S. HRG. 113–674

CRAMMING ON WIRELESS PHONE BILLS: A REVIEW OF CONSUMER PROTECTION PRACTICES AND GAPS

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

JULY 30, 2014

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ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

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CRAMMING ON WIRELESS PHONE BILLS: A REVIEW OF CONSUMER PROTECTION PRACTICES AND GAPS

WEDNESDAY, JULY 30, 2014

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 2:50 p.m. in room SR–253, Russell Senate Office Building, Hon. Richard Blumenthal, presiding.

OPENING STATEMENT OF HON. RICHARD BLUMENTHAL, U.S. SENATOR FROM CONNECTICUT

Senator BLUMENTHAL. This hearing is open.

And as you know, my name is Richard Blumenthal. I am a Senator from Connecticut, and I am here regretfully in place of Chairman Rockefeller, who has an urgent intel, intelligence matter and therefore could not be with us at the opening. I do not think he will be able to join us, but his absence is in no way a sign of any lack of interest in this subject. In fact, I have talked to him in some detail about this hearing, and I know that he would be here if he could be.

I want to welcome all of our panel here and all of the folks who are attending. This subject is one very, very close to my heart as a former Attorney General for a couple of decades in Connecticut. I had firsthand experience with cramming, both wireless and landline, and worked with at least one of the members of this panel, Attorney General Sorrell. And I will be introducing him in just a moment.

As many of you know, more than 2 decades ago, the telephone industry decided to get into the payment processing business. The bright idea was that consumers could charge purchases to their phone bills rather than doing it through a credit card or a bank account. At the end of every billing period, consumers would pay for their telephone service plus the purchases they had made from third-party vendors.

In theory, using a telephone bill as a way to purchase goods and services makes some sense, has a lot of potential, and attracted a lot of interest. As several of our witnesses point out in their testimony today—and they do it very well—the so-called direct carrier billing method of payment could benefit unbanked customers and other people looking for an alternative way to shop or make a charitable contribution.

But the reality of third-party charges on telephone bills is a markedly different story, a profoundly different tale, and the fact of the matter is that it has not lived up to its potential. Almost as soon as the telephone companies opened up their payment platforms to outside parties, scammers figured out a way to beat the system, not surprisingly. They found ways to cram unauthorized charges onto consumers' bills, and they have been absolutely relentless in doing so.

So today most consumers still do not understand, including some of my colleagues, that their phone bills have often contained charges for things they never actually bought. What a surprise. They are paying for things they never bought. And it is an unwelcome surprise to them, especially when they discover that they have trouble getting refunds or that they cannot get their money back at all.

In the 1990s and into the 2000s, most cramming occurred on consumers' wireline telephone bills, as this committee documented in an excellent 2011 hearing and report. American consumers and businesses paid billions of dollars for fax, voice mail, celebrity gossip, and other services they did not want and did not order. A few days ago, the crammers very predictably turned their attention—I should have said a few years ago the crammers very predictably turned their attention to the rapidly growing wireless telephone market. They figured out a way to rip consumers off who had grown accustomed to purchasing music and other content on their phones through a text messaging-based system called PSMS, premium short messaging system.

The Commerce Committee staff—and I really want to thank them for their excellent work—has prepared a new report documenting how crammers exploited the weaknesses in the premium messaging system to fraudulently charge American consumers literally hundreds of millions of dollars. And I ask unanimous consent to put this report and its exhibits in the record of this hearing.

[The information referred to follows:]

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION

OFFICE OF OVERSIGHT AND INVESTIGATIONS
MAJORITY STAFF

Cramming on Mobile Phone Bills: A Report on Wireless Billing Practices

STAFF REPORT FOR CHAIRMAN ROCKEFELLER
JULY 30, 2014

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Executive Summary

For several decades, phone companies have allowed third-party vendors to charge consumers on their phone bills for goods and services unrelated to phone service, such as photo storage, voice-mail, and faxes. This practice began with landline phone bills and continued on wireless phone bills as consumer use of mobile phones increased. Throughout this period, the industry has assured the public that its self-regulatory system is effective at protecting consumers from fraudulent third-party billing on their phone bills.

However, this Committee's 2010–2011 review of third-party billing practices on landline phones showed that widespread unauthorized charges—known as "cramming"—had been placed on phone bills and had likely cost consumers billions of dollars over the preceding decades.

In light of these findings, and emerging reports of cramming in the wireless context, the Committee subsequently began reviewing third-party billing practices on wireless phone bills.

This inquiry focused largely on third-party vendor charges placed through a system known as the premium short message service, or "PSMS," which involves use of text messaging charged to consumers at a higher rate than standard text messaging. These types of charges had been the focus of mounting reports of abuses. Products charged to consumers through the PSMS system generally have involved digital goods used on mobile phones, such as ringtones and cellphone wallpaper, or for services such as subscriptions to periodic text message content sent to the subscriber on subjects such as horoscopes or celebrity gossip.

To assess the nature and scale of wireless cramming, the Committee's majority staff reviewed narrative and documentary information provided by the four major wireless carriers, entities known as "billing aggregators" that serve as middlemen between vendors and carriers in the billing process, and other sources.

Unfortunately, the information reviewed by the Committee shows that, just as in the landline context, cramming on wireless phone bills has been widespread and has caused consumers substantial harm. Specifically, this report finds:

- Third-party billing on wireless phone bills has been a billion dollar industry that has yielded tremendous revenues for carriers. AT&T, Sprint, T-Mobile, and Verizon generally retained 30 percent–40 percent of each vendor charge placed.
- Despite industry assertions that fraudulent third-party wireless billing was a "de minimis" problem, wireless cramming has been widespread and has likely cost consumers hundreds of millions of dollars.
- The wireless industry was on notice at least as early as 2008 about significant wireless cramming concerns and problems with third-party vendor marketing tactics, yet carriers' anti-cramming policies and sometimes lax oversight left wide gaps in consumer protection:
  - Consumer billing authorization requirements known as the "double opt-in" that were touted as safeguards by industry were porous, and multitudes of scammers appeared to have repeatedly skirted them.
  - Some carrier policies allowed vendors to continue billing consumers even when the vendors had several months of consecutively high consumer refund rates—and documents obtained by the Committee indicate this practice occurred despite vendor refund rates that at times topped 50 percent of monthly revenues.
  - Carriers placed questionable reliance on billing aggregators in monitoring conduct of vendors that were charging consumers on carriers' billing platforms.

In November 2013, the Attorney General of Texas brought an action alleging that Mobile Messenger, one of the major PSMS billing aggregators, had engaged in a deceptive scheme with vendors to cram consumers' bills. Within weeks—and after years of wireless industry attestations about its effective consumer protection practices—AT&T, Sprint, T-Mobile, and Verizon abruptly announced they would virtually eliminate PSMS billing on their platforms.

Today, while the major carriers have phased out commercial PSMS services, they continue to allow third-party charges on consumers' wireless bills using methods that do not involve PSMS. These include methods sometimes labeled "direct carrier billing" (DCB) through which vendors using websites and apps connect to carrier billing platforms. To date, products and services charged through these non-PSMS billing methods have primarily involved digital content, such as music and apps including games with in-app purchasing capabilities.

Direct carrier billing methods are relatively nascent, and it is not possible at this stage to predict the extent to which scammers will find ways to cram charges on

wireless bills under these non-PSMS systems. As new third-party wireless billing methods continue to evolve, it is important that industry and policymakers evaluate the consumer protection gaps that have enabled widespread deceptive and fraudulent charges to be placed on consumers' landline and wireless bills, and to ensure that the unfortunate history of cramming on consumer phone bills does not repeat yet again.

Background

A. Initiation of Third-Party Billing on Telephone Bills

Third-party billing on consumer phone bills grew out of two regulatory steps that occurred in the 1980s: the divestiture of AT&T in 1984 and de-tariffing of telephone billing and collection in 1986. Prior to those steps, AT&T had its own billing and collection system that encompassed both local and long-distance charges. Following the break-up of AT&T, regional bell operating companies, also known as local exchange carriers, were not allowed to offer their own long-distance services, and began providing billing collection services to AT&T and other companies that offered long-distance services.[1]

Over time, telephone companies opened these billing platforms to an array of other third-party vendors that offered products and services beyond those directly related to phone service—from webhosting, to online gaming, online photo storage, and roadside assistance.[2] Telephone numbers thus became a payment method similar to credit card numbers. However, third-party charges levied on the phone bill platform did not receive the same protections as credit card payments. For example, with credit card payments, consumers' liability for unauthorized charges is limited to $50, consumers have the right to dispute unauthorized charges, and consumers have the right to seek to reverse a charge.[3] Further, unlike credit card numbers, telephone numbers for landline phones are widely accessible to anyone with a telephone directory.[4]

B. Third-Party Charges on Landline Phone Bills

From early on, industry representatives pledged that voluntary industry practices would protect consumers from billing scams relating to third-party charges on the carrier billing platforms, and carriers agreed upon a set of nonbinding guidelines.[5] At a Senate hearing in July 1998, the President of the United States Telephone Association asserted, "I have a high degree of confidence that these voluntary guidelines will produce an effective means to curb this abuse," that the industry has "a powerful self-interest to correct this problem," and, that the industry was "working overtime" to eliminate "this scourge."[6]

However, over the decade that followed, consumers increasingly began to complain that the third-party charges appearing on their wireline—also known as "landline"—telephone bills were unauthorized. This came to be known as "cramming." State and Federal law enforcement agencies brought dozens of enforcement actions against third-party crammers that highlighted problems consumers were encountering. For example:

- In 2006, the Attorney General of Florida filed a lawsuit against E-mail Discount Network for charging 20,000 Florida consumers' telephone bills for e-mail accounts and coupons they did not request or use;[7]
- In 2009, the Attorney General of Illinois filed a lawsuit against U.S. Credit Find for placing "unauthorized charges on more than 9,000 Illinois consumers' phone

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[1] Senate Committee on Commerce, Science, and Transportation, *Staff Report on Unauthorized Third-Party Charges on Telephone Bills,* at 1 (July 12, 2011).

[2] *See* Senate Committee on Commerce, Science, and Transportation, *Staff Report on Unauthorized Third-Party Charges on Telephone Bills,* at 22 (July 12, 2011).

[3] *See* Fair Credit Billing Act, 15 U.S.C. §§ 1666–1666j; Consumer Credit Protection Act 15 U.S.C. § 1643; Regulation Z, 12 C.F.R. § 1026.13.

[4] *See* Senate Committee on Commerce, Science, and Transportation, *Staff Report on Unauthorized Third-Party Charges on Telephone Bills,* at 2 (July 12, 2011).

[5] *See* Federal Communications Commission, *Anti-Cramming Best Practices Guidelines* (available at *www.fcc.gov/Bureaus/Common_Carrier/Other/cramming/cramming.html*) (accessed July 7, 2011).

[6] Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, *Hearing on "Cramming": An Emerging Telephone Billing Fraud,* 105th Cong. (July 23, 1998) (S. Hrg. 105–646).

[7] *See* Settlement Agreement, *Florida, Office of the Attorney General* v. *E-mail Discount Network,* Fla. 2d Cir. Ct. (No. 2006 CA 2475) (Feb. 15, 2007).

bills" for a purported online tutorial that would "help consumers fix their credit;" [8] and

- In 2010, a Federal district court awarded the FTC a $37.9 million judgment against Inc21.com Corporation and related third-party vendors after learning that as few as 3 percent of the defendants' customer base expressly authorized the defendants' charges on their telephone bills.[9]

In 2010, Chairman Rockefeller opened an investigation to examine the extent of third-party billing on landline telephone bills. This investigation resulted in a majority staff report issued in July 2011 that found:

(1) third-party billing on wireline telephone bills was a billion-dollar industry, with over $10 billion in charges placed on consumer bills over a five year period;

(2) a substantial percentage of the charges placed on consumers' telephone bills were likely unauthorized;

(3) telephone companies profited from cramming, generating over $1 billion in revenue from placing third-party charges on customer bills over preceding years;

(4) cramming affected every segment of the landline telephone customer base, from individuals to small businesses, non-profits, corporations, government agencies, and educational institutions;

(5) many third-party vendors were illegitimate and created solely to exploit third-party billing;

(6) many telephone customers who were crammed did not receive help from their telephone companies; and

(7) telephone companies were aware that cramming was a major problem on their third-party billing systems.[10]

Following release of the investigation's findings at a Committee hearing and through a majority staff report, in early 2012 the three major telephone companies—Verizon, AT&T, and CenturyLink—agreed to stop placing third-party charges for enhanced services on their customers' wireline telephone bills.[11] These and other carriers continued, however, to allow third parties to place charges on consumers' *wireless* telephone bills.

C. The Emergence of Cramming on Wireless Phone Bills

Over the past two decades, consumers have migrated from using landline phones to relying on mobile phones,[12] including Internet-enabled smartphones that today represents over half of the mobile phone market.[13] As use of wireless phones began to increase, reports began to mount that consumers were being "crammed," or charged for text message services for which they had not enrolled, on their wireless phone bills. Many of the products that were the subject of consumer complaints were charges for subscription services such as celebrity gossip, horoscopes, sports scores, love tips, and diet tips, which were similar to many of the services found to be fraudulent in the Committee's 2011 wireline cramming investigation.[14]

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[8] *See* Press Release, *Madigan Reaches Agreement with U.S. Credit Find to Prevent Phone Cramming,* The Office of the Illinois Attorney General (June 18, 2009).

[9] *See Federal Trade Commission* v. *Inc21.com Corp.,* 745 F.Supp.2d 975, 982–983 (N.D. Cal. 2010).

[10] Senate Committee on Commerce, Science, and Transportation, *Staff Report on Unauthorized Third-Party Charges on Telephone Bills,* at ii–iv (July 12, 2011).

[11] *See* Senate Committee on Commerce, Science, and Transportation, *Rockefeller Hails Verizon Decision to Shut Down Unwanted 3rd-Party Charges on Telephone Bills* (Mar. 21, 2012); Senate Committee on Commerce, Science, and Transportation, *Another Major Phone Company Agrees to End Third-Party Billing on Consumer Phone Bills* (Mar. 28, 2012); *Chairman Rockefeller Introduces Telephone Bill Anti-Cramming Legislation,* U.S. Federal News (June 14, 2012).

[12] A recently released report by the National Center for Health Statistics showed that two out of five U.S. households, or 41 percent, had only wireless phones in the second half of 2013 (July–December 2013). Pew Research Center, *CDC: Two of Every Five U.S. Households Have Only Wireless Phones* (July 8, 2014) (online at *http://www.pewresearch.org/fact-tank/2014/07/08/two-of-every-five-u-s-households-have-only-wireless-phones/*).

[13] As of January 2014, 90 percent of American adults had a cell phone and 58 percent had a smartphone. Pew Research Center, *Cell Phone and Smartphone Ownership Demographics* (online at *http://www.pewinternet.org/data-trend/mobile/cell-phone-and-smartphone-ownership-demographics/*).

[14] *See What's Your Sign? It Could Be a Cram,* New York Times (Mar. 24, 2012) (reporting on a consumer who complained of being billed for horoscope text services not authorized). In the

Continued

In recent years, private parties, state Attorneys General, the Federal Trade Commission (FTC), and the Federal Communications Commission (FCC) have brought a number of actions highlighting consumer protection vulnerabilities in the wireless billing system, particularly with respect to charges placed through a system known as premium short message service (PSMS).

For example, between 2008 and 2010, the Attorney General of Florida reached settlements with AT&T Mobility, Verizon, T-Mobile, and Sprint, wherein the companies agreed to issue refunds to customers billed for ringtones, wallpapers, and other mobile content that had been advertised on the Internet as free, but resulted in consumers being signed up for monthly text message subscriptions.[15] A plethora of other actions followed.[16]

Most recently, the FTC filed its first wireless cramming complaint against a major carrier, alleging that T-Mobile placed unauthorized third-party charges on its customers' wireless bills, including in some cases, for services that had refund rates of up to 40 percent in a month. The complaint alleged that T-Mobile knew or should have known that these charges were not authorized and that T-Mobile's billing practices—allegedly burying charges deep into phone bills and without clear descriptions—made it difficult for consumers to find these unauthorized charges on their bills. According to the complaint, when consumers found these charges on their bills, T-Mobile failed to provide full refunds, and directed consumers to the third-party content providers for redress.[17] The FCC announced that it is also investigating complaints against T-Mobile regarding these same practices.[18]

D. State and Federal Enforcement and Regulatory Authority

Agencies at the state and Federal level have enforcement and regulatory authority to protect consumers from cramming. Many states have enacted legislation and

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wireline cramming investigation, the Committee found that companies that were charging consumers each month for e-mail accounts that included weekly e-mail messages with "celebrity gossip" and "fashion tips." *See* Senate Committee on Commerce, Science, and Transportation, *Staff Report on Unauthorized Third-Party Charges on Telephone Bills,* at ii–iii (July 12, 2011); *See also* footnote 16 *infra,* detailing legal actions concerning various subscription services.

[15] *See FL AG McCollum in Settlement With Sprint Over 'Free' Ringtones,* Bloomberg (Oct. 8, 2010) (online at *http://www.bloomberg.com/apps/news?pid=21070001&sid=aXwc4FpkupsU*); *T-Mobile $600k Settlement with Florida AG Affects All Mobile Content Marketing,* Mobile Marketer (July 22, 2010) (online at *http://www.mobilemarketer.com/cms/news/legal-privacy/6873.html*). *See* Part I.D below for discussion of additional state and Federal actions.

[16] *See Texas* v. *Eye Level Holdings, LLC, et al.,* Tex. D. Ct., Travis County (No. 1:11–cv–00178) (Mar. 11, 2011) (where the Texas Attorney General accused the defendants of engaging in deceptive trade practices by running a text messaging scheme that cost consumers in Texas millions in unauthorized wireless charges; and defendants agreed to pay nearly $2 million to settle the charges); *Federal Trade Commission* v. *Wise Media, LLC, et al.,* N.D. Ga. (No. 1:13cv1234) (Apr. 16, 2013) (where the third-party content provider was charged for placing over $10 million on consumers' wireless bills for unauthorized charges for PSMS messages containing horoscopes, love and flirting tips, and other information); *Federal Trade Commission* v. *Jesta Digital, LLC, also d/b/a JAMSTER,* D.D.C. (No. 1:13–CV–01272) (Aug. 20, 2013) (where the third-party content providers were charged with cramming unwanted charges on consumers' cell phone bills for ringtones and other mobile content); *Texas* v. *Mobile Messenger U.S. Inc., et al,* Tex. D. Ct., Travis County (Nov. 6, 2013) (alleging that defendants, who were a billing aggregator, four content providers, and an online advertising placement business, conspired to enroll consumers in PSMS programs for ringtones, horoscopes, celebrity gossip news, and other coupons without consumer consent); and *Federal Trade Commission* v. *Tatto, et al.,* C.D. Cal (No. 2:13–cv13–8912–DSF–FFM) (Dec. 5, 2013) (in which FTC alleged that defendants placed millions of dollars on consumers' wireless phone bills for text messages that consumers did not authorize; and defendants ultimately agreed to surrender over $10 million in assets to settle these charges). Private parties also have brought legal actions involving third-party cramming charges. *See Tracie McFerren* v. *AT&T Mobility LLC,* Sup. Ct. of Ga. (No. 08–cv–151322) (May 30, 2008) (a class action suit alleging that AT&T failed to set up controls to stop unauthorized third-party charges on consumers' wireless bills); *Gray* v. *Mobile Messenger Americas, Inc.,* S.D. Fl. (No. 0:08–cv–61089–CMA) (July 11, 2008) (a class action suit charging Mobile Messenger, a billing aggregator, with placing unauthorized third-party charges on consumers' wireless bills); *Armer* v. *OpenMarket, Inc.,* W.D. of Wash. (No. 08–CV–01731–CMP) (Dec. 1, 2008) (a lawsuit against OpenMarket, a billing aggregator, and Sprint concerning alleged unauthorized charges for PSMS messages containing content such as ringtones, sports score reports, weather alerts, and horoscopes); and *Cellco Partnership d/b/a Verizon Wireless* v. *Jason Hope, Eye Level Holdings, LLC, et al.,* D. Ariz. (No. 2:11–cv–00432–DGC) (Mar. 7, 2011) (in which Verizon charged that the third-party content provider collected unauthorized or deceptive charges on consumers' wireless bills through PSMS messages).

[17] *See Federal Trade Commission* v. *T-Mobile USA, Inc.,* W.D. Wash. (No. 2:14–cv–00967) (July 1, 2014) (online at *ftc.gov/enforcement/cases-proceedings/132–3231/t-mobile-usa-inc*).

[18] FCC, *FCC Investigates Cramming Complaints Against T-Mobile* (July 1, 2014) (online at *http://www.fcc.gov/document/fcc-investigates-cramming-complaints-against-t-mobile*).

regulations prohibiting cramming on landline service.[19] Further, California has adopted regulatory provisions specifically addressing wireless cramming.[20] In addition, state Attorneys General have been active in pursuing cases against carriers, billing aggregators, and third-party content providers alleged to have crammed consumers on their wireless bills under their state laws prohibiting unfair and deceptive trade practices.[21]

At the Federal level, both the FTC and the FCC have jurisdiction over cramming. The FTC enforces Section 5(a) of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce."[22] The FTC has pursued enforcement actions against third-party content providers, billing aggregators, and carriers based on this authority, finding that cramming charges onto phone bills is both an unfair and deceptive practice.[23]

In addition to these enforcement actions, the FTC has held a workshop regarding wireless cramming and explored the possibility of Federal regulations.[24]

The FCC has pursued cramming cases under Section 201(b) of the Communications Act of 1934, which states in pertinent part: "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service [by wire or radio], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . ."[25] The FCC has found "cramming" to be an "unjust and unreasonable" practice.[26]

Current FCC regulations also contain "truth-in-billing" rules regarding both wireline and wireless phone bills.[27] Further, on April 27, 2012, the FCC issued a Further Notice of Proposed Rulemaking (FNPRM) seeking comments on additional measures to prevent wireline cramming and on possible regulatory and non-regulatory measures to address wireless cramming.[28] The comment period closed in July 2012.[29]

In joint comments made to the FCC in 2012, consumer advocates including the Consumers' Union, Consumer Federation of America, and National Consumer

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[19] *See, e.g.,* Mich. Comp. Laws §484.2502; Cal. Pub. Util. Code §2890; 52 Pa. Code §64.23; Tex. Util. Code §17.151; Va. Code §56–479.3. In 2011, Vermont became the first state to enact legislation prohibiting third-party billing on landline telephone bills, with three limited exceptions: "(1) billing for goods or services marketed or sold by entities subject to the jurisdiction of the Vermont Public Service Board; (2) billing for direct-dial or dial-around services initiated from the consumer's telephone; and (3) operator-assisted telephone calls, collect calls, or telephone services provided to facilitate communication to or from correctional center inmates." 9 Vt. Stat. §2466. Illinois enacted similar legislation in 2012. *See* 815 ILCS 505/2HHH.

[20] The California Public Utilities Commission adopted rules that (1) established that wireless carriers must obtain explicit authorization from consumers before they can be billed for third-party charges; (2) establish that the carriers must refund consumers for unauthorized charges and investigate any complaints of unauthorized charges; and (3) requires wireless carriers to report quarterly the total amount of refunds given to California consumers for unauthorized charges and third party vendors that have been suspended or terminated. *See* Press Release, *CPUC Strengthens Consumer Protections Against Cramming and Fraud on Telephone Bills,* California Public Utilities Commission (Oct. 28, 2010).

[21] *See, e.g.,* cases cited at footnote 16, *supra.*

[22] 15 U.S.C. §45(a). Misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices, and acts or practices are unfair if they cause substantial injury to consumers that consumers cannot reasonably avoid themselves and that is not outweighed by countervailing benefits to consumers or competition. *Id.*

[23] *See, e.g.,* cases cited at footnote 16, *supra.*

[24] *See* Federal Trade Commission Roundtable, *Mobile Cramming, An FTC Roundtable* (May 8, 2013) (online at *http://www.ftc.gov/news-events/events-calendar/2013/05/mobile-cramming-ftc-roundtable*). The FCC also held a workshop on wireless cramming. *See* Federal Communications Commission Workshop, *Bill Shock and Cramming* (Apr. 17, 2013) (online at *http://www.fcc.gov/events/workshop-bill-shock-and-cramming*).

[25] 47 U.S.C. §201(b).

[26] *See* Order, *FCC* v. *Assist 123, LLC,* at 3 (EB–TCD–12–00005541) (July 16, 2014) (online at *http://www.fcc.gov/document/assist-123-pay-13m-resolve-wireless-cramming-investigation*).

[27] 47 C.F.R. §§64.4200–64.2401.

[28] *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in-Billing and Billing Format,* 27 FCC Rcd 4436 (Apr. 27, 2012). The additional safeguards proposed regarding wireline cramming "require wireline carriers that currently offer blocking of third-party charges to clearly and conspicuously notify consumers of this option on their bills and websites, and at the point of sale; to place non-carrier third-party charges in a distinct bill section separate from all carrier charges; to provide subtotals in each section of the bill; and to display separate subtotals for carrier and non-carrier charges on the payment page of the bill." *Id.*

[29] *Consumer and Governmental Affairs Bureau Announces Comment Deadline for "Cramming" Further Notice of Proposed Rulemaking,* Public Notice, DA 12–833 (May 25, 2012).

League,[30] pressed the agency to adopt rules that would, among other things: (1) prohibit third party charges on wireless accounts except for charitable or political giving;[31] (2) for recurring charges (such as subscriptions), require authorization every time a charge is placed on the consumer's account;[32] (3) require carriers to report wireless cramming complaints on a regular basis;[33] and establish a clear dispute resolution process when consumers complain of unauthorized charges on their wireless bills that includes consumer protections such as the right to withhold payment for the charge while the dispute resolution process takes place.[34] Industry representatives, on the other hand, submitted comments arguing that, at the time, wireless cramming was not "a prevalent consumer issue," that voluntary industry measures would ensure that it did not become a significant consumer issue, and that the FCC lacked authority to issue wireless cramming rules.[35]

On August 27, 2013, the FCC released a Public Notice seeking to refresh the record on cramming "in light of developments and additional evidence"[36] related to both wireline and wireless cramming. The FCC rulemaking remains pending.

II. Committee Investigation

In June 2012, Chairman Rockefeller followed up on his wireline cramming investigation to open an inquiry into the scope of unauthorized third-party charges in the wireless context and what steps carriers had undertaken to protect consumers from cramming. He launched this investigation with letters to the four major U.S. wireless phone companies—Sprint, T-Mobile, Verizon Wireless, and AT&T[37]—requesting information regarding the companies' relationships with third-party vendors and billing aggregators and their practices to prevent cramming on consumer wireless bills.

As evidence of wireless cramming continued to mount, Chairman Rockefeller followed up with additional letters to the same four carriers in March 2013 requesting billing data the companies had provided to the California Public Utilities Commission (CPUC) under California's law requiring disclosures relating to wireless billing.[38] Also in March 2013, the Chairman requested information from five major billing aggregators—Ericsson, mBlox, Mobile Messenger, Motricity, and OpenMarket—relating to their practices in facilitating third-party wireless billing and steps they were taking to prevent abuses.[39]

In June 2013, Chairman Rockefeller wrote the four major carriers to request additional information on questions that had emerged regarding how carriers were monitoring consumer authorizations of third-party billing and following up on consumer concerns.[40]

In November 2013, the Attorney General of Texas filed a complaint against Mobile Messenger, one of the major wireless billing aggregators, alleging that the company had engaged in a deceptive scheme with third-party vendors to cram con-

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[30] The comments were also joined by the National Consumer Law Center, Consumer Action, and the Center for Media Justice. *Comments of Center for Media Justice, Consumer Action, Consumer Federation of America, Consumers Union, National Consumer Law Center—On Behalf of its Low-Income Clients, and National Consumer League,* Federal Communications Commission, CG Docket No. 11–116, CG Docket No. 09–158, & CG Docket No. 98–170 (June 25, 2012).

[31] *Id.* at 18.

[32] *Id.* at 20.

[33] *Id.* at 20–21.

[34] *Id.* at 21–22.

[35] *Comments of CTIA-The Wireless Association,* Federal Communications Commission, CG Docket No. 11–116, CG Docket No. 09–158, & CG Docket No. 98–170 (June 25, 2012).

[36] *Consumer and Governmental Affairs Bureau Seeks to Refresh the Record Regarding "Cramming,"* CG Docket No. 11–116, CG Docket No 09–158, & CC Docket No. 98–170, Public Notice, DA 13–1807 (rel. Aug. 27, 2013). Issues on which FCC sought comment included the extent of cramming for consumers of wireline and wireless services, the need for an opt-in requirement and the mechanics of an opt-in process for wireline and wireless services, the details and efficacy of any other industry efforts to combat wireline and wireless cramming, whether different measures to combat cramming are appropriate for small and rural wireless carriers and other wireless carriers, and whether additional measures to combat wireline and wireless cramming are appropriate. *Id.* at 2–3.

[37] Senate Committee on Commerce, Science, and Transportation, *Rockefeller Asks Wireless Carriers for Information on Third-Party Charges* (June 12, 2012).

[38] Senate Committee on Commerce, Science, and Transportation, *Rockefeller Vows to Avert Wireless Cramming Scams on Consumers* (Mar. 1, 2013).

[39] Senate Committee on Commerce, Science, and Transportation, *Rockefeller Questions Billing Aggregators on Wireless Cramming* (Mar. 22, 2013).

[40] Senate Committee on Commerce, Science, and Transportation, *Senators Introduce Legislation to Stop Cramming on Telephone Bills* (June 12, 2013).

sumers.[41] These allegations raised questions regarding representations Mobile Messenger had made to the Committee about the company's commitment to consumer protection and the assurances major carriers had given the Committee that aggregators worked with carriers to promote consumer protections in the third-party wireless billing process. In late November, Chairman Rockefeller wrote to Mobile Messenger seeking additional information concerning a subset of vendors whose conduct had raised concerns and pressing for production of previously requested information.[42]

When Mobile Messenger refused to provide key information requested in the Chairman's March 2013 and November 2013 letters, the Committee on March 14, 2014, issued a subpoena to the company, and Mobile Messenger was responsive to the subpoena.

Over the course of the Committee's investigation, Committee majority staff reviewed thousands of pages of narrative and documentary materials produced by wireless carriers and billing aggregators, and conducted interviews of carrier and aggregator representatives as well as other experts. An association for the wireless industry, CTIA—The Wireless Association (CTIA), also provided the Committee documentary and narrative information about the third-party wireless billing system.

III. Overview of Premium Short Message Service (PSMS) Wireless Billing

From the early days of third-party wireless billing, major carriers allowed third-party vendors to charge for their goods and services on customers' wireless accounts. One system that became prevalent is known as the premium short message service (PSMS) whereby consumers would be charged at a higher rate for one-time content or subscriptions received via text message as compared to the standard messaging rate.[43] PSMS charges, along with other third-party charges, are billed to the consumers' wireless account and appear on their billing statement. Over the past few years, use of PSMS has been waning and major carriers ultimately stopped most commercial PSMS billing early in 2014.[44] At the same time, use of other methods that do not involve PSMS for placing third-party charges on consumers' wireless bills has been increasing.

This section of the report provides an overview of the billing process associated with PSMS and the self-regulation regime that the wireless industry developed to oversee marketing and billing under the PSMS system. Section V of the report addresses alternative third-party billing methods that have been emerging amid the recent decrease in PSMS billing.

A. The PSMS Third-Party Wireless Billing Process

Third-party PSMS billing generally has involved three types of companies: vendors (often known as content providers), wireless carriers, and middlemen known as "billing aggregators" who have provided technology to link content providers and wireless carriers. Under this system, vendors contract with billing aggregators to facilitate placement of charges for goods and services—often referred to as "programs"—on consumers' wireless accounts. Billing aggregators in turn contract directly with the wireless carriers, which control access to the consumers' wireless bills. Each party in this process has retained a portion of the charges paid by consumers.[45]

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[41] Plaintiff's Original Petition, *Texas* v. *Mobile Messenger U.S. Inc., et al,* Tex. D. Ct., Travis County (Nov. 6, 2013).

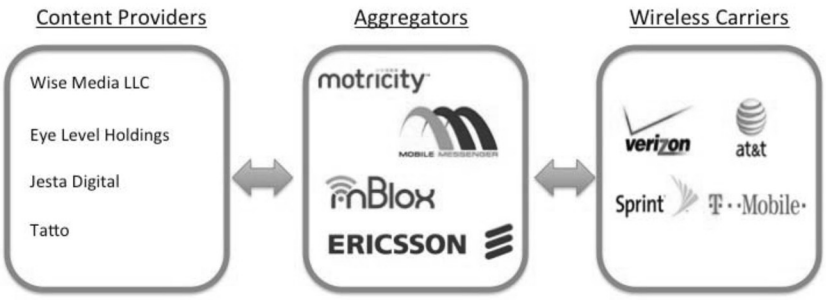
[42] Letter from Chairman Rockefeller to Michael L. Iaccarino, Chief Executive Officer, Mobile Messenger (Nov. 26, 2013).

[43] Verizon Wireless, *Premium Messaging FAQs* (accessed July 27, 2014) (available at *http://www.verizonwireless.com/support/faqs/Premium__TXT__and__MMS/faq__premium__txt__and__mms.html*).

[44] *See, e.g.,* Letter from Chief Executive Officer, mBlox, to Senator John D. Rockefeller IV (Apr. 23, 2013); *VT. AG: 3 Firms End Extra Cellphone Bill Charges,* Associated Press (Nov. 21, 2013). *See also AT&T Mobility, Sprint and T-Mobile Will No Longer. . . .,* Communications Daily (Nov. 25, 2013) (quoting Verizon General Counsel as saying that Verizon had "previously decided to exit the premium messaging business"). PSMS use continues for charitable giving and political contributions. Briefing by CTIA—The Wireless Association to Senate Commerce Committee Majority Staff (June 3, 2014); Briefing by Sprint Nextel to Senate Commerce Committee Majority Staff (July 16, 2014).

[45] *See, e.g.,* Master Services Agreement provided by Mobile Messenger to Senate Commerce Committee (AG–MM–COMM–001908–001911).

FIGURE I: PARTIES IN THE PSMS BILLING PROCESS



In order for a content provider to send commercial premium text messages, the provider first has to obtain authorization to use a five or six-digit code known as a "common shortcode" (CSC).[46] CTIA-The Wireless Association has managed and controlled issuance of CSCs.[47] Once a content provider has been granted a shortcode, they also must apply to individual wireless carriers to obtain access to the carrier's billing platform to charge consumers for specific content—or "campaigns"—associated with the shortcode.[48]

From a consumer's perspective, the PSMS purchase process as prescribed by industry guidelines has worked as follows. Using an authorization process known as the "double opt-in," consumers must take two affirmative acts when purchasing goods or services with their mobile phone: one to initiate the purchase and one to confirm the purchase.[49] At least one of these actions must be performed using the mobile device associated with the wireless account to be charged.

Industry guidelines also have required content providers to provide information and disclosures to consumers before completing the PSMS charge including the identity of the content provider, contact details for the content provider, a short description of the program, pricing, and terms under which consumers could opt out of the subscription, among other requirements.[50]

In addition, content providers must provide a confirmation message after affirmative consumer acceptance, including disclosures about the premium charge billed or deducted from the user's account.[51]

Following is an example of what the prescribed authorization process looks like from a consumer's perspective: a consumer would see an advertisement online, on television, or in-store, for downloading a song. The advertisement denotes the advertisement's sponsor, a description of the service or good being offered, its cost, the frequency of the service—which in this case was one song—information regarding customer support, opt-out information, and information regarding any additional carrier costs.

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[46] Common shortcodes can also be used to allow consumers to make charitable donations and political contributions via text messaging. The Committee's inquiry focused on commercial shortcode charges.

[47] *See* Common Short Code Administration, *About Short Codes Frequently Asked Questions—CTIA Vetting* (online at *http://www.usshortcodes.com/about-sms-short-codes/sms-marketing-faqs.php#.U8l0L6ggZss*).

[48] *See, e.g.,* Letter from Executive Vice President, Federal Relations, AT&T, to Chairman John D. Rockefeller IV, at 5 (July 11, 2012); Letter from General Counsel, Verizon Wireless, to Chairman John D. Rockefeller IV, at 5 (July 11, 2012); Letter from Vice President, Federal Legislative Affairs, T-Mobile USA, to Chairman John D. Rockefeller IV, at 1 (July 11, 2012).

[49] Mobile Marketing Association, *Global Code of Conduct;* Mobile Marketing Association, *U.S. Consumer Best Practices for Messaging, Version 7.0* (Oct. 16, 2012) (online at: *http://www.mmaglobal.com/files/bestpractices.pdf*).

[50] *Id.*

[51] *Id.*

FIGURE II: STEPS IN PRESCRIBED PSMS BILLING PROCESS [52]

The advertisement would tell the consumer to send a text to the shortcode "12345" with the message "music" to buy the song list in the ad. The consumer would take this step, then receive a message confirming the content ordered, which would reiterate much of the information provided in the original advertisement, including program sponsor, price, frequency of product, how to ask for help with the product purchase, and any additional carrier costs. After confirming this content was accurate, the consumer was to authorize the purchase by sending an affirmative message, in this case "Yes," to the "12345" shortcode. The consumer would then receive a link to the product purchased.

B. Voluntary Industry Oversight Over Third-Party Wireless Billing Practices

With respect to third-party billing via PSMS, the U.S. wireless industry developed industry-wide consumer protection standards. Industry-based member organizations created guidelines and recommendations for mobile marketers including parties involved in the marketing and sale of products consumers charge to the wireless phone bills through the PSMS system. Further, carriers developed their own individual policies for oversight of these charges. The following is a description of industry policies concerning the placement of third-party charges on consumer wireless bills.

1. Industry-Wide Oversight

The Mobile Marketing Association (MMA) and CTIA—The Wireless Association (CTIA) spearheaded a number of industry initiatives that were widely adopted throughout the industry for PSMS billing.[53] MMA drafted the Global Code of Conduct and the U.S. Consumer Best Practices for Messaging to provide advertisers, aggregators, application providers, carriers, content providers, and publishers with guidelines for implementing shortcode programs.[54] The guidelines provide detailed

[52] Graphic was provided to the Committee by the company Boku.

[53] Mobile Marketing Association, *Global Code of Conduct* (July 15, 2008); Mobile Marketing Association, *U.S. Consumer Best Practices for Messaging, Version 7.0* (Oct. 16, 2012); and CTIA—The Wireless Association, *Mobile Commerce Compliance Handbook, Version 1.0* (June 4, 2012).

[54] Mobile Marketing Association, *Global Code of Conduct* at 1 (July 15, 2008); Mobile Marketing Association, *U.S. Consumer Best Practices for Messaging, Version 7.0* (Oct. 16, 2012). MMA defines "application provider" as an organization that offers network based software solutions. Mobile Marketing Association, *MMA Glossary—Application Provider* (2014) (online at *http://mmaglobal.com/wiki/application-provider*). "Publisher" is defined as a company that provides WAP sites [a website that is specifically designed and formatted for display on a mobile device] and/or facilitates the delivery of advertising via one or more WAP sites; also, as a pub-

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requirements for advertising and notice to consumers, along with the appropriate methods for authenticating consumer PSMS purchases.

CTIA—in its Mobile Commerce Compliance Handbook—provides "a unified standard of compliance for mobile carrier billing." The guidelines set forth principles for acceptable program content, opt-in procedures, and cancellation. Many of these are highlighted in the "Consumer Bill of Rights," which provide:

- Programs must use a two-factor authentication for all opt-ins.
- After opt-in, users should receive purchase confirmation of their purchase, either on an additional screen or via a text message.
- All offers must display clear, legible pricing information adjacent to the call-to-action. Pricing information must appear on all screens in the purchase flow.
- Billing frequency information should appear with pricing information, and subscriptions should be labeled clearly as such.
- Clear opt-out instructions must be provided before the purchase is completed and before renewal billing each month.
- All offers must include customer care contact information in the form of a toll-free phone number or an e-mail address. Contact information should function and result in actual user help.
- All offers must supply privacy policy access.
- Purchase flows should include clear descriptions of products offered, and products marketed must match products delivered.
- Product descriptions on customers' wireless bills must reflect accurately the product purchased. Descriptions should include the billing shortcode and the program name.[55]

CTIA in conjunction with an outside auditor would vet content providers that were seeking to lease shortcodes to market and charge products to consumers.[56] Content providers that passed CTIA screening through the Common Short Code Administration could lease a shortcode from CTIA consistent with terms of a user agreement requiring compliance with industry best practices and standards, such as whether the vendor makes clear disclosures to the consumer about how to authorize purchases, or whether the consumer is signing up for a one-shot versus a recurring charge.[57]

Content providers that are permitted to charge consumers via the PSMS system have been subject to ongoing CTIA monitoring for compliance with industry standards surrounding program content, as well as opt-in and cancellation procedures.[58] In 2010, CTIA began providing carriers and billing aggregators access to an online portal that provided the results of these reviews—or audits—in reports that detailed why and how guidelines were violated and that assigned a severity level to each failure. Under this system, each carrier has been responsible for determining what follow-up they would conduct with the violating vendor.[59] In addition, carriers re-

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lisher of mobile content, such as games and personalization products. Mobile Marketing Association, *MMA Glossary—Publisher* (2014) (online at *http://mmaglobal.com/wiki/publisher*).

[55] CTIA—The Wireless Association, *Consumer Bill of Rights* (July 1, 2013).

[56] CTIA has been screening all applicants for shortcodes by requiring basic identity and program information, such as the company name, corporate registration, and legal history. *See* Common Short Code Administration, *About Short Codes Frequently Asked Questions—CTIA Vetting* (online at *http://www.usshortcodes.com/about-sms-short-codes/sms-marketing-faqs.php#.U8l0L6ggZss*). CTIA has worked with Aegis Mobile and WMC Global to conduct the vetting process. *See id.;* Aegis Mobile, *CTIA Vetting FAQ* (online at *http://www.aegismobile.com/resources/industry-documents/ctia-vetting-faq/*).

