

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

<i>In the Matter of</i>	)	
	)	
Credit Union National Association	)	
Petition for Declaratory Ruling	)	
	)	
	)	
Rules and Regulations Implementing	)	CG Docket No. 02-278
the Telephone Consumer Protection Act	)	

**Reply Comments of the Credit Union National Association**

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## **SUMMARY**

Numerous comments filed by credit unions and others amply demonstrate the need for the Telephone Consumer Protection Act (“TCPA”) reforms proposed in the Credit Union National Association’s (“CUNA”) Petition. These comments confirm that the current TCPA rules have curtailed communications between credit unions and their member-owners depriving them of potentially important information regarding their finances and the governance of the credit union.

The limited comments opposing the Petition inveigh against proposals that bear little resemblance to the reforms the Petition actually proposes. They ignore the type of educational and informational communications for which relief is sought, focusing instead on general robocalling statistics and citing abusive debt collection practices that would not be allowed under the proposed exemptions. Opponents also erroneously contend that the Commission lacks the authority to adopt either an established business relationship or free-to-end-user exemption. The claim is predicated on a restrictive, one-sided interpretation of the Commission’s delegated authority that would preclude any new rules unless they further restrict communications. Congress, however, delegated broad rulemaking authority to the Commission for the purpose of balancing the privacy interests of consumers while not unduly interfering with the right of businesses to contact their customers in the normal course of business. Last, the opponents’ claim that the Petition’s free-to-end-user exemption is unlawful is based on the erroneous assumption that the Petition would also exempt calls that are not free. The Petition is clear that if the call or text is not free then the exemption would not apply. Accordingly, CUNA respectfully

urges the Commission to adopt the common sense and modest reforms set forth in its Petition, and restore the balance intended by Congress when it enacted the TCPA.

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## **Reply Comments of the Credit Union National Association**

On behalf of America's approximately 6,000 credit unions and their 110 million members, the Credit Union National Association ("CUNA") respectfully files these reply comments in support of its Petition for Declaratory Ruling ("Petition").<sup>1</sup> Credit unions and their trade associations and service organizations have filed comments corroborating the need for the common sense Telephone Consumer Protection Act ("TCPA") reforms set forth in the Petition. Opposition to the Petition largely consists of overheated rhetoric and the construction of straw men arguments that bear little resemblance to the actual reforms requested by CUNA. The proposed reforms, in fact, are modest but necessary and fall comfortably within the authority Congress delegated to the Federal Communications Commission. ("Commission").

### **I. Credit Unions and Associations Underscore the Need for the Petition's Reforms**

In response to the Petition, a number of credit unions and other associations and organizations filed comments underscoring the need for reforms that will allow them to communicate with their members without the fear and uncertainty wrought by today's TCPA regulatory quagmire.<sup>2</sup> The comments highlight the "unique relationship" between credit unions and their members "since members 'own' the credit union."<sup>3</sup> As explained by Bellco Credit

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<sup>1</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Credit Union National Association Petition for Declaratory Ruling Under the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Public Notice DA 17-798 (rel. Oct. 6, 2017).

<sup>2</sup> *See, e.g.*, Illinois Credit Union League (Oct. 29, 2017); Wright-Patt Credit Union (Oct. 31, 2017); Bellco Credit Union (Oct. 31, 2017); Digital Liberty (Nov. 2, 2017); Ohio Credit Union League (Nov. 2, 2017); Public Service Credit Union (Nov. 2, 2017); Access Community Credit Union (Nov. 3, 2017); American Consumer Institute Center for Citizen Research (Nov. 3, 2017); Navy Federal Credit Union (Nov. 3, 2017); The Wisconsin Credit Union League (Nov. 3, 2017); American Airlines Credit Union (Nov. 6, 2017); Credit Union Association of the Dakotas (Nov. 6, 2017); CUNA Mutual Group (Nov. 6, 2017); Eastman Credit Union (Nov. 6, 2017); National Association of Federally-Insured Credit Unions (Nov. 6, 2017); New York Credit Union Association (Nov. 6, 2017); PSCU (Nov. 6, 2017); SchoolsFirst Federal Credit Union (Nov. 6, 2017); Truliant Federal Credit Union (Nov. 6, 2017); Minnesota Credit Union Network (Nov. 6, 2017); TTCU Federal Credit Union (Nov. 6, 2017); Vibrant Credit Union (Nov. 10, 2017).

