APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 6, 2017 Decided April 27, 2018

No. 17-5093

SOUNDBOARD ASSOCIATION,
APPELLANT

v.

FEDERAL TRADE COMMISSION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-00150)

Karen Donnelly argued the cause for appellant. With her on the briefs was *Errol Copilevitz*. *Daniel W. Wolff*, entered an appearance.

Matthew M. Hoffman, Attorney, Federal Trade Commission, argued the cause for appellee. With him on the brief were *David C. Shonka*, Acting General Counsel, and *Joel Marcus*, Deputy General Counsel. *Michele Arington* and *Leslie R. Melman* Assistants General Counsel, and *Bradley Grossman*, Attorney, entered appearances.

Thomas C. Bennigson was on the brief for *amicus curiae* Public Good Law Center in support of appellee.

Before: ROGERS, MILLETT and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

Dissenting Opinion filed by *Circuit Judge* MILLETT.

WILKINS, *Circuit Judge*: This appeal arises from Appellant Soundboard Association's ("SBA's") challenge to a November 10, 2016 informal opinion letter (the "2016 Letter") issued by Federal Trade Commission ("FTC" or "Commission") staff. The 2016 Letter stated it was the FTC staff's opinion that telemarketing technology used by SBA's members is subject to the FTC's regulation of so-called "robocalls," and it announced the rescission of a 2009 FTC staff letter (the "2009 Letter") that had reached the opposite conclusion.

SBA filed suit seeking to enjoin rescission of the 2009 Letter. It argued the 2016 Letter violated the Administrative Procedure Act ("APA") because it was a legislative rule issued without notice and comment and because the FTC's robocall regulation unconstitutionally restricted speech on the basis of content. The FTC opposed both these arguments and also disputed that the 2016 Letter was reviewable final agency action. The District Court concluded the 2016 letter qualified as reviewable final agency action, but the court granted summary judgment for the FTC on the grounds that the 2016 Letter was an interpretive rule not subject to notice and comment and that the interpretation stated in the letter survived First Amendment scrutiny.

We conclude that because the 2016 staff opinion letter does not constitute the consummation of the

Commission's decisionmaking process by its own terms and under the FTC's regulations, it is not final agency action. As SBA concedes, its speech claims are pleaded as APA claims under 5 U.S.C. § 706(2)(B) and cannot proceed without final agency action. We therefore vacate the decision below and dismiss the case for failure to state a cause of action under the APA.

I.

A.

SBA is a trade association for companies that manufacture or use "soundboard" telemarketing technology ("soundboard"). Soundboard enables telemarketing agents to communicate with customers over the phone by playing pre-recorded audio clips instead of using the agent's live voice. The agent can choose a pre-recorded clip to ask questions of or respond to a customer, while retaining the ability to break into the call and speak to the customer directly. Soundboard also enables agents to make and participate in multiple calls simultaneously. According to SBA, soundboard provides many advantages to telemarketers, including ensuring accurate communication of information and disclaimers, improving call-center performance and cost-effectiveness, and employing individuals who would otherwise have difficulty being understood over the phone due to accent or disability. J.A. 85-86.

The FTC regulates telemarketing pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, which directs the Commission to

"prescribe rules prohibiting deceptive . . . and other abusive telemarketing acts or practices." 15 U.S.C. § 6102(a)(1). In 1995, the Commission promulgated the Telemarketing Sales Rule ("TSR"), which restricts telemarketing to certain times of day, creates the "do-not-call" list, and imposes other requirements to prevent fraud, abuse, and intrusions on customer privacy. 60 Fed. Reg. 43842 (Aug. 23, 1995); 16 C.F.R. § 310.4(b)(ii), (c). In 2003, the Commission amended the TSR to more closely regulate "predictive dialing," which places multiple simultaneous calls for a single call-center agent and, therefore, can result in "call abandonment" – i.e., abruptly hanging up – when too many customers answer the phone. The 2003 amendment prohibited telemarketers from failing to connect a customer to an agent within two seconds of the customer's completed greeting. 16 C.F.R. § 310.4(b)(1)(iv). The amendment thus effectively prohibited outbound telemarketing campaigns consisting "solely of prerecorded messages" – colloquially known as robocalls – because "consumers who receive a prerecorded message would never be connected to a sales representative." 73 Fed. Reg. 51,164, 51,165 (Aug. 29, 2008).

In 2008, the Commission amended the TSR to prohibit telemarketers from "initiating any outbound telephone call that delivers a prerecorded message" without "an express agreement, in writing" from the consumer with language demonstrating the individual customer's consent to receiving such calls from that telemarketer. *Id.* at 51,184; 16 C.F.R. § 310.4(b)(1)(v)(A). The express-written-consent requirement does not

apply to calls made on behalf of charitable organizations intended to "induce a charitable contribution from a member of, or previous donor to," the organization, as long as the donor can opt out of such calls. 16 C.F.R. § 310.4(b)(1)(v)(B). The Commission justified this exception on the grounds that members and prior donors have consented to receiving future charitable solicitation calls and, as a result, have a reduced privacy interest vis-à-vis a charitable organization's speech interest. *See* 73 Fed. Reg. at 51,193-94.

In promulgating the 2008 amendments, the Commission explained that the comments it received from customers and industry showed "the reasonable consumer would consider interactive prerecorded telemarketing messages to be coercive or abusive of such consumer's right to privacy. The mere ringing of the telephone to initiate such a call may be disruptive; the intrusion of such a call on a consumer's right to privacy may be exacerbated immeasurably when there is no human being on the other end of the line." *Id.* at 51,180. The Commission also rejected the industry's argument that an interactive opt-out mechanism for robocalls would adequately protect consumer privacy, reasoning that the "volume of telemarketing calls from multiple sources is so great that consumers find even an initial call from a telemarketer or seller to be abusive and invasive of privacy." *Id.* (quotation marks omitted).

B.

Before the TSR went into effect in September 2009, a telemarketer and soundboard user, Call Assistant LLC ("Call Assistant"), submitted a "request for a FTC Staff Opinion Letter" regarding whether Call Assistant's use of soundboard was subject to the 2008 amendments. J.A. 230 (emphasis in original). In its request, Call Assistant represented that "[a]t all times" during a soundboard call, "even during the playing of any recorded segment, the agent retains the power to interrupt any recorded message." J.A. 37. It also represented that during soundboard calls, "live agents hear every word spoken by the call recipient, and determine what is said" in response. J.A. 38.

On September 11, 2009, FTC staff responded with an "informal staff opinion" letter from Lois Griesman, the FTC's Associate Director of the Division of Marketing Practices (the "2009 Letter"). J.A. 37. The 2009 Letter stated that "[b]ased on the description of the technology included in [Call Assistant's] letter," "the staff of the [FTC] has concluded that the 2008 TSR Amendments . . . do not prohibit telemarketing calls using" soundboard. J.A. 38. Griesman explained that the robocall regulation "prohibit[s] calls that deliver a prerecorded message and do not allow interaction with call recipients in a manner virtually indistinguishable from calls conducted by live operators. Unlike the technology that [Call Assistant] describe[s], the delivery of prerecorded messages in such calls does not involve a live agent who controls the content and continuity of what is said to respond to concerns,

questions, comments – or demands – of the call recipient." *Id.* Griesman quoted the FTC's justification for the TSR's prohibition on robocalls, which "convert the telephone from an instrument for two-way conversations into a one-way device for transmitting advertisements." *Id.* Given Call Assistant's assertions that soundboard calls featured a "live human being continuously interact[ing] with the recipient of a call in a two-way conversation," "in Staff's view," soundboard use did not implicate the purposes of the TSR. *Id.*

The 2009 Letter expressly conditioned this conclusion on the factual representations in Call Assistant's request for a staff opinion, and Griesman advised Call Assistant that the letter did not represent the views of the Commission:

> Please be advised that this opinion is based on all the information furnished in your request. This opinion applies only to the extent that actual company practices conform to the material submitted for review. Please be advised further that the views expressed in this letter are those of the FTC staff. They have not been reviewed, approved, or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the opinions of the staff members charged with enforcement of the TSR.

J.A. 39.

After issuing the 2009 Letter, the Commission began to receive consumer complaints and to observe media reports about the use of soundboard that

conflicted with factual representations made by Call Assistant. This included complaints that consumers "are not receiving appropriate recorded responses to their questions or comments," that "no live telemarketer intervenes to provide a human response when requested to do so," and that "the call is terminated in response to consumers['] questions." J.A. 30-31. FTC staff also collected evidence from consumers and industry stakeholders that "some companies are routinely using soundboard technology" to "conduct separate conversations with multiple consumers at the same time," and observed that companies engaging in these practices were using the 2009 Letter as a defense against consumer lawsuits. J.A. 31; 225.

The FTC staff began to reconsider the 2009 Letter. In early 2016, FTC staff contacted telemarketing industry groups for input and held meetings at which industry representatives made presentations about soundboard. In a February 2016 meeting, "representatives of [a telemarketing trade group] acknowledged that soundboard technology is frequently utilized in a matter to allow one live agent to handle multiple calls simultaneously." J.A. 226. A trade group representative also told FTC staff "that if the FTC enforced a requirement that one agent could only manage one call at a time, no call center would use soundboard technology because it would not be cost effective – i.e., the capital expenditure in implementing soundboard . . . only made business sense if a call center could increase the volume of calls its agents could handle." *Id.* During this time SBA argued to FTC staff that the practices

described in consumer complaints were contrary to the trade groups' code of conduct, and that bad actors should be punished instead of the entire soundboard industry. J.A. 147-48.

On November 10, 2016, FTC staff issued a letter (the "2016 Letter") concluding that the TSR did apply to soundboard calls and rescinding the 2009 Letter effective May 12, 2017. The 2016 Letter was from Griesman, as well. It noted the 2009 Letter was premised on factual representations made by Call Assistant. But based on consumer complaints, media reports, meetings with industry representatives, and other data points, by 2016 the FTC staff believed the factual bases of the 2009 Letter were faulty. Specifically,

> A fundamental premise of [the] September 2009 letter was that soundboard technology was a surrogate for the live agent's actual voice. A human being cannot conduct separate conversations with multiple consumers at the same time using his or her own voice. Nonetheless, some companies are routinely using soundboard technology in precisely this manner [of enabling an agent to handle multiple simultaneous calls] . . . Indeed, Call Assistant noted publicly that one of the advantages of its technology is that an agent can conduct multiple calls simultaneously.

J.A. 31-32 (internal quotation marks omitted).

The 2016 Letter also stated that because soundboard users play prerecorded audio files to communicate with customers, soundboard calls fall within the

plain language of the TSR's prohibition on "any outbound telephone call that delivers a prerecorded message." J.A. 30. Accordingly, the letter reasoned,

> Given the actual language used in the TSR, the increasing volume of consumer complaints, and all the abuses we have seen since we issued the September 2009 letter, we have decided to revoke the September 2009 letter. It is now staff's opinion that outbound telemarketing calls that utilize soundboard technology are subject to the TSR's prerecorded call provisions because such calls do, in fact, "deliver a prerecorded message" as set forth in the plain language of the rule. Accordingly, outbound telemarketing calls made using soundboard technology are subject to the provisions of 16 C.F.R. § 310.4(b)(1)(v), and can only be made legally if they comply with the requirements [applicable to robocalls].

J.A. 32 (footnote omitted).

The 2016 Letter provided that "[i]n order to give industry sufficient time to make any necessary changes to bring themselves into compliance, the revocation of the September 2009 Letter will be effective six months from today, on May 12, 2017. As of that date, the September 11, 2009 letter will no longer represent the opinions of FTC staff." J.A. 33. The 2016 Letter concluded by stating that "the views expressed in this letter are those of the FTC staff, subject to the limitations of 16 C.F.R. § 1.3. They have not been approved or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the

views of staff members charged with enforcement of the TSR."[1] *Id.*

C.

SBA sought to enjoin the revocation of the 2009 Letter and what it characterized as a compliance deadline of May 12, 2017. It argued before the District Court that the 2016 Letter is a legislative rule requiring notice and comment under 5 U.S.C. § 553 because it expanded the scope of the TSR to reach soundboard. It also argued that to the extent the 2016 Letter amends the TSR to apply to soundboard, it is a content-based speech restriction that "treat[s] speech tailored for first-time donors differently than speech tailored for previous donors." J.A. 191. The Commission moved for summary judgment. It argued the 2016 Letter was not a reviewable final agency action, and in any event was an interpretive rule not subject to notice and comment. The Commission also argued that the SBA's affirmative First Amendment challenge was barred by the APA's six-year statute of limitations, but that on the merits the TSR was a reasonable time, place, and manner restriction that survived intermediate scrutiny.

The District Court consolidated the motions as cross-motions under Rule 56 and granted summary

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[1] 16 C.F.R. § 1.3(c) provides that "[a]dvice rendered by the staff is without prejudice to the right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement proceeding."

judgment for the Commission. The court concluded the 2016 Letter was a final agency action but held it was an interpretive rule not subject to notice and comment, and that the TSR's application to SBA survived the intermediate scrutiny applicable to regulations of commercial speech. SBA timely appealed.

II.

This court "review[s] *de novo* a district court's decision to grant summary judgment, viewing the evidence in the light most favorable to the non-moving party. A party is entitled to summary judgment only if there is no genuine issue of material fact and judgment in the movant's favor is proper as a matter of law." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 805 (D.C. Cir. 2006) (quotation marks omitted).

The APA limits judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. While the requirement of finality is not jurisdictional, without final agency action, "there is no doubt that appellant would lack a cause of action under the APA." *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003); *Flytenow, Inc. v. FAA*, 808 F.3d 882, 888 (D.C. Cir. 2015). Agency actions are final if two independent conditions are met: (1) the action "mark[s] the consummation of the agency's decisionmaking process" and is not "of a merely tentative or interlocutory nature;" and (2) it is an action "by which rights or

obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted); *see also Scenic Am. v. U.S. Dep't of Transp.*, 836 F.3d 42, 55-56 (D.C. Cir. 2016). "An order must satisfy both prongs of the *Bennett* test to be considered final." *Sw. Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016).

In evaluating the first *Bennett* prong, this Court considers whether the action is "informal, or only the ruling of a subordinate official, or tentative." *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967) (internal citations omitted). The decisionmaking processes set out in an agency's governing statutes and regulations are key to determining whether an action is properly attributable to the agency itself and represents the culmination of that agency's consideration of an issue. *See Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012) (relying upon the FDA Manual's description of warning letters as preceding enforcement action to conclude they "do not mark the consummation of FDA's decisionmaking"); *Reliable Automatic Sprinkler*, 324 F.3d at 732, 733 (holding a letter interpreting a safety regulation was not a final agency action because "the Commission itself ha[d] never considered the issue," and "[t]he Act and the agency's regulations clearly prescribe a scheme whereby the agency must hold a formal, on-the-record adjudication before it can make any determination that is legally binding."); *see also Sw. Airlines*, 832 F.3d at 275 (In evaluating finality, this Court also looks to

"the way in which the agency subsequently treats the challenged action.").

Because each prong of *Bennett* must be satisfied independently for agency action to be final, deficiency in either is sufficient to deprive SBA of a cause of action under the APA. *Sw. Airlines*, 832 F.3d at 275.

III.

A.

SBA argues, and the District Court concluded below, that the extensive investigative efforts by FTC staff and some definitive language in the 2016 Letter render it the consummation of agency decisionmaking for "all intents and purposes." *Soundboard Ass'n v. FTC*, 251 F. Supp. 3d 55, 54 [sic] (D.D.C. 2017). We disagree.

There is no dispute that the 2016 Letter was "informal" and "only the ruling of a subordinate official," and not that of any individual Commissioner or of the full Commission. *Abbott Labs.*, 387 U.S. at 151 (citations omitted). It is readily distinguishable from the final agency action in *Frozen Food Express v. United States*, relied upon by SBA and the decision below. That case involved a formal, published report and order of the Interstate Commerce Commission, not its staff, following an investigation and formal public hearing. 351 U.S. 40, 41 (1956). Similarly, unlike the jurisdictional determination in *U.S. Army Corps of Engineers v. Hawkes Co.*, which was issued by the agency and expressly deemed "final agency action" by regulation,

was "valid for a period of five years," and was "bind[ing on] the Corps for five years," 136 S. Ct. 1807, 1814 (2016), the 2016 Letter is issued by staff under a regulation that distinguishes between Commission and staff advice, is subject to rescission at any time without notice, and is not binding on the Commission. 16 C.F.R. § 1.3(c). This factor also distinguishes this case from *Sackett v. EPA*, 566 U.S. 120 (2012), in which a binding enforcement order issued by the EPA Administrator was deemed the consummation of the agency's decisionmaking.

The 2016 Letter does not represent otherwise. It explicitly and repeatedly states that it expresses the views of "staff," and it explains that such views do not bind the Commission. While the letter does present a conclusive view that "outbound telemarketing calls made using soundboard are subject to [the TSR] . . . and can only be made legally if they required with [sic] [the TSR]," J.A. 32, it characterizes this as "staff's opinion" and nowhere presents this as the conclusive view of the Commission. To the contrary, the 2016 Letter is clear that agency staff is "merely expressing *its* view of the law," *AT&T v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001) (emphasis added). Indeed, nonbinding *staff* advice is precisely what Call Assistant sought in its specific "request for a FTC Staff Opinion Letter," J.A. 230 (emphasis in original).

