



To All Broadcast Clients

December 21, 2004

## ***Enforcement Bureau Issues Notice of Apparent Liability for Use of Unsolicited, Pre-Recorded Telephone Advertisements to Residential Numbers***

On December 8, 2004, the FCC's Enforcement Bureau issued a Notice of Apparent Liability for Forfeiture against Warrior Custom Golf, Inc. for delivering unsolicited, pre-recorded advertising messages to home telephone numbers. This decision is a warning that these marketing tactics are illegal, and that the FCC will strictly enforce its rules prohibiting these types of calls.

### ***The Restriction on Unsolicited, Pre-Recorded Advertising Messages***

Following a finding by Congress that consumers believe pre-recorded telephone calls to their homes "to be a nuisance and invasion of privacy," Section 227(b)(1)(B) of the Communications Act was adopted to ban calls "to any residential telephone line using an artificial or pre-recorded 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."

In Section 64.1200 of the Commission's rules, the following types of calls are considered to be exempt from the statutory restriction:

- Calls made for emergency purposes;
- Calls made for non-commercial purposes;

- Calls that are not telephone solicitations;
- Calls to persons "with whom the caller has an established business relationship at the time the call is made"; and
- Calls "made by or on behalf of a tax-exempt nonprofit organization."

### ***The Warrior Golf Decision***

In August 2002, a complaint filed with the FCC charged Warrior Golf with making three unsolicited, pre-recorded telephone calls to offer a consumer a chance to try out the company's custom golf clubs without charge and asked the consumer to call the company's toll-free number to take advantage of the offer. The FCC cited the company for violating the pre-recorded telephone solicitation rule and warned Warrior Golf that further violations could result in monetary forfeitures.

The company told the FCC that it had changed its marketing strategy to make sure that only individuals with whom the company had a "pre-existing business relationship" would receive such calls in the future. To qualify as a "pre-existing business relationship," the rule requires that there be a purchase by the consumer within 18 months

prior to the call or a voluntary inquiry from the consumer within three months before the call. However, in 2004 the FCC received a number of new complaints about substantially identical unsolicited, pre-recorded calls being made by Warrior Golf to the homes of individuals who were not established customers, including calls made *after* the consumer directly instructed the company not to call again.

In the recent Notice of Apparent Liability, the FCC concluded that Warrior Golf's unsolicited, pre-recorded calls did not qualify under any of the exemptions to the rule and violated the statute and the FCC's rules. The FCC has proposed a fine of \$23,500 — \$4,500 for each unsolicited call, and an additional \$10,000 fine for continuing to call one consumer after he had notified the company not to call him again.

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The success of the "do not call" registry has reduced the number of news stories about telephone solicitations to residential numbers, but, as shown by the FCC's decision, the rules restricting unsolicited calls to homes telephones are being strictly enforced by the FCC, and violations will result in substantial fines.

We are aware of marketing proposals that include telephone calls to home numbers. If presented with one, you should carefully review it to be certain that these calls are permitted under the FCC's rules.

This memorandum is intended only as a general discussion of these issues and should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. If you have questions regarding the legality of unsolicited, pre-recorded telephone messages, we recommend that you contact Robert-Paul Sagner at (202) 416-6783 or any other attorney in our office.