget Act Amendment includes servicing calls, which is clearly encompassed by the definition of a federal nontax debt.[17] Using Congress' definition of a debt owed to the United States[18], the Budget Act Amendment does not differentiate between "servicing" calls and calls made "to collect a debt." Introducing such a dichotomy into the Budget Act Amendment by regulation is inconsistent with the plain language of the statute. It will also have an adverse effect on borrowers by providing an additional restriction to the "number" and "duration" limitations contemplated by the Budget Act Amendment (discussed in greater detail in Section III below) and making beneficial borrower contacts more difficult.

The federal nontax debt collection process includes informing borrowers of how to reduce payment amounts, reminding borrowers about payments, how to consolidate or modify loans, how to change payment dates, etc. These conversations occur in the context of an attempt to collect the debt in a collaborative manner mutually beneficial to both the creditor and borrower. Under any name, whether servicing or debt collection, these types of calls relate to collection and should be provided the same exemption as calls placed to a borrower in which the collector simply demands payment.

3: "Servicing Calls" Provide Tangible Benefits to the Consumer.

ConServe disagrees that calls made attempting to resolve federal debts can be characterized as anything other than debt collection calls, especially in light of the DCIA definition of a "debt." To the extent the Commission bifurcates the applicability of the Budget Act Amendment between "servicing" calls and calls made "to collect a debt," servicing calls should include any call that is made in relation to a debt obligation owed the federal government and the borrower's rights and obligations attendant thereto. This definition may include providing the borrower information about the debt or informing him or her of changes in the debts status or programs that may be available to the borrower for repayment of the debt. The benefits of such programs to borrowers—and their ability to secure housing, for instance—are substantial and potentially life altering. Defaulted nontax debt presents a significant risk to U.S. economic growth and threatens the ability of borrowers to secure housing, start their own businesses, and save for retirement.[19]

Permissible servicing calls are an indivisible, integral part of debt collection calls based upon the definition of a debt under the DCIA.[20] According to the text of the Budget Act Amendment, applicability of the exemption depends upon the purpose of the call—"to collect a debt owed to or guaranteed by the United States"—and not the whether the caller is the creditor, though the exemption is limited to the government and its contractors. If a call is made for the purpose of collecting a covered federal debt, the exemption applies. This is true no matter the party attempting to collect payment, so long as the attempt is made on the government's behalf.

4: Who can be called? All persons allowed by law.

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17 The terms "debt" and "claim" are often used interchangeably in federal debt collection statutes and regulations, and there is generally no meaningful distinction between these terms. 31 U.S.C. § 3701(b) (defining "the term 'claim' or 'debt'"); 31 CFR § 900.2(a) ("[f]or the purposes of the standards in this chapter, the terms 'claim' and 'debt' are synonymous and interchangeable."); see also 49 Fed. Reg. 8889, 8889 (Mar. 9, 1984) (former Federal Claims Collection Standards) (there is no meaningful distinction between the terms "debt" and "claim" because the DCA uses them interchangeably). The term "debt" generally includes both current receivables and delinquent debts. See 31 U.S.C. § 3701.

18 *See* U.S. Department of the Treasury, Bureau of the Fiscal Service, *Treatise on Federal Nontax Debt Collection Law* (Dec. 2015), https://fiscal.treasury.gov/fsservices/gov/debtColl/rsrcsTools/debt_dca_legal_treatise.htm (last accessed June 3, 2016).

19 *See* June 4, 2014, Written Testimony of Rohit Chopra, Assistant Director and Student Loan Ombudsman of the Consumer Financial Protection Bureau, before the Committee on the Budget, available at http://www.consumerfinance.gov/about-us/newsroom/written-testimony-of-rohit-chopra-before-the-committee-on-the-budget/ (last accessed May 30, 2016) .

20 *Id*.

The phrase "solely to collect a debt" does not act as a limitation of calls to only the person or persons obligated to pay the debt. Congress had the opportunity to limit the exemption based on the recipient of the call, but declined to do so. Instead, as discussed herein, the Budget Act Amendment's language makes clear that the availability of the exemption depends on the *purpose* of the call alone.

