

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
GroupMe, Inc./Skype Communications S.A.R.L)	CG Docket No. 02-278
Petition for Expedited Declaratory Ruling)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

DECLARATORY RULING

Adopted: March 27, 2014

Released: March 27, 2014

By the Commission: Commissioner O’Rielly concurring and issuing a separate statement.

I. INTRODUCTION

1. The Telephone Consumer Protection Act (TCPA)¹ protects consumers from unwanted calls and texts that are made with autodialers and with prerecorded messages. The TCPA and our rules help consumers avoid unwanted communications that can represent annoying intrusions into daily life and, in some cases, can cost them financially. At the same time, our goal is to make sure the TCPA is not interpreted to inhibit communications consumers may want and that do not implicate the harms TCPA was designed to prevent. With this decision, we address one such case. We clarify that text-based social networks may send administrative texts confirming consumers’ interest in joining such groups without violating the TCPA because, when consumers give express consent to participate in the group, they are the types of expected and desired communications TCPA was not designed to prohibit, even when that consent is conveyed to the text-based social network by an intermediary. To ensure that the TCPA’s consumer protection goals are not circumvented, we emphasize that social networks that rely on third-party representations regarding consent remain liable for TCPA violations when a consumer’s consent was not obtained. We make these clarifications and grant to the extent indicated herein a request by GroupMe, Inc./Skype Communications S.A.R.L (GroupMe), as modified.²

¹ *Codified as* 47 U.S.C. § 227.

² *See GroupMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012) (*Petition*). GroupMe originally sought resolution of two issues, but we read two subsequent letters as narrowing its request to the single issue we address in this order. *See* Letter from Ronald W. Del Sesto, Jr., Counsel to GroupMe, to Marlene Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (filed Jan. 15, 2014) (*Modified Request*); Letter from Ronald W. Del Sesto, Jr., Counsel to GroupMe, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (filed Mar. 4, 2014) (“Given that many [other] parties seek clarification regarding the question of what constitutes an ATDS under the TCPA . . . GroupMe requests that the Commission clarify the intermediary consent issue as presented in the *GroupMe Petition*.”). Based on GroupMe’s narrowed request and at our discretion, we make no finding as to whether it uses an autodialer to send the messages at issue and dismiss that portion of GroupMe’s original request without prejudice. Our finding that GroupMe may rely on consent provided through an intermediary as described herein applies when it does use an autodialer. If, on the other hand, it does not use an autodialer to send the text messages at issue, the TCPA’s protections, including the requirement to obtain consumers’ prior express consent, are not triggered.

II. BACKGROUND

2. In 1991, Congress enacted the TCPA in an effort to address certain practices thought to be an invasion of consumer privacy and a risk to public safety.³ In relevant part, the TCPA and the Commission's implementing rules prohibit the use of an artificial or prerecorded voice or an automatic telephone dialing system to make a non-emergency call without prior express consent to, among others, any telephone number assigned to cellular telephone services.⁴ In the *2003 TCPA Order*, the Commission concluded that the TCPA's protections encompass both voice calls and text messages, including short message service (SMS) calls, if the autodialed or prerecorded call is made to a telephone number assigned to such service.⁵

3. On March 1, 2012, GroupMe filed its Petition seeking clarification of the TCPA as it applies to the type of group texting service offered by GroupMe.⁶ According to its Petition, GroupMe provides a free group text messaging service for groups of up to 50 members.⁷ A user who wishes to create a group using GroupMe's service must register with GroupMe and agree to its terms of service, which require the group creator to represent that each individual added to the group has consented to be added and to receive text messages.⁸ Once registered, the group creator provides GroupMe with the wireless telephone numbers of the group members.⁹ GroupMe then sends up to four text messages to each group member, informing each member of information about the group creator, the names of the individuals who comprise the group, the unique ten-digit number GroupMe assigned to the group, instructions on how to stop receiving text messages associated with the group, and instructions to download the free GroupMe app.¹⁰ GroupMe allows users to communicate either over their standard text messaging service or by using the GroupMe app, which uses a data connection and avoids texting fees.¹¹

4. GroupMe asks that the Commission clarify that consent for certain calls under the TCPA may be given through intermediaries.¹² Currently, the Commission requires "some form of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers" and "leaves it to the caller to determine, when making an autodialed or prerecorded non-telemarketing call to a wireless number, whether to rely on oral or written consent in complying with the statutory consent

³ See 47 U.S.C. § 227.

