



3138 10th Street North
Arlington, VA 22201-2149
703.522.4770 | 800.336.4644
f: 703.524.1082
nafcu@nafcu.org | nafcu.org

National Association of Federally-Insured Credit Unions

March 9, 2017

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

RE: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act, CG Docket No. 02-278 and CG Docket No. 05-338

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 to you in regard to the Petition for Rulemaking and Declaratory Ruling filed by Craig Moskowitz and Craig Cunningham. The Federal Communication Commission's (FCC) interpretation of "prior express consent" is supported by the legislative history of the *Telephone Consumer Protection Act* (TCPA) and therefore should not be reversed. Additionally, NAFCU is concerned that a deviation from the FCC's current interpretation has the potential to make it even more burdensome for credit unions to contact their members with important information regarding their existing accounts.

The FCC's long-held interpretation of "prior express consent" is in line with congressional intent as evidenced by legislative history. A 1991 House Report from the Committee on Energy and Commerce regarding amendments to the *Communications Act* of 1934 provides that "the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications."¹ The FCC's subsequent interpretation of "prior express consent" stems from this House Report.² More recently, in 2014, the Eleventh Circuit confirmed

¹ H.R. No.102-317, 1st Sess., 102nd Congress (1991), at 13 ("In addition, if a subscriber has given 'prior express permission or invitation' to a telephone solicitation, this consent renders the call solicited and relieves the caller of liability for relying on such permission.").

² *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (1992 TCPA Order), 7 FCC Rcd. 8752, 8769 ("[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.").

the validity of the FCC's 1992 TCPA Order on "prior express consent."³ The FCC's interpretation is, thus, justified by legislative history and has been upheld by the courts, so it must stand.

Relatedly, since the FCC's 2015 Declaratory Ruling and Order interpreting the TCPA, credit unions have been forced into the precarious position of deciding between contacting their members and running the risk of violating the TCPA or not contacting their members, thereby withholding vital notifications and updates regarding their existing accounts. NAFCU requests the FCC deny the Petition and carefully consider any changes to the interpretation of "prior express consent" so as to not create more regulatory obstacles for credit unions that are simply trying to serve their members as effectively as possible.

It should be easier, not harder, for a credit union to contact its members when provided with a cellular phone number. In fact a growing number of consumers no longer have traditional phone lines and rely solely on their cellular phone. Congress has, however, required "prior express consent" when making autodialed or prerecorded phone calls and the FCC has enforced that standard for both cellular and residential phone lines. Absent a legislative change, the FCC should deny the petitioners' request and further clarify that it adopts the most liberal interpretation of "prior express consent" and does not require prior express written consent for all autodialed or prerecorded calls, especially informational calls.

In today's increasingly interconnected environment, consumers likely understand that providing their phone number to a credit union means the credit union will use the phone number, when necessary, to contact the consumer. Therefore, providing a phone number constitutes express written consent to be contacted generally, even though the consent may technically be implicit. Furthermore, the petitioners' characterization of such an interpretation as improper does not justify the drastic remedy they seek.

The more obvious solution is a notification requirement whereby consumers are given information about the types of communications they may receive as a result of providing their phone number. Even this option, however, is inappropriate in the credit union context because credit unions are not engaging in the type of harassing behavior described in the Petition. If the FCC does decide to rethink its interpretation of "prior express consent" to be more restrictive, NAFCU asks that the FCC build in an exemption for credit unions. At the very least, the FCC should further study the credit union industry to better understand the member-first approach of credit unions nationwide and realize how the TCPA and the FCC's 2015 Order have harmed, instead of helped, consumers.

The FCC should deny the Petition filed by Craig Moskowitz and Craig Cunningham regarding "prior express consent" because its requests pose a risk to consumers nationwide. If granted, credit unions would face immense difficulties contacting their consumers because they would have to obtain new consent from every single member. In the meantime, members would be deprived of time-sensitive, important information that may even involve suspected instances of fraud, identity theft or data breaches.

³ *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1120-21 (11th Cir. 2014).

Federal Communications Commission

March 9, 2017

Page 3 of 3

NAFCU would be happy to continue this dialogue in person and appreciates the opportunity to provide comments on the Petition. 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". The signature is fluid and cursive, with the first name "Ann" and last name "Kossachev" clearly distinguishable.

Ann Kossachev
Regulatory Affairs Counsel