



Submitted Via Electronic Filing

June 13, 2018

The Honorable Chairman Ajit Pai
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Comment on D.C. Circuit's ACA International Decision
CG Docket No. 18-152
CG Docket No. 02-278

Dear Chairman Pai:

On behalf of Ohio's 276 credit unions and their nearly three million members, the Ohio Credit Union League (OCUL) is responding to the Federal Communications Commission request for comment related to the interpretation and implementation of the Telephone Consumer Protection Act (TCPA) following the recent decision of the U.S. Court of Appeals for the District of Columbia in *ACA Int'l v. FCC*.¹

Ohio credit unions are democratically operated financial cooperatives whose mission is to provide affordable, consumer-friendly products to their members. Ohio credit unions serve a wide array of members: military service personnel and their families, state employees, religious groups, individuals and families of modest means, and students, among many other groups. The average Ohio credit union is \$107 million in assets and retains a staff of 27 employees. While credit union membership is increasing on a national and state level, Ohio credit unions are not immune from market consolidation. Declaratory relief from TCPA would go a long way in helping to ensure the continued success of Ohio credit unions by eliminating restrictive requirements that inhibit member communications and impede credit union operations. Not only would declaratory relief benefit credit unions, it would enhance the consumer experience in credit unions by improving communication and allowing for the transfer of more financial information to the consumer-member.

A. ACA Int'l v. FCC

OCUL supported the majority of the court's decision in *ACA Int'l v. FCC* as we have previously written the FCC² regarding its interpretation of various items under the 2015 Omnibus Order³. We appreciate the FCC issuing a timely request for comment after the court's recent decision. Below we will address specific issues in light of the court's decision.

¹ *ACA Int'l v. FCC*, No. 15-211, 2018 U.S. App. LEXIS 6535 (D.C. Cir. Mar. 16, 2018).

² OCUL's comments to the FCC available online at <https://www.ohiocreditunions.org/Advocacy/Regulatory/Pages/CommentLetters.aspx>.

³ *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (July 10, 2015).





I. The Definition of an Automatic Telephone Dialing System (Auto-Dialer) Should Reflect Common Understanding

The TCPA defines an automatic telephone dialing system as “equipment which has the capacity---(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” The FCC seeks comment on how to interpret “capacity” in light of the court’s guidance.

OCUL believes “capacity” should be construed narrowly and interpreted to mean “present capacity.” Additionally, an auto dialer definition must make clear that the equipment must use a random or sequential number generator to store or produce numbers, and dial those numbers *without* human intervention. The FCC should not deviate from the straightforward language found in the statute. The absence of human intervention is what makes the system an *automatic* telephone dialing system actually automatic. If human intervention is required in generating the list of numbers to call or in making the call, then the equipment should not be defined as an auto-dialer.

To remove any confusion, the FCC should make clear that both functions must actually be, not theoretically, present and active in a device at the time the call is made. This approach provides a clear, bright-line rule, eliminating confusion and multiple interpretations. Thus, callers do not have to worry about whether their calling equipment could perhaps one day be used as an automatic telephone dialing system.

II. Revocation of Consent

In *ACA Int’l v. FCC*, the court found that a party may “revoke her consent through any reasonable means clearly expressing a desire to receive no further messages from the caller,” and such a standard means callers (employers or businesses) “have no need to train every retail employee on the finer points of revocation.”

As such, the FCC seeks input on what, if any, opt-out methods exist that would be sufficiently clearly defined and easy to use. In order to eliminate confusion that currently exists within the regulatory scheme, opt-out methods should be clear, specific, and tailored. Also, a waiting period (of possibly up to 30 days) is necessary so that internal systems may record and communicate the opt-out.

The caller (credit union) should have the ability to create opt-out channels which mirror opt-in channels. For example, if consumers opt-in through a website, the consumers should opt-out the same way. If consumer opt-in through a form, the consumers should opt-out through a form.

