

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)

NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioner Pai dissenting and issuing a statement; Commissioner O’Rielly approving in part, dissenting in part and issuing a statement.

I. INTRODUCTION

1. With this Notice of Proposed Rulemaking, we take steps to implement a provision of the Bipartisan Budget Act of 2015¹ that excepts from the Telephone Consumer Protection Act’s² consent requirement robocalls “made solely to collect a debt owed to or guaranteed by the United States.”³ The Budget Act requires the Commission to “prescribe regulations to implement the requirements” within nine months of enactment,⁴ and authorizes the Commission to adopt rules to “restrict or limit the number and duration” of these covered calls.⁵ In taking this first step toward implementing these requirements, as Congress instructed, we recognize and seek to balance the importance of collecting debt owed to the United States⁶ and the consumer protections inherent in the TCPA.⁷

¹ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (Budget Act).

² The Telephone Consumer Protection Act (TCPA) is codified at section 227 of the Communications Act of 1934, as amended. See 47 U.S.C. § 227.

³ Budget Act § 301(a)(1)(A) (amending 47 U.S.C. § 227(b)(1)(A)); see also id. § 301(a)(1)(B) (amending 47 U.S.C. § 227(b)(1)(B) to read, in part, that artificial- or prerecorded-voice calls cannot be made to a residential telephone line without the consent of the called party unless the call is “made solely pursuant to the collection of a debt owed to or guaranteed by the United States”). “Robocalls” include calls made either with an automatic telephone dialing system (“autodialer”) or with a prerecorded or artificial voice. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7694, para. 1 n.1 (2015) (2015 TCPA Declaratory Ruling and Order). The Commission has interpreted the TCPA to apply both to voice calls and to text messages. Id. at 8016-17, para. 107. Throughout this order we refer to robocalls that will be subject to the Budget Act’s consent exception as “covered calls,” and those who can make such robocalls as “covered callers.”

⁴ Budget Act § 301(b).

⁵ Budget Act § 301(a)(2) (amending 47 U.S.C. § 227(b)(2)).

⁶ See para. 6, infra.

⁷ See 2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 7964, paras. 1-2 (“we affirm the vital consumer protections of the TCPA”).

II. BACKGROUND

2. *The TCPA and the Current Rules.* In 1991, Congress enacted the TCPA and made clear that “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”⁸ The TCPA, among other things, limits the calls that can be made to residential and wireless phones, limits unsolicited facsimile advertisements,⁹ and grants consumers a private right of action against alleged violators separate from regulatory enforcement.¹⁰

3. The TCPA and the Commission’s rules generally require a caller to obtain the prior express consent of the called party when: (1) making a non-emergency telemarketing call using an artificial or prerecorded voice to *residential* telephone lines;¹¹ and (2) making any non-emergency call using an automatic telephone dialing system (“autodialer”) or an artificial or prerecorded voice to a *wireless* telephone number, among other specified recipients.¹² Unless exempted by rule or an order of the Commission,¹³ a caller must ensure that he or she has the consent of the called party¹⁴ prior to each such call he or she makes.¹⁵

4. *Budget Act Amendments.* Section 227(b)(1)(A) and (B) of the TCPA now explicitly *do not* make it unlawful for anyone to make autodialed, artificial-voice, or prerecorded-voice calls to both wireless phones and residential landline phones, without the prior express consent of the called party, if the calls are “made solely to collect a debt owed to or guaranteed by the United States.”¹⁶ The law says

⁸ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9). As its name makes clear, the Telephone Consumer Protection Act is a broad consumer protection statute that addresses the calling practices of both bad actors attempting to perpetrate frauds and legitimate businesses and other legitimate callers who employ calling practices consumers may find objectionable. The TCPA makes it unlawful for any person to make robocalls that do not comply with the provisions of the statute. While the Commission has sought to “reasonably accommodate[] individuals’ rights to privacy as well as the legitimate business interests of telemarketers,” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8754, para. 3 (1992) (*1992 TCPA Order*), legitimate callers are not exempt from the statute’s consumer protections.

⁹ See 47 U.S.C. § 227(b)(1)(C).

¹⁰ See *id.* § 227(b)(3).

¹¹ *Id.* § 227(b)(1)(B); 47 CFR § 64.1200(a)(3). Consent to such telemarketing calls must be in writing. 47 CFR § 64.1200(a)(3). Telemarketing calls to residential lines that are made by or on behalf of a tax-exempt nonprofit organization and telemarketing calls subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) may be made without the prior express written consent of the called party. *Id.*

¹² 47 U.S.C. § 227(b)(1)(A); 47 CFR § 64.1200(a)(1)-(2). The restriction also applies to such calls directed to emergency numbers and other specified locations. For autodialed or artificial- or prerecorded-voice telemarketing calls to wireless numbers, prior express consent must be in writing. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1838, para. 20 (2012) (*2012 TCPA Order*); 47 CFR § 64.1200(a)(2).

¹³ See 47 U.S.C. § 227(b)(2)(B), (C).

¹⁴ See *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8000-06, paras. 73-84.

¹⁵ See *id.* at 8014, para. 100; see also *id.* at 7993-99, paras. 55-70 (explaining that a consumer may revoke consent through any reasonable means).

¹⁶ Budget Act § 301(a)(1) (amending 47 U.S.C. § 227(b)(1)(A)). The phrasing is slightly different in the amended § 227(b)(1)(B): “made solely pursuant to the collection of a debt owed to or guaranteed by the United States.” Section 227(b)(1)(A)(iii) is not limited to wireless phone numbers, but states that non-emergency robocalls require consumer consent if made “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for

that, in implementing the Budget Act amendments, 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.”¹⁷ On timing, the Budget Act states that: “Not later than 9 months after the date of enactment of this Act, the Federal Communications Commission, in consultation with the Department of the Treasury, shall prescribe regulations to implement the amendments made by this section.”¹⁸ Commission staff has and will continue to consult with Department of Treasury staff, along with other interested agencies, on Budget Act implementation questions.

5. *Robocalls Generally.* TCPA complaints as a whole are the largest category of informal complaints the Commission receives.¹⁹ The Federal Trade Commission (FTC) received more than 200,000 robocall complaints per month in the final quarter of 2012, and in 2013 the Consumer Federation of America ranked do-not-call and telemarketing abuse issues as its fastest-growing complaint subject.²⁰ Debt collection calls, in particular, often pose a problem for consumers. As we noted in our recent *2015 TCPA Declaratory Ruling and Order*, “[m]ore than one of every five [debt collection call] complaints is about communications tactics, including frequent or repeated calls; obscene, profane or other abusive language; and calls made after written requests to stop.”²¹ The record there indicated that such calls sometimes lack a means for consumers to ask that they stop, and can even instruct the consumer to hang up if they are not the debtor, or that callers may have a policy to not speak to anyone other than the debtor.²² In addition to inconvenience, debt collection calls to wireless numbers, like all calls to wireless numbers, cost consumers financially.²³

6. *Collection of Federal Debt and Debt Collection Generally.* According to the Department of Treasury, in Fiscal Year 2014, the federal Government had \$1.2 trillion of non-tax receivables (current

the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States.” 47 U.S.C. § 227(b)(1)(A)(iii) (as amended).

¹⁷ Budget Act § 301(a)(2)(C) (adding 47 U.S.C. § 227(b)(2)(H)).

¹⁸ Budget Act § 301(b). Commission staff has consulted Department of Treasury staff, as required by the Budget Act, as well as with the staffs of other interested federal agencies, including those with substantive expertise regarding debtor-creditor relationships.

¹⁹ See Federal Communications Commission Encyclopedia, Quarterly Reports-Consumer Inquiries and Complaints, Top Complaint Subjects, <http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints> (last visited May 18, 2015).

²⁰ Federal Trade Commission Staff’s Comments on Public Notice DA 14-1700 Regarding Call Blocking, CG Docket No. 02-278, WC Docket No. 07-135, at 2 n.5 (Jan. 23, 2015); Consumer Federation of America North American Consumer Protection Investigators 2013 Consumer Complaint Survey Report (July 30, 2014), <http://www.consumerfed.org/pdfs/2013-consumer-survey-report.pdf> (last visited May 18, 2015). The FTC also reports that, “[f]rom October 2013 to September 2014, [it] received an average of 261,757 do-not-call complaints per month, of which approximately 55% (144,550 per month) were complaints about robocalls.” Federal Trade Commission Staff’s Comments on Public Notice DA 14-1700 Regarding Call Blocking, CG Docket No. 02-278, WC Docket No. 07-135, at 2 n.4.

