

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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In the Matter of)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
)	
Petition of SoundBite Communications, Inc.)	CG Docket No. 02-278
For Expedited Declaratory Ruling)	
)	

GROUPME, INC.’S COMMENTS

GroupMe, Inc. (“GroupMe”), by its attorney, respectfully submits these comments pursuant to the Public Notice issued March 30, 2012, by the Federal Communication Commission (“Commission” of “FCC”) in the above-referenced proceeding.¹ SoundBite Communications, Inc. (“SoundBite”) seeks a declaratory ruling that a one-time confirmatory text message sent to a consumer in conformity with the Mobile Marketing Association guidelines does not violate the Telephone Consumer Protection Act (“TCPA”) or Section 64.1200 of the Commission’s rules.² GroupMe agrees that the Commission should clarify that text messages sent to confirm the request of an individual to opt-out of receiving future text messages should not be construed as a violation of either the TCPA or the Commission’s rules subjecting the sender to liability. But, the Commission must provide clarification beyond what is requested by Sound-

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from SoundBite Communications, Inc.*, DA 12-511 (rel. Mar. 30, 2012) (“Public Notice”).

² *See SoundBite Communications, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Feb. 16, 2012) (“*SoundBite Petition*”), at 1.

Bite. Specifically, the Commission should clarify, consistent with the *GroupMe Petition*,³ that its rules and the TCPA allow for third-party consent for non-telemarketing, administrative, informational calls or text messages to wireless numbers. Further, GroupMe respectfully submits that the Commission should place its petition on Public Notice to resolve important issues left unaddressed by the *SoundBite Petition*. Apart from the third-party consent issue, the *GroupMe Petition* seeks clarification on the definition of what constitutes an “automatic telephone dialing system” (“ATDS”) as provided in § 227(a)(1) of the TCPA. It is only by addressing both the consent issue and the definition of an ATDS that the Commission can meaningfully impact the baseless litigation that has proliferated under the TCPA so as to ensure that innovation is not stifled in the mobile industry.

I. THE COMMISSION SHOULD COMPREHENSIVELY CLARIFY ITS RULES AS PROPOSED BY THE *SOUNDBITE PETITION* AND THE *GROUPME PETITION*

Like SoundBite and many others in the mobile ecosystem,⁴ GroupMe has been the target of a putative class action lawsuit where the plaintiffs allege violation of the TCPA based solely on administrative, informational, non-commercial text messages and overly broad interpretations of what constitutes an ATDS under the TCPA. While GroupMe applauds the Commission for issuing a Public Notice with respect to the *SoundBite Petition*, GroupMe respectfully submits that the Commission should issue a Public Notice concerning the *GroupMe Petition* as well. The endless parade of litigation targeting administrative, informational, non-commercial text messages is impeding the continued development of innovative mobile services, interfering with the desires of consumers and users to receive such communications, and is inconsistent with the

³ See *GroupMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012) (“*GroupMe Petition*”).

⁴ See *id.* at 2 n.4, 3 n.5, 12 n.23, and 15 n.32.

policies that informed both the TCPA and Commission's rules. Clarification that certain types of text messages do not violate the TCPA and the Commission's rules is a critical first step and will be a great improvement to the current state of affairs. But in order to address sufficiently the litigious environment in which companies like GroupMe, SoundBite and many others operate, the Commission must issue a comprehensive clarification of its interpretation of the TCPA consistent with the relief requested by GroupMe and SoundBite.

II. THE COMMISSION SHOULD CLARIFY THAT INTERMEDIARIES CAN PROVIDE CONSENT FOR THIRD PARTIES TO RECEIVE TEXT MESSAGES UNDER THE TCPA AND THE COMMISSION'S RULES

Clarifying that sending consumers a confirmatory text message that the consumer has successfully opted-out of receiving future text messages would strike anyone not engaged in TCPA litigation as the hallmark of common sense. Users are accustomed to receiving a confirmatory email when opting out from either a commercial email campaign, or a non-commercial email subscription, such that they expect to receive a text message in response to similar activity in the mobile marketplace. Moreover, such a confirmatory text message assures the recipient that his or her request to opt-out has not been lost in the "ether" of the communications network. Certainly, neither Congress nor the Commission meant to allow for recipients of a confirmatory non-commercial text message received in response to that consumer's initiated text message to collect statutory damages, or to participate in putative class actions that threaten to put companies in the mobile services industry out of business because such statutory damages could potentially be multiplied by the number of users.⁵

⁵ See, e.g., *id.* at 12-13 (discussing the legislative history of the TCPA and FCC policy considerations when interpreting the TCPA).

