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

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| In the Matter of | ) | |
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| Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 | ) | CG Docket 02-278 |
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| GroupMe, Inc. Petition for Declaratory Ruling | ) | |
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# COMMENTS OF THE U.S. CHAMBER OF COMMERCE

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## Executive Summary

The U.S. Chamber of Commerce supports both aspects of the GroupMe Petition because the requested declaratory ruling will bring necessary and valuable clarity to the Telephone Consumer Protection Act ("TCPA"). The ambiguity both with respect to the meaning of "capacity" and with regards to intermediary consent stifles innovation, deprives consumers of timely access to valuable non-marketing information, and creates a loophole for plaintiffs' lawyers to file frivolous class-action lawsuits seeking millions of dollars in damages. The Commission should bring clarity to the statute in an effort to reverse these unintended results.

In bringing clarity to the TCPA, the Commission should explain that "capacity" means only "present capacity," and, therefore, the TCPA's provisions relating to "automatic telephone dialing systems" do not govern equipment which merely has the theoretical capacity, after additional hardware or software modifications, to store or produce, and then dial, randomly or sequentially generated numbers. Numerous court decisions and real world examples support this interpretation of "capacity," both as an ordinary language term and as it is used in the context of the TCPA. Furthermore, this reading of "capacity" is more consistent with the TCPA's legislative history and purpose than the unbounded interpretation that plaintiffs' lawyers have pressed in the courts. Their contrary reading leads to nonsensical results, such as subjecting even manually dialed calls and consumer-to-consumer calls using smart-phones to the TCPA's regulatory scheme.

The Commission should also clarify that consent to a call otherwise governed by the TCPA can be provided by a third-party intermediary. The well-developed body of law addressing intermediary consent to a law enforcement search provides a ready framework for so concluding. Here, there is little incentive for an intermediary to falsely give consent, because GroupMe's requested ruling is limited to informational, non-telemarketing calls. These calls,

including product recall and safety information, flight and service interruption updates, data breach notifications, and other vital consumer notifications are currently restricted under certain interpretations of the TCPA. In order to ensure that consumers can receive this valuable information in a timely manner, and to stem the onslaught of TCPA litigation, the Commission should grant the petition for declaratory ruling.

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The U.S. Chamber of Commerce ("Chamber")[1] respectfully submits the following comments in response to the Public Notice, issued July 24, 2012, requesting comment on the Petition for Declaratory Ruling filed by GroupMe Inc./Skype Communications S.A.R.L. (the "GroupMe Petition") in the above-referenced docket. The Public Notice requests comment on two issues relating to the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, identified in the GroupMe Petition: (1) the meaning of "capacity" in the definition of "automatic telephone dialing system," and (2) whether an intermediary's consent is sufficient for purposes of the TCPA's rules governing non-telemarketing informational calls made using an automated telephone dialing system. For the reasons described below, the Chamber supports GroupMe's request for a declaratory ruling clarifying that "capacity" for purposes of the TCPA means "present capacity," and that, as a result, the TCPA does not prohibit the use of innovative technologies that might, only if modified, also be able to store or produce, and then dial, telephone numbers using a random or sequential number generator. The Chamber also supports GroupMe's request for clarification that consent for non-telemarketing informational calls may be provided by an intermediary.

## I. BACKGROUND

### A. History of the TCPA

#### 1. Impetus for Legislation and Enactment.

Congress enacted the TCPA in 1991 in order to curtail the onslaught of telemarketing calls then invading the privacy of American homes. The Senate Report on the TCPA noted that "[t]he use of automated equipment to engage in telemarketing [wa]s generating an increasing

[1] The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

number of consumer complaints. . . . The growth of consumer complaints about these calls has two sources: the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective."[2]

The Senate Report noted a number of problems associated with this automated equipment. In general, the equipment's design gave it the potential to automatically dial numbers in ways that could undermine public safety. For instance, the legislative history discusses automated calls to emergency numbers.[3] More broadly, automated-calling technology at the time often dialed phone numbers "in sequence, thereby tying up all the lines of a business."[4] In addition, some automated calls did not release the line immediately or did not respond to human commands.[5]

To address these concerns, the TCPA therefore set out rules for "automatic telephone dialing system[s]," defined 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."[6] Absent an emergency or prior consent, the TCPA prohibits calls using an automatic telephone dialing system:

> (i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);
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> (ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

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[2] S. Rep. 102-178, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969 (1991).
[3] *Id.*
[4] *Id.*; *see also* H.R. Rep. No. 102-317, at 10 (1991) ("Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers. . . . This capability makes these systems not only intrusive, but, in an emergency, potentially dangerous as well.").
[5] 1991 U.S.C.C.A.N. at 1969.
[6] 47 U.S.C. § 227(a)(1).

> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.[7]

In short, after explicitly finding that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy [or] . . . a risk to public safety," Congress set about "[b]anning such automated or prerecorded telephone calls to the home,"[8] as well as to other types of numbers, including cellular telephones.

2. The Commission's Revised Interpretation of "Automatic Telephone Dialing System."

In its initial rules implementing the TCPA, the Commission determined that calls from an automatic telephone dialing system were calls "dialed using a random or sequential number generator."[9] In 2003, however, the Commission revised its interpretation of an "automatic telephone dialing system," with the stated goal of taking into account technological changes in telemarketing practices.[10] Increasingly, telemarketing calls were made from a list of telephone numbers, rather than randomly or sequentially.

To address concerns about telemarketers' use of new technologies to circumvent the requirements of the TCPA, the Commission asserted that "in order to be considered an 'automatic telephone dialing system,' the equipment need only have the '***capacity*** to store or produce telephone numbers.'"[11]

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[7] 47 U.S.C. § 227(b)(1)(A).
[8] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, 2394 (1991) (congressional findings).
[9] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 F.C.C. Rcd. 8752 ¶ 39 (1992); *accord In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 F.C.C. Rcd. 12391 ¶ 19 (1995).
[10] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C. Rcd. 14014 ¶ 132 (2003) ("*2003 TCPA Order*") (noting "the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective").
[11] *Id.*

While the Commission's decision included equipment with the "capacity" to store or produce, and to dial, telephone numbers randomly or sequentially, the Commission's *2003 TCPA Order* did not define the term "capacity." As described below, modern telecommunications technologies are increasingly running up against a reading of the *2003 TCPA Order* under which ***any*** equipment, with subsequent hardware or software modifications, could eventually include the "capacity to store or produce telephone numbers," and thus qualify as an "automatic telephone dialing system."

3. The TCPA's Current Impact

The ambiguity resulting from the Commission's 2003 Order now presents the Commission with the opportunity to provide clarity for American businesses and consumers. Without such clarity, businesses are deterred from providing valuable information to consumers in a timely manner. Informational calls such as product recall and safety information, flight and service interruption updates, data breach notifications, and more, are increasingly being challenged by plaintiffs' lawyers alleging millions of dollars in class action damages. More specifically, the current ambiguity in the Commission's TCPA rules has triggered an onslaught of litigation under the TCPA's private right of action. Between 2008 and 2011, federal lawsuits brought under the TCPA increased by more than 500 percent. The majority of TCPA federal lawsuits ever filed were filed after January 1, 2010. The number of federal ***class-action*** TCPA lawsuits – which seek millions of dollar in aggregate damages – has increased ten-fold since 2008.

This increase in litigation is being driven by opportunistic plaintiffs' firms seeking attorneys' fees, not by aggrieved consumers. Just a few law firms account for the majority of TCPA class actions filed. Judges have criticized one such firm for requesting large fees upon

settlement of a case, despite "boilerplate complaint[s] that Plaintiff's counsel need only amend slightly in each case it files alleging a TCPA violation."[12]

In tension with the purposes identified in the legislative history of the TCPA, the majority of recent TCPA cases do not address telemarketing calls. Rather, for instance, plaintiffs' lawyers are bringing suit against companies that engage in non-marketing text-messaging communications with their consumers. Over one dozen federal class actions have been filed against companies such as Facebook, Twitter, the NFL, and American Express, alleging that their practice of sending a confirmatory message that a consumer has opted out of receiving additional communications violates the TCPA. The suits identified in the GroupMe Petition provide further examples of such opportunistic litigation. This litigation inhibits non-marketing communications important to consumers.

## II. DISCUSSION

The GroupMe Petition requests that the Commission "adopt a definition of ['automatic telephone dialing system'] that excludes technologies with the theoretical capacity, but not the actual capability, to autodial random or sequential numbers."[13] In addition, the petition requests that the Commission "rule that for non-telemarketing, informational calls or text messages to wireless numbers . . . , the caller can rely on an intermediary obtaining consent from the called party" for purposes of complying with the TCPA.[14] The Chamber fully supports GroupMe's request that the Commission provide clarity on these matters.

