

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of )
Call-Em-All, LLC ) File No.: EB-TCD-12-00002355

CITATION AND ORDER

PRERECORDED MESSAGE VIOLATIONS

Adopted: May 4, 2015

Released: May 4, 2015

By the Chief, Telecommunications Consumers Division, Enforcement Bureau:

I. NOTICE OF CITATION

1. This CITATION AND ORDER (Citation) notifies Call-Em-All, LLC (Call-Em-All or Company), that it failed to comply with the provisions of the Communications Act of 1934, as amended (Act) and Commission’s rules (Rules) that prohibit making calls to cell phones using autodialers or artificial or prerecorded messages (robocalls) absent an emergency purpose or prior express consent. We therefore direct Call-Em-All to take immediate steps to comply with FCC Rules and the Telephone Consumer Protection Act’s (TCPA) prohibitions against unlawful robocalls. If Call-Em-All fails to comply with these laws, it may be liable for significant penalties, including fines of up to \$16,000 per call.

2. Notice of Duty to Comply with the Law: We issue this Citation pursuant to Section 503(b)(5) of the Act, which states that the Commission may not impose monetary forfeitures against non-regulatees who violate Commission Rules or the Act unless and until: (a) the Commission issues a citation to the violator; (b) the Commission provides the violator a reasonable opportunity to respond; and (c) the violator subsequently engages in conduct described in the citation.1 Accordingly, Call-Em-All is hereby on notice that it must comply with Section 227 of the Act and Section 64.1200 of the Commission’s Rules.2 If Call-Em-All subsequently engages in any conduct of the type this Citation describes — and specifically any violation of the TCPA and accompanying Rules — may be subject to civil penalties, including but not limited to, substantial monetary forfeitures. In assessing such forfeitures, the Commission may consider both the conduct that led to this Citation and the conduct following it.3

II. BACKGROUND

3. Robocalls made to consumers’ cell phones without consent or in the absence of an emergency are illegal. For more than two decades, Congress and the Commission have sought to protect consumers from harassing, intrusive, and unwanted robocalls to pagers, cell phones, smart phones, and other mobile devices. In 1991, Congress passed the TCPA and outlawed robocalls to mobile phones except in two limited circumstances: the two specific exceptions are calls made (1) for emergency purposes or (2) with the prior express consent of the called party. The Commission adopted regulations implementing the

1 See 47 U.S.C § 503(b)(5).

2 47 U.S.C. § 227, 47 C.F.R. § 64.1200, 47 C.F.R. § 64.1601(e).

3 See S. Rep. No. 95-580, 95th Cong., 1st Sess. at 9 (1977) (If a person or entity that has been issued a citation by the Commission thereafter engages in the conduct for which the citation of violation was sent, the subsequent notice of apparent liability “would attach not only for the conduct occurring subsequently but also for the conduct for which the citation was originally sent.”) (emphasis added).

TCPA in Section 64.1200 of the Rules,<sup>4</sup> and enforces the TCPA by conducting investigations and taking enforcement actions against violators.<sup>5</sup>

4. Call-Em-All offers a robocalling service whereby clients use the Company to make artificial or prerecorded voice calls to telephone numbers of the clients' choosing.<sup>6</sup> The Company is the registrant of the website, [www.call-em-all.com](http://www.call-em-all.com),<sup>7</sup> and conducts business under the name of Call-Em-All, LLC.<sup>8</sup> The Company offers several methods for clients to create prerecorded messages for the Company to send. For example, clients can choose to call a Company telephone number and have the Company's system call the client to record a message. Alternatively, clients can upload an audio file to the Company's website or use the Company's software to convert text into speech for a prerecorded message.<sup>9</sup> Once a prerecorded message is created, the Company will, for a fee, send the prerecorded message to a telephone list provided by the client.<sup>10</sup> The Company claims that it has worked with "tens of thousands of clients over nearly eight years."<sup>11</sup> The Company's clients include: employment staffing firms (using the service to communicate with temporary employees); non-profit organizations, such as youth sports leagues, schools, and churches (using the service to communicate game times, changes in schedules, and other time-sensitive information); and other clients that transmit political or solicitation messages.<sup>12</sup>

5. On February 15, 2013, the Telecommunications Consumers Division (TCD) of the FCC's Enforcement Bureau sent the Company a letter of inquiry (LOI) directing the Company to, among other things, provide: (1) a list of the telephone numbers that the Company called during the last two weeks of October, 2012, using prerecorded messages; (2) a list of the dates and times when the Company made the calls using the prerecorded messages; and (3) sound files of the delivered prerecorded messages.<sup>13</sup> On June 13, 2012, the Company filed a response to the LOI.<sup>14</sup> The Company's response included the

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<sup>4</sup> See 47 C.F.R. § 64.1200. See also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 (1992).

