

SUBJECT: Telemarketing and Related Consumer Protections

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INTRODUCTION

This release applies to all credit unions, state and federal. It describes various regulatory limits on telemarketing and related consumer protections, including the federal Telephone Consumer Protection Act.

EXECUTIVE SUMMARY

Credit unions that market to members or potential members by telephone, mail, text message or email need to be aware of certain state and federal limitations.

Administrative rules by Wisconsin's Department of Agriculture, Trade and Consumer Protection (DATCP) regulate telephone solicitation in several ways:

1. They govern Wisconsin's "No Call List," a list of home telephone numbers for Wisconsin residents who do not want calls or texts from telemarketers.
2. While telemarketers may still call households that are not on the No Call List, the rules prohibit certain telemarketing practices.
3. The rules require all telephone solicitors to register with DATCP and pay annual fees.

The "No Call List" rules have several exceptions to the definition of "telephone solicitor," however, and credit unions may fit into one or more.

Other DATCP rules regulate other types of direct marketing, such as email, direct mail, and face-to-face sales. Credit unions themselves are exempt from these other rules; however, credit union service organizations and other third parties are not exempt. DATCP also has additional rules for telemarketers other than credit unions.

The Federal Trade Commission's Telemarketing Sales Rule requires telemarketers to make specific disclosures, prohibits misrepresentations, sets limits on the times telemarketers may call consumers, prohibits calls after a consumer asks not to be called, sets payment restrictions for the sale of certain goods and services, and requires that specific business records be kept for two years.

The Federal Communications Commission has rules that enforce the federal Telephone Consumer Protection Act. Among other things, the TCPA restricts the making of telemarketing calls and the use of automatic telephone dialing systems (i.e., autodialers) and artificial or prerecorded voice messages. The FCC's TCPA rules also limit calling hours, require the transmission of caller-ID information, restrict abandoned calls, and regulate the sending of unsolicited faxed advertisements.

Truth in Savings requires that, in an oral response to a member's or potential member's inquiry about dividend rates payable on its accounts, the credit union must state the annual percentage yield. Under Truth in Lending, when a credit union orally responds to a member's request for rate information on closed-end loans, the reply must state the annual percentage rate.

WISCONSIN TELEMARKETING RULES

(Wis. Admin. Code Ch. ATCP 127)

Administrative rules by Wisconsin's Department of Agriculture, Trade and Consumer Protection (DATCP) regulate telephone solicitation in several ways:

1. They govern Wisconsin's "No Call List," a list of home telephone numbers for Wisconsin residents who do not want calls or texts from telemarketers.
2. While telemarketers may still call households that are not on the No Call List, the rules prohibit certain telemarketing practices.
3. The rules require all telephone solicitors to register with DATCP and pay annual fees.

The No Call List rules have several exceptions to the definition of "telephone solicitor," however, and credit unions may fit into one or more.

For specific information on DATCP's telephone solicitation rules, visit the DATCP website at:

https://datcp.wi.gov/Pages/Programs_Services/WIDoNotCallLaw.aspx.

Do the Rules Apply to You?

Subchapter V of the DATCP rules regulate "telephone solicitations," which are defined as unsolicited telephone calls or text messages for the purpose of encouraging the recipient to buy property, goods or services. There are several exceptions to DATCP's definition of a "telephone solicitation." A credit union may fit into one or more of these exceptions, meaning that it may not be subject to Subchapter V of the DATCP rule. If you think that one of these exceptions applies, please consult your local counsel before beginning any telemarketing campaign.

Under the DATCP regulations, "telephone solicitation" does not include:

- A telephone call encouraging someone to donate property, goods or services to a "nonprofit organization."
- A telephone call encouraging someone to buy property, goods or services from a "nonprofit organization." This exception only applies if:
 - 1) The sale proceeds are exempt from Wisconsin sales tax and federal income tax; and
 - 2) The non-profit complies with subchapter III of Wis. Stats. Chap. 440, if applicable. That subchapter (among other things) requires the registration of charities raising money in Wisconsin and lists prohibitions related to charitable fundraising. (At this point there is no guidance as to whether credit unions are included in the nonprofits that may be exempted.)
- A telephone call made to a current client. A current client is a person who has a current agreement to receive from the caller property, goods or services "of the type" promoted by the telephone call. The rules do not define the phrase "of the type," but according to DATCP legal staff, this exception only applies if there is some "nexus" between the goods or services being promoted and those the customer is already buying. For example, the current client exception does not allow credit unions to call account holders in order to solicit loans, since there is not a sufficient "nexus" between deposit accounts and loans to consider them products or services of the same "type." However, a credit union may call members with auto loans in order to solicit mortgage loans, according to DATCP's legal staff, since these loan products are considered to be of the same "type."
- One telephone call to determine whether a former client mistakenly allowed a contractual relationship to lapse.
- A telephone call made to determine a former client's level of satisfaction, unless the call is part of a plan or scheme to encourage the former client to purchase more property, goods or services.
- Telephone calls made to customers who have given you prior express invitation or permission to call.

