No. 23-1661

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAKE'S FIREWORKS INC.,

Plaintiff-Appellant,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION; ALEXANDER HOEHN-SARIC, in his official capacity as Chairman of the CPSC,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR APPELLEES

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

EREK L. BARRON
United States Attorney

DANIEL TENNY
CYNTHIA A. BARMORE
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 598-0956

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INTRODUCTION

The Office of Compliance and Field Operations (referred to herein as the Compliance Office or the Office) is a division of the Consumer Product Safety Commission that, among other things, investigates violations of the Federal Hazardous Substances Act. The Compliance Office has no enforcement authority of its own. Instead, it makes recommendations to the Commission if it believes that enforcement action is warranted and conducts administrative litigation only if the Commission authorizes it. The Compliance Office also advises manufacturers, distributors, and others of concerns that arise when it inspects potentially hazardous materials and encourages the responsible entity to address them. As relevant here, the Office obtains samples of fireworks, reviews testing performed by the Commission's laboratory staff on those samples, informs the responsible entity when agency staff believe that the sampled fireworks violate federal law, and requests that the entity take voluntary remedial actions.

Determinations that enforcement action should be taken are made by the Commission, after consultation with the Office of the General Counsel. In making such determinations, the Commission considers the recommendations made by the Compliance Office—both as to whether a violation likely occurred and as to whether enforcement action is warranted—but those recommendations are not entitled to any particular weight. If the Commission determines that administrative

action is warranted, the agency generally conducts a formal administrative hearing on the record. Only then can the Commission issue a final administrative decision that a violation occurred and order remedial actions such as a product recall. The Commission also may refer matters to the Department of Justice to bring enforcement actions seeking civil or criminal penalties, and before doing so, will give the regulated entity notice and an opportunity to present evidence and arguments.

In this case, the district court properly rejected an effort by Jake's Fireworks, a large importer and distributor of consumer fireworks, to obtain judicial review of advice and recommendations made by the Compliance Office despite the absence of any final agency action by the Commission. In particular, after examining and testing samples of fireworks imported by Jake's, the Compliance Office found that certain samples were dangerously overloaded with explosive material. The Office thereafter sent Jake's several notices of noncompliance and requested that Jake's destroy those shipments. Two judges of the district court agreed, in separate decisions, that the notices are not final agency action subject to judicial review under the Administrative Procedure Act (APA).

This Court should affirm. The notices reflect the view of subordinate agency officials. They neither mark the end of the agency's decisionmaking nor impose any legal consequences. To take final agency action, the Commission

would review the Compliance Office's findings, receive an independent recommendation from the Office of the General Counsel, determine that the shipments likely violate federal regulations, and either initiate an enforcement action against Jake's culminating in a final order at the end of a formal hearing on the record, or refer the matter to the Department of Justice.

Courts have properly rejected efforts to obtain judicial review of similar letters that do not reflect the agency's final determination on the matters at issue and do not give rise to legal consequences. A contrary rule would discourage agencies from providing informal guidance that assists regulated entities and would require courts to resolve legal and factual issues without the benefit of the agency's full consideration, or even any certainty that the agency will take any action necessitating judicial review.

STATEMENT OF JURISDICTION

Jake's asserted jurisdiction under 28 U.S.C. § 1331 in this APA action. On April 24, 2023, the district court dismissed the complaint for lack of jurisdiction. JA350. Jake's filed a timely notice of appeal on June 20, 2023. JA351; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the notices of noncompliance issued by the Compliance Office to Jake's are final agency action subject to judicial review under the APA.

STATEMENT OF THE CASE

A. The Consumer Product Safety Commission's Regulation Of Consumer Fireworks

1. The Consumer Product Safety Commission is an independent agency created by Congress in 1972 to protect the public against unreasonable risks of injury from consumer products. *See* 15 U.S.C. §§ 2051(b), 2053. The Commission is composed of up to five Commissioners who are appointed by the President with the advice and consent of the Senate. *Id.* § 2053(a).

The Commission has authority to implement numerous statutes, including parts of the Federal Hazardous Substances Act. 15 U.S.C. § 2079. That Act authorizes the Commission to ban certain dangerous hazardous substances, *id.* § 1261(q)(1)(B), and prohibits the introduction of banned or misbranded hazardous substances into interstate commerce, *id.* § 1263(a). *See United States v. Focht*, 882 F.2d 55, 57-58 (3d Cir. 1989) (discussing agency's authority to "ban any substance that cannot be made safe through labeling"). The Commission also administers the Consumer Product Safety Act, which further prohibits any banned hazardous substance from being sold, offered for sale, manufactured, distributed, or imported into the United States. 15 U.S.C. § 2068(a)(1), (2)(D).

The Commission regulates consumer fireworks under these authorities. Fireworks are subject to various safety regulations to reduce the risk that consumers will be seriously injured by their use. *See generally* 16 C.F.R. pt. 1507;

id. § 1507.1 (failure to "conform to applicable requirements" renders the firework a "banned hazardous substance"). For example, all fireworks must be appropriately labeled. Certain types of fireworks that present special hazards must carry specific warnings, *id.* § 1500.14(b)(7), while all other fireworks must carry a general warning, *id.* § 1500.14(b)(7)(xv).

The Commission also has determined that certain types of fireworks are excessively dangerous and thus are banned hazardous substances. As relevant here, since 1970, a general ban has applied to "[f]ireworks devices intended to produce audible effects," such as cherry bombs, "if the audible effect is produced by a charge of more than 2 grains of pyrotechnic composition," with certain exceptions for wildlife management. 16 C.F.R. § 1500.17(a)(3). The agency's predecessor[1] found that those fireworks were "dangerously explosive" and responsible for numerous fatalities and serious injuries in adults and children. 35 Fed. Reg. 7415, 7415 (May 13, 1970). To determine whether a firework is intended to produce audible effects, agency staff will detonate a sample and listen for a distinctive sound (often referred to as a "bang" rather than a "poof") that

[1] Congress created the Commission in 1972 and, at that time, gave it authority to administer the relevant provisions of the Federal Hazardous Substances Act. 15 U.S.C. § 2079(a). The Food and Drug Administration previously exercised that authority, *id.*, and promulgated the 1970 regulation banning certain fireworks intended to produce audible effects. 35 Fed. Reg. 7415 (May 13, 1970). The Commission subsequently adopted that regulation. *See* 38 Fed. Reg. 27,012, 27,017 (Sept. 27, 1973).

typically indicates the firework is dangerously overloaded with explosive material. If staff hear the requisite sound, they will perform further tests to determine whether the firework's explosive content exceeds the regulation's quantitative limit. *See United States v. Shelton Wholesale, Inc.*, 34 F. Supp. 2d 1147, 1158-59 (W.D. Mo. 1999) (describing and upholding the testing methodology).