<sup>5</sup> See, e.g., *Dialing Servs., LLC*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 5537 (2014) (*Dialing Services*).

<sup>6</sup> See Letter from Andrew Lustigman, Olshan Frome Wolosky LLP, to Kristi Thompson and Lloyd Collier, Telecommunications Consumers Division, FCC Enforcement Bureau at 3 (Apr. 18, 2013) (on file in EB-TCD-12-00002355) (CEA Response) (stating that the Company's "voice broadcasting service is an online platform that can deliver one or more prerecorded messages to any quantity of selected phone numbers in a short amount of time."); Call-Em-All Website, Home Page, <https://www.call-em-all.com/> (last visited Apr. 6, 2015) ("Get with the best automated calling service around.").

<sup>7</sup> Although the Company is the registrant and directly controls a number of other domain names, TCD staff determined that most of these names linked directly back to [www.call-em-all.com](http://www.call-em-all.com). See CEA Response at 12 (listing the other domain names used by Call-Em-All).

<sup>8</sup> CEA Response at 12. See also Call-Em-All Website, Terms of Use, <https://www.call-em-all.com/Legal/TermsOfUse> (last visited Apr. 6, 2015) (listing Call-Em-All, LLC, in the first paragraph of the "Terms of Use").

<sup>9</sup> CEA Response at 14–15.

<sup>10</sup> See CEA Response at 15 (stating that the Company does not create phone lists for its clients); *id.* at 14 (discussing the methods by which clients can upload their phone lists onto the Company's website); Call-Em-All Website, Features, <https://www.call-em-all.com/Features> (last visited Apr. 6, 2015) ("We call-em-all so you don't have to . . . . You record a voice or text message, whether it's critical or routine, and we send it out to all your contacts.").

<sup>11</sup> CEA Response at 3.

<sup>12</sup> CEA Response at 2. The Company states that promotional solicitations represent a small percentage of the calls made by the Company's clients. *Id.*

<sup>13</sup> See Letter from Richard Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Brad Herrmann, President/Co-founder, Call-Em-All, LLC (Feb. 15, 2013) (on file in EB-TCD-12-00002355).

<sup>14</sup> CEA Response.

requested information for the last two weeks of October 2012, as well as spreadsheets indicating the dates and times that the Company made calls and the telephone numbers that the Company called during those months.<sup>15</sup>

### III. APPLICABLE LAW AND VIOLATIONS

6. Section 227(b)(1)(A)(iii) of the Communications Act and Section 64.1200(a)(1)(iii) of the Commission's Rules prohibit prerecorded voice messages and autodialed calls (including autodialed live calls and prerecorded or artificial voice messages) to cell phones and other mobile services, such as paging systems unless certain conditions are met. Specifically, the Act makes it unlawful "for any person . . . to make any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call."<sup>16</sup> The Commission implemented the statutory prohibition in its Rules without substantive change.<sup>17</sup> The prohibitions in the Act and the Rules are subject to only two exceptions: (1) calls made for emergency purposes and (2) calls made with the prior express consent of the called party.<sup>18</sup> Callers contending that they have the prior express consent to make prerecorded voice or autodialed calls to cell phones or other mobile service numbers have the burden of proof to show that they obtained such consent.<sup>19</sup>

7. TCD staff compared lists of the thousands of telephone numbers that Call-Em-All made robocalls to with an industry-standard, commercially available database of known assigned and ported wireless numbers to determine whether Call-Em-All made robocalls to wireless telephones.<sup>20</sup> From that analysis, TCD staff determined that Call-Em-All made *more than 55,000 autodialed or prerecorded message calls to cell phones*, in violation of Section 227(b)(1)(A)(iii) of the Act and Section 64.1200(a)(1)(iii) of the Rules.<sup>21</sup>

8. TCD staff reviewed over 300 of the sound files provided by Call-Em-All. Of the sound files used in the prerecorded message calls that were the basis of this Citation, most were recorded by the Company's clients for either political or advertising purposes and none indicated that the Company made

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<sup>15</sup> CEA Response at 24, Attachments.

<sup>16</sup> 47 U.S.C. § 227(b)(1), (b)(1)(A)(iii). *See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (discussing unlawful telemarketing calls to wireless numbers and explaining that statutory prohibition "encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls").

<sup>17</sup> 47 C.F.R. § 64.1200(a)(1)(iii) (making it unlawful "to initiate any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call."). As explained above, we interpret the term "initiate" in the Rule as intended to have the same meaning as "make" as used in Section 227(b)(1)(A) of the Act.

