

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<i>In the Matter of</i>	)	
	)	
Consumer and Governmental Affairs Bureau	)	CG Docket No. 18-152
Seeks Comment on Interpretation of the Telephone	)	
Consumer Protection Act in Light of the D.C.	)	
Circuit’s ACA International Decision	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**Comments of the Credit Union National Association**

The Credit Union National Association (“CUNA”), by and through its counsel, submits these comments in response to the *ACA Public Notice*.<sup>1</sup> The D.C. Circuit’s decision in *ACA International* affords an opportunity for the Federal Communications Commission (“Commission”) to revise its rules and interpretations implementing the Telephone Consumer Protection Act (“TCPA”) and restore the balanced approach Congress intended.<sup>2</sup> The TCPA was primarily intended to protect consumers from annoying and invasive telemarketing calls without unduly interfering with the desired and expected communications. Defining key statutory terms such as an automatic telephone dialing systems (“ATDS”) and “called party” and identifying reasonable methods to revoke consent consistent with the TCPA’s language and intent will substantially reduce uncertainty and help mitigate the onslaught of TCPA litigation. The

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<sup>1</sup> Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision, CG Docket Nos. 18-152, 02-278 (rel. May 14, 2018) (*ACA Public Notice*).

<sup>2</sup> *ACA Int’l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015)(*2015 TCPA Order*)).

Commission should also use this opportunity to update antiquated distinctions between wireless and wireline calls when companies make informational calls to their customers or members, as requested in CUNA's petition for declaratory ruling.<sup>3</sup>

## **I. Introduction**

CUNA is the largest national trade association in the United States serving America's credit unions. With its network of affiliated state credit union associations, CUNA serves nearly 6,000 credit unions, which are owned by more than 110 million members. Credit unions are community-based, tax-exempt nonprofit financial cooperatives. Credit union members not only contribute to the capital of their credit union as consumers, but also democratically control that capital through the one-member-one-vote principle in credit union policy setting and decision making.<sup>4</sup> This means that every member has an equal voice in the governance of his or her credit union regardless of the amount of savings or loans he or she has with the credit union. There is thus a close and unique relationship between credit unions and their member-owners, who not only use their credit union's financial services but also participate in the governance of their credit union. This unique relationship is fostered and nourished by educational and governance-related communications with member-owners. Credit union communications relay both critical financial information and educational materials that aid members in fulfilling their responsibilities as owners of the cooperative enterprise.<sup>5</sup>

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<sup>3</sup> Credit Union National Association Petition for Declaratory Ruling, CG Docket 02-278 (filed Nov. 21, 2017) (*CUNA Petition*).

<sup>4</sup> The credit union membership elects unpaid, volunteer officers and directors who establish the credit union's policies. In addition, officials and directors must be members of the credit union.

<sup>5</sup> Commenting on the important role that credit unions play in educating and informing consumers, the former head of the Consumer Financial Protection Board ("CFPB") noted at a Credit Union Advisory Council meeting that "I have seen firsthand the important role that credit unions play in the lives of so many consumers and communities" and that credit unions "take your responsibility to your members very seriously, and many of you have been pacesetters as consumer educators." Richard Cordray, *Prepared Remarks of Richard Cordray Director of the Consumer Financial Protection Bureau*, CONSUMER FINANCIAL PROTECTION BUREAU - CREDIT UNION ADVISORY

Congress never intended that the TCPA restrict these types of normal and expected business communications.<sup>6</sup> Nevertheless, the Commission's confusing and at times conflicting interpretations and rulings have had a chilling effect on credit unions' communications with their members, depriving them of important or even vital information. CUNA confirmed this chilling effect in a survey it conducted with its members regarding TCPA compliance. More than three-fourths (76%) of respondents reported that it is "very difficult" (30%) or "somewhat difficult" (46%) to determine whether their communications are compliant with the TCPA following the Commission's *2015 TCPA Order*. The same survey found that more than one in three credit unions (35%) that had used text messaging to communicate with their members in the past have cut-back or outright discontinued texting members.<sup>7</sup> Three-fourths (75%) of credit unions that had used some form of an artificial or prerecorded voice messaging system in the past have curtailed or ceased completely such communications.<sup>8</sup> Fear of TCPA lawsuits by aggressive plaintiff's attorneys exploiting vague or overly broad interpretations has curtailed use of efficient communications technologies.