[12] *See Lo v. Oxnard European Motors, LLC*, No. 11-cv-1009, 2011 WL 6300050, at *7 n.3 (S.D. Cal. Dec. 15, 2011) (collecting cases).
[13] GroupMe Pet., at ii.
[14] *Id.* at 19.

### A. The Commission Should Clarify that "Capacity" Means Present Capacity.

"As with any question of statutory interpretation, [the Commission's] analysis [should] begin . . . with the plain language of the statute."[15] As the Commission has acknowledged, "[i]f the intent of Congress is clear, that is the end of the matter; for . . . the agency . . . must give effect to the unambiguously expressed intent of Congress."[16] The Commission "must presume that a legislature says in a statute what it means and means in a statute what it says there."[17] Here, the TCPA, by its language, only applies to "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." This language plainly excludes equipment, like GroupMe's, that does not store or produce, and then dial, telephone numbers randomly or sequentially.

While no court appears to have addressed the precise interpretive question presented here,[18] the Fourth Circuit has examined a closely analogous statute. Until recently, federal trademark law defined "dilution" as "the lessening of the ***capacity*** of a famous mark to identify and distinguish goods or services."[19] Faced with the question of whether "mere threatened, future economic harm" from a competing mark constituted "dilution," the Fourth Circuit concluded that the term "capacity" meant merely "present capacity" rather than "future capacity," the same interpretation GroupMe proffers for the TCPA.[20] In doing so, the Fourth Circuit explicitly

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[15] *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009).

[16] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also In re Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act Of 2004 Reciprocal Bargaining Obligation*, 20 F.C.C. Rcd. 10339, ¶ 27 (2005) ("Here, we believe that the statute is clear on its face and we must give effect to its plain meaning." (citing *Chevron*, 467 U.S. at 842)).

[17] *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

[18] In *Ibey v. Taco Bell Corp.*, No. 12-cv-583, 2012 WL 2401972 (S.D. Cal. Jun 18, 2012), the court did conclude that an allegation that a text message was sent "without human intervention" was insufficient to allege that an "automatic telephone dialing system" was used. *Id.* at *3. There, the complaint "neither specifie[d] that the device [used to send the confirmatory text message] has the capacity to store or produce telephone numbers nor that the system use[d] a random or sequential number genera[tor] to text message the numbers." *Id.*

[19] 15 U.S.C. § 1127 (2006) (emphasis added).

[20] *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 46 (4th Cir. 1999), *superseded by statute*, Pub. L. No. 109-312, 120 Stat. 1730 (2006).

considered, and rejected, the contrary claim, which asserted that "'[c]apacity,' the argument runs, necessarily imports futurity; it means in this context the ability of a mark continuously over future time to 'identify and distinguish,' even if it has not yet suffered any lessening of that ability."[21] The court thought such an argument was "belied both by the word's ordinary intrinsic meaning and by its use in context."[22] Indeed, the Supreme Court similarly limited the trademark dilution statute, albeit without discussion of the term "capacity,"[23] and Congress subsequently amended the statute to avoid use of the word "capacity" and explicitly capture the concept of possible future harm.[24]

The same analysis applies to the TCPA's use of the term "capacity." First, the term's "ordinary intrinsic meaning" only encompasses "present capacity." Examples are legion:

- "Stadium capacity" suggests the current number of seats a stadium can hold.
- "Excess capacity" means currently available but unused resources.[25]
- "Mental capacity" means a current ability to understand the meaning of events.[26]
- "Fiduciary capacity" means a current obligation to act in another's best interest.[27]
- "Operating capacity" means the current maximum amount a facility can accommodate.[28]
- "Carrying capacity" means a location's current tolerance for a particular activity.[29]

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[21] *Id.*
[22] *Id.*
[23] *See Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (holding that "actual dilution" rather than a "likelihood of dilution" was required).
[24] *See* Pub. L. No. 109-312, 120 Stat. 1730 (2006) (permitting suit against a use "that is likely to cause dilution").
[25] *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1441 (9th Cir. 1995) ("Excess capacity is the capacity of the rivals in a market to produce more than the market demands at a competitive price.").
[26] *See Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.")
[27] *See, e.g.*, *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2328 (2011) (distinguishing between "personal" and "fiduciary" capacity).
[28] *In re Mirant Corp.*, 332 B.R. 139, 148 n.13 (Bankr. N.D. Tex. 2005).
[29] *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1028 (9th Cir. 2008) (discussing National Wild and Scenic Rivers System; Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. 39,454 (Sept. 7, 1982)).