The Commission also has banned reloadable tube aerial shell fireworks (referred to herein as reloadable shells) with shells larger than 1.75 inches in diameter. 16 C.F.R. § 1500.17(a)(11)(ii)(A); 56 Fed. Reg. 37,831, 37,831-32 (Aug. 9, 1991) (discussing "severe injuries" caused by reloadable shells). To launch a reloadable shell, the user places separate shells inside a cardboard launcher tube and ignites a fuse extending from the top. 56 Fed. Reg. at 37,831. "Because the fuse must be lit from the top of the tube, some part of the user's body may remain over the firing path of the device when it is launched," potentially causing "serious facial and eye injuries." *Id.* at 37,832-33. Because three-quarters of reported injuries from reloadable shells involved shells larger than 1.75 inches in diameter, the Commission excluded smaller reloadable shells from the categorical ban, though they still must "comply with applicable requirements" noted above. *Id.*

2. For imported fireworks (like the samples from Jake's at issue here), the Commission coordinates with United States Customs and Border Protection to

ensure that shipments comply with these regulations. *See* 15 U.S.C. §§ 1273(a)-(b), 2066(c), (e), (h); 19 C.F.R. § 113.62(d); JA337-339 (describing the monitoring program for imported goods). The Compliance Office, a component within the Commission, may obtain samples of imported fireworks for testing by the Commission's laboratory staff to investigate whether they satisfy applicable requirements. The Compliance Office reviews those tests in its factfinding and advisory role to support the Commission in identifying potential violations. *See* 16 C.F.R. § 1000.21 (describing the Office's role); JA56. In the event of an apparent violation, shipments may be detained by Customs and Border Protection or conditionally released on bond. *See* 19 U.S.C. § 1499(a)(1); 15 U.S.C. § 1273(b). This process is designed to discover dangerous fireworks before they are sold to consumers in the United States.[2]

If the Compliance Office suspects that a shipment violates federal regulations, the agency engages at the staff level with the regulated entity to

[2] Pursuant to this border authority, the shipments at issue in this case were detained and conditionally released subject to import and entry bonds. Those bonds have expired, and the shipments thus cleared the border and entered interstate commerce more than one year ago. Consequently, Customs and Border Protection may no longer demand the return of those products to its custody, and various statutory authorities that apply at the border are not at issue here. *See* JA340 (explaining that any future action against Jake's would be based solely on the Commission's authorities, discussed *infra* pp. 8-10, to regulate products in the United States); *see also* Opening Br. 19 n.8 (noting that Customs and Border Protection's "actions in this case have no bearing on the finality questions here").

cooperatively resolve the problem. This process is set out in the Compliance Office's Regulated Products Handbook: If "staff determines that a product violates a specific statute or regulation," the Office "generally notifies the responsible firm … of the violation and requests a specific remediation of the problem." JA54. That notice "is usually in the form of an official letter," called a letter of advice or notice of noncompliance. JA54. The notice "informs the firm of the specific product and violation that has occurred," "requests that the firm take specific corrective actions," and "informs the firm of the legal actions available to the Commission." JA54. The notice also "informs the firm that if it disagrees," the firm "may question staff's findings and present evidence to support its position." JA54-55. "Any additional evidence or arguments that a firm presents are reviewed" by staff, and if they still believe that the product is banned, the Compliance Office generally "will notify [the firm] in writing before staff pursues any enforcement action against the products or [the] firm." JA67. At that point, if the firm "declines to take corrective action," the Office "may request the Commission approve appropriate legal proceedings," such as "the issuance of an administrative complaint, injunctive action, seizure action, or such other action as may be appropriate." JA68.

If the Compliance Office recommends that the Commission take enforcement action, the Commission consults with the Office of the General

Counsel, which assists the Commission by providing "advice and counsel … on matters of law arising from operations of the Commission." 16 C.F.R. § 1000.14. The Office of the General Counsel thus will conduct its own review and make a recommendation to the Commission regarding potential legal violations. If the Commission is considering an action for civil or criminal penalties, the Commission also provides notice and an opportunity for the regulated entity to present evidence and arguments. *See id.* § 1119.5 (civil); 15 U.S.C. § 1266 (criminal). Only then will the Commissioners vote on whether to pursue enforcement. If the Commission believes that no violation occurred or otherwise decides that enforcement is unwarranted, the Commission will reject the Compliance Office's recommendation and decline to take enforcement action.

If the Commission elects to take enforcement action, it has several options. The Commission may bring an administrative action to seek an order directing the regulated entity to cease distribution of the offending product, provide notice of the defect or failure to comply, or recall the product. *See* 15 U.S.C. §§ 1274, 2064(c), (d). The Commission generally may issue an administrative order only after authorizing a complaint and holding a formal hearing on the record that affords the regulated entity with notice and an opportunity to present evidence and arguments. *Id.* §§ 1274(e), 2064(f); *see* 16 C.F.R. § 1025.11. The Commission's final decision

is final agency action subject to review under the APA. *See, e.g.*, *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 968 F.3d 1156 (10th Cir. 2020).

The Commission also may refer a matter to the Department of Justice and recommend that the Department bring a civil or criminal enforcement action in federal court. *See* 15 U.S.C. §§ 1264, 1265, 1267, 2069-2071. If the Department of Justice declines to pursue a civil enforcement action, the Commission may file a complaint in district court in its own name; the Attorney General's concurrence, however, is required to pursue criminal enforcement. *See id.* § 2076(b)(7).

B. Factual Background

1. Jake's Fireworks is a large importer and distributor of consumer fireworks. As relevant here, Jake's imports reloadable shells that are manufactured in China and are small enough not to be subject to the categorical ban on large reloadable shells.

Between 2014 and 2018, on several occasions, the Commission's laboratory staff tested samples of shipments by Jake's to ensure their compliance with federal law. Staff first detonated the samples and determined that many made the distinctive "bang" that is associated with dangerously overloaded fireworks and triggers the limits set out in 16 C.F.R. § 1500.17(a)(3). Staff then weighed the samples that had generated an audible effect and found that they invariably contained an excessive quantity of explosive material. For example, the average

amount of explosive material in the samples collected in April 2018 ranged from 6,489 mg to 9,341 mg—between 50 and 72 times the legal limit. JA108. Jake's alleges that violations were identified in roughly one-third of samples. JA26. Some shipments were found to violate other regulations as well, such as by causing burning debris to fall to the ground, which Jake's has not disputed in this case. *E.g.*, JA114.

