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April 7, 2011

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex F)
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Public Workshop: Debt Collection 2.0: Protecting Consumers as Technologies Change

The National Council of Higher Education Loan Programs (NCHELP) is a trade association that represents a nationwide network of guaranty agencies, secondary markets, lenders, loan servicers, private collection agencies (PCAs), schools and others that administer loan programs, including the Federal Family Education Loan (FFEL) Program and private education loans, that make loan assistance available to students and parents to pay for the costs of postsecondary education. Our membership offers information and assistance to student borrowers to help them manage their debt, understand and choose the appropriate repayment options, avoid default, and to guide them through the unique means by which defaulted debts voluntarily can be resolved, avoiding (or at least minimizing) the pitfalls of delinquency and default.

We are responding to your office's March 15, 2011, call for comments ("Notice") to "address consumer protection issues that have arisen as debt collectors avail themselves of advances in technology", including the effects of technological, economic, and legal changes on the debt collection industry and whether the Fair Debt Collection Practices Act (FDCPA or Act) and other laws have kept pace with these developments.

Current law has not kept pace with the needs of a new and growing class of borrowers, who are increasingly moving away from traditional land-line telephones in favor of cellular telephones, text-messaging and e-mail as their preferred methods of communication, and who are transforming communications technology, whether cellular or landline, from a simple means of verbal communication to a communications management device by allowing pre-answer caller identification through Automatic Number Identification (ANI) and voice messaging. The results are increased costs of communications and decreased effectiveness in communicating, which will cause an unnecessary increase in student loan defaults, inability to effect voluntary repayment and a consequent increased reliance on involuntary repayment options, all as explained below.

Newer technologies like cellular telephones, emails, texting and other similar services are no longer supplemental to landline conversations and U.S. Postal Service (USPS) mail, but are replacements to these increasingly out-dated modes of communication. Consumers are turning to email/instant messaging and cell phone text messaging in place of USPS mail for written communications. Many consumers no longer even open their USPS mail, making it a more

expensive and increasingly ineffective means of written communications with consumers either to request or provide information or to seek payment of defaulted debt.

Consumers similarly are increasingly abandoning landlines in favor of cell phones as a means of oral communications, resulting in increased ineffectiveness of landline communications to engage consumers either to collect or to inform. The growing use of ANI/ caller ID technology lets the consumer know before answering, either a landline or cell phone, who is calling so the consumer can decide whether or not to answer the call. In short, the communication landscape is rapidly changing, and regulations have not kept pace to permit consumers and businesses alike to fully benefit from enhancements in communication technology.

Student loan volume has increased significantly over the past decade as the cost of education has increased at nearly double the rate of inflation and federal and state grants have failed to keep pace. Annual and aggregate limits on government-backed student loans¹ have not kept pace with the rising costs of education, leading to significant reliance on private education lending, which reached nearly \$9 billion last year. Together, government-backed and private loans totaled over \$105 billion for the 2009-10 academic year. Average borrower indebtedness has grown as well and is now approximately \$23,000 for a four-year degree.

FFEL Program participants are tasked with creating and implementing programs to promote financial literacy and responsibility and to avoid student loan defaults. Unfortunately, some student loans do go into default and FFEL Program guaranty agencies and the U.S. Department of Education (“ED”) must attempt to recover this debt on behalf of the federal taxpayer. Under the Higher Education Act and implementing regulations, default aversion and collection goals are accomplished within a very specific and limited financial model; participants need to constantly improve their efficiency. The vast majority of student loan debt collection activities, both in the FFEL Program and the William D. Ford Federal Direct Loan Program, are outsourced to PCAs, whose prime focus on this aspect of the program permits them to perform these functions in a more efficient manner.

