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

Federal Communications Commission  
Office of the Secretary

ORIGINAL  
FILE

CC Docket No. 92-90

In the Matter of  
The Telephone Consumer  
Protection Act of 1991

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TO: The Commission

COMMENTS

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TO: The Commission

COMMENTS

On December 20, 1991, President Bush signed into law The Telephone Consumer Protection Act of 1991 ("TCPA"). The express purpose of the TCPA is to prohibit telephone solicitations which utilize automatic telephone dialing systems ("autodialers") and prerecorded voice messages.

In the TCPA, Congress added Section 227 to the Communications Act of 1934, as amended (the "Act"). This new Section 227 expressly prohibits such telephone solicitations.

Pursuant to Section 1.401 of the Commission's Rules, 47 C.F.R. Section 1.401 (1991), MessagePhone, Inc. ("MessagePhone") hereby comments on the above-captioned Federal Communications Commission ("Commission") Notice of Proposed Rulemaking ("NPRM") to establish rules implementing the TCPA. Specifically, herein MessagePhone addresses the Commission's statutory obligation under the TCPA to exempt caller-initiated message delivery services ("MDS") from the prohibitions and restrictions of Section 227 of the Act.

MessagePhone is a Texas-based research and development

company. It has developed and patented caller-activated MDS. These services include automatic MDS for pay telephones, operator service centers, business and residential telephone lines, cellular, and long distance carrier networks.

## I. SUMMARY

### A. GOALS OF THE TCPA

In passing the TCPA, Congress notes that individual consumers and businesses are outraged by the invasion of privacy caused by proliferating random, automated solicitations. Furthermore, Congress realizes that the nature of these solicitations endanger the health and safety of consumers when emergency telephone facilities are seized by random calls or when telemarketers' communications equipment fail to release telephone lines after the called party goes back on-hook. Finally, Congress observes that random, prerecorded solicitations interfere with interstate commerce. Thus, Congress enacted the TCPA to prohibit most random, prerecorded solicitations, thereby protecting telephone subscribers from invasion of privacy, facilitating effective completion of emergency telephone calls, and eliminating burdens upon interstate commerce.

MDS are not calls Congress seeks to prohibit. Unlike the messages delivered by automated telemarketers, MDS are intended as alternatives to busy or unanswered personal telephone calls. Instead of random, generic messages, MDS, like those designed by MessagePhone, actually are offered to callers after a personal

call is made and the call is busy or unanswered.

For example, with MessagePhone's MDS, the caller is given the opportunity to record a short message for subsequent delivery. These types of personal messages merely are a delayed completion of the original, attempted personal communication. Even though the destination telephone number is dialed automatically, the equipment is not an autodialer, as defined in the TCPA or in the NPRM.<sup>1</sup>

MDS are not designed to solicit sales. MDS do not infringe upon the called party's privacy rights any more than an ordinary personal telephone call. MDS are not used to deliver messages to medical or other emergency services facilities. Because MDS are designed solely to complete busy and unanswered personal telephone calls, it is highly unlikely that this technology, in the future, would be used for mass, unsolicited advertising.

#### B. PROVISIONS OF THE TCPA

To safeguard against random, prerecorded solicitations, the TCPA amends the Act by adding Section 227. Pursuant to Section 227 of the Act, it is unlawful to

mak[e] any call (other than a call made for emergency purposes or made with the prior consent of the called party) to residences using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party.<sup>2</sup>

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<sup>1</sup> NPRM at para. 2.

<sup>2</sup> Id. at para. 2.

While prescribing a broad range of telephone calls, Congress also recognizes that certain classes of unsolicited telephone calls are useful and not obtrusive. Thus, the Commission "is authorized to propose exemptions to this prohibition" for calls that: (1) are not made for a commercial purpose; or (2) are made for a commercial purpose, but do not adversely affect privacy rights of the called party or do not include transmission of an unsolicited advertisement.<sup>3</sup>

Pursuant to the TCPA, the Commission adopted the NPRM to implement these new restrictions and establish classes of telephone calls and prerecorded messages that should be exempt from Section 227 restrictions. Specifically, the Commission recommends exemption for: (1) non-commercial calls made by civic institutions; local, state, or federal governments; political campaigns; and other non-commercial institutions;<sup>4</sup> (2) commercial calls that do not transmit an advertisement, such as messages to employees or messages to confirm the arrival, shipment or delivery date of a product;<sup>5</sup> (3) calls by tax exempt, nonprofit organizations;<sup>6</sup> and (4) calls to former or existing clientele.<sup>7</sup>

Under Section 227(d) of the Act, specific technical and procedural standards for telephone calls subject to the TCPA are

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<sup>3</sup> Id. at paras. 2 and 9.