²¹ *2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd at 8003, para. 79 (citing Consumer Financial Protect Bureau, Consumer Response Annual Report (January 1, 2013, through December 31, 2013), at 17, http://files.consumerfinance.gov/f/201403_cfpb_consumer-response-annual-report-complaints.pdf (last visited May 18, 2015)).

²² See National Consumer Law Center (NCLC) *et al* Comments on Consumer Bankers Association Petition for Declaratory Ruling at 4; NCLC *et al* Reply Comments on Consumer Bankers Association Petition for Declaratory Ruling at 2.

²³ *2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd at 8021, para. 119.

and delinquent), of which \$139.3 billion was delinquent.²⁴ According to the same report, the top federal creditor agencies were the Department of Education, the Department of Health and Human Services, the Department of Agriculture, the Department of Housing and Urban Development, and the Department of Defense.²⁵ Federal agencies employ a variety of collection tools to recover this debt, including calls.²⁶ The Debt Collection Improvement Act (DCIA) guides agencies and contractors acting on their behalf in their efforts to collect non-tax debts owed to the United States.²⁷ In Fiscal Year 2014, private collection agencies assisted federal creditor agencies by collecting \$157.6 million.²⁸ The Fair Debt Collection Practices Act (FDCPA)²⁹ governs consumer debt collection practices by eliminating abusive debt collection practices, ensuring that debt collectors who refrain from using abusive practices are not competitively disadvantaged, and promoting consistent State action to protect consumers against debt collection abuses.³⁰ The FDCPA does not apply to officers or employees of the United States or any State where those persons are collecting or attempting to collect debts in the performance of their official duties.³¹

III. NOTICE OF PROPOSED RULEMAKING

7. In this *Notice*, we seek comment on implementation of the Budget Act amendments. Among other things, we seek comment on a number of implementation questions, such as which calls are covered by the phrase “solely to collect,” how we should restrict the number and duration of such calls,³² and how to implement such restrictions.³³

²⁴ U.S. Dept. of the Treasury, *Fiscal Year 2014 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies* (May 2015), <https://fiscal.treasury.gov/fsservices/gov/debtColl/pdf/reports/debt14.pdf>. One media source reports that, according to the Federal Reserve Bank of New York, student debt has “more than doubled since 2007 to \$1.3 trillion, and as many as one in four borrowers—excluding those still in school—are 90 days behind on payments.” Brent Kendall and Josh Mitchell, *Supreme Court Denies Appeal on Student-Loan Erasure*, Wall Street Journal, Jan. 11, 2016, <http://www.wsj.com/articles/supreme-court-denies-appeal-on-student-loan-erasure-1452527286>. “More than 80% of all outstanding student debt in the U.S. is guaranteed by or directly owed to the Education Department.” *Id.*

²⁵ U.S. Dept. of the Treasury, *Fiscal Year 2014 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies*, 4 (May 2015), <https://fiscal.treasury.gov/fsservices/gov/debtColl/pdf/reports/debt14.pdf>.

²⁶ See, e.g., *id.* at 12.

²⁷ Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 31 U.S.C. § 3701(b)(1), (f)).

²⁸ U.S. Dept. of the Treasury, *Fiscal Year 2014 Report to the Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies* at 11 (May 2015), <https://fiscal.treasury.gov/fsservices/gov/debtColl/pdf/reports/debt14.pdf>.

²⁹ 15 U.S.C. §§ 1692-1692p.

³⁰ 15 U.S.C. § 1692(e).

³¹ *Id.* § 1692a(6)(C). The longstanding interpretation of § 1692a(6)(C) is that independent contractors are not included in the terms “officer or employee,” and therefore they are covered by the FDCPA. See *Gillie v. Law Office of Eric A. Jones*, 785 F.3d 1091, 1101 (6th Cir. 2015), *cert. granted*, 136 S.Ct. 614 (U.S. Dec. 11, 2015) (No. 15-338) (“The overwhelming weight of authority sensibly finds that independent contractors are not exempt from FDCPA coverage as officers or employees, pursuant to 15 U.S.C. § 1692a(6)(C).”).

³² Budget Act § 301(a)(2)(C) (adding 47 U.S.C. § 227(b)(2)(H)).

³³ We also seek comment on any legal issues raised in the separate statements accompanying this NPRM.

A. Covered Calls

8. *At what point is a call to collect a debt a covered call?* We turn first to the phrase “solely to collect a debt”³⁴ and seek comment regarding the parameters of that phrase, including how we should interpret “solely” and “collect.” Our proposal, to ensure that debtors do not receive non-consent calls before failing to make a timely payment, is to interpret “solely to collect a debt” to mean only those calls made to obtain payment after the borrower is delinquent on a payment. We seek comment on our proposal, including how we should interpret “delinquent” for these purposes, and any alternative approaches. We also seek comment on the alternative that covered calls may only be made after the debtor is in default, how we should define “default,” and whether we should distinguish between default caused by non-payment and a default resulting from a different cause under the terms of the debt instrument.

9. *Are debt servicing calls covered?* We note that debt servicing calls may provide a valuable service by offering information about options and programs designed to keep at-risk debtors from defaulting or becoming delinquent on their loans. Helping a debtor avoid delinquency or default can preserve the person’s payment history and credit rating, and help maintain eligibility for future loans. The potential value of these debt servicing calls, and the probability that servicing calls will create conditions for debtors that allow debts to be more readily collected by the United States, leads us to propose that servicing calls should be included in covered calls. We seek comment on this proposal and, if adopted, how to ensure it does not result in the types of calls consumers would not want, such as marketing calls. We seek comment on what initiating event should enable a creditor or entity acting on a creditor’s behalf to begin making covered calls to convey debt servicing information. Our proposal, above, is that covered calls begin when a borrower is delinquent on a payment; should delinquency also be the initiating event for debt servicing calls, or should some other event trigger a caller’s ability to make servicing calls under the exception? What should the trigger event be?

10. We seek comment on the definition of “servicing” that should guide our analysis in this regard. Should servicing calls include calls informing debtors how to reduce payment amounts; consolidate, modify, or restructure loans; change payment dates; or other matters indirectly related to seeking payment? We propose that permissible “servicing” calls only refer to calls made by the creditor and those entities acting on behalf of the creditor. We seek comment on this proposal.

11. *“Owed to or guaranteed by the United States.”* We seek comment on the meaning of the phrase “a debt owed to or guaranteed by the United States.”³⁵ What is a debt “owed to” the United States and a debt “guaranteed by” the United States? Does the phrase “owed to or guaranteed by” include debts insured by the United States? Should we look to or adopt the definition of “debt” in the DCIA?³⁶ Why or why not?

12. We also seek comment on whether there are any circumstances under which a party other than the federal government obtains a pecuniary interest in a debt such that the debt should no longer be considered to be “owed to . . . the United States.” Basic contract principles dictate that when an owner sells an item, it no longer belongs to the original owner, but to the purchaser.³⁷ Likewise, the purchaser of

³⁴ Budget Act § 301(a)(1)(A) (amending 47 U.S.C. § 227(b)(1)(A)(iii)).

³⁵ *Id.*

³⁶ Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 31 U.S.C. § 3701(b)(1)).

³⁷ Restatement (Second) of Contracts § 22 (1981) (“The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.”); *id.* § 317(1) (“An assignment of a right is a manifestation of the assignor’s intention to transfer it by virtue of which the assignor’s right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.”).

a debt is owed the repayment obligation, not the prior obligee.³⁸ For example, would a debt still be “owed to . . . the United States” if the right to repayment is transferred in whole or part to anyone other than the United States, or a collection agency collects the funds and then remits to the federal government a percentage of the amount collected? Are there specific types of debts that are covered or not covered by the phrase “debt owed to or guaranteed by the United States,”³⁹ such as federal student loans, Small Business Administration loans, and federally guaranteed mortgages? Are there any other factors the Commission should consider in determining which types of debts should be included or excluded from this phrase for purposes of implementing the Budget Act amendments to the TCPA? If so, what are those factors? Consistent with the focus of the amended statutory language on debts “owed to or guaranteed by the United States,” should we also require that the content of covered calls be limited to such debts, and that such calls not be permitted to include content concerning other debts or matters about which the caller may want to speak with the debtor? Similarly, can we and should we place any limits on a covered caller using or transferring (such as by sale) information (such as the debtor’s location or phone number) obtained during covered calls in order to collect other debts or to address other matters?

