

The Do-Not-Call Quagmire: Federal Court Rulings Block Implementation But FTC and FCC Are Set to Enforce

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The Federal Trade Commission and Federal Communications Commission began enforcing the national do-not-call registry on October 17, but not before a flurry of court rulings, hurried legislation passed by Congress and signed by the President, and action by a Supreme Court Justice. The uncertainty began in late September, when rulings from federal district courts in Oklahoma and Colorado effectively blocked the FTC's ability to enforce the national do-not-call list. The FTC has appealed both rulings and, pending the appeals, has authority to proceed with implementation and enforcement.

As the ultimate fate of the national registry remains in limbo, the 54 million consumers who have registered for the do-not-call list have likely noticed a decrease in telemarketing calls. Many telemarketers began voluntary compliance on October 1. The FTC and FCC have begun investigating complaints from consumers who receive unwanted telemarketing calls. The FTC announced on November 7 that it had received approximately 63,000 consumer reports of do-not-call list violations. It is reviewing those reports for recurring complaints about certain telemarketers, which will likely trigger an investigation into the telemarketers' compliance with the do-not-call and other requirements of the Telemarketing Sales Rule.¹ The FTC expects to bring an enforcement action by December.

Background

In January of this year the FTC announced, with some fanfare, the creation of a national do-not-call registry as part of amendments to the Telemarketing Sales Rule (TSR).² The FTC issued the original TSR in 1995, giving effect to the Telemarketing and Consumer Fraud and Abuse Prevention Act,³ and based the amendments on that same authority. The TSR applies to any plan, program, or campaign that is conducted through interstate phone calls to sell goods or services or solicit a charitable contribution. The TSR applies to telemarketers that solicit consumers, even on behalf of a third party, and to sellers that provide or arrange to provide goods or services.

In addition to those requirements, consumers may sign up for the do-not-call registry, and for-profit telemarketers and sellers must scrub from their call lists those who have registered for the

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¹ 16 C.F.R. Part 310.

² Although publicity surrounding the amended TSR has focused on the do-not-call registry, other changes also significantly affect all aspects of telemarketing, including requirements to make certain disclosures, obtain express verifiable authorization for payments not made by credit cards, display number on caller ID, tape record certain types of transactions, and eliminate abandoned calls when using predictive dialers.

³ 15 U.S.C. §§ 6101–6108.

do-not-call list. The FTC exempted calls to consumers with whom the caller has an “established business relationship,”⁴ “upsells,”⁵ and callers soliciting charitable and political contributions.

The FCC joined forces with the FTC over the summer to implement and enforce the do-not-call list, announcing its own do-not-call rules and broadening the scope of industries required to comply with the list.⁶ The FTC is responsible for establishing and maintaining the list. The FTC and FCC planned to begin enforcing the do-not-call list requirements on October 1, but ran into significant roadblocks.

First Hurdle: Statutory Authority

On September 23, Judge West of the U.S. District Court for the Western District of Oklahoma ruled that the FTC lacked statutory authority to establish a national do-not-call registry.⁷ The ruling came in a lawsuit filed by the Direct Marketing Association and several of its members challenging certain provisions of the FTC’s amended Telemarketing Sales Rule, including the do-not-call registry. The court found that the regulation of telemarketing in this way must derive from a grant of authority from Congress, which, it said, the FTC lacked. The court declared the registry invalid. It found, however, that, while Congress had not given the FTC authority to establish and enforce a national do-not-call registry, Congress had given such authority to the FCC.

The FTC and Congress responded immediately to the court’s ruling. The next day the FTC filed an appeal and moved for a stay of the court’s order. Congress passed legislation to explicitly grant the FTC authority to create, maintain, and enforce the do-not-call registry. President Bush signed the bill into law on September 30. Although that new statutory authority may have addressed the basis for Judge West’s ruling, thornier problems lay ahead. On the same day that Congress passed the new legislation, a district court in Colorado issued a ruling that presents additional concerns.