True, the fact that staff and not an agency head has taken a challenged action does not end the finality inquiry. But the 2016 Letter differs significantly from decisions by subordinate officials we have deemed final

agency action. Unlike the guidance at issue in *Appalachian Power v. EPA*, the 2016 Letter is not binding on Commission staff "in the field" or on third parties such as state permitting authorities. *Cf.* 208 F.3d 1015, 1022, 1023 (D.C. Cir. 2000) ("The short of the matter is that the Guidance, insofar as relevant here, is final agency action, reflecting a settled agency position which has legal consequences both for State agencies administering their permit programs and for companies like those represented by petitioners who must obtain Title V permits in order to continue operating."). Nor is SBA trapped without recourse due to the indefinite postponement of agency action. *Cf. Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990) ("[A]lthough . . . the EPA concededly made no final decision on petitioners' request that the section 115 remedial process be initiated, it clearly and unequivocally rejected . . . petitioners' requests for a separate proceeding[.]"). SBA concedes it could, but did not, seek an opinion from the Commission itself – and SBA remains free to do so today. *Cf. Sackett*, 566 U.S. at 127 (holding an order issued by the agency itself to be final when "not subject to further agency review"); *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 437 (D.C. Cir. 1986) ("Having definitively stated its position that Ciba-Geigy has no statutory right to a cancellation hearing, EPA has provided its final word on the matter short of an enforcement action." (alterations, citation, and quotation marks omitted)).

The dissent repeatedly cites *Sackett* as authority for its conclusion that informal staff advice is final

agency action. *Sackett* is a very different case. There, the EPA Administrator issued a compliance order against the Sacketts under the "Enforcement" section of the Clean Water Act, 33 U.S.C. § 1319. The Administrator's order made enforceable factual findings and legal conclusions that the Sacketts' property included "waters of the United States" subject to the Clean Water Act, and that the Sacketts therefore had committed violations of the Clean Water Act. 566 U.S. at 124-25. The order directed the Sacketts "immediately [to] undertake activities to restore" their property "in accordance with [an EPA-created] Restoration Work Plan" and to provide to EPA employees "access to the Site . . . [and] access to all records and documentation related to the conditions at the Site." *Id.* at 125 (alterations in original). The Sacketts sought a hearing on the order from the EPA, which EPA denied, prompting the Sacketts (having no other recourse) to bring suit in the district court.

The Supreme Court analyzed the Administrator's order separately under each prong of *Bennett*. Under the first prong, the Administrator's order was the consummation of the agency's decisionmaking process because the Sacketts sought a hearing, and when that request was denied, "the 'Findings and Conclusions' that the compliance order contained were not subject to further agency review.'" 566 U.S. at 127. This alone sufficiently distinguishes the informal staff opinion in this case from the Administrator's enforcement order in *Sackett*, as the informal staff opinion is "subject to further agency review" in at least two ways. First, SBA

is and has always been able to request an opinion from the Commission itself; given that Call Assistant specifically emphasized that they sought a "Staff Opinion Letter," a request for *Commission* advice remains an available alternative of which the requestors of the 2009 Letter were well aware – and which they chose not to pursue. Second, if at some future date the FTC staff make the further decision to recommend a TSR enforcement action against a soundboard user, proceeding on that recommendation would require the Commission to decide – itself, for the first time – whether the 2016 Letter's interpretation of the TSR is correct, and to vote on whether to issue a complaint. 16 C.F.R. § 3.11. SBA seeks a shortcut around both these decision points, but unlike the Sacketts, SBA is neither out of regulatory review options nor subject to an order or enforcement action issued from the head of the agency itself.

Further, the FTC regulations expressly delineate between advice from the Commission and advice from its staff. The manner in which an agency's governing statutes and regulations structure its decisionmaking processes is a touchstone of the finality analysis. *See Holistic Candlers*, 664 F.3d at 944. Under FTC rules, when the Commission itself gives advice, it may only rescind or revoke that advice upon "notice . . . to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice." 16 C.F.R. § 1.3(b). Advice from the Commission also constrains its future enforcement authority: It "will not proceed against the requesting party with respect

to any action taken in good faith reliance upon the Commission's advice under this section, where all the relevant facts were fully, completely, and accurately presented to the Commission. . . ." *Id.*

A separate provision governs "[a]dvice rendered by the staff." 16 C.F.R. § 1.3(c). Staff advice is given "without prejudice to the right of the Commission to later rescind the advice and, where appropriate, to commence an enforcement proceeding," and § 1.3(c) has no notice requirement and provides no safe harbor for reasonable reliance on the advice.[2] *Id.* Unlike Commission opinions, staff advice cannot constrain the Commission's future enforcement authority. Thus, contrary to SBA's assertions, the 2016 Letter's disclaimer is not fairly read as meaningless "boilerplate." Rather, the 2016 Letter reflects and cites specific FTC regulations that structure the agency's decisionmaking processes. *Cf. Scenic Am.*, 836 F.3d at 56 (dismissing as "boilerplate" an agency's vague statement that it "may provide further guidance in the future as a result of additional information"). While an opinion from the Commission itself might constitute the consummation

[2] We note a textual distinction between § 1.3(b), which provides that the Commission may "rescind or revoke" its own advice, and § 1.3(c), which provides only that the Commission may "rescind" staff advice. We conclude this is a distinction without a difference. Courts and agencies frequently use the terms "rescind"/"rescission" and "revoke"/"revocation" interchangeably, *e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51-52 (1983), and we find no indication that "revoke" must have an independent meaning here. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) ("[O]ur preference for avoiding surplusage constructions is not absolute.").

of its decisionmaking process, the 2016 Letter from FTC staff does not.

The dissent interprets the FTC's regulations differently, concluding that the Commission has "delegated" – in the dissent's terms – its advice function such that the staff actually speaks directly for the Commission, despite express disclaimers and regulatory distinctions between staff and Commission advice. Dissenting Op. at 4. We do not agree.

Quoted in full, Section 1.3(a) provides, "[o]n the basis of the materials submitted, as well as any other information available, and if practicable, the Commission *or its staff* will inform the requesting party of its views." 16 C.F.R § 1.3(a) (emphasis added). The dissent's theory of complete "delegation" of the Commission's interpretation and enforcement authority, such that staff and Commission advice are interchangeable for finality purposes, is simply incorrect. When the Commission delegates its authority to staff, it does so expressly. *Cf.* 16 C.F.R. § 2.1 ("The Commission *has delegated* to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition, the Director, Deputy Directors, and Associate Directors of the Bureau of Consumer Protection and, the Regional Directors and Assistant Regional Directors of the Commission's regional offices, without power of redelegation, limited authority to initiate investigations.") (emphasis added); § 2.14(d) ("The Commission *has delegated* to the Directors of the Bureaus of Competition and Consumer Protection, their Deputy Directors, the Assistant Directors of the Bureau of Competition, the

Associate Directors of the Bureau of Consumer Protection, and the Regional Directors, without power of redelegation, limited authority to close investigations.") (emphasis added). By contrast, 16 C.F.R. §§ 1.1 *et seq.* say nothing about delegation. Rather, the Commission "has authorized its staff to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted."[3] 16 C.F.R. § 1.1(b). The fact that the Commission "has authorized" staff to give advice on matters of lesser importance does not transform staff views into the Commission's views. To the contrary, under the plain text of the 16 C.F.R. § 1.1, if "a Commission opinion [is] not [] warranted," a Commission opinion is not provided. Only a staff opinion is provided. *See* 16 C.F.R. § 1.3(b), (c).

B.

The dissent criticizes the majority for "measur[ing] finality exclusively from the Commission's vantage point" because we conclude that failure to meet *Bennett*'s first prong is sufficient to dismiss for want of finality. Dissenting Op. at 1. But it is undisputed that *both* prongs of *Bennett v. Spear* must be satisfied

[3] To authorize is "to empower; to give a right or authority to act" generally. BLACK'S LAW DICTIONARY 122 (5th ed. 1979); *see also id.* at 121 (defining "authority" as "permission"). Delegation is narrower and more specific – to delegate is to give someone authority to act specifically *on one's behalf* or *in one's stead. See id.* at 383 (defining "delegate" as "a person who is delegated or commissioned to act in the stead of another"). Delegation may be one species of authorization, but the distinction is material.

independently. *Sw. Airlines*, 832 F.3d at 275. *Bennett* directs courts to look at finality from the agency's perspective (whether the action represents the culmination of the agency's decisionmaking) and from the regulated parties' perspective (whether rights or obligations have been determined, and legal consequences flow). Deficiency from either perspective is sufficient to dismiss a claim. Thus, there is no need to reach the second *Bennett* prong if the action does not mark the consummation of agency decisionmaking. We therefore need not do so here.

We respond to some of the dissent's concerns out of respect for our colleague and to clarify the appropriate finality analysis. The dissent is troubled that judicial review of informal agency advice would be unavailable here where, according to SBA's characterization, companies have relied on the 2009 Letter in conducting and growing their operations. Certainly, reasonable reliance interests of regulated parties should often be considered when an agency changes course. But the facts matter. SBA's members do not have any significant or reasonable reliance interests in the 2009 Letter, either by the letter's own terms or under FTC regulations. Call Assistant specifically requested an informal "Staff Opinion Letter" (emphasis Call Assistant's) on the applicability of the TSR to soundboard; in that request, Call Assistant made representations about how it used soundboard in order to provide the staff with a factual basis for such an opinion. J.A. 230. In express reliance on these factual representations, the FTC staff stated its opinion that, if these particular facts were true, the TSR would not

prohibit the use of soundboard, at least for the uses described by Call Assistant: J.A. 38. The 2009 Letter emphasized that the staff opinion extended only to soundboard use as factually portrayed in Call Assistant's letter soliciting the opinion. Call Assistant did not state anywhere in its letter or supporting materials that call-center agents would use soundboard to field multiple simultaneous calls; instead, Call Assistant highlighted how the technology would allow an agent to better interact with a caller and accurately convey information to a caller. *See* J.A. 230-35. Thus, even if the 2009 Letter had been binding on the Commission, it did not bless the practice of using soundboard to field multiple calls simultaneously, and it therefore does not appear to be reasonable for a company to rely upon the 2009 Letter for such uses. SBA members also did not take any affirmative steps to apprise the FTC that soundboard is frequently not used in the manner represented by Call Assistant, even after the issuance of the 2009 Letter; instead, the FTC had to learn that this from its own investigation after receiving numerous consumer complaints and reviewing news reports. If industry actors such as Call Assistant had corrected the factual misrepresentations (by omission) as proactively as they solicited the staff opinion, seven years might not have passed before FTC staff reconsidered and rescinded the 2009 Letter.[4]

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[4] The possibility of immediate judicial review of informal advice in these circumstances might make guidance harder for industry to request and receive. Not only might staff be less willing to give advice, the advice that is released may take longer and be more costly to develop. Further, allowing informal staff opinions of this sort to be brought into court immediately would cast judges

Whether a regulated entity is a small business or a large trade association, the bottom line is the same for the finality of an agency's action. Both prongs of *Bennett* must be met. The dissent argues that somehow the impact on industry should have been accounted for in the staff's decisionmaking, and the failure to account for practical impacts somehow makes informal staff advice more final. That approach bootstraps *Bennett*'s second prong into its first. The point where an agency's decisionmaking process is complete cannot be pulled to and fro by the gravity of any particular decision for an industry. Such an unmoored approach to evaluating the finality an agency's decision would create uncertainty for everyone – the agency, the industry, and the courts.

Indeed, if regulated entities could assert a dramatic impact on their industry no matter who issued the advice or under what regulatory authority, the first prong of *Bennett* would have little meaning. Say some advice is issued by a paralegal, who writes a letter on

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in a role for which they are particularly ill-prepared: providing advisory opinions about the policy merits and applicability of agency actions on an underdeveloped record. The broad interpretation of finality advocated for by the dissent would, contrary to *Abbott Labs.*, "entangle[e] [courts] in abstract disagreements over administrative policies." 387 U.S. at 148. While it may serve the short-term interest of SBA's members to bring this particular grievance to court immediately, the incentives of such a result would harm the interest of all regulated parties in access to informal advice and compliance help in general. These practicalities are reflected in the plain text of the FTC regulations that distinguish Commission advice from staff advice and that provide staff advice more flexibility by making it rescindable without notice and giving it no precedential effect.

no authority but his or her own personal opinion. And say that advice – if adopted by the Commission itself – could have significant industry consequences. Under the dissent's approach, it is unclear what would stop a regulated party from claiming that what matters for finality is potential industry impact, not whether a paralegal's opinion constitutes the culmination of agency decisionmaking. This is one reason why precedent emphasizes the importance of *who* made a decision, and how an agency's regulations delineate responsibility for and the bindingness of such a decision. *See Abbott Labs.*, 387 U.S. at 151; *Holistic Candlers*, 664 F.3d at 944. The fact that an opinion of someone at an agency could potentially impact a regulated entity says nothing about whether that opinion is the culmination of the agency's decisionmaking.[5]

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[5] Our dissenting colleague appears to believe that FTC staff has an obligation to proactively investigate whether the facts being represented by an entity requesting advice are false or incomplete. Dissenting Op. at 20. This is mistaken. Commission regulations provide that the Commission or the staff will provide advice "[o]n the basis of the materials submitted." § 1.3(a). There is no obligation on the part of FTC staff to investigate further. In fact, FTC regulations expressly provide that "a request for advice will ordinarily be considered *inappropriate* where . . . [a]n informed opinion cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry." 16 C.F.R. § 1.1 (emphasis added). The fact that the regulations authorize "the Commission or its staff" to use "any other information available" when providing advice "if practicable" simply allows – but does not require – the use of any other information that may be in the agency's possession. A request for informal staff advice is not a petition for rulemaking, nor is it an adjudication requiring investigative fact-finding by the agency. The onus is on requestors of advice to provide accurate information to form

In addition, we do not believe finality can be measured by what the industry claims it will do or stop doing. The test is what legal and practical consequences will flow from the *agency's* action. Here, it is unclear that much, if any, of the claimed consequences for industry could properly be attributed to the 2016 Letter at all. Even from this underdeveloped record it appears that the practices that prompted the 2016 Letter – such as soundboard agents handling multiple calls at a time – may not be permissible under the 2009 Letter's interpretation of the TSR. In addition, even if the staff's interpretation were adopted or enforced by the Commission, many permissible soundboard uses remain. More importantly, if the soundboard industry built its business on practices that do not conform to the facts as represented by Call Assistant, they have no cause to complain about the impact of rescinding the 2009 Letter on those practices. In any event, under FTC regulations, the 2009 Letter is not and could not be a basis for legally cognizable reliance interests because it was not issued by the Commission. 16 C.F.R. § 1.3(b).

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the basis of that advice – notably, FTC regulations provide a safe harbor against enforcement only "where all the relevant facts were fully, completely, and accurately presented to the Commission." 16 C.F.R. § 1.3(b). *See also* 16 C.F.R. § 1.2(a) ("Submittal of additional facts may be requested [by the agency from the party requesting advice] prior to the rendering of any advice."). Therefore, as both the FTC's regulations and the staff advice letters make clear, staff or Commission advice is only as good as the facts on which it is based, and at least in the circumstances here, the primary responsibility for developing and presenting those facts lies with the requestor.

Finally, the dissent relies heavily again on *Sackett* to argue that the 2009 and 2016 Letters constitute final agency action under *Bennett*'s second prong. While we need not and do not conduct a full analysis of this prong, we note significant differences between the EPA Administrator's order setting out express legal obligations in *Sackett* and the informal staff advice here. The *Sackett* Court concluded that "through the order, the EPA 'determined' 'rights or obligations' " because, "[b]y reason of the order, the Sacketts have the legal obligation to 'restore' their property . . . and must give the EPA access to their property and to 'records and documentation related to the conditions at the Site.' " *Sackett*, 566 U.S. at 126. In contrast, the informal staff advice in the 2016 Letter offers an interpretation of the TSR, but it fixes no specific, legally enforceable rights or legal obligations of the kind created by the Administrator's order in *Sackett*. As the FTC conceded, the 2016 Letter might be used to show an SBA member's knowledge regarding the meaning of the TSR and, therefore, could be *evidence* of willfulness should an SBA member violate *the TSR*. But, unlike a violation of the Administrator's order in *Sackett*, a so-called "violation" of the 2016 Letter does not independently trigger any penalties.

We respect our dissenting colleague's concern for consequences to the soundboard industry in this case, but we cannot agree that these consequences are sufficient to render informal FTC staff advice final agency action.

IV.

