

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

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)

Comments of the Credit Union National Association

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SUMMARY

Credit unions are tax-exempt, not-for-profit, democratically operated financial cooperatives that have a unique relationship with their member-owners. This unique relationship between credit unions and their members requires a wide array of informational communications ranging from governance and financial education to critical fraud alerts and account status calls and texts. Credit union members want and often need to receive this vital information. Imposing new regulatory obligations on these informational calls as proposed by the Commission will further hinder credit unions' ability to communicate important information to their members.

The Commission should not adopt limitations on the number of calls that can be made pursuant to the exemptions for non-commercial calls or commercial calls that do not contain a solicitation. Nor should the Commission adopt its proposals to require that prerecorded residential informational calls include an opt-out mechanism that would automatically place the called person's number on to-be-established company specific do-not-call lists. The Commission posits no justification for imposing these significant new burdens on informational calls. Requiring the creation of do-not-call lists for informational calls would exceed the Commission's statutory authority, generate substantial confusion regarding the scope of a do-not-call request, and lead to new rounds of vexatious litigation.

Rather than impose new burdens on residential informational calls, the Commission should use this opportunity to harmonize rules governing residential and cell phone calls by extending the residential informational calls exemptions to wireless calls and texts. The Credit Union National Association has previously filed a petition requesting similar relief.

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The Credit Union National Association (“CUNA”) submits these comments in response to the Notice of Proposed Rulemaking for the above-captioned proceeding to implement Section 8 of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act.)¹ CUNA respectfully urges the Federal Communications Commission (“Commission”) to refrain from imposing burdensome new obligations on credit unions or other businesses when making purely informational calls to residential lines. Instead, the Commission should take this opportunity to harmonize its rules by extending to wireless calls the same informational call exemptions that apply to residential calls.

I. Credit Union Informational Calls

Credit unions are tax-exempt, not-for-profit, democratically operated financial cooperatives that have a unique relationship with their member-owners.² This unique relationship between credit unions and their members requires a wide array of informational communications ranging from governance and financial education to critical fraud alerts and account status calls

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, FCC 20-140 (rel. Oct. 1, 2020) (“Notice”).

² *See*, 26 U.S.C. § 501(c)(14). *See generally*, Credit Union National Association Petition for Declaratory Ruling, GC Docket No. 02-278 (filed Sept. 29, 2017) (“CUNA Petition”).

and texts. Credit union members want and often need to receive this vital information. The Commission should refrain from imposing burdensome new obligations that would delay or prevent this information exchange.

Credit union members play an active role in governance of their credit unions, including participating in quarterly or annual meetings, voting for their board of directors in democratic elections, and even volunteering to run and serve as directors. This unique cooperative structure should be recognized and remain unhindered so that credit unions can call members' residential lines to provide governance-related informational notifications, invitations, and updates without undue fear of adverse consequences under the TCPA.

Providing financial education to members is of particular importance to the nation's credit unions. The Federal Credit Union Act organized federally regulated credit unions for the purpose of "promoting thrift among its members and creating a source of credit for provident or productive purposes."³ To further this mission, credit unions often seek to inform their members about financial literacy programs and similar educational opportunities to help them develop skills for building savings, creating a budget, and managing debt. Significantly, due to their historic role as community-based financial institutions, credit unions often provide these educational opportunities and information to low- and moderate-income populations, particularly in rural areas, who are underserved by banks. As the former head of the Consumer Financial Protection Bureau (CFPB) noted, credit unions commonly serve "low-income, unbanked, underbanked and economically vulnerable consumers."⁴ It would be a mistake to impose any

³ 12 U.S. C. § 1752(1).

⁴ Consumer Financial Protection Bureau, *Mobile Financial Services*, at 4 (Nov. 2015), <https://bit.ly/32Y6t56>. The CFPB has urged credit unions and other financial institutions to proactively enable consumers to track and manage their accounts through mobile applications or text messages. *Mobile Financial Services*, CONSUMER FINANCIAL PROTECTION

regulation that makes it more difficult for these vulnerable members to receive informational notices about these financial education offerings and opportunities.

In addition to governance and educational communications, credit unions also provide alerts regarding the status of accounts, fraud alerts, and other time-critical financial information. Additionally, credit unions communicate with their members in the wake of natural disasters to provide information regarding loan deferral options or other forms of relief.⁵ When credit unions are making these critically important calls, there is no statutory rationale for imposing additional obligations in order to disseminate information.

