

# FCC Issues TCPA Rule Clarifications Related to Package Delivery Notifications and Text-Based Social Networking Applications

[Lauri A. Mazzuchetti](#)

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The Federal Communications Commission (the “Commission” or “FCC”) seems to be opening the spigot a bit on its extensive backlog of Telephone Consumer Protect Act (“TCPA”) petitions. On March 27, 2014, the Commission granted, in part, two petitions for declaratory ruling from the Cargo Airline Association (the “[CAA Order](#)”) and GroupMe, Inc./Skype Communications S.A.R.L. (the “[GroupMe Order](#)”) seeking clarification with respect to the Commission’s TCPA rules. In the CAA Order, the Commission granted an exemption that allows package delivery companies to alert wireless consumers about their packages subject to a set of conditions designed to protect the consumers’ privacy. In the GroupMe Order, the Commission clarified that text-based social networks may send administrative text messages confirming consumers’ interest in joining text message groups, without violating the TCPA, when consumers give express consent to participate in the group, even when that consent is conveyed to the text-based social network by an intermediary (e.g., a group leader).

These Orders, together with the Commission’s recent [SoundBite Communications Order](#), provide much needed guidance to companies sending informational text messages to consumers’ wireless numbers. Nevertheless, the Commission has yet to rule on two dozen more petitions seeking TCPA-related clarifications in the wake of the Commission’s [2012 TCPA Order](#) and an explosion in TCPA class action litigation. While we don’t expect a quick resolution of all outstanding issues, the Commission’s rulings last week provide some hope that the Commission has begun to focus on its backlog of TCPA petitions.

## TCPA

As relevant to the CAA and GroupMe Orders, the TCPA and the Commission’s rules prohibit an individual or entity from using an automatic telephone dialing system (“ATDS” or “autodialer”) or prerecorded or artificial message to transmit a non-emergency phone call or text message to a wireless number without the prior express consent of the called party. While the TCPA rules require prior express *written* consent for autodialed and prerecorded telemarketing calls, non-telemarketing informational calls only require prior express consent, which may be oral. Moreover, the TCPA authorizes the Commission, “by rule or order,” to exempt from the restriction on autodialed and prerecorded calls and messages to wireless telephone numbers such calls and messages “that are not charged to the called party, subject to such conditions as the Commission may prescribe as

necessary in the interest of the privacy rights the provision is intended to protect.” *See* 47 U.S.C. § 227(b)(2)(C). Until last week, the Commission had not exercised its exemption authority under Section 227(b)(2)(C).

## The CAA Order

In its petition, CAA requested clarification that for non-telemarketing, informational calls related to package delivery sent via voice or text messages to wireless numbers, the package delivery company can rely upon a representation from a package sender that it has obtained the requisite consent from the consumer. Alternatively, CAA requested that the Commission declare that package delivery notifications are exempt from the TCPA’s restrictions on autodialed and prerecorded calls and messages to wireless telephone numbers. In its alternative request, CAA clarified that it was requesting an exemption for non-telemarketing wireless package delivery notifications that are not charged to the called party. CAA members ensure that the called party is not charged utilizing several options available to send free-to-end-user text messages to wireless telephone numbers that work with all four nationwide wireless carriers’ networks. In connection with its petition, CAA proposed to assume a set of seven conditions designed to protect consumers’ privacy interests.

In the CAA Order, the Commission dismissed CAA’s request for clarification with respect to third-party consent and granted CAA’s request for an exemption, adopting the seven proposed conditions with slight modifications. This new exemption will allow package delivery companies to alert wireless consumers about their packages, provided that: (1) consumers are not charged and may easily opt out of future messages if they wish, and (2) the delivery company meets the following conditions:

1. a notification must be sent, if at all, only to the telephone number for the package recipient;
2. notifications must identify the name of the delivery company and include contact information for the delivery company;
3. notifications must not include any telemarketing solicitation or advertising content;
4. voice call and text message notifications must be concise, generally one minute or less in length for voice calls and one message of 160 characters or less in length for text messages;
5. delivery companies shall send only one notification (whether by voice call or text message) per package, except that one additional notification may be sent to a consumer for each of the following two attempts to obtain the recipient’s signature when the signatory was not available to sign for the package on the previous delivery attempt;
6. delivery companies relying on this exemption must offer parties the ability to opt-out of receiving future delivery notification calls and messages and must honor the opt-out requests within a reasonable time from the date such request is made, not to exceed thirty days; and
7. each notification must include information on how to opt out of future delivery notifications; voice call notifications that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make an opt-out request prior to terminating the call; voice call notifications that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt-out of future package delivery notifications; text notifications must include the ability for the recipient to opt-out by replying “STOP.”

