No. 17-5093

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUNDBOARD ASSOCIATION,
Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia
No. 17-cv-00150
Hon. Amit P. Mehta

BRIEF OF THE FEDERAL TRADE COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a), the Federal Trade Commission certifies as follows:

A. Parties and Amici. The parties to the case in the district court were Plaintiff-Appellant Soundboard Association ("SBA") and the Federal Trade Commission. The same parties appear in this Court. There were no intervenors or *amici curiae*.

B. Rulings Under Review. The ruling under review is the district court's Memorandum Opinion and Order of April 24, 2017, denying SBA's motion for a preliminary injunction and granting the FTC's cross-motion for summary judgment. ECF No. 19 (JA). The opinion is reported on Westlaw at 2017 WL 1476116 and on Lexis at 2017 U.S. Dist. LEXIS 61408. The citation to the Federal Supplement is not yet available.

C. Related Cases. The case has not previously been on review before this Court or any other court (except the district court) and the FTC is not aware of any related cases pending in this Court or any other court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

* Authorities principally relied upon are marked with asterisks

STATUTES

REGULATIONS

OTHER AUTHORITIES

GLOSSARY

HIPAA	Health Insurance Portability and Accountability Act
SBA	Soundboard Association
TSR	Telemarketing Sales Rule, 16 C.F.R. Part 310

QUESTIONS PRESENTED

1. Is an informal advisory opinion letter by FTC staff, which is not binding on the Commission, a final agency action subject to review under the Administrative Procedure Act?

2. Is SBA's First Amendment challenge, filed in 2017, time-barred as a facial attack on the 2008 amendment to the FTC's Telemarketing Sales Rule?

3. Has SBA waived its principal First Amendment argument, where it advances an entirely new theory on appeal that was not presented in the district court?

4. To the extent that SBA's First Amendment arguments are not time-barred or waived, is the FTC's rule prohibiting prerecorded messages in outgoing telemarketing calls consistent with the First Amendment?

5. Did the district court properly determine that the FTC staff's letter was, at most, an interpretive rule not subject to the APA's notice-and-comment requirement?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the Addendum.

STATEMENT OF THE CASE

Prerecorded telemarketing calls—commonly referred to as "robocalls"—are a nuisance to anyone with a telephone. They invade the sanctity of homes, often at dinnertime, and violate consumers' right to peace and quiet. Increasingly, prerecorded calls barrage wireless phones as well, giving consumers no respite from unwanted interruptions. Unwanted robocalls are one of the most common and fastest growing sources of consumer complaints to the Federal Trade Commission. The agency received over 3.4 million consumer complaints about robocalls in 2016—more than four times the number of complaints in 2009.

In the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-6108, Congress directed the FTC to adopt rules prohibiting telemarketers from "undertak[ing] a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." *Id.* § 6102(a)(3)(A). Under that authority, the FTC issued the Telemarketing Sales Rule, which as amended in 2008 generally prohibits robocalls by for-profit telemarketers. The rule applies to "any outbound telephone call that delivers a prerecorded message." 16 C.F.R. § 310.4(b)(1)(v).

This case involves a technology known as "soundboard," which allows call centers (including telemarketers) to contact consumers using prerecorded messages in lieu of an agent's own voice. Appellant SBA represents users and

manufacturers of soundboard technology. In 2009, in response to a request from a company proposing to use soundboard for telemarketing, FTC staff issued an informal advisory letter opining that the anti-robocall rule did not prohibit such use. The requester had represented that soundboard would be used in a way that was indistinguishable from a live two-way conversation, and the staff letter cautioned that its opinion applied "only to the extent that actual company practices conform to the material submitted for review" and was not binding on the Commission in any event. ECF No. 1-3 at 4 (JA).

In the ensuing years, consumers increasingly complained to the FTC about telemarketing calls using soundboard technology. Investigation revealed that in practice, soundboard calls generally did not resemble two-way conversation and were essentially indistinguishable from ordinary robocalls. Accordingly, in 2016 FTC staff issued a new informal opinion letter—the letter now on review—revoking the 2009 letter and opining that outbound telemarketing calls using soundboard violate the anti-robocall rule. Staff once again cautioned that its opinion had not been reviewed by the Commission and was not binding upon it. ECF No. 1-2 at 2-5 (JA).

Although SBA could have sought an advisory opinion from the Commission itself rather than just its subordinate staff, SBA opted not to do so. Instead, it sued in the district court under the Administrative Procedure Act, arguing that the 2016

staff opinion letter is a legislative rule that required notice and comment and that certain aspects of the anti-robocall rule violate the First Amendment. The district court rejected both arguments. This appeal followed.

A. Limited Delegation of Commission Authority to Staff

The FTC is a bipartisan independent agency composed of five Commissioners. *See* 15 U.S.C. § 41. It enforces the FTC Act, which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce, *id.* § 45(a)(1), and many other federal statutes. The Commission is assisted by staff attorneys in its Bureaus of Competition and Consumer Protection, each of which is divided into several units. *See* 16 C.F.R. §§ 0.16, 0.17.[1] The Commission has delegated "limited authority" to the Bureau directors and other senior staff to open investigations. *Id.* § 2.1. Based on the results of an investigation, staff may recommend that the Commission undertake an enforcement action, but staff has no authority to commence enforcement proceedings on its own initiative.[2]

[1] All citations to the Code of Federal Regulations are to the 2017 edition.

[2] The Commission may choose to enforce the law either in an administrative proceeding before the Commission or through a lawsuit in federal district court. *See* 15 U.S.C. §§ 45(b), 53(b). The Commission may seek civil penalties in district court for violation of a rule, but only if the violator acts 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." *Id*. § 45(m)(1)(A).

FTC regulations allow a business to seek an advisory opinion either from the Commission itself or from FTC staff with respect to a course of action the business wishes to pursue. 16 C.F.R. § 1.1. Commission opinions provide a safe harbor: "The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice" so long as "all the relevant facts were fully, completely, and accurately presented to the Commission." *Id.* § 1.3(b). Staff advice provides no such safe harbor: "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." *Id.* § 1.3(c).

Any Commission action (including issuance of a complaint or advisory opinion) must be approved by a majority vote of the Commissioners. *Id.* §§ 3.11(a); 4.14(c).

B. The Telemarketing Act and the TSR

In 1994, Congress passed the Telemarketing Act, which instructed the Commission to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C. § 6102(a)(1). Among other things, it directed the Commission to forbid "unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." *Id.* § 6102(a)(3)(A).

The Act initially defined "telemarketing" to encompass only calls "to induce purchases of goods or services," but in 2001 Congress broadened that definition to include calls to induce "a charitable contribution, donation, or gift of money or any other thing of value." *Id.* § 6106(4); *see* USA PATRIOT Act, Pub. L. No. 107-56, § 1011(b)(3), 115 Stat. 272, 396 (2001).

The Commission implemented these directives by issuing the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, which places numerous restrictions on telemarketers. The TSR was extensively amended in 2003. Among other things, those amendments prohibit "abandoned" calls (where the consumer is not connected to a live sales representative within two seconds of answering the call) and commercial telemarketing calls to numbers on a national "Do Not Call" registry. *See id.* § 310.4(b)(1)(iii)(B), (iv). Sellers and charitable organizations must also maintain entity-specific do-not-call lists and add consumers to those lists upon request. *Id.* § 310.4(b)(1)(iii)(A). Violations of the TSR are deemed unfair or deceptive acts or practices under the FTC Act. *See* 15 U.S.C. §§ 45(a), 6102(c).

As amended in 2003, the TSR applies to all for-profit telemarketers (as defined by the Telemarketing Act), including both purely commercial marketers and so-called "telefunders"—for-profit businesses that solicit contributions on

behalf of charities.[3] *See* Telemarketing Sales Rule, Final Amended Rule, 68 Fed. Reg. 4580, 4585 (Jan. 29, 2003); *see also Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331 (4th Cir. 2005) (discussing restrictions on telefunding in 2003 amendment to the TSR and holding that they do not violate the First Amendment).

C. The 2008 Anti-Robocall Rule

The TSR's prohibition on "abandoned" calls in 2003 and the "Do Not Call" registry restricted telemarketing robocalls, but the FTC continued to receive large numbers of complaints about such calls. Investigations and enforcement efforts indicated that millions of prerecorded calls were being made to numbers on the Do Not Call Registry and that many of these calls were abandoned if a consumer answered the telephone. *See* Telemarketing Sales Rule, Final Rule Amendments, 73 Fed. Reg. 51164, 51178 (Aug. 29, 2008). In response to a proposed rulemaking to revise the TSR, the Commission received over 13,000 comments from consumers. *Id.* at 51166. An "overwhelming number" of consumers indicated that they "hate prerecorded calls, and consider them a gross invasion of their privacy at home." *Id.* at 51166, 51177. Commenters also viewed robocalls as coercive and manipulative, and likely to mislead vulnerable populations such as the young and

[3] Because the Commission lacks jurisdiction over nonprofit corporations, *see* 15 U.S.C. § 44, the TSR does not apply to charitable organizations themselves. In addition, the definition of "telemarketing" requires at least one interstate telephone call. *Id.* § 6106(4).

the elderly, and complained that they impose unnecessary costs because they force consumers to pay for airtime and use voicemail storage space for unwanted telemarketing messages. *Id.* at 51167-68.