The Compliance Office sent notices of noncompliance notifying Jake's of the violations. JA331. Each notice took "the same approach: it request[ed] destruction of the fireworks and mandate[d] the procedures for destruction should Jake's Fireworks choose to take that action, and it warn[ed] of the possibility of legal action if Jake's Fireworks sells banned hazardous substances to the public." JA344; *see, e.g.*, JA165 ("Due to the risk of injury to consumers from fireworks that fail to comply with the regulations cited above, the staff requests that the distribution of the sampled lots [to consumers] not take place and that the existing inventory be destroyed."); JA282 (similar); JA286 (similar).

Jake's sought further review by the Compliance Office, consistent with the procedures set forth in the Regulated Products Handbook. JA331-332. Jake's asked the Compliance Office to rescind the notices on both legal and factual grounds, and the Office agreed to retest certain samples, rescinding notices for the samples that were found to be compliant upon retest. JA331-332. Jake's provided

further written submissions in support of its position and met with representatives from the Compliance Office in 2017, but staff did not agree with Jake's and continued to send notices regarding shipments that failed to comply with the regulations as the Office had interpreted and applied them. JA331-332.

2. In 2019, Jake's filed a complaint in district court to challenge the notices of noncompliance as arbitrary and capricious under the APA. JA304. The district court dismissed the complaint for lack of final agency action. JA308-312.

The district court (Grimm, J.) recognized that agency action is not final if it does not "mark the consummation of the agency's decisionmaking process." JA308 (quoting *Village of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 194 (4th Cir. 2013)). The court held that the notices at issue failed to satisfy that requirement. The court reasoned that the notices were "an intermediate ruling of a subordinate official" who lacked the "independent authority to initiate enforcement action that could expose Jake's Fireworks to civil or criminal penalties, without first obtaining the approval of the Commission's Office of General Counsel, which, in turn, must refer the matter to the Department of Justice, which then must decide whether to bring an enforcement action." JA310. While the Compliance Office "may request that the Commission … approve appropriate legal proceedings and, generally, will provide a written notification before that happens," no such "enforcement proceedings have been initiated, and the [notices

do not] indicate in any way that an enforcement action will be pursued by the staff." JA310. The district court also noted that "there are still steps that Jake's Fireworks may take, such as request a hearing or reconsideration" by the Compliance Office. JA312.

Jake's thereafter requested that the Compliance Office reconsider its conclusions. Jake's sent a letter asking that the Office "either inform it of what steps it could take to 'perfect the informal hearing process,' including requesting another meeting, or confirm that Jake's Fireworks had 'exhausted [its] administrative appeals and that your determinations expressed in the Notices stand.'" JA334; JA316. The Office responded that the notices "are an initial determination in the Commission's process," do "not constitute a final determination by the Commission subject to enforcement in federal court," and do not "complete the agency's decision-making process." JA334; JA318-319. To take enforcement action, it explained, "staff would have to refer the matter" to the Office of the General Counsel and "the five-member Commission … would have to approve any recommendation for a referral for an enforcement action," and Jake's "would be notified in writing prior to the commencement of any such enforcement action." JA335.

Jake's responded by asking the Compliance Office to "confirm that [Jake's] ha[s] exhausted the informal hearing process" or, alternatively, schedule an in-

person hearing or confirm that Jake's may sell the noncompliant fireworks "without risk of civil or criminal penalties." JA335; JA321. The Office in turn replied that a hearing was "premature" because the Commission had "made no final determination regarding Jake's or the samples that were the subject of the Notices." JA335; JA328.

To date, neither the Compliance Office nor the Commission has taken any additional actions with respect to the disputed shipments of small reloadable shells. The Compliance Office has not recommended that the Commission initiate any enforcement action against Jake's. Nor has the Commission taken any steps to review the Compliance Office's findings or pursue an enforcement action. Since the Office issued the challenged notices, the most recent of which was dated April 2019, the Office has not sent Jake's any similar notices with respect to any subsequent imports of small reloadable shells.

C. Prior Proceedings

In 2021, Jake's filed a second complaint in district court to challenge the notices of noncompliance as arbitrary and capricious under the APA. JA335. Jake's again raised the same legal challenges to the Compliance Office's interpretation of the regulations and to the testing methodology. JA336. Jake's represented that it has chosen to store rather than sell the shipments identified in the notices. *See* JA336.

The district court again dismissed the case for lack of final agency action. The second judge (Chuang, J.) reached the same conclusion that the notices do not "mark the consummation of the agency's decisionmaking process," JA342 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)), because they "only request voluntary compliance" and, "under the applicable statutory and regulatory regime, the Commission itself or [the Office of the General Counsel] must act before any enforcement action may proceed," JA345. The Compliance Office "may request the Commission approve appropriate legal proceedings," but "[t]o pursue an administrative enforcement action, the [Office's] staff would have to secure approval from the Commission itself." JA345. The Commission, in turn, "could commence and impose an administrative enforcement action only after notice and an opportunity to be heard." JA345. Similarly, "[t]o pursue either civil penalties or criminal prosecution in federal court, the [Office's] staff would have to make a recommendation to the Commission, which would consult with [the Office of the General Counsel] to make a determination of whether to refer the matter to [the Department of Justice], and any such referral would occur only with notice and an opportunity to be heard provided to the product owner." JA345. "Thus, [the Compliance Office], even if it has completed its assessment of whether the [fireworks] constitute banned hazardous substances, does not have the final word within the [Commission] on that issue." JA345.

The district court rejected the argument that the agency's decision had been rendered final by communications between Jake's and the Compliance Office since dismissal of the first complaint. The court reasoned that "[t]hose steps arguably would exhaust available procedures within [the Compliance Office]." JA343. But the completion of proceedings before the Office did not result in final agency action, which would require a decision by the Commission. "While the Notices state that the [the Compliance Office] staff's position is that the [fireworks] are banned hazardous substances," the court reasoned, "they do not actually order Jake's Fireworks to take any action." JA344. "[T]he completion of any such processes" by the Compliance Office "does not end the agency's activities." JA344. "At this point, all that has occurred is that the [Compliance Office] staff has requested voluntary compliance." JA344.

SUMMARY OF ARGUMENT

I. The district court correctly held that the Compliance Office's notices of noncompliance are not subject to judicial review because they are not final agency action. To be final, agency action must "mark the consummation of the agency's decisionmaking process" and be an action "by which rights or obligations have been determined or from which legal consequences will flow." *Village of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 194-95 (4th Cir. 2013) (quoting *Bennett v. Spear*, 520

U.S. 154, 178 (1997)). The notices here satisfy neither condition. First, the notices reflect intermediate assessments by subordinate agency officials. Under the statutory and regulatory framework that governs the Commission, only the Commission can issue a final decision regarding the lawfulness of products, and it has not done so here. Second, the notices merely inform Jake's of an apparent violation and request voluntary compliance with federal fireworks regulations as interpreted by the Compliance Office; they do not compel Jake's to do anything or subject Jake's to any legal consequences.