As of the close of fiscal year 2014, the United States had $139.3 billion in delinquent nontax receivables.[21] The Commission recognizes the importance of collecting these debts.[22]

There is a strong correlation between live communication with a borrower and successful account resolution. Unfortunately, it is often the case that contact information contained in a loan application is incomplete or it has become obsolete by the time the loan is placed for collection with a PCA by ED.[23] When the last known contact information for a delinquent borrower proves ineffective, obtaining a delinquent borrower's current contact information by calling parties listed in the borrower's loan application -- which are typically family members, friends or relatives -- is an effective, approved[24] method of locating borrowers. Aside from the last known contact information and any information available in a loan application, attempting to call telephone numbers obtained through requests for location information in the manner prescribed by § 1692b of the FDCPA is likely to be the only way to reach delinquent borrowers. Notably, the FDCPA restricts the number of calls that can be made to third parties to obtain location information, the nature of information that may be shared with third parties, and the scope of third party inquiries.[25]

The Supreme Court noted that the government enjoys certain privileges beyond those available to private creditors.[26] Some of these privileges include the ability to garnish wages or Social Security benefits without a court order, intercept tax refunds, and revoke eligibility for federal assistance. Further, the burden to obtain a discharge of federal student loan debt in bankruptcy is also much steeper than that for private debts.[27]

If the Commission decides to not apply location information directives similar to the FDCPA, and instead imposes further restrictions, many federal contractors will inevitably default to recommending that administrative remedies be pursued against debtors (such as administrative wage garnishments), which, depending on the particular agency's directives, can occur on the sixty-first day after placement with the PCA. Additional administrative remedies such as treasury offset may also result for unreachable borrowers. Some unreachable borrowers could face both administrative wage garnishment and treasury offset.

Not surprisingly, borrowers subject to involuntary repayment are generally dissatisfied and tend to file complaints. ConServe's data shows that it receives more than twice as many complaints related to involuntary payment mechanisms than complaints related to communication attempts. Further restrictions on communications with consumers will only result in more consumers dissatisfied with the collection process and more complaints.

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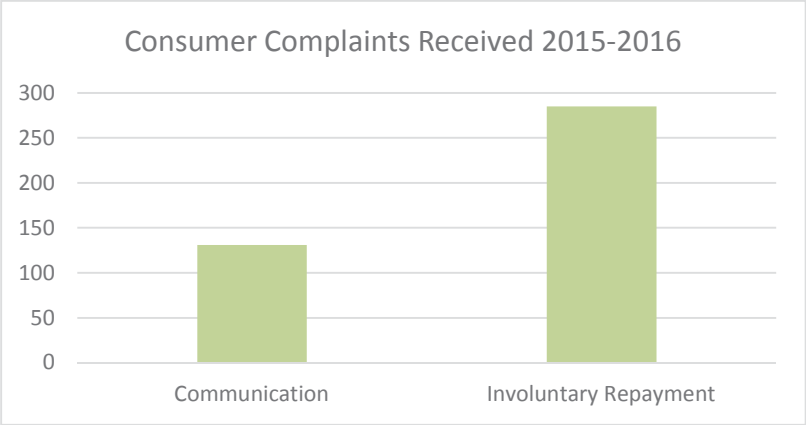
21 *See* 81 Fed. Reg. 31889, 31892-31893, para. 6. ((May 20, 2016) (citing *U.S. Dept. of the Treasury, Fiscal Year 2014 Report to Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies* (May 2015)).
22 *See id*.
23 *See* Letter from Mark Brennan, Counsel to Navient, to Marlene H. Dortch, FCC, CC Docket No. 02-278, at 2 (filed March 29, 2016) (noting correlation between consent to call cell phones and delinquency).
24 *See* 15 U.S.C. § 1692b.
25 *See* 15 U.S.C. § 1692b(1)-(6).
26 *See Sheriff v. Gillie*, 578 U. S. ____ (2016) (slip opinion, No. 15-338).
27 *See* 11 U.S.C. § 523(a)(8)(A)(i).

