

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
)	
Petition for Declaratory Ruling of All About the)	CG Docket No. 02-278
Message, LLC)	
)	
To: The Commission)	

**PETITION FOR DECLARATORY RULING OF
ALL ABOUT THE MESSAGE, LLC**

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EXECUTIVE SUMMARY

All About the Message, LLC (“AATM”) respectfully requests the Federal Communications Commission declare that the delivery of a voice message directly to a voicemail box does not constitute a call that is subject to the prohibitions on the use of an automatic telephone dialing system (“ATDS”) or an artificial or prerecorded voice that are set forth in the Telephone Consumer Protection Act (“TCPA”), at 47 U.S.C. § 227(b)(1)(A)(iii), and the Commission’s rules implementing that provisions, at 47 C.F.R. § 64.1200(a)(1)(iii) (“Regulations”). Alternatively, AATM requests that the Commission grant a waiver, pursuant to 47 C.F.R. § 1.3, with respect to any voicemail message delivered by AATM or on behalf of an AATM customer to any recipient.

The TCPA proscribes the use of certain equipment “to *make any call* (other than a call made for emergency purposes or made with the prior express consent of the called party) 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” 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). The TCPA does not impose liability for voicemail messages, delivered directly to a voicemail service provider, that never pass through a person’s cellular telephone line, and never result in a charge to the subscriber for the delivery of the message. Such conduct falls outside the plain statutory language and the Commission’s Regulations. What’s more, the Commission lacks the authority to regulate voicemail service.

If the Commission chooses not to grant the aforementioned declaratory relief, AATM alternatively requests that the Commission grant a waiver, pursuant to 47 C.F.R. § 1.3, with respect to any voicemail message delivered by AATM or on behalf of an AATM customer to any recipient. AATM submits that the waiver should be retroactive to the date that Section 64.1200(a)(1)(iii) took effect. The TCPA's legislative history makes clear our responsibility to balance legitimate business and consumer interests, and a retroactive waiver would serve the public interest because AATM and its customers have attempted to comply with the Commission's rules, but an adverse ruling could subject them to potentially substantial damages, as well as possible liability for forfeitures under the Communications Act. In contrast, construing direct to voicemail technology to violate Section 64.1200(a)(1)(iii) incentivizes plaintiffs to pursue potentially devastating class actions based on technical violations of an ambiguous rule—even though Congress never expressed an intention to regulate voicemail or to permit a private right of action arising from the receipt of voicemail.

Accordingly, AATM requests the Commission declare that the use of direct to voicemail insertion technology does not violate the TCPA or, in the alternative, grant a retroactive waiver to AATM and its customers for the use of such technology.

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Pursuant to Section 1.2 of the Commission’s Rules,¹ All About the Message, LLC (“AATM”) respectfully requests the Federal Communications Commission declare that the delivery of a voice message directly to a voicemail box does not constitute a “call” that is subject to the prohibitions on the use of an automatic telephone dialing system (“ATDS”) or an artificial or prerecorded voice that are set forth in the Telephone Consumer Protection Act (“TCPA”), at 47 U.S.C. § 227(b)(1)(A)(iii), and the Commission’s rules implementing that provisions, at 47 C.F.R. § 64.1200(a)(1)(iii).

If the Commission chooses not to grant the aforementioned declaratory relief, AATM alternatively requests that the Commission grant a waiver, pursuant to 47 C.F.R. § 1.3, with respect to any voicemail message delivered by AATM or on behalf of an AATM customer to any recipient. AATM submits that the waiver should be retroactive to the date that Section 64.1200(a)(1)(iii) took effect.

¹ 47 C.F.R. § 1.2.

I. INTRODUCTION AND BACKGROUND.

Formed in 2016, AATM is a white label distributor of direct to voicemail insertion technology developed by Stratics Networks, Inc. (“Stratics”). AATM’s customers sign up through AATM to use Stratics’ software and platform for delivery of voicemail messages directly to consumers’ voicemail services.

The TCPA has proven lucrative for plaintiffs’ attorneys and has resulted in a cottage industry for class actions. Although the TCPA does not indicate Congress intended for the statute to serve as a basis for class actions, such actions have proliferated, likely because the TCPA presents no overall damages cap. As the Commission is certainly aware, these class actions have exposed businesses to multimillion dollar lawsuits and threaten businesses, large and small, for technical violations that have little to no impact on consumers.

As explained herein, a direct to voicemail service platform is not covered by the TCPA, and the use of direct to voicemail insertion technology does not “make a call” to a wireless phone number as contemplated by Section 227, of Title 47 of the U.S. Code. What is more, consumers are not charged for delivery of the voicemail communications. Further, from a broader policy perspective, the use of direct to voicemail technology serves an important public purpose. The act of depositing a voicemail on a voicemail service without dialing a consumers’ cellular telephone line does not result in the kind of disruptions to a consumer’s life—dead air calls, calls interrupting consumers at inconvenient times, or delivery charges to consumers—which the TCPA was designed to prevent.

This subject is vulnerable to a floodgate of new litigation over the offering and use of lawful enhanced information services. AATM respectfully requests that the Commission declare that the use of direct to voicemail insertion technology does not violate the TCPA. Alternatively,

to avoid ensnaring AATM's customers unwittingly in a trap that the Legislature never intended to set, AATM requests that the Commission grant AATM and its customers a retroactive administrative waiver of the Commission's rule implementing the TCPA for its use of direct to voicemail insertion technology.

II. THE TECHNOLOGY AT ISSUE AVOIDS DIALING THE CELLULAR TELEPHONE LINES OF CONSUMERS.

Stratics is a provider of various teleservices software and related products, including a proprietary direct to voicemail insertion solution.²

Stratics' voicemail insertion solution bypasses the wireless telephone and telephone subscriber altogether, creating a direct communication between Stratics' servers and the voicemail system of the carrier telephone company.³ Stratics' proprietary technology, which interconnects the carrier telephone companies' voicemail servers directly with Stratics' internal network, allows Stratics' computers to communicate directly with the carrier telephone companies' computers without placing a direct call to the subscriber.⁴ Voicemails delivered by the voicemail insertion solution are not delivered through telephone calls to the recipient.⁵

Stratics' voicemail insertion technology delivers voicemail messages without a resulting charge to the subscriber for such delivery, or appearing as a received call on the cellular telephone bill.⁶ During the transmission of a voicemail message, the software uses a data

² See Declaration of Chris Blaylock, attached herewith as Appendix 1 ("Blaylock Decl."), ¶ 2.