Given this overwhelming evidence, the Commission concluded in 2008 that an explicit prohibition on telemarketing robocalls was needed. It found that "[t]he mere ringing of the telephone to initiate such a call may be disruptive," but that "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 51180. It rejected an industry proposal to allow prerecorded telemarketing calls if they included an "interactive opt-out mechanism," finding that "whether interactive or non-interactive," robocalls "convert the telephone from an instrument for two-way conversations into a one-way device for transmitting advertisements," thus upsetting the "very high value consumers place on their privacy at home." *Id.* "[T]he reasonable consumer would consider interactive prerecorded telemarketing messages to be coercive or abusive of such consumer's right to privacy." *Id.*

The 2008 amendment to the TSR addresses these problems by generally declaring it unlawful for a telemarketer to "initiat[e] any outbound telephone call that delivers a prerecorded message" absent express written consent from the call recipient. 16 C.F.R. § 310.4(b)(1)(v). This basic prohibition applies to all for-

profit telemarketers except for those working on behalf of entities covered by the Health Insurance Portability and Accountability Act ("HIPAA"), which are subject to separate extensive federal regulation. *Id.* § 310.4(b)(1)(v)(D); 73 Fed. Reg. at 51192. Telefunders soliciting donations on behalf of a charity may use prerecorded messages without written consent in calls to "a member of, or previous donor to" the charity. 16 C.F.R § 310.4(b)(1)(v)(B).[4]

D. Soundboard Technology and the 2009 Staff Letter

Soundboard technology is intended to allow businesses, including telemarketers, to use clips of prerecorded messages to simulate live telephone conversations. At least in theory, a live agent can select in real time the "appropriate audio clip" to respond to each statement the consumer makes. Compl. ¶ 29, ECF No. 1 at 9-10 (JA). In 2009, the telemarketing firm Call Assistant, LLC sought an advisory opinion from FTC staff—but not the Commission itself—concerning whether soundboard technology counts as a "prerecorded message" under the TSR. ECF No. 11-2 (JA). Staff provided the requested advisory opinion in a letter (the "2009 Staff Letter") signed by Lois Greisman, the Associate Director of the Division of Marketing Practices within the FTC's Bureau of Consumer Protection. ECF No. 1-3 (JA).

[4] The Federal Communications Commission has also promulgated robocall rules under the Telephone Consumer Protection Act, *see* 47 C.F.R. § 64.1200, and many states also have laws restricting robocalls.

The staff premised its opinion on Call Assistant's representations that live agents using soundboard technology (1) "hear every word spoken by the call recipient"; and (2) "always stay[] with a call from beginning to end." *Id.* at 3. Based on these assurances, staff opined that soundboard telemarketing calls were not "prerecorded messages" under the TSR because they were "virtually indistinguishable" from calls by live operators. *Id.*

The letter warned that the staff's advice was conditional: it rested "exclusively" on information that the requester submitted to the staff and was valid "only to the extent that actual company practices conform to [that] material." *Id.* at 4. The letter further cautioned that it reflected only the "views … of the FTC staff," which "ha[d] not been reviewed, approved, or adopted by the Commission, and … are not binding upon the Commission." *Id.*

E. The 2016 Staff Letter

In the wake of the 2009 letter, FTC staff became increasingly concerned about the use of soundboard technology. Staff saw growing evidence that soundboard technology "was not being deployed in a manner that was 'virtually indistinguishable' from live operator calls." ECF No. 11-1 at 3 (JA). Consumer complaints and press articles indicated that consumers who received telemarketing calls utilizing soundboard were not receiving appropriate responses to their questions and that no live operator intervened in these calls. *Id.* In addition, staff

received evidence that soundboard telemarketers were fielding multiple calls simultaneously. *Id.* Accordingly, staff decided to revisit the 2009 Staff Letter.

After meeting with industry representatives (including SBA) and considering their extensive written and oral presentations, staff issued the 2016 Staff Letter, also signed by Ms. Greisman. That letter explains that the factual assumptions underlying the earlier letter did not reflect the way soundboard technology had been used in practice: "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." ECF No. 1-2 at 3 (JA). Such use was "inconsistent with the principles … laid out" in the 2009 Staff Letter and staff's understanding of the technology at that time. *Id.*

Based on its further examination of the evidence and industry practices, the 2016 Staff Letter concluded that the TSR's anti-robocall provision prohibits outbound telemarketing calls using soundboard. The letter explained that the "plain language" of the rule supports this conclusion because it is "indisputable that calls made using soundboard technology deliver prerecorded messages." *Id.* at 4 (JA). Although the staff was concerned about soundboard telemarketers' practice of fielding multiple calls at once, the letter notes that staff would have reached this same opinion even if telemarketers used soundboard only to make one

call at a time. *Id.* The letter explained that such an approach would enable a soundboard operator to "simply press a button to 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," and then connect the consumer to a live seller who would deliver a telemarketing pitch. *Id.* Such calls would be "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." *Id.* From a consumer's perspective, it "makes little difference" whether a soundboard operator or a computer plays the message and delivers the call to a live seller. *Id. at* 5 (JA). Either way, the consumer will experience the same intrusion on privacy of a ringing telephone followed by a recorded voice.

Although the 2009 Staff Letter did not create any legal safe harbor under the FTC rules, staff recognized that it might be unfair to recommend immediate enforcement proceedings against companies utilizing soundboard in good faith reliance on the earlier letter. Accordingly, the 2016 Staff Letter advised that "[i]n order to give industry sufficient time to make any necessary changes to bring themselves into compliance," the staff's revised opinion would become effective in six months—on May 12, 2017—but that after that date, the 2009 Letter would "no

longer represent the opinions of FTC staff" and could not be "used, relied upon, or cited for any purpose." *Id.*[5]

Like the 2009 letter, the 2016 Staff Letter closes with the caveats that "the views expressed in this letter are those of the FTC staff," and that "[t]hey have not been approved or adopted by the Commission, and they are not binding upon the Commission." *Id.*

F. District Court Proceedings

SBA or its members could have sought a further advisory opinion from the Commission itself, but they did not do so. Instead, SBA sued the FTC, challenging the 2016 Staff Letter under the Administrative Procedure Act. Count I of the Complaint alleges that the letter is a legislative rule unlawfully issued without notice and comment, ECF No. 1 at 21-22 (JA). Count II alleges that the 2016 Staff Letter violates the First Amendment because it impermissibly distinguishes between speech "made on behalf of charitable and other nonprofit advocacy organizations." *Id.* at 22-23 (JA). Specifically, it alleges that the letter "is content-based because it treats speech tailored for first-time donors differently than speech tailored for previous donors." *Id.* at 23 (JA). Count III seeks a declaratory judgment that "in promulgating the November 10 letter, the FTC violated the APA." *Id.* At a hearing in the district court, SBA stated on the record

[5] Staff later extended that date until May 19, 2017.

that it was not contending that staff's interpretation of the TSR was arbitrary and capricious. ECF No. 24 at 4-6 (JA).

SBA sought a preliminary injunction against enforcement of the 2016 Staff Letter. With the parties' consent, the district court treated the preliminary injunction pleadings as cross-motions for summary judgment and proceeded to address whether the 2016 Staff Letter satisfied the APA standard of review. ECF No. 19 at 8-9 (JA). Concluding that it did, the district court granted summary judgment to the FTC. *Id.* at 29 (JA).

The district court held that the 2016 Staff Letter was a final agency action under the APA, but that it was an interpretive rule rather than a legislative rule and that notice and comment therefore were not required. ECF No. 19 at 9-23 (JA). The district court rejected SBA's First Amendment claim. *Id.* at 24-28 (JA). It concluded that the robocall regulation's distinction between charitable solicitations to existing donors or members and potential new donors is based not on the content of the call but the relationship between the charity and the call recipient. *Id.* at 25 (JA). The regulation was therefore subject to intermediate scrutiny, and it easily satisfied that standard because it served a significant governmental interest and left open ample alternative channels of communication. *Id.* at 27-28 (JA).

SUMMARY OF ARGUMENT

1. The 2016 Staff Letter is not a final agency action subject to judicial review under the APA. The Court may dispose of this entire case on that ground alone and proceed no further.

The letter is merely an informal advisory opinion by staff with no authority to bind the Commission. At most, it means that staff may recommend that Commission issue an enforcement complaint against a robocaller using soundboard. Even if the Commission were to accept such a recommendation and vote to issue a complaint, that would not be a final action subject to review. *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232 (1980). Logically, therefore, the staff letter cannot be final agency action. And treating an informal staff opinion as a final rule would deter the staff from providing industry with needed legal advice for fear of legal challenge.

The cases cited by SBA (and the district court) finding final action in decisions made by subordinate officials in the Environmental Protection Agency do not show otherwise. The EPA is organized very differently from the FTC. EPA has delegated authority to subordinate officers to interpret and enforce environmental laws. The FTC, by contrast, has delegated only limited authority to its staff, which does not include the power to commence enforcement proceedings or to issue binding interpretations of the law. The staff's informal opinion thus

fails both prongs of the finality test set forth in *Bennett v. Spear*, 520 U.S. 154 (1997): it is not the consummation of the Commission's decisionmaking process (indeed, it is not even the beginning of that process), and does not determine any rights or obligations or impose legal consequences.

2. SBA's First Amendment claim is time barred. SBA purports to challenge the 2016 Staff Letter, but it is really challenging the TSR's anti-robocall rule itself. A facial attack on a rule is subject to a six-year statute of limitations. 28 U.S.C. § 2401. The rule was promulgated in 2008, but SBA did not challenge the rule until 2017, well beyond the allowable time.

SBA also waived the principal argument it makes here: that the anti-robocall rule violates the First Amendment because it applies to telemarketing calls but not to political or other non-commercial calls. SBA did not raise this theory in the district court and may not do so now.

SBA's newly minted argument is meritless in any event. The anti-robocall rule is content neutral: it applies to any "prerecorded message" in an outgoing telemarketing call regardless of its content. The rule does not address what a telemarketer can or cannot say. Nor is the rule "content based" because it reaches telemarketing but not other categories of speech. That is a consequence of jurisdictional limitations on the FTC's authority by Congress that have nothing to do with the content of any message. Moreover, the First Amendment does not

prohibit differential regulation of commercial and non-commercial speech. To the contrary, decades of Supreme Court precedent establish that commercial speech can be subject to greater governmental regulation than, for example, political speech. SBA's position would stand that law on its head and lead to the illogical result that the FTC cannot police misleading commercial advertisements because it cannot address misleading campaign ads.

