

December 12, 2017

**VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: *In the Matter of Petition for Clarification or Declaratory Ruling filed by  
ContextMedia, Inc. d/b/a Outcome Health, CG Docket No. 02-278***

Dear Ms. Dortch:

The U.S. Chamber Institute for Legal Reform (“ILR”), with the United States Chamber of Commerce, submits reply comments to the Federal Communications Commission (“FCC” or “Commission”) on the ContextMedia, Inc. d/b/a Outcome Health Petition for Clarification or Declaratory Ruling (“Outcome Health Petition” or “Petition”)<sup>1</sup> under the Telephone Consumer Protection Act (“TCPA”). The U.S. Chamber of Commerce is the world’s largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, as well as state and local chambers and industry associations. ILR is a Chamber affiliate, dedicated to making our nation’s civil legal system simpler, faster, and fairer.

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<sup>1</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) (“*Petition*”).

The current TCPA regime is dysfunctional. Litigation abuse is on the upswing, as shown in several FCC filings.<sup>2</sup> The Chamber joined a challenge to the Commission’s 2015 TCPA Omnibus Order, which further distorted the landscape with expanded liability.<sup>3</sup> ILR urges the FCC to grant the Petition as a step toward rationalizing a dysfunctional TCPA.

**I. CURRENT INTERPRETATIONS OF THE TCPA ENCOURAGE ABUSIVE LAWSUITS AGAINST LEGITIMATE BUSINESSES RATHER THAN TARGETING UNSCRUPULOUS TELEMARETERS.**

**A. Unchecked Expansion of the TCPA Has Promoted Abusive Litigation.**

The TCPA aimed to stop abusive cold-call telemarketing and fax-blast spamming.<sup>4</sup> It was meant to “restrict the most abusive telemarketing practices,”<sup>5</sup> and the Commission has long stated that its rules should “reasonably accommodate[] individuals’ rights to privacy as well as the legitimate business interests of telemarketers.”<sup>6</sup> The Commission has not achieved this. In some instances, the Commission has reached beyond its authority and the plain text of the

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<sup>2</sup> See, e.g., U.S. Chamber Comments on Advance Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59 (filed Aug. 28, 2017); U.S. Chamber Comments on Petition for Declaratory Ruling filed by All About the Message, LLC, CG Docket No. 02-278 (filed May 18, 2017); U.S. Chamber Comments on Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz, CG Docket No. 02-278; CG Docket No. 05-338 (filed Mar. 10, 2017). As further evidence, ILR submits with these Reply Comments its August 2017 study entitled *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*.

<sup>3</sup> See Petition for Review, *Chamber of Commerce of the United States of America v. Federal Communications Commission* (D.C. Cir. Sep. 2, 2015).

<sup>4</sup> See S. Rep. 102-178 at 1-2 (1991) (stating that the purpose of the TCPA is to “plac[e] restrictions on unsolicited, automated telephone calls to the home” and noting complaints regarding telemarketing calls); H.R. Rep. No. 102-317 at 6-7 (1991) (citing telemarketing abuse as the primary motivator for legislative action leading to the TCPA). See also Comments of the U.S. Chamber and ILR, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 2-3 (filed Mar. 10, 2017).

<sup>5</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, n.24 (Oct. 16, 1992) (“1992 Report and Order”).

<sup>6</sup> 1992 Report and Order ¶ 1.

TCPA.<sup>7</sup> This has fueled an explosion of lawsuits, as the number of TCPA litigants ballooned from 14 in 2007 to 4,860 in 2016.<sup>8</sup> At the same time, the FCC has only *increased* compliance burdens. For example, instead of providing clarity, the 2015 Omnibus Order expanded liability.<sup>9</sup> Subsequently, TCPA litigation increased by a staggering 46% in the 17-month period following the omnibus order.<sup>10</sup>

The TCPA’s expanded scope, together with statutory damages add to staggering amounts,<sup>11</sup> create a windfall for the plaintiffs’ bar, and do not benefit consumers.<sup>12</sup> The modern TCPA landscape is marked by threats of liability designed to yield large fees.<sup>13</sup> “[T]he average recovery for a consumer in a TCPA class action settlement was \$4.12. Their lawyers, by contrast, received an average of \$2.4 million.”<sup>14</sup> One law firm offers a free app, “BLOCK

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<sup>7</sup> ILR urges the FCC to heed limits on its authority. The FCC should not engage in policymaking properly done by Congress. *See* Comments of U.S. Chamber of Commerce, CG Docket No. 17-59, at 2 (Aug. 28, 2017).