The result would be especially unfair to those borrowers eligible for rehabilitation or programs whom were unable to learn about such programs from the PCAs due to call restrictions.



5: Are calls to persons the caller does not intend to reach, that is persons whom the caller might believe to the debtor but is not, covered by the exception? Yes, all called persons are covered.

ConServe does not support a rule restricting the applicability of the exemption based on the identity of the recipient and the application of the "one-call window." To the extent the one-call window adopted by the FCC was already in place prior to the Budget Act Amendment, it is reasonable to conclude that in adopting the Amendment, Congress did not intend such a restriction to apply to the collection of federal debts.

State and federal laws other than the TCPA already limit the information PCAs may reveal to third-parties, such as friends and relatives of a delinquent debtor.[28] Other federal laws address the Commission's concerns regarding inconvenience that may result to third-parties.[29] ConServe is also subject to ED's rules for third-party collection agencies and is subject to contractual consumer satisfaction and quality benchmarks pursuant to its contract with ED.[30] Furthermore, the FDCPA precludes the disclosure of sensitive consumer information to third parties absent the consumer's explicit consent.[31]

In addition, federal contractors are required to honor requests to cease communication as set forth in 15 U.S.C. § 1692c(c) and actively update account information to exclude wrong parties and wrong numbers using the most advanced technology and methods available. Notwithstanding these safeguards and the natural business motive for reaching the intended party, calls to reassigned numbers are inescapable. While these circumstances are present for the collection of all debts, Congress sought to expand the Government's activities to recovery of debts without risk of violating the existing limitations on calling mobile phones.

6: Who may make the covered calls at issue? Calls may be made by federal contractors and the Government.

See Section II, 3 above.

28 *See, e.g.*, 31 U.S. Code § 3720E; 15 U.S.C. § 1692b(2) (prohibiting a debt collector from revealing to third parties "that such Consumer owes a debt").
29 *See, e.g.*, 47 C.F.R. § 64.1200(c)(2), 47 C.F.R. §§ 64.1200(c)-(e).
30 *See, e.g.*, U.S. Department of Education, Statement of Work, Section 1.1, Introduction (July 1, 2009).
31 15 U.S.C. § 1692c(b)

7: What is the meaning of person within the TCPA and is the federal government a person? The Federal Government is not a "person".

The Budget Act Amendment does not imply that the federal government is a "person" under the TCPA. The TCPA and the Budget Act Amendment provide no definition of the term "person." The term is defined in the definitions section of the Communications Act, which encompasses the TCPA.[32] The definition provides that a person "includes an individual, partnership, association, joint-stock company, trust, or corporation."[33]

This definition does not include government entities, and the Supreme Court has repeatedly refused to include a sovereign in the definition of 'person' and "statutes employing the [term] are ordinarily construed to exclude it."[34] The TCPA, as amended, does not provide any indication that the term "person" should be interpreted contrary to the definition supplied by the Communications Act and Supreme Court guidance.

In rule making, a federal agency does have the authority to explain ambiguous terms.[35] However, the Supreme Court has consistently followed precedent that the government does not meet the definition of a "person"[36] and therefore, the FCC cannot expand the scope of the definition of person, which would effectively undermine the government's sovereign immunity.

***8: Campbell-Ewald Co.* and the Budget Act Amendments Can be Applied Consistently.**

In *Campbell-Ewald Co. v. Gomez*, the Supreme Court recognized absolute sovereign immunity of the federal government.[37] If the government's immunity remains intact, then its contractors can acquire this immunity and, at a minimum, if the contractor does not follow the standard set in *Campbell-Ewald*, any vicarious liability to the government is avoided.

The Supreme Court's position on sovereign and derivative immunity indicates that the Budget Act Amendment should be implemented without needing further modification to the TCPA as to the definition of "person."

III. Limits on Number and Duration of Covered Calls

1: Need for Restrictions. What types of number and duration restrictions should be adopted for covered calls?

The promulgation of any rules on call number and duration restrictions should be made at a later date, after analysis of the Budget Act Amendment's efficacy in decreasing borrower defaults, increasing borrower contacts and default resolution rates.