<sup>3</sup> Bellco, at 1.

Union, a Colorado-based credit union with just over 300,000 members, “establishing a business relationship with a credit union is much more than just establishing a customer-merchant relationship [because] credit union members can take an active role in how the credit union is managed.”<sup>4</sup> Another commenter, the Credit Union Association of the Dakotas, representing 66 credit unions in North and South Dakota serving more than 450,000 members, describes the relationship between credit unions and their members as “more like a partnership,” emphasizing that “it benefits both parties to be in timely communication with each other.”<sup>5</sup> Likewise, the New York Credit Union Association describes credit unions and their members as “equal partners,”<sup>6</sup> which, as explained by the SchoolsFirst Federal Credit Union serving approximately 750,000 members in Southern California, creates an expectation on the part of members for a “high level of service, which includes immediate communication on matters of importance.”<sup>7</sup> Multiple commenters note that it is the mission of every credit union to serve its members given credit unions’ status as tax-exempt, nonprofit financial cooperatives.<sup>8</sup>

Further, the comments illustrate the on-the-ground challenges faced by credit unions large and small. The Wright-Pratt Credit Union serves over 300,000 members in Ohio and explains that the TCPA has “posed many troublesome issues,” including that “[a]s with most credit unions, our core banking system provided no means to track and identify whether a phone

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<sup>4</sup> *Id.*

<sup>5</sup> Credit Union Association of the Dakotas, at 2.

<sup>6</sup> New York Credit Association, at 1.

<sup>7</sup> SchoolsFirst Federal Credit Union, at 1.

<sup>8</sup> Belco, at 1 (“This important distinction is the focal point of the mission of every credit [union], which is to serve our members.”); American Airlines Credit Union, at 1 (“Unlike other for-profit companies whose goal is to increase shareholder value, we exist to serve our membership, and we have established business relationships with our member-owners.”); New York Credit Association, at 1 (“They [credit unions] are ultimately created by and for the benefit of members who work as equal partners to do what’s best for their institution.”); Truliant Federal Credit Union, at 4 (“The mission of Truliant is to enhance the quality of life of our members and become their preferred financial institution.”); The Wisconsin Credit Union League, at 1 (“Unlike banks, which exist to create value for shareholders, credit unions have a statutorily defined mission: ‘to encourage thrift among its members, create a source of credit at a fair and reasonable cost, and provide an opportunity for its members to improve their economic and social conditions.’”); Public Service Credit Union, at 1 (“As a member-owned financial cooperative, the credit union’s mission is to help its members afford life.”).

number is a mobile number.”<sup>9</sup> Similarly, the 11,000-member Access Community Credit Union in West Texas observes that providing the relief requested in the Petition would “help eliminate confusion between landline and wireless in an increasingly wireless era.”<sup>10</sup> The New York Credit Union Association states it more directly: “[A]ny regulation that continues to make a distinction between a cellphone and a landline is hopelessly outdated. . . . It simply makes no sense to distinguish between landlines and cell phones at a time when consumers make no such distinction and would be shocked to find out that their financial institutions still do.”<sup>11</sup> The difficulty credit unions have in distinguishing between landlines and cell phones is indicative of the larger difficulty they face in achieving TCPA compliance. In its comments supporting CUNA’s Petition, the National Association of Federally-Insured Credit Unions describes this larger difficulty well: “Credit unions have never been and will never be the type of institution the TCPA was intended to target. Credit unions also have limited resources, which makes it especially difficult to navigate the nuances of the TCPA and its implementing regulations.”<sup>12</sup>