<sup>8</sup> <https://webrecon.com/2016-year-in-reviewfdcpa-down-fcra-tcpa-up/>. From 2015 to 2016, TCPA litigation grew by 31.8%. *Id.*

<sup>9</sup> For example, the FCC, over dissents, imposed strict liability on companies that unintentionally call reassigned numbers 2015 Omnibus Order. *See* D.C. Circuit Appeal, Joint Final Brief for Petitioners (filed Feb. 24, 2016).

<sup>10</sup> *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. Chamber Institute for Legal Reform, at 2 (Aug. 2017).

<sup>11</sup> Dish Network was recently ordered to pay approximately \$341 million in two separate federal court actions. *See Krakauer v. Dish Network LLC*, No. 1:14-cv-00333 (M.D.N.C. 2017); *United States of America et al. v. Dish Network LLC*, No. 3:09-cv-03073 (C.D. Ill. 2017). *See also Birchmeier v. Caribbean Cruise Line, Inc.*, No. 1:12-cv-04069 (N.D. Ill. 2012) (settling for \$76 million); *Bull v. US Coachways, Inc.*, No. 1:14-cv-05789 (N.D. Ill. 2014) (settling for \$49.9 million).

<sup>12</sup> *Engineered Liability: The Plaintiffs’ Bar’s Campaign To Expand Data Privacy and Security Litigation*, U.S. Chamber Institute for Legal Reform, at 5 (Apr. 2017).

<sup>13</sup> For example, as part of its 2013 agreement to settle a series of TCPA class actions, Bank of America agreed to settle with a class of 7.7 million people for just over \$32 million. Despite not conceding a violation, the bank agreed not to oppose any request from plaintiffs’ counsel for fees up to 25% of the settlement—or \$8 million. Had the bank not settled, it could have faced damages in the billions.

<sup>14</sup> Testimony of Adonis E. Hoffman before the Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice, Hearing on “Lawsuit Abuse and the Telephone Consumer

CALLS GET CASH,” to track calls and transmit information so the firm can sue. It promises that users can “collect up to \$1,500 per call.”<sup>15</sup>

FCC leadership has concerns with this outdated law. Describing the TCPA as “the poster child for lawsuit abuse,” then-Commissioner Pai noted that “trial lawyers have found legitimate, domestic businesses a much more profitable target” than “illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters.”<sup>16</sup> He predicted that the 2015 Omnibus Order would “make abuse of the TCPA much, much easier” by “twist[ing] the law’s words even further to target useful communications between legitimate businesses and their customers.”<sup>17</sup>

Commissioner O’Rielly noted that TCPA implementation “paints companies from virtually every sector of the economy as bad actors, even when they are acting in good faith to reach their customers.”<sup>18</sup> He went on to state:

[P]rior decisions ... have expanded the boundaries of TCPA far beyond what I believe Congress intended, as evidenced by the actual wording of the statute. As the scope of TCPA has increased, so too has TCPA litigation. Thousands of lawsuits are filed each year against businesses who thought they were taking the right precautions to stay within the law.<sup>19</sup>

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Protection Act” (June 13, 2017), <https://judiciary.house.gov/wp-content/uploads/2017/06/Witness-Testimony-Hoffman-06.13.2017.pdf>; see also Adonis Hoffman, “Sorry, Wrong Number, Now Pay Up,” *The Wall Street Journal*, June 15, 2015.

<sup>15</sup> Block Calls Get Cash, <http://www.blockcallsgetcash.com/>.

<sup>16</sup> Pai Dissent to 2015 Omnibus Order.

<sup>17</sup> *Id.*

<sup>18</sup> O’Rielly Dissent to 2015 Omnibus Order.

<sup>19</sup> O’Rielly Remarks to ACA International, [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344718A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344718A1.pdf).

Commissioner Clyburn’s former Chief of Staff agrees that “all is not well” and “[s]omewhere along the line, the reasonable balance that was originally intended shifted away from business into the hands of activist plaintiffs’ lawyers, and they have taken it all the way to the bank.”<sup>20</sup>

**B. The Outcome Health Petition Demonstrates How Irrational and Punitive the TCPA System Has Become.**

Outcome Health’s Petition is illustrative: a U.S. company provided desired, beneficial communications about health and well-being, but faces \$192 million in damages because of a technical error that it acted quickly to fix. Based on the Petition, there was nothing egregious about Outcome Health’s behavior. It appears to have had a robust TCPA compliance program: it had a “voluntary subscription process;” “never used third-party phone lists;” “updated [its subscriber list] daily to ensure that [it] sent messages only to consenting subscribers;” “included opt-out instructions” in each text message; sent opt-out confirmation messages “consistent with best practices and the *Soundbite* decision;” “hard-coded the opt-out process into its software;” “kept precise subscriber records;” and “trained [personnel] on TCPA compliance.”<sup>21</sup> Despite all this, a technical glitch caused an error in the opt-out process for a limited group. “[T]he very day a subscriber complained [about texts received], the entire program was shut down.”<sup>22</sup>

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<sup>20</sup> Adonis Hoffman, “Does TCPA stand for ‘total cash for plaintiffs’ attorneys’?”, The Hill (Feb. 17, 2016), <http://thehill.com/blogs/pundits-blog/technology/269656-does-tcpa-stand-for-total-cash-for-plaintiffs-attorneys>.

