



SOUNDBOARD ASSOCIATION, *Appellant*

v.

FEDERAL TRADE COMMISSION, *Appellee*

No. 17-5093, Decided April 27, 2018

U.S. Court of Appeals for the District of Columbia Circuit

Introduction:

A divided panel of the D.C. Circuit, per Judge Wilkins, held that the court lacked jurisdiction to hear an association's Administrative Procedure Act challenge of an FTC informal opinion letter. The letter announced the FTC staff's conclusion that the technology used by the association's members is subject to FTC regulation of "robocalls." The association argued that the letter constituted a legislative rule, improperly issued without notice and comment. The court reasoned that "by its own terms and under the FTC's regulations, [the letter] is not final agency action." Judge Millett authored a dissenting opinion, digested below.

Opinion Digest:

MILLETT, *Circuit Judge*, dissenting: Why let reality get in the way of a good bureaucratic construct? In holding that the 2016 Letter from the Federal Trade Commission's Division of Marketing Practices is not a judicially reviewable "final agency action," the court's opinion focuses on the Commission's structuring of its own regulations to preserve its right to disagree (or not) with the Division at some "later" date. 16 C.F.R. § 1.3(c). In so doing, the court's opinion measures finality exclusively from the Commission's vantage point.

But there are two sides to this story. Finality is supposed to look at *both* whether "the agency's decisionmaking process" has "consummat[ed]," and the reality of whether "rights or obligations have been determined" by or "legal consequences will flow" from the challenged agency action. *Bennett v. Spear*, 520 U.S. 154, 178, (1997) (internal quotation marks and citations omitted). And in deciding whether the agency process has ended for purposes of *Bennett's* first prong, courts must look beyond the agency's say-so to objective and practical indicia of finality. *See, e.g., Sackett v. EPA*, 566 U.S. 120, 127 (2012). ***

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. *Sackett*, 566 U.S. at 127.

In my view, the Administrative Procedure Act should not countenance an agency telling an individual or industry that its business must end, while fending off court review on the ground that its own internal

Judge Patricia A. Millett was appointed to the D.C. Circuit on December 10, 2013. She had no role in WLF's selecting or editing this opinion for our CIRCULATING OPINION feature. The full opinion is available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/0/3BC2D87AA12356598525827C004DF559/\\$file/17-5093-1728451.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/0/3BC2D87AA12356598525827C004DF559/$file/17-5093-1728451.pdf).

administrative processes have not ended. Because the structure of the Commission's regulations, the substantive content of the Division's Letter, the absence of an internal appeal mechanism, and the consequences that flow from it together render the Division's 2016 Letter the end of the agency's process, I respectfully dissent.

A

Courts must examine finality in a "flexible" and "pragmatic way," considering the impact of delayed review on both the agency action and the regulated entities. *Ciba-Geigy v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986) (internal quotation marks and citation omitted). ***

Applying that pragmatic test, I acknowledge that the Federal Trade Commission has dressed the Division's advice up with some of the trappings of non-finality. Commission regulations say that "[a]dvice 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." 16 C.F.R. § 1.3(c). *** But a closer look at the Commission's regulations governing agency advice reveals the 2016 Division Letter to be, for all practical purposes, a definitive agency position that concludes the administrative process for the foreseeable future.

First, advisory opinions by different divisions of the Commission are not some independent or detached endeavor. Instead, all requests for advisory opinions must first be submitted to the Secretary of the Commission. 16 C.F.R. § 1.2(a). Then, "[o]n the basis of the materials submitted, as well as any other information available," the Commission "will inform the requesting party of its views," *id.* § 1.3(a), through either the issuance of an opinion by the Commission itself, *id.* § 1.1(a), or the Commission deputizing agency staff to "render [the] advice," *id.* § 1.1(b). ***

As a result, when staff issues advisory opinions to industry, it does so at the Commission's direction and as its delegate. *** In fact, leaving Division staff to provide regulatory advice appears to be par for the course with the Commission. Of the 59 advisory opinions published on the Commission's website, 57 have been issued by staff; only 2 were issued by the Commission itself. *See* FED. TRADE COMM'N, *Advisory Opinions*, <https://www.ftc.gov/policy/advisory-opinions> (last visited April 17, 2018). *** That pattern of regulatory delegation of decisions to staff weighs in favor of finality. *See Kobach v. Election Assistance Comm'n*, 772 F.3d 1183, 1190 (10th Cir. 2014) (finding that internal delegation to Executive Director of the Election Assistance Commission rendered his decision final). ***

Second, nothing in the regulations governing advisory opinions labels those delegated decisions as non-final or just a first round in the agency process. Instead, the regulatory scheme treats the advisory letter as concluding the process for obtaining the agency's position on legal matters. 16 C.F.R. § 1.3(a) (request for Commission advice will be answered by either "the Commission or its staff * * * inform[ing] the requesting party of its views").