The majority of this country's credit unions are small to very small businesses that lack the resources to untangle confusing rules or to hire more personnel to manually dial their members in order to avoid even the possibility of costly or potentially ruinous litigation. In the United States, nearly half of all credit unions, 2,708 out of approximately 6,000 credit unions,

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COUNCIL MEETING (Sept. 1, 2016), <http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-richard-cordray-director-consumer-financial-protection-bureau-fall-2016-cuac/> (last visited June 13, 2018).

<sup>6</sup> The TCPA's restriction on calls to wireless numbers and other mobile devices was not meant to apply where "the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers." H.R. REP. NO. 102-317, at 17 (1991).

<sup>7</sup> *2017 "Impact of TCPA Rules" Survey*, CREDIT UNION NATIONAL ASSOCIATION, at 2. Texting is an extremely efficient method of communication. Text messages have a 98% open rate and 90% of all text messages are read in under three minutes. *45 Texting Statistics that Prove Businesses Need to Take SMS Seriously*, ONEREACH (Sept. 10, 2015), <https://onereach.com/blog/45-texting-statistics-that-prove-businesses-need-to-start-taking-sms-seriously/> (last visited June 13, 2018).

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

have five or fewer full time employees. More than half (3,457) have assets of less than \$50 million. Moreover, credit unions with less \$20 million in assets account for over 40% of all U.S. credit unions (2,369). It thus comes as no surprise that over 60% of credit unions that utilize artificial or prerecorded voice calls or place text messages to their members believe a TCPA lawsuit would be “very problematic—severely threatening the [credit union’s] resources.”<sup>9</sup>

## **II. The Commission Should Grant the Petition Filed by U.S. Chamber Institute for Legal Reform to Clarify the Definition of an ATDS.**

CUNA was one of nearly 20 entities that joined with the U.S. Chamber Institute for Legal Reform in filing a Petition for Declaratory Ruling to revise the definition of an ATDS in light of the D.C. Circuit’s *ACA International* decision.<sup>10</sup> As found by the D.C. Circuit, the Commission’s current interpretations provide “no meaningful guidance” on whether the equipment they are using qualifies as an ATDS.<sup>11</sup> Following the roadmap provided by the D.C. Circuit, the *Chamber Petition* urges the Commission to define the functions that qualify equipment as ATDS and to require use of those functions when making a call in order to trigger the TCPA’s restrictions. Specifically, the *Chamber Petition* requests the Commission to confirm that to qualify as an ATDS, the equipment must use a random or sequential number generator to store or produce numbers to be called, and then to dial those numbers without human intervention. This functionality must be inherent in the equipment itself and must be used when making the call. Under this definition, predictive dialers would not qualify as ATDS. The *Chamber Petition* cogently explains the grounds for these findings and CUNA need not repeat

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<sup>9</sup> 2017 “*Impact of TCPA Rules*” Survey, CREDIT UNION NATIONAL ASSOCIATION, at 3.

<sup>10</sup> U.S. Chamber Institute for Legal Reform *et al.*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018) (*Chamber Petition*).

<sup>11</sup> *ACA Int’l*, 885 F.3d at 701.

them here. CUNA simply urges the Commission to act promptly and provide much needed certainty to the industry.

### **III. The Commission Should Revise Its Reassigned Number Framework By Defining the Called Party as the Intended Recipient**

Section 227(b)(1) of the TCPA makes it unlawful for any person to “make any [nonemergency] call” using an ATDS to “any telephone number assigned to a . . .cellular telephone service” without the “prior express consent of the called party.” The Commission’s *ACA Public Notice* seeks renewed comment, in light of the D.C. Circuit’s *ACA International* opinion, on how to interpret the term “called party.” The Commission has correctly found that the phrase “called party” is ambiguous.<sup>12</sup> Congress has thus delegated to the Commission the discretion to interpret the phrase in the first instance based on a permissible construction of the statute.<sup>13</sup>

The Commission should reverse its now-vacated reassigned number framework and interpret the “called party” as the intended or expected recipient of the call. Although the DC Circuit found that the Commission was not “*compelled*” to interpret “called party” as the intended recipient, neither is it foreclosed from doing so as a reasonable exercise of its discretion to interpret ambiguous terms.<sup>14</sup> Interpreting “called party” as the intended or expected recipient best comports with the statute’s language and its overriding policy of balancing the privacy rights of consumers with the rights of companies to communicate with their customers.

Defining the called party as the intended recipient is a permissible construction of the statute. The statutory language ties the “called party” to “prior express consent.” The statute’s framework contemplates that a caller will have had an opportunity to obtain consent before

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<sup>12</sup> 2015 TCPA Order at ¶74.

