

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Credit Union National Association)
Petition for Declaratory Ruling)
)
)
Rules and Regulations Implementing) GC Docket No. 02-278
the Telephone Consumer Protection Act)

PETITION FOR DECLARATORY RULING

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SUMMARY

Credit unions are tax-exempt nonprofit democratically operated financial cooperatives that have a unique relationship with their members, who are also owners of the enterprise. This special relationship spawns a variety of communications between the credit union and its member-owners, ranging from timely and critical financial information to messages regarding governance issues and financial education. Members welcome and expect this information.

When a credit union conveys such information to a member at her home over a landline connection, the call does not require the member's prior consent. If the member, however, takes that same call at home on a cell phone, the rules are completely different. The Telephone Consumer Protection Act ("TCPA") and the Federal Communications Commission's implementing rules require prior express consent to make informational calls to cell phones using an automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice, and the credit union risks potentially ruinous class-action litigation if for some reason consent had not been obtained or documented. The different treatment of informational calls to cell phones and landlines is antiquated and unfair and fails to reflect how the vast majority of consumers communicate today.

In today's communications environment, it is far more likely that a credit union member will be reached on a cell phone than a landline phone. The majority of consumers no longer even own a landline phone. A recent Centers for Disease Control ("CDC") study found that the majority (50.8%) of Americans only use a cell phone. This cord cutting is even more pronounced for younger adults and renters. The CDC found that more than 70% of all adults aged 25-34 and of adults renting their homes were living in wireless-only households. Wireless-only households are also more prevalent among those with lower incomes. More than two-thirds

(66.3%) of adults living in poverty and nearly 60% of adults living in near poverty relied solely on wireless telephones. These trends will only continue to accelerate. At the same time that consumers are abandoning landline phones, cell phone use is becoming less and less expensive. In fact, voice calls and texts are almost always free under today's wireless plans, which have evolved from per minute or per text charges, to limited buckets of minutes and texts, to unlimited minutes and texts. A 2015 study estimated, for example, that nearly 90% of Americans have unlimited texting, meaning that if a company sends a text, it is highly likely that the recipient will **not** incur a charge. The percentage of unlimited voice and texts is likely higher today than when this study was conducted several years ago. It is increasingly difficult to even find a wireless plan today that places any limits or charges for calls or texts. This is true for many Lifeline plans as well. Offering unlimited minutes and texts is a rational pricing policy for today's high-capacity broadband wireless networks, where revenue is pegged primarily to high bandwidth data consumption rather than voice and text messages that barely register on the network.

This Petition proposes two routes toward equalizing TCPA treatment of informational messages to landlines and cell phones. First, it proposes that the Commission adopt an established business relationship ("EBR") exemption for credit union informational calls and text messages to cell phones. For more than 20 years, the Commission exempted all residential calls, both informational calls and telemarketing calls, from the TCPA's prior express consent requirement where the called party had an established business relationship with the caller. The Commission recognized that such calls do not infringe on consumers' privacy interests. The Commission only recently rescinded the EBR exception for residential telemarketing calls but maintained an exemption for any artificial or prerecorded informational voice call to a residential

line. The Commission should place informational calls to cell phones on the same footing as residential calls by instituting an EBR exemption from the TCPA's prior express consent requirement for informational autodialed or artificial or prerecorded voice calls (including texts) made by credit unions to their members' cell phones.

Commission precedent demonstrates that it has authority to adopt an EBR exemption for informational calls to cell phones notwithstanding that the TCPA only expressly authorizes the agency to adopt exemptions to cell phone calls that are free to the end user. The Commission established the EBR exemption for *telemarketing* calls to residential lines even though the TCPA expressly authorized the Commission to exempt only informational calls. The Commission clearly views its exemption authority to extend beyond that expressly conferred by the TCPA, which is an imminently reasonable position given that Congress conferred broad authority on the Commission to issue rules implementing the TCPA.

A second, or alternative, route available to the Commission is to utilize its express authority to exempt calls and texts that are without charge to the called party. CUNA requests that the Commission exempt credit union informational calls or texts that are in fact free to the called party under the called party's wireless plan. Although the Commission has previously limited this exemption to instances where the callers provided assurances that they were capable of ensuring that calls would be free, § 227(b)(2)(C) of the TCPA—the free-to-end-user provision—imposes no such requirement. All this provision requires is that the call is in fact free to the consumer, not that the caller took steps to attempt to ensure the call is free. Given that a caller could take advantage of the exemption only where the call is in fact free, and because the vast majority of consumers are not charged for calls or texts to their wireless phones, it is illogical and unnecessarily burdensome to require that credit unions provide assurances that the

call is free. This is particularly true given most credit unions are small businesses. Nearly half of all credit unions have five or fewer full time employees and a majority have assets of less than \$20 million.

Adoption of these exemptions would restore the balance that Congress sought to achieve between consumers' privacy interests and the legitimate interests of businesses to communicate with their consumers. Informational calls to credit union members are the least likely to raise privacy concerns, but to further ensure such interests, credit unions agree to abide by conditions to limit the frequency of calls and to provide and honor easy to use opt-out mechanisms.

Adopting these exemptions would also eliminate much of the confusion and uncertainty currently surrounding the various conditions and exemptions that have accreted over time. A recent CUNA survey found that more than three-fourths (76%) of respondents reported that it is "very difficult" (30%) or "somewhat difficult" (46%) to determine whether their communications are compliant with the TCPA in the wake of the Commission's *2015 Omnibus TCPA Order*. Coupled with potentially crippling liability should a credit union miscalculate the applicability of an exemption, the current maze of TCPA rules is causing credit unions to curtail communicating with their member-owners altogether. The same survey found that more than one in three credit unions (35%) that had used text messaging to communicate with their members in the past have cut-back or outright discontinued texting members, even though texting is highly efficient and often a preferred method of communication. Three-fourths (75%) of credit unions that had used some form of an artificial or prerecorded voice messaging system in the past have curtailed or ceased completely such communications. Granting this Petition would also align the Commission's policies with recent guidance from the Consumer Financial

Protection Bureau (“CFPB”) urging both banks and credit unions to text their consumers regarding financial information.

In light of these trends, CUNA respectfully requests that the Commission issue a declaratory ruling that wireless informational calls and texts to credit union member-owners with whom the credit union has an established business relationship, or where the call or text is in fact free, are exempt from the TCPA’s prior express consent requirement.

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PETITION FOR DECLARATORY RULING

Pursuant to § 1.2¹ of the Federal Communications Commission (“Commission”) rules, the Credit Union National Association (“CUNA”) respectfully submits this Petition for Declaratory Ruling (“Petition”) regarding the applicability of the Telephone Consumer Protection Act (“TCPA” or the “Act”)² and the Commission’s TCPA rules to informational calls placed by or on behalf of credit unions.³ Specifically, CUNA requests that the Commission exempt from the TCPA’s “prior express consent” requirement informational calls⁴ made by credit unions to wireless numbers in one of two circumstances: (1) the wireless subscriber has an established business relationship with the credit union;⁵ or (2) the calls are in fact not charged to

¹ 47 C.F.R. § 1.2.

² 47 U.S.C. § 227.

³ 47 C.F.R. § 64.1200.

⁴ By informational calls, CUNA means calls not made for a commercial purpose or calls made for a commercial purpose but that do not include or introduce an advertisement or constitute telemarketing, as those terms are defined under the Commission’s rules. *See* 47 C.F.R. § 64.1200(f)(1) (defining advertisement), (f)(12) (defining telemarketing).