<sup>4</sup> Id. at para. 10.

<sup>5</sup> Id. at para. 11.

<sup>6</sup> Id. at para. 12.

<sup>7</sup> Id. at para. 13.

required. Specifically, the Commission must prescribe such standards for artificial or prerecorded voice systems that require: (a) identity and location of the caller; and (b) automatic release of the called party's line within five (5) seconds after the called party has terminated the call.<sup>8</sup>

### C. APPLICABILITY OF THE TCPA TO MDS

The MDS developed and provided by MessagePhone and other manufacturers and vendors are subject to the TCPA. This legislation restricts telephone calls to residences using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party. However, as demonstrated herein, MDS clearly are distinguishable from the types of calls Congress intended to prohibit in Section 227, are characterized by the attributes of calls eligible for exemption from such prohibitions, and thus expressly should be exempted from these restrictions.

Indeed, the legislative history of the TCPA unequivocally shows Congress' intent that MDS are not to be subject to the prohibitions under Section 227. For example, Congressman Markey, the Chairman of the House Subcommittee on Telecommunications and Finance, stated:

I fully expect the Commission to grant an exemption ...  
for voice messaging services that forward calls.<sup>9</sup>

<sup>8</sup> Id. at para. 22.

<sup>9</sup> Cong. Rec. H11310 (daily ed. Nov. 26, 1991)("Cong. Rec.").

Unfortunately, despite this clear legislative intent, MDS are not even addressed in the NPRM, let alone expressly exempted from Section 227 of the Act, as Congress desires.

While MessagePhone applauds the Commission's efforts to implement the TCPA in a fair and expeditious manner, the NPRM is flawed in these critical respects:

1. The Commission misinterprets the TCPA by addressing only telephone calls made by autodialers instead of also addressing telephone calls made by other technologies, such as MDS.
2. The Commission ignores Congressional intent by failing to address MDS and by failing to expressly exempt MDS from the TCPA.
3. The Commission proposes technical and procedural standards for identifying telephone callers that are unnecessary and are overly broad.

1. The Commission misinterprets the TCPA.

Both the rules and exemptions proposed in the NPRM incorrectly assume that an automatic telephone dialing system ("autodialer") must be used in conjunction with the delivery of a prerecorded message for the communication to be subject to the TCPA.<sup>10</sup> The language of the TCPA and its legislative history clearly demonstrate that this assumption is incorrect. Under the TCPA, the Commission's rules also must address prerecorded messages that are delivered by automated dialing devices other than autodialers.

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<sup>10</sup> An autodialer is defined as: "equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator; and to dial such numbers." 47 U.S.C. Section 227(a)(1) (1992); NPRM at para. 2 (emphasis added).

2. The Commission ignores Congress' intent.

The Commission, in the NPRM, completely fails to address a major category of unsolicited telephone calls -- MDS -- despite clear legislative intent. It is evident that MDS do not infringe upon the privacy rights of telephone subscribers, interfere with emergency calls or burden interstate commerce. Thus, MDS clearly fall within the class of telecommunications services that Congress intends should be exempt from Section 227.

Furthermore, it is certainly Congress' intent that MDS must be addressed by the Commission, in its mandated rulemaking, and specifically exempted from Section 227 prohibitions. Because the Commission, in the NPRM text and in the rules proposed therein, fails specifically to address MDS, it is uncertain whether these services are subject to and exempted from Section 227. This ambiguity does not exist in the legislative record and must be corrected by the Commission.

To ensure that Congress' intent is satisfied and that messages delivered by means other than autodialers are expressly exempt from Sections 227 of the Act, MessagePhone recommends that Section 64.1100, as proposed in the NPRM, be revised as follows:<sup>11</sup>

First, add Section 64.1100(e) to define what devices are subject to the Section 227 restrictions:

(e) Automatic telephone dialing system - equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator to dial such numbers.

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<sup>11</sup> MessagePhone's proposed revisions are underscored.

Second, revise proposed Section 64.1100(c) to clarify what telephone calls are subject to the Section 227 restrictions:

The term "telephone call" in sec. 64.1100(a)(2) shall not include a call or message by, or on behalf of, a caller:

(1) that is not made with an automatic telephone dialing system;

(2) that is not made for a commercial purpose;

(3) to any person with whom the caller has had a prior or current business relationship at the time the call is made; or

(4) by a tax exempt nonprofit organization.

