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July 18, 2012

## Via Electronic Filing

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Room TW-A325  
Washington, D.C. 20554

**Re: Ex Parte Notice of Ex Parte Communication - GroupMe, Inc.'s  
Petition for Declaratory Ruling and Clarification in CG Docket  
No. CG 02-278**

Dear Ms. Dortch:

On July 16, 2012, the undersigned and Jared Hecht and Steven Martocci, founders of GroupMe, Inc. ("GroupMe"), and Jason Anderson and Staci Pies of GroupMe, Inc./Skype Communications S.A.R.L, met with Angela Kronenberg, Wireline Legal Advisor to Commissioner Mignon Clyburn, Priscilla Delgado Argeris, Wireline Legal Advisor to Commissioner Jessica Rosenworcel, Christine Kurth, Policy Director and Wireline Counsel to Commissioner Robert McDowell, Courtney Reinhard, Legal Advisor to Commissioner Ajit Pai, and a number of individuals from the Consumer and Governmental Affairs Bureau, including: Kris Monteith (Acting Bureau Chief); Mark Stone (Deputy Bureau Chief); Kurt Schroder (Acting Division Chief of the Consumer Policy Division); Michael Jacobs (Senior Legal Advisor to the Bureau Chief); John B. Adams (Acting Deputy Chief, Consumer Policy Division), and Lynn Ratnavale (Senior Attorney); and from the Office of General Counsel, including: Sean Lev (General Counsel), Diane Griffin Holland (Deputy Associate General Counsel), Marcus Maher (Assistant General Counsel) and Raelynn Remy (Attorney-Advisor). The presentation shared during these meetings is included as Attachment 1.

The purpose of these meetings was to update the Commission on a new offering by GroupMe and to discuss GroupMe's Petition for Declaratory Ruling and Clarification ("Petition") and the importance of placing the Petition on Public Notice. GroupMe's private beta launch of "Experiences by GroupMe" was on July 10, 2012. The new offering provides GroupMe users with the ability to review events that have been curated by GroupMe as potentially interesting and fun activities. The events are posted on GroupMe's website and GroupMe facilitates payments and other aspects of the offering. Importantly, none of the payment collection or marketing for "Experiences by GroupMe" is done through the group text messaging tool.

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As explained in the Petition and during the meetings, GroupMe's offering of a non-commercial, social networking tool that enables group text messaging is the subject of a class action lawsuit against the company.<sup>1</sup> GroupMe informed the Commission that the lawsuit has been stayed pending the completion of certain Commission proceedings, thereby affording the parties to the litigation and the Court the benefit of the Commission's guidance on, among other things, the definition of an "automatic telephone dialing system" ("ATDS") under the Telephone Consumer Protection Act ("TCPA") and what it means to obtain "prior express consent" through an intermediary to send text messages when such messages are of a non-commercial nature. Later this month the parties will file a joint status report with the Court regarding the Commission's proceeding on the relevant issues.

We discussed that GroupMe's offering raises important public policy considerations that the Commission has not had the opportunity to explore, including the innovative and unique use of text messaging that GroupMe provides, coupled with a statute and implementing regulations that have primarily considered commercial uses of text messaging services. As the expert agency designated by Congress to promulgate regulations implementing the TCPA, the Commission is uniquely qualified to consider issues central to GroupMe's litigation as well as other TCPA-related class action litigation that has proliferated over the past few years.<sup>2</sup>

As detailed in its Petition and further explained during the meetings, GroupMe is a social networking tool that allows users to establish self-defined groups of consenting people to receive non-commercial text messages that the group creator thinks will be of interest to the group members. GroupMe has developed an application that can be used on the web or smartphones, but use of the application is not required in order to participate in the GroupMe service.

GroupMe provides the service for free. There is no charge for the application, for maintaining the GroupMe groups, or any other aspect of the service. GroupMe does not send advertising or other marketing messages to GroupMe users. In fact, GroupMe has not configured the service in a manner where GroupMe could even send text messages to all of its users. Moreover, the terms of service require users to agree to not use the service for commercial purposes.<sup>3</sup> GroupMe groups are limited in size to a total of

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<sup>1</sup> The First Amended Class Action Complaint and Order Granting Motions to Stay are included as Attachment 2.

