

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

In the Matter of	)	
	)	
GroupMe, Inc.	)	CG Docket No. 02-278
	)	
Petition for Declaratory Ruling	)	

**COMMENTS OF PORTFOLIO RECOVERY ASSOCIATES, LLC**

Portfolio Recovery Associates, LLC (“PRA”),<sup>1</sup> by its attorneys and pursuant to the Commission’s Public Notice in the above-referenced proceeding,<sup>2</sup> hereby submits these comments in support of the Petition for an Expedited Declaratory Ruling filed by GroupMe, Inc.

The Telephone Consumer Protection Act of 1991 (“TCPA”) sought to eliminate abusive telemarketing practices that were a danger to public safety and an invasion of consumer privacy. As a consequence, the TCPA imposes restrictions on the use of “automatic telephone dialing systems” (“ATDS”), which it defines as equipment with the “capacity” to generate numbers randomly or sequentially and to dial those numbers.<sup>3</sup> However, over the years the ATDS moniker has been applied far beyond its intended scope, to equipment that neither possesses nor can possess these statutorily-required capabilities. The unintended effect of this expansion has been a surge in costly and unnecessary litigation, which hampers the ability of companies to provide valuable services, while providing no meaningful countervailing privacy protection to consumers.

---

<sup>1</sup> Portfolio Recovery Associates, LLC, is a leader in the debt recovery industry. PRA’s company debt service representatives contact consumers to inform them of their obligations and work with them to find ways to repay their debts.

<sup>2</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from GroupMe, Inc.*, Public Notice, DA 12-1180 (July 24, 2012).

<sup>3</sup> 47 U.S.C. § 227(a)(1).

It is for this reason that PRA supports GroupMe’s Petition for an Expedited Declaratory Ruling clarifying that the term “capacity,” as used in the TCPA, “encompasses 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.”<sup>4</sup> This definition respects the plain language of the statute, Congressional intent, and the need for regulations to adapt sensibly to technological changes without introducing technology-based competitive distortions.

**I. THE TERM “CAPACITY” SHOULD REFER ONLY TO EQUIPMENT CAPABLE OF DIALING RANDOM OR SEQUENTIAL TELEPHONE NUMBERS AT THE TIME OF USE WITHOUT ALTERATION.**

The TCPA defines an “automatic telephone dialing system” to mean “equipment which has the capacity” to “store or produce telephone numbers to be called, using a random or sequential number generator” and to “dial such numbers.” PRA agrees with GroupMe that the Commission should interpret the term “capacity” to “exclude[] technologies with a theoretical capacity, but not the actual capability, to autodial random or sequential numbers.”<sup>5</sup> This interpretation comports with the plain language of the statute and adheres to Congressional intent when the TCPA was first enacted, which was to protect consumers from abusive autodialing practices. Interpreting the statute to apply to equipment that is incapable of autodialing random or sequential numbers at the time of use improperly strains the statutory language and produces absurd results far beyond anything Congress could possibly have intended.

---

<sup>4</sup> GroupMe, Inc.’s Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278, at 3 (filed March 1, 2012) (“Petition”).

<sup>5</sup> Petition at ii.

A. Interpreting “Capacity” Too Broadly is Contrary to the Plain Language and Legislative History of Section 227(a)(1).

As noted above, the TCPA 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>6</sup> Put another way, the plain and natural reading of this language is that an ATDS consists of equipment that can generate numbers randomly or sequentially and then dial the numbers generated by the equipment. This *combination* of abilities is what makes the dialing system “automatic,” *i.e.*, a machine “that works by itself under fixed conditions, with little or no direct human control.”<sup>7</sup> Thus, the most logical interpretation of the term “capacity” in this context suggests that the ability to store or produce telephone numbers to be called, using a random or sequential number generator, must exist at the time of use. The text of the statute shows that Congress knew how to, and did, distinguish between present capacity and future capacity.<sup>8</sup> The choice by Congress to focus on present capacity in the definition of autodialers must be respected.

Even if the plain language were not clear (which it is), there is no indication in the legislative history that Congress intended the term “capacity” to refer to anything other than the ability of the equipment at the time of use. The legislative history confirms that in enacting the TCPA, Congress was focused most on “computerized,” “automated,” or “machine-generated”

---

<sup>6</sup> 47 U.S.C. § 227(a)(1) (emphasis added).

<sup>7</sup> See “automatic, adj. and n.,” OED Online, <http://www.oed.com/view/Entry/13464?redirectedFrom=automatic&> (last visited August 29, 2012).

