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June 3, 2016

Chairman Thomas Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O'Rielly
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (Implementation of the Budget Act)

Dear Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O'Rielly:

On behalf of America's credit unions, I am writing regarding the Federal Communication Commission's (FCC) implementation of the Bipartisan Budget Act of 2015 (Budget Act). The Credit Union National Association (CUNA) represents America's credit unions and their more than 100 million members.

When implementing the Budget Act, the FCC should consider the concerns that Congress and the President had with the limitations the Telephone Consumer Protection Act (TCPA) places on the ability of a variety of businesses to contact consumers with information that they want and need. In accordance with this consideration, it should address those concerns on a broader level to not only include debts owed to or guaranteed by the federal government, but also provide more than artificial relief to financial institutions seeking to communicate with consumers on their cellular phones.

I. Background

The TCPA and the FCC's rules generally require a caller to obtain the prior express consent of the called party when: (1) making a non-emergency telemarketing call using an artificial or prerecorded voice to residential telephone lines; and (2) making any non-emergency call using an automatic telephone dialing system (autodialer), or an artificial or prerecorded voice, to a wireless telephone number, among other specified recipients. However, the Budget Act which was passed by Congress and signed by President Obama in the fall 2015 amended the law so that calls, "made solely pursuant to the collection of a debt owed to or guaranteed by the United States," are exempt from the requirement to obtain prior express consent. The law also states that in implementing the Budget Act amendments, the FCC, "may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States." It required implementation of this law within a 9-month timeframe. Accordingly, the FCC proposed steps for implementation on May 4, providing industry 30 days to comment on its ideas. Regrettably, the FCC's interpretation of this law mirrors its July 2015 TCPA Omnibus Declaratory Ruling and Order ("Order") which shows a fundamental lack of understanding of the need to communicate with consumers in a timely and efficient manner. Specifically, the limit on the number of calls in its proposal appears to frustrate the intent of Congress in passing this law. Furthermore, limiting the exemption to include only three calls per month does little to improve communications with consumers.

CUNA has three specific concerns addressed in this letter. First, in the proposal, the FCC takes an extremely narrow reading of how to implement the Budget Act, and does not appropriately address the concerns Congress and the President had with the onerous limitations the FCC has placed on those seeking to communicate with consumers about debt owed to or guaranteed by the federal government. Second, we urge the FCC to include mortgage debt and Small Business Administration (SBA) loans in its consideration of what is debt owed to or guaranteed by the federal government. Lastly, we would like to reiterate our concerns with the FCC's problematic July 2015 TCPA Order, which provides an exemption for financial institutions that in practicality is not workable and provides little relief regarding their ability to communicate pertinent account information with consumers.

As an overarching matter, we urge the FCC to reevaluate its interpretation of the TCPA, which imposes significant impediments on the ability of financial institutions, such as credit unions, to communicate with their members. This analysis should also consider the statements and guidance of financial regulators, such as the Consumer Financial Protection Bureau (CFPB). Other regulators consistently urge financial institutions to maintain adequate communication with consumers, which conflicts with the FCC's interpretation of the TCPA.

II. The FCC's Interpretation of the Budget Act is Not in Line with the Law Passed by Congress and Signed by the President

In the proposal, the FCC is seeking comment on how it should restrict or limit the number and duration of covered calls, including both collection calls and debt servicing calls. It proposes to restrict the number of covered calls to three per month, and only includes debt when the borrower is in default or delinquent on a payment. The three calls would also include unanswered calls. Furthermore, calls to reassigned numbers are not included in the exemption, except for a one-call safe harbor. These limitations, as outlined in more detail below, make this exemption virtually meaningless. The FCC placed similar limitations on the exemption it provided to financial institutions in the July Order, and credit unions have found this exemption virtually unworkable. Moreover, the three-call limit, which essentially includes any attempt to contact a consumer against this number, is unreasonable on its face since there are countless reasons one may not be able to connect with a consumer on the first few attempts.

In his dissent, FCC Commissioner Michael O'Reilly states, "Even the Administration has become so alarmed by the prospect that the United States might not be able to collect on its debts that it sought to exempt calls regarding such debts from the TCPA's prior express consent requirements. And in 2015, Congress enacted legislation codifying the exemption and requiring the FCC to implement it by this August. In other words, both the Administration and Congress saw a need to override the Commission. . . . Instead of accepting fate, the FCC attempts to read the exception as narrowly as possible, contravening both the spirit and text of the law."

