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Legal Sidebar

D.C. Circuit Rules FTC Opinion Letter Not "Final Agency Action" Subject to Judicial Review

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Courts will typically only review agency orders, regulations, licenses, and other decisions that are "final." In *Soundboard Association v. Federal Trade Commission*, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held by a vote of 2-1 that an opinion letter issued by Federal Trade Commission (FTC or Commission) staff was not "final agency action" and, therefore, not judicially reviewable under the Administrative Procedure Act (APA). The opinion letter concluded that telemarketing calls utilizing "soundboard" technology—a technology that allows telemarketers to make phone calls consisting of a mix of pre-recorded audio and live discussion—were subject to the FTC's "robocall" regulations. Petitioners challenged the letter under the APA, both as an unconstitutional abridgment of speech and as a binding regulation which had not been promulgated in compliance with the procedural requirements of the APA. The majority and dissenting opinions by the D.C. Circuit panel disagreed in many significant respects about the proper method for determining whether the letter was final. One particularly interesting disagreement concerned how the letter's practical consequences on regulated entities should inform the court's finality assessment.

The *Soundboard Association* decision highlights difficulties that lower courts often confront when assessing the finality of agency action. The Supreme Court has not supplied a bright-line rule for determining whether an agency action is final, instead instructing courts to evaluate finality in a "pragmatic" and "flexible" manner. Accordingly, the Supreme Court's instructions may leave some discretion to lower courts in determining whether agency action has characteristics rendering it "final" and therefore subject to judicial review. Congress could consider providing greater clarity by amending the APA to include a definition for "final agency action." But crafting a generally applicable definition that promotes effective judicial oversight of consequential agency decisions, while also ensuring the

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preservation of scarce judicial resources and the orderly administration of agency proceedings and processes prescribed by Congress, may prove challenging.

This Sidebar begins with a summary of the APA's finality requirement, before discussing the D.C. Circuit's decision in *Soundboard Association*, as well as potential takeaways that judicial interpretation of the APA's finality requirement may have for Congress.

"Final Agency Action"

In addition to promulgating binding regulations and orders, agencies carry out their statutorily prescribed activities in countless other ways, including by gathering information and input from stakeholders and the public through public hearings and other formal and informal formats; issuing non-binding oral or written guidance detailing how they understand or interpret their statutory authority or obligations; and determining whether and how to utilize their discretion to enforce regulations and statutes they administer. The APA, as well as many other federal statutes, authorizes judicial review of "final" agency decisions. This requirement is designed to prevent courts from interfering with the administrative decision-making process, conserving scarce judicial resources so that the judicial process does not begin until administrative proceedings have definitively ended. But how does a court assess whether an agency action is "final"? In the absence of clear specification in the APA, the Supreme Court has instructed lower courts to analyze finality in a "pragmatic" and "flexible" manner.

The approach handed down by the Supreme Court for determining finality has changed over time. Initially, Supreme Court decisions recognized that an agency action is final if it is "definitive" and has "'a direct and immediate . . . effect on the day-to-day business' of the complaining parties" or an "immediate and practical impact." But in 1997, this test was effectively replaced by the now-dominant approach to measuring finality announced by the Supreme Court in *Bennett v. Spear*, which the Court characterized as synthesizing, rather than overturning, its earlier finality decisions.

In *Bennett*, the Supreme Court explained that an action is final if it meets a two-pronged test. *First*, the action "must mark the 'consummation' of the agency's decision-making process" and not be of a "merely tentative or interlocutory nature." *Second*, the action must determine "rights or obligations" or trigger "legal consequences." Despite the elucidation of this two-pronged test, the Supreme Court has continued to use language from pre-*Bennett* case law alongside *Bennett* in its subsequent finality decisions. As a result, there is perhaps an understandable amount of variation in how lower courts specifically characterize or approach the proper finality analysis. Many courts deploy a host of considerations that are intended to complement (and, arguably, supplement) *Bennett*'s two-step test. Some of these considerations include an evaluation of the relevant action's practical effects. For example, the U.S. Court of Appeals for the Third Circuit considers five "pragmatic considerations" in addition to *Bennett*'s two prongs when evaluating finality, which include whether the action at issue "involves a pure question of law that does not require further factual development" and whether it "has an immediate impact on the day-to-day operations of the party seeking review." Similarly, many panels and judges in the D.C. Circuit (including the district judge in *Soundboard Association*) complement the *Bennett* test with three additional considerations, one of which is "whether the agency action imposes 'an immediate and significant practical burden'" on the petitioner. Other courts articulate additional considerations. For example, courts in the Fourth Circuit consider whether an action is "dependent upon future uncertainties or intervening agency rules."

