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GLOSSARY

SBA	Soundboard Association
TSR	Telemarketing Sales Rule, 16 C.F.R. Part 310

INTRODUCTION AND SUMMARY

The Court should deny the Soundboard Association's petition for rehearing en banc. This case does not meet the exacting standards for en banc review. The panel majority held in a carefully reasoned opinion that an informal advisory opinion issued by FTC staff, which was neither approved by the Commission itself nor binding upon it, was not a "final agency action" under the Administrative Procedure Act. The panel majority scrupulously followed the Supreme Court's two-part test set forth in Bennett v. Spear, 520 U.S. 154 (1997), which the dissent agreed was the correct approach. The decision does not conflict with any decision of the Supreme Court or of this Court. This Court routinely finds similar staff advisory statements nonfinal. *See, e.g.*, Holistic Candler & Consumers Ass'n v. FDA, 664 F.3d 940, 944 (D.C. Cir. 2012); Reliable Automatic Sprinkler Co. v. CPSC, 324 F.3d 726, 732-33 (D.C. Cir. 2003).

Nor does the petition present a question of exceptional importance. The disagreement between the panel majority and Judge Millett's dissent turns on a fact-bound dispute over the proper interpretation of FTC regulations authorizing staff to issue advisory opinions—hardly the kind of exceptionally important question for which en banc review is appropriate. There was no dispute between the majority and Judge Millett as to the core principle that action is not final unless

it marks the consummation of the agency's decisionmaking process. Nebs could

corrective action is warranted, the Commission may initiate further proceedings." Id. § 2.14(a) (emphasis added). Thus, all enforcement actions must be authorized by majority vote of the Commissioners. Id. §§ 3.11(a), 4.14(c).

To provide guidance to the business community, the FTC has also adopted mechanisms enabling businesses to seek advisory opinions on whether particular actions would be lawful. 16 C.F.R. § 1.1. A business may seek an advisory opinion either from the Commission itself or from the FTC staff. FTC regulations specify that Commission opinions -- which must be approved by a majority vote of the C5 (or)0.(C)4.3 ((ni)8.53 (d)8.3 (e)34 (or)33 (ns)]TJ 0 Tc 07.678.615 0 [(7 (--)Tj 0

amended the TSR to bar most telemarketing calls that "deliver[] a prerecorded message." 16 C.F.R. § 310.4(b)(1)(v). Prerecorded message calls, commonly known as "robocalls," are a familiar nuisance that is one of the most common and fastest growing sources of consumer complaints to the FTC.

This case concerns the application of the TSR's robocall provisions to a technology known as "soundboard." Soundboard calls use short prerecorded messages in lieu of an agent's own voice; the agent can select an appropriate prerecorded clip to respond to the call recipient's responses. In 2009, a company sought an advisory opinion from FTC staff as to whether its use of soundboard in telemarketing calls would violate the TSR. JA 230. The company represented that it would use the technology in a way that was indistinguishable from a live two-way conversation, with one agent handling one call at a time. JA 231, 234. Based on that representation, staff issued an opinion letter advising that "to the extent that actual company practices conform to the material submitted for

issued a new advisory opinion—the letter now on review—revoking the 2009 letter and opining that soundboarded telemarketing calls violate the anti-robocall rule. JA030-34. Staff once again cautioned that its opinion had not been approved or adopted

Bennett prong, because it represented

ARGUMENT

En banc review is appropriate only where (1) the panel decision conflicts with a decision of the Supreme Court or this Court or (2) the proceeding involves "one or more questions of exceptional importance." Fed. R. App. P. 35(b)(1). SBA's petition satisfies neither condition.

I. THE PANEL DECISION DOES NOT CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR THIS COURT.

The panel majority faithfully followed and applied the finality test established by the Supreme Court in Bennett. Its decision does not conflict with any of the other Supreme Court decisions cited in SBA's petition.

SBA relies most heavily on Sackett, a case it did not even cite in its briefs before the panel. But as the panel majority held, Sackett is a very different case." A15. Sackett turned on the fact that the EPA's findings and conclusions "were not subject to further agency review." A16 (quoting Sackett, 566 U.S. at 127). Here, by contrast "the informal staff opinion is 'subject to further agency review' in at least two ways." Id. First, SBur may "request an opinion from the Commission itse

time—whether the 2016 Letter's interpretation of the TSR is correct, and, to vote on whether to issue a complaint. *Id.* A potential target of enforcement action would typically have an opportunity to meet individually with the Commissioners in advance of the Commission's vote.

Moreover, EPA is organized very differently from the FTC. Much of the EPA Administrator's authority has been expressly delegated to subordinate officers and components in a detailed manual.[2] By contrast, as the panel majority held, the Commission has not delegated to staff either the authority to issue binding interpretations of the FTC Act or to initiate enforcement proceedings. A13, 16-19. And in *Sackett*, EPA had issued a compliance order making enforceable factual findings and legal conclusions and directing the plaintiffs to take remedial action. Here, the Commission has made no ruling as to whether soundboard calls violate the anti-robocall rule and has not ordered SBA or its members to do anything. Staff has merely issued a nonbinding opinion as to its interpretation of the TSR.

