

Testimony of Vermont Attorney General William H. Sorrell before the United States Senate Committee on Commerce, Science, and Transportation

July 30, 2014

Summary

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

Cramming is a huge, nationwide problem that has been pervasive in both landline and mobile telecommunications and has cost American consumers many billions of dollars. Cramming involves consumers being charged amounts on their phone bills without authorization, usually for goods and services “sold” by third-party vendors ranging from \$9.99 to \$24.99¹ per month that the consumer neither requested nor used. Among the things that make cramming so pernicious and persistent is the continuing lack of consumer awareness that their trusted telephone carriers are able and willing to place charges on their telephone bills for goods and services sold by disreputable third parties. Not only do consumers not expect unanticipated third-party charges on their bill, they rarely recognize the charges that do appear on their bills as unauthorized third-party charges. Those few consumers that do detect unauthorized third-party

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

charges—at least with respect to mobile cramming—have not consistently been able to obtain full refunds from their carriers or the carriers’ third-party partners.

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

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

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

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

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

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

On the wireless side, the magnitude of consumer loss is equally daunting. As the Committee may be aware, my Office recently retained the University of Vermont's Center for Rural Studies to conduct a survey to determine the mobile cramming rate in Vermont for the customers of two major wireless carriers—that is, the proportion of third-party charges placed on mobile phones that were unauthorized.⁷ Through the study, a sample of 2,400 Vermonters who

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

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

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

⁷ See Jane Kolodinsky, *Mobile Phone Third-Party Charge Authorization Study: Vermont*, CENTER FOR RURAL STUDIES AT THE UNIVERSITY OF VERMONT (May 5, 2013), available at

had third-party charges placed on their mobile telephone bills during August and/or September of 2012 were contacted by my Office; we asked them about 5,388 third-party charges for a total of \$43,250.96 that had been placed on their mobile phone bills over the course of those two months. Over 60% of the surveyed consumers reported the charges were crammed, bringing consumer losses over a two month period *for these 2,400 Vermonters alone* to over \$25,950.58. Extrapolating nationwide, the Vermont survey suggests a similar survey done on a national scale would reveal that a sample of 1.2 million Americans lost \$12,975,290 to mobile cramming during August and September of 2012 *alone*. My Office believes that carriers started placing third-party charges on mobile phone bills in Vermont as early as 2006. Even if only 5% of American consumers have ever experienced third-party charges on their mobile phone bills, consumer losses for mobile cramming alone may have exceeded \$10 billion between 2007 and 2013.⁸

Cramming is a Pervasive, Nationwide and Industrywide Problem

This Committee is well aware of the depth and breadth of the landline cramming problem; I expect the Committee's work in recent years has uncovered the fact that mobile cramming is similarly nation and industrywide. Vermont, like other jurisdictions around the country, fielded an increasing number of consumer complaints about mobile cramming from

<http://ago.vermont.gov/assets/files/Mobile%20Phone%20Third-Party%20Charge%20Authorization%20Study.pdf>

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

2006 to 2013.⁹ While these complaints are voluminous, it is generally believed that they represent only a very small fraction of the consumers who have been improperly charged for third-party goods and services on their mobile phone bills.¹⁰ Nevertheless, consumer complaints implicate the entire third-party charge industry; naming more than a dozen mobile carriers and hundreds of third parties, including content providers and billing aggregators.¹¹

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

Typically, consumers complain of having been signed up for a premium text messaging subscription service (or “PSMS” subscription) without their knowledge or authorization, costing them \$9.99 or more on their mobile phone bill each month.

Some of these subscriptions purport to be for goods such as ringtones and wallpaper, but many more are for “alerts”—a service in which the content provider purports to send periodic texts to the consumer with information about weather, traffic, news, or sports, for example, or with inspirational messages, horoscopes, celebrity gossip, or trivia.

Consumers typically complain that they do not desire and do not use the goods and services for which they are being billed. Some consumers report that they do not even receive the alerts for which they have been charged.

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

¹⁰ *Id.*

¹¹ *Id.*

While consumers can sometimes recall having gotten spam text(s) or having entered their mobile phone numbers into a website immediately prior to being signed up for a subscription service (often to receive a “free” good or service), just as often— if not more often—consumers simply have absolutely no idea how they came to be signed up for the subscription.

Consumers are often crammed by more than one content provider and, many times, after they have already asked their mobile carrier to place a block on their account to stop third party billing altogether.

Consumers that detect that they have been crammed on their mobile phone bills typically do so after they have been paying for a subscription service for several months.

Even consumers who do not text and have no access to the internet (and thus, cannot have opted in to a third party good or service through a typical method) report having been crammed. Too often, these consumers are elderly.¹²

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

¹² *Letter, supra* note 9, at 3 – 4.

¹³ *Id.* at 4, 6.

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

Most Third-Party Charges are Crammed Charges

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

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

It is no secret that the landline and mobile telecommunications industries have profited to the tune of billions of dollars from placing third-party charges on landline and mobile telephone bills.¹⁷ And yet, consumers have gained very little as a result. Consumers not only report that they are crammed for third-party services that they did not want or authorize, but that they would have no reason to value such offerings. A number of the landline consumers my Office spoke to in connection with our first landline billing aggregator investigation indicated they had no

¹⁵ *Letter, supra* note 9, at 4.

¹⁶ *Hearing, supra* note 5, at 2.

