

# Chapman Client Alert

January 24, 2017

Current Issues Relevant to Our Clients

## New FCC Chairman May Change Tack on TCPA

In one of his first Presidential acts, President Trump has named Commissioner Ajit Pai as Chairman of the Federal Communications Commission (“FCC”).<sup>1</sup> Chairman Pai, who has been an FCC commissioner for almost five years, will not need to be confirmed by the Senate because he is already a sitting commissioner.<sup>2</sup> His regulatory philosophy is often colored by his belief that open markets and less regulation help consumers benefit by encouraging competitive business practices between companies.<sup>3</sup> Because of that philosophy, Chairman Pai has become well-known for his dissenting opinions during his time with the FCC, including his dissent to the most recent Telephone Consumer Protection Act (“TCPA”) Omnibus Ruling and Order issued in July 2015 (“2015 Order”).

Chairman Pai’s predecessor, Tom Wheeler, encouraged broader application and an expansive reach for the TCPA. Chairman Pai staunchly disagreed, arguing with the respect to the 2015 Order, that it “twists the law’s words even further to target useful communications between legitimate businesses and their customers.”<sup>4</sup> With Mr. Wheeler’s resignation from the FCC, there are now only three sitting commissioners on the five-member panel, two Republicans and one Democrat.<sup>5</sup> The two vacant spots must be filled by one Democrat and one Republican, which will shift the Commission to a Republican majority.<sup>6</sup> With this shift, it is expected that the FCC will change its strategies with respect to its rulemaking and enforcement, which may affect how the FCC interprets the TCPA.

In his dissent to the 2015 Order, then-Commissioner Pai argued that the FCC could be supporting many other (perhaps more effective) efforts to combat the rise of unwanted telephone calls. He called for “aggressive enforcement action against those who violate the federal Do-Not-Call rules,” “a safe harbor so that carriers could block spoofed calls from overseas without fear of liability,” and “shutting down the abusive lawsuits by closing the legal loopholes that trial lawyers have exploited to target legitimate communications between businesses and consumers.”<sup>7</sup> These suggestions from now-Chairman Pai’s dissent could influence the FCC’s interpretations of the TCPA going forward with the expected Republican majority.

Oral arguments regarding a court challenge to the 2015 Order were completed in October 2016, and the 2015 Order is still under review by the U.S. Circuit Court of Appeals for the D.C. Circuit.<sup>8</sup> With the recent appointment of Chairman Pai, it is possible that if the Court agrees with his dissent to the 2015 Order, the FCC may not appeal an adverse ruling, though it is at this point unclear how the administration will handle issues such as these.

Even with this insight into Chairman Pai’s philosophy, experts are not certain how he will influence the FCC during his chairmanship. He was appointed by President Obama and is widely expected to be non-partisan, despite his affiliation as a Republican, though his statements in the dissent emphasizing less regulation may still signal changes in the FCC’s approach to TCPA in the future.<sup>9</sup>

### For More Information

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- 1 Ajit Pai (@AjitPaiFCC), TWITTER, (January 23, 2017 3:41 PM), *Statement of Ajit Pai on being Designated FCC Chairman by President Donald J. Trump*, <https://twitter.com/AjitPaiFCC/status/823646831196389376>.
- 2 *Ajit Pai*, FEDERAL COMMUNICATIONS COMMISSION, <https://www.fcc.gov/about/leadership/ajit-pai> (last visited January 23, 2017).

- 3 *Id.*
- 4 *Rules and Regs. Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, FCC 15-72, *Dissenting Statement of Commissioner Ajit Pai* (July 10, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-72A5.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A5.pdf) (last visited January 23, 2017).
- 5 *Leadership*, FEDERAL COMMUNICATIONS COMMISSION, <https://www.fcc.gov/about/leadership> (last visited January 23, 2017).
- 6 47 U.S.C. § 154.
- 7 *Rules and Regs. Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, FCC 15-72, *Dissenting Statement of Commissioner Ajit Pai* (July 10, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-72A5.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A5.pdf) (last visited January 23, 2017).
- 8 See our previous Client Alert for a more comprehensive analysis of the appeal, <http://www.chapman.com/insights-publications-DC-Circuit-FCC-TCPA.html>.
- 9 *Ajit Pai*, FEDERAL COMMUNICATIONS COMMISSION, <https://www.fcc.gov/about/leadership/ajit-pai> (last visited January 23, 2017).

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