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November 6, 2017

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

Re: Telephone Consumer Protection Act – Petition of Declaratory Ruling
GC Docket No. 02-278

Dear Mr. Chairman:

Eastman Credit Union ("ECU") is a federally insured Tennessee state chartered credit union. ECU is the largest credit union in Tennessee and serves over 194,000 members with branches in Tennessee, Texas, and Virginia. ECU is commenting on the Petition for Declaratory Ruling submitted by the Credit Union National Association ("CUNA") seeking relief from the Telephone Consumer Protection Act ("TCPA").

In its Petition, CUNA proposes two methods by which the Federal Communications Commission ("FCC") can alleviate the burden of compliance with the TCPA. First, CUNA proposes that the FCC adopt an established business relationship exemption for credit union informational calls and text messages to cell phones. Second, CUNA proposes that the FCC exempt calls and texts that are made without charge to the called party.

ECU supports the adoption of the established business relationship exemption and, similarly, urges the FCC to adopt an exemption for consent obtained through contract. Finally, ECU requests that the FCC reinstate the definition of "autodialer" in existence prior to the 2015 Declaratory Ruling and Order.

I. Established Business Relationship Exemption

ECU supports the restoration of the established business relationship exemption. The established business relationship was a long standing exemption allowing informational and telemarketing calls to residential lines without first obtaining prior express written consent. The FCC recognized that such calls do not infringe on consumers' privacy interests. Consumers expect to have ongoing dialogue with companies with which they have business dealings and financial interests. Limiting the ability of a credit union to call a member about existing accounts and loans directly interferes with that member's ability to manage their financial wellbeing with the most up-to-date information. Furthermore, credit unions continually look for ways to improve their members' financial interests. Limiting the ability to call with promotional and marketing material further diminishes members' access to vital information needed to make future financial decisions.

In addition to the restoration of the established business relationship exemption for calls made to residential lines, ECU urges the FCC to extend this exemption for calls made to cell phones. According to recent studies outlined in CUNA's Petition, 50.8% of Americans only use a cell phone. More than 70% of all adults aged 25-34 renting homes are living in wireless-only

households. Wireless-only households are even more prevalent among those with lower incomes with 66.3% of adults living in poverty and nearly 60% of adults living in near poverty relying solely on wireless telephones. These studies demonstrate Americans' heavy reliance on wireless telephones as a means of communication and information gathering. Residential lines are quickly becoming an outmoded convention. Cell phones serve a variety of purposes including telephone calls and text messages, instant access to internet and social media and news, instant access to digital media such as music, movies, books, and the list continues. The FCC should modernize the TCPA to reflect this shift in communication and dissolve the antiquated distinction between calls made to residential lines and calls made to cell phones.

II. Contract Exemption

In *Reyes v. Lincoln Automotive Financial Services*, the U.S. Court of Appeals for the Second Circuit denied a rehearing upholding the court's decision that consent to be called under the TCPA cannot be revoked when that consent is part of the bargained-for exchange memorialized in the parties' contract. In *Reyes*, an automobile-lease agreement expressly authorized the lessor to contact the lessee using prerecorded or artificial-voice messages, text messages, emails, and/or automatic telephone-dialing systems.

Credit unions enter into agreements with consumers to establish membership, make loans, open deposit accounts and a variety of other financial products and services. These agreements are contracts between the credit union and the consumer whereby the credit union agrees to open and service these accounts and the consumer agrees to repay loans, maintain sufficient levels of deposits, and so on. Contained within these contracts are provisions similar to the *Reyes* contract provision in which the credit union and consumer agree to convey information about these products and services through various communication channels.

While the *Reyes* court relied on the bilateral nature of the contract, where one party could not unilaterally alter a contract term without the mutual assent of the other party, credit unions typically reserve the right to alter membership and account contract terms without the mutual assent of the other party. However, despite this discrepancy, ECU urges the FCC to consider amending the TCPA to exempt from coverage consent given and obtained in contracts between a credit union and its members. For reasons stated above, credit unions must be able to communicate quickly and effectively with their members without fear of litigation. So long as the methods of communication are clearly set forth in a contract for the exchange of financial products and services, the provisions of the contract should be binding and upheld and exempt from the TCPA's onerous consent requirements.

III. Definition of "Autodialer"

The original intent of the TCPA was to protect consumers against unwanted calls and unsolicited advertisements sent by "autodialers," artificial or recorded voice messages, and fax machines while permitting legitimate telemarketing practices. To meet that end, Congress defined "autodialer" 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." Congress made no mention of equipment having a future or theoretical ability; only



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what the equipment is able to do as currently configured. To adopt a different definition would potentially open every sophisticated communication system to the scope of the TCPA.

In 2015, the FCC expanded the definition of "autodialer" by stating that the capacity of an "autodialer" is not limited to its current configuration but also includes potential functionalities. Equipment that has both the *present* and *potential* ability to dial random and sequential numbers now falls within the purview of the TCPA.

It is ECU's opinion that the FCC's 2015 ruling is contrary to the intent of Congress and should be overturned. The current definition does indeed open every sophisticated communication system to potential liability regardless of how it is currently utilized. It cannot have been Congress' intent to subject a caller to TCPA liability for manually dialing a phone number on a device that has the theoretical ability to generate and dial random and sequential numbers. The FCC's 2015 definition severely limits legitimate business activities in addition to subjecting any individual or business caller not using a "rotary-dial phone" to frivolous litigation.

IV. Conclusion

While ECU also supports CUNA's second proposed exemption for calls that do not result in any fee or charge to the called party, ECU feels the exemption would be superfluous in light of an established business relationship exemption or a contract exemption. Furthermore, there is no reliable way for an entity to know whether a consumer's data plan allows for free calls and texts. Again, such knowledge is unnecessary with the restoration and expansion of the exemptions as explained in this letter.

Reinstatement of a reasonable definition of "autodialer" will bring the TCPA back to the original congressional intent and target bad actors without unduly burdening legitimate businesses and marketing activities.

Credit unions must be allowed to contact their members freely, without the risk of frivolous litigation. Without the ability to do so, credit unions cannot sufficiently mitigate fraud loss, adequately service loans, or effectively advise members of the potential for financial improvement through the use of additional products and services. The Consumer Financial Protection Bureau itself mandates such contact with consumers in its financial regulations. Aside from the reasons stated above, credit unions should not have to navigate the minefield of competing federal law simply to serve the best interests of their members.

Sincerely,

A blue ink signature of Olan O. Jones, Jr. is written over a faint, stylized background of a tree and a path.

Olan O. Jones, Jr.
CEO/President
Eastman Credit Union