

November 2, 2017

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

RE: Request for Comment on Credit Union National Association Petition for Declaratory Ruling Under the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278

Dear Ms. Dortch:

Thank you for the opportunity to comment in this proceeding.

Digital Liberty is an organization that advocates for free market policies relating to telecommunications and technology, and is a sister organization of Americans for Tax Reform.

I would like to express support for (1) mitigating liability for good faith callers who call reassigned numbers by establishing a flexible safe harbor (2) creating an established business relationship exemption for informational calls or text messages without prior express consent, or calls that are free of charge.

The Telephone Consumer Protection Act (TCPA) was enacted in 1991, when landlines were king, as a response to consumer complaints of unwanted harassing telemarketing calls.

Today at least 50.8 percent of Americans use only a cell phone, and extensions and interpretations of the TCPA after 1991 don't match the realities of communications now.

People want to hear from their financial institution about instances of fraud, data breach, overdrawn accounts, or other pertinent account information, but Federal Communications Commission Rules adopted in July of 2015 have created serious uncertainties.

The rules require prior consent for a company to contact a customer via mobile phone or text and restrict automatic dialing systems. This sounds good on the surface, but the rules for prior consent are confusing and the liabilities are steep.

A mistaken call to a changed number could land a bank or credit union with \$500 in statutory damages per unwanted call; this includes reassigned numbers. For example, Navy Federal Credit Union settled a class action for \$2.75 million over automated calls to wrong numbers.

About half of credit unions are small businesses, many of which have less than \$20 million in assets, and are the hardest hit by the confusion. As non-profit whose members are also the owners, class actions are just a way for trial lawyers to get a cut of members' hard-earned savings.

A safe harbor from predatory litigation is required.

One way to avoid trial lawyer abuse of liability for reassigned numbers called accidentally, would be for the FCC to implement the reassigned number database, and companies using this database would be afforded a safe harbor from statutory damages.

There are also market based solutions available to callers that may more efficiently predict the reliability of a call; these types of solution will likely have more ability to adapt to the changing communications marketplace.

A database may be useful, but the FCC should maintain flexibility in what constitutes a safe harbor to afford the most effective long-term solution to unwanted calls and predatory litigation.

When it comes to communicating with a credit union “customer” the credit union is actually communicating with a member-owner, not just a customer. Credit unions are nonprofit, democratically-operated financial cooperatives that are owned by their members, and a competitor to traditional banks. Non-profits are exempt from many of the restrictions imposed by the FCC’s rules; however, there is no clarity as to credit unions being recognized as such.

The TCPA did not account for the unique relationship between credit unions and their member-owners. As member-owners, they need to hear about topics ranging from account discrepancies to governance and financial decisions the credit union is considering.

Since the July 2015 TCPA order, more than 75 percent of credit unions reported difficulties determining whether their communications comply with the TCPA. There are different levels of consent needed for different types of calls, depending on whether the call is for telemarketing or non-telemarketing purposes. Non-telemarketing calls are those involving informational and non-commercial messages. These require a consumer's “prior express consent.” Telemarketing calls involve a commercial message and require a consumer's express written consent.

Reasoning for prior consent for mobile phone contact, was that in 1991 customers were being charged by the minute for their phone usage. Now charges associated with an incoming call or text message are rare.

Regardless of the type of call, the TCPA bans automated calls to cell phones entirely, making communications even more difficult, though there is technology to make sure potential calls are free of charge.

Limitations on auto-dialers were intended to curb unwanted dinner-time marketing calls from automated systems sending a multitude of unwanted calls, even after consumers asked, then demanded, the calls stop.

Automated calls are not categorically for mass marketing. These calls often distribute important information regarding the governance or other aspects of a credit union's function. If a customer didn't want to receive automated or pre-recorded calls, most have some clear way to opt out of future communications. As of now, this normal business communication would violate the TCPA.

The FCC has said that the TCPA is not intended to prevent normal business communication. However, credit unions have drastically curbed their contact with member owners under threat of steep penalties and lack of clarity as to what is and is not a violation of TCPA rules.

The FCC could uphold the intent of the TCPA — to prevent harassing telemarketing calls — and account for new kinds of communications by exempting a clear class of informational calls from the prior consent requirement.

To be exempt these calls could either be from the credit union to a party with an established business relationship, or the call is free of charge. The call could also be auto dialed as long as there is an easy opt out mechanism from calls and the call is only informational.

Meeting each of those requirements makes for a reasonable exemption for credit unions and other financial institutions as well.

The TCPA was not intended to stop normal business interactions. Financial institutions, credit unions in particular, should be exempt from many of these restrictions due to the sensitivity of the information they provide their customers or member-owners.

Regards,

Katie McAuliffe
Executive Director
Digital Liberty