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National Association of Federally-Insured Credit Unions

November 6, 2017

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW, Room TW-A325
Washington, D.C. 20554

RE: *In the Matter of* Credit Union National Association Petition for Declaratory Ruling
(CG Docket No. 02-278)

Dear Ms. Dortch:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing in support of the Credit Union National Association's (CUNA) Petition for Declaratory Ruling (Petition) requesting an established business relationship exemption from the *Telephone Consumer Protection Act's* (TCPA) "prior express consent" requirement for informational calls or text messages made by credit unions to wireless numbers. NAFCU has repeatedly voiced its concerns regarding the restrictive and burdensome provisions of the Federal Communication Commission's (FCC) regulations implementing the TCPA and encourages the FCC to grant this Petition to ease some of the confusion and frustration credit unions face when trying to contact their members. Credit unions need clarification and a guarantee that they will no longer have to fear frivolous lawsuits from plaintiffs looking to take advantage of the unclear language in the TCPA and its implementing regulations. Moreover, in light of the recent Equifax breach, NAFCU requests that the FCC expand its exigent circumstances exception for data breaches, so that when a data breach occurs, credit unions may contact their members without limitation to provide notifications and remediation options.

General Comments

The TCPA was enacted in 1991 to guard consumers against aggressive telemarketing strategies utilizing autodialers or robocalls without prior express consent. The FCC's rules implementing the TCPA have drawn distinctions between residential lines and wireless numbers for purposes of the prior express consent requirement. Prior express written consent must be obtained for telemarketing or advertising calls to a residential landline made using an autodialer. If the call is an informational call, meaning it has a commercial purpose but is not an advertisement or does not constitute telemarketing, prior express consent is not required. For wireless numbers, however, prior express consent is required for advertising, telemarketing, and informational calls.

The FCC's 2015 Declaratory Ruling and Order (2015 Order) created a "free-to-end-user calls" exemption to prior express consent for communications (calls and text messages) made by a financial institution to wireless numbers in certain exigent circumstances, including fraud, data security breaches, and money transfers. The FCC, however, placed restrictions on the number of communications that can be made per event and the content and length of the communications. Despite its attempt to provide an exemption for calls regarding time-sensitive financial information, the FCC's regulations lack sufficient clarity to provide credit unions with assurance that their calls will satisfy these necessary conditions. Nevertheless, other informational calls to wireless numbers are still not permitted without prior express consent. The FCC's regulations also provide different standards for calls made by tax-exempt nonprofit organizations and calls made to collect on federally-guaranteed debt, but little to no guidance has been issued on these standards, leaving credit unions perpetually unsure as to whether they are permitted to contact their members.

Considering a growing number of consumers today use only a wireless number, these restrictions and other uncertainties regarding the TCPA have made it very difficult for credit unions to share important information with their members. Legislative history makes it clear that the TCPA was not intended to impede "normal, expected or desired" communications as part of an ongoing business relationship, such as the communications between a credit union and its members. Unfortunately, after several decades and a complex labyrinth of regulations, this is precisely what has occurred. Accordingly, NAFCU requests that the FCC recognize the unique relationship credit unions have with their members and grant this Petition to help relieve some of this regulatory burden, thereby allowing credit unions to better serve their members. Additionally, NAFCU requests that the FCC expand its exigent circumstances exemption for data breaches to allow credit unions to have unlimited communications with their members immediately after a breach.

The Credit Union-Member Relationship and Nature of Communications

Credit unions exist to serve their members. As not-for-profit, member-owned financial institutions, credit unions strive to provide unparalleled products and services to their members. 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. Thus, credit unions have been forced to limit their communications with members for fear of violating the TCPA. NAFCU requests that the FCC recognize the unique relationship credit unions have with their members and grant this Petition.

