

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
Rules and Regulations Implementing ) CG Docket No. 02-278  
The Telephone Consumer Protection )  
Act of 1991 )

**REPLY COMMENTS OF AMERICAN BANKERS  
ASSOCIATION AND CONSUMER BANKERS  
ASSOCIATION IN SUPPORT OF PETITION FOR  
EXPEDITED DECLARATORY RULING OF GROUPME,  
INC./SKYPE COMMUNICATIONS S.A.R.L.**

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## **EXECUTIVE SUMMARY**

The comments filed in support of GroupMe's pending request for expected declaratory ruling amply demonstrate that granting of the petition would be consistent with the letter and purpose of the Telephone Consumer Protection Act. Granting of that relief would not increase unwanted telemarketing and would have no adverse effects on consumers. Accordingly, the Commission should promptly approve GroupMe's petition. In addition, the Commission should take this opportunity to resolve the ongoing legal uncertainty concerning the use of mobile services for a wide range of non-advertising communications. A declaration that technologies used to communicate with mobile devices, where those technologies lack the present capacity to generate numbers randomly or in sequence, may be used for non-telemarketing purposes would serve the public interest.

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The American Bankers Association (ABA)<sup>1</sup> and the Consumer Bankers Association (CBA)<sup>2</sup> hereby file these reply comments in support of the petition for expedited declaratory ruling (Petition) of GroupMe, Inc./Skype Communications S.A.R.L. (GroupMe).<sup>3</sup> ABA and CBA urge the Commission to grant GroupMe's Petition and to take the opportunity presented by the Petition to resolve the legal uncertainty surrounding a broad range of consumer-friendly services based upon mobile communications.

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<sup>1</sup> The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than \$165 million in assets.

<sup>2</sup> The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services. CBA provides leadership, education, research and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies, as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

<sup>3</sup> Petition for Expedited Declaratory Ruling in CG Docket No. 02-278 (filed March 1, 2012) (Petition).

**I. GROUPME’S PETITION AND THE SUPPORTING COMMENTS DEMONSTRATE THE VALUE AND LAWFULNESS OF AUTOMATED, NONTELEMARKETING TEXT MESSAGES**

GroupMe’s Petition asks the Commission to find that an individual may invite others to subscribe to its group texting service by authorizing GroupMe’s transmission of a non-telemarketing text message invitation. As GroupMe’s Petition points out, meritless lawsuits brought under the Telephone Consumer Protection Act (TCPA) present a potential obstacle to the sending of these messages because the recipients have not advised GroupMe directly of their consent to receive them. Accordingly, GroupMe has asked the Commission to find: (1) that the recipient’s prior express consent to receive invitation texts may be sent through the GroupMe customer, acting as an intermediary; and (2) that the term “capacity” under section 227(a)(1) of the TCPA refers only to equipment “that, at the time of use, could, in fact, have employed the functionality described in the TCPA without human intervention and without first being technologically altered.”<sup>4</sup>

The need for the requested relief goes well beyond the specifics of GroupMe’s texting service. For example, as the Cargo Airline Association points out in its comment letter, package delivery notifications can be sent at low cost to the mobile devices of recipients who do not have a customer relationship with the shipper and have not directly given their consent to receive messages from that shipper.<sup>5</sup> Similarly, innovative companies are developing a number of services that depend upon the transmission of administrative messages to persons who might not have a business relationship with the institution sending the message. As the U.S. Chamber of Commerce points out in its comments in this proceeding:

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<sup>4</sup> Petition at 16-19.

<sup>5</sup> Comments of The Cargo Airline Association in CG Docket No. 02-278 (Aug. 17, 2012).

Incidents where intermediary consent is necessary are not limited to businesses such as GroupMe. As the GroupMe Petition notes, delivery services often receive contact information for the recipient, but such information is provided by the sender. Similarly, a bank may wish to notify the bank customer's customer that funds have been sent or received. A friend may request that a retailer send an electronic gift certificate or an E-card to a recipient's phone number. Or a family member may ask a school to contact other family members regarding scheduling information. These everyday communications would be prohibited absent a clarification of the TCPA that permits intermediaries to give consent for informational calls placed with automatic telephone dialing systems.<sup>6</sup>

As technology advances, and as customers increasingly demand that services and payments be implemented through their mobile devices, unnecessary restrictions on non-telemarketing mobile communications will impede the development of technologies and services that this Commission has declared its intention to promote. The Commission's most fundamental expression of this policy was made in its National Broadband Plan, which identified mobile broadband services as one of the most important engines of U.S. economic development and competitiveness:

From smart phones to app stores to e-book readers to remote patient monitoring to tracking goods in transit and more, mobile services and technologies are driving innovation and playing an increasingly important role in our lives and our economy. Mobile broadband is the next great challenge and opportunity for the United States. It is a nascent market in which the United States should lead.<sup>7</sup>

The Commission applied this policy expressly to the question of automated messages sent to mobile devices in its order entered in this docket in February, 2012, when the Commission declared its intention not to impede or unnecessarily restrict informational programs

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<sup>6</sup> Comments of the U.S. Chamber of Commerce in CG Docket No. 02-278 at 13 (Aug. 30, 2012).

