

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
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Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
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**ANNUAL REPORT ON THE NATIONAL DO-NOT-CALL REGISTRY**

**Adopted: December 15, 2004**

**Released: December 15, 2004**

**By the Chief, Consumer & Governmental Affairs Bureau:**

**I. BACKGROUND**

1. On March 11, 2003, President Bush signed the Do-Not-Call Implementation Act (Do-Not-Call Act), authorizing the Federal Trade Commission (FTC) to collect fees for the implementation and enforcement of a national do-not-call registry.<sup>1</sup> In addition, the Do-Not-Call Act required the Federal Communications Commission (FCC or Commission) to issue final rules in its ongoing rulemaking proceeding under the Telephone Consumer Protection Act (TCPA)<sup>2</sup> within 180 days of the Do-Not-Call Act's enactment and to consult and coordinate with the FTC to maximize consistency with the rule promulgated by the FTC in 2002.<sup>3</sup> The Do-Not-Call Act also requires the FCC to transmit an annual report to Congress on the status of the national "do-not-call" registry.<sup>4</sup> This report is in response to this requirement for fiscal year 2003 and reflects activity through September 30, 2003.

2. On July 3, 2003, the FCC released a Report and Order (Order) revising the rules on telemarketing in compliance with the requirements of the Do-Not-Call Act.<sup>5</sup> The Order revised the existing TCPA rules and adopted new rules to provide consumers with several options for avoiding unwanted telephone solicitations. Specifically, the Order establishes with the FTC a national do-not-call registry for consumers who wish to avoid unwanted telemarketing calls.<sup>6</sup> Because of the Commission's

<sup>1</sup> Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003), *to be codified at* 15 U.S.C. § 6101 (*Do-Not-Call Act*).

<sup>2</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

<sup>3</sup> *See* FTC rule 47 C.F.R. § 310.4(b).

<sup>4</sup> *See generally* Do-Not-Call Act, Sec. 4(b).

<sup>5</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 44144 (2003) (*Order*). The Commission delegated its authority to the Chief of the Consumer & Governmental Affairs Bureau to issue the Report to Congress. *Order*, 18 FCC Rcd at 14142, para. 217.

<sup>6</sup> *See Order*, 18 FCC Rcd at 14034-65, paras. 28-85.

broad authority under the TCPA, the national do-not-call registry covers all entities that use the telephone to advertise, including those entities over which the FTC lacks jurisdiction, such as common carriers, banks, credit unions, savings and loans, airlines, and companies in the business of insurance.<sup>7</sup> The FCC's jurisdiction also extends to both intrastate and interstate telemarketing calls.<sup>8</sup>

3. The FCC and FTC jointly implemented a nationwide do-not-call registry following the adoption of rules by each agency to protect consumers from unwanted telemarketing calls. The FTC received funding to set up and administer the do-not-call registry, while both the FCC and FTC are responsible for enforcement of the do-not-call rules, along with the states. Telemarketers are required to pay fees to access the database and to "scrub" their calling lists of the telephone numbers in the database.<sup>9</sup>

4. The opening of the National Do-Not-Call Registry was announced on June 27, 2003, by President George W. Bush, FTC Chairman Timothy J. Muris and FCC Chairman Michael K. Powell. That same day, consumers were permitted to begin registering their telephone numbers on the registry online or by calling a toll-free number. Within the first three days of the registry's operation, consumers registered more than 10 million telephone numbers.

5. Several telemarketers filed separate actions challenging the FCC-FTC registry. U.S. Security; Chartered Benefit Services, Inc.; Global Contact Services, Inc.; Infocision Management Corp.; and Direct Marketing Association, Inc., ("U.S. Security plaintiffs") filed a complaint in the Western District of Oklahoma, challenging the registry adopted by the FTC on statutory and constitutional grounds. Mainstream Marketing Services, Inc.; TMG Marketing, Inc.; and American Teleservices Association ("Mainstream plaintiffs") raised similar challenges in the District of Colorado. On September 23, 2003, the court in *U.S. Security* entered judgment for the plaintiffs, holding that the FTC lacked authority to promulgate those provisions of the TSR that pertain to the registry.<sup>10</sup> Congress acted quickly to overrule this decision by enacting a statute ratifying the FTC's authority to establish the registry.<sup>11</sup> On September 25, 2003, the court in *Mainstream* entered judgment for plaintiffs there, holding that the registry violated the First Amendment and enjoining the FTC from enforcing the rule provisions creating and implementing the registry.<sup>12</sup> Although the FTC was forced to temporarily shut down the registry due to the court's decision, the FCC's rules nevertheless went into effect on October 1, 2003. The FCC announced that it intended to do everything legally permissible to enforce the registry and provide consumers with the protections afforded by the national do-not-call list.