⁵ For purposes of this Petition, an established business relationship can be defined consistent the Commission’s definition at 47 C.F.R. § 64.1200(f)(5) (defining EBR for purposes of telephone solicitations) but tailored for credit union informational calls with wireless subscribers. An EBR would thus mean a prior or existing relationship formed by voluntary, two-way communication between a credit union and a wireless subscriber with or without an exchange of consideration, on the basis of the subscriber’s purchase or transaction with the credit union within eighteen (18) months immediately preceding the date of the telephone call or text message or on the basis of the subscriber’s inquiry or application regarding products or services offered by the credit union within three months

the called party, for example, because the called party's wireless plan has unlimited minutes and texts.⁶ In either event, CUNA proposes certain conditions to minimize any harm to consumer privacy, including reasonable limits on the frequency of such communications. The Petition is necessary to resolve confusion created by the current fractured TCPA regulatory landscape and to eliminate the antiquated distinctions between informational calls made to residential lines and those made to wireless subscribers. Granting the Petition will help dissipate the cloud of uncertainty that is causing credit unions to stop providing important information to their member-owners. This Petition does not seek relief for telemarketing calls.

I. INTRODUCTION

CUNA is the largest national trade association in the United States serving America's credit unions. With its network of affiliated state credit union associations, CUNA serves nearly 6,000 credit unions, which are owned by more than 110 million members. Credit unions are tax-exempt nonprofit financial cooperatives, whose members/consumers are also owners who have voting rights. There is thus a close and unique relationship between credit unions and their member-owners, who not only use their credit union's financial services but also participate in the governance of their credit union. This unique relationship is fostered and nourished by educational and governance-related communications with member-owners. Credit union communications relay both critical financial information and educational materials that aid members in fulfilling their responsibilities as owners of the cooperative enterprise.

immediately preceding the date of the call or text, which relationship has not been previously terminated by either party. In the specific context of credit unions, an EBR also includes, of course, members of a credit union who have an ongoing account or outstanding loan with the credit union.

⁶ Consistent with Commission precedent, calls includes text messages. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, 14115, ¶ 165 (2003) ("2003 TCPA Order").

Congress never intended that the TCPA restrict this type of normal and expected business communication.⁷ Nevertheless, the Commission’s TCPA rules and guidance have evolved into a confusing tangle of restrictions that subject credit unions to potentially crippling liability and are demonstrably reducing informational communications. For example, credit unions may make informational calls to their members’ residential “lines” without having to obtain prior consent, even when using advanced calling technologies or prerecorded messages.⁸ When conveying the same content, having the same purpose, and using similar technology, communications made by credit unions to their members’ cell phones require prior express consent.⁹ Now that the majority of American’s have abandoned their landlines, and the vast majority of calls and texts are free to wireless subscribers, it is time for the Commission to eliminate the arbitrary and antiquated distinction between informational calls to residential lines and the same informational communications to cell phones.

In addition to the unreasonable distinction between residential lines and cell phones for informational calls, credit unions must also navigate the fractured and complex mosaic of recent

⁷ The TCPA’s restriction on calls to wireless numbers and other mobile devices was not meant to apply where “the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers.” H.R. REP. NO. 102-317, at 17 (1991). In the analogous context of the Fair Debt Collection Practices Act (“FDCPA”), Congress chose to exclude creditors—such as credit unions—from the FDCPA’s limitations on communications with consumers, instead focusing on independent debt collectors: “Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts, independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer’s opinion of them.” S. REP. NO. 95-382, at 2 (1977). As member-owned nonprofit organizations, credit unions have every reason and intention to promote and preserve goodwill with their members.

⁸ See 47 C.F.R. § 64.1200(a)(3)(ii), (iii) (exempting residential noncommercial calls and commercial calls not containing an “advertisement” or constituting “telemarketing”).

⁹ Complicating matters is the Commission’s expansive definition of an ATDS as any system that has the “*potential ability*,” even if it lacks the present ability, “to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers.” *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 7971–78, ¶¶ 10–24 (2015) (“*2015 Omnibus TCPA Order*”), *pet. for review pending*. In a recent survey of credit unions, a majority (62%) of respondents reported that they are not currently using an autodialer, but nonetheless concerned that their system may be found to have the future capability to be used as an autodialer resulting in uncertainty as to whether communications made from such devices are restricted. One in three (33%) credit unions indicated they were unsure.

TCPA regulation concerning “prior express consent.” Under the 2015 Bipartisan Budget Act, for example, wireless calls “made solely to collect a debt owed to or guaranteed by the United States” are exempt from the TCPA’s prior express consent requirement.¹⁰ Additionally, the Commission’s *2015 Omnibus TCPA Order* exempted exigent calls made by financial institutions to customers concerning financial fraud or money transfers from needing prior express consent. In either case, however, the exemption is contingent on meeting a number of specific Commission-created requirements.¹¹ Like other financial institutions, credit unions make (or would like to make) both types of informational calls, debt collection and exigent circumstances calls, to their members. The possibility, however, that a call may not qualify under these definitions, or that a qualifying condition may not be met, is hampering the ability of credit unions to make these calls using efficient calling technologies.¹² Even for calls by tax-exempt nonprofit organizations, like credit unions, the Commission’s rules impose different requirements for residential lines and cell phones.¹³

Accordingly, this Petition asks the Commission to issue a ruling exempting from TCPA liability informational calls made by credit unions to their members’ wireless numbers, so long as such communications are either made to a wireless subscriber with whom the credit union has an established business relationship or, alternatively, the subscriber is not charged for the call under the subscriber’s wireless plan. In either event, CUNA proposes certain conditions to further safeguard consumer privacy. Granting the Petition would restore the balance that Congress sought to achieve between consumer privacy and the legitimate rights of businesses to

¹⁰ See 47 U.S.C. § 227(b)(1)(A)(iii).

¹¹ *2015 Omnibus TCPA Order*, 30 FCC Rcd. at 8028, ¶¶ 138–39; 30 FCC Rcd. at 8031-32, ¶¶ 147–48.

¹² This Petition does not address another source of litigation risk, reassigned numbers. CUNA urges the Commission to revise, in an appropriate proceeding, the current reassigned number rules by defining the called party to mean the intended recipient and to create an effective and workable safe harbor.

¹³ Compare 47 C.F.R. § 64.1200(a)(2) (requiring prior express consent for telemarketing calls to cell phones by tax exempt nonprofit organizations) with § 64.1200(a)(3)(iv) (exempting all calls to residential lines made by or on behalf of tax-exempt nonprofit organizations).

communicate with their consumers. The Commission has the authority to adopt either alternative and doing so would further important social goals and policies by alleviating the paralyzing confusion that now reigns.

II. THE TYPES OF CALLS AT ISSUE REFLECT THE UNIQUE RELATIONSHIP BETWEEN CREDIT UNIONS AND THEIR MEMBER-OWNERS

As indicated above, credit unions are community-based, member-owned, nonprofit cooperatives. Credit union members not only contribute to the capital of their credit union as consumers, but also democratically control that capital through the one-member-one-vote principle in credit union policy setting and decision making.¹⁴ This means that every member has an equal voice in the governance of his or her credit union regardless of the amount of savings or loans he or she has with the credit union. Accordingly, credit unions should be able to communicate regularly with their members concerning governance issues—such as voting for board directors and changes to credit union policies—without fear of potentially ruinous litigation.

Because credit unions are independent, autonomous organizations controlled by their members, particular importance and emphasis is placed on financial education for members, especially young members.¹⁵ To that end, credit unions often seek to inform their members about financial literacy programs to help members learn skills such as how to build savings, create a budget, and manage loans. Engrained in the credit union mission is the cooperative principle of member education that manifests itself in financial counseling to help members better understand and manage their personal finances. Credit unions are extremely active in providing financial literacy resources to their communities, covering the entire life cycle of a

¹⁴ The credit union membership elects unpaid, volunteer officers and directors who establish the credit union's policies. In addition, officials and directors must be members of the credit union.