⁴ *Id.* § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (*2003 TCPA Order*); see also *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a "call").

⁶ See *Petition* at 1. We note that GroupMe's Petition does not argue that it is not the "sender" of the text messages for purposes of the TCPA. See *Petition* at 6-7. We therefore do not address whether any other service provider is the "sender" of any text (administrative or otherwise), raised in other pending petitions. See, e.g., *Petition of YouMail, Inc. for Expedited Declaratory Ruling That YouMail's Service Does Not Violate the TCPA*, CG Docket No. 02-278 (filed Apr. 22, 2013).

⁷ *Id.* at 5; GroupMe Reply Comments at 5.

⁸ *Petition* at 5.

⁹ *Id.*

¹⁰ *Id.* at 7.

¹¹ *Id.* at 4.

¹² *Petition* at 18, *Modified Request* at 1.

requirement.”¹³ GroupMe contends that in the case of non-telemarketing or informational text messages prior express consent should be allowed via an intermediary because requiring a specific type of express consent is unnecessarily burdensome for purely informational calls and texts, which is inconsistent with the TCPA’s goals.¹⁴ Specifically, GroupMe requests that the Commission clarify that for non-telemarketing voice calls or text messages to wireless numbers, which can permissibly be made using an autodialer under the TCPA with the consumer’s oral prior express consent, the caller can rely on a representation from an intermediary that they have obtained the requisite consent from the consumer.¹⁵

5. The Commission issued a Public Notice seeking comment on GroupMe’s petition.¹⁶ Eighteen parties filed comments, including 10 individuals.¹⁷ Commenters, in general, are divided as to whether an intermediary may only convey consent that has been given by the consumer or may give consent on behalf of the consumer.

III. DISCUSSION

6. We grant GroupMe’s request to the extent indicated herein. Specifically, we clarify that a consumer’s prior express consent may be obtained through and conveyed by an intermediary, such as the organizer of a group using GroupMe’s service.

7. As a threshold matter, we find that the TCPA is ambiguous as to how a consumer’s consent to receive an autodialed or prerecorded non-emergency call should be obtained. While the TCPA plainly requires a caller to obtain such consent, both the text of the TCPA and its legislative history¹⁸ are silent on the method, including by whom, that must be done. Similarly, although the Commission has required written consent for telemarketing calls,¹⁹ neither the Commission’s implementing rules nor its orders require any specific method by which a caller must obtain such prior express consent for non-telemarketing calls to wireless phones.²⁰ We conclude therefore 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.

8. Because the TCPA is silent on how consumer consent should be obtained, we exercise our discretion to interpret the requirement by looking to the consumer protection policies and goals underlying the TCPA. Congress did not expect the TCPA to be a barrier to normal, expected, and desired business communications.²¹ To the extent that administrative texts GroupMe sends to group members

¹³ See *Petition* at 16 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1992*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1842 (2012) (*2012 TCPA Order*)).

¹⁴ See *Petition* at 16-17.

¹⁵ See *id.* at 18.

¹⁶ See *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from GroupMe, Inc.*, CG Docket No. 02-278, Public Notice, 27 FCC Rcd 8257 (2012).

¹⁷ See Appendix.

¹⁸ See, e.g., H.R. Rep. 102-317 1st Sess., 102nd Cong. (1991).

¹⁹ *2012 TCPA Order*, 27 FCC Rcd at 1838.

²⁰ As stated in 2012, the TCPA and our rules require “some form of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers” and “leave[] it to the caller to determine, when making an autodialed or prerecorded non-telemarketing call to a wireless number, whether to rely upon oral or written consent in complying with the statutory consent requirement.” *Id.* at 1842, para. 29.