³ *Id.* ¶ 6, Exs. A-B, D.

⁴ *Id.* ¶ 7, Exs. A, D.

⁵ *Id.* ¶ 6, Exs. A-B, D.

⁶ *Id.* ¶ 58, Ex. A.

channel to initiate the connection to voicemail servers.⁷ The voicemail insertion technology creates a direct path between the servers and the carrier telephone company's voicemail infrastructure itself, only passing a message to the server if the voicemail is set up and is capable of accepting messages at that moment.⁸ Subscribers may either retrieve the message from the carrier telephone companies' voicemail service if the subscriber chooses to do so at a time of the subscriber's choosing, or to simply delete the message.⁹

III. STATUTORY AND REGULATORY STRUCTURE.

A. The TCPA.

In 1991, Congress enacted the TCPA by adding section 227 to Title II of the Communications Act of 1934 ("Communications Act"). See Pub. L. No. 102-243, 105 Stat. 2394 (1991); 47 U.S.C. § 227. The TCPA provides, in relevant part:

- (b) Restrictions on use of automated telephone equipment
- (1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) *to make any call* (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(iii) 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, unless such call is made solely to collect a debt owed to or guaranteed by the United States¹⁰

⁷ *Id.* ¶ 9, Exs. A-B, D.

⁸ *Id.* ¶ 9, Exs. A-B, D.

⁹ *Id.* ¶ 10, Exs. A-B, D.

¹⁰ 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

Congress also directed the Commission to “prescribe regulations to implement the requirements of this subsection”¹¹ The Commission, in turn, reiterated that there can be no liability unless a call is placed “[t]o 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.”¹² In addition to enforcement actions by the Commission and state attorneys general, the TCPA creates a private right of action to enforce its terms.¹³

B. Title II of the Communications Act Does Not Regulate Voicemail Service.

Cellular telephone and other radio (or wireless) common carrier services are governed by Title II of the Communications Act, as amended by the Telecommunications Act of 1996.¹⁴ Title II of the Communications Act, which includes the TCPA, expressly does *not* regulate voicemail.

The Communications Act identifies two categories of services that common carriers provide: “telecommunications services” and “information services.”¹⁵ “The term ‘telecommunications service’ means the offering of telecommunications¹⁶ for a fee directly to the public, or to such classes of users as to be effectively available directly to the public,

¹¹ 47 U.S.C. § 227(b)(2).

¹² 47 C.F.R. § 64.1200(a)(1)(iii).

¹³ *See* 47 U.S.C. § 227(c)(5) (providing for statutory damages of no less than \$500 per call and/or injunctive relief).

¹⁴ 47 U.S.C. § 201 *et seq.*; Pub. L. No. 104-104, 110 Stat 56 (1996).

¹⁵ *Id.*

¹⁶ In turn, the term “telecommunications” means “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(50). In other words, a traditional phone call unbundled from any other service.

regardless of the facilities used.”¹⁷ In contrast, “[t]he term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications”¹⁸ Information services include “enhanced services.”¹⁹

Whereas telecommunications services are subject to Title II of the Communications Act, information or enhanced services are expressly “not regulated under title II of the Act.”²⁰ The Commission has determined that voicemail is an enhanced service, and not a telecommunications service.²¹ Accordingly, the Commission, through its Regulations, has not issued rules limiting, curtailing, or controlling voicemail service under the TCPA.

¹⁷ 47 U.S.C. § 153(53).

¹⁸ 47 U.S.C. § 153(24).

¹⁹ See *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 F.C.C. Rcd. 20599 ¶ 314 (1998) (“*BellSouth Louisiana Order*”) (stating that “the definition of ‘information services’ under the 1996 Act includes those services previously classified as ‘enhanced services,’” and noting that information services and telecommunications services are “mutually exclusive”); see also *U.S. W. Commc’ns v. Hix*, 183 F. Supp. 2d 1249, 1253 (D. Colo. 2000) (“[T]he FCC has confirmed that ‘information services’ are synonymous with ‘enhanced services.’”).

²⁰ 47 C.F.R. § 64.702(a).

²¹ *BellSouth Louisiana Order*, 13 F.C.C. Rcd. 20599 ¶ 314; see also *MCI Telecommunications Corp. v. Sprint-Florida Inc.*, 139 F. Supp. 2d 1342, 1346 (N.D. Fla. 2001) (noting that the “FCC has . . . determined that voice mail is “information service,” not “telecommunications service,” within the meaning of the Act’s definitions”); *U.S. W. Commc’ns*, 183 F. Supp. 2d at 1253 (“[V]oicemail is an ‘enhanced service.’”); *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket Nos. 96-115 and 96-149, Order and Further Notice of Proposed Rulemaking, 13 F.C.C. Rcd. 8061, ¶ 72 (1998) (“Because information services generally, and in particular those few identified in the record (*i.e.*, call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, and Internet access services), are provided to consumers independently of their telecommunication service, they neither are used by the carrier nor necessary to the provision of such carrier’s service.”).

IV. THE COMMISSION SHOULD CLARIFY THAT THE USE OF DIRECT TO VOICEMAIL INSERTION TECHNOLOGY IS NOT COVERED BY THE TCPA.

The TCPA governs the use of certain automated technology to place calls to consumers' phones; it does not impose liability for the receipt of voicemail messages that do not pass through consumers' phone lines.

