

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
American West Advertising)	File No. EB-09-TC-395
)	
Apparent Liability for Forfeiture)	NAL/Acct. No. 201132170015
)	
)	FRN: 0020675757

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 22, 2011

Released: March 22, 2011

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that American West Advertising (“American West”)¹ apparently willfully and repeatedly violated section 227(b)(1)(B) of the Communications Act of 1934, as amended (“Act”), and section 64.1200(a)(2) of the Commission’s rules,² by delivering four unsolicited, prerecorded advertising messages to four consumers. Based on the facts and circumstances surrounding these apparent violations, we find that American West is apparently liable for a forfeiture in the amount of \$18,000.

II. BACKGROUND

2. The Telephone Consumer Protection Act of 1991 was enacted by Congress to address problems of abusive telemarketing, including unsolicited prerecorded calls.³ Section 227(b)(1)(B) prohibits any person from initiating “any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission.”⁴ Section 64.1200(a)(2) of the Commission’s rules provides exemptions to the prohibition for calls: 1) made for emergency purposes; 2) not made for a commercial purpose; 3) made for a commercial purpose but “not includ[ing] or introduc[ing] an unsolicited advertisement or constitut[ing] a telephone solicitation”;⁵ 4)

¹ According to publicly available information, American West is also doing business as American West Tour and Travel. Therefore, all references in this *NAL* to “American West” encompass American West Advertising as well as American West Tour and Travel. American West has offices at 2108 SW 152nd Street, Burien, WA 98166. Patricia Huth is listed as the contact person for American West. Accordingly, all references in this *NAL* to “American West” also encompass the foregoing individual and all other principals and officers of this entity, as well as the corporate entity itself.

² 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(2).

³ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, *codified at* 47 U.S.C. § 227.

⁴ 47 U.S.C. § 227(b)(1)(B).

⁵ An “unsolicited advertisement” is defined as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or
(continued....)

made to any person “with whom the caller has an established business relationship at the time the call is made”⁶; or 5) “made by or on behalf of a tax-exempt nonprofit organization.”⁷

3. On July 13, 2009, in response to a consumer complaint concerning unsolicited prerecorded calls, the Enforcement Bureau (“Bureau”) issued a citation⁸ to American West, pursuant to section 503(b)(5) of the Act.⁹ American West did not respond to the citation. Despite the citation’s warning that subsequent violations could result in the imposition of monetary forfeitures, we have received four additional consumer complaints indicating that American West continued to deliver unsolicited prerecorded calls after the date of the citation.¹⁰

III. DISCUSSION

A. Violations of the Commission’s Rules Restricting Unsolicited Facsimile Advertisements

4. We find that American West apparently violated section 227(b)(1)(B) of the Act and section 64.1200(a)(2) of the Commission’s rules by delivering four unsolicited, prerecorded advertising messages to the four consumers identified in the Appendix. According to the complaints, the unsolicited, prerecorded messages at issue informed the consumers that they had won awards of vacation packages, but did not offer a specific product for purchase. As the Commission stated in the *TCPA Revisions Report and Order*, however, the TCPA’s definition of unsolicited advertisement “does not require a sale to be made during the call in order for the message to be considered an advertisement.”¹¹ To the contrary, “offers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services” also qualify as unsolicited advertisements and are “prohibited to residential telephone subscribers, if not otherwise exempted.”¹² Thus, American West’s messages offering free vacations to

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permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5); 47 C.F.R. § 64.1200(f)(13). A “telephone solicitation” is defined as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person’s prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.” 47 U.S.C. § 227(a)(3). See also 47 C.F.R. § 64.1200(f)(12). We have previously found that “prerecorded messages containing free offers and information about goods and services that are commercially available are prohibited to residential telephone subscribers, if not otherwise exempt[].” *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14097-98 (2003) (*TCPA Revisions Report and Order*).

⁶ An “established business relationship” is defined as “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber’s purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.” 47 C.F.R. § 64.1200(f)(4).

⁷ 47 C.F.R. § 64.1200(a)(2).

⁸ Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-09-TC-395, issued to American West on July 13, 2009.

⁹ See 47 U.S.C. § 503(b)(5) (authorizing the Commission to issue citations to persons who do not hold a license, permit, certificate, or other authorization issued by the Commission, or who are not an applicant for any of those listed instrumentalities, for violations of the Act or of the Commission’s rules and orders).

¹⁰ See Appendix for a listing of the consumer complaints against American West requesting Commission action.

¹¹ See *TCPA Revisions Report and Order*, 18 FCC Rcd at 14097-98 ¶ 140 & n.477. See also note 6 *supra*.

¹² *Id.*

consumers were commercial in nature and constituted prohibited telephone solicitations. Moreover, the complaints indicate that the calls were not made for any emergency or noncommercial purposes, and were not on behalf of a tax-exempt, nonprofit organization, nor did the consumers have an established business relationship with American West or give American West permission to deliver the messages.¹³ As a result, American West's unsolicited, prerecorded messages fall outside the scope of any relevant exemption to the rules.¹⁴ Based on the entire record, including the consumer complaints, we therefore conclude that American West apparently violated section 227(b)(1)(B) of the Act and section 64.1200(a)(2) of the Commission's rules by delivering four unsolicited, prerecorded advertising messages on four separate occasions.

