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**Carrie R. Hunt**  
Executive Vice President of Government Affairs  
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**National Association of Federally-Insured Credit Unions**

August 15, 2018

The Honorable John Thune  
Chairman  
Committee on Commerce, Science,  
and Transportation  
United States Senate  
Washington, D.C. 20510

The Honorable Bill Nelson  
Ranking Member  
Committee on Commerce, Science,  
and Transportation  
United States Senate  
Washington, D.C. 20510

**Re: Oversight of the Federal Communications Commission (FCC)**

Dear Chairman Thune and Ranking Member Nelson:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only trade association exclusively representing the federal interests of our nation's federally-insured credit unions, I write today in conjunction with tomorrow's oversight hearing of the Federal Communications Commission (FCC) to share with you our comment letters to the FCC outlining credit union priorities as the FCC seeks to modernize the *Telephone Consumer Protection Act (TCPA)*.

In light of the recent decision from the D.C. Circuit Court of Appeals in *ACA International v. FCC*, the FCC has taken steps to gather information from the industry regarding its approach to defining terms and establishing liability under the TCPA. For example, the court struck down the FCC's definition of "autodialer," as outlined in its 2015 Declaratory Ruling and Order, so the FCC must now develop a new standard that better balances consumer protection with the needs of credit unions and other entities seeking to contact their consumers with important information. In a separate effort to assist callers with TCPA compliance, the FCC is also considering developing a database of reassigned numbers.

It is with this in mind that I ask you to review the attached letters regarding the above issues and raise NAFCU's concerns with the FCC Commissioners in your oversight capacity. We ask you to urge the Commissioners to adopt the approaches suggested in the letters so that credit unions may communicate important information to their members without fear of inadvertently violating the TCPA. Thank you for your attention to this matter. If my colleagues or I can be of assistance to you, or if you have any questions regarding this issue, please feel free to contact me or NAFCU's Associate Director of Legislative Affairs, Alex Gleason, at (703) 842-2237.

Sincerely,

Carrie Hunt  
Executive Vice President of Government Affairs and General Counsel

cc: Members of the Committee on Commerce, Science, and Transportation

Attachments: NAFCU Comment Letter on Reassigned Numbers Database (6/7/2018)  
NAFCU Comment Letter on TCPA Interpretation in Light of ACA Decision (6/13/2018)



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**National Association of Federally-Insured Credit Unions**

June 7, 2018

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

RE: *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*  
(CG Docket No. 17-59)

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 regard to the Federal Communications Commission's (FCC) proposed rule *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls* regarding the creation of a reassigned numbers database. NAFCU would like to reiterate its support of the FCC's efforts to evaluate the creation of a reassigned numbers database. NAFCU and its member credit unions urge the FCC to create a single, FCC-designated database and require service providers to report all reassigned numbers information. The FCC should also adopt a safe harbor for those callers who inadvertently make calls to reassigned numbers after checking the database.

### **General Comments**

In response to the host of issues posed by unwanted calls made to reassigned numbers, the FCC has initiated a multiple-front approach to help alleviate the annoyance faced by consumers and the inefficiencies and potential *Telephone Consumer Protection Act* (TCPA) liability imposed on callers. Currently, the Commission requires voice service providers to reassign a telephone number after it is disconnected by the previous subscriber. This reassignment process consists of the following four steps: a number currently in use is disconnected, then aged, then made available for assignment, and finally assigned to a new subscriber.

Some existing tools can help callers identify which numbers have been reassigned, but there is no centralized database that provides callers with guaranteed methods to discover all reassignments. In his statement related to the 2015 TCPA Declaratory Ruling and Order (2015 Order), FCC Commissioner Michael O'Rielly noted that existing solutions are incomplete and not timely updated. As a result, in July 2017, the FCC released a Reassigned Numbers Notice of Inquiry (NOI) to solicit information regarding potential ways to reduce unwanted calls to reassigned numbers. The FCC solicited comment on ways that service providers should report

information about number reassignments and how that information can most effectively be made available to callers. Of the thirty-three comments received, most supported a comprehensive and timely database overseen by the FCC that allows callers to verify whether a number has been reassigned before making a call. The FCC has also received requests from members of Congress to move forward with a rulemaking to create a reassigned numbers database. In March 2018, the FCC released this Second Further Notice of Proposed Rulemaking and approved the proposal for publication in the *Federal Register* during its Open Commission meeting that month.

