

Ronald W. Del Sesto, Jr.  
Direct Phone: 202.373.6023  
Direct Fax: 202.373.6001  
r.delsesto@bingham.com

June 24, 2013

**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. 02-278**

Dear Ms. Dortch:

On June 20, 2013, the undersigned, Jason Anderson, and Staci Pies, of GroupMe, Inc./Skype Communications S.A.R.L (“GroupMe”), met with Rebekah Goodheart, Legal Advisor to Acting Chairwoman Mignon Clyburn and Mark Stone, Deputy Bureau Chief of the Consumer Government and Affairs Bureau, to discuss GroupMe’s Petition. Separately, we also met with Kris Monteith (Acting Bureau Chief); Kurt Schroder (Acting Division Chief of the Consumer Policy Division); John B. Adams (Acting Deputy Chief, Consumer Policy Division); Lynn Follansbee Ratnavale (Senior Attorney); and Kristi Lemoine (Legal Advisor).

As detailed in the attached slides, which were distributed during the meetings, we explained that the definition of an Automatic Telephone Dialing System (“ATDS”) under the Telephone Consumer Protection Act (“TCPA”) has been interpreted so broadly by some courts so as to allow plaintiffs’ lawyers to argue for a finding of liability based on the alleged and hypothetical use of equipment, rather than how equipment is actually used. Indeed, the definition has become so broad that retail end users of smartphones could be found to be using an ATDS in violation of the TCPA under certain circumstances.

We also emphasized that the Commission should provide additional clarity with respect to “intermediary consent.” GroupMe has already detailed how its service is unlike the services described in the other pending petitions seeking clarification of TCPA in that it enables personal, group communications. Similar to the Commission’s “do-not-call,” rules where an exception is provided for a telemarketer having a “personal

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Bingham McCutchen LLP  
2020 K Street NW  
Washington, DC  
20006-1806

T +1.202.373.6000  
F +1.202.373.6001  
bingham.com

relationship” with the called party, relying on “intermediary consent” should be allowed when the service is triggered by a group creator to send non-commercial, administrative and informational text messages.<sup>1</sup> Such a finding serves even more important policy goals when used to allow non-commercial, administrative and informational speech.

Additionally, GroupMe emphasized that providing such clarity would also serve to remedy the excessive and destructive class action litigation that has proliferated under the TCPA. By clarifying that “intermediary consent” is allowed under the TCPA, GroupMe submits that plaintiffs’ lawyers will be required to make a specific showing that putative class action members did not provide the requisite consent, while preserving the ability of an individual to seek legal redress. In removing what have become perverse incentives for class action plaintiffs’ lawyers, the Commission would serve the public interest by allowing innovative service offerings that take advantage of the new capabilities presented by new communications platforms to thrive without the risk of facing nuisance lawsuits that do not serve the public good. Moreover, providing such clarity would preserve the limited resources of the Commission, courts and innovative companies like GroupMe.

Finally, we explained that GroupMe’s service allows for a unique use of text messaging services empowering individuals to engage in non-commercial group discourse through a ubiquitous medium. In 1991, when the TCPA was passed, no one, including Congress, could have foreseen how text messaging would evolve and the important role it would serve as a communications medium. Had Congress foreseen its interpretation over a decade later to include text messaging and its interpretation now, over two decades later, Congress would have made allowances for its use in connection with non-commercial speech. One need only look at the junk fax provisions of the TCPA, where there is a non-commercial exception provided for in the statute, for support of this proposition.<sup>2</sup> Moreover, the legislative history illustrates that Congress was concerned about potential First Amendment issues even in the context of regulating commercial speech.<sup>3</sup> Indeed, it is at odds with the overall statutory scheme and its related legislative

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<sup>1</sup> See, e.g., Reply Comments of GroupMe, 02-278, at 19-20 (Sept. 10, 2012); Comments of GroupMe, 02-278, at 7-8 (Nov. 15, 2012) (filed in connection with the Cargo Airline Assoc. Pet’n); *Rules and Regulations Implementing the Telephone Consumer Protection Act*, Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14045; 47 C.F.R. § 64.1200(c)(2)(iii).

<sup>2</sup> Compare 47 U.S.C. § 227(b)(1)(A) (prohibiting “any call” with few exceptions), with § 227(b)(1)(C) (limiting the restriction to the sending of a communication that includes an “unsolicited advertisement”).

<sup>3</sup> See, e.g., GroupMe Comments, CG Docket No. 02-278, at 7-14 (Aug. 30, 2012).

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history for a statute that *regulates* commercial speech to *prohibit* non-commercial speech.<sup>4</sup>

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

Respectfully Submitted,

/electronically signed/  
Ronald W. Del Sesto, Jr.

Attachment

cc: Rebekah Goodheart  
Kris Monteith  
Mark Stone  
Kurt Schroder  
John B. Adams  
Lynn Follansbee Ratnavale  
Kristi Lemoine  
Jason Anderson (Skype/GroupMe)  
Staci Pies (Skype/GroupMe)

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<sup>4</sup> See, e.g., Ex Parte Letter from Ronald W. Del Sesto, Jr., counsel for GroupMe, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 4 (filed July 18, 2012).