A. The TCPA Does Not Apply to Direct to Voicemail Insertion Technology.

The TCPA proscribes the use of certain automated equipment “to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) . . . 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”²² The statutory structure and the Commission's implementing regulations are clear: TCPA liability exists only when an autodialed or pre-recorded call is made to the mobile telephone number of a consumer or a telephone number of another wireless service for which the consumer is charged. Voicemail service, and the process by which voicemail is deposited on a carrier's platform for subsequent access by a subscriber, is neither a call made to a mobile telephone number nor a call for which a consumer is charged, and, indeed, is a service that is not regulated at all.

The Commission imposes certain requirements on voicemail service providers to ensure that the service is accessible to individuals with disabilities. These requirements are imposed pursuant to Title I of the Communications Act, and the regulations are not among those imposed as a common carrier regulation. *See* 47 C.F.R. §§ 7.1-7.23; 47 U.S.C. § 255.

²² 47 U.S.C. § 227(b)(1)(A)(iii).

1. The Process by Which Messages are Deposited Directly on a Voicemail Service Does not Involve Making a Call to a Cellular Telephone Number.

The TCPA does not define the term “call,”²³ but the Commission has explicitly stated that the TCPA’s restrictions on the use of ATDS “encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.”²⁴ Thus, in at least the context of the section governing autodialed and prerecorded calls, the TCPA and the Commission contemplate that a call involves dialing a telephone number for a communication directly to the wireless handset of a subscriber.

This reasoning is further supported by the fact that the Commission has opined that “a call placed to a wireline number that is then forwarded, at the subscriber’s sole discretion and request, to a wireless number or service, does not violate the ban on autodialed and prerecorded message calls to wireless numbers.”²⁵ In other words, this section of the TCPA covers only calls made directly to wireless telephone lines.²⁶ Indeed, courts applying the Commission’s rules to private civil actions have previously noted that to state a claim under the TCPA, “a plaintiff must

²³ See 47 U.S.C. § 227(b)(1).

²⁴ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd. 14014, 14115, ¶ 165 (2003); see also *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953-54 (9th Cir. 2009) (concluding that the FCC’s interpretation—that a call includes both voice and text provided the call is made “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service . . .”—is reasonable because “the ordinary, contemporary, and common meaning of the verb ‘to call’ . . . in this context [is] ‘to communicate with or try to get into communication with a person by a telephone’”).

²⁵ *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 20 F.C.C. Rcd. 3788, 3807 ¶ 48 (2005).

establish that a defendant *made any call* using an automatic telephone dialing system [or a prerecorded or artificial voice] *to his or her cellular telephone* for a non-emergency purpose.”²⁷

Stratics is able to deliver messages directly to voicemail without dialing a consumer’s cellular telephone number and in such a way that the consumer is unable to receive a voice channel communication.²⁸ Stratics’ direct to voicemail insertion technology bypasses the telephone and subscriber altogether, creating direct communication between Stratics’ servers and the voicemail system of the carrier telephone company.²⁹ Stratics’ technology interconnects the carrier telephone companies’ voicemail servers directly with Stratics’ internal network.³⁰ This allows Stratics’ computers to communicate directly with the carrier telephone companies’ computers without ever placing a call to the subscriber.³¹ Consumers may then retrieve the messages from the voicemail service provider, often by dialing a separate phone number and entering a password.³²

²⁶ See *Satterfield*, 569 F.3d at 954 (“The FCC’s interpretation of 47 U.S.C. § 227(b)(1)(A) is consistent with the dictionary’s definition of call in that it is defined as ‘to communicate with or try to get into communication with a person *by telephone*.’” (emphasis added)).

²⁷ *Reed v. Morgan Drexen, Inc.*, 26 F. Supp. 3d 1287, 1290 (S.D. Fla. 2014) (emphasis added); see also *Reichman v. Poshmark, Inc.*, No. 16-2359, 2017 WL 436505, at *4 (S.D. Cal. Jan. 3, 2017) (“To state a claim under the TCPA, a plaintiff must allege: ‘(1) *the defendant called a cellular telephone number*; (2) using an automatic telephone dialing system; (3) without the recipient’s prior express consent.’” (quoting *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012) (emphasis added))).

²⁸ Blaylock Decl., ¶¶ 2-4, 7-8, Exs. A-B, D.

²⁹ *Id.* ¶ 6, Exs. A-B, D.

³⁰ *Id.* ¶ 7, Exs. A-B, D.

³¹ *Id.*

³² *Id.* ¶ 10, Exs. A-B, D.

Notably, while neither the courts nor the Commission has ruled on whether a direct to voicemail message constitutes a “call” for purposes of the TCPA, the Canadian Radio-Television and Telecommunications Commission has declared that “[t]he use of voicemail broadcast³³ for making telemarketing telecommunications is not currently regulated by the Commission.”³⁴ The same common sense approach should be applied here: Not only does direct to voicemail technology not dial consumers’ cellular telephone lines, but the conduct at issue—the act of depositing a voicemail message directly on a voicemail service without ever dialing a cellular telephone—is expressly unregulated. Accordingly, the Commission should find that voicemail insertion technology does not implicate a call to cellular telephone line under the TCPA.

2. Consumers Are Not Charged for Direct to Voicemail Messages.

Alternatively, if a call is not made to a consumer’s cell phone, liability only exists under the TCPA if a call is made to “any [other] service for which the called party is charged”³⁵ As discussed, direct to voicemail technology results in the insertion of messages on voicemail service providers’ servers.³⁶ Stratics’ voicemail insertion technology, for example, delivers voicemail messages without showing up on the recipient’s phone bill.³⁷

³³ The term “voicemail broadcast” is defined as “a type of telecommunication whereby a recorded message is delivered directly into a voice mailbox without interrupting the voice mailbox subscriber’s activities in real time.” *Telecom Decision*, CRTC 2007-48, ¶ 471.

³⁴ *Id.*

³⁵ 47 U.S.C. § 227(b)(1)(A)(iii); *see also* *Osoorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1257-58 (11th Cir. 2014) (“[W]e conclude that the phrase ‘for which the called party is charged for the call’ modifies only ‘any service’ and not the other terms of the series.”).

³⁶ Blaylock Decl., ¶ 6, Exs. A-B, D.

³⁷ *Id.* ¶ 8, Ex. A.

