

December 11, 2017

**Via electronic submission**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

**RE: ContextMedia, Inc. d/b/a Outcome Health Petition for Clarification or Declaratory Ruling Under the Telephone Consumer Protection Act of 1991, *Public Notice*, DA-17-1054 CG Docket No. 02-278**

Dear Ms. Dortch:

The American Bankers Association,<sup>1</sup> the Consumer Bankers Association,<sup>2</sup> and the Financial Services Roundtable<sup>3</sup> (collectively, the “Associations”) appreciate the opportunity to comment on the above-referenced Petition for Clarification or Declaratory Ruling (“Petition”) regarding the Telephone Consumer Protection Act of 1991 (“TCPA”).<sup>4</sup> The Associations’ members finance the American economy—creating jobs, expanding businesses, securing homes, businesses and retirement, insuring growth and building consumer confidence—and include financial institutions from the banking, insurance, asset management, finance, and credit card sectors.

The Associations acknowledge and appreciate that Federal Communications Commission (“FCC” or “Commission”) Chairman Pai and Commissioner O’Rielly in particular have been outspoken about the critical need to diminish the incentive that trial lawyers have to file frivolous TCPA suits.<sup>5</sup> TCPA-driven trial lawyer abuse has had a material adverse effect on financial

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<sup>1</sup> The American Bankers Association is the voice of the nation’s \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

<sup>2</sup> The Consumer Bankers Association is the only national trade focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

<sup>3</sup> The Financial Services Roundtable represents the largest integrated financial services companies providing banking, insurance, payment and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America’s economic engine, accounting for \$54 trillion in managed assets, \$1.1 trillion in revenue, and 2.1 million jobs.

<sup>4</sup> Petition of ContextMedia, Inc. d/b/a Outcome Health For Clarification, or, in the Alternative, for Declaratory Ruling, CG Docket No. 02-278 (filed Oct. 20, 2017) (“Outcome Petition”).

<sup>5</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, 30 FCC Rcd 7961, 8072-8083 (dissenting statement of Commissioner A. Pai (“Pai TCPA Dissent”), 8084-8098 (dissenting statement of Commissioner M. O’Rielly) (“O’Rielly TCPA Dissent”) (2015).

service businesses and their customers. As a result, the Associations are pleased to support the above-referenced petition (“Petition”) filed by ContextMedia, Inc. d/b/a Outcome Health (“Outcome”).

Just as Outcome’s Healthy Tips messages seek to promote an important public good (the frequent need to remind patients to adopt and maintain healthful habits in between medical appointments),<sup>6</sup> financial institutions too must have the ability to stay in close contact with their customers to provide them with important information about their existing accounts, such as suspicious activity alerts, data security breach notifications, and low balance alerts.<sup>7</sup> The Associations’ members rely on advanced technologies to communicate these messages to their customers in a timely manner.

The Associations agree with Outcome that the Commission has long recognized that consumers appreciate receiving timely, relevant information, and that the Commission should not inhibit these important, consumer-friendly communications.<sup>8</sup> However, the Commission’s interpretations of the TCPA have strayed far from the statute’s purpose to become instead a frequent vehicle for lawsuit abuse, with an astonishing increase in cases filed each year. The number of lawsuits demanding awards of statutory damages because of inadvertent and good faith calls continues to grow.<sup>9</sup> The potential liability for making these calls—and the draconian litigation costs that must be incurred to defend against the resulting lawsuits—threatens to curtail important and valued communications between financial institutions and their customers.<sup>10</sup>

The Commission has an ongoing obligation to ensure that good actors are not penalized for employing modern technologies to reach their customers. Clear guidance would bring the certainty that both calling parties and their customers deserve. Outcome faces a \$192 million lawsuit for an alleged technical error related to honoring opt-out requests—a situation that serves as yet another egregious example of how trial lawyers manipulate the TCPA to the detriment of consumers.<sup>11</sup>

Outcome could not have anticipated that an undetected and inadvertent technical error could have undermined its good-faith attempt to comply with opt-out requests. Accordingly, the Associations urge the Commission to clarify or declare that an undetected technical error does

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<sup>6</sup> See Outcome Petition at 1.

<sup>7</sup> See Letter from American Bankers Ass’n (“ABA”) to FCC Secretary M. Dortch re Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59 (filed Sept. 17, 2017) (“ABA Letter”) at 1.

<sup>8</sup> See Outcome Petition at 1-3, 7.

<sup>9</sup> See *id.* at 2, 13-14.

<sup>10</sup> See ABA Letter at 4-5.

<sup>11</sup> Similarly, another recent filing reports that Navy Federal Credit Union, a not-for-profit financial services entity, settled a class action for \$2.75 million over automated calls to wrong numbers. This occurred even though consumers have an obvious desire to hear quickly and directly from their financial institution when faced with possible fraud, data breaches, or overdrawn accounts. Yet the rules adopted by the Commission in 2015 have jeopardized the ability of responsible companies to undertake this important outreach. See O’Rielly TCPA Dissent at 8098 (the FCC’s July 2015 TCPA ruling “will lead to more litigation and burdens on legitimate businesses without actually protecting consumers from abusive robocalls made by bad actors”); see also Pai TCPA Dissent at 8073 (“lawyers go to ridiculous lengths to generate new TCPA business” ... asking “family members, friends, and significant others to download calling, voicemail, and texting apps in order to sue the companies behind” the apps).

not subject the caller to liability pursuant to the *SoundBite* ruling. Companies like Outcome that engage in good-faith efforts to comply with the *SoundBite* ruling should be protected from liability for inadvertent technical errors.<sup>12</sup> The Commission has ample authority to determine that a violation of the TCPA that results from an undetected and inadvertent technical error satisfies the public interest requirements for protection from liability under a safe harbor. In the TCPA context, the Commission has recognized that parties who have made good faith efforts to comply with its rules may occasionally experience technical error. In 2003, the Commission concluded that “callers should not be liable for [TCPA] violations that result from an error” related to a consumer’s request to be placed on the national do-not-call list.<sup>13</sup> Thus, the agency established “a safe harbor” exemption from liability in these instances.<sup>14</sup>

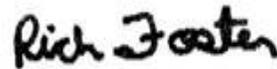
Finally, the Associations encourage the Commission to proceed mindful that the American consumer often suffers as a result of these frivolous suits. The uncertainty inherent in the Commission’s TCPA rules has enhanced the incentive to bring such suits against a business, which dissuades companies from communicating important information to consumers.

All companies and consumers deserve a clear understanding about how to communicate effectively within the bounds of the law. We are grateful that the Commission is examining these important issues and stand ready to assist with the agency’s efforts.

Sincerely,



Jonathan Thessin  
Senior Counsel, Center for Regulatory  
Compliance  
American Bankers Association



Richard Foster  
Senior Vice President & Senior Counsel for  
Regulatory and Legal Affairs  
Financial Services Roundtable



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<sup>12</sup> See Outcome Petition at 7-10.

<sup>13</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278, 18 FCC Rcd 14014, 14040 (2003).

<sup>14</sup> See *id.*