- Calls made for non-commercial purposes such as polls, surveys and political purposes.
- Calls made to a number listed in the current local business telephone directory.
- A telephone call, made to a party to an existing contract that is necessary to complete the contract.

Wisconsin Do Not Call Registry

State law prohibits telephone solicitors from calling or texting numbers that are on the state's Do Not Call Registry. Wisconsin residents can register their residential landline, cell or "voice over Internet protocol" numbers. The state used to require residents to re-register their numbers every two years. Since Aug. 1, 2014, however, numbers on the Wisconsin Do Not Call Registry are permanent. The registration process is now handled via the Federal Trade Commission's nationwide list. Phone numbers on the previous Wisconsin list were automatically transferred to the federal list. DATCP continues to enforce the state's Do Not Call laws, protecting Wisconsin residents registered on the federal list.

Registration Required for Telephone Solicitations

DATCP registers telephone solicitors who call or text Wisconsin residents. The registration year begins December 1 and ends November 30. For information on registration, [*visit this DATCP website.*](#)

Telephone solicitors must give WDATCP proof that they have obtained copies and updated versions of the Wisconsin Do Not Call Registry. Calling or texting consumers on the registry or not registering as a telephone solicitor are separate violations.

Telephone solicitors registering with DATCP must subscribe to the FTC's National Do Not Call Registry. The Wisconsin Do Not Call Registry is the portion of the National Do Not Call Registry that consists of telephone numbers with Wisconsin area codes. After a solicitor registers with the National Do Not Call Registry, subscribes to the Wisconsin area codes, pays the appropriate fees and agrees to the certification requirements, it then receives a Subscription Account Number (SAN) from the FTC, which it must provide to register with DATCP.

Prohibited Practices

In addition to prohibiting telephone solicitations to people on the "No Call List," the DATCP rules bar several other telemarketing practices:

- Using an electronically prerecorded message in a telephone solicitation to a residence or business without prior consent.
- Failing to disclose, at the request of a residential telephone customer receiving a telephone solicitation, the telemarketer's Wisconsin registration number.
- Making a telephone solicitation to a business if that business has notified the telemarketer by mail that the business does not wish to receive telephone solicitations. A telemarketer must provide a business with the telemarketer's mailing address within 10 days after the business requests it.
- Requiring, instructing or authorizing an employee or agent to make a telephone solicitation in violation of this rule, or knowingly facilitating a violation of this rule. Using caller-ID blocking when making a telephone solicitation.

OTHER WISCONSIN DIRECT MARKETING RULES

Other subchapters of *Wis. Admin. Code Ch. ATCP 127* affect other types of direct marketing, such as email, direct mail, and face-to-face sales. Also, Subchapter I contains additional rules for telemarketers, beyond the rules discussed earlier in this release. Credit unions themselves are exempt from all of these other subchapters; however, credit union service organizations and other third parties are not exempt from the rules, including the additional telemarketing limitations.

If a credit union plans to conduct direct marketing via a CUSO or other third party, it should be familiar with the restrictions of ATCP Chap. 127.

FTC TELEMARKETING SALES RULES

(16 CFP Part 310)

The Federal Trade Commission's (FTC's) Telemarketing Sales Rule enforces the federal Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFPA). (15 U.S.C. §§6101-6108.) The TCFPA gives the FTC and state attorneys general law enforcement tools to combat telemarketing fraud, gives consumers added privacy protections and defenses against unscrupulous telemarketers, and helps consumers tell the difference between fraudulent and legitimate telemarketing.

The FTC's Telemarketing Sales Rule regulates "*telemarketing*," defined as "a plan, program, or campaign . . . to induce the purchase of goods or services or a charitable contribution" involving more than one interstate telephone call. With some important exceptions, any businesses or individuals that take part in "telemarketing" must comply with the rule. This is true whether, as "*telemarketers*," they initiate or receive phone calls to or from consumers, or as "*sellers*," they provide, offer to provide, or arrange to provide goods or services to consumers in exchange for payment. It makes no difference whether a company makes or receives calls using low-tech equipment or the newest technology.

Difference between FTC and FCC telemarketing regulations

The Federal Communications Commission has separate rules to enforce the federal Telephone Consumer Protection Act or TCPA, which also regulates telemarketing (not to be confused with the TCFPA). There are differences in the rules. For one thing, the FTC's Telemarketing Sales Rule only addresses interstate calls (that is, calls between different states). The FCC's rules, on the other hand, regulate both interstate calls and intrastate calls (that is, calls made within one state). The next section of this release discusses the FCC's rules.