We agree with the concerns voiced in this dissent and urge the FCC to take a more reasonable approach when providing exemptions from the TCPA. Providing unworkable exemptions, like this, and the exemption provided to financial institutions previously, is a missed opportunity. It does not address the concerns Congress, the President, other regulators, consumers, and the financial services industry have raised regarding the problems the FCC's TCPA interpretations have caused for those seeking to communicate with consumers about important information that could affect their financial health.

III. Mortgage Debt and Small Business Administration Loans Should be Included in the Exemption

In the proposal, the FCC does not define what is included in debt "owed to or guaranteed by the United States." The FCC seeks comment on its meaning. The federal government bears the risk of credit loss on some loans provided by credit unions, and we urge the FCC to specify that all such debts are included under this exemption. Further, the FCC seeks comment on whether there are specific types of debts that are covered by the phrase "debt owed to or guaranteed by the United States," such as federal student loans, SBA loans, and federally guaranteed mortgages.

Credit union mortgages backed by government-sponsored entities should qualify for the TCPA's exemption because the United States is at risk for credit loss despite not holding legal title to these mortgages. Enhanced and timely communications to borrowers about mortgage debt can also prevent foreclosures and other negative consequences for consumers, such as late fees. Other federal agencies, as well as state governments, have created specific policies to decrease the likelihood of foreclosures, and the FCC should not be adopting policies that conflict with these efforts. For example, the CFPB has put numerous policies in place to attempt to help distressed mortgage borrowers.[1] To the extent that the FCC can provide relief to financial institutions subject to the TCPA in contacting distressed mortgage borrowers, it should.

Similarly, loans offered by credit unions through programs such as the SBA's 7(a) Loan Program, with up to 90% of the loan guaranteed by the SBA, should be included in the exemption. The SBA describes 7(a) loans as follows: "The 7(a) Loan Program is SBA's primary program for helping start-up and existing small businesses, with financing guaranteed for a variety of general business purposes. SBA does not make loans itself, but rather guarantees loans made by participating lending institutions. In this way, taxpayer funds are only used in the event of borrower default. This reduces the risk to the lender but not to the borrower, who remains obligated for the full debt, even in the event of default." In its own description, the SBA acknowledges that a borrower default will prompt the use of taxpayer funds. Accordingly, it is clear that these loans should be included in the FCC's definition of debt owed to or guaranteed by the federal government.

IV. Credit Unions Still Need Relief from the Onerous July 2015 TCPA Order

This past summer, the TCPA July 2015 Order immediately went into effect after being approved on a party-line vote at an FCC meeting, and without being published as a proposed rulemaking with a notice and comment period.[2] As soon as it was released, credit unions were sent into a state of disarray about how they could instantaneously comply with a document that is well over 100 pages, filled with onerous language and unclear nuances. While the Order purported to recognize the

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[1] Consumer Financial Protection Bureau, Foreclosure Avoidance, *available at* http://files.consumerfinance.gov/f/201312_cfpb_foreclosure-avoidance-procedures.pdf (2013).

[2] *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).

importance of communications between financial institutions and consumers, and provided certain exemptions, as noted the ruling in practicality creates obstacles to credit unions' ability to communicate with their members. Furthermore, it disregards consumers' preferences to use new technologies and modern forms of communication.

Surely when passing the TCPA decades ago, Congress did not intend to arbitrarily scrutinize and limit communications between credit unions, which are not-for-profit, member-owned financial cooperatives, and their members. This Order has not only restricted important communications, but has attracted the attention of law firms seeking to profit from frivolous class action litigation and the exorbitant attorneys' fees and statutory damages associated with TCPA lawsuits. Frivolous class action litigation has proven costly and detrimental to the mission of credit unions to serve their members and provide the best products and service offerings at competitive rates.

