

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991) DA 17-798
)
Petition for Declaratory Ruling by Credit Union National)
Association)

Comments Opposing the Petition for Declaratory Ruling

Filed by

**National Consumer Law Center
on behalf of its low-income clients**

and

**Americans for Financial Reform
Consumer Action
Consumer Federation of America
Consumers Union
National Association of Consumer Bankruptcy Attorneys (NACBA)
National Association of Consumer Advocates
Public Citizen
U.S. PIRG**

**Public Law Center, California
Connecticut Legal Services
Jacksonville Legal Aid, Florida
CARPLS Legal Aid, Illinois
Public Justice Center, Maryland
Public Utility Law Project of New York (PULP)
Charlotte Center for Legal Advocacy, North Carolina
Financial Protection Law Center, North Carolina
Legal Aid Society of Southwest Ohio
South Carolina Appleseed Legal Justice Center
Northwest Consumer Law Center, Washington
West Virginia Center for Budget and Policy**

Summary

The **National Consumer Law Center**, on behalf of its low-income clients and the nineteen national, state and local public interest and legal services organizations listed above, files these

comments opposing both of the requested exemptions from the requirements for consent to direct automated calls and texts to the members of credit unions, made by the Credit Union National Association (CUNA). Neither requested exemption is legally permitted under the Telephone Consumer Protection Act (TCPA), and allowing either exemption would seriously and significantly add to the number of unwanted robocalls now made by financial institutions. Almost 60 million robocalls are now made *monthly* by financial institutions just to collect consumer debt; allowing credit unions to make calls without consent would add significantly to this number.

If the information to be imparted by credit unions is so important and valuable to their members, the members will consent to receive it—eliminating any necessity for an exemption. Credit unions can avoid TCPA liability by maintaining reasonable business practices and employing a reassigned number database. The cases against credit unions and other financial institutions, cited by CUNA as justifications for the requested exemptions, instead illustrate that robust enforcement of the TCPA is essential to protect consumers' privacy, as is the purpose of this important consumer protection law.

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I. Introduction.

Pursuant to the Public Notice¹ issued by the Consumer and Governmental Affairs Bureau, the **National Consumer Law Center** (NCLC)² files these comments on behalf of our low-income clients and the following national and state public interest and legal services programs:

**Americans for Financial Reform
Consumer Action
Consumer Federation of America
Consumers Union
National Association of Consumer Bankruptcy Attorneys (NACBA)
National Association of Consumer Advocates
Public Citizen
U.S. PIRG**

**Public Law Center, California
Connecticut Legal Services
Jacksonville Legal Aid, Florida
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Public Utility Law Project of New York (PULP)
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Financial Protection Law Center, North Carolina
Legal Aid Society of Southwest Ohio
South Carolina Appleseed Legal Justice Center
Northwest Consumer Law Center, Washington
West Virginia Center for Budget and Policy**

We respectfully oppose, in all respects, the requests the Credit Union National Association (CUNA) made in its Petition.³ CUNA requested that the Federal Communications Commission (Commission)

¹ Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeking Comment on Credit Union National Association Petition for Declaratory Relief, CG Docket No. 02-278 (Rel. April 18, 2017), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1006/DA-17-978A1.pdf.

² The National Consumer Law Center is a nonprofit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace.

³ Credit Union National Association Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 29, 2017) [hereinafter CUNA Petition], *available at* <https://ecfsapi.fcc.gov/file/10929652106182/CUNA%20petition%20draft.pdf>.

create an exemption from the prior-express-consent requirement of the Telephone Consumer Protection Act⁴ (TCPA) for informational autodialed or artificial or prerecorded-voice calls (including text messages) made by credit unions to their members' wireless phone numbers.

CUNA's request rests on two alternate footings: either 1) that the Commission use its rulemaking authority under the TCPA to establish an exemption based on an established business relationship between credit unions and their members, or 2) that the Commission establish an exemption pursuant to 42 U.S.C. § 227(b)(2)(C) if the calls are not charged to the called party, without the credit union being required to ensure that the calls would in fact be free to the subscribers. However, neither of these proposals would be legal under the TCPA. First, there is absolutely no authority for the Commission to establish an exception from the requirement for calling cell phones without consent based on an established business relationship. There is likewise no authority for the Commission to establish an exception for free-to-end-user calls that are not in fact free to all of the persons receiving the calls.

