

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Consumer & Governmental Affairs Bureau)	CG Docket No. 02-278
Seeks Comment on Petition for)	
Expedited Declaratory Ruling from)	
GroupMe, Inc.)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

COMMENTS OF COMMUNICATION INNOVATORS

Communication Innovators (“CI”) respectfully submits these comments in response to the July 24, 2012 Public Notice released by the Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding,¹ which seeks comment on a Petition for Expedited Declaratory Ruling and Clarification (“Petition”) filed by GroupMe, Inc. (“GroupMe”).² In the Petition, GroupMe asks the Federal Communications Commission (“Commission”) to, *inter alia*, clarify the meaning of “automatic telephone dialing system” (“autodialer”) under the Telephone Consumer Protection Act (“TCPA”)³ and the Commission’s TCPA rules⁴ by limiting the scope of the term “capacity” in the TCPA’s “autodialer” definition.

As discussed below, CI supports GroupMe’s request and encourages the Commission to begin addressing the significant confusion regarding the applicability of the TCPA to innovative

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from GroupMe, Inc.*, CG Docket No. 02-278, Public Notice, DA 12-1180 (rel. July 24, 2012).

² *See* GroupMe, Inc., Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012) (“GroupMe Petition”).

³ 47 U.S.C. § 227.

⁴ *See* 47 C.F.R. § 64.1200 *et seq.*

new technologies by clarifying the meaning of “capacity” and “autodialer.” In particular, the Commission should declare that, at least for informational calls, “capacity” refers to a *current ability* to generate and dial random or sequential numbers. Equipment and technologies therefore should only be considered “autodialers” if, *at the time of use*, they can generate and dial random or sequential numbers without first being technologically altered. Consistent with the text of TCPA, this clarification should apply to all communications platforms, not just to GroupMe’s group text messaging technology. Moreover, to ensure that it addresses fully the existing TCPA confusion, the Commission should also seek comment promptly on the separate Petition for Declaratory Ruling filed by CI regarding non-telemarketing use of “predictive dialers.”⁵

I. About Communication Innovators

CI is a 501(c)(4) coalition of technology companies that seeks to maximize the pace of telecommunications innovation for American consumers and businesses. CI works to identify and support important telecommunications innovations and to provide policy leaders insight into regulatory barriers that may limit their development and deployment. CI and its member technology companies strongly endorse efforts by the President, the Commission, and many in Congress to minimize the burden imposed on innovators and entrepreneurs by outdated, unnecessary, or inefficient regulations.

On June 7, 2012, CI filed a Petition for Declaratory Ruling with the Commission seeking to eliminate confusion regarding the applicability of the TCPA to “predictive dialers.”⁶ The CI Petition asks the Commission to clarify, consistent with the text of the TCPA and Congressional

⁵ See *Petition for Expedited Declaratory Ruling*, Communication Innovators, CG Docket No. 02-278 (filed June 7, 2012) (“CI Petition”).

⁶ *Id.*

intent, that predictive dialers that: (1) are not used for telemarketing purposes; and (2) do not have the current ability to generate and dial random or sequential numbers, are not “autodialers” under the TCPA and the Commission’s TCPA rules.

II. Equipment and Technologies Must Have the Current Ability to Generate and Dial Random or Sequential Numbers to be Considered an “Autodialer” Under the TCPA.

The TCPA prohibits the delivery of “autodialed” calls and text messages to wireless telephone numbers absent an emergency or the “prior express consent” of the called party.⁷ As explained below, the Commission should clarify that this restriction only applies to equipment and technologies that have the *current ability* to generate and dial random or sequential numbers.