The asserted need for such restrictions assumes first that the restrictions must be disseminated now and if not, borrowers will experience increased harm by receiving more calls and that such harm can be mitigated by limited the number or duration of such calls. Perceived consumer annoyance, however, is

32 *See* 47 U.S.C. § 153 (providing definitions "[f]or the purposes of this chapter, unless the context otherwise requires").
33 *Id*. at (39).
34 *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989); *see also Wilson v. Omaha Tribe*, 42 U.S. 653, 667 (1979) (quoting *U.S. v. Cooper Corp.*, 312 U.S. 600, 604 (1941)); *U.S. v. Mine Workers*, 330 U.S. 258, 275 (1947).
35 *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)
36 See Footnote 37.
37 136 S. Ct. 663, 672 (2016), as revised (Feb. 9, 2016).

not a sufficient basis upon which to promulgate number and duration restrictions on calls related to federal nontax debts.[38]

In addition to analyzing the data collected post-amendment and in advance of any implemented restriction, there should be meaningful study of the complaints received by the FCC. The analysis should determine whether the complainants are receiving unwanted "robocalls" from telemarketers and other sales business, PCAs, private debt collectors who are not federal contractors, or in fact do not want to receive debt collection calls or calls regarding financial matters or other notifications. Additional consideration should be given to ensure complaints received by the FCC regarding PCAs are forwarded to PCAs to act on. Without such initial inquiry and further development of the complaint handling process, the efficacy of any such limitation cannot be properly measured.

Data cited by the Commission in prior rulings evidence a recent increase in student loan default rates, due, in large part, to the fact that federal contractors cannot locate or contact the borrower telephonically.[39] PCAs are able to help borrowers resolve defaults—and the attendant impact to borrowers' assets and credit—to a much greater degree in instances where they are able to reach and communicate with the borrower telephonically.[40]

Remedies already exist for student loan borrowers who experience annoyance or are upset by attempted collection contacts. The FDCPA, for instance, allows a consumer to demand the collector cease communication with her and, if a collector makes an unreasonably excessive number of calls, the Act creates a private right of action in consumers against the debt collector.[41] The FDCPA specifically provides that "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt," including "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with the intent to annoy, abuse, or harass any person called at that number."[42]

As such, and without additional consumer data in particular with respect to the collection of federal debt, no action should be taken at this time to limit the frequency and duration of covered calls.

Efforts to disseminate accurate and beneficial information to student loan borrowers or in relation to other federal debt should not be impeded by the drastic measures the FCC has taken to stop the seemingly ceaseless illegal robocalls consumers receive every day from "Rachel from Cardholder Services" and other robocall scams. Further, consumers should be apprised of the limits on the scope of certain protections. For example, consumers may enter their names in Do Not Call Registries, but there should be dissemination of information by the FCC that there is no expectation Do Not Call Registries will operate to prevent creditors and debt collectors from contacting them about an existing or previous business relationship.

2: The Nature of Call Restrictions, if Any Are Ultimately Adopted.

If the Commission elects to impose a call volume restriction, after focused data collection and analysis occurs post-amendment in particular with respect to federal debt, should be crafted to strike the

38 *See Sheriff v. Gillie*, 578 U.S. ____, 2016 WL 2842453 (2016) (citing to *Gillie v. Law Office of Eric A. Jones, LLC*, 785 F.3d 1091 (6th Cir. 2015)) ("In other words, § 1692e bars debt collectors from deceiving or misleading consumers; it does not protect consumers from fearing the actual consequences of their debt.").
39 *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; American Association of Healthcare Administrative Management, Petition for Expedited Declaratory Ruling and Exemption; et al*, CG Docket No. 02.278, FCC 15-72, 125 (2014).
40 *Id*.
41 *See* 15 U.S.C. §§ 1692c, 1692d.
42 15 U.S.C. § 1692d(5).

appropriate balance in preventing perceived borrower annoyance and economic reality. Three calls per month (as suggested by the Commission in the NPRM) —even if achieved with a live-connection with the borrower on each attempt—is simply insufficient to provide a reasonable expectation that PCAs can effectively honor the contract terms to collect debts on behalf of the federal government.

