

## The Hidden Scam: Why Consumers Should No Longer Be Forced to Shoulder the Burden of Liability for Mobile Cramming

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## The Hidden Scam: Why Consumers Should No Longer Be Forced to Shoulder the Burden of Liability for Mobile Cramming

### INTRODUCTION

“MOBILE CRAMMING” IS A FRAUDULENT FORM OF MOBILE PHONE BILLING that systematically siphons money away from unknowing consumers.<sup>1</sup> Part I of this comment provides an introduction to how and why mobile cramming occurs.<sup>2</sup> Part II gives a brief overview of federal regulation of mobile billing fraud with a particular focus on the Federal Trade Commission.<sup>3</sup> In addition, Part II discusses why the Federal Trade Commission’s efforts to stop mobile cramming are insufficient, and explains how the Commission’s approach has played a role in the lackluster industry practices concerning mobile billing fraud.<sup>4</sup> Finally, Part III proposes that mobile cramming regulation should emulate the federally-mandated consumer protections against credit card fraud and implement a cap on consumer liability for mobile cramming.<sup>5</sup>

### I. MOBILE CRAMMING: A PERFECT CONSUMER FRAUD SCHEME

Most people expect that the bold-print grand total on page one of their lengthy mobile phone bill reflects what they owe the phone company that month. In contrast, many do *not* expect that their mobile phone bill can actually include

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1. See *infra* Part I.
2. See *infra* Part I.
3. See *infra* Part II.
4. See *infra* Part II.
5. See *infra* Part III.

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charges from companies other than their phone carrier.<sup>6</sup> Surprisingly, this practice has been around long before mobile phones became prevalent.<sup>7</sup> Unsurprisingly, it has become the target of opportunists seeking the perfect scam; an issue which the Federal Trade Commission has devoted a great deal of effort to preventing.<sup>8</sup>

### A. *What is Mobile Cramming, Exactly?*

Mobile cramming is a fraudulent practice in which a company other than a mobile phone carrier (e.g., Sprint or Verizon) places charges on a consumer's mobile telephone bill that the consumer did not authorize.<sup>9</sup>

Since the Telecommunications Act of 1996<sup>10</sup> was enacted, parties other than a consumer's telephone carrier have been able to place charges on consumers' telephone bills (also known as "third-party billing").<sup>11</sup> Third-party billing is itself a legitimate, convenient, and alternative payment method that allows consumers to charge purchases to their mobile phone bill instead of a credit or debit card.<sup>12</sup> However, a consumer must expressly and knowingly authorize these charges from a third-party.<sup>13</sup> 'Crammers' add charges to a consumer's bill without obtaining

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6. According to a Vermont study, "close to 80 percent" of consumers are completely unaware that "they could be charged for third-party goods and services on their mobile phone bills." FED. TRADE COMM'N, TRANSCRIPT OF THE MOBILE CRAMMING ROUNDTABLE 12 (2013) [hereinafter TRANSCRIPT].

7. See *infra* note 11 and accompanying text.

8. See *infra* Part II.

9. FED. TRADE COMM'N, CRAMMING ON WIRELESS PHONE BILLS: A REVIEW OF CONSUMER PROTECTION PRACTICES AND GAPS 1 (2014) ("Mobile cramming is the act of placing unauthorized third-party charges on mobile phone accounts.").

10. 47 U.S.C.S. § 252 (LexisNexis 2015).

11. STAFF OF S. COMM. ON COMMERCE, SCIENCE, & TRANSPORTATION, 112TH CONG., REP. ON UNAUTHORIZED CHARGES ON TELEPHONE BILLS, at i (Comm. Print 2011) (noting that "telephone companies opened their billing platforms to an array of third-party vendors offering a variety of services" in the 1990s); James Hood, *Wireless Carriers—Minus Verizon—Agree to Stop Unauthorized Third-Party Charges*, CONSUMER AFFAIRS (Nov. 22, 2013), <http://www.consumeraffairs.com/cramming-lawsuits-and-scams> (explaining that third-party billing was initially authorized by Congress when it "included the provision that telephone carriers must pass on bills submitted by third-party providers" in the Telecommunications Act of 1996).

12. STAFF OF S. COMM. ON COMMERCE, SCIENCE, & TRANSPORTATION, 113TH CONG., REP. ON WIRELESS BILLING PRACTICES 3 (Comm. Print 2014) [hereinafter SENATE REPORT] (noting that, "[o]ver time, telephone companies opened [their] 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," and stating that this system "became a payment method similar to credit card numbers"); see also TRANSCRIPT, *supra* note 6, at 7, 16 (noting that the "mobile marketplace . . . offers incredible opportunities for consumers to shop and make payments through their mobile devices," and is a tool for "tremendous good" by "enabl[ing] a wide range of individuals who have no other access or means to support causes and charities").

13. See SENATE REPORT, *supra* note 12, at 12 (describing the third-party billing process for the former most common type of third-party billing, Premium Short Message Service (PSMS), as requiring consumers to make "two affirmative acts when purchasing goods or services with their mobile phone: one to initiate the purchase and one to confirm the purchase").

appropriate consumer authorization.<sup>14</sup> Some crammers will elicit a consumer's authorization through deception, while others begin charging consumers' phone bills absent any customer contact.<sup>15</sup> Although most consumers are unaware that mobile cramming exists, the problem is not small: almost 20 million people a year are crammed.<sup>16</sup>

*B. With Mobile Cramming, What You Don't Know Really Can Harm You*

For those interested in making money through fraud, third-party billing is great business. There are a couple of factors that make mobile cramming particularly dangerous to consumers and profitable for crammers. First, third-party companies (hereinafter referred to as "content providers")<sup>17</sup> easily avoid having to obtain express authorization to charge consumers.<sup>18</sup> Second, crammed charges are very difficult to detect, allowing consumers to be scammed for long periods of time.<sup>19</sup>

*1. Mobile Crammers Easily Circumvent Obtaining Express Consumer Authorization*

As previously mentioned, content providers can charge a consumer's phone bill only with a consumer's express approval.<sup>20</sup> Unfortunately, mobile crammers often gain access to consumer phone bills without such authorization. A form of third-party billing called Premium Short Message Service ("PSMS")<sup>21</sup> provides a good

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14. See *supra* note 9.

15. See FED. TRADE COMM'N, *supra* note 9 ("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.").

16. Herb Weisbaum, *FCC Proposes Crackdown on Phone-Bill Cramming*, NBCNEWS.COM, [http://www.nbcnews.com/id/43728825/ns/business-consumer\\_news/t/fcc-proposes-crackdown-phone-bill-cramming/#.VNPQ4sZhgS0](http://www.nbcnews.com/id/43728825/ns/business-consumer_news/t/fcc-proposes-crackdown-phone-bill-cramming/#.VNPQ4sZhgS0) (last visited Dec. 13, 2015) ("The FCC estimates that as many as 20 million people are crammed each year.").

17. Third-party companies that place charges on mobile phone bills are referred to interchangeably as "content providers," "third-party vendors," and "third-party merchants" by the Senate Committee on Commerce, Science, and Transportation, and the Federal Trade Commission. See generally, SENATE REPORT, *supra* note 12; FED. TRADE COMM'N, *supra* note 9.