<sup>21</sup> *Petition* at 4-5.

<sup>22</sup> *Id.* at 6.

## II. GRANTING THE PETITION WILL PROMOTE DESIRABLE COMMUNICATIONS, PROTECT CONSUMERS, AND REDUCE LAWSUIT ABUSE.

### A. Outcome Health Asks the FCC to Clarify Protection for Well-Meaning Companies Who Experience Technical Errors.

The Petition asks the FCC to recognize that TCPA liability should not attach to certain technical errors. First, Outcome Health asks the Commission to “clarify or declare that the unknown and inadvertent technical error present in Outcome’s system. . . does not eliminate or curtail Outcome’s eligibility for the liability protection afforded by the 2012 *Soundbite ruling*.”<sup>23</sup> Essentially, Outcome Health urges the Commission to recognize an “error defense,” as the FCC has in other TCPA contexts, and find that “good-faith efforts to comply with the statute and the Commission’s rules do not warrant liability under the TCPA.”<sup>24</sup> Second, in the alternative, Outcome Health asks the Commission to “clarify or declare that Outcome’s unknown and inadvertent technical error is exempt from liability and entitled to safe harbor relief.”<sup>25</sup> It describes the safe harbor as “limited,”<sup>26</sup> akin to safe harbors previously adopted under the TCPA. It “would not exempt Outcome from the rules” but would “merely preclude the TCPA from

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<sup>23</sup> *Petition* at 7-10 (In the 2012 decision in *SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, the FCC found that “a consumer’s prior express consent to receive text messages from an entity can be reasonably construed to include consent to receive a final, one-time text message confirming that such consent is being revoked at the request of that consumer.” ¶ 7). Outcome Health’s technical issue involved a mismatch in transitioning between two vendors’ methods of reconciling unsubscribe requests: “the population of people who subscribed under Signal HQ’s management of the program who were transferred to Twilio (approximately 2240 individuals) could not unsubscribe because the database of consenting subscriber mobile numbers assembled by Signal HQ included a “carriage return” character after each number. Twilio’s program did not include any such character.” *Petition* at 6.

<sup>24</sup> *Petition* at 8-9.

<sup>25</sup> *Id.* at 10-12.

<sup>26</sup> *Id.* at 12.

demanding the impossible.”<sup>27</sup> The FCC should not allow unknown and inadvertent technical missteps to subject well-intentioned companies to devastating TCPA liability.

**B. Clarifying the Rules as Requested Will Benefit the Public Interest.**

As Commissioner O’Rielly has noted, consumers demand modern services and communications via text messages and other modern forms of communications that “provide timely and relevant information.”<sup>28</sup> Unfortunately, the TCPA landscape does not support innovation in communications. Outcome Health sent messages to promote health and well-being to those who signed up. Outcome Health’s program has been suspended and, in the face of company-ending damages, similar beneficial programs may be slowed or abandoned due to the prospect of crushing liability for innocent technical problems. The FCC should promote a rational, predictable regulatory regime for innovative communications.

If the Commission acknowledges the Petition’s proposed safe harbor,<sup>29</sup> it can set forth compliance measures. As the Petition points out—and as has been the case for other safe harbors—clear guidelines are needed to benefit businesses and consumers. Predictability will

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<sup>27</sup> *Id* at 10-12.

<sup>28</sup> O’Rielly Dissent to 2015 Omnibus Order.

<sup>29</sup> In exercising its authority to interpret the TCPA in a manner consistent with Congress’ authorization, there are a number of ways for the Commission to create the regulatory certainty that the requested safe harbor would provide. The Commission could find that a safe harbor is necessary to fully implement the TCPA while ensuring that its reach does not extend beyond Congress’ original intent. *See, e.g.*, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Order (2004) (creating a safe harbor in the number-portability context to facilitate full TCPA implementation). Both then-Commissioner Pai and Commissioner O’Rielly supported the creation of a safe harbor in their dissents to the 2015 Omnibus Order. *See Pai Dissent to 2015 Omnibus Order* (commenting that the lack of a safe harbor “opens the floodgates to TCPA litigation”); *O’Rielly Dissent to 2015 Omnibus Order* (noting that without a safe harbor there is substantial litigation risk). Alternately, the Commission could interpret the statute’s consent provision to preclude actions against companies that experience inadvertent and unforeseeable technical errors. There are many ways to bring order to the current TCPA regime.

encourage companies to take measures to comply, knowing that their efforts will not be worthless in the case of a mistake.

