UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OPINION

Almost every American who owns a telephone has experienced it: The phone rings, you pick up, there is a distinct pause, and then an automated voice begins to make you an unsolicited sales offer. Such calls, popularly known as "robocalls," are subject to heavy federal regulation.

on speech because the robocall regulation's written-consent requirement does not apply to pre-recorded solicitation calls between a non-profit charitable organization and its existing donors, but it does apply to such calls with potential first-time contributors. According to Plaintiff, that distinction renders the robocall regulation a content-based regulation of speech that cannot be justified under strict scrutiny.

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The court rejects both claims. First, the court finds that, although the FTC's November 2016 Letter is a final, reviewable agency action, the Letter is 9(C)-1n -0.0(2.3 Td [(6(r-27(s)-11(N)-1(he)-16(

43,842 (Aug. 23, 1995), *codified at* 16 C.F.R. pt. 310. The TSR prohibits telemarketing calls at certain times of day, allows consumers to request placement on a "do-not-call" list, and imposes other requirements on telemarketers. *See id.* § 310.4(b)(ii), (c).

In 2008, the FTC amended the TSR to include new regulations on robocalls. *See* Telemarketing Sales Rule, Final Rule Amendments, 73 Fed. Reg. 51,164, 51,184 (Aug. 29, 2008). The amendments barred telemarketers from "[i]nitiating any outbound telephone call that delivers a prerecorded message" without first obtaining "an expr6(xp)-.3 Td [(2)6 0.0meg6(xp)-.3]TJ 0ere20.0 14(l)d.9(d.4(call

2. The FTC Applies the Robocall Regulation to Soundboard Technology

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

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These concerns about the technology's use prompted the FTC staff to reach out to telemarketing trade groups to hear the industry's perspective. *Id.* ¶ 6. In the early part of 2016, the FTC staff had at least two meetings with the trade groups, during which industry representatives shared information about the use and operation of soundboard technology. *Id.* ¶¶ 7–9. The FTC staff also collected data about soundboard technology's use. *Id.* ¶¶ 5, 10.

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

> Given the actual language used in the TSR, the increasing volum(t)-6(o)-de g(m)18(bC-22((l)e4

B. Procedural Background

The Soundboard Association ("SBA") filed suit in this court on January 23, 2017, advancing claims under the Administrative Procedure Act ("APA"), the First Amendment, and the Declaratory Judgment Act that the November 2016 Letter does not reflect lawful agency action. Compl. ¶¶ 1, 79. Those claims are predicated on two theories. First, Plaintiff contends that the November 2016 Letter is a legislative rule that the FTC was required to promulgate through notice and comment, which it did not do. *Id.* ¶¶ 65–66. Second, Plaintiff claims that the November 2016 Letter

'pragmatic'" inquiry. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) (quoting

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final agency action. *See, e.g.*, *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1531–32 (D.C. Cir. 1990) (finding that letters from the "Acting Assistant Administrator for Air and Radiation" were final agency actions, given that the author was "clearly speaking in an official rather than a personal capacity" and there was no reason to question his authority to speak for the EPA); *Nat. Res. Def. Council, Inc. v. Thomas*, 845 F.2d 1088, 1094 (D.C. Cir. 1988). And, while the Commission does have the power to rescind the Letter, *see* Def.'s Opp'n at 17 (citing 16 C.F.R § 1.3(c)), the mere prospect that it might do so does not insulate the Letter from judicial review. *See U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. ___, 136 S. Ct. 1807, 1813–14 (2016) (observing that the mere possibility of revision "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal"); *accord Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016).

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

The Supreme Court's decision in *FTC v. Standard Oil of California* does not, as the FTC argues, compel a different result. Def.'s Opp'n at 18. There, the Court held that the FTC's decision to commence an enforcement action was not a final, reviewable action. 449 U.S. 232, 242–43 (1980). Such an action, the Court reasoned, was not final because "[i]t had no legal force or practical effect upon [the company's] daily business other than the disruptions that accompany any

was a final reviewable action. 136 S. Ct. at 1811, 1814.

Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n, 324 F.3d 726, 732 (D.C. Cir. 2003)). The FTC relies primarily on two cases to support its position: *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 324 F.3d 726, and *Holistic Candlers and Consumers Association v. Food & Drug Administration*, 664 F.3d 940 (D.C. Cir. 2012). In each case, the D.C. Circuit held agency letters to manufacturers to be nonfinal. Both, however, are distinguishable from the facts presently before the court.

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

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characteristic between the two, therefore, "is whether the new rule effects a 'substantive' regulatory change to the statutory or regulatory regime." *Id.* (citing *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6–7 (D.C. Cir. 2011). Stated another way, "[t]o be interpretative, a rule 'must derive a proposition from an existing document whose meaning compels or logically justifies the proposition.'" *Id.* (quoting *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010)).