¹⁵ See e.g., *Biz Kid\$: Making Financial Education Engaging & Meaningful*, THE NATIONAL CREDIT UNION FOUNDATION, <https://www.ncuf.coop/how-we-help/biz-kids/financial-literacy-curriculum.cmsx>.

member from introductory information for youths to information combatting the abuse of seniors. Commenting on this point, CFPB Director Richard Cordray noted at a recent Credit Union Advisory Council meeting that “I have seen firsthand the important role that credit unions play in the lives of so many consumers and communities” and that credit unions “take your responsibility to your members very seriously, and many of you have been pacesetters as consumer educators.”¹⁶ Contacting members via phone call or text is an important component of credit unions’ financial educational efforts.¹⁷

In addition, because credit unions are locally based, they are uniquely committed to serving members of modest means and areas that are often underserved by banks. As reported by the CFPB, wireless communications regarding financial information are particularly important for “low-income, unbanked, underbanked and economically vulnerable consumers.”¹⁸ These communications include information on opportunities for members to address an outstanding debt before incurring additional fees, account balance and overdraft alerts, possible breaches of members’ personal and financial information, and card usage and fraud alerts. These communications are time-sensitive, and any delay in members receiving and acting on these notifications risks financial harm.

Credit unions only target these types of communications to their member-owners. There is no need or incentive for credit unions to place these kinds of calls or texts to anyone other than their members, nor is there any benefit to doing so. Given the large number of credit union members, and the limited resources of many credit unions, they must be able to use advanced,

¹⁶ Richard Cordray, *Prepared Remarks of Richard Cordray Director of the Consumer Financial Protection Bureau*, CONSUMER FINANCIAL PROTECTION BUREAU - CREDIT UNION ADVISORY COUNCIL MEETING (Sept. 1, 2016), <http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-richard-cordray-director-consumer-financial-protection-bureau-fall-2016-cuac/>.

¹⁷ Nearly half (45%) of large credit unions communicate with their members by call or text about “financial education opportunities.” *2017 “Impact of TCPA Rules” Survey*, CREDIT UNION NATIONAL ASSOCIATION, at 11.

¹⁸ *Mobile Financial Services*, CONSUMER FINANCIAL PROTECTION BUREAU, at 4 (Nov. 2015), http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf.

efficient calling solutions and standardized calling methods to facilitate timely and cost-effective contact and delivery of information. Automated calling technologies help credit unions ensure consistent, reliable, and accurate information, while reducing the chance of human dialing errors that interfere with the delivery of personal and sensitive financial information. Manual dialing, on the other hand, is more time-intensive, error-prone, and costly. As such, it is in the best interests of credit unions and their members to allow unrestricted communications that can be made in the most efficient and accurate way.

Due to the current confusing patchwork of regulation and the risk associated with inadvertently failing to comply with these regulations arising from TCPA litigation and large TCPA awards, the flow of valuable informational communications by credit unions to their members is threatened. The current rules covering wireless communications for informational calls are creating the exact type of undue interference between credit unions and their member-owners that Congress sought to avoid. The Commission can substantially mitigate these concerns by exempting credit union's wireless information calls from prior consent requirements, just as such calls are exempt when made to residential lines today.

III. THE COMMISSION SHOULD EXEMPT CREDIT UNIONS' INFORMATIONAL CALLS TO WIRELESS NUMBERS WHERE THERE IS AN ESTABLISHED BUSINESS RELATIONSHIP OR WHEN THERE IS NO CHARGE

The Commission can address the concerns outlined above, and promote sound policies that balance consumer privacy with the legitimate interest of credit unions to contact their members, by adopting either an established business relationship exemption for wireless informational calls made by or on behalf of credit unions, or exempting such calls if there is no charge.

A. THE COMMISSION SHOULD EXEMPT CREDIT UNIONS' CALLS TO WIRELESS SUBSCRIBERS WITH WHOM THEY HAVE AN ESTABLISHED BUSINESS RELATIONSHIP

In its *1992 TCPA Order*, the Commission established an exemption from TCPA liability for any “telephone call to any residential telephone line” where the caller and the “residential subscriber” had an established business relationship (“EBR”).¹⁹ By implication, this exemption extended to debt collection calls to residential subscribers.²⁰ The EBR exemption from the requirement to obtain prior express consent extended to all residential calls and was in addition to the Commission’s codification, per § 227(b)(2) of the TCPA, of exemptions for noncommercial calls and commercial calls that did not include an unsolicited advertisement.²¹ The EBR was never extended to wireless calls. Twenty years later, in its *2012 TCPA Order*, the Commission eliminated the EBR for residential telemarketing calls but retained the exemption for noncommercial or commercial residential calls without an advertisement or telemarketing, which this Petition defines as informational calls.²²

Thus, today, informational calls may be made to residential lines using an autodialer or an artificial or prerecorded voice without any form of prior express consent—but the same call for the very same purpose made to a wireless subscriber risks fines or litigation in the absence of

¹⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8770–71, ¶ 34 (1992) (“*1992 TCPA Order*”).

²⁰ *1992 TCPA Order*, 7 FCC Rcd. at 8773, ¶ 39 (concluding that “an express exemption from the TCPA’s prohibitions for debt collection calls is unnecessary because such calls are adequately covered by exemptions we are adopting here for commercial calls which do not transmit an unsolicited advertisement and for established business relationships”).

²¹ *1992 TCPA Order*, 7 FCC Rcd. at 8790–91 (exempting call or message, by or on behalf of a caller “to any person with whom the caller has an established business relationship at the time the call was made”).

²² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd. 1830, 1845–48, ¶¶ 35–43 (2012) (“*2012 TCPA Order*”). Although the *2012 TCPA Order* spoke in terms of eliminating the EBR only for residential telemarketing calls, the Commission completely eliminated the EBR provision from the pre-existing rules, suggesting that the EBR was eliminated for all calls, telemarketing or informational. The *2012 TCPA Order*, however, retained the codified exemptions for noncommercial calls and non-telemarketing commercial calls. The Commission changed the terminology for what constituted an exempt commercial call from one without a “solicited advertisement” or “telephone solicitation” (both defined terms in the TCPA), to a commercial call without an “advertisement” or “telemarketing,” terms newly defined in the Commission’s rules.

consent. In an age when more than half of all telephone subscribers have “cut the cord” and use a wireless phone for their residential “line,” and virtually all calls or texts to wireless phones are under unlimited plans and hence free, the distinction between residential and wireless informational calls is no longer fair or sustainable.

1. Adopting an EBR for Informational Calls to Wireless Phones Reflects Today’s Communications Landscape

Maintaining an increasingly artificial distinction between informational calls to residential and wireless subscribers is no longer sustainable in a world where the majority of consumers no longer even own a landline telephone. The Centers for Disease Control (“CDC”) found that, at the end of 2016, “50.8% of American homes did not have a landline telephone but did have at least one wireless telephone.”²³ This cord cutting is even more pronounced for younger adults and renters. The CDC found that “[m]ore than 70% of all adults aged 25-34 and of adults renting their homes were living in wireless-only households.”²⁴ More specifically, with respect to young adults, approximately 73% of adults aged 25-29 and 62% of adults aged 18-24 live in households with only wireless telephones.²⁵ Young adults are more likely to rely on smartphones for bill payment and other “information seeking and transactional activities.”²⁶ Wireless only households are also more prevalent for those with lower incomes. More than two-thirds (66.3%) of adults living in poverty and nearly 60% of adults living in near poverty relied

²³ Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey*, July-December 2016, NATIONAL CENTER FOR HEALTH STATISTICS, at 1 (May 2017), www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf.

²⁴ *Id.*

²⁵ *Id.* at 2.

²⁶ See Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CENTER (Apr. 1, 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/>.

solely on wireless telephones, compared to 48.5% of higher income adults.²⁷ These trends will only continue to accelerate.