It is important to note that contact efforts by FFEL Program lenders and guaranty agencies, and their PCA partners, are not limited to collection attempts. Early delinquency contacts are designed to assure the understanding of the student loan borrower’s federal debt obligations and of repayment plans and other means to avoid default. Default collection contact attempts are made as well to educate the defaulted student loan borrower on the unique federal array of payment restructuring and/or loan discharge options that can save them considerable money and even result in the removal of the default record from their credit bureau reports².

Since the adoption of the FDCPA, various means of communications and call technologies have come into existence and acceptance including cell phones, text messaging, predictive dialers,

¹ In addition to the FFEL Program, federal student loans are available directly from the U. S. Department of Education through the William D. Ford Federal Direct Loan Program and, through educational institutions, under the Federal Perkins Loan Program, in each case with the cooperative assistance of servicers and PCAs. Under the Health Care and Education Affordability Reconciliation Act of 2010, loans previously made under the FFEL Program are now originated under the William D. Ford Federal Direct Loan Program.

² For example, the defaulted borrower may qualify for a rehabilitation program, or for discharge of the debt under various federal program provisions. The information sought to be provided to the student loan borrower, and often mandated under the federal program, serves to educate and provide helpful options and assistance and differs greatly from the “unwanted” calls commonly associated with the telemarketing activity regulated under the TCPA.

automated messaging, voicemail, caller ID/ANI and email. The use of cellular telephones, and attendant text messaging, has grown exponentially over the past several years, with more than 76 percent of the U.S. population (233 million subscribers) now owning cell phones. A growing number of households are disconnecting their traditional land-line telephones and becoming completely wireless. According to the Centers for Disease Control's National Health Interview Survey, which gathered data through June of 2010, 26.6 percent of American households have gone completely wireless, an increase of nearly 100 percent in the past three years. Conversely, the percentage of American households without a cellular telephone has dropped nearly in half over the past three years, to just under 13 percent.

The statistics for college students are even more dramatic. According to Student Monitor, a market research company specializing in the college student market, 89 percent of college students own a cell phone, and almost all of them list caller-ID as the most-used feature. Similarly, 88 percent of college students own a personal computer, the large majority of whom are regular users of e-mail.

Unfortunately, certain provisions of the FDCPA, and other laws like the Telephone Consumer Protection Act (TCPA) and related regulations enforced by the Federal Communications Commission (FCC), stifle the use of certain technologies that would otherwise permit efficient and effective communication³.

The purpose of the FDCPA is to "eliminate abusive debt collection practices"⁴; including, among others, harassing or abusive conduct⁵ and unfair practices⁶. The FDCPA was drawn well before the prevalence of the technologies available today. However, its provisions addressing privacy-related matters, such as inconvenient call times⁷ and third party disclosure⁸, have been aggressively interpreted to impose severe limits on the ability to communicate using available technology. Other laws more directly focusing on privacy concerns also have been subject to similarly overbroad interpretations, with the same debilitating potential.⁹

³ Periodic telephone contact efforts are specifically required by federal regulations (see 34 C.F.R. 682.411(d)) and predictive dialers are a key and common tool used by FFELP participants to contact borrowers. Predictive dialers are used to dial specific, not random or sequential, telephone numbers, which generally are provided by the borrowers themselves. Predictive dialers protect customer privacy by eliminating dialing errors that risk inadvertent contact with unrelated third parties and are programmed to dial area codes only during times allowed by federal and state fair debt collection laws. By many accounts, predictive dialer technology has increased borrower contact efficiency by over three hundred percent.

⁴ As stated in Section 802(e), the purpose of the Act is to "eliminate abusive debt collection practices".

⁵ Act Section 806.

⁶ Act Section 808.

⁷ Act Section 805(a)(1).

⁸ Act Section 805(b).

⁹ For example, according to the FCC's interpretation of the TCPA (*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014 (2003)), lenders, loan servicers, and collectors would be prohibited from using predictive dialer technology to call cellular telephones. The prohibition would apply to default aversion as well as default collection activities and would impose unreasonable costs on them by preventing their use of technology that benefits not only them, but also the debtor, by allowing the efficient communication of rights, responsibilities and borrower benefits that help borrowers better manage their debt.