Clear expectations and protections also will free up judicial, agency, and private resources. It is wasteful that “courts throughout the country [are] forced to devote significant resources to the ‘business venture’ of TCPA litigation.”<sup>30</sup> Safe harbors or other protections for conduct such as Outcome Health’s will help alleviate this burden. At the FCC, streamlining regulations and decades of TCPA decisions will help consumers by (1) addressing actual harm;<sup>31</sup> (2) properly targeting bad actors;<sup>32</sup> and (3) encouraging well-meaning companies to offer innovative connected services while taking reasonable steps to decrease unwanted communications. Instead of helping plaintiffs’ lawyers, the FCC should enforce clear standards against fraudsters and continue working with industry and internationally to abate illegal robocalling. Finally, at the industry level, companies will be able to focus on delivering helpful and wanted communications. Presently, any company considering communicating with customers or the public must worry that even their best efforts cannot protect them from liability.

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<sup>30</sup> *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*, at 15.

<sup>31</sup> Chairman Pai has highlighted that historically, this has not occurred: *See* Pai Dissent to 2015 Omnibus Order (“Unwanted telemarketing calls in violation of the National Do-Not-Call Registry are on the rise. In fact, such complaints made up almost 40 percent of consumer complaints in our latest report—and the number of complaints jumped dramatically last year from 19,303 in the first quarter to 34,425 in the third. Let’s fix this problem.’ What has the Commission done since then to enforce the rules? It has issued a single citation to a single potential violator of federal Do-Not-Call rules. That’s not going to solve the problem.”). Commissioner O’Rielly has also spoken on this issue: “The prior Commission and some courts have taken the position that simply receiving a couple of stray calls or voicemails constitutes a real harm that can subject well-intentioned companies to liability. ... This approach is completely wrongheaded and does not actually protect consumers.”

[https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344718A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344718A1.pdf).

<sup>32</sup> We applaud actions that new FCC leadership has taken in this direction. *See, e.g.*, Abramovich and Best Insurance Contacts enforcements.



### C. Addressing the TCPA Complements Efforts to Address Illegal Robocalling.<sup>33</sup>

Rationalizing the TCPA is part of a bigger movement to comprehensively address illegal robocalling. The FCC is concerned about the “unacceptably high volume of illegal robocalls.”<sup>34</sup> Industry experts are aggressively tackling this issue. For example, an industry-led Robocall Strike Force is developing solutions to prevent, detect, and filter unwanted robocalls.<sup>35</sup> ILR applauds the Commission’s support; private efforts are benefitting from technical and regulatory solutions, as well as aggressive enforcement against bad actors.<sup>36</sup> The proliferation of frivolous TCPA lawsuits fails to advance these goals. As the FCC promotes a sensible approach to robocalling, it should rein in the excesses of the TCPA landscape.

### III. CONCLUSION

The U.S. Chamber Institute for Legal Reform and U.S. Chamber of Commerce urge the Commission to grant Outcome Health’s Petition for Clarification or Declaratory Ruling. Doing so would be an important step toward mitigating abuses of the TCPA system. It would assure well-meaning companies they will not be bankrupted by inadvertent and unforeseeable technical glitches and consumers that the FCC is committed to supporting innovation and addressing bad actors who exploit the system.

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<sup>33</sup> See, e.g., *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Report and Order and Further Notice of Proposed Rulemaking, FCC 17-151 (Nov. 16, 2017) (“*Robocall Call Blocking Order*”); Robocall Strike Force, Robocall Strike Force Report at 1 (2016), <https://transition.fcc.gov/cgb/Robocall-Strike-Force-Final-Report.pdf>.

<sup>34</sup> *Robocall Call Blocking Order* ¶ 5.

<sup>35</sup> See *Industry Robocall Strike Force Report* (Apr. 28, 2017).

<sup>36</sup> See, e.g., *Robocall Call Blocking Order*; *Adrian Abramovich, Marketing Strategy Leaders, Inc., and Marketing Leaders, Inc.*, Citation and Order (June 22, 2017); *Best Insurance Contracts, Inc., and Philip Roesel, dba Wilmington Insurance Quotes*, Citation and Order (Aug. 4, 2017).

Respectfully Submitted,



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