18. See *infra* Part I.B.1.

19. See *infra* Part I.B.2.

20. See *Supra* note 13.

21. PSMS billing is a form of billing in which customers authorize the placement of charges on their mobile phone bill through text message, by sending a confirmatory text message to the third-party content provider. The Senate Committee on Commerce described the PSMS process from the consumer's perspective as follows:

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

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example. Content providers billing via PSMS must acquire a consumer's phone number to charge for services or products<sup>22</sup> (such as text message subscriptions and ringtones).<sup>23</sup> Some PSMS crammers have successfully captured mobile phone numbers by sending consumers unsolicited text messages that look like "spam" or appear to be "sent in error."<sup>24</sup> The crammer then proceeds to sign up and bill the consumer, regardless of whether the consumer responds to the texts.<sup>25</sup>

Another devious technique used by PSMS content providers to seize consumers' phone numbers involves creating deceptive website offers.<sup>26</sup> False websites constructed by content providers in Florida and California induced consumers to enter their mobile phone number in order to claim 'freebies' such as Justin Bieber tickets, gift cards, and free Apple iPads that the consumers were led to believe they had won.<sup>27</sup> Instead of receiving the advertised prizes, the consumers were unknowingly billed for entirely unrelated services and products.<sup>28</sup>

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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.

See SENATE REPORT, *supra* note 12, at 13.

22. Content providers first must obtain access to consumers' mobile phone bills from wireless carriers, by contracting with "middlemen known as 'billing aggregators' who have provided technology to link content providers and wireless carriers," who in turn contract with the wireless carriers. *Id.* at 11. Upon obtaining access to the wireless billing platform, content providers billing via PSMS can only charge a specific consumer once the consumer texts the content provider the special code associated with the content provider's product or service, "using the mobile device associated with the [consumer's] wireless account." See *supra* text accompanying note 20; SENATE REPORT, *supra* note 12, at 12. Alternatively, a consumer might first enter his or her phone number into a content provider's web advertisement to initiate the process. See Complaint at 8, Fed. Trade Comm'n v. MDK Media Inc., No. CV14-5099-JFW-SH (C.D. Ca. July 3, 2014) [hereinafter MDK Media] ("For example, a consumer who visits a content provider's web page advertisement . . . may initiate the subscription process by entering his or her mobile phone number on that web page advertisement.").

23. FED. TRADE COMM'N, *supra* note 9 (providing "ringtones and recurring text messages containing trivia or horoscopes" as examples of content-provider services).

24. See MDK Media, *supra* note 22, at 9 (detailing one "mechanism" by which the defendant content provider "obtain[ed] consumers' mobile phone numbers" by "sending to the consumers' mobile phones unsolicited text messages that many consumers assume have been sent in error"); see also Complaint at 8-9, Fed. Trade Comm'n v. Tatto Inc., No. CV-08912-DSF-FFM (C.D. Ca. Dec. 5, 2013) [hereinafter Tatto] (noting the defendant content provider often sent text messages "containing random factoids or other types of message alerts . . . [that] often appear merely to be spam").

25. See, e.g., MDK Media, *supra* note 22, at 9 ("Defendants begin cramming charges on consumers' mobile phone bills contemporaneous with the sending of these unsolicited text messages.").

26. See, e.g., Tatto, *supra* note 24, at 9 (alleging the defendant content provider used "misleading website offers" to fraudulently "obtain consumers' phone numbers and . . . sign them up for subscription services").

27. See *id.* (describing how one defendant's website first "informed consumers that they had won free Justin Bieber tickets, which they could claim by completing an online quiz," before "direct[ing] the consumer to enter his/her cell phone number."); see also Complaint at 5-8, Fed. Trade Comm'n v. Acquinity Interactive L.L.C., No. 13-cv-5380 (N.D. Ill. July 29, 2013) [hereinafter Acquinity Interactive] (explaining how the defendant-content provider operated a website scheme that offered consumers "purportedly free merchandise," including "\$1,000 gift cards to large retailers" and an "Apple iPad," by sending unsolicited text messages that directed consumers to the defendant's websites and often "represent[ing], expressly or by implication, that the consumer receiving the message has won a contest"; these "free merchandise websites" led the consumer to a

Content providers seeking to cram consumers via other third-party billing platforms also effectively avoid obtaining consumer authorization before billing.<sup>29</sup> “Wireless Application Protocol” billing (“WAP”) allows a content provider to “capture[]” a consumer’s mobile phone number from a mobile phone’s “subscriber identity module,” also known as a “SIM’ card.”<sup>30</sup> One cramming content provider made millions using WAP billing by running a fake “banner ad[]” within apps on Android devices.<sup>31</sup> “[D]esigned. . .to look like warning messages generated by the Android operating system,” the ad grabbed consumers’ attention by feigning detection of a virus on the mobile device and offering to remove it.<sup>32</sup> The content provider immediately registered consumers who clicked on the “subscribe” button after entering the ad (and some who never clicked the “subscribe” button at all) for monthly ringtone charges.<sup>33</sup>

Crammers using these techniques falsely represent to mobile phone companies that the consumers have knowingly authorized their service or product charges.<sup>34</sup> Consequently, crammed charges easily find their way onto millions of consumers’ phone bills each year.<sup>35</sup>

## 2. Crammed Charges Are Designedly Difficult to Detect

In addition to the fact that crammers frequently worm their illegal charges into consumer’s phone bills, these charges are extremely difficult to detect. Significantly,

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“registration page” that included an “online form eliciting personal information” such as the consumer’s “cell phone number”).

28. See *Acquinity Interactive*, *supra* note 27, at 9–10 (noting the defendant’s websites “usually” required consumers to “complete a total of thirteen (13) offers in order to qualify for the promised free merchandise,” many of which entailed “incurring some other obligation, such as applying and qualifying for credit cards,” and asserting that “few if any consumers ever receive the promised free merchandise”).

29. The FTC sued the content provider Jesta Digital, LLC for running an alleged mobile cramming scheme by gaining unauthorized access to consumers’ mobile phone numbers via a “billing technology or process called Wireless Application Protocol.” Complaint at 6, 10, *Fed. Trade Comm’n v. Jesta Digital, L.L.C.*, No. 13-cv-01272 (D. D.C. Aug. 20, 2013) [hereinafter *Jesta Digital*].

30. *Id.* at 6.

31. *Id.* at 2. In the FTC’s Complaint for Permanent Injunction and Equitable Relief against the content provider Jesta Digital, LLC, the FTC alleged that Jesta ran an advertisement for anti-virus software that appeared in the free version of the Angry Birds app on Android mobile devices. *Id.* at 2–3.

32. See *id.* at 3 (“The banner ads contain a robot image that looks similar to the robot logo for the Android operating system, state ‘virus detected’ or identify a number of viruses found on the mobile device, and include a ‘remove’ button.”).

33. See *id.* at 3–6 (describing the consumer experience when clicking through Jesta’s banner ad and explaining that “[w]hen consumers click on the subscribe button or elsewhere on the screen such as the ‘Block Mobile Virus Now’ or ‘Protect Your Android Today’ buttons, Jesta charges the consumer \$9.99 per month” for “ringtones or other goods and services without their authorization or agreement,” including consumers “who did not click on the subscribe button.”).