The district court's decision follows directly from Supreme Court precedent and is consistent with the decisions of numerous courts holding that similar agency letters are not final agency action. In particular, the Supreme Court has held that issuance of an administrative complaint is not final agency action. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980). The D.C. Circuit has applied *Standard Oil* to hold that a notice of noncompliance from the Compliance Office is not final agency action, reasoning that, if "even the filing of an administrative complaint does not constitute final agency action," it "follows that the Commission's actions here, which are merely investigatory and clearly fall short of filing an administrative complaint, are not final agency action." *Reliable Automatic*

Sprinkler Co. v. Consumer Prod. Safety Comm'n, 324 F.3d 726, 732 (D.C. Cir. 2003); *see also Holistic Candlers & Consumers Ass'n v. Food & Drug Admin.*, 664 F.3d 940 (D.C. Cir. 2012); *Soundboard Ass'n v. FTC*, 888 F.3d 1261 (D.C. Cir. 2018).

These decisions reflect that notices of noncompliance are a valuable and ubiquitous feature of agency operations. If agency staff could not issue informal opinions without subjecting the agency to judicial review, "it is likely that many voluntary and helpful comments from agency staff would be withheld altogether." *Sanitary Bd. of Charleston v. Wheeler*, 918 F.3d 324, 338 (4th Cir. 2019). Companies commonly rely on such statements and the advice of their own counsel to make business decisions, and it is not always possible to get definitive guidance from the agency or the courts before they sell their products. *See National Park Hosp. Ass'n v. Department of the Interior*, 538 U.S. 803, 811 (2003) (cautioning against pre-enforcement challenges where "courts would soon be overwhelmed with requests for what essentially would be advisory opinions").

II. Jake's offers no basis to conclude that the notices at issue are final agency action. Jake's contends that the notices "mark the 'consummation' of the agency's decisionmaking process," *Bennett*, 520 U.S. at 178, but it identifies no case that has held that any similar communication constituted final agency action.

That Jake's is forced to rely on wholly inapposite cases like *Sackett v. EPA*, 566 U.S. 120 (2012), which involved a binding compliance order, and *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), which involved a final rule issued after notice and comment, highlights the absence of precedent to support the position that assessments by subordinate agency officials, which are subject to further review within the Commission, conclude the agency's decisionmaking process.

Jake's also argues that the notices of noncompliance are actions "from which 'legal consequences will flow,'" *Bennett*, 520 U.S. at 178, but any legal consequences would flow from the statutory and regulatory provisions that prohibit Jake's from selling illegal fireworks—not from the Compliance Office's notices that identify those provisions. Jake's argues that the notices would subject it to civil or criminal penalties by establishing a "knowing" violation of law for any future sales, but the notices are just one piece of evidence that might be relevant to its state of mind, much like any other statement by agency officials that could be used as evidence of a regulated entity's knowledge. Jake's once again identifies no court that has found legal consequences from notices like these that do not state the definitive position of the agency. Jake's also argues that the notices "cast a cloud of uncertainty" over the legality of its products, but an agency (or its staff) does not issue final agency action "merely by expressing its view of the law." *AT&T Co. v.*

EEOC, 270 F.3d 973, 976 (D.C. Cir. 2001). Nor does the possibility of a future enforcement action turn a warning letter into final agency action, as this Court and others have held. *See, e.g.*, *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 433 (4th Cir. 2010); *Reliable Automatic Sprinkler*, 324 F.3d at 732.

Finally, Jake's cannot escape the finality requirement by arguing that it has satisfied the independent requirement of exhausting its administrative remedies. Those remedies exist to facilitate the cooperative resolution of matters like this by encouraging open dialogue between the Compliance Office and regulated entities. While that process has not resolved the disagreement here, Jake's cannot compel the Commission to take up a matter and issue a final decision. Such decisions concern the Commission's enforcement priorities and are committed to the agency's discretion. If the Commission takes final agency action in the future, Jake's may seek judicial review at that time.

STANDARD OF REVIEW

The district court granted the Commission's motion to dismiss for lack of jurisdiction. This Court reviews de novo whether the challenged agency action is final and thus subject to review under the APA. *See City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 430 (4th Cir. 2019).

ARGUMENT

I. The Notices Of Noncompliance Are Not Final Agency Action Subject To Judicial Review.

The district court correctly held that the notices of noncompliance at issue here are not final agency action subject to judicial review.[3]

1. Judicial review under the APA "is limited to 'final agency actions.'" *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 430 (4th Cir. 2019) (quoting 5 U.S.C. § 704). Congress provided that "preliminary, procedural, or intermediate" agency decisions are subject to review only after the agency issues a final decision. 5 U.S.C. § 704. "[T]o be 'final,'" agency action must satisfy two conditions: First, "the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Village of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 194-95 (4th Cir. 2013) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Second, "the action must be one by which rights or obligations have been determined or from which legal consequences will flow." *Id.* (quoting *Bennett*, 520 U.S. at 178). "An order must satisfy both prongs of the *Bennett* test to be considered final."

[3] The government also argued in district court that Jake's lacks standing, that the notices do not constitute "agency action," much less final agency action, and that the case is unripe. Because this Court has held that final agency action is a jurisdictional requirement and the district court's decision on finality is sufficient to resolve this appeal, the government limits this brief to finality.

Southwest Airlines Co. v. U.S. Dep't of Transp., 832 F.3d 270, 275 (D.C. Cir. 2016). Neither prong is satisfied here.

a. With respect to the first *Bennett* prong, the notices of noncompliance are "interlocutory" decisions that do not "mark the consummation of the agency's decisionmaking process." *Bennett*, 520 U.S. at 178. Those notices reflect "only the ruling of a subordinate official," not of the Commission. *See Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967)).

To determine "whether an action is properly attributable to the agency itself and represents the culmination of that agency's consideration of an issue," courts look to "[t]he decisionmaking processes set out in an agency's governing statutes and regulations," which "is a touchstone of the finality analysis." *Soundboard Ass'n*, 888 F.3d at 1267, 1269. Here, as the district court correctly recognized, the Commission's statutory and regulatory authorities make clear that the Compliance Office has not—indeed, cannot—issue a final decision on behalf of the agency that a product is a banned hazardous substance. JA347.

Nothing in the statutory or regulatory framework authorizes the Compliance Office to issue a final administrative decision on behalf of the Commission. Both the Federal Hazardous Substances Act and the Consumer Product Safety Act authorize the Commission (not the Compliance Office) to issue an administrative

order to address a banned hazardous substance. *See* 15 U.S.C. § 1274(a) ("If … *the Commission* determines … that notification is required … *the Commission* may order" specified actions. (emphases added)); *id.* § 1274(b) (similar); *id.* § 2064(c) (similar); *id.* § 2064(d) (similar). The Compliance Office provides "advice and guidance on complying with all administered acts," but its findings are not binding either on regulated entities or on the Commission. *See* 16 C.F.R. § 1000.21.