III. Treatment of Reassigned Wireless Numbers Under TCPA

The FCC is considering the feasibility of a reassigned numbers database and evaluating various ways to implement such a database. Generally, OCUL supports the idea of the FCC creating and maintaining a reassigned numbers database. When a number is provided by a party who had given prior express consent and then the number is reassigned to a new user (an untended





recipient) who had not given consent, liability would unjustly penalize the caller. Often times, individuals change their numbers without notifying the caller. Good faith errors, such as incorrect entry of a number, may also occur. OCUL believes a database may eliminate some of these inadvertent errors made by good faith actors. Such a database has the potential to benefit both consumers (called parties) and companies (callers) by providing all interested parties with updated information on suspended, terminated, and reassigned numbers which would ultimately aim to reduce calls made in error.

However, OCUL is concerned with whether the benefit would outweigh the monetary costs and regulatory burden associated with this new endeavor. Access to the database must be affordable. This is particularly important for smaller financial institutions, such as most credit unions, that suffer disparate impact from the cost and burden of regulations. Any potential fee structure for access should consider the needs of the organization conducting business on a regional, state, or local level. The FCC should also provide free access to any reassigned numbers database to the same extent that free access is provided to the national “Do Not Call” registry.

All voice providers with access to numbers, not just wireless companies, should be required to report reassigned number information. Service providers should update the database in real time whenever a number is disconnected and classified appropriately pursuant to the FCC’s numbering rules. Further, the database should include the reporting dates for when a number is disconnected or reassigned.

A safe harbor should be tailored to the database. It is unrealistic to expect companies (especially financial institutions who must communicate fraud concerns, items of financial health, and other financial services in a timely expedient manner) to run a number against a reassigned numbers database before every call is made. That would exponentially increase operational cost and decrease timeliness of communications. Rather, a safe harbor should be based on a documented yearly query processed against the reassigned number database. As an example, a credit union would have a membership list containing names and contact numbers. If the query did not produce any hits from the database that any numbers were suspended, terminated, or reassigned, the credit union could call those members and receive a 12-month safe harbor. This safe harbor could be predicated on the requirement that a financial institution still must comply with any proper revocation initiated by an individual member.

As the FCC continues to explore the possibility of a reassigned numbers database, OCUL urges the Commission to focus on the following principles:

- The benefit of a reassigned numbers database must outweigh any associated monetary costs, increase in regulatory burden, and operational challenges.
- A reassigned numbers database should have adequate privacy protection measures.
- A safe harbor must be associated with the use of a reassigned numbers database to protect legitimate business communications from unfair and potentially exorbitant liability that is associated with inadvertently dialing a reassigned number.

It is important that the FCC recognizes a reassigned numbers database is not the most appropriate or effective safeguard for legitimate businesses who have an established relationship from the unfair and potentially exorbitant liability that is associated with inadvertently dialing a





reassigned number. In order to resolve confusion as a result of circuit court splits, curb frivolous litigation, and create a clear and efficient regulatory environment, the FCC must address the entire 2015 Omnibus Order (discussed in further detail below).

B. Outstanding Issues to Address with the 2015 Omnibus Order Not Addressed in *ACA Int'l v. FCC*

While the FCC has requested specific comments relating to *ACA Int'l v. FCC*, OCUL would be remiss if we did not address, in a holistic manner, the complexities that remain within the TCPA rules outside of the court case. As such, we strongly urge the Commission to discard the 2015 Omnibus order and create a new foundation of regulatory framework that rightly focuses on marketing and robo-calls without infringing on legitimate business communications.

I. Ohio's Credit Unions Face Significant Challenges Regarding TCPA Regulations

We believe TCPA does not address the advancements made in communications technology since its enactment in 1991. We understand the congressional intent of TCPA's enactment was to protect consumers from businesses, particularly telemarketing companies, who make unwelcome and repetitive contact with consumers with whom they have no established relationship. The congressional intent of TCPA's passage arguably was not to prevent not-for-profit, member-owned, financial cooperatives (credit unions) from communicating with members. Choosing membership with a credit union implies an established relationship; and, therefore, consent to be contacted regarding a member's financial well-being. As written, TCPA prevents vital outreach by credit unions to members. Below, are examples of how TCPA rules currently interfere with legitimate Ohio credit union communications with their membership.

