

Litigation Alert:

FCC TCPA Ruling Provides Guidance on Mobile App Messaging

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On March 27, 2014, the Federal Communications Commission (“FCC”) issued a Declaratory Ruling interpreting the federal Telephone Consumer Protection Act (“TCPA”) as it relates to prerecorded and autodialed calls to cellular phones. That ruling, issued in the matter of *GroupMe, Inc./Skype Communications*, provides useful guidance on the confusing and potentially treacherous TCPA rules, particularly as they relate to modern social-networking and mobile-retail applications.

GroupMe provides a free group-texting service, which allows its users to create groups of up to 50 members for community text-messaging. GroupMe users must agree to GroupMe’s terms of service and affirmatively represent that each member added to a group has consented to be added and to receive text messages. GroupMe then sends text messages to those proposed members with information about the group, how to download and use the GroupMe app, and how to opt out and stop receiving messages. In its petition to the FCC, GroupMe sought clarification that it can rely on its users’ representations regarding consent, and that GroupMe’s introductory text messages to non-users do not violate the TCPA.

In material part, the FCC granted GroupMe’s petition and agreed with GroupMe’s position, with certain limitations. The *GroupMe, Inc./Skype Communications* ruling is instructive and important in several key respects:

- The FCC recognized that the TCPA is ambiguous with respect to how to obtain consent for autodialed or prerecorded *non*-telemarketing calls (as opposed to the FCC’s recently adopted specific rules regarding written consent for telemarketing calls).
- The FCC noted that “Congress did not expect the TCPA to be a barrier to normal, expected, and desired business communications.” The FCC went on to find that, “[t]o the extent that administrative texts GroupMe sends to group members relate to using and canceling GroupMe’s group texting service, we consider them to be normal business communications.” This is a particularly important

finding because the FCC accepted the position that GroupMe’s introductory text messages to non-users about the GroupMe app are “administrative” *non*-telemarketing messages. Some courts have interpreted the notion of “telemarketing” very broadly to encompass virtually any communication that is ultimately intended to drive consumer traffic to a commercial app or website. The *GroupMe* ruling supports a more flexible and expansive view of what messages from a commercial entity may be deemed informational and not telemarketing.

- The FCC ruled that “the TCPA does not prohibit a caller, such as GroupMe, from obtaining the consumer’s prior express consent through an intermediary, such as the organizer of a group using GroupMe’s service.” Thus, for non-telemarketing messages, a retailer like GroupMe may rely on its users to obtain consent from non-users to receive such messages. Note that users cannot consent on behalf of third parties; GroupMe users must affirmatively represent that they have obtained the consent of the third parties to be contacted by GroupMe. Importantly, if that consent was not, in fact, obtained — *i.e.*, if the user’s representations to GroupMe are false or inaccurate — GroupMe remains liable for violating the TCPA.
- The FCC found that, where a person has agreed to join a GroupMe group, has consented to receive messages related to the group, and has provided a cellular telephone number for that purpose, the consent “extends to a wide range of calls ‘regarding’ the transaction.” This comment too potentially broadens the scope of “administrative” or informational messages a retailer may send based on the less stringent prior consent requirements that apply to non-telemarketing messages.
- In a concurring statement, Commissioner Michael O’Rielly applauded the ruling for providing “much needed clarity in an area where uncertainty can inhibit legitimate businesses from offering consumer-friendly applications and services, and can breed litigation.”

In summary, the *GroupMe, Inc./Skype Communications* ruling provides reason for optimism that the FCC will take a more practical, real-world approach to consent and the use of text messages to provide useful information to consumers.

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