The panel decision is likewise consistent with the other Supreme Court cases SBA cites. As the panel majority noted, *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), involved a jurisdictional determination that was expressly deemed final by regulation and was binding on the agency. A13. Abbott

Laboratories v. Gardner, 387 U.S. 136 (1967), involved a regulation issued by the Commissioner of Food and Drugs, "exercising authority delegated to him by the Secretary [of Health, Education, and Welfare]." *Id.* at 138. Frozen Food Express v. United States, 351 U.S. 40 (1956), "involved a formal, published report and order of the Interstate Commerce Commission, not its staff, following an

1986), EPA's warning letter provided the agency's "final word" on the matter short of an enforcement action. Id.

In any event, this case does not present a question of exceptional importance. The difference between the majority opinion and the dissent boils down to diverging interpretations of the FTC's rules governing staff opinion letters. The majority interpreted the regulations to mean that staff action was not the agency's final word on an issue; the dissent read the same regulations differently. Both sides applied the same law (principally *Bennett* and its progeny). The difference amounts at bottom to a narrow, fact-bound disagreement over the Commission's delegation of authority to its staff, with little application beyond the confines of this case.

This Court has squarely held that "[a]n order must satisfy both prongs of the *Bennett* test to be considered final." *Southwest Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016). Judge Millett did not dispute that principle, but disagreed with the majority regarding the effect of the FTC regulations authorizing staff to issue advisory opinions. The panel majority relied on the fact that the Commission itself has never considered the applicability of the TSR to soundboard, and that the FTC regulations do not authorize staff to speak for the Commission itself. A1669. In contrast, Judge Millett read the regulations to mean that "when staff issues advisory opinions to industry, it does so at the Commission's direction and as its delegate." A30. A disagreement over the

interpretation of FTC regulations, which has little effect beyond this case, is not the kind of exceptionally important question that warrants en banc review.

Furthermore, the panel majority's reading of the regulations is correct. As the panel majority noted, "[w]hen the Commission delegates its authority to staff, it does so expressly." A18. Judge Millett's dissent turns on the proposition that there is no difference between "authoriz[ing]" staff to render advice and "delegat[ing]" the Commission's authority to staff. A31. But these words do not mean the same thing. "Authorize" means "[t]o give legal authority; to empower." Black's Law Dictionary (10th ed. 2014). "Delegate" means "[t]o give part of one's power or work to someone in a lower position within one's organization." Id. Thus as the panel majority correctly noted, "[d]elegation may be one species of authorization, but the distinction is material." A19. Here, the Commission has authorized staff to issue informal, nonbinding advisory opinions, but has not delegated to staff the power either to definitively interpret the TSR or to initiate enforcement proceedings.

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the FTC staff's 2009 letter to either restructure their businesses or face a risk of costly civil penalties. A4-15. But as she expressly acknowledged (A41), this argument relates to the second prong of Bennett, which looks to whether "legal consequences will flow" from the agency's action. Bennett, 520 U.S. at 178. The panel majority's opinion turned on the first prong of Bennett, and as discussed above, the law is clear that both prongs must be satisfied for agency action to be deemed final.

Furthermore, Judge Millett's concerns are largely misplaced. First of all, as the panel majority held, soundboard telemarketers "do not have any significant or reasonable reliance interests in the 2009 Letter, either by the letter's own terms or under FTC regulations." A20. The staff's opinion in the 2009 letter was narrow by limited to a single company that represented it would use soundboard in a manner indistinguishable from a live two-way conversation, with one agent handling one call at a time. In fact, as staff's 2016 investigation found, most soundboard telemarketers were actually using the technology to field multiple simultaneous calls. Insofar as the soundboard industry "built its business on practices that do not conform to the facts as represented [in the 2009 request letter], they have no cause to complain about the impact of rescinding the 2009 Letter on those practices." A24. Furthermore, the text of the 2009 letter and the FTC regulations made clear

telemarketers do not face the purported dilemma described in Judge Millett's dissent.

Finally, not only does this case not present an important question worthy of review, reversal of the opinion would disserve the business community. Advisory opinions allow regulated businesses to get the benefit of staff's views so they can order their affairs in a lawful way and minimize the risk of enforcement proceedings. But, as the panel majority noted, "[t]he possibility of immediate judicial review of informal advice in these circumstances might make guidance harder for industry to request and receive. Not only might staff be less willing to give advice, the advice that is released may take longer and be more costly to develop." A21. Thus, even if it would "serve the short-term interest of SBA's members to bring this particular grievance to court immediately, the incentives of such a result would harm the interest of all regulated parties in access to informal advice and compliance help in general." *Id.* The panel majority properly chose not to impose a finality rule that would limit staff's flexibility and willingness to provide useful advice to the business community.

Respectfully submitted,

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July 16, 2018

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