

September 21, 2016

The Honorable Greg Walden
Chairman
Subcommittee on Communications and
Technology
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable Anna Eshoo
Ranking Member
Subcommittee on Communications and
Technology
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Walden and Ranking Member Eshoo:

On behalf of America's credit unions, I am writing regarding tomorrow's hearing entitled "Modernizing the Telephone Consumer Protection Act." The Credit Union National Association (CUNA) represents America's credit unions and their more than 100 million members. Thank you for the opportunity to comment on this hearing.

Credit unions understand the importance of consumer protection and support efforts to rein in those abusing or taking advantage of consumers. Since their inception they have played a unique role in the financial services marketplace as not-for-profit financial cooperatives, owned by their members. They provide credit at more affordable rates than most others in the financial services marketplace and take their role in providing financial education seriously.

Communication with credit union members is an essential consumer protection function; members need and want to hear from their credit union in a timely and efficient manner when an issue arises with their account. Communicating with credit union members can help prevent identity theft and stolen data, mitigate the harm once such events have occurred, and give consumers the chance to receive other important information about their accounts, such as the ability to avoid late payments.

Unfortunately, the Federal Communications Commission's (FCC) July 2015 Omnibus Declaratory Ruling and Order ("Order") for the Telephone Consumer Protection Act (TCPA) was problematic and has impacted credit unions' ability to communicate with their members about pertinent account information. We support the concept of preserving consumers' rights to privacy on their cell phones and protecting financial information; however, the FCC's Order goes far beyond the scope or purpose of the TCPA, which was enacted in 1991 when a cell phone was considered a luxury item and smartphones were still years away from production.

The Order Had an Immediate Adverse Impact, Causing Disarray and Exposing Credit Unions to Frivolous Litigation

When the FCC, on a party-line vote, issued the Order over a year ago, it immediately went into effect without having been put out as a proposed rule subject to public comment. As soon as it was released, credit unions were sent into a state of disarray about how they could instantaneously comply with a document that is well over 100 pages and filled with onerous language and unclear nuances. While the FCC recognized the importance of communications between financial institutions and consumers, and did provide certain exemptions, the Commission's ruling created obstacles to credit unions' ability to communicate with their members. For small financial institutions, with resources already stretched thin on an unprecedented number of new regulatory burdens, the resource draining of complying with unclear, outdated, and in some cases largely impossible guidance is particularly problematic.

Congress could not have intended to arbitrarily limit communications between credit unions, which are not-for-profit, member-owned financial cooperatives, and their members when it enacted the TCPA several decades ago. The confusion created by the TCPA Order has not only increased the regulatory burden that credit unions are facing, but it will place additional limits on their ability to provide the safest and most affordable products and services to consumers.

The consequences of the Order extend beyond the credit unions' ability to communicate with members because the TCPA carries with it a private right of action. Predictably, the Order has attracted the attention of law firms seeking to profit from the exorbitant attorneys' fees and statutory damages associated with TCPA lawsuits. Frivolous class action litigation has proven costly and detrimental, when credit unions are simply seeking to serve their members in the way they always have, and to continue to provide products and service offerings at competitive rates. We believe that class action litigation against a credit union makes very little sense in general given the member-owned, cooperative structure of the credit union; it makes even less sense when the litigation is based on actions the credit union is taking to protect its members from harm.

The Exemption for Financial Institutions Provides Minimal Relief

In its Order, the FCC recognized the importance of receiving information from financial institutions. It provided an exemption for calls concerning: (1) transactions and events that suggest a risk of fraud or identity theft; (2) possible breaches of the security of customers' personal information; (3) steps consumers can take to prevent or remedy harm caused by data security breaches; and (4) actions needed to arrange for receipt of pending money transfers.

However, the conditions that must be met to qualify for these exempted calls are difficult, if not impossible, to meet. The Order requires that the exempted calls must be free-to-end-user calls; in other words, there can be no charge of any kind to the consumer. This requirement places an unreasonable burden on financial institutions to ensure that notifications do not count against a recipient's minutes or texts plan. The technology and resources needed are not readily available to the majority of credit unions, particularly smaller credit unions.

Other conditions to qualify for this exemption apply as well. For example, a credit union must initiate no more than three messages (whether by voice call or text message) per “event” over a three-day period for an affected account; must offer recipients within each message an easy means to opt out of future messages; and must honor opt-out requests immediately. The technicalities associated with each of these requirements creates many unanswered questions, such as what constitutes an “event.” Additionally, the exemption only allows calls and text messages to be sent to wireless numbers provided by the customer of the financial institution.