Neither *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), nor *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015), has any bearing on this case. *Reed* involved a town law that generally banned outdoor signs but had 23 different exemptions based on signs' content. The TSR draws no distinctions at all among prerecorded messages. *Cahaly* involved a state law that singled out *political* robocalls for disfavored treatment while allowing other types of speech. It does not suggest that a rule applying only to telemarketing calls would violate the First Amendment.

The district court properly rejected the sole First Amendment argument SBA made below. The anti-robocall rule's distinction between telefunding calls made to a charity's members or prior donors and calls made to potential new donors is not content based; it turns on the relationship between the charity and the call recipient, not the content of the call. The rule passes intermediate scrutiny because the government has a significant interest in ensuring residential privacy and the rule leaves open ample alternative means for charities to contact new donors.

3. The 2016 Staff Letter is not a legislative rule that required notice and comment. The letter is not a "rule" at all because it is not binding. But even if it were, the letter is quintessentially interpretive because it describes the staff's views as to how an existing rule applies to a specific technology. SBA's claim that the staff's interpretation is inconsistent with the plain language of the anti-robocall rule is an arbitrary-and-capricious challenge, which SBA expressly disavowed below. But even if the staff's interpretation were wrong, that would not make it a legislative rule. And staff's interpretation is not plainly wrong. The plain language of the anti-robocall rule applies to calls containing "a prerecorded message," and there is no dispute that soundboard calls consist of prerecorded messages. SBA's assertion that the rule only covers calls containing a single prerecorded message is contrary to ordinary grammar and legal usage. And it would lead to absurd consequences: for example, a robocaller could escape scrutiny by splitting one prerecorded message into two. The district court properly held that the 2016 Staff Letter is at most an interpretive rule.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *E.g.*, *Va. Dep't of Med. Assistance Servs. v. HHS*, 678 F.3d 918, 921 (D.C. Cir. 2012). The Court may affirm on any ground supported by the record. *E.g.*, *Jones v. Bernanke*, 557 F.3d 670, 676 (D.C. Cir. 2009).

ARGUMENT

I. THE 2016 STAFF LETTER IS NOT A FINAL AGENCY ACTION.

Both SBA's First Amendment claim and its procedural claim are brought under the APA. *See* 5 U.S.C. § 706(2)(B), (D); Br. 14, 17. Before the Court can entertain any of SBA's claims, it therefore must answer a threshold question: whether the 2016 Staff Letter is a reviewable "final agency action." *See* 5 U.S.C. § 704. It is not. The letter is an informal advisory opinion issued by an FTC staff member that, by its terms, is not binding on the Commission and does not impact the legal rights of SBA members. Treating such a letter as a final action subject to judicial review would ultimately be detrimental to both consumers and industry, because it would give agency staff a strong disincentive not to provide informal advice, out of concern that an unfavorable opinion would trigger a lawsuit.

An agency action is final only if it (1) "mark[s] the consummation of the agency's decisionmaking process" and is neither "tentative [n]or interlocutory"; and (2) is "one 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) (citation and quotation marks omitted).[6] The 2016 Staff Letter fails both prongs of that test.

[6] As the district court noted, this Court sometimes uses the three-factor test of *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430 (D.C. Cir. 1986), which is complementary to the *Bennett* test, to assess finality. *E.g.*, *CSI Aviation Servs. v. EPA*, 637 F.3d

A. The Staff Letter Does Not Mark the Consummation of the Commission's Decisionmaking Process.

Agency action is not consummated when it is "informal, or only the ruling of a subordinate official, or tentative." *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967) (citations omitted). As the 2016 Staff Letter makes clear, the agency here—the Commission—has made no decision regarding the legality of telemarketing calls using soundboard technology. The FTC *staff* has provided its nonbinding informal opinion, but the Commission itself has not addressed the issue. The Commission has authorized the staff to issue such informal advisory opinions, but its regulations state plainly that any opinion offered by the staff is not binding upon the Commission. 16 C.F.R. § 1.3(c). In short, the FTC staff has no authority to decide anything on behalf of the Commission.

The staff's lack of authority to issue binding interpretations distinguishes this case from the decisions relied on by SBA (and the district court) involving the Environmental Protection Agency. *See, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *Her Majesty the Queen in Right of Ontario v. EPA*,

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408 (D.C. Cir. 2011). The *Ciba-Geigy* test yields the same results. As described further below, the Commission (as opposed to the staff) has not taken a "definitive" position, or indeed any position at all. The issues are not "purely legal," as they turn on the application of the TSR to the particular facts that would be presented in an enforcement proceeding. And the staff's position does not impose an "immediate and significant practical burden" because it does not affect soundboard users' rights or impose obligations upon them.

912 F.2d 1525 (D.C. Cir. 1990); *Nat. Res. Def. Council, Inc. v. Thomas*, 845 F.2d 1088 (D.C. Cir. 1988). These cases are inapposite because they turn on delegations of authority absent here. The Administrator of EPA has statutory authority which has been expressly delegated to subordinate officers and components of the EPA in a detailed Delegations Manual. *See, e.g.*, *Amigos Bravos v. EPA*, 324 F.3d 1166, 1172 & n.1 (10th Cir. 2003) (citing manual); *Am. Vanguard Corp. v. Jackson*, 803 F. Supp. 2d 8, 14 (D.D.C. 2011) (same).

The FTC operates very differently. The Commissioners have not delegated enforcement authority to the staff. Nor has the Commission authorized staff to issue binding interpretations of Commission rules. Thus, unlike the EPA officials in cases cited by SBA, FTC staff members in this context do not have authority to speak for the Commission.

Given the way the FTC undertakes enforcement, a staff advisory letter is not even the beginning of the Commission's decisionmaking process, let alone its "consummation." The decisionmaking process begins when the Commission votes to issue an enforcement complaint. *See* 15 U.S.C. § 45(b) (Commission may issue complaint when it has "reason to believe" the respondent engaged in illegal conduct). Once the Commission issues a complaint, the respondent and the FTC

staff litigate whether the respondent's conduct is illegal. At the end of that process, the Commission renders a final decision.[7]

The Supreme Court has made clear that only the Commission's ultimate judgment amounts to final agency action. *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 243 (1980). The initial decision to issue a complaint is merely a nonfinal "threshold determination that further inquiry is warranted." *Id.* at 241. Thus, under *Standard Oil*, even a formal vote by the Commission to bring a case against a soundboard user would be an unreviewable nonfinal action. It defies logic that an informal opinion letter issued by FTC staff—which at most indicates what recommendations the staff may make to the Commission regarding enforcement—could be deemed final agency action.

That is precisely the conclusion this Court reached in *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726 (D.C. Cir. 2003). The agency in that case, the Consumer Products Safety Commission, is a multimember commission similar in structure to the FTC. CPSC staff sent a letter to a company indicating that they intended to make a preliminary determination that the company's sprinkler heads presented a "substantial product hazard" under the agency's governing statute and requested voluntary corrective action. *Id.* at 730. Relying on *Standard Oil*, the

[7] The process is similar when the Commission sues in district court for injunctive relief, *see* 15 U.S.C. § 53(b), except there the ultimate determination of legality is made by a court rather than the Commission.

Court held that the letter was not a final agency action because "the Commission itself ha[d] never considered the issue." *Id.* at 733. The Court explained that "[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," but that it had "not yet taken the steps required under the statutory and regulatory scheme for its actions to have any legal consequences." *Id.* at 732. The same is true here.

The district court held that *Reliable Automatic Sprinkler* was distinguishable because it involved an "investigation" whereas the 2016 Staff Letter "reflects the FTC's *conclusion* that soundboard technology is subject to the robocall regulation." ECF No. 19 at 15 (JA). But the 2016 Staff Letter resulted from FTC staff's investigation into the use of soundboard technology, just as the letter in *Reliable Automatic Sprinkler* set forth the CPSC staff's views based on its investigation into sprinkler heads. In both situations, agency staff were advising industry that they might recommend an enforcement action absent voluntary compliance. And the 2016 Staff Letter does *not* represent any kind of "conclusion" by the FTC regarding soundboard technology. The only body authorized to make such a conclusion is the Commission itself, and as in *Reliable Automatic Sprinkler*, the Commission has never considered the issue.

The only case SBA cites involving an agency structured like the FTC is *Frozen Food Express v. United States*, 351 U.S. 40 (1956), which held that an order of the Interstate Commerce Commission determining that certain specified commodities were not "agricultural" was reviewable because it had an immediate impact on carriers' and shippers' business. *Id.* at 43-44. But that order was issued by the ICC itself—it was not merely an advisory opinion issued by ICC staff. Here, although it could have, SBA never sought advice from the Commission itself. *Standard Oil* and *Reliable Automatic Sprinkler* therefore control this case.

This Court has held in other contexts that letters similar in character to the 2016 staff letter were not final agency action. In *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940 (D.C. Cir. 2012), the Court addressed warning letters sent by the Food and Drug Administration to manufacturers "advising that the agency considered their [products] to be adulterated and misbranded medical devices." *Id.* at 941-42. The Court held the letters nonfinal because they were a means of "achieving prompt *voluntary* compliance," were only "informal and advisory," and did not "commit [the agency] to taking enforcement action." *Id.* at 944. The same is true here.

SBA also argues that the cautionary language in the 2016 Staff Letter—expressly stating that staff's views "have not been approved or adopted by the Commission" and "are not binding upon the Commission"—is "mere boilerplate."

Br. 39 (citing *Appalachian Power*, 208 F.3d at 1023). Again, this argument reflects a failure to consider the significant organizational differences between the EPA and the FTC. Because the Commission has not authorized the staff to speak or take action on its behalf, staff's cautionary statement reflecting the limits on its authority was not mere boilerplate.