This consequent inability to fully utilize calling, texting and messaging technologies and newer means of communication, particularly recognizing the use of telephone technologies to “manage” communications, has led to an increase in costs, both in real terms and in loss of potential savings through efficiencies, and an impairment in the ability to “reach” student borrowers.

The result is a severe negative impact on the effectiveness of default aversion activities as well as default collections, needlessly driving up costs for both the guaranty agency and its PCA partners (in terms of higher expenses) and the taxpayer (in terms of increased defaults and reduced recoveries).¹⁰

Also, the borrowers themselves are being hurt by these regulations, which inhibit efforts to improve student borrower financial literacy, in particular in helping borrowers understand their loan obligations and the various ways of avoiding or, when necessary, resolving defaults. The impact of these rules cause both creditors and their collection partners to lose the ability to inform and to work cooperatively with consumers, leaving both sides with the frustrating outcome of simply waiting for the unnecessary defaults and proceeding to more drastic, involuntary collection activities, including litigation and wage garnishment. These inhibitions need to be removed so that borrowers can be contacted in order to provide the necessary information and tools to avoid more punitive and costly ways to resolve their debts.

Following are examples of common forms of communication where regulations have not kept up with technology, and how each impacts the FDCPA.

Cell Phones

The use of cell phones as an alternate, and often exclusive, means of verbal communication is becoming the norm. The FDCPA prohibits calls at “inconvenient” times¹¹, specifying “normally” convenient times to call. However, even when a call is placed to a known cellular phone it is nearly impossible, given their portability, to know the location of the called party at the time of the call, creating the potential for strict liability exposure for each call.

Further, the FCC interprets the TCPA to prohibit calls to cell phones using dialers, and automated messaging to cell phones, absent prior express consent. While there are resources to determine area codes and exchanges assigned to wireless numbers, it is nearly impossible to determine all cell phone numbers due to landline portability (a landline today could be wireless tomorrow). Though there are resources for this type of information, they are cumbersome and

¹⁰ FFELP participants contact millions of delinquent and defaulted borrowers every year. In the context of normal servicing and delinquency and default prevention efforts, over \$60 billion in potential defaults are averted each year through the efforts of the nation’s student loan lenders, guarantors and their PCAs. Millions of delinquent student loan borrowers are contacted and counseled on their loan repayment options, with well over 90 percent of those borrowers returning to a current status. If existing restrictions are causing a 10 percent reduction in efficiency (which, given changing demographics and technologies, is probably a conservative assumption), annual defaults are \$6 billion higher than would otherwise be the case, and tens of thousands of borrowers are needlessly suffering the consequences of default. Regarding default collection activity, in Federal fiscal year 2010, ED and FFEL Program participants recovered over \$10.2 billion in defaulted loans on behalf of the federal taxpayer. Again, assuming a 10% negative impact on effectiveness, the adverse financial impact is at least \$1 billion annually, an amount that will grow with increased loan volume.

¹¹ Act Section 805(a)(1)

quickly (almost daily) outdated due to portability. The strict liability nature of the FDCPA¹² places the caller at risk for each call, subject only to the limited protection of the “bona fide error” defense.¹³

More importantly, predictive dialers provide the ability to efficiently “pace” the dialing of outbound phone calls of all types (e.g., individualized contacts, voice or text messaging through automated means) by permitting the automated dialing of phone numbers input by the collector, reducing “wait” times between calls and minimizing the potential for unproductive, “dropped” calls. Having to exclude cell phones from dialer-based calls and/or messaging campaigns will preclude the use of an efficient means of contacting borrowers to assist them to avoid or resolve their defaults.