Wright-Patt Credit Union (WPCU) – Fairborn, Ohio

WPCU is a not-for-profit institution serving more than 330,000 member-owners. When WPCU is seeking to communicate with its members, it is seeking to connect with the same people who own the credit union and who have the opportunity to vote in the governance of the credit union. The member-owner relationship is unique, and should be considered different from the harassing communication TCPA was created to regulate.

Many of WPCU's members have been with the credit union for years if not decades. As a result, the credit union's core system is populated with phone numbers, but WPCU struggles to find a reasonable method of verifying whether these numbers are tied to a mobile phone or land line. Many credit union members overwhelmingly expect and deserve timely communication regarding their accounts. A significant percentage of the membership utilizes cell phones as their primary method of contact. It is imperative that credit unions have an unfettered ability to provide time sensitive information via cell phone calls and text messages. Because of this, WPCU, at times, must delay the deployment of real time text alerts related to suspicious activity out of concern over potential legal backlash arising from the plaintiff's bar using TCPA to create class action claims. TCPA directly diminishes WPCU's ability to proactively mitigate fraud exposure as a consequence. The result is less communication which prevents members from making informed decisions regarding their financial well-being.





TCPA impacts other aspects of WPCU's operations outside of fraud. Like all large institutions, WPCU utilizes a VOIP phone system. Under current TCPA definitions, any phone system or device (including an iPhone) that is *capable* of acting as an auto-dialer triggers coverage. So while WPCU always has a human being-live voice contact with the members, the use of the phone system technically requires that WPCU have express consent to make that contact.

It is WPCU's practice to welcome new members with a phone call. As a part of the welcome call, the credit union reviews the transaction(s) that arose with the member's first contact with the credit union. Additionally, the credit union requests an opportunity to walk through their credit report to determine if additional savings can be provided for any financing needs. This additional part constitutes "marketing" activity under TCPA and thus again triggers "prior express consent." It is practically impossible for WPCU to gain the written express consent from the member prior to the call. This is in part due to the fact that WPCU processes a high volume of indirect auto lending (\$50 million per month). These types of members come to the credit union through WPCU's dealer network: it is very challenging to have the member provide the required consent before they have even technically become a member.

Finally, TCPA impacts collection calls made by WPCU to their members, which also requires express written consent. Often calls are a critical reminder of a past due payment that can avoid further adverse financial consequences. By the time a member has reached the point where collection calls are necessary, WPCU may opt to use a third party to acquire current contact information. Therefore, it is even harder to document consent for a mobile number. If WPCU cannot make these calls, the credit union is doing a disservice to its members. Currently, WPCU pays a third party to scrub every phone number in its database to identify cell phone numbers, which are called manually. This method is costly, time consuming, and delays the ability to help the member.

Kemba Credit Union (Kemba) - West Chester, Ohio

As it does for WPCU, TCPA is negatively impacting Kemba's fraud alerts sent to debit card holders. Kemba uses a third party vendor for their debit card products. Neither Kemba nor the vendor are able use the fraud exemption under the 2015 order as neither can ensure the call or text is free to the end user. Because the exemption is not available, Kemba must comply with TCPA.

With almost 100,000 members, Kemba cannot guarantee to their third party vendor that there is "prior express consent" and/or the call is "free to the end user." Thus, when fraud is triggered Kemba incurs a cost for each call.

As a part of the fraud management system, every debit card transaction receives a score. When a high score reaches a certain limit, it is an indication that the transaction may be fraudulent. The debit card processor initiates an outbound call to the cardholder to verify whether the purchase was authorized by the credit union member. To maintain compliance, the debit card processor makes manual calls to the card holders and does not use an automated dialing system. This cost for manual calls is passed on to Kemba. With more than 42,000 debit cards in circulation, the cost for manual calls for fraud alerts adds up quickly.