SBA also argues the 2016 Letter violates its free-speech rights by subjecting it to the TSR's alleged content-based restrictions on constitutionally protected speech. As SBA's counsel conceded at oral argument, however, SBA pleaded the alleged free-speech violations as APA claims only, not standalone First Amendment claims. We therefore need not reach the FTC's arguments that SBA's speech claims are either forfeited or time-barred, as these claims must also be dismissed for want of final agency action.[6]

* * *

[6] We note a subtle but important distinction between prudential doctrines such as ripeness, where the presence of constitutional claims may favor judicial review, and the APA's statutory prerequisite of final agency action, without which no cause of action or claim exists. *See John Doe, Inc. v. DEA*, 484 F.3d 561, 567 (D.C. Cir. 2007) (opinion of Edwards, J.) ("[E]ven if exhaustion, ripeness, and finality may be difficult to distinguish in some contexts, they must be carefully delineated when, as here, finality is a statutory jurisdictional prerequisite rather than merely a precaution related to concreteness and institutional capacity."); *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 745-46 (D.C. Cir. 1987) (opinion of Williams, J.) ("[W]hile courts often mingle the three doctrines [of finality, ripeness, and exhaustion], they are analytically distinct. . . . While exhaustion is directed to the steps a litigant must take, finality looks to the conclusion of activity by the agency."). Unlike reviewability doctrines developed by courts, final agency action is a statutory requirement set by Congress. We have found no decision of this Court, and no decision of any other circuit court, holding that the presence of constitutional claims eases the Supreme Court's two-part *Bennett* test for final agency action. *Cf. Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) (finding First Amendment chilling concerns relevant to ripeness while explicitly distinguishing ripeness from finality of agency action); *Chamber of Commerce v.*

Pursuant to FTC regulations and by its own terms, the 2016 Letter does not constitute the consummation of the Commission's decisionmaking process regarding the applicability of the TSR to soundboard technology. Without final agency action, SBA lacks a cause of action under the APA. We therefore vacate the decision below and dismiss the complaint for failure to state a claim.

So ordered.

MILLETT, *Circuit Judge*, dissenting: Why let reality get in the way of a good bureaucratic construct? In holding that the 2016 Letter from the Federal Trade Commission's Division of Marketing Practices is not a judicially reviewable "final agency action," the court's opinion focuses on the Commission's structuring of its own regulations to preserve its right to disagree (or not) with the Division at some "later" date. 16 C.F.R. § 1.3(c). In so doing, the court's opinion measures finality exclusively from the Commission's vantage point.

But there are two sides to this story. Finality is supposed to look at *both* whether "the agency's decisionmaking process" has "consummat[ed]," and the reality of whether "rights or obligations have been determined" by or "legal consequences will flow" from

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FEC, 69 F.3d 603-04 (D.C. Cir. 1995) (finding the presence of First Amendment speech claims to favor pre-enforcement ripeness when finality was conceded). Regardless, SBA has not argued for such a doctrinal shift.

the challenged agency action. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks and citations omitted). And in deciding whether the agency process has ended for purposes of *Bennett*'s first prong, courts must look beyond the agency's say-so to objective and practical indicia of finality. *See*, *e.g.*, *Sackett v. EPA*, 566 U.S. 120, 127 (2012) (holding that compliance order that triggers potential penalties is final even though agency provided for ongoing "informal discussion" and consideration of the accuracy of its findings).

In this case, the agency's emphatic and directive language in the 2016 Division Letter, combined with the absence of any avenue for internal administrative review, unleashes immediate legal and practical consequences for the industry, forcing its members to choose between complying by shuttering their businesses or exposing themselves to potentially significant financial penalties. When agency action threatens such severe repercussions, the "mere possibility that an agency might reconsider" does not deprive the action of finality. *Sackett*, 566 U.S. at 127.

In my view, the Administrative Procedure Act should not countenance an agency telling an individual or industry that its business must end, while fending off court review on the ground that its own internal administrative processes have not ended. Because the structure of the Commission's regulations, the substantive content of the Division's Letter, the absence of an internal appeal mechanism, and the consequences that flow from it together render the Division's 2016

Letter the end of the agency's process, I respectfully dissent.

A

Courts must examine finality in a "flexible" and "pragmatic way," considering the impact of delayed review on both the agency action and the regulated entities. *Ciba-Geigy v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) (internal quotation marks and citation omitted); *see United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (applying the "'pragmatic' approach we have long taken to finality"); *Federal Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 239 (1980) ("[C]ases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way.") (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)).

Applying that pragmatic test, I acknowledge that the Federal Trade Commission has dressed the Division's advice up with some of the trappings of nonfinality. Commission regulations say that "[a]dvice rendered by the staff is without prejudice to the right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement proceeding." 16 C.F.R. § 1.3(c). Also, the Division says in its 2016 Letter that it is "express[ing]" only the views of Commission "staff," and that the Letter has "not been approved or adopted by the Commission," nor is it "binding upon the Commission." Letter from Lois C. Griesman, Assoc. Dir., Div. Mktg. Practices, to Michael

Bills, Former Chief Exec. Officer, Call Assistant 4 (Nov. 10, 2016) ("2016 Division Letter").[1]

But a closer look at the Commission's regulations governing agency advice reveals the 2016 Division Letter to be, for all practical purposes, a definitive agency position that concludes the administrative process for the foreseeable future.

First, advisory opinions by different divisions of the Commission are not some independent or detached endeavor. Instead, all requests for advisory opinions must first be submitted to the Secretary of the Commission. 16 C.F.R. § 1.2(a). Then, "[o]n the basis of the materials submitted, as well as any other information available," the Commission "will inform the requesting party of its views," *id.* § 1.3(a), through either the issuance of an opinion by the Commission itself, *id.* § 1.1(a), or the Commission deputizing agency staff to "render [the] advice," *id.* § 1.1(b); *see id.* ("The Commission has authorized its staff to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted."); *see* 16 C.F.R. § 0.7 ("The Commission * * * may delegate, by published order or rule, certain of its functions to a division of the Commission * * * or an employee * * * .").[2]

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[1] *Available at* https://www.ftc.gov/system/files/documents/advisory_opinions/letter-lois-greisman-associate-director-division-marketing-practices-michael-bills/161110staffopsoundboarding.pdf.

[2] According to the regulations, a Commission opinion is warranted only when the "matter involves a substantial or novel

As a result, when staff issues advisory opinions to industry, it does so at the Commission's direction and as its delegate. For this case, that means the Commission itself has already decided that this matter does not warrant a Commission decision and is best handled by delegating the decision to the enforcement Division.[3] In fact, leaving Division staff to provide regulatory advice appears to be par for the course with the Commission. Of the 59 advisory opinions published on the Commission's website, 57 have been issued by staff; only 2 were issued by the Commission itself. *See* FED. TRADE COMM'N, *Advisory Opinions*, https://www.ftc.gov/policy/advisory-opinions (last visited April 17, 2018). And neither of those Commission decisions purported to review a staff advisory opinion.[4] That pattern

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question of fact or law and there is no clear Commission or court precedent," or the "subject matter of the request and consequent publication of Commission advice is of significant public interest." 16 C.F.R. § 1.1(a).

[3] In this case, an industry member requested staff advice following the adoption of the Telemarketing Sales Rule, 16 C.F.R. § 310, and the Commission directed the staff to issue an opinion. Staff initially advised in 2009 that the Rule would not apply to soundboard technology. Letter from Lois C. Griesman, Assoc. Dir., Div. Mktg. Practices, to Michael Bills, Chief Exec. Officer, Call Assistant (Sept. 11, 2009), https://www.ftc.gov/sites/default/files/documents/advisory_opinions/opinion-09-1/opinion0901_1.pdf ("2009 Division Letter"). Staff revisited and "revoked" its advice in the 2016 Letter based on new fact findings about the nature of soundboard technology when used for telemarketing. *See* 2016 Division Letter, *supra*, at 3.

[4] One Commission letter addressed a matter in the first instance. *See* Letter from Donald S. Clark, Sec'y, FED. TRADE COMM'N, to Rozanne M. Anderson, ACA Int'l & Andrew M. Beato, Stein, Mitchell & Mezines, LLP (June 23, 2009), https://www.ftc.gov/

of regulatory delegation of decisions to staff weighs in favor of finality. *See Kobach v. Election Assistance Comm'n*, 772 F.3d 1183, 1190 (10th Cir. 2014) (finding that internal delegation to Executive Director of the Election Assistance Commission rendered his decision final).

That the regulation says it "authorize[s]" staff to render advice, rather than "delegates" to staff, is neither here nor there semantically. *See* Op. at 17–18. The ordinary meaning of "authorizes" is to empower a person to act or speak for another. *See* BLACK'S LAW DICTIONARY 123 (5th ed. 1979) (defining "authorize" as "[t]o endow with authority or effective legal power, warrant, or right."); *see also* MERRIAM-WEBSTER ("[T]o endorse, empower, justify, *or permit by or as if by some recognized or proper authority.*") (emphasis added); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 89 (New College ed. 1976) ("To grant authority or power to."). That is also what a delegation does. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 349 (New College ed. 1976) (defining "delegate" as "to commit to one's agent or representative.").

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system/files/documents/advisory_opinions/federal-trade-commission-advisory-opinion-clarifying-intersection-fair-debt-collection-practices-act/p064803facta-adop-1.pdf. The other came almost thirteen years after an advisory opinion by agency staff had issued. *See* Letter from Donald S. Clark, Sec'y, FED. TRADE COMM'N, to Jonathan Sheldon & Carolyn Carter, Nat'l Consumer Law Ctr. (May 3, 2012) (continuing the longstanding position adopted by staff), https://www.ftc.gov/system/files/documents/advisory_opinions/16-c.f.r.part-433-federal-trade-commission-trade-regulation-rule-concerning-preservation-consumers-claims/120510advisoryopinionholderrule.pdf.

Here, the Commission specifically decided that the Division was best suited to speak on this matter, and that the Commission would not weigh in. It is that fact of deputization that matters in determining finality, not which synonym for conferring authority the agency uses.

Second, nothing in the regulations governing advisory opinions labels those delegated decisions as non-final or just a first round in the agency process. Instead, the regulatory scheme treats the advisory letter as concluding the process for obtaining the agency's position on legal matters. 16 C.F.R. § 1.3(a) (request for Commission advice will be answered by either "the Commission or its staff * * * inform[ing] the requesting party of its views").

Notably, the Commission's regulations do not provide a process for appealing or obtaining any form of internal review of staff opinions. Instead, the decision whether to issue advisory opinions directly or through agency staff rests exclusively with the Commission. 16 C.F.R. § 1.2(a), 1.3(a). Individuals seeking agency advice cannot control that decision, no matter how many times they might try to get the Commission itself to weigh in. *See also* Oral Arg. Tr. 31–32 (Commission counsel acknowledges that, while the Association "certainly could make the request" for review of the Division's decision, "the Commission [is] not certainly bound to issue an opinion[.]"). And as mentioned, precious few requests succeed in prompting the Commission to weigh in. If the Commission itself answers only 3% of requests for advice, as its history suggests, and

if the Commission has never once intervened to "review" the opinion of its subdivisions, the numbers themselves evidence that the Division's advice here was the agency's final word.

Like the Sacketts, Soundboard has no "*entitlement* to further agency review." *Sackett*, 566 U.S. at 127 (emphasis added). The court is unmoved, reasoning that Soundboard could either request an advisory opinion from the Commission or await enforcement. Op. at 15–16. But the Commission has already decided that this issue does not meet the criteria for a Commission opinion. Soundboard's ability to keep knocking on a door that will not open is as beside the point here as it was in *Sackett:* "The mere possibility that an agency might reconsider * * * does not suffice to make an otherwise final action nonfinal." *Sackett*, 566 U.S. at 127; *see also Hawkes Co.*, 136 S. Ct. at 1814 (where the agency decision is typically not revisited, the "possibility" of further consideration "does not make an otherwise definitive decision nonfinal").

Nor does the option to await a penalty-seeking civil enforcement action strip agency action of finality. The Supreme Court has repeatedly held that parties need not "wait[ ] for [the agency] to drop the hammer in order to have their day in court." *Hawkes Co.*, 136 S. Ct. at 1815 (internal quotation marks omitted); *see Sackett*, 566 U.S. at 127 ("But the Sacketts cannot initiate [an enforcement] process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability."); *see also Free Enter. Fund v. Public Co.*

Accounting Oversight Bd., 561 U.S. 477, 490 (2010) ("We normally do not require plaintiffs to bet the farm by taking the violative action before testing the validity of the law.") (internal quotation marks, citation, and alteration omitted).

Third, while the Commission emphasizes that the regulations expressly reserve its right "later to rescind the advice" of staff, 16 C.F.R. § 1.3(c), that language actually supports finality. To begin with, the same qualification about potential rescission applies, almost verbatim, to indisputably final Commission opinions. *Id.* § 1.3(b) ("Any advice given by the Commission is without prejudice to the right of the Commission to reconsider the question involved, and, where the public interest requires, to rescind or revoke the action."). Indeed, even without that regulatory reservation, the ability of agencies to reverse course is well-settled, so long as they reasonably explain themselves. *See Telecommunications Research & Action Ctr. v. Federal Communications Comm'n*, 26 F.3d 185, 193 (D.C. Cir. 1994) ("We have long recognized that an agency's view of what is in the public interest may change * * * . When that happens, we require only that the agency changing its course supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.") (internal quotation marks, alterations, and citation omitted).[5]

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[5] *See also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances.").

In addition, the regulation's requirement that the Commission "rescind" Division opinions underscores that, unless the Commission takes that affirmative step, the Division opinion operates as a statement of the agency's position. After all, "rescind" means "[t]o make void; to repeal or annul" a legally operative document, as in to "rescind the legislation." BLACK'S LAW DICTIONARY 1499 (10th ed. 2009); *see also* THE NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005) (defining "rescind" as to "revoke, cancel, or repeal (a law, order, or agreement): *the government eventually rescinded the directive*"). One does not "rescind" a mere suggestion or informal advice.

Further, the regulation speaks only of the Commission reserving the power to rescind the staff opinion "later." 16 C.F.R. § 1.3(c). Framed that way, the ability to rescind is just a tool the Commission keeps in its back pocket; it does not mean that Division advice that the Commission chooses to leave in place is only half-baked or tentative. The opposite is true. Once staff "inform[s] the requesting party of its views," *id.* § 1.3(a), that is the agency's final answer, unless and until there is a later change of heart. The simple fact that the Division's decision could (or could not) "be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000); *see id.* at 1023 (concluding that interpretive and policy statements may constitute final, consummated action if they are otherwise "final" in nature).

Fourth, the Administrative Procedure Act is explicit that an agency action remains reviewable "final" agency action notwithstanding the availability of appeal to a "superior agency authority," unless agency rules render the initial agency decision "inoperative" pending such appeal. 5 U.S.C. § 704. Nothing in the Commission's regulations provide for appeal to the Commission, let alone render the Division's 2016 Letter inoperative until reviewed. To the contrary, the regulations are explicit that whatever opinion issues is the Commission's answer to the request for its views, 16 C.F.R. § 1.3(a), and the decision will take effect on whatever date the staff decides—here, May 12, 2017. *See* 2016 Division Letter, *supra*, at 4 ("[T]he revocation of the September 2009 letter will be effective six months from today, on May 12, 2017."). In short, as in *Sackett*, the Commission's regulations provide "no entitlement to further agency review," 566 U.S. at 127, or even a second bite at the advisory apple.

The opinion for the court also points out that staff decisions do not afford regulated entities the same "safe harbor" protections from enforcement as formal Commission opinions do. Op. at 16–17; *see* 16 C.F.R. § 1.3(b) (providing that, when all relevant facts have been disclosed and agency orders complied with, the "Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section").

The regulations certainly do make that formal distinction. But it bears noting that the Commission in an

enforcement action cannot extract penalties unless the defendant had "actual knowledge or knowledge fairly implied * * * that [its] act is unfair or deceptive and is prohibited by [Commission] rule." 15 U.S.C. § 45(m)(1). Reasonable reliance on a staff advisory opinion would thus seem to inoculate the regulated entity against liability for penalties. Presumably that is why the soundboard industry continued its business practices without Commission challenge for seven years on the basis of the 2009 Division Letter advising that the Telemarketing Sales Rule did not apply. And presumably that is also why the Division felt obliged before reversing its legal position in the 2016 Letter to (i) undertake a months-long investigation, (ii) conduct multiple meetings with industry members, and (iii) afford industry members six months' lead time to come into compliance before enforcing the agency's new position.

In other words, while the formal protections differ for Commission-rendered advice, the differential in practice seems small, and whatever delta remains says nothing about the finality of the Division's 2016 Letter for purposes of judicial review.[6]

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[6] The court responds that Soundboard lacked any basis for reasonable reliance here because the facts Call Assistant provided to the agency in 2009 did not reflect reality. That puts the cart ahead of the horse since judicial review is where parties can contest the accuracy and substantiality of agency factual determinations. 5 U.S.C. § 706 (providing for judicial review of final agency action "unsupported by substantial evidence"). Anyhow, that same point would be just as true if the Commission were to issue an indisputably final Commission opinion. *See* 16 C.F.R. § 1.3(b) ("The Commission will not proceed against the requesting

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Consistent with that regulatory structure, the 2016 Division Letter itself speaks in final, conduct-altering, and compliance-demanding terms, leaving the regulated businesses to either knuckle under or face a penalty-seeking enforcement action.