None of these concepts would make sense if "capacity" were meant to include future modifications or adjustments. "Stadium," "operating," and "carrying" capacities would become infinite. "Excess capacity" would become meaningless. No individual could ever be held to lack "mental capacity" to stand trial or enter into a contract. One could never step outside one's "fiduciary capacity" once such a position was even contemplated. As discussed in more detail below, *see infra* Section II.D, similar problems arise out of an unrestricted interpretation of the use of "capacity" within the TCPA.

Turning to the use of the term in context, the statute points firmly to a "present capacity" reading through its use of the present tense verb "has." The TCPA does not target equipment which "will have the capacity" or "could have the capacity" once additional modifications are made. As the Supreme Court has made clear, "Congress' use of a verb tense is significant in construing statutes."[30] Indeed, the Fifth Circuit has found significant another statute's use of the present-tense "has." In *In re Ran*, the court interpreted a provision examining whether a taxpayer "has an establishment" in a foreign country. Rejecting a claim that a taxpayer could later create an establishment and thereby trigger the statute, the court held that the use of the present tense verb "has" was controlling.[31] The same analysis applies to the TCPA.

Finally, the Commission should clarify that "capacity" means "present capacity" in order to follow the interpretive canon against surplusage. The TCPA sets forth two requirements for an "automatic telephone dialing system" – the capacity to store or produce random/sequential numbers, ***and*** the capacity "to dial ***such*** numbers," meaning randomly or sequentially generated numbers. If future capacity is included, the second prong would be rendered surplusage. Since

[30] *United States v. Wilson*, 503 U.S. 329, 333 (1992).

[31] *In re Ran*, 607 F.3d 1017, 1027 (5th Cir. 2010) ("The use of the present tense implies that the court's establishment analysis should focus on whether the debtor has an establishment in the foreign country where the bankruptcy is pending at the time the foreign representative files the petition for recognition under Chapter 15.").

the relevant TCPA provisions only restrict calls, by definition the equipment has the capacity to dial ***some*** numbers. But the TCPA's plain language requires more – a capacity to dial the randomly or sequentially generated or stored numbers. Only by clarifying that "capacity" means "present capacity" can the Commission avoid rendering this second prong superfluous, as all telephone equipment could dial additional numbers with sufficient future modifications. "It is [the Commission's] duty to give effect, if possible, to every clause and word of a statute."[32] The Commission should be "especially unwilling to" treat a clause as surplusage "when the term occupies so pivotal a place in the statutory scheme."[33]

Accordingly, the Commission should clarify that "capacity" under the TCPA means "present capacity." Not only does the plain meaning of "capacity" support such an interpretation, but its use in the context of the TCPA supports such a result. As a consequence of this specific evidence, the TCPA is a statute for which the context implies a restriction to the present tense, rather than the inclusion of future possibilities as well.[34] Because the plain language of the statute supports GroupMe's petition, the Commission should grant the request for a declaratory ruling.

### B. A Broad Interpretation of "Capacity" Would Conflict with the TCPA's Purpose and Legislative History.

Even if the TCPA's plain language was ambiguous, further support for GroupMe's requested relief is found in the purpose and history of the statute. In passing the TCPA, Congress wanted to "target . . . calls that are the source of the tremendous amount of consumer complaints

[32] *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).
[33] *Id.*
[34] *See* 1 U.S.C. § 1 (noting that "words used in the present tense include the future as well as the present" "unless the context indicates otherwise"); *see also Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 776 (9th Cir. 2008) ("[O]n its own terms the Dictionary Act . . . looks first to 'context,' and only if the 'context' leaves the meaning open to interpretation does the default provision come into play.").

– telemarketing calls placed to the home."[35] Absent clarification regarding the scope of the term "capacity," the TCPA's reach expands far beyond this goal.

Most notably, the broader interpretation of "capacity" would inhibit valuable calls that consumers wish to receive. This is in large part because the TCPA's rules generally prohibit calls to wireless numbers using an automatic telephone dialing system. But, "wireless services offer access to information that consumers find highly desirable and thus [the Commission] do[es] not want to discourage purely informational messages."[36] Yet, the broad definition of "capacity" that plaintiffs' lawyers advocate would do just that – prohibit businesses from using cost-effective technologies to provide consumers with "highly desirable" non-marketing information in a timely manner.