All of these informational calls are exempt from the TCPA's prior consent requirement when calls are made to residential lines. As set forth below, the Commission should retain these exemptions as currently implemented without imposing additional requirements. There is no reason to assume that informational calls to residential lines result in enough sufficiently egregious consumer harm to justify the additional burden imposed by establishing new opt out and do-not-call requirements or imposing arbitrary call limits.⁶ To the contrary, the Commission should extend the informational call exemption to wireless calls.

II. The Commission Should Retain the Exemption for Non-telemarketing Commercial Calls Without Imposing Additional, Burdensome Requirements

The TRACED Act requires the Commission to amend regulations “as necessary” to ensure that the existing exemptions “contain requirements with respect to: ‘(i) the classes of parties that may make such calls; (ii) the classes of parties that may be called; and (iii) the

BUREAU at 4 (Nov. 2015), http://files.consumerfinance.gov/f/201511_cfbp_mobile-financial-service.pdf.

⁵ See, e.g., Letter from Gail Enda, President & CEO, American Airlines Federal Credit Union, to Marlene Dortch, Secretary, FCC, CG Docket Nos. 02-278, 18-152 (filed May 17, 2019) (“AAFCU Letter”).

⁶ See e.g., Notice ¶¶ 12-15.

number of such calls that a calling party may make to a particular called party.’’⁷ The TCPA authorizes the Commission to exempt from the prior consent requirement prerecorded or artificial informational calls to residential lines. More specifically, the TCPA authorizes the Commission to exempt non-commercial calls and commercial calls that do not include telemarketing.⁸ The Commission readily adopted these exemptions in its initial 1992 Order implementing the TCPA.⁹

A. The Exemptions for Informational Calls Remain in the Public Interest

Before addressing the specific conditions set forth in the TRACED Act, the Commission asks generally whether these two exemptions remain in the public interest.¹⁰ The answer is a resounding yes. As described above, informational calls often contain critically important information that members of credit unions want and need. Eliminating these exemptions and requiring callers to obtain and record prior consent would create the same chilling effect on communications that arise with non-exempt calls.¹¹

With respect to the TRACED Act’s specific criteria, the Notice proposes to identify the class of callers that may make non-commercial calls as “informational callers” that “do not have a commercial purpose.”¹² The Notice further proposes to identify the classes of parties that may make commercial calls that do not involve telemarketing as one of the following: “informational

⁷ Notice at ¶ 7 (quoting TRACED Act § 8(a)).

⁸ 47 U.S.C. § 227(b)(2)(B).

⁹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-20, Report and Order, 7 FCC Rcd 8752 (1992) (“1992 TCPA Order”).

¹⁰ Notice at ¶¶ 11, 14.

¹¹ *See, e.g.*, CUNA Petition at 23-25 (noting extent of TCPA litigation against credit unions; AAFCU Letter at 2-3 (describing extent to which AAFCU forgoes use of efficient dialing technologies due to threat of litigation). Moreover, because credit unions are owned by their member customers, TCPA compliance and litigation costs fall directly on their shoulders. CUNA Petition at 24.

¹² Notice at ¶12.

callers” to the extent they are only providing information or “transactional callers” that are calling to complete or confirm a commercial transaction.¹³

The Commission’s efforts here are overly complicated and could lead to confusion. CUNA believes it would be sufficient to identify parties that may make calls under either exception as “informational callers” without further reference to the type of organization or specific nature of the call. The exemptions are, in both instances, intended to distinguish informational calls from telemarketing calls, and it is therefore sufficient to identify the class of callers accordingly as those making “informational calls.”

The Notice finds that these two exemptions already adequately specify the classes of parties that may be called because the calls are, in either case, limited to residential telephone lines. Although this is true with respect to scope of the current exemptions, as explained below, CUNA respectfully urges the Commission to expand these exemptions to include wireless informational calls.