NAFCU supports the creation of a single, centralized database that is overseen by the FCC as the best option to tackle this issue. The other proposed alternatives are dispersed and incomplete, which has the potential to create confusion for callers and inconsistency across the voice service provider industry. If, after rigorous study and analysis of the costs and benefits, the FCC should decide that greater economies of scale may be achieved through the modification of one of the existing numbering databases overseen by the Commission, NAFCU would support requiring service providers to report information to one or more commercial data aggregators, subject to certain parameters. Again, even this method should aim to create a centralized and timely-updated repository of reassigned numbers instead of continuing the fragmented and ineffective approach to compiling reassigned numbers that exists currently. NAFCU also urges the FCC to expressly exempt credit unions from any cost associated with using the reassigned numbers database. Below are NAFCU's specific responses to several of the requests for comment in the order in which they appear in this proposal.

#### **Database Information, Access, and Use**

NAFCU encourages the FCC to move forward with formal rulemaking to create a centralized reassigned numbers database. Credit unions, as member-owned, not-for-profit, cooperative financial institutions, operate with their members' best interests in mind and seek to contact them with vital information regarding their accounts and services. NAFCU is hopeful that the creation of a centralized reassigned numbers database will provide some relief from TCPA liability to credit unions acting in good faith in contacting their members.

##### *Type of Information Needed*

Credit unions have detailed personal information about their members so that they may best serve their financial needs. As such, when attempting to contact a member, a credit union has on hand the name and telephone number of their member. Additionally, credit unions typically have information regarding the last contact they made with the member. With regard to the use of a reassigned numbers database, credit unions would seek to find information about when the member's telephone number was reassigned. In particular, it would be most helpful for a reassigned numbers database query to provide the following information: (1) the date the number was disconnected; (2) whether this was a permanent disconnection or the number is in temporary suspension status (due to, for example, non-payment); (3) the current stage of the reassignment process (e.g., disconnected, aged, available for assignment, and assigned to a new subscriber); and (4) whether the number is a residential or mobile phone number.

All of this information would greatly help credit unions determine whether the telephone number is still assigned to the member in question and what steps they should take moving forward to communicate with the member while complying with the requirements of the TCPA. In order for this information to be effective and efficient in informing callers before they attempt to contact a consumer, the FCC should provide guidance on the definition of the terms "temporary suspension status" and "disconnected," clarifying that the latter is a permanent deactivation of the telephone number. Moreover, the FCC should clarify that ported numbers (i.e., numbers that have been transferred to another voice service provider or moved from a residential line to a mobile line) do not qualify as reassigned numbers for the purposes of reporting to a reassigned numbers database as a way to avoid false positives and confusion. NAFCU urges the FCC to tackle such definitional obstacles first even before determining what information is and is not to be included in a reassigned numbers database.

#### *Comprehensiveness of Database Information*

NAFCU maintains that all types of voice service providers, including wireless, wireline, interconnected VoIP, and non-interconnected VoIP providers should submit all of their reassigned numbers data to the centralized database. Receiving data from all voice service providers is the best way to ensure the database contains the most up-to-date and complete list of reassigned numbers. To be clear, the database should contain only those numbers that have been disconnected or placed in temporary suspension status and not all numbers allocated by a numbering administrator to a service provider. If all numbers were to be included, the database would surely become unwieldy, difficult to navigate, and confusing for users. Additionally, to further enhance the usability of the database, the FCC should limit the reported reassigned numbers information to no more than 10 years.

#### *Timeliness of Database Information*

NAFCU's member credit unions would like a reassigned numbers database to be as current as possible; therefore, voice service providers should be required to update the reassigned number information they report to such a database on a regular basis. Approximately 100,000 cell phone numbers are reassigned to new users every day, so providing updates infrequently would defeat the purpose of the database. Voice service providers of all sizes and across all regions of the country should be held to the same reporting standard.

More specifically, voice service providers that age their numbers quickly should be required to report disconnection information on at least a daily basis to provide callers with as close to real-time updates as possible. For those service providers that age their numbers for 45 days or more, reporting should be permitted less frequently because a requirement to report the same information on a more frequent basis would not serve the best interests of callers. Ideally, the FCC would require all voice service providers to comply with a minimum aging period of at least 30 days to minimize confusion and limit the possibility of false positives. In that instance, service providers should be required to report disconnected numbers only on a weekly basis but then update the database as soon as the number has been reassigned. These parameters would

help create consistency across voice service providers and assist credit unions and other users of the reassigned numbers database to access the most timely and accurate information possible.