The danger in this broader interpretation is readily apparent when one considers the quintessential call outside the scope of the TCPA: a manually dialed call to a specific, pre-determined telephone number. While obviously not intended to be covered by the TCPA,[37] such a call may nonetheless be regulated if the Commission adopted a "future capacity" interpretation. Opportunistic plaintiffs' lawyers have asserted that manually dialing a call is no defense to a TCPA class action.[38] For instance, in *Mudgett*, plaintiffs argued that the defendant's "phone and computer systems are interconnected, and that this interconnected system qualifies as an automatic telephone dialing system within the meaning of the TCPA. Therefore, argues Mudgett,

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[35] 137 Cong. Rec. 18123 (daily ed. July 11, 1991) (statement of Sen. Hollings); *see also* S. Rep. 102-178, 1991 U.S.C.C.A.N. at 1969 ("The use of automated equipment to engage in telemarketing [wa]s generating an increasing number of consumer complaints.").

[36] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 F.C.C. Rcd. 1830 (2012) ("*2012 TCPA Order*"), ¶ 20.

[37] *See, e.g.*, 105 Stat. at 2395 (targeting "automated or prerecorded calls [that] are a nuisance and an invasion of privacy"); 137 Cong. Rec. 30818 (1991) ("[T]his legislation does not cover calls made by live persons. The intention of this bill is to deal directly with computerized calls."); *see also In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 20 F.C.C. Rcd. 3788, ¶ 45 n.137 (2005) ("[C]alls that are dialed manually and connect to live operators could be placed to wireless numbers.").

[38] *See Mudgett v. Navy Fed. Credit Union*, No. 11-cv-039, 2012 WL 870758 (E.D. Wisc. Mar. 13, 2012); *Dobbin v. Wells Fargo Auto Fin., Inc.*, No. 10-cv-268, Dkt. No. 134 (N.D. Ill. June 14, 2011).

[the defendant] is liable for making calls to her cell phone with an autodialer even if it is true that [the callers] manually dialed their phones."[39] In other words, plaintiffs' attorneys are now attempting to exploit ambiguity in the Commission's rules to argue that even manually dialed calls may subject a caller to TCPA liability. The Commission should clarify that manually dialed calls are not within the scope of the TCPA.

Otherwise, rather than regulate "[t]he use of automated equipment to engage in telemarketing," the TCPA would become, as many plaintiffs' lawyers apparently believe it already is, a vehicle for litigation regarding ***any*** call, whether such call is automated or dialed manually. As GroupMe highlights in its petition, "even a manually-dialed voice call to an *intended* number could be construed to violate the TCPA if the called party had not consented in advance to receive it, as long as the originating device had the 'capacity' to place automated calls."[40] The original purpose of the TCPA – restricting *autodialed* calls to random or sequential numbers – is served through regulation of equipment with the "present capacity" to place calls randomly or sequentially. Conversely, expanding the scope of the TCPA to include manually dialed calls would obliterate the boundaries established by the statute. The Commission's clarification of the term capacity would help confirm the scope of the TCPA.

### C. The TCPA's History and Purpose Supports Consent from Intermediaries.

In addition to showing that the GroupMe Petition's interpretation of "capacity" is correct, the history and purpose of the TCPA support the petition's request for clarification regarding consent through an intermediary for non-marketing informational calls. As discussed above, the TCPA provides for an exception to its ban on calls to certain numbers using an "automatic

[39] *Mudgett*, 2012 WL 870758, at *1; *see also Dobbin*, Dkt. No. 134, at 7 ("[P]laintiffs assert that the TCPA prohibits even manually dialed calls to cell phones made 'using' 'equipment which has the capacity' to autodial.").
[40] GroupMe Pet., at 11.

telephone dialing system" for calls "made with the prior express consent of the called party."[41] The Commission has well-established authority to interpret and define acceptable methods of consent.[42]

Courts have long recognized a third party's ability to consent on behalf of another. Most commonly, the situation arises in the context of a Fourth Amendment search. There, the law is clear that "[c]onsent may be obtained . . . from a third party who possesses either actual authority or apparent authority to consent to the search."[43] Of course, the question of actual or apparent authority is fact-intensive, asking whether "the facts available to the officer at the moment [would] warrant a man of reasonable caution in the belief that the consenting party had authority over the premises."[44] Here, a similar analysis of the facts and circumstances surrounding intermediary consent supports GroupMe's request for a declaratory ruling.