CUNA seems to have missed the primary goal of the TCPA's requirements for consent for calls to cell phones, which is to protect the *privacy* of the called parties. Allowing either of these exemptions would eviscerate those privacy protections and permit credit unions to make over a dozen automated, unconsented-to calls a month to its members,⁵ and others, without redress. This would remove any

⁴ The TCPA is codified at 47 U.S.C. § 227. The Commission's implementing rules are codified at 47 CFR § 64.1200. The TCPA prohibits any call, other than a call made for emergency purposes, to a telephone number assigned to a "paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call" using any automatic telephone dialing system or an artificial or prerecorded voice without the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(A)(iii). *See also* 47 CFR § 64.1200(a)(1)-(2). There is also an exception for calls made solely to collect a debt owed to or guaranteed by the United States.

⁵ CUNA proposes to limit the calls to one call or text message a day, up to three a week. CUNA Petition at 19.

incentives for credit unions to ensure that they are calling only members who have consented to automated calls.

II. The TCPA prohibitions against unwanted calls need to be strengthened, not weakened.

While the TCPA's requirements for prior express consent for automated calls to cell phones may be unpopular with callers such as CUNA's member credit unions, it is essential to put that inconvenience in perspective with the impact of unwanted robocalls on American cell phone subscribers:

- 2.4 billion robocalls were placed nationwide in September alone.⁶
- This equals roughly 7.4 calls per person in this one month.⁷
- 22.5 billion robocalls were made during the first nine months of 2017.⁸
- In 2016 there were over five million complaints about unwanted calls filed with the Federal Trade Commission,⁹ increasing from three and one half million the previous year.¹⁰
- Unwanted calls are the leading cause of complaints to the FCC,¹¹ triggering over 165,000 complaints in 2016 alone.¹²

⁶ *Youmail Robocall Index*, last accessed October 31, 2017. Available at <https://robocallindex.com/>.

⁷ *Id.*

⁸ *Id.*

⁹ See Federal Trade Commission, National Do Not Call Registry Data Book for Fiscal Year 2016 (Dec. 2016), available at https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2016/dnc_data_book_fy_2016_post.pdf.

¹⁰ See Federal Trade Commission, National Do Not Call Registry Data Book for Fiscal Year 2015 (Dec. 2015), available at <https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2015/dncdatabookfy2015.pdf>.

¹¹ See Federal Communications Commission Encyclopedia, Quarterly Reports-Consumer Inquiries and Complaints, Top Complaint Subjects, <http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints> (last visited Aug. 24, 2017).

¹² See Federal Communications Commission, Consumer Complaint Data Center, Quarterly Reports-Consumer Inquiries and Complaints, Consumer Complaint Data – Unwanted Calls, <https://opendata.fcc.gov/Consumer/Consumer-Complaints-Data-Unwanted-Calls/vakf-fz8e> (last visited Aug. 24, 2017).

Moreover, these unwanted and invasive calls are *not* just unknown telemarketers seeking to make a buck by perpetrating scams on unsuspecting consumers. Financial institutions collecting consumer debts made over 59 million of these robocalls:

- The single caller that generated the most robocalls in the month of September 2017 was a bank doing debt collection calls: which made 14.5 million robocalls in this one month.¹³
- The top twenty robocallers in the month of September generated 146.7 million of these robocalls.¹⁴
- Eight of the top twenty robocallers in the month of September 2017 were either banks or other financial services institutions collecting debts.¹⁵
- The financial institutions collecting consumer debt were responsible for over 59 million of these robocalls, or over 40% of the total calls made by the top twenty robocallers.¹⁶

It is popular among robocallers to complain about the strict liability standards in the TCPA, which can lead to automatic damages for multiple violations of this consumer protection law. But this liability standard is an *intended* accountability mechanism to give robocallers the incentive to ensure that they actually have the consent of the person being called before they make the robocall or send the robo-text. The liability standard is inconvenient for robocallers because it inhibits the automated nature of their communications. But the burden on consumers from unwanted robocalls is far worse. Every call to cell phone users interrupts their day, requires their attention, is an invasion of their privacy, and can interrupt work tasks, family time or driving. Every call to low-income and other telephone users with limited minutes also costs them money.¹⁷

¹³ *Youmail Robocall Index*, last accessed October 31, 2017. Available at <https://robocallindex.com/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Approximately one quarter of the population in the United States has cell phone plans with limited minutes. See *CTIA-The Wireless Association, CTIA's Wireless Industry Summary Report, Year-End 2013 Results, 2014, Prepaid Connections Make Up 23.4 Percent of Wireless Market*, available at <http://www.ctia.org/industry-data/facts-and-infographics-details/factand-infographics/prepaid-connections-make-up-23-4-percent-of-wireless-market> (accessed Jan. 29, 2017) .