Universal 1 Credit Union (Universal 1) – Dayton, Ohio

Like other credit unions, Universal 1 finds value in reaching out to new members to welcome them to the credit union and to provide members with additional information on products and services. This is particularly beneficial to members who came to Universal 1 through an indirect auto loan. However, TCPA restricts these communications. This informational call is considered “marketing” under TCPA due to conversation stemming around products and services of benefit to the member. Because TCPA is triggered, Universal 1 must obtain prior written consent from the member to contact them. Like with WPCU, Universal 1 struggles to obtain consent from new members (stemming from indirect auto loans) before the member is technically a part of the credit union.

Universal 1 has used an automated message to notify members of the conversion to a new online banking platform and to notify members regarding new chip cards being mailed. This automated calling system provides an additional means to contact members and is cost-effective. Universal 1 has been trying to navigate TCPA regulations and how they affect the implementation and usage of this calling system. Universal 1 considers this a call precluded by TCPA unless there is prior consent. Because of TCPA regulations, members are no longer contacted through the automated calling system. Rather, Universal 1 has opted to use mass mailings when needed, which has an added cost.

Not only have TCPA regulations impacted day-to-day communications, Universal 1 is not able to transfer appropriate, timely communications to their members concerning delinquent payments. Often times, Universal 1 is unable to reach their member due to outdated contact information among other reasons concerning a delinquent loan. Previously, Universal 1 would use another number provided on the loan application (perhaps a reference or family member) or a number found through “skip tracing.” However, Universal 1 is not currently able to use these numbers to attempt to make contact with the member.

To provide proactive financial information to decrease delinquent payments and penalties to members, Universal 1 utilized an automated calling system to send out payment reminders to members who are approaching due dates for their loan payments. Universal 1 saw a correlation between payment reminders and delinquent loans. Despite the success for both the credit union and member, Universal 1 is no longer providing this reminder service to their members in order to maintain compliance with TCPA. Universal 1 has an established business relationship with their members; yet, TCPA still requires consent to contact them. If the choice is receiving a payment reminder from an auto dialer or being late on a loan payment, Universal 1 members would prefer the automated dialer.

II. Revocation of Consent –Reasonable Means

While the statute of the TCPA allows a consumer to revoke consent, the 2015 Omnibus order adds the “reasonable” requirement. While the court did not strike the reasonableness requirement down as arbitrary and capricious, the FCC still maintains the authority to create a revocation formula which does not contain the reasonableness requirement.





The reasonable modifier of revocation has been interpreted to mean an oral revocation which is unworkable for many businesses, especially those covering vast geographic areas, those with multiple locations, and those with nationwide or multinational operations. As it has been brought to the FCC's attention numerous times, it is quite challenging for a business to record oral revocation and communicate that revocation to the appropriate person and/or computer system so that it reaches the correct internal department. Even revocation sent via email to a general company inbox is challenging to document. Both of these items require the customer service employee to be versed in compliance enough to recognize a legal revocation and pass it along internally. Thus, we urge the FCC to further explore how consumers should revoke consent and consider removing the reasonableness requirement.

III. Moving Forward, the FCC Should Adopt an “Established Business Relationship” Exemption Under TCPA by Clarifying Definition of “Covered Person”

As we previously wrote to the FCC, we believe the agency should adopt an “established business relationship” exemption for credit union informational messages to cell phones. Because of the unique member relationship, credit unions are different than typical businesses communicating with consumers. Members are owners of the credit union with a vested interest in being informed about the many aspects of operations. Simply put, the relationship between credit unions and members is more like a partnership; it benefits both parties to be in timely communication with each other.

An established business relationship exemption could be created by altering the definition of “covered person” under TCPA. Understandably, there are sensitivities associated with unwanted phone calls. OCUL understands this concern. Like the FCC, OCUL's member credit unions do not want their members plagued by marketing and robo-calls. However, it is important for the FCC to critically analyze the nature of the call: marketing calls vs. information calls (calls associated with fraud, theft, and account services). When the nature of the call is informational and often predicated upon an existing relationship with the consumer, the caller (financial institutions) should receive a significant amount of deference. As such, once a called party enters into a legitimate, established business relationship, the called party should not be defined as a “covered person” under the TCPA. It is implied (and may be indicated through a contract or member agreement) that the individual agrees to and often expects timely communications on a variety of items from the financial institution.