Helping to spur the increasing usage of wireless phones are pricing plans that offer free voice minutes and texting. Wireless service plans have evolved from per minute/per text charges, to buckets of minutes and texts, to unlimited voice and texting plans. Today, virtually no one pays for texts or voice calls, either in terms of paying a per-minute or per-text charge, or by having calls or texts count against a bucket of minutes or texts. A 2015 study estimated, for example, that nearly 90% of Americans have unlimited texting, meaning that if a company sends a text, it is highly likely that the recipient will **not** incur a charge.²⁸ The percentage of unlimited voice and texts is likely higher today than when this study was conducted several years ago. It is increasingly difficult to even find a wireless plan today that imposes incremental charges for minutes of use or texts.

Unlimited plans are also available to low-income households that utilize the Commission's Lifeline program, which helps ensure that low-income households afford telephone and data services. Although some of these plans may still utilize buckets of minutes, at least for their least expensive plans, almost all provide unlimited, free texting. For example, both Assurance Wireless and Safelink Wireless, the two largest wireless Lifeline providers, offer unlimited free texts.²⁹ These facts suggest that those who argue that callers can readily avoid potential TCPA liability by simply making manually-dialed voice calls, rather than using automated systems to send informational texts to consumers, may in fact be hurting low-income

²⁷ *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey*, July-December 2016, at 3, www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf.

²⁸ Josh Zagorsky, *Almost 90% of Americans have Unlimited Texting*, INSTANT CENSUS (December 8, 2015), <https://instantcensus.com/blog/almost-90-of-americans-have-unlimited-texting>.

²⁹ See <http://www.freegovernmentcellphones.net/free-cell-phone-providers> (identifying Assurance Wireless and Safelink Wireless as the two largest Lifeline providers and providing links to their websites describing plans).

Lifeline households who are more likely to incur charges, or use up minutes, for those voice calls than for texts, which are free.

The Commission recognized many of these trends years ago when it determined, in an expansion of the TCPA's text, that wireless numbers should be included in the do-not-call registry.³⁰ The TCPA expressly authorizes the Commission to establish a do-not-call list only for "residential telephone subscribers."³¹ Nevertheless, in its *2003 TCPA Order* setting rules for the do-not-call registry, the Commission concluded that allowing wireless subscribers to add their numbers to the do-not-call list would further the objectives of the Act. The Commission noted that it was "well-established that wireless subscribers often use their wireless phones in the same manner in which they use their residential wireline phones" and that there were a "growing number of consumers who no longer maintain wireline phone service."³² To further the objectives of the TCPA to protect consumers from the "nuisance" of telemarketing calls, the Commission went so far as to "*presume* wireless subscribers who ask to be put on the national do-not-call list to be 'residential subscribers.'"³³

2. The Commission Has Ample Authority to Extend the EBR to Informational Calls to Wireless Phones

Nothing in the TCPA bars the Commission from adopting an EBR exemption for informational calls to wireless phones. To the contrary, the Act broadly directs the Commission to "prescribe regulations to implement" the TCPA's prohibitions, including those related to wireless calls.³⁴ To be sure, in implementing those requirements, the Act provides that the Commission "may" exempt from TCPA liability "calls to a telephone number assigned to a cell

³⁰ *2003 TCPA Order*, 18 FCC Rcd. at 14037, ¶ 33.

³¹ 47 U.S.C. § 227(c). The Act uses the terms "residential telephone subscriber" and "residential subscriber." The Commission has found that they are the same. *2003 TCPA Order*, 18 FCC Rcd. at 14038, n.132.

³² *2003 TCPA Order*, 18 FCC Rcd. at 14038–39, ¶ 35.

³³ *2003 TCPA Order*, 18 FCC Rcd. at 14039, ¶ 36 (emphasis added).

³⁴ 47 U.S.C. §227(b)(2).

phone telephone service that are not charged to the called party.”³⁵ That the Act authorizes the Commission to adopt one type of exemption (free-to-end-user calls) does not preclude the Commission from adopting another exemption that strikes a reasonable balance between consumer privacy and the interests of legitimate businesses to communicate with their customers. Congress did not intend to so severely restrict the Commission’s delegated authority. To the contrary, Congress intended to give the Commission broad authority, as evidenced by Congress’s finding that the Commission “should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy”—“regardless of the type of call.”³⁶

Wireless informational calls by credit unions to member-owners with whom they have an established business relationship that impart critical financial information, or financial educational information, or communications relating to governance should not be considered a nuisance or an invasion of privacy. These are calls that member-owners expect and want. This is not a difficult policy judgement given that the Commission has previously concluded that even a telemarketing call to a residential subscriber with whom the caller had an established business relationship satisfied Congressional intent and struck a reasonable balance between privacy interests and legitimate business communications.

The Commission’s prior adoption of an EBR exemption for any residential call, including telemarketing calls, confirms that it views its TCPA rulemaking authority expansively and that it is not limited to establishing only those exemptions specifically contemplated in subsection (b)(2) of the TCPA. In adopting the residential EBR, the Commission readily acknowledged that the TCPA did not expressly exempt telemarketing calls from a party “with whom the consumer

³⁵ 47 U.S.C. § 227(b)(2)(C). As discussed below, the Commission should exercise this authority and find that free credit union informational calls to wireless subscribers should be exempt from TCPA liability.

³⁶ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(13), 105 Stat. 2394 (December 20, 1991).

has an established business relationship.”³⁷ The TCPA expressly authorized exemptions only for “commercial calls which do not adversely affect residential subscriber interests *and do not include an unsolicited advertisement*.”³⁸ Nonetheless, the Commission had little trouble in adopting an EBR exemption even for calls that do contain a solicitation. The Commission predicated its authority on policy determinations, its interpretation of legislative history, and a supportive record:

We conclude, based upon the comments received and legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship. Additionally, the legislative history indicates that the TCPA does not intend to unduly interfere with ongoing business relationships; barring autodialer solicitations or requiring actual consent to prerecorded message calls where such relationships exist could significantly impede communications between businesses and their customers. Thus, we are not persuaded that the TCPA precludes the use of prerecorded messages to make solicitations to a party with whom the telemarketer has an established business relationship. In view of the support in the record for the exemption and the legislative history, we conclude that the TCPA permits an exemption for established business relationship calls from the restriction on artificial or prerecorded message calls to residences.³⁹

The Commission’s broad view of its authority to adopt exemptions beyond those expressly authorized in the TCPA was further confirmed when, in 2012, the Commission eliminated the EBR for residential telemarketing calls. Noting that “[s]ection 227 of the Act

³⁷ 1992 TCPA Order, 7 FCC Rcd. at 8770–71, ¶ 34.

³⁸ *Id.* (emphasis added). The Commission was referencing § 227(b)(2)(B), which provides that in “implementing the requirements of this subsection [b] the Commission –

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe –

(i) calls that are not made for commercial purposes as the Commission determines; and
(ii) such classes or categories of calls made for commercial purposes as the Commission determines –

(I) will not adversely affect the privacy rights that this section is intended to protect; and
(II) do not include the transmission of any unsolicited advertisement.”

47 U.S.C. § 227(b)(2)(B).

³⁹ 1992 TCPA Order, 7 FCC Rcd. at 8770–71, ¶ 34 (citations omitted). The Commission contrasted its authority to adopt or not adopt an EBR for telemarketing calls to residential lines with the TCPA’s specific requirement to establish an EBR for fax advertisements. 2012 TCPA Order, 27 FCC Rcd. at 1846, n.112.

grants the Commission authority to create exemptions to the restrictions on prerecorded calls to residential lines but does not require that we recognize an EBR exemption in this context,” the Commission then concluded that the TCPA gave it “authority *to establish* – or not establish – an EBR exemption for prerecorded telemarketing calls.”⁴⁰

The Commission is similarly unconstrained in establishing an EBR for informational calls to wireless numbers. The analogous statutory provision to that addressing exemptions for residential lines at § 227(b)(2)(B) is found at (b)(2)(C), which, like its residential counterpart, provides that the Commission “may” adopt a specified exemption (in this case wireless calls that are not charged) subject to conditions the Commission may prescribe. Just as the Commission concluded it had authority to adopt an EBR exemption for residential lines that went beyond the exemptions expressly set forth in § 227(b)(2)(B), the Commission has authority to adopt an exemption for wireless calls that goes beyond the expressly identified exemption in § 227(b)(2)(C) for free calls.