#### *User Access to Database Information and Cost to Use Database*

Reassigned numbers database users should certainly be required to login to the database in order to access the information. This login would require the user to create an account at little or no cost, and supply information including their name, affiliation, and address. NAFCU would support a requirement that during the process of creating an account, the user must certify that they will use the database only to seek information for the purposes of TCPA compliance and to reduce unwanted calls to reassigned numbers. This would help protect the integrity of the database. Users should not be subject to audits or other reviews unless there is reason to believe the user is engaging in suspicious behavior. Most importantly, access to the database should be affordable to institutions of all sizes, meaning the creation of an account should come at little or no cost. Credit unions have limited resources, yet need to comply with the whole spectrum of applicable federal and state regulations, which requires an immense amount of dedication and hard work from credit union compliance officers. NAFCU urges the FCC to consider these constraints on credit unions and exempt them from any costs associated with access to a reassigned numbers database.

#### *Database Use and TCPA Compliance*

NAFCU and its member credit unions wholeheartedly support the adoption of a safe harbor for those callers that use the reassigned numbers database. Section 251(e) of the *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, provides the FCC with the statutory authority to implement a safe harbor for reassigned numbers. If a database user takes all necessary steps to determine whether a telephone number has been reassigned, yet either receives incorrect information from the database or somehow inadvertently makes a call to a reassigned number after checking the database, the user should be protected from liability for a TCPA violation. A safe harbor for callers using existing commercial solutions is not practicable because the information contained on those databases is often times incomplete and untimely. Those callers who use the newly established database and make reassigned-number calls in good faith or receive inaccurate or untimely information should be shielded from TCPA liability. The U.S. Court of Appeals for the D.C. Circuit's recent ruling in *ACA International v. FCC* does not prevent the FCC from establishing a safe harbor, but simply holds that the one-call safe harbor is arbitrary and capricious. NAFCU encourages the FCC to craft a safe harbor for users of the reassigned numbers database as explained above.

#### **Approaches to Database Administration**

The D.C. Circuit's recent decision has only made it clearer just how important it is for the FCC to move ahead with the creation of a reassigned numbers database. The Court notes the Commission's acknowledgment in the 2015 Order that a consumer could "purposefully and unreasonably" not inform a good-faith caller about their reassigned number simply to accrue statutory penalties. These perverse incentives are precisely what the FCC should be combatting.

There is no excuse for the influx of incredibly expensive lawsuits alleging TCPA violations that have emerged since the 2015 Order and waiting any longer to create a reassigned numbers database would only further exacerbate this issue. This litigation risk forces many credit unions to shy away from contacting their members because they cannot afford to be wrong about a telephone number and face an expensive TCPA lawsuit. The benefits of establishing a centralized, FCC-designated database largely outweigh the costs of doing so and the ongoing costs of maintaining the database. NAFCU urges the FCC to act swiftly to create a comprehensive, centralized reassigned numbers database.

#### *Mandatory Reporting to Single Database*

Although NAFCU and its member credit unions strongly support the creation of a single database overseen by the FCC, it may be possible to expand or modify one of the existing numbering databases to achieve the same purpose in a more efficient manner. NAFCU supports cost-saving initiatives and would support a process such as transforming an existing database to create the centralized database so long as the final result is as inclusive and functional as it would be otherwise. NAFCU encourages the FCC to consult with all relevant parties with expertise in numbering, such as the North American Numbering Council, to establish the reassigned numbers database. If, after a rigorous evaluation of all available options to expand or modify existing databases, the FCC finds that building up an existing database would require more work than just developing a completely new database, then it should proceed to create an entirely new database.

Moreover, the FCC should evaluate all possible options for funding of an FCC-designated reassigned numbers database. NAFCU urges the FCC to consider the resource constraints faced by credit unions and expressly exempt credit unions from paying for the use of a reassigned numbers database. If the FCC is not willing to create an exemption for credit unions, NAFCU urges the FCC to find the best pricing scheme (e.g., charge per query or a flat fee) that will create the cheapest option for credit unions while adequately funding the database. Users should be billed through the accounts they created to access the database to eliminate any additional steps and avoid paper billing.

