BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES IN RESPONSE TO THE COURT'S SEPTEMBER 24, 2003 ORDER

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 03-9571

MAINSTREAM MARKETING SERVICES, INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

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Pursuant to the Court's September 24, 2003 Order, respondents Federal Communications Commission ("FCC") and United States hereby submit this brief discussing the effect of the district court's decision in *U.S. Security v. FTC*, No. CIV-03-122-W (W.D. Okla. Sept. 23, 2003), on petitioners' motion for a stay pending appeal of the Federal Communications Commission's "do-not-call" rules.[1] As we explain below, legislation to overrule the district court's decision already has passed the House and the Senate, and as of the time of this filing was awaiting the President's signature.

1. The *U.S. Security* litigation involves a challenge to the Federal Trade Commission's do-not-call rules. In its September 23, 2003 decision, the district court (West, J.) upheld the

[1] A copy of the district court's decision (hereinafter "slip op.") is attached as Exhibit A.

FTC's authority to promulgate restrictions on abandoned calls and to restrict the use of preacquired account information. Slip op. at 15-17. But the district court ruled that the FTC's establishment of a do-not-call registry exceeded that agency's statutory authority. Slip op. at 11-15. The court reached this conclusion despite the fact that, as it acknowledged (slip op. 4, 13): (1) the FTC is generally empowered to combat abusive and deceptive telemarketing practices, *see* 15 U.S.C. 6102(a)(2), (2) Congress appropriated funds to the FTC to administer the do-not-call registry, *see* Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11 (2003), and (3) Congress authorized the FTC to collect fees for the registry's implementation and enforcement. *See* Do-Not-Call Implementation Act, Pub. L. No. 108-10, § 2, 117 Stat. 557 (2003). Moreover, although the court saw the issue as one of statutory interpretation, it failed to defer to the agency's statutory construction under the well-settled principles of *Chevron U.S.A., Inc*. v. *Natural Resources Defense Council, Inc*., 467 U.S. 837, 843 (1984). Accordingly, the FTC yesterday filed a notice of appeal of the *U.S. Security* decision and has sought a stay pending appeal.

2. Whatever the force of its determination regarding the *FTC*'s authority to establish a do-not-call registry, the district court's decision provides no support for petitioners' motion for a stay pending appeal of the *FCC's* do-not-call rules. As the court acknowledged, the Telephone Consumer Protection Act of 1991 (TCPA) "expressly granted" the FCC the authority to "establish and operate" a national do-not-call registry. Slip op. at 11 (citing 47 U.S.C. 227(c)(3)). *Accord id.* at 2. The court also recognized that by seeking to eliminate telemarketing fraud and prohibit deceptive and abusive telemarketing acts or practices through a do-not-call registry, the FTC sought to address "significant public concerns." Slip op. at 15; *see also id.* at

15-16 (describing abandoned call rule as "a permissible regulation of this most (and undisputedly) invasive and abusive practice"). And the district court conspicuously failed to adopt plaintiffs' arguments –asserted by petitioners here – that the do-not-call rules violate the First Amendment rights of telemarketers. Slip op. at 11 (finding that the "dispositive" issue was that of the FTC's statutory authority). In short, the *U.S. Security* decision recognizes the FCC's statutory authority to regulate telemarketers and acknowledges the public interest in doing so.

3. The FCC has nonetheless recognized that the FTC's inability to implement the do-not-call registry could have an adverse impact on the FCC's ability to enforce its rules. *See Rules and Regulations Implementing the Telephone Consumer Protection Act*, 18 FCC Rcd 14014, 14042 ¶ 41 (2003) ("*Order*"). "Because Congress has approved funding for the administration of the national list only for the FTC," the FCC has stated, the agency would be "forced to stay implementation of any national list should the plaintiffs prevail in one of [the two lawsuits challenging the FTC's rules]." *Ibid.*

It cannot be said, however, that plaintiffs have "prevailed" in their litigation against the FTC's do-not-call registry at this time. First, Congress today has passed legislation (H.R. 3161) – by a vote of 412-8 in the House and 95-0 in the Senate – that expressly authorizes the FTC "to implement and enforce a national do-not-call registry," *id*. § 1(a), and affirmatively "ratifie[s]" the do-not-call registry provision of the FTC's rules. *Id*. § 1(b).[2] As of the time of this filing, that bill, which would overrule the district court's decision, is awaiting the President's signature. Second, as we have explained, the FTC has appealed the decision and has sought a stay pending appeal. Third, while the decision holds that the FTC lacks authority to enforce its own do-not-

[2] A copy of the legislation is attached as Exhibit B.

call requirements, nothing in the decision purports to prevent the FTC from aiding the FCC in the implementation and enforcement of the FCC's do-not-call rules.[3]

The FCC is currently in the process of determining whether it can resolve any funding or administrative obstacles that might exist to its administration of the do-not-call registry independent of the FTC. Only in the event that corrective legislation is not enacted or the FTC is unable to obtain a stay pending appeal would the FCC have to consider whether, in accordance with paragraph 41of its Do-Not-Call Order, it should stay its rules because of a lack of funds or an inability to administer the do-not-call registry.

4. In any event, whether or not the FCC encounters funding or other practical obstacles to implementing the do-not-call registry on its own, there is no basis for this Court to conclude that the FCC's do-not-call rules should be stayed because they are *unconstitutional* – which is the sole contention that petitioners have made on the merits in support of their stay request in this case. As we have shown in our opposition,[4] the FCC's rules are a narrowly focused mechanism for protecting the ability of consumers to choose to maintain the privacy of their homes from repeated commercial intrusions by telephone solicitors. They are therefore a reasonable exercise of Congress's power to regulate commercial speech. The district court's decision in *U.S. Security* provides no additional support for petitioners' constitutional claims, and a stay pending appeal remains unwarranted.

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[3] In any event, when the FCC observed that it might have to stay its rules if the FTC lost in litigation, the do-not-call registry had not yet begun operating, and the funds for establishing the registry had not been spent. The registry has now been in existence for nearly three months, more than 50 million numbers have been registered, and the initial start-up costs have already been incurred.

[4] *See* Response of the Federal Communications Commission to Petitioners' Motion for Expedited Stay Pending Appeal at 8-16 (filed Sept. 10, 2003).

CONCLUSION

For the foregoing reasons and those stated in our Opposition, Petitioners' Motion for Expedited Stay Pending Appeal should be denied.

Respectfully submitted,

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