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To begin with, the Letter states unqualifiedly that telemarketing calls using soundboard technology "are subject" to the "plain language of the [Telemarketing Sales] [R]ule," 16 C.F.R. § 310.4(b)(1)(v). 2016 Division Letter, *supra*, at 3. So going forward, calls "*can only be made legally* if they comply with the [rule's] requirements." *Id.* (emphasis added). For both agency officials on the sending end and industry on the receiving end, there is nothing preliminary, tentative, or qualified about that message.

In case that shot across the industry's bow were not warning enough, the 2016 Division Letter then gives notice that the newly announced application of the Telemarketing Sales Rule to soundboard technology "will be effective six months from today." 2016

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party with respect to any action *taken in good faith reliance* upon the Commission's advice under this section, *where all the relevant facts were fully, completely, and accurately presented* to the Commission[.]"). What matters to finality is that staff letters, even if not formally granted safe harbor protection, functionally serve the same purpose in that, by dint of the knowledge requirement, they will generally preclude imposition of penalties where regulated entities have reasonably relied on the agency's advice.

Division Letter, *supra*, at 4. That six-month lead time, the Letter explains, is to afford the industry sufficient time to "make [the] necessary changes to bring themselves into compliance" with the law. *Id.* The agency thus "views its deliberative process as sufficiently final to demand compliance with its announced position." *Ciba-Geigy*, 801 F.2d at 436. And when agency action is final enough that business-ending compliance is expected by a date certain, it should be final enough for judicial review. What is final for the goose should be final for the gander.

The 2016 Division Letter also identifies no avenue for further Commission review on the question. Worse, the Letter snuffs out any hope for a change of heart by explaining that its broadside against the use of soundboard technology in telemarketing calls is commanded by the "plain language" and "plain meaning" of the Telemarketing Sales Rule. 2016 Division Letter, *supra*, at 3. Specifically, the Division said:

> The plain language of the [Telemarketing Sales Rule] provision governing prerecorded calls imposes restrictions on "any outbound telephone call that delivers a prerecorded message." It is indisputable that calls made using soundboard technology deliver prerecorded messages. As such, under the plain meaning of the words in the [Telemarketing Sales Rule's] prerecorded call provision, outbound telemarketing calls using soundboard technology are covered because such calls "deliver a prerecorded message."

Id. The Division's position thus "admit[s] of no ambiguity" or possibility of modification. *Ciba-Geigy*, 801 F.3d at 437. If, as the Commission acknowledges, Appellee Br. 53–54, the Telemarketing Sales Rule on its face plainly foreordains the 2016 Letter's conclusion, exactly what more is industry supposed to wait for?

Even more importantly, the consequences to industry that flow from compliance with the Division's 2016 Letter are dire, "forc[ing] many users to downsize or close their doors altogether." Soundboard Br. 13. The Division knew this when issuing the letter. The Soundboard Association told the Division that extending the Telemarketing Sales Rule to soundboard technology would "decimate[ ] an industry" and "[e]liminate[ ] jobs for persons with a variety of disabilities[.]" J.A. 62. "Because the letter largely outlaws soundboard, the many businesses that manufacture or distribute soundboard technology will have no choice but to close down entirely or, at a minimum, dramatically scale back their operations. That will lead to the loss of thousands of jobs across those industries alone." J.A. 113 (quoting Declaration of Arthur F. Coombs III, Dkt. 2-2).

In addition, telling industry that telemarketing can no longer "lawfully" be undertaken with their technology will require industry "to scrap the soundboard technology systems in which they have invested millions of dollars and countless hours of development and training," and to "lay off many—and, in some cases, all—of the thousands of people whom the companies have trained and, for years, paid good salaries to[.]" Dkt. 2-2 at 11–12; *see also* Dkt. 2-2 at 10

(compliance with the 2016 Division Letter will "eliminate 80% or more of [company] revenue," and dampen sales even in areas not subject to the Telemarketing Sales Rule); Dkt. 2-3 at 3–4 (affirming that one company will be forced to make massive layoffs and will lose over $3 million invested in soundboard technology as a result of the Division's 2016 letter).

Neither the Commission nor the Division denies that those consequences will ensue.

To be sure, the 2016 Division Letter ends with the caveat that the advisory opinion has "not been approved or adopted by the Commission," and does "not bind[]" it. 2016 Division Letter, *supra*, at 4. But the 2016 Letter then quickly intones that it nonetheless "reflect[s] the views" of the Division "charged with enforcement of the [Telemarketing Sales Rule]." *Id.*[7] And the Commission, for its part, decided to publish the 2016 Letter on its website, right alongside Commission advice (which also takes the form of a letter to the requesting party).[8]

Anyhow, such boilerplate qualifications are not enough to fend off judicial review of otherwise final agency action. In *Appalachian Power Co.*, the EPA's

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[7] *See* 16 C.F.R. § 0.16 (The Bureau "investigat[es] alleged law violations, conducts compliance investigations and initiates proceedings for civil penalties to assure compliance with final Commission orders[.]"); *id.* § 2.1 (delegating authority to the Bureau to initiate investigations); *id.* § 2.5 (noting that delegated agents conduct investigations).

[8] *See* FED. TRADE COMM'N, *Advisory Opinions*, https://www.ftc.gov/policy/advisory-opinions (last visited April 17, 2018).

advisory guidance contained an even more forceful caution, emphasizing that "[t]he policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party." 208 F.3d at 1023. Such "boilerplate," which the EPA—like Commission staff here—routinely included at the end of guidance documents, was not enough " 'to keep the proceduralizing courts at bay.' " *Id.* (quoting Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1485 (1992)); *see* FED. TRADE COMM'N, *Advisory Opinions*, https://www.ftc.gov/policy/advisory-opinions (last visited April 17, 2018) (documenting that all of the Commission's staff advisory opinion letters contain the same or nearly identical cautionary language as the 2016 Letter).

Likewise, in *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990), we held that an assistant EPA administrator's letter constituted final agency action notwithstanding a concluding demurral that the letter represented only the assistant's personal thoughts and not those of the agency, *id.* at 1532. What mattered was that the assistant, who was the principal advisor for the matters at issue, laid out a decidedly non-tentative interpretation of the governing statute that was "unambiguous and devoid of any suggestion that it might be subject to subsequent revision." *Id.*

So too here. The Division's 2016 Letter speaks with the announced authority and expertise of the Telemarketing Sales Rule's enforcer. There is nothing

tentative or interlocutory about its declaration that the plain meaning of federal law requires Association members to shutter most if not all of their telemarketing business. Nor is there any administrative appeal process. In other words, the writing is on the wall, and a line of routine boilerplate cannot erase it.

2

The final straw that collapses the Commission's claim of non-finality is the "legal consequences [that] flow" from the 2016 Division Letter. *Sackett*, 566 U.S. at 126 (internal quotation marks, citation, and alterations omitted). Federal law empowers the Commission to file civil enforcement actions for penalties against those who violate Commission rules governing unfair or deceptive trade practices, including the Telemarketing Sales Rule, if the defendants had "actual knowledge or knowledge fairly implied" that their conduct was "prohibited by such rule." 15 U.S.C. § 45(m)(1); *see* 16 C.F.R. § 1.98 (addressing penalty amounts). Each individual "violation" subjects the offender to up to a roughly $40,000 penalty, 16 C.F.R. § 1.98. And for ongoing violations, each day the conduct continues "shall be treated as a separate violation," 15 U.S.C. § 45(m)(1)(C). Penalties could thus quickly snowball into more than $1 million a month or roughly $14.5 million a year for each single contract held by a soundboard company.[9]

[9] At oral argument, counsel for the Commission indicated that each individual phone call "would be a violation," which

As counsel for the Commission agreed at oral argument, the specificity and directness of the 2016 Division Letter's conclusion that the Telemarketing Sales Rule outlaws the use of soundboard technology "certainly[] * * * would be a factor" in establishing the knowledge required to trigger an enforcement action and financial penalties, and it is something that "a reasonable business would take into account." Oral Arg. Tr. 33. Given the 2016 Letter's warning to industry that the use of soundboard technology is "plain[ly]" unlawful, 2016 Division Letter, *supra*, at 3, any failure to comply would put a business at substantial risk of not only an enforcement action, but also significant penalties running back to the date of this so-called non-final Letter. The 2016 Division Letter thus is not, as the court's opinion would have it (Op. 24), mere "evidence." Op. at 24. The Letter lights the liability fuse; it is the difference between severe financial penalties and no penalties at all. *See Sackett*, 566 U.S. at 120 (noting

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would accumulate even more rapidly into crushing financial penalties. Oral Arg. Tr. 24. Like the Supreme Court in *Sackett*, this court need not definitively resolve the amount of penalties that the law might ultimately permit in these circumstances. 132 U.S. at 126 & n.3 (assuming without deciding that government is correct about liability for penalties). What matters to finality analysis is the "Government's current litigating position," grounded in statutory text, that failure to comply with the 2016 Division Letter could provide a legal basis for substantial civil penalties, *id.* at 126. That risk is a specific and concrete legal consequence that flows from the challenged agency action. *See id.* And because the Division Letter spawns such legal exposure, the mere possibility that prosecutorial discretion later down the road could reduce the amount of penalties says nothing about the finality of agency action *now*.

that legal consequences flow from the EPA's order because it "exposes the Sacketts to double penalties in future enforcement proceedings").

The Division's message to industry is clear: Proceed at your own peril. Finality principles will not allow the Commission to brush off that "immediate and practical impact" of the Division's announcement. *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956). The clear and explicit announcement in the 2016 Division Letter about the reach of the Telemarketing Sales Rule's "plain language," 2016 Division Letter, *supra*, at 3, "warns" every member of the soundboard industry to either reshape "the manner in which an important segment of the * * * business will be done" or run the "risk" of civil penalties, *Frozen Food Express*, 351 U.S. at 44. When an agency's "authoritative interpretation" and demand for "compliance" means business's "only alternative to costly compliance" is "to run the risk of serious civil * * * penalties," finality attaches and the time for judicial review has come. *Ciba-Geigy*, 801 F.2d at 437–439; *see Hawkes Co.*, 136 S. Ct. at 1815 (holding that parties "need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties"); *Sackett*, 566 U.S. at 126 (finding that the Army Corps' action had "all of the hallmarks of APA finality that our opinions establish" because, *inter alia*, it "exposes the Sacketts to double penalties in a future enforcement proceeding"); *Rhea Lana, Inc. v. Department of Labor*, 824 F.3d 1023, 1025 (D.C. Cir. 2016) ("By notifying Rhea Lana

that the company was in violation of its wage-and-hour obligations, the letter rendered knowing any infraction in the face of such notice, and made Rhea Lana susceptible to willfulness penalties that would not otherwise apply.").

Also, the risks to which the soundboard industry is exposed in this case are magnified because the 2016 Letter threatens enforcement actions and substantial penalties against speech. Given the Telemarketing Sales Rule's varied prohibitions and exceptions pertaining to the scope of outlawed speech, the "legal consequences [that] flow" from the 2016 Letter include the chilling of potentially constitutionally protected speech. *Bennett*, 520 U.S at 178; *cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011) (striking down selectively imposed content- and speaker-based burdens on the commercial speech of pharmaceutical manufacturers as unconstitutional under the First Amendment).

Accordingly, the Division's declaration that the soundboard industry needs to shut up and shut down by a date certain should weigh heavily in the finality calculus. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485–486 (1975) (finding state court decision "final" in part because "[d]elaying final decision of the First Amendment claim until after trial will leave unanswered an important question of freedom of the press under the First Amendment, an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press") (internal quotation marks and alterations omitted); *see also Blount v. Rizzi*, 400 U.S. 410, 416–417 (1971) (noting that prior

restraints "require 'prompt judicial review' * * * to prevent the administrative decision of the censor from achieving an effect of finality").[10]

Given all of that, the Division's 2016 Letter comfortably fits the mold of cases in which we have held that the actions of subordinate agency officials qualify as final agency action. *See Safari Club Int'l v. Jewell*, 842 F.3d 1280 (D.C. Cir. 2016) (Fish and Wildlife press release adopting position of Division of Scientific Authority constitutes final agency action); *Rhea Lana, Inc.*, 824 F.3d at 1025 (letter from subordinate official informing company of agency's longstanding interpretation of the Fair Labor Standards Act is final agency action); *Appalachian Power Co.*, 208 F.3d at 1021–1022 (guidance drafted by subordinate EPA officials constitutes final agency action); *Her Majesty the Queen*, 912 F.2d at 1531 (letter of assistant EPA official—with explicit caveat that it contained only a personal opinion—constitutes final agency action); *Natural Res. Def. Council, Inc. v. Thomas*, 845 F.2d 1088, 1093–1094 (D.C. Cir. 1988) (memorandum drafted by subordinate EPA official constitutes final agency action); *Ciba-Geigy Corp.*, 801 F.2d at 435 (letters issued by director of pesticide programs constitute final agency action).

* * *

[10] The opinion for the court cabins consideration of any potential chilling effect to the ripeness inquiry alone. Op. at 25 n.5. But factors relevant to ripeness often bear on finality as well. *See Ciba-Geigy*, 801 F.3d at 435 (considering finality as a component of ripeness).

As the opinion for the court notes, agency advice that is genuinely advisory can play an important role in allowing the regulators and regulated to communicate effectively and work together in coordinating voluntary compliance measures and improving the effectiveness of regulatory programs.

But "such a 'count your blessings' argument is not an adequate rejoinder to the assertion of a right to judicial review[.]" *Hawkes Co.*, 136 S. Ct. at 1816. If agencies want to give advice, they should speak in advisory terms, allow for internal review, or not attach substantial consequences to noncompliance with what is supposed to be mere advice.

To be sure, allowing judicial review in this case might increase the fact-finding burden on agencies issuing advisory opinions, but that will only be true for a certain subset of decisions—those with unambiguous pronouncements of a legal position, announced compliance dates, and substantial legal consequences for failure to fall in line. And those seem to be precisely the cases in which the law should force agencies to take a harder look, to substantiate their judgments, and to submit their decisions to judicial review. If the agency does not yet have all the facts or is not yet committed to its position as a matter of statutory policy, perhaps it should finish the job before telling an industry to shutter its operations.

At bottom, finality is about agency accountability for the decisions it makes and the consequences it unleashes. The Division's 2016 Letter, after all, is not

about just adjusting or modifying business behavior to comport with regulatory standards. Rather, the Letter announces that plain regulatory language broadly condemns as illegal an entire business model. The Letter then assigns a date certain by which businesses are expected to comply by largely ceasing their operations, laying off employees, and writing off significant financial investments. Failure to toe the Division's line will expose the soundboard industry to potentially severe penalties, with no right first to administrative appeal or review. The Division Letter leaves the soundboard industry whipsawed between abandoning its business and facing potentially ruinous enforcement actions and penalties. In these circumstances, the benefits of informal and collaborative interchange between the regulator and the regulated have evaporated. And the agency should not be able to transmogrify the mantle of "staff advice" into both a sharp regulatory sword and a shield from judicial review.

No doubt a technology used for telemarketing is hardly a sympathetic poster child for a dissenting opinion. But the pride of our legal system is its evenhandedness and fairness to all who come before it. Plus the issue here is not whether the Commission can regulate the soundboard industry or telemarketing. It is only whether the Commission must own up to the regulatory actions it has set in motion, and whether those who are told to close up shop and discharge their employees are entitled first to a day in court. In my view, if the law requires us to treat the 2016 Division Letter and its business-ending consequences as just

some informal, take-it-or-leave-it staff suggestion, then the law is being stingy with reality. I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SOUNDBOARD ASSOCIATION,	)	
Plaintiff,	)	
v.	)	**Case No. 17-cv-00150 (APM)**
U.S. FEDERAL TRADE COMMISSION,	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed Apr. 24, 2017)

Almost every American who owns a telephone has experienced it: The phone rings, you pick up, there is a distinct pause, and then an automated voice begins to make you an unsolicited sales offer. Such calls, popularly known as "robocalls," are subject to heavy federal regulation. Generally speaking, a telemarketer cannot direct a robocall to a person unless that person first consents in writing to receipt of the call. Thus, while federal regulations do not absolutely bar robocalls, the written-consent requirement, along with other restrictions—collectively, "the robocall regulation"—render marketing via robocall prohibitively expensive.

But not all automated voices are created the same. The traditional robocall consists of a one-way telemarketing message that involves no live sales agent or other human interaction. "Soundboard" technology—

the subject of this case—is different. It involves two-way communication between sales agent and consumer, in which the sales agent plays pre-recorded audio clips in response to the consumer's statements. Soundboard technology also allows the sales agent to break into the call and speak directly to the consumer, if needed. Say, for instance, a consumer asks for additional information about how to buy a product. A sales agent using soundboard technology first attempts to answer that inquiry by playing a pre-recorded audio file. If the pre-recorded response is unsatisfactory, then the sales agent can intervene and give the consumer a direct response. So, like a traditional robocall, soundboard technology uses automated, pre-recorded messages to convey information. But, it differs markedly from the traditional robocall in that a human being is on the other end of the line, who is sometimes revealed to the consumer and sometimes not.