34. See, e.g., *MDK Media*, *supra* note 22, at 9–10 (asserting that MDK Media “misrepresent[ed] to wireless phone carriers” that consumers “knowingly subscribed” to their services and “authorized” MDK Media to place charges on consumers’ phone bills).

35. See *supra* note 16 and accompanying text.

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a majority of consumers do not know that third-parties have access to their mobile phone bill.<sup>36</sup> Consumers' virtual cluelessness on this issue is due—at least in part—to a lack of adequate disclosure by mobile phone carriers.<sup>37</sup> Mobile carriers fail to inform consumers about third-party billing upon sale of a service plan.<sup>38</sup> In addition, the FTC has exposed two of the major mobile phone carriers for issuing bills that do not adequately and “conspicuously” disclose the presence of third-party charges.<sup>39</sup> The phone bill usually does not identify third-party charges (if it identifies them at all)<sup>40</sup> until the “middle or towards the end” of the document.<sup>41</sup> As a result, most consumers are unaware that fraudulent third-party charges may be hiding in their phone bill.

Crammers capitalize on an unknowledgeable consumer base by setting the monthly fees for their sham services at small amounts.<sup>42</sup> Usually fixed at ten dollars or less<sup>43</sup> and designed to automatically renew each month,<sup>44</sup> the almost unnoticeable charge amount<sup>45</sup> is highly beneficial to crammers; consumers are more likely to just

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36. See *supra* note 6.

37. See TRANSCRIPT, *supra* note 6, at 6–7 (“We also know that consumers often fail to spot unauthorized charges on their bills. . . . False [consumers] may read the bill and fail to spot the charges because they’re buried, you know, deeply within the bill or listed in generic-sounding categories.”).

38. In suits against the wireless carriers AT&T Mobility and T-Mobile USA, the FTC alleged both carriers declined to inform consumers that charges for third party services could appear on their phone bills during the “sales process.” Complaint at 4–5, Fed. Trade Comm’n v. AT&T Mobility, LLC, No. 14-mi-99999-UNA (N.D. Ga. Oct. 8, 2014) [hereinafter AT&T Mobility]; Complaint at 4, Fed. Trade Comm’n v. T-Mobile U.S.A., Inc., No. 14-cv-00967 (W.D. Wash. July 1, 2014) [hereinafter T-Mobile U.S.A.]. And in a suit against Sprint Corporation, the Consumer Financial Protection Bureau alleged Sprint “automatically enrolled customers in third-party billing without their consent.” Complaint at 5, Consumer Fin. Prot. Bureau v. Sprint Corp., No. 14-cv-9931 (S.D.N.Y. Dec. 17, 2014) [hereinafter Sprint].

39. See AT&T Mobility, *supra* note 38, at 5–7 (exposing AT&T’s practice of “lump[ing]” third-party charges under the term “New Charges” on its phone bill summary and—in the full bill—listing third-party charges under the misleading title “AT&T Monthly Subscriptions”); see also T-Mobile U.S.A., *supra* note 38, at 4–9 (describing in detail how near-impossible it is to parse out third-party charges from actual T-Mobile charges on either an online bill summary or a “full” phone bill from T-Mobile).

40. The FTC stated in its federal action against AT&T that the carrier’s billing format did not include any form of disclosure about third-party charges until March of 2013. AT&T Mobility, *supra* note 38, at 6 (“In many instances until at least March 2013, [AT&T’s] online bill has also not provided disclosures in other parts of the bill.”).

41. See T-Mobile U.S.A., *supra* note 38, at 8 (“A breakout of the actual third-party charges has typically appeared in the middle or towards the end of the [T-Mobile phone] bill, which in some instances may exceed 50 pages in length.”).

42. See SENATE REPORT, *supra* note 12, at 19 (observing from information provided by individual phone carriers that “[i]ndividual charges” for third-party content-provider services were “generally small—most often ranging from \$1 to \$20, with frequent reports of a \$9.99 recurring monthly charge”).

43. See *supra* note 42.

44. See, e.g., Tatto, *supra* note 24, at 9 (explaining that the fraudulent charges placed by the defendant content-provider on consumers’ telephone bills were all automatically “recurring . . . unless and until the consumer notices the charge and takes action to unsubscribe”).

45. See *id.* (stating that the “slight variations in [consumers’] bill totals” caused by the defendant’s “\$9.99” monthly charge “often” went unnoticed by consumers).

pay the monthly total, no questions asked.<sup>46</sup> As previously noted, when consumers do detect and investigate a price change to their phone bill, it is still difficult to determine the source of the new charge.<sup>47</sup> The confusing way that third-party charges appear and are described on most phone bills contributes to this difficulty. Often, the charges are not distinguishable from a mobile phone carrier's own service fees.<sup>48</sup> Further, when third-party charges are finally listed and described in a bill, the service descriptors are nearly indecipherable.<sup>49</sup> For example, the following image is from an actual T-Mobile phone bill in which the description of a third-party content-provider's ("Shaboom Media") charge appears:<sup>50</sup>

PREMIUM SERVICES					
Date	Content Provider	Time	Description	Usage Charges	Total
OTHER SERVICE PROVIDER CHARGES					
11/13/12	Shaboom Media	10:32 AM	8888908150 BmStorm23918	\$ 9.99	\$ 9.99
Other Service Provider Charges					

The "Description" of the charge provides no clear information to the consumer about its source or substance.

Confusing billing practices like those above, combined with designedly unnoticeable monthly rates, have made it nearly impossible for consumers to identify that they have been crammed. Coupled with the ease with which content-providers can cram phone bills,<sup>51</sup> these characteristics make mobile cramming a dangerous threat to consumers' economic well-being.<sup>52</sup>

46. See *id.* (noting, because "[m]any consumers have not noticed Defendants' charges included on their phone bills" due to the small dollar amount and the confusing descriptors used, those consumers have merely "paid their bills in full").

47. See *supra* note 39 and accompanying text.

48. See *supra* note 39 and accompanying text.

49. Services provided by two of the defendant content-providers in the FTC's suit against Tatto, Inc., were identified by the following "billing descriptor[s]" on mobile phone bills, which consist of a seemingly meaningless string of letters and numbers: "77050IQ12CALL8663611606" and "25184USBFIQMIG." Tatto, *supra* note 24, at 9.

50. This image was taken directly from the FTC's Complaint for Permanent Injunction and Other Equitable Relief against T-Mobile. T-Mobile U.S.A., *supra* note 38, at 8–9.

51. See *supra* Part I.B.1.

52. Considering crammed charges usually cost \$9.99 per month, a consumer that overlooked a single fraudulent charge would lose nearly 120 dollars a year. See *supra* note 42.