The Expansion of What is Considered an Autodialer is Problematic

Another concerning aspect of the Order is the expansion of what is considered an automated telephone dialing system (autodialer). Credit unions need the FCC to define clearly what constitutes an autodialer because informational calls using an autodialer to a consumer’s cell phone requires either oral or written prior express consent. Notably, dissenting FCC Commissioner Ajit Pai expressed concern that the language about what is considered an autodialer in the Order is so expansive it could even cause a device like a smartphone to now be considered an autodialer.

Currently, credit unions are not even able to interpret from the Order whether the calling system they use qualifies them to be subject to the TCPA. As a result of this ambiguity, some credit unions have limited their communications or have been forced to revert to manually dialing calls to members. The FCC in its Order leaves it wide open for courts to interpret the autodialer definition. This muddled guidance and lack of certainty is not helpful for credit unions and consumers looking for certainty in the law.

Other Issues that Could Stifle Communication with Credit Union Members

Additionally, the FCC creates ambiguity about how consumers can revoke consent for autodialed calls by stating it can be done at any time and in any reasonable manner. This onerous language is problematic because consent could be revoked in almost any manner including through oral conversations with an employee at any level of a credit union. Since it is not clear what is a “reasonable” way of revoking consent, credit unions theoretically have to monitor all communications in every manner with every member and every employee.

Furthermore, the Order increases the possibility of being liable under the TCPA when calling a reassigned number that the credit union has previously been given consent to call. The Order makes clear that callers can make only one call under a safe harbor before they are considered to have actual or constructive knowledge that the number was reassigned. The one call safe harbor does not account for the dozens of reasons it may not be possible to connect with the new holder of the number in one attempt. The Order indicates that it does not matter whether the phone is answered; the caller is still considered to be on notice. For credit unions serving working families who may switch jobs, move, or simply can no longer afford one type of wireless carrier plan over another, it makes no sense to penalize either the credit union or a member seeking information for switching numbers.

CFPB Statements Have Conflicted with the FCC's Order

Other federal regulators and consumer groups share CUNA's views about the benefits of communicating with consumers on their cell phones. Mobile technology is often the preferred method of communication for consumers, and for many younger and lower-income consumers it may be their only method to receive communications. This is also the same demographic of consumers that can benefit the most when credit unions are able to intervene early to provide financial education or counseling. The CFPB, in particular, appears to recognize this benefit of increased communication.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB has the charge of promoting financial education, researching developments in markets for consumer financial services and products, and providing information, guidance, and technical assistance regarding the offering and provision of consumer financial products or services to traditionally underserved consumers and communities. In this regard, the CFPB has provided the public information about how it believes the financial services marketplace should be communicating with consumers on mobile devices. In one such recent publication, the CFPB noted,

“Major development in the consumer financial services market over the past few years has been the increasing use and proliferation of mobile technology to access financial services and manage personal finances....Using a mobile device to access accounts and pay bills can reduce cost and increase convenience for consumers. By enabling consumers to track spending and manage personal finances on their devices through mobile applications or text messages, mobile technology may help consumers achieve their financial goals.”

Again, this reasoning directly conflicts with FCC policies that are making it more difficult to communicate with distressed consumers. Notably, credit unions with over \$10 billion in assets are supervised by the CFPB, and others operate in compliance with numerous consumer financial laws

that the CFPB has jurisdiction over. As such, conflicting guidance from the CFPB makes it very difficult to make compliance decisions concerning communication efforts.

Congress Should Express Appropriate Oversight Authority

Decades old, the TCPA has become severely outdated and obsolete in the face of new technologies and forms of communication. It is imperative that Congress take action to eliminate the negative consequences the FCC's Order is having on both financial institutions and consumers, and consider what actions can be taken to assure communication between the two can continue.

The FCC continues to ignore the input of industry, consumers, Congress, and even the President of the United States. It has far exceeded the scope of the authority Congress granted it and also, as noted, the FCC did not provide an opportunity for notice and comment on the Order. We urge you to address this overreach and take action to hold the FCC accountable to provide more transparency to those seeking to comply with laws under its jurisdiction.

Conclusion

On behalf of America's credit unions and their more than 100 million members, we thank you for your attention to this important matter and we look forward to working with Congress and the Administration to create a rule that protects the consumer, while ensuring credit unions can freely communicate with their members.

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