<sup>7</sup> Federal Communications Commission, "Connecting America: The National Broadband Plan" at 9.

based upon text messaging. Specifically, the Commission stated that “[w]hile we observe the increasing pervasiveness of telemarketing, we also acknowledge that wireless services offer access to information that consumers find highly desirable and thus do not want to discourage purely informational messages.”<sup>8</sup>

In the markets served by ABA and CBA members, informational text programs include suspicious activity alerts concerning payment cards and breach notification messages that prevent fraud, as well as communications designed to protect against defaults and foreclosures, respond to service inquiries, and protect against disasters. In the future, financial institutions’ non-telemarketing messages increasingly will include notifications of funds transfers and other transactions. Those messages may be sent to persons who are not present customers of the sending financial institutions, and from whom it may not be feasible for those institutions to obtain consent directly. The threat of opportunistic, potentially catastrophic litigation should not prevent these useful, non-telemarketing communications.<sup>9</sup> Accordingly, the Commission should expedite its favorable consideration of GroupMe’s Petition.

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<sup>8</sup>*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Report and Order rel. Feb. 15, 2012).

<sup>9</sup>*See, e.g., Annoni v. FYIsms.com, LLC*, Case No. 11-cv-1603 (N.D. Ill.); *Emanuel v. NFL Enterprises, LLC*, Case No. 11-cv-1781 (S.D. Cal.); *Gutierrez et al. v. Barclays Group et al.*, Case No. 10-cv-1012 (S.D. Cal.); *Holt v. Redbox Automated Retail, LLC*, Case No. 11-cv-3046 (S.D. Cal.); *Jaber v. NASCAR Holdings, Inc.*, Case No. 11-cv-1783 (S.D. Cal.); *Karayan v. GameStop Corp. and GameStop Inc.*, Case No. 11-cv-1777 (S.D. Cal.); *Lo v. Oxnard European Motors, LLC et al.*, Case No. 11-cv-1009 (S.D. Cal.); *Maleksaeedi v. American Express Centurion Bank*, Case No. 11-cv-790 (S.D. Cal.); *Ryabyshchuk v. Citibank*, Case No. 11-cv-1236 (S.D. Cal.).

## II. GRANTING OF GROUPME’S PETITION WILL NOT INCREASE UNWANTED TELEMARKETING TO MOBILE DEVICES

Some commenters oppose GroupMe’s Petition on the ground that the Commission’s endorsement of intermediary consent for non-telemarketing messages, or the Commission’s clarification of the automatic telephone dialing system (ATDS) definition to include only devices that have the present capacity to store and dial numbers randomly or in sequence, will result in a deluge of unwanted “text spam.”<sup>10</sup> In support of these claims, commenters point to the volume of unsolicited marketing texts already being sent, and to the possibility that GroupMe and other service providers will implement targeted advertising features in the future.<sup>11</sup>

Neither of these arguments supports rejection of GroupMe’s Petition. The predictions of some commenters that granting of GroupMe’s petition will unleash a torrent of unwanted telemarketing texts ignore the ample consumer protections built into the TCPA. Notably, the statute and the Commission’s regulations empower consumers to place their mobile telephone numbers, as well as their wireline residential numbers, on the national do-not-call registry and to make company-specific do-not-call requests to individual telemarketers.<sup>12</sup> If the Commission elects to recognize intermediary consent for non-telemarketing messages, and to confirm that the TCPA’s ATDS definition includes only equipment with the present, enabled capacity to store or

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<sup>10</sup> See Comments of Robert Biggerstaff in CG Docket No. 02-278 (Aug. 28, 2012)(Biggerstaff Comments); Comments of Joe Shields on the Petition for Expedited Declaratory Ruling of GroupMe, Inc. Petition in CG Docket No. 02-278 (Aug. 30, 2012); Gerald Roylance’s Comments on GroupMe’s Petition in Docket No. 02-278 (Aug. 30, 2012) (Roylance Comments).

<sup>11</sup> Roylance Comments at 3 (“GroupMe clearly *does* intend to send commercial text ads of its own choosing and on behalf of its advertising clients”) (*emphasis in original*); Roylance Comments at 6 (“4.5 billion spam messages are sent annually in the U.S., despite the TCPA”); Biggerstaff Comments at 6 (“[U]nscrupulous people are currently sending massive numbers of spam text solicitations, despite their patent illegality”).

<sup>12</sup> 47 C.F.R. §§ 64.1200(c)(2), 64.1200(d).

produce telephone numbers to be called using a random or sequential number generator, and to dial such numbers, consumers still will be fully protected from telemarketing calls and texts – whether manual or automated – that they do not wish to receive. Also, GroupMe’s reported statements to the effect that it may implement an advertiser-supported business plan in the future, on an opt-in basis, has nothing to do with the relief it requests in its present Petition, which would permit only the transmission of *non-telemarketing* administrative messages.