Until recently, the robocall regulation did not apply to calls using soundboard technology. In September 2009, the staff of Defendant Federal Trade Commission ("FTC") issued an "informal" opinion letter, concluding that, because calls using soundboard technology enable the caller and recipient to have a two-way conversation, such calls are not subject to the robocall regulation. Seven years later, the agency changed course. Citing "widespread use of soundboard technology in a manner that does not represent a normal, continuous, two-way conversation between the call recipient and a live person," the FTC staff issued a second opinion letter in November 2016—which the court will refer to as the "November 2016 Letter"—that

reversed its earlier position. The staff's view now was that telemarketing calls using soundboard technology are subject to the general prohibition placed on traditional robocalls. The FTC staff gave the telemarketing industry until May 12, 2017, "to make any necessary changes to bring themselves into compliance."

Plaintiff Soundboard Association is a trade group representing companies that manufacture and use soundboard technology. It asserts that the November 2016 Letter is unlawful for two reasons. First, Plaintiff asserts that the November 2016 Letter is a "legislative rule" that the FTC failed to promulgate through notice and comment, as required under the Administrative Procedure Act ("APA"). Second, it contends that the November 2016 Letter is an unconstitutional restriction on speech because the robocall regulation's written-consent requirement does not apply to prerecorded solicitation calls between a non-profit charitable organization and its existing donors, but it does apply to such calls with potential first-time contributors. According to Plaintiff, that distinction renders the robocall regulation a content-based regulation of speech that cannot be justified under strict scrutiny.

The court rejects both claims. First, the court finds that, although the FTC's November 2016 Letter is a final, reviewable agency action, the Letter is not a legislative rule, but is, at most, an interpretive rule that the FTC was not required to issue through notice and comment under the APA. Second, the court concludes that the November 2016 Letter does no more than subject soundboard calls to valid time, place, and

manner restrictions. The exemption provided to pre-recorded calls on behalf of charitable organizations to existing donors, but not to charitable organizations' calls to potential, first-time donors, is a content-neutral regulation of speech that easily satisfies the requisite intermediate scrutiny. Accordingly, the court denies Plaintiff's Motion for Summary Judgment and grants Defendant's Motion for Summary Judgment.

I. BACKGROUND

A. Factual Background

1. The "Robocall" Regulation

In 1994, Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act to protect consumers from deceptive and abusive telemarketing practices. *See* Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297 § 2, 108 Stat. 1545 (1994). The Act charges the U.S. Federal Trade Commission ("FTC") with prescribing rules regulating the telemarketing industry. 15 U.S.C. § 6102(a)(1). Pursuant to that authority, in 1995, the FTC promulgated the Telemarketing Sales Rule ("TSR"). Telemarketing Sales Rule, 60 Fed. Reg. 43,842 (Aug. 23, 1995), *codified at* 16 C.F.R. pt. 310. The TSR prohibits telemarketing calls at certain times of day, allows consumers to request placement on a "do-not-call" list, and imposes other requirements on telemarketers. *See id.* § 310.4(b)(ii), (c).

In 2008, the FTC amended the TSR to include new regulations on robocalls. *See* Telemarketing Sales Rule, Final Rule Amendments, 73 Fed. Reg. 51,164, 51,184 (Aug. 29, 2008). The amendments barred telemarketers from "[i]nitiating any outbound telephone call that delivers a prerecorded message" without first obtaining "an express agreement, in writing" from the consumer. 16 C.F.R. § 310.4(b)(1)(v). The written "express agreement" must include certain elements, such as language demonstrating the consumer's willingness to receive the robocalls, the consumer's telephone number, and the consumer's signature. *Id.* § 310.4(b)(1)(v)(A)(i)–(iv). The 2008 TSR Amendments further provide that, even when a telemarketer has an express agreement in hand, the telemarketer's robocall must adhere to strict caller disclosure and consumer opt-out notice requirements. *Id.* § 310.4(b)(1)(v)(B). This opinion refers to these restrictions collectively as "the robocall regulation."

The written consent requirement does not apply to pre-recorded calls made on behalf of charitable organizations to past donors or current members. Instead, the robocall regulation specifically provides that charitable organizations may place robocalls "to induce a charitable contribution from a member of, or previous donor to," the organization without obtaining an express written agreement from the member or donor. *Id.* In carving out this exception, the FTC explained that it sought to balance the interest of non-profit organizations in seeking donations via telephone with the privacy rights of consumers. It reasoned that prior

donors had a reduced privacy interest because, by donating to the organization previously, they are deemed to have consented to receiving future charitable solicitation calls. 73 Fed. Reg. at 51,193–94.

2. The FTC Applies the Robocall Regulation to Soundboard Technology

As noted, the traditional robocall is a one-way, prerecorded communication that does not involve any human interaction. Soundboard technology, on the other hand, allows for a two-way conversation between the caller and recipient. After initiating a soundboard call, a live sales agent uses pre-recorded audio clips to respond to the recipient's statements and can, if necessary, opt to engage in a live conversation with the consumer. Thus, like a robocall, soundboard technology uses pre-recorded messages to market a good or service, but ultimately differs from a robocall because it depends on a live sales agent.

This technological distinction prompted questions within the telemarketing industry as to whether soundboard calls would be subject to the robocall regulation. Before the new regulations went into effect in September 2009, *see* 73 Fed. Reg. at 51,164, a telemarketing firm, Call Assistant LLC, sent a letter to the FTC seeking clarification of whether the technological distinction placed soundboard calls outside of the scope of the robocall regulation. Def.'s Opp'n to Pl.'s Appl. for Prelim. Inj., ECF No. 11 [hereinafter Def.'s Opp'n], Ex. 2, ECF 11-2. Call Assistant's letter specifically asked

whether its "[soundboard] system conforms to the TSR Amendment." *Id.*

On September 11, 2009, the FTC responded with an "informal staff opinion" signed by Lois Greisman, the FTC's Associate Director of the Division of Marketing Practices ("September 2009 Letter"). Compl., ECF No. 1 [hereinafter Compl.], Ex. 2, ECF No. 1-3 [hereinafter Sept. 2009 Letter]. The September 2009 Letter stated that "the staff of the [FTC] has concluded that the 2008 TSR Amendments . . . do not prohibit telemarketing calls using this technology." *Id.* Greisman explained that the robocall regulation "prohibit[s] calls that deliver a prerecorded message and do not allow interaction with call recipients. . . . Unlike the technology that you describe, the delivery of prerecorded messages in such calls does not involve a live agent who controls the content and continuity of what is said to respond to concerns, questions, comments—or demands—of the call recipient." *Id.* Quite naturally, the September 2009 Letter led telemarketers to believe that soundboard calls, unlike traditional robocalls, did not have to conform to the written-consent component of the robocall regulation. *See* Notice of Filing of Pl.'s Corrected Appl. for Prelim. Inj., ECF No. 4, Mem. in Supp., ECF No. 4-2 [hereinafter Pl.'s Mot.], Ex. 1, ECF No. 4-3 [hereinafter Coombs Decl.], ¶ 18 (stating that it has been "widely understood" since the September 2009 Letter that soundboard calls did not fall under the robocall regulation, and "SBA member companies relied on that assurance as we developed and grew our businesses"); Pl.'s Mot., Ex. 2, ECF No. 4-4, ¶ 6; Pl.'s

Mot., Ex. 3, ECF No. 4-5, ¶ 4; Compl., Ex. 7 (PACE Soundboard Technology White Paper), ECF No. 1-8, at 7 (stating that relying on the September 2009 Letter, "the contact center industry has continued using and investing in Soundboard" and subjecting it now to the robocall regulation will "detrimentally impact[]" the soundboard industry).

The September 2009 Letter remained the FTC's position on soundboard technology for more than seven years. Then the FTC changed its mind. According to the FTC, sometime after September 2009, it began seeing an increased number of consumer complaints, as well as press articles, about the improper use of soundboard technology. Specifically, they received complaints that consumers were not receiving appropriate responses to their questions and comments and that live operators were not intervening in calls. Def.'s Opp'n, Ex. 1, ECF No. 11-1 [hereinafter Bandy Decl.], ¶ 5. Additionally, the FTC staff received evidence that sales agents using soundboard technology were handling more than one call at a time, which made the practice more like placing robocalls and therefore undercut the FTC staff's rationale behind the September 2009 Letter. *Id.*; Compl., Ex. 1, ECF No. 1-2 [hereinafter Nov. 2016 Letter], at 2–3.

These concerns about the technology's use prompted the FTC staff to reach out to telemarketing trade groups to hear the industry's perspective. *Id.* ¶ 6. In the early part of 2016, the FTC staff had at least two meetings with the trade groups, during which industry representatives shared information about the use and

operation of soundboard technology. *Id.* ¶¶ 7–9. The FTC staff also collected data about soundboard technology's use. *Id.* ¶¶ 5, 10.

On November 10, 2016, the FTC staff announced that it now considered soundboard calls subject to the robocall regulation. Nov. 2016 Letter at 2. The November 2016 Letter explained that the FTC had changed its position on the applicability of the TSR to soundboard technology:

> Given the actual language used in the TSR, the increasing volume of consumer complaints, and all the abuses we have seen since we issued the September 2009 letter, we have decided to revoke the September 2009 letter. It is now staff's opinion that outbound telemarketing calls that utilize soundboard technology are subject to the TSR's prerecorded call provisions because such calls do, in fact, "deliver a prerecorded message" as set forth in the plain language of the rule.

Id. at 3. The FTC staff added that the evidence it had gathered showing the misuse of soundboard technology was "inconsistent with the principles we laid out in our September 2009 letter as well as our understanding of the technology at the time we issued the letter." *Id.* at 2.

The FTC staff gave the telemarketing industry time to adjust to its new position. It announced that, "[i]n order to give industry sufficient time to make any necessary changes to bring themselves into compliance," the September 2009 Letter's revocation would

become effective in six months, on May 12, 2017. *Id.* at 4. The November 2016 Letter closed by stating that "the views expressed in this letter are those of the FTC staff" and "have not been approved or adopted by" and "are not binding upon" the Commission. *Id.* "However, they do reflect the views of staff members charged with enforcement of the TSR." *Id.*

B. Procedural Background

The Soundboard Association ("SBA") filed suit in this court on January 23, 2017, advancing claims under the Administrative Procedure Act ("APA"), the First Amendment, and the Declaratory Judgment Act that the November 2016 Letter does not reflect lawful agency action. Compl. ¶¶ 1, 79. Those claims are predicated on two theories. First, Plaintiff contends that the November 2016 Letter is a legislative rule that the FTC was required to promulgate through notice and comment, which it did not do. *Id.* ¶¶ 65–66. Second, Plaintiff claims that the November 2016 Letter unlawfully subjects telemarketers using soundboard technology to regulations that "treat[] speech tailored for first-time donors differently than speech tailored for previous donors," *id.* ¶ 74, and that such a content-based regulation does not survive strict scrutiny under the First Amendment. *Id.* ¶¶ 70–79. Plaintiff also seeks a declaration that the FTC violated the APA in issuing the November 2016 Letter. *Id.* at ¶ 83.

Plaintiff simultaneously filed a Motion for Preliminary Injunction with its Complaint, asking the court

to enjoin enforcement of the May 12, 2017, compliance deadline until the court ruled on the merits. *See* Pl.'s Mot. at 1. The parties agreed to consolidate the hearing on the preliminary injunction motion with the "trial" on the merits, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. Order, ECF No. 16, at 1; Fed. R. Civ. P. 65(a)(2); *Morris v. District of Columbia*, 38 F. Supp. 3d 57, 62–63 (D.D.C. 2014). Thus, with their consent, the court treats the parties' pleadings as cross-motions for summary judgment.

II. LEGAL STANDARD

Ordinarily, cross-motions for summary judgment are reviewed under the standard set forth in Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56, a court may grant summary judgment when a party demonstrates that there is no genuine issue of material fact and shows it is entitled to judgment as a matter of law. However, in cases such as this one that involve review of agency action under the APA, the Rule 56 standard does not apply. *See Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007). Instead, "the district judge sits as an appellate tribunal" and "[t]he entire case on review is a question of law." *Am. Biosci., Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (internal quotation marks omitted) (collecting cases). In this posture, the court must decide "whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *See*

Se. Conference v. Vilsack, 684 F. Supp. 2d 135, 142 (D.D.C. 2010).

III. DISCUSSION

A. Whether the November 2016 Letter is a Final Agency Action

Before proceeding to the merits of Plaintiff's APA claim, the court must address the vigorously contested threshold issue of whether the November 2016 Letter is a "final agency action," within the meaning of the APA. *See Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006). If it is, then the court may address the merits of Plaintiff's claims. If it is not, then the Letter is not reviewable, and the court's inquiry comes to an end. *See id.*

The APA allows for judicial review of a "final agency action." 5 U.S.C. § 704. For an agency action to be final, it must possess two characteristics. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). First, the action must "mark the consummation of the agency's decision-making process"—in other words, it cannot be "tentative or interlocutory." *Id.* (internal quotation marks omitted). Second, it must determine "rights or obligations" or have "legal consequences." *Id.* at 178 (internal quotation marks omitted). Whether an agency action is final is a "'flexible' and 'pragmatic'" inquiry. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149–50 (1967)).

The D.C. Circuit has identified three additional factors for courts to consider in assessing the finality of an agency action—factors it has characterized as "complementary" to the two-part *Bennett* inquiry. *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011). Those factors, as articulated by the court in *Ciba-Geigy Corp. v. EPA*, are: (1) whether the agency "ha[s] taken a 'definitive' legal position concerning its statutory authority"; (2) whether the case presents "'a purely legal' question of 'statutory interpretation'"; and (3) whether the agency action imposes "an immediate and significant practical burden" on Plaintiff. *Id.* (quoting *Ciba-Geigy*, 801 F.2d at 435–37).

On occasion, the D.C. Circuit has applied the three *Ciba-Geigy* factors as a proxy for the two-part *Bennett* inquiry, particularly in cases that involve a pre-enforcement challenge to agency action. For example, in *CSI Aviation Services v. U.S. Department of Transportation*, the court relied primarily on the *Ciba-Geigy* factors to find that a Department of Transportation cease-and-desist letter was a reviewable final agency action. *See* 637 F.3d at 411–13. It reached the same conclusion in *Reckitt Benckiser Inc. v. EPA*, holding that an EPA-issued misbranding notice qualified as a final agency action. 613 F.3d 1131, 1136–41 (D.C. Cir. 2010). *Cf. John Doe, Inc. v. Drug Enf't Admin.*, 484 F.3d 561, 566–67 (D.C. Cir. 2007) (holding that "[b]oth *Bennett* and *Ciba-Geigy* firmly support a finding of finality" where DEA affirmatively denied drug manufacturer's permit application to import generic version of

FDA-approved drug for testing, blocking manufacturer's plans to market the generic version).

Whether this court applies either the two-part *Bennett* test or the three *Ciba-Geigy* factors, the result is the same: the November 2016 Letter constitutes a final agency action.

1. The Bennett *Test*

a. The First Element of the *Bennett* Test

The court finds that the November 2016 Letter represents the "consummation" of the FTC's decision-making process. *See* 520 U.S. at 177–78. The November 2016 Letter was the culmination of months of investigation and deliberation by the FTC's Division of Marketing Practices, which is charged with enforcing the TSR. The FTC staff not only considered consumer complaints, but also proactively sought out and received input from the telemarketing industry. Nov. 2016 Letter at 2 ("During the last few months, we have had multiple productive discussions and meetings with [industry groups]" and "[s]taff carefully considered the input" of these groups); *see also* Bandy Decl. ¶¶ 5–10. Neither the FTC staff nor the Commission itself presently is reviewing the position announced in the November 2016 Letter; nor is any review anticipated in the near future. *See* Oral Argument Tr. (rough draft), at 33 (FTC counsel stating, "[FTC rules] certainly allow[ ] the Commission to rescind the guidance at any time, but I'm unaware of any action suggesting it's doing so."). Thus, for all intents and purposes, the

agency's review of whether the robocall regulation applies to soundboard calls is at an end.

The FTC disputes that the November 2016 Letter constitutes the consummation of the agency's decision-making because it is "an informal, tentative assessment of the law by a subordinate official." Def.'s Opp'n at 17. It is merely "staff advice," the FTC contends, issued by a subordinate official, who "do[es] not speak for the agency," and is not binding on the Commission. *Id.* (citing 16 C.F.R. §§ 1.26(d), 1.3(c), 2.14(a), 3.11(a)) (alteration omitted). That argument is unavailing. The fact that a lower-level agency official issued the November 2016 Letter, rather than the Commission itself, is not dispositive. The D.C. Circuit has made clear that legal positions announced, as here, by subordinate officials responsible for oversight can constitute final agency action. *See*, *e.g.*, *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1531–32 (D.C. Cir. 1990) (finding that letters from the "Acting Assistant Administrator for Air and Radiation" were final agency actions, given that the author was "clearly speaking in an official rather than a personal capacity" and there was no reason to question his authority to speak for the EPA); *Nat. Res. Def. Council, Inc. v. Thomas*, 845 F.2d 1088, 1094 (D.C. Cir. 1988). And, while the Commission does have the power to rescind the Letter, *see* Def.'s Opp'n at 17 (citing 16 C.F.R § 1.3(c)), the mere prospect that it might do so does not insulate the Letter from judicial review. *See U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. ___, 136 S. Ct. 1807, 1813–14 (2016) (observing that the mere possibility of

revision "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal"); *accord Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016).