### 3. Mobile Cramming Causes Harm Beyond the Individual Consumer

Mobile cramming not only threatens fraudulent economic harm to millions of consumers,<sup>53</sup> it also has the potential to ruin a highly beneficial avenue for payment transactions. Third-party billing provides consumers with a more secure method of paying for services that does not include the transfer of any credit card information.<sup>54</sup> Since “a billing agreement already exists between a [mobile phone] carrier and a user,” content-providers directly receive their portion of the charged amount from the consumer’s mobile carrier (instead of the consumer).<sup>55</sup> Through this billing process, content providers can more easily reach unbanked and underbanked consumers in emerging markets, who frequently supplement or replace bank accounts with other financial services.<sup>56</sup>

## II. THE FEDERAL TRADE COMMISSION AND MOBILE CRAMMING: A LOVE(LESS) STORY

Both Federal and State Governments have acted to combat mobile cramming. The Federal Trade Commission (“FTC”), the Federal Communications Commission, and the Consumer Financial Protection Bureau have declared cramming to violate sections of the FTC Act,<sup>57</sup> the Communications Act,<sup>58</sup> and the Consumer Financial Protection Act,<sup>59</sup> respectively. The FTC alone has instituted numerous enforcement actions against mobile crammers and issued best-practices guidelines to the mobile

53. See *supra* note 16 and accompanying text.

54. See Ingrid Lunden, *Amazon has Turned on Carrier Billing For Apps, in Germany with Bango and O2*, TECHCRUNCH.COM (Sep. 16, 2014) <http://techcrunch.com/2014/09/16/amazon-has-turned-on-bango-carrier-billing-for-apps-first-in-germany-with-o2/> (reasoning the “logic behind enabling carrier billing” has to do with its heightened “security,” because “given the many breaches we have seen around user data and credit card information, the idea is that a billing agreement already exists between a carrier and a user, so none of that kind of information needs to get shared again”).

55. *Id.*

56. See Oded Israeli, *The ‘3x factor’ of carrier billing in app store purchases*, MOBILE PAYMENTS TODAY (Feb. 1, 2013) <http://www.mobilepaymentstoday.com/blog/9789/The-3X-factor-of-carrier-billing-in-app-store-purchases> (naming “[e]merging markets” the “biggest growth opportunity for [third-party] carrier billing,” because “bank accounts and credit cards are not as popular in emerging markets as they are in developed markets,” and third-party billing “is the only available electronic payment channel for 1.7 billion people in the world, who own a mobile phone but don’t have a bank account”)(emphasis in original).

57. 15 U.S.C.S. § 45(a)(1) (LexisNexis 2015) (prohibiting “[u]nfair methods of competition” and “unfair or deceptive acts or practices in or affecting commerce”). In five separate suits against third-party content providers alleging mobile cramming, the FTC has claimed the defendant’s practices violated 15 U.S.C. §45(a). See, e.g., Memorandum in Support of Plaintiff’s Motion for Temporary Restraining Order at 15, Fed. Trade Comm’n v. Wise Media, LLC, No. 1:13-CV-1234-WSD (N.D. Ga. Apr. 16, 2013).

58. 47 U.S.C.S. § 201(b) (LexisNexis 2015); see FCC NEWS, FCC TO CRAMMERS: NO MORE “MYSTERY FEES” (June 16, 2011) (“The FCC has found that cramming is an ‘unjust and unreasonable’ practice that violates section 201(b) of the Communications Act.”).

59. 12 U.S.C.S. §§ 5531(a), 5536(a)(1)(B) (LexisNexis 2015); see Sprint, *supra* note 38, at 8 (asserting Sprint’s “actions and omissions” in contributing to third-party cramming were “unfair acts and practices in violation of §§1031 and 1036(a)(1)(B) of the CFPB”).

billing industry.<sup>60</sup> Additionally, “multiple state enforcement authorities” have been highly committed to stopping crammers.<sup>61</sup> Although the FTC has put forth a concerted and valiant effort in the fight against mobile cramming,<sup>62</sup> consumers remain vulnerable to mobile billing fraud.<sup>63</sup> In the absence of strict regulation of consumer liability, poor mobile-cramming prevention standards have developed within the industry.<sup>64</sup>

#### *A. Enforcement Actions—Going After the Bad Guys*

Since 2013, the FTC has sued five content providers and two major mobile phone companies for purportedly running or participating in mobile cramming schemes.<sup>65</sup> Through these enforcement actions, the FTC levied significant financial penalties against individual perpetrators. In four of its five cases against content providers, the FTC has achieved sizable monetary judgments.<sup>66</sup> In addition, AT&T agreed to pay \$105 million to settle its case, with \$80 million of that amount to be refunded to

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60. See *infra* Part II.A–B.

61. See FED. TRADE COMM’N, MOBILE CRAMMING STAFF REPORT 12 (2014) [hereinafter FTC STAFF REPORT] (noting “Attorneys General of 36 States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands submitted in a comment to the FTC . . . urging action to address mobile cramming” and, additionally, have “targeted deceptive practices used to sign up consumers unknowingly for unwanted subscription services” through state enforcement actions).

62. Because the author will argue that mandatory regulation at the federal level is the necessary solution to mobile cramming, and because the FTC has been the most active federal agency in enforcing mobile cramming violations, the efforts of the FTC will be the primary focus of this comment.

63. See *infra* Part II.C.

64. See *infra* Part II.C.

65. See AT&T Mobility, *supra* note 38; MDK Media, *supra* note 22; T-Mobile, U.S.A, *supra* note 38; Tatto, *supra* note 24; Jesta Digital, *supra* note 29; Acquinity Interactive, *supra* note 27; Wise Media, *supra* note 57. The FTC alleged both AT&T Mobility and T-Mobile U.S.A. “engaged in the widespread practice of charging consumers for recurring Third-Party Subscriptions without consumers’ authorization for the charges” and misrepresented that “charges appearing on [AT&T or T-Mobile’s] phone bills were for [AT&T or T-Mobile’s] services. . .even when the charges were unauthorized charges for Third-Party Subscriptions.” AT&T Mobility, *supra* note 38, at 19–20; T-Mobile, U.S.A, *supra* note 38, at 14.

66. See Final Order For Permanent Injunction and Monetary Judgment at 4, Fed. Trade Comm’n v. MDK Media, No. 2:14-cv-05099-JFW-MRW (C.D. Cal. May 6, 2015) (ordering the defendant MDK Media to pay \$383,000 to the Commission); *Operators of Massive Mobile Cramming Scheme Will Surrender More Than \$10M in Assets in FTC Settlement*, FED. TRADE COMM’N (June 13, 2014), <https://www.ftc.gov/news-events/press-releases/2014/06/operators-massive-mobile-cramming-scheme-will-surrender-more-10m> (reporting that the FTC reached a “partially suspended” \$150 million settlement with all defendants in the Tatto lawsuit, including the surrender of assets valued at “more than \$10 million”); *Mobile Crammers Settle FTC Charges of Unauthorized Billing*, FED. TRADE COMM’N (Nov. 21, 2013), <https://www.ftc.gov/news-events/press-releases/2013/11/mobile-crammers-settle-ftc-charges-unauthorized-billing> (noting a partially suspended judgment of \$10,965,638 had been entered against the defendants in the FTC’s suit against Wise Media); *Jesta Digital Settles FTC Complaint it Crammed Charges on Consumer’s Mobile Phone Bills*, FED. TRADE COMM’N (Aug. 21, 2013), <https://www.ftc.gov/news-events/press-releases/2013/08/jesta-digital-settles-ftc-complaint-it-crammed-charges-consumers> (announcing the defendant Jesta Digital was ordered to pay \$1.2 million to the Commission, in addition to providing refunds to crammed consumers).

