

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	Case No. 15-1306
	)	(consolidated with
v.	)	Nos. 15-1211, 15-1218,
	)	15-1244, 15-1290, 15-
FEDERAL COMMUNICATIONS	)	1304, 15-1311, 15-1313, &
COMMISSION AND UNITED STATES	)	15-1314)
OF AMERICA,	)	
	)	
Respondents.	)	

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**MOTION OF**  
**THE NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS**  
**FOR LEAVE TO INTERVENE**

Pursuant to 47 U.S.C. § 402(a), 28 U.S.C. § 2348, Federal Rule of Appellate Procedure 15(d), and D.C. Circuit Rule 15(b), the National Association of Federal Credit Unions (“NAFCU”) hereby moves for leave to intervene in support of the Chamber of Commerce of the United States (“Petitioner”) in this action seeking review of the July 10, 2015 Declaratory Ruling and Order of the Federal Communications Commission (“FCC”), captioned *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No.

07-135, FCC 15-72 (July 10, 2015) (the “Order”).<sup>1</sup>

In the alternative, pursuant to Federal Rule of Appellate Procedure 29 and D.C. Circuit Rule 29, NAFCU moves for leave to file a brief *amicus curiae* in support of Petitioner.

### **GROUND FOR INTERVENTION**

1. NAFCU is a national trade association of federally-insured credit unions—the only trade association focusing on the issues affecting the nation’s credit unions at the federal level. NAFCU’s 769 members are not-for-profit, member-owned financial cooperatives that provide invaluable financial services for up to 101 million people nationwide.

2. Federal Rule of Appellate Procedure 15(d) permits a party to intervene in a proceeding to review agency action if a motion to intervene is “filed within 30 days after the petition for review is filed” and “contain[s] a concise statement of the interest of the moving party and the grounds for intervention.” Fed. R. App. P. 15(d); *see, e.g., Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991).

3. Although NAFCU did not participate in the proceedings before the FCC, the statute governing review of FCC orders permits intervention by

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<sup>1</sup> Pursuant to D.C. Circuit Rule 15(b), this motion should be deemed a motion to intervene in all cases that have been filed and all those that will be filed in this Court requesting review of the same underlying FCC Order.

any party “whose interests are affected by the order,” 28 U.S.C. § 2348, so long as that party satisfies the requirements for standing under Article III of the Constitution. *See Rio Grande Pipeline Co. v. FERC.*, 178 F.3d 533, 539 (D.C. Cir. 1999) (“For those who have Article III standing but failed to participate at the agency level, § 2348 ... permits intervention.”); *World Commc’ns, Inc. v. FCC*, 735 F.2d 1465, 1473, n.20 (D.C. Cir. 1984).

4. NAFCU satisfies the requirements for intervention here.

5. *First*, this motion for leave to intervene is timely. It is being filed within 30 days of the filing of the Petition in this case on September 3, 2015.

6. *Second*, NAFCU’s interests are affected by the Order because NAFCU’s members will be adversely affected in numerous ways if the Order is not vacated or modified.

7. Credit unions regularly contact customers via telephone and text message to provide information regarding fraud, identity theft, and other data security issues, as well as to supply marketing information and account alerts. The Order dramatically expands the scope of the Telephone Consumer Protection Act of 1991 (“TCPA”), thereby restricting the ability of credit unions to communicate with their customers on these important topics, and exposing credit unions to class action litigation risk.

8. The Order expands the definition of “automatic telephone dialing system” to include equipment that “lacks the ‘present ability’ to dial randomly or sequentially” but has the “potential” or “capacity” to provide those capabilities. Order ¶¶ 15, 16. This broad definition potentially sweeps in a wide swath of dialer technology, and leaves credit unions to determine on a case-by-case basis whether a particular piece of equipment is covered. The ambiguity as to what qualifies as an autodialer will deter credit unions from making important communications to their customers for fear of inadvertently violating the Act, particularly given the rapid pace of technological development and lack of concrete guidance from the FCC.

9. The Order defines “called party” for purposes of the prior express consent provision to include the “subscriber” or “customary user of the phone,” rather than the intended recipient of the call, *id.* ¶ 73, and the Order imposes strict liability for calls to reassigned wireless numbers following the first call to the new subscriber, “when a previous subscriber, not the current subscriber or customary user, provided the prior express consent on which the call is based,” *id.*. These provisions too will deter credit unions from making important communications to their members about issues affecting their accounts because credit unions will often have no way of knowing whether a wireless number for which a customer previously

provided consent to be called has been reassigned to a new subscriber. And by limiting the safe harbor to one call—regardless of whether the caller is alerted that the number has been reassigned or even connects with the new subscriber—the Order opens the door to potential liability for good faith errors.

10. NAFCU members will also be adversely affected by the Order's treatment of revocation of consent to be called. The Order requires callers to accept revocation of consent "through any reasonable means," without defining what those means include. *Id.* ¶ 47. This vague standard is problematic because it potentially permits customers to revoke consent through oral communication with any credit union representative. Because it is impossible for credit unions to know what means of revoking consent will be considered "reasonable," it is difficult if not impossible to train credit union representatives to recognize when consent has been revoked and to record that revocation accordingly.

