CLIENT ALERTS & INSIGHTS

Ringless Voicemail: Don't Believe The TCPA Compliance Hype

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Ringless Voicemail ("RVM"), also known as direct-to-voicemail, is a growing telecommunications technology that allows telemarketers and businesses to "drop" voicemails directly into a consumer's telephone voicemail. To do so, companies use technology that sends a message via server-to-server communication, bypassing the need for a consumer's telephone to ring. From the consumer's perspective, there is no ringing telephone or missed call notification. All the consumer receives is a voicemail (and in the case of a cell phone, a notification that a voicemail message has been left).

RVM technology provides companies the ability to reach a massive amount of people with low cost by avoiding typical telephony charges. Advocates argue that RVM is more time efficient due to the large number of telephone calls that are unanswered and is also less intrusive on consumers because it does not result in a ringing telephone. Critics argue that the practice is potentially more intrusive by filling up voicemail inboxes, particularly if RVM technology gains more widespread use.

Regardless of the merits of RVM in customer contact, a critical issue is whether a business's intended use of RVM is compliant with federal and state laws, and particularly the Telephone Consumer Protection Act ("TCPA"). Many RVM providers market their products as TCPA "compliant" because RVM does not place calls in the traditional sense and because calling lists may be scrubbed against the national do-not-call ("DNC") registry prior to sending any messages. These claims of compliance should be viewed skeptically.

It is true that the TCPA, and similar state laws, generally regulate "calls" to telephone numbers and that RVM does not place a "call" in the traditional sense. However, the Federal Communications Commission ("FCC") has long held that sending text messages-another technology that relies on server-to-server communication and does not result in a ringing telephone-constitutes a "call" under the TCPA. Given that the TCPA was enacted in 1991, before text messaging or RVM existed, courts and the FCC have consistently recognized that the TCPA and its terms should be construed in relation to new technologies that emerge that could attempt to circumvent the statute. Applying this framework, every single court to have addressed the issue to date has concluded that the use of RVM still constitutes a "call" and is subject to the TCPA, because it constitutes an attempt to communicate by telephone. Indeed, one RVM provider previously petitioned the FCC to issue an order stating that RVM was not subject to the TCPA, only to withdraw the petition after the FCC sought public comment and received a significant negative consumer response.

Even if RVM technology is subject to the TCPA, that does not make it inherently unlawful to use. Rather, the business must evaluate whether its intended use of RVM is subject to any specific restrictions in the TCPA. And while compliance with the DNC registry is certainly important, it is just

one component of that inquiry. Just because a company's use of RVM is DNC compliant does not mean that it is TCPA compliant.

For example, even if a telephone number is not on the DNC registry, it may violate the TCPA if a prerecorded telemarketing message is left on either a residential landline or a cellular telephone, unless the caller has the prior express written consent of the called party. Even if not for telemarketing purposes, it is still generally a violation of the TCPA to leave a prerecorded message on a cellular telephone without some other form of consent (not necessarily written). And even if a company's use of RVM is TCPA compliant, there are still other laws that must be considered. For example, in 2018 the State of Florida amended its telephone solicitation laws to expressly include RVM technology within its scope.

The above are simply illustrative examples. While RVM technology has great potential, there is an equally grave potential for misstep. The TCPA imposes penalties of up to $1,500 per call in violation of the statute. Given the large number of TCPA class action lawsuits, improper use of RVM may result in potentially crippling damages for a business, far exceeding whatever benefit or cost-savings is realized in the short-term.

Do not simply rely on an RVM provider's assurances or marketing materials that its product is "TCPA compliant." Businesses must independently evaluate their intended use of any RVM campaigns, including who is being called, the type of telephone number being calls, the purpose of the message, and (if applicable) the type of consent necessary, relative to the TCPA's requirements to ensure compliance.

For more information on this topic, contact David M. Krueger at dkrueger@beneschlaw.com or 216.363.4683.