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customers.<sup>67</sup> T-Mobile eventually followed AT&T's lead in 2015, reaching a settlement of \$90 million with the FTC.<sup>68</sup> These massive settlements with T-Mobile U.S.A. and AT&T Mobility raised public awareness of mobile cramming by garnering media coverage in major news outlets.<sup>69</sup>

### *B. The FTC's Attempt to Guide the Industry*

In addition to suing mobile crammers, the FTC also issued a list of general recommendations for "best practices" to the mobile billing industry.<sup>70</sup> These recommendations are mostly directed at mobile carriers, and include: (1) informing consumers that third-parties may charge their phone bill upon "activation," and providing consumers with "the option to block all third-party charges on their phone accounts," or to "block or allow...specific providers"; (2) adopting "reasonable procedures" to detect and take action against "risky or suspicious" content providers; (3) implementing "more centralized control" over the consumer "opt-in" authorization process; (4) providing "non-deceptive," clear, and conspicuous disclosure of all third-party charges on a consumer's phone bill, such as "providing separate subtotals for carrier and third-party charges" or sending "separate notification" of third-party charges to consumers who "auto-pay" their bills; and (5) creating a "clear and consistent" dispute resolution process for consumers who discover questionable charges on their mobile phone bill, including giving consumers the right to "withhold payment" on any disputed charges "during the dispute period" without threat of cancellation of services.<sup>71</sup>

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67. Jim Puzzanghera, *AT&T to Refund \$80 Million in Settlement of Mobile Cramming Case*, LA TIMES, (Oct. 8, 2014, 10:50 AM), <http://www.latimes.com/business/la-fi-tn-att-settlement-mobile-cramming-federal-trade-commission-20141008-story.html>. It is also worth noting that the Federal Communications Commission, working jointly with the Consumer Financial Protection Bureau and State Attorneys General, recently secured settlements from Sprint Corporation (\$68 million) and Verizon Communications Inc. (\$90 million) to close mobile cramming investigations into both carriers. See FCC NEWS, VERIZON & SPRINT TO PAY \$158 MILLION TO SETTLE MOBILE CRAMMING INVESTIGATIONS (2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-333427A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-333427A1.pdf).

68. Stipulated Order for Permanent Injunction and Monetary Judgment at 10, Fed. Trade Comm'n v. T-Mobile, Inc., No. 2:14-cv-00967-JLR (W.D. Wa. Dec. 19, 2014).

69. Edward Wyatt, *AT&T Mobility to Pay \$105 Million to Settle Unlawful Billing Claims*, N.Y. TIMES, Oct. 9, 2014, at B3; Brian Fung, *For \$90 million, T-Mobile will Settle FTC Charges That it Slipped Bogus Fees onto Wireless Bills*, THE SWITCH BLOG (Dec. 19, 2014), <https://www.washingtonpost.com/news/the-switch/wp/2014/12/19/for-90-million-t-mobile-will-settle-ftc-charges-that-it-slipped-bogus-fees-into-wireless-bills/>.

70. FTC STAFF REPORT, *supra* note 61, at i-ii.

71. *Id.* at i-ii, 34.

*C. Something is Missing: The FTC's Regulatory Approach is Not Strong Enough to Combat Mobile Cramming*

For two important reasons, the FTC's endeavors to thwart mobile cramming have not adequately protected consumers. First, while the FTC has secured economic remedies for some consumers through monetary judgments against—and settlements with—content-providers and mobile carriers, these only compensated injured consumers for a form of mobile cramming that virtually no longer exists.<sup>72</sup> Second, the financial incentive within the mobile billing industry to allow mobile cramming to occur is too strong for voluntary recommendations to curb;<sup>73</sup> consequently, phone companies' fraud-monitoring practices are abysmal.<sup>74</sup>

*1. Enforcement Actions Have Only Compensated Consumers for Harm from Outdated Forms of Mobile Cramming*

With the exception of its action against the content provider Jesta Digital, LLC, the FTC has only sued content providers that used the PSMS form of third-party billing to cram consumers.<sup>75</sup> This form of billing has practically disappeared today,<sup>76</sup> while other billing platforms are rapidly growing in popularity.<sup>77</sup> The FTC's lone suit against a WAP-billing content provider illustrates that cramming is just as possible with these alternative billing platforms.<sup>78</sup> The FTC should not make consumers wait for new schemes to befall them before crammers are brought to justice. Therefore, the FTC cannot successfully combat mobile cramming through threat of lawsuit alone.<sup>79</sup>

*2. Substandard Fraud-Monitoring Programs within the Mobile Billing Industry Result*

Along with the inherent weaknesses in deterring mobile cramming via lawsuits against individual perpetrators, the FTC's "best practices" recommendations have failed to inspire effective industry self-regulation of mobile cramming because the recommendations are merely guidelines.<sup>80</sup>

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72. See *infra* Part II.C.1.

73. See *infra* Part II.C.2.

74. See *infra* Part II.C.2.

75. See MDK Media, *supra* note 22, at 7; Tatto, *supra* note 24, at 8; Jesta Digital, *supra* note 29 and accompanying text; Acquinity Interactive, *supra* note 27, at 5–8; Wise Media, *supra* note 57, at 5.

76. See FTC STAFF REPORT, *supra* note 61, at 4 (noting the "Premium SMS market ha[d] been declining in size over the past few years" due to "the emergence of mobile apps" and will "continue to shrink" because "the four largest mobile carriers pledged to discontinue Premium SMS billing for commercial transactions" in 2013).

77. See SENATE REPORT, *supra* note 12, at 37–38 (stating that one form of third-party billing known as "[d]irect carrier billing . . . increased 30% year-over-year from 2009-2012" and is now offered by "the Google Play store" along with "Sony, Facebook, Skype, and Rhapsody").

78. See *supra* Part I.B.1.

79. See *supra* Part II.A.

80. See *infra* note 81–102 and accompanying text.

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Three of the four major mobile carriers have been accused of making hundreds of millions of dollars in profit from third-party charges, authorized and unauthorized alike.<sup>81</sup> Currently, carriers “generally collect[] 30% to 40% of the total value” of all third-party charges billed,<sup>82</sup> and accumulate additional profit from “fees” levied against content providers with frequent customer refunds.<sup>83</sup> These numbers show that abolishing mobile cramming would extinguish a significant revenue source for the mobile billing industry. Up against a financial temptation this strong, the FTC’s regulatory efforts are not enough. Because the threat of legal action is currently the lone to not perpetuate mobile cramming,<sup>84</sup> mobile carriers are encouraged to bet against getting caught.<sup>85</sup>

A snapshot of the ineffective fraud monitoring and prevention practices of some of the major mobile carriers illustrates this point. Any content provider seeking to use third-party billing must pass a “vetting” process established by the Wireless Association (“CTIA”).<sup>86</sup> The major mobile carriers additionally employ their own pre-screening system to determine which merchants should be granted billing access.<sup>87</sup> For content-providers that billed via PSMS, the pre-screening process evaluated compliance with certain specific standards issued by the CTIA.<sup>88</sup> Additionally, the CTIA would conduct audits for compliance with these standards.<sup>89</sup> As early as 2010, the Association would publish reports summarizing the results of its audits and alert mobile carrier companies to merchants exhibiting excessive violations.<sup>90</sup>

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81. See Sprint, *supra* note 38, at 2 (“While its customers suffered losses, Sprint retained 40% of the gross revenue it collected for third-party charges, totaling hundreds of millions of dollars.”); see also AT&T Mobility, *supra* note 38, at 4 (“In 2012, Defendant earned \$108 million from charges for Third-Party Subscriptions, and in 2013, \$161 million for such charges, many of which were unauthorized”); T-Mobile USA, *supra* note 38, at 4 (“Defendant has earned hundreds of millions of dollars from Third-Party Subscriptions” and “caused consumers millions of dollars of injury”).