Text Messaging

Utilization of text messaging has grown with the prevalence of cell phones, and the increasingly sophisticated “smart phone” technology platforms facilitate this means of communication. In fact, demonstrating the speed with which communication technologies are being introduced and eclipsed, evidence suggests that text messaging even is coming to supplant email as a means of communication among a growing population of consumers who prefer “real time, right now, sound bites” of information over the perceptively slower moving “noise” provided even by emails. As reported in the New York Times,¹⁴ in the wake of text messaging, use of email appears to have declined by between 6% and 18% (depending on the demographic) within a one year period. If the law continues to hamper our ability to adapt and adopt the consumers’ chosen means of communication, we will be rendered unable, at any cost, to reach them.

As with cell phones, the use of texting technology is most often coupled with an automated dialing process (i.e., predictive dialers) to maximize communication efficiencies, subjecting the use of this highly effective means of communication not only to TCPA rules restricting the ability to utilize predictive dialers to call cell phones but also to separate TCPA rules similarly restricting the use of automated messaging. Several states also have rules impacting the availability of these technological advances, which, at times, are even more restrictive than those under the federal mandate of the TCPA.

Finally, the technological restrictions on the literal “size” of text messages, coupled with both FDCPA disclosure requirements and additional state requirements outside of the “validation” notice, where applicable,¹⁵ can result in practical prohibitions on the use of this means of communications.

¹² Unlike the Telephone Consumer Protection Act of 1991, which provides a 15 day “grace” period for ported numbers; see 47 CFR 64.1200(a)(1)(iv)

¹³ Act Section 813(c).

¹⁴ “E-Mail Gets an Instant Makeover” N.Y Times December 20, 2010

¹⁵ see, e.g., those of MA (Mass. Regs. Code 209 sec. 18.17(13)), NC (N.C. Gen Stat. sec. 58-70-50), TN (Tenn. Code Ann. Sec. 62-20-111(b)) and NYC (NYC NY Code 20-493.1 and NYC NY Rules 6 sec. 1-05)

Voice mail/caller ID (ANI)

One of the most-used cell phone functions is caller ID or “ANI”. This is equally true of landlines. Whether cell or landline, most phones also have a voicemail function which, with ANI, allow the called party to both preserve “privacy” and otherwise “manage” their communications by deciding before answering who they will talk to and who they will “let go to message” and call back (depending on their identity and purpose), if at all, at their convenience.

However, recent interpretations of the FDCPA have all but eliminated the ability to leave a message, whether an automated message otherwise permitted to a landline under the TCPA, or a “live” message left on an answering machine. Specifically, courts have imposed an overly-broad interpretation of the definition of “communication”¹⁶, requiring the message to disclose that it is from a debt collector, in order to comply with Act Section 807(11), and finding that leaving messages equates to “the placement of telephone calls”, requiring “meaningful disclosure of the caller’s identity”, including the purpose of the call to comply with Act Section 806(6)¹⁷. The caller is then left in the untenable, Catch-22 position of either risking violation of those provisions or of providing the disclosures and risking claims of third party disclosure under Act Section 805(b).¹⁸ The only other option is to incur the costs of continued contact attempts (which similarly will probably not be answered) without providing return call information.

Email

Like text messaging, email is a low cost and highly effective preferred means of communication. Emails can be read and answered at the convenience of the recipient at any time, from nearly anywhere and, from a personal perspective, somewhat anonymously¹⁹.

However, because there currently is no reliable directory of email addresses, and due to the prevalence of “shared” emails and the use of work emails (where privacy expectations are minimized), a greater risk of inadvertent disclosure to a third party exists, subjecting the sender to potential FDCPA strict liability exposure.²⁰ The “bona fide error” defense provides only limited protection because, given the lack of address confirmation capabilities, there is no way to set up procedures to prevent inadvertent disclosures.