A. Credit unions, and others, can protect themselves from TCPA liability with good practices.

Credit unions can readily and appropriately protect themselves from liability from TCPA enforcement actions by a) regularly requesting that members confirm their desire to receive texts and automated calls on a monthly basis, and b) using a reassigned number database.¹⁸ Many financial institutions regularly request updates of consent and telephone numbers from their customers. They do this to ensure that they are only sending automated messages to customers who truly want them, and to protect themselves from TCPA liability.

So long as callers attempt to ensure that their automated calls and texts are addressed only to members who have given their consent—presumably because these members want the information provided by the calls and texts—and keep their records up to date, there is little litigation risk from the TCPA. Calls to members who have consented to receive them pose no risk. Calls to wrong numbers can be avoided through the use of a robust reassigned number database.¹⁹

B. The litigation against credit unions and other financial institutions illustrates the need for maintaining the current strict rules requiring consent for automated calls.

In its petition CUNA repeatedly cites to the “critical financial information and educational materials that aid members in fulfilling their responsibilities as owners of the cooperative enterprise” as its justification for avoiding the consent requirement.²⁰ This argument is essentially that credit union members will find the information of so much value that they will want it relayed to them via

¹⁸ According to multiple filings in the recent Notice of Inquiry proceeding initiated about a mandatory reassigned number database, there are already robust, if imperfect, databases on the market. The use of these mechanisms undoubtedly will reduce robocallers’ potential exposure to litigation risk.

¹⁹ See e.g. Credit Union National Association Reply Comments, Docket No. 17-59, regarding Advanced Methods to Target and Eliminate Unlawful Robocalls, September 26, 2017, *available at* <https://ecfsapi.fcc.gov/file/109261735208093/CUNA%20TCPA%20NOI%20Reply%20Comments.pdf>.

²⁰ See e.g. CUNA petition at 2.

automated texts or calls even when they have not consented to receive the information. But this argument does not make any sense. If the information is so important, then credit union members will not hesitate to consent to receive it. And once that consent is provided, there is no issue: the TCPA then allows unlimited automated calls and texts. It is only when the credit union members have failed or refused to provide that consent that the credit union cannot use robocalls and texts to contact members.

Credit unions interact regularly and often with their members in other ways: via deposits, withdrawals, monthly statements, and reminders. All of these are separate opportunities for the credit union to inform its members of the information, and, if it wants, to ask again for consent to transmit it by robocall or text. If, despite these repeated solicitations, the members fail to consent, then the message is clear: the member does not want more robocalls and texts, even from the credit union. And that, of course, is exactly the purpose of the TCPA: to permit only those robocalls and texts that the consumer has consented to receive.

CUNA complains about a “fractured maze”²¹ of regulations related to automated calls, noting the regulatory exemption permitted for certain exigent calls from financial institutions calls²² and the Budget Act exception for calls to collect debts owed to the United States.²³ But these rules are not at all complex: the rule is simply that consent is required for most automated calls and texts that credit unions want to make. If credit unions choose to take advantage of one of the existing exemptions, then they can. The existence of the exceptions does not complicate the basic rule—that consent is required for all automated calls and texts to cell phones unless there is an emergency. Credit unions exist to provide complex financial products to members, and must comply with the Truth in Lending Act, the

²¹ CUNA Petition at 20, 22.

²² 2015 Omnibus TCPA Order, 30 FCC Rcd. at 8023–28, ¶¶ 125–139.

²³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 31 FCC Rcd. 9074 (2016).

Truth in Savings Act, the Real Estate Settlement Procedures Act, the federal money-laundering rules, and a host of rules regarding their governance, their deposits, and their safety and soundness. A credit union that cannot master this simple TCPA rule—to not make robocalls to cell phones without the called party’s consent—should perhaps not be in the financial services business.

CUNA is correct in pointing out that non-compliance leads to potential financial exposure.²⁴ Indeed, that is exactly the point of the damages provisions in the TCPA. CUNA points to several cases in which credit unions had to pay damages for noncompliance as a justification for these requested exemptions.²⁵ However, of the four cases cited for which information is publicly available, only two actually involved TCPA violations leading to the appropriate award of TCPA damages:

1. **Munday v. Navy Fed. Credit Union**, Case 8:15-cv-01629-JLS-KES (C.D. Cal. July, 14, 2017). This was a class action based on the credit union’s repeated calling of numbers *after* it knew those numbers did not belong to the members who had consented to being called, and even after it had coded wrong-number information in its files.²⁶
2. **Pennant v. Boeing Employees’ Credit Union Fin. Servs. Inc.**, Case No. 2:11-cv-1697 (W.D. Wash. Oct. 12, 2011). The complaint alleged that the credit union called the plaintiff approximately 120 times, sometimes calling five times a day and more than 15 times a week, many of these calls were made after the credit union was informed that the plaintiff had filed bankruptcy, and others after she requested that the calls stop. As noted in the CUNA petition, this case was settled for \$14,750.²⁷

In both cases the credit union had violated the TCPA and invaded the privacy of consumers to such an extent that these consumers went to the trouble to find lawyers and initiate the difficult and stressful process of engaging in litigation. In each case, the law did its job: punishing violators of the law for harming consumers.

²⁴ CUNA Petition at 23.

²⁵ CUNA Petition, Note 60.

²⁶ See Munday v. Navy Fed. Credit Union Class Notice of Motion and Renewed Joint Motion for Preliminary Approval of Class Action Settlement.

²⁷ Information available at <https://ecf.wawd.uscourts.gov/doc1/19714577775>.

The other two cases cited for which information is available publicly did not actually involve

TCPA violations:

1. **Petley v. San Diego County Credit Union, et al.**; Case No. 16cv891, (S.D.CA., January 27, 2017). In this case, there was actually no TCPA claim involved. The court denied the credit union's attempt to dismiss claims related to illegal debt collection based on repeated phone calls, harassing behavior, and filing a time-barred debt collection claim.²⁸
2. **Mudgett v. Navy Fed. Credit Union**, 998 F. Supp. 2d 722, 723 (E.D. Wis. 2012). In this case, the credit union established that the calls were manually dialed, so that the TCPA was not implicated.

Similarly, the cases that CUNA cites in note 62 regarding liability faced by other financial institutions for repeated violations of the TCPA also illustrate the need to continue enforcing the TCPA, rather than allow non-compliance with this consumer privacy law:

1. **Luster v. Wells Fargo Dealer Services Inc.**, Case No. 1:15-CV-01058 (N.D. Ga. June 9, 2017). Plaintiff received multiple autodialed calls from Wells Fargo over four years regarding loans made to unrelated third parties, despite never having consented to receive calls and having no loans with Wells Fargo.²⁹
2. **Markos et al. v. Wells Fargo Bank, N.A.**, Case No. 1:15-cv-01156 (N.D. Ga. Jan. 30, 2017). This was a class action based on Wells Fargo's repeated autodialed calls to consumers who had previously refused permission to be autodialed, and who made repeated verbal requests that the calls stop.³⁰
3. **James et al. v. JPMorgan Chase Bank N.A.**, Case No. 8:15-cv-2424 (M.D. Fla. June 5, 2017). At least 675,000 people received autodialed calls from Chase Bank that were made to wrong numbers, which continued even after plaintiffs repeatedly told Chase that they were reaching wrong numbers. Plaintiffs were not customers of Chase Bank.³¹
4. **Gehrich et al. v. Chase Bank USA, N.A., et al.**, Case No. 1:12-cv-05510 (N.D. Ill. Mar. 2, 2016). Plaintiffs received autodialed calls from Chase Bank, without their consent and after

²⁸ Information available at:

https://scholar.google.com/scholar_case?case=1939812098170315941&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

²⁹ Order Conditionally Certifying Settlement Class, available at

<https://www.lusterwellsfargotcpa.com/Documents/Preliminary%20Approval%20Order.pdf>.

³⁰ Final Approval Order and Judgment available at

<http://www.markoswellsfargotcpa.com/docs/90%20ORDER%20final%20approval%20order.pdf>.

³¹ Order available at <https://eclaim.kccllc.net/caclaimforms/jmj/Documents/JMJ%20-%20Order.pdf>.

repeated requests that the bank stop calling. Chase also sent automated text messages.³²

5. **Allen v. JPMorgan Chase Bank N.A.**, Case No. 1:13- cv-08285 (N.D. Ill. Oct. 21, 2015). Plaintiff received multiple autodialed calls from Chase Bank regarding auto loans, despite having no auto loans from Chase, never having consented to receive calls, and repeatedly requesting Chase to stop calling. Chase never provided plaintiff with instructions or opportunities to opt out of future calls.³³
6. **Rose et al. v. Bank of America Corp. et al.**, Case Nos. 5:11-cv-02390, 5:12-cv-04009 (N.D. Cal. Sept. 2, 2014). Plaintiffs received multiple autodialed calls and texts on their cell phones from Bank of America, despite never giving prior consent to be contacted.³⁴

Congress specifically allowed statutory damages for violations of the TCPA to create a monetary incentive for compliance. CUNA's proposal would turn this incentive on its head by exempting many of the automated calls that consumers hate from the requirement to obtain consent. Instead of designing new exemptions, the Commission's attention should be on increasing compliance, and assisting consumers and industry with the means to reduce unwanted calls to cell phones.