B. The Staff Letter Does Not Determine Rights or Obligations or Impose Legal Consequences.

The 2016 Staff Letter also fails the second prong of the *Bennett* finality test because it determines no rights or obligations and no legal consequences flow from it. As the FTC regulations and the 2009 Staff Letter itself make clear, the Commission could have brought an enforcement action even while the earlier letter was in effect. Indeed, the staff's investigation in 2016 found that companies were "routinely" using soundboard in a manner inconsistent with the factual premises of the 2009 Staff Letter—so anyone using soundboard in this manner could reasonably have anticipated an enforcement action. But even companies that used soundboard strictly in accordance with the 2009 Staff Letter were on explicit notice that the staff's advice was "without prejudice to the right of the Commission later to rescind the advice and … to commence an enforcement proceeding." 16 C.F.R. § 1.3(c).

All that has happened is that the FTC staff has expressed a new view—based in part on assessment of additional evidence not presented in 2009—as to how the TSR's anti-robocall provision applies. But "an injury typically is not caused when an agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party." *AT&T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001). In *AT&T*, the Equal Employment Opportunity Commission issued a "Letter of Determination" finding that AT&T had violated pregnancy discrimination laws. This Court held the letter nonfinal because "[t]he Commission has not inflicted any injury upon AT&T merely by expressing its view of the law—a view that has force only to the extent the agency can persuade a court to the same conclusion." *Id.* at 976. The situation here is even more attenuated because the Commission itself has not even taken a position—the staff's views have force only to the extent they later may be adopted by the Commission.

Similarly, in *Center for Auto Safety v. NHTSA*, 452 F.3d 798 (D.C. Cir. 2006), the National Highway Traffic Safety Administration issued policy guidelines on regional recalls of vehicles. The Court held the guidelines nonfinal, explaining that they were "nothing more than a privileged viewpoint in the legal debate," that they would not be binding in an enforcement proceeding, and that the agency "remain[ed] free to exercise discretion in assessing proposed recalls and in enforcing the Act." *Id.* at 808, 809. As in this case, the author of the guidelines

"had no authority to issue binding regulations or make a final determination." Id. at 810. Because the agency action did not impose a "certain change in the legal obligations of a party," it was nonfinal for the purposes of the APA. *Id.* at 811; *see also DRG Funding Corp. v. Secretary of HUD*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (action nonfinal when it "affects [regulated parties'] rights adversely on the contingency of future administrative action") (quotation omitted).

In this case, the 2016 Staff Letter does not impose any "certain change" in the legal obligations of SBA members. Any effect is contingent on further administrative action that may or may not occur, depending on how the Commissioners view the matter. The letter may increase the likelihood that the Commission will ultimately begin an enforcement proceeding against SBA members if they continue to use soundboard for outbound telemarketing calls. But *Standard Oil* makes clear that even the actual filing of an enforcement complaint—let alone the possibility of facing such a proceeding—is not a legal consequence that confers finality. *Standard Oil*, 449 U.S. at 242, 244. As this Court has explained, "'[p]ractical consequences,' such as the threat of [a party] 'having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement,' are insufficient" to render an agency's legal guidance final and subject to judicial review. *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427-28 (D.C. Cir. 2004) (quoting *Reliable Automatic Sprinkler*, 324 F.3d at 732).

Nor does the staff's decision to delay the effective date of the 2016 Staff Letter suffice to turn its nonfinal advisory opinion into a binding edict. At most, the letter cautions that beginning on May 12, 2017, staff may recommend that the Commission bring an enforcement proceeding against the continued use of soundboard in telemarketing. That is substantively indistinguishable from the letter in *Reliable Automatic Sprinkler*, which announced an "*intention* of the [CPSC] Compliance staff to make the preliminary determination" that the company's sprinklers constituted a substantial product hazard—*i.e.*, to recommend enforcement action if the company did not take voluntary corrective action. *Reliable Automatic Sprinkler*, 324 F.3d at 733 (emphasis added). The Court held that statement insufficient to make the letter final because "[w]e do not know whether the agency will bring administrative enforcement proceedings," and if it did, the company would have "ample opportunity" to defend itself at a hearing before the Commission. The same reasoning applies here.

Since there is no final and reviewable agency action here, the Court may simply affirm the judgment below. It need not consider either SBA's First Amendment challenges or its procedural challenges to the 2016 Staff Letter.

II. SBA'S FIRST AMENDMENT CHALLENGES ARE PROCEDURALLY IMPROPER AND MERITLESS.

SBA challenges the 2016 Staff Letter under the APA as "contrary to a constitutional right." Br. 17; *see* 5 U.S.C. § 706(2)(B). It contends that the letter is a content-based regulation of speech that violates the First Amendment. But although styled as a challenge to the 2016 Staff Letter, SBA's argument has nothing to do with the substance of that letter. In reality, it is a facial attack on the TSR's anti-robocall rule and the TSR's definition of "telemarketing," which is taken verbatim from Congress' definition in the Telemarketing Act. *See* 15 U.S.C. § 6106(4); 16 C.F.R. § 310.2(gg). Specifically, SBA contends that the anti-robocall rule is content based because, (1) it applies to telemarketing but not political speech or other types of speech and (2) it distinguishes between telefunding calls to existing members of or donors to a charity and calls to potential new donors. Br. 20-30. SBA's First Amendment challenges are procedurally defective and wrong on the merits.

A. SBA's First Amendment Challenge to the TSR Is Untimely.

Unless another statute of limitations applies, facial challenges to agency regulations are subject to a six-year statute of limitations. 28 U.S.C. § 2401; *P&V Enters. v. United States Army Corps of Eng'rs*, 516 F.3d 1021, 1023 (D.C. Cir. 2008). The Court has consistently held that this six-year period is a jurisdictional condition attached to the waiver of sovereign immunity. *Id.*; *see also Muwekma*

Ohlone Tribe v. Salazar, 708 F.3d 209, 218 (D.C. Cir. 2013). The anti-robocall rule was adopted in 2008; any challenge therefore should have been filed no later than 2014. SBA's facial First Amendment challenges, first asserted in 2017, are thus time-barred.

The 2016 Staff Letter did not restart the clock because it merely described rules that were already in place. The Court addressed a comparable situation in *Alliance for Safe, Efficient & Competitive Truck Transportation v. Federal Motor Carrier Safety Administration*, 755 F.3d 946 (D.C. Cir. 2014). There, the agency posted to its website presentations describing certain online safety databases the agency maintained pursuant to regulations. *Id.* at 947-49. An industry group sued, alleging that the presentations amounted to a legislative rule promulgated without notice and comment. The Court held that the challenge was untimely under the 60-day Hobbs Act statute of limitations because the presentations "d[id] no more than describe" systems that had been announced in the Federal Register and put in place two years earlier. *Id.* at 953. The same reasoning applies here. Although the 2016 Staff Letter refers to the TSR and its prohibition on robocalls, it does not change (or purport to change) those regulations. Staff merely expressed a view as to what types of technologies are subject to the robocall prohibition.

This Court has not definitively resolved whether the § 2401 limitations period is subject to equitable tolling. *See Felter v. Kempthorne*, 473 F.3d 1255,

1260 (D.C. Cir. 2007). But in any case, there is no basis for equitable tolling here. To establish equitable tolling, a litigant must prove "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Here, nothing prevented SBA or its members from timely challenging the anti-robocall rule.

SBA may contend that its members did not know that they might be subject to the anti-robocall regulation until 2016, but any such argument fails for three reasons. First, soundboard telemarketers knew (and the 2009 Staff Letter makes clear) that they were subject to other provisions of the TSR that make the same distinction between telemarketing and other speech that SBA complains about here. ECF No. 1-3 at 3-4 (JA). Second, they knew that the staff's opinion regarding the anti-robocall rule applied "only to the extent that actual company practices conform to the material submitted for review." *Id.* at 4 (JA). Finally, they knew that staff's opinion was not binding on the Commission and did not preclude an enforcement action. *Id.*; 16 C.F.R. § 1.3(c).

Nor does the "reopening doctrine" apply here. That doctrine "allows an otherwise stale challenge to proceed because the agency opened the issue up anew and then reexamined and affirmed its prior decision." *P&V Enters.*, 516 F.3d at

1023 (citation, internal quotation marks, ellipsis and brackets omitted).[8] But the doctrine applies only where "the entire context demonstrates that the agency has undertaken a serious, substantive reconsideration of the existing rule." *Id.* at 1024 (citation, internal quotation marks, and brackets omitted). Here, neither the Commission nor its staff ever undertook to reconsider the substance of the anti-robocall rule. Indeed, staff is without power to change the rule.

SBA's failure to assert a timely facial challenge to the anti-robocall rule does not mean its members may never raise First Amendment claims. If the Commission seeks to enforce the TSR against them, they may raise a First Amendment defense. *See P&V Enters.*, 516 F.3d at 1026; *NLRB Union v. FLRA*, 834 F.2d 191, 195 (D.C. Cir. 1987). But they cannot assert a facial challenge in this proceeding.

B. The District Court Properly Rejected the Sole First Amendment Argument Made Below.

If the Court decides to consider SBA's First Amendment theories, it should reject them. Before the District Court, the only First Amendment argument that SBA made was that the anti-robocall rule impermissibly distinguished between telefunding calls to first-time donors to a charitable organization and calls made to previous donors. SBA argued that this distinction was content based and that it

[8] The Commission amended the TSR in 2010 and 2015, but those amendments are not pertinent to the issues raised by SBA here.

failed strict scrutiny. Compl. ¶¶ 73-79, ECF No. 1 at 22-23 (JA); Mem. in Supp. of Pl.'s Application for Prelim. Inj. 31-40, ECF No. 4-2 at 38-47 (JA). The district court rejected this argument, holding that the distinction was content neutral because it is "based on who the recipient is—a prior donor or a potential new donor—not on what is being said." The court further held that the regulation "easily satisfies intermediate scrutiny" because it "plainly advances the government's recognized interest in preventing against unwarranted intrusions into a person's home or pocket" and leaves open ample alternative means for charities to communicate with potential new donors. ECF No. 19 at 25, 27-28 (JA).