Notably, the Commission's regulations do not provide a process for appealing or obtaining any form of internal review of staff opinions. Instead, the decision whether to issue advisory opinions directly or through agency staff rests exclusively with the Commission. ***

Like the Sacketts, Soundboard has no "entitlement to further agency review." *Sackett*, 566 U.S. at 127 (emphasis added). The court is unmoved, reasoning that Soundboard could either request an advisory opinion from the Commission or await enforcement. *Op.* at 1268–69. But the Commission has already decided that this issue does not meet the criteria for a Commission opinion. Soundboard's ability to keep knocking on a door that will not open is as beside the point here as it was in *Sackett*. ***

Third, while the Commission emphasizes that the regulations expressly reserve its right "later to rescind the advice" of staff, 16 C.F.R. § 1.3(c), that language actually supports finality. *** [T]he regulation's requirement that the Commission "rescind" Division opinions underscores that, unless the Commission takes that affirmative step, the Division opinion operates as a statement of the agency's position. After all, "rescind" means "[t]o make

void; to repeal or annul” a legally operative document, as in to “rescind the legislation.” BLACK’S LAW DICTIONARY 1499 (10th ed. 2009). ***

Fourth, the Administrative Procedure Act is explicit that an agency action remains reviewable “final” agency action notwithstanding the availability of appeal to a “superior agency authority,” unless agency rules render the initial agency decision “inoperative” pending such appeal. 5 U.S.C. § 704. Nothing in the Commission’s regulations provide for appeal to the Commission, let alone render the Division’s 2016 Letter inoperative until reviewed. ***

B

Consistent with that regulatory structure, the 2016 Division Letter itself speaks in final, conduct-altering, and compliance-demanding terms, leaving the regulated businesses to either knuckle under or face a penalty-seeking enforcement action.

1 To begin with, the Letter states unqualifiedly that telemarketing calls using soundboard technology “are subject” to the “plain language of the [Telemarketing Sales] [R]ule,” 16 C.F.R. § 310.4(b)(1)(v). 2016 Division Letter, *supra*, at 3. So going forward, calls “*can only be made legally* if they comply with the [rule’s] requirements.” *Id.* (emphasis added). For both agency officials on the sending end and industry on the receiving end, there is nothing preliminary, tentative, or qualified about that message.

In case that shot across the industry’s bow were not warning enough, the 2016 Division Letter then gives notice that the newly announced application of the Telemarketing Sales Rule to soundboard technology “will be effective six months from today.” 2016 Division Letter, *supra*, at 4. That six-month lead time, the Letter explains, is to afford the industry sufficient time to “make [the] necessary changes to bring themselves into compliance” with the law. *Id.* The agency thus “views its deliberative process as sufficiently final to demand compliance with its announced position.” *Ciba-Geigy*, 801 F.2d at 436. And when agency action is final enough that business-ending compliance is expected by a date certain, it should be final enough for judicial review. What is final for the goose should be final for the gander.

The 2016 Division Letter also identifies no avenue for further Commission review on the question. Worse, the Letter snuffs out any hope for a change of heart by explaining that its broadside against the use of soundboard technology in telemarketing calls is commanded by the “plain language” and “plain meaning” of the Telemarketing Sales Rule. 2016 Division Letter, *supra*, at 3. *** If, as the Commission acknowledges, Appellee Br. 53–54, the Telemarketing Sales Rule on its face plainly foreordains the 2016 Letter’s conclusion, exactly what more is industry supposed to wait for?

Even more importantly, the consequences to industry that flow from compliance with the Division’s 2016 Letter are dire, “forc[ing] many users to downsize or close their doors altogether.” Soundboard Br. 13. The Division knew this when issuing the letter. *** To be sure, the 2016 Division Letter ends with the caveat that the advisory opinion has “not been approved or adopted by the Commission,” and does “not bind[]” it. 2016 Division Letter, *supra*, at 4. But the 2016 Letter then quickly intones that it nonetheless “reflect[s] the views” of the Division “charged with enforcement of the [Telemarketing Sales Rule].” *Id.* And the Commission, for its part, decided to publish the 2016 Letter on its website, right alongside Commission advice (which also takes the form of a letter to the requesting party).