CUNA's petition for an exemption can be compared to this situation: A town erects a stop sign at a dangerous intersection, and some drivers who would like to keep speeding through the intersection, complain about the sign and ask the government to excuse them from having to obey it. Most would agree that the government should make sure the fines for running through the stop sign apply to everyone. We urge the FCC not to remove the stop signs in the TCPA..

C. CUNA's proposed exemption would undermine the privacy protections of the TCPA.

One of the reasons to require consent for auto-dialed calls—especially those calls that impart personal financial information—is to make sure that the callers are actually communicating with the

³²Memorandum and Order, available at <http://www.gehrichtcpasettlement.com/docs/Approval%20Order.pdf>.

³³ Final Approval Order and Judgment available at <file:///Users/margotsaunders/Downloads/Final%20Approval%20Order.pdf>.

³⁴ Order Granting Motion for Final Approval of Settlement available at <https://www.leagle.com/decision/infdc020140903b60>.

intended parties. It would be entirely inappropriate, wrong, and potentially seriously harmful, for one person to receive personal financial information intended for another person. This danger swings both ways:

If Mary Jones receives information that Cindy Smith's account is overdrawn, that is a breach of Cindy Smith's privacy. Yet if the information is provided without mentioning Cindy Smith's name, such that Mary Jones, the recipient of the call, believes it is about *her own* account, that would lead Mary Jones to be alarmed and to waste time, money, and emotional effort to deal with something that has nothing to do with her.

Moreover, failing to ensure that these calls are actually reaching the intended recipient could lead to potentially dire financial results.

If Mary Jones receives the call saying that Cindy Smith's account is overdrawn—that means that Cindy Smith does not receive that notification. Yet, the credit union considers that it has fulfilled its obligation to inform Cindy Smith of the needed course of action.

For these reasons, it becomes even more important to ensure that, for calls related to a person's personal financial situation, callers must take the utmost care sure to reach the intended recipient. Having the actual consent of the intended party is the best way to ensure that the intended recipient actually receives the call, and it is the best way to ensure that these calls do not result in a significant invasion of privacy for the intended party, or an unnecessary amount of trouble and worry for the party reached who is not the intended party. If the Commission dispenses with the consent requirement altogether for calls related to personal financial information, the privacy concerns relating to these calls would skyrocket.

III. There is no legal basis for an established business relationship exception for automated calls to cell phones in the TCPA.

CUNA requests that the Commission exempt from the requirement for prior express consent informational autodialed or artificial or prerecorded calls and texts made by credit unions to the cell phones of their members based on an established business relationship (EBR). As the statutory basis

for such an exemption, CUNA cites the general directions in the law that the Commission should “prescribe regulations to implement” the TCPA’s requirements. 47 U.S.C. § 227(b)(2).³⁵

There are multiple problems with this request. First, the TCPA is not a statute to facilitate calls from business to consumers. The TCPA is a consumer protection statute, the goal of which is to protect consumers from the invasions of privacy caused by automated calls. As such, the only reasonable way to read the explicit language in the referenced section is to recognize that the Congressional instruction in the prefatory language in § 227(b)(2) instructs the Commission to “prescribe regulations to implement the requirements of this subsection” *which will protect consumers*. CUNA’s proposed exemption does not protect consumers.

Further, the regulatory framework is quite explicit: the only “exemptions” permitted from the requirement of prior express consent for robocalls to cell phones are set out in § 227(b)(2)(C). That subsection gives the Commission authority *only* to exempt calls to cell phones “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*” (emphasis added). As much as CUNA might like there to be one, there is simply no authority in the statute for an EBR exemption for robocalls to cell phones. The fact that Congress expressly gave the Commission broader authority to create exemptions to the prohibition of prerecorded calls to residential telephones (§ 226(b)(2)(B)), allowing exemptions to the prohibition found at § 226(b)(1)(B)), and did not authorize a similar exemption for robocalls to cell phones, is a strong indication that the Commission has no such exemption authority for robocalls to cell phones.

Moreover, the argument that an EBR can be the basis for an exemption for automated calls to cell phones has been repeatedly found to be without merit. Most recently, the Third Circuit said:

³⁵ CUNA Petition at 11.