B. The Commission Should Not Impose Arbitrary Limits on the Number of Informational Calls Made to Residential Lines

The Commission should not adopt a numerical limit on informational calls and should instead, as alternatively proposed, specify in its rules that “a calling party shall not be limited in terms of the number of calls it makes under the exemption.”¹⁴ As outlined above, informational calls often include critically important alerts and notifications that should not be artificially restricted to a certain number of calls.¹⁵ Limits on the number of calls will become even more

¹³ Notice at ¶ 15

¹⁴ Notice at ¶¶ 12, 15.

¹⁵ The Commission should reconsider its current three call limitation placed on the exemption for certain time-sensitive calls from financial institutions that applies to both residential and cell phone calls. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and

problematic due to the increasing prevalence of call blocking. CUNA and others have noted the increase in the inadvertent blocking of important informational calls.¹⁶ Limiting the number of calls could frustrate the companies' abilities to overcome the inadvertent blocking of calls by initiating additional call attempts.

C. The Commission Should Not Adopt Opt-Out or Do-Not-Call Requirements

The Commission should not adopt its proposals to require informational calls to include the opt-out mechanism and do-not call requirements in sections 64.1200(b)(3) and 64.1200(d) of the Commission's rules that historically have only applied to telemarketing calls.¹⁷ The proposals would impose substantial new burdens, generate considerable confusion, and lay the groundwork for new rounds of vexatious litigation. The proposal to create a not-call-list for informational calls would also exceed the Commission's authority under the TCPA, which authorizes the agency to prescribe do-not-call regulations to protect residential privacy only with respect to "telephone solicitations", not informational calls.¹⁸ Moreover, nothing in the TRACED Act requires the Commission to take this step. The Notice proffers no legal authority to impose the obligations and provides no policy rationale warranting this drastic extension of regulatory obligations to noncommercial or commercial informational calls. These obligations have never

Order, 30 FCC Rcd 7961, 8027-28 (2015) ("2015 TCPA Order"). Even if the Commission retains that limitation for that specific exemption, the Commission should, for reasons forth in the text, refrain from adopting a numerical limitation for all informational calls to residential lines.

¹⁶ See, e.g., CUNA et al., Reply Comments filed in *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No 17-59 (Sept. 29, 2020) at 4-5 (citing substantial record of blocking legitimate calls).

¹⁷ Notice at ¶¶ 13, 15. The Commission would also impose these obligations on calls made by tax-exempt nonprofit organizations to residential lines. *Id.* at ¶ 17. For the reasons set forth in the text, the Commission should similarly refrain from extending opt-out and do-not-call requirements to those organizations.

¹⁸ 47 U.S.C. 227(c)(1) (authorizing the Commission to develop methods, such as "company-specific 'do not call' systems" to "protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object.").

been applied to any of the Commission’s previously adopted content-specific exemptions and the Notice does not propose to impose the do-not-call obligations on those exemptions now.¹⁹

The proposed opt-out mechanism would impose substantial burdens on informational callers. It would require prerecorded messages to provide, within 2 seconds of identifying the caller, an “automated, interactive voice- and/or key press-activated opt-out mechanism.”²⁰ It would further require the caller to automatically capture the called person’s number, insert it into the caller’s company-specific do-not-call list, and immediately terminate the call when the called person uses the opt-out mechanism.²¹ Companies making informational calls would be required to implement all of the Commission’s existing requirements for creating and maintaining telemarketing-related company-specific do-not-call lists. These requirements include developing a written policy for maintaining a do-not-call list; training personnel engaged in making informational calls on the use of the list; recording the do-not-call request and placing the subscriber’s name, if provided, and telephone number on the do-not-call list at the time the request is made; ensuring that the do-not-call request is honored within a reasonable time not to exceed 30 days from the date the request was made; and maintaining a record of the request and ensuring that it is honored for five years.²²

The proposal to establish do-not-call lists for informational calls exceeds the Commission’s statutory authority. The TCPA authorized the agency to assess alternatives for protecting

¹⁹ Compare proposed new section 64.1200(b)(3) and 64.1200(d) with proposed new section 64.1200(a)(9). See Notice App. A.

²⁰ Notice at ¶¶ 13, 15.

²¹ If the prerecorded message goes to voice mail, the rule would require the message to “also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person’s number to the caller’s do-not-call list.” See Notice at App. A (revising section 64.1200(b)(3)).