A. The Exemption for Financial Institutions Provides Minimal Relief

In the Order, the importance of receiving information from financial institutions was recognized. An exemption was provided for calls concerning: (1) transactions and events that suggest a risk of fraud or identity theft; (2) possible breaches of the security of customers' personal information; (3) steps consumers can take to prevent or remedy harm caused by data security breaches; and (4) actions needed to arrange for receipt of pending money transfers.

<u>However, the conditions that must be met for a call to qualify as exempt are difficult, if not impossible, for credit unions to meet.</u> The Order requires that the exempted calls be free-to-end-user calls, or in other words, there can be no charge of any kind to the consumer. This requirement places an unreasonable burden on financial institutions to ensure that notifications do not count against a recipient's plan for minutes or texts. The technology and resources to be able to administer this are not readily available to the majority of credit unions, particularly smaller credit unions.

Other conditions to qualify for this exemption apply as well. For example, a credit union (1) must initiate no more than three messages (whether by voice call or text message) per "event" over a three-day period for an affected account; (2) must offer recipients within each message an easy means to opt out of future messages; and (3) must honor opt-out requests immediately. The technicalities associated with each of these requirements creates many unanswered questions. For example, it is not clear what constitutes an "event."

Additionally, the exemption only allows calls and text messages to be sent to wireless numbers provided by the customer of the financial institution. An example of a problem with this is that it could preclude another member of a family with a different number, but who is impacted by the account update, from being allowed to receive a call about it.

These are just a few examples of problems associated with the conditions to qualify for the exemption for financial institutions.

B. The Expansion of What is Considered an Autodialer is Problematic

Another concerning aspect of the Order is the expansion of what is considered an autodialer. Clarification on this is important for credit unions because if they are making informational calls using an autodialer to a consumer's cellular phone, they need either oral or written prior express consent. Notably, dissenting FCC Commissioner Ajit Pai expressed concern that the language about what is considered an autodialer used in the Order is so expansive it could cause a device like a smartphone to now be considered an autodialer.

Currently, credit unions and others are not able to interpret from the Order whether the calling system they use subjects them to the TCPA. As a result of this ambiguity, some credit unions have drastically limited their communications or have been forced to revert to manually dialing calls to members. This muddled guidance and lack of certainty is helpful for those looking to profit from frivolous class action litigation, but exasperating for credit unions and consumers looking for certainty in the law and the ability to communicate with each other.

C. Other Issues that Could Stifle Communication with Credit Union Members

Additionally, the FCC creates ambiguity about how consumers can revoke their consent for all autodialed calls stating that it can be done at any time and in any reasonable manner. This onerous language is problematic since consent could be revoked in almost any manner including through oral conversations with an employee at any level of a credit union. Since it is not clear what is a “reasonable” way of revoking consent, credit unions theoretically have to monitor and document all communications in every manner with every member and every employee. This could be particularly problematic for credit unions who are proud of the fact they have employees at all levels who know their members and have longstanding relationships with them.

Furthermore, the Order increases the possibility of being liable under the TCPA when calling a reassigned number that the credit union has previously been given consent to call. The Order makes clear that callers can make only one call under a safe harbor before they are considered to have actual or constructive knowledge that the number was reassigned. The one-call safe harbor does not account for the dozens of reasons it may not be possible to connect with the new holder of the number in one attempt. The Order indicates that it does not matter whether the phone call is answered; the caller is still considered to be on notice. For credit unions serving working families who may switch jobs, move, or simply can no longer afford one type of wireless carrier plan over another, it makes no sense to penalize either the credit union or a member seeking information, because of a different number.

D. CFPB Statements Have Conflicted with the FCC’s Order

Other federal regulators and consumer groups share CUNA's views about the benefits of communicating with consumers on their cellular phones. According to Pew Research Center, around 64 percent of American adults own smartphones, up 29 percent in just four years. Among the Americans who have smartphones, 10 percent said they do not have broadband access at home and 15 said they have limited online options beyond their mobile devices.[3] Mobile technology is often the preferred method of communication for consumers, and for many younger and lower-income consumers it may be their only method to receive communications. This is also the same demographic of consumers that can benefit the most when credit unions are able to intervene early to provide financial education or counseling. The CFPB, in particular, appears to recognize this benefit of increased communication.

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[3] Ungarino, Rebecca, “For More Poor Americans, Smartphones are lifelines,” available at http://www.cnbc.com/2015/04/01/for-more-poor-americans-smartphones-are-lifelines.html (April 1, 2015).