Moreover, to issue a final administrative order, the Commission must first vote to authorize the issuance of a complaint, after consulting with the Office of the General Counsel which conducts its own review and makes its own recommendation to the Commission. 16 C.F.R. § 1025.11(a) ("Any adjudicative proceedings under this part shall be commenced by the issuance of a complaint, authorized by the Commission, and signed by the Associate Executive Director for Compliance and Enforcement."); *id.* § 1000.14 (setting forth the responsibilities of the Office of the General Counsel). And before the Commission enters a final order, the regulated entity generally is entitled to a formal hearing on the record where it may present evidence and arguments. 15 U.S.C. § 1274(e) ("An order under subsection (a), (b), or (c) may be issued only after an opportunity for a hearing in accordance with section 554 of Title 5," with an exception for members of a class); *id.* § 2064(f) (similar, with an exception for imminent hazards already subject to a district court action); 16 C.F.R. § 1025.55(a)-(b) ("Upon appeal from

or review of an Initial Decision, the Commission shall consider the record" and, "[i]n rendering its decision, … shall issue an order reflecting its Final Decision.").

The Compliance Office similarly lacks statutory or regulatory authority to initiate a civil or criminal enforcement action in district court. The governing framework authorizes the Commission (not the Compliance Office) to recommend that the Department of Justice pursue civil or criminal penalties, 15 U.S.C. § 2076(b)(7), after the Commission consults with the Office of the General Counsel, 16 C.F.R. § 1000.14, and after the Commission provides the regulated entity with notice and an opportunity to present evidence and arguments, *id.* § 1119.5; 15 U.S.C. § 1266. The Commission may not bring criminal proceedings without the Attorney General's concurrence, and it generally may initiate civil proceedings only if the Department of Justice declines to proceed on its behalf. 15 U.S.C. § 2076(b)(7).

To date, the Compliance Office has not even recommended that the Commission take enforcement action. As the district court explained, "all that has occurred is that the [Compliance Office] staff has requested voluntary compliance." JA344; *see, e.g.*, JA165 ("[T]he staff requests that the distribution of the sampled lots not take place and that the existing inventory be destroyed."). While Jake's notes that certain notices also include seemingly mandatory language, that is in the context of identifying the Commission's enforcement authority and

communicating the Compliance Office's views about when enforcement may be warranted. For example, one notice stated that "staff requests" destruction of inventory and then described procedural steps that would be needed to document the destruction. JA103. The notice went on to state that the samples "must be destroyed" within a certain time period, before immediately turning to the statutory provisions that would be violated if the products were sold, which are "enforced by the Commission." JA103-104. The notices thus reflect an assessment by the Compliance Office that certain fireworks violate federal regulations and provide a description of actions that should be taken if Jake's wishes to avoid future enforcement action by the Commission. But the Compliance Office, "even if it has completed its assessment of whether the [fireworks] constitute banned hazardous substances, does not have the final word within the [Commission] on that issue." JA345.

Nor has the Commission taken any of the steps outlined above that are necessary to issue a final administrative order or pursue an action in district court. The Commission has not received a recommendation from the Office of the General Counsel, issued a complaint to initiate a formal hearing, entered a final order at the end of proceedings, or referred the matter to the Department of Justice. When the Commission issues a final order in a case like this, it uses unambiguously mandatory language wholly unlike the Compliance Office's

requests for voluntary compliance. *See, e.g.*, Final Decision and Order at 54-56, *Zen Magnets, LLC*, No. 12-2 (C.P.S.C. Oct. 26, 2017) (ordering that a regulated entity "shall cease" product distribution and "shall" take various remedial actions). Here, where the notices instead "seek voluntary compliance and the steps required to impose a mandatory order upon the subject have not yet occurred, no final agency action has occurred." JA347-348.

b. The failure to satisfy the first *Bennett* prong is fatal to this case. *See Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. EPA*, 313 F.3d 852, 858 (4th Cir. 2002) ("[A]n agency action may be considered 'final' only when the action signals the consummation of an agency's decisionmaking process *and* gives rise to legal rights or consequences." (quoting *COMSAT Corp. v. National Sci. Found.*, 190 F.3d 269, 274 (4th Cir. 1999))). In any event, Jake's also cannot satisfy the second *Bennett* prong because no "rights or obligations have been determined" by the Commission and no "legal consequences will flow" from the Compliance Office's notices. *Bennett*, 520 U.S. at 178; *see Flue-Cured Tobacco*, 313 F.3d at 859 (holding that an agency report that "carries no legally binding authority" fails to satisfy the second *Bennett* prong); *International Tel. & Tel. Corp., Commc'ns Equip. & Sys. Div. v. Local 134, Int'l Bhd. of Elec. Workers*, 419 U.S. 428, 443-44 (1975) (agency decision "is not itself a 'final disposition' within the meaning of 'order' and 'adjudication' in 5 U.S.C. § 551(6), (7)" where agency

has not "order[ed] anybody to do anything" and the decision, "standing alone, binds no one"). The notices request that Jake's voluntarily comply with federal regulations as interpreted by Compliance Office staff. Those notices do not order Jake's to do so; indeed, the Compliance Office has no statutory authority to finally determine the rights or obligations of regulated entities, a power that belongs to the Commission. *See supra* pp. 22-24.

Nor do any legal consequences flow from the notices. The notices serve an advisory function, giving Jake's helpful information about its fireworks shipments to facilitate compliance with federal law. If Jake's believes that the Compliance Office's legal conclusions are indefensible, nothing prevents Jake's from ignoring the notices and selling the shipments. Conversely, the Commission or the Department of Justice could commence an enforcement action even if the Compliance Office had never sent the notices. Either way, the notices themselves would not impose any legal consequences on Jake's: Jake's would only be subject to legal consequences at the end of enforcement proceedings, if the Commission issues a final administrative order requiring Jake's to take certain actions, or if the Department of Justice secures a judicial decision ordering relief. *See Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432-33 (4th Cir. 2010) (distinguishing between agency statements that "inform the regulated community of what violates the law" and those that "*determine* the law or the consequences of

not following it"); *Howard County v. Federal Aviation Admin.*, 970 F.3d 441, 449 (4th Cir. 2020) (no final agency action where agency statement "left the [regulated entity] in the same legal position it had occupied beforehand").

