

## Reply to Comments by the Fax Ban Coalition and the National Federation of Independent Businesses

By: Jimmy A. Sutton

There are a few brief comments I would like to make in response to the filings of the above-named organizations (and others) that would like to become legal junk faxers.

First, there appears to be a significant and consistent legal history that the TCPA does not grant preemption of state laws governing interstate junk faxers. A recent Utah case has already been submitted to this proceeding which makes that reasoning crystal clear.

More recently, in *Gotlieb v. Carnival* (2006 WL 257103 (2d Cir. Feb. 3, 2006), the court directly considered this question. From FN 9:

"This Court is aware of no reasoned legal analysis supporting the belief expressed in the congressional reports that state laws could not reach such unsolicited, interstate advertisements."

Second, advertisers must comply with a host of state laws to do business in a forum state. For example, any advertiser wishing to do business in California must be registered with the Secretary of State, must have an agent for service, and must pay taxes on that business. As a specific example, mortgage brokers/bankers must have a license with and be registered with either the Department of Corporations or Department of Real Estate. They must disclose the license under which they would do business in any advertisements. They have to comply with a wide variety of state-specific laws re unfair business practices and consumer legal rights. Complying with, e.g., California junk fax laws, is a very minor extension to what is already required. The advertiser *must* already know in which forum state it is doing business.

Establishing preemption of state laws on junk faxing and telemarketing unreasonably would open the question as to whether state consumer protection, etc., laws go out the window as soon as a seller hires an out-of-state telemarketer or junk faxer to violate the state laws.

Finally, I encourage the Commission and staff to look back at all of these comments filed in this proceeding. There is not a single comment from a consumer asking to have state laws preempted—consumers feel protections are insufficient as they stand. There is not a single comment from a consumer stating that he/she would like to get more telemarketing calls or junk faxes and that state law prevents this.

Go back to the original purpose of the TCPA. Congressional intent was to protect privacy, prevent constant interruptions, and stop the trespass and conversion of consumer (and business, in the case of faxes) resources.

The law and case law is clear. The TCPA does not preempt more restrictive state laws even on interstate faxes.

*/s/ Jimmy A. Sutton*