6. On October 7, 2003, the Tenth Circuit Court of Appeals stayed the *Mainstream* decision.<sup>13</sup> The FTC was allowed to reopen the do-not-call registry on October 9 to allow consumers to continue adding numbers to the list, and telemarketers were given access to the registry on October 10, 2003. The Tenth Circuit also denied a petition by the Mainstream plaintiffs to stay the FCC's rules pending appeal. On February 17, 2004, the Tenth Circuit upheld the constitutionality of the national do-

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<sup>7</sup> See *Order*, 18 FCC Rcd at 14034, para. 27.

<sup>8</sup> See 47 U.S.C. § 152.

<sup>9</sup> "Scrubbing" refers to comparing a do-not-call list to a company's call list and eliminating from the company call list the telephone numbers of consumers who have registered a desire not to be called.

<sup>10</sup> *U.S. Security v. Federal Trade Comm'n*, 282 F.Supp.2d 1285 (W.D. Okla. 2003).

<sup>11</sup> See P.L. 108-82, 117 Stat. 1006 (2003).

<sup>12</sup> *Mainstream Marketing Services, Inc. v. Federal Trade Comm'n*, 283 F.Supp.2d 1151 (D. Colo. 2003).

<sup>13</sup> *Federal Trade Comm'n v. Mainstream Marketing Services, Inc.*, 345 F.3d 850 (10<sup>th</sup> Cir. 2003).

not-call registry.<sup>14</sup>

7. Pursuant to the requirements of the Do-Not-Call Act, this Report contains an analysis of the “do-not-call” program established by the FCC and FTC as of September 30, 2003 (FY2003). This report is submitted in accordance with Section 4(b) of the Do-Not-Call Act.<sup>15</sup> Section 4(b) states:

(b) ANNUAL REPORT.—For each of fiscal years 2003 through 2007, the Federal Trade Commission and the Federal Communications Commission shall each transmit an annual report to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report which shall include--

- (1) an analysis of the effectiveness of the “do-not-call” registry as a national registry;
- (2) the number of consumers who have placed their telephone numbers on the registry;
- (3) the number of persons paying fees for access to the registry and the amount of such fees;
- (4) an analysis of the progress of coordinating the operation and enforcement of the “do-not-call” registry with similar registries established and maintained by the various States;
- (5) an analysis of the progress of coordinating the operation and enforcement of the “do-not-call” registry with the enforcement activities of the Federal Communications Commission pursuant to the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.); and
- (6) a review of the enforcement proceedings under the Telemarketing Sales Rule (16 CFR 310), in the case of the Federal Trade Commission, and under the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.), in the case of the Federal Communications Commission.

## **II. THE NATIONAL DO-NOT-CALL REGISTRY**

### **A. Effectiveness of the Do-Not-Call Registry**

8. As of September 30, 2003, the rules establishing the national do-not-call registry were not yet in effect. Beginning October 1, 2003, telemarketers were prohibited from contacting numbers on the list unless the call was exempted under the rules.

### **B. Number of Consumers Registered on the Do-Not-Call Registry**

9. As of September 30, 2003, 51,968,777 telephone numbers had been placed on the national do-not-all registry.<sup>16</sup>

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<sup>14</sup> See *Mainstream Marketing Services, Inc. v. Federal Trade Comm’n*, 358 F.3d 1228 (10<sup>th</sup> Cir. 2004), *cert. denied*, 2004 WL 2050134 (U.S. Oct. 4, 2004) (No. 03-1552).

<sup>15</sup> See *Do-Not-Call Act*, Sec. 4(b).

<sup>16</sup> There are now over 64 million telephone numbers registered on the national do-not-call list.