If any restriction is implemented, it is again submitted that the approach should be to use the FDCPA as the purpose of the call is a more appropriate limiting factor to foster collaboration with borrowers and promote results mutually beneficial to the federal government and borrowers.

The FDCPA was passed to prevent abusive collection tactics, and frame the outer bounds of collection conduct for legitimate actors. It was not designed to police criminal conduct—*e.g.*, those defrauding consumers, falsifying information to deceive consumers into thinking they owe a debt when they do not. To the extent the Commission is attempting to curb the behavior of such criminal actors in implementing the Budget Act Amendments, ConServe believes that more meaningful due diligence efforts to stop these bad actors is needed without unduly limiting the efforts of legitimate debt collectors, in particular those collecting government debt that Congress has confirmed should be afforded priority for collection.

A: Call number restrictions

If restrictions are required, any call number restriction should be determined by the number of live contacts, not number of calls attempted. Counting calls based on non-answered dials will not serve any purpose beneficial to borrowers and will interfere with the legitimate, beneficial objective of reaching borrowers at an effective rate.

A call number restriction may also interfere with federal contractor ability to discharge its contractual obligations to the federal government. Task Orders require attempts to contact the borrower prior to and after recommending the initiation of administrative wage garnishment. Inflexible call number restrictions will unduly burden federal contractors in attempting to comply with their contractual duties and would also decrease borrower contact rates, which, as discussed above, is more harmful than it is helpful to borrowers.

B: The Commission should impose no call duration restriction.

There should be no restriction on the duration for calls made in an attempt to collect federal nontax debt. As noted above, it can take more than an hour to obtain necessary borrower information, provide required disclosures, and finalize any borrower arrangements. Limiting the duration of a call may force consumers to hurry through important information and prompt borrowers not to ask questions in order to complete the call in the specified time. In addition, either party to a call may terminate it at any time, so it is within the borrower's discretion to end a call should they wish to do so. Duration restrictions serve no purpose beneficial to consumers and are more likely to harm borrowers' interests.

4: Should the Commission look to other standards or precedents for guidance?

The Commission should consider the restrictions established by the FDCPA. The FDCPA provides ample protection to consumers against abusive and unethical collection practices.[43] The FDCPA applies to collection of covered student loans and other federal nontax debt.

43 *See* 15 U.S.C. 1692 *et seq*.

Along with the statutory provisions of the FDCPA, the Consumer Financial Protection Bureau may promulgate rules to regulate all debt collectors. The Commission should specifically consider a recent consent order issued by the CFPB involving permissible times and methods of contact involving student loan debt.[44]

Further, multiple states adopted laws and restrictions to regulate debt collectors attempting to collect from Consumers located. These restrictions remain in effect for debt collectors attempting to collect debts owed to the government.

With regard to hours of contact, the Commission should look to the FDCPA, which allows a collector to assume "that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian."[45] To limit confusion and maximize effective application of the law, these hours should be determined based on the borrower's area code and the time zone associated with it, unless the collector has reason to know that the borrower resides in a different area code located within a different time zone.

5: Consumer ability to stop covered calls, transferability to subsequent caller, and recordkeeping of this event.

Several existing statutory mechanisms require a debt collector to "cease" calls when the borrower says "stop." The FDCPA provides consumers with the ability to request a "cease" of communications from debt collectors.[46] Additionally, the Commission held in its 2015 TCPA Declaratory Order and Ruling that a "called party may revoke consent at any time and through any reasonable means".[47] Multiple states also allow their citizens to request that a collector cease contacting them.

ConServe does not support the requirement that the request be applied to subsequent collectors of the same debt. As discussed in detail above, calls regarding a covered student loan benefit the borrower. If a borrower requested that one party cease calls, it does not necessarily mean that the borrower never wishes to discuss the account again.

6: How should callers inform consumers of their right to make a stop calls request?