²² Notice, App. A.

residential telephone subscriber rights, including the establishment of a national and/or company-specific, do-not-call lists.²³ This authority, however, is limited to “telephone solicitations,” which the Commission’s rules define as encouraging the “purchase or rental of, or investment in, property, goods, or services.”²⁴ The TCPA provides no authority to impose do-not-call obligations on informational calls. Additionally, nothing in the TRACED Act authorizes or warrants adoption of opt-out or do-not-not requirements. The TRACED Act only calls on the Commission to assess whether existing exemptions adequately identify calling and called parties or include limitations on the number of calls. Neither the TRACED Act nor the TCPA confer authority on the Commission to require the establishment of do-not-call lists for informational calls.

The opt-out and do-not-call proposals would impose significant burdens, especially for companies that have not made telemarketing calls, which includes many credit unions that do not engage in telemarketing, and thus would have had no reason to create and maintain do-not-lists. Moreover, many credit unions have extremely limited staff and resources with which to overcome these burdens. Nearly 40 percent of all credit unions employ five or fewer full-time employees, approximately 25 percent have less than \$10 million in assets, and over two-thirds have less than \$100 million in assets.²⁵ The Notice contains no effort to undertake a cost-benefit analysis for imposing these new obligations and identifies no basis to assume consumers demand the ability to opt-out of, or seek do-not-call mandates related to, informational calls.

The proposed requirements also will create substantial confusion and likely result in consumers unwittingly being placed on do-not-call lists for calls that they otherwise would want

²³ 47 U.S.C. § 227(c)(1).

²⁴ 47 C.F.R. 1200(f)(14). The term telephone solicitation excludes calls made with prior consent, made to a person with whom the caller has an established business relationship, or calls made by or on behalf of a tax-exempt nonprofit organization. *Id.*

²⁵ CUNA Analysis of National Credit Union Administration June 2020 Call Report.

or need. Do-not-call lists for informational calls would be fundamentally different than those established for telemarketing calls. In the context of telemarketing calls, the scope of a do-not-call request is readily defined. The caller knows not to call the person to sell or advertise a product or service.²⁶ Informational calls, by contrast, can include a wide range of topics that would make determining the scope of an opt-out or do-not-call request difficult at best. For example, would a request to opt-out of a call regarding account balances necessarily mean that a credit union member would not want to be called about financial educational opportunities or governance matters?

The Commission has previously acknowledged that opt-out requests for certain informational calls should not be construed broadly as to apply to other calls, and callers may tailor opt-notices accordingly.²⁷ But such tailoring is not practical for do-not-call requests. Where the opt-out request is automatically coupled with placement on a do-not-call list, the credit union would either have to maintain a series of do-not-call lists pertaining to different types of informational calls, which is likely impracticable, or refrain from making any further calls to its member, a result the member may not want or realize has been triggered. The difficulty of maintaining do-not-call lists for informational calls is likely one reason the Commission did not impose such an obligation on its content-specific exemptions such as for exigent financial calls.

The opt-out and do-not-call requirements would also create an entirely new class of unwarranted litigation opportunities. As Chairman Pai has previously observed, the TCPA is already the “poster-child for litigation abuse.”²⁸ Overlaying a new set of burdensome and

²⁶ See e.g., 47 C.F.R. 64.1200(f)(12)(defining telemarketing as calling “for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.”)

²⁷ 2015 TCPA Order, 30 FCC Rcd at 8027, ¶ 137.

²⁸ 2015 TCPA Order, 30 FCC Rcd at 8073 (dissenting statement of then-Commissioner Ajit Pai).

confusing obligations on a strict liability statute will only exacerbate the litigation abuse faced by legitimate companies seeking to provide information to their customers.

Requiring the establishment of a do-not-call list for informational calls will also place the Commission's rules into conflict with the Federal Trade Commission's do-not-call requirements, which only apply to telemarketing calls, and with which the Commission has previously strived to maintain maximum consistency.²⁹ Moreover, it is unclear whether the good faith safe harbor that applies to violations of the Commission's company-specific do-not-call rules for telemarketing would extend to informational calls that violate an informational do-not-call list. In creating a private right of action for violations of do-not-call lists established by the Commission, the TCPA established a good faith affirmative defense but only with respect to telemarketing calls. Section 227(c)(5) of the TCPA provides an affirmative defense to private litigation where the company "has established and implemented, with due care, reasonable practices and procedures to effectively prevent *telephone solicitations* in violation of the regulations prescribed under this subsection."³⁰

Finally, the proposed rules are unnecessary. To the extent companies like credit unions make prerecorded calls, the Commission's rules already require callers to identify themselves and provide a call back number.³¹ Credit union members can thus immediately determine that the recording is from their credit union and will have a number to call if they have concerns. Credit unions value the long-term relationships that they have with their member-owners and would not engage in wide-spread conduct that their members find annoying.