Basics of the FTC Telemarketing Sales Rule

For interstate telemarketing, the FTC Telemarketing Sales Rule imposes several restrictions, such as:

- Establishing a National Do Not Call Registry and generally prohibiting telemarketing calls to consumers listed on the registry.
- Allowing telemarketing calls only between the hours of 8 a.m. and 9 p.m.
- Requiring telemarketing calls to be transmitted with Caller ID information.
- Requiring telemarketers to disclose material information relating to the identity of the telemarketer, purpose of the call, nature of goods or services, cost, quantity, limitations, restrictions, refund policy, prize promotions, credit card loss protection, and explanation of negative option features.
- Prohibiting misrepresentation by the telemarketer.
- Establishing standards for payment authorization verification.
- Prohibiting the assisting and facilitating of sellers or telemarketers who violate the rule.

If your credit union is engaged in interstate telemarketing, you should review FTC's booklet titled "*Complying with the Telemarketing Sales Rule*." It contains a thorough, but plainly worded summary of the Telemarketing Sales Rule.

Exemptions

With some important exceptions, any business or individual must comply with the FTC Telemarketing Sales Rule if it takes part in "telemarketing" – defined as "a plan, program, or campaign . . . to induce the purchase of goods or services or a charitable contribution" involving more than one interstate telephone call.

If your telemarketing campaigns involve any calls across state lines—whether you make outbound calls or receive calls from other states in response to advertising—you may be subject to the FTC rule.

The FTC Telemarketing Sales Rule does not apply to federal credit unions, but it does apply to state-chartered credit unions and to third-party telemarketers, whether hired by a federal or state-chartered credit union.

Some types of *calls* also are not covered by the Rule, regardless of whether the entity making or receiving the call is covered. These include:

- Unsolicited calls from consumers;
- Calls placed by consumers in response to a catalog;

- Certain business-to-business calls (involving a business itself, not personal purchases by or contributions from employees);
- Calls made in response to general media advertising, such as television commercials, print advertisements in newspapers or magazines, Yellow Pages ads, radio ads, or banner ads on the Internet (with some important exceptions); and
- Calls made in response to direct mail advertising, such as postcards, flyers, letters, facsimile transmissions, etc. (with some important exceptions, including a requirement that the advertising must clearly and conspicuously disclose certain terms in the advertising).

Payment Methods

The Telemarketing Sales Rule prohibits the use of certain payment methods in telemarketing:

- Remotely created payment orders and checks, which are electronic checks that merchants can create after obtaining a consumer's financial institution account number;
- Cash-to-cash money transfers, which are made electronically from one person to another in a different location by money transfer providers like MoneyGram and Western Union; and
- A cash reload mechanism, which is an authorization code PIN number or other security measure that allows consumers to convert cash into an electronic form.

The FTC Telemarketing Sales Rule requires “express verifiable authorization” when the payment is made by a method other than a credit card or a debit card. Authorization is considered verifiable if it is obtained in one of three ways:

- Advance written authorization from the consumer;
- An audio recording of the consumer giving express oral authorization; or
- Written confirmation of the transaction sent to the consumer before the charge is submitted for payment.

The “express verifiable authorization” requirement does not apply to conventional checks that the consumer writes, signs and mails, or to payments by money order, cash, gift certificates or direct billing (where the customer or donor receives a written bill or statement before having to pay).

A recording made to memorialize a consumer's express verifiable oral authorization of a charge for a telemarketing transaction must include “an accurate description, clearly and conspicuously stated of the goods or services or charitable contribution for which payment authorization is sought.”

Unauthorized billing

In addition, it is a violation of the FTC Telemarketing Sales Rule to cause billing information to be submitted for payment – directly or indirectly – without the express informed consent of the customer to be charged a specific amount on a particularly identified account, to pay for the goods or services offered, or to make a charitable contribution.

Do Not Call Provisions

The FTC Telemarketing Sales Rule contains two types of “no call” provisions:

1. Prohibiting calls to any consumer who previously asked not to get calls from or on behalf of a particular seller; and
2. Prohibiting calls to any numbers consumers have placed on the National Do Not Call Registry maintained by the FTC

Compliance with the first prohibition is straightforward. Sellers and telemarketers are responsible for maintaining their individual Do Not Call lists of consumers who have asked not to receive calls placed by, or on behalf of, a particular seller. Calling a consumer who has asked not to be called exposes a seller and telemarketer to a civil penalty of \$11,000 per violation. Telemarketers and sellers cannot place unfair burdens on consumers who want to be placed on their individual do-not-call lists, such as harassing consumers who make such a request, hanging up on them, requiring them to listen to a sales pitch before accepting the request, and charging a fee for honoring the request. If a seller or telemarketer does not get the information needed to place a consumer's number on its do-not-call list, it cannot claim protection under the Telemarketing Sales Rule's safe harbor for isolated or accidental violations.

The FCC has coordinated with the FTC to maintain a national Do Not Call registry. Telemarketers are prohibited from calling registered numbers (with certain exceptions). The registry is administered by the FTC. The FCC rules under the Telephone Consumer Protection Act (discussed in the next section of this release) also include provisions related to the Do Not Call registry; however, those FCC's "do-not-call" provisions do not apply to "tax-exempt nonprofit organizations," such as credit unions. Nevertheless, all credit unions still have to comply with the other aspects of the FCC's regulations, and state-chartered credit unions still have to comply with the FTC's do-not-call-rules (discussed in this section) and the Wisconsin telemarketing rules, discussed earlier.