ConServe supports a rule requiring borrowers to be informed of the ability to stop calls. Such disclosure should not be communicated verbally, and rather should be require to be provided to the Borrower in writing, one time, similar to the FDCPA's disclosure requirements.[48]

A written disclosure is complete and affords the consumer with the opportunity to review it in detail and to reflect on the consequences. Further, the collector should have the opportunity to apprise the borrower of the consequences of the stop-call request, including the borrower's ability to enroll in beneficial loan programs, and the potential for litigation and enforcement remedies. Those consequences also include

44 *See In the matter of Discover Bank, the Student Loan Corporation, and Discover Products, Inc*., 2015-CFPB-0016, available at http://files.Consumerfinance.gov/f/201507_cfpb_consent-order-in-the-matter-of-discover-bank-student-loan-corporation.pdf (last accessed May 26, 2016).
45 15 U.S.C. § 1692c(a)(1).
46 15 U.S.C. § 1692c(a)(c).
47 *2015 TCPA Declaratory Ruling and Order*, FCC 15-72, para. 47.
48 *See e.g.* 15 U.S.C. § 1692g(a).

administrative remedies uniquely available in the collection of government debt, such as tax return intercepts and administrative wage garnishments.[49]

ConServe recommends the following written disclosure, drafted by the Consumer Relations Consortium— reviewed by several consumer advocacy groups and proposed for consideration to the CFPB—as part of its debt collection rulemaking, will effectuate the Budget Act Amendment's purpose without causing consumers to think the debt is resolved by a cease communication request:

> *If you tell us that you want us to stop collecting, we are required by law to stop calling or writing you, but this alone will not resolve the debt.*

IV. Other Implementation Issues

1: Should covered calls include calls to residential phone lines?

ConServe opposes any expansion of the Commission's rulemaking to apply to debt collection calls placed to residential landlines. Congress specified the scope of the Commission's rulemaking in the Budget Act Amendment, providing that the Commission "may restrict or limit the number and duration of calls made to a telephone number assigned to a *cellular telephone service* to collect a debt owed to or guaranteed by the United States."[50] If Congress had intended for the Commission to regulate landlines it would have clearly omitted the term "cellular" from the Budget Act Amendment. Further, the FDCPA provides sufficient consumer protections to address that minimal risk regarding calls placed to landlines. The statute creates private rights of action against debt collectors that engage in "harassing" behavior, including excessive numbers of calls to a landline or a cell phone.[51] The FDCPA further provides consumers with the ability to stop calls from being placed at "unusual times or places" or at "inconvenient" times.[52]

2: Restrictions on Calls to only Cellular Telephone Service, or all assigned telephone numbers?

Congress, in a previous delegation of authority to the Commission, provided that "[t]he Commission shall prescribe regulations to implement the requirements of this subsection…" including exempting from the prohibitions set forth at 47 U.S.C. § 227(b)(1)(A)(iii) "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party…."[53] Congress' delegation of authority to the Commission under the Bipartisan Budget Act of 2015 to implement number and duration limitations is written more narrowly still, providing that the number and duration limitations may apply only to "calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States."

If Congress intended to delegate authority to the Commission to regulate the number or duration of calls placed to telephone numbers assigned to the other services set out in the TCPA, it would have expressly done so and as a result debt collection calls to those other serves must be excluded from the scope of the delegation.

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49 *See Sheriff v. Gillie*, 578 U.S. ____ (2016) (slip opinion, No. 15-338) (addressing the concern that "special counsel" utilizing the Ohio attorney general's letterhead in an attempt to collect debts owed the government "could lead debtors to prioritize their debt to the State over other, private debts out of a belief that the consequences of failing to pay a state debt would be more severe," by noting that "[t]his impression is not false; the State does have enforcement powers beyond those afforded private creditors," including interception of the debtor's tax refund).
50 Pub. L. No. 114-74, § 301(a)(2)(C), 129 Stat. 584.
51 *See* 15 U.S.C. § 1692d(5).
52 15 U.S.C. § 1692c(c).
53 47 U.S.C. § 227(b)(2)(C).