13. *Who can be called?* We seek comment on the person or persons to whom covered calls may be made. We believe the most reasonable way to read the phrase “solely to collect a debt” is to include only calls to the person or persons obligated to pay the debt because it appears impossible that calls to non-debtors by their nature would directly result in collection from the debtor. We believe this approach will ensure that a debtor’s family, friends, and other acquaintances will not be subject to non-consent robocalls seeking information about the debtor. We seek comment on this proposal and the related question of whether we should limit covered calls to the cellular telephone number the debtor provided to the creditor, *e.g.*, on a loan application.

14. We seek comment on whether calls to persons the caller *does not intend to reach*, that is persons whom the caller might believe to be the debtor but is not, are covered by the exception. Parties seeking debtors’ current telephone numbers often use techniques such as skip tracing,⁴⁰ which are not guaranteed to identify the debtor. We propose to exclude such calls from the exception to encourage callers to avoid robocalling unwitting individuals who have no connection to the debtor. Similarly, and consistent with our recent robocalls decision, we propose that calls to a wireless number a debtor provided to a creditor, but which has been reassigned unbeknownst to the caller, are not covered by the exception, but have the same one-call window the Commission has found to constitute a reasonable opportunity to learn of reassignment.⁴¹ We seek comment on our proposals and any alternatives.

15. *Who may call?* We next seek comment on who may make the covered calls at issue. As amended, the relevant portion of the TCPA reads: “It shall be unlawful for any person . . . to make any call . . . using any [autodialer] or an artificial or prerecorded voice to any [wireless number] unless such call is made solely to collect a debt owed to or guaranteed by the United States.”⁴² This provision is not clear as to who may make calls covered by the exception. We believe the most reasonable way to interpret this language is to include calls made by creditors and those calling on their behalf, including their agents. Is there a limiting principle to determining who should be deemed to be acting on behalf of the creditor? We seek comment on our interpretation and whether we should interpret the statute to

³⁸ Restatement (Second) of Contracts § 317, Illustration 1 (1981) (“A has a right to \$100 against B. A assigns his right to C. A’s right is thereby extinguished, and C acquires a right against B to receive \$100.”).

³⁹ Budget Act § 301(a)(1)(A) (amending 47 U.S.C. § 227(b)(1)(A)(iii)).

⁴⁰ Skip tracing is the process of locating a person, using as much information as possible, including from sources such as phone number databases, credit reports, job applications, criminal background checks, utility bills, and public tax information. See Wikipedia entry for “skiptrace,” <https://en.wikipedia.org/wiki/Skiptrace> (last visited Dec. 17, 2015).

⁴¹ See 2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 8006-10, paras. 85-92.

⁴² 47 U.S.C. § 227(b)(1) (as amended).

include other callers and, if so, who. Alternatively, should we interpret the statute to apply more narrowly to only the creditor or to the creditor and its agents acting within the actual scope of their authority?

16. We note that petitions pending before the Commission seek clarification regarding the meaning of “person” and whether the federal government or its agents are persons for purposes of the TCPA, among other things.⁴³ We seek comment on whether the Budget Act amendments imply that the federal government is a person for TCPA purposes and whether the Commission must resolve these questions in order to complete this rulemaking. We also seek comment on whether and, if so, how the Supreme Court’s recent decision in *Campbell-Ewald Co. v. Gomez*⁴⁴ should inform our implementation of the Budget Act amendments to the TCPA.

B. Limits on Number and Duration of Covered Calls

17. *Need for restrictions.* In considering the need for restrictions on covered calls, we note the volume of consumer complaints, as set forth above.⁴⁵ These factors, along with Congress’ explicit statement that the Commission “shall prescribe regulations to implement the amendments made by” the Budget Act,⁴⁶ and Congress’ authorization 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,”⁴⁷ lead us to propose that we do so here. We seek comment on our proposal and on what types of number and duration restrictions we should adopt for the covered calls. Apart from our specific proposals and questions below, we seek comment generally on what other actions we should consider to reduce unwanted debt collection robocalls to consumers.

18. *If adopted, the nature of restrictions.* We seek comment on how we should restrict or limit the number and duration of covered calls, including both collection calls and debt servicing calls. Consistent with the conditions we have adopted when granting exemptions to permit certain free-to-end-user robocalls to be made without consent of the called party,⁴⁸ and regardless of whether the caller leaves a prerecorded or artificial-voice message or whether the call is an autodialed call resulting in a live conversation, we propose to restrict the number of covered calls to three per month, per delinquency only after delinquency. We believe three calls per month provides an adequate opportunity to convey necessary information about the debt, repayment, and other matters the caller wishes to communicate without the consent of the called party and, in any case, affords callers an opportunity to obtain the debtor’s consent to make additional calls beyond any limit we adopt. We propose that the limit on the number of calls should be for any initiated calls, even if unanswered by a person, because many consumers may choose not to answer calls from unfamiliar numbers.⁴⁹ These limits would apply to

⁴³ *Broadnet Teleservices LLC*, Petition for Declaratory Ruling, CG Docket No. 02-278, filed Sept. 16, 2015; *National Employment Network Association*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed Aug. 5, 2014; *RTI International*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed Sept. 29, 2014.

⁴⁴ *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016).

⁴⁵ See para. 5, *supra*.

⁴⁶ Budget Act § 301(b).

⁴⁷ Budget Act § 301(a)(2)(C) (adding 47 U.S.C. § 227(b)(2)(H)).

⁴⁸ In the *2015 TCPA Declaratory Ruling and Order*, we exempted certain banking calls, allowing three voice calls or text messages per event over a three-day period; we exempted certain healthcare calls, allowing one message per day, up to a maximum of three voice calls or text messages combined per week from a specific healthcare provider. *2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd at 8027-28, 8032, paras. 138, 147.

⁴⁹ See *2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd at 8000, para. 72.

autodialed, prerecorded, or artificial voice calls to wireless numbers.⁵⁰ In the case of autodialed calls, the limits apply whether they use a prerecorded or artificial voice or instead attempt to connect the called debtor with a live agent. We see potential value, however, in debtors hearing from a live agent to discuss the debt and potential servicing options and seek comment on whether and how we should encourage that approach. We seek comment on these proposals. We also seek comment on the maximum duration of a voice call, and whether we should adopt different duration limits for prerecorded- or artificial-voice calls than for autodialed calls with a live caller. Should there be a limit on the length of text messages? What should that limit be? We also seek comment on how to count debt servicing calls for purposes of our proposed three-call limit per month or any other limit on the number of calls.

19. Should the Commission look to other standards or precedents for guidance? For example, should the Commission restrict calls to the hours of 8:00 a.m. to 9:00 p.m. (local time at the called party's location), similar to the rule that now applies to telemarketing calls?⁵¹ Should the Commission consider any limits on the number of calls pursuant to the Fair Debt Collection Practices Act if it adopts such limits here? How should the Commission take account of any limits adopted by the Consumer Financial Protection Bureau? Are there other standards or precedents, including restrictions that might exist under either federal or state debt collection laws, the Commission should consider? Are calls covered by the Budget Act exception subject to other laws and rules that more generally govern debt collection and, if so, how should we harmonize any overlapping requirements?

20. *Consumer ability to stop covered calls.* The Commission has determined that an ability to stop unwanted calls is critical to the TCPA's goal of consumer protection.⁵² That right may be more important here, where consumers need not consent to the calls in advance in order for a caller to make the calls. We propose, therefore, that consumers should have a right to stop such calls at any point the consumer wishes. We seek comment on our proposal. For example, does the amended law allow the Commission to require that a caller limit covered calls to the first of (1) a specific number (perhaps within a set period of time) or (2) until the consumer says "stop"? We propose that stop-calling requests should apply to a subsequent collector of the same debt.⁵³ We seek comment on this proposal and how we might ensure that a request to stop such calls be honored if later transferred to other collectors. Should the Commission require that callers making covered calls record any request to stop calling and provide a record of such a request to subsequent callers along with other information about the debt?