<sup>13</sup> See *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290 (2013); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

<sup>14</sup> *ACA International*, 855 F.3d at 694 (emphasis in original).

making a call. Most commonly such consent is obtained when a customer relationship is initiated and the customer proffers a telephone number where he or she may be reached.<sup>15</sup> The Commission has determined that this proffer evinces consent to be called for purposes within the scope of the consent.<sup>16</sup> To give meaning to the entire clause requiring the caller to obtain “prior express consent of the called party,” the better reading of called party is that it refers to the party that provided consent to be called, or the “intended recipient.” If the called party is the current subscriber and the caller has no knowledge that it is dialing a reassigned number and thus has no ability to obtain prior consent, the statute’s emphasis on obtaining consent is rendered ineffective for a significant universe of calls.

Defining “called party” as the “intended recipient” also best comports with the Commission’s determination, which it should uphold, that a caller may reasonably rely on the prior consent of the party that provided the telephone number to contact. As the D.C. Circuit noted, the result of defining the called party as the current subscriber is to “extinguish[] any consent given by the number’s previous holder and expose[] the caller for liability for reaching the party that has not given consent.”<sup>17</sup> The Commission was uncomfortable with the strict liability that result created. To give effect to reasonable reliance on prior consent in light of its flawed interpretation of called party as the current subscriber, the Commission created the one-call safe harbor. The *ACA International* court rightly struck down this “safe harbor” as arbitrary and capricious.

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<sup>15</sup> See *Petition for Declaratory Ruling of the Consumer Bank Association*, CG Docket No. 02-278 (filed Sept. 19 2014) at 4 (noting that Congress appears to have equated called party with the customer and quoting House Energy and Commerce Committee report accompanying the TCPA, H.R.Rep. 102-317).

<sup>16</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8769 (1992); *Request of ACA International for Clarification and Declaratory Ruling*, 23 FCC Rcd 559, 564 (2008).

<sup>17</sup> *ACA International*, 885 F.3d at 705.

Interpreting the “called party” as the intended recipient, when coupled with the concept of reasonable reliance on prior consent, creates a framework that best balances the interests of callers and consumers. Reliance on the prior consent of the intended recipient remains reasonable only so long as the caller does not know that the number has been reassigned. At that point it is no longer reasonable to rely on prior consent. Rather than draw arbitrary lines at some number of call attempts, the Commission should clarify that reasonable reliance is extinguished when the caller has actual knowledge that the number it is calling is no longer associated with the intended recipient.

As then-Commissioner Pai recognized in his dissent to *2015 TCPA Order* on this issue, “the statute takes into account a caller’s knowledge” and interpreting the term “called party” as the intended recipient “is by far the best reading of the statute.”<sup>18</sup> The term’s “ordinary usage,” Commission precedent, and sound policy that “aligns the incentives of all parties to welcome legitimate calls and punish bad behavior,” all dictate that “the called party is the person who consented to be called and the person who would ordinarily be expected to answer.”<sup>19</sup> Commissioner O’Rielly too acknowledged that defining “called party” as the “intended recipient” is a “common sense approach” that allows callers “to reasonably rely on consent obtained for a particular number.”<sup>20</sup> The Commission should now adopt the reasoning and analysis set forth in those dissents and interpret the called party as the “intended recipient.”

#### **IV. The Commission Should Identify Reasonable Methods to Revoke Consent**

Although the TCPA is silent on the question of revocation of prior express consent, the Commission, in the *2015 TCPA Order*, and courts, have concluded that the remedial purposes of

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<sup>18</sup> See Dissenting Statement Of Commissioner Ajit Pai, 30 FCC Rcd. at 8078 (“Pai Dissent”).

<sup>19</sup> *Id.*

<sup>20</sup> See Commissioner Michael O’Rielly Dissenting In Part And Approving In Part, 30 FCC Rcd. at 8094 (“O’Rielly Dissent”).

the statute are best effectuated by incorporating common law concepts of revocation.<sup>21</sup> Having incorporated revocation into the statute, the *2015 TCPA Order* addressed the question of the manner of revocation and expressed the concern that callers might dictate overly burdensome methods of revocation that could “materially diminish the consumer’s ability to revoke” consent. The Commission, however, tilted the balance too far in the other direction by permitting consumers to revoke consent using any reasonable means, oral or in writing, including, “among other possibilities” a “consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location.”<sup>22</sup> Then-Commissioner Pai and Commissioner O’Rielly both predicted that this open ended method of revocation would place an impossible burden on companies attempting to identify and track whether a consumer may have communicated a “desire not to receive further messages.”<sup>23</sup>