Although the Commission concluded in 2012 that the policy justifications it initially relied upon in establishing an EBR for *telemarketing* calls were no longer supported by the record, the establishment of EBR for *informational* wireless calls by credit unions to their members is readily justified by the legislative history and the objectives of the TCPA. In passing the TCPA, Congress was overwhelmingly focused on telemarketing, as reflected in the Act’s findings, which largely refer to telemarketing practices.⁴¹ Even for telemarketing calls, the TCPA reflects Congressional recognition that communications with those in an established business relationship deserve special treatment, which is evidenced by the Act’s exclusion of

⁴⁰ 2012 TCPA Order, 27 FCC Rcd. at 1846, ¶ 38 (emphasis added).

⁴¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(1–9), 105 Stat. 2394 (December 20, 1991) (Congressional findings 1 through 9 each expressly refer to “telemarketing” or “solicitations”).

EBR calls from the definition of telephone solicitations.⁴² Credit unions' informational calls to their members with whom they have an established business relationship do "not adversely affect subscriber privacy interests" and fall comfortably within the scope of business/consumer communications that Congress did not intend to disrupt or discourage.

Finally, although adopting an EBR for credit unions' informational calls or messages to wireless numbers will go far toward equalizing rules between residential and wireless subscribers, an EBR exemption would not be as broad as the blanket exemption for all informational calls to residential lines created by the Commission's rules. The exemption proposed in this Petition would apply only to a subset of informational calls—those where the called party has an established business relationship. Particularly in the context of the unique relationship between credit unions and their member-owners described herein, the EBR exemption proposed by this Petition raises minimal privacy concerns and readily furthers the underlying policies of the TCPA.⁴³

B. ALTERNATIVELY, THE COMMISSION SHOULD ESTABLISH A FREE-TO-END-USER EXEMPTION FOR CREDIT UNIONS' INFORMATIONAL CALLS

As noted above, the TCPA expressly authorizes the Commission to exempt wireless calls or text messages "that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect."⁴⁴ The Commission may make such exemptions "by rule or Order."⁴⁵ The Commission should exercise this authority to exempt from prior consent requirements credit

⁴² 47 U.S.C. § 227(a)(4).

⁴³ As noted above, members of credit unions have a vote to influence the policies and practices of their credit union. If members become truly exorcized by the number of informational calls received, they have the power to act directly.

⁴⁴ 47 U.S.C. § 227(b)(2)(C).

⁴⁵ *Id.*

union wireless informational calls to its member-owners that are in fact free. Credit union informational calls and text messages to wireless numbers would be considered without charge if there is no per call or per text charge or, consistent with previous Commission rulings, as long as the call or text does not count against the recipient's wireless plan's free bucket of minutes or texts. In an era when most consumers have unlimited voice minutes and texts, such charges are becoming increasingly unlikely. Should the Commission exempt credit union informational calls and texts that are without charge (or based on an EBR), the Commission should further clarify that the lack of a charge for the call or text (or presence of an EBR) constitutes an affirmative defense for the credit union.

When previously granting a free-to-end-user exemption, the Commission has noted assurances from the entities seeking the exemption that they would work with wireless carriers or third-party vendors to ensure that the call would be free.⁴⁶ A Bureau-level order issued late last year interprets this precedent as reading into § 227(b)(2)(C) a requirement that the caller be capable of ensuring that the call will not be charged to called party.⁴⁷ In effect, the Bureau order appears to require callers to incur the cost of the call. Section 227(b)(2)(C) nowhere requires callers to undertake any such obligation. The plain language of the exemption simply requires that the called party in fact will not be charged. Requiring credit unions to incur the costs of ensuring a call is free as a predicate for granting the exemption imposes an unnecessary hurdle,

⁴⁶ See *2015 Omnibus TCPA Order*, 30 FCC Rcd. at 8024, ¶ 127, 8030, ¶ 144; *In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Order, 29 FCC Rcd. 3432, 3435–36, ¶ 12 (2014) (“*Cargo Airline Order*”).

⁴⁷ *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Mortgage Bankers Association Petition for Exemption*, CG Docket No. 02-278, Order, 31 FCC Rcd. 12484, 12488–89, ¶ 13 (2016), *pet. for review pending*. (denying the Mortgage Bankers’ petition in part because they did not provide information on how they would ensure calls would be free.) That order also suggested that a free-to-end-user exemption requires a showing that the communication must involve exigent circumstances. *Id.* at ¶ 14. Apart from the fact that this order is not binding on the Commission, the TCPA nowhere requires that a free-to-end-user exemption may only apply to time-critical communications. Nevertheless, as indicated in the text, many of the calls intended to be covered by this Petition are time sensitive.

especially when the vast majority of calls and texts are already free under today's unlimited wireless plans. As noted above, more than 90% of subscribers have free, unlimited texting and virtually every wireless plan today has unlimited voice and texting. Imposing an obligation on credit unions to make a showing that they are "paying" for calls that are already free makes little sense. Furthermore, it creates the need for unnecessary technological burdens, especially on the majority of credit unions that are small businesses with limited resources.⁴⁸

In practice, exempting free credit union informational calls would establish an affirmative defense against claims that the call was made without consent in violation of the TCPA. Given the diminishing likelihood that the call or text would be subject to a charge, or count against a bucket of minutes or texts, exempting credit union informational calls would have the salutary effect of minimizing litigation against legitimate businesses seeking to communicate with their consumers. Determining whether the call was free would require little more than ascertaining the nature of the called party's wireless plan. Competent plaintiffs' counsel hopefully would undergo that diligence before even filing a claim knowing that it would be quickly dismissed if the called party had an unlimited plan.

Granting the requested exemption will allow the Commission to provide much needed relief to credit unions attempting, in good faith, to comply with the TCPA without unduly impinging on consumers' privacy interests. As described above, the member-specific calls and texts credit unions seek to make provide vital, time-sensitive information consumers welcome, expect, and often rely on to make informed financial decisions. These communications include opportunities for members to address an outstanding debt before incurring additional fees; account balance and overdraft alerts; possible security breaches of members' personal and

⁴⁸ Credit unions are, of course, free to enter into such agreements with wireless carriers or third-party vendors should they wish to eliminate even a small risk that the called party's wireless plan imposes a per-message charge or contains a limited number of free minutes or texts.

financial information; and payment card usage and fraud alerts: all of which are in alignment with the purpose and mission of credit unions, the directives from the CFPB, and the legislative intent behind the TCPA. Such timely communications have the potential to protect consumers from considerable financial harm. Requiring prior express consent for such calls severely hinders the ability to make these communications. Like the types of calls exempted under the financial institution and healthcare exemptions, these calls contain exigent information that benefits consumers.

Although calls and texts from credit unions concerning credit union policy, voting, or financial education material may not have the same exigency as the member-specific financial alerts, they are pro-consumer, non-telemarketing calls that member-owners welcome and expect. Allowing credit unions to make such calls and texts through automated means could increase the likelihood that members will actively participate in credit union governance—as is their right—and will increase consumer financial education (furthering one of the main goals of the CFPB). In this context, consumer privacy concerns are significantly diminished, especially considering that credit unions do not have an incentive to make an excessive number of calls or texts.

As explained below, to further protect consumer privacy, CUNA proffers certain conditions to minimize the frequency of calls and provide members with easy to use opt-out mechanisms that the credit unions will promptly honor.