11. Furthermore, the "free-to-end-user" call exemption adopted by the FCC provides little relief to credit unions. The Order creates an exemption from the TCPA for certain calls made by financial institutions to customers concerning: (1) fraudulent transactions or identity theft; (2) possible data breaches of customers' personal information; (3) measures

consumers may take to prevent identity theft following a data security breach; and (4) money transfer notifications. *See id.* ¶ 127. However, to qualify for the exemption, the calls must be completely free of charge to the customer, meaning the customer will incur no fees of any kind in connection with the call or text message. *See id.*; *see also id.* ¶ 129. Moreover, the financial institution must offer an easy means to opt out of future messages, honor opt-out requests immediately, and send no more than three messages per event per account over a three-day period. *See id.* ¶ 138. In practice, it is unworkable for credit unions to comply with these restrictions, particularly the requirement that the consumer not incur any costs under his individual rate plan, making it functionally impossible for credit unions to take advantage of the exemption. As a result, credit unions' ability to contact customers regarding important issues affecting their accounts, such as fraud and identity theft, will be constricted.

12. As explained in the preceding paragraphs, the interests of NAFCU and its members are "affected" by the Order in numerous ways. As a result of the expansive interpretation of the TCPA adopted in the Order, credit unions' ability to communicate with their customers about important issues affecting their accounts will be severely restricted; credit unions will be forced to expend significant time and money attempting to comply with

the uncertain standards created by the Order; and they may be exposed to potentially crippling liability from class action lawsuits for good faith errors. The latter two considerations are particularly acute for credit unions, given their relationship with their member-owners.

13. *Third*, NAFCU has Article III standing. “An association has standing to sue on behalf of its members when: ‘(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.’” *Military Toxics Project v. EPA*, 146 F.3d 948, 953-54 (D.C. Cir. 1998) (quoting *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)). As explained above, credit unions routinely communicate with their customers through calls and text messages, and their ability to do so will be severely limited if the Order is not vacated or modified. Accordingly, NAFCU’s members would have standing to intervene in support of Petitioner. *See id.* (association permitted to intervene in challenge to EPA order where association members were “directly subject to the challenged Rule,” and thus “would suffer concrete injury” if the Rule were not overturned). The interests NAFCU seeks to protect are germane to its purposes. NAFCU’s mission is to “[p]rovide credit unions with the best

federal advocacy, education and compliance assistance in the industry.”

NAFCU “is committed to representing, assisting, educating and informing [its] member credit unions to help them grow, and help grow the credit union industry.” Neither the claim asserted nor the relief requested requires participation by individual NAFCU members.

### CONCLUSION

For these reasons, the Court should grant NAFCU’s motion to intervene. In the alternative, NAFCU requests leave to file an *amicus* brief in support of Petitioner.

Respectfully submitted,

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*Counsel for NAFCU*

Dated: September 25, 2015

**RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, counsel for the National Association of Federal Credit Unions (“NAFCU”) states as follows:

NAFCU is a not-for-profit corporation and trade association, that provides federal advocacy, education, and compliance assistance to the nation’s federally-insured credit unions. Since 1967, NAFCU has been an independent voice in promoting a strong credit union industry, which is vital to our nation’s economy. NAFCU does not have a parent corporation, and there is no publicly-held corporation that owns 10% or more of its stock.

Dated: September 25, 2015

Respectfully submitted,

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**CERTIFICATE AS TO PARTIES**

Pursuant to D.C. Circuit Rule 28(a)(1), the National Association of Federal Credit Unions (“NAFCU”) states as follows:

In case No. 15-1306, the Chamber of Commerce of the United States of America is Petitioner; the Federal Communications Commission (“FCC”) and the United States of America are Respondents.

In consolidated case No. 15-1211, ACA International is Petitioner; the FCC and the United States of America are Respondents.

In consolidated case No. 15-1218, Sirius XM Radio Inc. is Petitioner; the FCC and the United States of America are Respondents.

In consolidated case No. 15-1244, the Professional Association for Customer Engagement, Inc. is Petitioner; the FCC and the United States of America are Respondents.

In consolidated case No. 15-1290, Salesforce.com Inc. and ExactTarget, Inc. are Petitioners; the FCC and the United States of America are Respondents.

In consolidated case No. 15-1304, the Consumer Bankers Association is Petitioner; the FCC and the United States of America are Respondents.

In consolidated case No. 15-1311, Vibes Media, LLC is Petitioner; the FCC and the United States of America are Respondents.

In consolidated case No. 15-1313, Rite Aid Hdqtrs. Corp. is Petitioner; the FCC and the United States of America are Respondents.

In consolidated case No. 15-1314, Portfolio Recover Associates is Petitioner; the FCC and the United States of America are Respondents.

Intervenors on behalf of Petitioners in the consolidated cases include Council of American Survey Research Organizations; Marketing Research Association; MRS BPO LLC; Cavalry Portfolio Services, LLC; Diversified Consultants, Inc.; and Mercantile Adjustment Bureau, LLC.

Dated: September 25, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that, on September 25, 2015, I electronically filed the foregoing Motion for Leave to Intervene, Corporate Disclosure Statement, and Certificate as to the Parties on the Court's CM/ECF System, which caused those documents to be served on all parties or their counsel who are registered CM/ECF users. I also served the foregoing documents, by first-class mail, on the following individuals:

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