On appeal, SBA argues that the distinction between calls to existing members or donors and new donors is content based because it requires the FTC to look at the content of the call to determine whether the robocall prohibition applies. Br. 28. Not so. As the district court held, the agency need only look at whether the recipient is a prior donor to or existing member of the charitable organization. If it is, then the exception applies, regardless of what is said in the call. Courts have uniformly held that statutes similarly regulating who may be called, as opposed to what can be said, are content neutral and do not violate the First Amendment. *See, e.g.*, *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017); *Bland v. Fessler*, 88 F.3d 729, 733–34 (9th Cir. 1996); *Van Bergen*

v. Minnesota, 59 F.3d 1541, 1553, 1556 (8th Cir. 1995). We are not aware of any court decision to the contrary. The district court's judgment should be affirmed.

C. SBA's New First Amendment Argument Is Waived and Wrong.

SBA also advances an entirely new First Amendment argument that it did not raise before the district court (and that the district court therefore did not consider). It argues that the TSR's robocall prohibition, in its entirety, is a content-based restriction subject to strict scrutiny because it "applies to calls with a *consumer* or *charitable* message but does not reach calls made for any other purpose." Br. 23. In other words, SBA's complaint now is that the anti-robocall rule unlawfully applies only to telemarketing as defined in the TSR and the Telemarketing Act, and not to political or other types of robocalls. SBA did not argue this theory in either its complaint or its briefs before the district court. The argument is therefore waived. *See, e.g.*, *Huron v. Cobert*, 809 F.3d 1274, 1280 (D.C. Cir. 2016) (finding waiver where appellant "roll[ed] out an entirely new argument … for the first time on appeal"). But in any event, SBA's newly minted First Amendment argument is also meritless.

1. The Anti-Robocall Rule Is Not a Content-Based Law Subject to Strict Scrutiny.

A law regulating speech is content based and subject to strict scrutiny if it "applies to particular speech because of the topic discussed or the idea or message

expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). "The government may not regulate … based on hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992). But not every law that distinguishes between different types of speech amounts to a content-based distinction that triggers strict scrutiny. For example, "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there." *Id.* at 388-89 (citation omitted). Such a law becomes subject to strict scrutiny only if it further distinguishes among advertisements based on their content. *Id*. at 390.

A law is also not content based "merely because, at a general level, the character of the expressive activity must be taken into account to discern whether the law applies." *Act Now to Stop War and End Racism Coalition v. District of Columbia*, 846 F.3d 391, 404 (D.C. Cir. 2017) ("*ANSWER*"). For example, a law prohibiting a person from approaching another within 100 feet of a health care facility to engage in "oral protest, education, or counseling" is content neutral, even though a court may need to make a "cursory examination" of the communication to determine whether it is prohibited activity "rather than pure social or random conversation." *Hill v. Colorado*, 530 U.S. 703, 721-22 (2000). Similarly, a law that merely distinguishes between posting of event-related signs

and non-event-related signs, without drawing any further distinctions, is content neutral. *ANSWER*, 846 F.3d at 403-06.

Applying these principles, the TSR's anti-robocall rule does not draw any content-based distinctions that would trigger strict scrutiny. The rule prohibits *any* "prerecorded message" in an outgoing telemarketing call; it makes no distinction based on the content of such messages. And it applies generally to *all* for-profit telemarketers (except for HIPAA-covered entities, which are addressed in separate extensive federal regulations issued by a different agency).[9] Thus, the rule does not address what a telemarketer can or cannot say in a robocall.

SBA's core argument is that the rule is content based because it prohibits only telemarketing robocalls—not political robocalls or other types of non-commercial messages. But that distinction does not reflect any approval or disapproval of speech based on its content; rather, it is a consequence of jurisdictional limitations established by Congress. The Commission generally has authority only over activities "in or affecting commerce," 15 U.S.C. § 45(a)(1), which does not include political or other noncommercial activity. And its authority

[9] Apart from a cursory reference to "healthcare calls" (Br. 23), SBA does not argue that the exception for HIPAA-covered entities renders the rule content based. Any such argument is therefore waived. In any event, the HIPAA exception is not content based; it turns only on the identity of the caller, not the content of the communication. "So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 645 (1994).

under the Telemarketing Act is limited to "telemarketing," as that term was defined by Congress. *See* 15 U.S.C. §§ 6102(a)(1), 6106(4). That definition does not cover political calls or other noncommercial calls.

That the FTC has confined its regulation to the jurisdictional limits established by Congress does not transform the anti-robocall rule into a content-based restriction on speech. The Fourth Circuit rejected the identical argument in *National Federation of the Blind v. FTC*, 420 F.3d 331 (4th Cir. 2005), holding that the 2003 revision of the TSR was not content based merely because it did not cover "some commercial, political, and intrastate speech." *Id.* at 348. The court explained that "[w]hen an agency regulates to the extent of its jurisdiction it will unavoidably leave out some speakers and some speech that is beyond its authority to regulate," but "it does not make sense to see this unavoidable distinction as a red flag indicating First Amendment problems." *Id*. If an agency distinction "based on the clear congressional directives governing its jurisdiction" were unconstitutional, then "any regulation by any federal agency that applied to only some speakers would be imperiled." *Id.* Such a rule would present "a stark choice for lawmakers—either assign all regulation touching on speech to one federal agency, or do not regulate at all." *Id.* As the Fourth Circuit held, the First Amendment does not "hamstring[] Congress in such a manner." *Id.*

Moreover, SBA's claim that the anti-robocall rule is unconstitutional because it does *not* apply to political calls makes no sense under established First Amendment principles. Speech "uttered during a campaign for political office" receives the "fullest and most urgent" level of First Amendment protection. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (internal quotation marks omitted). Restrictions on political speech are therefore subject to strict scrutiny. *Id.* Commercial speech, by contrast, "can be subject to greater governmental regulation than noncommercial speech," *Cincinnati v. Discovery Network*, 507 U.S. 410, 426 (1993), and is subject to a more lenient intermediate scrutiny standard. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). As *R.A.V.* makes clear, Congress may choose to regulate commercial speech in one industry but not another based on the risks presented by that industry. *R.A.V.*, 505 U.S. at 388-89. That is exactly what Congress did here; it determined that telemarketing posed special risks of fraud, deception and abuse that necessitated additional regulation by the FTC. *See* 15 U.S.C. § 6101 (factual findings). Congress could constitutionally direct the FTC to regulate telemarketing calls—a form of commercial speech—without also requiring it to regulate more highly protected political calls.

SBA's position seems to be that if the FTC does not regulate political speech, it cannot regulate any speech—an argument that stands First Amendment jurisprudence on its head. Decades of Supreme Court decisions expressly recognize that political and commercial speech may be treated differently. By contrast, SBA's all-or-nothing approach would imply, for example, that the FTC cannot take action against deceptive commercial advertisements because it lacks the authority to regulate false political advertisements. The First Amendment does command such an illogical and unworkable regime.

2. *Reed* and *Cahaly* Are Inapposite.

Contrary to SBA's assertions, the Supreme Court's *Reed* decision does not suggest that a prohibition on telemarketing robocalls but not other kinds of robocalls is a "content-based" regulation subject to strict scrutiny. The sign code in *Reed* banned outdoor signs but exempted 23 categories of signs, with a complex set of different rules for each category, based on the content of the sign. *Reed*, 135 S. Ct. at 2224-25. The Court held that because the sign code was content based on its face, it was subject to strict scrutiny. *Id.* at 2227. By contrast, the anti-robocall rule does not have this kind of patchwork of content-based exceptions; it applies uniformly to all outgoing calls containing a prerecorded message.[10]

[10]Moreover, *Reed* involved signs posted in public streets—a quintessential public forum where "the government's ability to permissibly restrict expressive

Nothing in *Reed* remotely calls into question the nearly forty years of decisions holding that the government can treat commercial speech—such as telemarketing—differently from other types of speech because the First Amendment "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson*, 447 U.S. at 563. To the contrary, the Supreme Court has continued to recognize and apply the *Central Hudson* test for commercial speech since *Reed*. *See Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017). Nor did *Reed* purport to undermine the Court's longstanding distinction between purely commercial speech and charitable solicitations, which are subject to a higher level of scrutiny. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 788 (1988); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 960-61 (1984); *Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

In short, nothing in *Reed* even suggests that categorical regulatory distinctions between purely commercial telemarketing, telefunding, and non-telemarketing calls are impermissibly content based. Rather, as this Court has explained, "[w]hat *Reed* held constitutionally suspect was the way in which the

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conduct is very limited." *United States v. Grace*, 461 U.S. 171 (1983). By contrast, this case involves speech that is forced into consumers' homes, where they reasonably expect a high degree of privacy. *See Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988).

[town's] Sign Code made content-based distinctions among different types of issues and events, and even different types of signs relating to the same event." *ANSWER*, 846 F.3d at 405. But a District of Columbia law that merely distinguished between event-related and non-event-related signs was content neutral because it "ma[de] no distinctions among event-related signs based on their particular communicative content." *Id.* at 406. Similarly, the FTC's anti-robocall rule is content neutral because it draws no distinctions among robocalls based on the content of particular messages. And the fact that the FTC must make a "cursory examination" of a call to determine whether a message is in fact telemarketing does not make the rule content based. *ANSWER*, 846 F.3d at 404 (quoting *Hill*, 530 U.S. at 720, 722).

Nor does *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015), support SBA's claim that the anti-robocall regulation is content based. There, the law at issue applied to "calls with a consumer or political message but d[id] not reach calls for any other purpose." *Id.* at 405. The plaintiff was arrested for making *political* robocalls. *Id.* at 402-03. The court held, unsurprisingly, that the state law was content based, which it obviously was, because it singled out *political* robocalls for express prohibition while allowing many other types of speech. "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). But nothing in

Cahaly suggests that a regulation applying *only* to commercial telemarketing calls, issued by an agency with no authority to regulate other types of calls, would be content based and subject to strict scrutiny.[11]

3. The Anti-Robocall Rule Easily Satisfies the Applicable Levels of Judicial Scrutiny.

To the extent that it regulates purely commercial speech, the anti-robocall regulation must be assessed under the *Central Hudson* test, which it easily satisfies. Restrictions on commercial speech satisfy the First Amendment if they serve a "substantial" governmental interest, "directly advance[]" that interest, and are "not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. The last two factors require "consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *United States v. Edge Broad. Co.*, 509 U.S. 418, 427-28 (1993).