In *Soundboard Association*, a panel of the D.C. Circuit grappled with the proper approach to determining finality, disagreeing on questions such as the proper place in the finality analysis for a consideration of the significant practical effects of an agency's action.

Background

The agency action at issue in *Soundboard Association* was a 2016 opinion letter prepared by the Associate Director of FTC's Division of Marketing Practices, revoking an earlier, contrary staff opinion letter. The letter expressed the opinion that telemarketing calls using "soundboard" technology—a technology that allows telemarketers to engage in two-way conversations with customers using both pre-recorded messages and live agents—fell within the plain meaning of FTC's Telemarketing Sales Rule (TSR). The TSR prohibits telemarketers from, among other things, "initiating . . . outbound telephone call[s] that deliver[] a prerecorded message" (i.e., "robocalls") without the customer's written consent. The consent requirement does not apply to telemarketing calls by charitable organizations to current donors, but it does apply to calls directed to prospective new donors.

Industry trade group Soundboard Association (SBA) filed suit against FTC, alleging that the letter was a binding regulation that should have undergone notice-and-comment procedures under the APA and was an unconstitutional restriction on speech because the TSR distinguished between calls to current charitable donors and calls to first-time donors. FTC contended, among other things, that the letter was not subject to judicial review because it was not a final agency action. While the district court concluded that the letter was final, it ultimately found for the FTC on the merits, holding that the opinion letter was a non-binding interpretive rule that was not subject to the APA's notice-and-comment requirements, and that the letter did not violate the First Amendment because the underlying regulation (the TSR) was supported by a legitimate government interest "in protecting against unwarranted intrusions into a person's home or pocket" and "le[ft] 'open ample alternative channels' of communication between charities and" new contributors. SBA appealed to the D.C. Circuit.

The D.C. Circuit's Decision

In an opinion authored by Judge Wilkins and joined by Judge Rogers, a panel of the D.C. Circuit vacated the district court's decision and dismissed SBA's complaint, holding that FTC's opinion letter was not final agency action under the APA because it did not "mark the consummation of the agency's decisionmaking process" as required by the first prong of *Bennett v. Spear*. In assessing whether the letter signaled the definitive end of the agency's decision-making process, the court asked whether it was "informal, or only the ruling of a subordinate official, or tentative." The court found evidence of non-definitiveness in the letter itself, observing that, although the letter categorically concluded that telemarketing calls utilizing soundboard technology must comply with the TSR, the letter "explicitly and repeatedly state[d] that it expresses the views of 'staff'" and that staff views are not binding on the Commission. The court's position was also grounded on the structure and content of the regulations governing FTC advisory opinions. Whereas the regulatory provision governing Commission advice prohibits the rescission of advice without notice and establishes an enforcement safe harbor for "action[s] taken in good faith reliance" on advisory opinions, a separate provision governing staff advice contains no such protections. In addition, the latter provision clearly states that staff advice does not bind the FTC. The court concluded that, "[w]hile an opinion from the Commission itself might constitute the consummation of its decisionmaking process, the 2016 [l]etter from FTC staff does not."