¹⁶ Act Section 803(2)

¹⁷ See Hosseinzadeh v. M.R.S. Associates, Inc. 387 F. Supp 2d 1104 (USDC C.D CA. 2005); Foti v. NCO Financial Systems, Inc., 2006 U.S. Dost. LEXIS 13857 (USDC SDNY)

¹⁸ In fact, suits have been filed going both ways e.g., Wright v. NCO Financial Systems, Inc. (06cv3078 USDC MN) (message with disclosures violates third party disclosure prohibitions); Jachetta v NCO Financial Systems, Inc. (5;05-cv-01445 USDC ND CA)(message without disclosure violates “meaningful disclosure” requirement) since settled.

¹⁹ For example, while “regular” mail is protected only until delivery (U.S. v. Maxwell, 137 F. Supp. 298 (WD MO 1955) aff’d 235 F. 2d 903 (Eighth Cir. 1956)), electronic communications arguably enjoy much broader protection under a combination of the Wiretap Act (communications in transit), Stored Communications Act (communications resident at the ISP0); and Computer Fraud and Abuse Act (prohibiting access without authorization in interstate commerce), but are subject to the Electronic Communications Privacy Act (limiting privacy rights in, e.g, workplace communications).

²⁰ Act Section 805(b).²² See Act Section 805(b).

We do not deny the importance of protecting privacy; however, we do not believe this is the primary purpose of the FDCPA and that, to the extent privacy is to be afforded protection under the FDCPA, privacy must be balanced against the need (and desire) for the student loan borrower to be informed and responsible, weighing in favor of adopting revisions to, and interpretations of, the FDCPA that permit the non-abusive use of available technology. Unnecessary restrictions on student loan providers and their servicers and collectors carries serious consequences that will cost federal taxpayers billions of dollars in additional student loan defaults and reduced default recoveries, limiting the already scarce resources necessary to help Americans pursue higher education. It will also harm borrowers, tens of thousands of whom will needlessly default on their student loans because they could not be contacted about their loan statuses and counseled on the many repayment options available to them.

NCHELP respectfully requests that the FTC consider regulatory or statutory changes that would specifically permit lenders, servicers and collectors to use predictive dialer technology when attempting to contact delinquent and defaulted borrowers of student loans. We further request that the FTC recognize that the use of automated voice and text messaging, and Internet email, are the communication methods of choice by millions of young debtors and their use should be specifically authorized for loan servicing and debt collection.

To address these concerns, we respectfully suggest consideration of modifications to the FDCPA to provide that:

- (a) Absent knowledge to the contrary, a debt collector may assume the convenient time for communication by cell phone based on the last known address of the consumer²¹;
- (b) The fact of contact, whether through live or automated means and including messages, by means of email or wireless telephone, without more, does not constitute harassment or abuse²² or an unfair practice²³;
- (c) Leaving a message (whether through live or automated means) that does not convey information regarding the debt does not constitute a “communication”²⁴;
- (d) The requirement for disclosure of the debt collector’s identity applies only in connection with a “communication”²⁵; and
- (e) If a consumer’s consent expressly includes consent to third parties such as the debt collector, consent of the consumer to third party communication need not be given directly to the debt collector.²⁶

²¹ Act Section 805(a)(1)

²² Act Section 806

²³ Act Section 808

²⁴ Act sections 803(2) and 807(11)

²⁵ Act Sections 803(2) and 806(6)

²⁶ Act Section 805(b).

In addition, we suggest consideration of clarification to the TCPA that predictive dialers (i.e., equipment which permits the “pacing” of calls to numbers input into the system, but does not either randomly or sequentially generate phone numbers) does not constitute an “automatic telephone dialing system” and modification of the TCPA to apply the “established business relationship” and “commercial/non-solicitation” landline messaging exceptions to cell phone voice and/or text messages.

We further suggest consideration of preemption of state laws which otherwise would curtail the benefits of any changes in federal law which may result from your efforts pursuant to the Notice and that the impact of both federal and state disclosure rules on text messaging (or any other or future communications technology that impose message “size” limitations) be addressed so that the availability of such means of communication is not lost as a practical matter.

If you have any questions or need additional information, please contact me at the address or telephone number included below.

Sincerely,

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