

*The Telephone Consumer Protection Act (TCPA), enacted in 1991 by the Federal Communications Commission (FCC), in large part to protect consumers from intrusive telemarketers, has emerged as a class action lawsuit and litigation trend.*

*With heightened focus on TCPA violations, credit unions should understand the TCPA requirements and ensure compliance to minimize risks.*



## Understanding TCPA

TCPA regulates telemarketing and non-telemarketing calls using an automatic telephone dialing system (ATDS), also referred to as an autodialer, as well as calls using a prerecorded or artificial voice.

**Autodialer(s)** specifically refers to equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator and to dial such numbers. The basic functions of an autodialer are to dial numbers without human intervention and to dial thousands of numbers in a short period of time.

According to the FCC's 2015 Declaratory Ruling and Order, autodialers with the capacity to dial random and sequential numbers, rather than just the present ability to do so, are subject to the TCPA. Under this interpretation, many telephone systems can be categorized as an ATDS including those systems that have ATDS features that are currently not used, can be activated, or reconfigured to add these features.

The U.S. Court of Appeals for the District of D.C. set aside the FCC's interpretation of an autodialer *in ACA International v. Federal Communications Commission*, referring to it as an unreasonable and impermissible interpretation of the statute's reach. However, the court did not provide any further interpretative guidance. Although many viewed this decision as favorable for credit unions; uncertainty remained as subsequent circuit court decisions interpreted the definition of an ATDS more narrowly while others more broadly. This split in interpretations resulted in continued uncertainty over what constitutes an ATDS.

### Landmark Decision...

In what many believed to be a landmark decision, the U.S. Supreme Court in ***Facebook, Inc. v. Duguid***, overturned a Ninth Circuit decision that broadly defined an autodialer as any equipment that has the capacity to store and dial numbers, regardless of whether those numbers were generated by a random or sequential number generator. The Supreme Court held that to qualify as an autodialer under the TCPA, the equipment must have the capacity either to store a telephone number using a random or sequential number generator or to produce a telephone number using a random or sequential number generator.

However, the Supreme Court failed to address what it means for the equipment to have the "capacity" to store or produce numbers using a random or sequential number generator. The decision did not specifically address the question of whether equipment that has, but does not use, the ability to store or produce a telephone number using a random or sequential number generator qualifies as an ATDS.

## TCPA Compliance Violations

Failing to comply with the TCPA can lead to significant statutory **damages ranging from \$500 to \$1,500 per call / text with no cap on the number of penalties** for multiple violations.

Non-compliance has attracted class action litigation due to the potential for exorbitant damages. While TCPA litigation is often centered around telemarketing calls and texts to members without first gaining prior express written consent, outgoing calls or texts related to collections, servicing or fraud alerts when made without the appropriate prior express consent can also pose risks.

# Telephone Consumer Protection Act

## Credit Union Action Steps



- Evaluate their system to determine if it has a random or sequential number generator feature capable of storing or producing numbers.
- If the credit union doesn't know if the phone system has a random or sequential number generator feature capable of storing or producing numbers to be called, or if the system is confirmed to have this feature – whether or not this feature is currently in place or used - credit unions should be conservative by complying with the consent provisions for telemarketing and non-telemarketing calls and texts to members' wireless phones.
- Credit unions using a third-party vendor to make telemarketing or non-telemarketing calls or texts to members' wireless phones using an autodialer or an artificial/prerecorded voice should ensure the appropriate consent – prior express written consent or prior express consent – has been obtained.
- Consult with legal counsel to assess compliance with the TCPA.

Credit unions must still comply with the TCPA's consent requirements for telemarketing and non-telemarketing calls to members' wireless phones, and telemarketing calls to residential landlines, using an artificial or prerecorded voice.

## TCPA Consent Requirements

Credit unions are required to obtain prior express written consent from members to make **advertising or telemarketing calls and text messages** to:

- wireless telephone numbers if either an ATDS or prerecorded or artificial voice is used; and
- residential landlines, only if a prerecorded or artificial voice is used.