Moreover, contrary to the FTC's position, the November 2016 Letter is not a mere "ruling" or "recommendation" from a subordinate official that is still subject to review and therefore not a final agency action. *See, e.g., Abbott Labs.*, 387 U.S. at 151; *Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 669–70 (D.C. Cir. 2016). Rather, it reflects the "views of staff members charged with enforcement of the TSR." Nov. 2016 Letter at 4. The court has no reason to believe that the FTC staff's "considered determination" on the use of soundboard technology does not, as a practical matter, reflect the position of the agency itself. *Safari Club Int'l*, 842 F.3d at 1289.

The Supreme Court's decision in *FTC v. Standard Oil of California* does not, as the FTC argues, compel a different result. Def.'s Opp'n at 18. There, the Court held that the FTC's decision to commence an enforcement action was not a final, reviewable action. 449 U.S. 232, 242–43 (1980). Such an action, the Court reasoned, was not final because "[i]t had no legal force or practical effect upon [the company's] daily business other than the disruptions that accompany any major litigation. And immediate judicial review would serve neither efficiency nor enforcement of the [law]." *Id.* at 243. Based on *Standard Oil*, the FTC argues that, if the decision to initiate an actual enforcement action is not a final agency act, then it is "impossible to see how

it can be a final action when FTC staff issues a letter indicating how it might make recommendations for Commission enforcement." Def.'s Opp'n at 18.

Though the FTC's argument has some intuitive appeal, it is wrong as a matter of law. The Supreme Court has taken different approaches on the question of finality as between the pre- and post-enforcement contexts. For example, in *Frozen Food Exp. v. United States*, the Court addressed an agency order specifying that certain commodities were not considered "agricultural" commodities, which would make motor vehicles transporting them exempt from permitting and certification requirements. 351 U.S. 40, 41 (1956). Although the agency had yet to initiate or threaten an enforcement action, the Court held that the agency's order was final because it "had an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well." *Id.* at 43–44. The order, the court explained, forms "the basis for carriers in ordering and arranging their affairs. . . . [and] sets the standard for shaping the manner in which an important segment of the trucking business will be done." *Id.* The agency's order also "warns every carrier, who does not have authority from [the agency] to transport those commodities, that it does so at the risk of incurring criminal penalties." *Id.; cf. Abbott Labs.*, 387 U.S. at 153 (holding reviewable prior to enforcement FDA regulations that forced drug manufacturers to "risk serious criminal and civil penalties" for noncompliance, or incur large expenses to come into compliance).

Though over 60 years old, *Frozen Food* remains vibrant today. Recently, the Court in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, relying on *Frozen Food*, held that an Army Corps of Engineers' "jurisdictional determination" that subjected property to the Clean Water Act was a final reviewable action. 136 S. Ct. at 1811, 1814. The Court explained that, because the Corps' jurisdictional determination "warns that if [the companies] discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties," it is a final agency action. *Id.* at 1815.

The November 2016 Letter at issue in this case bears all of the hallmarks of final agency action present in *Frozen Food* and *Hawkes*. Acting through its staff, the FTC has taken a definitive position that telemarketing calls deployed with soundboard technology are subject to the robocall regulation. The Letter also puts companies on notice and gives them time "to bring themselves into compliance." Nov. 2016 Letter at 4. The upshot of the Letter could not be clearer: telemarketing companies either must undertake the expense of coming into compliance with the agency's new position or risk enforcement action. Thus, the Letter has an "immediate and practical impact" on the telemarketing industry and "sets the standard for shaping the manner in which" it does business. *Frozen Food*, 351 U.S. at 44. The November 2016 Letter, therefore, constitutes a reviewable final action.

b. The Second Element of the *Bennett* Test

Having concluded that the November 2016 Letter has a "immediate and practical impact" on the telemarketing industry, the Letter also then satisfies the second element of the *Bennett* test—the agency's action determines "rights or obligations." 520 U.S. at 178; *see also Hawkes*, 136 S. Ct. at 1814 (citing the "definitive nature" of the Corps' decision as giving rise to "direct and appreciable legal consequences" (quoting *Bennett*, 520 U.S. at 178)).

The FTC contends that the November 2016 Letter fails the second prong, arguing that, at most, it requires telemarketers to "choose 'between voluntary compliance' and the 'prospect of having to defend [themselves]' in FTC enforcement litigation." Def.'s Opp'n at 19 (quoting *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003)). The FTC relies primarily on two cases to support its position: *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 324 F.3d 726, and *Holistic Candlers and Consumers Association v. Food & Drug Administration*, 664 F.3d 940 (D.C. Cir. 2012). In each case, the D.C. Circuit held agency letters to manufacturers to be nonfinal. Both, however, are distinguishable from the facts presently before the court.

Reliable Automatic Sprinkler differs from the present case because, whereas the letter there announced the agency's *investigation* into whether its rule applied

to the plaintiff's product, the November 2016 Letter reflects the FTC's *conclusion* that soundboard technology is subject to the robocall regulation. In *Reliable Automatic Sprinkler*, the Consumer Product Safety Commission issued a letter to a sprinkler manufacturer communicating "the intention of the Compliance staff to make the preliminary determination that these sprinklers present a substantial product hazard, as defined by . . . 15 U.S.C. § 2064(a)." 324 F.3d at 730. The D.C. Circuit held that the Commission's letter was not a reviewable agency action because "[t]he agency's conduct thus far amounts to an investigation of appellant's sprinkler heads, a statement of the agency's intention to make a preliminary determination that the sprinkler heads present a substantial product hazard, and a request for voluntary corrective action." *Id.* at 731. Unlike the letter in *Reliable Automatic Sprinkler*, the November 2016 Letter does not request mere "voluntary corrective action." Rather, it conclusively states that soundboard calls must comply with the robocall regulation. Indeed, the FTC staff acknowledged that its new position effectively meant that telemarketers no longer would be able to use soundboard calls to induce the purchase of any good or service. *See* Nov. 2016 Letter at 3. That much is clear from the FTC staff's pointing out that *other* uses of soundboard technology—such as for non-telemarketing calls, including political, survey, and pure informational calls, and for responding to in-bound calls—remain permissible under the TSR, as well its observation that those other uses constitute a "significant percentage" of overall soundboard technology use. *Id.* at 4. Thus, the Letter

does not seek mere voluntary compliance; it effectively prohibits a use of soundboard technology. *Cf. Safari Club Int'l*, 842 F.3d at 1289 (holding that agency's "de facto denial of permits" "leads inexorably to the conclusion that [the plaintiff's] 'rights . . . have been determined'" (second alteration in original) (quoting *Bennett*, 520 U.S. at 178)).

Holistic Candlers is distinguishable for similar reasons. In *Holistic Candlers*, the D.C. Circuit considered warning letters the FDA had issued to manufacturers of "ear candles," advising that the agency considered the products to be adulterated and misbranded medical devices. 664 F.3d at 942. The FDA's warning letters did not, however, conclusively determine whether the ear candles actually were medical devices. Instead, the letters

> advise[d] the recipients that 'it *appears* your ear candles are intended to mitigate or treat' the listed disorders, explain[ed] where to get the 'information you need to submit in order to obtain approval or clearance for your device,' and state[d] that 'FDA *will evaluate* the information you submit and decide whether your product may be legally marketed.'

Id. at 944. In light of this language, the D.C. Circuit found that the letters failed to reflect the consummation of the FDA's decision-making process. *Id.* The court also held that the letters could not determine rights or obligations, or constitute a decision from which legal consequences flow, because they prompted only voluntary compliance with the FDA's preliminary

assessment of the ear candles; the FDA's decision-making process plainly remained ongoing. *Id.* at 944–45. The same cannot be said of the November 2016 Letter. The Letter definitively finds that soundboard technology is subject to the robocall regulation, and it does not invite industry to submit additional information to inform an ongoing decision-making process. *Cf. id.* at 942, 946. The FTC staff already has taken industry input into consideration, and the November 2016 Letter announces the staff's final decision that the robocall regulation applies to soundboard technology. Accordingly, the warning letters at issue in *Holistic Candlers* are distinguishable from the November 2016 Letter, and that case does not change the court's analysis.

2. The Ciba-Geigy Factors

A review of the three "complementary" *Ciba-Geigy* factors only bolsters the court's conclusion that the FTC staff's change in position constitutes a reviewable, final agency action. The first factor—whether the agency has stated a "definitive" position as to its statutory authority—is satisfied because the FTC staff has taken the "definitive" legal position that soundboard calls are subject to the robocall regulation. *See CSI Aviation*, 637 F.3d at 478. Like the agency actions at issue in both *Ciba-Geigy* and *CSI Aviation*, the November 2016 Letter "admit[s] of no ambiguity" and "[gives] no indication that it [is] subject to further agency consideration or possible modification." *Ciba-Geigy*, 801 F.2d at 436–37. Although the Letter recites the truism that

the Commission is not bound by the staff's position, such text is mere boilerplate and does not create doubt about the finality of the agency's position. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022–23 (D.C. Cir. 2000) (rejecting the argument that "boilerplate" language in an agency guidance document is dispositive as to whether an agency action has legal consequences); *compare* Sept. 2009 Letter at 3, *with* Nov. 2016 Letter at 4.

This case also presents a purely legal question. *See Ciba-Geigy*, 801 F.2d at 437. Although this case does not involve a "pure legal" question of "statutory interpretation," as in *Ciba-Geigy* and *CSI Aviation*, the question presented—whether November 2016 Letter is a "legislative rule" under the APA—would not "benefit from a more concrete setting." *Id.* at 435. The answer to that legal question depends entirely on the context in which the Letter was adopted, and it does not depend on further development of the administrative record. *See CSI Aviation*, 637 F.3d at 412.

Finally, as already discussed, the November 2016 Letter imposes "an immediate and significant practical burden" on the telemarketing industry, thereby satisfying the third *Ciba-Geigy* factor. *Id.* The FTC staff's reversal effectively bars the use of soundboard technology to place outgoing calls to promote the sale of goods or services. *See id.* (finding agency's cease-and-desist letter that "effectively declared the company's operations unlawful" to be a final agency action). Even if not an effective prohibition, at a minimum, the agency's action "cast[s] a cloud of uncertainty" over

the continued use of soundboard technology for telemarketing purposes. *Id.* As noted, it puts the telemarketing industry to the "painful choice" between "costly compliance and the risk of prosecution at an uncertain point in the future." *Id.*

In summary, the three *Ciba-Geigy* factors all point to the conclusion that the November 2016 Letter is a final, reviewable agency action. The D.C. Circuit's observation in *CSI Aviation*—"[h]aving thus flexed its regulatory muscle, [the agency] cannot now evade judicial review"—is equally applicable here. *Id.* at 413. In light of the November 2016 Letter's conclusive determination that soundboard technology falls within the purview of the robocall regulation, which will take effect in a matter of weeks, the court concludes that the Letter constitutes final agency action subject to judicial review.

B. Whether the November 2016 Letter is a Legislative or Interpretive Rule

The court now arrives at the merits of Plaintiff's APA claim. The narrow question presented is whether the November 2016 Letter is a "legislative" as opposed to an "interpretive" rule.[1] If it is a legislative rule, then the FTC was required to issue the Letter pursuant to notice-and-comment rulemaking under the APA; on

[1] The FTC also has argued that the November 2016 letter is not a "rule" as defined by the APA. Def.'s Opp'n at 21–22. Because the court concludes the November 2016 Letter is not a legislative rule, it need not reach that issue.

the other hand, if it is an interpretive rule, then the FTC's direct issuance of the Letter to an industry representative did not run afoul of the APA. *See* 5 U.S.C. § 553(b); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. ___, ___, 135 S. Ct. 1199, 1203 (2015). Plaintiff's challenge to the November 2016 Letter is, therefore, purely procedural; the court is not tasked with evaluating its substance.[2]

The line separating a legislative rule from an interpretive rule is not always clear, and the task of classification is "quite difficult and confused." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). The Supreme Court has observed that the "prototypical example of an interpretive rule issued by an agency [is one] [that] advise[s] the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (internal quotation marks omitted). More recently, acknowledging the difficulties attendant to drawing the distinction between the two types of rules, the Court reinforced that "it suffices to say that the critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez*, 135 S. Ct. at 1204 (internal quotation marks omitted).

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[2] Accordingly, the court does not address whether, under 5 U.S.C. § 706(2)(A), the FTC staff's decision to apply the TSR's robocall regulation to soundboard technology-initiated calls and to disavow the September 2009 Letter was an unlawful arbitrary and capricious act. Plaintiff has not advanced that claim.

The D.C. Circuit draws the line of demarcation between the two types of rules in a similar fashion. In *Mendoza v. Perez*, the Circuit explained that "[a] rule is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy," whereas an interpretive rule "describes the agency's view of the meaning of an existing statute or regulation." 754 F.3d 1002, 1021 (D.C. Cir. 2014) (quoting *Batterton v. Marshall*, 648 F.2d 694, 702 n.34 (D.C. Cir. 1980). The distinguishing characteristic between the two, therefore, "is whether the new rule effects a 'substantive' regulatory change to the statutory or regulatory regime." *Id.* (citing *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6–7 (D.C. Cir. 2011). Stated another way, "[t]o be interpretative, a rule 'must derive a proposition from an existing document whose meaning compels or logically justifies the proposition.'" *Id.* (quoting *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010)).

Applying those principles here, the November 2016 Letter is an interpretive rule. The Letter begins with an explanation of why the FTC staff is revisiting the September 2009 Letter. Nov. 2016 Letter at 1–2 ("[S]ince we issued the letter in 2009, staff has seen evidence of the widespread use of soundboard technology in a manner that does not represent a normal, continuous, two-way conversation between the call recipient and a live person."). It then cites to the relevant TSR provision—the robocall regulation—barring telemarketers from initiating "any outbound telephone

call that delivers a prerecorded message" without prior written consent from consumers, *id.* at 3 (quoting 16 C.F.R. § 310.4(b)(1)(v)), and announces that, in light of newly acquired facts about soundboard technology, "[soundboard calls] are subject to the TSR's prerecorded call provisions because . . . [they] 'deliver a prerecorded message' as set forth in the plain language of the rule." Nov. 2016 Letter at 3. That determination does not supplement or effect a change to the statutory or regulatory scheme applicable to telemarketers. Rather, it communicates to the telemarketing industry the agency's view that an existing regulation now applies to a particular form of telemarketing technology as currently used by the industry. That is a "quintessential interpretive rule." *Flytenow, Inc. v. Fed. Aviation Admin.*, 808 F.3d 882, 889 (D.C. Cir. 2016) (holding that a FAA letter conveying the agency's position that a proposed flight-sharing service would be a "common carrier," as defined by the FAA's regulations, and therefore would require commercial pilot licenses, "is a quintessential interpretative rule, as it was 'issued by an agency to advise the public of the agency's construction of the statutes and rules it administers'" (quoting *Shalala*, 514 U.S. at 99)).

That the November 2016 Letter announced a new position—and, in so doing, took the telemarketing industry by surprise—does not render it a legislative rule. It is beyond dispute that agencies are free to adopt a position that reverses or substantially deviates from an earlier one. *See Perez*, 135 S. Ct. at 1207. Such a change does not subject the agency's action to the

APA's notice-and-comment requirements. "Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule." *Perez*, 135 S. Ct. at 1206. Here, there can be little doubt that the FTC staff's earlier opinion on soundboard technology, the September 2009 Letter, was an interpretive rule. *See Flytenow*, 808 F.3d at 889. The decision to rescind that opinion did not change the fundamental character of the agency's action and transform an interpretive rule into a legislative one.

Plaintiff advances three main arguments in opposition to this outcome. First, it asserts that the November 2016 Letter is a legislative rule because it has a "practically binding" effect on the telemarketing industry—it all but compels telemarketers to abandon use of soundboard technology to initiate calls. In doing so, Plaintiff relies heavily on *Appalachian Power v. EPA*. Specifically, Plaintiff seizes on the D.C. Circuit's statement that, "if [an agency action] leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'" Pl.'s Mot. at 16 (citing *Appalachian Power Co.*, 208 F.3d at 1021). Although the denial of permits is not at issue here, Plaintiff equates such specific agency authority with an agency's general enforcement power and argues that the November 2016 Letter is interpretive because

it "rigidly demands compliance . . . on pain of FTC enforcement action." Pl.'s Mot. at 17.