²¹ See, e.g., H.R. Rep. 102-317 at 17 (1991) (“[t]he restriction . . . does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.”).

relate to using and canceling GroupMe's group texting service,²² we consider them to be normal business communications. We find it reasonable to conclude that such communications are expected and desired by consumers who have given their prior express consent to participate in a GroupMe group and to receive such texts.

9. We further conclude that allowing consent to be obtained and conveyed via intermediaries in this context facilitates these normal, expected, and desired business communications in a manner that preserves the intended protections of the TCPA. Because group organizers already have an established association with the called parties and are required by GroupMe's terms of service to have obtained prior express consent from all group members, the TCPA's goals of preventing unwanted calls of all types to wireless consumers and avoiding costs associated with those calls, as well as of protecting consumer privacy are not negatively impacted. Further, while we are not convinced by commenters who assert that obtaining consent directly from the recipient of a voice call or text message to a wireless telephone number is not possible in all instances, we agree that allowing intermediaries to obtain and convey consent in this case is efficient for a service such as GroupMe's without significantly diminishing the TCPA's consumer protection goals underlying the prior express consent requirement.²³ In addition, although GroupMe's service already is in operation, we have seen very few complaints out of presumably a very large number of texts sent by GroupMe.²⁴ Only one of those complaints is clearly about the issues raised by GroupMe's petition. One complainant alleged that the initial text from GroupMe did not identify the sender and that he received three subsequent texts almost immediately, which, although offering him the opportunity to opt out, were costly and an invasion of privacy.²⁵ This complaint highlights the importance of GroupMe identifying itself as the sender and ensuring that there is an effective opt-out mechanism. We will be vigilant about watching for complaints about both. We do not see a significant indication in our complaints, however, that suggests a significant number of consumers are receiving GroupMe messages to which they had not consented. Thus, we see nothing in the record or our present complaints that warrants requiring GroupMe to get consent directly from each called party, rather than indirectly through the group organizer, who conveys each party's consent, in order to meaningfully ensure the protections of the TCPA are extended to the recipients of these GroupMe messages.

10. Our clarifications here are consistent with the *1992 TCPA Order* and the Commission's 2008 *ACA Order*. The Commission stated in the *1992 TCPA Order* that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."²⁶ Based on this reasoning, the Commission found in the *ACA Order* that a consumer who provides his or her wireless telephone number on a credit application, absent instructions to the contrary, has given prior express consent to receive autodialed or prerecorded message calls "regarding the debt" at that number, including autodialed and prerecorded debt

²² When a new group is organized, GroupMe sends up to four text messages to each group member, informing each member of information about the group creator, the names of the individuals who comprise the group, the unique ten-digit number GroupMe assigned to the group, instructions on how to stop receiving text messages associated with the group, and instructions to download the free GroupMe app. *Petition* at 7.

²³ See CAA Comments at 2; Twilio Comments at 15-17; Nicor Reply Comments at 7-8.

²⁴ Between January 1, 2012 and December 31, 2013, the Commission received five complaints regarding GroupMe's service.

²⁵ See IC 12-T01200604-1.

²⁶ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8769, para. 31 (1992) (*1992 TCPA Order*).

collection calls from a debt collector acting on behalf of the creditor.²⁷ Thus, the Commission determined that a third-party debt collector could lawfully make an autodialed or prerecorded call “regarding the debt” to a wireless number that the consumer had provided to the creditor, which the creditor had then passed along to the debt collector.

11. The *ACA* scenario is analogous to the fact pattern presented by GroupMe. To the extent that a consumer, in the absence of instructions to the contrary, agrees to participate in a GroupMe group, agrees to receive associated calls and texts, and provides his or her wireless telephone number to the group organizer for that purpose, we interpret that as encompassing consent for GroupMe to send certain administrative texts that relate to the operation of that GroupMe group. Absent instructions to the contrary, the consumer, in doing so, gives permission to be called or texted at that number in connection with the GroupMe texting group, just as the consumer in *ACA* gave consent to be called regarding the debt. Under the facts presented by GroupMe, text messages from GroupMe to consumers associated with the specific group the consumer agreed to join fall within the scope of the permission that the consumer granted. Although the *ACA Order* did not formally address the legal question of whether consent can be obtained and conveyed via an intermediary, that *Order* did make clear that consent to be called at a number in conjunction with a transaction extends to a wide range of calls “regarding” that transaction, even in at least some cases where the calls were made by a third party.²⁸ While the scope of the consent must be determined upon the facts of each situation, we here find GroupMe’s administrative texts to be within the scope of the consent given by the consumer. Given that, we find it to be a reasonable extension of the reasoning of the *ACA Order* to interpret the TCPA to permit a text sender such as GroupMe to send such autodialed text messages based on the consent obtained and conveyed by an intermediary, with the caveat that if consent was not, in fact, obtained, the sender, such as GroupMe, remains liable.