#### *Mandatory Reporting to Commercial Data Aggregators*

If the costs of creating a centralized, FCC-designated database are too high, then NAFCU would support the mandatory reporting to a single commercial data aggregator, provided that the FCC creates clear requirements and regulations for the data aggregator. Having more than one commercial data aggregator in this space raises concerns that reassigned numbers information would become jumbled and inconsistent; however, it also creates competition and the potential for cost-savings. Additionally, with more than one data aggregator, NAFCU is apprehensive about a race to the bottom regarding the accuracy of reassigned numbers information. If the FCC could establish a disincentive for data aggregators to be the "first" to report reassigned numbers, NAFCU would support this option as well. Nonetheless, under this alternative, the parameters for the database would be the same as explained above for a centralized, FCC-designated database. Namely, all service providers should be required to report data to the aggregator(s) and use of the database should come at little or no cost to credit unions. Should there be greater

Federal Communications Commission  
June 7, 2018  
Page 6 of 6

efficiencies with this approach, NAFCU supports the FCC pursuing this type of database, so long as the parameters outlined above are implemented.

*Voluntary Reporting to Commercial Data Aggregators*

NAFCU and its member credit unions are strongly opposed to the creation of a voluntary reporting regime to commercial aggregators. This approach is antithetical to the idea of a complete, up-to-date reassigned numbers database that helps consumers avoid unwanted calls and good-faith callers avoid TCPA liability. Service providers would have no incentive to report data more than they do now and it is clear that the present "solutions" are not really solutions at all. Therefore, NAFCU urges the FCC to reject this idea and focus on creating a single, FCC-designated database or, alternatively, mandatory reporting to one or more commercial data aggregators, subject to the parameters explained above.

**Conclusion**

NAFCU is thankful for the opportunity to comment on this proposed rule for the creation of a reassigned numbers database and looks forward to continuing to work with you to modernize the TCPA and lessen its burden on credit union operations. If you have any questions or concerns, please do not hesitate to contact me at (703) 842-2212 or [akossachev@nafcu.org](mailto:akossachev@nafcu.org).

Sincerely,



Ann Kossachev  
Senior Regulatory Affairs Counsel



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**National Association of Federally-Insured Credit Unions**

June 13, 2018

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

RE: Interpretation of the TCPA in Light of D.C. Circuit Decision in *ACA International*  
(CG Docket No. 18-152; 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 regard to the Federal Communications Commission's (FCC) Public Notice on the interpretation of the *Telephone Consumer Protection Act* (TCPA) in light of the recent decision from the U.S. Court of Appeals for the D.C. Circuit in *ACA International v. FCC*. NAFCU urges the FCC to interpret "automatic telephone dialing system" (ATDS) to mean equipment that uses a random or sequential number generator to dial numbers without human intervention. Second, the FCC should interpret "called party" as the intended recipient of the call, or the party the caller expected to reach. The FCC should also allow callers the flexibility to establish reasonable opt-out methods for consumers to revoke "prior express consent" to receive calls from an ATDS.

NAFCU has long advocated for changes to the TCPA to help provide relief to credit unions attempting to deliver important information to members about their existing accounts. The problem is clear: the outdated language in the TCPA and the FCC's overly-expansive interpretations have led to a rise in frivolous litigation and discouraged good faith actors from making important and desired calls to consumers. NAFCU recommends that the FCC, in light of the D.C. Circuit's recent decision, initiate rulemakings to adopt the following changes.

#### **Definition of ATDS**

On March 3, 2018, NAFCU, along with several other groups, submitted a Petition for Declaratory Ruling to the FCC asking for a more narrow interpretation of the TCPA's definition of ATDS. Based on the D.C. Circuit's guidance in its recent decision, the FCC should (1) clarify that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and (2) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions. To qualify as an ATDS, the equipment's dialing capabilities must be completely "automatic." Automatic



necessarily means non-manual. Automatic means a robotic, non-human action. Therefore, equipment is not an ATDS unless it has the capacity to dial numbers without human intervention.

