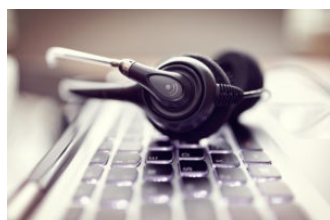


Judge Upholds FTC Staff Opinion that Avatar Calls are Prerecorded Messages under TSR

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April 25, 2017



Yesterday, a D.C. district court upheld a recent opinion letter issued by FTC staff that extended robocalling restrictions to telemarketing calls that use so-called soundboard technology or “avatars.” This technology generally allows a live agent to communicate with a call recipient by playing recorded audio snippets instead of using his or her own live voice.

In September 2009, the FTC staff had taken the position that avatar calls were not considered prerecorded messages under the Telemarketing Sales Rule (TSR). See [FTC Staff Opinion Letter to Call Assistant LLC](#) (Sept. 11, 2009). In November 2016, however, the FTC decided to revoke its previous letter, explaining that it is now the FTC staff’s opinion that outbound telemarketing calls that utilize avatars are subject to the TSR’s prerecorded call provisions. See [FTC Staff Opinion Letter to Call Assistant LLC](#) (Nov. 10, 2016).

The 2016 opinion letter explained that the staff’s change in position is due to the increasing volume of consumer complaints, the increase in how this technology has allegedly been abused by using it to conduct multiple calls at the same time without giving appropriate responses to consumers, and that the soundboard technology does “deliver a prerecorded message” under the statutory language used in the TSR. The staff said that, even with a 1-to-1 limitation in place (*i.e.*, using the technology to place one call at a time), this would not change the staff’s analysis.

A trade group representing companies that manufacture and use soundboard technology had challenged the FTC staff’s opinion letter, stating that the FTC: (1) circumvented the Administrative Procedures Act’s (APA) notice-and-comment requirements, and (2) violated the First Amendment by exempting pre-recorded solicitation calls between a non-profit charitable organization and its existing donors, but failing to exempt such calls to potential first-time contributors. The court rejected both claims in *Soundboard Ass’n v. FTC*, No. 1:17-cv-00150 (D.D.C. Apr. 24, 2017).

First, the court found that, although the November 2016 letter is a final, reviewable agency action, it was at most an interpretive rule that the FTC was not required to issue through notice and comment under the APA. Second, the court concluded that the letter did no more than subject soundboard

calls to valid time, place, and manner restrictions. The court explained that the exemption provided to pre-recorded calls on behalf of charitable organizations to existing donors, but not to charitable organizations' calls to potential, first-time donors, is a content-neutral regulation of speech that easily satisfies the requisite intermediate scrutiny.

Bottom Line: Companies that use soundboard technology will need prior written consent and will need to comply with the prerecorded message requirements under the TSR effective May 12, 2017, per the FTC's grace period for compliance (as well as the TSR's abandoned call provisions, as applicable).