Anyhow, such boilerplate qualifications are not enough to fend off judicial review of otherwise final agency action. In *Appalachian Power Co.*, the EPA’s advisory guidance contained an even more forceful caution, emphasizing that “[t]he policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.” 208 F.3d at 1023. Such “boilerplate,” which the EPA—like Commission staff here—routinely included at the end of guidance documents, was not enough “to keep the proceduralizing courts at bay.” *Id.* (quoting Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1485 (1992)).

*** The Division's 2016 Letter speaks with the announced authority and expertise of the Telemarketing Sales Rule's enforcer. There is nothing tentative or interlocutory about its declaration that the plain meaning of federal law requires Association members to shutter most if not all of their telemarketing business. Nor is there any administrative appeal process. In other words, the writing is on the wall, and a line of routine boilerplate cannot erase it.

2 The final straw that collapses the Commission's claim of non-finality is the "legal consequences [that] flow" from the 2016 Division Letter. *Sackett*, 566 U.S. at 126 (internal quotation marks, citation, and alterations omitted). Federal law empowers the Commission to file civil enforcement actions for penalties against those who violate Commission rules governing unfair or deceptive trade practices, including the Telemarketing Sales Rule, if the defendants had "actual knowledge or knowledge fairly implied" that their conduct was "prohibited by such rule." 15 U.S.C. § 45(m)(1); see 16 C.F.R. § 1.98 (addressing penalty amounts). ***

As counsel for the Commission agreed at oral argument, the specificity and directness of the 2016 Division Letter's conclusion that the Telemarketing Sales Rule outlaws the use of soundboard technology "certainly[] * * * would be a factor" in establishing the knowledge required to trigger an enforcement action and financial penalties, and it is something that "a reasonable business would take into account." Oral Arg. Tr. 33. Given the 2016 Letter's warning to industry that the use of soundboard technology is "plain[ly]" unlawful, 2016 Division Letter, *supra*, at 3, any failure to comply would put a business at substantial risk of not only an enforcement action, but also significant penalties running back to the date of this so-called non-final Letter. The 2016 Division Letter thus is not, as the court's opinion would have it (Op. 24), mere "evidence." Op. at 1273. The Letter lights the liability fuse; it is the difference between severe financial penalties and no penalties at all.

The Division's message to industry is clear: Proceed at your own peril. Finality principles will not allow the Commission to brush off that "immediate and practical impact." *** *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956). The clear and explicit announcement in the 2016 Division Letter about the reach of the Telemarketing Sales Rule's "plain language," 2016 Division Letter, *supra*, at 3, "warns" every member of the soundboard industry to either reshape "the manner in which an important segment of the * * * business will be done" or run the "risk" of civil penalties, *Frozen Food Express*, 351 U.S. at 44. When an agency's "authoritative interpretation" and demand for "compliance" means business's "only alternative to costly compliance" is "to run the risk of serious civil * * * penalties," finality attaches and the time for judicial review has come. ***

Also, the risks to which the soundboard industry is exposed in this case are magnified because the 2016 Letter threatens enforcement actions and substantial penalties against speech. Given the Telemarketing Sales Rule's varied prohibitions and exceptions pertaining to the scope of outlawed speech, the "legal consequences [that] flow" from the 2016 Letter include the chilling of potentially constitutionally protected speech. *Bennett*, 520 U.S. at 178; cf. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011) (striking down selectively imposed content- and speaker-based burdens on the commercial speech of pharmaceutical manufacturers as unconstitutional under the First Amendment). ***

* * * * *

As the opinion for the court notes, agency advice that is genuinely advisory can play an important role in allowing the regulators and regulated to communicate effectively and work together in coordinating voluntary compliance measures and improving the effectiveness of regulatory programs. *** But "such a 'count your blessings' argument is not an adequate rejoinder to the assertion of a right to judicial review[.]" *Hawkes Co.*, 136 S.Ct. at 1816. If agencies want to give advice, they should speak in advisory terms, allow for internal review, or not attach substantial consequences to noncompliance with what is supposed to be mere advice. ***

At bottom, finality is about agency accountability for the decisions it makes and the consequences it unleashes. *** In my view, if the law requires us to treat the 2016 Division Letter and its business-ending consequences as just some informal, take-it-or-leave-it staff suggestion, then the law is being stingy with reality. I respectfully dissent.