Plaintiff's reliance on *Appalachian Power*, and the "'practically binding doctrine," *id.* is unavailing for two reasons. First, the above-cited quotation from *Appalachian Power* concerns whether an agency action is "final," not whether it is an interpretive or legislative rule. *See* 208 F.3d at 1020–21. That much is made clear when, in the same section of the opinion in which the quoted text appears, the court discusses the two *Bennett* finality factors and ultimately concludes that the agency action at issue there "is final agency action." *Id.* at 1022–23. Second, to the extent post-*Appalachian Power* cases have relied on the "practically binding" formulation, they have done so when distinguishing, not between interpretive rules and legislative rules, but between legislative rules and a different category of agency actions exempt from notice and comment—policy statements. *See, e.g., Elec. Privacy Info. Ctr.*, 653 F.3d at 7; *General Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002). Indeed, Plaintiff has cited no authority for the proposition that whenever an agency action puts a private party to the choice of either complying with the agency's interpretation of a statute or regulation or risking an enforcement action the agency is acting legislatively. Accordingly, the fact that the November 2016 Letter puts the telemarketing industry to the unenviable choice of complying with the robocall regulation or inviting enforcement does not, by itself, render the Letter a legislative rule.

Next, Plaintiff argues that the November 2016 Letter is a legislative rule because "[t]he FTC's newfound position on the reach of the robocall prohibition is flatly inconsistent with that provision of the TSR." Pl.'s Mot. at 20. Plaintiff devotes considerable energy to this argument, asserting that the November 2016 Letter is premised on a misreading of the TSR and a misunderstanding of soundboard technology. *Id.* at 20–30. These arguments read as if Plaintiff is challenging the agency's action on the merits, yet Plaintiff concedes that its "point is *not* to persuade this Court to vacate the November 10 letter as arbitrary and capricious." Pl.'s Reply, ECF No. 12, at 14 (emphasis added).[3] Instead, Plaintiff says "it presented the counterpoint to the FTC's position on the merits of soundboard only for the purpose of demonstrating why notice-and-comment rulemaking was required." *Id.* Plaintiff, however, cites no authority for the proposition that courts must consider the degree to which an agency would benefit from the notice-and-comment process when deciding whether an agency action is a legislative rule. Indeed, it is hard to conceive how such a "benefit standard" would operate in practice. That the FTC could have derived some benefit from notice-and-comment rulemaking does not render the November 2016 Letter a legislative rule.

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[3] Although Plaintiff's counsel at oral argument raised the possibility of amending the Complaint to add a claim under 5 U.S.C. § 706(2)(A), which would assert that the November 2016 Letter violates the APA because it is arbitrary and capricious, Oral Arg. Tr. at 25, Plaintiff has yet to file a motion seeking leave to amend.

Finally, Plaintiff argues that the "ruinous consequences" of the FTC's new position on the telemarketing industry warrants treating the November 2016 Letter as a legislative rule. Pl.'s Mot. at 30; Pl.'s Reply at 15. Once more, Plaintiff cites no authority to support its position, and it is hard to conceive how such a subjective criteria would operate in practice. Agency actions unquestionably can have a profound impact on an industry's operations. But the degree of impact does not, as a legal matter, dictate whether an agency action is legislative.

Accordingly, the court concludes that the November 2016 Letter is an interpretive rule under the APA and, thus, the FTC need not have promulgated it through notice and comment. Therefore, the court will enter judgment in favor of the FTC on Plaintiff's APA claim.

C. Whether the TSR Amendment as Applied to Soundboard Calls Violates the First Amendment

The court now turns to Plaintiff's First Amendment claim. Plaintiff asserts that subjecting soundboard technology to the robocall regulation violates the First Amendment because it constitutes an impermissible content-based restriction on the speech of Plaintiff's members who engage in charitable fundraising. Pl.'s Mot. at 31–40; Pl.'s Reply at 16–21. Under the First Amendment, "the government has no power to restrict expression because of its message, its ideas, its

subject matter, or its content." *Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. ___, ___, 135 S. Ct. 2218, 2226 (2015). That level of review, known as strict scrutiny, presents a high bar. *Id.* at 2227; *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (describing it as a "rare case" for a law to survive strict scrutiny). Government regulations related to speech but not directed at the *content* of the speech are considered content-neutral regulations. Content-neutral regulations are permissible, "so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). Permissible, content-neutral regulations of speech include regulations of the time, place, and manner in which speech is expressed in order to serve legitimate government interests. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Plaintiff argues that the November 2016 Letter is a content-based restriction on speech because the robocall regulation, to which soundboard calls are now subject, is itself a content-based regulation. The robocall regulation bars all pre-recorded calls whose purpose is to induce the purchase of any good or service, absent the call recipient's prior written consent. 16

C.F.R. § 310.4(b)(1)(v)(A). The written-consent requirement also applies to calls soliciting charitable donations from *new* donors, but does not apply to calls soliciting donations from *prior* donors or members of the non-profit organization on whose behalf the call is made. *Id.* § 310.4(b)(1)(v)(B). Plaintiff claims that the robocall regulation's carve-out for solicitation calls made to prior donors or members constitutes a content-based regulation of speech, because the FTC must look at what is said during the call—whether the caller requests a *first-time* charitable donation or a *repeated* charitable donation—to determine if the written-consent requirement applies. Pl.'s Reply at 17–18. The FTC responds that the restriction is content-neutral because its applicability "turns on the caller's relationship with the consumer rather than what may be said in the calls." Def.'s Opp'n at 29.

The FTC has the better argument. The robocall regulation's distinction between charitable solicitations to existing donors or members and potential new donors is a content-neutral restriction. It distinguishes calls based on who the recipient is—a prior donor or a potential new donor—not on what is being said.

As the FTC correctly points out, every court that has considered one of these types of robocall restrictions has held that a distinction based on the caller-recipient relationship does not violate the First Amendment. Def.'s Opp'n at 29–30; *see Bland v. Fessler*, 88 F.3d 729, 733–34 (9th Cir. 1996) (upholding state anti-robocall statute because exemptions were based on existing relationships and were therefore

reasonable time, place, or manner restrictions); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1553, 1556 (8th Cir. 1995) (upholding state statute with exemptions for messages regarding school attendance, messages about work schedules, and messages from companies to current subscribers, as acceptable content-neutral time, place, or manner regulation); *Gresham v. Picker (Picker)*, No. 16-01848, 2016 WL 5870809, at *3, 7–8 (E.D. Cal. Oct. 7, 2016) (holding state robocall regulation that exempted calls from schools about student attendance, calls from government agencies related to emergencies, and other types of calls by certain entities drew permissible relationship-based, consent-based, or emergency-based distinctions), *appeal docketed*, No. 16-16829 (9th Cir. Oct. 12, 2016); *Gresham v. Swanson (Swanson)*, No. 16-1420, 2016 WL 4027767, at *1–2 (D. Minn. July 27, 2016) (upholding statute at issue in *Van Bergen*, 59 F.2d 1541, as a constitutionally permissible time, place, and manner restriction), *appeal docketed*, No. 16-3219 (8th Cir. July 28, 2016).

Most recently, in *Patriotic Veterans v. Zoeller*, the Seventh Circuit held that exceptions to a state robocall regulation for messages from school districts to students, parents, or employees, or messages to subscribers with whom the caller has a current relationship, were valid time, place, and manner restrictions, not content-based discrimination. 845 F.3d 303, 304–05 (7th Cir. 2017). "The . . . exceptions . . . depend on the relation between the caller and the recipient, not on what the caller proposes to say. . . . The exceptions collectively concern who may be called, not what may be

said, and therefore do not establish content discrimination." *Id.* at 305.

So it is here. The robocall regulation does not require the FTC to review a call's content to determine whether the written-consent requirement applies to a pre-recorded charitable call. It need only determine whether the call's recipient is either a potential first-time donor or a prior donor or member. If the recipient falls into the first category, then the written-consent requirement applies; if she falls into the second, then it does not. The distinction is plainly relationship-based and does not constitute a content-based restriction on speech.

Plaintiff relies on two cases—*Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015), and *Gresham v. Rutledge*, 198 F. Supp. 3d 965 (E.D. Ark. 2016)—to support its claim that the robocall regulation is a content-based restriction. Pl.'s Mot. at 34–39; Pl.'s Reply at 17–18. Those cases are inapposite. In *Cahaly*, the court struck down a state robocall regulation as facially content-based because "it applies to calls with a consumer or political message but does not reach calls made for any other purpose." 796 F.3d at 404–05. The robocall regulation at issue here does not contain a similar facially content-based provision. Separately, in *Gresham v. Rutledge*, the parties "agree[d] that the statute is a content-based restriction on speech." 198 F. Supp. 3d at 969. Consequently, *Gresham* provides no guidance as to whether the TSR's robocall regulation is content-based.

Plaintiff's reliance on *Reed v. Town of Gilbert* likewise is misplaced. 135 S. Ct. 2218, 2222 (2015). *Reed* does not hold, or even suggest, that a speech restriction based upon the relationship of the speaker and the listener is a content-based restriction. *See Patriotic Veterans*, 845 F.3d at 305–06 ("Because Indiana does not discriminate by content—the statute determines who may be called, not what message may be conveyed—these decisions have not been called into question by *Reed*."); *Picker*, 2016 WL 5870809 at *7 (finding that *Reed* did not reach "relationship-based, consent-based, or emergency-based distinctions"); *Swanson*, 2016 WL 4027767, at *2 ("The court does not interpret *Reed* to expand the definition of content-based restrictions at all, let alone to the extent required to render the [statute] a content-based restriction.").

Having concluded that the TSR's robocall regulation is content neutral, the regulation easily satisfies intermediate scrutiny. *See A.N.S.W.E.R. Coalition (Act Now to Stop War and End Racism) v. Basham*, 845 F.3d 1199, 1212–13 (D.C. Cir. 2017). The TSR's restrictions on charitable pre-recorded messages is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels" of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). By requiring telemarketers to obtain written consent from potential first-time donors, the robocall regulation plainly advances the government's recognized interest in protecting against unwarranted intrusions into a person's home or pocket. *See Frisby v. Schultz*, 487 U.S. 474, 484 (1988) ("The State's interest

in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)); *Patriotic Veterans*, 845 F.3d at 305 ("No one can deny the legitimacy of the state's goal: Preventing the phone . . . from frequently ringing with unwanted calls."); *Van Bergen*, 59 F.3d at 1554 ("Residential privacy is a significant government interest."). The carve-out for calls made to prior donors and members is consistent with that purpose. By having made a donation or becoming a member of the organization, the recipient has effectively signaled her consent to receive a solicitation from the charity. Thus, as the FTC puts it, the carve-out "allows charities to communicate freely with their members and donors while sparing other consumers from an onslaught of recorded solicitations by a 'virtually infinite array' of other organizations." Def.'s Opp'n at 34 (quoting 73 Fed. Reg. at 51,194).

The robocall regulation also leaves "open ample alternative channels" of communication between charities and first-time donors. Charities can use, among other things, media advertising, mailings, websites, and in-person solicitations to reach new donors. They also can use live callers instead of pre-recorded messages. Accordingly, the robocall regulation satisfies intermediate scrutiny and does not offend the First Amendment.

V. CONCLUSION

For the foregoing reasons, the court denies Plaintiff's Motion for Summary Judgment and grants Defendant's Motion for Summary Judgment.

A separate Order accompanies this Memorandum Opinion.

Dated: April 24, 2017 /s/ Amit Mehta
Amit P. Mehta
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUNDBOARD ASSOCIATION,	)	
Plaintiff,	)	
v.	)	**Case No. 17-cv-00150 (APM)**
U.S. FEDERAL TRADE COMMISSION,	)	
Defendant.	)	

ORDER

For the reasons stated in the Memorandum Opinion, ECF No. 19, the court denies Plaintiff's Motion for Summary Judgment, grants Defendant's Motion for Summary Judgment, and enters judgment in favor of Defendant.

This is a final, appealable Order.

Dated: April 24, 2017 /s/ Amit Mehta
Amit P. Mehta
United States District Judge

APPENDIX C

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

[SEAL]

Lois C. Greisman
Associate Director
Division of Marketing Practices

November 10, 2016

Michael Bills
132 S 600 East, Suite 204
Salt Lake City, UT 84102

Re: September 11, 2009 Staff Opinion Letter on Soundboard Technology

Dear Mr. Bills:

We are writing to you regarding the informal staff opinion letter we provided to your former company, Call Assistant, LLC, on September 11, 2009.[1] Our September 2009 letter responded to Call Assistant's inquiry regarding whether the Telemarketing Sales Rule's ("TSR") provisions governing outbound telemarketing calls that deliver prerecorded messages[2] apply to calls utilizing soundboard technology, which is

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[1] A copy of the September 11, 2009 staff opinion letter can be found at http://www.ftc.gov/sites/default/files/documents/advisory_opinions/opinion-09-1/opinion0901_1.pdf. Call Assistant, LLC, filed for Chapter 7 bankruptcy on August 13, 2015. *In re Call Assistant LLC*, Case No. 15-11708 (KJC) (Bankr. D. Del. Aug. 13, 2015).

[2] 16 C.F.R. § 310.4(b)(1)(v).

technology that allows a live agent to communicate with a call recipient by playing recorded audio snippets instead of using his or her own live voice. In the September 2009 letter, staff stated its opinion that the technology, as described by Call Assistant, would not be subject to the prerecorded message provisions of the TSR. Staff's opinion was based on important features that Call Assistant highlighted about its technology – i.e., that for the entire duration of a call made using the technology, a single live agent stays with the call from beginning to end, listens to every word spoken by the call recipient, determines what is heard by the call recipient, and has the ability to interrupt recordings and use his or her own voice to communicate with the call recipient if needed. In our view at that time, these features made the calls "virtually indistinguishable" from normal two-way conversations with live operators and placed them outside the scope of the TSR's prerecorded message provisions.

Since the issuance of our September 2009 letter, staff has received a steadily increasing volume of formal and informal complaints from consumers about telemarketing calls utilizing soundboard technology. Consumers complain that during these calls they are not receiving appropriate recorded responses to their questions or comments. Consumers further complain that often no live telemarketer intervenes to provide a human response when requested to do so, the recorded audio snippets that are played do not adequately address consumer questions, or the call is terminated in response to consumers questions. Indeed, media

reports also have taken note of this phenomenon, which some in the press have dubbed telemarketing "robot" calls.[3] Simply put, since we issued the letter in 2009, staff has seen evidence of the widespread use of soundboard technology in a manner that does not represent a normal, continuous, two-way conversation between the call recipient and a live person. This is inconsistent with the principles we laid out in our September 2009 letter as well as our understanding of the technology at the time we issued the letter.[4] Moreover,

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[3] *See, e.g.*., Sean Gallagher, *The New Spam: Interactive Robo-Calls From the Cloud as Cheap as E-Mail*, ARS TECHNICA, (Apr. 15, 2015), http://arstechnica.com/information-technology/2015/04/the-new-spam-interactive-robo-calls-from-the-cloud-as-cheap-as-e-mail; Alexis C. Madrigal, *Almost Human: The Surreal, Cyborg Future of Telemarketing*, THE ATLANTIC, (Dec. 20, 2013), http://www.theatlantic.com/technology/archive/2013/12/almost-human-the-surreal-cyborg-future-of-telemarketing/282537/; Alexis C. Madrigal, *The Only Thing Weirder Than a Telemarketing Robot*, THE ATLANTIC, (Dec. 13, 2013), http://www.theatlantic.com/technology/archive/2013/12/the-only-thing-weirder-than-a-telemarketing-robot/282282/; Zeke Miller & Denver Nicks, *Meet the Robot Telemarketer Who Denies She's a Robot*, TIME, (Dec. 10, 2013), http://newsfeed.time.com/2013/12/10/meet-the-robot-telemarketer-who-denies-shes-a-robot/; Kris Hundley, *These Telemarketers Never Stray From Script*, TAMPA BAY TIMES, (Nov. 14, 2013), http://www.tampabay.com/news/these-telemarketers-never-stray-from-the-script/2152303.

[4] For example, Call Assistant highlighted the ability of its agents to use their own voices during calls using its soundboard technology: "Our technology merely substitutes sound files for the agent's voice (*although the agent can interject with his or her voice at any time*). . . ." (emphasis supplied). *See also* September 2009 Letter at 1 ("In response to the greeting, the agent may elect to speak to the call recipient *using his or her voice*, or may press a button to play an appropriate recorded script segment. . . . At all times, even during the playing of a recorded segment, *the agent*

this type of use does not provide the consumer benefits upon which we based our September 2009 opinion.

In response to rising complaints and concerns, staff reached out to the Professional Association for Customer Engagement ("PACE"), which is a trade association representing call centers, and the Soundboard Association, a trade organization representing manufacturers and users of soundboard technology. During the last few months, we have had multiple productive discussions and meetings with PACE and the Soundboard Association to learn more about soundboard technology and obtain industry input regarding the regulatory status of that technology. Both PACE and the Soundboard Association were responsive to requests, provided meaningful input to assist staff in its review of this technology, and highlighted the potential benefits of responsible soundboard use. Staff carefully considered the input of PACE and the Soundboard Association.