82. SENATE REPORT, *supra* note 12, at 19.

83. *Id.*

84. See *supra* Part II.A.

85. Especially when the generally undetectable nature of crammed charges is considered. See *supra* Part I.B.

86. See SENATE REPORT, *supra* note 12, at 15 (stating that the “CTIA in conjunction with an outside auditor would vet content providers that were to seeking to . . . market and charge products to consumers”).

87. See *id.* at 16 (explaining that mobile carriers reported to the Committee that they also conducted “vetting” of third-party merchants “beyond the CTIA vetting process”).

88. These standards primarily involved advertising disclosure requirements—especially regarding the placement of pricing information—but they also required third-party merchants to obtain “two-factor authentication” from a consumer before placing any charges on the consumer’s mobile phone bill. *Id.* at 14.

89. See *id.* at 15 (“Content providers that are permitted to charge consumers via the PSMS system have been subject to ongoing CTIA monitoring for compliance with industry standards.”).

90. See *id.* (detailing how carriers were granted “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 additionally “receiv[ed] email notification of new audit findings and weekly reports aggregating the audit failures across the mobile content market,” including identification of “content” that had “the most failures”).

In spite of these measures, enforcing compliance with PSMS standards and punishing violators remained entirely at the discretion of the mobile carriers.<sup>91</sup> The enforcement policies employed by carriers were neither uniform nor strict.<sup>92</sup> For example, while most carriers monitored the refund rates of content providers<sup>93</sup> as a method of identifying fraudulent behavior, the threshold number of refunds that triggered sanctions were set at high levels and differed from company to company.<sup>94</sup> Additionally, under some programs, sanctioned content providers were allowed to continue charging currently-subscribed consumers; only the ability to obtain new subscriptions was temporarily prohibited.<sup>95</sup> Violators generally remained free to charge consumers for every other service that had not exceeded the refund rate threshold.<sup>96</sup>

More importantly, forms of third-party billing other than PSMS are currently subject *only* to the pre-screening, monitoring, and sanction policies of individual mobile carriers.<sup>97</sup> It should be noted that today AT&T, Sprint, T-Mobile, and Verizon do allow consumers the opportunity to completely block all third-party charges for free.<sup>98</sup> AT&T also offers its customers the option to receive text message or email notifications any time a purchase from a third-party is billed to the customer's AT&T account.<sup>99</sup> Unfortunately, all of these services are buried in the

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91. See *id.* (providing that “[u]nder [the current] system, each carrier has been responsible for determining what follow up they would conduct” with the “violating” content provider).

92. *Id.* at 30–35.

93. In the context of third-party billing, ‘refund rate’ refers to “the ratio of a carrier’s refunds [to consumers] to charges billed [by a particular content provider] for a particular period of time.” See FTC STAFF REPORT, *supra* note 61, at 13.

94. See SENATE REPORT, *supra* note 12, at 30–31 (reporting AT&T’s threshold was an 18% refund rate coupled with a failed audit, Verizon’s threshold to be between 5% and 7.99%, Sprint’s threshold for levying financial penalties at 12%, and T-Mobile’s threshold rate as 15%).

95. See *id.* (noting that under Verizon’s program, “[b]illing aggregator documents indicate that the policy [for threshold-exceeding content providers] . . . was that suspension . . . meant a bar on acquiring new subscribers,” and also noting that T-Mobile employed a similar procedure) (emphasis in original).

96. See *id.* Verizon’s program was the sole exception, with its policy being a suspension of “all PSMS campaigns managed by” the content provider. *Id.* (emphasis in original).

97. See *id.* at 38 (“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.”).

98. *Wireless Support: About AT&T Purchase Blocker*, AT&T.COM, [http://www.att.com/esupport/article.jsp?sid=KB92822&cv=820&br=BR&ct=9005842&pv=2#fbid=QoR\\_iz4fbDF](http://www.att.com/esupport/article.jsp?sid=KB92822&cv=820&br=BR&ct=9005842&pv=2#fbid=QoR_iz4fbDF) (last visited Dec. 13, 2015); *Support: Find out About Third-Party Billing*, SPRINT.COM, [http://support.sprint.com/support/article/Find\\_out\\_about\\_Premium\\_Messaging/cas/ecx832318\\_20091116\\_142129?ECID=vanity:premiummessaging&question\\_box=third%20party%20charges&id16=third%20party%20charges#!/](http://support.sprint.com/support/article/Find_out_about_Premium_Messaging/cas/ecx832318_20091116_142129?ECID=vanity:premiummessaging&question_box=third%20party%20charges&id16=third%20party%20charges#!/) (last updated Nov. 17, 2014); *T-Mobile Support: Apps, Downloads, and Other Content Purchases FAQs*, TMOBILE.COM (last modified July 9, 2015, 2:43 PM); *Support: Carrier Billing FAQs*, VERIZONWIRELESS.COM, <http://www.verizonwireless.com/support/carrier-billing-faqs/> (last visited Oct. 29, 2015).

99. *Wireless Support Billing Notifications*, AT&T.COM, <http://www.att.com/esupport/article.jsp?sid=KB425044> (last visited Oct. 29, 2015).

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'Support' sections of the carriers' websites.<sup>100</sup> This makes it highly likely that only a consumer with previous knowledge of third-party billing or one who had already discovered a suspicious third-party charge on his or her account would be able to locate their carrier's purchase-blocking option.<sup>101</sup> Since most consumers are wholly unaware of third-party billing,<sup>102</sup> the major mobile carriers' efforts in this respect do little to prevent mobile cramming in emerging billing platforms.

With the current state of mobile cramming prevention in mind, it is time to look elsewhere for a model of fraud regulation that will work.

### III. SOLVING THE PROBLEM: A FEDERALLY-MANDATED CAP ON CONSUMER LIABILITY FOR MOBILE CRAMMING

In order to fully shield consumers from the hidden danger of mobile cramming, Congress should enact legislation (and the FTC should accordingly implement regulations) that imposes a cap on consumer liability for fraudulent phone bill charges.<sup>103</sup> The Federal Government successfully applied this strategy in regulating consumer credit card fraud.<sup>104</sup> A consumer liability limit will be equally successful in regulating mobile cramming because both industries have similar financial incentives with respect to fraud.<sup>105</sup>

#### *A. Modeling the Regulation of Credit Card Fraud Will Provide Consumers With Adequate Protection from Mobile Cramming*

Currently, mobile carriers provide little protection to consumers from mobile cramming. However, the FTC *can* transform consumers' vulnerability in this area by emulating the treatment of consumer fraud in another market: credit card transactions. Mobile cramming and credit card fraud constitute a similar form of consumer fraud—unauthorized use of a payment transaction.<sup>106</sup> In addition, the credit card and mobile billing industries have notable similarities in financial motives and structure.<sup>107</sup> Both credit card companies (along with the banks that

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100. See *supra* notes 98–99. To discover what options AT&T, Sprint, T-Mobile, and Verizon offered to their customers regarding third-party charges, this author (who brought with her all of the knowledge on mobile cramming gained from writing this comment) went to each carrier's website, located the 'Support' section, and had to either type "third-party charges" into the section's search box or navigate through sub-sections until information regarding third-party charges appeared.