21. We also propose, so that consumers fully understand any right we adopt to stop calls, to require callers to inform debtors of their right to make such a request. We seek comment on this proposal and on when and how callers should provide such notice. For example, should the permissible ways to opt out of further calls under the TCPA—*i.e.*, any reasonable method, including orally or in response to a text message—apply here?⁵⁴ Should the Commission require callers making artificial- or prerecorded-voice calls to include an automated, interactive voice- and/or key press-activated opt-out mechanism for

⁵⁰ As noted below, *see* para. 23, *infra*, we seek comment on whether such limits should also apply to covered prerecorded or artificial voice calls to residential lines.

⁵¹ *See* 47 CFR § 64.1200(c)(1).

⁵² *See 2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd at 7997, para. 66 ("As we have found above, the most reasonable interpretation of 'prior express consent' in light of the TCPA's consumer protection goals is to permit a right of revocation."); *see also id.* at 7993-99, paras. 55-70 (discussing revocation of consent and a consumer's methods of revoking consent).

⁵³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02-278, 23 FCC Rcd 559, 564-65, paras. 9-10 (2008) (*ACA Declaratory Ruling*) (discussing calls made "in connection with an existing debt").

⁵⁴ *See 2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd at 7996, para. 64.

stopping future excepted calls?⁵⁵

C. Other Implementation Issues

22. *Covered Calls to Residential Lines.* We note that under our current rules, artificial- or prerecorded-voice calls to residential lines that are made for the purpose of collecting a debt are currently not subject to the prior express consent requirement. Although the TCPA allows for broad application of the prior express consent requirement to all non-emergency artificial- and prerecorded-voice calls to residential lines,⁵⁶ the Commission has exercised its statutory exemption authority so as to apply the consent requirement only to calls that include or introduce an advertisement or constitute telemarketing.⁵⁷ The Commission has also found that debt collection calls do not constitute telemarketing.⁵⁸ Accordingly, the consent exception under the Budget Act currently does not appear to affect whether artificial- or prerecorded-voice calls to residential lines for the purpose of collecting a covered debt require prior express consent.⁵⁹

23. We nonetheless propose to revise our rule concerning artificial- or prerecorded-voice calls to residential lines to reflect the exception contained in the Budget Act. We do not believe, however, that it is necessary at the present time to determine the exact contours of the statutory exception for covered calls to residential lines, including, for example, determining the specific impact of the somewhat different language in the Budget Act amendments with regard to covered calls to residential lines and to wireless numbers. We seek comment on these views, and on whether we should consider any additional issues concerning covered calls. For example, should any limits on the number and duration of covered calls also apply to covered calls to residential lines, even though such calls would not have required prior express consent even before the Budget Act amendments to the TCPA?

24. *Restrictions on Calls to Cellular Telephone Service.* Congress authorized the Commission to “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.”⁶⁰ Yet, the amendment to the TCPA, authorizing calls made to collect a debt owed to or guaranteed by the United States, is broader, applying to “any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.”⁶¹ Considering the identical language in the prior delegation of authority in Section 227(b)(2)(C), we propose that Congress delegated the Commission authority to limit the number and duration of all calls made pursuant to the debt collection exception in section 227(b)(1)(A)(iii).

25. Congress, in granting the Commission authority to limit the number and duration of calls, used identical language to the language it used in the separate delegation of authority in Section

⁵⁵ Cf. 47 CFR § 64.1200(b)(3).

⁵⁶ 47 U.S.C. § 227(b)(1)(B) (requiring prior express consent for all non-emergency artificial- or prerecorded-voice calls to residential lines unless exempted by the Commission).

⁵⁷ 47 CFR § 64.1200(a)(3); *1992 TCPA Order*, 7 FCC Rcd at 8755, para. 5

⁵⁸ *ACA Declaratory Ruling*, 23 FCC Rcd at 565, para. 11.

⁵⁹ The Budget Act amendment is not superfluous. The statutory consent exception would apply to covered calls even if the Commission were to alter its prior rulings.

⁶⁰ Budget Act § 301(a)(2)(C) (adding 47 U.S.C. § 227(b)(2)(H)).

⁶¹ Budget Act § 301(a)(1)(A) (amending 47 U.S.C. § 227(b)(1)(A)(iii)).

227(b)(2)(C).⁶² The identical language in these two delegations of authority indicates that Congress intended the two provisions to apply to the same services.⁶³

26. The Commission has interpreted Section 227(b)(2)(C) to apply to all services mentioned in Section 227(b)(1)(A)(iii). In so doing, it has interpreted “cellular telephone service” by asking whether services are functionally equivalent from the consumer perspective rather than on technical or regulatory differences, such as which spectrum block is used to provide the service.⁶⁴ This avoids, for example, consumers receiving wireless voice service from being treated differently depending on which spectrum block their carriers use and callers having to determine which spectrum block is used for a particular consumer’s service in order to know which requirements apply.

27. Applying the canon of statutory construction that Congress knows the law, including relevant agency interpretations, at the time it adopts a statute, we presume that Congress knew of the Commission’s interpretation of this key language.⁶⁵ Congress used the same language in the recent delegation of authority without taking any action to alter the Commission’s interpretation of identical language elsewhere in the same statute. We therefore propose that the authority delegated to us in the new Section 227(b)(2)(H) added by the Budget Act applies to all services to which amended Section 227(b)(1)(A)(iii) applies. We seek comment on this proposal.

28. *Application of Other TCPA Restrictions to Covered Calls.* We believe the most reasonable interpretation is that calls must be in compliance with all other legal requirements—for example, the requirement that artificial- or prerecorded-voice calls contain certain identifying information⁶⁶—in order for the Budget Act consent exception to apply. We seek comment on this proposal, as well as on whether and how compliance with other legal requirements should affect the application of the Budget Act exception.

IV. LEGAL AUTHORITY

29. The proposed and anticipated rules are authorized under sections 1-4, 201(b), 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201(b), 227, 303(r); and the Bipartisan Budget Act of 2015, Public Law No. 114-74, 129 Stat. 584.

V. PROCEDURAL MATTERS

1. Initial Regulatory Flexibility Act Analysis

30. With respect to this *Notice*, an Initial Regulatory Flexibility Analysis (“IRFA”) is contained in Appendix B. As required by Section 603 of the Regulatory Flexibility Act of 1980, as amended,⁶⁷ the Commission has prepared an IRFA of the expected impact on small entities of the proposals contained in the *Notice*. Written public comments are requested on the IRFA. Comments must

⁶² 47 U.S.C. § 227(b)(2)(C) (authorizing the Commission to exempt certain calls made “to a number assigned to a cellular telephone service” from the requirements of Section 227(b)(1)(A)(iii)).

⁶³ See, e.g., *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240 (D.C. Cir. 2007).

⁶⁴ See *2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd at 7988, para. 43 n.174. The Commission also has taken a similar consumer-oriented approach to wireless services in other contexts. See also *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 13-135, Seventeenth Report, 29 FCC Rcd 15311, 15314, para. 3 (WTB 2014) (“Similar to previous reports, the analysis in this *Report* is based on a consumer-oriented view of mobile services, with a focus on specific product categories regardless of their regulatory classification.”).

⁶⁵ See, e.g., *Washington Legal Foundation v. U.S. Sentencing Commission*, 17 F.3d 1446, 1450 (D.C. Cir. 1994).

⁶⁶ 47 CFR § 64.1200(b)(1)-(2).

⁶⁷ See 5 U.S.C. § 603.

be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice*. The Commission will send a copy of the *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.⁶⁸

2. Paperwork Reduction Act

31. The *Notice* contains either new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).⁶⁹ It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002,⁷⁰ we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”⁷¹

3. Ex Parte Rules

32. Permit-But-Disclose. The proceeding this *Notice* initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁷² Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

4. Filing Requirements

33. Comments and Replies. Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.

⁶⁸ See 5 U.S.C. § 603(a). In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.