The D.C. Circuit sustained the Commission’s determination in the *2015 TCPA Order* as a permissible construction of the statute, but highlighted the Commission’s language that a consumer’s method of revocation must itself be reasonable based on the totality of the circumstances.<sup>24</sup> The court also concluded that the “Commission’s ruling absolves callers of any responsibility to adopt systems that would entail ‘undue burdens’ or would be ‘overly burdensome to implement.’”<sup>25</sup> The court further opined that called parties’ “efforts to sidestep”

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<sup>21</sup> See, *2015 TCPA Order* ¶ 56; *Gager v. Dell Financial Services, LLC*, 727 F.3d 265 (3<sup>rd</sup> Cir. 2013). But see O’Rielly Dissent, 30 FCC at 8095, (Congress did not intend to provide for revocation of previously provided express consent).

<sup>22</sup> *2015 TCPA Order* at ¶ 64.

<sup>23</sup> See Pai Dissent, 30 FCC Rcd. at 8083 (questioning how “any retail business [could] possibly comply with the provision that consumers can revoke consent orally ‘at any in-store bill payment location’”); O’Rielly Dissent, at 30 FCC Rcd. at 8096 (noting untenable position of companies attempting to prove a negative – that a consumer had not revoked consent).

<sup>24</sup> *ACA International*, 885 F.3d at 709 (citing *2015 TCPA Order* at 7996 ¶ 64, n. 233.) At least one court has noted that the Commission’s conclusion that a company may not infringe on a consumer’s chosen method of revocation by designating an exclusive means of revocation “seems to be in some tension” with its further statement that the reasonableness of the method chosen would be determined by “totality of the facts and circumstances.” *Rando v. Edible Arrangements Int’l*, 2018 WL 1523858, \* 5-6 (D.N.J. Mar. 28, 2018).

<sup>25</sup> 885 F.3d at 709.



“clearly-defined and easy-to-use opt-out methods” in favor of “idiosyncratic or imaginative revocation requests” might well be found to be unreasonable.<sup>26</sup>

The court’s analysis is of little comfort to companies that find themselves in costly litigation brought by plaintiffs claiming that they revoked prior consent despite sidestepping clearly-defined and easy-to-use opt-methods in favor of highly idiosyncratic or imaginative revocation requests. Although courts ultimately have concluded that plaintiffs’ that failed to use an easy clear method, such as text “Stop” and instead responded with various verbose messages did not use a reasonable method of revocation, these findings were only reached after costly discovery and submission of dispositive motions.<sup>27</sup> In each instance, plaintiffs claimed they were in compliance with the Commissions’ determination that consumers may revoke using any reasonable means and that the company could not dictate a method of revocation, even if that method was clear and easy. The Commission’s rulings regarding revocation are but one more example of how the *2015 TCPA Order* “opens the floodgates to more TCPA litigation against good faith actors.”<sup>28</sup>

The *ACA Public Notice* suggests one solution to this issue. The Commission should require consumers to utilize company designated clearly defined and easy to use opt methods.<sup>29</sup> The Commission should identify several revocation options that, if used by the consumer, would

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<sup>26</sup> *Id* at 710.

<sup>27</sup> See e.g., *Rando v. Edible Arrangements Int’l*, 2018 WL 1523858, at \*7 (finding that “a reasonable person seeking to revoke consent would have tried, at least at some point during the back-and-forth, simply replying ‘STOP’ to cancel – as instructed, rather than ignoring Defendant’s revocation method and sending ten long text messages to that effect, most of which did not include the word ‘stop’ at all”); *Viggiano v. Kohl’s Dept. Store*, 2017 WL 5668000, at \*3 (D. N. J. Nov. 27, 2017) (despite having been provided 5 one word options to stop further texts, such as STOP, CANCEL and QUIT, plaintiff sent several sentence long messages); *Epps v. Earth Fare, Inc.*, 2017 WL 1424637, at \*5 (C.D. Cal. Feb. 27, 2017) (Rather than text STOP, plaintiff responded with messages such as “I would appreciate [it] if we discontinue any further texts[.]”).

<sup>28</sup> *Pai Dissent* at 30 FCC Rcd. at 8077.

<sup>29</sup> *ACA Public Notice* at 4.

be sufficient to revoke prior consent. Conversely, failure to use those options would not be effective to revoke consent.