### C. Number of Telemarketers Accessing the Do-Not-Call Registry

10. On September 2, 2003, telemarketing organizations were given access to the national do-not-call registry. The annual cost for organizations to access phone numbers in the registry was \$25 per area code, with a maximum annual fee of \$7,375 to access numbers for the entire country, including U.S. territories.<sup>17</sup> There is no charge for companies to access the first five area codes of data. As of September 30, 2003, 1968 entities had paid \$5,239,000 to access the registry data.

### D. Coordination with the State Do-Not-Call Registries

11. In the Report and Order, the Commission determined not to preempt state do-not-call lists, stating that “[n]othing that we do in this order prohibits states from enforcing state regulations that are consistent with the TCPA and the rules established under this order in state court.”<sup>18</sup> We acknowledged that the states have a long history of regulating telemarketing practices, and we believe that it is critical to combine the resources and expertise of the state and federal governments to ensure compliance with the national do-not-call rules. In fact, the TCPA specifically outlines a role for the states in this process.<sup>19</sup> Section 227(e)(2) prohibits states, in regulating telephone solicitations, from using any database, list, or list system that does not include the part of such single national database that relates to that state.<sup>20</sup> Thus, pursuant to this requirement, any individual state do-not-call database must include all of the registrants on the national database for that state. We determined that the administrator of the national database shall make the numbers in the database available to the states as required by the TCPA.

12. In addition, we believe that the most efficient way to create a single national database will be to download the existing state registrations into the national database. The national database is designed to allow the states to download into the national registry—at no cost—the telephone numbers of consumers that have registered with their state do-not-call lists. We noted that a reasonable transition period may be required to incorporate the state registrations in a few states into the national database. We therefore adopted an 18-month transition period for states to download their state lists into the national database.

13. We refer the Committee to the report transmitted by the FTC for the number of states that had downloaded into the national registry the telephone numbers of consumers on their do-not-call lists as of September 30, 2003.

### E. Coordination with the FTC on Operation and Enforcement of the Registry

14. In the Report and Order, we explained that the FTC’s adoption of a nationwide do-not-call registry along with the Commission’s adoption of requirements that maximize consistency with those adopted by the FTC create an overlap in federal regulations governing telemarketing activities. The Commission directed FCC staff to negotiate with the FTC a Memorandum of Understanding between the respective staffs to achieve an efficient and effective enforcement strategy that will promote compliance with federal telemarketing regulations. In addition, we anticipate that, given the substantial gaps in the FTC’s authority over the full range of telemarketing activities, our enforcement staff will focus

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<sup>17</sup> The FTC later proposed raising the access fees to \$45 per area code of data with the maximum amount that any entity would be charged becoming \$12,375. *See Telemarketing Sales Rule Fees*, Federal Trade Commission, 69 Fed. Reg. 23701 (April 30, 2004).

<sup>18</sup> *See Order*, 18 FCC Rcd at 14065, para. 85.

<sup>19</sup> *See* 47 U.S.C. § 227(e) and (f).

<sup>20</sup> *See* 47 U.S.C. § 227(e)(2).

particularly on those telemarketing activities and entities that fall outside the FTC's reach—airlines, banks, credit unions, savings and loans, insurance companies, and common carriers, as well as intrastate transmissions by any entity. For reasons of efficiency and fairness, Commission staff will work closely with the FTC to avoid unnecessarily duplicative enforcement actions.<sup>21</sup>

#### **F. FCC Enforcement Proceedings**

15. The national do-not-call registry rules did not become effective until October 1, 2003. There are no enforcement proceedings to report as of September 30, 2003.<sup>22</sup>

### **III. ADMINISTRATIVE MATTERS**

16. This report is issued pursuant to the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557, and section 227 of the Communications Act of 1934, as amended, 47 U.S.C. § 227.

17. IT IS ORDERED that the Secretary SHALL SEND copies of this report to the appropriate committee and subcommittees of the United States House of Representatives and the United States Senate.

FEDERAL COMMUNICATIONS COMMISSION

K. Dane Snowden  
Chief, Consumer & Governmental Affairs Bureau

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<sup>21</sup> As will be detailed in our FY2004 Report, the FCC and the FTC have in fact entered into a Memorandum of Understanding regarding enforcement of the Registry requirements, and the staffs of the two agencies have coordinated their enforcement efforts to avoid unnecessary duplicative actions.

<sup>22</sup> The FCC enforcement proceedings initiated since September 30, 2003, will be described in our FY2004 Report.