MessagePhone's proposed revisions expressly limit the definition of "automatic telephone dialing system" to a device capable of making random, unsolicited telephone calls and expressly exclude calls made with this device from the class of calls prohibited under Section 227. By adopting these proposed revisions, the Commission would guarantee that MDS are exempt, as Congress intends.

3. The Commission proposes unnecessary and overly broad technical and procedural standards.

The Commission recommends rules for technical and procedural standards for "artificial or prerecorded voice systems:"

(d) Automatic Dialing Devices; identification of the caller. All artificial or prerecorded telephone messages (i) shall:

(1) at the beginning of the message state clearly the identity of the business, individual, or other entity initiating the call, and

(2) during or after the message, state clearly the telephone number or address of such business, other entity, or individual.

These proposed rules fail to differentiate between randomly-

delivered, prerecorded sales presentations (that use autodialers) and personal messages that are merely a delayed completion of the original, attempted personal communication (that do not use autodialers).

The scope of these proposed technical and procedural standards is uncertain. This uncertainty results from the use of "Automatic Dialing Devices" in proposed Section 64.1100(d). Is an "automatic dialing device" the same as an "automatic telephone dialing system" as defined in Section 227(a)(1) and as used in the Commission's proposed Section 64.1100(a)(1)? Do these rules apply to prerecorded messages that do not use autodialers for message delivery? The Commission must resolve this ambiguity.

MessagePhone recommends that, regardless of the purpose of the prerecorded communication or the equipment utilized to deliver the communication, the message should begin with the caller's name. However, in the case of personal messages, especially communications from friends or family members, that are recorded in response to uncompleted or unanswered telephone calls, it is unnecessary to preface the recorded message with the caller's location or telephone number.

Unlike marketing messages, the caller's name provides the called party with sufficient information to decide whether to listen to the message. In fact, a called party, who is anxiously waiting to hear a message from a family member (who might even live at the same address as the called party), would consider the announcement of the telephone number and address to be a nuisance. In addition, because MDS are offered from pay

telephones, it is often impossible for the caller to determine the address and telephone number of the location where the message is recorded.

To narrow the scope of the Commission's proposed technical and procedural standards consistent with the foregoing factors, MessagePhone recommends the following revision to Section 64.1100(d):<sup>12</sup>

All artificial or prerecorded telephone messages shall:

(1) at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(2) all messages being delivered with an automatic telephone dialing system shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual.

MDS, such as those developed by MessagePhone, must be exempt from the restrictions in Section 227 of the Act. The Commission should revise its proposed rules accordingly, as set forth herein. Prompt adoption of the rules proposed in the NPRM, with MessagePhone's suggested revisions, would assure that technologies and services beneficial to the public are widely available.

## II. THE TCPA

### A. CONGRESS INTENDS CONTROLLING UNSOLICITED, PRERECORDED TELEMARKETING CALLS

To protect against invasion of privacy, disruption of

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<sup>12</sup> MessagePhone's proposed revision is underscored.

emergency or public safety services, and interference to interstate commerce, Congress, in the TCPA, amended the Act to include Section 227, "Restrictions on the Use of Telephone Equipment." Under Section 227, specific prohibitions address the abuses described above:

(b)(1) PROHIBITIONS - It shall be unlawful for any person 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 prerecorded voice -

(i) to any emergency telephone line (including any '911' line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(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;

(B) to initiate 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 under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.<sup>13</sup>

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<sup>13</sup> 47 U.S.C. Section 227(b)(1) (1992).

1. Congress intends the TCPA to protect against invasion of privacy.

Congress enacted the TCPA in response to the escalating public outcry over the use, by telemarketing firms, of autodialers and prerecorded sales presentations for random telephone solicitations. The report released by Senator Hollings that accompanies the TCPA, gives the following rationale for this legislation:

The Committee on Commerce, Science, and Transportation, to which was referred the bill [TCPA] to amend the Communications Act of 1934 to prohibit certain practices involving the use of telephone equipment for advertising and solicitation purposes, having considered the same, reports favorably thereon....

[T]he purposes of the bill are 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 ... automatic dialers.<sup>14</sup>

During the past year, the Commission received over 2,300 related complaints.<sup>15</sup> Congress found that these unsolicited advertisements are considered by the public to be a nuisance and to infringe upon their privacy rights:

Unrestricted telemarketing ... can be an intrusive invasion of privacy ... many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.<sup>16</sup>

Moreover Congress noted that:

Over half of the States now have statutes restricting various uses of the telephone for marketing, but

<sup>14</sup> S. Rep. 17B, 102d Cong., 1st Sess. (1991) at 1 ("Hollings Report") (emphasis added).