⁶⁹ Pub. L. No. 104-13.

⁷⁰ Pub. L. No. 107-198.

⁷¹ 44 U.S.C. § 3506(c)(4).

⁷² 47 CFR §§ 1.1200 *et seq.*

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

34. Accessibility Information. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

35. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

36. Additional Information. For additional information on this proceeding, contact Kristi Thornton, Kristi.Thornton@fcc.gov or (202) 418-2467, of the Consumer and Governmental Affairs Bureau, Consumer Policy Division.

VI. ORDERING CLAUSES

37. **IT IS ORDERED**, pursuant to the authority contained in sections 1-4, 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, 303(r); and the Telephone Consumer Protection Act as amended by the Bipartisan Budget Act of 2015, Public Law 114-74, 129 Stat. 584, that this *Notice of Proposed Rulemaking* **IS ADOPTED**.

38. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Draft Proposed Rules for Public Comment

The Federal Communications Commission proposes to amend Part 64 of Title 47 of the Code of Federal Regulations as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

Subpart L – Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising

1. Amend § 64.1200 by revising paragraph (a)(1)(iii) and (a)(3)(v), and by adding paragraph (a)(3)(vi) to read:

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

...

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States.

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

...

(v) Delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 15 CFR 160.103;

(vi) Is made solely pursuant to the collection of a debt owed to or guaranteed by the United States.

APPENDIX B**Initial Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended, (RFA),

¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking* (*Notice* or NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided on the first page of this document. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.² In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. The *Notice* contains proposals regarding how to modify our rules to align them with the amended statutory language of the TCPA enacted by Congress in the Bipartisan Budget Act of 2015.⁴ The NPRM seeks comment generally on all entities that make autodialed or prerecorded- or artificial-voice calls to collect debts owed to or guaranteed by the United States. Paragraphs 8 through 16 of the NPRM seek comment on covered calls. Specifically, in paragraph 8 of the NPRM, we seek comment on the parameters of the phrase “solely to collect a debt.” In paragraphs 9 through 10 of the NPRM, we seek comment on whether debt servicing calls are covered. In paragraphs 11 through 12 of the NPRM, we seek comment on the meaning of the phrase “owed to or guaranteed by the United States,” including the applicability of the exception to debt insured by or purchased from the United States. In paragraphs 13 through 14 of the NPRM, we seek comment on the person or persons to whom covered calls can be made. In paragraphs 15 through 16 of the NPRM, we seek comment on who is entitled to make calls under the exception Congress created in the 2015 Budget Act.

3. Paragraphs 17 through 21 of the NPRM seek comment on limits on the number and duration of covered calls. Specifically, in paragraph 17 of the NPRM, we seek comment on the need for restrictions on covered calls, including types of number and duration restrictions. In paragraphs 18 through 19 of the NPRM, we seek comment on the nature of the restrictions, if adopted, including looking to other standards or precedents for guidance. In paragraphs 20 through 21 of the NPRM, we seek comment on the consumer’s ability to stop covered calls.

4. Paragraphs 22 through 28 of the NPRM seek comment on other implementation issues. Specifically, in paragraphs 22 through 23 of the NPRM, we seek comment on the applicability of the exception to residential lines. In paragraphs 24 through 27 of the NPRM, we seek comment on whether the authority delegated to us in the new Section 227(b)(2)(H) added by the Budget Act applies to all services to which amended Section 227(b)(1)(A)(iii) applies. In paragraph 28 of the NPRM, we seek comment on the application of other TCPA restrictions to covered calls. Our underlying concern is to protect small businesses by giving them ample opportunity to comment on the proposed rules under consideration.

¹ 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² 5 U.S.C. § 603(a).

³ *Id.*

⁴ Pub. L. No. 114-74 (2015), 129 Stat. 584 (Budget Act).

5. The Commission's rules restricting the use of automated telephone dialing equipment and artificial or prerecorded voice to call wireless numbers apply to a wide range of entities, including all entities that make such calls or texts to wireless telephone numbers to collect debts owed to or guaranteed by the federal government. Thus, we expect that the proposals in this proceeding could have a significant economic impact on a substantial number of small entities in a wide range of categories.

B. Legal Basis

6. The proposed and anticipated rules are authorized under sections 1-4, 201(b), 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201(b), 227, 303(r); and the Bipartisan Budget Act of 2015, Public Law No. 114-74, 129 Stat. 584.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

7. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.⁵ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁶ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁷ Under the Small Business Act, a "small business concern" is one that: 1) is independently owned and operated; 2) is not dominant in its field of operation; and 3) meets any additional criteria established by the Small Business Administration (SBA).⁸

8. *Collection Agencies.* This industry comprises establishments primarily engaged in collecting payments for claims and remitting payments collected to their clients.⁹ The SBA has determined that Collection Agencies with \$15 million or less in annual receipts qualify as small businesses.¹⁰ Census data for 2007 indicate that 4,532 establishments in this category operated throughout that year. Of those, 4,288 establishments operated with annual receipts of less than \$10 million.¹¹ We conclude that a substantial majority of businesses in this category are small under the SBA standard.

9. *Telemarketing Bureaus and Other Contact Centers.* This U.S. industry comprises establishments primarily engaged in operating call centers that initiate or receive communications for others-via telephone, facsimile, email, or other communication modes-for purposes such as (1) promoting clients products or services, (2) taking orders for clients, (3) soliciting contributions for a client, and (4)

⁵ 5 U.S.C. § 603(b)(3).

⁶ 5 U.S.C. § 601(6).

⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 5 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

⁸ 15 U.S.C. § 632.

⁹ U.S. Census Bureau, *2007 NAICS Definitions, 561440 Collection Agencies*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=561440&search=2007%20NAICS%20Search> (last visited Dec. 17, 2015).

¹⁰ 13 CFR § 121.201; 2012 NAICS code 561440.

¹¹ 2007 U.S. Economic Census, NAICS Code 561440, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table.

providing information or assistance regarding a client's products or services.¹² The SBA has determined that Telemarketing Bureaus and other Contact Centers with \$15 million or less in annual receipts qualify as small businesses.¹³ U.S. Census data for 2007 indicate that 2,100 firms in this category operated throughout that year. Of those, 1,909 operated with annual receipts of less than \$10 million.¹⁴ We conclude that a substantial majority of businesses in this category are small under the SBA standard.

10. *Commercial Banks and Savings Institutions.* Commercial banks are establishments primarily engaged in accepting demand and other deposits and making commercial, industrial, and consumer loans. Commercial banks and branches of foreign banks are included in this industry.¹⁵ Savings institutions are establishments primarily engaged in accepting time deposits, making mortgage and real estate loans, and investing in high-grade securities. Savings and loan associations and savings banks are included in this industry.¹⁶ The SBA has determined that Commercial Banks and Savings Institutions with \$500 million or less in assets qualify as small businesses.¹⁷ December 2013 Call Report data compiled by SNL Financial indicate that 6,877 firms in this category operated throughout that year.¹⁸ Of those, 5,533 qualify as small entities.¹⁹ Based on this data, we conclude that a substantial number of businesses in this category are small under the SBA standard.

11. *Credit Unions.* This industry comprises establishments primarily engaged in accepting members' share deposits in cooperatives that are organized to offer consumer loans to their members.²⁰ The SBA has determined that Credit Unions with \$500 million or less in assets qualify as small businesses.²¹ The December 2013 National Credit Union Administration Call Report data indicate that

¹² U.S. Census Bureau, *2007 NAICS Definitions, 561422 Telemarketing Bureaus and Other Contact Centers*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=561422&search=2007%20NAICS%20Search> (last visited Dec. 17, 2015).

¹³ 13 CFR § 121.201; 2012 NAICS code 561422.

¹⁴ 2007 U.S. Economic Census, NAICs Code 561422, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table.

¹⁵ U.S. Census Bureau, *2012 NAICS Definitions, 522110 Commercial Banks*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522110&search=2012%20NAICS%20Search> (last visited Dec. 17, 2015).

¹⁶ U.S. Census Bureau, *2012 NAICS Definitions, 522120 Savings Institutions*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522120&search=2012%20NAICS%20Search> (last visited Jan. 13, 2015).