B. Proposed Forfeiture

5. After we have issued a citation to an entity, as we have in this case, section 503(b) of the Act authorizes the Commission to assess a forfeiture for each subsequent violation of the Act, or of any rule, regulation, or order issued by the Commission under the Act.¹⁵ In exercising such authority, we are to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁶ The maximum penalty for a violation of section 227(b)(1)(B) is \$16,000 for each violation occurring on or after September 2, 2008; here the instant violations occurred in March of 2010.¹⁷

6. We find that American West is apparently liable for a forfeiture in the amount of \$18,000. The Commission has previously considered \$4,500 per message to be an appropriate base amount for delivering an unsolicited, prerecorded advertising message to a residential telephone line.¹⁸

¹³ See, e.g., complaint dated March 24, 2010, from S. Scahill (stating that the consumer had never done any business with the company, never made an inquiry or application to the company, and never gave permission for the company to make the call). The complainants involved in this action are listed in the Appendix below.

¹⁴ See *supra* ¶ 2.

¹⁵ See 47 U.S.C. § 503(b)(1). The Commission has the authority under this section of the Act to assess a forfeiture against any person who has "willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act"; *Id.* The Commission has the authority under section 503(b)(5) of the Act to assess such a forfeiture penalty against any person who does not hold a license, permit, certificate or other authorization issued by the Commission or an applicant for any of those listed instrumentalities so long as such person (A) is first issued a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission nearest to the person's place of residence; and (C) subsequently engages in conduct of the type described in the citation. 47 U.S.C. § 503(b)(5).

¹⁶ See 47 U.S.C. § 503(b)(2)(E); see also *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17100-01 para. 27 (1997) (*Forfeiture Policy Statement*), *recon. denied*, 15 FCC Rcd 303 (1999).

¹⁷ Section 503(b)(2)(C) provides for forfeitures of up to \$10,000, which the Commission may adjust for inflation, for each violation in cases not covered by subparagraph (A) or (B), which address forfeitures for violations by licensees and common carriers, among others. See 47 U.S.C. § 503(b). The Commission has made such inflation adjustments and the current maximum statutory forfeiture in this case is \$16,000. See 47 C.F.R. § 1.80(b)(3)..

¹⁸ See *Warrior Custom Golf, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd. 23648, 23652 (Enf. Bur. 2004) (first NAL to address pre-recorded advertising messages); see also *Septic Safety, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd. 2179 (Enf. Bur. 2005); *Septic Safety, Inc.*, Forfeiture Order, 21 FCC Rcd. 6868 (Enf. Bur. 2006); *1 Home Lending Corporation, d/b/a Capital Line Financial, LLC.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd. 11852 (Enf. Bur. 2006); *1 Home Lending Corporation, d/b/a Capital Line Financial, LLC.*, Forfeiture Order, 24 FCC Rcd 2888 (2009).

We apply that base amount to each of these four apparent violations. Thus, a total forfeiture of \$18,000 is proposed. American West will have the opportunity to submit evidence and arguments in response to this *NAL* to show that no forfeiture should be imposed or that some lesser amount should be assessed.¹⁹

IV. CONCLUSION

7. We have determined that American West apparently violated section 227(b)(1)(B) of the Act and section 64.1200(a)(2) of the Commission's rules by delivering four unsolicited, prerecorded advertising messages to the four consumers identified in the Appendix. We have further determined that American West Advertising is apparently liable for a forfeiture in the amount of \$18,000.

V. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, pursuant to section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80 of the Rules, 47 C.F.R. § 1.80, and under the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that American West is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of \$18,000 for willful and repeated violations of section 227(b)(1)(B) of the Communications Act, 47 U.S.C. § 227(b)(1)(B), and section 64.1200(a)(2) of the Commission's rules, 47 C.F.R. § 64.1200(a)(2).

9. **IT IS FURTHER ORDERED THAT**, pursuant to section 1.80 of the Commission's rules,²⁰ within thirty (30) days of the release date of this *Notice of Apparent Liability for Forfeiture*, American West **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

10. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). American West shall also send electronic notification on the date said payment is made to Johnny.Drake@fcc.gov. Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

11. The response, if any, must be mailed both to: Marlene H. Dortch, Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, ATTN: Enforcement Bureau – Telecommunications Consumers Division; and to Richard Hindman, Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, and must include the NAL/Acct. No. referenced in the caption. Documents sent by overnight mail (*other than* United States Postal Service Express Mail) must be addressed to: Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743. Hand or messenger-delivered mail should be directed, without envelopes, to Marlene H. Dortch, Secretary, Federal Communications

¹⁹ See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

²⁰ 47 C.F.R. § 1.80.

Commission, Office of the Secretary, 445 12th Street, SW, Washington, DC 20554 (deliveries accepted Monday through Friday 8:00 a.m. to 7:00 p.m. only). See www.fcc.gov/osec/guidelines.html for further instructions on FCC filing addresses.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

13. **IT IS FURTHER ORDERED** that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by Certified Mail Return Receipt Requested and First Class mail to American West Advertising, Attention: Patricia Huff, 2108 SW 152nd Street, Burien, WA 98166.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

APPENDIX**Complainants and Violation Dates**

Complainants who received unsolicited prerecorded messages	Violation Date(s)
M. Wong	3/23/2010
S. Scahill	3/24/2010
K. Kozelka	3/25/2010
L. Johnson	3/26/2010