PREPARED STATEMENT OF

THE FEDERAL TRADE COMMISSION

on

"Cramming on Wireless Phone Bills:

A Review of Consumer Protection Practices and Gaps"

Before the

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

Washington, D.C.

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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 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

[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.

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

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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).

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 Commission'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.

[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"].

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]

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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.

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:

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[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.

- *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 numbers.[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

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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"].

"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

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[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.

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 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]

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[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.

[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).

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% 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]

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[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.

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 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]

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[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.

[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.

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

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[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.

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]

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[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.

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.

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

[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.

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%, a threshold that is less than one-

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[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.

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% 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 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.

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[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%. 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.

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

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[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.

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.