the reasons explained below, the court denies Plaintiff's Motion for an Injunction Pending Appeal.

I. LEGAL STANDARD

Rule 62(c) of the Federal Rules of Civil Procedure authorizes a district court to issue an injunction pending appeal. Fed. R. Civ. P. 62(c). A motion brought under Rule 62(c) is subject to the same four criteria as a motion for preliminary injunction. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842–43 (D.C. Cir. 1977). The moving party "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *accord Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972 (D.C. Cir. 1985) (per curiam) (citing *Holiday Tours*, 559 F.2d at 843–44).

It "remains an open question" in the D.C. Circuit how trial courts are to weigh those four factors in evaluating a motion for injunctive relief. *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014). This Circuit has long adhered to the "sliding scale" approach, whereby "a strong showing on on3Tm1(d[(facing)-99.6(ld(on)-99mak-99.7(on39s 3Tm.)-2487ing)mak-9wen)(d[(faci)]TJT*[(

The November 2016 Letter also does not require a strained reading of the regulation's plain text in order to apply it to soundboard calls. Not even Plaintiff disputes that the November 2016 Letter applies the robocall regulation only to soundboard technology that is used to make (1) "outbound" (2) "telephone call[s]" that (3) "deliver[]" (4) a "message." *Id.*; *see* Pl.'s Reply, ECF No. 25 [hereinafter Pl.'s Reply], at 2 ("Of course soundboard calls deliver messages."). The nub, of course, is whether a soundboard telemarketing call is "prerecorded," as that term is used in the regulation. Even as to that question, however, Plaintiff does not dispute that soundboard technology makes use of prerecorded snippets, or audio clips, to communicate with a consumer. *See* Pl.'s Reply at 1–2 (stating that "soundboard uses prerecorded sounds, words, phrases, and sentences to form messages") (internal quotation marks and alteration omitted). Thus, Plaintiff does not seriously contend that soundboard calls satisfy, at least facially, the constituent elements of the robocall regulation.

Plaintiff nevertheless argues that soundboard calls "are plainly not the type of communications the robocall prohibition was crafted to prevent" because, unlike the traditional one-way robocall, soundboard calls involve a two-way communication. *See* Pl.'s Mot. at 6; *see also* Reply at 2. That argument does not, however, support Plaintiff's position that the November 2016 Letter effected a *substantive* change to the robocall regulation, making it a

what the FAA did in *Flytenow*—it construed a rule it administers and applied it to the evidence before the agency. Such an exercise of agency authority is not a legislative act. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S.___, ___, 135 S. Ct. 1199, 1203 (2015).

2. Whether the Law's Ambiguity Warrants Entry of a Preliminary Injunction

Plaintiff also submits that the case law guiding the court's distinction between legislative and interpretive rules is so ambiguous as to warrant the award of an injunction pending appeal. The court disagrees. The fact that case law addressing the legislative-interpretive distinction is "quite difficult and confused," *Soundboard Ass'n*, 2017 WL 1476116, at *10 (quoting *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014)), does not favor granting injunctive relief in this case. *Contra* Pl.'s Mot. at 11–12. It is true that the Supreme Court has observed that the distinction is hardly clear cut and is "the source of much scholarly and judicial debate." *Perez*, 135 S. Ct. at 1204. Yet, the mere fact that the case law is marked by some lack of clarity cannot, by itself, support a substantial case on the merits to warrant injunctive relief. Regardless, here, the court found that the November 2016 Letter is a "quintessential interpretive rule" because 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." *Soundboard Ass'n*, 2017 WL 1476116, at *11. Accordingly, any ambiguity in the case law does not cut in favor of a preliminary injunction in this case.

B. The Other Factors Do Not Favor Granting an Injunction

The remaining factors the court must consider—irreparable harm, balancing the equities, and consideration of the public interest—do not weigh so strongly in favor of injunctive relief that they make up for Plaintiff's deficient showing of a likelihood of success.

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of the robocall regulation, the question of how to weigh the preamble's language in interpreting the term "prerecorded message" was not squarely before the -115ufo—irrep8aw

1. Irreparable Harm

To show irreparable harm, plaintiff must demonstrate injury that is "both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (emphasis and internal quotation marks omitted). Furthermore, it is "well settled that economic loss does not, in and of itself, constitute irreparable harm," except "where the loss threatens the very existence of the movant's business." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *accord John Doe Co. v. CFPB*, 849 F.3d 1129, 1134–35 (D.C. Cir. 2017).

Plaintiff's case for irreparable harm is uncertain, at best. Plaintiff claims that implementation of the November 2016 Letter will lead to the "destruction of a whole industry," marks "the end of soundboard in the telemarketing sales industry," and will force its member companies "to lay off many of their employees and, in most cases, cease soundboard-related operations altogether." Pl.'s Mot. at 12. The full record is more equivocal. The November 2016 Letter does not reach all uses of soundboard technology. For example, it does not cover the use of soundboard technology to handle *inbound* customer service calls, which Plaintiff's counsel told the FTC is "the fastest growing segment for SoundBoard Technology." Def.'s Opp'n to Pl.'s Appl. for Prelim. Inj., ECF No. 11 [hereinafter Def.'s Opp'n], Ex. 3, ECF No. 11-3 [hereinafter Def.'s Ex. 3]. It also does not reach every kind of outbound call. Telemarketers still can use soundboard technology for, among other things, political calls, survey calls, pure informational calls, and certain charitable fundraising calls. *See* Compl., Ex. 1, ECF No. 1-2 [hereinafter Nov. 2016 Letter], at 4. These other uses are far from trivial. Plaintiff reported to the FTC in September 2016 that, of the 20,000 world-wide call center seats that use soundboard

technology, 8,000—or less than half—are engaged in traditional telemarketing activities. Def.'s Ex. 3. Those numbers are backed up by a perusal of Plaintiff's member's websites, which advertise the use of soundboard technology for inbound calls and other types of calls that do not

2. The Balance of Equities and the Public Interest

Plaintiff likewise has not shown that the balancing of equities or the public interest favors granting an injunction. The balancing of equities requires a court to weigh the harm that the movant will incur if the injunction is denied against the harm the defendant will suffer if the challenged action is enjoined. *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). Here, the FTC's harm and the public interest "are one and the same, because the government's interest *is* the public interest," *id.*, which leads the court to consider the third and fourth factors in tandem.

At most, Plaintiff has demonstrated that the public and private interests stand in equipoise. Plaintiff has shown that, unless the court grants injunctive relief, its members will suffer some economic harm and some number of its members' employees may be laid off. That harm, however, must be counterbalanced against the harm the public would suffer if the court were to grant the injunction. The public has an interest in not receiving unwanted calls that disturb the tranquility of the home. *See Soundboard*, 2017 WL 1476116, *14. The FTC found, after an investigation, that "a significant percentage of the total number of call center seats utilizing soundboard technology are used to make telemarketing or lead generation calls," which "are indistinguishable from standard lead generation robocalls that are governed by the [robocall regulation] and are the subject of a large volume of consumer complaints and significant telemarketing abuse." Nov. 2016 Letter at 3. Because granting the injunction would mean that the public would remain susceptible to the very telemarketing complaints and abuses that the FTC sought to address through the November 2016 Letter, the public interest weighs against granting injunctive relief.

Accordingly, having considered all four *Winter* factors, the court concludes that, even applying a sliding scale, Plaintiff is not entitled to an injunction pending appeal. Therefore, the court denies Plaintiff's Motion.

Dated: May 10, 2017