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National Association of Federally-Insured Credit Unions

June 13, 2018

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW, Room TW-A325
Washington, D.C. 20554

RE: Interpretation of the TCPA in Light of D.C. Circuit Decision in *ACA International*
(CG Docket No. 18-152; 02-278)

Dear Ms. Dortch:

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 in regard to the Federal Communications Commission's (FCC) Public Notice on the interpretation of the *Telephone Consumer Protection Act* (TCPA) in light of the recent decision from the U.S. Court of Appeals for the D.C. Circuit in *ACA International v. FCC*. NAFCU urges the FCC to interpret "automatic telephone dialing system" (ATDS) to mean equipment that uses a random or sequential number generator to dial numbers without human intervention. Second, the FCC should interpret "called party" as the intended recipient of the call, or the party the caller expected to reach. The FCC should also allow callers the flexibility to establish reasonable opt-out methods for consumers to revoke "prior express consent" to receive calls from an ATDS.

NAFCU has long advocated for changes to the TCPA to help provide relief to credit unions attempting to deliver important information to members about their existing accounts. The problem is clear: the outdated language in the TCPA and the FCC's overly-expansive interpretations have led to a rise in frivolous litigation and discouraged good faith actors from making important and desired calls to consumers. NAFCU recommends that the FCC, in light of the D.C. Circuit's recent decision, initiate rulemakings to adopt the following changes.

Definition of ATDS

On March 3, 2018, NAFCU, along with several other groups, submitted a Petition for Declaratory Ruling to the FCC asking for a more narrow interpretation of the TCPA's definition of ATDS. Based on the D.C. Circuit's guidance in its recent decision, the FCC should (1) clarify that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and (2) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions. To qualify as an ATDS, the equipment's dialing capabilities must be completely "automatic." Automatic

necessarily means non-manual. Automatic means a robotic, non-human action. Therefore, equipment is not an ATDS unless it has the capacity to dial numbers without human intervention.

In the 2015 Declaratory Ruling and Order (2015 Order), the FCC vastly expanded the concept of "capacity" by pronouncing that equipment can meet the statutory definition even if it lacks the present capacity to generate and dial random or sequential numbers. The D.C. Circuit invalidated this inherently inconsistent position, so the FCC should now confirm that equipment must be presently functioning as an ATDS when a call is made to be subject to the TCPA's prohibitions. The fact that equipment may be configured to function as an ATDS does not, during a particular call, make it an ATDS. Unless those capabilities are being utilized presently for the call, the statutory prohibition on ATDS calls does not apply. For consistency and to achieve the most equitable, narrow definition of ATDS, the FCC should clarify this point.

Reassigned Numbers

One of the biggest issues facing credit unions trying to communicate with their members is determining whether a number has been reassigned. Although third-party "solutions" currently exist, these databases are incomplete and sometimes inaccurate. As a result, NAFCU and its member credit unions strongly support the creation of a single, FCC-designated reassigned numbers database, or alternatively mandatory reporting to one or more commercial data aggregators, subject to certain parameters. The FCC should require users to create an account to access the database and NAFCU urges the FCC to consider exempting credit unions from any user fees associated with the creation of an account and use of the database. Additionally, the FCC should adopt a safe harbor for those callers who use the reassigned numbers database but, either due to inaccurate or untimely information or some other inadvertent reason, make a good-faith call to a reassigned number. A more detailed explanation of NAFCU's position on this issue can be found in its June 7, 2018 letter submitted to the FCC under CG Docket No. 17-59.

Revocation of Consent

The current standard for revocation of consent by "any reasonable means" has ballooned litigation risk and put credit unions in a very precarious position with respect to contacting their members. NAFCU urges the FCC to undo this standard in favor of a caller's reasonable opt-out method standard. Callers should be permitted to define the channels of revocation that are acceptable based on the means that are most convenient for their systems and processing procedures. Oral revocation of consent is not ideal for credit unions because it causes confusion for employees and members alike. There are too many instances in which a consumer alleges to have orally revoked consent to be contacted yet there is no record of such consent and callers have not had the opportunity to incorporate the revocation into their systems. This unstandardized, unreliable method is flawed because it forces callers to implement unreasonably expensive and time-consuming methods to ensure consumer revocation is properly documented and integrated.

Credit unions would prefer that revocation of consent be made in writing and signed by the member if done in-person at a branch location or be completed through the opt-out method

provided by the credit union if done through a phone call or text message. The FCC should permit callers to decide the remote opt-out method that works best for their particular needs, including options such as responding to a text message with "STOP" or dialing a standardized code such as "*7" for live calls. Additionally, the FCC should clarify that a caller may designate whether an opt-out is only for a particular type of communication or all future communications. Once a consumer revokes consent, callers should be afforded at least 30 days to process the request and designate the consumer as removed from future communications.

Moreover, the D.C. Circuit's decision made it clear that the 2015 Order did not address "revocation rules mutually adopted by contracting parties," but NAFCU requests the FCC address this issue and confirm that parties may contract for specified methods of revocation of consent. Other courts have spoken in favor of contracting for revocation methods. Most recently, the U.S. District Court for the Northern District of Ohio ruled in favor of the bank defendant and held that a consumer's alleged oral revocation of consent to receive autodialed calls to his mobile phone was ineffective under the TCPA because his credit card agreement provided that written notice was required.¹ Aside from this ruling, the only circuit court to have decided this issue held that consent to be contacted cannot be revoked if it is part of the bargained-for exchange in a contract between the parties.² Instead of continuing to generate uncertainty and encourage litigation on this matter, the FCC should take a stance by confirming these court decisions and clarifying that parties may contract for the terms of revocation of consent.

Conclusion

NAFCU appreciates the opportunity to comment on the FCC's efforts to interpret and modernize the TCPA. If you have any questions or concerns, please do not hesitate to contact me at (703) 842-2212 or akossachev@nafcu.org.

Sincerely,



Ann Kossachev
Senior Regulatory Affairs Counsel

¹ See *Barton v. Credit One Fin.*, Case No. 16CV2652, 2018 U.S. Dist. LEXIS 72245 (N.D. Oh. April 27, 2018).

² *Reyes v. Lincoln Auto. Fin. Serv.*, 861 F.3d 51 (2d Cir. 2017).