Applying those principles here, the November 2016 Letter is an interpretive rule. The Letter begins with an explanation of why the FTC staff is revisiting the September 2009 Letter. Nov. 2016 Letter at 1–2 ("[S]ince we issued the letter in 2009, staff has seen evidence of the widespread use of soundboard technology in a manner that does not represent a normal, continuous, two-way conversation between the call recipient and a live person."). It then cites to the relevant TSR provision—the robocall regulation—barring telemarketers from initiating "any outbound telephone call that delivers a prerecorded message" without prior written consent from consumers, *id.* at 3 (quoting 16 C.F.R. § 310.4(b)(1)(v)), and announces that, in light of newly acquired facts about soundboard technology, "[soundboard calls] are subject to the TSR's prerecorded call provisions because . . . [they] 'deliver a prerecorded message' as set forth in the plain language of the rule." Nov. 2016 Letter at 3. That determination does not supplement or effect a change to the statutory or regulatory scheme applicable to telemarketers. Rather, it communicates to the telemarketing industry the agency's view that an existing regulation now applies to a particular form of telemarketing technology as currently used by the industry. That is a "quintessential interpretive rule." *Flytenow, Inc. v. Fed. Aviation Admin.*, 808 F.3d 882, 889 (D.C. Cir. 2016) (holding that a FAA letter conveying the agency's position that a proposed flight-sharing service would be a "common carrier," as defined by the FAA's regulations, and therefore

enforcement power

challenging the agency's action on the merits, yet Plaintiff concedes that its "point is *not* to persuade this Court to vacate the November 10 letter as arbitrary and capricious." Pl.'s Reply, ECF No. 12, at 14 (emphasis added).[3] Instead, Plaintiff says "it presented the counterpoint to the FTC's position on the merits of soundboard only for the purpose of demonstrating why notice-and-comment rulemaking was required." *Id.* Plaintiff, however, cites no authority for the proposition that courts must consider the degree to which an agency would benefit from the notice-and-comment process when deciding whether an agency action is a legislative rule. Indeed, it is hard to conceive how such a "benefit standard" would operate in practice. That the FTC could have derived some benefit from notice-and-comment rulemaking does not render the November 2016 Letter a legislative rule.

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

Accordingly, the court concludes that the November 2016

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

The court now turns to Plaintiff's First Amendment claim. Plaintiff asserts that subjecting soundboard technology to the robocall regulation violates the First Amendment because it constitutes an impermissible content-based restriction on the speech of Plaintiff's members who engage in charitable fundraising. Pl.'s Mot. at 31–40; Pl.'s Reply at 16–21. Under the First Amendment, "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. ___, ___, 135 S. Ct. 2218, 2226 (2015). That level of review, known as strict scrutiny, presents a high bar. *Id.* at 2227; *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (describing it as a "rare case" for a lawI1-346 0 Tn ası

§ 310.4(b)(1)(v)(A). The written-consent requirement also applies to calls soliciting charitable donations from *new* donors, but does not apply to calls soliciting donations from *prior* donors or members of the non-profit organization on whose behalf the call is made. *Id.*

(holding state robocall regulation that exempted calls from schools about student attendance, calls from government agencies related to emergencies, and other types of calls by certain entities drew permissible relationship-based, consent-based, or emergency-based distinctions), *appeal docketed*, No. 16-16829 (9th Cir. Oct. 12, 2016); *Gresham v. Swanson (Swanson)*, No. 16-1420, 2016 WL 4027767, at *1–2 (D. Minn. July 27, 2016) (upholding statute at issue in *Van Bergen*, 59 F.2d 1541, as a constitutionally permissible time, place, and manner restriction), *appeal docketed*, No. 16-3219 (8th Cir. July 28, 2016).

Most recently, in *Patriotic Veterans v. Zoeller*, the Seventh Circuit held that exceptions to a state robocall regulation for messages from school districts to students, parents, or employees, or messages to subscribers with whom the caller has a current relationship, were valid time, place, and manner restrictions, not content-based discrimination. 845 F.3d 303, 304–05 (7th Cir. 2017). "The . . . exceptions . . . depend on the relation between the caller and the recipient, not on what the caller proposes to say . . . . The exceptions collectively concern who may be called, not what may be said, and therefore do not establish content discrimination." *Id.* at 305.

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

Plaintiff relies on two cases—*Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015), and *Gresham v. Rutledge*, 198 F. Supp. 3d 965 (E.D. Ark. 2016)—to support its claim that the robocall regulation is a content-based restriction. Pl.'s Mot. at 34–39; Pl.'s Reply at 17–18. Those cases are

inapposite. In *Cahaly*, the court struck down a state robocall regulation as facially content-based because "it applies to calls with a consumer or political message but does not reach calls made for any other purpose." 796 F.3d at 404–05. The robocall regulation at issue here does not contain a similar facially content-based provision. Separately, in *Gresham v. Rutledge*, the parties "agree[d] that the statute is a content-based restriction on speech." 198 F. Supp. 3d at 969. Consequently, *Gresham* provides no guidance as to whether the TSR's robocall regulation is content-based.

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

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

V. CONCLUSION

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