Alternatively, OCUL is amenable to an exemption proposal that the FCC utilize its express authority to exempt calls that are without charge to the called party under the party's wireless plan. The vast majority of cell phone plans now include unlimited calling and texting. It follows that if members are not paying for these, common sense dictates that credit unions should be able to freely communicate with their members about information they want, and most importantly, need.

We believe the FCC should take broader steps to provide regulatory relief to credit unions. When considering the potential breadth of regulatory relief, the FCC should consider credit unions' relationship with third parties, i.e. vendors and Credit Union Service Organizations. The untenable situation Ohio credit unions, like Kemba, have been put in from confusing and challenging FCC rulemaking warrants regulatory relief that scales back and corrects outdated





rulemaking, considers advancements in technology, recognizes credit union's interdependence with third parties, and accounts for the credit union-member owner relationship.

IV. Conflicting Regulatory Guidance Harms Credit Unions

In addition to confusion stemming from TCPA rules, guidance from multiple agencies subjects credit unions to unclear direction regarding member outreach. The lack of consistency has put Ohio credit unions in juxtaposition between which regulations will take precedent. Below are a few examples of conflicting guidance:

- The Consumer Financial Protection Bureau's "Early Intervention Rule," which requires institutions to establish live contact or make a good faith effort to establish live contact within 36 days after a mortgage loan becomes delinquent;
- Fannie Mae's "Quality Right Party Contact," which establishes a code of conduct for interactions with customers with delinquent debt and includes a requirement to build a rapport and have open and on-going dialogue with those customers to positively resolve delinquency. Fannie Mae also requires sending the consumer a foreclosure prevention package and then making follow-up calls to the consumer at least every three days until resolution of the issue; and
- The Home Affordable Modification Program, which requires institutions to "proactively solicit" customers for inclusion in the program by making a minimum of four telephone calls to the customer at different times of day.⁴

C. Conclusion

Federal agencies have encouraged credit unions to communicate with consumers. Beginning to address issues raised in this letter would benefit consumers and the industry alike. Until appropriate relief is provided, TCPA rules will continue to inhibit communications from financial institutions which consumers rely on. Further, without relief, credit unions will continue to be in the untenable position of having to choose between federal regulators.

Our primary concern is that present circumstances are jeopardizing consumers' unabridged and continued access to open and timely communications provided by their cooperative financial institutions. We urge the FCC to consider all comments within this letter and within the recent petition filed by Credit Union National Association, the U.S. Chamber of Commerce and other trade organizations, to account for the unique structure and ownership of credit unions, and to ensure federal agencies are working in cohesion and providing consistent, non-conflicting guidance.

In light of the court's decision in *ACA Int'l v. FCC*, we believe the FCC should take the following steps to address issues highlighted by the court:

- Narrowly construe "capacity" to create a clear, bright-line rule;
- Provide callers with the flexibility to create their own opt-out methods which are easily trackable and do not hinder normal operations;

⁴ Wells Fargo *Ex Parte* CG Docket No. 02-278 January 26, 2015, exhibit 3.





- Further investigate the necessary items for a reassigned numbers database which does not require a caller to check the database on a per call basis; and,
- Develop a broad safe harbor attached to the database which recognizes good faith actors.

In order to provide holistic relief, OCUL urges the FCC to address the entire 2015 Omnibus Order by taking the following steps:

- Re-evaluate the 2015 Omnibus Order, specifically as it relates to reasonable revocation and create opt-out methods which are not based on reasonableness but rather efficient, trackable, and easily utilized methods;
- Exclude legitimate established business relationship calls by narrowly defining called party to preclude consumers and businesses who have entered into a relationship; and
- Recognizing and clarifying the TCPA rules which currently conflict with guidance from other federal agencies.

Thank you for your careful consideration and for the opportunity to express these views to the FCC. Should you have any questions regarding our comments, please feel free to contact us at 1-800-486-2917.

Sincerely,

A handwritten signature in black ink, appearing to read 'Paul Mercer'.

Paul Mercer
President

A handwritten signature in black ink, appearing to read 'Miriah Lee'.

Miriah Lee
Regulatory Counsel