In adopting these conditions, the Commission noted that the conditions are message-specific, and that a delivery company may not claim this exemption for any text that is charged to the called party or fails to meet the conditions outlined in the CAA Order. Moreover, the Commission emphasized its authority to initiate enforcement actions against delivery companies that send non-consensual notifications to wireless numbers that are charged to the called party or do not meet the seven conditions. Clients intending to send delivery notifications to recipient's wireless numbers should closely track the Commission's stringent conditions, including the notification and opt-out requirements for all such messages. Additionally, clients must ensure that the recipient is not charged for the call, employing one of the many third-party solutions for free-to-end-user messages.

## The GroupMe Order

GroupMe similarly requested clarification related to the consent provisions of the TCPA. GroupMe is a free social networking application that allows individuals to create and join text-based groups to communicate with one another. To comply with TCPA obligations, GroupMe's terms of service require group creators to obtain consent from other group members to receive group text messages. Moreover, when an individual joins a GroupMe group, he or she receives a series of automatic administrative text messages from GroupMe about the group and the service.

In its petition, GroupMe requested that the Commission clarify that for non-telemarketing voice calls or text messages to wireless numbers, the caller can rely on a representation from an intermediary (e.g., a group creator) that he or she has obtained the requisite consent from the consumer to receive such calls or text messages.

In the GroupMe Order, the Commission ruled that a consumer's prior express consent may be obtained through and conveyed by an intermediary. Further, the Commission clarified that, with respect to a particular GroupMe group, the TCPA's prior express consent requirement is satisfied as to both GroupMe and the group members where each group member has:

- agreed to participate in a GroupMe group;
- agreed to receive associated calls and texts; and
- provided his or her wireless phone number to the group organizer for that purpose.

Finally, the Commission highlighted that GroupMe should make absolutely clear to group creators that they must obtain the prior consent of each group member to receive texts from GroupMe, and reminded GroupMe that it remains liable for TCPA violations through both Commission enforcement and the TCPA's private right of action.

Clients with text-based social messaging applications that allow an intermediary to obtain consumer consent for TCPA issues should make an extra effort to notify those intermediaries about their obligation to obtain the prior express consent of each group member. In so doing, clients should ensure that the intermediaries meet the three consent requirements set forth in the GroupMe Order. In this way, companies can mitigate potential TCPA litigation and enforcement risks.

## Commissioner O'Rielly's Concurrence

In a concurring statement that accompanied both the CAA and GroupMe Orders, FCC Commissioner Michael O'Rielly noted his support of the two petitions because of their consumer benefits, but

expressed “hesitation” with respect to applying the TCPA to text messages. He argued that because the TCPA was enacted in 1991 (before the first text message was transmitted), the Commission should have sought clear guidance from Congress before ruling that text messages are covered under the TCPA.

### 3 Down, 24 to Go...

The CAA and GroupMe Orders provide a welcome clarification on two discrete issues in the TCPA landscape. However, the Commission still has 24 outstanding TCPA petitions from a wide range of entities on a series of complicated issues. It is unclear how quickly the FCC will resolve these remaining issues, leaving individuals and companies vulnerable to costly class-action lawsuits and Commission enforcement. Nevertheless, these two orders, alongside the recent SoundBite Order addressing confirmatory opt-out messages, demonstrate that the Commission is attempting to address the long-standing regulatory uncertainty surrounding its telemarketing rules.

Should you have any questions about these recent actions or the Commission’s telemarketing regulations, Kelley Drye’s [Communications](#) and [TCPA Defense](#) teams stand ready to assist you.