Second Hurdle: First Amendment Violation

On September 25, Judge Nottingham of the U.S. District Court for the District of Colorado ruled that the national do-not-call registry violates the First Amendment.⁸ The American Teleservices Association (ATA) had filed a lawsuit in Colorado challenging the do-not-call registry and other provisions of the FTC’s amended Telemarketing Sales Rule. Specifically, the court ruled that the FTC, by exempting charitable and political solicitors from the registry’s requirements, imposed a content-based restriction on speech. The court ruled that nothing in the FTC’s rulemaking record

⁴ The company has an “established business relationship” with the consumer if (a) the consumer has purchased, leased, or rented goods or services from the company within eighteen months preceding the call or (b) the consumer has submitted an application or made an inquiry to the company within three months preceding the call.

⁵ An “upsell” is any solicitation for goods or services that follows an initial transaction of any sort in a single telephone call.

⁶ FCC Report and Order, CG Docket No. 02-278 (release date July 3, 2003). The FCC Rule, issued pursuant to the FCC’s authority under the Telephone Consumer Protection Act (TCPA), establishes compliance responsibilities for any person or entity using the telephone system for solicitation, including industries that are exempt from FTC jurisdiction, such as banks, credit unions, savings and loans, airlines, telephone companies, and insurance companies. Although the FTC’s Telemarketing Sales Rule applies only to interstate calls, the FCC Rule applies to both interstate and intrastate calls.

⁷ U.S. Security v. FTC, available at <http://www.okwd.uscourts.gov/files/03-cv-122order.pdf>.

⁸ Mainstream Mktg. Servs., Inc. v. FTC, No. 03-N-0184 (D. Colo. Sept. 25, 2003), available at http://www.co.uscourts.gov/opinions/ewn_030184.pdf.

or the record before the court justified this differential treatment. Accordingly, the court held the do-not-call registry imposes a regulatory burden on commercial speech that violates the First Amendment, and enjoined the FTC from implementing the registry.⁹

Again, the FTC reacted quickly, asking the court the following day to stay its order and appealing the decision to the U.S. Court of Appeals for the Tenth Circuit. On September 29, Judge Nottingham refused to stay the order, finding that it would not cause the FTC irreparable harm.¹⁰ Later that day, the FTC filed a motion with the Tenth Circuit for an emergency stay pending appeal of the district court's order.

Meanwhile, FTC Chairman Timothy Muris was on Capitol Hill testifying before the Senate Committee on Commerce, Science, and Transportation criticizing the district court's ruling, stating that it eliminated any distinction between commercial and non-commercial speech and erroneously applied two Supreme Court cases, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York City*,¹¹ and *Cincinnati v. Discovery Network, Inc.*¹² First, the Chairman noted that the district court assumed that calls from charities and commercial entities are equally invasive, despite Congress' conclusions when enacting the TCPA and evidence that commercial entities frequently ignored company-specific do-not-call requests under the TSR. Second, in contrast to the practice ruled unconstitutional in *Discovery Network* that discriminated against only a small percentage of newsrack advertising, the TSR's do-not-call registry covers almost 80 percent of telephone solicitations. Third, the Chairman argued that the registry does not ban any speech; rather, it provides a choice to consumers about the calls they are willing to receive.

On October 7, the Tenth Circuit stayed the Colorado district court's order, giving a green light to the FTC to begin operating the registry pending each agency's appeal.¹³ A hearing on the appeal is scheduled for November 10.¹⁴

In addition to challenging enforcement of the list by the FTC, ATA is challenging enforcement by the FCC. It had asked the Tenth Circuit Court of Appeals to stay the FCC's power to enforce the do-not-call registry. The Tenth Circuit rejected ATA's petition on September 26. On September 29, the FCC announced that it would enforce its do-not-call rules against telemarketers that had obtained the FTC's do-not-call list. The same day ATA escalated its request for a stay to Supreme Court Justice Stephen Breyer, who oversees courts in the Tenth Circuit. Justice Breyer denied the appeal. Hours later, as part of the order refusing to stay the ruling against the FTC that the do-not-call registry was unconstitutional, Judge Nottingham in Colorado prohibited the FTC from using the FCC to implement the registry indirectly.¹⁵ The October 7 ruling from the Tenth Circuit staying the district court's order, however, essentially permits the FCC to go forward with the FTC.