Because direct to voicemail technology does not involve calling a cellular telephone handset, and does not result in a charge to the consumer for the delivery of the voicemail message, the Commission should find that the use of the technology is permissible under the TCPA.

B. Congress Never Intended to Regulate Direct to Voicemail Technology Under the TCPA, and Imposing Liability for the Use of Direct to Voicemail Technology does not Advance the Goals of the TCPA.

As noted, “[t]he TCPA is designed to protect individual consumers from receiving intrusive and unwanted *telephone calls*.”³⁸ The TCPA was enacted to “protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, *automated telephone calls to the home* and to facilitate interstate commerce by restricting certain uses of facsimile machines and automatic dialers.”³⁹ The TCPA was enacted in response to an increasing number of consumer complaints arising from the increased number of telemarketing *calls*.⁴⁰ “In particular, Congress reported, ‘[m]any consumers are outraged over the proliferation of intrusive, nuisance [telemarketing] calls to their *homes*.’”⁴¹ Comments made on the Senate floor by the TCPA’s sponsor, Senator Hollings, reflect the intended scope of the Act: “Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.”⁴²

³⁸ *Reed*, 26 F. Supp. 3d at 1290 (emphasis added).

³⁹ S. Rep. No. 102-178, at 1 (1991), reprinted in 1991 U.S.C.C.A.N. 1968.

⁴⁰ *See id.* at 2.

⁴¹ *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012) (emphasis added) (addressing similar concerns with respect to calls to the plaintiff’s cellular phone, and citing TCPA, 105 Stat. 2394, note following 47 U.S.C. § 227 (Congressional Findings)).

⁴² *Mims*, 565 U.S. at 384 (citing 137 Cong. Rec. 30821-30822 (1991)).

Tellingly, when courts have been called upon to “constru[e] the extent and contour of [the TCPA], courts consistently and properly look to the purpose and history of the statute.”⁴³ Courts “broadly recognize that not every text message or call constitutes an actionable offense; rather, the TCPA targets and seeks to prevent ‘the proliferation of intrusive, nuisance *calls*.’”⁴⁴ The Ninth Circuit, for example, emphasizes that courts should look to the surrounding circumstances in determining whether particular calls “run afoul of the TCPA,” and in so doing, courts “approach the problem with a measure of common sense.”⁴⁵ “[C]ontext is indisputably relevant to determining whether a particular call is actionable under the TCPA.”⁴⁶

The TCPA was never designed to protect a person from the receipt of voicemails not left on the person’s phone. *Voicemail* messages delivered directly to a voicemail service provider do not implicate the same concerns as autodialed *telephone calls*. There is no voice channel through which a voice communication can be made, and no function on the telephone that would allow the subscriber to answer the “call” or communicate back instantaneously. Unlike the computerized dialing methods the statute was designed to prevent, direct to voicemail technology does not make a “call” to a cellular telephone line and does not involve the potential annoyance of dead air calls. Consumers have the freedom to dial into their carriers’ voicemail service platform to pick up the voicemail or not, to listen to it or not, as and when they see fit, and may do so without incurring any delivery charges.

⁴³ *Ryabyshchuck v. Citibank (S. Dakota) N.A.*, No. 11-1236, 2012 WL 5379143, at *2 (S.D. Cal. Oct. 30, 2012) (citing *Mims*, 565 U.S. at 372).

⁴⁴ *Ryabyshchuck*, 2012 WL 5379143, at *2 (emphasis added) (citing *Mims*, 565 U.S. at 372).

⁴⁵ *Chesbro v. Best Buy Stores*, 705 F.3d 913, 918 (9th Cir. 2012); *see also Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1453 (9th Cir. 1992) (“Common sense not dogma is what is needed in order to explore the actual meaning of legislative enactments.”).

⁴⁶ *Ryabyshchuck*, 2012 WL 5379143, at *3.

Given the overall context that led to the TCPA, it is reasonable to conclude that Congress, in enacting legislation to regulate nuisance telephone calls, did not intend to make actionable such non-invasive voicemail messages that are deposited on back-end servers and do not pass through consumers' telephone lines.⁴⁷ Because the use of direct to voicemail technology falls outside the scope and purpose of the TCPA, and because the TCPA must be applied with a measure of "common sense," the Commission should clarify that the technology does not violate the TCPA.

C. Congress Did Not Grant the Commission Authority to Regulate Voicemail.

As discussed, Title II vests the Commission with authority to regulate telecommunications services; enhanced services are expressly *not* regulated.⁴⁸ The Commission has confirmed that voicemail is an enhanced service.⁴⁹ The Commission's authority to implement rules is therefore cabined to regulations of calling technology, not voicemail technology. Accordingly, the Commission should adopt AATM's proposed interpretation and declare that the use of direct to voicemail insertion technology is not subject to the TCPA.

⁴⁷ See *3550 Stevens Creek Associates v Barclays Bank of Cal.*, 915 F.2d 1355, 1365 (9th Cir. 1990) (declining to infer Congressional intent "to create . . . a far-reaching private cause of action" that "would have substantial and far-reaching legal, financial, and practical consequences").

⁴⁸ 47 C.F.R. § 64.702(a).

⁴⁹ *BellSouth Louisiana Order*, 13 F.C.C. Rcd. 20599 ¶ 314.

V. ALTERNATIVELY, THE COMMISSION SHOULD EXERCISE ITS AUTHORITY AND GRANT A RETROACTIVE ADMINISTRATIVE WAIVER FOR THE USE OF DIRECT TO VOICEMAIL INSERTION TECHNOLOGY.