The TCPA and the Commission’s TCPA rules define an “autodialer” 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.”⁸ Under this definition, the phrase “using a random or sequential number generator” modifies “to store or produce telephone numbers to be called.” In addition, the phrase “to dial such numbers” refers to dialing numbers that have been randomly or sequentially generated. Therefore, under the plain language of the

⁷ See 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 165 (2003) (“2003 TCPA Report and Order”) (concluding that the TCPA’s restriction on “autodialed” and prerecorded or artificial calls encompasses both voice calls and text messages, including SMS); *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd 15927 ¶ 17 (2004) (stating that “the TCPA prohibition on using automatic telephone dialing systems to make calls to wireless phone numbers applies to text messages (e.g., phone-to-phone SMS), as well as voice calls”). The Commission recently adopted a requirement that the consent be in writing if the call is for telemarketing purposes. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, FCC 12-21 (rel. Feb. 15, 2012) (“Robocall Report and Order”).

⁸ 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1).

TCPA, equipment that does not have the “capacity” to generate and dial random or sequential numbers is excluded from the definition of an “autodialer.”

As GroupMe explains in its Petition, “capacity” is an ambiguous concept that is not defined by the TCPA, and the Commission has neither defined the term “capacity” nor clarified its scope.⁹ This ambiguity has created significant confusion for companies and has led to skyrocketing class action litigation for businesses and increased costs to consumers.¹⁰ It has also curtailed the ability of companies to offer new products and services that consumers demand, such as GroupMe’s group texting service.

The Commission should clarify that the definition of an “autodialer” under the TCPA reflects equipment that has an actual, present capacity, *i.e.*, having the current ability to generate and dial random or sequential numbers without additional modifications to the equipment. Thus, equipment and technologies would only be considered “autodialers” if, *at the time of use*, they can generate and dial random or sequential numbers without first being technologically altered.¹¹ Equipment and technologies meeting this standard would have random or sequential number generation and dialing as a functioning feature – that can be used readily and without further

⁹ See GroupMe Petition at ii, 9.

¹⁰ See, *e.g.*, CI Petition at 10-16 (discussing the significant confusion and unintended consequences of the Commission’s TCPA “autodialer” decisions).

¹¹ GroupMe requests that “capacity” be defined to “encompass 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.” GroupMe Petition at 14. As CI explained in its separate petition, the “capacity to dial numbers without human intervention” is a concept that appears nowhere in the TCPA and is very different from the statutorily required ability to “store or produce telephone numbers to be called,” use “a random or sequential number generator,” and dial numbers that have been randomly or sequentially generated. CI petition at 12.

software or device changes (*e.g.*, without the installation or modification of software or hardware) – even if the feature is turned “off” at the time of use.¹²

CI agrees with GroupMe that the Commission should exclude from the scope of the “autodialer” definition “equipment and technologies with a theoretical capacity, but not the actual capability, to autodial random or sequential numbers”¹³ The Commission should not interpret “capacity” as encompassing any conceivable hardware or software modification to a device that would permit it to generate and dial numbers randomly or in sequence. For example, mobile phones, smart phones, tablets, e-readers, and personal computers can all be modified, using various third-party software or hardware configurations, to randomly or sequentially generate and dial telephone numbers.¹⁴ Such an unconstrained interpretation would make the statutory term “capacity” superfluous, contrary to elementary rules of statutory interpretation. Moreover, as GroupMe notes, it could subject businesses and consumers to TCPA violations if they send a text message or even manually dial a voice call to a wrong number (as such calls would be viewed as made using “autodialers”).

To the extent that the Commission may be concerned about enabling any new unwanted automated telemarketing calls, it can distinguish between telemarketing and informational calls when it clarifies the meaning of “capacity.” The Commission has correctly recognized that changes in technology and industry practices must be taken into account under the TCPA,¹⁵ and

¹² Therefore, if a caller merely has to “flip a switch” to generate and dial random or sequential numbers, the device would still be an autodialer, even if the switch or feature is turned off at the time the call is made.

¹³ GroupMe Petition at ii.

¹⁴ *See also id.* at 10 (noting that “much of our everyday technology, including smartphones and social networking mediums, can be altered to either unlock a dormant [autodialer] function or add such function via new software”).