⁹ "[T]he court finds that the FTC's do-not-call registry does not materially advance its interest in protecting privacy or curbing abusive telemarketing practices. The registry creates a burden on one type of speech based solely on its content, without a logical, coherent privacy-based or prevention-of-abuse-based reason supporting the disparate treatment of different categories of speech." *Id.* at 26.

¹⁰ *Mainstream Mktg. Servs., Inc. v. FTC*, No. 03-N-0184 (D. Colo. Sept. 29, 2003), available at http://www.co.uscourts.gov/opinions/ewn_03N184MJW.pdf.

¹¹ 447 U.S. 557 (1980).

¹² 507 U.S. 410 (1993).

¹³ *FTC v. Mainstream Marketing Servs., Inc.*, No. 03-1429 (10th Cir. Oct. 7, 2003), available at <http://www.ck10.uscourts.gov/circuit/031429.pdf>.

¹⁴ A copy of FTC's and FCC's brief is available at <http://www.ftc.gov/os/2003/10/mainstreambrief.pdf>. A hearing on the appeal was held on Nov. 10.

¹⁵ *Mainstream Mktg. Servs., Inc. v. FTC*, No. 03-N-0184 (D. Colo. Sept. 29, 2003), available at http://www.co.uscourts.gov/opinions/ewn_03N184MJW.pdf.

Current Status: Call At Your Own Risk

While the FTC and FCC pursue their appeals, they have moved forward with enforcement initiatives. Consumers can continue to sign up for the registry by visiting www.donotcall.gov or calling 888.382.1212. On October 2, the FCC announced the establishment of a special do-not-call enforcement team. The FTC began collecting consumer complaints on October 11, and has already received over 63,000 reports and, assuming that it wins the courtroom battle, could file its first enforcement action in December. In light of the FTC's reluctance to remain idle and the continuing consumer outcry, telemarketers and sellers could undertake significant risks by continuing to call consumers included on the national do-not-call list. The FTC, states, and private citizens who suffer \$50,000 or more, may bring civil actions in federal district court to enforce the TSR. Entities that violate the TSR are subject to civil penalties of up to \$11,000 per violation, consumer redress, and injunctive relief.

Moreover, over thirty state do-not-call lists remain in effect with aggressive attorneys general ready to enforce them.¹⁶ In some cases, state lists cover a broader range of calls with fewer exceptions. Many state statutes also impose various requirements regarding disclosures, calling times, authorization, and rebuttals. The Colorado court's ruling however, could also jeopardize the validity of state do-not-call lists. The FCC's rules under the Telephone Consumer Protection Act prohibit any state with a state do-not-call list from enforcing the list unless the state list includes the phone numbers of consumers on the national registry. If states cannot access the national registry, they may be prohibited from enforcing their state lists. Moreover, the Denver court's reliance on the First Amendment to block the national do-not-call registry could become the basis for similar challenges to state lists. ●

¹⁶ Shortly over a week ago, the California Attorney General filed a lawsuit against American Home Craft, Inc., a home improvement company and licensed contractor, alleging that the company violated the TCPA and state unfair competition law by calling consumers registered on the national do-not-call list. Although the TCPA is typically enforced by the FCC, states also have enforcement authority. The Attorney General seeks at least \$100,000 in penalties and a permanent injunction. A copy of the Attorney General's complaint is available at <http://caag.state.ca.us/newsalerts/2003/03-137.pdf>. California has also passed legislation to create a state do-not-call list that takes effect on January 1, 2004.