¹⁷ 13 CFR § 121.201; 2012 NAICS code 522110 and 2012 NAICS code 522120. A financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. "Assets" means the assets defined according to the Federal Financial Institutions Examination Council 041 call report form for NAICS Codes 522110, 522120, 522190, and 522210 and the National Credit Union Administration 5300 call report form for NAICS code 522130.

¹⁸ Bureau of Consumer Financial Protection, Home Mortgage Disclosure (Regulation C), Final Rule, 80 Fed. Reg. 66128, 66301 (Oct. 28, 2015) (CFPD Rule) (citing December 2013 Call Report data as compiled by SNL Financial).

¹⁹ *Id.*

²⁰ U.S. Census Bureau, *2007 NAICS Definitions, 522130 Credit Unions*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522130&search=2007%20NAICS%20Search> (last visited Jan. 13, 2015).

²¹ 13 CFR § 121.201; 2012 NAICS code 522130. A financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. "Assets" means the assets defined according to the Federal Financial Institutions Examination Council 041 call report form for NAICS Codes 522110, 522120, 522190, and 522210 and the National Credit Union Administration 5300 call report form for NAICS code 522130.

6,687 firms in this category operated throughout that year.²² Of those, 6,252 qualify as small entities.²³ Based on this data, we conclude that a substantial number of businesses in this category are small under the SBA standard.

12. *Other Depository Credit Intermediation.* This industry comprises establishments primarily engaged in accepting deposits and lending funds (except commercial banking, savings institutions, and credit unions). Establishments known as industrial banks or Morris Plans and primarily engaged in accepting deposits, and private banks (i.e., unincorporated banks) are included in this industry.²⁴ The SBA has determined that Other Depository Credit Intermediation entities with \$500 million or less in assets qualify as small businesses.²⁵ Census data for 2007 indicate that 29 firms in this category operated throughout that year.²⁶ Due to the nature of this category, we conclude that a substantial number of businesses in this category are small under the SBA standard.

13. *Sales Financing.* This industry comprises establishments primarily engaged in sales financing or sales financing in combination with leasing. Sales financing establishments are primarily engaged in lending money for the purpose of providing collateralized goods through a contractual installment sales agreement, either directly from or through arrangements with dealers.²⁷ The SBA has determined that Sales Financing entities with \$7 million or less in annual receipts qualify as small businesses.²⁸ Census data for 2007 indicate that 2,267 firms in this category operated throughout that year. Of those, 1,806 operated with annual receipts of less than \$5 million.²⁹ We conclude that a substantial majority of businesses in this category are small under the SBA standard.

14. *Consumer Lending.* This U.S. industry comprises establishments primarily engaged in making unsecured cash loans to consumers.³⁰ The SBA has determined that Consumer Lending entities with \$7 million or less in annual receipts qualify as small businesses.³¹ Census data for 2007 indicate that 3,234 firms in this category operated throughout that year. Of those, 2,969 operated with annual receipts

²² CFPD Rule at 66301 (citing National Credit Union Administration 5300 call report form).

²³ *Id.*

²⁴ U.S. Census Bureau, *2012 NAICS Definitions, 522190 Other Depository Credit Intermediation*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522190&search=2012%20NAICS%20Search> (last visited Jan. 13, 2015).

²⁵ 13 CFR § 121.201; 2012 NAICS code 522190. A financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. "Assets" means the assets defined according to the Federal Financial Institutions Examination Council 041 call report form for NAICS Codes 522110, 522120, 522190, and 522210 and the National Credit Union Administration 5300 call report form for NAICS code 522130.

²⁶ 2007 U.S. Economic Census, NAICS Code 522190, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table.

²⁷ U.S. Census Bureau, *2007 NAICS Definitions, 522220 Sales Financing*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522220&search=2007%20NAICS%20Search> (last visited Jan. 13, 2015).

²⁸ 13 CFR § 121.201; 2007 NAICS code 522220.

²⁹ 2007 U.S. Economic Census, NAICS Code 522220, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table.

³⁰ U.S. Census Bureau, *2007 NAICS Definitions, 522291 Consumer Lending*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522291&search=2007%20NAICS%20Search> (last visited Jan. 13, 2015).

³¹ 13 CFR § 121.201; 2007 NAICS code 522291.

of less than \$5 million.³² We conclude that a substantial majority of businesses in this category are small under the SBA standard.

15. *Real Estate Credit.* This U.S. industry comprises establishments primarily engaged in lending funds with real estate as collateral.³³ The SBA has determined that Real Estate Credit entities with \$7 million or less in annual receipts qualify as small businesses.³⁴ Census data for 2007 indicate that 5,791 firms in this category operated throughout that year. Of those, 5,036 operated with annual receipts of less than \$5 million.³⁵ We conclude that a substantial majority of businesses in this category are small under the SBA standard.

16. *International Trade Financing.* This U.S. industry comprises establishments primarily engaged in providing one or more of the following: (1) working capital funds to U.S. exporters; (2) lending funds to foreign buyers of U.S. goods; and/or (3) lending funds to domestic buyers of imported goods.³⁶ The SBA has determined that International Trade Financing entities with \$38.5 million or less in annual receipts qualify as small businesses.³⁷ Census data for 2007 indicate that 125 firms in this category operated throughout that year. Of those, 118 operated with annual receipts of less than \$25 million.³⁸ We conclude that a substantial majority of businesses in this category are small under the SBA standard.

17. *Secondary Market Financing.* This U.S. industry comprises establishments primarily engaged in buying, pooling, and repackaging loans for sale to others on the secondary market.³⁹ The SBA has determined that Secondary Market Financing entities with \$7 million or less in annual receipts qualify as small businesses.⁴⁰ Census data for 2007 indicate that 105 firms in this category operated throughout that year. Of those, 74 operated with annual receipts of less than \$5 million.⁴¹ We conclude that a substantial majority of businesses in this category are small under the SBA standard.

18. *All Other Nondepository Credit Intermediation.* This U.S. industry comprises establishments primarily engaged in providing nondepository credit (except credit card issuing, sales financing, consumer lending, real estate credit, international trade financing, and secondary market

³² 2007 U.S. Economic Census, NAICs Code 522292, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table.

³³ U.S. Census Bureau, *2007 NAICS Definitions, 522292 Real Estate Credit*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522292&search=2007%20NAICS%20Search> (last visited Jan. 13, 2015).

³⁴ 13 CFR § 121.201; 2007 NAICS code 522292.

³⁵ 2007 U.S. Economic Census, NAICs Code 522292, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table.

³⁶ U.S. Census Bureau, *2007 NAICS Definitions, 522293 International Trade Financing*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522293&search=2007%20NAICS%20Search> (last visited Jan. 13, 2015).

³⁷ 13 CFR § 121.201; 2012 NAICS code 522293.

³⁸ 2007 U.S. Economic Census, NAICs Code 522293, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table.

³⁹ U.S. Census Bureau, *2007 NAICS Definitions, 522294 Secondary Market Financing*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522294&search=2007%20NAICS%20Search> (last visited Jan. 13, 2015).

⁴⁰ 13 CFR § 121.201; 2007 NAICS code 522294.

⁴¹ 2007 U.S. Economic Census, NAICs Code 522294, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodType=table.

financing).⁴² Examples of types of lending in this industry are: short-term inventory credit, agricultural lending (except real estate and sales financing), and consumer cash lending secured by personal property.⁴³ The SBA has determined that All Other Nondepository Credit Intermediation entities with \$38.5 million or less in annual receipts qualify as small businesses.⁴⁴ Census data for 2007 indicate that 4,590 firms in this category operated throughout that year. Of those, 4,494 operated with annual receipts of less than \$25 million.⁴⁵ We conclude that a substantial majority of businesses in this category are small under the SBA standard.

19. *Mortgage and Nonmortgage Loan Brokers.* This industry comprises establishments primarily engaged in arranging loans by bringing borrowers and lenders together on a commission or fee basis.⁴⁶ The SBA has determined that Mortgage and Nonmortgage Loan Brokers with \$7 million or less in annual receipts qualify as small businesses.⁴⁷ Census data for 2007 indicate that 17,702 firms in this category operated throughout that year. Of those, 17,393 operated with annual receipts of less than \$5 million.⁴⁸ We conclude that a substantial majority of businesses in this category are small under the SBA standard.