12. We stress that our clarification in no way mitigates GroupMe’s duty (or that of any other caller), except in emergencies, to obtain the prior express consent of the called party before placing an autodialed or prerecorded call to that party’s wireless telephone number. The TCPA holds a caller liable for TCPA violations even when relying upon the assertion of an intermediary that the consumer has consented to the call. In this regard, we further clarify that where the consumer has agreed to participate in a GroupMe group, agreed to receive associated calls and texts, and provided his or her wireless telephone number to the group organizer for that purpose, the TCPA’s prior express consent requirement is satisfied with respect to both GroupMe and the group members regarding that particular group, but only regarding that particular group.

13. We note the concern of two commenters,²⁹ however, that GroupMe should make absolutely clear to group organizers that they must obtain the prior consent of each group member to receive texts from GroupMe. While that information currently is contained in GroupMe’s Terms and Conditions,³⁰ we encourage GroupMe to ensure that group organizers are aware of the need to obtain such

²⁷ See *Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 564-65, paras. 9-10 (2008) (*ACA Order*).

²⁸ *Id.* at 564, para. 9 (citing *1992 TCPA Order*, 7 FCC Rcd at 8769, para. 31; House Report, 102-317, 1st Sess., 102nd Cong. (1991) at 13 (“noting that in such instances the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications”)). The Commission also noted, however, that if a caller’s number is “captured” by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls. *1992 TCPA Order*, 7 FCC Rcd at 8769, para. 31.

²⁹ See Royslance Reply Comments at 2; Shields Comments at 3-5 and Reply Comments at 3-4.

³⁰ See GroupMe’s terms of service and “User Responsibilities” at <http://groupme.com/terms> (visited January 24, 2014).

prior express consent and that they are representing to GroupMe that they have in fact obtained it. We further remind GroupMe that it remains liable for TCPA violations through both Commission enforcement and the TCPA's private right of action if, in fact, group organizers do not obtain prior express consent as required by the TCPA.³¹ We therefore strongly urge GroupMe to take adequate steps to ensure full disclosure to group organizers and to ensure that group organizers do in fact obtain the requisite consent.

14. We find inapposite comments stating that there is well-developed body of law addressing intermediary consent, including in the context of the Fourth Amendment where consent to a police search may be obtained from a third party who possesses either actual or apparent authority.³² The comments provide no explanation of the relevance of Fourth Amendment principles to the TCPA's prior express consent requirement. To the extent that the comments are intended to suggest that we should interpret the TCPA as permitting someone other than the consumer, such as someone claiming actual or apparent authority, to provide the prior express consent of the consumer, we make no such finding.³³ GroupMe's petition does not raise that issue. We note, however, that the TCPA specifically requires the prior express consent of the consumer and reiterate that, under our ruling today, a group organizer may only convey the consumer's prior express consent.³⁴ We also disagree with commenters who argue that GroupMe is seeking a "get-out-of-jail-free card" for its "inherently risky" manner of gaining prior express consent based upon its Terms of Service agreement.³⁵ Instead, we confirm that a caller remains liable for TCPA violations when it relies upon the assertion of an intermediary that the consumer has given such prior express consent. We emphasize that the intermediary may only convey consent that has actually been provided by the consumer; **the intermediary cannot provide consent on behalf of the consumer.** As discussed above, neither the TCPA nor our implementing rules and orders require any specific method by which a caller must obtain such prior express consent for non-telemarketing calls to wireless phones, and we conclude that the TCPA does not prohibit a caller from obtaining consent through an intermediary. As such, we disagree with commenters who argue that GroupMe should be required to obtain consent directly from the consumer simply because it is possible for GroupMe to do so.³⁶

IV. CONCLUSION AND ORDERING CLAUSES

15. For the reasons stated above, IT IS ORDERED, pursuant to sections 4(i), 4(j) and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 227, and sections 1.2 and 64.1200 of the Commission's Rules, 47 C.F.R. §§ 1.2, 64.1200, that the Petition for Expedited

³¹ See 47 U.S.C. § 227(b)(3); *2003 TCPA Order*, 18 FCC Rcd at 14135, para. 204 (2003).