<sup>15</sup> Hollings Report at 1.

<sup>16</sup> TCPA at Sections 2(5), (6).

telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing.<sup>17</sup>

2. Congress intends protecting the integrity of emergency telecommunications networks.

In the TCPA, Congress addresses the concern that random, prerecorded solicitations pose a serious safety threat. In many instances, the autodialer equipment used to make such solicitations "seizes" the telephone line and does not "release" the line even when the called party returns the telephone handset "on-hook" (*i.e.*, when the called party terminates the call). Rather, the communications equipment continues to play the unsolicited sales presentation until it is completed. During this time, the called party is unable to use the telephone line for any call, including emergency calls.<sup>18</sup>

In addition, autodialers used for prerecorded solicitations dial telephone numbers in numerical sequence or dial random telephone numbers. On occasion, these calls will seize the telephone lines of emergency facilities or will systematically dial every direct inward dial ("DID") telephone number of an emergency or medical facility, such as health care facilities, fire protection, or law enforcement agencies.<sup>19</sup> The TCPA was

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<sup>17</sup> Id. at Section 2(7).

<sup>18</sup> During the debate on the TCPA, Congresswoman Roukema (Rep., N.J.), recounted the story of a New York mother who tried to call an ambulance for her injured child, "and the sheer terror she experienced when she picked up her phone only to find it occupied by a computer call that would not disconnect." Cong. Rec. at H11313.

<sup>19</sup> Id. at H11311.

enacted by Congress to protect against such interference with emergency or other medical telecommunications facilities.

3. Congress intends eliminating undue interference with interstate commerce.

Congress noted that random, prerecorded telephone solicitations interfere with interstate commerce:

Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.<sup>20</sup>

Specifically, the unrestricted opportunity to make such calls congests the business telecommunications networks. In the Hollings Report, the Senate stated that "automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls."<sup>21</sup>

B. CONGRESS AUTHORIZES THE COMMISSION TO EXEMPT CERTAIN CLASSES OF SERVICE FROM SECTION 227 RESTRICTIONS

The Commission may choose to exempt certain messaging services that otherwise would be prohibited under Section 227 of the Act. Even while prohibiting the abusive practices of telemarketers, Section 227(b)(1)(B) provides that some prerecorded messaging services, which are not telephone

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<sup>20</sup> TCPA at Section 2(14).

<sup>21</sup> Hollings Report at 2.

solicitations<sup>22</sup> or unsolicited advertisements,<sup>23</sup> might be exempted:

It shall be unlawful for any person in the United States --

(B) to initiate 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 under paragraph (2)(B).<sup>24</sup>

Furthermore, Section 227(b)(2)(B) identifies the conditions under which such exemptions can be granted:

(b)(2)(B) [the Commission] may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe --

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines

(1) will not adversely affect the privacy rights that this section is intended to protect; and

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<sup>22</sup> The term "telephone solicitation" means 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. Section 227(a)(3) (1992).

<sup>23</sup> The term "unsolicited advertisement" means 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 permission." 47 U.S.C. Section 227(a)(4) (1992).

<sup>24</sup> 47 U.S.C. Section 227(b)(1)(B) (emphasis added).

(2) do not include the transmission of any unsolicited advertisement.<sup>25</sup>

As demonstrated in Section II.B.1, infra, Congress intends that the Commission specifically address and exempt MDS. The legislative record unambiguously establishes that MDS radically differ from random, prerecorded telemarketer solicitations and fall within the statutory criteria for exemption.

1. Congress intends that the Commission address and exempt MDS.

The record established by U.S. Congress and by the President of the United States clearly dictates the types of services that should be exempted from Section 227 of the Act. The President released the following statement when signing the TCPA into law:

This legislation is designed for the laudable purpose of protecting the privacy rights of telephone users. However, the Act could also lead to unnecessary regulation or curtailment of legitimate business activities.

I have signed the bill because it gives the Federal Communications Commission ample authority to preserve legitimate business practices ... [and] flexibility to adapt its rules to changing market conditions.<sup>26</sup>

Furthermore, the record established during the floor debate amply demonstrates Congress' intent to exempt beneficial telecommunications services, especially MDS, from Section 227. Congress correctly realizes that there is a great difference between random, prerecorded solicitations and messages that are an extension of regular, personal communications. This legislation, and particularly the exemption of MDS therefrom,

<sup>25</sup> 47 U.S.C. Section 227(b)(2)(B).

