

**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.<sup>1</sup> 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

---

<sup>1</sup> 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.<sup>2</sup> For example:

- Housing and Urban Development – Federal Housing Administration: “Telephone contact within 20<sup>th</sup> 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.<sup>3</sup>

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.

---

<sup>2</sup> MBA Presentation at 5.

<sup>3</sup> 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,<sup>4</sup> 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.<sup>5</sup> In addition, borrowers have up to 32 deferment, forbearance, or forgiveness options, depending on their qualifications.<sup>6</sup> 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.”<sup>7</sup> 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.”<sup>8</sup> 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.”<sup>9</sup>

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.<sup>10</sup>

---

<sup>4</sup> 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*).

<sup>5</sup> *Navient Mar. 11 Letter* at 2.

<sup>6</sup> 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*).

<sup>7</sup> 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*).

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

<sup>9</sup> *Navient Mar. 11 Letter* at 1 (emphasis in original).

<sup>10</sup> *Navient Mar. 29 Letter* at 4.

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 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.