



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

December 9, 2019

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

### **RE: Capital One Services Petition on text message transmitted through an automatic telephone dialing system (ATDS) (CG Docket Nos. 18-152 and 02-278)**

Dear Ms. Dortch:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in regard to the Federal Communications Commission's (FCC or Commission) Public Notice seeking comment on a Capital One Services Petition on text message transmitted through an ATDS (the Petition). NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 118 million consumers with personal and small business financial service products. NAFCU respectfully requests the FCC to grant the Petition and issue a declaratory order clarifying this matter. Credit unions and consumers could benefit from a safe harbor that would allow credit unions to send text messages to their members to clarify in an opt-out confirmation message the scope of the recipient's opt-out request without violating the *Telephone Consumer Protection Act* (TCPA) or related Commission rules. Relatedly, NAFCU continues to urge the Commission to act on the outstanding petitions regarding the definition of "autodialer."

### **Legal Authority for Transmission of Clarifying Opt-Out Confirmation Text Messages**

The Petition refers to the Commission's ruling in *SoundBite* as evidence in support of granting the transmission of clarifying opt-out confirmation text messages.<sup>1</sup> Currently, unless for emergency purposes, the Commission's implementing regulations of the TCPA prohibit the transmission of an informational text message using an ATDS to a mobile telephone number without the recipient's prior express consent and permit consumers to revoke consent if they no longer wish to receive text messages from a sender.<sup>2</sup> NAFCU continues to support the adoption of a reasonable, uniform opt-out method for revocation of consent. The current "any reasonable means" standard for revocation of consent exposes credit unions to endless TCPA liability and creates confusion

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<sup>1</sup> See *SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 27 FCC Rcd 15391 (2012).

<sup>2</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115 (2003); WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7962, 7993 (2015).

for consumers who want a clear method of revoking consent. Credit unions should be able to dictate clear opt-out methods to provide consistency to their members.

The Petition correctly points to the evidentiary support in *SoundBite*, where the Commission noted that a sender may, within a short period of time, confirm a recipient's consent revocation request without violating the TCPA or the Commission's rule. As the Petitioner argues, and as the Commission has previously acknowledged, consumers expect and want to receive a confirmation message as part of the opt-out process to verify that the sender has received their request and intends to honor the request. Such messages are not only common practice across industries, they also offer a much needed clarification for consumers who inadvertently submit an opt-out request or who want to opt-out of specific messages but want to continue to receive other important, time-sensitive information.

As member-owned, not-for-profit cooperatives, credit unions have a unique relationship with their members and want to continue offering member-driven services, including providing critical information to their members through the use of text messages. Accordingly, NAFCU agrees with the Petitioner that a clarifying text message after an initial revocation of consent to receive text messages would benefit consumers by allowing them to make an informed choice on the messages they would like to receive. Particularly, these follow-up opt-out confirmation messages would clarify the customer's intent regarding the breadth of his or her opt-out, in the context of a program that transmits more than one category of messages.

### **Comprehensive TCPA Reform**

The Petitioner also references that the Commission has yet to act more broadly on TCPA reform following the D.C. Circuit's decision in *ACA International v. FCC*.<sup>3</sup> In its current form, the TCPA continues to create limitations on the ability of credit unions to communicate freely and effectively with their members regarding their personal and often time-sensitive financial information. Although NAFCU recognizes that broad TCPA reform is outside the scope of the Petitioner's request, NAFCU urges the Commission to act immediately on this important issue; in particular, NAFCU requests the Commission provide legitimate callers and consumers with a much-needed clarification on the definition of "autodialer." NAFCU supports the Commission's efforts to eradicate illegal robocalls but simultaneously stresses the need to protect the free flow of legitimate, beneficial consumer communications, whether through a phone call or text message. Legitimate businesses, including credit unions, increasingly face the threat of frivolous TCPA lawsuits as a result of the absence of an order clarifying the definition of "autodialer."

In recent years, majority of NAFCU's members have indicated a concern over litigation risk, with some limiting communication with their members due to the uncertainty surrounding the TCPA. This uncertainty persists today as numerous courts hand down inconsistent rulings as a result of a lack of clarity from the FCC regarding the definition of an "autodialer." Accordingly, NAFCU urges the FCC to promptly offer meaningful guidance on what equipment would constitute an "autodialer." The inconsistent rulings over the definition of "autodialer" affect the scope of TCPA

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<sup>3</sup> 885 F.3d 687 (D.C. Cir. 2018).

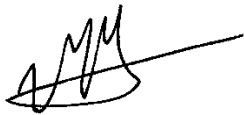
enforcement and creates challenges for credit unions using automated communications to ensure compliance and manage litigation risk. NAFCU is concerned that the FCC's inaction will continue to create compliance burdens for credit unions wanting to contact their members with important information regarding their existing accounts. As such, it is critical that credit unions have clear guidelines to effectively and efficiently operate and better serve their communities.

The FCC should grant the Petition filed by Capital One Services regarding the transmission of clarifying opt-out confirmation text messages. NAFCU supports TCPA reforms that help credit unions contact their members, including an opt-out method that allows credit unions to send a clarifying text message on the scope of their member's revocation so that consumers are well-informed on the type of information they no longer wish to receive. Ultimately, NAFCU supports a broad definition of "autodialer" that only includes equipment that uses a random or sequential number generator to store or produce numbers and dial those numbers without human intervention.

### **Conclusion**

NAFCU appreciates the opportunity to comment on this Petition and encourages the Commission to grant this Petition and confirm the permissibility of opt-out confirmation notices under the TCPA. Moreover, NAFCU looks forward to continuing to work with the Commission to modernize the TCPA and lessen its burden on credit union operations. If you have any question or concerns, please do not hesitate to contact me at (703) 842-2222 or mmakonnen@nafcuh.org.

Sincerely,

A handwritten signature in black ink, appearing to be 'MM', with a long horizontal line extending to the right.

Mahlet Makonnen  
Regulatory Affairs Counsel