<sup>26</sup> The White House Press Release, December 20, 1991 (emphasis added).

enjoyed consensus bipartisan support.

Congressman Markey, the Chairman of the House Subcommittee on Telecommunications and Finance, stated:

The legislation makes two absolute exceptions to this prohibition:

... the bill allows the Federal Communications Commission to exempt, by rule or order, classes or categories of calls made for commercial purposes that do not "adversely affect the privacy rights" that this section of the bill is intended to protect and, that "do not include the transmission of any unsolicited advertisement." ... I fully expect the Commission to grant an exemption, for instance, for voice messaging services that forward calls. For example, if a consumer is late catching a plane and calls his home to tell his wife he'll be arriving late and can't get through to her, this service allows him to leave a message and board the plane. While he is traveling, the service automatically dials the number repeatedly until the message is delivered. Such a voice messaging service is a benefit to consumers and should not be hindered by this legislation.<sup>27</sup>

Similarly, Congressman Rinaldo, the ranking minority member of the House Subcommittee on Telecommunications and Finance, declared:

[T]he bill would prohibit autodialed calls to anyone that has not given the caller prior express consent. This bill also requires the FCC to restrict only those categories of artificial or prerecorded voice calls which are made for commercial purposes and will affect the privacy rights that the bill intends to protect. Among categories which should be made available to the public are voice messaging services which deliver legitimate personal messages to one or more persons.

The FCC has already authorized as in the public interest a service which allows a caller from a coin telephone to record a message for later delivery when encountering a busy signal or no answer. Likewise, a similar service which the FCC has also authorized would allow a person to send a message to a group of people through a recorded message. Clearly, these types of

<sup>27</sup> Cong. Rec. at H11310 (emphasis added).

personal voice messaging services are not invasive of a person's privacy rights, and this bill is not intended to prohibit these or other such services yet to be developed.<sup>28</sup>

Congressman Bryant, also a member of the House Subcommittee on Telecommunications and Finance, singles-out MDS designed by MessagePhone and utilized by telecommunications companies, like Bell Atlantic, as services that must be exempted from Section 227. In his statement for the record, Congressman Bryant differentiates MDS from the technology used by telemarketers, which the TCPA intends to restrict:

Unlike the technology used by telemarketers for their random solicitations, [MessagePhone's automatic MDS] is a prepaid, person-to-person communication, not all that different from a regular telephone call. The service is designed so that the messages are short and the content is personal in nature.... MessagePhone's automatic message delivery service does not consist of random calls with prerecorded messages that invade the privacy of our constituents. Rather, they provide a message service that clearly is beneficial to the public. It is important that existing and emerging technologies and services that are beneficial to the public should not be prohibited by this legislation.<sup>29</sup>

To ensure that Congress' intent to exempt MDS from Section 227 is clear, Congressman Bryant engaged in the following floor colloquy with Congressman Markey:

Mr. Bryant. I understand that the legislation we have before us now does not shut down all telemessaging services.... I further understand that the FCC is amenable to this language as a means of preserving these valuable telemessaging services.... Mr. Speaker, I would like to ask the chairman of the subcommittee, ... if I am correct in my understanding of the bill.

Mr. Markey. Mr. Speaker, the gentleman has accurately described the intention of the legislation. We have

<sup>28</sup> Id. at H11311 (emphasis added).

<sup>29</sup> Id. at H11311-11312 (emphasis added).

made the commonsense exceptions that in fact improve communications between individuals using the modern telecommunications technologies while at the same time targeting that abusive robotic use of the technology which has become such an intrusive part of the American society.

Mr. Bryant. Mr. Speaker, I further understand that the FCC is amenable to the direction that the bill is taking now with regard to this automated type of messaging service; is that correct?

Mr. Markey. The gentleman is correct.<sup>30</sup>

Certainly, it is Congress' unequivocal intent, in passing the TCPA, that MDS should be exempt from the prohibitions of Section 227. Moreover, as stated by Congressmen Markey and Bryant, it is the Commission's intent as well. As set forth in Section IV, infra, the legislative history of the TCPA, as well as the President's statement when signing it into law, demonstrate that MDS meet the Section 227 criteria for exemption and provide a valuable service to the public.

