SUPPLEMENTAL MEMORANDUM OF EX PARTE COMMUNICATION

DOCKET: CG Docket No. 18-152; CG Docket No. 02-278

DATE OF EX PARTE COMMUNICATION: November 2, 2018

SUBJECT: Telephone Consumer Protection Act

PARTICIPANTS:

FCC:
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MEMO PREPARED BY: Ann Kossachev, Senior Regulatory Affairs Counsel, NAFCU

On October 23, 2018, NAFCU met with FCC staff to share its member credit unions' concerns regarding the interpretation of the Telephone Consumer Protection Act (TCPA) following the Ninth Circuit's interpretation of "automatic telephone dialing system" in *Marks v. Crunch San Diego, LLC*. As part of its discussion, NAFCU asked the FCC for an expanded exemption for data breach and fraud communications and explained its intent to submit a supplemental filing detailing this request. After conducting outreach to its members, NAFCU has determined that credit unions differ in their views of the restrictive nature of the data breach exemption in the FCC's 2015 Declaratory Ruling and Order as well as the associated litigation risk. Nonetheless, all respondents agreed that more communications would provide increased flexibility to inform consumers of a data breach or fraud event and help protect their personal financial information.

Based upon responses, NAFCU requests the FCC consider expanding the existing exemption to provide for at least 6 communications over a 1-week period immediately following the event to help alleviate some of the difficulties institutions currently face when trying to reach consumers in such circumstances. Such parameters would provide credit unions with much-needed flexibility to contact members regarding a time-sensitive issue concerning consumers' finances. For example, some credit unions have reported playing "phone-tag" with consumers and running out of the allotted communications before making live contact. With just three communications, a credit union could only place two calls and send one text message or one of the other permutations available within this limitation. The problem is that within that time, a member's credit card balance could be maxed out or their debit card account depleted and the credit union is left helpless, yet responsible for refunding the consumer. Such expenses could be avoided with more opportunity to establish live contact with the consumer.

Another concern shared by one of NAFCU's member credit unions is the affordability of using a vendor that offers automatic account freezes in the event of suspected fraud. Some credit unions cannot afford such a service and have to rely on their limited fraud department, which sometimes consists of only one or two employees, to conduct the necessary research and contact the affected consumer. In such a case, it is imperative that credit unions reach their members to inform them of the suspected fraud because that is the only available option.

Email alerts may also not be an effective alternative method of reaching the member because an email is not required to be provided to the credit union and even if they do have an email on file, it is typically inaccurate or even fictitious. The credit union's indirect lending partners often provide fictitious emails to complete the transaction without informing the credit union, so if they do attempt to contact their member via email, the message will bounce back. Additionally, members will occasionally change their email address or use a different primary email and not update the credit union of this change and then neglect to check any alerts or communications that are sent via email. Some older credit union members also either do not frequently use or are unfamiliar with email and rely on their relationship with the credit union and its employees to call them directly regarding a data breach or cases of suspected fraud.

For the aforementioned reasons, NAFCU respectfully requests that the FCC consider expanding the existing exemption for data breach and fraud events to 6 communications over a 1-week period immediately after an event. This expansion would greatly assist credit unions that are attempting to contact their members about important, time-sensitive information regarding their accounts. The other existing parameters of the exemption may remain unchanged.