Insofar as it regulates charitable solicitations, the rule is subject to the stricter standard set forth in *Schaumberg*, *Munson* and *Riley*, which it also passes. Under that test, restrictions on solicitations satisfy the First Amendment if they "serve[] a sufficiently strong, subordinating interest that the [government] is entitled to protect" and are "narrowly drawn … to serve those interests without

[11] Similarly, in *Gresham v. Rutledge*, 198 F. Supp. 3d 965 (E.D. Ark. 2016), the statute singled out political calls for restriction. The parties agreed it was content based. *Id.* at 969.

unnecessarily interfering with First Amendment freedoms." *Schaumberg*, 444 U.S. at 636-37; *Nat'l Fed'n of the Blind*, 420 F.3d at 338.

The FTC's interest here—protecting the privacy of consumers in their homes—satisfies the government-interest element of both the commercial and charitable tests. In *FTC v. Mainstream Marketing Services, Inc.*, 345 F.3d 850 (10th Cir. 2003), the Tenth Circuit held that "prevention of intrusions upon privacy in the home" is a "paradigmatic substantial governmental interest" sufficient to justify regulation of commercial telemarketing. *Id.* at 854. Other courts have reached the same conclusion. *See Van Bergen*, 59 F.3d at 1554; *Bland*, 88 F.3d at 734-35; *Patriotic Veterans*, 845 F.3d at 305-06. Likewise, the Fourth Circuit has held that protection of residential privacy is a "sufficiently strong subordinating" interest that justifies the TSR's restrictions on charitable solicitations. *Nat'l Fed'n of the Blind*, 420 F.3d at 339-40.

Those cases apply here. The government undeniably has a powerful—even compelling—interest in defending Americans' peace and privacy from telephonic nuisances. "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." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)). Thus the Supreme Court has "repeatedly held that individuals are not required to welcome unwanted speech into their own homes

and that the government may protect this freedom." *Id.* at 485; *see also FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978) (government could regulate indecent broadcast into home); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737-38 (1970) (government could prohibit unwanted mailings into home).

And it is not just "the ringing of the phone" that threatens consumers' privacy and repose; instead, "how invasive a phone call may be is also influenced by the manner and substance of the call." *Mainstream Mktg.*, 345 F.3d at 855. Unsolicited robocalls are "uniquely intrusive" and the "sheer quantity" of these calls can be overwhelming. *Van Bergen*, 59 F.3d at 1554-55; *Bland*, 88 F.3d at 734-35. "The lack of a live person makes the call frustrating for the recipient but cheap for the caller, which multiplies the number of these aggravating calls in the absence of legal controls." *Patriotic Veterans*, 845 F.3d at 306. And the government's interest in protecting consumers from unwanted intrusions on their privacy extends as well to cell phones, which have replaced landlines for many consumers and may be on a consumer's person at all times. As the Seventh Circuit explained, "[e]very call uses some of the phone owner's time and mental energy, both of which are precious." *Id.* at 305-06.

The prohibition on purely commercial robocalls absent written consent easily satisfies the remainder of the *Central Hudson* test. "[T]o show a reasonable fit the government must 'demonstrate that the harms it recites are real and that its

restriction will in fact alleviate them to a material degree.'" *Mainstream Mktg.*, 345 F.3d at 853 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995)). Here, there can be no doubt that the harm posed by telemarketing robocalls is real and that a general prohibition on such calls alleviates that harm. Courts have consistently upheld the FTC's prohibition of calls to numbers on a "Do Not Call" list. *Nat'l Fed'n of the Blind*, 420 F.3d at 341-42 (entity-specific list for charitable solicitations); *Mainstream Mktg.*, 345 F.3d at 860 (national "Do Not Call" list for commercial telemarketers); *see also Rowan*, 397 U.S. at 737-38.

The prohibition on telemarketing robocalls is similar in nature to the Do-Not-Call rule, except that the default option is that consumers are deemed not to have consented to receive robocalls. That assumption is amply justified by evidence submitted to the Commission that "an overwhelming number of consumers hate prerecorded calls, and consider them a gross invasion of their privacy." 73 Fed. Reg. at 51177. Moreover, the Commission carefully considered less restrictive alternatives, such as requiring customers to "opt out" of receiving robocalls or permitting calls to customers with whom a company has an existing business relationship, and determined that such alternatives would not adequately protect consumer privacy. *Id.* at 51168, 51172-79.

The relaxed restrictions on telefunding likewise satisfy the *Schaumberg* "narrow tailoring" test for charitable fundraising. In adopting the anti-robocall

rule, the Commission recognized that charitable solicitations are entitled to greater First Amendment protections than purely commercial calls, but noted that these calls still threaten privacy interests and that consumers complain about them. 73 Fed. Reg. at 51194. While a charity's members and prior donors may be deemed to have consented to further contacts, "[p]ermitting telefunders to make impersonal prerecorded cold calls on behalf of charities that have no prior relationship with the call recipients … would defeat the [anti-robocall rule's] purpose of protecting consumers' privacy" and lead to "a likely tide of low-cost charitable solicitation calls to potential donors made by telefunders on behalf of a virtually infinite array of non-profit organizations seeking to boost donations." *Id.* The Commission thus sought to "balance … the strongly-protected right of non-profit organizations to reach donors through telefunding, and the privacy rights of those potential donors to be free, in their own homes, of prerecorded message calls that they do not want." *Id.* at 51193.

Moreover, as the district court noted, the rule does not unduly limit the ability of charities to reach first time donors because it leaves "open ample alternative channels" of communication. ECF No. 19 at 27-28 (JA) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Subject to the other TSR requirements, charities may contact new donors using live callers, and they can also use "media advertising, mailings, websites, and in-person solicitations."

Id. The Commission thus struck a reasonable balance that is narrowly tailored to protect consumers' privacy interests without chilling the right of charities to solicit donations.

Indeed, even if strict scrutiny were appropriate here—which it is not—the anti-robocall rule would satisfy that standard. In *Cahaly*, which applied strict scrutiny, the court did not question that protection of residential privacy is a compelling government interest, but found that prohibiting political and consumer robocalls was not narrowly tailored because there were "[p]lausible less restrictive alternatives" such as "time-of-day limitations, mandatory disclosure of the caller's identity, or do-not-call lists." *Cahaly*, 796 F.3d at 405. But the Commission already tried all of these alternatives in the 2003 revision of the TSR. *See* 16 C.F.R. § 310.4(b)(1)(iii), (c), (d)(1), (e)(1). By 2008, overwhelming evidence in the administrative record showed that such measures were not adequate to protect consumers from unwanted telemarketing robocalls and that further protections were needed. The alternative that the Commission chose is narrowly tailored to protect consumers from the specific privacy harm posed by unwanted telemarketing robocalls.

III. THE 2016 STAFF LETTER IS AT MOST AN INTERPRETIVE RULE EXEMPT FROM NOTICE AND COMMENT.

SBA renews on appeal its argument that the 2016 Staff Letter is a legislative rule that the Commission could promulgate only through notice-and-comment rulemaking. Br. 44-54. The district court properly rejected this argument.

First, the 2016 Staff Letter is not a "rule" at all. The APA defines a "rule" as "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." 5 U.S.C. § 551(4). For a letter to qualify as a rule under this definition, it must have been authored by someone "with the authority to announce rules binding on [the agency]." *Amoco Prod. Co. v. Watson*, 410 F.3d 722, 732 (D.C. Cir. 2005); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1257 (D.C. Cir. 1996). As discussed above, the author of the 2016 Staff Letter, Ms. Greisman, does not have authority to announce rules binding on the Commission, and the letter by its terms was not binding. As in *Amoco* and *Independent Petroleum*, "[t]he letter is not an agency rule at all, legislative *or* interpretative, because it does not purport to, nor is it capable of, binding the agency." *Indep. Petroleum*, 92 F.3d at 1257.

But if it were deemed a rule, the 2016 Staff Letter would at most be an interpretive rule exempt from notice and comment. *See* 5 U.S.C. § 553(b)(A); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015). "[T]he 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.'" *Id.* at 1204 (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). Thus an interpretive rule is one that "describes the agency's view of the meaning of an existing statute or regulation." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

That is exactly what the FTC staff did here. The TSR applies to "any outbound telephone call that delivers a prerecorded message." 16 C.F.R. § 310.4(b)(1)(v). In response to an inquiry as to whether "any prerecorded message" includes the prerecorded messages used in soundboard technology, staff advised that it does. If that is not an "interpretive" ruling, then nothing is.

As the district court held, *Flytenow, Inc. v. FAA*, 808 F.3d 882 (D.C. Cir. 2016), is squarely on point. There, an FAA rule required common carrier aviation services to use commercially licensed pilots. A startup aviation business sought a legal interpretation whether its services would be considered common carriage under the existing rule. The FAA answered yes. *Id.* at 885. The Court held that this was a "quintessential interpretative rule" because it was "issued by an agency to advise the public of the agency's construction of the statutes and rules it administers." *Id.* at 889 (quoting *Guernsey Mem'l Hosp.*, 514 U.S. at 99). That holding applies foursquare here. As in *Flytenow*, advice to the public on how an

existing rule applies to a particular situation is a quintessential interpretive function.