In the 2015 Declaratory Ruling and Order (2015 Order), the FCC vastly expanded the concept of "capacity" by pronouncing that equipment can meet the statutory definition even if it lacks the present capacity to generate and dial random or sequential numbers. The D.C. Circuit invalidated this inherently inconsistent position, so the FCC should now confirm that equipment must be presently functioning as an ATDS when a call is made to be subject to the TCPA's prohibitions. The fact that equipment may be configured to function as an ATDS does not, during a particular call, make it an ATDS. Unless those capabilities are being utilized presently for the call, the statutory prohibition on ATDS calls does not apply. For consistency and to achieve the most equitable, narrow definition of ATDS, the FCC should clarify this point.

### **Reassigned Numbers**

One of the biggest issues facing credit unions trying to communicate with their members is determining whether a number has been reassigned. Although third-party "solutions" currently exist, these databases are incomplete and sometimes inaccurate. As a result, NAFCU and its member credit unions strongly support the creation of a single, FCC-designated reassigned numbers database, or alternatively mandatory reporting to one or more commercial data aggregators, subject to certain parameters. The FCC should require users to create an account to access the database and NAFCU urges the FCC to consider exempting credit unions from any user fees associated with the creation of an account and use of the database. Additionally, the FCC should adopt a safe harbor for those callers who use the reassigned numbers database but, either due to inaccurate or untimely information or some other inadvertent reason, make a good-faith call to a reassigned number. A more detailed explanation of NAFCU's position on this issue can be found in its June 7, 2018 letter submitted to the FCC under CG Docket No. 17-59.

### **Revocation of Consent**

The current standard for revocation of consent by "any reasonable means" has ballooned litigation risk and put credit unions in a very precarious position with respect to contacting their members. NAFCU urges the FCC to undo this standard in favor of a caller's reasonable opt-out method standard. Callers should be permitted to define the channels of revocation that are acceptable based on the means that are most convenient for their systems and processing procedures. Oral revocation of consent is not ideal for credit unions because it causes confusion for employees and members alike. There are too many instances in which a consumer alleges to have orally revoked consent to be contacted yet there is no record of such consent and callers have not had the opportunity to incorporate the revocation into their systems. This unstandardized, unreliable method is flawed because it forces callers to implement unreasonably expensive and time-consuming methods to ensure consumer revocation is properly documented and integrated.

Credit unions would prefer that revocation of consent be made in writing and signed by the member if done in-person at a branch location or be completed through the opt-out method

provided by the credit union if done through a phone call or text message. The FCC should permit callers to decide the remote opt-out method that works best for their particular needs, including options such as responding to a text message with "STOP" or dialing a standardized code such as "\*7" for live calls. Additionally, the FCC should clarify that a caller may designate whether an opt-out is only for a particular type of communication or all future communications. Once a consumer revokes consent, callers should be afforded at least 30 days to process the request and designate the consumer as removed from future communications.

Moreover, the D.C. Circuit's decision made it clear that the 2015 Order did not address "revocation rules mutually adopted by contracting parties," but NAFCU requests the FCC address this issue and confirm that parties may contract for specified methods of revocation of consent. Other courts have spoken in favor of contracting for revocation methods. Most recently, the U.S. District Court for the Northern District of Ohio ruled in favor of the bank defendant and held that a consumer's alleged oral revocation of consent to receive autodialed calls to his mobile phone was ineffective under the TCPA because his credit card agreement provided that written notice was required.<sup>1</sup> Aside from this ruling, the only circuit court to have decided this issue held that consent to be contacted cannot be revoked if it is part of the bargained-for exchange in a contract between the parties.<sup>2</sup> Instead of continuing to generate uncertainty and encourage litigation on this matter, the FCC should take a stance by confirming these court decisions and clarifying that parties may contract for the terms of revocation of consent.

### **Conclusion**

NAFCU appreciates the opportunity to comment on the FCC's efforts to interpret and modernize the TCPA. If you have any questions or concerns, please do not hesitate to contact me at (703) 842-2212 or [akossachev@nafcu.org](mailto:akossachev@nafcu.org).

Sincerely,



Ann Kossachev  
Senior Regulatory Affairs Counsel

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<sup>1</sup> See *Barton v. Credit One Fin.*, Case No. 16CV2652, 2018 U.S. Dist. LEXIS 72245 (N.D. Oh. April 27, 2018).

<sup>2</sup> *Reyes v. Lincoln Auto. Fin. Serv.*, 861 F.3d 51 (2d Cir. 2017).