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FTC's Decision Treating Soundboard Calls as Robocalls Remains Undisturbed. What Comes Next?

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April 23, 2019

A two-year legal battle in the federal courts has come to an end, the Supreme Court announced last week. On April 15, 2019, it declined to review the Soundboard Association's challenge to the legality of a Federal Trade Commission decision in 2016 that outbound telemarketing calls made through soundboard technology are robocalls.

Soundboard technology allows call center agents to interact and converse with consumers on a real-time basis using a combination of audio clips and the agent's own voice. It may involve reading a pre-determined script, responding to queries and interjections from consumers by playing a pre-recorded audio clip, using "response keys" to generate common interactive conversational responses (such as "I understand," "exactly," "yeah," or a recorded statement that the agent is a real person using audio clips to communicate with the consumer), or giving the consumer the option to speak with a live operator's own voice for the duration of the call. It has been widely used by call centers in the last two decades.

In November 2016, the FTC issued an informal opinion letter from its staff members, reversing its previous position since 2009 that "outbound telemarketing calls that deliver prerecorded messages . . . utilizing soundboard technology, . . . would not be subject to the prerecorded message provisions of the Telemarketing Sales Rule (TSR)." In the 2016 informal opinion letter, the FTC distinguished a call where "a single live agent stays with the call from the beginning to end [and] listens to every word spoken by the call recipient" from a call where the agents "conduct separate conversations with multiple consumers at the same time." The FTC considered the former to be "virtually indistinguishable from normal two-way conversations" while the latter to be calls that "indisputabl[y] deliver prerecorded messages" within the meaning of the TSR.

Citing the growing volume of consumer complaints, including that the messages do not adequately respond to their questions or comments or that a live telemarketer does not always connect with the consumer upon request, the FTC revoked its previous position even to some calls where the live agents using soundboard technology handle one call at a time. For example, the FTC considered a one-to-one call in which live operators play a prerecorded message offering a good or service and transfer the consumer to the seller once the consumer says "yes" or "press 1" to be "indistinguishable from standard lead generation robocalls that are governed by the TSR." The only exceptions that the FTC permitted since this point were the use of soundboard technology for inbound calls or for non-telemarketing calls.

The Soundboard Association first mounted its opposition to the FTC's 2016 informal opinion letter on behalf of a group of manufactures and users of soundboard technology in January 2017. The Soundboard Association's complaint alleged that the FTC had abused its rulemaking authority by establishing a binding rule without following the notice-and-comment procedures and that the FTC had infringed on the callers' First Amendment right by imposing content-based restriction on speech.

In April 2017, the District Court for the District of Columbia (251 F. Supp. 3d 55) dismissed the Soundboard Association's claims. Initially, it rejected the FTC's argument that the informal opinion letter did not amount to a final decision. Instead, it held that the informal opinion letter was an interpretive rule as opposed to a legislative rule, which was exempt from the notice-and-comment requirement. The court also found the informal opinion letter to be a final agency action subject to judicial review because it was based on months of investigation and had set forth standard and timing for compliance on telemarketing industry. Upon review, the court sided with the FTC and concluded that the informal opinion letter imposes a content-neutral restriction because it distinguishes calls based on callers and recipients, not what is being said.

The Soundboard Association appealed, and the D.C. Circuit (888 F.3d 1261) dismissed the claims again on different grounds a year later, in April 2018. The D.C. Circuit found that the informal opinion letter did not mark consummation of the FTC's decision-making process and thus was not final agency action subject to judicial review. The court pointed to the fact that the informal opinion letter was issued by a subordinate official and not by any individual Commissioner or the full Commission and contained clarification that the views of staff do not bind the Commission.

One Circuit Judge disagreed with the D.C. Circuit's reasoning. Judge Millett criticized the court's one-sided focus on "whether the agency's decisionmaking process has consummated" and failure to consider "the reality of whether rights or obligations have been determined by or legal consequences will flow from the challenged agency action." Her dissent opinion states:

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

After the Soundboard Association's petition for rehearing *en banc* was denied by the D.C. Circuit in August 2018, the Soundboard Association filed a petition for a writ of certiorari in November 2018, asking the Supreme Court to review D.C. Circuit's decision. Relying on Judge Millett's dissent that the compliance mandate within the informal opinion letter is subject to no mechanism for administrative appeal or entitlement to further review, the Soundboard Association argued that the D.C. Circuit deviated from established Supreme Court precedent when it held that the informal opinion letter was not final agency action because the Soundboard Association could simply seek a second opinion. The Cato Institute, Professional Association for Customer Engagement, and the U.S. Chamber of Commerce all filed *amicus*briefs supporting the Soundboard Association's petition.

As the District Court for the District of Columbia recognized, because a "traditional robocall is a one-way, pre-recorded communication that does not involve any human interaction," soundboard technology presents a unique challenge to robocall regulations.

This is a challenge with which the FCC has also been grappling in recent months. The FCC is currently considering NorthStar Alarm Services, LLC's petition, filed in January 2019, asking the FCC to clarify that the TCPA, which is analogous to the TSR, does not categorically ban all marketing and similar calls using soundboard technology, which NorthStar categorized as a "technologically-advanced version of the traditional two-way voice call." NorthStar urged the FCC to provide clarity on this issue in an expeditious manner as industries suffer growing harm from professional plaintiffs who have turned the TCPA into "the poster child for lawsuit abuse." "The current wave of lawsuits targeting soundboard technology chill important technological advancements that the TCPA was never intended to cover in the first instance," the petition states. The Soundboard Association quickly lined up behind NorthStar, arguing that the TCPA's plain text prohibit delivering a singular message through prerecorded voice and that Congress only intended to prohibit "unsolicited prerecorded advertisements broadcast across the telephone like a radio, leaving consumers powerless to interact."

Industries that have invested millions of dollars and countless hours of development and training in soundboard technology are eagerly awaiting a clear and consistent rule. Although Soundboard's legal battle against the FTC in federal courts has come to a close, we expect the industries to increase their efforts before both the FTC and the FCC in seeking further review of this and other issues under robocall regulations like the TSR and the TCPA.