2. The Supreme Court has held that no final agency action occurred when an agency proceeded even further along in the administrative enforcement process. In *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980), the Court held that issuance of an administrative complaint is not final agency action. A private party had sued the Federal Trade Commission in district court, arguing that the agency's issuance of an administrative complaint "without having 'reason to believe' that [the party] was violating the Act" violated the Federal Tort Claims Act. *Id.* at 234-35 (quoting 15 U.S.C. § 45(b) (1976)). The Court reasoned that the "Commission's averment of 'reason to believe' that [the party] was violating the Act is not a definitive statement of position" but instead "represents a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings." *Id.* at 241; *see also Gerator Corp. v. Equal Emp't Opportunity Comm'n*, 592 F.2d 765, 768 (4th Cir. 1979) (holding that agency's "determination of reasonable cause" to support an alleged legal violation was not reviewable because it "can fix no obligation nor impose any liability on the plaintiff" and "is merely preparatory to further proceedings"). All the more here, the notices reflect "threshold determination[s]" by Compliance Office staff that certain fireworks

shipments violate federal regulations. *Standard Oil*, 449 U.S. at 241. Only the Commission can issue a "definitive statement of position" by the agency, and it has not even issued a complaint, much less an order at the conclusion of administrative proceedings. *Id.*

The D.C. Circuit has applied *Standard Oil* to hold that a notice that is nearly identical to the ones at issue here is not final. In *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 324 F.3d 726 (D.C. Cir. 2003), the court of appeals considered a challenge to a notice from the Compliance Office that informed a regulated entity that staff believed certain sprinklers presented a "substantial product hazard" in violation of the relevant statute and "requested" that the regulated entity take "voluntary corrective action." *Id.* at 730. There, as here, the Commission had "not yet made a formal determination" of a legal violation "or even filed an administrative complaint initiating the administrative proceedings that would be required before the agency could make such a determination." *Id.* The D.C. Circuit held that "[t]hese agency activities do not constitute final agency action within the meaning of the APA, 5 U.S.C. § 704." *Id.* at 731.

The court reasoned that the Supreme Court in *Standard Oil* "held that even the filing of an administrative complaint does not constitute final agency action," and it "follows that the Commission's actions here, which are merely investigatory

and clearly fall short of filing an administrative complaint, are not final agency action." *Reliable Automatic Sprinkler*, 324 F.3d at 732. There, as here, "[t]he agency's conduct thus far amounts to an investigation of [the plaintiff's product], a statement of the agency's intention to make a preliminary determination that the [product is noncompliant], and a request for voluntary corrective action." *Id.* at 731. "But the agency has not yet made any determination or issued any order imposing any obligation on [the plaintiff], denying any right of [the plaintiff], or fixing any legal relationship." *Id.* at 732. "The Act and the agency's regulations clearly prescribe a scheme whereby the agency must hold a formal, on-the-record adjudication before it can make any determination that is legally binding," but "the agency ha[d] not yet taken the steps required under the statutory and regulatory scheme for its actions to have any legal consequences." *Id.*

The D.C. Circuit has reached the same conclusion in many other cases addressing similar letters from agencies. For example, in *Holistic Candlers & Consumers Ass'n v. Food & Drug Administration*, 664 F.3d 940 (D.C. Cir. 2012), the court held that warning letters from the Food and Drug Administration, "like other agency advice letters that we have reviewed over the years," are not final agency action. *Id.* at 944-45, 945 n.6 (citing cases). The letters advised that the agency considered a product to violate the relevant statute, "request[ed]" that the recipient "correct the problem," and "warned that '[f]ailure to promptly correct

these deviations may result in regulatory action.'" *Id.* at 942. Just like the notices at issue here, those letters gave "firms an opportunity to take voluntary and prompt corrective action *before* [the agency] initiates an enforcement action," but enforcement action was not "inevitabl[e]," and the letters did "not commit [the agency] to taking enforcement action." *Id.* at 944; *see id.* at 945-46 (citing *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001), for the proposition "that agency action is not final when the 'agency merely expresses its view of what the law requires of a party, even if that view is adverse to the party'"); *Soundboard Ass'n*, 888 F.3d at 1267-68 (holding that a letter from Federal Trade Commission staff was not final agency action, even though the letter "present[ed] a conclusive view" from staff regarding the entity's legal obligations and followed "extensive investigative efforts," where the letter was "'only the ruling of a subordinate official,' and not that of any individual Commissioner or of the full Commission," and was "not binding on the Commission" (quoting *Abbott Labs.*, 387 U.S. at 151)).

3. These uniform judicial decisions reflect that notices of noncompliance are a valuable and ubiquitous feature of agency operations. As this Court has recognized, "[t]here is a reason letters like this, issued thousands of times by federal agencies every year, travel under the monikers 'advisory,' 'pre-decisional,' or 'staff.'" *Sanitary Bd. of Charleston v. Wheeler*, 918 F.3d 324, 338 (4th Cir.

2019). "Agencies need the ability to designate the import of the information they disseminate, and this includes the ability to clearly communicate when a decision is final." *Id.* "If they could not do this, it is likely that many voluntary and helpful comments from agency staff would be withheld altogether." *Id.*; *see also Golden & Zimmerman*, 599 F.3d at 432 ("Holding that the publication of the Reference Guide constitutes agency action 'would quickly muzzle any informal communications between agencies and their regulated communities—communications that are vital to the smooth operation of both government and business.'" (quoting *Independent Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004))).

While Jake's objects that it must decide for itself whether to sell the fireworks, it is commonplace for companies to make business decisions based on the governing statutes and regulations and advice from counsel, with or without the benefit of informal agency guidance. Regulated entities in every industry must comply with legal requirements, and it is not always possible to get definitive guidance from the agency or the courts before they sell their products. Otherwise "courts would soon be overwhelmed with requests for what essentially would be advisory opinions because most business transactions" could benefit "if even a small portion of existing legal uncertainties were resolved." *National Park Hosp. Ass'n v. Department of the Interior*, 538 U.S. 803, 811 (2003) ("mere uncertainty

as to the validity of a legal rule" does not "constitute[] a hardship" necessary to bring a pre-enforcement challenge to a regulation).

II. Jake's Presents No Basis In Logic Or Precedent To Support Its Contrary Arguments.

Jake's offers no basis to overturn the district court's holding that the notices are not final agency action.

1. The cases on which Jake's relies to contest the district court's holding on the first *Bennett* prong only underscore the errors in its argument. In *Sackett v. EPA*, 566 U.S. 120 (2012), the Supreme Court held that a compliance order issued by the EPA was final agency action. The relevant statute authorized the agency "either to issue a compliance order or to initiate a civil enforcement action." *Id.* at 123. The agency took the former route, thereby issuing an order under the EPA Administrator's statutory authority to impose on the plaintiffs "the legal obligation" to take certain actions. *Id.* at 125-26. As Jake's acknowledges (at 45), the order was "not subject to any further review within EPA." Thus, "EPA's 'deliberation' over whether the [plaintiffs] we[re] in violation of the Act [wa]s at an end," and the only remaining question for the agency was whether "to initiate litigation." *Sackett*, 566 U.S. at 129.