If the Commission declines to issue the declaratory relief advocated above, AATM respectfully requests a waiver of compliance for AATM and AATM’s customers with respect to Section 64.1200(a)(1)(iii) for voice messages transmitted through the use of direct to voicemail insertion technology.⁵⁰

The Commission may grant a waiver upon a showing that “[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest.”⁵¹ The Commission may waive any of its rules for good cause shown.⁵² A waiver may be granted if “(1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.”⁵³ The Commission has previously exercised its authority to grant retroactive waivers of its rules implementing the TCPA and provided parties with temporary relief from any past obligation to follow the Commission’s TCPA rules. For example, in 2014, the Commission granted petitions for limited retroactive waivers, citing inconsistency in

⁵⁰ See 47 C.F.R. § 1.3 (allowing for waiver of provisions for good cause shown); *In re United Telephone Co. of Kan.*, 25 FCC Rcd. 1648, 1651 (acknowledging ability of an agency order to have retroactive effect).

⁵¹ 47 C.F.R. § 1.925(b)(3)(ii). The rule also allows waiver where, “[i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.” *Id.* It is imperative for the Commission to expeditiously rule on the Petition to provide AATM’s customers with the information necessary to evaluate their future communications plans and clarify potential available defenses in the event of litigation.

⁵² 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

⁵³ *Id.* at 1166.

the application of its rule requiring certain opt-out language on solicited fax advertisements.⁵⁴ There, the Commission found waiver appropriate where the petitioners were “confus[ed]” by the Commission’s rules.⁵⁵ The Commission further noted that a retroactive waiver would serve the public interest because the petitioners had attempted to comply with the Commission’s rules, but an adverse ruling “could subject parties to potentially substantial damages, as well as possible liability for forfeitures under the Communications Act,” citing the fact that “the TCPA’s legislative history makes clear our responsibility to balance legitimate business and consumer interests.”⁵⁶

Applying Section 64.1200(a)(1)(iii) to AATM’s customers would not serve the underlying purpose of the Legislature or the Commission’s rules which, as noted, were designed only to regulate telephone calls to telephone lines. Special circumstances thus support a retroactive waiver.

Moreover, it is in the public interest to permit businesses such as AATM and its customers to use direct to voicemail technology. Business should be permitted to communicate with consumers in a non-intrusive manner by inserting voicemail messages directly on voicemail servers, without dialing the consumers’ cellular telephone lines and without resulting in unwanted delivery charges to the consumers. Likewise, consumers should be afforded the opportunity to mitigate the number of intrusive calls to their cellular telephone lines by allowing businesses to communicate with them by voicemail, such that consumers can retrieve the business’s communications if, when, and how they see fit. In contrast, construing direct to

⁵⁴ *Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 13998 (2014).

⁵⁵ *Id.* at 14009 ¶ 25.

⁵⁶ *Id.* at 14010-11 ¶ 27.

voicemail technology to violate Section 64.1200(a)(1)(iii) incentivizes plaintiffs to pursue potentially devastating class actions based on technical violations of an ambiguous rule—even though Congress never expressed an intention to regulate voicemail or to permit a private right of action arising from the receipt of voicemail.

Accordingly, if the Commission declines to grant AATM’s requested declaratory relief, AATM requests that the Commission grant a retroactive waiver to AATM and AATM’s customers for compliance with Section 64.1200(a)(1)(iii).

VI. CONCLUSION.

The TCPA does not prohibit, nor was it designed to restrict, businesses from delivering information directly to consumers’ voicemail services without making a call to consumers’ telephone lines or causing consumers to incur a delivery charge. Accordingly, AATM respectfully requests that the Commission issue a declaration that the use of direct to voicemail insertion technology does not violate the TCPA or the Commission’s regulations thereof. Alternatively, AATM requests that the Commission grant a retroactive waiver to AATM and AATM’s customers for compliance with the Commission’s regulation.

Respectfully submitted,

DATED: March 31, 2017

HACKLEMAN, OLIVE & JUDD, P.A.

By: /s/ Christian A. Petersen

Christian A. Petersen
cpetersen@hojlaw.com
2426 E. Las Olas Boulevard
Ft. Lauderdale, FL 33301
Tel: 954.334.2250
Fax: 954.334.2259

*Attorneys for Petitioner
All About the Message, LLC*

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Case No. 17-80029-CV-MIDDLEBROOKS/BRANNON

Tom Mahoney, individually and on
behalf of a class,

Plaintiff,

v.

TT of Pine Ridge, Inc.,

Defendant.

_____ /

DECLARATION OF CHRIS BLAYLOCK

I, Chris Blaylock, declare:

1. I am over the age of 18, and I am a Partner at All About the Message LLC (“AATM”), a Wyoming limited liability company.

2. AATM is a white label distributor of Stratics Networks, Inc. (“Stratics”). Stratics is a provider of various teleservices software and related products, including a proprietary direct to voicemail insertion solution known as “Ringless Voicemail Drop.”

3. A true and correct copy of a document provided to me by Stratics, titled “Ringless Voicemail Drops Compliance,” is attached hereto as **Exhibit A**.

4. A true and correct copy of a document provided to me by Stratics, titled “Top Telecom Attorneys Endorse Ringless Voicemail Drops,” is attached hereto as **Exhibit B**.

5. A true and correct copy of an AATM document, titled “Ringless Voicemail Drops Compliance,” modeled after the Stratics document of the same name, is attached hereto as **Exhibit C**.

6. Based on the companies' business dealings, the materials that have been provided to me from Stratics, and my own research and review of publicly-available information on Stratics' website (<https://straticsnetworks.com/>), I understand that Stratics' voicemail insertion solution bypasses the wireless telephone and telephone subscriber altogether, creating a direct communication between Stratics' servers and the voicemail system of the carrier telephone company. In other words, the voicemails are not delivered through telephone calls to the recipient. *See Exhibits A & B; see also <https://straticsnetworks.com/ringless-voicemail-drops/>* (attached as Exhibit D).

7. I further understand that the above is possible through Stratics' proprietary technology, which interconnects the carrier telephone companies' voicemail servers directly with Stratics' internal network and allows Stratics' computers to communicate directly with the carrier telephone companies' computers without placing a direct call to the subscriber. *See Exhibits A & D.*

8. It is my understanding that Stratics' voicemail insertion technology delivers voicemail messages without a resulting charge on the recipient's cellular telephone bill for such delivery, or showing up as a received call on the cellular telephone bill. *See Exhibit A.*

9. I further understand that during the transmission of a voicemail message, the software uses a data channel to initiate the connection to voicemail servers. The voicemail insertion technology creates a direct path between our servers and the carrier's voicemail infrastructure itself, only passing a message to the server if the voicemail service is set up and is capable of accepting messages at that moment.