[57] Briefing by CTIA—The Wireless Association to Senate Commerce Committee Majority Staff (June 3, 2014); Mobile Marketing Association, *U.S. Consumer Best Practices for Messaging, Version 7.0* at 23–24 (Oct. 16, 2012); CTIA—The Wireless Association, *Mobile Commerce Compliance Handbook, Version 1.0* at 3–4 (June 4, 2012). CTIA also included the same provisions in its updated Handbook. *See* CTIA—The Wireless Association, *Mobile Commerce Compliance Handbook, Version 1.2* at 5, 7 (Aug.1, 2013).

[58] *See CTIA—The Wireless Association Launches Common Short Codes Media Monitoring Process,* Business Wire (June 15, 2009) (online at *http://www.businesswire.com/news/home/20090615005802/en/CTIA%E2%80%93The-Wireless-Association-Launches-Common-Short-Codes#.U8VyB6ggZss*); WMC Global, *Frequently Asked Questions* (online at *http://www.wmcglobal.com/faq.html*); CTIA, *CTIA In-Market Monitoring Portal User Guide* (online at *http://www.wmcglobal.com/assets/ctia_imm_portal_user_guide.pdf*); Briefing by CTIA—The Wireless Association to Senate Commerce Committee Majority Staff (June 3, 2014).

[59] Briefing by CTIA—The Wireless Association to Senate Commerce Committee Majority Staff (June 3, 2014); CTIA—The Wireless Association, *Mobile Commerce Compliance Handbook, Version 1.0,* at 6–7 (June 4, 2012).

ceive e-mail notification of new audit findings [60] and weekly reports aggregating the audit failures across the mobile content market.[61] These weekly reports have been compiled into monthly reports to the carriers, which also identify the PSMS billing aggregators that hosted content with the most failures.[62]

2. Individual Carrier Policies

In responses to Committee inquiries, the four major carriers all reported that they comply with CTIA and MMA guidelines for third-party wireless billing, [63] and contractually require the same from their billing aggregators and vendors.[64] All carriers also highlighted several key components of their oversight policies:

- Vetting of third-party vendors and their services beyond the CTIA vetting process; [65]
- The two-step authentication process known as the "double-opt-in" required for consumer approval of third-party services charged on wireless bills [66] (see discussion above in part III.A);
- Monitoring of third-party vendor opt-in and opt-out functionality as well as how they market to consumers; [67]
- Monitoring of third-party vendors through consumer complaint and refund thresholds; [68] and
- Offering consumers the option to block third-party purchases that, when implemented, restrict the purchase of any third-party content billed to a customers' mobile device.[69]

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[60] *Id.*

[61] Briefing by CTIA—The Wireless Association to Senate Commerce Committee Majority Staff (June 3, 2014).

[62] *See, e.g.,* WMC Global for CTIA—The Wireless Association, *In-Market Monitoring Update January 2011,* at 6 (Jan. 2011).

[63] Letter from Executive Vice President, Federal Relations, AT&T, to Chairman John D. Rockefeller IV, at 4 (July 11, 2012); Letter from General Counsel, Verizon Wireless, to Chairman John D. Rockefeller IV, at 6 (July 11, 2012); Letter from Vice President—Government Affairs, Sprint Nextel, to Chairman John D. Rockefeller IV, at 2 (July 11, 2012); Letter from Vice President, Federal Legislative Affairs, T-Mobile USA, to Chairman John D. Rockefeller IV, at 6 (July 11, 2012).

[64] *See, e.g.,* Sample Advanced Messaging Agreement for Marketing Messaging Hubs provided by mBlox to the Senate Commerce Committee (stating "At a minimum, programs shall be run in a manner that is congruous with the letter and spirit of the MMA Code of Conduct for Mobile Marketing") (000360).

[65] Letter from Assistant General Counsel, Verizon Wireless, to Senate Commerce Committee Majority Counsel, at 1–5 (July 12, 2013); Letter from Vice President—Government Affairs, Sprint Nextel, to Chairman John D. Rockefeller IV, at 3 (Mar. 22, 2013); Letter from Executive Vice President, Federal Relations, AT&T, to Chairman John D. Rockefeller IV, at 4–5 (July 11, 2012); Letter from Vice President, Federal Legislative Affairs, T-Mobile USA, to Chairman John D. Rockefeller IV, at 3 (July 11, 2012).

[66] Letter from Executive Vice President, Federal Relations, AT&T, to Chairman John D. Rockefeller IV, at 5 (July 11, 2012); Letter from General Counsel, Verizon Wireless, to Chairman John D. Rockefeller IV, Attachment A, at 6 (July 11, 2012); Letter from Vice President—Government Affairs, Sprint Nextel, to Chairman John D. Rockefeller IV, at 7 (July 11, 2012); Letter from Vice President, Federal Legislative Affairs, T-Mobile USA, to Chairman John D. Rockefeller IV, at 5 (July 11, 2012).

[67] One carrier stated that such audits are done "randomly" (Letter from Vice President—Government Affairs, Sprint Nextel, to Chairman John D. Rockefeller IV, at 8 (June 28, 2013)); while another stated they are done on at least a monthly basis (Letter from Assistant General Counsel, Verizon Wireless, to Senate Commerce Committee Majority Counsel, at 5–6 (July 12, 2013)).

[68] Letter from Vice President—Government Affairs, Sprint Nextel, to Chairman John D. Rockefeller IV, at 5–6 (June 28, 2013); Letter from Vice President, Federal Legislative Affairs, T-Mobile USA, to Chairman John D. Rockefeller IV, at 4–5 (June 28, 2013); Letter from Executive Vice President, Federal Relations, AT&T, to Chairman John D. Rockefeller IV, at 4–5 (July 2, 2013); Letter from Assistant General Counsel, Verizon Wireless, to Senate Commerce Committee Majority Counsel, at 8 (July 12, 2013).

[69] Letter from Vice President, Federal Legislative Affairs, T-Mobile USA, to Chairman John D. Rockefeller IV, at 6 (July 11, 2012); Letter from Vice President—Government Affairs, Sprint Nextel, to Chairman John D. Rockefeller IV, at 4 (June 28, 2013); Letter from Executive Vice President, Federal Relations, AT&T, to Chairman John D. Rockefeller IV, at 7 (July 2, 2013); Letter from Assistant General Counsel, Verizon Wireless, to Senate Commerce Committee Majority Counsel, at 1 (July 12, 2013). Consumers are often made aware of these options at the time of purchase of a wireless plan, during customer service calls regarding the appearance of unauthorized charges on a bill, and on the carriers' websites.

Three of the four carriers said they also have used "first call" resolution of consumer cramming complaints, in which the consumer is generally refunded their money on the first complaint call.[70]

IV. Committee Findings on PSMS Third-party Wireless Cramming

Similar to telecom industry assurances about self-regulation of landline billing, from the outset of the Committee's review of cramming on wireless bills, the four major wireless carriers—AT&T, T-Mobile, Verizon, and Sprint—told the Committee that their procedures and practices effectively insulate consumers from cramming on charges incurred through the PSMS system. In July 2012 letters to the Committee, carriers characterized this voluntary system as a "robust process designed to protect customers from unscrupulous actors,"[71] asserting that it provides consumers "simplicity and security,"[72] that the outcome has been a "consistent, secure, and reliable experience" for the consumer,[73] and that carriers have "every incentive to avoid losing a customer due to unauthorized third-party charges."[74] In July 2013 letters to the Chairman, all four carriers asserted that they had only strengthened their anti-cramming practices.[75]

Over this same time period, major industry associations echoed these assurances.[76] In June 2012 comments to the Federal Communications Commission, CTIA-The Wireless Association said that "the wireless industry is already successfully engaged in voluntary initiatives to prevent cramming," calling unauthorized third-party wireless billing a "de minimis" problem.[77] Similarly, the Mobile Marketing Association asserted in May 2013 that the CTIA and MMA rules "are very effective."[78]

However, documents and other information the Committee obtained and reviewed over the course of its inquiry indicate that—just as with landline cramming—industry has gained substantial profits from third-party wireless billing while providing consumers inadequate protections against deceptive and fraudulent charges on their wireless bills. This section details the findings of the Committee majority staff.

A. Carriers Have Profited Tremendously from Third-Party Wireless Billing

It has been estimated that third-party wireless billing activities likely constitute a multi-billion dollar industry.[79] The evidence reviewed by the Committee staff for a sample time frame between 2011 and 2013 supports that analysis.

For example, one carrier reported that nearly $250 million worth of PSMS charges were charged to its customers' accounts in 2011 alone, while another reported over $375 million in total charges for the same year.[80] In addition, information provided by billing aggregators to the Committee shows that the combined revenues of content providers that had relationships with four top aggregators over

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[70] Letter from Vice President—Government Affairs, Sprint Nextel, to Chairman John D. Rockefeller IV, at 4 (June 28, 2013); Letter from Assistant General Counsel, Verizon Wireless, to Senate Commerce Committee Majority Counsel, at 6 (July 12, 2013); Update from AT&T, to Chairman John D. Rockefeller IV, at 2 (Mar. 11, 2013).

[71] Letter from Vice President, Federal Legislative Affairs, T-Mobile USA, to Chairman John D. Rockefeller IV, at 3 (July 11, 2012).

[72] Letter from Executive Vice President, Federal Relations, AT&T, to Chairman John D. Rockefeller IV, at 1 (July 11, 2012).

[73] Letter from Vice President—Government Affairs, Sprint Nextel, to Chairman John D. Rockefeller IV, at 2 (July, 11 2012).

[74] Letter from General Counsel, Verizon Wireless, to Chairman John D. Rockefeller IV, at 1 (July 11, 2012).

[75] Letter from Assistant General Counsel, Verizon Wireless, to Senate Commerce Committee Majority Counsel, at 10–12 (July 12, 2013); Letter from Vice President—Government Affairs, Sprint Nextel, to Chairman John D. Rockefeller IV, at 6–8 (June 28, 2013); Letter from Vice President, Federal Legislative Affairs, T-Mobile USA, to Chairman John D. Rockefeller IV, at 6–7 (June 28, 2013); and Letter from Executive Vice President, Federal Relations, AT&T, to Chairman John D. Rockefeller IV, at 7–11 (July 2, 2013).

[76] *See, e.g.,* Comments of CTIA—The Wireless Association, Federal Communications Commission, CC Docket No. 98–170 (June 25, 2012); Commentary of Mike Altschul, General Counsel, CTIA—The Wireless Association, Federal Trade Commission, *Mobile Cramming, An FTC Roundtable* (May 8, 2013).

[77] *Comments of CTIA—The Wireless Association,* Federal Communications Commission, CC Docket No. 98–170, at 1–2 (June 25, 2012).

[78] Commentary of Cara Frey, General Counsel, Mobile Marketing Association, Federal Trade Commission, *Mobile Cramming, An FTC Roundtable* (May 8, 2013).

[79] Commentary of Jim Greenwell, Chief Executive Officer and President, BilltoMobile, Federal Trade Commission, *Mobile Cramming, An FTC Roundtable* (May 8, 2013) (estimating the volume of such billing to be between $2 to $3 billion).

[80] Letters from Carrier Representatives to Chairman John D. Rockefeller IV (July 2012).

2011–2013 totaled over $1.2 billion.[81] This amount—while substantial—does not reflect the entirety of the third-party wireless billing market, as multiple other aggregators were operating in the PSMS market during this time period,[82] and other non-PSMS third-party billing mechanisms were emerging as well.[83]

Further, information provided by the California Public Utility Commission (CPUC) shows that in 2012, over $191 million worth of third-party charges were placed on consumers' wireless bills in California alone—and California has been estimated to constitute about 10 percent of the wireless market in the United States. Extrapolating and applying the California data across all 50 states, over a span of years, it is likely these numbers would climb into the billions.[84]

Information provided to the Committee by individual carriers indicates that major carriers reaped hundreds of millions of dollars annually from their role in placing third-party charges on wireless phone bills. Contracts reviewed by the Committee show that the carriers generally collected 30 percent to 40 percent of the total value of the charges placed.[85] Individual charges are generally small—most often ranging from $1 to $20, with frequent reports of a $9.99 recurring monthly charge. However, the high volume of these charges yields substantial cumulative revenues. For example, one carrier reported processing over 120 million individual third-party transactions on consumer wireless bills in 2011.

In addition to the carriers' revenue shares, contracts reviewed by Committee staff show that certain carriers have collected additional fees that could also add to their profits. For example, one carrier also collected "Excessive Premium Campaign Refund Rate Fees." These additional fees allow the carrier to charge $10.00 per customer care call once a content provider's refund rate exceeded 15 percent per month.[86] Another carrier has imposed fees ranging from $25,000 to $100,000 where providers experience billing issues which include high levels of refunds.[87]

B. Wireless Cramming has Likely Cost Consumers Hundreds of Millions of Dollars

The evidence reviewed by Committee staff indicates that wireless cramming has likely cost consumers hundreds of millions dollars over the past several years. This assessment is based on a review of data regarding refund rates, consumer complaint information provided by carriers and billing aggregators regarding unauthorized third-party charges, and a number of studies and law enforcement actions that have quantified the extent of wireless cramming.

1. Refund Rates

Beginning in 2011, the California Public Utilities Commission (CPUC) required wireless carriers to provide data about refunds made directly to consumers. Numbers provided by CPUC show that between 2011 and 2013, carriers returned over $60 million in refunds to customers out of $495 million in total third-party wireless charges, just with respect to California wireless consumers.[88] While industry argues that refund rates are a "flawed metric" because refunds can be made for reasons

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[81] Four out of five aggregators provided revenues of content providers to the Committee. Letter from Head of Corporate Affairs and Communications, Ericsson Inc., to Chairman John D. Rockefeller IV (Apr. 19, 2013); Letter from Chief Administrative Officer and General Counsel, Motricity, Inc., to Chairman John D. Rockefeller IV (May 25, 2013); Letter from Attorney, Mobile Messenger, to Chairman John D. Rockefeller IV (Apr. 21, 2014); mBlox Response to Chairman John D. Rockefeller IV (Apr. 21, 2014).

[82] Response letters from carriers listed many aggregators. Letter from Executive Vice President, Federal Relations, AT&T, to Chairman John D. Rockefeller IV, at 3 (July 11, 2012); Letter from General Counsel, Verizon Wireless, to Chairman John D. Rockefeller IV, at Attachment A (July 11, 2012); Letter from Vice President—Government Affairs, Sprint Nextel, to Chairman John D. Rockefeller IV, at 4 (July 11, 2012); Letter from Vice President, Federal Legislative Affairs, T-Mobile USA, to Chairman John D. Rockefeller IV, at 1 (July 11, 2012).

[83] *See, e.g.,* Commentaries of Jim Greenwell, Chief Executive Officer and President, BilltoMobile, and Martine Niejadlik, Compliance Officer and Vice President of Customer Support, Boku, Federal Trade Commission, *Mobile Cramming, An FTC Roundtable* (May 8, 2013).

[84] Comments of California Public Utilities Commission, Federal Communications Commission, CC Docket No. 98–170, at 20 (Nov. 18, 2013).

[85] Committee staff reviewed a number of contracts between billing aggregators and wireless carriers that outlined the payment arrangements.

[86] Sample aggregator contract provided to the Senate Commerce Committee (000179).

[87] Sample aggregator contract provided to the Senate Commerce Committee (000066–000067).

[88] Between 2011 and 2013, carriers reported refunding $60,037,906 out of $495,134,687 in total wireless charges, including $25,095,834 in 2011, $23,250,885 in 2012, and $11,691,187 in 2013, with total billed, including $173,644,442 in 2011, $191,302,355 in 2012, and $130,187,888 in 2013. Comments of California Public Utilities Commission, Federal Communications Commission, CC Docket No. 98–170 (Nov. 18, 2013) and e-mail from CPUC Representatives to Senate Commerce Committee Majority Counsel (Apr. 23, 2014).

other than cramming,[89] CPUC explained its rationale for using this measure as follows:

> [W]e use refunds as a proxy for complaints because when we had complaint reporting, we would end up in endless semantic digressions around the meaning of the word complaint. So refund is something a little more tangible and we assume that in most cases refunds are not made out of the blue but in relation to some expression of dissatisfaction by the customer.[90]

CPUC also notes that this approach addresses concerns carriers have expressed that "tallying subscriber complaints of unauthorized charges would be excessively burdensome."[91]

As noted earlier, the CPUC numbers concern activity on wireless accounts solely in California, which reflects approximately 10 percent of the total U.S. wireless market.[92] If the rate of refunds and total charges billed reported to the CPUC were applied nationwide, the total refunds would likely have been well over $200 million out of $1.9 billion in 2012 alone. Even assuming that a portion of the refunds reported to the CPUC are not related to cramming, these numbers provide substantial evidence that cramming on wireless bills has been a serious problem.

Industry argues that numbers of refunds is not an accurate tool to assess the incidence of cramming due to the carriers very liberal refund policies. However, one carrier was able to provide a rough breakdown of refunds specifically attributable to complaints that charges were unauthorized—a category they titled "Authorization of Charge Disputed"—and the results are still high. This carrier reported that 28.1 percent of total refunds issued in 2012 constituted the "Authorization of Charge Disputed" category.[93] If this percentage were applied to the $200 million figure estimated above to reflect total nationwide wireless refunds for 2012, refunds attributable to cramming for that year would top $50 million nationwide in one year alone. Based on this analysis, over time, wireless cramming has likely cost American consumers hundreds of millions of dollars.

2. Consumer Complaint Data

Consumers also reported on wireless cramming via complaints to Federal and state law enforcement as well as to carriers and billing aggregators. One billing aggregator reported receiving over 7,000 contacts from consumers in 2012 alone, over 30 percent of which involved requests for refunds.[94] A FTC review of complaints from the Consumer Sentinel database, one of the major national resources for compiling local, state, and Federal consumer complaints, showed over 2,000 complaints of unauthorized charges on wireless bills between 2010 and 2013.[95]

In addition, in a 2013 survey conducted by the Office of the Attorney General of Vermont, 60 percent of respondents reported that the third-party charges found on their wireless telephone bills were unauthorized.[96]

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[89] *See Reply Comments of CTIA—The Wireless Association,* Federal Communications Commission, CC Docket No. 98–170, at 5 (Dec. 16, 2013) (arguing that "refund amounts and refund rates are flawed metrics for assessing instances of unauthorized charges on wireless bills. Carriers have consumer-friendly refund policies that cover a variety of situations and transactions—much more than just unauthorized third-party charges.").

[90] Commentary of Chris Witteman, Senior Staff Counsel, California Public Utilities Commission, Federal Trade Commission, *Mobile Cramming, An FTC Roundtable* (May 8, 2013).

[91] Letter from Consumer Affairs Branch, California Public Utilities Commission, to Senate Commerce Committee Majority Counsel (Jan. 31, 2013).

[92] Calculation of this percentage was based on the total number of wireless subscriber connections in California (34 million), and the United States (326.4 million) in 2012, as reported by CPUC and CTIA respectively. California Public Utilities Commission, *2012 Annual Report* (Feb. 1, 2013); CTIA—The Wireless Association, *Wireless Quick Facts* (last updated June 2014) (online at *http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey*). Committee staff was unable to compare California and national wireless subscriber numbers for 2013, as CPUC's 2013 Annual Report did not include the number of wireless subscriber connections in California.

[93] Letter from T-Mobile USA, to Chairman John D. Rockefeller IV, at 5 (June 28, 2013).

[94] mBlox Response to Senate Commerce Committee (Mar. 25, 2014) (chart titled "U.S. Cases (Jan-1-2012–March-31-2013)").

[95] Federal Trade Commission, *Consumer Sentinel Network Data Book for January—December 2012,* at 84 (Feb. 2013) (showing 784 complaints for mobile unauthorized charges in 2010); Federal Trade Commission, *Consumer Sentinel Network Data Book for January–December 2013,* at 84 (Feb. 2014) (showing complaints for mobile unauthorized charges was 626 in 2011, 714 in 2012, and 363 in 2013).

[96] Center for Rural Studies at the University of Vermont, *Mobile Phone Third-Party Charge Authorization Study* (May 5, 2013). Following the release of survey results, CTIA engaged an expert to conduct an analysis of the Vermont Study. The analysis highlighted concerns with the

Industry representatives have argued that complaint numbers were low and that the incidence of cramming on wireless bills was insignificant.[97] However, consumer complaint tallies likely reflect numbers far lower than actual cramming occurrences. Evidence shows that consumers are frequently unaware that third-party charges are appearing on their telephone bills. FTC Commissioner Maureen Ohlhausen elaborated on this point as follows:

> Indeed, we are aware of thousands of consumer complaints about unauthorized charges on wireless bills. And we believe that these complaints may well under represent the problem or under report the problem. From surveys done in the landline cramming context, we know that many consumers are unaware that third parties can place charges on their phone bills. We also know that consumers often fail to spot unauthorized charges on their bills. They may simply look at the overall bill amount and pay in full without doing a line-by-line review; or they may read the bill and fail to spot the charges because they're buried deeply within the bill or listed in generic sounding categories, such as premium services.[98]

Committee staff review of consumer complaints substantiates this viewpoint. Individual consumers often reported only finding the charges after paying them for extensive periods of time. For example, one consumer complained, "I was billed for 18 months for $9.99 ($10.76 after taxes) for something I had no clue about and up till [sic] today when I reviewed my bill I noticed these charges." Another consumer reported, "Having automatically paid my bills for one year, I unfortunately just learned I was paying for unsolicited text messages for over a year."[99]

Indeed, the complaint filed by the FTC against T-Mobile alleges that the bill statements received by customers did not adequately disclose PSMS charges.[100] Customers reviewing their bill online allegedly could not see these charges by viewing a summary of the charges; only by clicking a series of links could they find premium service charges.[101] Figure III below is a graphic from the FTC complaint in this case illustrating how the charges allegedly were shown on the consumers' paper statements.

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methodology used for the study. The analysis was submitted to the Federal Trade Commission by CTIA on June 24, 2013.

[97] *See, e.g.,* Federal Communications Commission, CC Docket No. 98–170, Comments filed by AT&T, Inc. (July 20, 2012), (Dec. 16, 2013); T-Mobile USA Reply Comments (July 20, 2012); and Verizon Wireless (June 25, 2012).

[98] Opening Remarks by Commissioner Maureen Ohlhausen, Federal Trade Commission, *Mobile Cramming, An FTC Roundtable* (May 8, 2013).

[99] Sprint Nextel Response to Chairman John D. Rockefeller IV (Mar. 22, 2013).

[100] Complaint for Permanent Injunction and Other Equitable Relief, *Federal Trade Commission* v. *T-Mobile USA, Inc.,* W.D. Wa., at 4–9 (No. 2:14-cv-00967) (July 1, 2014).

[101] *Id.* at 5–6.

FIGURE III: T-MOBILE BILL SUMMARY [102]

EXCERPTS FROM AN ACTUAL T··Mobile·· BILL

Page 1 hides unauthorized 3rd party charges:

Summary

Item		Amount
Previous Balance		96.71
Prnt Rec'd - Thank You		(96.71)
		-
Monthly Recurring Chgs		73.32
Credits & Adjustments		(10.00)
Usage Charges		9.99
Other Charges		4.83
Taxes & Surcharges		14.97
	Total Current Charges	**$93.11**
	Current Charges Due By	**2/07/13**
	Grand Total	**$93.11**

INCLUDES UNAUTHORIZED CHARGES FOR TRIVIA TEXT ALERTS

123 pages later . . .

PREMIUM SERVICES

SAYS NOTHING ABOUT TRIVIA TEXT ALERTS

Date	Content Provider	Time	Description	Usage Charges	Total
OTHER SERVICE PROVIDER CHARGES					
1/11/13	Shaboom Media	6:59pm	8888906150 BrnStorm23918	9.99	9.99
				SUBTOTAL	9.99

Premium charges were not individually listed in the summary section of the bill. Though they were itemized in a "Premium Services" section several pages into the bill, the information was presented in a way that did not adequately explain that the charge was for a recurring subscription service authorized by the consumer.[103] If these allegations are true, it is entirely possible that many consumers over a number of years had paid for third-party charges they did not authorize.

3. State and Federal Actions

The charges detailed in numerous state and Federal law enforcement actions also underscore the broad consumer impact of wireless cramming. These cases have charged that consumers have been victims of cramming schemes costing them hundreds of millions of dollars. For example:

[102] *Id.* T-Mobile recently represented to Committee majority staff that the company has changed the way these charges are depicted in their wireless bills. Briefing by T-Mobile USA to Senate Commerce Majority Staff (July 17, 2014).

[103] *FTC* v. *T-Mobile, supra* note 100, at 6–9.

- In 2011, the Attorney General of Texas filed a lawsuit against Eye Level Holdings, LLC, alleging that the defendants collected millions of dollars through the placement of unauthorized charges on the wireless telephone bills of thousands of Texas residents.[104]
- In 2013, Wise Media and its owners agreed to settle FTC allegations that they caused more than $10 million in consumer harm by placing unauthorized recurring $9.99 monthly fees on consumers' wireless bills.[105]
- In June 2014, a district court issued a stipulated order for a monetary judgment totaling over $150 million in a case brought by FTC alleging defendants used deceptive websites to cram consumer's wireless bills.[106]
- In July 2014, the FTC charged T-Mobile with placing third-party charges on consumers' wireless bills despite clear warnings that the charges were unauthorized, and engaging in billing practices that made it difficult for consumers' to discern fraudulent charges, alleging that these practices cost consumer millions of dollars in injury.[107]

Indeed, review of 2011–2013 data provided to the Committee by major billing aggregators regarding revenue generated by content provider clients shows that many of the top revenue generators in this time frame were ultimately the subject of state or Federal enforcement actions. According to this data, the subjects of enforcement actions generated approximately 23.5 percent of total revenue reported to the Committee for this time period—$289,037,831 of $1.2 billion.[108]

In short, the cumulative evidence revealed by enforcement actions, consumer complaints, refund rates, and studies, indicates that hundreds of millions of dollars in crammed charges have been placed on consumers' wireless bills over the past several years.

C. Carriers Were on Notice about Cramming and Other Vendor Problems

Carriers should have known at least as early as 2008 that consumers were complaining of cramming on their wireless bills. Beginning in 2008, the Florida Attorney General entered into enforcement settlements with Cingular (AT&T), Verizon, Sprint, and T-Mobile over allegations that unauthorized charges had been placed on their consumers' bills.[109] These settlements created a "best practices" regime intended to ensure that consumers were receiving clear and conspicuous prices and terms of the content being purchased before such charges could be placed on a consumer's wireless bill.[110]

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[104] Plaintiff's Original Verified Petition and Application for Ex Parte Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, *Texas* v. *Eye Level Holdings, LLC, et al.,* Tex. D. Ct., Travis County (No. 1:11–cv–00178) (Mar. 11, 2011).

[105] Press Release, *Mobile Crammers Settle FTC Charges of Unauthorized Billing,* Federal Trade Commission (Nov. 21, 2013) (online at *http://www.ftc.gov/news-events/press-releases/2013/11/mobile-crammers-settle-ftc-charges-unauthorized-billing*).

[106] Press Release, *Operators of Massive Mobile Cramming Scheme Will Surrender More than $10 M in Assets in FTC Settlement,* Federal Trade Commission (June 13, 2014) (online at: *http://www.ftc.gov/news-events/press-releases/2014/06/operators-massive-mobile-cramming-scheme-will-surrender-more-10m*). The judgment was partially suspended based on defendants' inability to pay the full amount.

[107] Complaint for Permanent Injunction and Other Equitable Relief, *Federal Trade Commission* v. *T-Mobile USA, Inc.,* W.D. Wa. (No. 2:14–cv–00967) (July 1, 2014).

[108] Defendants named in state and Federal enforcement action include: Jesta Digital, Bullroarer, Mobile Media Products, Bune, Wise Media, Tatto, Eye Level Holdings, Anacapa Media LLC, Tendenci Media, Bear Communications LLC, MDK Media, Mundo Media, SE Ventures, GMK Communications, MindKontrol Industries LLC, and Network One Commerce Inc. *Federal Trade Commission* v. *Jesta Digital, LLC, also d/b/a JAMSTER,* D.D.C. (No. 1:13–CV–01272) (Aug. 20, 2013); *Federal Trade Commission* v. *Tatto, et al.,* C.D. Cal (No. 2:13–cv13–8912–DSF–FFM) (Dec. 5, 2013); *Federal Trade Commission* v. *Wise Media, LLC, et al.,* N.D. Ga. (No. 1:13cv1234) (Apr. 16, 2013); *Texas* v. *Eye Level Holdings, LLC, et al.,* Tex. D. Ct., Travis County (No. 1:11–cv–00178) (Mar. 11, 2011); *Texas* v. *Mobile Messenger U.S. Inc., et al,* Tex. D. Ct., Travis County (Nov. 6, 2013); *Federal Trade Commission* v. *MDK Media, Inc., et al.,* C.D. Cal (No. 2:14–cv–05099–JFW–SH) (July 3, 2014).

[109] *AT&T Settles with Florida AG Over Mobile Content Ads,* Mobile Marketer (Mar. 3, 2008); *T-Mobile $600k Settlement with Florida AG Affects All Mobile Content Marketing,* Mobile Marketer (July 22, 2010); *Sprint Settles Cell Phone Cramming Charges in Florida,* Consumer Affairs (Oct. 8, 2010).

[110] *See, e.g., Verizon Settlement with Florida AG Affects All Marketing of Mobile Content,* Mobile Marketer (June 29, 2009); *In the Matter of Verizon Wireless LLC and Alltel Communications, LLC,* Assurance of Voluntary Compliance at 5–13 (June 16, 2009). Specifically, the settlements resulting from the Florida actions require that certain provisions be included in the contracts between the carriers and any companies that "advertise, aggregate billing for, offer and/

Continued

According to CTIA, shortly after the last settlement was signed in October 2010,[111] this best practice regime was incorporated into the mobile billing standards against which the industry audited vendors for compliance.[112] The CTIA audit reports that followed indicated that, three years after the Florida enforcement cases sounded the alarm about wireless cramming, the overwhelming majority of vendors allowed to charge consumers on wireless billing platforms were not meeting basic standards.

For example, with respect to the monthly reports CTIA provided carriers summarizing in-market auditing, the January 2011 report showed a failure rate of nearly 100 percent for marketing offers tested—or "intercepted"—by the auditors.[113] Virtually all of the failures[114] were for violations classified by CTIA as "severity level one," meaning "serious consumer harm."[115] While monthly industry audit reports after January 2011 showed declining numbers of compliance failures, it was not until September 2011 that more interceptions were reported to have passed than failed.[116] And in January 2012, audits still showed a 25 percent failure rate.[117] After August 2012, the reports indicated passage rates of 95 percent or higher, meaning that 95 percent of offers tested complied with CTIA guidelines.[118]

D. Industry Self-Regulation Has Left Gaps In Consumer Protection

1. The Double Opt-In Safeguard Was Porous

Many of the voluntary policies and practices industry instituted to protect against cramming in the PSMS system are similar to those industry touted in the landline context.[119] However, as with law enforcement actions in the 2000s involving landline cramming,[120] a series of recent state and Federal law enforcement cases concerning wireless cramming have highlighted potential vulnerabilities with industry's voluntary consumer protection system. In particular, recent actions raise concerns regarding the effectiveness of the double opt-in authorization.

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or sell mobile content." These include: (1) a prohibition on using words like "free," "complimentary," "without charge" or other similar terms without clear and conspicuous disclosure that the consumer will have to pay for a subscription in order to receive the content; (2) specifications for font size and color on all consumer disclosures for web-based advertising for mobile content; and (3) certain price and billing disclosures must be made "above the fold" on the mobile "submit" and "PIN submit" pages. In addition to these best practices, the settlements also required the carriers to establish monetary compensation programs for consumers who had experienced unauthorized third-party billing charges. *Id.* at 4–10, 13–14.

[111] Briefing by CTIA—The Wireless Association to Senate Commerce Committee Majority Staff (June 3, 2014).

[112] *See* Part III.B.1, *supra.*

[113] WMC Global for CTIA—The Wireless Association, *In-Market Monitoring Update January 2011,* at 2 (Jan. 2011). According to the report, 18,304 offers were tested. *Id.* at 3. A copy of this report is attached as Exhibit A. In May 2011, the monthly in-market auditing reports began including specific breakdowns of premium messaging testing results and standard rate testing results, but the January 2011 report does not provide that breakdown. CTIA has represented to the Committee that the PSMS testing in January 2011 had a failure rate of 97 percent.

[114] The January 2011 In-Market Monitoring Update showed that 99.57 percent of interceptions failed at severity level 1. *Id.* at 3.

[115] CTIA—The Wireless Association, *Mobile Commerce Compliance Handbook, Version 1.0,* at 6 (June 4, 2012). For example, the most common of the January 2011 violations concerned the "no account holder authorization disclosure" requirement concerning how to disclose that the account holder must authorize purchases. *In-Market Monitoring Update January 2011,* at 2 (Jan. 2011)*;* CTIA—The Wireless Association, *Mobile Commerce Compliance Handbook, Version 1.0* at 8 (June 4, 2012) (describing standards).

[116] According to the September 2011 report, 49 percent of the interceptions failed while 51 percent passed. WMC Global for CTIA—The Wireless Association, *In-Market Monitoring Update September 2011,* at 3 (Sept. 2011).

[117] WMC Global for CTIA—The Wireless Association, *In-Market Monitoring Update January 2012,* at 3 (Jan. 2012).

[118] *See, e.g.,* WMC Global for CTIA—The Wireless Association, *In-Market Monitoring Update September 2012,* at 3 (Sept. 2012) (showing 96 percent of interceptions passed); WMC Global for CTIA—The Wireless Association, *In-Market Monitoring Update October 2012,* at 3 (Oct. 2012) (showing 97 percent of interceptions passed), WMC Global for CTIA—The Wireless Association, *In-Market Monitoring Update December 2012,* at 3 (Dec. 2012) (showing 98 percent of interceptions passed). Copies of relevant portions of the January 2012 and December 2012 reports are attached at Exhibit A.

[119] For example, similar to the policies described above, for third-party billing on landline phones, phone companies instituted policies providing for screening of vendors, the option for consumers to block third-party billing, and customer complaint thresholds that trigger corrective action. For a detailed discussion of industry self-regulation initiatives to address cramming on wireline phone bills *see* Senate Committee on Commerce, Science, and Transportation, *Staff Report on Unauthorized Third-Party Charges on Telephone Bills,* at 30–33 (July 12, 2011).

[120] *Id.* at 4–5.

As discussed above, industry representatives have argued that a key protection against wireless cramming that was not present in the landline context is the "double opt-in" requirement,[121] as it involves affirmative steps by the consumer that are "immediate," "current," and "actionable" before billing can be activated.[122] However, several cases brought at the state and Federal level in the last few years have detailed multiple ways content providers have circumvented the double opt-in. For example:

- According to an FTC action brought in December 2013, content providers operated a scam in which they billed consumers for services that were not authorized through the use of misleading websites. The complaint cites as an example a website that offered to sign up consumers for Justin Bieber concert tickets if consumers provided their phone number, and alleges defendants likely used that phone information to sign up the consumer for services without their knowledge.[123]
- According to the complaint in a separate FTC action brought in April 2013, consumers received unsolicited text messages from a third-party vendor and were charged on their wireless bills for the vendors' services regardless of whether the consumers had ignored the text message or had responded via text message that they did not want the services.[124]
- A complaint brought by the Attorney General of Texas in 2011 claimed that the defendants used deceptive websites to entice consumers to enter their wireless telephone numbers. According to the complaint, defendants' websites would come up as prominent sponsored links when consumers entered generic search queries for information on topics such as "song lyrics." Defendants' link would not mention subscriptions or costs, and if consumers clicked on the link they would be taken to a page where they were encouraged to enter their phone number with prominent instructions such as "enter your cell phone number to access the lyrics" without any clear and conspicuous disclosures that consumers were in fact signing up for paid subscription services. The complaint further alleged that, to conceal this flawed enrollment process from regulators, carriers, and consumers re-visiting the site, defendants created "dummy" websites that included larger, brighter, and clearer disclosures on the service cost and subscription nature.[125]

In another case brought by the Attorney General of Texas, defendants allegedly worked around the "double opt-in" requirement through the following process depicted with the accompanying graphics reproduced in Figure IV below.[126] An online search for Olive Garden coupons would turn up a link for a 50 percent discount coupon, without disclosures regarding any fees or subscriptions charged for enrolling.[127]

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[121] *Comments of CTIA—The Wireless Association,* Federal Communications Commission, CC Docket No. 98–170, at 2 (June 25, 2012); Letter from General Counsel, Verizon Wireless, to Chairman John D. Rockefeller IV, at 2 (July 11, 2012) (noting there is no analogue to the double opt-in in the wireline billing context).

[122] Commentary of Mike Altschul, General Counsel, CTIA—The Wireless Association, Federal Trade Commission, *Mobile Cramming, An FTC Roundtable* (May 8, 2013).

[123] Complaint for Permanent Injunction and Other Equitable Relief, *Federal Trade Commission* v. *Tatto, et al.,* C.D. Cal (No. 2:13–cv13–8912–DSF–FFM) (Dec. 5, 2013).

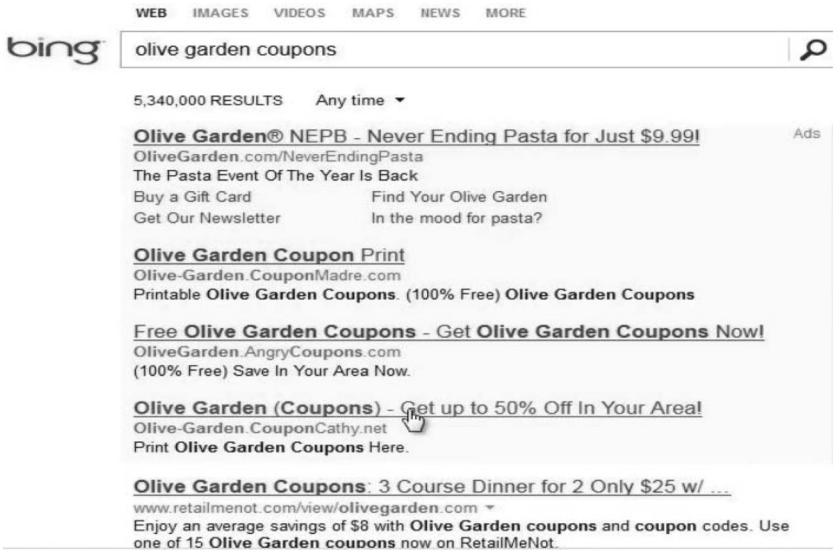
[124] Complaint for Permanent Injunction and Other Equitable Relief and Exhibits, *Federal Trade Commission* v. *Wise Media, LLC, et al.,* N.D. Ga. (No. 1:13cv1234) (Apr. 16, 2013).

[125] Plaintiff's Original Verified Petition and Application for Ex Parte Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, *Texas* v. *Eye Level Holdings, LLC, et al.,* Tex. D. Ct., Travis County (No. 1:11–cv–00178) (Mar. 11, 2011). The case settled in 2012.

[126] Plaintiff's Original Petition, *Texas* v. *Mobile Messenger U.S. Inc., et al.,* Tex. D. Ct., Travis County, at 12 (Nov. 6, 2013).

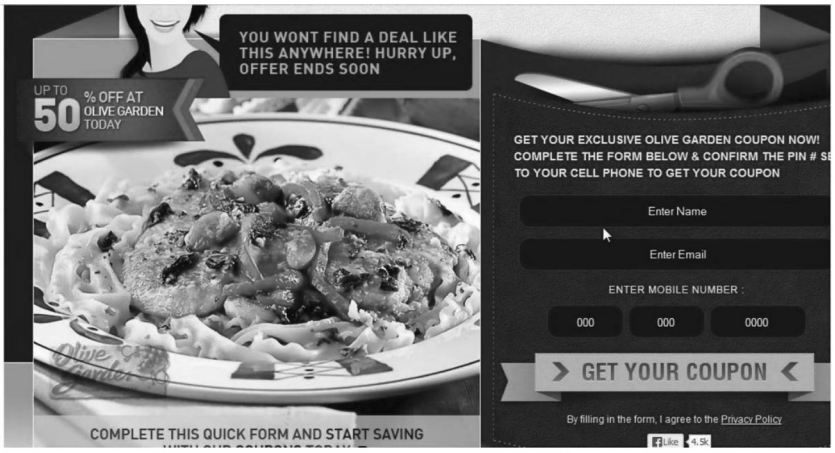
[127] *Id.*

FIGURE IV: INTERNET SEARCH PRODUCING PSMS WEBSITE



Consumers who tried to download the coupon were required to enter their personal information including mobile phone number (see depiction of this screen in Figure V below). The complaint alleged that, by entering their mobile phone numbers, consumers unknowingly authorized a $9.99 per month subscription service providing monthly horoscopes.[128] Consumers were not provided clear disclosures regarding the actual offer of the subscription service or its relevant terms and conditions unless consumers scrolled down.[129]

FIGURE V: WEBSITE DRAWING CONSUMERS INTO PSMS CAMPAIGN



In this case, the Texas Attorney General also alleged that content providers lured unknowing consumers to subscribe for deceptive PSMS campaigns through the use of website addresses that contained common typos and misspellings of the addresses

[128] *Id.* at 14–15.
[129] *Id.* at 15.

of legitimate websites. These websites would encourage consumers to share personal information including their phone numbers in exchange for a promised gift card.[130]

Industry representatives have underscored that wireless cramming enforcement cases have involved conduct that circumvents consent mechanisms, and that generally the double-opt in mechanism was sound.[131] However, conduct described in the above cases allegedly continued for time periods as long as several years, indicating substantial weaknesses in the wireless industry's ability to root out abuses of consumer authorization requirements.