20. *Other Activities Related to Credit Intermediation.* This industry comprises establishments primarily engaged in facilitating credit intermediation (except mortgage and loan brokerage; and financial transactions processing, reserve, and clearinghouse activities).⁴⁹ The SBA has determined that Other Activities Related to Credit Intermediation entities with \$7 million or less in annual receipts qualify as small businesses.⁵⁰ Census data for 2007 indicate that 5,494 firms in this category operated throughout that year. Of those, 5,277 operated with annual receipts of less than \$5 million.⁵¹ We conclude that a substantial majority of businesses in this category are small under the SBA standard.

⁴² U.S. Census Bureau, *2007 NAICS Definitions, 522298 All Other Nondepository Credit Intermediation*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522298&search=2007%20NAICS%20Search> (last visited Dec. 17, 2015).

⁴³ *Id.*

⁴⁴ 13 CFR § 121.201; 2012 NAICS code 522298.

⁴⁵ 2007 U.S. Economic Census, NAICs Code 522298, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodT ype=table.

⁴⁶ U.S. Census Bureau, *2007 NAICS Definitions, 522310 Mortgage and Nonmortgage Loan Brokers*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522310&search=2007%20NAICS%20Search> (last visited Dec. 17, 2015).

⁴⁷ 13 CFR § 121.201; 2012 NAICS code 522310.

⁴⁸ 2007 U.S. Economic Census, NAICs Code 522310, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodT ype=table.

⁴⁹ U.S. Census Bureau, *2007 NAICS Definitions, 522390 Other Activities Related to Credit Intermediation*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=522390&search=2007%20NAICS%20Search> (last visited Dec. 17, 2015).

⁵⁰ 13 CFR § 121.201; 2012 NAICS code 522390.

⁵¹ 2007 U.S. Economic Census, NAICs Code 522390, at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_52SSSZ4&prodT ype=table.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

21. Under the current rules, all artificial or prerecorded voice calls to a wireless telephone number are prohibited without prior express consent.⁵² This NPRM contains proposals regarding how to modify our rules to align them with the amended statutory language of the TCPA enacted by Congress in the 2015 Budget Act, creating an exception that allows calls to wireless telephones made solely pursuant to the collection of a debt owed to or guaranteed by the United States.

22. The proposals under consideration could result in additional costs to regulated entities. If the Commission imposes restrictions on the number and duration of calls to wireless numbers as proposed for comment in paragraphs 17 through 21 of the NPRM, then calling entities might incur some additional costs in tracking that information. For example, calling entities might need to modify software, develop tracking procedures, and train staff in order to keep within the restrictions on the number and duration of calls to wireless numbers. However, some calling entities may already track calls and call durations, and therefore, no additional compliance efforts would be required. Calling entities may also be relieved of tracking the consent of the called party, which could offset any new burdens.

23. If the Commission determines that a called party may stop future calls concerning collection of a debt owed to or guaranteed by the United States as proposed for comment in paragraphs 20 through 21 of the NPRM, then calling entities might incur some additional cost in maintaining do-not-call lists for wireless numbers. Such costs could include software modification, development of procedures, and training. However, some calling entities may already have procedures in place for maintaining do-not-call lists, and therefore, no additional compliance efforts will be required.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

24. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁵³

25. The Commission believes that any economic burden these proposed rules may have on carriers is outweighed by the benefits to consumers. The compliance costs we identified in Section D are small. We seek comment on how to minimize the economic impact of our proposals. For instance, we seek comment on the specific costs of the measures we discuss in the NPRM and ways we might mitigate any implementation costs. We also seek comment on the overall economic impact these proposed rules may have because we seek to minimize all costs associated with these proposed rules. Finally, we seek comment on whether to consider the size of the calling entity or the type of debt being collected in determining the appropriate timeframes for implementation.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

26. None.

⁵² 47 U.S.C. § 227(b)(1)(A); 47 CFR § 64.1200(a)(1)-(2). If such calls are for telemarketing purposes, the consent must be in writing. 47 CFR § 64.1200(a)(2). This restriction also applies to such calls directed to emergency numbers and other specified locations. For autodialed or prerecorded-voice telemarketing calls to wireless numbers, prior express consent must be written. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1838, para. 20 (2012) (*2012 TCPA Order*).

⁵³ 5 U.S.C. § 603(c).

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278

If there is one thing Americans can agree on, it's that nobody wants to get robocalls. Whether you are sitting down for dinner or trying to unwind at the end of a long day, the last thing you want is to hear "Rachel from Cardholder Services" on the other end of the line.

This is the main reason why Congress passed the Telephone Consumer Protection Act (TCPA) in 1991—to crack down on the illegal telemarketing calls and robocalls that consumers hate. But last summer, the FCC twisted the law's words to target entirely legitimate, live, non-telemarketing calls between businesses and their customers.

It turns out that the FCC's decision created a problem for the federal government. The federal government relies on a host of private businesses to communicate with the American public, including by placing calls to collect on debts owed to or guaranteed by the United States. The FCC's new approach rendered those calls unlawful.

Rather than asking Congress to overturn the agency's order on this point, the Obama Administration took a different tack—one hostile to consumers. It snuck into last year's budget deal a special exemption for federal debt collectors.¹

Just think about what that means: The federal government has deliberately allowed federal debt collectors to robocall consumers at their homes and on their cellphones without their prior express consent. As it is, Americans hate picking up the phone to hear the tinny sound of a robotic voice. I tend to doubt their irritation will lessen when they learn that voice is calling to collect cash on behalf of the government.

Just think about what else that means: Yet again, the government is using the law to benefit politically favored constituencies. "The law" in this area used to mean one set of rules that applied equally to all. Now, the game has changed; "the law" nominally restricts everyone but singles out the few, the happy few, that band of robocallers, for special treatment.

The FCC itself accommodated this kind of rent-seeking in the *TCPA Transformation Order*. It nominally prohibited any business from using any technology other than a "rotary-dial phone" to call consumers.² But it then exempted prison payphone providers,³ banks,⁴ and healthcare companies⁵ from this prohibition. Now we can add federal debt collectors to the list of companies with special privileges.

Perhaps the Administration thinks that bestowing largesse upon favored industries is just the way business is done in Washington. Perhaps it thinks that subjecting Americans to intrusive robocalls is worth it on the off-chance that it yields a return, however slight, for the U.S. Treasury.

¹ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584.

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7975, para. 18 (2015).

³ *Id.* at 7884–89, paras. 38–46.

⁴ *Id.* at 8023–28, paras. 127–39.

⁵ *Id.* at 8028–32, paras. 140–48.

Whatever the reason, I don't think it's right. And I don't think it's what the American people want. We should be exercising our discretion to mitigate the law's impact as much as possible, and yet we are not. I respectfully dissent.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY
DISSENTING IN PART AND APPROVING IN PART**

*Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG
Docket No. 02-278*

The Commission's recent implementation of the Telephone Consumer Protection Act (TCPA) has been nothing short of a disaster. Its sweeping interpretations contained in its June 2015 Order have unhinged implementation from both the law and reality, preventing legitimate businesses, as well as federal, state, and local government entities, from reaching Americans on their mobile phones to provide important information that consumers want or need to receive. Increasingly, upstanding companies are being forced to choose between complying with the Commission's absurd TCPA rulings or adhering to other federal and state laws that mandate that companies contact consumers. Consumers lose out and businesses are being taken to the cleaners to settle frivolous TCPA claims.

Even the Administration has become so alarmed by the prospect that the United States might not be able to collect on its debts that it sought to exempt calls regarding such debts from the TCPA's prior express consent requirements. And in 2015, Congress enacted legislation codifying the exemption and requiring the FCC to implement it by this August. In other words, both the Administration and Congress saw a need to override the Commission.

Instead of accepting fate, the FCC attempts to read the exception as narrowly as possible, contravening both the spirit and text of the law. My vote to approve in part is on the narrowest possible grounds: solely to initiate the rulemaking required by Congress. In all other respects, I strongly dissent. The Commission should be embarrassed to issue an NPRM that flies in the face of Congress's clear instructions, and I am concerned that it will further damage the agency's credibility, if that is even possible.