10. The subscriber may either retrieve the message from the carrier telephone companies' voicemail service if the subscriber chooses to do so at a time of the subscriber's choosing or to simply delete the message. See Exhibits A, B & D.

11. Naples Nissan signed up through AATM to use the Stratics software and platform for delivery of voicemail messages.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 29th day of March, 2017, at Phoenix, Arizona.

By: _____

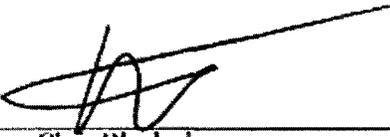

Chris Blaylock

EXHIBIT A



STRATICS NETWORKS

Ringless Voicemail Drops™
Compliance



100 Washington St NE
Huntsville, AL 35801



Info@StraticsNetworks.com



866.635.6918



StraticsNetworks.com

Mobile Device Facts

There are 318 million people in the US and 328 million registered mobile phone numbers making America one of the highest number of cell phone users in the world.

90% of adults have a cell phone and 67% of cell owners find themselves checking their phone for messages, alerts or calls - even when they don't notice their phone ringing or vibrating!

The increase in the use of cell phones amongst Americans has resulted in the decrease of traditional communication methods, which has created a dilemma for many organizations. It has become more difficult to connect with people to gather and share information.

This poses a significant challenge to industries that need to connect to individuals, such as research departments, financial institutions, governments, schools, health care organizations, insurance agencies, just to name a few.

Catch 22

The current laws regulate who can call us directly on our cell phones, which is great. After all, who wants to hear their cell phone constantly ringing and being subject to expensive charges every time we answer!

Here's the Catch 22, if people are overwhelmingly using their cell phone to communicate and key industries are restricted from contacting cell phones, then how are consumers going to receive key information?

This is where cutting edge technology designed and pioneered by Stratics Networks is beginning to take shape and is revolutionizing how organizations reach their targeted audience.

Introducing Ringless Voicemail Drops, also known as Direct Voicemail Messaging. Imagine the ability to drop a voicemail message directly into a subscriber's voice mailbox without ever making a call or ringing their phone line

The subscriber is never bothered or charged for a call.

Ringless Voicemail Drops are 100% legal and have been specifically designed to be a non-intrusive form of communication. This voicemail service has also been developed to be compliant with all federal laws and regulations.

Our Technology

Our proprietary M7.7RVM software creates a landline to landline session directly to the telephone company's voicemail server. There is never contact between the message provider and the subscriber. It is essentially computer to computer communication.

Our voicemail messaging allows an organization to legally contact an individual by dropping a voicemail directly into an individual's voicemail inbox, without making a call or ringing the person's phone line.

How Are Ringless Voicemail Drops Legal?

Direct Voicemail Messaging is legal based on a few major points:

- 1) The FCC has defined voicemail and voicemail services as Enhanced Information Services and has chosen not to regulate these enhanced services (The Telecommunications Act of 1996).
- 2) Our Direct Voicemail Messaging service creates a direct session to the telephone company's voicemail server.
- 3) We never directly call the recipient. Therefore, there is no direct contact and the subscriber is never charged for the call.

Telecommunication Legislation and Regulations

Cell phones are protected through federal and state telecommunications laws and regulations. For example, the TCPA, the National Do Not Call Registry, state-by-state robocall laws and a host of other regulations from the FTC and the FCC.

However, voicemail and voicemail services have been purposely excluded from these laws and regulations and have been left exempt from FTC and FCC laws and regulations.

Voicemail Defined: Enhanced Information Services

In 1980, the FCC formed the Computer Inquiry II (CEII), which formed rules and regulations for the computer communications industry. CEII purposely defined the difference between Basic Information Services and Enhanced Information Services.

Basic services from common carriers are direct transmissions over traditional telco paths, such as direct phone calls. Enhanced Information Services use advanced and/or enhanced computer applications to transmit information. The definition for Enhanced Information Services later included transmissions such as email, Voice over Internet Protocol (VoIP), voicemail and voicemail services.

This classification is very important since subsequent telecommunications laws and regulations applied to basic services, while exempting or excluded mentioning (or excluding mention) of Enhanced Information Services.