As recommended by Commissioner O’Rielly, the Commission should also follow the Second Circuit’s reasoning in *Reyes* and conclude that a consumer may not unilaterally revoke consent “when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract.”<sup>30</sup> Holding consumers to their bargained for exchanges would substantially reduce abusive litigation and bring further certainty to the marketplace. This would not be unfair to consumers, particularly in the context of consumer debt, where in exchange for lending the consumer money or agreeing to periodic payments, the consumer provides contact information should repayment problems arise. Moreover, consumers are afforded other protections against harassment by statutes such as the Fair Debt Collection Act.<sup>31</sup>

## **V. The Commission Should Grant the *CUNA Petition* and Eliminate Antiquated Distinctions Between Cell Phone and Landline Informational Calls.**

The *ACA Public Notice* addresses the interpretation of several key statutory terms. Liability for violating the TCPA expands or contracts depending on those interpretations, but they do not resolve a fundamental shortcoming of the Commission’s overall regulatory approach. At the core of the TCPA, and Commission’s rules, is the question of consent and on this most fundamental of issues, the Commission has sustained an increasingly antiquated distinction between landline and wireless calling. Using discretionary authority delegated by Congress in section 227(b)(2)(B) of the TCPA, the Commission’s rules allow informational calls to made to residential landlines, regardless of calling technology, without the need for any prior consent. Section 64.1200(a)(3) of the Commission’s rules permits calls to “any residential line” without

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<sup>30</sup> *Reyes v. Lincoln Automotive Financial Services*, 861 F.3d 51, 56 (2<sup>nd</sup> Cir. 2017). See Statement of Commissioner Michael O’Rielly on D.C. Circuit TCPA Decision, March 16, 2018.

<sup>31</sup> Fair Debt Collections Practices Act, 15 U.S.C. § 1601 (1977).

consent if the call is “not made for a commercial purpose” or is made for commercial purpose “but does not include or introduce an advertisement or constitute telemarketing.”<sup>32</sup> The *CUNA Petition* defines these noncommercial calls or commercial calls without advertising as informational calls.<sup>33</sup>

The Commission also has discretionary authority to exempt from prior consent requirements calls to cell phones that are “not charged to the called party.”<sup>34</sup> The Commission to date has used this authority very sparingly and subject to severe restrictions on call frequency and other conditions.<sup>35</sup> Thus, today, all manner of informational calls, including debt collection calls, may be made to residential lines using an autodialer or an artificial or prerecorded voice without any form of prior consent – but the same call for the very same purpose made to a wireless subscriber risks fines or litigation in the absence of consent. In an age when more than half of all telephone subscribers have “cut the cord”<sup>36</sup> and use a wireless phone for their residential “line”, and virtually all calls or texts to wireless phones are under unlimited plans and hence free to the end user, the distinction between residential and wireless informational calls is no longer fair or sustainable.

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<sup>32</sup> 47 C.F.R. § 64.1200(a)(3). See also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd. 1830, 1845–48, ¶¶ 35–43 (2012) (“*2012 TCPA Order*”).

<sup>33</sup> *CUNA Petition* at 8.

<sup>34</sup> 47 U.S.C. § 227(b)(2)(C) (providing that the Commission “may, by rule order, exempt from the requirements of (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to the conditions as the Commission may prescribe as necessary in the interest of privacy rights this section is intended to protect.”) Subsection (1)(A)(iii) makes it unlawful, in the absence of prior consent, to use an autodialer to make any call to a “cellular telephone service . . . or any service for which the called party is charged for the call.” 47 U.S.C. 227(b)(1)(A)(iii).

<sup>35</sup> See *2015 Omnibus TCPA Order*, 30 FCC Rcd. at 8024, ¶ 127, 8030, ¶ 144; *In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Order, 29 FCC Rcd. 3432, 3435–36, ¶ 12 (2014) (“*Cargo Airline Order*”).

<sup>36</sup> Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey*, July–December 2016, NATIONAL CENTER FOR HEALTH STATISTICS, at 1 (May 2017), [www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf](http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf) (last visited June 11, 2018). This number is expected to increase to around 60 percent by the end of this year. See *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141, at iii (filed May 4, 2018).