<sup>18</sup> *See* 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

<sup>19</sup> *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd 559, 565, para. 10 (2008) (concluding that "[s]hould a question arise as to whether express consent was provided, the burden will be on [the caller] to show it obtained the necessary prior express consent.").

<sup>20</sup> *See* Interactive Marketing Solutions, Inc., Website, <https://www.ims-dm.com/mvc/index.php> (last visited Apr. 6, 2015). Interactive Marketing Solutions, Inc., is a member of the Direct Marketing Association and bills itself as "the country's largest single-source supplier" of data identifying telephone numbers that have been assigned or ported to wireless devices, "to help businesses comply with state and federal legislation." *Id.*

<sup>21</sup> By making calls, Call-Em-All necessarily "initiates" calls for the purposes of Section 64.1200(a)(1)(iii) of the Commission's Rules. *See Dialing Services, LLC*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd at 5542–5545, paras. 13–18.

the calls for an emergency purpose.<sup>22</sup> Therefore, we conclude that none of the Company's calls that led to this Citation were made for an emergency purpose. Moreover, Call-Em-All provided no evidence of prior express consent for any of the calls that led to this Citation.<sup>23</sup> Therefore, we conclude that these calls were made to cell phones without the prior express consent of the recipients.<sup>24</sup>

9. Independently, TCD staff randomly chose 10 cell phone numbers that Call-Em-All called with a prerecorded message in October 2012 and spoke with each call recipient. A chart listing these 10 randomly identified cell phone numbers and the dates and times that Call-Em-All made autodialed calls and delivered prerecorded messages to the recipients is attached at the Appendix. Without exception, each recipient denied giving anyone permission to robocall their respective cell phones at any time.<sup>25</sup> This further shows that Call-Em-All did not have the prior express consent of these called parties to make an autodialed, prerecorded call to their mobile phones.

10. Based on the record developed in this case, the Enforcement Bureau, acting through its delegated authority, finds that Call-Em-All made one or more calls with prerecorded voice messages in violation of Section 227(b)(1)(A)(iii) of the Act and Section 64.1200(a)(1)(iii) of the Rules.<sup>26</sup>

#### IV. OPPORTUNITY TO RESPOND TO THIS CITATION

11. Call-Em-All may respond to this Citation within thirty (30) calendar days from the release date of this Citation by any of the following methods: (1) a written statement, (2) a teleconference interview, or (3) a personal interview at the Commission Field Office nearest to Call-Em-All's place of business. The Commission Field Office nearest Call-Em-All is located in Dallas, Texas.

7. If Call-Em-All requests a teleconference or personal interview, contact Kristi Thompson at (202) 418-1318. We note that such teleconference or interview must take place within 30 calendar days of the release date of this Citation. If Call-Em-All prefers to submit a written response with supporting documentation, it must send the response within thirty (30) calendar days of the release date of this Citation to the contact and address provided in paragraph below.

8. All written communications should be sent to the address below.

Kristi Thompson  
Deputy Division Chief, EB-TCD  
Room 4-C220  
Federal Communications Commission  
445 12th St SW, Washington DC 20554  
**Re: EB-TCD-12-00002528**

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<sup>22</sup> See 47 C.F.R. § 64.1200(f)(4) (stating that "emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.").

<sup>23</sup> In response to the LOI's request for proof of any prior express consent and/or emergency purposes of the prerecorded messages, Call-Em-All claimed that the information is inapplicable because the Company does not place calls. With regard to prior express consent, the Company stated that it strives to educate its clients about which calls require express consent, and provided a spreadsheet of its disclosures to its clients on this topic. CEA Response at 24, Attachments. This spreadsheet, however, did not provide proof of prior express consent from any consumers to receive any prerecorded messages on their cell phones, as required by the Act and the Rules. See 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

<sup>24</sup> See *supra* note 19.

<sup>25</sup> See Declaration of Lloyd Collier, Attorney Advisor, Telecommunications Consumers Division, FCC Enforcement Bureau (Jan. 9, 2014) (on file in EB-TCD-12-00002355).

<sup>26</sup> 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

9. Upon request, the Commission will make reasonable accommodations for persons with disabilities. If applicable, Call-Em-All should provide a description of the accommodation required, and include as much detail as possible, and also provide a telephone number and other contact information. Call-Em-All should allow at least five business days advance notice; last minute requests will be accepted, but may be impossible to fill. Call-Em-All should send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer & Governmental Affairs Bureau:

For sign language interpreters, CART, and other reasonable accommodations:  
202-418-0530 (voice), 202-418-0432 (tty);

For accessible format materials (braille, large print, electronic files, and audio format):  
202-418-0531 (voice), 202-418-7365 (tty).