<sup>2</sup> In 2008, there were 13 TCPA-related class action lawsuits filed. By 2011, there were approximately 90 which is an increase of almost 700%.

<sup>3</sup> The GroupMe terms of service are available at <https://groupme.com/terms> and are attached to this filing as Attachment 3.

25 people including the Group creator and cannot be “chained” together such that the limit of 25 people per group could be exceeded. The average GroupMe group size is five.

During the meetings, Messrs. Hecht and Martocci relayed that the idea for a group texting service originated when the pair discussed the lack of an analogue to the “reply all” function present on email applications. The GroupMe founders explained that GroupMe is a communication tool that is immediate, personal, easy to use, and available across all mobile platforms and devices. GroupMe remains the only group texting service that works on every mobile phone, feature and smartphone alike.

Since inception, GroupMe has been and remains a communication tool that leverages the power of the mobile platform to allow for group conversations similar to Usenet newsgroups, but more narrowly focused and customized due to the nature of text messaging along with the technical limitations imposed on the size of the groups by GroupMe. For example, Messrs. Hecht and Martocci described the first uses of the GroupMe service. Mr. Martocci and a small group of friends used GroupMe to communicate and to connect at a music festival that they were jointly attending, while Mr. Hecht used the service to ease communication concerning the arrival of a baby in his extended family. The power of their idea was immediately apparent not only to them but those that comprised the groups they created.

The varied uses of the service continue to proliferate. A small sampling of GroupMe groups can be found on page 10 of Attachment 1, which details the diversity of uses from assisting law enforcement, to enhancing social outings, to providing a multi-generational social networking tool. GroupMe has emerged as a unique, personal, non-commercial, group communication tool.

The founders explained that GroupMe has always focused on the user experience and the self-evident power of the communication tool. To that end, triggered by user-action, GroupMe sends a limited number of purely informational messages to users that are meant to, for example, educate those that have been added to the group about the service, provide notice as to how users can opt-out of the particular group or from all future GroupMe groups. Moreover, GroupMe *requires an affirmative action* by each person that has been added to a group. Failure to act results in the person automatically being removed from the group and receiving a final text message letting them know how they can opt back in to receiving group text messages associated with the GroupMe group. This stands in stark contrast to other application available today that provide group texting services without a way for a recipient to opt-out from future group messages.

Under the TCPA, making “any call” to a cellular telephone, without the prior express consent of the called party using an ATDS is prohibited.<sup>4</sup> The statute defines an 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.”<sup>5</sup> In the absence of significant guidance from the Commission regarding modern cellular phone technologies in particular, some courts have interpreted capacity to mean (1) equipment capable of autodialing random or sequential numbers whether or not used for that purpose; and (2) equipment that could be altered to make it capable of autodialing random or sequential numbers.<sup>6</sup> As explained in the Petition and during our meetings, while both interpretations are problematic, the second interpretation expands the definition of an ATDS under the statute to include many if not all smartphones widely available in the marketplace today and virtually any programmable device.

Against this background, the participants explained that it is critical for the Commission to place the GroupMe Petition on Public Notice due to important First Amendment considerations that have not been adequately examined by the agency as well as significant changes in the marketplace in the twenty years that have passed since the TCPA was enacted. Unlike the provisions relating to junk fax, the portion of the TCPA addressing use of an ATDS does not explicitly refer to commercial and non-commercial uses of an ATDS. In 1991, when the TCPA was passed into law, text messaging was not specifically addressed, nor was it part of the legislative history as it was not a prevalent form of communication at that time. It wasn’t until 2003 that the Commission interpreted the TCPA’s ATDS provisions as applicable to text messages.<sup>7</sup> Since that time, only a few courts have considered First Amendment challenges to this provision, but all have applied the *Central Hudson* test in considering such challenges.<sup>8</sup>

As detailed in the GroupMe Petition and discussed during Commission meetings, GroupMe’s service enables personalized speech where individuals add friends, family, and people sharing a common interest or affiliation. The service is designed so that it remains powerful social media networking tool through technical means, like limitations on group size, the use of long codes, and performance adjustments, as well as through the

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<sup>4</sup> See 47 U.S.C. §§ 227(b)(1)(A), 227(b)(1)(A)(iii).