At first glance, Dell's argument appears correct: the FCC regulations implementing the TCPA permit certain types of autodialed debt collection calls, including calls similar to the ones at issue in this case However, Dell fails to recognize that these exemptions do not apply to cellular phones; rather, these exemptions apply only to autodialed calls made to land-lines. Therefore, the debt collection exemption invoked by Dell is not applicable in this case.³⁶

Numerous other courts have determined the same thing: there is no basis for an exemption for calls to cell phones based on an established business relationship.³⁷

Moreover, because the credit unions have such a close working relationship with their members, they have ample opportunity to obtain, and recheck, their members' consent to receiving automated calls. Every single time members log in to their accounts online, the credit union could

³⁶ Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 273 (3d Cir. 2013) (emphasis added).

³⁷ See e.g. Legg v. Voice Media Group, Inc., 20 F. Supp. 3d 1370, 1378 (S.D. Fla. 2014) (the established business relationship exemption does not apply to calls to a cellular telephone, and instead applies only to calls to land lines.); Forrest v. Genpact Services, L.L.C., 962 F. Supp. 2d 734, 736 (M.D. Pa. Aug. 26, 2013) (there is no established business relationship or debt collection exemption that applies to autodialed calls made to cellular phones); Levy v. Receivables Performance Mgmt., L.L.C., 972 F. Supp. 2d 409, 418 (E.D.N.Y. 2013) (existing business relationship exemption applies only to autodialed calls made to residential land lines; "because the debt collection calls at issue in this case were undisputedly made to a cell phone, the existing business relationship exemption is inapplicable"); Hamlett v. Santander Consumer USA Inc., 931 F. Supp. 2d 451, 456-457 (E.D.N.Y. 2013) ("the business relationship exemption applies to residential, landline telephones, but does not apply to cell phones"; "the section governing calls to cell phones (which often charge recipients on a per-call basis), does not provide for an exemption"); Bentley v. Bank of Am., 773 F. Supp. 2d 1367 (S.D. Fla. Mar. 23, 2011) (declining to hold that established business relationship exception applies to autodialed or artificial voice calls to cell phones for debt collection purposes); Flores v. Access Ins. Co., 2017 WL 986516, at *8 (C.D. Cal. Mar. 13, 2017) (finding that the established business relationship exception does not apply to cellular telephones); Rhan v. Bank of Am., N.A., 2016 WL 7325657, at *4 (N.D. Ga. June 24, 2016) (the exemption for prior business relationships only relates to calls to 'residential' telephone lines.); Vazquez v. Triad Media Solutions, Inc., 2016 WL 155044, at *4 (D.N.J. Jan. 13, 2016) (where plaintiff alleged that she received text messages on wireless telephones, not residential lines, there was no set of facts under which the "established business relationship" exemption of 47 U.S.C. § 227(b)(1)(C)(i) could provide a defense to this action); Paradise v. Commonwealth Fin. Sys., Inc., 2014 WL 4717966, at *3-4 (M.D. Pa. Sept. 22, 2014) (exemption applies only to land lines); Blair v. CBE Group Inc., 2013 WL 5677026, at *5 (S.D. Cal. Oct. 17, 2013) (the exceptions listed in 47 C.F.R. § 64.1200(a)(2) (iii-iv) apply to residential lines only); Zehala v. American Express, 2012 WL 1657061, at *4 (S.D. Ohio May 9, 2012) (the exemption for established business relationship applies only to residential lines.); Watson v. NCO Group, Inc., 462 F. Supp. 2d 641, 644 (E.D. Pa. 2006) (erroneous collection calls not exempt from TCPA under exemption for calls to party with whom caller had established business relationship).

display the member's name and the cell phone number on file, and request again consent for those calls and texts that CUNA says members want and need. The procedure could be easy and automatic: the name and cell number on file could be automatically displayed and, if the member had previously consented and provided a phone number, the check boxes could be automatically filled in. The member would have to uncheck the boxes to indicate a change in consent. Similar requests for consent or reconfirmation of consent could be also provided with regular monthly statements and bill notices. This type of regular activity would almost completely protect credit unions from TCPA suits from members, as long as the credit union abided by the member's consent or refusal to consent. And using a reassigned number database would provide substantial protection from litigation for calls to non-members.