As a consequence, “credit unions have been forced to limit their communications with members for fear of violating the TCPA.”<sup>13</sup> In some instances, “compliance staff spends more time having meetings to review TCPA rules and regulations and verify that their communication methods are in compliance than they do actually contacting their members about important information regarding their existing accounts.”<sup>14</sup> Vibrant Credit Union, for example, details how it has “struggled through creating and altering systems, business practices, forms and procedures in order to achieve TCPA compliance.”<sup>15</sup> In Vibrant’s experience, it is far from “‘easy’ for

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<sup>9</sup> Wright-Patt Credit Union, at 1.

<sup>10</sup> Access Community Credit Union, at 1.

<sup>11</sup> New York Credit Union Association, at 2.

<sup>12</sup> National Association of Federally-Insured Credit Unions, at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Vibrant Credit Union, at 1.

credit unions to just obtain and track consent” as suggested by some because of the required “changes to our membership forms, creation of new forms, changes to our system in order to create fields for proper tracking, etc.”<sup>16</sup> In the words of Public Service Credit Union, another Colorado-based credit union, “[i]t seems the current state of the TCPA is a complex minefield, and the credit union’s management is hesitant to venture into such dangerous territory.”<sup>17</sup> In the face of litigation risk, Public Service Credit Union, like many other commenters, has “been forced to limit or eliminate many communications that would help it serve its members better. These communications include governance-related communications, notifications regarding fraudulent activity, and information about overdue payments.”<sup>18</sup>

Others have refrained from using efficient dialing technologies that enable timely notifications. The Credit Union of Texas notes that it is “one of the 75% of credit unions that ceased using an autodialer and prerecorded or artificial voice messages to contact our members, due to our concern under the TCPA.” Using such technologies, the credit union was able to reach many of its member-owners in a timely fashion to avoid delinquencies and late fees. They instead have now more than doubled their collection staff who manually dial and try to reach their members, a much less efficient mechanism, leading to increased delinquencies and their members suffering late fees.<sup>19</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> Public Service Credit Union, at 1.

<sup>18</sup> *Id.* Notably, the Commission recently issued a public notice seeking comment on an expedited request previously made by the Federal Housing Finance Agency (“FHFA”) regarding the need to allow mortgage servicers to use autodialers to contact homeowners affected by Hurricanes Harvey and Irma to provide important information about available mortgage assistance program. *Consumer and Governmental Affairs Bureau Seeks Comment on Federal Housing Finance Agency Petition for Clarification and Declaratory Ruling Under the Telephone Consumer Protection Act*, CG Docket No. 02-278, DA 17-1121 (rel. Nov. 17, 2017). The FHFA noted that the mortgage services are “reluctant to use available auto dialer technology to reach their borrower’s cell phones due to the TCPA’s prohibitions even though such calls are permitted when made for ‘emergency purposes,’” further confirming the chilling affect of the current TCPA rules. FHFA’s Oct. 3, 2017 Request (posted Nov. 15, 2017).

<sup>19</sup> Letter from V. Eric Pointer, President and CEO of Credit Union of Texas, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 02-278 (filed Nov. 6, 2017).



These comments show the overwhelming need for the Petition’s reforms because, as summarized by the Ohio Credit Union League, which represents credit unions in a state where the average credit union has \$100 million in assets and four to eight employees, “present circumstances are jeopardizing consumers’ unabridged and continued access to open and timely communications provided by their cooperative financial institutions.”<sup>20</sup> All of these points are echoed by Digital Library, which recognizes that the TCPA’s rules regarding wireless communications are outdated and that fear of litigation is having a chilling effect on credit unions’ ability to communicate important information to their members.<sup>21</sup>