³² See U.S.C.C. Comments at 12 (citing *United States v. Cos*, 498 F.3d. 1115, 1124 (10th Cir. 2007)).

³³ Addressing this issue may require consideration of agency and guardianship principles or other matters that are well beyond the scope of GroupMe's petition in order to determine what may constitute a consumer's prior express consent. The Commission has not addressed this set of issues previously.

³⁴ To be clear, we do not foreclose the possibility that an agent or legal guardian, for example, could provide the consent of the consumer. The Petition, however, only raises the question of whether a friend or other associate of a consumer may obtain and convey to GroupMe the prior express consent that was actually given by the consumer.

³⁵ See Roylance Reply Comments at 2; Shields Comments at 3-5 and Reply Comments at 3-4.

³⁶ See Roylance Reply Comments at 2; Shields Comments at 3-5 and Reply Comments at 3-4. In the context of the conveyance of consent between the intermediary obtaining consent and the autodialer user, we expect that the intermediary and autodialer user will already have some established relationship, contractual or otherwise, which lays out the responsibilities of each/ provides assurance that actual consent has been obtained, and, if consent was not actually obtained, **provides the autodialer user legal recourse against the party who falsely claimed that consent had been given. To be clear, the existence or scope of recourse between these parties in no way affects the liability of the autodialer user to the consumer.**

Declaratory Ruling filed by GroupMe on March 1, 2012 IS GRANTED to the extent indicated herein and is otherwise DISMISSED.

16. IT IS FURTHER ORDERED that this Declaratory Ruling shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

List of Commenters

<u>Commenters</u>	<u>Abbreviation</u>
Robert Biggerstaff	Biggerstaff
Cargo Airlines Association	CAA
James Christopher	Christopher
Communications Innovators	CI
Consumer Litigation Group	CLG
Cate Eranthe	Eranthe
Brian Glauser	Glauser
GroupMe Inc./Skype Communications S.A.R.L GroupMe	GroupMe
Diana Mey	Mey
Joseph Mullaney	Mullaney
Portfolio Recovery Associates	PRA
Gerald Roylance	Roylance
Joe Shields	Shields
Jimmy A. Sutton	Sutton
Twilio, Inc.	Twilio
U.S. Chamber of Commerce	U.S.C.C.
Michael C. Worsham	Worsham
<u>Reply Commenters</u>	<u>Abbreviation</u>
American Bankers Association and Consumer Bankers Association	ABA/CBA
GroupMe Inc./Skype Communications S.A.R.L GroupMe	GroupMe
Nicor Energy Services Company	Nicor
Gerald Roylance	Roylance

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

- Re: *Cargo Airline Association Petition for Expedited Declaratory Ruling; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; CG Docket No. 02-278
- Re: *GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; CG Docket No. 02-278

I concur with these two items because of the good that they accomplish. They will provide much needed clarity in an area where uncertainty can inhibit legitimate businesses from offering consumer-friendly applications and services, and can breed litigation. They will also directly benefit consumers by enabling them to receive package delivery notifications they want and expect, and by ensuring that they can take advantage of a service that helps connect groups of friends, families, and colleagues.

My only hesitation is on the applicability of the TCPA to text messages. The TCPA was enacted in 1991 – before the first text message was ever sent. I was not at the Commission when it decided that the TCPA does apply to text messages, and I may have approached it differently. It would have been better if the Commission had gone back to Congress for clear guidance on the issue. I will look for opportunities, like the ones presented here, to ensure that our rules do not stand in the way of innovation and certainty that benefits consumers and businesses alike.