History & Past Rulings

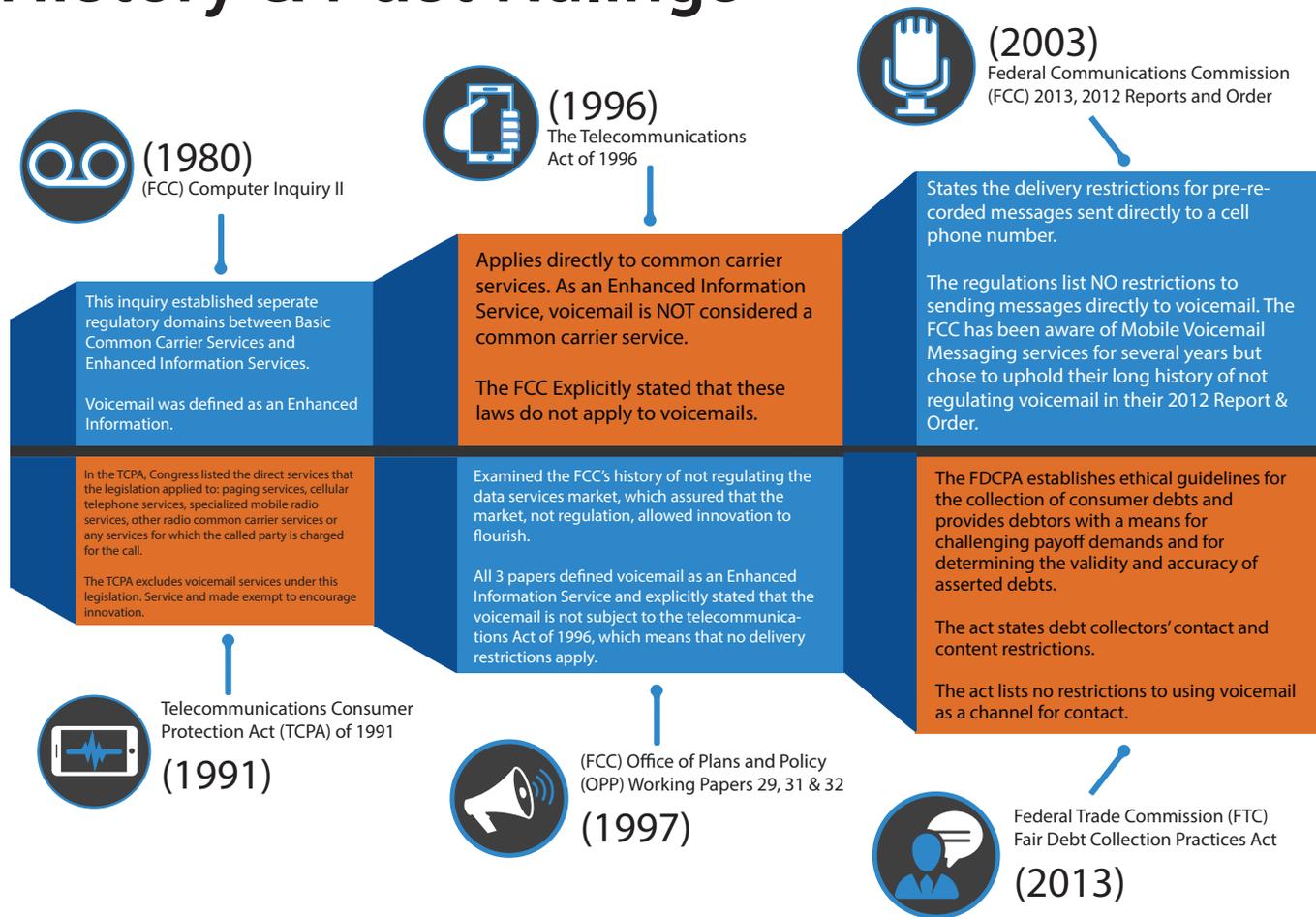


EXHIBIT B



STRATICS NETWORKS

Top Telecom Attorneys Endorse
Ringless Voicemail Drops



100 Washington St NE
Huntsville, AL 35801



Info@StraticsNetworks.com



866.635.6918



StraticsNetworks.com



ALLEN, MITCHELL & ALLEN

2091 Murray Holladay Road, Suite 21, Salt Lake City, Utah 84117
telephone: (801) 930-1117 · facsimile: (866) 777-0742 · eric@allenlawyer.com

Attorneys & Counselors at Law

March 10, 2016

Stratics Networks

RE: The Compliance Position of Stratics Networks' Ringless VoiceMail Delivery Method.

Dear Management:

Stratics has engaged our firm to investigate the compliance position of its Ringless VoiceMail Drop system. After having performed our initial evaluation, it is my opinion that nothing in the TCPA prohibits the delivery system. Additionally, we have been able to identify no FCC agency action or ruling against the delivery method, nor any private TCPA litigation against users of Stratics' technology. Stratics' system is the non-intrusive alternative to other forms of mobile messaging. There is no more defensible technology in the ringless market at this time.

Voicemail services generally fall under the category of "enhanced or information" services, which are expressly not regulated under the TCPA at this time. The Stratics' system does not place traditional telephone calls to wireless numbers. Rather, Stratics engages in server-to-server communication directly with the recipient's voicemail platform, circumventing the need to call the recipient. I believe the system is outside of the scope of the TCPA and the FCC's implementing regulations. Finally, Stratics does not make a telephone call to a "telephone number assigned to" a "service for which the called party is charged for the call." The statutory language unambiguously focuses on whether or not a call, "using any automatic language telephone dialing system or an artificial or prerecorded voice" results in "the called party [being] charged for the call." Here, that is not the case. Stratics deposits the message on the voicemail provider's server without the need to "call" the recipient.

Based upon the above, it is my legal opinion that Stratics' Ringless Voicemail Drop delivery system is either compliant with and/or not regulated at all by the FCC or TCPA. There are, of course, some common sense behavioral and content rules which apply to any telemarketing "message," which Stratics users should investigate and follow. This would include refraining from delivering solicitations (telemarketing messages) to people on the Do Not Call list, for example. I feel the system is a much safer, non-invasive alternative to traditional robocall and mobile messaging, which are directly restricted in the FCC's regulations. Our position is bolstered by the fact Canadian regulators have already blessed the product and neither the FCC, FTC, nor any significant private litigation has ever targeted a user of Stratics' technology by alleging a TCPA violation. Despite the fact that the FCC has not yet addressed the technology, certainly there is no more defensible platform in the ringless messaging space at this time.

