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**National Association of Federally-Insured Credit Unions**

October 2, 2018

The Honorable Ajit Pai  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, D.C. 20554

RE: *Telephone Consumer Protection Act*

Dear Chairman Pai:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing to you in regard to the *Telephone Consumer Protection Act* (TCPA) and the recent court decisions related to the definition of an automatic telephone dialing system (ATDS or autodialer). Following the decision by the U.S. Court of Appeals for the District of Columbia Circuit in *ACA International v. Federal Communications Commission*, three circuit courts have decided questions related to what type of equipment constitutes an autodialer. The Second and Third Circuit<sup>1</sup> have adopted a narrower definition whereas the Ninth Circuit chose to expand the definition of an ATDS<sup>2</sup>. NAFCU is troubled by this Circuit split and urges the Federal Communications Commission (FCC or Commission) to take action and issue a rulemaking on the pending petitions as soon as possible to resolve the current uncertainty surrounding what constitutes an ATDS.

The FCC's 2015 Declaratory Ruling and Order (2015 Order) created an environment that produced absurd results and lined the pockets of plaintiffs' attorneys seeking to take advantage of a vague statute and the Commission's expansive interpretation. The D.C. Circuit confirmed that the 2015 Order went too far beyond Congress's intended scope of the TCPA. Instead of protecting consumers, the TCPA has turned into a weapon for attorneys and has caused significant harm to legitimate businesses attempting to, in good faith, contact their consumers. NAFCU encourages the FCC to act swiftly in issuing a ruling so that callers and consumers alike have clear guidelines moving forward, especially now that district courts in the Ninth Circuit may be divided on the appropriate precedent to apply to TCPA lawsuits.

A few months after the *ACA International* decision, the Third Circuit held in *Dominquez v. Yahoo, Inc.* that, in light of the recent decision, it must interpret an autodialer as it did before the

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<sup>1</sup> *King v. Time Warner Cable, Inc.*, No. 15-2474 (2d Cir. June 29, 2018); *Dominquez v. Yahoo, Inc.*, No. 17-1243 (3d Cir. June 26, 2018).

<sup>2</sup> *Marks v. Crunch San Diego, LLC*, No. 14-56834 (9<sup>th</sup> Cir. Sept. 20, 2018).

2015 Order and thus rejected the plaintiff's argument that "capacity" includes potential capacity to function as an autodialer. The court concluded that an ATDS must have the present capacity to generate random or sequential telephone numbers and dial those numbers. That same week, in *King v. Time Warner Cable, Inc.*, the Second Circuit also interpreted the term "capacity" to mean that equipment must have the present ability to dial numbers randomly and sequentially.

On September 20, 2018, the Ninth Circuit issued its decision in *Marks v. Crunch San Diego, LLC*, concluding that the TCPA is ambiguous on its face and holding that an autodialer must be interpreted to include equipment that can automatically dial phone numbers stored on a list, regardless of whether human intervention is required. This decision has created a rift among the courts and sowed considerable uncertainty as to whether the D.C. Circuit's decision should be followed in courts in the Ninth Circuit. NAFCU's credit union members in states in the Ninth Circuit are now even more uncertain as to what constitutes an autodialer and whether their lawful and legitimate communications with members may expose them to TCPA liability. As such, a mandate from the FCC is now necessary to establish uniformity and reduce confusion. NAFCU requests the FCC take the lead in defining an ATDS and clarifying other issues left open after the D.C. Circuit's decision.

One such issue is the FCC's standard for revocation of consent. The D.C. Circuit left intact the FCC's "any reasonable means" standard for revocation of consent, consequently leaving the door open for a continued frenzy of lawsuits because of the unlimited liability established by this standard. NAFCU urges the FCC to reverse its "any reasonable means" standard for revocation of consent so that credit unions are no longer exposed to endless liability and can provide their members with a reasonable, uniform method for revocation of consent.

NAFCU greatly appreciates your attention to resolving the ambiguities surrounding the TCPA and looks forward to the Commission's much-anticipated ruling on the matter. If you have any questions or concerns, please do not hesitate to contact me or Ann Kossachev, NAFCU's Senior Regulatory Affairs Counsel, at (703) 842-2212 or [akossachev@nafcu.org](mailto:akossachev@nafcu.org).

Sincerely,

A handwritten signature in purple ink that reads "Carrie R. Hunt". The signature is written in a cursive, flowing style.

Carrie R. Hunt

Executive Vice President of Government Affairs and General Counsel

cc: FCC Commissioners Michael O'Rielly, Brendan Carr, and Jessica Rosenworcel