**Prior express written consent** is defined as a signed agreement that clearly and conspicuously discloses to members that by signing the agreement, the member authorizes the credit union to deliver telemarketing calls using an ATDS or an artificial or prerecorded voice to a designated phone number. In addition, the member must not be required to sign the agreement or agree to enter into it as a condition of purchasing any property, goods or services.

Design and content requirements for prior express written consent:

- clear and conspicuous
- separate and distinguishable from other disclosures
- must include the specific number(s) to which such calls will be made
- signed by the member
- must not be a condition of purchasing any property, goods or services

The prior express written consent requirement may be met through the use of an electronic agreement and electronic signatures in compliance with the E-Sign Act.

**Prior express content**, either oral or written, is required for non-telemarketing (e.g., debt collection, servicing) calls / texts to wireless telephone numbers using an ATDS or using an artificial or prerecorded voice message.

In July 2015, the FCC clarified that call / text alerts to wireless telephone numbers pertaining to fraud, identity theft, data security breaches and money transfers are excluded from the prior express consent requirements but only as long as requirements are met. For example, the exemption applies only if the call / text is not charged to the member or counted against any plan limits. If all of the requirements are not met, then prior express consent must be obtained.

# Telephone Consumer Protection Act

## TCPA Consent Overview

	Mobile		Residential Landline	
	Telemarketing	Non-Telemarketing	Telemarketing	Non-Telemarketing
Autodialer	Prior Express <b>Written</b> Consent	Prior Express Consent	N/A	N/A
Artificial / Prerecorded Voice	Prior Express <b>Written</b> Consent	Prior Express Consent	Prior Express <b>Written</b> Consent	N/A
No Autodialer or No Artificial / Prerecorded Voice Used	N/A	N/A	N/A	N/A

## Capturing Consent

Consent can be captured in a number of ways, via a number of channels, on any number of documents. Adding language to existing membership documents or loan applications or agreements will facilitate capturing the consent of new members / borrowers; however, you need to determine how consent will be obtained from existing members / borrowers.

An alternative or companion solution is to capture consent from members using a separate consent document. This is often beneficial for capturing subsequent prior express written consent, such as when a member provides a new wireless telephone number via a channel where membership or lending documents are not typically used (e.g. teller line).



### Best Practice

*Work directly with your document / compliance partner or legal counsel to draft a compliant consent agreement to meet the TCPA's prior express written consent requirement to be signed by members.*

- *Ensure new members sign a compliant consent agreement at account opening*
- *Gain consent of existing members by sending a consent agreement to be signed; or, signing it during an in-branch or online interaction*



# Telephone Consumer Protection Act

## Opting Out of Consent

Consumers have the right to revoke their prior consent to receiving telemarketing and debt collection calls or texts at any time by any reasonable means. Credit unions may provide preferred methods for members to revoke consent, but still must accept a revocation done in any reasonable method.

The Court in *ACA International v. Federal Communications Commission* examined whether members should be able to revoke consent by any reasonable means. Ultimately, the Court agreed with the FCC and determined that consent may be revoked at any time by any reasonable means.

Under the amended TCPA, all prerecorded or artificial voice telemarketing calls made to cell phone numbers and residential landlines must include a mechanism that allows members to opt-out of future calls.

The opt-out mechanism should:

- clearly identify the caller at the beginning of the call;
- include an automated, interactive voice and / or key press-activated opt-out mechanism for the called party to make a do-not-call request within two seconds of the caller being identified (calls must be terminated immediately upon the called party's request to be added to the calling party's do-not-call list); and
- provide a toll-free telephone number for the called party to access the automated, interactive voice and / or key press-activated for opting out of future calls if a prerecorded or artificial voice telemarketing message is left on the called party's answering machine or voice mail.

