Client Alert

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FTC Releases Staff Report on Mobile Phone Bill Cramming

By Obrea Poindexter and Ryan Rogers

On July 28, 2014, the Federal Trade Commission ("FTC") released a report, entitled "Mobile Cramming: An FTC Staff Report" ("Report"). The Report focuses on, and makes recommendations regarding, the mobile payment option typically referred to as "carrier billing." The Report describes this payment option as the means by which consumers "charge payments for third-party goods and services to their mobile phone accounts." The Report is a follow up to the FTC roundtable held in May 2013 that also focused on carrier billing. This latest action demonstrates the FTC's ongoing interest in addressing fraudulent practices that result in unauthorized third-party charges to consumer mobile phone accounts.

FTC CONCERNS

The focus of the Report is on "cramming," which is described by FTC staff as the placement of unauthorized third-party charges on a phone account. In the Report, FTC staff explains that cramming has become more of a problem in recent years because consumers "frequently overlook" unauthorized charges on their mobile phone bills and often pay their bills in full, notwithstanding such charges. For example, FTC staff notes that consumers may not notice unauthorized charges on their mobile phone accounts when they use:

- Auto bill-pay or paperless billing;
- A family plan with multiple connected phones; or
- A prepaid mobile phone where the consumer does not receive a bill.

FTC staff notes in the Report that the ability to post unauthorized charges to consumer phone bills in circumstances where consumers may not actively monitor such charges leaves consumers vulnerable to being scammed. The Report also points to apparent increases in carrier refund rates—the equivalent of credit card or ACH chargeback rates—and consumer complaints as indicators that cramming is a growing problem. With respect to an upward trend in consumer complaints, FTC staff speculates that the "vast majority of fraudulent conduct" is not reported to government agencies and that increased consumer complaints likely reflect only the "'tip of the iceberg'" (*i.e.*, that the number of incidents of actual consumer injury might be higher).

FTC RECOMMENDATIONS

FTC staff recommends various actions that could to be taken to address the problems they have associated with cramming, and the Report includes staff explanations for each approach. As outlined below, FTC staff recommends several measures to address cramming, including: (1) providing consumers the option of blocking third-party charges at the inception of a consumer relationship; (2) identifying bad actors and preventing them from being part of carrier-billing arrangements; (3) ensuring that third-party charges are adequately disclosed; (4) establishing a consistent dispute resolution and refund process; and (5) providing for informed consumer consent for third-party charges.

- **Ability to Block Charges**. The Report states that "all wireless providers should give consumers the option to block all third-party charges from their mobile phone accounts," even for those types of charges—such as charitable donations—that have not been a focus of consumer complaints. Under this approach, when signing up for mobile services, consumers would be informed that third-party charges may be placed on their accounts and would be given the opportunity to block all charges at that time. This type of blocking option, according to FTC staff, would help consumers who want to avoid third-party charges.
- **Addressing Bad Actors**. FTC staff also recommends that telecommunications carriers and billing intermediaries implement "reasonable procedures" to assess the practices of potentially risky or suspicious merchants and to terminate or take other appropriate action against merchant participants that engage in harmful or deceptive practices. In the Report, FTC staff notes that this is the same type of approach used by payments system participants in the payment card and ACH processing industries.
- **Disclosure of Charges**. To assist consumers in identifying third-party charges on a mobile phone bill, FTC staff recommends that carriers clearly and conspicuously disclose all charges for third-party services in a non-deceptive manner. Specifically, FTC staff suggests that carriers should provide the name of the third-party service under an appropriate bill heading that relates to the product or service and not suggest an affiliation with the carrier's service. FTC staff also recommends that charges be disclosed in a separate part of consumers' mobile phone bills, using separate subtotals for carrier and third-party charges.
- **Dispute Resolution**. FTC staff urges telecommunications carriers to implement a consistent process for consumers to dispute suspicious charges on their mobile phone accounts and obtain refunds for unauthorized charges. This recommendation is not a novel one and was included in the FTC staff report, entitled "Paper, Plastic... or Mobile?" that followed the FTC's April 2012 workshop of the same name. Read about our coverage of that report here. The FTC staff appears to be borrowing from pages out of the industry and regulatory framework applicable to payment card transactions (*e.g.*, with respect to chargebacks and error resolution procedures).
- **Consumer Consent**. In the Report, FTC staff advocates for "express, informed consent" before a consumer's mobile phone account can billed by a third party. The Report states that third-party representations regarding consumer consent have been difficult to verify in connection with enforcement actions and also suggests that, for this reason, it may be important for participants in carrier-billing arrangements to maintain reliable records of such authorizations. The express, informed consent standard was defined in the FTC's settlement with Apple, Inc. to resolve allegations relating to billing

practices involving mobile apps used by children ("Apple Settlement").[1] As defined in the Apple Settlement, express, informed consent requires an affirmative act communicating authorization of a charge, made proximate to both an in-app activity and a clear and conspicuous disclosure of material information about the charge. Under this definition, the affirmative act and disclosure must be reasonably calculated to ensure that the person providing consent is the account holder. In addition, the standard in the Apple Settlement requires the disclosure to appear at least once per mobile device.

We will continue to follow the FTC's recommendations in this area and provide updates on developments as they occur.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.

[1] *See In the Matter of Apple Inc.*, FTC Enforcement Order, FTC File No. 112-3108, Docket No. C-4444 (March 25, 2014), *available at* http://www.ftc.gov/enforcement/cases-proceedings/112-3108/apple-inc.