2. Tolerance for High Consumer Refund Rates Raises Questions about Carrier Commitment to Preventing and Addressing Cramming

All four major carriers cited consumer refund thresholds as a tool for spotting potential vendor misconduct. However, the thresholds and response actions triggered by breach of these thresholds varied widely in the policies carriers described to the Committee.[132] Documents produced to the Committee by billing aggregator Mobile Messenger regarding a subset of its vendors provided a further window into the role that refund threshold policies played in the industry's oversight of the PSMS billing system.[133] Review of these documents revealed that carriers saw extremely high refund rates and high monthly refund totals for some vendors and were not consistent in how they followed up on red flags concerning vendor misconduct.

a. Carrier Policies on Refund Thresholds

Verizon Wireless, AT&T, Sprint, and T-Mobile established different refund threshold levels for triggering additional vendor review, and their policies also varied regarding specific prescribed follow-up steps. For example, Verizon Wireless's policy provided that if the refund rate *for any one program* in any month is between 5 percent and 7.99 percent, *all* PSMS campaigns managed by that vendor would be suspended, and if the refund rate exceeded 8 percent, *all* PSMS campaigns of the vendor would be terminated.[134] Billing aggregator documents indicate that the policy applied to shortcodes on Verizon's network was that suspension for refunds between 5 percent and 7.99 percent meant a bar on acquiring *new* subscribers for a period of 90 days.[135] The policy applicable once refunds exceeded 8 percent involved both a bar on new subscribers and a requirement that existing subscribers be unsubscribed for shortcodes with subscriptions that brought in an average revenue of at least $5000 over the previous three months.[136]

AT&T, on the other hand, stated that it did not have a static threshold for refund rates but rather it adjusted the threshold "over time to account for changes in the overall refund rate as observed."[137] The company further stated it had a general disciplinary policy that could involve "suspending or de-provisioning the short code, and/or terminating the content provider" from the carrier's network, but these steps

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[130] *Id.* at 18–22.

[131] *See, e.g.,* Commentary of Mike Altschul, General Counsel, CTIA—The Wireless Association, Federal Trade Commission, *Mobile Cramming, An FTC Roundtable* (May 8, 2013) (stating that the negative option, where companies would instruct the consumer to reply "stop" or be charged, in the double opt-in process, which was utilized by many of the subjects in law enforcement proceedings, was "not compliant with the industry best practices" and use of this negative option was "not playing by the rules"). *See also* Commentary of John Bruner, Chief Operating Officer, Aegis Mobile, Federal Trade Commission, *Mobile Cramming, An FTC Roundtable* (May 8, 2013) (stating, "[W]hat we see in the market is not a violation of the double opt-in where it's being skipped necessarily. What we usually see is that consumers are either, through stacked marketing or deceptive advertising, double opting in and not realizing that they had purchased something. And, so, you know, the process, the physical process itself seems to be a very sound process for purchase. It's more the method leading up to getting a consumer to perform that function.").

[132] *See* Section IV.B.1 for discussion of industry and consumer advocate views on the significance of refund rates.

[133] Mobile Messenger Subpoena Response to Chairman John D. Rockefeller IV (Mar. 31, 2013), (Apr. 21, 2014), (Apr. 22, 2014). Because documents produced to the Committee concerned a small number of vendors, findings of this review provide a sample rather than a comprehensive review of carrier practices, and a review of communications relating to other vendors would be necessary to draw broad conclusions about an individual carrier's practices generally.

[134] Letter from Assistant General Counsel of Verizon Wireless, to Senate Commerce Committee Majority Counsel, at 8 (July 12, 2013).

[135] E-mail from Mobile Messenger Sales Employee to Mobile Messenger Account Manager (May 30, 2013) (with subject line: "05/29/2013 Refund Report for AT&T/Sprint/T-Mobile/VZW (Anacapa)") (AG–MM–COMM–043461–043464).

[136] *Id.*

[137] Letter from Executive Vice President, AT&T, to Chairman John D. Rockefeller IV, at 4 (July 2, 2013).

were not tied to specific threshold violations.[138] Billing aggregator documents indicate that as of May 2013, the policy applied to shortcodes on AT&T's network was to "enforce a 30-day suspension on any shortcode with a combination of a failed audit and a refund rate of 18 percent."[139]

Sprint reported that its policy provided for a "combination of metrics" including refund rates to assess noncompliance, and was penalizing with "lower revenue share" those aggregators that work with vendors demonstrating noncompliance or a refund rate greater than 10 percent.[140] According to billing aggregator documents from May 2013, the policy applied to shortcodes on Sprint's network was that a refund rate between 0 percent and 7 percent meant incentives and bonuses might apply; refunds between 7.01 percent and 12 percent merited a "normal payout;" and refunds greater than 12.01 percent meant Sprint would apply a "25 percent penalty on the average monthly retail revenue . . . for the three-month period and risk of code termination."[141]

Finally, T-Mobile stated that its refund threshold was 15 percent, at which point aggregator partners and vendors would be "penalized financially in accordance with the terms of the aggregator's contract."[142] Additional detail provided by billing aggregator documents indicates that the policy applied to shortcodes on T-Mobile's network was that T-Mobile would charge a vendor $10 for each refund/customer care call after refund rate surpassed 15 percent;[143] in addition, T-Mobile would apply a multi-step "Refund Performance Improvement Plan" (PIP) if a vendor's refund rate exceeded 15 percent and involved at least $10,000 in "excessive refund fees."

The documents indicate that the PIP program involved placing the vendor on a "watch list" for 12 months for remediation steps before T-Mobile would terminate the campaign.[144] Once on the watch list, the vendor had three months to address the high refund rate or else in month four, new subscribers would be suspended for a one-month period. The vendor could resume new subscriptions in month five after this suspension, and had three additional months to address the refund rate. If, after month seven, the vendor still qualified for the "watch list," the PIP program applied a two-month suspension of new subscribers in months eight and nine. The vendor could resume new subscriptions in month 10, but the campaign at issue would be terminated after month 12 if the vendor still met PIP criteria.[145]

It is worth noting that even the lowest stated refund threshold rates of 5 percent-7.99 percent that were set forth in policies carriers described to the Committee are substantially higher than the threshold used for chargebacks levels on consumer credit card bills as a trigger for follow-up with the merchant whose chargebacks are at issue. For example, under VISA's chargeback policy, merchants will receive a notification and request for explanation if the ratio of transactions charged back to total transactions exceeds 1 percent, where the merchant has had over 100 transactions and 100 chargebacks in that month.[146]

Documents received by the Committee from Mobile Messenger included a number of examples demonstrating the follow up actions taken by carriers after adverse audit findings or other red flags regarding particular shortcodes.[147] However, docu-

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[138] *Id.*

[139] E-mail from Mobile Messenger Sales Employee to Mobile Messenger Account Manager (May 30, 2013) (with subject line: "05/29/2013 Refund Report for AT&T/Sprint/T-Mobile/VZW (Anacapa)") (AG–MM–COMM–043461–043464).

[140] Letter from Vice President, Government Affairs, Sprint Nextel, to Chairman John D. Rockefeller IV, at 5 (June 28, 2013).

[141] E-mail from Mobile Messenger Sales Employee to Mobile Messenger Account Manager (May 30, 2013) (with subject line: "05/29/2013 Refund Report for AT&T/Sprint/T-Mobile/VZW (Anacapa)") (AG–MM–COMM–043461–043464).

[142] Letter from Vice President, Federal Legislative Affairs, T-Mobile USA, to Chairman John D. Rockefeller IV, at 5 (June 28, 2013).

[143] E-mail from Mobile Messenger Sales Employee to Mobile Messenger Account Manager (May 30, 2013) (with subject line: "05/29/2013 Refund Report for AT&T/Sprint/T-Mobile/VZW (Anacapa)") (AG–MM–COMM–043461–043464).

[144] E-mail from Mobile Messenger Account Manager to Vendor Employee (Aug. 4, 2011) (with subject line: "FW: Client Alert—Carrier Alert: T-Mobile—Modifications to Their Refund Performance Improvement Plan") (AG–MM–COMM–016777–016779).

[145] *Id.*

[146] Briefing by VISA Representatives to Senate Commerce Committee Majority Staff (July 10, 2014).

[147] *See, e.g.,* Letter from Verizon Wireless Director to Mobile Messenger Compliance & Consumer Protection Employee (Oct. 20, 2011) (AG–MM–COMM–030220–22) (describing that Ontario Corp. had "repeatedly violated the requirements applicable to premium messaging campaigns" and "given the repeated and serious nature of the violations, Verizon Wireless ha[d] decided that all premium messaging campaigns managed by the content provider must be terminated"); Spreadsheet created by Mobile Messenger listing status on several shortcodes of Sprint

ments also indicated there were instances where carriers were lax in overseeing or enforcing their own stated policies. This issue is illustrated in an e-mail chain between AT&T and Mobile Messenger in October 2013 when AT&T sent Mobile Messenger a notice of termination for content provider Anacapa, a client of Mobile Messenger, due to "excessive CTIA Sev 1 [severity 1] audit failures."[148]

In the course of the e-mail chain, an AT&T representative gives more explanation for the termination. He begins by noting that when Anacapa requested access to AT&T's billing platform in November 2012, Anacapa "did not pass our internal vetting process, . . . and we rejected them from running PSMS campaigns."[149] However, AT&T nonetheless let one of the Anacapa shortcode campaigns have access to the AT&T billing platform, as in fact AT&T had "failed to reject" that shortcode. Anacapa was able to bill consumers on AT&T's platform well into 2013, despite two AT&T suspensions of the Anacapa shortcode in the first part of 2013. Further, in May 2013 AT&T "drafted" a termination notice but again "failed to deliver" it.[150] The October 2013 e-mail summary also noted that AT&T had found that Anacapa had received twenty severity 1—"serious consumer harm"—audit findings across several of its shortcodes from October 2012 to October 2013, including two Severity 1 findings on the shortcode that was apparently erroneously allowed to use the AT&T network.[151]

b. Some Vendors Had Exceedingly High Refund Rates that at Times Spanned Several Months

Documents reviewed by the Committee regarding a subset of vendors who contracted with billing aggregator Mobile Messenger indicate that some vendors experienced high monthly refund rates that in some cases topped 50 percent of monthly revenues and amounted to hundreds of thousands of dollars in refunds in a single month. For example, in a July 2011 Mobile Messenger e-mail to vendor representatives, Mobile Messenger employees reported violations of T-Mobile thresholds on 11 different shortcodes for the preceding month, including one shortcode with a 50.5 percent refund rate and $55,974 in refunds for the month, and others with 43.7 percent, 38.4 percent, and 36.1 percent rates. The refunds for the 11 listed shortcodes totaled over $450,000 that month.[152]

A similar Mobile Messenger e-mail notification to vendor representatives in October 2012 notes that 11 shortcodes had exceeded AT&T's 18 percent refund threshold in the preceding month, including one shortcode with a refund ratio of 56.8 percent and $124,759 in refunds for the month, another with a ratio of 31.4 percent and $100,949 in refunds. The 11 shortcode refunds that month together totaled nearly $600,000.[153] Documents indicate that other carriers also had high refund rates and high refund totals.[154]

(last saved Aug. 10, 2011) (AG–MM–COMM–021051) (noting 5 terminated codes and several codes that were temporarily suspended); E-mail from AT&T Senior Account Manager to Mobile Messenger Employees (Jan. 14, 2013) (AG–MM–COMM–125203–4) (noting AT&T termination of all short codes associated with AVL marketing); E-mail from T-Mobile Compliance to Mobile Messenger Employees (Oct. 4, 2013) (AG–MM–COMM–143991) (noting 3 shortcodes that received 3 strikes under T-Mobile's PIP policy and directing Mobile Messenger employees to "immediately terminate all billing and related services currently operating" and the short codes).

[148] E-mail from WMC Global AT&T Account Manager to Mobile Messenger Employees (Oct. 15, 2013) (AG–MM–COMM–057077–057080). This document is attached at Exhibit B.

[149] E-mail from AT&T Mobility Marketing Manager to Mobile Messenger Employees (Oct. 16, 2013) (AG–MM–COMM–056884–056885).

[150] *Id.*

[151] *Id.*

[152] E-mail from Mobile Messenger Compliance & Analytics to NeoImage Employees (July 5, 2011) (AG–MM–COMM–112226–112227) (the 11 shortcode refunds totaled $457,252.29). A copy of this e-mail is attached at Exhibit C. As indicated by this e-mail and other Mobile Messenger documents, NeoImage personnel had e-mail addresses at "mundomedia.com." *See also* Mobile Messenger Spreadsheet Response to Subpoena Item 2a and 2c (AG–MM–COMM–001128) (Apr. 21, 2014) (listing company directors with e-mail addresses, including NeoImage personnel with *mundomedia.com* addresses).

[153] E-mail from Mobile Messenger Account Management Employee to NeoImage Employees (Oct. 9, 2012) (AG–MM–COMM–585462–585463) (the 11 shortcode refunds totaled $594,479). This e-mail is attached at Exhibit C.

[154] *See, e.g.,* E-mail notification from Mobile Messenger Compliance & Analytics to NeoImage Employees (Oct. 4, 2011) (AG–MM–COMM–024918–024919) (noting that 8 of their shortcodes violated Sprint's threshold, with the highest rate at 28.79 percent and the refunds for all 8 totaling over $600,000 for the three-month period); E-mail from Mobile Messenger Compliance & Analytics to NeoImage Employees (June 7, 2011) (AG–MM–COMM–099369) (indicating that 6 shortcodes had refund rates exceeding Verizon's thresholds in May, with the highest rate re-

Continued

Documents also show that refund rates on the same shortcode at times exceeded carrier thresholds for a number of months at a time. For example, Mobile Messenger sent e-mails to vendor representatives notifying them that refunds on shortcode 67145 exceeded AT&T's threshold in February 2012 (with a 33.9 percent refund rate);[155] March 2012 (40.6 percent);[156] and May 2012 (18.1 percent).[157] Mobile Messenger sent similar notification e-mails that refunds on shortcode 85820 exceeded T-Mobile's threshold in December 2010 (20.06 percent);[158] February 2011 (34.13 percent);[159] and March 2011 (31.13 percent).[160]

c. Case Study on Vendor with High Refund Rates: Variation in Carrier Response Underscores Broad Latitude Afforded by the Self-Regulatory System

Documents indicate that different carriers employed different practices regarding follow-up on red flags such as high refund rates and adverse audit findings associated with shortcodes. For example, in October 2011, Verizon wrote to Mobile Messenger regarding several shortcodes used by Mobile Messenger client NeoImage.[161] This group of shortcodes also included certain shortcodes that appeared on high refund rate notices sent by Mobile Messenger to vendor employees concerning all four major carriers in 2011.[162]

Verizon's October 2011 letter requested that, because of "the repeated and serious nature" of content provider violations of requirements concerning premium messaging campaigns, "all of the premium messaging campaigns managed by the content provider must be terminated," and Verizon Wireless "will not consider reactivation of the shortcodes, or any new campaigns from the content provider."[163] The Verizon letter required the content provider to block all new subscriptions to the code and opt-out enrolled customers on a rolling basis "at the time their subscriptions otherwise would be renewed."[164]

Consistent with this letter, billing statements for Mobile Messenger client NeoImage indicate that Verizon ceased allowing NeoImage shortcodes to bill on its platform starting in late 2011.[165] However, the billing statements also indicate that

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ported as 22.23 percent and refunds for all 6 totaling over $340,000). These e-mails are attached at Exhibit C.

[155] E-mail from Mobile Messenger Compliance Analytics to NeoImage Employees (Mar. 9, 2012) (AG–MM–COMM–590211–590212).

[156] E-mail from Mobile Messenger Compliance Analytics to NeoImage Employees (Apr. 2, 2012) (AG–MM–COMM–584986–584987).

[157] E-mail from Mobile Messenger Compliance Analytics to NeoImage Employees (June 5, 2012) (AG–MM–COMM–568009–568010). The Mobile Messenger document production did not appear to include an AT&T excess refund rate notification for the month of April 2012.

[158] E-mail from Mobile Messenger Compliance Analytics to NeoImage Employees (Jan. 11, 2011) (AG–MM–COMM–060591).

[159] E-mail from Mobile Messenger Compliance Analytics to NeoImage Employees (Mar. 3, 2011) (AG–MM–COMM–146312–146313).

[160] E-mail from Mobile Messenger Compliance Analytics to NeoImage Employees (Apr. 4, 2011) (AG–MM–COMM–220607–220608).

[161] Letter from Verizon Wireless Director to Mobile Messenger Compliance & Consumer Protection Employee (Oct. 20, 2011) (AG–MM–COMM–032198–032199) (listing shortcodes 91097, 33999, 72449, 40684, 25692, 89147, 88922, 21500, 86358, 56255, 53405, and 62131).

[162] E-mail from Mobile Messenger Compliance & Analytics to NeoImage Employees, Subject: Notice: AT&T Refund Ratio Exceeded (Mar. 2, 2011) (AG–MM–COMM–145222–145223) (showing shortcode 89147 February refund rate was 45.52 percent); E-mail from Mobile Messenger Compliance & Analytics to NeoImage Employees, Subject: Notice: AT&T Refund Ratio Exceeded (Apr. 4, 2011) (AG–MM–COMM–220637–220638) (showing shortcode 91097 March refund rate was 50.65 percent); E-mail from Mobile Messenger Compliance & Analytics to NeoImage Employees, Subject: Notice: Sprint Refund Ratio Exceeded (Aug. 1, 2011) (AG–MM–COMM–012239) (noting shortcode 53405 April 2011-June 2011 refund ratio was 31.67 percent and 56255 was 15.95 percent); E-mail from Mobile Messenger Compliance & Analytics to NeoImage Employees, Subject: Notice: Verizon Refund Ratio Exceeded—June 2011 (July 5, 2011) (AG–MM–COMM–112223–112224) (noting June refund rate for 56255 was 10.74 percent, 33999 was 15.52 percent, 86358 was 11.8 percent, and 88922 was 11.15 percent); E-mail from Mobile Messenger Compliance & Analytics to NeoImage Employees, Subject: Notice: T-Mobile Refund Ratio Exceeded (Sept. 2, 2011) (AG–MM–COMM–290976–290977) (noting shortcode 33999 August refund rate was 19.05 percent).

[163] Letter from Verizon Wireless Director to Mobile Messenger Compliance & Consumer Protection Employee (Oct. 20, 2011) (AG–MM–COMM–032198–032199).

[164] *Id.*

[165] *See, e.g.,* Mobile Messenger, *Settlement Statement for NeoImage December 1, 2011–December 31, 2011,* at 10 (Jan. 2012) (showing a $11.25 balance due for Verizon Wireless); Mobile Messenger, *Settlement Statement for NeoImage January 1, 2012–January 31, 2012,* at 10 (Feb. 2012) (showing a $10.75 due for Verizon Wireless); Mobile Messenger, *Settlement Statement for NeoImage March 1, 2012–March 31, 2012,* at 7 (Apr. 2012) (Verizon does not appear on the statement).

the three other major carriers and many others continued to allow NeoImage to charge their customers through March 2013, the last date of statements provided to the Committee for NeoImage. In 2012, NeoImage charged a total of over $10 million to consumers' wireless bills across different carrier platforms.[166]

The billing statements produced by Mobile Messenger indicate that a number of carriers also continued to allow NeoImage to charge on their platforms for activity on several of the specific shortcodes that Verizon terminated in October 2011. For example, the statement for January 2012 shows that, with respect to campaigns on shortcode 89147, $107,000 in charges were placed with AT&T, $33,800 with T-Mobile, and $21,700 with Sprint.[167] With respect to the same shortcode, the March 2012 billing statement showed $81,100 in charges placed with AT&T, $20,600 with T-Mobile, and $16,300 with Sprint.[168] Documents also indicate that in January 2012 refunds on this same shortcode exceeded refund thresholds for both T-Mobile and AT&T, with a 15.7 percent refund ratio for T-Mobile,[169] and a 19.01 percent refund rate for AT&T.[170]

This example regarding NeoImage shortcodes illustrates that carriers had wide discretion in responding to indicia of vendor problems such as high refund rates.

3. Carriers Placed Questionable Reliance on Billing Aggregators as Oversight Partners

In submissions to the Committee in 2012 and 2013, a number of major carriers emphasized the important and reliable role that billing aggregators played in ensuring that vendors comply with consumer authorization requirements and other industry standards. Sprint noted that in its experience, the company's "reward/penalty system influences aggregators to work only with reputable content providers and to ferret out non-compliant PSMS campaigns."[171] AT&T assured the Committee that "in November 2012 the double opt-in procedures of all then existing Billing Aggregators were reviewed and certified" as compliant with the company's consent management program.[172] And T-Mobile asserted last June that "we are aware of no information that aggregator partners have played any role in cramming or otherwise facilitating improper third-party billing."[173]

Major billing aggregators contacted in the Committee's inquiry also attested to their role in the industry's compliance system. For example, Mobile Messenger, one of the leading aggregators, underscored that it is "committed to consumer protection," with a "dedicated compliance team" to review and test vendor campaigns,[174] and that the company has spent "considerable resources" to ensure that the sub-

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[166] Mobile Messenger, *Settlement Statement for NeoImage Jan. 1, 2012–Jan. 31, 2012* (Feb. 2012) (AG–MM–042772–042781); Mobile Messenger, *Settlement Statement for NeoImage Mar. 1, 2012–Mar. 31, 2012* (Apr. 2012) (AG–MM–585109–585115); Mobile Messenger, *Settlement Statement for NeoImage Apr. 1, 2012–Apr. 31, 2012* (May. 2012) (AG–MM–562235–562241); Mobile Messenger, *Settlement Statement for NeoImage May 1, 2012–May 31, 2012* (June. 2012) (AG–MM–568311–568318); Mobile Messenger, *Settlement Statement for NeoImage June 1, 2012–June 31, 2012* (July. 2012) (AG–MM–563935–563941); Mobile Messenger, *Settlement Statement for NeoImage July 1, 2012–Aug. 31, 2012* (Sept. 2012) (AG–MM–588084–588098); Mobile Messenger, *Settlement Statement for NeoImage Sept. 1, 2012–Sept. 31, 2012* (Oct. 2012) (AG–MM–192132–102137); Mobile Messenger, *Settlement Statement for NeoImage Dec. 1, 2012–Dec. 31, 2012* (Jan. 2013) (AG–MM–591730–591735) (Mobile Messenger's production to Committee staff was missing settlement statements for several months for 2012 so NeoImage's total charge of $10 million is a conservative total).

[167] Mobile Messenger, *Settlement Statement for NeoImage Jan. 1, 2012–Jan. 31, 2012,* at 3, 5, 7 (Feb. 2012).

[168] Mobile Messenger, *Settlement Statement for NeoImage Mar. 1, 2012–Mar. 31, 2012,* at 2, 3, 4 (Apr. 2012).

[169] E-mail from Mobile Messenger Compliance Analytics to NeoImage Employees (Feb. 2, 2012) (with subject line: Notice: T-Mobile Refund Ratio Exceeded) (AG–MM–COMM–040764–040765).

[170] E-mail from Mobile Messenger Compliance Analytics to NeoImage Employees (Feb. 2, 2012) (with subject line: Notice: AT&T Refund Ratio Exceeded) (AG–MM–COMM–040831–040832).

[171] Letter from Vice President—Government Affairs, Sprint Nextel, to Chairman John D. Rockefeller IV, at 7 (July 11, 2012).

[172] Letter from Executive Vice President, Federal Relations, AT&T, to Chairman John D. Rockefeller IV, at 7 (July 2, 2013).

[173] Letter from Vice President, Federal Legislative Affairs, T-Mobile USA, to Chairman John D. Rockefeller IV, at 3 (June 28, 2013).

[174] Mobile Messenger Narrative Response to Chairman John D. Rockefeller IV (May 24, 2013) (MM Confidential 000004, 000050).

scription and billing process and the company's content provider and advertiser clients abide by the "robust" industry guidelines.[175]

However, the allegations in the November 2013 action by the Texas Attorney General[176] raise serious questions about the effectiveness of aggregators as partners to carriers in combatting cramming as well as how closely carriers were scrutinizing aggregator practices. As noted above, in this action, the Texas AG alleged that Mobile Messenger was part of a "deceptive scheme" to trick consumers into signing up for unwanted "services" including ringtones, weekly text messages containing horoscopes and celebrity gossip, and coupons. According to the complaint, Mobile Messenger actively assisted content providers with circumventing consumer protections that carriers implemented, including the double opt-in and thresholds relating to consumer complaints and audit reports.[177]

In addition, Mobile Messenger documents reviewed by Committee staff about a subset of Mobile Messenger vendors underscore that the company was in a position to see red flags about worrisome shortcodes and vendors from both the industry-wide audits as well as from reports of individual carrier refund rates and vendor penalties.[178] And yet, in the case study discussed above, after one of the major carriers in October 2011 cut off all business with a vendor that had raised non-compliance concerns and been the subject of high refund rates across major carriers, Mobile Messenger continued doing business with the same vendor through 2013.[179] Such actions raise questions about whether Mobile Messenger served as a rigorous oversight partner with carriers in weeding out vendors with records of non-compliance with industry standards.

V. Emerging Third-party Wireless Billing Technologies and Potential Consumer Protection Issues

Though commercial PSMS billing has now virtually ended among the major carriers,[180] it is still possible for consumers to buy digital content online and bill those purchases to their wireless phone accounts. This is generally called the "direct carrier billing" payment option. Direct carrier billing is now offered by a variety of U.S. companies for music, applications, games, movies, and television shows, from retailers such as Sony, Facebook, Skype, and Rhapsody.[181]

Direct carrier billing for social media and gaming purchases increased 30 percent year-over-year from 2009–2012.[182] This option could become even more widely available in the future, for goods and services outside of digital content. According to CTIA, additional entities "currently using or planning to adopt" third-party billing include "major news organizations, companies offering video streaming, gaming companies, parking services, and even pizza delivery services."[183]

In discussions with Committee majority staff, carriers have differentiated between two methods of direct carrier billing: the "storefront" approach and the "billing aggregator" approach. In the "storefront" approach, consumers are given the option of billing their wireless account when making a purchase from a digital distribution platform that offers applications, music, movies, and games created by any number of vendors.[184] Under this billing model, the carriers rely on the company offering the digital distribution platform to vet the vendors who create the digital content

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[175] Mobile Messenger Narrative Response to Chairman John D. Rockefeller IV (May 24, 2013) (MM Confidential 000050).

[176] Plaintiff's Original Petition, *Texas* v. *Mobile Messenger U.S. Inc., et al.,* Tex. D. Ct., Travis County (Nov. 6, 2013). This case remains open at the time of this report.

[177] *Id.*

[178] *See, e.g.,* E-mail from Mobile Messenger Account Manager to NeoImages Employees (Aug. 24, 2011) (AG–MM–COMM–022790–022795) and E-mail from Mobile Messenger Sales Employee to Mobile Messenger Account Manager (May 30, 2013) (AG–MM–COMM–043461–043464) (cataloguing refund rates across major carriers for different vendors); Letter from Verizon Wireless Director to Mobile Messenger Compliance & Consumer Protection Employee, Re: Urgent Resolution of Violations (Oct. 20, 2011).

[179] See discussion *supra* at Section IV.D.2.c; *see also* Assignment of Rights and Amendment Among Neo Images, Inc., and Subscriber Management Services, LLC and Mobile Messenger US, Inc. (signed March 19, 2012) (AG–MM–COMM 001964–2031).

[180] Some carriers still support PSMS billing for charitable donations and political contributions. Briefing by Verizon Wireless to Senate Commerce Committee Majority Staff (July 16, 2014); Briefing by Sprint Nextel to Senate Commerce Committee Majority Staff (July 16, 2014); Briefing by T-Mobile USA to Senate Commerce Majority Staff (July 17, 2014).

[181] *Comments of CTIA—The Wireless Association,* Federal Communications Commission, CC Docket No. 98–170, at 4 (Nov. 18, 2013).

[182] *Id.* at 3 (citing *Study: Popularity of Direct Carrier Billing on the Rise,* Mobile Payments Today (Sept. 4, 2012).

[183] *Id.* at 4–5.

[184] Briefing by Verizon Wireless to Senate Commerce Committee Majority Staff (July 16, 2014).

offered in their store.[185] One example of the "storefront" billing method is the Google Play store. Since 2011, consumers have been able to make purchases from the Google Play store and bill them to their wireless account.[186]

Outside of the storefront approach, direct carrier billing is also an option for a number of additional vendors who utilize billing aggregators in order to place the charges on consumers' wireless accounts. In this model, both the carriers and aggregators vet each vendor before the vendor is permitted to bill consumers on their wireless accounts.[187] A handful of these billing aggregators have emerged to act as middlemen between vendors and wireless carriers.[188]

With respect to direct carrier billing, to date there are no industry-wide best practices or central monitoring similar to what was in place for PSMS. Instead, oversight of direct carrier billing occurs at the individual carrier level.[189] Policies described by several major carriers in briefings to Committee majority staff include the following features, among others:

- Clear disclosures by the content provider to the consumer regarding the terms of purchase;
- Clear designation of third-party vendor purchases on consumers' phone bills; and
- Carrier monitoring of refund rates and consumer complaints.

Some carriers also said they place caps on third-party purchases from $25 to $80 per month, and for consumers that have more than one wireless line on their plan these caps apply per line.[190]

As of now, direct carrier billing is primarily an option for digital content and only represents a small fraction of purchases made via computers and smartphones.[191] However, as noted by the CTIA in comments to the FCC, U.S. companies are increasingly offering direct carrier billing for purchases.[192] Direct carrier billing is a more widely utilized form of purchase internationally[193] and with the continued growth in the unbanked and underbanked population in the United States, it is conceivable that direct carrier billing could become a more widely utilized payment option in the future.

Currently, major carriers assert that they are seeing minimal indicia of consumer complaints involving direct carrier billing, including very few consumer complaints and refund rates around 1 percent–1.5 percent.[194] However, in light of the extensive evidence of cramming that has occurred to date in both the landline and wireless contexts, and the potential that a growing number of consumers may use this payment option in the future, this staff report recommends that industry and policymakers:

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[185] Briefing by Google to Senate Commerce Committee Majority Staff (July 11, 2014); Briefing by Verizon Wireless to Senate Commerce Committee Majority Staff (July 16, 2014); Briefing by Sprint Nextel to Senate Commerce Committee Majority Staff (July 16, 2014); Briefing by T-Mobile USA to Senate Commerce Committee Majority Staff (July 17, 2014).

[186] Briefing by Google to Senate Commerce Committee Majority Staff (July 11, 2014).

[187] Briefing by Boku to Senate Commerce Committee Majority Staff (June 23, 2014); Briefing by BilltoMobile to Senate Commerce Committee Majority Staff (Feb. 24, 2014); Briefing by Verizon Wireless to Senate Commerce Committee Majority Staff (July 16, 2014); Briefing by Sprint Nextel to Senate Commerce Committee Majority Staff (July 16, 2014); Briefing by T-Mobile USA to Senate Commerce Committee Majority Staff (July 17, 2014).

[188] Examples include, among others, Boku, a San Francisco-based company, and BilltoMobile, a San Jose-based company, both of which contract with major U.S. wireless carriers. *See* BilltoMobile, Home Page (online at http://www.billtomobile.com/); Briefing by BilltoMobile to Senate Commerce Committee Majority Staff (Feb. 24, 2014); Boku, Home Page (online at http://www.boku.com/); Briefing by Boku to Senate Commerce Committee Majority Staff (June 23, 2014).

[189] Briefing by CTIA—The Wireless Association to Senate Commerce Committee Majority Staff (June 3, 2014); Briefing by Sprint Nextel to Senate Commerce Committee Majority Staff (July 16, 2014); Briefing by Verizon Wireless to Senate Commerce Committee Majority Staff (July 16, 2014); Briefing by T-Mobile USA to Senate Commerce Committee Majority Staff (July 17, 2014).

[190] Briefing by Sprint Nextel to Senate Commerce Committee Majority Staff (July 16, 2014); Briefing by Verizon Wireless to Senate Commerce Committee Majority Staff (July 16, 2014).

[191] Briefing by Boku to Senate Commerce Committee Majority Staff (June 23, 2014); Briefing by Federal Reserve Bank to Senate Commerce Committee Majority Staff (July 18, 2014).

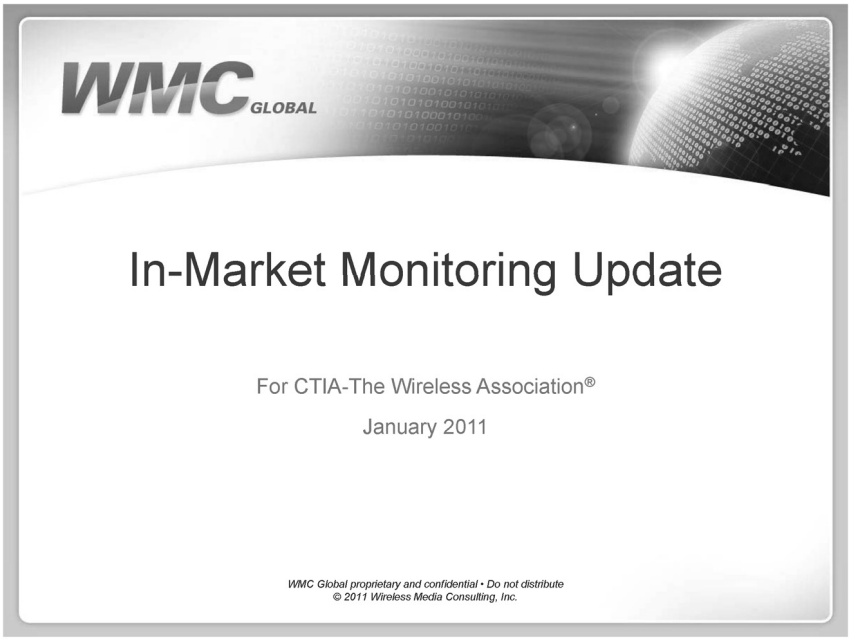
[192] *See* n. 181, *supra.*

[193] Briefing by Boku to Senate Commerce Committee Majority Staff (June 23, 2014); Briefing by Federal Reserve Bank to Senate Commerce Committee Majority Staff (July 18, 2014).

[194] Briefing by Sprint Nextel to Senate Commerce Committee Majority Staff (July 16, 2014); Briefing by Verizon Wireless to Senate Commerce Committee Majority Staff (July 16, 2014); Briefing by T-Mobile USA to Senate Commerce Committee Majority Staff (July 17, 2014).

- Vigilantly monitor evolving third-party billing practices to make sure that bad actors do not find ways to penetrate barriers to cramming on these new systems; and
- Evaluate consumer protection gaps that occurred in the landline and PSMS contexts to establish consistent policies going forward that will provide consumers with appropriate transparency in the third-party billing process and a clear avenue of recourse where unauthorized charges occur.

EXHIBIT A



January at a Glance

- This presentation provides an update on in-market monitoring results, based on current CTIA audit standards, for January 2011
- Total failures amounted to 18,298 among 18,304 interceptions, resulting in a roughly 100% overall failure rate
- "No account holder authorization disclosure" was the most common violation in January with 16,486 occurrences
- Other significant violations included:
  - "No legal age or parental permission disclosure," found in 59% of interceptions
  - "Disclosure that user agrees to T&Cs displayed inconspicuously," found in 59% of interceptions

WMC GLOBAL

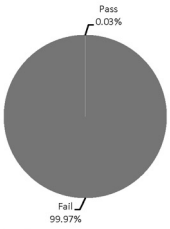
2

Overall Market Summary

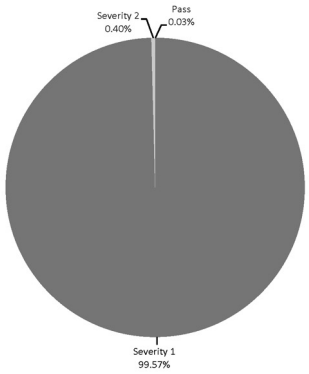
Interceptions Breakdown

- Total interceptions: 18,304
- Passed: 6
- Failed: 18,298
- All but six interceptions failed and more than 99% failed at Severity 1

Overall Pass/Fail Breakdown



Severity Breakdown



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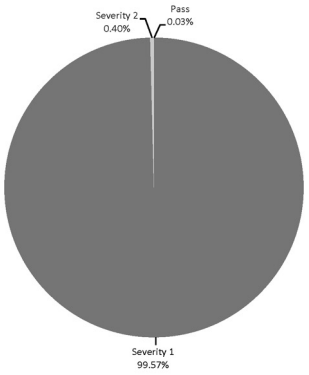
3

Overall Failures by Severity

Findings

- Severity 1: 18,225
  - "No account holder authorization disclosure," with 16,486 occurrences, was the most common violation overall, accounting for 14% of total violations
- Severity 2: 73
  - "No minimum subscription disclosure," with 7,735 occurrences, was the most common Severity 2 violation

Severity Breakdown



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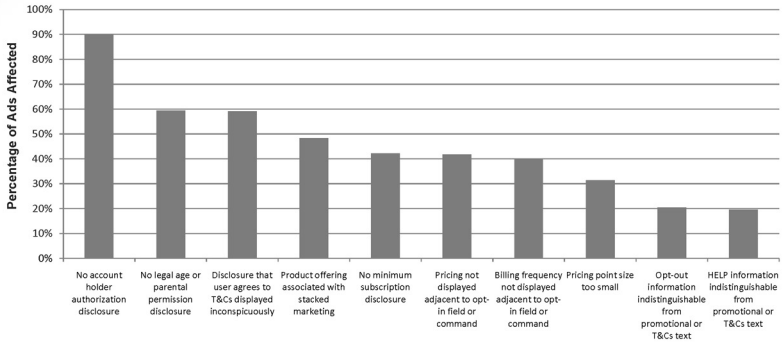
4

Violations Occurrence

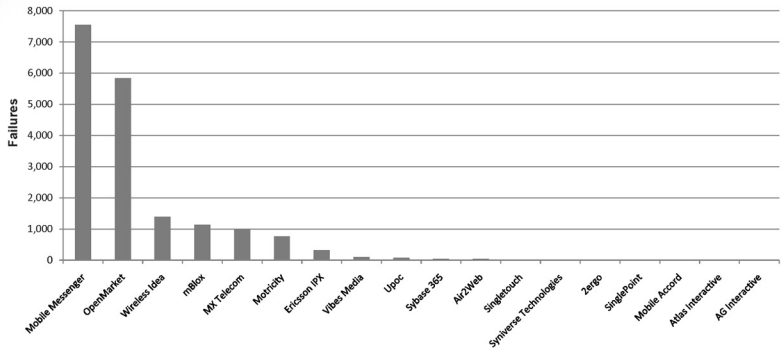


Graph depicts top 10 violations and the percentage of PSMS ads affected by them

The top violation, "No account holder authorization disclosure," affected 90% of all ads, driving the high overall failure rate

5

Failures by Aggregator



- Mobile Messenger hosted the most compliance issues this month, accounting for 41% of total failures
- AG Interactive and Atlas Interactive accounted for the fewest, with one failure each

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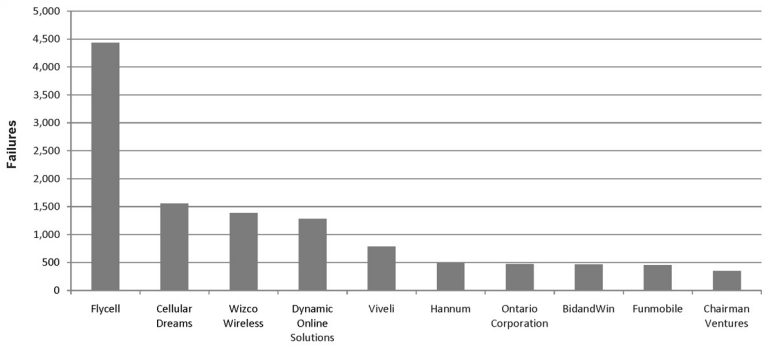
6

Failures by Content Provider



Graph depicts top content providers accounting for most of the failures

Flycell had the most failures again in January, with 4,433, and accounted for 24% of total failures

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7

WMC GLOBAL

Month End Report

CTIA-The Wireless Association®

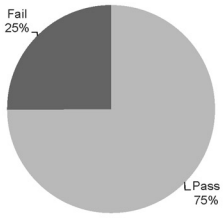
January 2012

Market Summary - PSMS

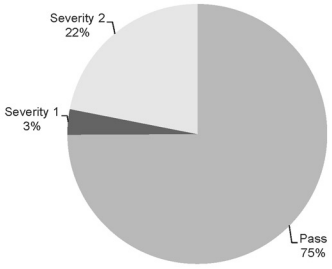
Interceptions Breakdown

- Total interceptions: 4,577
- Passed: 3,429
- Failed: 1,148
- Failed at Severity 1: 145

Pass/Fail Breakdown



Severity Breakdown



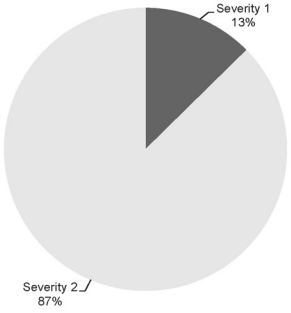
WMC GLOBAL

Overall Failures by Severity - PSMS

Findings

- ***Severity 0: 0***
  No Severity 0 violations for PSMS were reported in January 2012
- ***Severity 1: 145***
  "No account holder authorization disclosure," with 59 occurrences, was the most common Severity 1 violation
- ***Severity 2: 1,003***
  "Substitution details hidden in T&Cs," with 421 occurrences, was the most common violation, accounting for 19% of total violations

Severity Breakdown



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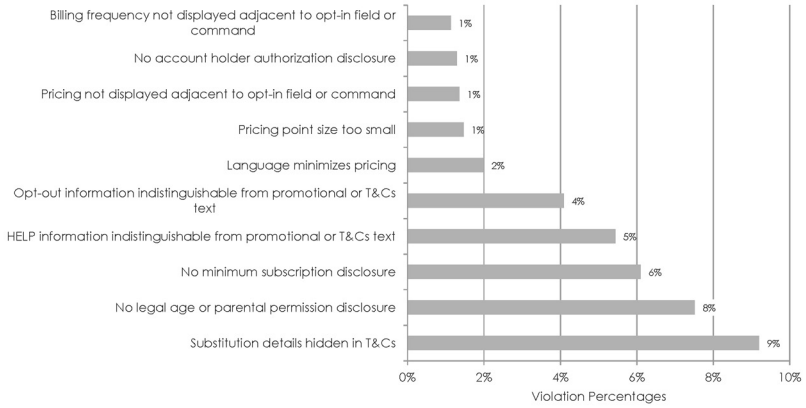
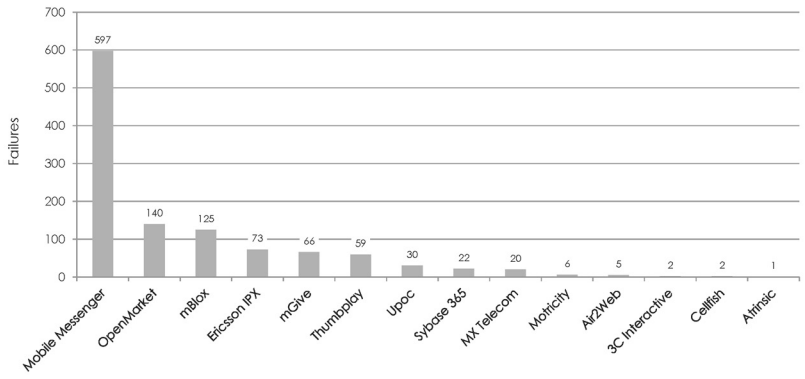
Violations Occurrence - PSMS