In addition to satisfying the opt-out requirements, credit unions should establish procedures for tracking members who revoke their consent by any reasonable means. This includes revocations made orally, in-person or through automated, interactive voice / key press activated opt-out mechanism, letters, emails, and faxes.



# Telephone Consumer Protection Act

## TCPA Risk Mitigation Tips

### Debt Collection Calls

Many TCPA lawsuits are the result of using an ATDS or a prerecorded / artificial voice to make debt collection calls / texts to members' cell phones. The FCC says the provision of a cell phone number to a creditor on the related loan application reasonably evidences prior express consent by the subscriber / borrower to be contacted at that number regarding the debt. Therefore, credit unions can initiate debt collection calls and texts to cell phone numbers provided by members on the related loan application using an autodialer or prerecorded / artificial voice. However, to further mitigate risk, you should obtain separate prior express consent for debt collection calls. This will allow you to make debt collection calls to any number provided by the member.

If your credit union is offering debt counseling services during a collections call with the hope of helping the member avoid future delinquencies and defaults, then the call may be classified as a telemarketing call which requires prior express written consent. Therefore, to prevent liability, you should also obtain separate prior express written consent for telemarketing calls when acquiring prior express consent for debt collection calls.

### Lawsuits against credit unions have most recently involved:

- calls / texts to members' cell phones to collect delinquent loans or negative deposit account balances using an ATDS or a prerecorded/artificial voice without obtaining the requisite prior express consent of the member.
- third-party debt collectors retained to collect debt on behalf of the credit union. Credit unions can be held liable for the vendor's failure to comply with the TCPA.
- a credit union sent account alert texts to a cell phone number provided by the member / subscriber not realizing the number had been reassigned to someone else.
- the member or subscriber demanded that the credit union cease the calls / texts to cease, but the calls/texts continued.

## Steps to help ensure compliance with TCPA

When making collection calls to members' cell phones:

- Adopt a separate prior express consent for debt collection calls / texts.
- Avoid calling or texting any number unless the credit union has obtained prior express consent or has verified that the number called is not assigned to a cell phone.
- Avoid calling members' cell phones where the cell phone number was obtained through a skip tracing service.
- Ensure prior express consent has been obtained from members whose delinquent loans have been assigned to third-party debt collectors retained to collect debt on behalf of the credit union.
- Ensure third-party service providers retained to collect debts on your behalf are in compliance with the TCPA.
- Ensure the contract with third-party service providers retained to collect debts on behalf of the credit union contains a provision requiring the providers to defend, indemnify and / or hold the credit union harmless from damages the credit union may incur as a result of the providers' violation of the TCPA.
- Ensure third-party service providers, retained to collect debts on behalf of the credit union, and the credit union communicate revocation of consent changes on a regular and routine basis and that systems, processes, procedures and contract language address this need to share revocation information.
- Cease calls / texts immediately upon learning of a reassigned or wrong number
- Consider having legal counsel review all documents used to comply with the TCPA consent requirements along with collection policies, scripts, procedures and practices for contacting delinquent borrowers.



## Reassigned Cell Phone Numbers

The TCPA requires the consent of the called party. In the FCC's 2015 Declaratory Ruling and Order, the called party was defined as the current subscriber to a cell phone number being called rather than the intended recipient of the call. As such, a credit union must be able to identify when a member's cell phone number has been reassigned to a new subscriber. Similarly, numbers must be identified even if ported from one device to another, such as from a landline to a cell phone, or may be shared among individuals, often within families.

The 2015 Declaratory Ruling and Order also established a one-call safe harbor. Credit unions making calls or texts without knowledge of a reassigned cell phone number yet have a reasonable basis to believe they have valid consent to make the call or text, could initiate one call or text to a cell phone number after a reassignment occurs to gain actual or constructive knowledge of the reassignment. If this one additional call or text did not yield actual knowledge of the reassignment, the credit union was deemed to have constructive knowledge of such.

