



**CardinalHealth**

VIA Overnight United Parcel Service

January 10, 2006

Commission's Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

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Cardinal Health  
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San Diego, CA 92130  
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**RE: Comments Requested CG Docket No. 02-278; DA 05-2975; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991**

Dear Sir or Madam:

Please accept this letter as our comments to the petition for declaratory ruling filed by the Fax Ban Coalition concerning the scope of the Commission's jurisdiction over interstate communications under the Telephone Consumer Protection Act of 1991 ("TCPA"). Cardinal Health is a leading provider of healthcare products and services. We communicate with our numerous customers via fax, in addition to e-mail and telephone and therefore have serious concerns about individual state laws that purport to permissibly regulate interstate facsimile transmissions while at the same time are in conflict with the Telephone Consumer Protection Act.

Specifically, California's recently enacted SB 833 prohibits sending fax advertisements into or out of the State to persons or entities with which the sender has an established business relationship unless the sender has the recipient's prior express consent.<sup>1</sup> This new California law countermands a recent amendment to Section 227 of the Federal Communications Act of 1934 - the Junk Fax Prevention Act of 2005 ("JFPA"). Congress passed the JFPA to codify the rule permitting fax advertisements to be sent to recipients with whom the sender has an established business relationship without the recipient's prior express consent. In contrast, the California law requires the fax sender to have an established business relationship with the recipient in addition to having the recipient's prior express consent to receive a fax. When there exists a conflict between state and federal law then the preemption doctrine requires that the state law give way.<sup>2</sup>

<sup>1</sup> The new law imposing this requirement is codified as Section 17538.43 of the California Business and Professions Code.

<sup>2</sup> See, e.g., *Ray v. ARCO*, 435 U.S. 151, 168-169 (1978) (holding that a state law establishing design or construction specifications for a tanker certified under federal law

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Cardinal Health supports an injunction that would permanently bar the enforcement of California's SB 833.

Article I, Section 8, Clause 3 of the United States Constitution, empowers the United States Congress, "[t]o regulate Commerce with foreign Nations, and among the several States...". Additionally, the Federal Communications Act of 1934 granted the FCC exclusive authority to regulate "all interstate and foreign communication".<sup>3</sup> Clearly, the intent of these laws was to give the federal government the authority to regulate interstate matters concerning commerce and communication. States lack jurisdiction to restrict *interstate* communications such as facsimile transmissions.<sup>4</sup>

Cardinal Health is seriously concerned about numerous states attempting to enact laws that regulate interstate fax communications. Varying state fax laws impose an undue burden on companies that communicate with their customers via facsimile transmission. Sending one fax to customers regarding a product they purchase could potentially implicate fifty different state laws. Like California, several other states have imposed laws that purport to control such things as the format of a fax and the font size of the opt-out notice. For Cardinal Health, these numerous and tedious differences between state's laws make it very difficult to continue to communicate needed product information to our customers.

Thank you for the opportunity to comment on these proposed rules and we appreciate your consideration in reviewing them. If there are additional questions please feel free to contact me at 858-480-5866.

Sincerely,



Karen Nishi  
Pharmacist  
Director of Regulatory Affairs

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as a safe vessel was preempted but that tankers were not free to ignore otherwise valid state or federal rules); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

<sup>3</sup> 47 U.S.C. § 152(a), (b).

<sup>4</sup> The TCPA provides that "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 ....". 47 U.S.S. § 227(e)(1) (emphasis added).