GroupMe only requests a declaratory ruling covering "informational, non-telemarketing" calls. These are calls that "consumers find highly desirable" and that Commission has expressed a desire not to "unnecessarily restrict."[45] For such calls, GroupMe requests that callers be allowed to "rely on a representation from an intermediary that they have obtained the requisite consent from the called party."[46] The circumstances under which consent is given offer further indicia of reliability and support GroupMe's requested declaratory ruling. Initially, there is little incentive for an individual to forge another's consent to receive these calls, because, as non-telemarketing informational calls, the opportunity for monetary gain is limited. Furthermore,

[41] 47 U.S.C. § 227(b)(1)(A).
[42] *See 2012 TCPA Order* ¶ 20.
[43] *United States v. Cos*, 498 F.3d 1115, 1124 (10th Cir. 2007).
[44] *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (internal quotation marks omitted).
[45] *2012 TCPA Order*, ¶¶ 21, 29.
[46] GroupMe Pet., at 18.

GroupMe's structure offers little opportunity for abuse, limiting group-size and providing simple methods for opting out of an intermediary's consent.

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.

As the GroupMe Petition outlines, the Commission has already recognized that different treatment regarding the provision of consent is necessary for informational calls. In its *2012 TCPA Order*, the Commission imposed written consent requirements for telemarketing calls, while retaining oral consent for informational calls. The GroupMe Petition merely asks that the Commission extend this reasonable approach to also permit consent through an intermediary for informational calls. The history and purpose of the TCPA support such a request.

**D. Clarification Regarding the Scope of the TCPA Is Urgently Needed.**

American businesses, as well as consumers, currently face uncertainty regarding which calls are governed by the TCPA. The GroupMe Petition, and the technology described therein, provide a ready example. But under the possible "future capacity" reading of the TCPA and its implementing regulations, any number of everyday consumer electronics would also fall within the statute's ambit. A computer, when paired with certain hardware (a modem for example) immediately gains "the capacity to store or produce numbers and dial those numbers." Modern

smart-phones need only have one of several widely available applications installed in order to gain the *capacity* to store and automatically dial numbers.[47] As a result, any misdialed or mistakenly placed call from a smart-phone to another wireless phone would arguably be a TCPA violation (and subject to the statutory damages provision of up to $1500 per call).

Furthermore, because such an interpretation would ask only whether the device has the future capacity to gain such functionality, it does not matter whether this software is presently installed or not, or would *ever* be installed. The mere theoretical existence of the software and the possibility of installation would be sufficient to render many mobile phones automatic telephone dialing systems. Even ***manually dialed*** calls using a smart-phone or other technologically capable telecommunications device would arguably be subject to the TCPA. Businesses, concerned about TCPA liability, need the Commission's guidance in order to safely contact consumers with important non-marketing information.

That guidance is all the more urgently needed due to the growing number of frivolous TCPA actions currently being filed around the country. Plaintiffs' lawyers, seeking ever-growing fee awards, have seized on the ambiguity currently present in the Commission's rules. As described above, these lawyers argue that even manually dialed calls are subject to TCPA liability, and that confirmatory text messages ought to result in $1500 of liability per text message. The specter of a potentially annihilating damages award is deterring innovation and valuable non-marketing communication with consumers by legitimate American businesses, including product recall and safety information, flight and service interruption updates, data breach notifications, as well as other vital consumer information.

[47] *See, e.g.*, iDialUDrive, Apple App Store, http://itunes.apple.com/us/app/idialudrive/id288947187?mt=8.

The Commission has an opportunity to clarify its regulations by issuing the requested declaratory ruling. Not only is such a ruling supported by the text and history of the TCPA, but it also makes good policy sense. Clarifying that "capacity" means only "present capacity" will avoid the absurd results described above, such as TCPA liability for any call placed with a smart-phone. Permitting consent via an intermediary will allow consumers to receive beneficial informational messages and calls. In both circumstances, the opportunity for frivolous litigation regarding purported TCPA violations will be reduced.

## III. CONCLUSION

For the reasons described above, the Chamber supports the GroupMe Petition and its requested relief. A commonsense interpretation of the phrase "capacity" that only encompasses technologies which have the present capacity to store or produce, and to dial, telephone numbers randomly or sequentially comports with previous judicial decisions interpreting similar statutes as well as the legislative history of the TCPA. Moreover, such an interpretation serves important policy goals, including promoting innovative communications technologies, incentivizing the timely provision of valuable non-marketing notifications, and stemming the explosion of frivolous class actions brought against legitimate American businesses. An interpretation of the TCPA permitting third-party consent to calls further serves these same interests. Therefore, the Commission should issue the requested declaratory ruling.

DATED: August 30, 2012

Respectfully submitted,

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