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## FCC Action On TCPA Protections Will Dial Up More Lawsuits

By **Allison Grande**

Law360, New York (June 8, 2015, 5:50 PM ET) -- The Federal Communications Commission is slated this month to take up its chairman's call to strengthen consumer protection laws against unsolicited robocalls and texts, a move that is likely to create tighter telemarketing restrictions and fan the flames of already widespread litigation.

In **an announcement late last month**, Commissioner Tom Wheeler revealed that he and his colleagues would vote at the agency's next open meeting June 18 on a proposal he has drafted to address two dozen long-pending open petitions seeking clarity on the scope and reach of the decades-old Telephone Consumer Protection Act.

While the full proposal was only circulated among the commissioners, Wheeler did release a public fact sheet broadly outlining the proposed set of actions that, according to the chairman, "if adopted, will close loopholes and strengthen protections already on the book."

Although the details of the chairman's proposal remain sketchy, attorneys say that the sweeping nature of the clarifications that are laid out in the fact sheet indicate that the answers companies have long sought from the commission are likely to open up even more liability pitfalls for telemarketers.

"Chairman Wheeler's proposals appear to be a step in the wrong direction," said Martin Jaszczuk, Locke Lord LLP's TCPA class action litigation section head. "What is needed is common-sense reform that targets the real wrongdoers but stops the onslaught of 'gotcha' litigation against well-meaning companies that are simply trying to conduct business. While difficult to pinpoint, Chairman Wheeler's proposals do not appear to provide the relief that is necessary to encourage healthy businesses and a thriving American economy."

Enticed by the potential to recover uncapped statutory damages of between \$500 and \$1,500 per violation, the plaintiffs bar in recent years **has seized on** ambiguous and outdated language in the TCPA statute, which was drafted in 1991, to support claims that telemarketers and other businesses have peppered consumers with unwanted calls or texts, according to attorneys.

The uncertainty has prompted businesses to file dozens of petitions urging the FCC to clear up confusing and hotly contested issues such as the definition of "autodialer," as well as the **liability that attaches** to calls and texts sent to reassigned cellphone numbers.

According to Kelley Drye & Warren LLP partner Steven Augustino, his firm is currently tracking over 130 clarification requests or waiver petitions that have been filed with the FCC, some of which have been pending for years, and the regulator's failure to quickly address the issues has been a major contributing factor in the recent uptick in litigation.

"Some kind of action on TCPA questions is long overdue," Augustino said.

But while the fact sheet suggests Wheeler's proposal would provide clarity on the vast majority of these outstanding quandaries, the commission's action is likely to only change the complexion of TCPA litigation, rather than stem the tide, according to attorneys.

"The tone of Chairman Wheeler's announcement is troubling, and may fuel the flames of litigation," Augustino said. "Although Wheeler's announcement describes its decisions as declaratory rulings, some of the provisions sound more like rulemaking decisions."

Such decisions would replace current ambiguities with sweeping new obligations for businesses to follow, a shift that is likely to raise concern among businesses, attorneys say.

"The fact sheet is a good outline, but the big issue for companies will be whether the FCC's ruling will be more company-friendly or consumer-friendly," Taylor English Duma LLP attorney Matthew Rosenkoff said. "The fact sheet seems to suggest that the proposal is geared more toward protecting Americans."

The tilt toward consumers is hinted at in the chairman's proposed resolution to several of the most pressing unresolved issues under the TCPA, including the liability that attaches to communications sent to reassigned numbers.

According to the fact sheet, reassigned numbers "aren't loopholes," and consumers who inherit a phone number should not be subjected to a barrage of unwanted robocalls to which a previous subscriber of the number consented.

"The single biggest driver of TCPA litigation that we see now is reassigned number lawsuits, so Chairman Wheeler's proposal as to reassigned numbers is, from a defense perspective, the most important indicator as to the future of TCPA class actions," Sheppard Mullin Richter & Hampton LLP partner David Almeida said.

While Wheeler's proposal regarding reassigned numbers would exempt companies from liability for the first call placed to a reassigned number, the absence of an accompanying clause that would allow companies to continue to skirt liability until they are told that the number has been reassigned leaves the door open for the plaintiffs bar to continue to attack, attorneys say.

"What will inevitably occur is that someone receives a few calls or text messages before notifying the company calling or texting that there was a subscriber change," Almeida said. "The better solution would be making none of the calls or texts actionable until a called party actually informs the company that there was a subscriber change."

The chairman's proposal with regard to the definition of an autodialer also appears to be incomplete and could contribute to further headaches for companies, according to attorneys.

The fact sheet says Wheeler's proposal would define "autodialer" as any technology with the capacity to dial random or sequential numbers, and clarify that robocallers "cannot skirt consumer consent requirements through changes in calling technology design or by calling from a list of numbers."

But attorneys say the proposed definition does little to clear up the crux of the issue dividing courts, which is whether "capacity" refers to the present capacity or potential capacity of the dialer.

"There is a lot of disagreement over which types of platforms should be classified as automatic telephone dialing systems, and it's unclear from the fact sheet whether the

proposal is going to address all of those issues," Rosenkoff said.

The chairman's suggestion that companies can't escape liability by calling from a list of numbers is also likely to strip away a defense used by businesses that they should be exempt if they call consumers based on a list of numbers they have gathered rather than from a random sampling, said Marc Roth chairman of Manatt Phelps & Phillips LLP's TCPA compliance and class action defense group, noted.

"The proposal in the fact sheet suggest that merely loading numbers into an autodialer would not be enough to fall outside the TCPA," he said.

Companies' liability risk is also likely to be stoked by the proposal that consumers should have the right to revoke their consent to receive robocalls and robotexts "in any reasonable way at any time," attorneys say.

While the change would clear up disputes over consumers' ability to revoke their consent, the ambiguous nature of the phrase "in any reasonable way" is likely to spark even more legal battles, according to attorneys.

"Now, the fight is over whether consumers can revoke consent," Rosenkoff said. "The question is whether the commission's action will result in answering the question once and for all or shifting the focus to the question of what is or is not a reasonable way of revoking consent."

While the specific details of the chairman's proposal and whether they will win support from his fellow commissioners at the open meeting this week remain unknown, attorneys agree that, although a ruling on the issues would be helpful, any declaration that raises additional questions or concerns would do little to provide the relief from litigation that businesses are so desperately seeking.

"The devil will be in the details of the commission's action," Roth said. "If the rulings are in any way ambiguous or unclear, then courts may say that they can't give deference to them."

--Editing by Mark Lebetkin and John Quinn.

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