Finally, some commenters argue that granting of GroupMe’s Petition will aggravate the problem of repeated wrong-number calls by debt collectors. Specifically, the Consumer Litigation Group contends that because debt collectors use automated devices that do not generate numbers randomly or in sequence, placing these devices outside the ATDS definition would mean that “debt collection ATDS to wrong cell numbers . . . would be even *more* out of control than it is now.”<sup>13</sup>

These arguments are not properly directed to the Commission or its regulation of telemarketing under the TCPA. Abusive debt collection practices are regulated under the Fair Debt Collection Practices Act, which confers authority to control *all* harassing calls – not just the calls to mobile devices that are addressed by the autodialer provisions of the TCPA.<sup>14</sup> Commenters’ concerns about debt collection practices should be directed to the Federal Trade Commission, the Consumer Financial Protection Bureau, and other regulators empowered to address those practices.

Moreover, as the Commission recognized in 2008, nothing in the TCPA’s legislative history suggests that Congress intended the statute to be used as a shield against communications

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<sup>13</sup> Comments of Consumer Litigation Group in CG Docket No. 02-278 (Aug. 31, 2012) at 2 (*emphasis in original*).

<sup>14</sup> 15 U.S.C. §§ 1601 *et seq.*

between a creditor and its customers concerning a past due obligation. Indeed, as the report of the House Committee on Energy and Commerce clearly states:

The restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such line to the caller for use in normal business communications. *The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers.* For example, a retailer, insurer, banker or other creditor would not be prohibited from using an automatic dialer recorded message player to advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, *or a bill had not been paid.*<sup>15</sup>

Since the enactment of the TCPA, the Commission has consistently recognized the unequivocal intent of Congress that autodialed calls to consumers to notify them of overdue bills do not infringe the privacy rights Congress sought to protect.<sup>16</sup>

### **III. THE COMMISSION SHOULD DECLARE THAT NON-ATDS DIALING TECHNOLOGIES MAY BE USED TO SEND NON-TELEMARKETING MESSAGES WITHOUT THE RECIPIENTS' PRIOR EXPRESS CONSENT**

Finally, as ABA and CBA have explained at greater length in previous filings in this docket, and as GroupMe and other parties have urged, the Commission should adopt a definition of “capacity,” as that term is used in the TCPA definition of an automatic telephone dialing system, to confirm that the requisite capacity does not exist unless dialing equipment can be used, without modification of the hardware, reprogramming of the software, or enabling of

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<sup>15</sup>H.R. REP. 102-317 (Nov. 15, 1991)(*emphasis added*).

<sup>16</sup>In this connection, ABA and CBA also ask the Commission to confirm its finding, made in 2008, that collections calls are not subject to the TCPA’s restrictions on telemarketing. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278 (Declaratory Ruling rel. Jan. 4, 2008), ¶ 9.

features that the device could support but that are not available as the device is currently operated or configured, to generate numbers randomly or in sequence.<sup>17</sup>

In addition to this requested clarification, ABA and CBA note that many dialing systems employ a “preview mode” in which consumers’ telephone numbers are displayed to an agent who then initiates calls by taking specific action, such as clicking a mouse on the displayed numbers. These systems lack the capacity to generate numbers randomly or in sequence and to dial such numbers, and do not permit dialing without human intervention. In order to foreclose any confusion, and any needless litigation, as to the status of such dialing methods under the TCPA, ABA and CBA ask the Commission to clarify that this dialing method does not fall within the TCPA definition of an automatic telephone dialing system.

These clarifications of the ATDS definition would confirm the meaning of that definition as Congress wrote it, and would advance the intent of Congress to prevent vexatious dialing of cell phone customers by telemarketers using robot number generators. Use of any ATDS, so defined, to make calls to mobile and emergency numbers would continue to be prohibited except in an emergency or with the prior express consent of the called party.<sup>18</sup>

Finally, ABA and CBA do not seek any relief that would automate telemarketing beyond the limits prescribed by the TCPA. We urge the Commission only to find that callers may use devices that automate the dialing of numbers, but that do not meet the statutory ATDS definition as clarified in accordance with our suggestions, to place non-telemarketing calls to mobile

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<sup>17</sup>See, e.g., Reply Comments of American Bankers Association and Consumer Bankers Association in Support of Petition for Expedited Declaratory Ruling of SoundBite Communications, Inc., in CG Docket No. 02-278 (May 15, 2012) at 11.

<sup>18</sup> Having made this clarification the Commission still could, if it found such action to be in the public interest, clarify its regulations to limit the use of non-ATDS dialing technologies by telemarketers.

devices without the recipients' prior express consent. This simple finding will permit the confirmation messages, personal group texting services, package delivery notifications and other useful communications that are the subjects of pending petitions and comments, without encouraging telemarketers to place unsolicited advertising calls to mobile telephones by automated means, including the use of devices that meet the ATDS definition. Such broad relief also will permit service providers to develop and implement new, advanced non-telemarketing equipment and services without seeking piecemeal rulings from the Commission as to their legality, and without risking needless litigation.

In keeping with its mandate to encourage, rather than hinder, the deployment of advanced services that create jobs and benefit the public, the Commission should take this opportunity to grant the requested relief promptly.

Respectfully submitted,

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