101. See *supra* note 100.

102. See *supra* note 6 and accompanying text.

103. See *infra* Part III.A.2.

104. See *infra* Part III.A.1.

105. See *infra* Part III.A.1.

106. Third-party billing qualifies as a payment-transaction because it is a means of paying for services or products through charging the value of the service or product purchased to the consumer's mobile phone bill. See *supra* Part I.

107. See *infra* notes 108–10 and accompanying text.



issue their cards) and mobile phone carriers have a significant financial stake in the occurrence of fraud; each industry player retains a portion of every charge posted to a credit card or mobile phone account, respectively.<sup>108</sup> Credit card companies and their issuing banks receive 2% on average per transaction, compared to the 30-40% of third-party charges retained by mobile carriers.<sup>109</sup> Further, credit card companies and mobile carriers similarly monitor refund or “chargeback” rates to identify suspicious merchants and potential instances of fraud.<sup>110</sup> Accordingly, the FTC should not treat third-party mobile billing fraud differently than credit card fraud. If the FTC enacts a limit on consumer liability for cramming similar to the federally-mandated cap on credit card fraud,<sup>111</sup> government *and* industry efforts to prevent cramming will improve.

*1. The Success of the Consumer Liability Cap on Credit Card Fraud: Shifting the Financial Burden Away from Consumers*

Regulation of credit card fraud essentially stems from two sources of governance: (1) the Fair Credit Billing Act<sup>112</sup> and (2) policies privately implemented by individual credit card companies.<sup>113</sup> As discussed below, the nature of the Fair Credit Billing Act has influenced credit card companies to adopt strict fraud-prevention policies.

*a. The Fair Credit Billing Act*

The Fair Credit Billing Act (“FCBA”) regulates credit card billing practices by granting consumers certain protections in billing disputes with their credit card

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108. See Amad Ebrahimi, *The Complete Guide to Credit Card Processing Rates & Fees*, MERCHANTMAVERICK (Jan. 10, 2013), <http://www.merchantmaverick.com/the-complete-guide-to-credit-card-processing-rates-and-fees/> (explaining that credit card companies and “card-issuing banks” charge “Interchange Reimbursement Fees and Assessments,” which are charged to merchants for each “[credit card] transaction,” and noting such fees “typically consist of a percentage of each transaction accompanied by a flat per transaction fee (2.10% + .10%)”); *supra* note 82 and accompanying text.

109. See *supra* note 108.

110. See Ken Musante, *Understanding Chargeback Rules*, THE GREEN SHEET (The Green Sheet Inc., Rohnert Park, CA) July 27, 2009, at 68 (explaining how Visa Inc. and MasterCard WorldWide have “implemented...specific chargeback monitoring programs” and “fraud identification” programs that identify offenders of the companies’ established chargeback “limits” and “ratios.”); see *infra* Part III.A.1.b.

111. See *infra* Part III.A.1.a.

112. 15 U.S.C.S. § 1666–1666j (LexisNexis 2015). Fraudulent charges to a consumer’s credit card bill qualify as a type of “billing error” under 15 U.S.C.S. § 1666, subject to the provisions of that section. See *id.* § 1666(b)(1)–(3) (stating that a “billing error” consists of “a reflection on a statement of an extension of credit which was not made to the obligor, or if made, was not in the amount reflected on such statement” as well as “a reflection on a statement of goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of transaction”).

113. See *infra* Part III.A.1.b.



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provider.<sup>114</sup> Most important among these protections is a cap on consumer liability for charges not authorized by the cardholder<sup>115</sup> (referred to as a “billing error” under the Act).<sup>116</sup> Under the FCBA, a consumer cannot be held liable to a creditor for any amount over fifty dollars that is attributable to unauthorized charges to their credit card bill.<sup>117</sup> If the credit card provider finds after investigating the “billing error” that the disputed charges are correct, the Act requires the provider to supply the consumer with a “written explanation” and “documentary evidence” supporting this finding.<sup>118</sup> Additionally, the Act grants consumers the right to withhold payment of a disputed charge during a dispute investigation.<sup>119</sup>

These provisions grant universal protection to consumers in the credit card industry by shifting the financial burden of fraud from the consumer to the credit card company:

*In fact, the best part of the credit card industry regulations, the so-called Truth in Lending Act [as amended by the Fair Credit Billing Act], is the part that says your liability by law is limited only to \$50. That forces the companies, all of them, to do a good job fighting fraud, because they have to eat it.<sup>120</sup>*

By shifting the risk of loss caused by fraud to the credit card companies, the FCBA liability cap directly shields consumers from liability exceeding fifty dollars and incentivizes the credit card companies to protect themselves by proactively preventing such losses. The vast difference between credit card companies’ and mobile carriers’ fraud-monitoring practices, as described below, illustrates how influential a federally-mandated consumer liability limit can be.

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114. The Fair Credit Billing Act applies to a creditor’s obligations after receiving “written notice” from a customer that the customer’s statement contains an alleged “billing error.” 15 U.S.C.S. § 1666(a).

115. See *id.* § 1666(e) (“[T]he amount required to be forfeited under this subsection may not exceed \$50”); see also *Consumer Information: Disputing Credit Card Charges*, FED. TRADE COMM’N (Aug., 2012), <http://www.consumer.ftc.gov/articles/0219-disputing-credit-card-charges> [hereinafter *Consumer Information*] (“Federal law limits your responsibility for unauthorized charges to \$50.”).

116. See *supra* note 112.

117. See *supra* note 115.

118. 15 U.S.C.S. § 1666(a)(B)(ii).

119. See *id.* § 1666(d) (“[A] creditor . . . may not, prior to the sending of the written explanation or clarification required under paragraph (B)(ii), restrict or close an account with respect to which the obligor has indicated pursuant to subsection (a) that he believes such account to contain a billing error solely because of the obligor’s failure to pay the amount indicated to be in error.”). The credit card provider also may not “threaten your credit rating, report you as delinquent, accelerate your debt. . . [or] discriminate against [consumers] who exercise their rights in good faith under the FCBA.” *Consumer Information*, *supra* note 115.

120. Frontline, *Secret History of the Credit Card: Interview with Edmund Mierzwinski*, PBS (Nov. 23, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/credit/interviews/mierzwinski.html>.