The FTC's National Do Not Call Registry accepts registrations from consumers who choose not to receive telemarketing sales calls. Consumer registrations are valid until the consumer asks to be taken off the National Registry or the number is disconnected.

Only telephone numbers are included in the National Registry. This means that all household members who share a number will stop receiving most telemarketing calls after the number is registered. Consumers may register both their residential "land line" telephone numbers and their wireless telephone numbers.

Sellers, telemarketers, and their service providers can access the Registry through a dedicated website. It is a Rule violation to make any calls covered by the FTC Telemarketing Sales Rule without having accessed the Registry. Sellers and telemarketers have to update their call lists—that is, delete all numbers in the National Do Not Call Registry from their lists—at least every three months.

Violators are subject to civil penalties of up to \$11,000 per violation, as well as injunctive remedies.

Coverage: The Do Not Call provisions of the Telemarketing Sales Rule cover any plan, program, or campaign to sell goods or services involving interstate phone calls. The Do Not Call rules do not apply to calls from political organizations, charities or telephone surveyors.

Exceptions: The Do Not Call registry rules have two exceptions:

- Sellers and telemarketers can call a consumer who expressly agrees, in writing, to receive calls by or on behalf of the seller, even if the consumer's number is in the National Do Not Call Registry. The agreement must be in writing, signed by the consumer, and include the number to which calls may be made. The signature may be a valid electronic signature, if the agreement is reached online.

If a seller seeks a consumer's permission to call, the request must be clear and conspicuous, and the consumer's OK must be affirmative. If the request is made in writing, it cannot be hidden; printed in small, pale, or non-contrasting type; hidden on the back or bottom of the document; or buried in unrelated information where a person would not expect to find such a request. A consumer must consent affirmatively, such as by checking a box. For example, a consumer responding to an email request for permission to call would not be deemed to have provided such permission if the "Please call me" button was pre-checked as a default.

- The rules also allow calls from sellers or telemarketers with whom a consumer has an existing business relationship. A company can call a consumer for 18 months after he/she makes a purchase or three months after he/she submits an inquiry or application; however, if the consumer asks the company to put his/her number on its own do-not-call list, the company must honor that request.

For example, the FTC's "*Complying With the Telemarketing Sales Rule*" website says:

A consumer calls a company to ask for more information about a particular product. If the company returns the consumer's call within three months from the date of the inquiry, whether the consumer's telephone number is on the National Registry is immaterial. But after that three month period, the company would need either the consumer's express agreement to get more calls or a transaction-based established business relationship to support more calls

The seller or telemarketer has the burden of demonstrating its eligibility for either of these two exceptions.

Accessing the registry: Access to the National Registry is limited to sellers, telemarketers, and other service providers. The National Registry may not be used for any purpose other than preventing telemarketing calls to the telephone numbers on the National Registry.

The FTC is preparing a fully automated and secure website at www.telemarketing.donotcall.gov to provide members of the telemarketing industry with access to the National Registry's database of telephone numbers, sorted by area code.

The only consumer information available from the National Registry is telephone numbers. After you (or the company telemarketing on your behalf) have accessed the National Registry the first time, you'll have the option of downloading only changes in the data that have occurred since the last time you accessed the Registry.

Paying for access: Data for up to five area codes will be available for free. Beyond that, there is an annual fee of \$25 per area code of data, with a maximum annual fee of \$7,375 for the entire U.S. database. The fee must be paid annually.

All sellers covered by the FTC Telemarketing Sales Rule must pay the appropriate fee for an area code of data before they call, or cause a telemarketer to call, any consumer within that area code, even those consumers whose telephone numbers are not on the National Registry.

In other words, not only is it against the law to call (or cause a telemarketer to call) any number on the National Registry; it's also against the law for a seller to call (or cause a telemarketer to call) any person whose number is within a given area code unless the seller first has paid the annual fee for access to the portion of the National Registry that includes numbers within that area code.

The only exceptions are for sellers that call only consumers with which they have an existing business relationship or written agreement to call, and do not access the National Registry for any other purpose.

Compliance: A company that is a seller or telemarketer could be liable for placing any telemarketing calls (even to numbers not on the National Registry) unless the seller has paid the required fee for access to the Registry. Violators may be subject to fines of up to \$11,000 per violation. The FTC Telemarketing Sales Rule has a "safe harbor" for inadvertent mistakes, if the seller or telemarketer can show that it meets certain requirements.

State Do Not Call lists: Some states administer their own Do Not Call lists. (Wisconsin uses the national Do Not Call registry for registrations.) The FTC Telemarketing Sales Rule does not preempt state law, so compliance at the state level is still required.