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

reason to order the voicemail service for which they were charged; the respondents gave such explanations as, “[I] have an answering machine [and so] would never use this service,” “I had voicemail from the phone company [and] did not need [another service],” and “[I] can’t imagine agreeing to voicemail since we have always had a personal voice recorder.”¹⁸ Further, 73% of the consumers my Office interviewed in 2011 said they would have had no reason to purchase the goods or services for which they were billed on their mobile phone—for example, one consumer had been charged for stock alerts, but owned no stocks and did not follow the market.¹⁹ Finally, while consumers typically complain they do not desire and do not use the goods and services for which they are charged on their phone bills, some consumers report they have not even *received* the goods and services for which they have been charged.²⁰ It is, therefore, of no surprise that there was no consumer outcry following the mobile carriers’ decision to exit the Premium Short Message Service (“PSMS”) platform—widely believed to be responsible for the lion’s share of the mobile cramming problem—in November of 2013. Likewise, my Office has received no negative feedback from consumers following Vermont’s passage of the 2011 ban on most third-party charges on landline bills. The only logical conclusion: contrary to industry talking points,²¹ very few, if any, consumers received any real value from this billion-dollar industry.

¹⁸ *Hearing, supra* note 5, at 2.

¹⁹ *Letter, supra* note 9, at 4.

²⁰ *Id.* at 3.

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

Cramming goes Undetected by Consumers

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

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

²² Kolodinsky, *supra* note 7, at 8.

²³ Letter, *supra* note 9, at 4.

²⁴ Hearing, *supra* note 5, at 2.

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

While consumers can sometimes recall having gotten spam text(s) or having entered their mobile phone numbers into a website immediately prior to being signed up for a subscription service (often to receive a “free” good or service), just as often— if not more often—consumers simply have absolutely no idea how they came to be signed up for the subscription.

Consumers that detect that they have been crammed on their mobile phone bills typically do so after they have been paying for a subscription service for several months.

Even consumers who do not text and have no access to the internet (and thus, cannot have opted in to a third party good or service through a typical double opt-in method) report having been crammed. Too often, these consumers are elderly.²⁵

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

²⁵ *Letter, supra* note 9, at 3 – 4.

²⁶ *Id.* at 7.

²⁷ *Id.* at 3, n. 4 (explaining that national consumers named the following third parties and/or campaigns in their complaints: “General Texting,” “General Texting Co.,” “General Texting, LLC,” “General Texting.com,” “Premium Axxess,”[sic], “Premium Customer Care,” “Premium SMS,” “Premium Text Messaging,” “Text Savings,” and “Text Savings, LLC.”).

provided by third parties.²⁸ As a result, consumers are typically charged on their mobile phone bills for third-party subscriptions for multiple months before they recognize they have been crammed.²⁹

Consumers Do Not Obtain Full Refunds for Cramming

At least with respect to mobile cramming, consumer experience with obtaining refunds is inconsistent. While some consumers are able to get full refunds from their mobile carrier, many are not.³⁰ Vermont consumers have likewise reported mixed success with obtaining refunds from their mobile carriers; while some are able to obtain full refunds, others are only able to obtain a partial refund.³¹ Still others are unable to get any refund from their mobile carrier, or are promised refunds they never receive.³² Consumers also report that carriers refer them to the third-party content provider to seek refunds, and/or that they are unable to reach the content provider, or, if they do reach the content provider, are unable to get a full, or even partial, refund.³³

The Time is Ripe for a New Approach

After over a decade of fighting landline cramming with enforcement actions against third-party merchants and billing aggregators, my Office successfully advocated for legislation

²⁸ *Letter, supra* note 9, at 7.

²⁹ *Id.*

³⁰ *Id.* at 3-4.

³¹ *Id.* at 6.

³² *Id.*

³³ *Id.* at 3-4.

prohibiting most third-party charges on landline telephone bills.³⁴ This statutory approach takes account of actual consumer expectations—*i.e.*, that consumers do *not* anticipate they will be charged on their phone bills for third-party goods and services—is straightforward to enforce, and does not interfere with other methods of receiving payment for services provided.³⁵ Most importantly, we believe the law has *worked*.³⁶

My Office decided to take another approach when turning our attention to mobile cramming. After launching dozens of investigations into third-party content providers and mobile billing aggregators, my Office began pursuing *carriers* for billing for unauthorized charges, first on behalf of Vermont, and then on behalf of—now—46 states.³⁷ In November of 2013, the nation’s four largest mobile carriers—Verizon, AT&T, Sprint and T-Mobile—decided to stop charging their customers for commercial PSMS, a platform which accounted for the majority of third-party charges on mobile phones, and for the overwhelming majority of cramming complaints.³⁸ My Office believes that billing for commercial PSMS has now ceased industry-wide, and has heard from Offices around the country that mobile-cramming complaints

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

³⁵ *Hearing, supra* note 5, at 4.

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

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

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

have slowed to a trickle, no doubt as a result. While the mobile carriers' exit of PSMS is undoubtedly very positive for consumers, it was a voluntary move on the part of industry and carries with it no guarantee of future action with regard to PSMS or other, similar platforms such as Direct to Consumer Billing ("DCB"). Non-PSMS mobile cramming complaints are few in number, but do exist.³⁹ Moreover, we expect platforms, such as DCB, that are more appropriate for consumption by consumers with smartphones (rather than feature phones, to which PSMS was keyed) to be on the rise.

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

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