

Telephone Consumer Protection Act

Overview and Considerations

BACKGROUND

The Telephone Consumer Protection Act (TCPA) was enacted in 1991 to protect consumers from intrusive telemarketing practices and provide options for avoiding unwanted telephone solicitations. The Federal Communications Commission (FCC) has issued regulations to implement the TCPA, including specific requirements for calls/texts to consumers' residential or wireless telephone numbers **when using an automatic telephone dialing system (autodialer) or an artificial or pre-recorded voice**. The FCC has also issued Reports and Orders and Declaratory Rulings that provide further clarification of these regulatory requirements.

It is important to understand the FCC's rules and clarifications impacting these types of contacts, including the definition of "autodialer," requirements for obtaining members' consent, and parameters for revocation of consent. This guide also walks through points to consider in assessing compliance with the TCPA.

AUTODIALER

The TCPA defines "autodialer" to mean equipment which has the capacity to (A) store or produce telephone numbers to be called, using a random or sequential number generator, and (B) to dial such numbers. The following is an overview of actions taken by the FCC to clarify the definition of "autodialer" and case law pertaining to the FCC's interpretation:

FCC's 2015 Declaratory Ruling and Order – The FCC sought to clarify various aspects of the TCPA. In part, the FCC established that equipment is considered an autodialer as long as it has the **potential capacity** to make autodialed calls and send automated text messages, even if it does not have the present capacity (and would require upgrades) to do so. This interpretation served to significantly broaden the definition of autodialer. However, the interpretation was later vacated in *ACA International v. Federal Communications Commission*.

ACA International v. Federal Communications Commission – In 2018, the D.C. Circuit Court of Appeals' decision in this case set aside the FCC's earlier interpretation of "autodialer" (see above). The Court found the FCC's clarification to be an unreasonable and impermissible interpretation of the TCPA's reach, but it did not go any further to define "autodialer."

FCC's June 2020 Declaratory Ruling – The FCC clarified that "if a calling platform is not capable of originating a call or sending a text without a person actively and affirmatively manually dialing each one, that platform is not an autodialer and calls or texts made using it are not subject to the TCPA's restrictions on calls and texts to wireless phones." Still, the FCC did not go further to address the issue of capacity or clarify when a calling platform is considered an autodialer.

Facebook, Inc. v. Duguid – In April 2021, the Supreme Court held that to qualify as an autodialer under the TCPA, the equipment must have the capacity either to store telephone numbers using a random or sequential number generator or to produce telephone numbers using a random or sequential number generator. This decision 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. While this decision is favorable for credit unions, the Court did not directly address the issue of capacity and whether equipment that has, but does not use, the ability to store or produce numbers using a random or sequential number generator qualifies as an autodialer. We recommend credit unions consult with legal counsel if they are uncertain whether their equipment is considered an autodialer in light of this ruling.

TYPES OF CONSENT

The TCPA establishes rules for obtaining **Prior Express Written Consent** or **Prior Express Consent** when required to do so. Credit unions must ensure they obtain the appropriate consent before initiating calls/texts to members. Refer to the following charts for more information regarding each type of consent, when it applies, and requirements for obtaining the consent.

PRIOR EXPRESS WRITTEN CONSENT	
Applicability	<p>Telemarketing calls/texts to <u>wireless telephone numbers</u>: Calls using an artificial or pre-recorded voice Calls/texts using an autodialer</p> <p>Telemarketing calls to <u>residential lines (landlines)</u> using an artificial or pre-recorded voice.</p>
Consent Requirements	<p>In obtaining members' prior express written consent, credit unions must ensure the consent complies with the following requirements:</p> <ul style="list-style-type: none"> • Is clear and conspicuous; • Is separate and distinguishable from other disclosures; • Includes the specific number to which such calls will be made; • Is signed by the member; and • Is NOT a condition for the purchase of any property, goods or services.
PRIOR EXPRESS CONSENT	
Applicability	<p>Non-telemarketing calls/texts to <u>wireless telephone numbers</u>, including: Calls using an artificial or pre-recorded voice Calls/texts using an autodialer</p> <p>Non-telemarketing calls/texts include those related to: Debt collection or servicing of accounts; and Fraud, identity theft, data security breaches or money transfers.*</p> <p>Non-telemarketing calls to <u>residential lines (landlines)</u> using an artificial or pre-recorded voice when more than three calls are made within a 30-period.</p> <p>* The FCC clarified that prior express consent is not required for situations where exigent/urgent messaging is critical, including those involving fraud, identity theft, data security breaches and money transfer; however, this exemption is subject to a number of conditions, including the requirement that the call or text cannot be charged to the consumer or counted against any plan limits. It may be difficult, if not impossible, to ensure calls/texts are not charged to members. Therefore, a best practice is to obtain prior express consent before initiating these types of calls/texts.</p>
Consent Requirements	<p>The TCPA does not define or establish specific required elements for "prior express consent." It is generally construed to mean any form of consent – written or oral –</p>

	granted by the member to receive calls at the phone number(s) they provide at any time.
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	WIRELESS TELEPHONE		RESIDENTIAL LINE	
	Telemarketing	Non-Telemarketing	Telemarketing	Non-Telemarketing
Autodialer Used (see “Autodialer” section)	Prior Express Written Consent	Prior Express Consent	N/A	Prior Express Consent (if placing more than 3 calls within a 30-day period)
Artificial/Pre-recorded Voice Used	Prior Express Written Consent	Prior Express Consent	Prior Express Written Consent	Prior Express Consent (if placing more than 3 calls within a 30-day period)
No Autodialer or Artificial/Pre-recorded Voice Used	N/A	N/A	N/A	N/A