But it is important to note that most of the TCPA litigation cited by CUNA as contributing to their fear of running afoul of the TCPA involves either repeated calling of numbers *after* the caller knew those numbers did not belong to the members who had consented to being called, and even after the institution had coded the wrong number information in its files (*see Munday v. Navy Fed. Credit Union; James et al. v. JPMorgan Chase Bank*). Or the litigation involved repeated calls to members after multiple requests were made to stop calling (*see Pennant v. Boeing Emps.' Credit Union Fin. Servs. Inc.; Markos et al. v. Wells Fargo Bank; Gebrich et al. v. Chase Bank USA, et al.; Allen v. JPMorgan Chase Bank*). So generally the problem behaviors that led to these cases and resulted in payment of TCPA damages, were the institutions' systemic failures to ensure either a) that automated calls were only made when consent had been provided, or b) automated calls were stopped once requests to stop were made by the persons called.

Allowing an established business relationship exemption would increase the number of unwanted calls credit union members receive, and would be antithetical to the privacy protections intended by the TCPA.

IV. CUNA's proposed exemption for calls for which consumers are not charged for each call is not legal and would be unworkable.

In the alternative to the exemption based on an established business relationship, CUNA requests the Commission to allow it to call cell phones without consent if the recipient does not have to pay a per call or per text charge. CUNA proposes that this exemption would be based on the authority allowed the Commission to allow free-to-end-user calls without consent in § 227(b)(2)(C). However, it asks the Commission to grant this exemption *without requiring the credit unions to ensure that the calls will not be charged to the called party*.³⁸

But this alternative proposal of CUNA also fails the logic test. First, tens of millions of cell phone subscribers in the United States still *do* pay for every call and text. We estimate that as many as 46 million cell phone subscribers in the U.S. are on limited-calling plans.³⁹ Of these, approximately 13 million are Lifeline subscribers.⁴⁰ Additionally, approximately 41.6 million subscribers are on limited-texting plans.⁴¹ Of these, approximately 6 million are Lifeline subscribers.⁴²

³⁸ CUNA Petition at 16, citing 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.)

³⁹ In 2016, according to the FCC mobile competition report, 18% of connections (about 77 million) were on prepaid plans. Federal Communications Commission, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Twentieth Report, WT Docket No. 17-69, Sept. 27, 2017, at 73. *Available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0927/FCC-17-126A1.pdf. Of those 77 million, a little over 26 million had Tracfone plans, most of which are limited-minute plans. *Id.* at 9. Additionally, of the twenty-one total prepaid plans offered by the largest five cell phone providers, three are limited-minute plans. So of the 51 million non-Tracfone prepaid connections, we estimate about one in seven (7 million) is on a limited-minute plan. That 7 million plus the Tracfone 26 plus million yields 33 million subscribers. Adding the 13 million non-Tracfone Lifeline subscribers with limited minutes (for Lifeline calculations, see note 40) yields 46 million subscribers on limited calling plans.

⁴⁰ Universal Service Administrative Company, Lifeline Subscribers by State or Jurisdiction, January 2015 through September 2015. *Available at* <https://usac.org/about/tools/fcc/filings/2016/Q1/LI08%20Lifeline%20Subscribers%20by%20State%20or%20Jurisdiction%20-%20January%202015%20through%20September%202015.xlsx>. We

CUNA's proposal to allow credit unions to make calls to consumers without consent, because the majority of cell phone users are on unlimited plans, ignores the realities of these costs for the 46 million people who are still paying for each call.

Second, CUNA is asking the Commission in essence to use its free-to-end-user exemption authority to allow credit unions to make calls that are *not* free to the end user. This request asks the Commission to exceed its exemption authority.

Allowing credit unions to make the calls without consent, and then mount an affirmative defense to a lawsuit in which it is accused of violating the TCPA for making unconsented-to calls would turn the TCPA consumer privacy protections on their head. The proposal wrongly assumes that just because subscribers were not charged for each specific call that means that the calls are free to the subscriber. This is not the case, the subscriber paid for the service allowing the calls to be received. That fact itself means that these calls don't meet the test required by this exemption: that the calls not be charged to the recipient. The only way to be sure that the calls would be free to the recipient, is for the caller to arrange to pay for all costs associated with the calls.

recognize that we have more recent figures for Lifeline subscribers, and that the number has been reduced in the past year. *See* (<https://usac.org/about/tools/fcc/filings/2018>). However, we believe it highly unlikely that Lifeline subscribers who lost access to their subsidized service would then turn to unlimited plans, which tend to be four or more times as expensive as unlimited plans, so that these subscribers would still likely be on limited calling plans, but would be captured in the first calculation. *See e.g.* <http://nocontractcellular.org/no-contract-monthly-cell-phone-plans-guide>.