C. EITHER THE EBR OR FREE-TO-END-USER EXEMPTION WOULD BE SUBJECT TO PRIVACY ENHANCING CONDITIONS

Credit unions' informational calls, whether exempted pursuant to an EBR or as free calls, are unlikely to raise significant privacy concerns. Nevertheless, to provide further protections, credit unions will comply with certain conditions that minimize call frequency and provide an easy to use opt-out mechanism. As long as credit unions comply with these conditions, and the

informational call is without charge or is made to a recipient with an established business relationship, no prior consent will be required. Specifically, CUNA proposes the following conditions for each EBR or free-to-end-user exempted call or text message:

1. Calls and text messages must identify the name of the credit union and include contact information for the credit union; for voice calls, these disclosures would need to be made at the beginning of the call;
2. Each credit union shall send or place only one call or text message per day, up to a maximum of three calls or text messages combined per week from a specific credit union (unless the call or text is also exempted based on the free-to-end-user exemption for certain communications from financial institutions or the BBA amendment concerning the collection of federally-backed debt); and
3. Credit unions relying on this exemption must offer the party being contacted an easy to use and effective ability to opt out of receiving future autodialed or prerecorded or artificial voice calls and text messages, which the credit union will honor.⁴⁹

With these conditions in place and the requirement that any wireless communications be to a consumer with whom the credit union has an EBR, or be free to the end user, exempting all credit unions' non-telemarketing calls and text messages to wireless phones will provide the

⁴⁹ By removing the requirement that credit unions obtain prior consent for free or EBR informational calls that comply with these conditions, granting the Petition would, at least for these calls, also indirectly address another area of major concern to credit unions, the current policy on revocation. The Commission determined in the *2015 Omnibus TCPA Order* that consumers may utilize any "reasonable" (but undefined) method to revoke consent, including oral revocation. 30 FCC Rcd. at 7996, ¶ 64. CUNA urges the Commission to revisit its conclusion regarding revocation, especially with respect to informational calls, and to adopt reasonable limitations to the methods for revoking consent. As Commissioner Michael O'Rielly noted in his dissent to the *2015 Omnibus TCPA Order*, the current revocation policy puts companies in the "untenable position" of having to prove that a called party did not somewhere or somehow seek to revoke consent. 30 FCC Rcd. at 8095–96 (Dissenting Statement of Commissioner Michael O'Rielly). The Commission can better balance the concerns that companies dictate unreasonably restrictive methods of revocation with the need of companies to reasonably obtain and record a consumer's revocation.

relief credit unions need in attempting, in good faith, to comply with the TCPA, while at the same time protecting consumers' privacy interests.

IV. EXEMPTING CREDIT UNIONS' INFORMATIONAL CALLS AND TEXT MESSAGES TO WIRELESS PHONES WOULD BRING UNIFORMITY AND CLARITY TO THE REGULATIONS AND BE CONSISTENT WITH CONGRESSIONAL INTENT AND CFPB GUIDANCE

The current TCPA landscape is stifling credit union's pro-consumer communications with their member-owners. Granting the proposed exemptions will provide much needed relief to credit unions, while furthering Congress's goals in passing the TCPA and aligning with recent CFPB policies urging financial institutions' outreach to financially distressed or vulnerable consumers. These exemptions will restore credit unions' confidence that they can make these important calls without fear of ruinous class action liability.

A. THE EXEMPTION WOULD BRING MUCH NEEDED UNIFORMITY AND CLARITY TO THE TCPA REGULATIONS GOVERNING CREDIT UNIONS' COMMUNICATIONS

The restrictions under the TCPA that apply to credit unions' informational calls and texts to their members vary greatly depending on the subject of the communication, the nature of the calling party, and the telephone service—wireline or wireless—of the called party. This fractured complex tapestry of regulation has caused confusion among credit unions that are attempting to contact their members with important financial and credit union governance information. The need to traverse this trap-door compliance maze arises because the Commission has different rules not only for wireless versus landline calls, but whether a call is to collect a federally guaranteed debt, to provide time-sensitive financial information, and/or whether they are made by a tax-exempt nonprofit organization. Credit unions make calls subject to all of these contingent exemptions.

Credit unions are tax-exempt nonprofit organizations.⁵⁰ Thus, credit unions' communications to residential landlines are exempted from numerous TCPA restrictions based on their tax-exempt nonprofit status. Under the Commission's rules implementing the TCPA, a "tax-exempt nonprofit organization" may make an informational or advertising call to a residential line using an artificial or prerecorded voice *without* any prior express consent.⁵¹ "Tax-exempt nonprofit organization[s]" are also exempt from the TCPA's prohibition on making a "telephone solicitation" to a residential or wireless number on the national do-not-call registry. Specifically, the TCPA and the Commission rules expressly exclude from the definition of "telephone solicitation" a call or message "[b]y or on behalf of a tax-exempt nonprofit organization."⁵²

Further, certain credit union calls and texts are exempted from the TCPA's prior express consent requirements on autodialed and artificial and prerecorded voice calls because they are calls and texts "made solely to collect a debt owed to or guaranteed by the United States."⁵³ The Commission's August 11, 2016 Report and Order implementing § 301 of the Bipartisan Budget Act of 2015, exempts debt collection calls for federally-backed debt.⁵⁴ As a result of the significant limitations surrounding the exemption and the Commission's failure to define which loans qualify as owed to or guaranteed by the United States, credit unions face considerable uncertainty regarding the applicability of the Balanced Budget Act. This has added to the

⁵⁰ Specifically, a credit union may be classified as a tax-exempt organization under one of two provisions. Federal credit unions that are under the supervision of the National Credit Union Association ("NCUA") are exempt from federal income tax under 26 U.S.C. § 501(c)(1). State credit unions that are chartered under state credit union laws and operate without profit and for the mutual benefit of their members are exempt from federal income tax under § 501(c)(14)(A).

⁵¹ See 47 C.F.R. § 64.1200(a)(3)(iv).

⁵² 47 C.F.R. § 64.1200(f)(14)(iii); accord 47 U.S.C. § 227(a)(4)(C).

⁵³ See 47 U.S.C. §§ 227(b)(1)(A)(iii).

⁵⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 31 FCC Rcd. 9074 (2016).

compliance uncertainty which has caused some credit unions to stop communicating with their members.

Additionally, the *2015 Omnibus TCPA Order* exempted from the TCPA’s prior express consent requirement non-telemarketing cell phone calls and texts made by a “financial institution”—that are not charged to the recipient—concerning fraud, security breaches, and money transfers.⁵⁵ Specifically, subject to certain conditions, the exemption applies to four types of “pro-consumer messages about time-sensitive financial . . . issues,” which includes messages delivered by phone or text: (1) to prevent fraudulent transactions or identity theft of a consumer’s account; (2) to alert consumers to potential data security breaches; (3) to inform consumers of measures they may take to prevent identity theft following a data security breach; and (4) to notify the recipient of a money transfer of the steps that need to be taken in order to receive the transferred funds.⁵⁶ Credits unions are tax-exempt nonprofit organizations, as well as “financial institutions.”⁵⁷ Therefore, certain calls made by credit unions also fall under this exemption. While this exemption covers some of a credit union’s communications with its members, its narrow and limited nature has created uncertainty when it was designed to create immunity.

Confronted with this fractured regulatory landscape and in light of the economic consequences of turning out to be wrong about whether a certain call may be made without prior consent, CUNA’s members increasingly avoid making the call or sending the text. The result of

⁵⁵ *2015 Omnibus TCPA Order*, 30 FCC Rcd. at 8023–28, ¶¶ 125–139.