OBTAINING MEMBER CONSENT

Credit unions will need to consider their entire membership as they go about developing processes and procedures for obtaining consent. Prior consent rules apply whether an individual is a new member or an existing member of the credit union. Therefore, credit unions should refrain from initiating covered calls and texts to existing members unless they have already obtained the appropriate consent.

The manner in which consent is obtained from a new member may differ from that of an existing member. While credit unions may wish to add consent provisions to documents such as membership and loan applications or agreements, doing so will only facilitate capturing consent from NEW members/borrowers. Therefore, credit unions will likely need to use a separate, stand-alone consent document for existing members/borrowers. A credit union may even consider using a stand-alone document solution for both new and existing members if it prefers to adopt a uniform approach for the entire membership. It is a matter of preference, and credit unions will need to determine the solution that will best support its operations.

REASSIGNED PHONE NUMBERS

While consent is required before credit unions initiate certain calls/texts to members' wireless telephone numbers, they may not always be aware when the number has been reassigned to another individual. The following is an overview of the FCC's actions pertaining to reassigned phone numbers and related case law.

[FCC's 2015 Declaratory Ruling and Order](#) – The FCC clarified that the TCPA requires consent of the current subscriber of a reassigned wireless telephone number rather than consent of the intended recipient of the call (e.g. the member). This can pose difficulties when a credit union has no awareness that the phone number has been reassigned. Recognizing this, the FCC adopted a one-call exemption, which allowed **one** call after reassignment to gain *actual* or *constructive* knowledge of the reassignment. This meant that,

even if the one call did not present the credit union with *actual* knowledge of the reassignment, the credit union would be deemed to have *constructive* knowledge and would need to refrain from initiating additional calls or risk liability under the TCPA.

ACA International v. Federal Communications Commission – The D.C. Circuit Court of Appeals considered the issue of reassigned phone numbers in this case and invalidated the FCC's 2015 interpretation. The court determined that the one-call exemption was arbitrary because the FCC failed to support why the caller would be liable after initiating just one call. However, the court did not establish a new exemption or provide clarification regarding reassignments of wireless telephone numbers.

FCC's Reassigned Numbers Database – In March 2019, the FCC issued a final rule requiring the creation of a comprehensive database for reassigned numbers, which credit unions can use to determine whether a member's telephone number has been reassigned and avoid initiating unwanted calls/texts. Credit unions with a valid subscription may access the Reassigned Numbers Database, which became operational in November 2021. If the database wrongly indicates that a number has not been reassigned, a credit union relying on that information to place a call or send a text may have safe harbor protection against TCPA liability. Credit unions are encouraged to engage legal counsel as needed for guidance in handling phone number reassignments.

REVOKING CONSENT

The FCC clarified in its 2015 Declaratory Ruling and Order that consumers must be allowed to revoke their consent to be contacted at this wireless telephone number at “any time through any reasonable means.” Credit unions may suggest preferred revocation methods (e.g. by mail, phone or email) but must honor revocation requests from members via any reasonable means.

Consumers must also be allowed to opt out of receiving future informational calls to their residential lines that involve the use of an artificial or pre-recorded voice by dialing a telephone number provided in the artificial or pre-recorded voice message to register their do-not-call request.

Credit unions will want to ensure that staff is appropriately trained to respond to member requests to revoke consent and that such revocation is accurately tracked.

Case Law Implications

The U.S. Court of Appeals for both the Second and Eleventh Circuits have ruled that a consumer who provides consent as part of a bargained-for contract may not unilaterally revoke that consent, with certain lower courts issuing similar rulings. However, other courts have not adopted this stance. Given the divergence in positions on this issue, credit unions are encouraged to engage legal counsel for guidance in establishing policies for and managing revocation of consent.

RISKS

Violations of the TCPA can pose significant risk to credit unions ~ \$500 per negligent violation (per call/text) and \$1,500 per willful violation (per call/text). There is no cap on the number of penalties a credit union can face for multiple violations.



“CONSENT TO CONTACT” PROVISIONS

Credit unions initiating calls/texts that are subject to the TCPA's consent requirements may wish to incorporate “Consent to Contact” provisions in their LOANLINER® documents. See Appendix A for sample language.

The FCC has commented that consent should be obtained in relation to the transaction for which the consumer is being contacted (e.g. obtain consent during the loan transaction – for example, via the loan application - in advance of initiating collection calls on delinquent loans). Therefore, credit union counsel may advise that consent provisions be included in both membership/deposit documents and lending documents.