A fundamental premise of our September 2009 letter was that soundboard technology was a surrogate for the live agent's actual voice. A human being cannot conduct separate conversations with multiple consumers at the same time using his or her own voice. Nonetheless, some companies are routinely using soundboard technology in precisely this manner, and these companies are improperly using our September 2009 letter to justify their actions in court

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retains the power to interrupt any recorded message to listen to the consumer and respond appropriately.") (emphasis supplied).

proceedings[5] and in investigations. Indeed, Call Assistant noted publicly that one of the advantages of its technology is that "an agent can conduct multiple calls simultaneously."[6] Staff also has seen evidence that call centers are using soundboard technology to increase the number of outbound calls they can make. In addition, in our discussions and meetings, industry representatives acknowledged that call centers routinely use soundboard technology to allow a single live agent to handle more than one call at the same time.

The plain language of the TSR provision governing prerecorded calls imposes restrictions on "any outbound telephone call that delivers a prerecorded message."[7] It is indisputable that calls made using soundboard technology deliver prerecorded messages. As such, under the plain meaning of the words in the TSR's prerecorded call provision, outbound telemarketing calls using soundboard technology are covered because such calls "deliver a prerecorded message."[8]

Given the actual language used in the TSR, the increasing volume of consumer complaints, and all the abuses we have seen since we issued the September 2009 letter, we have decided to revoke the September 2009 letter. It is now staff's opinion that outbound

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[5] *See, e.g., Fitzhenry v. ADT Corp.*, No. 9:14-CV-80180 (S.D. Fla.); *Barrett v. ADT Corp.,* No. 12:15-CV-1348 (S.D. Ohio).

[6] *Nougar, L.C., et al. v. Revocalize, LLC, et al.*, No. 2:11-cv-127, DE 41 (D. Utah, Oct. 18, 2011).

[7] 16 C.F.R. § 310.4(b)(1)(v).

[8] *Id*.

telemarketing calls that utilize soundboard technology are subject to the TSR's prerecorded call provisions because such calls do, in fact, "deliver a prerecorded message" as set forth in the plain language of the rule.[9] Accordingly, outbound telemarketing calls made using soundboard technology are subject to the provisions of 16 C.F.R. § 310.4(b)(1)(v), and can only be made legally if they comply with the requirements set forth in Section 310.4(b)(1)(v)(A) (for calls selling goods or services), Section 310.4(b)(1)(v)(B) (for calls seeking charitable contributions from members or prior donors), or Section 310.4(b)(1)(v)(D) (healthcare messages by a covered entity or its business associate under HIPAA).

In reaching this conclusion, staff did consider whether an express requirement that live agents using soundboard technology only handle one call at a time would change the analysis. Staff has concluded that it would not. First, even with a 1-to-1 limitation in place, such calls would still "deliver a prerecorded message" and therefore would fall within the plain language of 16 C.F.R. 310.4(b)(1)(v). Moreover, in staff's view, a 1-to-1 limitation would not stop abusive use of the technology. Based on preliminary information provided by industry representatives, a significant percentage of the total number of call center seats utilizing soundboard technology are used to make telemarketing or lead generation calls. A 1-to-1 limitation would allow a lead generation operation to use soundboard technology in which live operators simply press a button to

[9] *Id.* Staff notes that representatives of both PACE and the Soundboard Association disagree with this conclusion.

play a prerecorded message offering a good or service that asks the consumer to say "yes" or press 1 on their phone if they are interested. If the consumer says yes or presses 1, the live agent would then transfer the call to the seller who makes a telemarketing pitch. Such calls are indistinguishable from standard lead generation robocalls that are governed by the TSR and are the subject of a large volume of consumer complaints and significant telemarketing abuse. The fact that a live operator, instead of a computer, "delivers" the prerecorded message and transfers interested consumers to sellers makes little difference from the call recipient's perspective.

Thus, even a 1-to-1 limitation would permit soundboard technology to be used to deliver calls that are indistinguishable from the telemarketing robocalls that consumers consider to be abusive and that are illegal under the TSR.

Finally, staff does recognize that when the Commission adopted the TSR's robocall provisions TSR in 2008, it foresaw that technology could evolve to allow the use of interactive prerecorded messages in telemarketing calls in a manner "essentially indistinguishable from conversing with a human being."[10] Indeed, soundboard technology, when used properly, may one day approach that level of proficiency. If and when such advances occur, the Commission noted that parties could seek further amendment of the TSR

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[10] *Telemarketing Sales Rule*, 73 Fed. Reg. 51,164, 51,1180 (Aug. 29, 2008).

or exemptions from the prerecorded message provisions.[11]

In order to give industry sufficient time to make any necessary changes to bring themselves into compliance, the revocation of the September 2009 letter will be effective six months from today, on May 12, 2017. As of that date, the September 11, 2009 letter will no longer represent the opinions of FTC staff and cannot be used, relied upon, or cited for any purpose.

In closing, staff notes that revocation of the September 2009 opinion letter does not mean that the TSR prohibits all calls made using soundboard technology. To the contrary, call centers can still use soundboard technology for in-bound calls and to place a wide variety of outbound calls, such as non-telemarketing calls (e.g., political calls, survey calls, and pure informational calls), telemarketing calls that fall within the exemptions set forth in Section 310.4(B)(1)(v)(A), (B), or (D), certain types of charitable donation calls, and calls that are expressly exempt from the TSR under Section 310.6 (e.g., business-to-business calls). In fact, the preliminary data provided indicates that a significant percentage of call center seats that utilize soundboard technology are used for in-bound calls or to place non-telemarketing calls, such as political or charitable calls. As long as those calls remain outside the scope of the TSR, companies can continue to use soundboard

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[11] *Id.* ("Accordingly, nothing in this notice should be interpreted to foreclose the possibility of petitions seeking further amendment of the TSR or exemptions from the provisions adopted here.")

technology for those types of calls without violating the TSR. Please note, however, that we do not opine on whether the use of such technology complies with state or other federal laws, including the Telephone Consumer Protection Act, 47 U.S.C. § 227, or its corresponding regulations implemented by the Federal Communications Commission, 47 C.F.R. § 64.1200.

Please be advised that the views expressed in this letter are those of the FTC staff, subject to the limitations in 16 C.F.R. § 1.3. They have not been approved or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the views of staff members charged with enforcement of the TSR.

Sincerely,

/s/ Lois C. Greisman
Lois C. Greisman
Associate Director
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APPENDIX D

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5093 **September Term, 2017**

1:17-cv-00150-APM

Filed On: August 3, 2018

Soundboard Association,

Appellant

v.

Federal Trade Commission,

Appellee

BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Griffith, Kavanaugh*, Srinivasan, Millett, Pillard, Wilkins, and Katsas, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

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* Circuit Judge Kavanaugh did not participate in this matter.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

APPENDIX E

U.S. Const. amend. I provides:

Congress shall make no law . . . abridging the freedom of speech, or of the press.

5 U.S.C. § 702 provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 704 provides:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined

an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 551 provides:

For the purpose of this subchapter [5 U.S.C. §§ 551 et seq.] –

* * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

* * *

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

* * *

5 U.S.C. § 553 provides:

* * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity

for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title [5 U.S.C. §§ 556 and 557] apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except –

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * *

15 U.S.C. § 6102 provides:

(a) In general.

(1) The Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.

* * *

(b) Rulemaking authority. The Commission shall have authority to prescribe rules under subsection (a), in accordance with section 553 of title 5, United States Code. In prescribing a rule under this section that relates to the provision of a consumer financial product or service that is subject to the Consumer Financial Protection Act of 2010, including any enumerated consumer law thereunder, the Commission shall consult with the Bureau of Consumer Financial Protection regarding the consistency of a proposed rule with standards, purposes, or objectives administered by the Bureau of Consumer Financial Protection.

* * *

5 U.S.C. § 706 provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 U.S.C. §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 C.F.R. § 310.4 provides:

* * *

(b) Pattern of calls.

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

* * *

(v) Initiating any outbound telephone call that delivers a prerecorded message, other than a prerecorded message permitted for

compliance with the call abandonment safe harbor in § 310.4(b)(4)(iii), unless:

(A) in any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that:

(i) The seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person;

(ii) The seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;

(iii) Evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and

(iv) Includes such person's telephone number and signature;

* * *

(B) In any such call to induce the purchase of any good or service, or to induce a charitable contribution from a member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made, the seller or telemarketer:

(i) Allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call; and

(ii) Within two (2) seconds after the completed greeting of the person called, plays a prerecorded message that promptly provides the disclosures required by § 310.4(d) or (e), followed immediately by a disclosure of one or both of the following:

(A) In the case of a call that could be answered in person by a consumer, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A) at any time during the message. The mechanism must:

(1) Automatically add the number called to the seller's entity-specific Do Not Call list;

(2) Once invoked, immediately disconnect the call; and

(3) Be available for use at any time during the message; and

(B) In the case of a call that could be answered by an answering machine or voicemail service, that the person called can use a toll-free telephone number to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A). The number provided must connect directly to an automated interactive voice or keypress-activated opt-out mechanism that:

(1) Automatically adds the number called to the seller's entity-specific Do Not Call list;

(2) Immediately thereafter disconnects the call; and

(3) Is accessible at any time throughout the duration of the telemarketing campaign; and

(iii) Complies with all other requirements of this part and other applicable federal and state laws.

(C) Any call that complies with all applicable requirements of this paragraph (v) shall not be deemed to violate § 310.4(b)(1)(iv) of this part.

(D) This paragraph (v) shall not apply to any outbound telephone call that delivers a prerecorded healthcare message made by, or

on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

* * *

15 U.S.C. § 45(m)(1) provides:

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure.

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $ 10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with

respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice –

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $ 10,000 for each violation.

16 C.F.R. § 1.98 provides:

This section makes inflation adjustments in the dollar amounts of civil monetary penalties provided by law within the Commission's jurisdiction. The following maximum civil penalty amounts apply only to penalties assessed after January 22, 2018, including those penalties whose associated violation predated January 22, 2018.

* * *

(d) Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A) – $ 41,484;

(e) Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B) – $ 41,484;

* * *

(p) Civil monetary penalties authorized by reference to the Federal Trade Commission Act under any other provision of law within the jurisdiction of the Commission – refer to the amounts set forth in paragraphs (c), (d), (e) and (f) of this section, as applicable.

* * *

16 C.F.R. § 0.7 provides:

(a) The Commission, under the authority provided by Reorganization Plan No. 4 of 1961, may delegate, by published order or rule, certain of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board, and retains a discretionary right to review such delegated action upon its own initiative or upon petition of a party to or an intervenor in such action.

* * *

16 C.F.R. § 1.1 provides:

(a) Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. The Commission will consider such requests for advice and inform the requesting party of the Commission's views, where practicable, under the following circumstances.

(1) The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or

(2) The subject matter of the request and consequent publication of Commission advice is of significant public interest.

(b) The Commission has authorized its staff to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted. Hypothetical questions will not be answered, and a request for advice will ordinarily be considered inappropriate where: (1) The same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding involving the Commission or another governmental agency, or (2) an informed opinion cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry.

16 C.F.R. § 1.2 provides:

(a) Application. The request for advice or interpretation should be submitted in writing (one original and two copies) to the Secretary of the Commission and should: (1) State clearly the question(s) that the applicant wishes resolved; (2) cite the provision of law under which the question arises; and (3) state all facts which the applicant believes to be material. In addition, the identity of the companies and other persons involved should be disclosed. Letters relating to unnamed

companies or persons may not be answered. Submittal of additional facts may be requested prior to the rendering of any advice.

(b) Compliance matters. If the request is for advice as to whether the proposed course of action may violate an outstanding order to cease and desist issued by the Commission, such request will be considered as provided for in § 2.41 of this chapter.

16 C.F.R. § 1.3 provides:

(a) On the basis of the materials submitted, as well as any other information available, and if practicable, the Commission or its staff will inform the requesting party of its views.

(b) Any advice given by the Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all the relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

(c) Advice rendered by the staff is without prejudice to the right of the Commission later to rescind the

advice and, where appropriate, to commence an enforcement proceeding.

28 U.S.C. § 1254(1) provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

APPENDIX F

UNITED STATES OF AMERICA
[SEAL] FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Federal Trade
Commission
Division of
Marketing Practices

September 11, 2009

Mr. Michael Bills, CEO
Call Assistant, LLC
1925 West Indiana Avenue
Salt Lake City, Utah 84104

Dear Mr. Bills:

You have requested an informal staff opinion as to the applicability to 2008 amendments to the Telemarketing Sales Rule ("TSR") to a particular technology used by CallAssistant, L.C. ("CallAssistant"). The amendments at issue impose new restrictions on the use of prerecorded messages in telemarketing. 16 C.F.R. § 310.4(b)(1)(v); 73 Fed. Reg. 15204 (Aug. 29, 2008). Specifically, these amendments require, as of December 1, 2008, that any outbound telemarketing call that delivers a prerecorded message include: (1) if the call could be answered in person by a consumer, an automated interactive voice and/or keypress-activated opt-out mechanism that the call recipient can use at any time during the message to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A); and (2) if the

call could be answered by an answering machine or voicemail service, a toll-free telephone number that the call recipient can use to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A). Additionally, as of September 1, 2009, the amendments prohibit any outbound telemarketing call that delivers a prerecorded message unless the seller has obtained from the recipient of the call an express agreement, in writing, that evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of that seller and includes such person's telephone number and signature.

As described in your letter, CallAssistant uses technology that enables its calling agents to interact with the recipient of a call using his or her own voice or by substituting appropriate audio recording of a response. According to your letter, when used to place outbound telemarketing calls, this technology works as follows:

> A live agent using the System places a call to a consumer and hears the consumer greeting. In response to the greeting, the agent may elect to speak to the call recipient using his or her voice, or may press a button to play an appropriate recorded script segment. After the agent's response, the agent listens to the consumer customer's reply. After listening to the consumer's reply, the live agent again chooses whether to speak to the call recipient in his or her own voice, or another recording. At all times, even during the playing of any recorded segment, the agent retains the power to

> interrupt any recorded message to listen to the consumer and respond appropriately.

Furthermore, according to your description, "live agents hear every word spoken by the call recipient, and determine what is said" in response. A single agent always stays with a call from beginning to end.

You seek an opinion as to whether the amended TSR provisions on the use of prerecorded messages in telemarketing apply to CallAssistant's calls that employ the technology summarized above. Based on the description of the technology included in your letter, the staff of the Federal Trade Commission has concluded that the 2008 TSR amendments cited above do not prohibit telemarketing calls using this technology if the calls that otherwise comply with the TSR and other applicable law. The 2008 amendments at 16 C.F.R. § 310.4(b)(1)(v) prohibit calls that deliver a prerecorded message and do not allow interaction with call recipients in a manner virtually indistinguishable from calls conducted by live operators. Unlike the technology that you describe, the delivery of prerecorded messages in such calls does not involve a live agent who controls the content and continuity of what is said to respond to concerns, questions, comments – or demands – of the call recipient.

In adopting the 2008 TSR amendments, the Commission noted that the intrusion of a telemarketing call on a consumer's right to privacy "may be exacerbated immeasurably when there is no human being on the other end of the line." 73 Fed. Reg. at 51180. The

Commission observed that special restrictions on prerecorded telemarketing messages were warranted because they "convert the telephone from an instrument for two-way conversations into a one-way device for transmitting advertisements." *Id.*[1] Consequently, in Staff's view, the concerns about prerecorded messages addressed in the 2008 TSR amendments do not apply to the calls described above, in which a live human being continuously interacts with the recipient of a call in a two-way conversation, but is permitted to respond by selecting recorded statements.

Nevertheless, the use of such technology in a campaign to induce the sales of goods or services, or charitable donations is "telemarketing" under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6106(4), and therefore must comply with the Rule's other requirements and prohibitions. In particular, the technology must connect an

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[1] In adopting the 2008 amendments, the Commission recognized that in the future prerecorded message might eliminate the objections that prompted the adoption of the these rules and justify exemptions permitting interactive prerecorded messages:

> [T]he Commission notes that it is aware that the technology used in making prerecorded messages interactive is rapidly evolving, and that affordable technological advances may eventually permit the widespread use of interactive messages that are essentially indistinguishable from conversing with a human being. Accordingly, nothing in this notice should be interpreted to foreclose the possibility of petitions seeking further amendment of the TSR or exemption from the provisions adopted here.

73 Fed. Reg. 51180 (Aug. 29, 2008).

outbound telephone call to a live agent within two seconds of the call recipient's completed greeting. 16 C.F.R. § 310.4(b)(1)(iv). The agents making calls using this technology must disclose the purpose of the call, the identity of the seller, make other required disclosures, and comply with other TSR provisions preventing deceptive and abusive conduct. *Id.* §§ 310.3 and 310.4.

Please be advised that this opinion is based exclusively on all the information furnished in your request. This opinion applies only to the extent that actual company practices conform to the material submitted for review. Please be advised further that the views expressed in this letter are those of the FTC staff. They have not been reviewed, approved, or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the opinions of the staff members charged with enforcement of the TSR.

Sincerely,

/s/ Lois C. Greisman
Lois Greisman
Associate Director
Division of Marketing Practices