Checking Account Field Hearing

During a CFPB field hearing in February, Director Richard Cordray urged both banks and credit unions to contact consumers on their cellular phone. During the hearing, he stated,

> "Let me also take a moment to acknowledge another positive development, which is the decision some banks and credit unions have made to provide consumers with real-time information about the funds in their accounts available to be spent. They are doing this through various means, including online banking and text and e-mail alerts, which can reduce the risks that consumers inadvertently overspend their accounts."

Credit unions that have over $10 billion in assets are supervised and examined by the CFPB, and the Bureau has rulemaking and enforcement authority over numerous consumer protection laws to which all credit unions are subject. When the CFPB is urging them to use automated telephone communications to contact consumers to protect their credit, while the FCC is creating policies subject them to liability for doing this, it creates extremely problematic, conflicting guidance about how credit unions should be communicating with their members. Unfortunately, it also creates the possibility that consumers may not be able to receive the important updates they need about their financial situation if the liability is too great of a risk for credit unions.

Importance of Mobile Financial Services

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB has the charge of promoting financial education, researching developments in markets for consumer financial services and products, and providing information, guidance, and technical assistance regarding the offering and provision of consumer financial products or services to traditionally underserved consumers and communities. In this regard, the CFPB has provided the public information about how it believes the financial services marketplace should be communicating with consumers on mobile devices. In one such recent publication, the CFPB noted, "Major development in the consumer financial services market over the past few years has been the increasing use and proliferation of mobile technology to access financial services and manage personal finances. For example, in 2013, 74,000 new customers a day began using mobile banking services. Using a mobile device to access accounts and pay bills can reduce cost and increase convenience for consumers. <u>By enabling consumers to track spending and manage personal finances on their devices through mobile applications or text messages, mobile technology may help consumers achieve their financial goals. For economically vulnerable consumers, mobile financial services accompanied by appropriate consumer protections can enhance access to safer, more affordable products and services in ways that can improve their economic lives.</u>"[4] Again, this reasoning directly conflicts with FCC policies that are making it more difficult to communicate with distressed consumers.

CFPB Notice of Proposed Rulemaking on Arbitration

Additionally, the CFPB recently provided some acknowledgement about the problems TCPA class actions could cause for small financial institutions, such as credit unions, in its Notice of Proposed Rulemaking concerning Arbitration Agreements. The proposed rule highlights that Small Entity Representatives (SERs) on the Arbitration Small Business Regulatory Enforcement Fairness Act

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[4] Consumer Financial Protection Bureau, *Mobile Financial Services*, available at http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf (November 2015) (emphasis added).

panel noted they could not absorb the costs of TCPA-related class action lawsuits or settlements since there is no limit on the amount of statutory damages. The CFPB stated, "While the Bureau recognizes the concern expressed by SERs, among others, that particular statutes may create the possibility of disproportionate damages and awards, the Bureau believes that Congress and the courts are the appropriate institutions to address such issues."[5] Small credit unions have expressed similar concerns with the fear that even one class action, based on some alleged technical violation, could put the livelihood of the credit union and its members in jeopardy.

V. The FCC Should Address the Concerns of Congress, the President, Businesses, and Consumers

The FCC's proposal once again takes an unreasonable approach to applying the language of the TCPA to consumers' use of modern technology, and disregards consumers' preferences for communicating using their cellular phones. Unfortunately, as a result, consumers in financial distress may not be able to receive important information about their accounts, which is necessary to improve their situation. Furthermore, because of the FCC's onerous TCPA interpretations and unworkable exemptions, businesses such as credit unions, whose primary mission it is to serve consumers, remain vulnerable to frivolous TCPA class action litigation. We urge the FCC to consider our concerns and to make common sense reforms to allow credit unions to engage in much needed communications with their members.

Thank you for the opportunity to comment on this proposed rule. If you have any questions concerning our letter, please feel free to contact me.

Sincerely,

Leah Dempsey
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Credit Union National Association
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[5] Consumer Financial Protection Bureau, Proposed Rule on Arbitration Agreements, Docket No. CFPB-2016-0020, available at http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf (May 2016).