¹⁵ 2003 TCPA Report and Order ¶ 132 (internal citations omitted).

it could, for example, find that equipment and technologies used for *informational calls* only have the required “capacity” to generate and dial random or sequential numbers when the capacity is actually *enabled* (e.g., installed as a functioning feature that can be used readily and without further software or device changes) while also finding that the requisite “capacity” for *telemarketing calls* includes the current ability to dial numbers from a database. The Commission made a similar distinction between telemarketing and informational calls when it amended its prior express consent requirements in the Robocall Report and Order.¹⁶

III. Any Clarification of the Meaning of “Autodialer” Should Apply to All Technology Platforms.

The TCPA’s definition of “autodialer” does not distinguish between voice calling and text messaging platforms. Instead, it is only the specific capabilities of those platforms – and how those capabilities are used – that are relevant. Thus, consistent with the text of the TCPA, any clarification in response to the GroupMe Petition should apply to all voice calling and text messaging platforms that are used to make calls or deliver messages to wireless telephone numbers, not solely to GroupMe’s group text messaging technology.

GroupMe states that its request would not “reopen” the Commission’s 2003 TCPA Report and Order or 2008 Declaratory Ruling¹⁷ regarding predictive dialers,¹⁸ and it attempts to distinguish its text group messaging service from predictive dialer technologies. As CI described in its Petition, issues left unanswered by the 2003 and 2008 decisions effectively created the

¹⁶ As discussed in Section III, however, any clarification should apply to all platforms that are used to make voice calls or deliver text messages to wireless telephone numbers.

¹⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd 559 (2008) (“2008 Declaratory Ruling”).

¹⁸ GroupMe Petition at 15-16.

widespread confusion and resulting skyrocketing litigation seen today.¹⁹ In addition, GroupMe’s reliance on text messages instead of voice calls as the transmission medium for its service does not change the legal analysis required under the TCPA.²⁰ Like predictive dialers, GroupMe’s service relies on a list or database of numbers to be reached. And, just like predictive dialers that are used for informational calls, GroupMe’s technology does not have the *current ability* to generate or dial random or sequential numbers.

IV. The Commission Should Seek Comment Promptly on the CI Petition to Develop a Full Record on “Autodialer” and “Capacity” Issues.

CI supports the Commission’s efforts to address the confusion over the scope and meaning of the TCPA “autodialer” restriction. In the face of proliferating TCPA class action litigation, it is important that the Commission have an opportunity to clarify the application of the TCPA – particularly before more courts weigh in and create a patchwork of conflicting TCPA decisions.

As noted above, any Commission decision interpreting the meaning of these terms would need to apply broadly to all technologies, including predictive dialers. To ensure a fully developed record on these issues, the Commission should seek comment as soon as possible on the pending CI Petition. Although focused on the application of the TCPA to predictive dialers used only for informational calls, the CI Petition explains how the current confusion is hindering innovation, diverting time and resources away from consumer-facing operations, chilling critical

¹⁹ CI Petition at 10-14.

²⁰ The fact that GroupMe’s group messaging service is “reply-all by default” (*i.e.*, whenever anyone in the group sends a message, all group members will get the message), with no way for users to send or receive messages to only some group members or otherwise limit the volume of messages aside from opting out of a group entirely, also does not change the TCPA analysis. *See* “How can I use GroupMe to broadcast messages with no replies,” GroupMe Support, *at* <http://help.groupme.com/entries/20120441-how-can-i-use-groupme-to-broadcast-messages-with-no-replies> (last accessed Aug. 30, 2012).

account communications, and creating substantial costs that inevitably are passed on to consumers. These problems apply both to predictive dialers and to other innovative technologies, including text message-based services. The CI Petition also highlights the numerous changed circumstances that have occurred since the Commission's 2003 TCPA Report and Order and 2008 Declaratory Ruling, underscoring further the need for a Commission ruling.

V. Conclusion

For the foregoing reasons, the Commission should grant the GroupMe Petition and declare that, at least for informational calls, "capacity" refers to a *current ability* to generate and dial random or sequential numbers – regardless of the communications platform being used. It should also seek comment promptly on the CI Petition regarding non-telemarketing use of predictive dialers.

Respectfully submitted,

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