*Graph depicts top 10 violations and percentage of PSMS ads affected by them

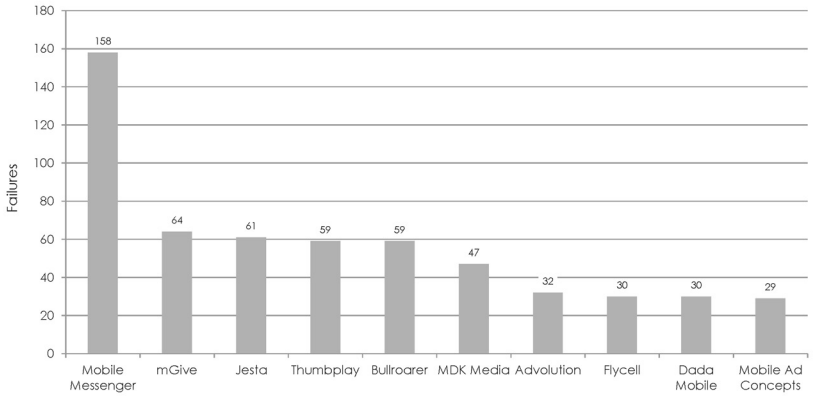
The top violation "substitution details hidden in T&Cs" affected 9% of all premium advertisements, driving the overall failure rate

Failures by Aggregator - PSMS



- Mobile Messenger hosted the most compliance issues this month, accounting for 52% of total premium advertising failures
- Atrinsic accounted for the fewest, with one failure

Failures by Content Provider - PSMS



*Graph depicts top content providers accounting for most PSMS failures

Mobile Messenger had the most failures in January, with 158, and it accounted for 14% of total premium advertising failures

WMC GLOBAL

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CTIA - The Wireless Association®

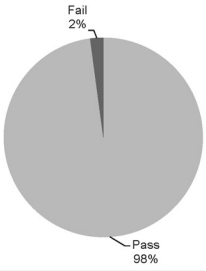
December 2012

Market Summary - PSMS

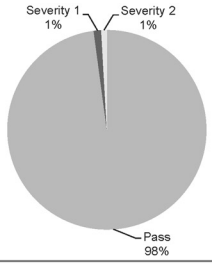
Interceptions Breakdown

- Total interceptions: 2,887
- Passed: 2,826
- Failed: 61
- Failed at Severity 1: 35

Pass/Fail Breakdown



Severity Breakdown



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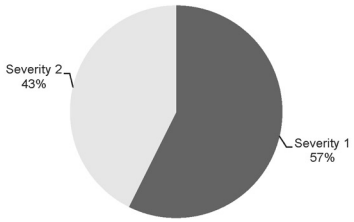
Overall Failures by Severity - PSMS

Findings

- ***Severity 0: 0***
  No Severity 0 violations were reported in December 2012
- ***Severity 1: 35***
  "No product or service description displayed in main offer," with 16 occurrences, was the most common Severity 1 violation, accounting for 12% of total violations
- ***Severity 2: 26***
  "Pricing not displayed adjacent to cell-submit field" and "billing frequency not displayed adjacent to cell-submit field," with 22 occurrences each, were the most common Severity 2 violations

Severity Breakdown



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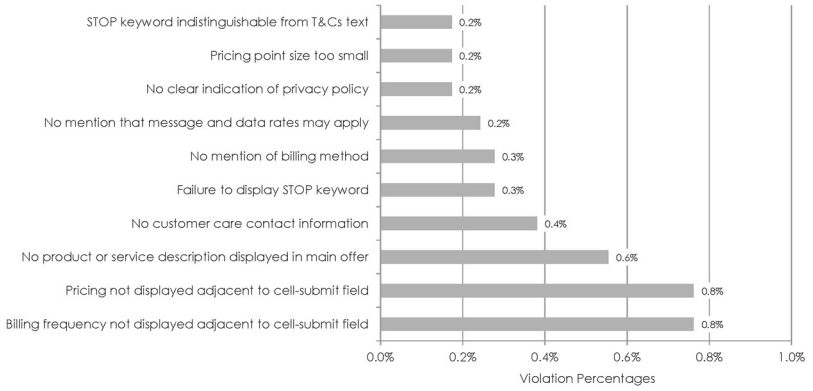
Violations Occurrence - PSMS



*Graph depicts top violations and percentage of PSMS advertisements affected by them

The top violations "pricing not displayed adjacent to cell-submit field" and "billing frequency not displayed adjacent to cell-submit field," each affected 0.8% of all premium advertisements

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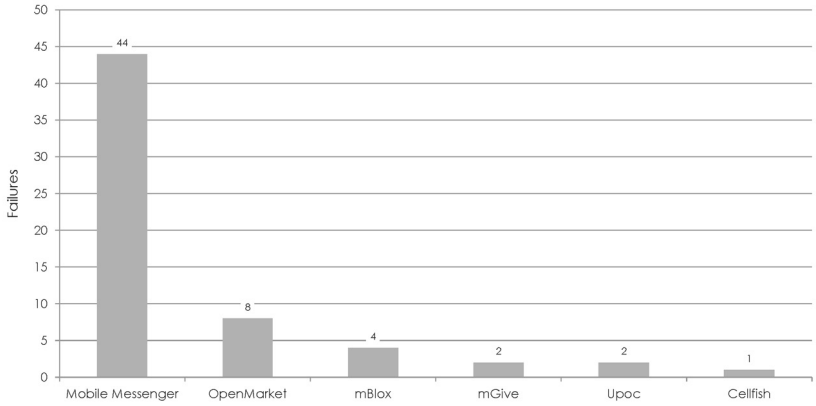
5

Failures by Aggregator - PSMS



- Mobile Messenger hosted the most compliance issues this month, accounting for 72% of total premium advertising failures
- Cellfish accounted for the fewest, with one failure

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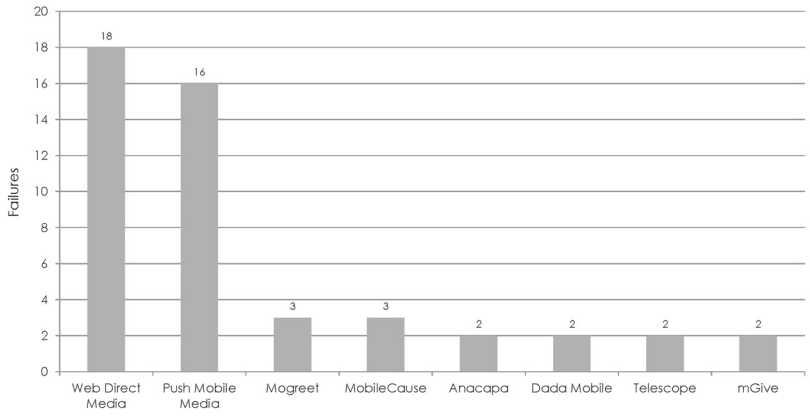
6

Failures by Content Provider - PSMS



*Graph depicts top content providers accounting for most PSMS failures

Web Direct Media hosted 18 failures in December, accounting for 30% of total premium advertising failures

EXUIBIT B

From: [redacted]
To: [redacted]
Sent: 10/16/2013 7:11:40 PM
Subject: RE: Termination Notice for CP Anacapa

Thanks [redacted]

From: [redacted] [mailto[redacted]@mobilemessenger.com]
Sent: Wednesday, October 16, 2013 1:55 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Termination Notice for CP Anacapa

Hi [redacted]
I've asked for this info and will get back to you asap.

Thank you!
[redacted]

Director of Audits and Compliance
MOBILEMESSENGER

[redacted]

www.mobilemessenger.com
Mobile Messenger is the leading Mobile Solutions Provider, supplying its partners with cutting-edge technology and services that facilitate the marketing, distribution, and monetization of digital content to mobile devices. We provide strong, secure, and trusted connections to consumers, and offer comprehensive solutions supporting every step of your mobile business initiative. From creative, content management, and messaging connections, to payment processing and robust analysis that drive ROI, Mobile Messenger helps businesses build long-lasting, successful brands and mobile campaigns.

From: [redacted] [mailto:[redacted]@att.com]
Sent: Wednesday, October 16, 2013 1:21 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Termination Notice for CP Anacapa

[redacted],
Can you or someone on your team please provide me with the Contact name, phone number and email address for Anacapa?
AT&T is required to report this to the CAPUC

Best,
[redacted]

From: [redacted] [mailto:[redacted]@mobilemessenger.com]
Sent: Wednesday, October 16, 2013 12:44 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Termination Notice for CP Anacapa

Thanks for the detailed info [redacted]

From: [redacted] [mailto:[redacted]@att.com]
Sent: Wednesday, October 16, 2013 6:10 AM
To: [redacted]
Cc: [redacted]
Subject: RE: Termination Notice for CP Anacapa

[redacted]

This is a situation where there is series of past issues that predicated this termination.

In November of 2012 we, and [redacted] specifically, reviewed their request for PSMS onboarding to AT&T's network. Anacapa did not pass our internal vetting process after the phone interview, and we rejected them from running PSMS campaigns. As such [redacted] rejected campaigns on SC's 54480 and 65815, but failed to reject the campaign on SC 97841 which got certified and turned LIVE.

This SC has already been suspended twice for high refunds. In January for 23% and May for 15.45%. They have had escalated complaints from customer care, and in fact we had drafted a termination notice back in May, which I failed to deliver. In reviewing our PSMS campaigns we found Anacapa had received 20 Sev 1 audit failures since 10/23/2012, including 2 severity 1's on SC 97841 in December 2012 , which coincides with the ramp up of this SC. On June 18 Anacapa was cited for incentive / stacked marketing on SC 65815.

Based on this history, the termination of this SC and Anacapa as a CP stands.

[redacted]
Lead Marketing Manager- Mobile Commerce
AT&T Mobility
[redacted]

From: [redacted] [mailto:[redacted]@mobilemessenger.com]
Sent: Tuesday, October 15, 2013 4:38 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Termination Notice for CP Anacapa
Importance: High

Hello [redacted]
Can you provide the details of the audit on this code? This short code has not received a CTIA since December 2012, and has not acquired new subscriptions in several months. Also, the refund rate is well under the threshold.

I hope we can figure this out before the code is completed.

Thanks!

[redacted]
Senior Director of Compliance and Customer Care

MOBILEMESSENGER

From: [redacted] [mailto:[redacted]@att.com]
Sent: Tuesday, October 15, 2013 12:14 PM
To: [redacted]
Cc: [redacted]
Subject: Termination Notice for CP Anacapa

Mobile Messenger,

This is to advise that we will terminate Short Code 97841 and the CP Anacapa. As a general matter, the activity of this Short Code and CP does not comport with our requirements for use of our network and access to our customers due excessive CTIA Sev 1 audit failures.

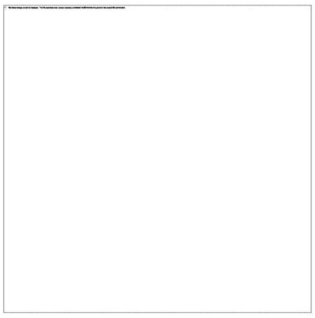
AT&T will complete Short Code 97841 by changing its status to COMPLETE in CMS immediately. This action will conclude all subscribers on their renewal date. We will review the traffic on this code. If we see that there is no content being delivered we will go back and refund the entire subscriber base on this Short Code.

Regards,
[redacted]

[redacted] | **WMC Global |AT&T Senior Account Manager**
[redacted]
[redacted]

EXHIBIT C

From: compliance&analytics
To: Duncan@mundomedia.com; jasonb@mundomedia.com; angelo@mundomedia.com; jason@mundomedia.com; araxie@mundomedia.com
CC: Jacob Leveton; Erdolo Eromo; Fraser Thompson
Sent: 7/5/2011 7:41:47 PM
Subject: Notice: T-Mobile Refund Ratio Exceeded
Attachments: logo240x123.png



Dear NeoImage,

This alert is to notify you that the refund ratio for short codes listed below exceeded T-Mobile's 15% threshold for the month of June 2011. As such T-Mobile will now charge $10 for each refund/Customer Care Call in June 2011.

ShortCode	June Refund	June Revenue	June Refund Ratio
63746	$55,973.97	$110,849.04	**50.50%**
41933	$67,592.34	$154,595.25	**43.72%**
91097	$51,098.85	$133,086.78	**38.40%**
86358	$92,307.60	$255,444.30	**36.14%**
33999	$57,452.49	$222,966.81	**25.77%**
46965	$86,803.11	$376,353.27	**23.06%**
62131	$14,915.07	$75,784.14	**19.68%**
40684	$5,514.48	$32,627.34	**16.90%**
70438	$3,576.42	$21,987.99	**16.27%**

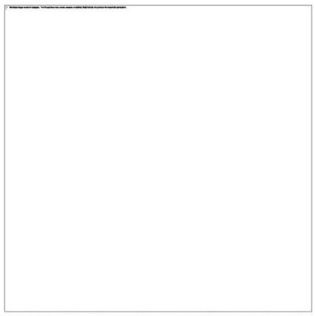
53405	$679.32	$4,185.81	**16.23%**
25692	$21,338.64	$137,712.15	**15.50%**

If you have any questions please do not hesitate in contacting your account manager.

Thank you,
Mobile Messenger Compliance Team

Mobile Messenger is the leading Mobile Solutions Provider, supplying its partners with cutting-edge technology and services that facilitate the marketing, distribution, and monetization of digital content to mobile devices. We provide strong, secure, and trusted connections to consumers, and offer comprehensive solutions supporting every step of your mobile business initiative. From creative, content management, and messaging connections, to payment processing and robust analysis that drive ROI, Mobile Messenger helps businesses build long-lasting, successful brands and mobile campaigns.

From: Chris Goff
To: Jason Brenzel; 'Jeannie Cuacos'
Sent: 10/9/2012 10:10:34 PM
Subject: FW: Notice: AT&T Refund Ratio Exceeded
Attachments: logo240x123.png



Dear NeoImage,

This notice is to alert you that Refund Rate of the short codes listed below is over AT&T's established 18% Refund Rate Threshold.

Short Code	September Refund	September Revenue	September Refund Rate
30900	$124,759	$219,580	**56.8%**
91097	$2,478	$4,755	**52.1%**
89147	$100,949	$321,109	**31.4%**
56255	$31,238	$103,367	**30.2%**
33999	$28,953	$112,458	**25.7%**
59025	$131,150	$522,357	**25.1%**
57808	$31,014	$127,363	**24.4%**
60638	$42,327	$181,668	**23.3%**
63837	$49,410	$214,785	**23.0%**
38868	$19,560	$85,924	**22.8%**
69097	$32,641	$178,182	**18.3%**

In accordance with AT&T's Refund Rate policy, all live campaigns for this short code will be sent to AT&T's audit team for Priority Audit.

If you have any further questions or queries about the information contained in this notice or would like further advice or information of the impact of these changes please do not hesitate in contacting your account manager.

Thank you,

Mobile Messenger Team

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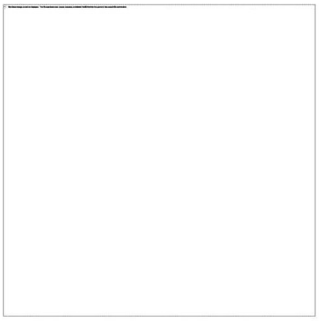
From: compliance&analytics
To: Duncan@mundomedia.com; jasonb@mundomedia.com; angelo@mundomedia.com; jason@mundomedia.com; araxie@mundomedia.com
CC: Jacob Leveton; Erdolo Eromo; Fraser Thompson
Sent: 10/4/2011 1:08:38 AM
Subject: Notice: Sprint Refund Ratio Exceeded
Attachments: logo240x123.png



Dear NeoImage,

This letter is to inform you that the short codes below have exceeded Sprint's refund rate policy.

As a result, the following table displays the penalties for exceeding Sprint's refund rates.

- **0% - 7%:** refund rate over 3 month average: applicable for incentives/bonus and normal payout
- **7.01% - 12%:** no incentives & no penalties, normal payout
- **12.01% - 17%:** 10% PENALTY ON THE AVERAGE MONTHLY RETAIL REVENUE IS FOR THE 3 MONTH PERIOD
- **Greater than 17.01%:** 25% PENALTY ON THE AVERAGE MONTHLY RETAIL REVENUE IS FOR THE 3 MONTH PERIOD & RISK OF CODE TERMINATION

Short Code	June 2011 -- August 2011 Revenue	July 2011 -- September 2011 Refund	Refund Ratio
63453	$328,770.90	$94,643.40	28.79%
30900	$7,052.94	$1,938.06	27.48%

53405	$7,122.87	$1,758.24	24.68%
83574	$19,860.12	$4,706.16	23.70%
29937	$1,498,430.07	$352,950.29	23.55%
85820	$21,218.76	$3,514.68	16.56%
63746	$808,820.37	$133,870.65	16.55%
56255	$159,859.98	$19,412.57	12.14%

Thank you,

Mobile Messenger Team

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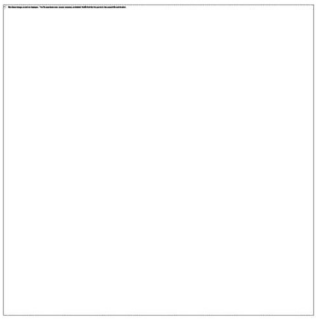
From: compliance&analytics
To: Duncan@mundomedia.com; jasonb@mundomedia.com; angelo@mundomedia.com; jason@mundomedia.com; araxie@mundomedia.com
CC: Jacob Leveton; Erdolo Eromo; Fraser Thompson
Sent: 6/7/2011 7:35:27 PM
Subject: Notice: Verizon Refund Ratio Exceeded - May 2011
Attachments: logo240x123.png



Dear NeoImage,

This notice is to alert you that the refund rate of the short codes listed below is over Verizon's expected 5% refund rate.

ShortCode	May Refund	May Revenue	May Refund Rate
69742	$65,254.68	$293,486.22	**22.23%**
56255	$66,063.87	$410,808.78	**16.08%**
88922	$55,804.14	$384,265.35	**14.52%**
85820	$46,783.17	$504,634.86	**9.27%**
33999	$52,827.12	$645,374.97	**8.19%**
69097	$55,184.76	$832,916.25	**6.63%**

If you have any further questions or queries about the information contained in this notice or would like further advice or information of the impact of these changes please do no hesitate in contacting your account manager.

Thank you,
Mobile Messenger Team

Mobile Messenger is the leading Mobile Solutions Provider, supplying its partners with cutting-edge technology and services that facilitate the marketing, distribution, and monetization of digital content to mobile devices. We provide strong, secure, and trusted connections to consumers, and offer comprehensive solutions supporting every step of your mobile business initiative. From creative, content management, and messaging connections, to payment processing and robust analysis that drive ROI, Mobile Messenger helps businesses build long-lasting, successful brands and mobile campaigns.

Senator BLUMENTHAL. Both this report and the Committee's earlier report on landline cramming make it abundantly clear that telephone carriers were not doing enough to protect their consumers from fraud. The key question is whether they are doing enough now. The carriers gave third-party access to their customers' bills, collected their cut, and then failed to make sure that the third parties were acting honestly. The massive fraud we have documented in these reports happened right under the telephone companies' noses. In the cases of both wireline and wireless cramming, the telephone companies had plenty of notice that crammers were placing fraudulent charges on their customers' bills. Thousands of consumers complained to both the companies and to State and Federal law enforcement agencies about this problem. And I know I received a lot of those complaints. I am sure that the FTC and Attorney General Sorrell and my colleagues did as well.

The Federal Trade Commission and Attorneys General brought case after case, enforcement action after enforcement action against crammers. When confronted with evidence of widespread fraud in their billing systems, the telephone carriers promised to tighten their rules and do a better job of protecting customers. But then the crammers seemed to go back to business as usual.

The telephone companies acted decisively only after the evidence of fraud became overwhelming and undeniable. In 2011, the major wireline carriers agreed to end third-party billing, and in November 2013, less than a year ago, the four major wireless carriers, AT&T, Sprint, T-Mobile, and Verizon, agreed to end third-party PSMS billing.

Do not get me wrong. I do not think the telephone companies were happy or content that crammers were defrauding their customers. But they almost certainly welcomed the revenue that third-party billing was generating for them. The committee staff report released today found that the wireless carriers received 30 to 40 percent—30 to 40 percent of each charged that third parties placed on their customers' bill through PSMS. For every $9.99 monthly charge placed on a bill, the carriers kept $3 to $4. Their financial incentive to allow third-party billing seems to conflict with their responsibility to protect their customers from fraud. They may not have been happy about it, but the fraud sure benefited them.

While the telephone carriers have discontinued certain types of third-party billing, their systems are still open for business. As we will hear today, the carriers are experimenting with new direct carrier billing techniques. I hope we will not be sitting here in several months or several years and discussing how they too failed to protect consumers from fraud. The time for effective action is now. The notice has been abundant that consumers are suffering, and I hope that these new measures will be truly effective.

I am now happy to yield to the Ranking Member, Senator Thune.

STATEMENT OF HON. JOHN THUNE,
U.S. SENATOR FROM SOUTH DAKOTA

Senator THUNE. Well, thank you, Mr. Chairman, for holding this hearing to discuss the unauthorized charges on mobile phone bills and the findings of Chairman Rockefeller's wireless cramming in-

vestigation. I commend the Chairman and staff for shining a light on these abuses.

I understand, Senator Blumenthal, that you are graciously filling in for him today and appreciate that.

Mobile payments are a growing way for consumers to pay for goods and services. Third-party billing is one way that consumers can take advantage of new technologies and customer conveniences. There are legitimate uses for this manner of billing. For instance, consumers can provide money to charities, support a political cause, or download the newest song or app and bill the purchase directly to their mobile telephone bill. Yet, despite the industry efforts to implement protections and state and Federal regulations in place to prevent cramming, unscrupulous actors have been able to game the system to take advantage of third-party billing.

Of course, cramming is not a new phenomenon. In the late 1990s Congress devoted a lot of time and attention to the issue of cramming on landline phone bills. This committee held a hearing on that issue again in 2011, highlighting the Chairman's investigation into cramming on landline phone bills and demonstrating the persistence of the problem.

Some states have enacted laws to limit third-party billing in an effort to prevent cramming on landline phones, and most of the major phone carriers have ended most types of third-party billing on landline phone bills. More recently, however, concerns have been raised about fraud on wireless phone bills, the topic of today's hearing and the chairman's more recent investigation.

There are three key parties involved in placing third-party charges on consumers' wireless phone bills: the third-party content provider, the billing aggregator, and the phone carrier. From what I have seen, there are some content providers and even some aggregators that appear to be bad actors, but all of the parties involved could do more to protect consumers from cramming. While cramming has been identified as a problem, it has been challenging to accurately measure how many consumers have been affected by cramming.

I appreciate that the wireless carriers and their association, CTIA, have taken a number of actions to prevent cramming of third-party charges on wireless phone bills. Significantly, this past November, the carriers decided to end most so-called premium SMS programs, which billed customers for text messages related to topics like daily horoscopes and sports alerts. In addition, at least one carrier has recently decided to end browser-based direct carrier billing. These steps show the carriers treat this issue seriously, but we will be asking whether they should do more.

At the same time, it is important to underscore the extraordinary innovation and economic dynamism in the wireless communications space. The owners of approximately 188 million smart phones in this country spend more time with their mobile devices each day than they do going online with a laptop or a PC. While we must strive to protect consumers from fraud, we must also make sure that we do so in a way that does not stifle innovation.

I look forward to hearing from CTIA, who is here today representing the wireless carriers, to discuss how the industry is working to address these issues. I also look forward to hearing

from FTC Commissioner McSweeny, who is here for the first time since her confirmation; Mr. LeBlanc of the FCC; and Attorney General Sorrell. The FTC, FCC, and State Attorneys General play a key role in fighting cramming with their law enforcement efforts and by educating consumers about carrier billing.

I also want to thank the South Dakota Public Utilities Commission and the South Dakota Attorney General, Marty Jackley, for their work in this area to better protect consumers. One recent government survey found that the Midwest is the most wireless connected region in the country, with 44 percent of Midwesterners living in cell phone-only homes. This underscores the importance to my constituents of addressing wireless cramming.

This hearing presents a good opportunity to recognize the good that everyone at the witness table is already doing to combat cramming. Industry, Congress, Federal agencies, and State Attorneys General all need to continue to work together on this issue to ensure that consumers are informed and protected against bad actors.

I want to thank our witnesses for appearing here today, and I look forward to your testimony.

Thank you, Mr. Chairman.

Senator BLUMENTHAL. Thank you very, very much, Senator Thune.

I will introduce the witnesses, and then we will hear from you in this order.

First of all, welcome to Commissioner McSweeny, your first appearance since your swearing in in April of this year. Prior to joining the Commission, Commissioner McSweeny served as Chief Council for Competition Policy and Intergovernmental Relations for the United States Department of Justice, Antitrust Division. She has a long and distinguished career in public service, serving as a Deputy Assistant to the President and Domestic Policy Advisor to the Vice President and a number of other positions in public service where she has significant experience in areas of competition and antitrust, as well as women's rights, domestic violence, judicial nominations, immigration and civil rights. She is a graduate of Harvard University and Georgetown University Law School.

Attorney General Sorrell has served in Vermont as the Attorney General there since—I am trying to remember—in June of——

Mr. SORRELL. 1997.

Senator BLUMENTHAL.—1997. I knew it was about 13 years that we served together. And before that, he was a prosecutor and distinguished law enforcement officer. He received the National Association of Attorney General Kelly Wyman Award given annually to the outstanding Attorney General and served as president of that organization for a year between 2004 and 2005. He is a graduate of the University of Notre Dame, magna cum laude, and Cornell Law School. And I know he knows a lot about this subject because I have worked with him on it and appreciate your being with us today.

Travis LeBlanc, who is the Acting Chief of the Enforcement Bureau of the Federal Communications Commission, is a graduate of Princeton University and the Yale Law School, among other institutions, and has served, before his present position, in the California Attorney General's Office as Special Assistant Attorney Gen-

eral in charge of the enforcement bureau—I am sorry—as Special Assistant Attorney General in charge of technology, high-tech crime, privacy, antitrust, and health care issues. And he also advised the California Attorney General on significant appellate and constitutional matters.

Mr. Altschul, Michael Altschul, is Senior Vice President and General counsel of CTIA, The Wireless Association. He has served in that capacity since September of 1990, if I am not mistaken, and was a trial attorney in the Antitrust Division of the United States Department of Justice between 1980 and 1990. Before then, he was in private practice. He is a graduate of Colgate University and New York University Law School.

We welcome you all. We thank you for all of your public service. All of you have been involved in public service. And if we can begin with you, Commissioner McSweeny.

STATEMENT OF HON. TERRELL MCSWEENY, COMMISSIONER, FEDERAL TRADE COMMISSION

Commissioner MCSWEENY. Thank you very much, Senator Blumenthal and Ranking Member Thune and Senator Johnson, for inviting me here today. I am Terrell McSweeny and I am the newest member of the Federal Trade Commission.

I appreciate the opportunity to appear here today and also the leadership that this committee has shown on mobile cramming and, indeed, on cramming generally.

I also want to thank the other witnesses for their perspectives and for the collaboration the Federal Trade Commission has received from the Federal Communications Commission and State Attorneys General in addressing this important consumer protection issue.

For more than 15 years, the Commission has been working with Congress to stop fraudsters that place unauthorized charges on consumers' telephone bills. The FTC began targeting landline cramming in the late 1990s and since then has brought more than 30 cases resulting in hundreds of millions of dollars in judgments.

As consumers have migrated to smart phones and mobile payment systems, we have turned our attention to the problem of unauthorized charges on mobile phone accounts. Mobile cramming scams can take a variety of forms. Sometimes consumers are tricked into subscribing for services by third-party merchants who use false pretenses to collect their telephone numbers, such as promises of free concert tickets or $1,000 gift cards. In other cases, consumers are targeted by deceptive ads. In one example, consumers were targeted with an ad for virus protection software for their phone and instead were subscribed to ring tones for $9.99 a month.

Generally, these unauthorized subscriptions are automatically renewed and the charges for them are racked up month after month. Frequently consumers are unaware that they are being billed for third-party services because charges are often difficult to locate on phone bills, and it is rarely clear that they are unassociated with phone service. And many consumers who have prepaid accounts or auto-pay bills do not receive bills at all or may not routinely inspect them.

Since the spring of 2013, the Federal Trade Commission has brought six enforcement actions aimed at combating these types of mobile cramming scams. We have obtained stipulated orders in three of these matters with judgments totaling more than $160 million.

Earlier this month, the Trade Commission announced our first case against a telecommunications company, T-Mobile. In that case, the FTC is alleging that T-Mobile deceptively described cramming charges on phone bills and unfairly continued to charge customers even after it became aware of telltale signs that charges were unauthorized.

These enforcement actions reinforce that basic consumer protections apply in the mobile environment just as they do in the brick-and-mortar world.

Along with our law enforcement efforts, the Commission has engaged with industry and consumer advocates to develop recommendations to better protect consumers while enabling innovation and access to mobile payment systems. In a report issued this week, the Commission staff recommends that carrier and industry participants take the following additional steps to reduce fraud and improve reliability of mobile carrier billing.

First, they should make it clear to customers and consumers that they can block all third-party charges on their accounts if they wish to.

Second, they should ensure that advertising, marketing, and opt-in processes for third-party charges are not deceptive.

Third, they should take action when refund requests, complaints, and other factors indicate a merchant is cramming unauthorized charges.

Fourth, they should clearly delineate third-party charges on bills.

And fifth, the industry should implement effective and consistent dispute resolution for consumers who wish to dispute charges or obtain refunds.

As consumers increasingly turn to their mobile phones as payment mechanisms, it is critical that carriers and other industry participants proactively address mobile cramming.

Unfortunately, crammers have been able to come up with creative and evolving ways to harm consumers. That is why the FTC remains committed to working with this committee and with Members of Congress and our State and Federal partners such as the State Attorneys General and the Federal Communications Commission to continue our efforts to shut down scammers as they appear.

I am pleased to answer any questions.

[The prepared statement of Commissioner McSweeny follows:]

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

I. Introduction

Chairman Rockefeller, Ranking Member Thune, and members of the Committee, my name is Terrell McSweeny, and I am a Commissioner at the Federal Trade Commission ("FTC" or "Commission").[1] I appreciate this opportunity to appear before

[1] While the views expressed in this statement represent the view of the Commission, my oral presentation and responses to questions are my own and do not necessarily reflect the view of the Commission or any Commissioner.

you today to discuss the Commission's experience addressing mobile cramming. I am pleased to be testifying alongside my partner at the Federal Communications Commission, with which the FTC has worked collaboratively to combat the problem of mobile cramming. I also would like to commend this Committee and you, Mr. Chairman, for the work you have done to investigate and address this important consumer protection issue.

Mobile cramming is the act of placing unauthorized third-party charges on mobile phone accounts. It occurs when consumers are signed up and billed for third-party services, such as ringtones and recurring text messages containing trivia or horoscopes, without the consumers' knowledge or consent. Companies that place crammed charges sometimes obtain consumers' phone numbers without any contact with consumers. Other times, these entities use deceptive means to obtain consumers' mobile phone numbers—such as in connection with offering free prizes—and then begin charging their phone accounts for recurring third-party charges for purported services unrelated to the offer. These unauthorized charges often appear buried in phone bills and have generic descriptors such as "usage charges." As a result, many consumers do not notice the charges or do not understand that they are unrelated to their phone service. Moreover, some consumers have prepaid accounts and do not receive bills at all, while others auto-pay their bills and therefore may not routinely inspect them. And many consumers do not even receive the services for which they are being charged.

Mobile cramming is a significant problem that threatens to undermine confidence in the developing payment method known generally as "carrier billing," which offers consumers the opportunity to charge goods and services to their mobile phone accounts. As stakeholders have noted, carrier billing of third-party charges may be particularly beneficial for unbanked and underbanked consumers. Additionally, consumers have used text messages to donate funds to a charitable organization, with the charge placed on their mobile phone account. As carrier billing has developed, however, fraud has become a significant problem for consumers.

For the past two decades, one of the Commission's top priorities has been ensuring that consumer protections keep pace with technological developments, including emerging mobile products and services, while encouraging innovations that benefit consumers and businesses. In the past few years the Commission has focused on mobile cramming as a key consumer protection issue.[2] Among other things, since the spring of 2013, the Commission has brought five mobile cramming cases against merchants, resulting in substantial monetary judgments.[3] And, earlier this month, the Commission filed its first action against a telecommunications company, T-Mobile USA, for mobile cramming.[4] These actions all reinforce the basic principle that a company must obtain a consumer's express, informed consent before placing charges on their bills—which applies to the mobile environment just as it does to brick-and-mortar companies.

In addition to its enforcement work, the Commission has recommended the adoption of certain baseline consumer protections,[5] encouraged public dialogue among industry stakeholders through a public roundtable in May 2013,[6] and, just this week, authorized the release of a Bureau of Consumer Protection staff report providing additional information about mobile cramming and discussing recommended approaches to address it.[7]

This testimony begins with an overview of the Commission's and this Committee's work to address landline cramming, which has provided the foundation for the Com-

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[2] The FTC has jurisdiction under the FTC Act over market participants engaged in third-party billing. *See FTC* v. *Verity Int'l, Ltd.,* 443 F.3d 48, 59–60 (2d Cir. 2006); *In re Detariffing of Billing and Collection Servs.,* 102 F.C.C.2d 1150¶¶ 30–34 (1986).

[3] To date, defendants have stipulated to final judgments, partially suspended based on inability to pay, totaling more than $160 million. *See FTC* v. *Wise Media, LLC,* No. 1:13–cv–1234–WSD (N.D. Ga. 2013); *FTC* v. *Jesta Digital, LLC,* No. 1:13–cv–01272 (D.D.C. 2103); *FTC* v. *Tatto, Inc.,* No. 2:13–cv–08912–DSF–FFM (C.D. Cal. 2013). *See also FTC* v. *Acquinity Interactive, LLC,* No. 14–60166–CIV (S.D. Fla.) (amended complaint filed June 16, 2014); *FTC* v. *MDK Media, Inc.,* No. 2:14–cv–05099–JFW–SH (C.D. Cal.) (complaint filed July 3, 2014).

[4] *FTC* v. *T-Mobile USA, Inc.,* No. 2:14–cv–00967 (W.D. Wash. filed July 1, 2014).

[5] *See* Reply Comment of the Federal Trade Comm'n, Fed. Commc'ns Comm'n CG Docket No. 11–116 (July 20, 2012), at 7, 12, available at *http://www.ftc.gov/sites/default/files/documents/advocacy__documents/ftc-reply-comment-federal-communications-commission-concerning-placement-unauthorized-charges/120723crammingcomment.pdf* [hereinafter "FTC Reply Comment"].

[6] *See* Fed. Trade Comm'n, Mobile Cramming Roundtable (May 8, 2013), available at *http://www.ftc.gov/news-events/events-calendar/2013/05/mobile-cramming-ftc-roundtable* [hereinafter "Roundtable"].

[7] *See* Fed. Trade Comm'n Staff, Mobile Cramming: An FTC Staff Report (2014), available at *http://www.ftc.gov/system/files/documents/reports/mobile-cramming-federal-trade-commission-staff-report-july-2014/140728mobilecramming.pdf* [hereinafter "Mobile Cramming Report"].

mission's recent efforts to address mobile cramming. The testimony then discusses publicly available evidence regarding the scope of the mobile cramming problem, and the Commission's recent enforcement actions to combat it. Finally, the testimony discusses the recommendations in the FTC staff report released this week.

II. Landline Cramming

As this Committee has recognized, the issue of unauthorized third-party billing on landline phone bills has been a problem for well over a decade. The Committee's investigation and 2011 staff report have played critical roles in illuminating this important consumer protection issue. Indeed, the Committee's staff report estimated that landline cramming has likely cost consumers billions of dollars.[8]

The FTC has brought more than 30 enforcement actions under Section 5 of the FTC Act to halt landline cramming practices and provide restitution to consumers.[9] These cases have resulted in tens of millions of dollars in refunded charges and stringent court orders to prevent future cramming violations. Over the years, the FTC also has worked closely with Federal and state partners, including State Attorneys General and the Federal Communications Commission, to combat the problem, and has engaged in consumer and business education to raise awareness about the issue. In addition, the FTC has sought input on the problem from industry participants, consumer groups, and other stakeholders, including by holding a workshop devoted to cramming in 2011.[10] Based on this multi-faceted experience, the FTC has advocated a number of measures to address landline cramming.[11]

III. FTC Enforcement Actions

Over the past few years, it has become apparent that unauthorized third-party charges were appearing not only on landline bills but also on mobile accounts. The use of mobile devices has grown so rapidly that, according to industry, mobile devices now outnumber people in the United States.[12] Building on its experience in the landline arena, the Commission has looked closely at how cramming has spread to mobile accounts. The Commission devoted a portion of the FTC's 2011 cramming workshop to the topic of mobile cramming, filed a comment in an FCC proceeding in July 2012 recommending certain baseline consumer protections,[13] and held a separate roundtable in May 2013 specifically to address mobile cramming.[14] FTC staff also addressed the issue in its April 2013 report on mobile payments.[15] Further, this week, the Commission released a staff report on mobile cramming recommending best practices for industry to prevent and remedy mobile cramming.[16]

As noted above, since the spring of 2013, the Commission also has brought six enforcement actions to prevent mobile cramming and provide restitution for injured consumers. Thus far, the Commission has obtained strong relief in the three actions that have been fully or partially resolved:

- *Tatto, Inc. & Bullroarer, Inc.* In this case, the FTC alleged that a widespread mobile cramming operation engaged in deceptive and unfair practices, for example by running web advertisements that promised consumers a chance to win prizes such as free Justin Bieber tickets and then solicited their phone num-

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[8] *See* MAJORITY STAFF OF S. COMM. ON COMMERCE, SCI., & TRANSP., OFFICE OF OVERSIGHT & INVESTIGATIONS, UNAUTHORIZED CHARGES ON TELEPHONE BILLS, (July 12, 2011), at ii, available at *http://www.commerce.senate.gov/public/?a=Files.Serve&File__id=3295866e-d4ba-4297-bd26–571665f40756.*

[9] *See, e.g., FTC* v. *Hold Billing Servs., Ltd.,* No. 98–cv–00629–FB (W.D. Tex.) (contempt motion filed Mar. 28, 2012); *FTC* v. *Inc21.com Corp.,* 745 F. Supp. 2d 975 (N.D. Cal. 2010), *aff'd,* 2012 WL 1065543 (9th Cir. Mar. 30, 2012); *FTC* v. *Nationwide Connections, Inc.,* No. 06–80180 (S.D. Fla. Sept. 18, 2008) (stipulated order).

[10] Fed. Trade Comm'n, Examining Phone Bill Cramming: A Discussion (May 11, 2011), available at *http://www.ftc.gov/bcp/workshops/cramming.*

[11] *See* Comment of the Fed. Trade Comm'n, Fed. Commc'ns Comm'n CG Docket No. 11–116 (Oct. 24, 2011), at 5–6, available at *http://www.ftc.gov/os/2011/12/111227crammingcomment.pdf.*

[12] *See, e.g.,* Cecilia Kang, *A Nation Outnumbered By Gadgets,* Washington Post, Oct. 12, 2011, available at *http://www.washingtonpost.com/business/economy/a-nation-outnumbered-by-gadgets/2011/10/11/gIQAhjdhdL__story.html.*

[13] *See* FTC Reply Comment, *supra* note 5.

[14] *See* Roundtable, *supra* note 6.

[15] *See* FED. TRADE COMM'N STAFF, PAPER, PLASTIC . . . OR MOBILE? AN FTC WORKSHOP ON MOBILE PAYMENTS (2013), at 7–8, available at *http://www.ftc.gov/sites/default/files/documents/reports/paper-plastic-or-mobile-ftc-workshop-mobile-payments/p0124908__mobile__payments__workshop__report__02-28-13.pdf.*

[16] Mobile Cramming Report, *supra* note 7.

bers.[17] Consumers did not receive the Justin Bieber tickets, but rather, as the Commission has alleged, it is likely that consumers were signed up for the defendants' subscription plans.[18] The primary corporate defendants and their operator have agreed to a partially suspended judgment of more than $150 million.[19]

- *Jesta Digital, LLC.* In this case, the FTC alleged that the defendant lured consumers into purchasing a monthly subscription for ringtones using deceptive virus scan ads.[20] According to the complaint allegations, some consumers saw banner ads on their mobile devices while playing a popular mobile app that falsely claimed a virus had been detected. Clicking on the ad led to a screen with a button stating "Get Now" above the phrase "Protect your Android [phone] today." Consumers who clicked "Get Now," and then a button on a subsequent page marked "Subscribe," were then subscribed to the $9.99 per month ringtone subscription plan, though the nature and cost of the subscription were never adequately disclosed. Indeed, some consumers were subscribed even if they clicked on parts of the screen other than the "subscribe" button. Moreover, if consumers actually attempted to subscribe and download Jesta's so-called anti-virus software to their mobile devices, the download often failed. To obtain consumers' purported authorization for the charges, Jesta used a process known as WAP or Wireless Access Protocol billing,[21] which captures consumers' phone numbers from a mobile device. Thus, consumers never even entered their phone numbers prior to being billed.[22] Under the terms of the settlement, the company must provide refunds to injured consumers and pay an additional $1.2 million to the FTC.[23]
- *Wise Media LLC.* The FTC filed suit in April 2013 against the merchant Wise Media, LLC, which purported to sell recurring subscriptions to text message services providing "love tips," horoscopes, diet tips, and similar kinds of "alerts" for $9.99 a month.[24] The company claimed that consumers signed up for the services by entering their information into websites, receiving PIN codes by text messages, and inputting the PINs into the websites. The FTC alleged that many consumers did not notice the charges, which were often buried in their phone bills, including, in at least one consumer's case, on page 18 of the consumer's bill.[25] Consumers who discovered the charges widely reported that they had never heard of Wise Media or signed up for the services; the FTC alleged that consumers were simply billed without authorization.[26] In November 2013, a court entered a stipulated order with a judgment for more than $10 million

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[17] Complaint for Permanent Injunction and Other Equitable Relief, at 10, *FTC* v. *Tatto, Inc.,* No. 2:13–cv–08912–DSF–FFM (C.D. Cal. Dec. 5, 2013), available at *http://www.ftc.gov/sites/default/files/documents/cases/131216bullroarercmpt.pdf.*

[18] *See id.;* Memorandum In Support of Plaintiff's Ex Parte Application For Temporary Restraining Order With An Asset Freeze and Other Equitable Relief, And Order to Show Cause Why A Preliminary Injunction Should Not Issue, at 12, *FTC* v. *Tatto, Inc.,* No. 2:13–cv–08912–DSF–FFM (C.D. Cal. Dec. 5, 2013).