SBA argues that the 2016 Staff Letter is a legislative rule because staff misconstrued the language of the anti-robocall rule, which in SBA's view cannot possibly apply to soundboard technology. But as the district court noted, this is an argument that the staff's interpretation is arbitrary and capricious—not that it is a legislative rule. *See* ECF No. 19 at 22-23 (JA). SBA did not raise an arbitrary-and-capricious challenge in its complaint; indeed, it expressly told the district court that it was *not* making that argument. ECF No. 24 at 4-6 (JA). The argument is therefore waived. SBA now claims that it "never 'disavowed'" an arbitrary-and-capricious claim (Br. 51), but as the hearing transcript shows, it plainly did. Its lawyer told the district court in no uncertain terms that "[w]e haven't asserted an arbitrary and capricious claim." ECF No. 24 at 4 (JA).

SBA also incorrectly argues that *American Mining Congress v. MSHA*, 995 F.2d 1106 (D.C. Cir. 1993), allows a court to import an arbitrary-and-capricious analysis to determine whether a rule is interpretive or legislative. To the contrary, *American Mining Congress* makes clear that incorrectly interpreting an existing rule does not make the interpretation legislative. So long as the interpretation is "sufficiently within the language of a legislative rule to be a genuine interpretation and not an amendment," it will remain an interpretation even if it is "an incorrect

interpretation of the agency's statutory authority." *Id.* at 1113. Even if it was error for FTC staff to find that the phrase "prerecorded message" used in the TSR applies to the prerecorded messages used in soundboard technology, staff's reading of the existing rule remains firmly rooted in its language.

But in any event, SBA's claim that staff misinterpreted the anti-robocall rule is meritless. SBA argues that "the phrase 'a prerecorded message' cannot reasonably be interpreted to apply to Soundboard calls." Br. 43. In fact, that phrase cannot reasonably be interpreted *not* to apply to soundboard technology. SBA's own complaint describes soundboard as playing audio clips consisting of "recorded sound files." Compl. ¶ 29, ECF No. 1 at 9 (JA). These are prerecorded messages by any reasonable reading of that term.

Faced with the inescapable fact that its technology uses prerecorded messages, SBA argues that the TSR's use of the indefinite article "a" means that the anti-robocall rule covers only calls that deliver a *single* prerecorded message and cannot apply to the multiple messages used in a soundboard calls. That interpretation is absurd. It would mean that anyone could circumvent the rule by splitting one prerecorded message into two: for example, by having one recording say "Hello" and another make a sales pitch. Furthermore, if a consumer hangs up after realizing that a call is delivering a prerecorded message, it makes no difference whether the initial recording would be followed by another recording.

SBA's constricted reading of "a prerecorded message" is also contrary to ordinary grammar and legal usage. The indefinite article "a" "generally implies the possibility of a larger number than one." *United States v. Edwards*, 834 F.3d 180, 193 (2d Cir. 2016); *see also United States v. Hagler*, 700 F.3d 1091, 1097 (7th Cir. 2012) (same); *KCJ Corp. v. Kinetic Concepts, Inc.*, 223 F.3d 1351, 1356 (Fed. Cir. 2000) ("[A]n indefinite article 'a' or 'an' in patent parlance carries the meaning of 'one or more'"); *Commissioner v. Kelley*, 293 F.2d 904, 912 (5th Cir. 1961) ("The indefinite article 'a' says in plain language that there may be two or more substantial parts."); *Black's Law Dictionary* 1 (6th ed. 1990) ("The article 'a' is not necessarily a singular term; it is often used in the sense of 'any' and is then applied to more than one individual object."). Furthermore, it is a general principle of statutory construction that "unless the context indicates otherwise … words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1. In light of this widely recognized rule of construction, the anti-robocall rule cannot reasonably be read to exclude calls containing more than one prerecorded message.

Nor does the preamble to the anti-robocall rule support SBA's interpretation. Nothing in the preamble suggests that the phrase "a prerecorded message" must mean only a single prerecorded message. SBA points to statements in the preamble (including comments from consumer and industry groups) to the effect

that prerecorded calls are "one sided conversations" that do not offer any human interaction. Br. 45 (quoting 73 Fed. Reg. at 51167, 51173, 51180) . SBA then asserts that soundboard cannot come within the scope of the prohibition because it is "used to facilitate a live, two-way interaction, with humans on both ends of the call." Br. 45.

SBA is wrong for two reasons. First, staff found that soundboard was not in fact being used to facilitate two-way conversation, and that soundboard calls were essentially "indistinguishable from the telemarketing robocalls that consumers consider to be abusive and that are illegal under the TSR." ECF No. 1-2 at 3-5 (JA). Second, even if such calls were truly interactive, that would not mean they fall outside the scope of the rule. The Commission expressly found that "the reasonable consumer would consider interactive prerecorded telemarketing messages to be coercive or abusive of such consumer's right to privacy." 73 Fed. Reg. at 51180. To be sure, the Commission anticipated that "technological advances may eventually permit the widespread use of interactive messages that are essentially indistinguishable from conversing with a human being." *Id.* But it did not exempt such technologies; instead, it noted that if they developed, telemarketers could seek an amendment to the TSR or exemption from the anti-robocall rule. *Id.* This statement would make no sense if the Commission believed

that calls using prerecorded messages to simulate a two-way conversation were *already* exempt from the TSR.

SBA argues that the 2009 Staff Letter should be given "substantial weight" as a "contemporaneous agency interpretation" of the anti-robocall rule. Br. 47. It cites *United States v. Kanchanalak*, 192 F.3d 1037, 1045 & n.15 (D.C. Cir. 1999), which used the preamble to a Federal Election Commission rule to help interpret the rule. But the 2006 Staff Letter is not a "contemporaneous agency interpretation"—as discussed above, it reflected only the views of FTC staff, not those of the Commission itself. And even if it had been a binding agency interpretation, that still would not mean the agency was stuck with it forever. To the contrary, "an agency is free to change its mind so long as it supplies 'a reasoned analysis.'" *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 667, (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)). Here, the staff explained that it was reconsidering the 2009 Staff Letter based on additional evidence showing that the premise of the letter—that soundboard was used in a manner indistinguishable from two-way conversation—was incorrect. The fact that the staff changed its original interpretation based on additional evidence does not vest the new interpretation with the status of a legislative rule. *Perez*, 135 S. Ct. at 1206.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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July 28, 2017

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July 28, 2017

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Attorney for the Federal Trade Commission

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing Brief to be served via the Court's CM/ECF system on all counsel of record this 28th day of July, 2017.

/s/ Matthew M. Hoffman
Attorney for the Federal Trade Commission

ADDENDUM OF STATUTES AND REGULATIONS

INDEX TO ADDENDUM

STATUTES

Dictionary Act

Administrative Procedure Act

Federal Trade Commission Act

Telemarketing and Consumer Fraud and Abuse Prevention Act

Statute of Limitations

REGULATIONS

United States Code, 2015 Edition
Title 1—GENERAL PROVISIONS

§1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

words importing the singular include and apply to several persons, parties, or things;

* * *

United States Code, 2015 Edition
Title 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

§551. Definitions

For the purpose of this subchapter—

* * *

(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;

* * *

§553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(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.

* * *

§704. 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. * * *

§706. Scope of review

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 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.

United States Code, 2015 Edition
Title 15 - COMMERCE AND TRADE

§41. Federal Trade Commission established; membership; vacancies; seal

A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party. * **

§44. Definitions

The words defined in this section shall have the following meaning when found in this subchapter, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

* * *

§45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a), the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him

or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph 1 (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such

terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) "Mandate" defined

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(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 subchapter 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.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy considerations

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

§53. False advertisements; injunctions and restraining orders

* * *

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided*, *however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

* * *

United States Code, 2015 Edition
Title 15 - COMMERCE AND TRADE

§6101. Findings

The Congress makes the following findings:

(1) Telemarketing differs from other sales activities in that it can be carried out by sellers across State lines without direct contact with the consumer. Telemarketers also can be very mobile, easily moving from State to State.

(2) Interstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud.

(3) Consumers and others are estimated to lose $40 billion a year in telemarketing fraud.

(4) Consumers are victimized by other forms of telemarketing deception and abuse.

(5) Consequently, Congress should enact legislation that will offer consumers necessary protection from telemarketing deception and abuse.

§6102. Telemarketing rules

(a) In general

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

(2) The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices which shall include fraudulent charitable solicitations, and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.

(3) The Commission shall include in such rules respecting other abusive telemarketing acts or practices—

(A) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy,

(B) restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers,

(C) a requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services; [1] and

(D) a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made.

In prescribing the rules described in this paragraph, the Commission shall also consider recordkeeping requirements.

(b) Rulemaking authority

The Commission shall have authority to prescribe rules under subsection (a), in accordance with section 553 of title 5. 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.

(c) Violations

Any violation of any rule prescribed under subsection (a)—

(1) shall be treated as a violation of a rule under section 57a of this title regarding unfair or deceptive acts or practices; and

(2) that is committed by a person subject to the Consumer Financial Protection Act of 2010 shall be treated as a violation of a rule under section 1031 of that Act [12 U.S.C. 5531] regarding unfair, deceptive, or abusive acts or practices.

* * *

§6105. Administration and applicability of chapter

(a) In general

Except as otherwise provided in sections 6102(d), 6102(e), 6103, and 6104 of this title, this chapter shall be enforced by the Commission under the Federal Trade Commission Act (15 U.S.C. 41 et seq.). Consequently, no activity which is outside the jurisdiction of that Act shall be affected by this chapter.

(b) Actions by Commission

The Commission shall prevent any person from violating a rule of the Commission under section 6102 of this title in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this chapter. Any person who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this chapter.

(c) Effect on other laws

Nothing contained in this chapter shall be construed to limit the authority of the Commission under any other provision of law.

* * *

§6106. Definitions

For purposes of this chapter:

(1) The term "attorney general" means the chief legal officer of a State.

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(4) The term "telemarketing" means a plan, program, or campaign which is conducted to induce purchases of goods or services, or a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which—

(A) contains a written description, or illustration of the goods or services offered for sale,

(B) includes the business address of the seller,

(C) includes multiple pages of written material or illustrations, and

(D) has been issued not less frequently than once a year,

where the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation.

