Telephone Consumer Protection Act Revisited

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Your Presenter

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The contents of this presentation are intended to provide you with a general understanding of the subject matter. However, it is not intended to provide legal, accounting, or other professional advice and should not be relied on as such.

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Think About It

- Collections is at the cross roads of member service, lending, back office operations and compliance.

- No other operational unit is more likely to drive a member into the waiting arms of an attorney than collections!
What does Collections have to do with Compliance?
Compliance Risk

**Compliance Risk** – Risk of violations and noncompliance with laws, rules, regulations, or ethical standards, resulting in fines, penalties, or damages.

*Impacted by:*
- Regulatory requirements that impose greater responsibilities for credit unions and their staff and resources. Material growth in particular areas, products, and services; or offering of new services, products, and programs.

*Indicators:*
- Authority and accountability
- Level of violations or noncompliance
- Training and resources
- Litigation and complaints
You Tell Us

How often is the collections function included in a compliance audit?

a. Never
b. Regularly
c. Right after this webinar
d. We only conduct dual control or other specialized audits of this function
The World in 1991

- End of the Soviet Union
- Birth of the publically available internet and its first 1 million users
- The air bag is invented
- Silence of the Lambs is king of the box office
The Mobile Phone of 1991
TCPA

• Telephone Consumer Protection Act of 1991
• Originally designed to combat uninvited telemarketing and sales calls
• Focuses on the use of auto dialers in the business process
• Looks at the purpose of the call and the consumer consent
• Ability to opt out
• Increasing liability and risk of class action status
What Is the TCPA

- The TCPA and its accompanying regulations limit the use of phone calls and text messages for both telemarketing and informational purposes, particularly where communications are sent using an automated dialing system or a prerecorded artificial voice.
- It requires consent for calls made to cell phones using an autodialer.
- Different types of consent for different types of calls
Inventory Your Processes

• Data integrity for telephone numbers
  – Home, Work and Mobile…….really?

• What is your technology capable of doing?
  – Not just what you have “turned on”

• Who is using the technology and how?
  – Marketing, credit cards, collections, etc.
What Is Covered

• Automated Telephone Dialing Systems (ATDS)
• Use the term “prerecorded” message or call to refer to “artificial or prerecorded voice” messages or calls.
• Includes Text messaging
TCPA Revisited - Again

- On July 10, 2015, the Federal Communications Commission (FCC) issued a Declaratory Ruling and Order (Order).
- The Order responds to 19 petitions from various businesses and organizations that sought clarification of the last FCC changes to the Telephone Consumer Protection Act (TCPA) which became effective in October 2013.
- It was a 3 to 2 vote and a “vocal” dissent
TCPA Revisited - Again

• The focus and tone of the Order expands consumer protections and rejects broad exemptions and safe harbors that were requested by the petitioners.

• The trend continues in the expansion of consumer protections and the lack of consideration for industry impact.
What Has Changed?

- FCC ruled on 19 specific requests for clarification
- Current changes include:
  - Prior express written consent requirement for telemarketing calls made to cellphones using an autodialer or prerecorded message (i.e. “robocalls”);
  - Prior express consent for telemarketing calls made to residential phones (i.e. landlines);
  - Removal of a previous exemption for having a prior business relationships with consumers
    - Established Business relationship
Types of Calls

- Telemarketing
- Non Telemarketing
- Informational
- Beware of calls with mixed messages because the most restrictive rule will likely apply
Focus on Consent

• Disclosures and Conspicuousness of Consent

• Express Verbal Consent
  – Non Telemarketing Call
  – Follow up with confirmation letter

• Express Written Consent
  – Market calls
  – Must contain certain information
Express Written Consent

- The consent must “a signed written agreement that clearly and conspicuously discloses to the consumer that: By signing the agreement, he or she authorizes the seller to deliver, to a designated phone number, telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and the consumer is not required to sign the agreement or agree to enter into it as a condition of purchasing any property, goods, or services.”
What Is an Autodialer

• Defines an ATDS as “equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, to dial such numbers” . PP15

• Even where those functions are not currently activated on the system!
Expansive Definition

- The original definition covered 1980s technology that could automatically dial any number.
- Now the definition would cover almost any non rotary phone device.
- How well do you know your phone system?
Autodialer

• Given that the level of “human intervention” that is necessary for particular equipment to avoid functioning as an autodialer varies widely across products, so instead whether a particular system is an “autodialer” is a “case-by-case determination.”

• One button calling and predictive dialers?
Free to End User Calls

• Four kinds of calls and texts will be exempt from the TCPA if the message is free to the consumer and relates to fraud or identity theft, possible data breaches, conveys information regarding preventing or remedying the harm of a data breach, or relates to pending money transfers.
Free to End User Calls

• In order to qualify for the exemption:
  – Can only be made to the number provided to the credit union by the member;
  – State the name and contact information of the credit union;
  – Are strictly limited in purpose, i.e. no telemarketing, cross-selling, or similar component;
  – Cannot initiate more than 3 messages per event over a three-day period;
  – Must offer members “an easy means to opt out” of the messages, honoring such opt-outs immediately.
Revocation of Consent

- The Order also states that consumers can revoke their consent to receive covered calls “through any reasonable means”.
- This means ANY MEANS. We can suggest a method, but can’t limit it.
- *Top to bottom training on the issue.*

*Order PP 33 and 36*
Reassigned Wireless Numbers

• What happens when a cell phone number is transferred to another end user?
• Under the Order, after the first call “without reaching the original subscriber,” the caller can reasonably be “considered to have constructive knowledge” that the number was reassigned. PP 50
• How would you know the end user has changed?
You Tell Us

Do you have a high degree of comfort that your Credit Union knows which member telephone numbers are cell phone numbers?

a. Yes
b. No
Number Scrubbing

• It is strongly suggested that a full data scrub be conducted to identify cellular telephone numbers currently in your data base.

• This would include the added step that the data base be corrected and updated to show cell phone numbers in the proper data field.
Unresolved Issue

• Vicarious liability
• What happens if you send an account to collections and the third party collections agency violates the TCPA?
• What is in the placement contract?
• What representations did you make about the telephone number and member consent?
Remember State Law

• State law is not preempted!
• Many states have specific consumer protection laws that may extend additional protections in the marketing and collection areas
• Several states have laws that restrict the ability to use a consumer’s cell phone – even with a manual dialing system
Pending Litigation


- Chamber of Commerce, et al. v. FCC
  - Seeks a review of the Order
Penalties

- The TCPA authorizes injunctive relief, recovery of actual monetary loss, or statutory damages of $500 per violation.
- But wait, there’s more! A court may award damages of up to $1,500 per violation if it finds that the alleged violations were willful or knowing.
Yikes!

• Capital One Financial Corp. and other entities, including a collections agency, have recently agreed to pay one of the largest Telephone Consumer Protection Act settlement amounts in history.

• According to the settlement agreement, the Defendants have agreed to pay over $75 million to settle a consolidated TCPA class action.
When in doubt, cut it out!
(and seek further guidance)
QUESTIONS?