

Progressive Business Publications
370 Technology Drive
Malvern, PA 19355

January 6, 2006

RE: CG Docket No. 02-278

Introduction

In response to the invitation of the Federal Communications Commission¹, Progressive Business Publications files these comments regarding the Fax Ban Coalition's pending petition for a declaratory ruling concerning the scope of the Commission's jurisdiction to regulate interstate communications under the Telephone Consumer Protection Act of 1991 (TCPA).² Progressive Business Publications, a diversified information company, fully supports this petition. Progressive Business Publications urges the Commission to affirm that it has exclusive authority to regulate interstate commercial fax messages. It further urges the Commission to find that the TCPA preempts all state laws that purport to regulate interstate facsimile transactions, including but not limited to section 17538.43 of the California Business and Professions Code.

Factual Background

In July 2003, the Commission issued a final rule³ regarding implementation of the TCPA. The final rule noted that the "TCPA does not act as a total ban on fax advertising,⁴ and it stressed the benefits of "a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations."⁵ It also indicated that it would consider issues of preemption on a case-by-case basis.⁶

On July 9, 2005, President Bush signed into law S. 714, the Junk Fax Prevention Act of 2005. The Junk Fax Prevention Act of 2005 permits fax advertisements to be sent to

¹ 70 Fed. Reg. 74,014 (December 14, 2005).

² 47 U.S.C. § 227.

³ Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144 (July 25, 2003).

⁴ *Id.* at 44,167.

⁵ *Id.* at 44,155.

⁶ *Id.*

recipients with whom the sender has an established business relationship.

On October 7, 2005, Gov. Arnold Schwarzenegger signed into law SB 833. The bill amended the California Business and Professions Code, by, *inter alia*, purporting to bar persons or entities from sending unsolicited facsimile advertisements to recipients located in California, regardless of the location of the sender.⁷ Despite the Commission's clearly expressed intent to foster a uniform regulatory scheme and the recent federal codification of the Commission's longstanding "established business relationship" exemption, the law purports to regulate interstate faxes without recognizing the exemption's existence.

The TCPA Preempts the California's Law's Regulation of Interstate Faxes

The TCPA preempts the California law's regulation of interstate faxes. To the extent that it purports to regulate interstate faxes, the California law undermines the intent of Congress, as expressed in the Junk Fax Prevention Act of 2005, to permit interstate fax advertisements to parties with whom the sender has an established business relationship.

The language of 47 U.S.C. § 227(e)(1) also compels the conclusion that Congress did not intend for states to exercise jurisdiction over interstate faxes. This provision reads as follows:

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits -

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic dialing systems;

⁷ California Business and Professions Code Section 17538.43(b)(1).

- (C) the use of artificial or prerecorded messages; or
- (D) the making of telephone solicitations.

(Emphasis added).

A critical aspect of this provision is its explicit limitation of the preemption bar to intrastate requirements only. The language of the statute compels the conclusion that the TCPA preempts any state regulation of interstate faxes. Statutes are to be interpreted so that each word is given meaning and effect, and so that no words are rendered superfluous. In addition, the inclusion of the specific word "intrastate," to the exclusion of similar terms such as "interstate," supports the conclusion that state laws imposing more restrictive interstate requirements are preempted.

The California Law Frustrates the Objective of Creating Uniform Rules

Interpreting 47 U.S.C. § 227(e)(1) to permit states to regulate interstate faxes would completely frustrate the clearly expressed legislative intent to avoid inconsistent interstate rules.

The final rule's discussion of the interplay between state and federal do-not-call regulations carries a prominent and overriding theme: There is a critical interest in promoting a uniform and consistent regulatory scheme. Importantly, the rule recognizes that the failure to achieve this goal would substantially burden telemarketers.

The California law frustrates the clear intent of Congress to promote a general, uniform scheme that would spare senders of fax advertisements the impossible task of complying with a hodgepodge patchwork of inconsistent state-law requirements. It clearly illustrates why the Commission should declare that it has exclusive jurisdiction over interstate communications.

Conclusion

Progressive Business Publications respectfully urges the Commission to grant the Fax Ban Coalition's petition for declaratory ruling in CG Docket 02-278.

Sincerely,

Edward Satell
President
Progressive Business Publications