Some of NAFCU's member credit unions have indicated that their 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. This runs counter to Congress's intent in implementing the TCPA and certainly should be a red flag for the FCC that their regulations

have led to unintended consequences. Furthermore, credit unions are in the difficult position of having to comply with other regulations, specifically mortgage servicing regulations on both the federal and state level, while trying to prevent TCPA violations. Calls to inform borrowers of a delinquency, to discuss loss mitigation options, or to inform them of alternatives to foreclosure are communications that are in the best interest of borrowers and may be required by the Consumer Financial Protection Bureau's mortgage servicing rules or other regulations. NAFCU encourages the FCC to recognize the difficulty its regulations have caused in terms of the interaction with other regulatory requirements faced by credit unions and take steps to resolve this problem.

Granting this Petition would be a positive first step in curing some of the regulatory complications credit unions encounter on a daily basis and would significantly simplify TCPA compliance efforts. Many credit unions believe that under the FCC's TCPA regulations, they are not permitted to contact their members with information regarding their existing accounts. Even those that do contact their members are constantly afraid that they will be subject to a lawsuit alleging a TCPA violation. From December 2015 to December 2016 alone, TCPA lawsuits increased by 31.8 percent; totaling almost 5,000 filings in 2016. With an overall increase in TCPA litigation of 1,272 percent between 2010 and 2016, it is clear that there are individuals and plaintiffs' lawyers taking advantage of the outdated and vague TCPA and its implementing regulations. Credit unions do not have unlimited resources and staff available to defend against such frivolous lawsuits and would be utilizing money that belongs to their members – effectively shifting money from one pot to another. Credit unions are not causing the type of nuisance that Congress intended to target when it passed the TCPA. NAFCU implores the FCC to publicly acknowledge that by granting this Petition and providing an expanded exemption for data breach-related calls for credit unions.

The Need for Unlimited Communications Regarding Data Breaches

NAFCU has always advocated for stringent data security standards for retailers similar to the requirements imposed on financial institutions by the *Gramm-Leach-Bliley Act*. Although the ultimate burden falls on retailers and other institutions to protect consumers' financial information and inform them if there is a data security breach, is very important that once a data breach does occur, credit unions' ability to contact their members is not hampered. This is especially true in light of the recent Equifax breach. Millions of consumers' sensitive financial information was compromised, which forced credit unions to incur expenses issuing new credit cards, monitoring their members' accounts, and indemnifying their members for any losses. NAFCU requests that in addition to this Petition, the FCC grant credit unions the ability to contact their members regarding data breaches without limitations on frequency.

Currently, credit unions are permitted to make three communications over a three-day period in relation to a data breach. The FCC also requires the consent of the called party for any communication beyond this limitation. If a credit union is attempting to, in good faith, contact a member to provide information about a data breach and cannot reach the member, this three communication limitation makes those efforts grossly ineffective. At the very least, the FCC

should make a distinction between text messages and calls to allow for additional text message communications immediately following a breach. Ideally, however, the FCC would recognize the immense importance of these communications and impose no limitations on the frequency of calls and text messages a credit union may make to its members after a data breach. It is undoubtedly in the best interest of the consumer to receive such calls so they may take the appropriate steps to protect their sensitive information following a breach.

NAFCU strongly supports strict data security standards for retailers and other institutions like Equifax that have access to Americans' sensitive financial information. NAFCU urges the FCC to show its support by granting this request for unlimited data breach-related communications by credit unions and granting this Petition, which has the potential to substantially improve credit unions' ability to communicate with their members on a variety of topics. In today's increasingly interconnected environment, it is essential that credit unions have greater ability to communicate with their members about important matters concerning their existing accounts without fear of violating the TCPA. Credit union members want and need this information. It is time for the FCC to recognize these concerns and take appropriate action to resolve the complications that have emerged.

Conclusion

NAFCU appreciates the opportunity to offer its support of this Petition and is hopeful that the FCC will take steps to modernize and clarify its TCPA regulations to help credit unions better serve their members. If you have any questions or concerns, please do not hesitate to contact me at (703) 842-2212 or akossachev@nafcu.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann Kossachev", written in a cursive style.

Ann Kossachev
Regulatory Affairs Counsel