10. We advise Call-Em-All that it is a violation of Section 1.17 of the Rules<sup>27</sup> for any person to make any false or misleading written or oral statement of fact to the Commission. Specifically, no person shall:

(1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and

(2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.<sup>28</sup>

11. Further, the knowing and willful making of any false statement, or the concealment of any material fact, in reply to this Citation is punishable by fine or imprisonment.<sup>29</sup>

12. Violations of Section 1.17 of the Rules or the criminal statute referenced above may result in further legal action, including monetary forfeitures pursuant to Section 503 of the Act.

13. Finally, we warn Call-Em-All that, under the Privacy Act of 1974,<sup>30</sup> Commission staff will use all relevant material information before it, including information disclosed in interviews or written statements, to determine what, if any, enforcement action is required to ensure Call-Em-All's compliance with the Act and Rules.

## V. FUTURE VIOLATIONS

14. If, after receipt of this Citation, Call-Em-All again violates Section 227 of the Act or Section 64.1200 of the Rules by engaging in conduct of the type described herein, the Commission may impose sanctions for each such violation. For example, the Commission may impose monetary forfeitures. The Commission may impose forfeitures not to exceed \$16,000 for each such violation or each day of a continuing violation, and up to \$112,500 for any single act or failure to act.<sup>31</sup> The Commission may further adjust the forfeiture reflecting enumerated statutory factors, which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of

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<sup>27</sup> 47 C.F.R. § 1.17.

<sup>28</sup> 47 C.F.R. § 1.17(a)(1)–(2).

<sup>29</sup> 18 U.S.C. § 1001.

<sup>30</sup> 5 U.S.C. § 552a(e)(3).

<sup>31</sup> See 47 U.S.C. § 503; 47 C.F.R. § 1.80(b). This amount is subject to further adjustment for inflation. See 47 C.F.R. § 1.80(b)(9).

culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.<sup>32</sup> Further, as discussed above, the Commission may assess forfeitures on both the conduct that led to this Citation and the conduct following it.<sup>33</sup>

## VI. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) and 4(j) of the Act,<sup>34</sup> Call-Em-All, LLC, must cease and desist from making autodialed or prerecorded or artificial voice message calls to wireless phones unless such calls are made (1) for an emergency purpose, or (2) with the prior express consent of the called party, in accordance with Section 227(b)(1)(A)(iii) of the Act and Section 64.1200(a)(1)(iii) of the Rules.<sup>35</sup>

16. **IT IS FURTHER ORDERED** that a copy of this Citation and Order shall be sent by first class mail and certified mail, return receipt requested, to Brad Hermann, President/Co-Founder, Call-Em-All, LLC, 2611 Internet Blvd, Suite 120, Frisco, TX 75034-9096, and to Andrew B. Lustigman, Esq., Olshan Frome Wolosky LLP, Park Avenue Tower, 65 East 55th Street, New York, NY 10022.

FEDERAL COMMUNICATIONS COMMISSION

Richard A. Hindman  
Division Chief

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<sup>32</sup> See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(8).

<sup>33</sup> See *supra* paragraph **Error! Reference source not found.**

<sup>34</sup> 47 U.S.C. §§ 154(i), 154(j).

<sup>35</sup> 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

## APPENDIX

## Call-Em-All

Prerecorded message calls made to wireless telephones without subscriber consent<sup>1</sup>

Date and Time of Call <sup>2</sup>	Wireless Phone Number Dialed	Prerecorded Message
10/30/2012 09:29	218 [REDACTED]	1849652.au
10/30/2012 09:29	218 [REDACTED]	1849652.au
10/25/2012 15:31	336 [REDACTED]	1881338.au
10/25/2012 15:32	336 [REDACTED]	1881338.au
10/25/2012 15:37	336 [REDACTED]	1881338.au
10/25/2012 15:38	336 [REDACTED]	1881338.au
10/25/2012 15:35	336 [REDACTED]	1881338.au
10/30/2012 11:15	646 [REDACTED]	1893623.au
10/30/2012 11:16	347 [REDACTED]	1893623.au
10/30/2012 11:16	347 [REDACTED]	1893623.au

<sup>1</sup> See Declaration of Lloyd Collier, Attorney, Telecommunications Consumers Division, FCC Enforcement Bureau (Jan. 9, 2014) (on file in EB-TCD-12-00002355).

<sup>2</sup> See CEA Response, Text Document attachment, [REDACTED].txt. The entry information listed in this Appendix appears in the call detail records produced by Call-Em-All in response to the Bureau's February 15, 2013, LOI.