*b. Subsequent Adoption of Strict Fraud-Monitoring Programs*

Credit card companies employ far more stringent monitoring programs for fraud than programs currently used by mobile phone companies. Credit card companies focus primarily on the amount of “chargeback[s]” granted by a particular merchant to consumers<sup>121</sup>—the functional equivalent of “refund rates” in the mobile third-party billing context.<sup>122</sup> However, most of the major credit card companies investigate merchants when chargeback rates exceed 1%<sup>123</sup> (with some even lower);<sup>124</sup> this is a fraction of the refund thresholds that mobile carriers use to trigger an investigation into a content provider (ranging from 5% to nearly 20%).<sup>125</sup>

Under VISA’s monitoring program,<sup>126</sup> first-time violators receive a warning.<sup>127</sup> A second violation prompts severe “financial penalties”<sup>128</sup> unless chargebacks are reduced below the threshold within a certain period of time.<sup>129</sup> Merchants cannot exit the monitoring program until acceptable chargeback rates are maintained for “three consecutive months,”<sup>130</sup> and permanent termination from accepting VISA credit cards can occur following nine months of excessive chargebacks.<sup>131</sup>

VISA concurrently operates a more severe chargeback-monitoring program for merchants identified as “high-risk.”<sup>132</sup> Merchants designated to this program do not receive a first-time warning<sup>133</sup> and are subject to instant penalties at higher rates.<sup>134</sup> Additionally, VISA tracks “issuer reported” fraudulent transactions in order to “more quickly identify problem merchants.”<sup>135</sup>

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121. See FED. TRADE COMM’N, *supra* note 9, at 14 (noting that “credit card networks” use chargeback rates to “root out unauthorized charges”); see also VISA, CHARGEBACK MANAGEMENT GUIDELINES FOR VISA MERCHANTS 11 (2015), <https://usa.visa.com/dam/VCOM/download/merchants/chargeback-management-guidelines-for-visa-merchants.pdf> (defining a “chargeback” as the “return [of] a disputed transaction” to the customer).

122. See *supra* note 93 and accompanying text.

123. FED. TRADE COMM’N, *supra* note 9, at 14.

124. Musante, *supra* note 110, at 68, 70 (stating MasterCard’s monitoring program maintains a chargeback rate threshold of only 0.5%).

125. See *supra* note 94 and accompanying text.

126. MasterCard implements “similar programs” to Visa’s. Musante, *supra* note 110.

127. VISA, *supra* note 121, at 39 (The “[f]irst notification of excessive chargebacks for a specific merchant is considered a warning.”).

128. *Id.*; see also Musante, *supra* note 110 (noting Visa’s financial penalties for chargeback violators can include \$5,000 to \$10,000 “[f]ines” and a \$50-per-chargeback fine that increases the longer a merchant remains in the program).

129. Musante, *supra* note 110.

130. *Id.*

131. *Id.*

132. VISA, *supra* note 121, at 40 (citing “direct marketers, adult content, online pharmacies, gambling merchants, outbound telemarketers” and “travel services” as examples of “high-risk” merchants).

133. *Id.*

134. Musante, *supra* note 110.

135. *Id.*

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These monitoring programs are superior to mobile cramming detection practices in numerous ways: (1) lower chargeback thresholds detect fraudulent merchants much earlier; (2) larger financial penalties for excessive chargebacks create a greater deterrent to fraudulent practices; and (3) gathering information from sources beyond chargeback rates increases the chances of detecting and preventing all fraudulent behavior. These monitoring programs provide consumers with greater protection from fraud—an indirect result of the FCBA’s consumer liability cap.

### *2. Copy and Paste: Applying a Federally-Mandated Consumer Liability Limit to the Mobile Billing Industry*

Enacting a concrete limit on consumer liability for mobile cramming will provide consumers with the same level of protection they enjoy from credit card fraud. The financial incentive for mobile phone carriers to promote mobile cramming<sup>136</sup> demands a powerful counter-motivation. Money talks; the Federal Government must make the mobile billing industry fearful of having to “eat it” too.<sup>137</sup> This means making mobile cramming prevention a principle economic interest of phone companies and content providers. Credit card regulation has successfully accomplished this via the FCBA consumer liability cap.<sup>138</sup> Implementing the same cap on mobile cramming liability will similarly prompt committed, consumer-protection action from the mobile carriers. Accordingly, the Federal Government would be remiss not to repeat this approach in the mobile billing industry.

### *3. Additional Benefits Will Flow from a Consumer Liability Cap*

In addition to shielding consumers from economic harm, a consumer liability cap on mobile cramming will foster greater consumer trust in third-party billing as a legitimate form of payment. Consumer trust is noted as integral to economic success and adoption of a service,<sup>139</sup> and is considered especially important in

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136. See *supra* note 81–83 and accompanying text.

137. See *supra* note 120 and accompanying text.

138. See *supra* Part III.A.1.

139. See Amanda Vickers & Jackie Smith, *Why Consumer Trust is the Key to Repeat Business*, THE WISE MARKETER (Jan. 2005), <http://www.thewisemarketer.com/features/read.asp?id=54> (advising that “[t]hose looking to build lasting customer relationships must keep the old saying ‘Trust is hard won and easily lost’ constantly in their minds,” and stating that “profit depends to a surprisingly large extent upon” consumer trust); see also CHRIS HALLIBURTON & ADINA POENARU, THE ROLE OF TRUST IN CONSUMER RELATIONSHIPS 3 (2010) (noting that “[t]rust is key in guaranteeing the success of business relationships, particularly those characterized by high degrees of risk, uncertainty and vulnerability, like services,” because trust gains “consumer loyalty, which in turn leads to a longer term relationship, greater share of wallet, and higher advocacy or word-of-mouth”).

“service-rich’ organizations” like the financial and mobile industries.<sup>140</sup> The history of credit card fraud regulation exemplifies these principles. Since the current federal regulations were implemented, the credit card exploded into a trillion dollar industry<sup>141</sup> due to an increase in consumer trust in plastic as a payment alternative.<sup>142</sup> Experts argue that the FCBA’s consumer liability limit for unauthorized credit card charges was the catalyst in garnering this trust.<sup>143</sup> Likewise, implementing a limit on consumer liability for mobile cramming will increase perceptions of security and foster greater consumer adoption of mobile third-party billing.

### CONCLUSION

Mobile cramming is a fraudulent practice that continues to threaten millions of consumers.<sup>144</sup> Currently, the Federal Trade Commission’s efforts to regulate fraud in the mobile billing industry afford little protection and enable lax industry policies.<sup>145</sup> To successfully insulate consumers from mobile cramming, the Federal Trade Commission must enact legally-mandated limits on consumer liability for crammed charges that are similar to those implemented by federal credit card regulation.<sup>146</sup> Both consumers and companies in the mobile billing industry will reap the benefits of such legislation.<sup>147</sup>

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140. See HALLIBURTON & POENARU, *supra* note 139, at 1 (“For service businesses, especially ‘service-rich’ organizations who have multiple customer contacts, or touch points, often over a long time period, this issue [of consumer trust] is even more critical.”).

141. Payments made by U.S. consumers with credit cards issued by the country’s seven largest lenders totaled over \$1.84 trillion in 2014. Trefis Team, *Q4 2014 Bank Review: Credit Card Payment Volumes*, FORBES.COM (Mar. 2, 2015, 8:36 AM), <http://www.forbes.com/sites/greatspeculations/2015/03/02/q4-2014-bank-review-credit-card-payment-volumes/>.

142. See Frontline, *supra* note 120 (explaining that “the \$50 limit [on consumer liability for fraud] is what caused the credit card industry to grow so much, because it gave consumers trust . . .”).

143. See *supra* note 142.

144. See *supra* Part I.

145. See *supra* Part II.

146. See *supra* Part III.

147. See *supra* Part III.A.2.–3.