## **II. Opposition to the Petition is Misguided**

The numerous comments in support of the Petition make clear that the current TCPA rules have chilled communications, making credit union member-owners worse off. The limited opposition to CUNA’s Petition, nevertheless, stems primarily from a group of certain public advocates and TCPA plaintiffs’ law firms whose strident legal and policy arguments bear little resemblance to the modest reforms actually proposed.<sup>22</sup> On policy, they mistakenly argue that adopting the proposed exemptions will open a flood gate of calls lacking consent and that compliance with the “simple” rule to not make calls without consent negates the need for any

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<sup>20</sup> Ohio Credit Union League, at 5.

<sup>21</sup> Letter from Katie McAuliffe, Executive Director, Digital Liberty, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 02-278 (filed Nov. 2, 2017).

<sup>22</sup> Comments Opposing the Petition for Declaratory Ruling, National Consumer Law Center, *et al.*, CG Docket No. 02-278 (filed Nov. 6, 2017) (“NCLC” or “NCLC Comments”). Self-interested opposition comments were also filed by lawyers with two firms that are among the most frequent filers of individual and class action TCPA lawsuits in the country. *See* Comments of Burke Law Offices, LLC in Opposition to Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Nov. 7, 2017) (*see* <https://www.burkelawllc.com/> (“If you have received (1) unsolicited telemarketing on your cell phone, (2) repeated automated debt collection calls despite requests to stop, or (3) telemarketing to your home phone or personal cell phone after you have asked for calls to stop, then please call for a free consultation.”)); Comments Opposing Petition for Declaratory Ruling Filed by Amanda J. Allen, The Consumer Protection Firm, CG Docket No. 02-278 (filed Nov. 7, 2017) (*see* <https://www.theconsumerprotectionfirm.com/> (“The Consumer Protection Firm specializes in fighting ‘robo-bullies.’ We have vast experience handling class action and individual cases all over the country in ‘robo-call’ aka TCPA litigation. . . . Maximum financial compensation is our goal . . .”)).

reforms. They further claim that the adoption of an established business relationship or free-to-end-user exemption would be unlawful. None of these arguments withstand scrutiny.

**A. CUNA’s Proposed Reforms Restore the Balance Contemplated by Congress**

The National Consumer Law Center’s (“NCLC”) claim that CUNA’s modest reforms would unleash a flood of additional unwanted calls ignores the nature of the calls at issue and the specifics of the proposal. It bears emphasizing, once again, that the proposed exemptions would not apply to telemarketing calls, and CUNA proposes no changes to current rules and guidance on what constitutes a telemarketing call. NCLC’s emphasis on robocall numbers in general or on the frequency of debt collection calls ignores the nature of calls primarily at issue in the Petition—calls regarding “both critical information and educational materials that aid members in fulfilling their responsibilities as owners” of the credit unions.<sup>23</sup> CUNA’s Petition also proposes reasonable limitations on the frequency of calls in order to qualify for either the established business relationship (“EBR”) or free-to-end-user exemption and easy to use opt-out options that the credit unions must honor.<sup>24</sup> These limitations preserve the privacy interests of credit union member-owners. The egregious conduct highlighted in NCLC’s recitation of inapposite cases would not be protected by the exemptions proposed in the Petition.

Most disappointing to efforts to strike a reasonable balance between consumer privacy and the legitimate interests of businesses to communicate with their consumers is the NCLC’s unrealistic and woefully simplistic view that TCPA compliance is a simple matter of making calls only to those who have provided consent. The argument naively ignores the real world of complex record keeping, limited resources, transient consumers, changing phone numbers,

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<sup>23</sup> Petition at 5-7, 27 (“[C]redit union communications with member-owners are placed for particular purposes that serve the unique needs of credit unions as both customers and owners.”).