FCC RULES UNDER THE TELEPHONE CONSUMER PROTECTION ACT (TCPA)

(47 CFR § 64.1200)

The Federal Communications Commission (FCC) has rules that enforce the federal Telephone Consumer Protection Act (TCPA) (47 U.S.C. 227). Congress enacted the TCPA in 1991 to address unwanted telephone marketing calls. Among other things, the TCPA restricts the making of telemarketing calls and the use of automatic telephone dialing systems (i.e., autodialers) and artificial or prerecorded voice messages.

Overview

The FCC's TCPA rules restrict a number of practices. Of particular concern, they restrict the use of automatic telephone dialing systems (i.e. autodialers) and prerecorded and/or artificial voice messages. Credit unions should understand that most modern phone systems are likely to be considered "automatic telephone dialing systems" under the FCC's broad definition of that term, and so they should be careful to follow the TCPA rules.

The rules require callers (including credit unions) to obtain a consumer's prior written consent before making any prerecorded telemarketing calls to residential phone numbers, or autodialed (i.e., using an automatic telephone dialing system) or prerecorded telemarketing calls or text messages to wireless numbers. If an autodialed or prerecorded call/text to a wireless number is not for telemarketing or advertising purposes (i.e., an informational call), the consent may be oral or written. Certain free calls or texts to mobile phones, such as to warn of identity theft or fraud, are exempt from these rules.

The FCC's TCPA rules also limit calling hours, require the transmission of caller-ID information, restrict abandoned calls, and regulate the sending of unsolicited faxed advertisements.

The FCC's TCPA rules include "do-not-call" provisions, but they do not apply to "tax-exempt nonprofit organizations," such as credit unions. However, credit unions still have to comply with the other aspects of the FCC's TCPA rules.

Also note that the FTC's Telemarketing Sales Rule, discussed previously in this release, does not apply to FCUs; however, it does apply to state chartered credit unions and third-party telemarketers, whether hired by a federal or state chartered credit union. There are other differences between the FTC's Telemarketing Sales Rule and the FCC's TCPA rules. For one thing, the FTC's Telemarketing Sales rules only address interstate calls (that is, calls between different states). The FCC's rules, on the other hand, regulate both interstate calls and intrastate calls (that is, calls made within one state).

The following material summarizes key points of the FCC's TCPA rules. The rules can be complex, and credit unions are urged to work with competent vendors and advisors before initiating telemarketing campaigns or other processes that the rules may cover.

Autodialed and prerecorded calls and text messages

The FCC's TCPA rules restrict the use of automatic telephone dialing systems (i.e. autodialers) and prerecorded and/or artificial voice messages. Under the rules:

- The credit union may not make any call (except an emergency call) to a cellular telephone using an automatic telephone dialing system (ATDS), or an artificial or prerecorded voice without prior express consent.
- The credit union may not make any telemarketing or advertising call to a cellular telephone using an ATDS or an artificial or prerecorded voice without prior express written consent.
- The credit union may not make any telemarketing or advertising call to a residential line using an artificial or prerecorded voice without prior express written consent. (The "established business relationship" exemption for these types of calls was eliminated in the *FCC's 2012 rulemaking*.)

Notice the differences: the first bullet point applies to any call, to a cell phone, and requires express consent. The other two bullet points apply to telemarketing or advertising calls, and they require express *written* consent. The second applies to cell phone calls, and the third applies to residential land line calls.

In addition, as of July 20, 2023, FCC rules limit the number of non-telemarketing robocalls to three prerecorded/artificial voice calls to any residential phone number from any caller within any consecutive 30-day period. Calls that exceed these limits require prior express consent (oral or written). There are no numerical limits on "live" non-commercial calls to residential landlines. The rules require callers to provide an automated, interactive voice- and/or key press activated opt-out mechanism for the called person to make a do-not-call request. They also require callers to have procedures in place for maintaining an internal do-not-call list of individuals who request not to receive such calls.

Most credit unions have "autodialer" systems

The FCC's TCPA rules address prerecorded messages, and they address calls made with "autodialers" or automatic telephone dialing systems (ATDS). You may think that your credit union does not have an autodialer system, but most modern telephone systems are considered autodialers, under the FCC's broad definition.

Under the FCC's TCPA rules, "ATDS" means equipment that has the capacity to store or produce and dial random or sequential numbers without human intervention, even if it is not presently used for that purpose. Any modern business telephone system is almost certainly an ATDS. Courts have said that equipment will be judged to have the "capacity" to dial numbers without human intervention even if modifications, such as software or hardware added to the system, would be required before it could do so. It doesn't matter if the credit union would have to install pricey software to make its system an "autodialer." If there is the capacity to make that modification, then it's an autodialer, even if the credit union hasn't actually done so.