[19] *See* Stipulated Order for Permanent Injunction and Monetary Judgment Against Defendants Tatto, Inc., Shaboom Media, LLC, Bune, LLC, Mobile Media Products, LLC, Chairman Ventures, LLC, Galactic Media, LLC, Virtus Media, LLC, and Lin Miao, *FTC* v. *Tatto, Inc.,* No. 2:13–cv–08912–DSF–FFM (C.D. Cal. June 11, 2014), available at *http://www.ftc.gov/system/files/documents/cases/140613bullroarerstiporder.pdf.* The judgment was partially suspended based on defendants' inability to pay, but the defendants that have settled to date have surrendered more than $10 million in assets to be used for restitution.

[20] Complaint for Permanent Injunction and Other Equitable Relief, at ¶¶ 8–25, *FTC* v. *Jesta Digital, LLC,* No. 1:13–cv–01272 (D.D.C. Aug. 20, 2013), available at *http://www.ftc.gov/sites/default/files/documents/cases/2013/08/130821jestacmpt.pdf* [hereinafter "Jesta Digital Complaint"].

[21] WAP opt-in involves consumers responding to an offer displayed on the mobile web by clicking on a confirmation button from the phone two separate times. This process captures the consumer's phone number without the need for the consumer to enter it manually.

[22] *See* Jesta Digital Complaint, *supra* note 20, at ¶¶ 8–28.

[23] *See* Stipulated Final Order for Permanent Injunction and Monetary Judgment Against Jesta Digital, LLC, *FTC* v. *Jesta Digital, LLC,* No. 1:13–cv–01372 (D.D.C. Aug. 23, 2013).

[24] Complaint for Permanent Injunction and Other Equitable Relief, at 7–8, *FTC* v. *Wise Media, LLC,* No. 1:13–cv–1234–WSD (N.D. Ga. Apr. 16, 2013), available at *http://www.ftc.gov/sites/default/files/documents/cases/2013/04/130417wisemediacmpt.pdf.*

[25] Memorandum in Support of Motion for Temporary Restraining Order, at 6, 10–11, *FTC* v. *Wise Media, LLC,* No. 1:13–cv–1234–WSD (N.D. Ga. Apr. 16, 2013) [hereinafter "Wise Media TRO Memo"].

[26] *Id.* at 6–9.

and a ban that prohibits Wise Media from placing charges on mobile phone bills altogether.[27]

The Commission is litigating two similar actions against content providers. In *FTC* v. *Acquinity Interactive, LLC,* the Commission alleges that crammers sent text messages promising free $1,000 gift cards and iPads as a way to deceive consumers into "confirming" their phone number and entering PINs on a website; this resulted in consumers being signed up for unwanted premium text messaging services and incurring charges of $9.99 per month on their mobile phone accounts.[28] In another case, against MDK Media, Inc., the Commission alleges that a content provider similarly used the lure of "free" gift cards to collect consumers' phone numbers and crammed consumers for subscription services such as horoscope alerts.[29]

Earlier this month, the Commission filed suit against T-Mobile USA, alleging that it unlawfully charged consumers for unauthorized monthly text message subscriptions offered by third-party merchants.[30] The complaint alleges that T-Mobile deceptively described these charges on its phone bills in a manner that made it difficult for consumers to discover them. For example, T-Mobile's online bill summaries lumped third-party charges into a line item labeled "Use Charges" that could include charges for both T-Mobile's own text services and for third-party charges.[31]

Additionally, according to the complaint, T-Mobile continued to charge consumers even after becoming aware of telltale signs that the charges were unauthorized. The complaint alleges that T-Mobile's own internal documents showed that consumers increasingly were calling T-Mobile to complain about unauthorized third-party charges. It also alleges that large numbers of consumers sought refunds and the refund rate—the ratio of refunds to charges billed for a particular period of time such as a month—for some subscriptions was as high as 40 percent in some months. Further, the complaint states that T-Mobile continued to bill consumers for charges from third-party merchants for years after those merchants were the subject of law enforcement or other legal action for cramming, and after news articles and industry alerts detailed cramming behavior and other deceptive behavior by those merchants. On the same day the FTC filed its complaint, the FCC announced that it had opened its own investigation into T-Mobile's practices in regard to cramming.[32]

A number of lessons can be drawn from these actions, as well as the enforcement actions brought by our state law enforcement partners.[33] First, many entities have been able to cram charges onto mobile phone accounts using similar practices, and the amount of money at stake has been substantial. The Wise Media, Jesta Digital, and Tatto/Bullroarer cases alone involved settlements totaling more than $160 million.

Second, the level of consumer complaints and refund requests has understated the overall harm. Carriers have received a large number of complaints and refund requests related to third-party charges on mobile accounts, but the evidence indicates that many consumers do not notice the unauthorized charges, which often are buried in their mobile phone bills and, as alleged in the T-Mobile matter, appear under non-descriptive headers mixed in with charges for phone services.[34] Further, consumers with prepaid mobile phone accounts do not receive a bill at all; unauthorized charges are simply deducted from their available balance of minutes.

Third, even when consumers notice unauthorized charges and have requested refunds, they have reported difficulties obtaining refunds from carriers. Many complain that carriers refuse to give more than two months' worth or other limited amounts of refunds, even if consumers learn that crammed charges have appeared

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[27] Stipulated Order for Permanent Injunction and Monetary Judgment Against Defendants Brian M. Buckley and Wise Media, LLC, at 4–6, *FTC* v. *Wise Media, LLC,* No. 1:13–cv–1234–WSD (N.D. Ga. Nov. 22, 2013), available at *http://www.ftc.gov/sites/default/files/documents/cases/131121wisemediabuckleystip.pdf.*

[28] Amended Complaint for Permanent Injunction and Other Equitable Relief, *FTC* v. *Acquinity Interactive, LLC,* No. 14–60166–CIV (S.D. Fla. June 16, 2014), available at *http://www.ftc.gov/system/files/documents/cases/140707revenuepathcmpt.pdf.*

[29] Complaint for Permanent Injunction and Other Equitable Relief, *FTC* v. *MDK Media, Inc.,* No. 2:14–cv–05099–JFW–SH (C.D. Cal. July 3, 2014).

[30] *See* Press Release, *FCC Investigates Cramming Complaints Against T-Mobile* (July 1, 2014), available at *http://www.fcc.gov/document/fcc-investigates-cramming-complaints-against-t-mobile.*

[31] *See* Complaint for Permanent Injunction and Other Equitable Relief, *FTC* v. *T-Mobile USA, Inc.,* No. 2:14–cv–00967, ¶¶ 11–20 (W.D. Wash. July 1, 2014) [hereinafter "T-Mobile Complaint"]

[32] *See id.,* ¶¶ 21–36.

[33] State law enforcement actions are discussed in more detail at pages 11–12 of the Mobile Cramming Report, *supra* note 7. The fact patterns described by the states are similar to those described in the Commission's actions.

[34] *See* Mobile Cramming Report, *supra* note 7, at 14–15, 17–18.

on their bills for longer periods of time.[35] In other instances, carriers have told consumers to contact the merchant for a refund, a request that the merchant often denies.[36]

IV. Staff Recommendations on Best Practices to Address Mobile Cramming

The Commission has advocated certain baseline consumer protections to combat mobile cramming, and the staff report released this week provides staff's additional recommendations for industry best practices. Stakeholders in the mobile billing industry generally have relied on a set of voluntary guidelines to attempt to address cramming, but as demonstrated above, these have not been effective in stopping cramming.[37]

In making its recommendations, Commission staff considered how the mobile carrier billing industry has evolved. Until recently, the dominant type of carrier billing has been "Premium SMS" billing. Premium SMS typically involves a text-messaging component, whereby a consumer purportedly authorizes charges by texting a particular five or six-digit number known as a "short code." Since the adoption of smartphones with advanced mobile web browsing capabilities and the greater use of mobile apps, there has been an increasing use of other forms of third-party billing arrangements, known as "direct carrier billing" arrangements. In direct carrier billing arrangements, a consumer does not necessarily need to send or receive a text message to initiate or complete a transaction that is billed to a mobile account. Instead, a consumer can initiate a transaction on a mobile website or within a mobile app, and the merchant can have the charge placed on the consumer's mobile account through back-end arrangements that involve the mobile carriers. In late 2013, after the Commission had held its mobile cramming roundtable and Federal and state agencies had brought numerous law enforcement actions highlighting the prevalence of mobile cramming, the four largest mobile carriers stated their intention to discontinue one form of third-party billing—Premium SMS billing for commercial transactions.[38] Direct carrier billing, in contrast, is expected to continue growing, and it appears likely to supplant Premium SMS as the preferred mode of carrier billing. Regardless of the type of carrier billing involved, it is important for companies to provide basic consumer protections.

Providing consumers the option to block third-party charges

The Commission has advocated that mobile providers give consumers the option to block all third-party charges from their mobile phone accounts.[39] Providing a blocking option would significantly benefit consumers who wish to avoid third-party charges while imposing minimal costs to consumers who wish to use their mobile accounts for third-party billing. At activation, consumers should be informed that third-party charges may be placed on their accounts, and they should be given the opportunity to block all charges at that time. This option should be clearly and prominently disclosed to consumers while the accounts are active, including on the carriers' websites.

Staff also suggests that carriers should consider offering consumers the ability to block or allow only specific providers, or to block commercial providers only, as this may benefit consumers who wish to use their mobile accounts for only certain kinds of third-party charges. Allowing more granular blocking would permit consumers to continue to authorize third-party charges such as charitable or political donations.[40]

Strategies for Detecting and Preventing Mobile Cramming

Industry participants have adopted a range of strategies to attempt to detect and prevent mobile cramming. The staff report discusses many of these in detail and recommends best practices for improvement. These strategies address two key issues: avoiding deceptive practices that lead to unauthorized charges on mobile accounts, and ensuring that consumers are providing express, informed consent to third-party charges on mobile accounts.

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[35] *Id.* at 14, 33.

[36] *See* Wise Media TRO Memo, *supra* note 25, at 11–12; Mobile Cramming Report, *supra* note 7, at 14.

[37] Until recently, the Mobile Marketing Association ("MMA"), a trade association that promotes mobile marketing, had taken the lead in publishing best practices for merchants who wish to place charges on mobile phone bills using Premium SMS, but the MMA itself did not enforce those best practices. *See* Mobile Cramming Report, *supra* note 7, at 23–25.

[38] *See, e.g.,* Ina Fried, *AT&T, Sprint, T-Mobile, Verizon Dropping Most Premium Test Service Billing in Effort to Combat Fraud,* ALLTHINGSD.COM, Nov. 21, 2013, *http://allthingsd.com/20131121/att-sprint-t-mobile-verizon-all-dropping-most-premium-text-service-billing-in-effort-to-combat-fraud/*.

[39] *See* FTC Reply Comment, *supra* note 5, at 12.

[40] Mobile Cramming Report, *supra* note 7, at 22.

The staff report notes that merchants are responsible in the first instance for ensuring that their practices—including any advertising, marketing, and opt-in processes—are not deceptive, pursuant to the FTC Act. Further, information about price is important to consumers and should be disclosed clearly and conspicuously before charging a consumer's telephone account for a good or service.[41] Thus, at a minimum, pricing information should be on the same page and immediately next to the purchase or buy button, entry of a PIN, or other invitation for a consumer to agree to a charge for a product or service. Additionally, advertising and purchase confirmation screens should clearly disclose that the charge is being billed to a specific telephone account. While industry guidelines have in the past focused extensively on the text-message based Premium SMS opt-in process, the basic consumer protection principles outlined in the report should apply regardless of the type of carrier billing used.

The staff report also recommends that carriers and billing intermediaries should implement reasonable procedures to scrutinize risky or suspicious merchants and terminate or take other appropriate steps against companies engaging in unlawful practices. For example, the report recommends that if a carrier or billing intermediary discovers that a merchant has run a campaign containing deceptive advertising, or discovers the merchant engaged in unauthorized billing on landline phones, the carrier or intermediary should closely monitor other campaigns run by that third party or its affiliates to ensure compliance.[42] Carriers and intermediaries can use monitoring techniques that compensate for known tactics that fraudsters use to evade detection of deceptive advertisements and sign-up processes. Industry participants also can adopt a policy of terminating serious and repeat offenders.[43]

Additionally, the report recommends that industry take stronger steps to ensure that consumers have opted-in to charges as represented by merchants. In Premium SMS, mobile carriers typically have relied on the merchant's representation—passed on by the billing intermediary—that a consumer opted-in to a charge. However, as the enforcement actions described above demonstrate, those representations are often unreliable. One option is to move toward more centralized control of the consumer opt-in process and authorization records, which appears to be the trend for at least some part of the industry.[44]

Finally, the staff report notes that monitoring consumer refund requests, and taking appropriate action when there are indications of unauthorized charges, can be a highly effective means of detecting and stopping cramming. Businesses providing other payment mechanisms use similar approaches to root out unauthorized charges. For example, credit card networks typically investigate merchants with chargeback rates of 1 percent, a threshold that is less than one-tenth of the refund rates seen in the cramming context.[45] While refund rates may differ across different types of payment methods, a representative from the Mobile Giving Foundation has suggested that charitable donations charged to a mobile bill and processed through the Foundation typically have a refund rate of under 1 percent overall.[46]

Adequate Disclosure of Third-Party Charges

Another important step in preventing cramming is ensuring that consumers are adequately informed of all third-party charges on their accounts. Carriers should clearly and conspicuously disclose all charges for third-party services in a non-deceptive manner. In particular, the name of the third-party service and any associated bill heading should relate to the product offered and not suggest an affiliation with

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[41] *See* FED. TRADE COMM'N STAFF, REVISED.COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), at 10, available at *http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.*

[42] Mobile Cramming Report, *supra* note 7, at 26–27.

[43] While there are costs to effective monitoring, there are also substantial benefits to both industry and to consumers. Industry participants can lower expenses related to the processing of refund requests and handling of customer complaints. And consumers avoid being crammed with unauthorized charges.

[44] *See* Mobile Cramming Report, *supra* note 7, at 28–30. Centralization may shift some compliance costs, in the short term, from the merchants to carriers and billing intermediaries. However, it should benefit consumers and industry participants by making it more difficult for unscrupulous merchants to place unauthorized charges and by streamlining dispute resolution when a consumer claims a charge was unauthorized.

[45] *See id.* at 13–14 For example, in the *Wise Media* case, the monthly refund rates for some services on one carrier were as high as 40 percent. Wise Media TRO Memo, *supra* note 24, at 10.

[46] *See* Fed. Trade Comm'n, Mobile Cramming Roundtable Transcript (May 8, 2013), J. Manis, Mobile Giving Foundation, at 58, available at *www.ftc.gov/sites/default/files/documents/public__events/Mobile%20Cramming%20Roundtable/30508mob.pdf.*

the carrier's service. And, in order for carriers to make these disclosures, billing intermediaries and merchants should provide accurate information about these charges to them.

For consumers who auto-pay their bills, and may be especially unlikely to review the charges, or consumers who have prepaid phone plans, staff has urged carriers to consider whether a separate notification of third-party charges is warranted.

Consumer Dispute Protections and Refunds

The Commission has explained that mobile carriers should provide a clear and consistent process for customers to dispute suspicious charges on their mobile accounts and obtain reimbursement.[47] And indeed, FTC enforcement actions show that it is difficult for consumers to obtain refunds, and that refunds often are limited to only some months' worth of charges, even when consumers discover they incurred crammed charges for a longer time period.[48] A clear and consistent process is particularly important in this context because no Federal statutory protections have been applied to consumer disputes about unauthorized charges placed on mobile carrier accounts. Consumers therefore have different dispute rights when using carrier billing than when using other payment mechanisms. For example, consumers have dispute resolution rights and liability limits for unauthorized credit card charges under Regulation Z, including a right to withhold payment while the dispute is pending, [49] and for unauthorized debit card charges under Regulation E, including a requirement that funds debited in an unauthorized transaction be returned to a consumer's account within ten days, pending further investigation.[50]

The staff report further suggests that mobile carriers also can do more to provide redress to consumers who have been crammed. For example, in the landline billing context, industry members have stated that consumers can withhold payment on disputed charges during the dispute period without a cut-off in phone service or accrual of interest. Industry should extend this protection to the mobile billing context, and inform consumers about it. The staff report also suggests that carriers be more proactive in notifying consumers when a third party's billing activities are terminated for unauthorized charges, in order to allow them to request a refund if appropriate.

V. Conclusion

Thank you for the opportunity to provide the Commission's views on mobile cramming. The Commission is committed to protecting consumers from mobile cramming and we look forward to continuing to work with the Committee and Congress on this important issue.

Senator BLUMENTHAL. Thank you, Commissioner.

Attorney General Sorrell?

STATEMENT OF HON. WILLIAM H. SORRELL, ATTORNEY GENERAL, STATE OF VERMONT

Mr. SORRELL. Senator Blumenthal, Ranking Member Thune, thank you for inviting me to be here today to participate in this hearing and to speak from the perspective of the State AGs.

I do want to make it clear that although Vermont is the lead state in a 47-state effort right now to combat wireless cramming, that I am speaking only on behalf of myself today.

It was over 10 years ago that Vermont started addressing the problem of landline cramming, and our focus was on the third-party providers and not on the carriers. But from enforcement actions and settlements, we have recouped for 25,000 Vermonters over $2 million in refunds. If you want to take Vermont at two-tenths of 1 percent of the U.S. population and look at that nationally, just from the companies that we looked at and have settled with, that would be over 125 million Americans and over $1 billion

[47] FTC Reply Comment, *supra* note 5, at 12.
[48] Mobile Cramming Report, *supra* note 7, at 14, 33.
[49] *See* 12 C.F.R. §§ 1026.12, 1026.13.
[50] *See* 12 C.F.R. §§ 1005.6, 1005.11.

lost to landline cramming. And that is just from those companies that we have taken action against.

Ultimately, self-regulation, we realize, did not work in the landline cramming arena, and our State legislature banned essentially all third-party charges on landlines.

And then about 3 years ago, our office with other AGs turned to the wireless arena. But instead of going at the third-party providers, we focused on the four large cell phone or wireless carriers. And we conducted a survey in Vermont involving all Vermonters with third-party charges on their cell phone bills on the part of two large carriers over a two-month period in the summer of 2012. We retained the University of Vermont Center for Rural Studies to conduct the survey, and what that survey turned up was that approximately 60 percent of those Vermonters with third-party charges from those carriers on their cell phone bills during those 2 months—they had been crammed. They did not know the charges were there. They were not availing themselves of those charges.

And perhaps more compelling is the fact that 80 percent of those surveyed were not aware that charges on their cell phone bill were not exclusively for services provided by their own carrier.

And other AG's have found similar results as they have looked at this issue in their States.

Now, as you and the Ranking Member have pointed out, there has been some progress in that the four big carriers last November essentially got out of the PSMS business, and consequently, complaints to us have sort of fallen off a cliff.

But we are very much looking forward and wanting to avoid recurrences of wireless cramming in the future and also be aware of new methodologies, new technologies, and opportunities for consumers to be scammed. So we want to protect going forward. We also want to see that those customers who have been crammed are made whole by their carriers, and we hope that there will be enhanced consumer education efforts to avoid recurrences going forward.

This is a national problem. We very much hope that the Federal regulators will step up and be aggressive and, if appropriate, that the Congress will take action to better protect American consumers going forward. In the wireless arena, self-regulation has failed, and with my Federal partners and the Congress, we need to step up.

Thank you very much.

[The prepared statement of Mr. Sorrell follows:]

PREPARED STATEMENT OF HON. WILLIAM H. SORRELL, ATTORNEY GENERAL, STATE OF VERMONT

Summary

Chairman Rockefeller, Ranking Member Thune, and members of the Committee, thank you for the opportunity to testify today. The placement of unauthorized charges on telephone bills, also known as "cramming," has victimized many of my constituents in Vermont, and many of your constituents as well, including consumers, small businesses, and even large organizations. Cramming is a practice of significant interest to me, and one that the Vermont Attorney General's Office has been combatting, on behalf of Vermonters and citizens nationwide, for well over a decade.

Cramming is a huge, nationwide problem that has been pervasive in both landline and mobile telecommunications and has cost American consumers many billions of dollars. Cramming involves consumers being charged amounts on their phone bills

without authorization, usually for goods and services "sold" by third-party vendors ranging from $9.99 to $24.99[1] per month that the consumer neither requested nor used. Among the things that make cramming so pernicious and persistent is the continuing lack of consumer awareness that their trusted telephone carriers are able and willing to place charges on their telephone bills for goods and services sold by disreputable third parties. Not only do consumers not expect unanticipated third-party charges on their bill, they rarely recognize the charges that do appear on their bills as unauthorized third-party charges. Those few consumers that do detect unauthorized third-party charges—at least with respect to mobile cramming—have not consistently been able to obtain full refunds from their carriers or the carriers' third-party partners.

A number of regulatory approaches have proven to be ineffective in curbing cramming. In both the landline and mobile contexts, the telecommunications industry has largely been permitted to engage in "self-regulation." As this laissez-faire approach evinced its failure with respect to landline cramming, Vermont tried a notice-regime, requiring consumers to be notified in writing before receiving a third-party charge from their landline carrier. It is under these failed policies that cramming blossomed into the national, industry-wide, multi-billion dollar problem law enforcement officials and regulators—and, increasingly, consumers—across the country are familiar with today.

Cramming is a Huge Problem that has Cost Consumers Many Billions of Dollars

As the Committee is well aware, cramming has been recognized by many for its size and cost to consumers. In July 2011, this Committee concluded that landline cramming—a problem that had then been in existence for over a decade—had cost consumers a "substantial percentage" of $2 billion annually in "recent years."[2] In 2012, Consumer Reports estimated that landline and mobile cramming together could be costing American consumers up to $2 billion per year.[3]

Based upon Vermont's experience, if anything, these estimates of consumer loss are low. To date, as a result of my Office's investigations into dozens of third-party merchants and billing aggregators involved in *landline* cramming, 25,000 Vermonters have recouped nearly $2.3 million in crammed landline charges.[4] My Office has no reason to believe that these companies disproportionately targeted Vermont consumers. Moreover, there are many more such companies that perpetrated cramming that my Office has *not* investigated.[5] Thus, it is reasonable to conclude that approximately 1.25 million Americans have lost a staggering $1.15 *billion* to the entities Vermont has investigated and settled with to date *alone* and that these figures represent just a fraction of total consumer loss due to landline cramming.[6]

On the wireless side, the magnitude of consumer loss is equally daunting. As the Committee may be aware, my Office recently retained the University of Vermont's Center for Rural Studies to conduct a survey to determine the mobile cramming rate in Vermont for the customers of two major wireless carriers—that is, the proportion of third-party charges placed on mobile phones that were unauthorized.[7] Through the study, a sample of 2,400 Vermonters who had third-party charges placed on their mobile telephone bills during August and/or September of 2012 were contacted by my Office; we asked them about 5,388 third-party charges for a total of $43,250.96 that had been placed on their mobile phone bills over the course of those two months. Over 60 percent of the surveyed consumers reported the charges were

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[1] These dollar amounts are typical for crammed charges on mobile phones.

[2] S. COMM. ON COMMERCE, SCI. AND TRANSP., 112TH CONG., UNAUTHORIZED CHARGES ON TELEPHONE BILLS: STAFF REPORT FOR CHAIRMAN ROCKEFELLER (July 12, 2011).

[3] *Beware of Bogus Phone Bill Fees; Consumers Could Be Losing Up to $2 Billion a Year,* CONSUMER REPORTS, August 2012, available at *http://www.consumerreports.org/cro/magazine/2012/08/beware-of-bogus-phone-bill-fees.*

[4] Press Release, Office of the Attorney General of Vermont, *A.G. Settles Case for $1.6 Million in Ongoing Effort to Combat "Cramming"* (Nov. 12, 2013), available at *http://ago.vermont.gov/focus/news/a.g.-settles-case-for-$1.6-million-in-ongoing-effort-to-combat-cramming.php.*

[5] *Unauthorized Charges on Telephone Bills: Why Crammers Win and Consumers Lose: Hearing before the S. Comm. on Commerce, Sci., and Transp.,* 112th Cong. 112–171 (2011) [hereinafter *Hearing*] (statement of Elliot Burg, Senior Assistant Atty Gen., State of Vermont).

[6] *See State & County QuickFacts, Vermont*, UNITED STATES CENSUS BUREAU (July 8, 2014), *http://quickfacts.census.gov/qfd/states/50000.html* (estimating United States and Vermont populations for 2013).

[7] *See* Jane Kolodinsky, *Mobile Phone Third-Party Charge Authorization Study: Vermont,* CENTER FOR RURAL STUDIES AT THE UNIVERSITY OF VERMONT (May 5, 2013). available at *http://ago.vermont.gov/assets/files/Mobile%20Phone%20Third-Party%20Charge%20Authorization%20Study.pdf*

crammed, bringing consumer losses over a two month period *for these 2,400 Vermonters alone* to over $25,950.58. Extrapolating nationwide, the Vermont survey suggests a similar survey done on a national scale would reveal that a sample of 1.2 million Americans lost $12,975,290 to mobile cramming during August and September of 2012 *alone.* My Office believes that carriers started placing third-party charges on mobile phone bills in Vermont as early as 2006. Even if only 5 percent of American consumers have ever experienced third-party charges on their mobile phone bills, consumer losses for mobile cramming alone may have exceeded $10 billion between 2007 and 2013.[8]

Cramming is a Pervasive, Nationwide and Industrywide Problem

This Committee is well aware of the depth and breadth of the landline cramming problem; I expect the Committee's work in recent years has uncovered the fact that mobile cramming is similarly nation and industrywide. Vermont, like other jurisdictions around the country, fielded an increasing number of consumer complaints about mobile cramming from 2006 to 2013.[9] While these complaints are voluminous, it is generally believed that they represent only a very small fraction of the consumers who have been improperly charged for third-party goods and services on their mobile phone bills.[10] Nevertheless, consumer complaints implicate the entire third-party charge industry; naming more than a dozen mobile carriers and hundreds of third parties, including content providers and billing aggregators.[11]

Importantly, mobile cramming is a problem that victimizes consumers no matter what mobile carrier they choose. Indeed, in a recent study of over 750 consumer complaints received by 28 jurisdictions, several state attorneys general discovered that 14 mobile carriers were implicated in cramming. Moreover, the following themes of consumer complaints were consistent across those carriers as well as across the country, and across time:

> Typically, consumers complain of having been signed up for a premium text messaging subscription service (or "PSMS" subscription) without their knowledge or authorization, costing them $9.99 or more on their mobile phone bill each month.
>
> Some of these subscriptions purport to be for goods such as ringtones and wallpaper, but many more are for "alerts"—a service in which the content provider purports to send periodic texts to the consumer with information about weather, traffic, news, or sports, for example, or with inspirational messages, horoscopes, celebrity gossip, or trivia.
>
> Consumers typically complain that they do not desire and do not use the goods and services for which they are being billed. Some consumers report that they do not even receive the alerts for which they have been charged.
>
> While consumers can sometimes recall having gotten spam text(s) or having entered their mobile phone numbers into a website immediately prior to being signed up for a subscription service (often to receive a "free" good or service), just as often—if not more often—consumers simply have absolutely no idea how they came to be signed up for the subscription.
>
> Consumers are often crammed by more than one content provider and, many times, after they have already asked their mobile carrier to place a block on their account to stop third party billing altogether.
>
> Consumers that detect that they have been crammed on their mobile phone bills typically do so after they have been paying for a subscription service for several months.
>
> Even consumers who do not text and have no access to the Internet (and thus, cannot have opted in to a third party good or service through a typical method) report having been crammed. Too often, these consumers are elderly.[12]

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[8] Based on the 84 months from January 2007 through December 2013; while my Office's understanding is that the practice of placement of third-party charges on mobile telephones began as early as 2004, we are not aware of cramming complaints predating 2006.

[9] Letter from Nat'l Ass'n of Att'ys Gen. to Donald Clark, Sec'y, Fed. Trade Comm'n 2–3 (June 24, 2013) (on file with Fed. Trade Comm'n), available at: *http://www.ftc.gov/sites/default/files/documents/public_comments/2013/06/564482-00015-86106.pdf* [hereinafter *Letter*].

[10] *Id.*

[11] *Id.*

[12] *Letter, supra* note 9, at 3—4.

These are the very same issues my Office hears about when it communicates with Vermont consumers about mobile cramming.[13] Thus, it should come as no surprise that my Office believes that many of the allegations contained in the Federal Trade Commission's recent complaint against T-Mobile are representative of behaviors engaged in by carriers throughout the industry.[14]

Most Third-Party Charges are Crammed Charges

It is my Office's conclusion that most third-party charges are crammed charges. My Office has conducted three consumer surveys regarding cramming since the Fall of 2011. According to these surveys, in excess of 60 percent of third party charges are unauthorized ("crammed"). As stated above, according to our 2013 mobile third party authorization study, over 60 percent of third-party charges on mobile phone bills were crammed charges. Previously, in the fall of 2011, my Office spoke to over 100 Vermont consumers by phone about their experience with third-party charges on their mobile telephone bills; a full 92 percent of the consumers said the charge was crammed, while only 8 percent of the consumers reported that the charge was authorized.[15] Finally, nearly 90 percent of consumers surveyed in connection with my Office's first landline billing aggregator investigation reported that the third-party charges on their landline bills were unauthorized.[16] We are aware of no studies that contradict these findings.

Third-Party Charges have Enriched Industry while Offering Consumers Little Value

It is no secret that the landline and mobile telecommunications industries have profited to the tune of billions of dollars from placing third-party charges on landline and mobile telephone bills.[17] And yet, consumers have gained very little as a result. Consumers not only report that they are crammed for third-party services that they did not want or authorize, but that they would have no reason to value such offerings. A number of the landline consumers my Office spoke to in connection with our first landline billing aggregator investigation indicated they had no reason to order the voice-mail service for which they were charged; the respondents gave such explanations as, "[I] have an answering machine [and so] would never use this service," "I had voice-mail from the phone company [and] did not need [another service]," and "[I] can't imagine agreeing to voice-mail since we have always had a personal voice recorder."[18] Further, 73 percent of the consumers my Office interviewed in 2011 said they would have had no reason to purchase the goods or services for which they were billed on their mobile phone—for example, one consumer had been charged for stock alerts, but owned no stocks and did not follow the market.[19] Finally, while consumers typically complain they do not desire and do not use the goods and services for which they are charged on their phone bills, some consumers report they have not even *received* the goods and services for which they have been charged.[20] It is, therefore, of no surprise that there was no consumer outcry following the mobile carriers' decision to exit the Premium Short Message Service ("PSMS") platform—widely believed to be responsible for the lion's share of the mobile cramming problem—in November of 2013. Likewise, my Office has received no negative feedback from consumers following Vermont's passage of the 2011 ban on most third-party charges on landline bills. The only logical conclusion: contrary to industry talking points,[21] very few, if any, consumers received any real value from this billion-dollar industry.

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[13] *Id.* at 4, 6.

[14] *See* Complaint, *Fed. Trade Comm'n* v. *T-Mobile USA, Inc.,* No. 2:14–cv–00967 (W.D. Wash. July 1, 2014), available at *http://www.ftc.gov/system/files/documents/cases/140701tmobile cmpt.pdf* (alleging, inter alia, that T-Mobile charged consumers for unauthorized third-party subscriptions despite clear indications that the charges were unauthorized, that T-Mobile retained a significant portion of the revenue obtained through such charges, and that T-Mobile bills obscured the nature and source of such charges on consumers' mobile telephone bills).

[15] *Letter, supra* note 9, at 4.

[16] *Hearing, supra* note 5, at 2.

[17] S. COMM. ON COMMERCE, SCI. AND TRANSP., 112TH CONG., *supra* note 2, at iii; Complaint, *Fed. Trade Comm'n* v. *T-Mobile USA, Inc.,* No. 2:14–cv–00967, at 3–4.

[18] *Hearing, supra* note 5, at 2.

[19] *Letter, supra* note 9, at 4.

[20] *Id.* at 3.

[21] Michael F. Altschul, Senior Vice President and Gen. Counsel, CTIA: The Wireless Association, Fed. Trade Comm'n Workshop: Bill Shock and Cramming (Apr. 17, 2014, 9:00 AM) *http://www.fcc.gov/events/workshop-bill-shock-and-cramming.*

Cramming goes Undetected by Consumers

Cramming is a particularly serious problem because consumers do not know the underlying activity—the placement of third-party charges on phone bills—is happening. Consumers do not expect third-party charges to appear on their phone bills because they do not understand it is possible for third parties to charge them this way. Often third-party charges appear on phone bills without the consumer having taken any action at all. This problem is exacerbated by the fact that such charges are not readily discernible on the billing statements.

The data consistently show that consumer awareness about the third-party charges on their landline and mobile telephone bills is very low in Vermont. According to our 2013 mobile cramming survey, in excess of 78 percent of the consumers reported that, prior to receiving the survey, they had been unaware they could be billed for goods and services provided by third parties on their mobile phone bills.[22] In my Office's 2011 mobile cramming survey, significantly more than half of the consumers did not know that the third-party charge was on their bill until they were informed of the charge by my Office, nor did they know that they could be billed for third-party goods and services on their mobile phone bills prior to being informed of the charge in question.[23] Finally, according to the consumers surveyed in connection with my Office's first landline aggregator investigation, only 27.4 percent of consumers noticed the third-party charge on their landline bills within three months of being charged.[24]

The national picture is no different; consumers often do not know how they came to be signed up for third-party charges on their phone bills. A recent national mobile-cramming complaint analysis indicated the following were among the themes of consumer complaints:

> While consumers can sometimes recall having gotten spam text(s) or having entered their mobile phone numbers into a website immediately prior to being signed up for a subscription service (often to receive a "free" good or service), just as often—if not more often—consumers simply have absolutely no idea how they came to be signed up for the subscription.
>
> Consumers that detect that they have been crammed on their mobile phone bills typically do so after they have been paying for a subscription service for several months.
>
> Even consumers who do not text and have no access to the Internet (and thus, cannot have opted in to a third party good or service through a typical double opt-in method) report having been crammed. Too often, these consumers are elderly.[25]

Consumers also routinely report that they do not understand their mobile phone bills and/or they find it difficult to detect the source of the third-party charges appearing on their bills.[26] Some consumers have even complained of having been crammed by third parties whose names (or whose subscription/product names) make it very difficult to detect that a third party was involved.[27] Consumers often express confusion about their mobile phone bills, and report that they had no idea they could be charged on their mobile phone bills for goods and services provided by third parties.[28] As a result, consumers are typically charged on their mobile phone bills for third-party subscriptions for multiple months before they recognize they have been crammed.[29]

Consumers Do Not Obtain Full Refunds for Cramming

At least with respect to mobile cramming, consumer experience with obtaining refunds is inconsistent. While some consumers are able to get full refunds from their mobile carrier, many are not.[30] Vermont consumers have likewise reported mixed success with obtaining refunds from their mobile carriers; while some are able to

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[22] Kolodinsky, *supra* note 7, at 8.
[23] *Letter, supra* note 9, at 4.
[24] *Hearing, supra* note 5, at 2.
[25] *Letter, supra* note 9, at 3–4.
[26] *Id.* at 7.
[27] *Id.* at 3, n. 4 (explaining that national consumers named the following third parties and/or campaigns in their complaints: "General Texting," "General Texting Co.," "General Texting, LLC," "General Texting.com," "Premium Axcess,"[sic], "Premium Customer Care," "Premium SMS," "Premium Text Messaging," "Text Savings," and "Text Savings, LLC.").
[28] *Letter, supra* note 9, at 7.
[29] *Id.*
[30] *Id.* at 3–4.

obtain full refunds, others are only able to obtain a partial refund.[31] Still others are unable to get any refund from their mobile carrier, or are promised refunds they never receive.[32] Consumers also report that carriers refer them to the third-party content provider to seek refunds, and/or that they are unable to reach the content provider, or, if they do reach the content provider, are unable to get a full, or even partial, refund.[33]

The Time is Ripe for a New Approach

After over a decade of fighting landline cramming with enforcement actions against third-party merchants and billing aggregators, my Office successfully advocated for legislation prohibiting most third-party charges on landline telephone bills.[34] This statutory approach takes account of actual consumer expectations—*i.e.,* that consumers do *not* anticipate they will be charged on their phone bills for third-party goods and services—is straightforward to enforce, and does not interfere with other methods of receiving payment for services provided.[35] Most importantly, we believe the law has *worked.*[36]

My Office decided to take another approach when turning our attention to mobile cramming. After launching dozens of investigations into third-party content providers and mobile billing aggregators, my Office began pursuing *carriers* for billing for unauthorized charges, first on behalf of Vermont, and then on behalf of—now—46 states.[37] In November of 2013, the Nation's four largest mobile carriers—Verizon, AT&T, Sprint and T-Mobile—decided to stop charging their customers for commercial PSMS, a platform which accounted for the majority of third-party charges on mobile phones, and for the overwhelming majority of cramming complaints.[38] My Office believes that billing for commercial PSMS has now ceased industry-wide, and has heard from Offices around the country that mobile-cramming complaints have slowed to a trickle, no doubt as a result. While the mobile carriers' exit of PSMS is undoubtedly very positive for consumers, it was a voluntary move on the part of industry and carries with it no guarantee of future action with regard to PSMS or other, similar platforms such as Direct to Consumer Billing ("DCB"). Non-PSMS mobile cramming complaints are few in number, but do exist.[39] Moreover, we expect platforms, such as DCB, that are more appropriate for consumption by consumers with smartphones (rather than feature phones, to which PSMS was keyed) to be on the rise.

It is my opinion that a new approach would be appropriate on a Federal level as well. While my Office's legislative advocacy has effectively stopped landline cramming in Vermont, we believe our law-enforcement leadership has merely pressed the "pause" button on mobile cramming. As we look forward to a world that becomes more mobile-device oriented, the time is right for all of us to take stock of the major lessons learned—the potential for enormous consumer loss, low consumer awareness about the practice, the difficulty of getting consumer redress—to ensure that cramming does not fool us again.

Senator BLUMENTHAL. Thank you very much, Attorney General Sorrell.

Mr. LeBlanc?

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[31] *Id.* at 6.

[32] *Id.*

[33] *Id.* at 3–4.

[34] *See* 9 VT. STAT. ANN. tit. 9 § 2466 (2014) (prohibiting most third-party charges from being placed on Vermonters' landline telephone bills).

[35] *Hearing, supra* note 5, at 4.

[36] In the approximate two years since the ban became effective, my Office has received no more than 2 complaints about unauthorized third-party charges on landline bills that postdate the ban.

[37] *See* Press Release, Office of the Attorney General of Vermont, *AT&T Mobility, Sprint and T-Mobile Will Stop Billing Problematic Third-Party Charges* (November 21, 2013), available at *http://ago.vermont.gov/focus/news/att-mobility-sprint-and-t-mobile-will-stop-billing-problematic-third-party-charges.php* (referring to a then-45-state matter).

[38] *Id.;* Ina Fried, *AT&T, Sprint, T-Mobile, Verizon Dropping Most Premium Text Service Billing in Effort to Combat Fraud,* ALL THINGS D (November 21, 2013), *http://allthingsd.com/20131121/att-sprint-t-mobile-verizon-all-dropping-most-premium-text-service-billing-in-effort-to-combat-fraud/.*

[39] Note also that my Office's 2013 study was of all third-party charges, and not just PSMS charges.

STATEMENT OF TRAVIS LEBLANC,
ACTING CHIEF, ENFORCEMENT BUREAU,
FEDERAL COMMUNICATIONS COMMISSION

Mr. LEBLANC. Senator Blumenthal, Ranking Member Thune, and Senator Johnson, my name is Travis LeBlanc. I am the Acting Chief of Enforcement at the Federal Communications Commission. Thank you for the opportunity to appear before you to highlight the FCC's efforts to deter, disrupt, and dismantle cramming, the fraudulent practice of placing unexpected or unauthorized charges on consumers' telephone bills.

Cramming is a significant problem, causing countless consumers to unwittingly open their wallets for products and services they never wanted. A report released in 2011 by Chairman Rockefeller showed that phone companies placed approximately $2 billion in third-party charges on their subscribers' landline bills each year and that most of these charges were unauthorized. In many of these cases, consumers were unaware that they had been crammed because charges were buried in multi-page bills, not clearly described, or small enough in amount to go unnoticed. As consumers embrace paperless billing and automated payments, the propensity increases for cramming to go undetected. Consumers' increased reliance on mobile phones makes the problem of cramming even thornier.

Today 90 percent of American adults have cell phones and a majority own smart phones. These phones are used not only for calls but also for a wide array of purchases in the real and virtual world. While the adoption of new mobile technologies and services presents exciting new opportunities for consumers, it also creates new opportunities for crammers who, I should add, target not only adult consumers but also children, small businesses, nonprofits, and religious organizations. We must make sure that our consumer protections keep up with new technologies and billing practices.

Since 2010, of the thousands of cramming complaints the FCC has received, the proportion of those about unauthorized charges on wireless bills has grown from 15 to 58 percent. To be clear, these are complaints from consumers who believe they were crammed. Yet, because so many consumers do not even know they have been crammed, these numbers are just the tip of the iceberg.