<sup>24</sup> See NCLC Comments, at 13 (discussing litigation based on failure to stop communicating after a consumer had asked to stop being contacted). This concern is addressed by the Petition’s proposal that exemptions would be predicated on easy to use opt-out mechanisms that would be honored by the credit union.

unclear rules regarding revocation of consent, and highly aggressive plaintiffs’ attorneys attempting to manufacture grounds for TCPA violations.<sup>25</sup> The NCLC Comments also suggest that credit unions could exercise better business practices by purchasing access to commercially available databases of reassigned numbers.<sup>26</sup> Many of these same commenters, however, steadfastly oppose establishing a safe harbor for those using such databases.<sup>27</sup> At any rate, the Commission has noted that none of these databases are comprehensive, leading it to propose creation of a Commission-supervised reassigned numbers database.<sup>28</sup> Contrary to the NCLC’s quixotic vision, the comments from the credit unions recounted above reflect the practical difficulties of good-faith compliance.

At bottom, the NCLC’s claim is that fewer calls or texts are better for consumers.<sup>29</sup> As one credit union put it, the “simple” rule actually being proposed by NCLC is “do not call or text anyone.”<sup>30</sup> The Petition pointed out, however, that refraining from calling or texting not only disserves credit union member-owners, but is contrary to the Consumer Financial Protection Bureau’s (“CFPB”) encouragement and approval of financial institutions’ efforts to use mobile technology to aid consumers to track and manage their personal finances.<sup>31</sup> The CFPB particularly noted that such communications were especially important and helpful to “economically vulnerable consumers,” whose interests the groups on the NCLC Comments

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<sup>25</sup> As noted in the Petition, many credit unions are small businesses with few employees and are thus resource constrained. Petition, at 24.

<sup>26</sup> NCLC Comments, at 5.

<sup>27</sup> See *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Comments by National Consumer Law Center, *et al.*, CG Docket No. 17-59, at 11-12 (filed Aug. 28, 2017).

<sup>28</sup> *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Notice of Inquiry, CG Docket No. 17-59, FCC 17-90 (rel. July 13, 2017).

<sup>29</sup> Actually worse, it appears NCLC would have the credit unions constantly ask its customers at each and every opportunity if they still consent to receiving a call or text. NCLC Comments, at 13. One can already anticipate TCPA class actions claiming that a credit union sought to confirm consent from a consumer that had not provided consent or had withdrawn consent in some manner.

<sup>30</sup> Letter from Steven C. Haubner, Vice President of Strategy, Vibrant Credit Union, to Ajit Pai, Chairman, Federal Communications Commission, CG Docket 02-278 (filed Nov. 10, 2017).

<sup>31</sup> Petition, at 28-29.

purportedly seek to protect from “unwanted” calls.<sup>32</sup> Instead of strident, over-the-top advocacy, those signing onto the NCLC Comments would better serve their constituencies (who are also credit union members) by seeking common-sense reforms that actually balance consumers’ privacy with the ability of credit unions to communicate with their member-owners without fear of costly litigation.

**B. The Commission Has Authority To Adopt an EBR Exemption for Informational Wireless Calls**

The NCLC’s claim that adoption of the proposed established business relationship exemption would be unlawful is predicated on a wholly one-sided view of the Commission’s delegated authority to implement TCPA rules. In response to CUNA’s citation to Congress’s directive in section 227(b)(2) that the Commission adopt implementing regulations, the NCLC claims that the Commission may only exercise this authority to impose additional restrictions on the ability of companies to communicate with their consumers. The Commission, they claim, has no ability to “facilitate calls.”<sup>33</sup> This claim surely would be news to Congress, which delegated broad rulemaking authority to the Commission and made clear that the TCPA was designed to balance the privacy interests of consumers while not unduly interfering with the right of businesses to contact their customers in the normal course of business.<sup>34</sup> It would be news to the Commission as well, which has, over the years, promulgated rules that both protect consumers and facilitate normal business communications between businesses and their customers. Most relevant, for purposes of the proposed EBR exemption, is the Commission’s

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<sup>32</sup> Petition, at 29 (quoting *Mobile Financial Services*, Consumer Financial Protection Bureau (Nov. 2015)).