Having found that the letter did not pass muster under *Bennett*'s first prong, the majority did not conduct a full analysis under its second (asking whether the action results in legal consequences or determines rights or obligations). In responding to the dissent, however, the majority opinion appeared to suggest that, under the second step of the *Bennett* finality test, the alleged consequences caused or obligations determined by an agency's action must flow directly from the action. In the case of FTC's opinion letter, the majority doubted whether any legal or practical consequences could be attributed to it. It is true, the court noted, that in a future enforcement action against a member of the soundboard industry, the opinion letter could serve as evidence in support of a claim that the company violated the TSR. But "a so-called 'violation'" of the letter itself, the majority argued, "does not independently trigger any penalties." In

other words, because the failure to comply with the opinion letter's interpretation will not independently impose any obligations on or result in any legal consequences for regulated entities, the majority appeared doubtful that the letter would satisfy the second *Bennett* prong.

Judge Millett dissented, concluding that the opinion letter marked the consummation of FTC's decision-making process under the first *Bennett* prong and, because it could lead to significant legal consequences for regulated entities, also satisfied *Bennett*'s second prong. While Judge Millett disagreed with the majority's reading of the letter and FTC regulations, she also staked out a position at odds with the majority's more formalistic application of the finality test. Disagreeing with what she described as the majority's measuring of "finality exclusively from the [agency's] vantage point," she instead maintained that "courts must look beyond the agency's say-so to objective and practical indicia of finality." Such important indicia included the "dire" practical consequences unleashed by the letter (e.g., imminent operational scale backs and layoffs due to the fact that, as alleged by SBA, the opinion letter effectively prohibits most uses of soundboard technology by telemarketers), a factor she considered separate and apart from her examination of the "legal consequences" of the letter under *Bennett*'s second prong. Thus, while Judge Millett grounded her analysis in the familiar *Bennett* two-part test, her dissent was imbued throughout with a concern for the practical impacts of the opinion letter and evoked, in some measure, the earlier "direct and immediate" effects line of Supreme Court decisions and the decisions in her own circuit that consider whether an action imposes an "immediate and significant burden" on the challenging party. Because, in Judge Millett's view, the letter would have immense practical consequences on the soundboard industry, she would have held the letter was final agency action subject to judicial review.

Conclusion

The finality analysis does not consist of a bright-line rule, but instead involves pragmatic and other considerations. Perhaps understandably, courts and individual judges do not always agree on the proper components of the finality analysis. As a case in point, the majority and dissent in *Soundboard Association* did not agree on, among other things, the role the practical effects of an agency's action should play in the finality analysis or, perhaps rather, when in the familiar two-part finality analysis set forth in *Bennett* should that consideration be taken into account. But the dissent's emphasis on the practical impacts of the FTC opinion letter calls to mind concerns with the "direct and immediate effect" or "immediate and practical impact" of an agency's action; considerations that stem from earlier, pre-*Bennet* Supreme Court rulings that are still occasionally cited by the High Court. Some courts have gone farther, treating actions that arguably do not involve the conclusion of an agency's decision-making process (e.g., an agency's failure to act on a petition to temporarily suspend the registrations of "economic poisons" containing DDT) as "final" when the consequences are particularly significant. But whether and how courts should examine practical, non-legal consequences when measuring finality, and the extent such an approach squares with *Bennett*'s emphasis on "legal consequences," appear to be open questions.

More generally, the disagreement among the *Soundboard Association* panelists demonstrates how reasonable jurists can disagree as to whether a given decision is a final expression of an agency's position. Congress could consider providing clarity to courts and regulated entities by supplying a definition for "final agency action" in the APA. The APA defines "agency action," but not the "final" variety. However, articulating an appropriate definition may prove challenging. An overbroad definition that sweeps in a host of interlocutory or preliminary decisions, such as initial complaints initiating enforcement actions, would likely impede administrative decision making and the orderly administration of congressionally prescribed proceedings, as well as potentially inundate the federal courts with an inordinate and possibly unmanageable number of challenges. That said, a definition confined to only a small subset of agency decisions—such as notice-and-comment regulations and formal adjudicative orders—would block from judicial oversight a huge swath of consequential decisions that agencies enshrine in policy statements and other informal or less well-known vehicles. Such a result could conflict with the APA's presumption in

favor of judicial review and run the risk of effectuating reduced agency accountability to Congress, the courts, and the public.