<sup>5</sup> 47 U.S.C. § 227(a)(1) (emphasis supplied).

<sup>6</sup> See, e.g., *Satterfield v. Simon & Schuster, et al.*, 569 F.3d 946, 951 (9th Cir. 2009) (“Accordingly, a[n] [ATDS] need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.”).

<sup>7</sup> *TCPA Report and Order*, 18 FCC Rcd at 14092 (2003).

<sup>8</sup> See *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (applying an intermediate level test to laws affecting commercial speech).

terms of service. The TCPA's legislative history makes clear that the law was meant to restrict uninvited, intrusive, and disruptive speech. Indeed, *Central Hudson* defines commercial speech in two ways: as "speech proposing a commercial transaction," or "expression related to the economic interest of the speaker." Yet this is not the type of speech that the GroupMe service enables. Instead, full First Amendment protection attaches to non-commercial speech where a government regulation must survive "strict scrutiny."

Placing the Petition on Public Notice would allow the Commission and the industry to consider the implications of the TCPA's ATDS provisions as applied to a popular social networking tool that enables non-commercial speech where individuals are defining both the groups and the content of the messages exchanged. Important questions need to be considered by the Commission in evaluating non-commercial group text messaging tools. If the definition of an ATDS is, in fact, as broad as some have suggested, it is incumbent upon the Commission to consider the policy implications associated with chilling non-commercial speech and whether prohibiting the use of a technology that has become pervasive in American life is the "least restrictive means" to accomplish the government's objective.

We also discussed the Commission's interpretation of "prior express consent" in the *2012 TCPA Order*. GroupMe relies on the group creator to provide the name and mobile telephone numbers of the participants when establishing the GroupMe group. The terms of service require that the group creator represent that he or she has the consent of the members comprising his or her group. In this way, an intermediary is providing consent on behalf of individuals who want to receive text messages. Importantly, individuals added to the group must affirmatively agree to become part of the group after receiving the first group text message by participating in the group text message conversation, or else they will automatically be removed from the group.

Obtaining consent through an intermediary is not uncommon for non-commercial text messages. The *2012 TCPA Order* recognizes that useful, non-commercial text messages are commonplace in the market. One example the Commission uses is information pertaining to school closings. Many schools rely on an intermediary, *i.e.*, the parent that completes the form, to provide mobile telephone numbers for *both* or even several adults that care for the child so that all will receive useful information from the school. Schools are not obtaining "prior express consent" directly from each individual that will receive informational text messages. Presumably, schools should not be subject to TCPA liability when sending out such informational text messages even when relying on intermediaries to transmit the recipient's consent to the school. So too with GroupMe groups.

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<sup>9</sup> *Id.* at 561-562.

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For all of these reasons it is important for the Commission to place the Petition on Public Notice. GroupMe presents a novel use of text messaging services empowering individuals to engage in non-commercial group discourse through a ubiquitous medium. It is hard to imagine that in 1991 Congress could have foreseen how text messaging would evolve. Equally difficult to accept is the proposition that Congress would have adopted a statute that contains provisions prohibiting the use of a technology that allows for non-commercial speech. In fact, the junk fax provisions of the TCPA make clear that Congress would have made allowances for a non-commercial exception had it entertained the idea that ATDS technology could be used for a non-commercial purpose, and the legislative history illustrates that Congress was concerned about potential First Amendment issues even in the context of regulating commercial speech. The Commission should place the Petition on Public Notice in order to consider these important policy considerations.

Please do not hesitate to contact the undersigned with any questions.

Respectfully Submitted,

*/electronically signed/*

Ronald W. Del Sesto, Jr.

#### Attachments

cc: Angela Kronenberg  
Priscilla Delgado Argeris  
Christine Kurth  
Courtney Reinhard  
Kris Monteith  
Mark Stone  
Kurt Schroder  
Michael Jacobs  
John B. Adams  
Lynn Ratnavale  
Sean Lev  
Diane Griffin Holland  
Marcus Maher  
Raelynn Remy  
Jason Anderson (Skype/GroupMe)  
Staci Pies (Skype/GroupMe)