As the Federal agency with primary oversight of the Nation's telephone carriers, the FCC has approached the problem of cramming comprehensively using a combination of enforcement, regulation, and consumer education. The Commission has taken 14 enforcement actions since 2010 against carriers for placing unauthorized charges on consumers' phone bills. These actions amount to approximately $123 million in monetary forfeitures, settlements, and refunds to injured consumers. Just in the last 2 weeks, we have taken three actions against carriers involving over $10.5 million in proposed penalties and payments to the Treasury.

A prime area for mobile cramming enforcement involves carriers who have charged their own subscribers via premium text messages around $10 a month for unauthorized third-party services such as horoscopes and stock quotes. This is the alleged fraudulent activity at issue in the FCC's cramming investigation of T-Mobile and the Federal Trade Commission's complaint against it. We have

no reason to believe that T-Mobile was the only carrier to engage in this conduct. To leverage our shared expertise and resources, the Federal Communications Commission worked collaboratively with the FTC on the T-Mobile investigation, and we look forward to continuing our partnerships with the FTC, State Attorneys General, and other law enforcers in the future.

We have also targeted our enforcement toward mobile and landline carriers who place unauthorized charges for their own services on customers' bills and, of course, carriers who act as third-party crammers by placing unauthorized charges on other carriers' bills. This month, we entered into a $1.2 million settlement with Assist 123 for allegedly placing unauthorized PSMS charges for subscription services like movie listings and lottery results on consumers' wireless and landline phone bills.

On the regulatory side, the FCC adopted truth-in-billing rules 15 years ago designed to help consumers detect cramming or other fraud in connection with their telephone bills. The Commission has now asked whether it should prohibit carriers from billing for third-party products and services unless the subscriber expressly opts in, whether it should ban carriers from charging for any third-party products and services, and whether it should expand all of the existing truth-in-billing rules to wireless carriers so that third-party charges are more conspicuous to consumers. It is expected that the FCC will consider any rule changes within the next several months.

On the education side, the FCC has been engaging consumers through written and video guides, tip sheets, and other materials aimed at empowering them to identify and report cramming. The Commission has also held a comprehensive public workshop on cramming in 2013, and to keep abreast of new and emerging kinds of cramming, as well as new carrier billing practices, the FCC is planning to host a workshop or similar event on these topics in the next 6 months.

In sum, through its enforcement, regulatory, and consumer education efforts, the FCC is using its authority to protect consumers from these unauthorized charges, and we will continue to do so whenever and wherever crammers exploit innovative communications technologies, consumer trust, and the pocketbooks of American families.

Senator Blumenthal, Ranking Member Thune, and members of the Committee, it has been an honor to appear before you today, and I look forward to answering your questions.

[The prepared statement of Mr. LeBlanc follows:]

PREPARED STATEMENT TRAVIS LEBLANC, ACTING CHIEF, ENFORCEMENT BUREAU, FEDERAL COMMUNICATIONS COMMISSION

Chairman Rockefeller, Ranking Member Thune, and members of the Committee, I am Travis LeBlanc, Acting Chief of the Enforcement Bureau at the Federal Communications Commission. Thank you for the opportunity to appear before you to highlight the FCC's efforts to combat the harmful practice of placing unexpected or unauthorized charges on consumers' telephone bills, a practice known as cramming.

The Cramming Problem

Cramming is a significant problem, and one that, by its nature, has caused countless consumers to unwittingly open their wallets for products and services they never wanted. A report released in 2011 by Chairman Rockefeller after a year-long

investigation of cramming on landline telephone bills showed that telephone companies placed approximately $2 billion worth of third-party charges on their subscribers' bills each year, and that most of these charges were unauthorized.[1] Fifteen to twenty million U.S. households are estimated to have been victims of cramming on their landline telephone bills,[2] and most do not even know it. Historically, many consumers have been completely unaware that their carriers are permitted to charge them for third-party products and services, and do not know to look for third-party charges on their telephone bills. Even those who are aware of the possibility often fail to spot unauthorized charges on their bills, because the charges have been hidden from scrutiny: they have been buried in multi-page bills, not clearly described, or small enough in amount to go unnoticed.[3] Consumer deception is a hallmark of cramming. The Commission took action in 2012 to help wireline consumers detect—or simply avoid—cramming, but unfortunately consumers continue to be crammed.

Today's hearing is about the fact that cramming is not just a problem for those with landline telephones. Since 2010, the FCC has received more than 5,000 complaints about cramming, and the proportion of those about unauthorized charges on wireless bills has grown from about 15 percent in 2008–2010 to 58 percent in 2013. Because so many consumers do not even realize that they have been crammed, or lack the time or knowledge to complain to the FCC, these numbers represent just the tip of the iceberg. A 2012 analysis by the Illinois Citizens Utility Board found that the percentage of fraudulent third-party charges on Illinois consumers' wireless bills skyrocketed in just one year, from about 26 percent to 51 percent.[4] It is critical that cramming on wireless bills not be overlooked, especially now, when Americans are becoming increasingly reliant on their mobile phones. The Pew Research Center estimates that 90 percent of American adults have a cell phone, including 74 percent of Americans 65 and over.[5] According to the Centers for Disease Control and Prevention, two in five U.S. households have "cut the cord" entirely from their landline phones and are using only mobile phones.[6]

Crammers are predators. They evolve with consumers. As consumers migrate to wireless phones and away from landlines, we expect that the same kind of predators that profited from unauthorized landline charges will look to wireless bills for new and creative ways to defraud consumers. Today, a majority of Americans (58 percent) have a smartphone.[7] The rise in wireless phone dependence introduces new ways for bad actors to profit from sneaky billing practices. This is because modern smartphones are not just phones that facilitate only voice communications, but sophisticated handheld computers that enable consumers to engage in a wide array of activities, from interactive gaming, to buying a coffee in a cafe, to shopping online from wherever they are. Consumers with Android phones, for example, can charge all of their app purchases to their phone bills, a form of direct-carrier billing.[8] The more consumers' mobile phone bills become like credit card bills—reflecting a host

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[1] *Unauthorized Charges on Telephone Bills,* U.S. Senate Committee on Commerce, Science & Transportation, Office of Oversight & Investigations, Majority Staff, Staff Report for Chairman Rockefeller (rel. July 12, 2011), available at *http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=3295866e-d4ba-4297-bd26-571665f40756.*

[2] *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"),* Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 4436, 4437 (2012) ("*FCC Cramming Order*").

[3] *Id.* at 4444.

[4] Citizens Utility Board, *Analysis: Frequency of Cellphone "Cramming" Scam Doubles in Illinois, CUB Concerned Wireless Customers Targeted as Landline Law Tighten* (Dec. 4, 2012), available at *http://www.citizensutilityboard/pdfs/NewsReleases/20121204_CellPhoneCramming.pdf.*

[5] Pew Research Internet Project, *Cell Phone and Smartphone Ownership Demographics,* available at *http://www.pewinternet.org/data-trend/mobile/cell-phone-and-smartphone-ownership-demographics/.*

[6] Centers for Disease Control and Prevention, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2013,* (July 2014), available at *http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf.*

[7] Pew Research Internet Project, *Cell Phone and Smartphone Ownership Demographics,* available at *http://www.pewinternet.org/data-trend/mobile/cell-phone-and-smartphone-ownership-demographics/.*

[8] *See, e.g.,* Ingrid Lunden, "Amazon's Carrier Billing Deal With Bango To Kick In This Year—Changes For The Appstore And Amazon Ahead?," TechCrunch, Mar. 20, 2013, available at *http://techcrunch.com/2013/03/20/amazons-carrier-billing-deal-with-bango-to-kick-in-this-year-changes-for-the-appstore-and-amazon-ahead/;* Kevin Parrish, "Google Play Offers Option to Charge Purchases to Your Bill," Tom's Guide, May 3, 2012, available at *http://www.tomsguide.com/us/Google-Play-Carrier-Billing-AT-T-Android-Sprint,news-15070.html.*

of different purchases—the more difficult it may become to spot unauthorized charges.

If there is any good news, it is that in 2012, major landline carriers announced that they would discontinue most third-party billing,[9] and in 2013, major wireless carriers followed suit,[10] at least with respect to third-party billing via premium short messaging services, or PSMS. Perhaps as a result of these agreements and increased government scrutiny, cramming complaints are trending downward. Of course, to the extent that the practice of cramming decreases due to private sector commitments, that is commendable. Unfortunately, that has not proven to be a silver bullet to the heart of cramming; we have not seen the practice of cramming cease entirely. Therefore, strong enforcement is still needed and perhaps additional regulation as well. Protecting consumers is the common goal that we all share, and the FCC stands ready to use the full spectrum of its authority to thwart bad actors and prevent consumers from being defrauded.

The FCC's Role in Combatting Cramming

As the Federal agency with primary oversight of the Nation's telephone carriers, the FCC approaches the problem of cramming through a combination of enforcement, regulation, and consumer education. On the enforcement side, the Commission has taken fourteen enforcement actions since 2010 for placing unauthorized charges on consumers' phone bills. Collectively, these actions are valued at no less than $122,750,000, including monetary forfeitures the Commission has sought to impose, payments the FCC has ordered enforcement targets to make to the U.S. Treasury in connection with settlements, and refunds the FCC has ordered the targets to make to injured consumers. Just in the last two weeks, the FCC has taken three of these enforcement actions, which proposed over $10.5 million in penalties and payments to the U.S. Treasury.

On the regulatory side, the FCC has adopted "truth-in-billing" rules designed to help consumers detect cramming or other unauthorized activities associated with their phone service, and is considering expansion of the rules. It is expected that the Commission will consider any rule changes within the next several months. We also anticipate that the Commission will conduct a workshop or similar event in light of continually evolving third-party billing technologies and practices. And on the education side, the FCC has been engaging consumers through written and video guides, tip sheets, and other materials aimed at empowering them to identify and report cramming.

The FCC's power to address cramming comes from its statutory authority over carriers. The Communications Act of 1934 is the FCC's enabling statute, and Section 201(b) is one of its cornerstones. That section declares unlawful all "unjust and unreasonable" charges and practices "for and in connection with" an "interstate or foreign or communication service by wire or radio."[11] Over fifteen years ago, the FCC found that cramming constituted an unjust and unreasonable practice.[12] Section 201(b), as well as Section 258, the anti-slamming provision of the Act, are the sources of authority for its truth-in-billing rules.

Enforcement

Under the Communications Act, the FCC has a variety of enforcement tools available to achieve compliance. Most often, the FCC initiates a forfeiture proceeding for violations of the Communications Act, including Section 201(b). Generally speaking, the first step in the process is for the FCC to issue a notice of apparent liability for forfeiture, or NAL. The Communications Act authorizes the FCC to impose a penalty of up to $160,000 for each violation, or each day of a continuing violation, up to a maximum of $1,575,000 for a continuing violation. Typically, the FCC proposes a forfeiture of $40,000 for each apparent cramming violation, although in recent cases it has substantially increased that amount for egregious violations. The Enforcement Bureau is generally open to settling a matter in lieu of initiating a for-

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[9] Press Release, U.S. Senate Committee on Commerce, Science, & Transportation, *Another Major Phone Company Agrees to End Third-Party Billing on Consumer Phone Bills* (Mar. 28, 2012), available at *http://www.commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=0245033e-6fe4-420d-8ed3-cdb39ed6537f.*

[10] Press Release, Office of the Vermont Attorney General, *AT&T Mobility, Sprint, and T-Mobile Will Stop Billing Problematic Third-Party Charges* (Nov. 21, 2013), available at *http://www.atg.state.vt.us/news/att-mobility-sprint-and-t-mobile-will-stop-billing-problematic-third-party-charges.php.*

[11] 47 U.S.C. § 201(b).

[12] *Long Distance Direct Direct, Inc.,* Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 314 (1998).

feiture proceeding. As a condition of settlement, the FCC may require a carrier to reimburse consumers who were injured by its unlawful practices.

The FCC's cramming enforcement actions have arisen from three basic kinds of bad conduct. The first is what I will call "billing carrier cramming," and involves a carrier, either landline or wireless, billing its own subscriber for a third-party product or service. In connection with mobile service in the United States, this has most often involved the carrier charging its subscribers, via PSMS, around $10 per month for services such as flirting tips, horoscopes, lottery results, and stock quotes. This is the alleged fraudulent activity at issue in the FCC's recently-announced investigation of T-Mobile, and the Federal Trade Commission's complaint in Federal district court against the carrier.[13] The FCC and the Federal Trade Commission worked collaboratively on this investigation in order to harmonize our respective enforcement as well as to leverage our respective expertise. T-Mobile allegedly crammed hundreds of millions of dollars of PSMS charges onto its subscribers' phone bills from third parties whom the carrier knew, or should have known, did not have authorization to bill its subscribers. Indeed, some of the third parties had refund rates, or "charge-backs," of 40 percent, and some had been sued for fraud. We are pleased with our collaboration with the Federal Trade Commission on the T-Mobile investigation and look forward to continuing to partner with the Federal Trade Commission in the future.

The second type of FCC cramming enforcement action is what I will call "third-party carrier cramming." It involves a fraudulent carrier placing an unauthorized charge for its own product or service on a consumer's phone bill issued by another carrier, typically the consumer's local phone bill. Fraudulent conduct of this type was at issue, in four NALs the Commission released in 2011, which collectively proposed forfeitures of nearly $12 million.[14] These third-party carriers assessed charges for their own "dial-around" long-distance service of around $10–15 per month on consumers' local phone bills. Each of the third-party carriers assessed its charges on at least tens of thousands—if not hundreds of thousands—of bills for the service in the year preceding the enforcement action. When the FCC investigated how many consumers the carriers had actually provided service to during that time, incredibly, two of the carriers disclosed that they had serviced only about 20 to 25 consumers, and the other two carriers could or would not answer the question. Further, earlier this month, the FCC settled with another carrier, Assist 123, LLC, for allegedly placing unauthorized PSMS charges for subscription services like directory assistance, movie listings, driving directions, and lottery results, on consumers' landline and wireless phone bills. The settlement requires Assist 123 to pay $1.3 million to the U.S. Treasury.[15]

Another flavor of "third-party carrier cramming" is often connected with "slamming"—the unauthorized switch of a consumer's preferred carrier. In the last fourteen months, the FCC has issued five NALs against carriers for apparently switching or attempting to switch consumers' long-distance service through deceit and trickery, and then charging the consumers for a new carrier's service they did not authorize or want. Collectively, the NALs proposed forfeitures of nearly $28 million.[16] According to the NALs, the *modus operandi* for most of these third-party carriers involved their agents cold-calling consumers, pretending to be affiliated with a consumer's existing provider, offering improved or upgraded service, recording the consumer supposedly authorizing such improved or upgraded service with the existing provider, and then using that "authorization" to switch, or attempt to switch, the consumer's existing long-distance service to the third-party carrier. In several of these cases, the FCC found the conduct so egregious that it proposed additional penalties beyond doubling or tripling the "base" forfeiture of $40,000 for cramming.

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[13] Press Release, Federal Communications Commission, *FCC Investigates Cramming Complaints Against T-Mobile,* (rel. July 1, 2014), available at *http://transition.fcc.gov/Daily__Releases/Daily__Business/2014/db0701/DOC-327998A1.pdf.*

[14] *Cheap2Dial Telephone, LLC,* Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 8863 (2011) ($3,000,000); *Main Street Telephone Co.,* Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 8853 (2011) ($4,200,000); *Norristown Telephone Co., LLC,* Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 8844 (2011) ($1,500,000); *VoiceNet Telephone, LLC,* Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 8874 (2011) ($3,000,000).

[15] *Assist 123, LLC,* Order, 2014 WL 3512917 (Enf. Bur. 2014).

[16] *Optic Internet Protocol, Inc.,* Notice of Apparent Liability for Forfeiture, 2014 WL 3427582 (rel. July 14, 2014) ($7,620,000): *Central Telecom Long Distance, Inc.,* Notice of Apparent Liability for Forfeiture, 2014 WL 1778549 (rel. May 5, 2014) ($3,960,000); *U.S. Telecom Long Distance, Inc.,* Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 823 (2014) ($5,230,000); *Advantage Telecommunications Corp.,* Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 6843 (2013) ($7,600,000); *Consumer Telecom, Inc.,* Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 17196 (2013) ($3,560,000).

Indeed, in one enforcement action that the FCC took this month, the agency found that the carrier, Optic Internet Protocol, Inc., apparently not only may have tricked consumers to obtain purported authorization, but also fabricated the recordings it offered to regulatory authorities as proof of authorization.

In some of the slamming/cramming cases, the FCC has alleged that the rogue carrier also billed consumers directly for its service, because the rogue carrier was not successful in pushing its charges onto the consumers' local exchange carrier bill. Conduct of this type does not involve cramming for unauthorized third-party charges, because the carrier is placing the charge for its own service on its own bill. This conduct nevertheless involves placing an unauthorized charge on a telephone bill, and the FCC has found that it also constitutes an unjust and unreasonable practice that violates Section 201(b) of the Communications Act.[17]

Since 2010, the FCC has pursued two major wireless carriers for allegedly placing unauthorized charges for their own services on their own bills. Both cases involved the carriers allegedly charging their subscribers for data services the subscribers did not expressly authorize.[18] The FCC ordered both carriers to notify affected customers of the applicable charges, to offer refunds, and to make a payment to the U.S. Treasury in lieu of a penalty. One of the cases required the carrier to refund at least $52.8 million to affected consumers, and to pay $25 million to the U.S. Treasury.

Rulemaking/Regulation

The FCC is also addressing cramming on the regulatory side. Fifteen years ago, the FCC adopted its first "truth-in-billing" rules, in order to help consumers detect cramming, slamming, and other fraud in connection with their telephone bills and telecommunications services. In 2009, the FCC issued a Notice of Inquiry to explore whether, and if so, how, to amend its "truth-in-billing" rules; in 2011, in response to continued cramming problems, the FCC issued a Notice of Proposed Rulemaking to strengthen its rules; and in 2012, the agency in fact did so.[19] Among other things, the current "truth-in-billing" rules require both landline and wireless carriers to clearly and conspicuously: (1) identify the name of each service provider associated with a billed charge; (2) identify any change in any service provider from the preceding billing cycle; (3) provide a brief, non-misleading, plain language description of the services billed; and (4) display a toll-free number for subscribers to dispute, or inquire about, any billed charge. The "truth-in-billing" rules also require landline—but not wireless—carriers to: (1) separate charges by service provider; (2) set forth charges from third parties for non-telecommunications services in a distinct section of the bill; and (3) notify subscribers that the carrier offers subscribers the opportunity to block third-party charges on their bills, if in fact the carrier does so.[20]

When the FCC strengthened its rules in 2012, it also issued a Further Notice of Proposed Rulemaking on whether it should expand the coverage of the rules still more. The FCC asked whether it should expand all of the existing rules to wireless carriers; whether it should prohibit carriers from assessing charges for third-party products and services on a subscriber's bill absent the subscriber expressly opting in; or whether it should altogether ban carriers from assessing charges for third-party products and services, at least on the same bills that contain charges for regulated telecommunications services. The FCC asked for additional comment on these and other issues last year, with the comment period officially closing in December 2013. The FCC is now poised for action in that docket, and expects to consider any rule changes within the next several months.

To keep abreast of new and emerging kinds of cramming as well as new carrier billing technologies and practices, the FCC is also planning to host a workshop or similar event on these topics in the next six months.

Consumer Education

In addition to its enforcement and regulatory work, the FCC also works to educate consumers about cramming. The agency has issued both printed and video consumer guides, as well as tip sheets on how to identify and report cramming.[21] The

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[17] *See, e.g., Advantage Telecommunications Corp NAL., supra* note 16.

[18] *AT&T,* Order & Consent Decree, 27 FCC Rcd 13492 (Enf. Bur. 2012); *Cellco Partnership d/b/a Verizon Wireless,* Order & Consent Decree, 25 FCC Rcd 15105 (Enf. Bur. 2010).

[19] *See FCC Cramming Order, supra* note 2.

[20] 47 C.F.R. § 64.2400–2401.

[21] Federal Communications Commission, *Cramming: Unauthorized, Misleading, or Deceptive Charges Placed on Your Telephone Bill* (last visited July 24, 2014), available at *http://www.fcc.gov/guides/cramming-unauthorized-misleading-or-deceptive-charges-placed-your-telephone-*

Commission also held a comprehensive public workshop on cramming in 2013. These outreach efforts, many of which involved close coordination with groups such as AARP, are intended to alert consumers to the fact that their carriers may charge them for third-party products and services on their telephone bills, and encourage consumers to review their bills carefully each month, paying attention to even small charges, as well as the descriptions offered for all charges, and who is responsible for them. The materials also encourage consumers to call their carriers about any charges they question, and any provider identified on the bill associated with such charges. In addition, our consumer education materials explain the FCC's "truth-in-billing" rules in plain English, and tell consumers how to file complaints with not only the FCC, but also the Federal Trade Commission and state public service commissions.

Enforcement Bureau Reforms

The FCC is proud of these strong enforcement actions, which are deterring cramming, but we will continue our commitment to do more to protect consumers. Since I joined the FCC four months ago, my first priority has been to make sure the great people and resources of the Enforcement Bureau are used as effectively and efficiently as possible. The Enforcement Bureau is embracing a modern enforcement philosophy that says we need to be smarter about how to deploy our limited resources. In many instances, that means working more closely and more frequently with our fellow law enforcement partners at the Federal and state levels, just as we have in the cramming context.

We are focused on ensuring the widest possible compliance with the law and rules that have the most impact on Americans in the 21st Century. For example, America's growing reliance on wireless phones leaves them increasingly vulnerable to unlawful privacy-invading robocalls and text-message spam. Cellular and Global Positioning System (GPS) jammers that can disrupt critical infrastructure and public safety networks are more and more widely available and must also continue to be the focus our enforcement efforts. And the recently announced Strike Force within the Enforcement Bureau will combat fraud, waste, and abuse in the Universal Service Fund (USF). It is our duty to vigorously protect the integrity of the USF programs by ensuring that program funds are used for their intended purposes.

We are also in the vanguard of the FCC's Commission-wide Process Reform efforts. For many outside the Commission, our most significant efforts in this area are already evident in our firm commitment to speedy resolution of both routine and significant matters. The reforms we have already adopted, and those in process, will ensure that the Commission's team of prosecutors will have the best chance at doing the most good for the greatest number of Americans.

Fundamentally, we are creating an Enforcement Bureau that is an efficient and smart prosecutorial unit. We are striving to be data-driven, nimble, creative, strategic and collaborative. Ultimately, I hope this will be good for consumers, good for industry, and just plain good government.

Conclusion

The FCC is the Nation's Federal regulatory authority over telecommunications carriers, and Congress has empowered the agency to combat unjust and unreasonable practices by carriers, as well as to adopt rules governing the conduct of carriers. Through its enforcement, regulatory, and consumer education work, the FCC is actively using these powers to address cramming and other unlawful acts by carriers that place unexpected and unauthorized charges on consumers' phone bills. We look forward to continued cooperation with the Committee and other regulatory authorities at both the Federal and state levels toward the common goal of protecting consumers from these unjust and unauthorized charges.

Senator BLUMENTHAL. Thank you very much.
Mr. Altschul?

STATEMENT OF MICHAEL F. ALTSCHUL, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, CTIA—THE WIRELESS ASSOCIATION®

Mr. ALTSCHUL. Thank you, Senator Blumenthal, Ranking Member Thune, and members of the Committee. On behalf of CTIA,

bill; Federal Communications Commission, Cramming Tip Sheet for Consumers (last visited July 24, 2014), available at *http://www.fcc.gov/encyclopedia/cramming-tip-sheet-consumers.*

thank you for the opportunity to participate in today's hearing and address the steps the wireless industry has taken and is taking to address cramming.

At the outset, I want to be clear. CTIA and its members share the Committee's concern, the regulators' concern, and the public's concern about cramming. Placing an unauthorized, misleading, or deceptive third-party charge on a consumer's wireless bill is wrong and simply not acceptable.

That is why in November 2013, wireless carriers ended their support of premium SMS services except for charitable and political giving and inmate calling services. Moreover, carriers allow customers to block all third-party charges and have worked to make it easier for consumers to obtain refunds for unauthorized or fraudulent charges.

CTIA originally became involved in the industry's efforts police premium SMS through the association's role as the common short code administrator. As I think you know, common short codes are used by commercial entities ranging from Dunkin' Donuts to Walmart, as well as by noncommercial entities, including government, charities, and political campaigns. From their start, users of common short codes issued by CTIA have been subject to written, publicly available guidelines administered both by the Mobile Marketing Association and CTIA. Not only do these guidelines reflect broadly accepted consumer best practices, between 2008 and 2010 these guidelines were incorporated as industry requirements in a series of State consent actions.

It is fair to say that CTIA and its carrier members discovered that trust alone was not sufficient to ensure compliance with these guidelines. The industry stepped up its efforts from trust to trust but verify through industry and individual carrier monitoring of all short code campaigns. And then when fraudsters went to great lengths to evade these monitoring efforts, CTIA added vetting to its monitoring efforts to confirm the identity of content providers and root out known offenders.

Although the annual complaint rates published by the FCC, FTC, and provided by State Attorneys General do not suggest a significant problem in this area as a result of both its own investigations and the Federal and State enforcement actions, the industry recognized that wireless customers and carriers were being victimized by determined fraudsters who crafted elaborate schemes to defeat the industry's self-regulation and third-party monitoring. Accordingly, wireless carriers chose to discontinue support for premium short code campaigns, as you have noted, in late last year except for the charitable and political campaign donations.

CTIA continues to monitor and vet all common short code leases and lessees. When monitoring identifies a problem, that information is sent to the carriers so they may take corrective action. These efforts and the national carriers' decisions to end support for premium short code campaigns should combine to significantly reduce the opportunity for third parties to use carrier billing platforms as a tool to commit fraud.

With the elimination of premium short codes for commercial campaigns, the remaining opportunities for third-party charges to appear on wireless bills are limited to instances involving direct

carrier billing. Although CTIA has no direct involvement in this area, it is our understanding that each of the carriers employs stringent vetting and safeguards to guard against abuse of this process, and as reported to this committee and included in the staff report, there have been very few consumer complaints associated with direct carrier billing and refund rates are around 1 to 1.5 percent.

As this committee's staff report recommends, the wireless industry is prepared to vigilantly monitor evolving third-party billing practices to make sure that bad actors do not find ways to penetrate barriers to cramming on direct carrier billing and other new systems, evaluate consumer protection gaps that have occurred in the context of landline and PSMS to establish consistent policies going forward that will provide consumers with appropriate transparency to the process and a clear avenue of recourse where unauthorized charges occur.

Moreover, the wireless industry already has adopted many of the recommendations proposed by the Federal Trade Commission staff report, including giving consumers the option of blocking all third-party charges on their phone accounts, monitoring advertisements and vetting merchants to ensure that advertising, marketing, and opt-in processes are not deceptive and the price information is clearly disclosed, ensuring that consumers provide their express informed consent to charges before it is billed to their mobile bill, as well as investigating and taking appropriate action when consumer complaints indicate a merchant may be cramming charges.

And we look forward to considering other ways to make third-party charges more clear and conspicuous on carrier bills and enabling consumers to dispute suspicious charges and obtain refunds for unauthorized charges through a clear and consistent dispute resolution process.

So thank you again for this opportunity to address your concerns and address the steps the wireless industry has taken to safeguard wireless consumers from unauthorized, misleading, or deceptive charges.

[The prepared statement of Mr. Altschul follows:]

PREPARED STATEMENT OF MICHAEL F. ALTSCHUL, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, CTIA—THE WIRELESS ASSOCIATION®

On behalf of CTIA—The Wireless Association®, thank you for the invitation to participate in today's hearing. At the outset, I want to be clear—CTIA and its members share the Committee's concern about cramming. Placing an unauthorized, misleading, or deceptive third party charge on a consumer's wireless bill is wrong and simply not acceptable. That's why, in November of 2013, wireless carriers ended their support of Premium SMS services, except for charitable and political giving and inmate calling services. Moreover, carriers allow customers to block all third-party charges and have worked to make it easier for consumers to obtain refunds for unauthorized or fraudulent charges.

CTIA became involved in the industry's efforts to police Premium SMS and the associated carrier billing for these services through the Association's role as the Common Short Code Administrator. Common Short Codes allow mobile users to engage and interact with a brand or service by using a short five-digit address to send text messages to a mobile application. CTIA, as the Common Short Code Administrator, assigns Common Short Codes to applicants allowing a single code to be used for the same application across multiple wireless service providers. Common short codes are used by commercial entities ranging from Dunkin Donuts to Wal-Mart, as well as by non-commercial entities, including government, charities, and political campaigns.

Short code campaigns can be employed to provide life saving information. For example, the Federal Emergency Management Agency's text message program offers regular safety tips for specific disaster types and allows for a search to find the nearest shelters and disaster recovery centers by texting "43362" ("4FEMA").[1] Another highly successful program is the Text4Baby campaign that has leveraged the power of mobile technology to help more than 700,000 new mothers and expectant women keep themselves and their babies healthy since the program's creation.[2] Not all short code campaigns are so serious—they also can be used for purposes as varied as voting for one's favorite player or summoning an usher during a Major League baseball game.

While the overwhelming majority of short code campaigns involve no charge other than the carrier's standard rate for SMS messages, short codes also can enable users to support charities or political candidates. For example, the American Red Cross employed common short code 90999 to raise money for disaster relief in the wake of the Haitian earthquake in 2010, with donors contributing more than $43 million. A 2012 study by the Pew Internet and American Life Project found that 1 in 10 Americans has made a charitable donation through a text message.[3] Similarly, after the Federal Elections Commission granted limited approval for Federal candidates, political committees, and political parties to collect political contributions through text message campaigns, the Obama for America and the Romney campaigns began using common short codes to solicit small dollar donations via mobile devices.[4] Each of these programs was, and remains, opt-in for consumers. Short codes have also been employed by state Departments of Correction to enable collect calls placed by inmates to be completed and billed to the mobile phone of the called party,[5] often a family member, who may be among the nearly 40 percent of American adults who have chosen to go "wireless-only" and forego subscribing to a wireline telephone.[6]

From their start, commercial, charitable, and political uses of common short codes issued by CTIA have been subject to written, publicly available guidelines administered both by the Mobile Marketing Association[7] and CTIA.[8] Carriers have looked to the "connection aggregators" who link content providers to wireless carriers to supervise and enforce the consumer best practices and carrier-specific practices. In 2008, a year in which the Federal Communications Commission received only about 345 wireless cramming complaints from the Nation's then 270 million wireless customers,[9] the wireless industry, both individually and through CTIA, began independent monitoring of all short code campaigns to detect any violations of the consumer best practices.

Over the next few years, the number of consumer wireless complaints filed with both the Federal Communications Commission and the Federal Trade Commission remained low and continued to decrease even with the significant growth in the number of wireless connections. While neither the FCC[10] nor FTC[11] complaint data

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[1] *http://www.fema.gov/text-messages*

[2] *https://www.text4baby.org/*.

[3] Pew Internet and American Life Project, REAL TIME CHARITABLE GIVING, (Jan. 12, 2012), available at *http://pewinternet.org/~/media//Files/Reports/2012/Real%20Time%20Charitable%20Giving.pdf* at 2.

[4] *http://www.huffingtonpost.com/2012/08/23/obama-text-message-donations_n_1824250.html* and *http://www.newsmax.com/Politics/Romney-text-messages-donations/2012/08/31/id/450534/*.

[5] *http://www.txtcollect.com/*.

[6] *http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf* at 2.

[7] *http://www.mmaglobal.com/files/bestpractices.pdf.*

[8] *http://www.ctia.org/docs/default-source/default-document-library/industry-best-practices.pdf?sfvrsn=0, http://www.ctia.org/docs/default-source/default-document-library/guidelines-for-mobile-giving-via-wireless-carrier-s-bill.pdf?sfvrsn=0* and *http://www.ctia.org/docs/default-source/default-document-library/guidelines-for-federal-political-campaign-contributions-via-wireless-carrier-s-bill.pdf?sfvrsn=0.*

[9] Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"), *Report and Order and Further Notice of Proposed Rulemaking* 27 FCC Rcd 4436 (rel. April 27, 2012)(at para. 20).

[10] *Id.* at para. 20–21. The last time the FCC directly reported wireless-related cramming figures was in 2002—at which time there were 92 complaints. Since then, wireless-related cramming complaints were too few to be included in the FCC's quarterly reports on Informal Complaints and Inquiries.

[11] The FTC's 2013 Consumer Sentinel report lists the number of complaints about "Mobile: Unauthorized Charges or Debits" for 2011, 2012, and 2013 as 626, 714, and 363. See *http://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2013/sentinel-cy2013.pdf* at 84. To put those numbers in context, in 2011 there were 306,300,207 active subscriber units, so complaints averaged 2.0 per million subscribers. In 2012, the wireless industry served 321,716,905 active subscriber units, with complaints amounting to

suggested there was a significant problem in this area, the industry recognized that both wireless customers and their carriers were being victimized by fraudsters who crafted elaborate schemes to defeat the industry's self-regulation and third-partying monitoring. Where problems were alleged or identified, CTIA and its member companies worked with law enforcement officials to identify solutions and shut down entities that pursued cramming schemes. [12]

As a further safeguard to consumers, beginning in February 2012, CTIA contracted with an outside vendor to verify information supplied to the Common Short Code Administration registry by companies seeking to lease short codes for premium SMS campaigns. CTIA's vendor uses numerous commercially-available databases such as Lexis/Nexis, Dun & Bradstreet, and the Better Business Bureau to confirm that the Content Provider displayed in the registry represents a legitimate company and is identified correctly in the registry. This vetting service satisfies the requirement of the California Public Utilities Commission that carriers be responsible for the content of their bills. Any discrepancies discovered during the vetting process are communicated directly to the carriers. Although the national carriers chose to discontinue support for premium short code campaigns in late 2013,[13] CTIA has expanded the scope of its vetting to include all common short code lessees.

In addition to this front-end vetting, CTIA continues to work with outside vendors to ensure that codes are used in compliance with the applicable guidelines. When monitoring identifies problems, that information is sent to the carriers so they may take corrective action. These efforts and the national carriers' decisions to end support for premium short code campaigns (with the limited exceptions for charities and political campaigns) should combine to significantly reduce the opportunity for third-parties to use carrier billing platforms as a tool to commit fraud.

With the carriers' decisions to no longer support premium short codes for commercial campaigns, the remaining opportunities for third-party charges to appear on wireless bills are limited to instances involving direct carrier billing. Although CTIA has no first-hand knowledge of carrier practices in this area, it is our understanding that each of the national carriers employs stringent vetting and safeguards to guard against any abuse of the process.

Thank you for the opportunity to participate in today's discussion.

Senator BLUMENTHAL. Thanks very much, Mr. Altschul.

I have a few questions. Then I will turn to Senator Thune.

As all of you are aware, the third-party wireless billing has involved three major players: the carriers, the third-party vendors, and the billing aggregators that act as middlemen. In this business, there is a lot of finger-pointing as to who is to blame, where the buck should stop. And law enforcement cases have now alleged wrongdoing at every stage of that billing process from vendors to billing aggregators to the recent action that you mentioned, Commissioner, by the FTC against T-Mobile. But all of that finger-pointing may not be of much benefit to consumers.

So the question is: where should the buck stop? Since the wireless carriers control the billing platform and they have ongoing relationships with their customers and they have been taking $3 to $4 out of every $10 vendors charge to consumers on this platform, Mr. Altschul, should the buck not stop with the wireless carriers?

2.2 per million subscribers. In 2013, subscribership rose to 326,914,000 active subscriber units, meaning complaints represented 1.1 per million subscribers, or just 0.0001 percent and a decline of 49 percent from 2012.

[12] *See, for example,* the statement by the Texas Attorney General, *https://www.texasattorneygeneral.gov/oagnews/release.php?id=4576,* and the cases brought against Mobile Messenger, *https://www.texasattorneygeneral.gov/newspubs/releases/2013/Mobile-Messenger-POP.pdf,* and Eye Level Holdings, *https://www.texasattorneygeneral.gov/newspubs/releases/2011/030911eyelevelholdings_pop.pdf.*

[13] Ina Fried, "AT&T, Sprint, T-Mobile, Verizon Dropping Most Premium Text Service Billing in Effort to Combat Fraud," All Things D (Nov. 21, 2013), available at *http://allthingsd.com/20131121/att-sprint-t-mobile-verizon-all-dropping-most-premium-text-service-billing-in-effort-to-combat-fraud/#ina-ethics* and *http://www.atg.state.vt.us/news/att-mobility-sprint-and-t-mobile-will-stop-billing-problematic-third-party-charges.php.*

Mr. ALTSCHUL. The carriers will take responsibility for charges on their bills and urge their customers to look at their bills carefully and call the carrier if they have any questions or if they detect anything that is suspicious on a bill.

Senator BLUMENTHAL. If they were making less money, would there be a greater incentive to take stronger action?

Mr. ALTSCHUL. Well, the amount that is collected, as you know from the fact that the carriers have discontinued the service, has not influenced the carriers' decisions to, first and foremost, protect their consumers. And carriers, of course, whatever they choose independently to charge, also have costs associated with providing this service. The carriers provide their own independent monitoring and vetting, in addition to the industry's efforts. There are costs associated with what they call onboarding and activating these systems in their billing systems and maintaining support. So what is collected and what is kept can be very different charges.

Senator BLUMENTHAL. Let me ask the others on the panel whether that level of revenue and the percentage that the wireless carriers make on those charges serves as a disincentive to take more effective action. And conversely, what kind of incentives would lead perhaps to the wireless carriers to take more effective action?

Commissioner MCSWEENY. I would start by saying that in the Federal Trade Commission's view, carriers and all of the participants in the sector have a role to play here. And certainly we believe that while some steps that have been taken are very promising, there are additional steps that are necessary and that should be taken to protect consumers.

As you point out, there are some questions about whether there are perverse incentives here, and I would also add that I have seen estimates that direct carrier billing is expected to grow. So while PSMS may have stopped, there is certainly some prospect here for a very vibrant direct carrier billing industry going forward.

Accordingly, we think the carriers have a role to play in protecting consumers and in improving the integrity of this kind of billing process both by ensuring better dispute resolution and consistent dispute resolution processes, but also by making it clear to consumers that they can block third-party charges and by taking steps to terminate or scrutinize merchants that may be involved in cramming unauthorized charges on their phone bills.

Senator BLUMENTHAL. Attorney General Sorrell?

Mr. SORRELL. Thank you, Senator.

First, in answer to your question, the buck stops with the carriers. There are others responsible, but that is where the buck stops. It is the carriers that decided to contract with the third-party providers and to pass along their bills and, as you suggested, keep 30 to 40 cents on the dollar of every payment made by the carriers' customers.

I am pleased to hear Mr. Altschul say that the carriers will take care of their customers when they call and question charges on their bills. But the reality has been very mixed in the past on this. Some carriers had a rather robust reimbursement mechanism. Others would reimburse only 2 months no matter how long the $9.99, the $20, or $29.99 a month was on customers' bills and being paid. And some of the carriers referred their own customers to the third-

party providers. In my view, for recurring monthly charges, the carriers should be obligated to confirm their customers' consent to those billings. And I do not think there is any question but that the hundreds of millions dollars, if not billions of dollars, that the carriers have made as their share of their customers being crammed is a huge incentive for them to look the other way.

Senator BLUMENTHAL. Mr. LeBlanc, do you want to add something?

Mr. LEBLANC. I will keep it short. I will echo the comments of Commissioner McSweeny, as well as Attorney General Sorrell, and also just to mention one further point which is the carriers here actually are acting as the platform for these charges. And as the platform, they bear a responsibility to ensure that the conduct that is taking place on their platform, that it is not deceiving and defrauding their customers. So we completely agree with our fellow law enforcement partners that the carriers bear accountability.

Senator BLUMENTHAL. Thank you.

My time has expired. I am going to come back to some of these questions and also give Mr. Altschul an opportunity to respond if he wishes. And I will turn to Ranking Member Thune.

Senator THUNE. Thank you, Mr. Chairman.

Commissioner McSweeny, the FTC's complaint in the T-Mobile case states that the FTC and the FCC have "concurrent enforcement jurisdiction over mobile telephone companies' billing and collection of third-party charges for non-telecommunications services," but it does not cite to any authority for that statement. Given the so-called common carrier exception, could you explain the authority for this claim in the FTC's complaint?

Commissioner MCSWEENY. The FTC has jurisdiction over carriers when they are engaged in non-common carrier activities such as billing for third-party services, which is the conduct at issue in this case. It is established by the relevant case law.

Senator THUNE. Are there other activities that the FTC might characterize as a non-telecommunications activity by the carriers that the FTC would then claim jurisdiction over?

Commissioner MCSWEENY. I would hesitate to give you an exhaustive list, but I imagine hypotheticals in which carriers are billing for third-party services. For example, if a carrier wants to put billing for a weight loss product on their phone bill, then we would consider that kind of conduct covered by the FTC Act.

Senator THUNE. Mr. LeBlanc, in your opinion, what independent agency is best equipped to regulate and enforce wireless cramming matters for telecommunications carriers?

Mr. LEBLANC. Well, as Senator Blumenthal pointed out at the beginning, there are a number of different entities that are involved in any cramming. There are the third-party content providers. There are the aggregators, as well as the carriers. At the FCC, we have primary jurisdiction over the carriers. We do not have the ability under our authority to reach the third parties which the FTC, for example, does, as well as our partners at the State level as well. So from our perspective, we think that it is necessary that you have Federal FTC, FCC, as well as State involvement to get to all three parties.

Senator THUNE. But in your view, though, the FCC is best equipped to deal with the carrier component of that.

Mr. LEBLANC. Certainly on the regulatory side, there is no question about it, Ranking Member Thune. We are the only authority that has the ability to promulgate regulations to prevent and to respond to this through rulemaking. On the enforcement side, we have worked very much over the last 4 years in fact in particular on cramming at the carrier level, and we are going to continue to vigorously enforce in that area.

Senator THUNE. Mr. Altschul, the Chairman's report on wireless cramming discusses emerging third-party wireless billing technologies such as the practice known as "direct carrier billing." Is this "direct carrier billing" practice being widely used by the wireless carriers?

Mr. ALTSCHUL. At present, the most popular and prevalent use is for billing for purchases made on various web app stores, in particular, Google Play. And when the customer goes to the Google Play store, Google presents the customer with a number of payment options, including credit cards and direct carrier billing, and presents and walks the customer through a number of screens and disclosures to obtain their knowing consent to the direct carrier billing.