Likewise, allowing for an intermediary to provide consent so that a third-party receives, in response to the actions of the intermediary, non-commercial text messages is consistent with users' expectations. Indeed, the Commission recognized as much in its most recent order finding that its rules shouldn't burden purely informational communications like "package delivery, and school closing information..."⁶ Clarifying the rules concerning consent as proposed in the *GroupMe Petition* would allow for consumers and users to continue to receive useful and desired communications and free the senders of such text messages from legal liability. It would also address the ambiguity inherent in the *2012 TCPA Order*.⁷

Package delivery services are a good example where the sender of the text message (the package delivery company) does not have a direct relationship with the recipient of the text message and must rely on an intermediary to provide consent, since the shipper provided the package recipient's wireless telephone number so that the recipient will know when the package arrives. There are many other instances where intermediaries provide wireless telephone numbers on behalf of third parties where the third party gives prior express consent through an intermediary and wants to receive the communication. For example, one parent may provide both parents' wireless telephone numbers when registering a child for school. Similarly, in the case of GroupMe, a family member or a soccer coach may establish a group to ease communication of information and confirm on behalf of all recipients that they consented in advance to receive the messages. The senders of text messages in these scenarios should not risk potentially catastrophic legal liability when engaging in these beneficial activities for which prior express

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No 02-278 (2012), at ¶ 21.

⁷ *See GroupMe Petition*, at 16-19.

consent has been given by a third-party, nor should the Commission’s rules interfere with such speech. Accordingly, it is important for the Commission to clarify its rules not only with respect to the *SoundBite Petition* but also consistent with the *GroupMe Petition*. Failure to do so will begin to curb the use of these and other communication media, which is clearly not in the public interest.

III. THE COMMISSION MUST CLARIFY THE DEFINITION OF AN ATDS AS PROPOSED IN THE *GROUPME PETITION*

Importantly, the Commission must not stop at clarifying the type of text messages that free the senders from legal liability. While this is a necessary step, it is not sufficient to end the putative class action lawsuits that are proliferating in the mobile ecosystem due to the relevant language in the TCPA. Determining whether a text message is administrative, informational, or non-commercial may be interpreted by many judges as a question of fact such that plaintiffs survive a motion to dismiss, continuing the destructive cycle of baseless litigation that does not promote the policies underlying either the TCPA or the Commission’s rules.

The TCPA prohibits making “any call” to a cellular telephone, without the prior express consent of the called party, using an ATDS.⁸ The statute defines ATDS as “equipment which has the *capacity* – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”² The Commission has previously concluded that Congress provided the agency with the discretion to determine what technologies

⁸ See 47 U.S.C. §§ 227(b)(1)(A), 227(b)(1)(A)(iii).

² 47 U.S.C. § 227(a)(1) (emphasis supplied).

constitute an ATDS.¹⁰ The Commission has yet to clarify what is meant by “capacity” except to note that “predictive dialers” constitute ATDS.¹¹

As detailed in the *GroupMe Petition*, the uncertainty surrounding the interpretation of the term “capacity” has led many district court judges to allow lawsuits to proceed even if the software and/or equipment as deployed does not allow for the functionality to randomly or sequentially dial telephone numbers.¹² Neither GroupMe nor SoundBite would be the targets of putative class action litigation if the definition of an ATDS made clear that the term “capacity” encompasses only equipment that, at the time of use, could, in fact have autodialed random or sequential numbers without human intervention and without first being technologically altered.¹³ It is only the ambiguity surrounding the term “capacity” that allows plaintiffs to survive motions to dismiss and costly discovery ensues.

Clarifying the definition as proposed in the *GroupMe Petition* would provide certainty to the industry and thereby significantly reduce the number of nuisance lawsuits that do nothing to further the TCPA or Commission policy. GroupMe’s proposed definition of “capacity” would continue to bar the types of activities intended under the TCPA and Commission’s rules by prohibiting the use of equipment with the actual capability to randomly or sequentially dial telephone numbers. The proposed definition would neither disturb the Commission’s 2003

¹⁰ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14092 (July 3, 2003) (“2003 TCPA Report and Order”).

¹¹ *See id.*

¹² *See GroupMe Petition*, at 9-16.

¹³ *See GroupMe Petition*, at 14-16; *SoundBite Petition*, at 6.

TCPA Report and Order nor would it undermine the *2008 Declaratory Ruling*¹⁴ concerning predictive dialers.¹⁵ Accordingly, the Commission should issue a Public Notice concerning the *GroupMe Petition* and clarify that the meaning of the term “capacity” in connection with the definition of an ATDS.

¹⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd. 559 (2008) (“*2008 Declaratory Ruling*”).

¹⁵ *See GroupMe Petition*, at 15-16.

CONCLUSION

For the foregoing reasons, GroupMe supports the *SoundBite Petition* as discussed herein, and further requests that the Commission issue a Public Notice concerning the *GroupMe Petition*. The *GroupMe Petition* addresses critical issues outside the scope of the *SoundBite Petition*. Specifically, the *GroupMe Petition* seeks clarification that for non-telemarketing, informational calls or text messages to wireless numbers, which can permissibly be made using an ATDS under the TCPA with the called party's oral prior express consent, the caller can rely on an intermediary obtaining such consent from the called party. Additionally, the *GroupMe Petition* seeks clarification of the definition of an ATDS with respect to the term "capacity" under Section 227(a)(1) of the TCPA. GroupMe proposes that the Commission clarify that the definition includes only equipment that, at the time of use, could, in fact, have employed the functionalities described in the TCPA without human intervention and without first being technologically altered. These important issues should be addressed by the Commission in addition to those raised by the *SoundBite Petition*.

Respectfully submitted,

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