<sup>8</sup> Compare 47 U.S.C. § 227(a)(1) (“The term ‘automatic telephone dialing system’ means equipment which *has the capacity*. . . .”) (emphasis added) with 47 U.S.C. § 227(c)(1)(B) (directing Commission to initiate rulemaking proceeding to, *inter alia*, “evaluate the categories of public and private entities that *would have the capacity*” to establish means of protecting subscribers’ privacy) (emphasis added).

calling,<sup>9</sup> and in particular on calls dialed randomly or sequentially,<sup>10</sup> not on regulating equipment *incapable* of such use. Even when the Commission interpreted the TCPA to classify predictive dialers as a kind of ATDS,<sup>11</sup> the Commission reached that conclusion only after finding that a predictive dialer “is equipment that dials numbers *and, when certain computer software is attached*, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, *when paired with certain software*, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers.”<sup>12</sup> The Commission therefore declined to exclude “equipment *that use[s] predictive dialing software* from the definition of ‘automated telephone dialing equipment.’”<sup>13</sup> The Commission never suggested that either the hardware or the software, in isolation, qualified as an ATDS. Neither element, on its own, has the capacity required by the statutory definition.

Although the legislative history states that “[t]he FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies,”<sup>14</sup> this

---

<sup>9</sup> See, e.g., 137 Cong. Rec. 18122-23, 35303 (1991).

<sup>10</sup> See S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969 (noting that “[h]aving an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially” and that “some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls”); see also 137 Cong. Rec. 30818, 35302, 35304 (1991).

<sup>11</sup> PRA continues to believe that conclusion was mistaken, at least as applied to predictive dialers that, at the time of use, do not have the random or sequential number-generation capability plainly required by the statutory definition.

<sup>12</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14091 (2003) (emphasis added, footnotes omitted) (“*2003 TCPA Order*”).

<sup>13</sup> *Id.* at 14092 (emphasis added).

<sup>14</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 559, 566 (2008) (“*2008 ACA Ruling*”); *2003 TCPA Order*, 18 FCC Rcd at 14092 n.436 (quoting 137 Cong. Rec. S18784 (1991) (statement of Sen. Hollings)).

means at most that the Commission may have the ability to apply the definition of ATDS to new technologies, not to expand the definition to cover equipment that does not otherwise meet it. The fact that the TCPA permits manually dialed informational calls to mobile phones makes it abundantly clear that interpreting the term “capacity” too broadly is contrary to Congressional intent.<sup>15</sup> As discussed below, a broad interpretation of “capacity” would prohibit even manually dialed informational calls to wireless numbers when those calls are placed using devices such as smartphones. Congress never intended to impose such a strict limit on informational calls to mobile numbers.

B. Changes in Technology Demonstrate the Fallacy of Interpreting “Capacity” Too Broadly.

The Commission has acknowledged that both the statutory language and legislative history of the TCPA support the notion that the Commission should consider changes in technology when interpreting its terms.<sup>16</sup> Changes in technology demonstrate the fallacy of interpreting the term “capacity” to mean what equipment may be capable of doing with alteration. As noted in the GroupMe Petition, under this interpretation “a new iPhone right out of the box could qualify as an ATDS . . . because an iPhone has the ‘capacity’ to download an ATDS application from the iTunes store.”<sup>17</sup> As also noted in the GroupMe Petition, under this interpretation, even a *manually dialed* voice call to an intended number using an iPhone could be construed to violate the TCPA because the iPhone technically has the “capacity” to place

---

<sup>15</sup> See 137 Cong. Reg. 35303 (statement of Rep. Rinaldo) (“Under this bill, *those who use automatic dialers* would be prohibited from making computer-generated calls to . . . paging or cellular telephone numbers.”) (emphasis added).

<sup>16</sup> See 2003 TCPA Order, 18 FCC Rcd at 14092.

<sup>17</sup> See Petition at 10.

automated calls.<sup>18</sup> It cannot be the case that the TCPA requires ordinary smartphone users to obtain prior express consent from each and every cellular customer the smartphone user intends to call. Nothing in the statutory language or the legislative history remotely implies that Congress intended to impose such a burden on users, but that would be the effect if the Commission does not interpret “capacity” as the Petitioner suggests.

C. Interpreting “Capacity” Too Broadly Has Resulted in Costly and Unnecessary Litigation.

Interpreting “capacity” too broadly has resulted in a surge of TCPA class action litigation, from at least 13 cases filed in 2008 involving alleged autodialer use to at least 90 such cases filed in 2011.<sup>19</sup> Thus, in less than five years, the number of class action cases that rest in some way on the meaning of “capacity” has risen nearly 700%. Some firms alone are responsible for filing dozens of claims.<sup>20</sup> The resolution of some of these lawsuits has turned on what constitutes the requisite “capacity” for equipment to be considered an ATDS.<sup>21</sup> Because the TCPA was codified in the Communications Act, courts have looked to the Commission for guidance on its interpretation.<sup>22</sup> It therefore is critical for the Commission to update and clarify its guidance on this point. These numerous class action lawsuits have imposed unreasonable and unnecessary costs on businesses and consumers, threatening economic growth, innovation, competitiveness and job creation, and stifling innovation.

---

<sup>18</sup> *See id.* at 11.