Here, in contrast, the Compliance Office lacks authority to determine whether a violation occurred, and Jake's could present all of its legal arguments to the Commission in advance of any final determination by the Commission.

Critically, while the statute at issue in *Sackett* gave the agency two administrative avenues to determine the entity's legal obligations (a compliance order or an enforcement action), the relevant statutes here give the Commission just one: a formal hearing on the record. *See supra* pp. 22-24. And no such hearing has happened here.

Jake's provides no support for its implausible argument that the Commission is bound by the factual and legal determinations made by the Compliance Office. The sole regulatory provision identified by Jake's, 16 C.F.R. § 1000.21, describes the Compliance Office's responsibilities and repeatedly makes clear that the Office's role is advisory and investigatory. For instance, the Compliance Office "conducts field enforcement efforts," which include "providing program guidance, advice, and case guidance." *Id.* The Office also "provides advice and guidance on complying with all administered acts," "promot[es] industry compliance," "conducts inspections and in-depth investigations," and "analyzes available data." *Id.* The staff Handbook provisions cited by Jake's similarly make clear that the Office's role is intermediate; no provision claims that the Commission has delegated to the Compliance Office the authority to issue conclusive determinations on liability. *See* JA54-55 (explaining that a notice of noncompliance reflects the determination of "staff" that "a product violates a specific statute or regulation" and the recipient "may question" those findings);

JA67-68 (setting forth "procedures to be followed if a firm disagrees with Commission staff's determination" and noting that "staff may request the Commission approve appropriate legal proceedings").

Jake's also repeatedly cites *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), which involved judicial review of a notice-and-comment rule issued by the FDA Commissioner. Similarly, Jake's relies on *U.S. Army Corps of Engineers v. Hawkes Co.* (*Hawkes II*), 578 U.S. 590 (2016), which involved a determination that was "issued by the agency and expressly deemed 'final agency action' by regulation" and was "bind[ing on] the Corps for five years." *See Soundboard Ass'n*, 888 F.3d at 1268 (distinguishing *Hawkes II*); *Hawkes II*, 578 U.S. at 597 (undisputed that the agency's decision "satisfies the first *Bennett* condition"). The fact that Jake's is forced to rely on cases like *Sackett*, *Abbott*, and *Hawkes II*, each of which involved formal determinations by the agency, underscores the absence of any support for its position that staff-level recommendations satisfy the first *Bennett* prong.[4]

[4] Other decisions cited by Jake's are distinguishable for similar reasons. *See Soundboard Ass'n*, 888 F.3d at 1268 (distinguishing *Frozen Foods Express v. United States*, 351 U.S. 40 (1956), as involving "a formal, published report and order of the Interstate Commerce Commission, not its staff, following an investigation and formal public hearing"); *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 418-19 (1942) (reviewing FCC regulation, "promulgated by order of the Commission," that had "the force of law before [its] sanctions are invoked as well as after"); *United States v. Storer Broad. Co.*, 351 U.S. 192, 198 (1956)

Continued on next page.

Jake's fares no better in relying on cases involving potential reconsideration of an agency's final decision. This is not a case where "an agency might reconsider" its decision, because here, the Commission has not made an initial decision. *Compare Sackett*, 566 U.S. at 127 (final decision issued under EPA Administrator's statutory authority to order compliance), *and Sierra Club v. West Va. Dep't of Envtl. Prot.*, 64 F.4th 487, 498 (4th Cir. 2023) (final decision issued by West Virginia Department of Environmental Protection after public notice and comment). The assessment of Compliance Office staff has no controlling effect and cannot be attributed to the Commission.

2. As noted above, the district court's judgment can be upheld solely on the ground that the notices do not satisfy the first *Bennett* prong because those notices did not (and could not) consummate the Commission's decisionmaking process. But in any event, Jake's fares no better in arguing that the notices satisfy the second *Bennett* prong. Jake's does not dispute that the notices impose no obligations on it and rather just reflect a statement of the Compliance Office's view of the application of the regulations to particular shipments. In that respect, this case is fundamentally different from cases like *Sackett*, in which the government argued that violation of a compliance order could be a basis for the imposition of

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(reviewing FCC regulation announcing a Commission policy where "[t]he process of rulemaking was complete"); *Ipsen Biopharmaceuticals, Inc. v. Azar*, 943 F.3d 953, 956 (D.C. Cir. 2019) (no dispute that first *Bennett* prong was satisfied).

greater penalties than would be imposed based on a statutory violation alone. *See Sackett*, 566 U.S. at 123 (noting that a penalty would be imposed for the underlying violation and a second penalty for violation of the compliance order).

Jake's contends (at 51), instead, that the notices "could be used as evidence" that Jake's knowingly violated the law, thereby exposing Jake's to civil or criminal penalties that would be unavailable for inadvertent violations. But the possibility that Jake's highlights is not a cognizable legal consequence because it does not "flow" from the notices themselves. Even if a notice may carry evidentiary relevance, the source of legal consequences is the statute that prohibits knowing violations of law, not the notice that may provide a regulated entity with knowledge of relevant facts. *See Golden & Zimmerman*, 599 F.3d at 433 ("[I]f the [agency] had never published the [challenged reference guide], the [agency] would still have had the authority to prosecute licensees for engaging in the conduct described in [the reference guide] because legal consequences do not emanate from [the reference guide] but from the [statute] and its implementing regulations.").

As the district court recognized, in some cases, a notice of noncompliance can provide evidence of a knowing violation because the notice informs the regulated entity of relevant facts about its products. *See* JA348-349. For example, a notice may alert a manufacturer that some of its fireworks have fuses that burn too quickly. In that event, if the entity were to argue that it was unaware of the

firework's fuse burn time, a court could reasonably rely on a notice from the Compliance Office to find otherwise (though it could just as well rely on a letter from a concerned customer). But in that case, the relevant statutory and regulatory requirements are what would impose legal consequences for knowingly violating the law. All manner of statements by agency officials—or, indeed, from individuals outside the agency—could be used as evidence of knowledge of a regulated entity's legal obligations, so that possibility alone cannot suffice to satisfy the second *Bennett* prong.

Moreover, a notice of noncompliance does not have conclusive evidentiary significance. Such a notice is simply one piece of evidence that *may* establish a knowing violation of law. In any case seeking civil or criminal penalties, a factfinder would consider all evidence that is relevant to the entity's knowledge. *See* JA348-349 (discussing *United States v. Shelton Wholesale, Inc.*, 1998 WL 251273 (W.D. Mo. Apr. 28, 1998), in which a similar letter "could" be considered but did not "definitively establish[] such state of mind"). Consequently, Jake's has not shown that legal consequences "will flow" from the notices in this case. Even if they might provide evidence of a knowing violation, a factfinder would consider all evidence and arguments relevant to knowledge if the Commission were to pursue penalties, including efforts by Jake's to obtain the Commission's definitive

views and the fact that the Commission has not taken any action with respect to the contested shipments in the last five years.