CUNA has thus urged the Commission to exempt wireless calls from the requirement of obtaining prior consent where such calls are in fact free of charge.<sup>37</sup> CUNA also proposed certain privacy-enhancing conditions for exempting free to end user informational wireless calls, including limitations on call frequency and using and honoring easy to use opt out mechanisms.<sup>38</sup> The free to end user exemption would not be available for calls that do not comply with these limitations.<sup>39</sup>

Congress's emphasis on the cost incurred by cell phone subscribers made sense in 1991 when the TCPA was adopted. Mass market cell phone use was just being deployed,<sup>40</sup> and each incoming call cost subscribers 50 cents to a dollar per minute. Moreover, mobile billing was completely different from traditional landline service. Landline customers were not billed at all for incoming calls, per minute charges were only imposed on landline subscribers *making outgoing* calls under the concept of calling party pays.<sup>41</sup> Cellular subscribers, by contrast, were

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<sup>37</sup> *CUNA Petition* at 15-18. To date, to the limited extent the Commission has exempted free to end user calls, it has required the caller to demonstrate that it has entered into arrangements with third party vendors or wireless carriers to ensure that calls are not subject to incremental charges. See *2015 TCPA Order*, 30 FCC Rcd. 8023, at ¶127. See also *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, *Mortgage Bankers Association Petition for Exemption*, CG Docket No. 02-278, Order, 31 FCC Rcd. 12484, 12488-89, ¶ 13 (2016), *pet. for review pending*. (denying exemption request where company failed to offer adequate assurance that it would enter into arrangements to ensure calls would be free). As CUNA has argued, entering into such arrangements may not be feasible for many of its very small credit union members and paying third parties to ensure calls are free does not make sense when that vast majority of calls are already “free” under unlimited calling and texting plans.

<sup>38</sup> *CUNA Petition* at 19.

<sup>39</sup> CUNA also proposed exempting, subject to the same limitations, informational wireless calls to consumers that have an established business relationship with the caller. *CUNA Petition* at 8-15. The Commission exempted from consent requirements both informational and telemarketing calls to residential lines in which the called party has an established business relationship (EBR) with the caller. The do not call rules still allow calls to registered numbers where there is an EBR. The Commission adopted the EBR in 1992 and maintained it until 2012, when it removed the EBR for telemarketing calls to residential lines. As explained in the *CUNA Petition*, the Commission has ample authority to adopt an EBR exemption for wireless informational calls. *CUNA Petition* at 11-15.

<sup>40</sup> In 1991, when the TCPA was enacted, roughly 3 people out of a hundred had a cell phone and these were primarily professionals using their phones for business purposes. See *Mobile Cellular Subscriptions in the U.S.* available at <https://fred.stlouisfed.org/series/ITCELSETSP2USA>, (last visited June 7, 2018). The Commission did not begin reporting cellular phone usage until 1992, when it reported data compiled by the then-Cellular Telecommunications Industry Association showing some 7.5 million wireless subscribers in December 1991. See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 10 FCC Rcd. 8844, 8873, Table 1 (1995) (First CRMS Competition Report).

<sup>41</sup> See e.g. *FCC Seeks Comment on CMRS “Calling Party Pays” Service Option*, 12 FCC Rcd. 17693 (Sept. 25, 1997) (“CMRS telephone consumers throughout the Nation typically pay on a per minute basis for all calls they

billed for each minute of incoming as well as outgoing calls. With cell phone subscribers facing substantially different economic consequences than traditional wireline residential subscribers when receiving incoming calls, it is no wonder that Congress treated the two differently and focused on the charges that wireless subscribers faced.

As noted, today's telecommunications market place could not be more different. The Commission should use this opportunity and exercise its authority to devise rules that update the TCPA by eliminating the antiquated distinction between residential landline and wireless informational calling. Removing the element of consent, coupled with reasonable restrictions on call frequency to protect consumer privacy, provides a bright line compliance regime that eliminates the need to ascertain Commission or court interpretations of terms such as "called party" or "automated telephone dialing systems" or assess whether revocation of consent was reasonable. The revised interpretations of these terms as described in these comments will help minimize uncertainty, but clever and tenacious plaintiffs' counsel may yet find ways to bring claims, notwithstanding the Commission's best efforts. By not requiring consent in the first instance, yet ensuring consumer privacy through straightforward and reasonable calling restrictions, both industry and consumer will be better served.

### Conclusion

The Commission should restore the balance that Congress intended when it passed the TCPA and adopt the recommendations set forth above.

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initiate or receive. The main billing difference between wireline and wireless telephone service is that a wireline telephone subscriber typically does not pay any additional charges to receive telephone calls, whereas most CMRS telephone subscribers pay a per minute charge to receive calls.") The exemption being "toll free" 800 calls in which the called party, typically entities seeking to offer their customers or users a free method of calling them, assumed the costs of the call.

Respectfully submitted,

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June 13, 2018