<sup>33</sup> NCLC Comments, at 11 (asserting Congress intended that the Commission only implement rules that “*will protect consumers*”) (emphasis in original).

<sup>34</sup> See Petition, at 3 n.7 (“The Committee does not intend for [TCPA’s] restriction to be a barrier to the normal, expected or desired communications between businesses and their customers.” (quoting H.R. Rep. No. 102-317 at 17 (1991))); *id.* at 12 (the “Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy” – “regardless of the type of call.” (quoting Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(13), 105 Stat. 2394 (Dec. 20, 1991))).

adoption of such an exemption for both informational calls and telemarketing calls to residential lines, as explained in the Petition.<sup>35</sup>

CUNA also anticipated arguments, such as those made by the NCLC, that the TCPA's express authorization for the adoption of a free-to-end-user exemption for wireless calls precludes adoption of any other exemption for wireless calls. The NCLC Comments completely ignore the Petition's discussion of the Commission's own precedent creating exemptions beyond the specific statutory grants contained in the TCPA.<sup>36</sup> The NCLC Comments further contend that courts have precluded the use of an EBR exemption for wireless calls, citing numerous cases.<sup>37</sup> Those cases, however, stand for the unremarkable proposition that no EBR exemption for wireless calls was in place at the time those cases were litigated. They do not stand for the proposition that the statute precludes the Commission from adopting such an exemption by rule or order.

Finally, it is ironic to note that some of the comments opposing the Petition invoke the national do-not-call list,<sup>38</sup> apparently overlooking the fact that the do-not-call list contains an EBR exemption. The EBR exemption reflects Congress's view that privacy interests are not harmed by calls to homes of consumers that have created a relationship with a business.<sup>39</sup> That Congress, in 1991, specifically authorized an EBR exemption for wireline calls while focusing on the cost of wireless calls reflects the communications environment of the time when personal wireless calling was in its infancy, highly expensive, and contrary to wireline calls, the wireless

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<sup>35</sup> Petition, at 8 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752 (1992) ("1992 TCPA Order")).

<sup>36</sup> Petition, at 12-13.

<sup>37</sup> NCLC Comments, at 12.

<sup>38</sup> Comments of Diana May, CG Docket No. 02-278 (filed Nov. 6, 2017).

<sup>39</sup> See, e.g., *1992 TCPA Order*, 7 FCC Rcd. at 8770-71, ¶ 34.

subscriber was billed for minutes for both outgoing and incoming calls.<sup>40</sup> As discussed below, in today's environment, neither wireline customers nor wireless customers typically incur any incremental costs for making or receiving a call or text.

### **C. Opponents Misstate the Free Calls Exemption**

CUNA has requested that the Commission exempt from the prior express consent requirement informational calls and texts to cell phones where the call or text is, in fact, free to the end user. NCLC argues that the Petition's request to exempt free calls is unlawful. This argument is based on a mistaken premise that CUNA would also exempt calls that are not free.<sup>41</sup> The NCLC Comments thoroughly misconstrue CUNA's proposal. If the call or text is not free, *i.e.*, subject to a per-minute or per-text charge or minute or texts limits, then the exemption would not apply. In that circumstance, if the call or text were otherwise unlawful under the TCPA, the credit union could not rely on the free-to-end-user exemption as a defense to potential liability. There is thus nothing "unlawful" about CUNA's requested approach, as it is fully consistent with the TCPA's express grant of authority for the Commission to exempt free calls.<sup>42</sup>

The Petition noted that a credit union could take two approaches to this exemption. It could take the small risk that the call or text would go to a subscriber that does not have an unlimited plan, in which case, as noted, the exemption would not apply. If, on the other hand, the credit union wants to eliminate this risk altogether, it could enter into the type of arrangement

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<sup>40</sup> Wireless billing thus differed substantially from wireline billing under which the calling party incurred the costs of, and was billed for, the call. This calling party pays regime, based on the premise that the calling party causes the communication and solely benefits from it, has been jettisoned by the Commission, which has recognized that both calling and called parties benefit from communications. *In the Matter of Connect America Fund*, 26 FCC Rcd. 17633, ¶ 744 (2011) (sub. history omitted).