A federal court in eastern Wisconsin held in 2012 that Navy Federal Credit Union did not have an "autodialer" simply because their system had the capacity to be used as an ATDS. "I have serious doubts as to whether manually dialing a telephone number on a phone that is connected to a computer system capable of autodialing gives rise to liability under the TCPA," the judge wrote. The opinion is *Mudgett v. Navy Federal Credit Union*, 998 F. Supp. 2d 722 (E.D. Wis. 2012). Other courts might rule differently, though, and the facts in any given situation may be very different from Navy FCU's. It's probably best to assume that your credit union's system is an "ATDS" and use it accordingly.

Obtaining consent

As explained in the previous subsection, "prior express written consent" is required for prerecorded/automated voice telemarketing calls to residential landlines and to cell phones. If an autodialed or prerecorded call/text to a wireless number is not for telemarketing or advertising purposes (i.e., an informational call), the consent may be oral or written. However, the prior express written consent rules will apply to informational calls that also contain any advertising message (i.e., intended to offer property, goods, or services for sale).

- *Prior express consent*: Suppose the credit union is making a collection call, which does not include any telemarketing or advertising component, to a borrower's cell phone number. It needs express (but not necessarily written) consent. Under the TCPA, express consent can include the fact that a consumer gave the credit union their cell number when

they applied for the loan the credit union is collecting on. The FCC has said that “[T]he provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”

But the FCC also said: “We emphasize that prior express consent is deemed granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.” In other words, a member can give “express consent” simply by supplying his/her cell number, but just because the member gave his/her cell number to the credit union in one circumstance (e.g. when they opened a deposit account) doesn’t mean that you can use that cell number for any purpose (e.g. collecting on a loan). If they supplied the number when they applied for the loan the credit union is collecting on, then it can consider that to be “express consent” to call them when calling about that loan.

- *Prior express written consent:* Under *the FCC’s current TCPA rules*, the term “prior express written consent” means “an agreement, in writing, bearing the signature of the person called that clearly authorizes” the credit union to send “advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.”

That agreement must clearly and conspicuously disclose to the consumer that:

- By signing the agreement, he or she authorizes the seller to deliver, to a designated phone number, telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
- The consumer is not required to sign the agreement or agree to enter into it as a condition of purchasing any property, goods, or services.

The required signature may be obtained electronically “in compliance with the E-SIGN Act,” including via an e-mail, website form, text message, telephone key press, or voice recording. For details on complying with E-SIGN’s requirements, please see The League’s *ii Release No. 0175*.

The credit union should keep a few issues in mind regarding consent:

- Consent may be revoked at any time and through any reasonable means (as explained in the next subsection). Further, a caller may not limit the manner in which revocation may occur. So, if your member tells you over the phone to stop calling his/her cell phone, the credit union needs to have a system in place to keep track of that request and honor it.
- The credit union needs express consent from the “called party,” which means either
 - The person who subscribes to (and is responsible for payment of) the telephone service, or
 - Any person who is a “customary user” of the cell phone account.

For example, in a 2014 federal court opinion, a debtor had given a lender permission to contact her on cell number owned by boyfriend. The court held that consent had to come from the actual subscriber of the phone – the boyfriend – and not the “intended recipient” of the call – the debtor.

- Courts and the FCC have said that consent becomes void once a cell phone number is reassigned, and the consent of the new subscriber or customary user must be obtained. A caller will not be liable for violation the FCC’s TCPA rules the very first time it dials a number that has been reassigned if it did not know about the reassignment; however, subsequent calls are violations even if the caller still does not know, such as because the first call went unanswered or the line was busy.

Revocation of consent

The *FCC’s June 2015 declaratory ruling* and order clarified that consumers have the right to revoke their consent at any time and through any reasonable means (“any manner that clearly expresses a desire not to receive further messages”). This consumer protection applies to calls placed to landlines as well as calls/texts to wireless phones.

The credit union cannot designate the method consumers may use to revoke their consent. Consumers can revoke their consent in any number of ways, for example: orally over the phone or in person; via a key-activated opt-out mechanism for live calls; toll-free number for voicemails; a reply of “STOP” for text messages; or in writing.

How can your credit union keep track of all of these channels? According to the FCC, that's up to you:

The well-established evidentiary value of business records means that callers have reasonable ways to carry their burden of proving consent. We expect that responsible callers, cognizant of their duty to ensure that they have prior express consent under the TCPA and their burden to prove that they have such consent, will maintain proper business records tracking consent.

The FCC’s TCPA rules require that every prerecorded telemarketing message, whether delivered to a mobile phone or a residential landline, provide an automated, interactive voice- and/or key press-activated mechanism for the consumer to request no further telemarketing calls from the caller.

The mechanism must be presented at the beginning of the call, together with instructions on how to use it. When a consumer uses the opt-out mechanism, his number must be automatically added to the telemarketer's do-not-call list, and the call must immediately terminate.

When the message is left on an answering machine, it must also provide a toll-free number that the consumer can use to connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism.