To the extent the Commission interprets § 227(b)(2)(H) to apply to cellular telephone numbers that are assigned to pager services or internet-telephony services that a third party might unwittingly dial under the good-faith belief that the number is in fact assigned only to a cellular telephone, it makes sense to insert a carve out or safe harbor provision shielding callers from unlimited liability for such calls. The pitfalls awaiting good-faith callers are amply demonstrated in the case law.[54]

Given the potential for serious abuses like those exposed in the *Kinder* case, the Commission should, to the extent it interprets § 227(b)(2)(H) to apply to cellular telephone numbers that are assigned to pager services or internet-telephony services, fashion a carve out or safe harbor provision to shield good-faith callers from unlimited liability for placing calls to numbers that a consumer has assigned to such services. Additionally, although it is not conceded that the TCPA applies to calls placed to a residential line that the recipient has attached to VOIP equipment or technology,[55] it is nonetheless recognized that at least one court has found such calls to violate the TCPA absent the recipient's prior express consent.[56]

To the extent the Commission interprets § 227(b)(1)(A)(iii) to apply to residential lines that have been attached to VOIP equipment or technology under the "call charged" provision, it is agreed that the exception for debts owed or guaranteed by the United States should apply to calls placed to such residential lines.

3: Must calls comply with all other legal requirements – for example, the requirement that artificial or prerecorded voice calls contain certain identifying information – in order for the Budget Act consent exception to apply?

ConServe agrees that this is a reasonable interpretation of the Budget Act exception, but does not agree to the application of the artificial or prerecorded call identifying information requirement to debt collectors or the government contacting consumers due to a current business relationship. ConServe also notes that compliance with the delivery restrictions set forth in C.F.R. § 64.1200(b)(1) regarding disclosure of the caller's identity may conflict with disclosure restrictions created by other relevant laws, including the FDCPA.[57]

The blanket application of all delivery restrictions set forth at C.F.R. § 64.1200 to entities attempting to collect debts owed to or guaranteed by the United States is inappropriate. The exception created by the Budget Act is a limited carve out for debt collection. It does not apply to telemarketers or similar service providers. However, many of the delivery restrictions created by Commission regulations apply to telemarketers and similar service providers.[58] These restrictions should not be applied to the government, federal contractors or their agents attempting to collect a debt owed to or guaranteed by the United States.

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54 See, e.g., *Kinder v. Allied Interstate, Inc.*, No. 2010 WL 2993958, at *1 (Ca. Ct. App. Aug. 2, 2010), *cert. denied* at 563 U.S. 1002 (2011) (involving a plaintiff who "intentionally subject[ed] himself to unwanted telephone calls and disconnect[ed] the number from his pager device, connect[ed] the number to a voice mail tape-recording system and employ[ed] a staff to listen to the voice mail messages and catalog the calls for the sole purpose of filing lawsuits.").

55 *See Daniel v. West Asset Management, Inc.*, No. 11-cv-10034, 2011 WL 3207790 (E.D. Mich. July 27, 2011) ("there is no indication that the internet telephony is a 'paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service for which the called party is charged for the call'")

56 *See Lynn v. Monarch Recovery Management, Inc.*, No. 11-cv-2824-WSQ, 2013 WL 1247815, at *7 (D. Md. Mar. 25, 2013) *affirmed* at 586 Fed.Appx. 103 (4th Cir. Oct. 2, 2014).

57 *See* 15 U.S.C. § 1692b(1) and (2) (mandating that in communicating with third parties a debt collector must "identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer," and requiring the that debt collector "not state that such consumer owes any debt….").

58 *See, e.g.,* 47 C.F.R. § 64.1200(a)(2); § 64.1200(a)(4); § 64.1200(a)(7); § 64.1200(b)(2); § 64.1200(b)(3); § 64.1200(d); § 64.1200(e).

V. Conclusion

ConServe values its relationship with its federal government clients, with whom it contracts to efficiently pursue debts owed to the United States and ultimately benefiting taxpayers, while reducing federal deficits and increasing the availability of credit to for the benefit of all consumers. We appreciate the FCC's consideration of ConServe's position. Please let us know if you have any questions or require additional information.

Very truly yours,

/s/ John K. Rossman

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