<sup>19</sup> *See* Communication Innovators, Petition for Declaratory Ruling, CG Docket No. 02-278, at 14-15 (filed June 7, 2012) (“*CI Petition*”).

<sup>20</sup> *Id.* at 15 n.40.

<sup>21</sup> *See Satterfield v. Simon & Schuster, Inc.*, 569 F. 3d 946, 951 (9th Cir. 2009) (“[A] system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.”).

<sup>22</sup> *See Griffith v. Consumer Portfolio Servs. Inc.*, No. 10 C 2697, slip op. at 8 (N.D. Ill. 2011); *Hicks v. Client Servs., Inc.*, No. 07-61822-CIV, slip op. at 9 (S.D. Fla. June 9, 2009).

D. Interpreting “Capacity” Too Broadly Punishes Efficiency Without Protecting Consumers.

Interpreting “capacity” too broadly does not in any way regulate the transmission of informational calls to mobile phones; it merely results in requiring such calls to be dialed manually. This does nothing to protect consumers and merely imposes burdensome restrictions on activities that can be done more efficiently through automated means. The Commission has recognized that the intent of Congress was to protect consumers from practices “determined to threaten public safety and inappropriately shift marketing costs from seller to consumers.”<sup>23</sup> Automated technologies that do not seize lines to mobile phones or “market” products or services to consumers fall outside of this category. Indeed, the Commission very recently observed that informational calls to wireless devices are “highly desirable” and should not be “discourage[d].”<sup>24</sup> Unduly restricting such calls therefore is not sensible.

**II. ANY INTERPRETATION OF THE TERM “CAPACITY” IN SECTION 227(a)(1) MUST BE APPLIED IN A TECHNOLOGY-NEUTRAL MANNER**

As the Commission has recognized, regulations should not draw technological distinctions that unduly burden or disadvantage any particular sector. “[T]he Commission seeks to promulgate rules that are ‘technology neutral’ because we believe that ideally it is in the public interest for competing telecommunications technologies to succeed or fail in the marketplace on the basis of their merits and other market factors, and not primarily because of government regulation.”<sup>25</sup>

---

<sup>23</sup> *2003 TCPA Order*, 18 FCC Rcd at 14092.

<sup>24</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1841 (2012) (“*2012 TCPA Order*”).

<sup>25</sup> *See Biennial Regulatory Review - Amendment of Parts 1, 22, 24, 27 and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services*, Third Report and Order, 23 FCC Rcd 5319, 5325 (2008). *Cf. Revision of the Commission's Rules To Ensure Compatibility with* (continued...)

In the TCPA context, a technology-neutral interpretation, such as the interpretation advanced by GroupMe, would avoid having to reconsider the application of the term “capacity” as technology continues to evolve. Technology is evolving more rapidly today than ever before. Doing all that is possible to “future proof” the interpretation of the term “capacity” will provide businesses and consumers with the certainty they need to thrive in the digital economy.

The Commission’s earlier rationale for interpreting the term ATDS to include predictive dialers does not hold in an era when widely available consumer devices are just as “capable” of dialing randomly or sequentially generated numbers as unmodified predictive dialers. Moreover, although “the statutory definition [of an ATDS] does not turn on whether the call is made for marketing purposes,”<sup>26</sup> the Commission’s own recent precedent confirms that autodialed non-telemarketing calls merit different treatment from telemarketing calls, and that the former can be “highly desirable.”<sup>27</sup> Predictive dialers that are capable of dialing only pre-programmed numbers at the time of use and that are used to transmit informational voice calls are no different from equipment that can only dial pre-programmed numbers and that is used to transmit informational text messages. If the Commission concludes — as it should — that the TCPA’s autodialer restrictions do not apply in the latter situation, there is no justification for continuing to apply those restrictions in the former situation.

---

*Enhanced 911 Emergency Calling Systems*, Order on Reconsideration, 17 FCC Rcd 14789, 14794-95 (2002) (“The Commission has strenuously avoided solutions that are other than technology-neutral in crafting regulatory requirements for E911 implementation.”).

<sup>26</sup> *2003 TCPA Order*, 18 FCC Rcd at 14093 n.442.

<sup>27</sup> *See 2012 TCPA Order*, 27 FCC Rcd at 1841.

## CONCLUSION

Granting the GroupMe Petition in a technology-neutral manner will ensure that consumers receive the full scope of the protection intended by Congress without imposing undue and unintended burdens on innovative providers of valuable consumer services. For the reasons discussed herein, the Commission should grant the GroupMe Petition.

Respectfully submitted,

PORTFOLIO RECOVERY ASSOCIATES

By: /s/ Yaron Dori

Yaron Dori  
Michael Beder\*  
1201 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
202-662-6000  
[ydori@cov.com](mailto:ydori@cov.com)  
[mbeder@cov.com](mailto:mbeder@cov.com)

Its attorneys

August 30, 2012

\*Member of the Bar of Maryland; not admitted in the District of Columbia. Supervised by principals of the firm.