⁵⁶ *Id.*

⁵⁷ In the *2015 Omnibus TCPA Order*, the Commission accepted the ABA’s proposed definition of “financial institution” as “any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956.” 30 FCC Rcd. at 8023, ¶ 127 n.424. Many activities classify a company as a financial institution under the Bank Holding Company Act, such as (but not limited to): institutions involved with lending, exchanging, transferring, investing for others, or safeguarding money or securities; institutions that provide insurance; institutions that provide financial or economic advisory services; institutions that issue or sell financial instruments; institutions that perform underwriting functions; and institutions that engage in activities “so closely related to banking or managing or controlling banks as to be a proper incident thereto.” 12 U.S.C. § 1843 (k)(4). There is no for-profit requirement for an organization to be considered a “financial institution” as defined by the Act. Thus, a credit union easily qualifies as a “financial institution.”

this chilling effect is that credit union member-owners are deprived of important or even vital information. A recent survey of credit unions reflects the confusion surrounding TCPA compliance and the resulting fear-induced reduction in communications. More than three-fourths (76%) of respondents reported that it is “very difficult” (30%) or “somewhat difficult” (46%) to determine whether their communications are compliant with the TCPA following the Commission’s *2015 Omnibus TCPA Order*. The same survey found that more than one in three credit unions (35%) that had used text messaging to communicate with their members in the past have cut-back or outright discontinued texting members.⁵⁸ Three-fourths (75%) of credit unions that had used some form of an artificial or prerecorded voice messaging system in the past have curtailed or ceased completely such communications.⁵⁹

That fear that a credit union communication may somehow be noncompliant resulting in potential financial exposure is not unfounded. In recent years, a number of credit unions have been subject to class action litigation under the TCPA,⁶⁰ reflecting the overall staggering growth of TCPA lawsuits.⁶¹ The growing frequency and scope of TCPA litigation against financial institutions poses an especially serious threat to credit unions. Often, TCPA damages obtained

⁵⁸ 2017 “Impact of TCPA Rules” Survey, CREDIT UNION NATIONAL ASSOCIATION, at 2.

⁵⁹ *Id.*

⁶⁰ See, e.g., *Munday v. Navy Fed. Credit Union*, Case 8:15-cv-01629-JLS-KES (C.D. Cal. July, 14, 2017) (approving a non-reversionary settlement fund of \$2,750,000 for automated calls to wrong numbers); *Petley v. San Diego Cty. Credit Union et al.*, Case No. 3:16-cv-00891 (settled on an individual basis for an undisclosed amount); *Navarro v. SCE Fed. Credit Union*, Case No. 2:14-cv-08493 (C.D. Cal. Oct. 31, 2014) (same); *Pacleb v. Nw. Fed. Credit Union Found.*, Case No. 2:13-cv-03076 (C.D. Cal. May 01, 2013) (same); *Pennant v. Boeing Emps.’ Credit Union Fin. Servs. Inc.*, Case No. 2:11-cv-1697 (W.D. Wash. Oct. 12, 2011) (settled on an individual basis for \$14,750); *Mudgett v. Navy Fed. Credit Union*, Case No. 2:11-cv-00039 (E.D. Wis. Jan. 14, 2011) (summary judgment entered in favor of the credit union).

⁶¹ According to a recent report, 4,860 TCPA cases were filed in 2016, compared to 3,687 in 2015—a nearly 32% increase. By comparison, only 14 TCPA cases were filed in 2007. The report also found that 35% of all plaintiffs that brought suit under the Fair Debt Collection Practices Act, Fair Credit Reporting Act, and/or TCPA in 2016 had previously filed an action under these statutes. *2016 Year in Review: FDCPA Down, FCRA & TCPA Up*, WEBRECON LLC (Jan. 24, 2017), <https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tepa-up/>.

against financial institutions reach well into the millions of dollars.⁶² The majority of the nation’s credit unions are small businesses that cannot afford this level of damages. In the United States, nearly half of all credit unions, 2,708 out of approximately 6,000 credit unions, have five or fewer full time employees. More than half (3,457) have assets of less than \$50 million. Moreover, credit unions with less \$20 million in assets account for over 40% of all U.S. credit unions (2,369). It thus comes as no surprise that over 60% of credit unions that utilize artificial or prerecorded voice calls or place text messages to their members believe a TCPA lawsuit would be “very problematic—severely threatening the [credit union’s] resources.”⁶³

Moreover, because credit unions are owned by consumers, TCPA compliance and litigations costs fall directly on their shoulders—the very people the TCPA is intended to protect. It is absurd that credit union members’ assets could be put at risk by a credit union attempting, in good faith, to contact such members with pro-consumer finance-related and governance communications. Class action litigation results in one pool of members’ resources being moved to another pool of members (or even non-members), with plaintiffs’ attorneys taking their cut in-between. Surely, Congress did not intend the TCPA to promote lawsuits by consumers against other everyday consumers and did not intend to limit a business from communicating with its

⁶² See, e.g., *Luster v. Wells Fargo Dealer Servs. Inc.*, Case No. 1:15-CV-01058 (N.D. Ga. June 9, 2017) (preliminarily approving a class settlement of \$14.8 million for alleged violations of the TCPA based on alleged autodialed calls to plaintiff’s cell phone attempting to collect debts apparently owed by unrelated third parties; final approval pending); *Markos, et al. v. Wells Fargo Bank, N.A.*, Case No. 1:15-cv-01156 (N.D. Ga. Jan. 30, 2017) (approving a class settlement of \$16.4 million for alleged violations of the TCPA for calls concerning residential mortgage and home equity loans); *James et al. v. JPMorgan Chase Bank NA*, Case No. 8:15-cv-2424 (M.D. Fla. June 5, 2017) (approving a \$3.75 million class settlement to resolve a TCPA action alleging the bank autodialed cell phone numbers that were reassigned from former customers to new users who hadn’t agreed to receive calls); *Gehrich, et al. v. Chase Bank USA, N.A., et al.*, Case No. 1:12-cv-05510 (N.D. Ill. Mar. 2, 2016) (approving a class settlement of \$34 million for alleged violations of the TCPA); *Allen v. JPMorgan Chase Bank NA*, Case No. 1:13-cv-08285 (N.D. Ill. Oct. 21, 2015) (approving a class settlement of \$10.2 million for alleged violations of the TCPA based on alleged robocalls to plaintiff’s cell phone attempting to collect debts apparently owed by unrelated third parties); *Rose et al. v. Bank of Am. Corp. et al.*, Case Nos. 5:11-cv-02390, 5:12-cv-04009 (N.D. Cal. Sept. 2, 2014) (approving a class settlement of \$32 million for alleged violations of the TCPA for calls or texts concerning residential mortgage loans or credit cards).

⁶³ 2017 “Impact of TCPA Rules” Survey, CREDIT UNION NATIONAL ASSOCIATION, at 3.

owners.⁶⁴ With 110 million credit union member-owners nationwide, this is a significant problem.

B. CONGRESS NEVER INTENDED TO RESTRICT CREDIT UNIONS' BUSINESS COMMUNICATIONS WITH THEIR MEMBER-OWNERS

Granting the Petition would be consistent with Congress's and the Commission's TCPA goals and would not allow any additional telemarketing calls or texts. The TCPA was not intended to burden normal business communications. Rather, the focus of the TCPA was on "protecting telephone subscribers' privacy rights from unsolicited telephone solicitations."⁶⁵ For example, the 1991 U.S. House of Representatives Report recommending the TCPA's passage (the "House Report") emphasized that the "restriction on calls to emergency lines, pagers and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications."⁶⁶ The House Report further stated that the TCPA's restriction on calls to wireless numbers and other mobile devices was not meant to apply where "the called party has provided the telephone number of such a line to the caller for use in normal business communications. The Committee *does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers.*"⁶⁷ Instead, the TCPA was intended to "reflect[] a balance . . . between barring all calls to those who objected to unsolicited calls [and] a desire to not unduly interfere with

⁶⁴ *Cf. Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) ("[An agency is] required 'to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.'" (quoting *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987)); 47 U.S.C. § 303 ("Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—... (r) Make such rules and regulations and prescribe such restrictions and conditions, *not inconsistent with law*, as may be necessary to carry out the provisions of this chapter") (emphasis added).