Limited exemptions for free to end user calls/texts to mobile phones

FCC Declaratory Ruling and Order 15-72 exempted from the TCPA's consumer consent requirements free calls and text messages to mobile phones concerning:

- Transactions and events that suggest a risk of fraud or identity theft;
- Possible security breaches of consumers’ personal information;
- Steps consumers can take to prevent or remedy harm caused by data security breaches; and
- Actions needed to arrange for receipt of pending money transfers.

The “no charge” requirement includes ensuring that notifications don't count against a recipient's plan minutes/texts. In addition, the following conditions apply to the exempted calls and texts made by a financial institution:

- Voice calls and text messages must be sent, if at all, only to the wireless telephone number provided by the member/customer of the financial institution;
- Voice calls and text messages must state the name and contact information of the financial institution (for voice calls, these disclosures must be made at the beginning of the call);
- Voice calls and text messages are strictly limited to purposes listed above and must not include any telemarketing, cross-marketing, solicitation, debt collection, or advertising content;
- Voice calls and text messages must be concise, generally one minute or less in length for voice calls (unless more time is needed to obtain customer responses or answer customer questions) and 160 characters or less in length for text messages;
- A financial institution 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;
- A financial institution 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 consumer can call to opt out of future calls, text messages must inform recipients of the ability to opt out by replying “STOP,” which will be the exclusive means by which consumers may opt out of such messages; and
- A financial institution must honor opt-out requests immediately.

Faxed Advertisements

In 2005, the Junk Fax Prevention Act amended the TCPA to permit businesses and organizations to send unsolicited commercial faxes without prior written permission as long as they have an "established business relationship" (EBR) with the recipient, and to provide a process for recipients to opt-out of receiving any future faxed advertisements.

The rule requires that, even in the case of an EBR, a person sending a fax advertisement must obtain the fax number directly from the recipient, or ensure that the recipient voluntarily agreed to make the number available for public distribution. An EBR in the context of sending fax advertisements is "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party."

This definition extends the EBR exemption to faxes sent to both business and residential subscribers. Once established, the EBR will permit an entity to send facsimile advertisements to a business or residential subscriber until the subscriber terminates it by making a request not to receive future faxes.

The sender of fax advertisements must provide clear and conspicuous notice and contact information on the first page of a fax that allows recipients to "opt-out" of future fax transmissions from the sender. This notice is in addition to the existing rules which require the fax to identify the sender and telephone number of the sending machine. Senders must honor opt-out requests within the shortest reasonable period of time, not to exceed 30 days.

The notice must identify a cost-free mechanism for the recipient to transmit the opt-out request, such as a Web site or e-mail address, toll-free number (or local number if faxes are only sent to local consumers), or toll-free fax number. The sender only needs to have one mechanism available to comply with this requirement. The sender must accept opt-out requests 24 hours, 7 days a week by the means identified in the opt-out notice. Senders must honor opt-out requests within the shortest reasonable period of time, not to exceed 30 days.

In order to stop any unwanted faxes, consumers' "opt-out" requests must: identify the fax number or numbers to which the request relates; and be sent to the telephone number, fax number, Web site address or e-mail address identified on the faxed advertisement. The consumer can subsequently grant express permission to receive faxes from a particular sender, in writing or orally.

Since the rules do not provide any sample language, credit unions and leagues should work with their legal counsel in developing the opt-out notice. The notice may end up looking something like this:

Example: To stop receiving faxed advertisements from _____, please call [insert phone number] or send a fax to [insert fax number] at any time. You may also send an e-mail to [insert e-mail address] or call [insert a toll-free number, if available]. Your opt-out request must identify the specific telephone number(s) of the fax machine(s) that you no longer wish to receive faxes from us. We will remove your fax number from our list(s) within [30 days or less], and will not send you additional faxes advertising goods or services unless you request that we do so.

Caller ID Information

All telemarketers must transmit caller ID information, when available, and must refrain from blocking any such transmission(s) to consumers.

Limits on Calling Hours

Telemarketing calls can only be made between the hours of 8 a.m. and 9 p.m. (local time at the called party's location).

Abandoned Calls

All telemarketers must comply with limits on "abandoned calls" and employ other consumer-friendly practices when using automated telephone-dialing equipment. A telemarketer must abandon no more than 3 percent of calls answered by a person and must deliver a prerecorded identification message when abandoning a call.

All businesses that use autodialers to sell services must maintain records documenting compliance with call abandonment rules.

Limits on automated messages

The credit union cannot initiate calls that deliver a prerecorded message, unless it has prior express written consent with the required disclosures, the message includes certain information, and steps are following to honor “do not call” requests. The restrictions on prerecorded calls include, for example:

- The calling system must be designed to allow for the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call.
- Within two (2) seconds after the completed greeting of the person called, the calling system must play a prerecorded message that promptly provides certain disclosures, including: the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods or services, that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered, and that any purchase or payment will not increase the person’s chances of winning in such a prize promotion.