### III. THE NOTICE OF PROPOSED RULEMAKING

Pursuant to the TCPA, the Commission has issued the NPRM.<sup>31</sup> In the NPRM, the Commission seeks comment on a number of issues, including, what types of "telephone calls" should be exempted from its restrictions on the delivery of prerecorded or artificial messages and what technical and procedural standards should be applied to prerecorded voice systems.

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<sup>30</sup> Id. at H11312 (emphasis added).

<sup>31</sup> 47 U.S.C. Section 227(c)(1).

A. THE TCPA REQUIRES THE COMMISSION TO PROPOSE RULES FOR DELIVERY OF ALL PRERECORDED MESSAGES

As described herein, the purpose of the TCPA is to curb abusive practices by telemarketers. The language of Section 227(b)(1)(B), restricting use of prerecorded voice messages, is not limited to messages delivered by telemarketers with the use of autodialer technology only:

It shall be unlawful for any person within the United States ... to initiate 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 under paragraph (2)(B).<sup>32</sup>

The legislative history of the TCPA demonstrates that Congress intends Section 227(b)(1)(B) to prohibit delivery of all prerecorded messages to residential telephone lines, regardless whether an autodialer is used or if the message is a telemarketer's solicitation.<sup>33</sup> In fact, the record demonstrates<sup>34</sup> that it is because of the unrestricted nature of Section 227(b)(1)(B) that Congress included the phrase,

unless the call ... is exempted by rule or order by the Commission under paragraph (2)(B).<sup>35</sup>

Congress clearly is concerned that the TCPA accidentally would restrict services, like MDS, that are considered helpful by

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<sup>32</sup> 47 U.S.C. Section 227(b)(1)(B).

<sup>33</sup> See Section II.B.1, supra.

<sup>34</sup> Id.

<sup>35</sup> 47 U.S.C. Section 227(b)(1)(B).

consumers, or that are mere extensions of basic telephone calls. For this reason, Congress expressly empowers the Commission to exempt specific classes of telephone calls from the Section 227 prohibitions and it clearly intends that MDS be so exempt.

Unfortunately, for some reason, in the NPRM, the Commission disregards Congress' intent to include non-autodialer technology by choosing only to address technology that utilizes autodialers:

**B. Prohibited uses of Autodialers** The general prohibition rules as proposed in Appendix B, section 64.1100, follow closely the language of the TCPA. Autodialer calls are prohibited to: residential telephone lines without the consent of the called party, emergency telephone lines, the telephone line of a guest room of a health care facility, a paging service or other specialized mobile radio service, and any service for which the called party is charged for the call.<sup>36</sup>

This myopic approach results in the Commission ignoring the fact that prerecorded messages can be transmitted by means other than by an autodialer. By overlooking this critical fact, the Commission fails to follow Congressional intent because it does not go "one step farther" and consider exempting non-autodialer technologies, such as MDS, from its proposed rules implementing the TCPA. Absent express exemption of MDS, confusion will emerge in the telecommunications industry concerning its regulatory status. The Commission can avoid this confusion and follow Congress' express intent by specifically exempting from Section 227 of the Act the delivery of all prerecorded messages with technologies other than autodialers. MessagePhone's revisions,

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<sup>36</sup> NPRM at para. 8 (emphasis added).

set forth in Section IV.B, supra, meet Congress' objective and thus must be adopted.

B. THE COMMISSION'S PROPOSED EXCEPTIONS TO SECTION 227 PROHIBITIONS ARE AMBIGUOUS AND MUST BE CORRECTED

Because it assumes that the TCPA prohibitions only concern prerecorded messages delivered with autodialer technology, the Commission, in the NPRM, mistakenly limits exemptions from Section 227 to prerecorded messages delivered with autodialers:

It appears that there are many valuable uses to autodialer messaging that do not necessarily fall within the intended scope of Section 227's prohibitions.<sup>37</sup>

Autodialers may sometimes be used to deliver non-commercial messages. The Commission tentatively finds that it is not the intent of the TCPA to prohibit or restrict such non-telemarketing uses of autodialers.<sup>38</sup>

MessagePhone generally supports the scope of the Commission's proposed exemptions. However, by failing to address prerecorded messages delivered without autodialers, the Commission stops short of proposing rules that satisfy Congressional intent. The Commission must address the issue of prerecorded messages that do not utilize autodialers, including MDS, by expressly exempting them from all Section 227 prohibitions.

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<sup>37</sup> NPRM at para. 9 (emphasis added).

<sup>38</sup> NPRM at para. 10 (emphasis added).