The circumstances surrounding these notices are also very different from cases in which other letters were found to have legal consequences. Courts that have concluded that a letter's possible use to demonstrate knowledge or willfulness can satisfy the second *Bennett* prong have done so only when an agency has given a definitive statement of its position. In some circumstances, agency regulations specifically state that willfulness can be established when a violation persists in the face of a statement of the agency's position. *See, e.g.*, *Rhea Lana, Inc. v. Department of Labor*, 824 F.3d 1023, 1029 (D.C. Cir. 2016). No such regulation exists here.

Absent such a regulation, courts sometimes conclude that a sufficiently final and clear agency position gives rise to legal consequences because even a good-faith disagreement with an agency's established position is unlikely to constitute a defense to a willful violation. For example, in *Ipsen Biopharmaceuticals, Inc. v. Azar*, 943 F.3d 953 (D.C. Cir. 2019), the court found legal consequences from letters that definitively informed the plaintiff "of [the agency's] position," thereby increasing the plaintiff's "risk of prosecution and penalties" by "refut[ing] any colorable argument [the plaintiff] might have in an enforcement action that it was acting without knowledge of [the agency's] position." *Id.* at 957. It was "critical,"

however, that the letters were "the consummation of the agency's decision-making." *Id.* Otherwise, the court reasoned, a letter that provides "informal advice is insufficient, as a matter of law, to establish a 'knowing' or 'willful' violation of a statute or regulation." *Id.*; *see also Rhea Lana*, 824 F.3d at 1027 (letters were consummation of agency's decisionmaking process); *Bellion Spirits, LLC v. United States*, 7 F.4th 1201, 1208-09 (D.C. Cir. 2021) (same); *Clarke v. Commodity Futures Trading Comm'n*, 74 F.4th 627, 638 (5th Cir. 2023) (same). As discussed above, the notices here offer the views of subordinate agency staff; they do not state the definitive position of the Commission.

Finally, Jake's argues (at 56) that the notices "cast a cloud of uncertainty over the safety and legal status of Jake's products," but that is not a cognizable legal consequence either. As discussed above, courts routinely hold that an agency does not issue final agency action simply by advising an entity that its product violates legal requirements. *See supra* p. 31. Even if the Compliance Office spoke for the Commission (which it does not), it would not have "inflicted any injury upon [Jake's] merely by expressing its view of the law—a view that has force only to the extent the agency can persuade a court to the same conclusion." *AT&T*, 270 F.3d at 976.

This case bears no resemblance to *Spirit Airlines, Inc. v. U.S. Department of Transportation*, 997 F.3d 1247 (D.C. Cir. 2021), where the D.C. Circuit held that a

refusal to reallocate flight authorizations caused legal consequences because only authorized flights would be entitled to precedence if regulatory conditions changed in the future. It was that discrete administrative act with particular consequences that caused the decision in that case to be final agency action.

It makes no difference whether ignoring a notice of noncompliance might invite enforcement action by the agency. For example, this Court has found no final agency action where the agency "warn[ed] members of the regulated community that they could be subject to prosecution for engaging in certain transactions," reasoning that the agency's statement was "not the source of an obligation that gives rise to penalties or other consequences." *Golden & Zimmerman*, 599 F.3d at 433. At bottom, "the expense and annoyance of litigation is 'part of the social burden of living under government,'" and "this burden is different in kind and legal effect from the burdens which have been considered in determining final agency action." *Eastman Kodak Co. v. Mossinghoff*, 704 F.2d 1319, 1324-25 (4th Cir. 1983) (quoting *Standard Oil*, 449 U.S. at 244); *see also Reliable Automatic Sprinkler*, 324 F.3d at 732 (acknowledging that the Compliance Office's notice may present "practical consequences, namely the choice … between voluntary compliance with the agency's request for corrective action and the prospect of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement," but such "consequences

attach to any parties who are the subjects of Government investigations and believe that the relevant law does not apply to them"); *Holistic Candlers*, 664 F.3d at 944 n.5 (similar).

Finality cannot "be measured by what the industry claims it will do or stop doing." *Soundboard Ass'n*, 888 F.3d at 1273; *see Golden & Zimmerman*, 599 F.3d at 430 (no final agency action despite plaintiff's allegation that it "refrained from selling" products "because the [agency] has taken the position in [a challenged reference guide] that such conduct violates the [statute]"). "The test is what legal and practical consequences will flow from the *agency's* action," *Soundboard Ass'n*, 888 F.3d at 1273, and here no relevant consequences flow from the notices themselves.

3. Jake's also emphasizes that it has no further administrative remedies with respect to the challenged shipments, but as this Court has recognized, exhaustion of remedies "does not *ipso facto* mean that the decision is a final agency action." *Eastman Kodak*, 704 F.2d at 1324. The government does not dispute that Jake's has pursued all available avenues for review within the agency. But that is because the Commission has declined, to date, to take any enforcement action that would give rise to further procedural rights. The fact that there is no agency review of the Compliance Office's decisions thus reflects that those decisions have no binding

effect, not that the Compliance Office is entitled to have the final word on behalf of the Commission.

No statutory or regulatory provision creates a mechanism for regulated entities to compel the Commission to issue final agency action with respect to a particular issue. Such decisions concern the Commission's enforcement priorities and are committed to the agency's discretion. *See Sierra Club v. Larson*, 882 F.2d 128, 132 (4th Cir. 1989) ("[A]n agency decision not to seek enforcement of a statute[] … is presumptively unreviewable under [*Heckler v. Chaney*, 470 U.S. 821 (1985)]."). As discussed above, a conclusion that all staff advice gave rise to a right to judicial review would not provide regulated entities with more certainty but would instead cause agencies to cease providing such informal advice, leaving regulated entities to act with less information. And the notion that judicial review would precede any determination by the Commission inverts longstanding principles of ripeness and exhaustion.

In short, Jake's is not entitled to judicial review of an intermediate decision by subordinate agency staff. If the Commission pursues an enforcement action against Jake's in the future, Jake's will have the opportunity to present its arguments to the agency, and Jake's may seek judicial review of any adverse final decision.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

EREK L. BARRON
United States Attorney

DANIEL TENNY
CYNTHIA A. BARMORE
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 598-0956

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,101 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Times New Roman 14-point font, a proportionally spaced typeface.

s/ Cynthia A. Barmore
Cynthia A. Barmore

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Cynthia A. Barmore
Cynthia A. Barmore