The rules make exceptions for certain calls, such as calls made for emergency purposes, calls made for non-commercial purposes, and calls made for commercial purposes, if the call does not include or introduce an unsolicited advertisement or constitute a telephone solicitation.

Line probing

In general, the rules prohibit using any technology to dial a number just to see if it is a fax or a voice line.

Multi-line calls

In general, the rules prohibit using an autodialer to tie up more than one business line simultaneously.

FCC’s Do-not-Call Registry

Under the FCC’s TCPA rules no seller (or entity telemarketing on behalf of the seller) can initiate a telephone solicitation to a residential telephone subscriber who has registered his or her telephone number on the national “do-not-call” registry. According to *NCUA Regulatory Alert No. 04- RA-08*, the do-not-call provisions in the FCC’s TCPA rules do not apply to tax-exempt nonprofit organizations, such as credit unions. In addition, state-chartered credit unions must comply with the FTC’s Telemarketing Sales Rule and the Wisconsin telemarketing rules, both of which are discussed previously in this release. Each of these rules has do-not-call provisions.

Apart from the do-not-call rules, credit unions still have to comply with the other aspects of the FCC’s TCPA rules.

THE “CAN-SPAM” ACT

The Controlling the Assault of Non-Solicited Pornography and Marketing (“CAN-SPAM”) Act addresses unwanted email. Its main purpose is to hinder persons who send unsolicited “commercial email messages” (spam) with the intent to mislead or deceive recipients; however, it also imposes certain obligations on legitimate users of commercial email and may affect some credit unions.

For more information on the CAN-SPAM Act, see The League’s *ii Release No. 0170*.

TRUTH IN SAVINGS

In any marketing campaign, take care when disclosing your credit union’s dividend rates. Truth in Savings requires that in an oral response to a member’s or potential member’s inquiry about dividend rates payable on its accounts, the credit union must state the annual percentage yield. The dividend rate may be stated in addition to the annual percentage yield. No other rate may be stated.

How to properly state a dividend rate and annual percentage yield depends on whether or not it is a term share account.

Dividend-bearing accounts other than term share accounts. For dividend-bearing accounts other than term share accounts, specify a dividend rate and annual percentage yield as of the last dividend declaration date.

The following are sample rate scripts non-term share account using the most recent rate:

1. The dividend rate on our _____ [e.g. share draft] account as of the last dividend declaration date is _____. ____% with an Annual Percentage Yield of _____. ____%.

2. The dividend rate on our _____ [e.g., share draft] account as of _____ [e.g., January 1, 2003] is _____% with an Annual Percentage Yield of _____%.

In the event that disclosures of a dividend rate and annual percentage yield as of the last dividend declaration date might be inaccurate because of known or contemplated dividend rate changes, the credit union may disclose the prospective dividend rate and prospective annual percentage yield. Such prospective dividend rate and prospective annual percentage yield may be disclosed either in lieu of, or in addition to, the dividend rate and annual percentage yield as of the last dividend declaration date.

The following is a sample rate script for a non-term share account using a prospective rate:

The dividend rate on our _____ [e.g., share draft] account is _____% with an Annual Percentage Yield of _____%.

Dividend-bearing term share accounts. For interest-bearing accounts and for dividend-bearing term share accounts, specify:

- An interest (dividend) rate and annual percentage yield that were offered within the most recent seven calendar days;
- State that the rate and yield are accurate as of an identified date; and
- Provide a telephone number members may call to obtain current rate information.

The following is a sample rate script for a term share account:

The dividend rate on our _____ [e.g., One Year Share Certificate account] is _____% with an Annual Percentage Yield of _____%.

These rates are accurate as of _____ [date within last seven calendar days].

You can call us at _____-_____ to obtain current rate information.

All three points above must be addressed.

For more information, see The League's ii Release Nos. 0101, "Truth in Savings" and 0124, "Advertising Compliance Checklist."

TRUTH IN LENDING

When marketing loan products, be careful about disclosing rate information. Under Truth in Lending, when a credit union orally responds to a member's request for rate information on closed-end loans, the reply must state the APR. For example, a credit union might state: "We have four-year auto loans at 12% APR." The nominal interest rate may be stated in addition but not instead of the APR.

If the APR cannot be determined in advance, the APR for a sample transaction must be stated. The credit union may also provide information about the consumer's specific case, such as the contract interest rate, points, and the finance and other charges. For example, "On a 30-year fixed-rate mortgage our rate is 9.875% [plus one point and a \$300 application fee]. On a \$90,000 loan the APR is 10.03%."

For more information, see The League's ii Release Nos. B042, "Reg. Z – Closed-End Credit Disclosures" and 0124, "Advertising Compliance Checklist."

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League publications are designed to provide accurate information with regard to the subject matter covered, with the understanding that The League does not render legal services. If you have general questions regarding this release, please call The League at (608) 640-4050 if local or (800) 242-0833. For specific legal advice, please consult your credit union's attorney.

Legal Affairs Department

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