United States Code, 2015 Edition
Title 28—JUDICIARY AND JUDICIAL PROCEDURE

§2401. Time for commencing action against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Code of Federal Regulations, 2016 Edition
Title 16

PART 0—ORGANIZATION

§ 0.16 Bureau of Competition.

The Bureau is responsible for enforcing Federal antitrust and trade regulation laws under section 5 of the Federal Trade Commission Act, the Clayton Act, and a number of other special statutes that the Commission is charged with enforcing. The Bureau's work aims to preserve the free market system and assure the unfettered operation of the forces of supply and demand. Its activities seek to ensure price competition, quality products and services and efficient operation of the national economy. The Bureau carries out its responsibilities by investigating alleged law violations, and recommending to the Commission such further action as may be appropriate. Such action may include injunctive and other equitable relief in Federal district court, complaint and litigation before the agency's administrative law judges, formal nonadjudicative settlement of complaints, trade regulation rules, or reports. The Bureau also conducts compliance investigations and initiates proceedings for civil penalties to assure compliance with final Commission orders dealing with competition and trade restraint matters. The Bureau's activities also include business and consumer education and staff advice on competition laws and compliance, and liaison functions with respect to foreign antitrust and competition law enforcement agencies and organizations, including requests for international enforcement assistance.

§ 0.17 Bureau of Consumer Protection.

The Bureau investigates unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act as well as potential violations of numerous special statutes which the Commission is charged with enforcing. It prosecutes before the agency's administrative law judges alleged violations of law after issuance of a complaint by the Commission or obtains through negotiation consented-to orders, which must be accepted and issued by the Commission. In consultation with the General Counsel, the Bureau may also seek injunctive or other equitable relief under section 13(b) of the Federal Trade Commission Act. The Bureau participates in trade regulation rulemaking proceedings under section 18(a)(1)(B) of the Federal Trade Commission Act and other rulemaking proceedings under statutory authority. It investigates compliance with final orders

and trade regulation rules and seeks civil penalties or consumer redress for their violation, as well as injunctive and other equitable relief under section 13(b) of the Act. In addition, the Bureau seeks to educate both consumers and the business community about the laws it enforces, and to assist and cooperate with other state, local, foreign, and international agencies and organizations in consumer protection enforcement and regulatory matters. The Bureau also maintains the agency's public reference facilities, where the public may inspect and copy a current index of opinions, orders, statements of policy and interpretations, staff manuals and instructions that affect any member of the public, and other public records of the Commission.

PART 1—GENERAL PROCEDURES

Subpart A—Industry Guidance

Advisory Opinions

§ 1.1 Policy.

(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.

§ 1.3 Advice.

(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.

PART 2—NONADJUDICATIVE PROCEDURES

Subpart A—Inquiries; Investigations; Compulsory Processes

§ 2.1 How initiated.

Commission investigations and inquiries may be originated upon the request of the President, Congress, governmental agencies, or the Attorney General; upon referrals by the courts; upon complaint by members of the public; or by the Commission upon its own initiative. 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. The Director of the Bureau of Competition has also been delegated, without power of redelegation, authority to open investigations in response to requests pursuant to an agreement under the International Antitrust Enforcement Assistance Act, 15 U.S.C. 6201 et seq., if the requests do not ask the Commission to use process. Before responding to such a request, the Bureau Director shall transmit the proposed response to the Secretary and the Secretary shall notify the Commission of the proposed response. If no Commissioner objects

within three days following the Commission's receipt of such notification, the Secretary shall inform the Bureau Director that he or she may proceed.

§ 2.14 Disposition.

(a) When an investigation indicates that corrective action is warranted, and the matter is not subject to a consent settlement pursuant to subpart C of this part, the Commission may initiate further proceedings.

(b) When corrective action is not necessary or warranted in the public interest, the investigation shall be closed. The matter may nevertheless be further investigated at any time if circumstances so warrant.

(c) In matters in which a recipient of a preservation demand, an access letter, or Commission compulsory process has not been notified that an investigation has been closed or otherwise concluded, after a period of twelve months following the last written communication from the Commission staff to the recipient or the recipient's counsel, the recipient is relieved of any obligation to continue preserving information, documentary material, or evidence, for purposes of responding to the Commission's process or the staff's access letter. The “written communication” may be in the form of a letter, an email, or a facsimile.

(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.

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

Subpart B—Pleadings

§ 3.11 Commencement of proceedings.

(a) *Complaint*. Except as provided in § 3.13, an adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint.

(b) *Form of complaint*. The Commission's complaint shall contain the following:

(1) Recital of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated;

(2) A clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law;

(3) Where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint; and

(4) Notice of the specific date, time and place for the evidentiary hearing. Unless a different date is determined by the Commission, the date of the evidentiary hearing shall be 5 months from the date of the administrative complaint in a proceeding in which the Commission, in an ancillary proceeding, has sought or is seeking relief pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b), and 8 months from the date of issuance of the administrative complaint in all other proceedings.

PART 4—MISCELLANEOUS RULES

§ 4.14 Conduct of business.

(a) Matters before the Commission for consideration may be resolved either at a meeting under § 4.15 or by written circulation. Any Commissioner may direct that a matter presented for consideration be placed on the agenda of a Commission meeting.

(b) A majority of the members of the Commission in office and not recused from participating in a matter (by virtue of 18 U.S.C. 208 or otherwise) constitutes a quorum for the transaction of business in that matter.

(c) Any Commission action, either at a meeting or by written circulation, may be taken only with the affirmative concurrence of a majority of the participating Commissioners, except where a greater majority is required by statute or rule or where the action is taken pursuant to a valid delegation of authority. No Commissioner may delegate the authority to determine his or her vote in any matter requiring Commission action, but authority to report a Commissioner's vote on a particular matter resolved either by written circulation, or at a meeting held in the Commissioner's absence, may be vested in a member of the Commissioner's staff.

PART 310—TELEMARKETING SALES RULE 16 CFR PART 310

§ 310.2 Definitions.

* * *

(ff) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(gg) *Telemarketing* means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

* * *

§ 310.4 Abusive telemarketing acts or practices.

(a) *Abusive conduct generally.* It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5)(i) Requesting or receiving payment of any fee or consideration for any debt relief service until and unless:

(A) The seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt pursuant to a settlement agreement, debt management plan, or other such valid contractual agreement executed by the customer;

(B) The customer has made at least one payment pursuant to that settlement agreement, debt management plan, or other valid contractual agreement between the customer and the creditor or debt collector; and

(C) To the extent that debts enrolled in a service are renegotiated, settled, reduced, or otherwise altered individually, the fee or consideration either:

(*1*) Bears the same proportional relationship to the total fee for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt amount. The individual debt amount and the entire debt amount are those owed at the time the debt was enrolled in the service; or

(*2*) Is a percentage of the amount saved as a result of the renegotiation, settlement, reduction, or alteration. The percentage charged cannot change from one individual debt to another. The amount saved is the difference between the amount owed at the time the debt was enrolled in the service and the amount actually paid to satisfy the debt.

(ii) Nothing in §310.4(a)(5)(i) prohibits requesting or requiring the customer to place funds in an account to be used for the debt relief provider's fees and for payments to creditors or debt collectors in connection with the renegotiation, settlement, reduction, or other alteration of the terms of payment or other terms of a debt, provided that:

(A) The funds are held in an account at an insured financial institution;

(B) The customer owns the funds held in the account and is paid accrued interest on the account, if any;

(C) The entity administering the account is not owned or controlled by, or in any way affiliated with, the debt relief service;

(D) The entity administering the account does not give or accept any money or other compensation in exchange for referrals of business involving the debt relief service; and

(E) The customer may withdraw from the debt relief service at any time without penalty, and must receive all funds in the account, other than funds earned by the debt relief service in compliance with §310.4(a)(5)(i)(A) through (C), within seven (7) business days of the customer's request.

(6) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; provided, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(7) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(7)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) Obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) Obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(7)(i)(A) of this section; and,

(C) Make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(7)(i) of this section, the seller or telemarketer must:

(A) At a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) Obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(7)(ii)(A) of this section;

(8) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; provided that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours;

(9) Creating or causing to be created, directly or indirectly, a remotely created payment order as payment for goods or services offered or sold through telemarketing or as a charitable contribution solicited or sought through telemarketing; or

(10) Accepting from a customer or donor, directly or indirectly, a cash-to-cash money transfer or cash reload mechanism as payment for goods or services offered or sold through telemarketing or as a charitable contribution solicited or sought through telemarketing.

(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:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with paragraph (b)(1)(iii)(A) of this section, including, but not limited to, harassing any person who makes such a request; hanging up on that person; failing to honor the request; requiring the person to listen to a sales pitch before accepting the request; assessing a charge or fee for honoring the request; requiring a person to call a different number to submit the request; and requiring the person to identify the seller making the call or on whose behalf the call is made;

(iii) Initiating any outbound telephone call to a person when:

(A) That person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) That person's telephone number is on the “do-not-call” registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller or telemarketer:

(*1*) Can demonstrate that the seller has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature[664] of that person; or

(*2*) Can demonstrate that the seller has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(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;[665] and

(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

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[664] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

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§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.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with §310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to §310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating §310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with §310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to §310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with §310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to §310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating paragraph (b)(1)(ii) or (iii) of this section is the result of error and not of failure to obtain any information necessary to comply with a request pursuant to paragraph (b)(1)(iii)(A) of this section not to receive further calls by or on behalf of a seller or charitable organization.

(4) A seller or telemarketer will not be liable for violating §310.4(b)(1)(iv) if:

(i) The seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

(ii) The seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) Whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed[666]; and

(iv) The seller or telemarketer, in accordance with §310.5(b)-(d), retains records establishing compliance with §310.4(b)(4)(i)-(iii).

(c) *Calling time restrictions.* Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

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[666] This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

(d) *Required oral disclosures in the sale of goods or services.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; provided, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) *Required oral disclosures in charitable solicitations.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.