<sup>41</sup> NCLC Comments, at 2, 15 ("CUNA is asking the Commission in essence to use its free-to-end user exemption authority to allow credit unions to make calls that are *not* free to the end user.") (emphasis in original).

<sup>42</sup> See 47 U.S.C. § 227(b)(2)(C).

that the Commission has previously approved for ensuring free calls.<sup>43</sup> Many smaller credit unions, however, simply do not have the resources to enter into such an arrangement. As noted in the Petition, nearly half of the nation's credit unions have five or fewer employees.<sup>44</sup> It makes no sense to require credit unions to undertake the time and expense to enter into an arrangement by which it would “pay” for the incremental cost of a call or text when the vast majority of calls and texts are not subject to such charges in the first place. It also makes no sense to deprive a credit union of a free call defense when, from the perspective of the consumer, the result is the same whether the call was free under the consumer's wireless plan or the credit union arranged for the call to be free. In either case, the consumer was not charged for the informational call or text. Moreover, in either case, the free call exemption would only operate as an affirmative defense to TCPA liability if the call, in fact, was free to the end user.

Apart from misstating the exemption, NCLC argues that the Petition overstates the extent to which calls and texts are free, especially for those with low incomes. NCLC's attempts at statistical manipulation notwithstanding, there are abundant, very low priced unlimited call and text plans, including Lifeline programs.<sup>45</sup> All of the big four nationwide providers—which

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<sup>43</sup> See, e.g., *In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Order, 29 FCC Rcd. 3432, ¶ 12 (2014).

<sup>44</sup> Petition, at 24.

<sup>45</sup> Cricket and Total Wireless offer an unlimited talk and text for \$25 per month.

[https://www.cricketwireless.com/cell-phone-plans?woo\\_campaign=SEM&woo\\_source=Google\\_PPC&woo\\_medium=keyword&woo\\_content=NBD%20Plans%20-%20EXM&woo\\_term=prepaid%20unlimited%20plan&kid=kwd-316569973163&cid=282396893](https://www.cricketwireless.com/cell-phone-plans?woo_campaign=SEM&woo_source=Google_PPC&woo_medium=keyword&woo_content=NBD%20Plans%20-%20EXM&woo_term=prepaid%20unlimited%20plan&kid=kwd-316569973163&cid=282396893);

[https://www.totalwireless.com/wps/portal/home/shop/serviceplans?utm\\_source=bing&utm\\_medium=cpc&utm\\_campaign=TW\\_AW\\_NB\\_Plan\\_Prepaid\\_Exact&utm\\_term=cheap%20prepaid%20cell%20phone%20plan&utm\\_content=Plan\\_Prepaid\\_Cheap\\_Exact&gclid=CPHmlKyutvcCFReYxQIdGecKnA&gclsrc=ds\\_](https://www.totalwireless.com/wps/portal/home/shop/serviceplans?utm_source=bing&utm_medium=cpc&utm_campaign=TW_AW_NB_Plan_Prepaid_Exact&utm_term=cheap%20prepaid%20cell%20phone%20plan&utm_content=Plan_Prepaid_Cheap_Exact&gclid=CPHmlKyutvcCFReYxQIdGecKnA&gclsrc=ds_) Consumer Cellular offers unlimited talk for \$20 per month and unlimited talk and text plus 250 MB of data for \$25 per month.

<https://www.consumercellular.com/Plans>. Tello and Republic Wireless offer unlimited minutes and texting for \$15 per month.