A significant threshold concern is that the NPRM proposes that the exemption will not apply to calls to reassigned numbers, even if a company was acting in good faith to reach a borrower and had no knowledge of the reassignment. That decision alone may gut the relief. Companies that have a choice may not risk calling consumers if they could be liable for unwittingly making as few as two stray calls to a reassigned number. Or, if they are required to place calls by other federal laws, then the FCC has effectively put targets on their backs. For instance, one commenter pointed out that the rules for Treasury's Home Affordable Modification Program (HAMP) require calls to the last known phone numbers of record even if the borrower is not the current subscriber.¹ Given that an estimated 100,000 numbers change hands each day, and there is still no foolproof way to determine who has what number, this is a huge exposure point. It is hard to imagine that a Congress that was intent on providing clarity to ensure collection of debt owed to the government would want the FCC to create a gaping liability trap for companies acting on behalf of the government.

Moreover, to qualify as a "covered call" or to take advantage of the scant relief provided by the Commission's "one free pass" rule, the NPRM imports the provided number requirement that the American Bankers Association has challenged in the context of its own exception. Specifically, a call must be made to a wireless number that "the debtor provided to the creditor". However, under existing precedent, the 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

¹ See Mortgage Bankers Association, How Consumers Benefit from Mortgage Servicing Calls and Are at Risk Under the TCPA, at 12 (Feb. 2016) (MBA Presentation).

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 consent—at any number they think will reach the debtor—because Congress has determined that the clear benefit of making the calls outweighs the minimal inconvenience of the person wrongly dialed. Moreover, providing “one free pass” in the case of reassigned numbers is not meaningful relief. In many cases, one call or text will not be enough to determine if the number has been reassigned. Instead, if a company reasonably believes that a borrower can be reached at a given number, then the company should be able to use it, whether or not it was “provided” by the debtor, and more than just once.

Even if calls do reach the right person, the Commission still proposes to place unfounded limits on such calls. Specifically, the NPRM proposes to restrict the number of covered calls to three per month, per delinquency, and only after delinquency. While the law does permit the agency to place some limits on the number and duration of calls, I find it hard to believe that Congress would have wanted the FCC to impose restrictions that the agency knows are inconsistent with other federal laws and rules.

The Mortgage Bankers Association provided information to the Commission noting several instances where more calls are required than what the FCC proposes to allow.² For example:

- Housing and Urban Development – Federal Housing Administration: “Telephone contact within 20th day of delinquency; at least 2 times per week until contact established or determine property is vacant or abandoned”
- Treasury – HAMP: “Minimum of 4 telephone calls to the last known phone numbers of record, at different times of the day, within 30 day period”

The last example is particularly notable because Congress directed the FCC to consult with Treasury in implementing the law. The fact that the NPRM proposes three calls per month suggests that the FCC has either shirked its responsibility to consult with Treasury or that it is willfully disregarding other federal agency requirements. Both prospects are extremely troubling.

Further, the NPRM proposes to apply the limits to call attempts, including call attempts placed by autodialers that would have connected a borrower to a live agent. This too is inconsistent with record evidence. As federal student loan servicer, Navient, explained in an ex parte:

[I]n recent months, 80 percent of Navient’s first live contacts with delinquent borrowers only occurred after six or more call attempts (i.e., it reached only 20 percent of the delinquent borrowers with fewer than six call attempts), and more than half of its live contacts with borrowers required more than 15 call attempts (i.e., it reached less than half of the borrowers with fewer than 15 call attempts). For 25 percent of the delinquent borrowers with whom Navient had a live contact, it took 40 or more call attempts to reach the live contact.³

Moreover, it does not make sense to require live agents to manually attempt calls when more efficient dialing technology exists. And, as we know from the *TCPA Omnibus Order*, even manually dialed calls will be considered autodialed calls if placed from equipment that could function as an autodialer in the future. The NPRM seeks comment on how to encourage debtors hearing from a live agent, but the solution is already in the record: do not artificially limit the number or type of calls.

² MBA Presentation at 5.

³ Letter from Mark Brennan, Counsel to Navient, to Marlene H. Dortch, FCC, CC Docket No. 02-278, at 2-3 (filed Mar. 11, 2016) (*Navient Mar. 11 Letter*).

Additionally, the law did not give the FCC authority to permit consumers to stop calls altogether. That is simply not in the text. The agency is making it up. The NPRM claims that a supposed “right” to stop calls may be even more important here because callers are permitted to make calls without consent. But that misses the entire point of the law: Congress has decided that making calls in order to collect debts owed to the United States trumps consumer consent. After all, this is a serious problem. At least \$115 billion in federal student loans are in default,⁴ and that’s just one type of loan covered by the law.

The NPRM reaches the height of absurdity when it asks whether there should be a maximum duration for a voice call, including autodialed calls with a live caller. It is incredible that the Commission would think of requiring a caller to hang up in the middle of an important conversation with a borrower. How does that help a consumer who needs assistance selecting a repayment plan? Navient noted there are now 15 different repayment plan options for student loans, including allowing monthly payments to be based on income and set as low as \$0 per month, but many distressed borrowers are not fully aware of those options.⁵ In addition, borrowers have up to 32 deferment, forbearance, or forgiveness options, depending on their qualifications.⁶ Similarly, NCHER noted that “borrowers in default can pay as little as \$5 per month over a 10-month period and remove their loans from default status, regain eligibility for federal student aid, and remove the record of default from their credit reports.”⁷ However, “calls with student loan borrowers can average 20 minutes or more in length and can often last more than an hour in cases where borrowers need to provide financial and other data for the caller to help the borrower understand and choose the resolution that best meets his or her needs.”⁸ The NPRM also seeks comment on limiting the length of text messages, which is equally ludicrous.

Placing artificial limits on calls and texts will cause consumers to miss out on valuable information that could help them repay their loans, avoid negatively impacting their credit history, and keep their homes, among other things. These are not hypothetical benefits. Navient states that it “is able to help student loan borrowers resolve their delinquencies and prevent default **more than 90 percent of the time** when it is able to have a telephone conversation with the borrower.”⁹

Finally, the NPRM proposes to exempt calls only after the borrower is delinquent. In the alternative, it seeks comment on permitting calls only after the debtor is in default. Here again, the Commission is reading its own language into the statute. The law states that covered calls must be “made solely to collect a debt owed to or guaranteed by the United States.” There is no mention of delinquency or default. Moreover, parties have provided examples of pre-delinquency calls that are just as important to avoiding delinquency and ensuring that debt will be collected, such as calls to remind borrowers to complete their annual Income-Driven Repayment plan recertifications in order to avoid substantial increases in monthly payment amounts.¹⁰

Some may try to make the claim that this is merely an NPRM and that the Commission will consider all of these examples and comments. But the fact that these arguments have already been made

⁴ See Letter from EFC, NCHER, SLSA, to FCC, CC Docket No. 02-278, at 2 (filed Jan. 26, 2016) (citing data from the U.S. Department of Education) (*EFC, NCHER, SLSA Letter*).

⁵ *Navient Mar. 11 Letter* at 2.

⁶ Letter from Mark Brennan, Counsel to Navient, to Marlene H. Dortch, FCC, CC Docket No. 02-278, at 2 (filed Mar. 29, 2016) (*Navient Mar. 29 Letter*).

⁷ Letter from Timothy Fitzgibbon, National Council of Higher Education Resources, to Marlene Dortch, FCC, CC Docket No. 02-278, at 3 (filed Apr. 5, 2016) (*NCHER Letter*).

⁸ *Id.*

⁹ *Navient Mar. 11 Letter* at 1 (emphasis in original).

¹⁰ *Navient Mar. 29 Letter* at 4.

and the agency is issuing an NPRM not grounded in these facts suggests that the FCC is not actually interested in listening to commenters and is likely to adopt an Order that bears strong resemblance to the proposals in this NPRM. Indeed, my own requests to conform the NPRM to the law and reality were denied, and I expect that when the Commission eventually adopts final rules—likely after the August deadline—I will be dissenting in full.