The Court in *ACA International v. Federal Communications Commission* agreed that the FCC's definition of called party was permissible. However, the Court determined that the one-call safe harbor was arbitrary. Rather than only vacating the FCC's one-call safe harbor from the 2015 Declaratory Ruling and Order and creating liability for all calls made to reassigned numbers under the TCPA, the Court set aside the FCC's entire approach to reassigned cell phone numbers.

It can be challenging to recognize when numbers are no longer assigned to the intended recipient of a call if the new subscriber fails to update their voicemail greeting. There are a number of options that can help you learn of reassigned cell phone numbers including the use of a database maintained by Neustar.

Callers seeking to determine wireless number reassignments can:

- Include an interactive opt-out mechanism in all artificial or prerecorded voice calls so that recipients may easily report a reassigned or wrong number;
- Implement procedures for recording wrong number reports received by employees placing outbound calls;
- Implement processes for allowing employees to record new phone numbers when receiving calls from members;
- Periodically send an email or mail request to the member to update his or her contact information;
- Utilize an autodialer's and / or live caller's ability to recognize "triple-tones" that identify and record disconnected numbers;
- Establish policies for determining whether a number has been reassigned if there has been no response to a "two-way" call after a period of attempting to contact a member; and
- Enable members to update contact information by responding to any text message they receive, which may increase a member's likelihood of reporting phone number changes and reduce the likelihood of a caller dialing a reassigned number.

After learning a member's new cell phone number, credit unions should obtain prior express written consent before initiating any telemarketing calls to the new number using an ATDS or a prerecorded or artificial voice.

# Telephone Consumer Protection Act

## Pro-Consumer Calls

To ensure compliance with pro-consumer calls or texts, credit unions should consider a conservative approach and obtain prior express consent before initiating calls or texts for these types of messages. For credit unions offering text alert services for transactions and events that suggest a risk of fraud or identity theft, a best practice is to require members to specifically request this service by implementing a sign-up process which complies with the prior express consent requirements.

An exemption to the consumer consent requirements exists for free calls and texts to cell phone numbers only for:

1. Transactions and events that suggest a risk or identity theft
2. Possible breaches of the security of members' personal information
3. Steps members can take to prevent or remedy harm caused by data security breaches
4. Actions needed to arrange for receipt of pending money transfers

The FCC adopted these conditions for each exempted call or text:

- must be sent, if at all, only to the cell phone number provided by the member;
- must state the name and contact information of the credit union (for voice calls, these disclosures must be made at the beginning of the call);
- are strictly limited to pro-consumer purposes listed and must not include any telemarketing, cross-marketing, solicitation, debt collection, or advertising content;
- must be concise, generally one minute or less in length for voice calls (unless more time is needed to obtain member responses or answer member questions) and 160 characters or less in length for text messages;
- may 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: voice calls that could be answered by a live person must include an automated, interactive voice- and / or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call; voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the member can call to opt-out of future calls; and text messages must inform recipients of the ability to opt out by replying "STOP," which will be the exclusive means by which members may opt out of such messages; and,
- must honor opt-out requests immediately.

**Risk & Compliance Solutions • 800.637.2676 • [riskconsultant@cunamutual.com](mailto:riskconsultant@cunamutual.com)**

This resource is for informational purposes only. It does not constitute legal advice. Please consult your legal advisors regarding this or any other legal issues relating to your credit union. CUNA Mutual Group is the marketing name for CUNA Mutual Holding Company, a mutual insurance holding company, its subsidiaries and affiliates. Insurance products offered to financial institutions and their affiliates are underwritten by CUMIS Insurance Society, Inc. or CUMIS Specialty Insurance Company, members of the CUNA Mutual Group.

2021 CUNA Mutual Group Proprietary and Confidential. Further Reproduction, Adaptation, or Distribution Prohibited.

800.637.2676 | [cunamutual.com](http://cunamutual.com)

P.O. Box 391 | 5910 Mineral Point Road

Madison, WI 53701-0391

10007588-0318 (rev 04/2021)

© 2021 CUNA Mutual Group, All Rights Reserved.