To learn more about the option of including consent provisions in your credit union's deposit and/or lending document(s), please schedule a consultation with a LOANLINER Compliance Consultant. Visit the LOANLINER Compliance Solutions webpage at www.loanliner.com/compliance; click the “Schedule Consultation Appointment” button and enter all required information to book your appointment.

TCPA COMPLIANCE CONSIDERATIONS

✓	CONSIDERATIONS CHECKLIST
	Have you reviewed this guide?
	Have you determined if your credit union is using an autodialer or pre-recorded voice? Are you familiar with the FCC's interpretation of and case law pertaining to autodialers?
	Do you know which types of calls/texts will you be making to your members/borrowers? <ul style="list-style-type: none"> • Telemarketing • Debt collection/servicing • Alerts pertaining to fraud/identity theft/data breaches/money transfers
	Have you determined how you will you capture consent of the members/borrowers when applicable (e.g. in new member/borrow documents, using stand-alone documents, orally, etc.)?
	Have you established a process for managing revocation requests? Are you familiar with the FCC's position regarding the right to revoke consent as well as case law implications?
	Have you developed a system to track those members/borrowers who have provided consent and those who have not?
	Are you familiar with the FCC's position on and case law pertaining to reassigned phone numbers? Are you aware of the FCC's Reassigned Numbers Database?
	Have you developed a system to track reassigned phone numbers and obtain updated phone information from members?
	Have you developed staff training to ensure appropriate understanding and execution of responsibilities pertaining to member contacts?
	Are you familiar with the potential penalties for violations of the TCPA?
	Have you consulted with your credit union's legal counsel for assistance in assessing compliance with the TCPA?
	Have you determined if you will be adding "consent to contact" provisions to your credit union's LOANLINER document(s)? If yes, have you determined which document(s)?

QUESTIONS? If you have questions about the information presented in this guide, please email compliancesolutions@trustage.com.

APPENDIX A: SAMPLE LANGUAGE
CONSENT TO CONTACT

Telemarketing

BY SIGNING BELOW, YOU AUTHORIZE **[CREDIT UNION NAME]** TO DELIVER OR CAUSE TO BE DELIVERED TO YOU AT THE TELEPHONE NUMBERS PROVIDED ABOVE, ADVERTISING AND TELEMARKETING CALLS AND TEXT MESSAGE(S) USING AN AUTOMATIC TELEPHONE DIALING SYSTEM AND/OR AN ARTIFICIAL OR PRERECORDED VOICE. YOU ARE NOT REQUIRED TO SIGN THIS AUTHORIZATION OR ENTER INTO THIS AGREEMENT AS A CONDITION OF PURCHASING ANY PROPERTY, GOODS OR SERVICES. You may withdraw the consent provided herein at any time [by providing written notice to us at [CU address], by email to [CU email address], via phone at [CU phone number]] or by any other reasonable means.

X	(SEAL)
APPLICANT'S SIGNATURE	DATE

X	(SEAL)
OTHER SIGNATURE	DATE

Debt Collection, Servicing

By executing this Application, you agree we and/or our third-party providers, including debt collectors, may contact you by telephone or text message at any telephone number associated with your account, including wireless telephone numbers (i.e. cell phone numbers) which could result in charges to you, in order to service your account or collect any amounts owed to us, excluding any contacts for advertising and telemarketing purposes as prescribed by law. You further agree methods of contact may include use of pre-recorded or artificial voice messages, and/or use of an automatic dialing device. You may withdraw the consent to be contacted on your wireless telephone number(s) [by written notice to us at [CU address], by email to [CU email address], via phone at [CU phone number]] or by any other reasonable means. If you have provided a wireless telephone number(s) on or in connection with any account, you represent and agree you are the wireless subscriber or customary user with respect to the wireless telephone number(s) provided and have the authority to give this consent. Furthermore, you agree to notify us of any change to the wireless telephone number(s) which you have provided to us.

Fraud, Identity Theft, etc.

In order to help mitigate harm to you and your account, we may contact you on any telephone number associated with your account, including a wireless telephone number (i.e. cell phone number), to deliver to you any messages related to suspected or actual fraudulent activity on your account, data security breaches or identity theft following a data breach, money transfers or any other exigent messages permitted by applicable law. These contacts will not contain any telemarketing, cross-marketing, solicitation, advertising, or debt collection message of any kind. The contacts will be concise and limited in frequency as required by law. You will have an opportunity to opt-out of such communications at the time of delivery.

NOTES

The FCC has clarified that consumers must be allowed to revoke their consent by any reasonable means. You may suggest that they contact you at a specific address, email address and/or phone number within the above language, but you must still accept their revocation request if directed to you by any other reasonable means.

The fields/verbiage highlighted in gray or yellow can be included or omitted. Gray highlights show where personalized credit union information would be inserted if that contact channel is included in the verbiage.

If you choose not to identify specific channels for revoking consent, the revocation statements will read as follows:

First Paragraph: "You may withdraw the consent to be contacted provided herein at any time by any reasonable means."

Second Paragraph: "You may withdraw the consent to be contacted on your wireless telephone number(s) at any time by any reasonable means."