⁶⁵ S. REP. NO. 102-177, at 7 (1991).

⁶⁶ H.R. REP. NO. 102-317, at 17 (1991).

⁶⁷ *Id.* (emphasis added).

ongoing business relationships.”⁶⁸ Accordingly, “the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy[.]”⁶⁹ The established business relationship exemption and the ability to exempt free calls are examples of such flexibility, and the Commission should exercise its discretion here to provide relief to credit unions for non-telemarketing calls.⁷⁰

Exempting credit unions’ informational calls to cell phones would also be consistent with Congress’s and the Commission’s rationale for exempting nonprofits from the do-not-call list rules and exempting artificial and prerecorded voice calls made by nonprofits to residential numbers from the prior express consent requirement. In its order declining to extend the national do-not-call requirements to tax-exempt nonprofit organizations, the Commission stated that “Congress’ decision to exclude tax-exempt nonprofit organizations from the definition of telemarketing in the TCPA was both rational and related to its interest in protecting residential privacy.”⁷¹ The Commission emphasized the TCPA House Report’s findings that calls from nonprofits are less intrusive:

[T]he record suggests that most unwanted telephone solicitations are commercial in nature....[T]he Committee also reached the conclusion, based on the evidence, that ... calls [from tax-exempt nonprofit organizations] are less intrusive to consumers because they are more expected. Consequently, the two main sources of consumer problems - high volume of solicitations and unexpected solicitations - are not present in solicitations by nonprofit organizations.⁷²

The Commission also made clear that exempting nonprofits from the do-not-call list provisions was fully consistent with protecting consumer privacy: “We reject the arguments that because

⁶⁸ *Id.* at 13.

⁶⁹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(13), 105 Stat. 2394 (December 20, 1991).

⁷⁰ 47 U.S.C. § 227(b)(2)(C); *see also Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1117–18 (11th Cir. 2014).

⁷¹ 2003 *TCPA Order*, 18 FCC Rcd. at 14055.

⁷² *Id.* (quoting H.R. REP. NO. 102-317, at 16 (1991)).

our do-not-call registry provisions do not apply to tax-exempt nonprofit organizations, our regulations do not directly and materially advance the government interest of protecting residential privacy.”⁷³

The Commission also relied on the House Report in concluding that the prohibition on artificial or prerecorded voice calls to residential lines does not apply to calls by tax-exempt nonprofit organizations.⁷⁴ In reaching its conclusion, the Commission noted “the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities” and that “[t]he legislative history of the TCPA contrasts calls made by tax-exempt nonprofit organizations with commercial calls and indicates that commercial calls have by far produced the greatest number of complaints about unwanted calls.”⁷⁵

Facilitating communication between a credit union—which is a nonprofit, member-owned financial cooperative—and its member-owners is in the public interest and consistent with the goals of the TCPA. The credit union communications described in this Petition do not involve any telemarketing, solicitation, or advertising. Nor do they trigger the other concerns that Congress was attempting to address through the TCPA, such as dialing random or sequential numbers, improperly shifting marketing costs to consumers, or tying up blocks of telephone lines. Instead, credit union communications with member-owners are placed for particular purposes that serve the unique needs of credit union members as both customers and owners. These are communications that the member-owners expect and find useful in making educated financial decisions. Obviously, consumers can only benefit from these communications if they timely receive them. Automated calls and texts are nearly instantaneous, and automatically-dialed voice calls and texts can reach more credit union members in a shorter time span than

⁷³ *Id.*

⁷⁴ 1992 *TCPA Order*, 7 FCC Rcd. at 8773–74.

⁷⁵ *Id.* (citing H.R. REP. NO. 102-317, at 16–17 (1991)).

manually-dialed calls. Research shows that consumers are several times more likely to open and read a text messages than an email, and that most texts are read within three minutes of delivery.⁷⁶ Simply put, contacting a cell phone is the best—and often only—way to connect with many credit union members, and automated messaging is the best way to ensure credit union members receive the important financial information credit unions seek to convey. In enacting the TCPA, Congress did not intend to curtail and penalize credit unions’ expected and beneficial communications with their members. This is plain from the Act’s legislative history.

C. EXEMPTING CREDIT UNION CALLS ALIGNS WITH CFPB GUIDANCE ON FACILITATING WIRELESS COMMUNICATIONS WITH DISTRESSED AND FINANCIALLY VULNERABLE CONSUMERS

Exempting credit union automated wireless informational calls and texts to their member-owners would also be consistent with recent guidance from the CFPB. For example, during a CFPB field hearing in February of 2016, Director Richard Cordray urged both banks and credit unions to contact consumers on their cell phones:

Let me also take a moment to acknowledge another positive development, which is the decision some banks and credit unions have made to provide consumers with real-time information about the funds in their accounts available to be spent. They are doing this through various means, including online banking and text and e-mail alerts, which can reduce the risks that consumers inadvertently overspend their accounts.⁷⁷

Credit unions that have over \$10 billion in assets are supervised and examined by the CFPB, which has rulemaking and enforcement authority over numerous consumer protection laws to which all credit unions are subject. When the CFPB is urging credit unions to provide “real-time

⁷⁶ *45 Texting Statistics that Prove Businesses Need to Take SMS Seriously*, ONEREACH (Sept. 10, 2015), <https://onereach.com/blog/45-texting-statistics-that-prove-businesses-need-to-start-taking-sms-seriously/> (“Text messages have a 98% open rate, while email has only a 20% open rate.”); (“90% of all text messages are read in under 3 minutes.”).

⁷⁷ Richard Cordray, *Prepared Remarks of CFPB Director Richard Cordray at a Field Hearing on Checking Account Access*, CONSUMER FINANCIAL PROTECTION BUREAU (Feb. 03, 2016), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-a-field-hearing-on-checking-account-access/>.

information” to consumers through text alerts to help protect their finances, while the TCPA and Commission rules subject credit unions to liability for automated calls and texts, it creates extremely problematic, conflicting guidance about how credit unions should be communicating with their members.

The CFPB has also stressed the importance of enabling consumers to effectively manage their finances through their wireless phones. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB is charged with 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. To that end, the CFPB’s Office of Financial Empowerment issued a Request for Information in June of 2014 “to help the Bureau understand better the potential for mobile financial services to help underserved consumers—including low-income, unbanked, underbanked and economically vulnerable consumers—access products and services that help them achieve their financial goals.”⁷⁸ The resulting report emphasized the benefits to consumers of mobile communications:

*A 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. For example, in 2013, 74,000 new customers a day began using mobile banking services. 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. For economically vulnerable consumers, mobile financial services accompanied by appropriate consumer protections can enhance access to safer, more affordable products and services in ways that can improve their economic lives.*⁷⁹

⁷⁸ *Mobile Financial Services*, CONSUMER FINANCIAL PROTECTION BUREAU, at 4 (Nov. 2015), http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf.

⁷⁹ *Id.* at 10 (emphasis added).

In recent remarks addressing overdraft fees incurred by consumers, Director Cordray stated:

In our fast-moving modern economy, it is increasingly common for consumers to use debit cards the way they used to use cash. They also write checks and arrange for money to be taken out of their account. This makes it harder to keep track of their checking account balances from day to day, even if they are diligent about checking their balances online or by phone. Consumers living on the edge can find themselves racking up numerous overdraft charges.

The current TCPA landscape and Commission rules make it more difficult—not less—for credit unions to communicate with economically vulnerable members. Granting this Petition would substantially assist credit unions in facilitating beneficial financial communications with their distressed members, consistent with the CFPB’s recommendations.

V. CONCLUSION

For the foregoing reasons, CUNA requests that the Commission exempt from the TCPA's "prior express consent" requirement all informational calls and text messages made by or on behalf of credit unions to wireless numbers, either where the wireless subscriber has an established business relationship with the credit union or the call or text is in fact free to the called party.

Respectfully submitted,

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