Senator THUNE. Should we be concerned that this practice will have the same risk of cramming for consumers as premium text messaging did?

Mr. ALTSCHUL. I think everyone needs to be vigilant to make sure that this remains a safe and trusted payment vehicle. But as you know, as mentioned in the reports that came out this week, the Federal Reserve Bank of Boston and others have noted that there are many consumers who are unbanked or under-banked and a mechanism such as direct carrier billing provides a mechanism, another on-ramp to many of these Internet and information services.

Senator THUNE. And it appears that the burden is on the consumer to identify unauthorized charges on their bills. The FTC in its recently released report—recommended that when a carrier terminates a third-party's billing activities for unauthorized charges, the carrier also should notify consumers who incurred charges from the third party to inform them about the termination so that they can request a refund.

What is CTIA's response to this recommendation by the FTC's staff? And should carriers do more, such as sending an e-mail or making a phone call, to proactively alert customers of potentially fraudulent activity?

Mr. ALTSCHUL. Well, first, we endorse the recommendation. It seems to be universal that customers need to look at their bills, whether they are paper, online, and be aware and be prepared to call and question any charges they do not recognize.

Second, with respect to carrier activities, I think the record in these reports shows that in certain instances carriers have done just that. Carriers actually are at a bit of a disadvantage in that they do not know which of their consumers may or may not have opted into existing programs. Some of these programs may strike those of us in this room as not of much value, but not just in your home states but at the Georgetown Safeway, take a look when you

go through the checkout counter at the horoscopes, the tabloids, the other magazines that sell exactly the same kind of content that had been marketed through these carrier billing mechanisms. And there is a legitimate interest among many Americans for these services. The carriers just are not in a position to know who has been defrauded. Certainly they are not in as good a position as the customer when they look at their bill.

Senator THUNE. But should they do more in the form of e-mails, phone alerts, just to be proactive?

Mr. ALTSCHUL. Well, again, in appropriate cases, they have done this and they certainly should continue to do it. Yes.

Senator THUNE. Mr. Chairman, thank you. My time has expired.

Senator BLUMENTHAL. Thank you very much.

Senator Johnson?

STATEMENT OF HON. RON JOHNSON,
U.S. SENATOR FROM WISCONSIN

Senator JOHNSON. Thank you, Mr. Chairman.

Ms. McSweeny and Mr. LeBlanc, both of you in your testimony talked about enforcement actions. So it sounds like this is being regulated, it is being enforced. Is there any authority that you do not have to conduct proper enforcement? I will start with you, Ms. McSweeny.

Commissioner MCSWEENY. Thank you, Senator.

I think we are using the enforcement authority that we have appropriately to combat scammers, and we do have adequate authority. I would note there is no civil penalty authority in this area for the FTC, but we have been able to take action to stop conduct and to get consumer redress.

Senator JOHNSON. Mr. LeBlanc, do you feel you have full authority? Is there anything else you would need in law?

Mr. LEBLANC. Senator Johnson, we are right now at the Commission looking at promulgating revised rules with respect to cramming. Those rules are asking questions about whether or not to block all third-party charges, whether to permit opt-in, whether to apply the same truth-in-billing rules that we use in the landline context to the wireless context. We look forward to the resolution of that in the next several months. That would offer us new opportunities to look at new avenues that we would have.

Senator JOHNSON. But, again, you are going to write the regulations. You believe you have the authority to write those regulations and enforce them?

Mr. LEBLANC. Yes.

Senator JOHNSON. Mr. Altschul, would the industry challenge that authority?

Mr. ALTSCHUL. We have filed comments questioning the FCC's existing authority over non-telecommunications services and billing for such services. I notice in Mr. LeBlanc's prepared testimony, he rests his authority or the Federal Communications Commission's authority over billing in Title II of the Communications Act. That is the so-called common carrier provision. And as Senator Thune raised in his questions, that does create a tension between the overlapping jurisdiction between the agencies here.

Senator JOHNSON. So you would question the authority then? To resolve this by regulation——

Mr. ALTSCHUL. Without detouring into the old debate about net neutrality and what should be Title II and not Title III, whether billing services for non-communications services are properly characterized as a communications service or not could stand to be clarified. Yes.

Senator JOHNSON. In both the testimony of Attorney General Sorrell and I believe Mr. LeBlanc, they both claimed that the majority of third-party charges were cramming. Do you agree with that?

Mr. ALTSCHUL. I do not, in my role in the association, have visibility into the universe of charges. But, no, I think that there have been many, and I would say the majority of charges have been charges that consumers have accepted and opted into. I am not denying that there has been cramming and that any cramming is too much cramming.

Senator JOHNSON. But do you think that may be an overstatement that the majority of third-party charges are cramming?

Mr. ALTSCHUL. That strikes me as an overstatement, yes.

Senator JOHNSON. What type of standards or what type of screening do the carriers provide to try and limit this?

Mr. ALTSCHUL. Well, as documented not just in my testimony but in both the Federal Trade Commission and Senate Commerce Committee staff reports that were released this week, the industry, both through the association and individually, contracts with third-party auditors. The auditors do three kinds of auditing of every premium SMS and standard SMS message. They monitor the marketing to make sure that marketing has all the necessary disclosures, does not misuse the word "free," and provides meaningful notice and opportunity to consent and——

Senator JOHNSON. Let me just stop you. Those disclosures can be very long. Right? They are probably contained in a very long statement that people just click.

Mr. ALTSCHUL. Well, the Federal Trade Commission actually has published some very helpful guidance on how to use the word "free," how big the asterisk has to be. And we have boiled down these disclosures so they can fit on the first screen that the customer looks at. And the Florida Assurance of Voluntary Compliance, which is a form of consent decrees, really specified how these can be done in a way that at least the Florida AG thought would protect consumers.

Senator JOHNSON. I interrupted you.

Mr. ALTSCHUL. Well, that is the first monitoring is media monitoring.

The second monitoring is that for every short code—and we now have the standard codes that are still being used on the networks—the monitoring firms subscribe. They make sure all the necessary disclosures—if somebody sends stop to stop a subscription service, that the service is stopped and likely do that on a monthly basis.

And finally, the industry has added last year vetting of every applicant for a short code because we were, frankly, deceived and burned by a scheme where repeat offenders hid their identity, went around the United States, used mail box—post office boxes and em-

ployee names rather than corporate names to get additional codes when their prior codes had been cutoff. So now we confirm that every applicant is a brick-and-mortar operation. We can find them in established directories on the Internet and so on.

So those are the three kinds of monitoring the industry does for SMS messages. And I understand it is very similar to what the monitoring carriers are doing for direct carrier billing.

Senator JOHNSON. Thank you.

Thank you, Mr. Chairman.

Senator BLUMENTHAL. Thanks very much.

Senator Nelson?

STATEMENT OF HON. BILL NELSON,
U.S. SENATOR FROM FLORIDA

Senator NELSON. Ladies and gentlemen, just so you know where I am coming from, as the former elected regulator of insurance products in Florida, I actually worked with our fraud division against insurance companies that billed for, charged for insurance services that the customer did not ask for, could not afford. And as a result, we sent some people to jail. Now, you need to know where I am coming from. So I do not have a lot of patience when I hear on somebody's wireless service that they are getting billed for things that they do not want or do not know about.

Now, could we require consumers to affirmatively opt in to allow third-party billing of services at the time they execute a contract for wireless services? What do you think?

Commissioner MCSWEENY. Well, Senator, I think it is a great question. I would point out that in the Federal Trade Commission's view, we think there are a lot of legitimate uses for mobile carrier billing, and that many consumers will want to take advantage of them.

What is very important here, though, is that consumers have adequate information, that they understand clearly that they have the right in many cases to block third-party charges for a phone if they elect to, and that they be able to take a look at their bill and understand where the third-party charges are and who they are from. Very often, they really do not have adequate transparency to see that the charge is unrelated to their phone service. So it is difficult to identify on the bill. And the information is not clearly presented around rights to block third-party charges.

I would also note that there is inconsistent dispute resolution among the carriers when customers do identify problems. So we really are urging clearer and more consistent dispute resolution, which would be consistent with the kinds of measures that are present in other industries.

Senator NELSON. Do you think there ought to be an independent consumer ombudsman at your agency to resolve consumer complaints?

Commissioner MCSWEENY. I think it is a very interesting proposal and one that I would have to give more thought to. At the moment, I think the Commission is doing a good job using its enforcement powers to go after scammers where we see them, to respond quickly to consumer complaints, and to provide consumer education material, which I think is very, very valuable. It is im-

portant for people to understand that right now, they are their own first line of defense against these kinds of practices, and that if you see something on your bill that you do not understand, you can contact your carrier, or you can contact the FTC, and we will respond.

Senator NELSON. I am not sure that there is enough public awareness. And that is one of the reasons, thanks to the chairman and Chairman Rockefeller and the Ranking Member, that we are having this hearing.

What do you think about an independent ombudsman, Mr. LeBlanc?

Mr. LEBLANC. The independent ombudsman is a very interesting idea, Senator. The concern that we see right now from the enforcement perspective at the FCC is that consumers do not have substantial protections when it comes to dispute resolution. In the credit card industry, for example, if a consumer has a dispute about something on their credit card bill, they have certain rights. They have a right to dispute the billing errors by notifying the credit card companies. They can have a right to withhold payment for damaged goods, for example. Here there are no such rights when they have an actual concern about something. And so it is helpful certainly to have an additional person, an ombudsman or the FTC, the FCC, State Attorneys General, State public utilities commissions that are there that they can go to to complain when they believe that they have been charged for unauthorized charges.

Senator NELSON. When you have that many choices, I cannot keep up with that. That is only one. I go to the next one.

Let me give you an example. A $9.99 a month charge for daily horoscopes or celebrity gossip. It was very cleverly designed. It is small enough that consumers may have missed it when they were paying their bill, and taking $9.99 from consumers month after month really adds up. So when you multiply these charges across millions of customers, you can see how this can become such a big industry.

So, Commissioners, tell me. Would any of you want to comment about how a small charge like $9.99 or less a month can make a big impact on consumers?

Commissioner MCSWEENY. I think it absolutely does make a big impact, especially as you point out, it is very easy for consumers to rack up these charges month after month before even recognizing that they are being crammed, if they do at all. And in some cases, the charges may be more than $9.99 or a consumer may be experiencing cramming from more than one third party.

We have had recent cases where we have indications that more than a million consumers have been charged, and there have been hundreds of millions in consumer harm associated with the conduct. So I think it is very significant, sir.

Mr. LEBLANC. I would add to that, Senator, that in 2011 Chairman Rockefeller released a report on cramming that found that it added up to $2 billion annually. That is a lot of money. A lot of Americans in this country live paycheck to paycheck. These charges we are finding are ones that very few people even notice. Many people are not even aware that third-party billing is possible on their telephone bill. So it is of great concern that $9.99 adds up and

they are unable to actually get all of these removed, if they catch it 2, 3, 4 years down the road.

Mr. ALTSCHUL. One solution which the Federal Trade Commission report recommends and the industry supports is to move the disclosure and consent process away from the merchant to the aggregator or the carrier so that there is clear responsibility for obtaining and maintaining the record of the customer's consent to be charged for whatever service is on their bill.

Senator NELSON. That sounds like a good suggestion. What do you think, Attorney General Sorrell?

Mr. SORRELL. I am not so sure about the aggregator. The buck stops with the carrier, as I said earlier, and for recurring charges, I think the carrier should be the one to have to confirm the consent.

But, you know, quite apart from putting these third-party charges in a separate section of the bill so someone knows that it is a service that is not afforded by the carrier, for the real scam artist they had names like "Text Savings" or "Text Savings, LLC." And I think the worst case I have heard or maybe the best depending on your perspective where the Texas AG's Office found a bill that—the third-party bill was "refund." So for those minority of consumers who are aware that third-party charges may be on their bill, these scam artists were masking what they were doing with what they put on the bill, and the carriers took a blind eye in passing along "refund" on their customers' bills when it was not a refund. It was a charge.

Senator BLUMENTHAL. Thank you, Senator Nelson.

Senator Markey?

STATEMENT OF HON. EDWARD MARKEY,
U.S. SENATOR FROM MASSACHUSETTS

Senator MARKEY. Thank you, Mr. Chairman, very much and thank you for holding today's very important hearing.

So let us be clear. The practice of cramming, forcing consumers to pay for fraudulent charges on their phone bills, costs consumers dearly. Cramming is wrong. Cramming is scamming. It is that simple.

Our focus today should be entirely on how to stop fraud now and in the future.

My first question. We are talking a lot today about cramming on wireless phone bills, which is very important. But what about the potential for abuse on broadband bills or on bills for bundled services where consumers pay for a telephone, broadband, and TV in one bill? Plenty of opportunity for cramming and scamming.

Mr. LeBlanc, is the FCC taking steps to look into whether broadband, bundled services is an emerging problem today?

Mr. LEBLANC. Senator Markey, crammers are predators. They evolve with consumers. Wherever consumer bills are, they are likely to try to pop up if third-party charges are allowed. We are trying to keep up and get in front of the crammers as they evolve. There is no question that to the extent that we are talking about wireless bills today, which include mobile broadband as part of the bill, that the investigation we have into T-Mobile, as well as the Assist 123

case that we recently did this month, show that there are concerns on wireless bills.

Senator MARKEY. Is the FCC looking right now at your rules, your enforcement strategies with regard to bundled services, broadband, telephone, TV, and then the cramming that occurs as part of the bill? Are you looking at that right now?

Mr. LEBLANC. We just put out last week an enforcement advisory about transparency in the commercial terms of service around mobile and broadband.

Senator MARKEY. And broadband.

Mr. LEBLANC. And broadband. And we indicated that we are going to focus enforcement in that area.

Senator MARKEY. OK.

Ms. McSweeny, do you want to talk about what the Federal Trade Commission is doing with regard to broadband cramming?

Commissioner MCSWEENY. I would say I think the Federal Trade Commission believes that we have the authority to take action to protect consumers from fraud and from unfair practices. And we believe that these protections extend to the mobile environment and beyond, just as they exist in the brick and mortar world.

Senator MARKEY. Mr. Sorrell, we have industries that take actions with voluntary guidelines on the books, which are always good for good people. They do not have the murder statute on the books for my mother or yours. They are not going to be committing murders, only for the bad people. That is why you have laws on the books.

So how do you feel about that as to its adequacy of ensuring that the bad actors in this space are not still free to act in anti-consumer ways, knowing that any sanction is voluntary and industry-driven rather than having a governmental sword behind the threat if they violate the consumer protections which we are trying to advance?

Mr. SORRELL. Thank you, Senator.

Self-regulation in Vermont's experience did not work in the landline cramming arena, and it has not worked in the wireless arena. Where there are bad actors, there must be regulatory efforts to identify them and hold them accountable.

Senator MARKEY. I want to give you, Mr. Altschul, a chance to talk about that issue, voluntary versus mandatory, just so that all the good players in the wireless sector are not tarred by the actions of a few.

Mr. ALTSCHUL. Thank you, Senator.

Well, first, I could not agree more. These crammers and fraudsters are predatory and they do move from one service to another. As one door shuts, they try another.

We do support voluntary efforts. Our experience, with hindsight always being 20/20, is we built a wall. The bad guys came over it with a ladder. We raised the wall. The bad guys came back with a taller ladder, and so on and so forth. So I think that with that experience, the industry is responsible for protecting its consumers in the first instance.

There is no shortage of enforcement agencies at the Federal and State level. They have said today—and we know from their enforcement actions—they are energetic. They have ample enforcement

authority to go after bad guys, and we support that. In fact, the industry and the association has assisted them in those efforts.

Senator MARKEY. May I ask one final question, Mr. Chairman? Thank you.

And it is a related subject and it is that I am the House author of the Telephone Consumer Protection Act of 1991, and I feel as strongly today as I did 2 decades ago that consumers should not be subject to intrusive calls from telemarketers, whether they are at home or on their mobile phones. By banning most autodial and prerecorded calls to landlines and mobile phones and establishing the Do-Not-Call List, which I am very proud of, the law created a zone of privacy that remains popular with consumers to this day. As a matter of fact, every consumer every time they get a call from somebody they do not know, they say how did they get my number. So they are conditioned now to think that they do not have a right to call someone who is not receptive to it.

For the Federal Trade Commission and the FCC, please tell me about your efforts to enforce this law and keep up with the changing technologies that seek to circumvent these protections. It seems to be increasing as a problem once again.

Mr. LEBLANC. Senator Markey, I recognize that you were the driver of the Do-Not-Call law, and thank you for your commitment to it.

There is no question that to date even the number one complaint that we get at the FCC is Do-Not-Call, by far, consumer complaints. We just recently in the last 3 months took the largest enforcement action under Do-Not-Call that we have taken in our history where we settled a case for $7.5 million with a carrier and we continue to aggressively enforce the TCPA there, as well as in the robo call context.

Senator MARKEY. I can only encourage you to be even more aggressive. It really ticks people off.

Ms. McSweeny?

Commissioner MCSWEENY. Senator, I would just second our appreciation for the TCPA as an important pro-consumer law, and I would add that we are very proud of our track record on Do-Not-Call at the FTC—we have more than 200 million people signed up, I think, by last count—and take the responsibility of continuing to protect those consumers very seriously. We are trying to work with technologists to address the robocall problem that typically tries to thwart the Do-Not-Call registry, and we are taking new steps to try to address those issues.

Senator MARKEY. And if I could just say this. We all grew up kind of conditioned to our phone in our living room ringing, and it could be somebody soliciting us. And we have a law saying do not solicit anymore. But when your cell phone rings, you are saying to yourself, well, the only people who have my number are my family and my friends. How did you get my number? And it just ticks people off. So the more aggressive you can be, I think the happier the American people will be.

Thank you, Mr. Chairman.

Senator BLUMENTHAL. Senator Klobuchar, I am sure, has some questions. I will just give her a chance to be seated. And if you like, I can fill in time or I can yield to you.

Senator KLOBUCHAR. Well, if you are just filling in, I can handle it.

Senator BLUMENTHAL. I have got some questions.

Senator KLOBUCHAR. Why do you not go ahead.

Senator BLUMENTHAL. You know, I think that this testimony has been very valuable, and I want to elaborate on some of the questions that have been asked.

First of all, the comparison inevitably has to be made to the other payment mechanisms that encounter similar problems with unauthorized charges. And they voluntarily, for example, credit card networks, typically investigate merchants when there are charge-backs, when there are requests for refunds above a certain rate. In other words, for any one of these chargers, whether valid or invalid, if there are refund requests above a certain rate, they investigate. For the credit card networks, that threshold is 1 percent. For the wireless carriers, my understanding is that it is 10 times as high, 10 percent, or higher, which indicates a much less vigorous level of vigilance.

I think you mentioned, Commissioner, that you thought greater scrutiny was one answer here, and perhaps that is what you meant by that answer. You did not elaborate on it, but you do in your testimony mention those numbers, and I am wondering whether perhaps you can elaborate on that point.

Commissioner MCSWEENY. I think it is a very important point, and in some of our cases, we have actually seen refund rate requests at 40 percent which is, as you point out, significantly higher than you see in other industries. So we do think that there needs to be much more scrutiny both by intermediaries and by carriers of merchants that have high refund rates and a much more consistent and aggressive approach to terminating those merchants or reviewing their activities.

Senator BLUMENTHAL. Mr. Altschul, does that not make sense to you that there should be investigative efforts, intense scrutiny when refunds are higher than 1 or 2 percent?

Mr. ALTSCHUL. I agree. Actually the statements of the State AG in Texas thanked the industry for working with the State's efforts in the cases that that Attorney General brought.

Senator BLUMENTHAL. But apparently the industry practice is very different from that one instance.

Mr. ALTSCHUL. The Committee staff's own report released today indicates that for direct carrier billing for charitable campaigns, it is 1 percent or less and for direct carrier billing, it is 1 to 1.5 percent, which is in the range that you have described for credit card investigations.

Senator BLUMENTHAL. I want to come back to this area of questioning, but I will yield to Senator Klobuchar.

STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA

Senator KLOBUCHAR. Oh, thank you very much, Senator Blumenthal. Thank you for holding this hearing and thank you, Senator Thune.

Two years ago, as I know you have discussed—I am sorry I was away chairing a hearing, contact lenses actually, with the Antitrust

Subcommittee. But two years ago, the FCC finally took additional regulatory action on wireline cramming following up on pressure from this committee, and one of the things that I was concerned about at the time, while I thought the action was important, that there were not protections put in place for wireless customers. And as I said in my filing at the FCC at the time, quote, with more and more households cutting the cord on their landline phones, the FCC should take all necessary steps to prevent crammers from finding new opportunities with wireless bills.

While I am encouraged that the FCC recently refreshed its record on truth-in-billing regulations in relation to wireless protections, we need to continue to look for ways to address the current and future evolution of crammers and actions that need to be taken.

I am a cosponsor of Senator Rockefeller's Fair Telephone Billing Act, which would address cramming as we know on wireline phones, and I hope this committee can work together to pass this legislation and continue to look at action on wireless cramming as well.

I guess I will start with you, Mr. LeBlanc, as well as Mr. Sorrell. In 2012, the FCC updated its truth-in-billing rules, which included protections for consumers from wireline cramming, as I just noted. However, the argument was made that there was not enough evidence of cramming on wireless. Two years later, it is extremely clear that wireless cramming is a huge problem, and the FCC still has not expanded cramming protections for wireless.

Mr. LeBlanc, will the FCC take regulatory action this year to protect wireless consumers from cramming, and what about some kind of additional enforcement action?

Mr. LEBLANC. Thank you, Senator Klobuchar, and thank you very much for your comments as well that you filed with the FCC over the last couple years.

The record in that matter closed in December 2013, and we anticipate that it will be ready for a decision within the next several months. So we are hopeful that we will see a change. Some of the issues that are presented to the Commission right now involve whether all third-party charges should be banned entirely, also whether we should have an opt-in process, and then finally ensuring that the truth-in-billing rules that apply in the landline context also apply in the wireless context. So it is ripe right now for a decision and we hope to have an answer within the next several months.

On the enforcement side, we are vigorously tailoring our enforcement resources toward the issues that affect average Americans today in the 21st century. And there is no question that the wireless space and cramming concerns in that space are those issues. We have just recently announced the investigation of T-Mobile, and we have no reason to believe that T-Mobile was the only wireless carrier that was engaging in cramming.

Senator KLOBUCHAR. Thank you. And I was aware of that action. Thank you.

Attorney General, do you think there should be more action here on the Federal level on the wireless issue?

Mr. SORRELL. Thank you, Senator. As the lead state of a 47-state effort to try to——

Senator KLOBUCHAR. That would be called a softball.

[Laughter.]

Mr. SORRELL. But I already hit it earlier before you came in. So I will just hit it again.

It is a huge problem and there is some good news in that the major carriers have gotten out of the PSMS business, and complaints to us have fallen off at the State level about wireless cramming. But now our focus is, one, trying make our constituents who have been crammed whole for the wrongs of the past, but also to work with Federal regulators to assure that there is not a recurrence of wireless cramming or a close cousin using new technologies going forward.

Senator KLOBUCHAR. And then, Commissioner McSweeny, you mentioned in your testimony, as did the Attorney General, that consumers are not aware that their cell phone carriers are able to add third-party charges to their bills and that they are not checking their bills, which is always an issue. I remember doing an event on this in Minnesota and I found like some math teacher, of course, checked his bill and figured it out, and a Lutheran minister. He also checked.

How long do you think it takes the average consumer to notice an unauthorized charge on their account, and how are you working to better inform consumers? And how under-reported do you think wireless cramming is?

Commissioner MCSWEENY. I think the six cases that the FTC has brought so far address mobile cramming—and I would say stay tuned. I am sure we will have more. Two things are very important here. One, the vast majority of customers who have been crammed do not realize it. So we are, I think, seeing the proverbial tip of the iceberg. And two, people really are having a hard time getting redress and getting refunds if they are lucky enough to identify charges that may be on their account.

So we think consumer education is very important. We have consumer education materials available. But as you point out, they recommend people review their bill and try to identify any charges that they do not understand. This can be very complicated, and in most cases, identifying third-party charges on bills is almost impossible. They generally look like phone bill charges. So we recommend people take that step. We hope they do. We are available as a resource at the FTC. Of course, the FCC is a resource, as well as our State Attorneys General. And we are urging industry to really take a look and try to make these kinds of third-party services more clear to consumers on their bills.

Senator KLOBUCHAR. Do you know what the average charge is for one of these cramming, whether it is wireline or wireless? What do you think the costs are? I know it is hundreds of millions of dollars. But how often did they get the full refund?

Commissioner MCSWEENY. Well, what we typically see are subscription services that range from $9.99 to $14.99 a month. But, again, people can be crammed by multiple third parties. So they may be billed more than just that $9.99. And very often it takes

some time for consumers to even realize it is occurring to them. So it can occur and accumulate over a matter of months or even years.

We have heard cases and had cases where people tried to get refunds and have not succeeded or have only gotten a couple of months' worth. So that is a significant problem.

Senator KLOBUCHAR. All right. Well, we encourage you to keep working on this. I think you know our Attorney General in Minnesota, Laurie Swanson, has been very aggressive about these cases and worked hard on them, and we have done some of this work together. I am glad that Senator Blumenthal as a former Attorney General understands how important it is as well. So we will continue to push on this issue. But thank you very much, all of you, for being here.

Senator BLUMENTHAL. Returning to the question I was about to ask you—and I appreciate your comment that your belief is that there are investigative efforts in some areas after the threshold reaches a percentage and a half. I take it then that you would not object to a requirement that there be investigative scrutiny after, let us say, a 2 percent——

Mr. ALTSCHUL. The devil is always in the details. Certainly not. I would be certainly willing to look into it.

One of the interesting things in the Vermont consumer survey that Attorney General Sorrell mentioned—and it was filed in the FCC docket—is how often in the customer responses you discover that a lot of these charges were what sometimes are called teachable moments in families with family plans. And the survey response indicates that a child on a family plan made a charge without the parents' consent. This is a serious issue. It is in violation of FTC rules, though maybe not a conflict because the users may be over 13. So not all of the refunds are attributed to lack of knowledge, just maybe perhaps, as I said, lack of adult supervision.

So that is why a refund rate per se is a very crude metric. And if that is the metric, you may find carriers being less liberal with their refund policies to stay under that line. That is a not a desire that the industry wants, and I am sure the Committee wants.

Senator BLUMENTHAL. I would not set the threshold at the level of refunds. I would set it at the level of requests for refunds. And I take it that you would not, barring viewing some of the details, object to, let us say, 2 or 3 percent.

Mr. ALTSCHUL. No. In fact, the actual numbers in the public record from the monitoring or the reports received by the FCC and Federal Trade Commission and the State AG's over a period of 4 years are below that number, and yet that number, as we have heard today, does not necessarily indicate the scope of the problem. So that is why the devil is in the details.

Senator BLUMENTHAL. OK. Well, maybe we will work on some of the details.

Comparing again the consumer disputes in this area as compared to some others, as you know, when a consumer disputes a vendor charge on their phone bill, they have far less protections—far fewer protections than a consumer who disputes a credit card charge. Those consumers have a statutory right to reasonable investigation of the dispute and they cannot be penalized for a bad credit report

for failing to pay the charge during the investigation, unlike consumers who dispute a vendor charge on a phone bill.

Let me ask the members of the panel whether perhaps those same protections in the credit card or credit charge area should be extended to charges on phone bills.

Mr. SORRELL. In my view that makes sense, Senator.

Commissioner MCSWEENY. I would note that the FTC's view is to suggest continued voluntary regulation at this point and a series of steps that we believe the industry and carriers should take. Personally, I would be very interested in working with you on that issue.

Senator BLUMENTHAL. Thank you.

Mr. LeBlanc?

Mr. LEBLANC. Senator, I would echo both Attorney General Sorrell, as well as Commissioner McSweeny, and say it is squarely a policy question that should definitely be considered.

Mr. ALTSCHUL. If I might add.

Senator BLUMENTHAL. Yes, please.

Mr. ALTSCHUL. While not an expert in payment mechanisms, I am sufficiently aware it is a mess of different levels of protection. And if this committee and Congress has the appetite, what they should do is take on the entire range of credit cards, debit cards, prepaid cards, charges to all kinds of additional third-party mechanisms because the current landscape is a total mess of differing and sometimes conflicting rights and obligations.

Senator BLUMENTHAL. Well, I am not sure how to interpret that answer. You would not object but only if it is more far-reaching?

Mr. ALTSCHUL. You have chosen to compare the credit cards with the protections that consumers have. That is just one of the existing regulatory schemes that exists for payment mechanisms today. There are other payment mechanisms which exist which have very similar rules and regulations as carrier billing which, as we have heard today, the Federal Trade Commission and Federal Communications Commission oversees.

Senator BLUMENTHAL. Well, let me take another area that is very comparable to yours. In the landline industry, industry members have stated that consumers can withhold payment on disputed charges. Is that true in the wireless area?

Mr. ALTSCHUL. It is not part of the FCC's truth-in-billing rules, and that was because the FCC found that wireline service, at least at the time, was something that households had and had a right to without interruption. Wireless—there were additional choices and very low barriers to getting additional wireless service.

Senator BLUMENTHAL. Would you object to that rule as applied to your industry?

Mr. ALTSCHUL. Once again, the devil is in the details. But certainly I think the industry would be open to discussing.

Senator BLUMENTHAL. Do you, by the way, have evidence that you could give us? I know you disputed the contentions made by the members of the panel that the majority of charges are unrequested. Do you have facts or data or studies that you could submit?

Mr. ALTSCHUL. I do not. The one study, as we all know, that is in the record is from Vermont. Our association has filed some com-

ments in the FCC docket just pointing out some of the flaws in that study. But that study itself indicates that there are a lot of reasons and a lot of inconsistent reasons why these charges show up on customer bills.

Senator BLUMENTHAL. Do you have a number that you can attribute to unauthorized or——

Mr. ALTSCHUL. I do not.

Senator BLUMENTHAL. So on what basis are you disputing that the majority are unrequested or unauthorized?

Mr. ALTSCHUL. As I believe I represented, it is my belief, based on my experience and the experience of my peers and friends, that the majority of charges on customer bills are charges that customers have opted into and consented to. I know I have looked at my charges. I hope you have looked at your bills as well.

Senator BLUMENTHAL. You described this problem as de minimis, I think, before the FTC not all that long ago.

Mr. ALTSCHUL. We described the number of complaints received by the FTC as de minimis.

Senator BLUMENTHAL. Do you still believe it is de minimis?

Mr. ALTSCHUL. Based on what we said at the time, the number of complaints reported by the agencies remain de minimis. The scope of the problem has been demonstrated to be significant, and that is why the industry has discontinued their support of premium SMS charges.

Senator BLUMENTHAL. You agree that it is significant?

Mr. ALTSCHUL. Significant, yes.

Senator BLUMENTHAL. Attorney General Sorrell, I am not sure whether it has been mentioned yet, but I think you did in your testimony say that in Vermont these third-party charges were actually banned by statute on landlines.

Mr. SORRELL. On landline, yes, Senator.

Senator BLUMENTHAL. In your testimony, you also call for a—and I am quoting—new approach. What about the idea of banning third-party charges on wireless?

Mr. SORRELL. I think given what is happening in the marketplace and how smart phones I believe are now a majority of cell phones in America, that I am concerned that an outright ban would have unintended consequences that might well be harmful to consumers. An opportunity for one to block all third-party charges on their phone or to block certain types of charges makes sense to me, but I would be concerned that if I took the position that what we have done in landline should also apply to the wireless arena, that although it would take care of a lot of bad actions by a lot of bad actors, that it might also tend to harm consumers and the economy going forward.

Senator BLUMENTHAL. Well, I tend to agree with you. I do not know whether any other members of the panel would have observations.

Commissioner MCSWEENY. I would agree and second what the Attorney General said. I think from the FTC's perspective and certainly my personal perspective, there are a lot of innovations in mobile carrier billing right now that are very beneficial to consumers. And at the moment, one of the primary gaps here is the fact that consumers may have the ability to, but do not know that

they can, block these third-party transactions if they wish to. Again, they may not wish to because they may be taking advantage of that service, but then it can be very difficult for them to see where the third-party charges are showing up in their bills. And as we have discussed, they do not have the same consistent dispute resolution procedures available to them, should they wish to dispute the charges.

Senator BLUMENTHAL. I am going to turn to Senator Klobuchar. I apologize. I did not know that you had more. I am sorry.

Senator KLOBUCHAR. No. I am just listening, believe it or not. The usual line in the Senate: everything has been said, but I have not said it. I am not using that today.

[Laughter.]

Senator KLOBUCHAR. You have been saying everything in a very good way.

Senator BLUMENTHAL. Thank you.

I have just a few more questions. The Commission actually has advocated, as you point out in your testimony, that consumers have the right to block these charges on a selective basis, in part perhaps to avoid the kind of teaching moments that Mr. Altschul has raised. I think that recommendation was made back in 2012. Can you bring us up to date as to what the FTC's position is now?

Commissioner MCSWEENY. It is my understanding—and I would defer to Mr. Altschul on this—that most of the carriers provide this as an option. And we articulate this in the report we released this week. Very few consumers are aware of it, and the information about the option is not readily available. So the FTC does include it in consumer education materials, and we think it is a valuable option, especially perhaps if you want to make sure that a phone a young person in your family has access to cannot include third-party charges on it. But it is not widely used and I think that is because people really do not understand that it is available or what it even means.

Senator BLUMENTHAL. A lot of these issues really seem to come back to consumers knowing what they are doing, paying attention, being educated. And I hope that this hearing will play at least some part in raising awareness, but I think with all due modesty, outside of this building, outside of Washington, D.C., there are probably very few people who will be watching their bills more closely simply because we had this hearing today. And so I think there are a number of areas where we can work together to ensure that consumers are not only educated but better protected.

And Attorney General Sorrell has very commendably and interestingly suggested that a new approach is necessary in this area. And I would welcome more specific ideas from the State Attorneys General, from the FTC, and the FCC, and of course, from the industry as to how we can do better.

If there are no other questions from the panel, we will keep the record open for 2 weeks.

I want to thank the staff for its really excellent work on the report that was released today. It is a profoundly important document, and rather than listen to me talk about it, I hope people will read it. I hope the American public looks at it. I hope it gains greater currency because it is truly eye-opening and important.

So record will remain open for two weeks. We welcome other comments.

And with that, the hearing is adjourned.

[Whereupon, at 4:30 p.m., the hearing was adjourned.]

A P P E N D I X

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. CORY BOOKER TO HON. TERRELL MCSWEENEY

Question. When it comes to consumer education, which mobile stakeholders should bear the responsibility for ensuring consumers are adequately informed about billing practices and equipped with the tools needed to challenge unauthorized activity on their phone bills? Is this incumbent on the carriers, or do others bear responsibility, as well?

Answer. All of the stakeholders in the mobile ecosystem should play a role in ensuring that consumers are adequately informed about billing practices and equipped with the tools needed to challenge unauthorized charges, and carriers can play a particularly important role in providing their customers with adequate information about third-party charges.

For instance, third-party providers of services charged to mobile bills should clearly and conspicuously disclose the cost of their services to consumers up front, and advertising and purchase confirmation screens should clearly disclose that the charge is being billed to a specific telephone account. Merchants also should ensure that the means used to obtain authorization for such charges is not deceptive. Billing intermediaries can take steps to ensure that consumers have consented to the charges placed on their bills, such as by scrutinizing risky or suspicious merchants.

Mobile carriers should take a lead role in ensuring that consumers are adequately informed, because they are uniquely situated in several respects. Mobile carriers are the only parties that can and should inform consumers at the time that they sign up for service that charges for third-party services may be placed on their telephone bills. Carriers can also give consumers the ability to block third-party charges from their bills, and inform consumers of that option at sign-up and while the accounts are active. And mobile carriers are responsible for the format and content of the telephone bills that consumers receive, so they are in the best position to ensure that third-party charges are clearly disclosed.

Carriers are also the natural first point of contact for consumers who wish to inquire or complain about third-party charges, so they should develop fair and efficient dispute resolution procedures and refund policies to address such complaints.

To assist industry efforts to combat mobile cramming and educate consumers, the FTC has issued consumer education materials and a Staff Report on Mobile Cramming that includes recommended best practices for industry members. *See http://www.consumer.ftc.gov/articles/0183-mystery-phone-charges; http://www.consumer.ftc.gov/blog/hiding-plain-sight; http://www.ftc.gov/reports/mobile-cramming-federal-trade-commission-staff-report-july-2014.*

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. TERRELL MCSWEENY

Question 1. Is the recent T-Mobile cramming case the first time the FTC has taken enforcement action against a telecommunications carrier?

Answer. The T-Mobile case is the first enforcement action the FTC has brought against a telecommunications carrier for deceptive or unfair practices under the FTC Act.

Question 2. Do you believe the exemption from the FTC's jurisdiction of communications common carriers inhibits the FTC's consumer protection mission? Please explain your answer.

Answer. While the FTC's jurisdiction over telecommunications companies when they are engaged in non-common carrier activities like billing for third-party services is well supported, the exemption encourages telecommunications companies to contend otherwise, leaving the matter open to litigation. Furthermore, non-common-carrier activities can be mingled with common-carrier activities (such as pricing and advertising of bundled services). These issues can inhibit our consumer protection

mission. The common carrier exemption can also frustrate effective consumer protection under FTC principles when dealing with advertising, marketing, and billing practices for common carrier activities.

Question 3. Do you believe the communications common carrier exemption is outdated or should be repealed?

Answer. Yes, the common carrier exception was implemented in the 1930s, at a time when telephone companies provided basic services that were heavily regulated monopolies. That economic and regulatory model no longer applies. Today, consumers would be better served by the repeal of the common carrier exemption. As communications technologies and platforms have continued to evolve, market participants may offer a range of communications-related services to consumers, some of which are subject to common carrier requirements under the Communications Act but many of which are not. Consumers should expect and receive the same protections against unfair or deceptive acts or practices in the context of common carrier services as in other services.

Question 4. Would repealing the communications common carrier exemption lead to duplicative jurisdiction with the FCC? Why or why not? Please explain your answer.

Answer. The FTC and the FCC already share concurrent jurisdiction in certain areas, such as mobile cramming by telecommunications companies. The two agencies cooperate and coordinate with one another, which furthers consistency and allows each agency to use its own statutory tools to combat serious problems like mobile cramming that have caused many millions of dollars of harm. For example, the FTC Act provides the FTC with the authority to seek equitable injunctive and monetary relief for consumers—including refunding money that was unfairly or unjustly taken, while the Communications Act gives the FCC authority to impose monetary forfeiture on a party that is paid to the U.S. Treasury.

Question 5. Wouldn't repealing the communications common carrier exemption lead to potentially inconsistent enforcement activities by the FTC and the FCC, which could undermine effective guidance to industry and ultimately the protection of consumers of telecommunication services? Please explain your answer.

Answer. The FTC and the FCC coordinate with each other to make sure that we are sending consistent messages to the industry and maximizing the effective use of our resources. Further, in areas that cause serious consumer harm, such as mobile cramming, it is important that each agency has the ability to use the different tools in its arsenal to combat the problem, such as consumer redress for the FTC and civil penalties for the FCC. It is important to note that concurrent jurisdiction is common. For example, we share jurisdiction with the CFPB over a wide swath of industries. We coordinate by, for example, notifying each other of investigations and other activities to avoid "double-teaming" a particular target. The presence of two agencies acting to address serious consumer protection issues has worked well, providing "more cops on the beat." For example, just last month the FTC and the CFPB announced a joint Federal and state law enforcement sweep, which targeted companies peddling fraudulent mortgage relief schemes to distressed homeowners. By combining resources, the agencies were able to engage in more robust enforcement in an area causing significant consumer injury. Similarly the two agencies coordinate with each other to provide guidance to industry. For example, in June 2013, the FTC and the CFPB co-hosted a roundtable to examine the flow of consumer data throughout the debt collection process. In a similar fashion, we also work cooperatively with the FDA and the Department of Justice in areas where we have concurrent jurisdiction.

Question 6. The FTC's complaint in the T-Mobile case states that the FTC and the FCC have "concurrent enforcement jurisdiction over mobile telephone companies' billing and collection of third-party charges for non-telecommunications services," but does not cite to any authority for this statement. During the hearing, you stated that this authority is established by "relevant case law," but did not specify any cases.

Please provide citations to any and all statutes, regulations, and case law that you believe establish the FTC's authority, and explain why the FTC believes these cases, statutes, and regulations establish the FTC's authority to sue T-Mobile notwithstanding the common carrier exemption.

Answer. I expect this issue to be fully briefed in the *T-Mobile* litigation depending on the arguments raised by the defendant. In the interim, I am attaching the brief filed by the agency in *FTC* v. *Verity Int'l Ltd.,* 194 F. Supp. 2d 270 (S.D.N.Y. 2002) that discussed this issue. In that case, the court found that the FTC has jurisdiction over a billing aggregator placing charges on consumers' telephone bills, explaining that "the better considered authorities . . . agree that whether an entity is a com-

mon carrier for regulatory purposes depends on the particular activity at issue." *Id.* at 274–75; *aff'd* 443 F.3d 48 (2d Cir. 2006).

Question 7. Two of your colleagues on the Commission, Commissioner Wright and Commissioner Ohlhausen, have indicated they believe that "the FTC's competencies as an antitrust enforcement and consumer protection agency, combined with the expertise it has developed in matters related to the Internet and broadband access, position the FTC well to deal with the difficult legal, economic, and technological issues related to net neutrality." Do you agree with this statement? Please explain your answer.

Answer. The issue of net neutrality raises a host of complicated legal, technical, and economic issues. We look forward to seeing how the FCC addresses them in its proceeding. While antitrust enforcement is vital to protecting a competitive marketplace, it is not always the most effective way to address policy issues in the economy. Sometimes the public interest is best protected through a combination of antitrust enforcement and well-designed regulation.