⁴¹ CUNA uses estimates that 10% of American subscribers have limited texting (CUNA Petition note 28). Using the FCC's determination that number of subscribers at the end of 2016 was 416.7 million http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0927/FCC-17-126A1.pdf at Chart II.B.2, that would mean that 41.6 million subscribers have limited texting plans. We estimate, based on the phone plans offered by the biggest Lifeline providers (SafeLink Wireless, available at <https://www.safelinkwireless.com/Enrollment/Safelink/en/NewPublic/index.html>, Assurance Wireless, available at <http://www.assurancewireless.com/Public/FAQs.aspx#faq2>, Access Wireless, available at <https://www.accesswireless.com/lifeline/this-is-what-you-get>, Budget Mobile [defunct as of April 2017, but included in this data], and Life Wireless, available at <https://www.lifewireless.com/main/plans>), that 6 million Lifeline subscribers are on limited texting plans. We are including these 6 million Lifeline subscribers in the 10% of total subscribers.

⁴² *See* note 41.

Moreover, it ignores the actual cost of these calls to tens of millions of American subscribers. If the credit union callers do not plan to ensure that calls are not charged to the recipients, how will it deal with the unconsented-to calls it makes to recipients who have to pay for each call? Will the credit unions voluntarily send TCPA damages to each recipient who identifies as having a limited call plan? How will these recipients be protected against the costs associated with these calls?

CUNA's proposed logic is: because some of these unconsented-to calls will be made to some subscribers on unlimited plans, then they should be able to assume that all their calls are made to callers on unlimited plans. An exemption like this would establish a rule that callers can call anyone they want, regardless of whether they have consent, and then if challenged for the calls, defend themselves by saying that because some of the calls were included in an unlimited plan, for which the recipients paid, that means the callers have not violated the privacy of that recipient, and thus should not be liable for any damages. But the purpose of the TCPA is to permit only those automated calls for which consumers have expressly agreed to receive, because automated calls are so invasive of privacy.

The exemption permitted for calls not charged to the recipient in § 227(b)(2)(C) is contingent on protecting the privacy rights of the recipients. CUNA's petition asks that all credit union informational calls be subject to the exemption. To do so would completely ignore the privacy goals of the TCPA, and would significantly add to the 2.4 billion robocalls placed monthly in this country.⁴³ And, if this exemption were granted, all the other financial institutions would flock to the Commission with copy-cat requests, arguing that to allow credit unions to make these calls without consent gives this one type of financial institution an unfair competitive advantage. So allowing CUNA's requested exemption would open the door to—literally—billions of more unconsented-to automated calls and texts to America's consumers.

⁴³ See discussion in Section II, *supra*, regarding the numbers of robocalls made each month in the U.S., and percentage of these (approximately 25%) which are debt collection calls from financial institutions.

And even if these calls were actually free to the end users, the Commission should not override the called party's right to consent, or deny consent, to these automated calls.

The existence of the millions of complaints to the Commission and to the FTC is testament to the extent to which consumers abhor these robocalls. Consumers want these unconsented-to automated calls to stop. They do not want more of them, even from their credit unions.

V. Conclusion

The TCPA is designed to create incentives to prevent unwanted and unconsented-to calls. It does not matter who makes those calls: all who violate its provisions are equally liable for damages. Unlike other consumer protection statutes,⁴⁴ there is no "good faith" exception from liability. *The reason for this is that Congress intended to require callers using automated dialing systems to make sure they have consent.* The inconvenience of the TCPA to callers is not an excuse to undermine or ignore it.

We urge the Commission to protect America's cell phone subscribers and deny this petition in all respects.

Respectfully submitted, this the 6th day of November, 2017.

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⁴⁴ These exceptions to liability exist in the Fair Debt Collection Protections Act and Truth in Lending Act, among others.

on behalf of the low-income clients of the National Consumer Law Center, and the following national, state and local public interest and legal services organizations:

Americans for Financial Reform
Consumer Action
Consumer Federation of America
Consumers Union
National Association of Consumer Bankruptcy Attorneys (NACBA)
National Association of Consumer Advocates
Public Citizen
U.S. PIRG

Public Law Center, California
Connecticut Legal Services
Jacksonville Legal Aid, Florida
CARPLS Legal Aid, Illinois
Public Justice Center, Maryland
Public Utility Law Project of New York (PULP)
Charlotte Center for Legal Advocacy, North Carolina
Financial Protection Law Center, North Carolina
Legal Aid Society of Southwest Ohio
South Carolina Appleseed Legal Justice Center
Northwest Consumer Law Center, Washington
West Virginia Center for Budget and Policy