Sincerely,

Allen, Mitchell & Allen PLLC

Eric Allen, Compliance Attorney

EXHIBIT C

ALL ABOUT THE MESSAGE

Ringless Voicemail Drops
Compliance

Chris (503) 871-1787

Scott (619) 576-1748

Contact@ABTMessage.com

WWW.ABTMessage.com

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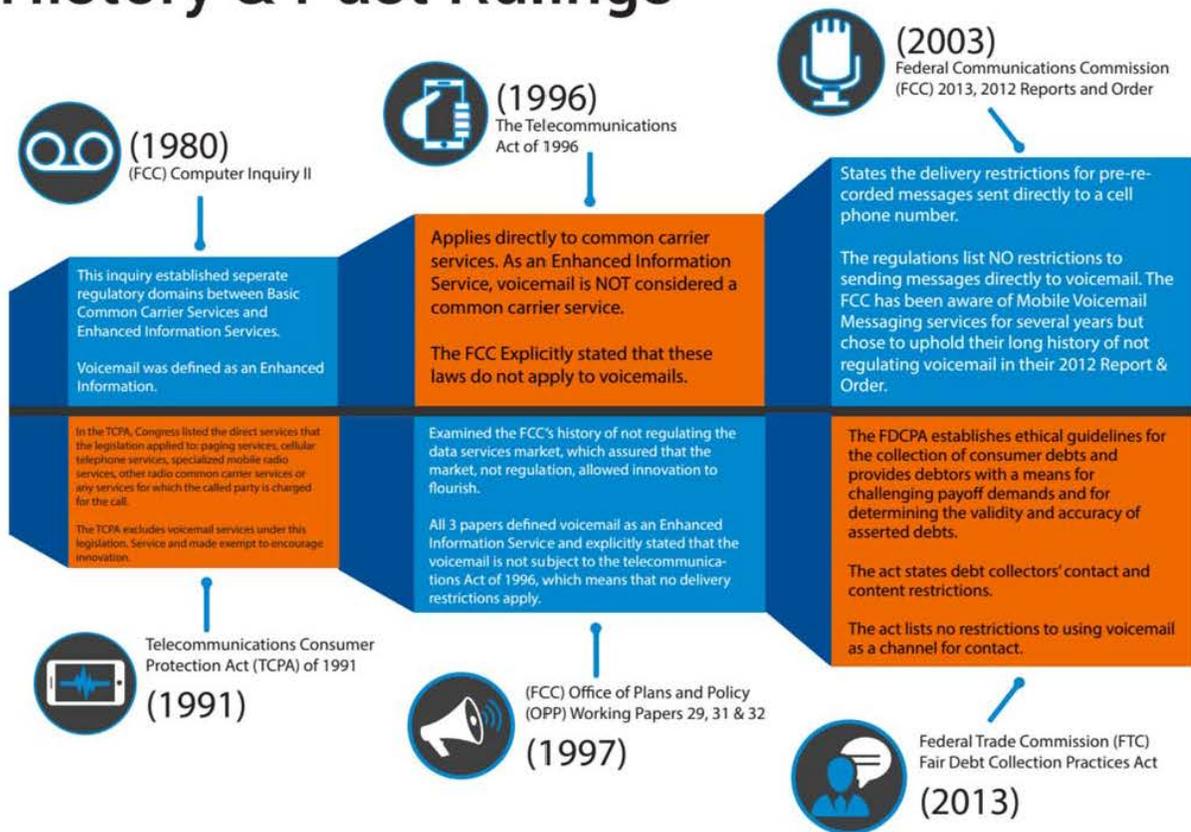


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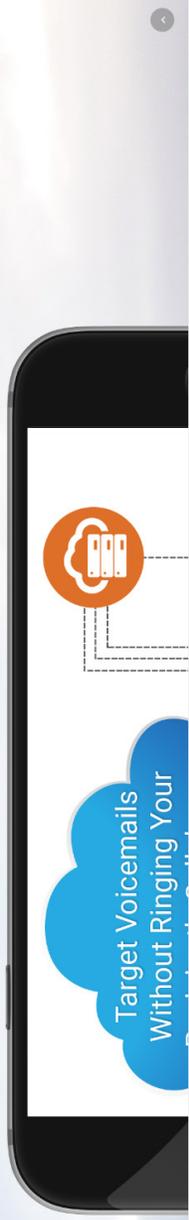
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The Only Safe, Responsible And Effective Way To Reach Mobile Subscribers



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Target Voicemails Without Ringing Your Recipient's Cellphone.

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Inventors of Ringless Voicemail Drops™ Insert a Ringless Voicemail™ (RVM Drop™) into a mobile phone without making a call. Ringless Voicemail Drops™ don't call cellphones; they are dropped on the backend. Ringless Voicemail Drops™ increase your response rate the responsible way.

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With RVM On-Demand, use our API to automatically send SINGLE Ringless Voicemail Drops to targeted individuals and make follow-up calls automatically.

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Stratics Networks is fully compliant. Ringless Voicemail Drops™ do not call cell phones; we drop your message on the back end.

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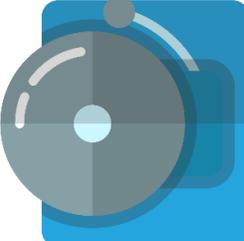
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6 Reasons Why Stratics Networks' Ringless Voicemail Drops™ Remain A Compliant Communications Service.

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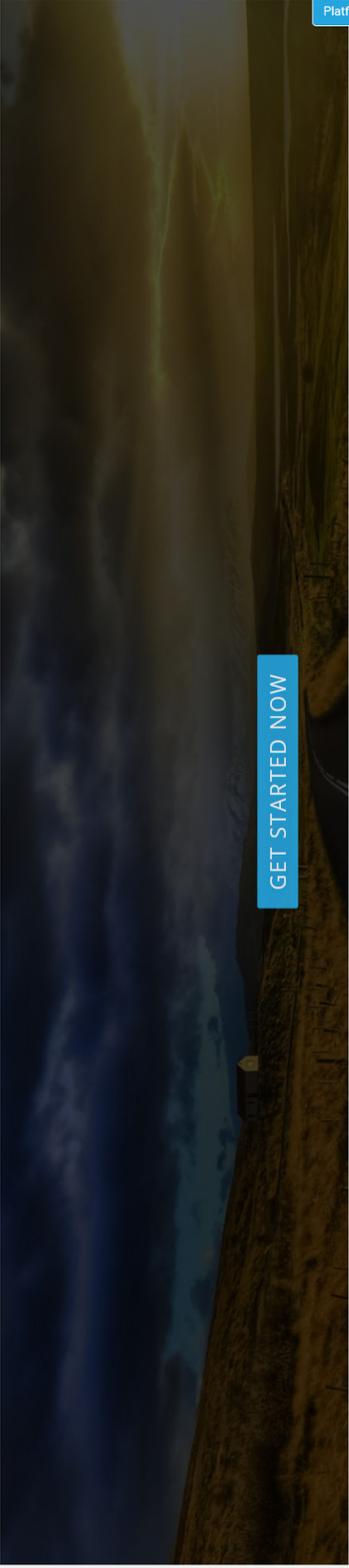
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