[https://tello.com/buy/custom\\_plans?utm\\_source=BizX&utm\\_campaign=Tello.com%20Organic%20Plan%20Listings%20BizX&utm\\_medium=cpc&src=BizX&mdm=cpc&cmg=Tello.com%20Organic%20Plan%20Listings%20BizX](https://tello.com/buy/custom_plans?utm_source=BizX&utm_campaign=Tello.com%20Organic%20Plan%20Listings%20BizX&utm_medium=cpc&src=BizX&mdm=cpc&cmg=Tello.com%20Organic%20Plan%20Listings%20BizX); <https://republicwireless.com/cell-phone-plans/>. Plans supported by Lifeline, e.g., True Wireless, provide unlimited texting and offer 500 minutes of talk and unlimited texting at \$4.99 per month. <https://gotruewireless.com/texas/>. Boomerang offers unlimited talk and text plus 500 MB of data at \$10 per month with the Lifeline subsidy. <https://gotruewireless.com/texas/>. Assurance and QLink offer Lifeline eligible subscribers free plans that include

collectively account for 98 percent of wireless connections<sup>46</sup>—also offer affordable unlimited calling and texting plans.<sup>47</sup> To the extent some very low priced plans contain limits, those are much more likely to apply to calls than to texts. As pointed out in the Petition, the most affordable plans, including Lifeline plans, are much more likely to have unlimited texts than unlimited voice minutes. Low income customers in such plans are much better off, from a cost perspective, receiving unlimited free texts than they would by receiving calls subject to limits on minutes, whether robocalls or hand-dialed calls. Logically, therefore, advocates for low income consumers should cheer the use of texting as the preferred method of consumer notification. It is worth repeating here that the CFPB has recognized that providing timely financial information is particularly important for low income consumers. Yet the complex rules regarding consent have begun to force credit unions to forgo all communications except for manually calling consumers, which, ironically, not only cost low income consumers more than texting and is less timely, but may be made without consent or other TCPA restrictions.

**D. Notably Other Groups Representing Consumers Have Alternative Views to NCLC**

The American Consumer Institute Center for Citizen Research (ACI) filed comments in support of CUNA’s Petition. In its comments, ACI notes:

“Because consumers require better information to make proper decisions, this rule puts consumers at a disadvantage. Consumers require market and service information necessary to make judgments and market decisions. This information could be about their purchases, service appointments, data breaches, fraud, overdrawn account balances, subscriptions and disruption of services. The lack of information reduces market

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unlimited texting along with 350 minutes. <http://www.assurancewireless.com/Public/FAQs.aspx#faq2>; <https://qlinkwireless.com/> (for \$15 per month, QLink offer unlimited minutes and texts). All plans last viewed on November 14, 2017.

<sup>46</sup> *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 17-69, FCC 17-126, at ¶ 13 (rel. Sept. 27, 2017).

<sup>47</sup> T-Mobile offers unlimited voice and text for \$25 per month, taxes included. <https://support.t-mobile.com/docs/DOC-36732>. Verizon offers unlimited text and voice plus 500MB of data for \$30 per month. <https://www.whistleout.com/CellPhones/Search?minutes=-1&sms=-1&address=Denver,+CO+80202>.



differentiation, rivalry and consumer welfare, as well as consumer information. It creates asymmetric information (or imperfect information) which is a market failure.”

ACI additionally highlights the fact that because credit unions are member-owned (consumer-owned), a lawsuit that sends money to one consumer is entirely paid for by its other consumers. Along with the added legal expenses, including the potential for trial attorney abuses, collectively, these customers will pay more than they get in return. Essentially, these rules make consumers worse off, not better off, and this represents yet another consumer welfare loss.

### **CONCLUSION**

For the reasons set forth in the Petition and these reply comments, CUNA respectfully urges the Commission to adopt these common-sense reforms and restore the balance intended by Congress.

Respectfully submitted,

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