²⁹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd at 14033, ¶ 25 (2003) ("2003 TCPA Order").

³⁰ 47 U.S.C. § 227(c)(5)(C) (emphasis added).

³¹ 47 C.F.R. § 64.1200(b)(1) & (2).

In short, there is no legal authority or reasonable policy justification for imposing these new obligations on the existing exemptions for informational calls and the Notice has not laid the groundwork to take these drastic steps.

III. The Commission Should Extend the Exemption for Informational Calls to Wireless Calls

Instead of imposing burdensome new requirements on existing exemptions for informational calls, the Commission should take the opportunity afforded by this rulemaking Notice to extend to wireless calls the exemptions for informational calls that currently apply to residential lines. CUNA has a petition pending before the Commission to take similar, although narrower, action. CUNA's petition seeks a ruling to exempt informational calls made to credit union members but only to the extent that there is an established business relationship with the credit union, or alternatively, where the called party is not charged for the call (or text) under that person's wireless subscription plan (*i.e.*, the plan provides for unlimited calling or texting, which is the case for the vast majority of wireless plans today).³² Ample justification and authority exists for rationalizing the treatment of residential and wireless informational calls, as fully explained in CUNA's petition.³³

The Commission could achieve a similar result here by issuing a rule that extends the residential telephone line exemptions for informational calls to wireless subscribers. For the majority of telephone subscribers, the cell phone has become their residential line, blurring the once sharp distinction that existed between wireless and landline calls when the TCPA was first enacted. Moreover, the vast majority of cell phone plans now include unlimited voice calls and

³² CUNA Petition at 4, 15

³³ CUNA Petition at 8-18.

texting, rendering calls or texts “free of charge” under the Commission’s interpretation.³⁴

Exempting purely informational calls to wireless subscribers would be consistent with Congress’s intent in passing the TCPA. Congress made clear that its primary concern in passing the TCPA was to protect residential privacy by limiting telemarketing calls.³⁵ Congress never intended to restrict legitimate calls between businesses and their customers.³⁶

IV. Conclusion

For the reasons set forth above, CUNA respectfully urges the Commission to retain the exemptions for informational calls to residential consumers, without imposing new restrictions, and utilize this rulemaking to extend these exemptions to wireless calls.

³⁴ 2015 TCPA Order, 30 FCC Rcd at 8028 at ¶ 139.

³⁵ *See e.g.*, 137 Cong. Rec. H11310 (Nov. 26, 1991) (Statement of Rep. Markey) (“In the final analysis a person’s home is his castle. Preservation of the tranquility and privacy of that castle should compel us to avail consumers of the opportunity to place the telephone line into their home, the sanctuary from which they escape all the other trials that society and Congress cause them, off limits to intrusive and annoying interruptions. I believe that telemarketing can be a powerful and effective business tool, but the nightly ritual of phone calls to homes from strangers and robots has many Americans fed up.”); 137 Cong. Rec. S32328 (Nov. 15, 1991) (Statement of Sen. Pressler) (“The purpose of this legislation is to prohibit cold calls by any telemarketer to the telephone of a consumer who has no connection or affiliation with the business”); S. Rep. 102-178, 102d Cong., 1st Session (Oct. 8, 1991) at 1 (“The purposes of the bill are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated calls to the home”); H. Rep. 102-317, 102d Cong., 1st Session (Nov. 15, 1991) at 5 (“The purpose of the bill (H.R. 1304) is to protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising users of the telephone and related telecommunications equipment.”).

³⁶ *See, e.g.*, 137 Cong. Rec. S30818 (Nov. 7, 1991) (Statement of Sen. Pressler) (“This bill will not prohibit businesses from contacting their established customers. For example, if a credit card company like Citibank needs to contact a customer regarding their credit card account, clearly this would be allowed.”).