ATTACHMENT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,	)	No. 00 Civ. 7422 (LAK)
Plaintiff,	)	
v.	)	
VERITY INTERNATIONAL, LTD., et al.,	)	
Defendants.	)	

PLAINTIFF'S FURTHER OPPOSITION TO DEFENDANT
AUTOMATIC COMMUNICATION LTD's
MOTION FOR JUDGMENT ON THE PLEADINGS

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I. INTRODUCTION

On May 31, 2001, a few days before a preliminary injunction hearing in this matter and after fully briefing the Federal Trade Commission's ("FTC's") Motion for Preliminary Injunction, Defendant Automatic Communications Limited ("ACL") filed a Motion for Judgment on the Pleadings, claiming for the first time that the filed rate doctrine provides a basis for dismissing the FTC's case against ACL. The FTC opposed that motion in a timely manner, fully explaining how the filed rate doctrine does not apply to the information services at issue in this case and how ACL's Motion to Dismiss was without merit. In its Reply Memorandum in Further Support of ACL's Motion for Judgment on the Pleadings (hereinafter "ACL Reply"), ACL asserts yet another new argument that the FTC's case against it should be dismissed because it now claims to have been a common carrier exempt from the FTC's jurisdiction. The Court has given the FTC leave to respond to ACL's new theory for dismissal, and the FTC respectfully submits this memorandum of law in further opposition to ACL's Motion for Judgment on the Pleadings.

ACL's arguments that it was a common carrier are somewhat muddled. First, ACL incorrectly contends that, by virtue of having belatedly filed an application to act as a reseller of international telecommunications services, it has the "status" of a common carrier and is therefore exempt from the FTC Act. As we will show, there is no such thing as a blanket common carrier status under the Communications Act. Moreover, ACL's application and its later tariff have no bearing on this matter. While the FTC Act exempts common carrier activities, the mere filing of an application and a tariff does not constitute common carrier activities, nor would it exempt ACL's non-common carrier activities from FTC jurisdiction.

Second, ACL argues that it acted as a common carrier by reselling international long distance service to the numbers it controlled in Madagascar. This contention has no evidentiary support whatsoever, and is in fact contradicted by the limited evidence on this issue submitted by the defendants. Finally, in tacit recognition of the weakness of its claims to be a reseller of long distance services, ACL contends that it should be considered a common carrier, exempt from FTC jurisdiction, because it controlled the Madagascar phone numbers that were dialed to access the information services at issue. While we appreciate the fact that ACL finally acknowledges responsibility for the underlying scheme because of its control of the telephone numbers at issue, control of a foreign exchange is not a common carrier activity subject to the Communications Act and therefore exempt from the FTC Act.

ACL's new theory and the arguments it uses to support its theory are legally insufficient and are premised on factual claims that are at odds with each other, with ACL's prior filings in this matter, and with the testimony ACL introduced at the most recent preliminary injunction hearing. In sum, ACL's new arguments are simply part of a last desperate attempt to avoid responsibility for engaging in the deceptive and unfair practices alleged in the FTC's complaint.

II. LEGAL ARGUMENT

A. The Communications Act Does Not Recognize an Entity as Having the Status of a Common Carrier for All Purposes, But Instead Focuses on the Specific Activities at Issue

"Common carriers subject to the Acts to regulate commerce" are exempt from the FTC Act's prohibition against unfair and deceptive practices. 15 U.S.C. § 45(a)(2). Section 4 of the FTC Act, 15 U.S.C. § 44, defines the "Acts to regulate commerce" to include the Communications Act of 1934, as amended. 47 U.S.C. 151 et. seq. ACL incorrectly asserts that

it is exempt from the FTC Act as a common carrier because the "FCC licensed ACL as a common carrier to offer global resale as of December 1999" and therefore "at all relevant times, ACL held the status of a common carrier under the Communications Act." ACL Reply at 3.

In fact, there is no such thing as blanket "common carrier status" under the Communications Act. Rather, whether an entity is a common carrier is dependent on the activities in which it is engaged. See Computer & Communication Industry Ass'n v. FCC, 693 F.2d 198, 210 n. 59 (D.C. Cir. 1982), cert. denied, 461 U.S. 938, 103 S. Ct. 2109 (1983) (using the term "common carrier" to "indicate not an entity but rather an activity as to which an entity is a common carrier"); cf. 47 U.S.C. § 153(10) (defining "common carrier" as any person "engaged as" a common carrier).[1] Thus, an entity can be a common carrier under the Communications Act for some purposes and not for others. National Ass'n of Regulatory Comm'rs v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) ("NARUC II"); In the Matter of Audio Communications, Inc., 8 FCCR 8697 at ¶ 12 (1993) ("The [FCC] has clearly established that a single firm that is a common carrier in some roles need not be a common carrier in other roles."). See also FCC v. Midwest Video Corp., 440 U.S. 689, 701 n. 9, 99 S.Ct. 1435, 1441 n. 9 (1979). Indeed, ACL has conceded that the Communications Act, as amended by the Telecommunications Act of 1996, specifically states that, "a telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services." ACL's Memorandum of Law in Support of its Motion for

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[1] See also In the Matter of Federal-State Joint Board on Universal Service, 13 FCCR 11501, 11508 ¶ 13 (1998) ("Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'").

Judgment on the Pleadings ("ACL's Initial Mem.") at 16, quoting 47 U.S.C. § 153(44). Thus, even if ACL engaged in some common carrier activities (and there is no evidence that it did so), it would only be a common carrier subject to the Communications Act with respect to those activities and not with respect to its non-common carrier activities. In order to show that it was a common carrier subject to the Communications Act, and therefore exempt from the FTC Act, ACL would need to show that the activities which are at issue in this case constituted common carriage subject to the Communications Act. This it cannot do.

ACL does not stop at ignoring FCC and federal court case law recognizing that, under the Communications Act, an entity can be a common carrier for some purposes and not others; it goes on to misconstrue the case law involving exemptions from the FTC Act. ACL claims that "the Second Circuit has held that Section 45(a)(2)'s exemptions apply based on an entity's status as a 'common carrier;' whether it acts as a common carrier in connection with the events sued upon by the FTC is wholly irrelevant." ACL Reply at 4 (citing Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2nd Cir., 1980), cert. denied, 450 U.S. 917, 101 S. Ct. 1362 (1981)). This is an outrageous misinterpretation of the very limited holding by the Second Circuit in the Official Airline Guides case. That case involved the narrow question of whether a company that published flight schedules, and was not itself an air carrier, should be exempt from the FTC Act, under the exemption for "air carriers . . . subject to the Federal Aviation Act of 1958." Official Airline Guides at 923. The Second Circuit rejected the argument that merely by engaging in activities that affected air carriers, the non-air carrier should itself be entitled to the exemption. Id. at 923-24. After determining that the company was not acting as an air carrier, the Court held that the activities the company was engaged in were not relevant to the question of whether the

air carrier exemption should apply. Id. This Court should reach an analogous determination: that ACL was not engaged in common carrier activities and therefore the common carrier exemption does not apply. However, if this Court reaches the conclusion that ACL was a common carrier for some purposes, the Court still needs to determine whether ACL was engaged in common carrier activities pursuant to the Communications Act with respect to the activities at issue in this case, and therefore exempt from the FTC's jurisdiction. The Official Airline Guides case simply does not speak to that issue.

The only federal court case, of which we are aware, that touches on the issue of whether an entity can be a common carrier, exempt from the FTC Act, for some purposes and not others, is FTC v. Miller, 549 F.2d 452 (7th Cir. 1977), and it does not resolve that issue. In Miller, the relevant FTC Act exemption under consideration was the exemption for common carriers subject to the Interstate Commerce Act, not the Communications Act. Miller at 454. The FTC issued subpoenas upon officers of Morgan Driveway, Inc., an entity that the FTC conceded had the status of a common carrier subject to the Interstate Commerce Act. Id. at 454, 457. The Seventh Circuit found that Morgan Driveway was engaged "solely in carrier activities," and therefore explicitly declined to reach the question of whether "the non-carrier activities of a common carrier" fall outside the exemption. Id. at 458. In contrast to Miller, here we do not concede that ACL was a common carrier under the applicable "Act to regulate commerce," in this case the Communications Act. Moreover, as explained above, the Communications Act recognizes that an entity can be a common carrier for some purposes and not for others. Thus, even if ACL were involved in some common carrier activities (and there is no evidence that it was), no such activities occurred here, and therefore the common carrier exemption would not apply.

ACL failed to call this Court's attention to Mass. Furniture & Piano Movers Ass'n, Inc., 102 F.T.C. 1176 (1983), where the FTC directly addressed the issue that Miller bypassed: whether the FTC would have jurisdiction over the non-carrier activities of an entity that was also a common carrier under the Interstate Commerce Act. The FTC found that "activities that lie outside the [Interstate Commerce Commission's] jurisdiction, even if engaged in by an interstate common carrier," would not be exempt from the FTC's jurisdiction. Id. at 1213 n.7.[2] Deference should be paid to the FTC's own interpretation of its statutory authority. Chevron U.S.A., Inc. v. National Resources Defense Counsel, 467 U.S. 837, 842-43, 104 S. Ct. 2778 (1984).

The final case ACL cited on this issue, FTC v. Saja, 1997 WL 703399 (D. Az. Oct 7, 1997), does not support ACL's position. Like the Official Airline Guides and Miller cases, Saja did not involve an analysis of whether an entity should be exempt from the FTC Act as a common carrier subject to the Communications Act. Likewise, Saja does not provide guidance in analyzing the activities of an entity to determine whether the common carrier exemption applies. Instead, Saja involved a decision about whether a for-profit telemarketer working, in part, on behalf of non-profit entities was entitled to the same exemption from the FTC Act as its non-profit clients. The Court found that since the defendant was not a non-profit itself, there was

[2] It could be argued that this finding is *dicta,* because in Mass. Furniture the FTC found that the Massachusetts Furniture & Piano Movers Association was "not an exempt carrier, [] not engaged in the transportation of goods or property; and [did] not have a certificate of public convenience and necessity as required of all motor carriers subject to the Interstate Commerce Act." Id. at 1212. Therefore, the fact that the FTC found persuasive the argument that the "intrastate" nature of the activities at issue took the activities outside the jurisdiction of the ICC, and into the jurisdiction of the FTC, arguably did not effect the outcome of the case.

no basis for arguing that it was entitled to an exemption as a non-profit.[3] Saja at *1-2. This limited holding does nothing to support ACL's position.

Putting aside ACL's cursory and incorrect interpretation of the case law in this area, the key factor for the Court to consider in determining whether ACL is exempt from the FTC Act is whether it was a "common carrier subject to" the Communications Act. 15 U.S.C. § 45(a)(2). As explained earlier, a telecommunications carrier is "subject to" the Communications Act "only to the extent that it is engaged in telecommunications services." 47 U.S.C. § 153(44). Thus, despite ACL's claims to the contrary, a blanket common carrier status does not exist under the Communications Act.

B. The FCC's Acceptance of an Application to Act as a Common Carrier Does Not Confer Upon an Entity the Status of Common Carrier

ACL argues that the FCC's acceptance of ACL's application to act as a reseller of long distance telecommunications services conferred upon ACL the status of a common carrier under the Communications Act. ACL's argument is incorrect. Indeed, ACL's suggestion that an entity can shield itself, both retroactively and pro-actively, from an enforcement action by the FTC by simply filing an application (or having the FCC grant the application) to act as a long distance reseller is unsupportable as a matter of law and policy.

The timing of ACL's filings with the FCC demonstrates the absurdity of its claim. ACL did not even file an application to act as a reseller of long distance services until well after its use

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[3] Contrary to the implication of ACL's Reply, there is no exemption for an entity from the FTC Act based on an entity's status as a non-profit. The question is whether the entity, regardless of its alleged status, is "organized to carry on business for its own profit or that of its members." If the entity is organized to carry on business for its own profit or for the profit of its members, then it is not exempt from the FTC Act. See, e.g., California Dental Ass'n v. FTC, 526 US 756, 765-770, 119 S. Ct. 1604 (1999).

of the Madagascar telephone numbers to offer information services began.[4] ACL entered into its initial contract with the Madagascar authorities to use Madagascar phone numbers to offer "recorded and live information services and Internet Services to international callers" in May 1997. ACL Ex. 8 at 1.[5] ACL's contract with AT&T, in which AT&T agreed to carry audiotext services between the United States and the Madagascar exchanges controlled by ACL, was executed in January 1999. ACL Ex. 6. It was not until ten months later, in November 1999, that ACL sought authority to act as a reseller of global telecommunications services. ACL Ex. 19 at ¶ e. Later that month, the FCC approved ACL's application to act as a global reseller. Eilender Ex. 1.[6] It was not until several months after that, in February 2000, that ACL filed a tariff describing the international long distance services it allegedly intended to offer pursuant to the application that the FCC had approved. Eilender Ex. 2. There is no justification for finding that ACL can successfully protect itself from civil prosecution under the FTC Act by filing an application to be a telecommunications reseller (and later a tariff) that ACL claims, incorrectly, apply to operations that began well before it made such filings.

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[4] Contrary to ACL's assertion, the FTC does not concede that defendants' began providing videotext services in March 2000. See ACL Reply at 1. Rather, the FTC's Complaint alleges that the services at issue started at least as early as January 1999, when ACL entered into its agreement with AT&T. Second Amended Complaint at ¶ 17. Discovery is ongoing, and thus far we have evidence that ACL notified others that the videotext services were available as early as December 7, 1999, several months before ACL filed its tariff. FTC Ex. 178 at GIB0001241 (submitted by the FTC at the June 5, 2001 hearing).

[5] All references to "ACL Ex. __" refer to exhibits offered by ACL at the June 5, 2001 preliminary injunction hearing.

[6] All references to "Eilender Ex. __" refer to exhibits attached to the declaration of Jeffrey Eilender, submitted with ACL's Reply.

Indeed, ACL has not alleged that its application to be a reseller was prompted by a change in its activities. Instead, ACL now seems to argue that, merely by receiving approval to act as a reseller of international long distance services, it transformed itself into a common carrier exempt from the FTC's jurisdiction. ACL Reply at 3. ACL offers no law in support of its position, ignores the law that says that an entity can be a carrier for some purposes and not for others, and fails to analyze the absurd result of such a position. If the mere approval of an application to act as a reseller protected entities from the FTC's jurisdiction, every deceptive telemarketer, pyramid scheme scam artist and company engaged in deceptive advertising could file an application with the FCC to act as a reseller of telecommunications services in order to shield all of its activities from the FTC's jurisdiction.

However, as explained above, in order to be considered a common carrier, an entity must be engaged in common carrier activity. Moreover, the law is clear that the mere filing of a tariff is not determinative of whether the activity at issue is a common carrier activity. See Southwestern Bell Telephone Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (declining to hold that the filing of a tariff for the offering of dark fiber service necessarily means that the service offered is a common carrier service). See also In the Matter of Local Exchange Carriers' Rates Terms and Conditions For Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, 12 FCCR 18730 at ¶ 429 (1997) (citing the FCC decision underlying Southwestern Bell with approval). Likewise, receiving approval to offer international telecommunications services, and filing a tariff for those services, cannot in and of themselves make an entity a common carrier, particularly where, as here, there is no evidence that the defendant actually engaged in the activities described by the tariff.

C. ACL Did Not Resell International Long Distance Telecommunications Services

ACL's argument that it acted as a common carrier by reselling international long distance service to the numbers it controlled in Madagascar is also incorrect. In fact, the evidence is clear that, its tariff notwithstanding, ACL did not actually resell long distance telecommunications services. Instead, ACL facilitated the purchase of information services, using AT&T and Sprint to carry the services, and using AT&T and then Integretel to bill for the services.

1. The Services At Issue Were Information Services, Not Telecommunications Services

In its FCC application to act as a reseller, ACL represented that it would be providing international telecommunications services. ACL Ex. 19 at ¶ e. Indeed, ACL concluded its application by stressing the continued growth of the "international voice market" and the appropriateness of it being authorized to provide "resold switched **voice** communications from the United States to international points." Id. at Conclusion (emphasis added). Notably, ACL made no mention of offering audiotext or videotext services. Indeed, such services are not tariffable because they are information services, rather than telecommunications services. See, e.g., FCC Staff Letter to Ronald J. Marlowe, Esq., 10 FCCR 10945 (Sept. 1, 1995). As this Court is well aware, the services in question were information services, not telecommunications services, and therefore were not common carrier services under the Communications Act. Yet, as the FCC has explicitly explained, "a resale entity is regulated as a common carrier only if it is providing a communications service." In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC.2d 384, ¶ 110 (1980). Rather than burden the Court by recapitulating one more time our argument that because these were information

services, ACL was not engaged in common carriage, we respectfully refer the Court to our prior filings on this issue. See, e.g., FTC's Memorandum of Points and Authorities Supporting Motion for Temporary Restraining Order at 16-19; FTC's Opposition to ACL's Motion for Judgment on the Pleadings at 3-7. See also ACL Ex. 8 at 1 (ACL's initial agreement with the authorities in Madagascar authorizing ACL to offer "recorded and live information services and "Internet Services" using Madagascar phone numbers).

2. ACL Did Not Act as a Reseller

ACL did not act as a reseller with respect to the services at issue. "Resale has been defined as 'an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with out without adding value) for profit.'" Philippine Long Distance Telephone Company v. USA Link, L.P., 12 FCCR 12010, ¶ 16 (1997) (citing Regulatory Policies Concerning Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261, 271 (1976), aff'd 62 FCC 2d 588 (1977), aff'd sub. nom. AT&T v. FCC, 572 F.2d 17 (2d. Cir 1978) ("PLDTC"). In other words, as the Supreme Court has explained, a reseller purchases "'bulk' long-distance services -- volume discounted services designed for large customers -- from long-distance providers, and resells them to smaller customers. . . . Of course [the reseller] passes along only a portion of the bulk-purchase discount to its aggregated customers, and retains the remaining discount as profit." AT&T v. Central Office Telephone, 524 U.S. 214, 216, 118 S. Ct. 1956, 1960 (1998). Thus, the reseller subscribes to the service, designates end users to be provided service under the subscriber's service plan, and remains primarily liable for all charges. See Transnational Communications, Inc. v. Overlooked Opinions, Inc., 877 F.Supp 35, 41 (D. Mass. 1994), aff'd,

229 F.3d 1133 (1st Cir. 2000); AT&T Corp v. PAB, Inc., 935 F.Supp. 584, 587 (E.D. Pa. 1996); Central Office Telephone v. AT&T, 108 F.3d 981, 986 n. 2 (9th Cir. 1997), rev'd on other grounds, 524 U.S. 214, 118 S. Ct. 1956 (1998). See also, MCI v. AT&T, 7 FCCR 5096 at ¶¶ 7, 12 (1992).

Putting aside, for the moment, the nature of the services at issue, ACL did not function as a reseller of any services. ACL did not subscribe to either AT&T's or Sprint's services, did not arrange for users to be charged pursuant to ACL's tariff, and did not remain primarily liable for the purchase of services from AT&T and Sprint. Instead, ACL took advantage of the international accounting procedures that effectively split the rates charged by AT&T and Sprint between the US carrier and the foreign phone company, and cut a deal with Telecom Malagasy to share in the benefit of the rate split. See Supplemental Declaration of Mark Blanchard, dated April 24, 2001, at ¶ 11 ("AT&T and Viatel paid ACL a portion of the 'accounting rate,' that is the tariffed rate for the call"); ACL Ex. 31 (chart showing the flow of money from US consumers who paid for the information services offered by the defendants); ACL Ex. 6 (ACL agreement with AT&T); ACL Ex. 17 (ACL's initial agreement with Sprint).

ACL's own presentation at the recent preliminary injunction hearing underscores the fact that ACL was not a reseller of long distance services, selling services pursuant to its own tariff. Most notably, in describing ACL's business, ACL's director, Mark Blanchard, did not describe ACL as a reseller. See Reply Declaration of Mark Blanchard, dated April 24, 2001, at ¶ 3 ("Blanchard Reply Dec."). In fact, in his various declarations, Mr. Blanchard acknowledged that the price paid by consumers during the AT&T billing period was not the ACL tariffed rate for calls to Madagascar of $3.99 per minute (see Eilender Ex. 2 at 45), but $5.40 - $7.40 per minute,

allegedly AT&T's rate. Blanchard Reply Dec. at ¶ 11, Blanchard First Supplemental Dec. (unsigned/undated) at ¶ 6.[7]

Additionally, ACL's agreements with AT&T and Sprint do not reflect an intention by ACL to purchase long distance services from AT&T and Sprint for resale. See ACL Ex. 6 (AT&T contract); ACL Ex. 17 (Sprint contract). If ACL were a reseller of telecommunications services, ACL would purchase the long distance service from AT&T and Sprint and be obligated to pay them for the carriage. However, that is not how ACL's contracts were designed. ACL was not obligated to pay AT&T for carriage under its contract with AT&T. Instead, AT&T treated ACL as a foreign terminating carrier, entitled to a share of the money collected by AT&T from the line subscribers. ACL Ex. 6 at 3-4. Moreover, in a recent filing with this Court, AT&T denied that ACL acted as a reseller. See AT&T Corp's. Memorandum of Law in Support of Its Motion to Dismiss the Third-Party Complaints at 10 n. 5. Certainly, AT&T is in a position to know whether it was selling communications services to ACL for resale. Similarly, Sprint's contract with ACL is not a contract for sale of communications services to ACL for resale purposes either. Instead, ACL is designated the "provider" of services in that contract, and Sprint is obligated to pay ACL for those services. ACL Ex. 17 at 3. Moreover, instead of describing itself as a subscriber to AT&T and Sprint's services, ACL describes AT&T and Sprint as "users" of its services.[8] ACL Reply at 6.

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[7] Mr. Blanchard's First Supplemental Declaration and Reply Declaration are inconsistent as to the amount actually charged under the AT&T tariff. But the point is the same: consumers were charged pursuant to the AT&T tariff, not the ACL tariff.

[8] The mere fact that ACL offered its services to AT&T and Sprint, the entities it describes as its "users," on different terms and conditions also means that ACL was not acting as a common carrier. As ACL points out in its Reply, to be a common carrier an entity must "hold

Finally, ACL did not have a reseller relationship with the consumers who were billed for the information services at issue. ACL's claim, in its motion to dismiss, that, under the filed rate doctrine, subscribers were billed under the AT&T and Sprint tariffs for the carriage at issue is wholly inconsistent with its current claim to be a reseller.[9] ACL Initial Mem. at 2-3, 8, 15. If ACL were a reseller, it would have purchased services in bulk from the underlying carriers (AT&T and Sprint) at their tariffed bulk rate, for resale at ACL's own tariffed rate. Under the filed rate doctrine, consumers would be liable to pay ACL's tariffed rate; while ACL would be liable to pay the underlying carriers' bulk rate. However, this is not what ACL claimed in its motion to dismiss, nor is there any evidence on the record that this is what occurred.

PLDTC is the only case that ACL cited in support of its claim to be a reseller. That case actually illustrates the differences between ACL and a reseller. Unlike ACL, Global Link, the entity the court found to be a reseller in the PLDTC case, was selling carriage not information

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himself out to serve indifferently all potential users." ACL Reply at 7, quoting NARUC II at 608. But ACL's contracts with AT&T and Sprint were exclusive contracts for the time periods that each was doing business with ACL. Moreover, the terms and conditions of those contracts, were individualized. See Virgin Islands Tel. Corp. v. FCC, 198 F.3d 921, 929 (D.C. Cir. 1999) (citing with approval the FCC holding in Federal State Joint Board on Universal Service, 12 FCCR 8776, ¶ 875 (1997), for the proposition that "'a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve'").

[9] In its Reply, ACL changes its tune at least with respect to the Integretel billing period, and claims that consumers were obligated to pay the Verity bills pursuant to either the Sprint or ACL tariff. ACL Reply at 12. Only if ACL's and Sprint's tariffed rates were the same for calls to Madagascar could ACL make such an argument. However, if ACL and Sprint's rates were the same, that would further undercut ACL's argument that it was a reseller, because ACL could not have resold Sprint's services at a profit.

services.[10] Moreover, Global Link set the rates, terms and conditions and held itself out as the provider of long distance services. PLDTC at ¶ 21. By contrast, ACL claims not to have set the rates charged to the consumers in this case, Blanchard Reply Dec. at ¶ 11, and ACL certainly did not hold itself out to consumers as a provider of long distance service, or bill consumers in its own name for the services at issue. Thus, both factually and legally, ACL cannot show that it resold AT&T's and Sprint's international long distance telecommunication services.

D. Parties Terminating Foreign Phone Calls in Foreign Jurisdictions are Not Common Carriers Subject to the Communications Act

Perhaps recognizing the weakness of its claim to be a reseller of international long distance service from the United States to Madagascar, ACL makes one more unsuccessful attempt to categorize itself as a common carrier exempt from the FTC Act. ACL's final claim is that it acted as a foreign terminating carrier by "providing the ability to terminate the calls" by controlling the Madagascar exchange. ACL Reply at 6. While we appreciate ACL's recognition of its integral role in defendants' scheme to deceive consumers, the fact that it controlled the foreign exchanges at issue does not make ACL a common carrier subject to the Communications Act. Quite the contrary, as the FCC has explained, it has "no jurisdiction over the foreign provider of termination services." In the Matter of International Settlement Rates, 12 FCCR 19806 at ¶¶ 215, 279 (1997). See also Cable and Wireless v. FCC, 166 F.3d 1224, 1229 (D.C. Cir. 1999) ("The [FCC] claims no authority to directly regulate foreign carriers."). If the FCC does not have jurisdiction over the foreign providers of terminating services, there is no way for

[10] In PLDTC, there was no dispute that the telecommunications services at issue were being provided on a common carrier basis. PLDTC at ¶ 17.

ACL to argue that, as a foreign terminating carrier, it was subject to the Communications Act, and therefore exempt from the FTC Act. See 15 U.S.C. § 45 (a)(2).

ACL apparently seeks to avoid the FCC's lack of jurisdiction over foreign terminating carriers by claiming that, at least in some instances, it carried traffic back to websites located in the United States. ACL Reply at 6-8. ACL offers no evidence in support of this argument. Indeed, this argument makes no sense, particularly in light of ACL's statements concerning its activities in the United States. For example, at the most recent preliminary injunction hearing, ACL offered testimony that "the only contact ACL has with any United States entity is its agreement with the long distance carriers [that carry the calls from the carriers' home countries to the phone numbers controlled by ACL]." Blanchard Reply Dec. at ¶ 3.[11]

III. CONCLUSION

As with its previous arguments in its Motion for Judgment on the Pleadings, ACL's recently discovered contention that it is a common carrier, exempt from the FTC's jurisdiction, is without merit. ACL's new theory ignores or misinterprets case law, is premised on irreconcilably

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[11] Even if we accept ACL's unsupported claim that it carried the calls back to the United States, from London, for connection to U.S. web sites, then as we noted in our previous brief, ACL is admitting that it acted as an Internet Service Provider, which is a non-common carrier activity. See FTC's Opposition to ACL's Motion for Judgment on the Pleadings at n.6. Of course, contrary to ACL's assertion, the fact that a website address ends with a .com suffix does not mean it is on a server located in the United States. See, e.g., Alitalia-Linee, S.p.A. v. CasinoAlitalia.com, 128 F.Supp.2d 340, 341 (E.D. Va. 2001) (involving casinoalitalia.com owned and operated by a defendant who "conducts its business entirely outside of the United States" and has "no offices or other physical presence in the United States"). Moreover, if ACL's account of the transmission path is accurate, U.S. consumers were being billed for services expressly represented as telephone calls to Madagascar, but which in fact were information services provided via dialer programs that placed modem calls to Madagscar phone numbers, but which only carried those calls as far as London and then carried them back to web sites in the United States. In other words, U.S. consumers were billed Madagascar telephone call rates for accessing web sites located on servers in the United States.

conflicted factual claims, and is contrary to logic and reason. Accordingly, ACL's Motion should be denied in all respects.

Dated: July 19, 2001

Respectfully submitted,

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CORY BOOKER TO TRAVIS LEBLANC

Question 1. When it comes to consumer education, which mobile stakeholders should bear the responsibility for ensuring consumers are adequately informed about billing practices and equipped with the tools needed to challenge unauthorized activity on their phone bills?

Answer. Consumers have a direct relationship with their carriers, and they trust that their carriers' bills will be accurate. Therefore, as a good business measure, all carriers should timely and adequately inform their customers about their billing practices and equip them with tools needed to challenge unauthorized activity on their phone bills. Additionally, third parties who place charges on consumers' phone bills and any other entities that have direct relationships with consumers by providing goods or services directly to consumers should also bear this responsibility. This is particularly important as the mobile ecosystem prepares to embrace new innovations that would allow consumers to pay for third party goods and services through their phone bill.

To help empower consumers in a world that is increasingly dependent on wireless communications, the FCC is currently considering a rulemaking that could extend wireline "cramming" rules to the wireless industry. For instance, wireline phone companies are required to place third-party charges in a separate section on customer bills and prominently disclose options for blocking such charges. The record was recently refreshed, and the FCC is now poised for action in that docket within the next several months.

Question 2. Is this incumbent on the carriers, or do others bear responsibility, as well?

Answer. As discussed above, mobile carriers and the third parties who place charges on consumers' phone bills should bear responsibility for ensuring consumers are adequately informed about billing practices and equipped with the tools needed to challenge unauthorized activity on their phone bills. Additionally, these duties should also apply to any other entities that have direct relationships with consumers wherein consumers pay for goods or services through their phone bill.

Also, as the Federal agency with primary oversight of the Nation's telephone carriers, the FCC approaches the problem of cramming through regulation, enforcement, and consumer education. It is important that we continue to educate consumers about third-party charging practices and how to respond to unauthorized charges on wireless bills. The FCC engages consumers through written and video guides, tip sheets, and other materials that empower consumers to prevent cramming, or identify and report it if it occurs. For example, the FCC held a public workshop in 2013 that brought together industry members, consumer advocates, and regulators to focus more attention on the cramming problem and offer consumers practical tips. We also partner in our outreach efforts with groups representing populations particularly vulnerable to cramming, such as AARP.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO TRAVIS LEBLANC

Question 1. Do you believe the exemption from the FTC's jurisdiction for communications common carriers frustrates effective consumer protection with regard to billing practices in the telecommunications industry? Please explain your answer.

Answer. I do not believe that the exemption from the FTC's jurisdiction for communications carriers frustrates effective consumer protection with regard to billing practices in the telecommunications industry. Over the years, the FCC has taken many enforcement actions to protect consumers from deceptive billing practices in the telecommunications industry. These actions have proposed forfeiture penalties, as well as required carriers to redress injured consumers and adopt rigorous compliance plans. The FCC has also adopted truth-in-billing rules to protect consumers from deceptive billing practices, and initiated a proceeding that considers the expansion of existing protections for consumers. The FCC expects to conclude this proceeding in the next several months. As a result, the exemption from the FTC's jurisdiction for common carriers does not frustrate effective consumer protection because the FCC is acting to protect consumers of telecommunications services.

Question 2. Do you believe the communications common carrier exemption is outdated or should be repealed? Please explain your answer.

Answer. I do not believe that the communications common carrier exemption is outdated or should be repealed. The FCC is the Federal agency with the expertise and experience to serve as the primary regulatory and enforcement oversight au-

thority for the Nation's telecommunications carriers. For decades, the FCC has exercised this authority through a combination of regulation, enforcement, and consumer education. The regulations that the FCC has adopted continue to protect consumers while also ensuring that all the people of the United States have rapid, efficient, and nationwide communications services with adequate facilities at reasonable charges. While the portfolio of enforcement actions that the Commission takes have evolved over time with changes in technology and industry practices, the Commission and the Enforcement Bureau are fully committed to ensuring that the Communications Act as well as the FCC's rules and regulations are efficiently and effectively enforced to protect American consumers in the 21st Century.

Question 3. Do you believe the FCC should remain the agency with primary jurisdiction over the telecommunications industry?

Answer. Yes.

Question 3a. Would repealing the communications common carrier exemption alter the jurisdiction of the FCC? Please explain your answer.

Answer. I do not believe that the communications common carrier exemption should be repealed. That being said, the FCC's jurisdiction is not tied to the FTC Act. As a result, repealing the common carrier exemption in the FTC Act would not alter the FCC's jurisdiction. However, granting another Federal agency jurisdiction over the activities of common carriers increases the risk of inconsistent actions by the agencies as well as inconsistent requirements for regulatees.

Question 4. Does the communications common carrier exemption need to be repealed or modified in order to better enable the FCC and the FTC to work together to protect consumers of telecommunication services? Please explain your answer.

Answer. No. It is not necessary to modify or repeal the common carrier exemption in the FTC Act in order to better enable the FCC and the FTC to work together to protect consumers of telecommunications services. The FCC and the FTC regularly collaborate and cooperate to protect consumers. For example, as discussed at the hearing, the FCC and the FTC coordinated our enforcement activities with respect to T-Mobile's alleged cramming via premium short messaging services. Our two agencies worked collaboratively on that investigation in order to harmonize our respective enforcement as well as to leverage our respective expertise. As other examples of our effective working relationship, the FCC has taken enforcement action against prepaid card providers for deceptive marketing based on FTC referrals; we have participated in each other's workshops on areas of mutual interest; and the agencies meet and confer routinely on Do-Not-Call and robocall enforcement. We at the FCC are pleased with our collaborations with the FTC and look forward to continuing to partner with the FTC in the future.

Question 5. As you know, call completion is a significant problem in rural America. To date, however, only three companies have reached agreement on consent decrees to address the issues, and persistent problems continue. Why has the Commission not taken more forceful and widespread enforcement action in this area?

Answer. I agree that rural call completion has been a significant problem; it can interfere with an individual's ability to communicate with family and friends, seek help in an emergency, and conduct important business. As a result of the Commission's investigations, Level 3, Windstream, and Matrix made substantial payments to the U.S. Treasury and agreed to institute comprehensive compliance plans designed to ensure future compliance with the Commission's rules. These investigations also informed the Commission's rural call completion rulemaking, which resulted in the adoption of the new rules that require providers to record, retain, and report to the Commission call completion data for long distance calls. When these rules go into effect, the data that providers file should highlight which providers have unacceptably low call completion rates and facilitate the Commission's ability to take additional enforcement action on an ongoing basis. In addition, the data collection should deter call completion problems by informing providers about their own performance, as well as the performance of each of their intermediate providers.

Question 6. The Commission adopted record keeping and reporting requirements in the Fall of 2013 to address the call completion issue, but the rules have not been implemented. To the extent investigative efforts are hampered by the lack of records, why have the rules not yet gone into effect—nine months after they were adopted?

Answer. Pursuant to the Paperwork Reduction Act (PRA), any rules that necessitate "information collections" from 10 or more entities, such as the recordkeeping, retention, and reporting requirements adopted in the Fall of 2013, must obtain Office of Management and Budget approval before taking effect. Although the Commission received OMB pre-approval for the collection proposed in the Notice of Pro-

posed Rulemaking, the *Rural Call Completion Order* that the Commission adopted modified, and in some respects expanded, the recordkeeping, retention and reporting burdens. The revised scope of the final rules generated additional PRA comments. The Commission is currently working on a submission to OMB that: (1) addresses the arguments raised during this separate notice and comment process; and (2) is designed to obtain prompt approval from OMB.

Question 7. Many believe that call completion problems can be traced to substandard intermediate providers. What will the Commission do to ensure that only quality intermediate providers are used to route calls and why has the Commission not taken enforcement action against poor performing intermediate providers?

Answer. The Commission has taken enforcement action against intermediate providers. Each of the three companies that have entered into consent decrees with the Commission—Level 3, Windstream, and Matrix—acts as an intermediate provider and carries significant quantities of wholesale traffic. Matrix primarily serves as an intermediate provider for other carriers. Level 3 is subject to potential additional penalties for substandard performance as an intermediate provider under the terms of its consent decree if its wholesale call completion rates to rural areas are more than five percentage points below its wholesale call completion rates to non-rural areas.

Moreover, the Commission's new rules require covered long distance providers to record and retain detailed information regarding call completion rates for each intermediate provider that the long distance provider uses to terminate calls to rural areas. Many long distance providers did not previously record this information. After the new rules take effect, identifying sub-standard performance among intermediate providers should be easier for long distance providers. This should deter them from using intermediate providers that perform poorly.

The new rules should also facilitate future enforcement actions by the Commission, which can request data regarding individual intermediate provider performance from long distance providers. Moreover carriers may be liable for call completion problems caused by the intermediate providers they employ. The 2012 *Rural Call Completion Declaratory Ruling* stated that "it is an unjust and unreasonable practice in violation of section 201 of the [Communications] Act for a carrier . . . to fail to ensure that intermediate providers, least-cost routers, or other entities acting for or employed by the carrier are performing adequately." This is in accordance with section 217 of the Act, which provides that carriers are liable for the acts of their agents or other persons acting on their behalf. By holding the originating providers responsible for rural call completion problems stemming from the actions of their intermediate providers, the rules encourage originating providers to choose their downstream providers more carefully, with a better eye toward call completion rates.

In addition, covered providers can reduce their recordkeeping, retention, and reporting burdens by using fewer than two intermediate providers. If a long distance provider choosing this option experiences call completion problems, it should be able to quickly identify and remove the problematic intermediate provider.

Prospectively, the *Rural Call Completion Order* sought comment on whether the Commission should extend its recordkeeping and reporting rules to intermediate providers, and whether we should impose certifications or other obligations on such entities. We are currently analyzing the comments.

Question 8. When the Commission issued its rural call completion report and order, it requested comment on additional rules. When will the Commission issue an order addressing the additional proposals?

Answer. Since releasing the *Rural Call Completion* Order, the Commission has received comments and ex parte presentations on the record suggesting additional steps and proposals that might improve rural call completion rates or reduce reporting burdens. We are analyzing the record to determine the best path forward.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. CORY BOOKER TO MICHAEL F. ALTSCHUL

Question. With fewer people using landlines, the number of wireless-only households is growing, particularly among young and low-income people. Cramming is a deeply troubling and deceptive practice that seems to be keeping pace with this significant growth in mobile technology. Additionally, as the use of legitimate billing of third-party services (such as apps and downloads) increases, it seems as though the mobile space presents additional challenges for consumers and their ability to discern unauthorized charges on their cell-phone bills. I am pleased to see the FTC

issued recommendations to carriers on how to combat mobile cramming. What is the industry's response to the recommendations the FTC outlined?

Answer. You are quite correct that the number of wireless-only (and wireless-primary) households is growing. The Center for Disease Control's National Center for Health Statistics has tracked wireless-only households, and the percentages of adults and children under 18 who live in wireless-only households, for most of the past decade. According to its 2013 survey (reporting on data through December 2012), nearly 40 percent of Americans have chosen to 'cut the cord' and live exclusively in wireless only homes. Overall, your state lags the Nation in the movement toward wireless-only households, although Essex County appears to be very close to the national average, with 40.2 percent of adults 18 and over living in wireless-only households.

As I testified to on June 30, the wireless industry already has adopted many of the FTC's recommendations. Commercial, charitable, and political uses of common short codes issued by CTIA are subject to written, publicly available consumer protection guidelines. Moreover, CTIA monitors advertisements to ensure compliance with these guidelines and that advertising and price information is clearly disclosed. As a further safeguard to consumers, beginning in February 2012, CTIA contracted with an outside vendor to verify information supplied to the Common Short Code Administration registry by companies seeking to lease short codes for premium SMS campaigns. CTIA's vendor uses numerous commercially-available databases such as Lexis/Nexis, Dun & Bradstreet, and the Better Business Bureau to confirm that the Content Provider displayed in the registry represents a legitimate company and is identified correctly in the registry. When monitoring identifies problems, that information is sent to the carriers so they may take corrective action. These efforts and the national carriers' decisions to end support for premium short code campaigns (with the limited exceptions for charities and political campaigns) should combine to significantly reduce the opportunity for third-parties to use carrier billing platforms as a tool to commit fraud. In addition, wireless companies provide customers the ability to block all third party charges (see: **AT&T:** *http://www.att.com/shop/wireless/services/purchase__blocker-sku6800254.html#fbid=pwxABFfDn2W;* **Sprint:** *http://support.sprint.com/support/article/Find__out__about__Premium__Messaging/case-cx832318-20091116-142129?ECID=vanity:premiummessaging&question__box=block billing&id16=block billing;* **T-Mobile:** *http://support.t-mobile.com/docs/DOC-2745?cm__sp=THE%20SOURCE__Support-__-Upgrades%20%26%20Planscontent__blocking__txt;* **Verizon:** *https://wbillpay.verizonwireless.com/vzw/nos/safeguards/SafeguardProductDetails.action?productName=serviceblock).* Wireless carriers are reviewing all of the Commission's recommendations with the shared goal of protecting consumers from deceptive advertisements and fraud, and helping dispute unauthorized charges and obtain refunds through a clear and consistent dispute resolution process.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO MICHAEL F. ALTSCHUL

Question 1. Is the recent T-Mobile cramming case the first time the FTC has taken enforcement action against a telecommunications carrier?

Answer. To CTIA's knowledge, it is the first time the FTC has taken enforcement action against a telecommunications carrier for a carrier-provided service. The FTC has brought actions against carriers for violations of the Fair Credit Reporting Act (FCRA).

Question 2. Do you believe the current exemption from the FTC's jurisdiction for communications common carriers frustrates effective consumer protection and industry guidance with regard to billing practices in the telecommunications industry?

Answer. Currently, the FCC imposes Truth-in-Billing requirements on telecommunications carriers. If Congress eliminated the FTC's common carrier exemption while keeping the FCC's rules in place, wireless carriers would be subject to two potentially conflicting sets of Federal requirements administered by two different Federal agencies. Such an outcome would lead to consumer and carrier confusion, and would frustrate effective consumer protection. In addition, dual Federal regulation would result in increased costs to taxpayers by funding two agencies to do similar work, while at the same time increasing compliance costs for carriers, also likely to be passed on to consumers.

Question 3. Do you believe the communications common carrier exemption is outdated or should be repealed? Please explain your answer.

Answer. Any determination affecting the common carrier exemption in the FTC Act should await the outcome of the current "Net Neutrality" debate and the regu-

latory status of carrier services. Any changes to agency authority over communications carriers should ensure that there is not dual Federal regulation and that Federal authority preempts state authority.

Question 4. Do you believe repealing the communications common carrier exemption would alter the jurisdiction of the FCC? Please explain your answer.

Answer. While repealing the common carrier exemption by itself would not alter the FCC's jurisdiction, such an outcome should logically be coupled with a change in the FCC's jurisdiction in order to avoid dual Federal regulation.

Question 5. Do you believe repealing the communications common carrier exemption is necessary to enable the FTC and FCC to work together to protect consumers of telecommunications services?

Answer. No. Repealing the exemption without altering the FCC's jurisdiction could create two potentially conflicting Federal regimes, which could undermine coordinated FTC and FCC actions to protect consumers.