ENSURING REMEDIES TO CURE CRAMMING

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I. INTRODUCTION

On July 23, 2012, the Federal Trade Commission ("FTC") called wireless telephone bill cramming "a significant consumer problem," and both the FTC and Federal Communications Commission ("FCC") have been delving into the morass of concerns regarding cramming with respect to landline (or wired) telephone billing.[1] "Cramming" occurs when a third party unaffiliated with a customer's telephone company adds charges to the telephone bills that the company sends to the customer. These charges can be for anything from horoscopes to long-distance telephone services.

Although some charges are legitimate, many (if not most) are unauthorized. Furthermore, these changes are problematic for consumers who do not realize that the charges have been added to their bills because the charges are relatively small. In addition, many consumers have their bills sent to them electronically (generally referred to as "e-billing"), and have their bill payments automatically debited from their bank accounts or credit cards (generally referred to as "auto-pay"). Telephone companies strongly encourage consumers to enroll in such e-billing and auto-pay programs in order to save printing and mailing costs, and to assure prompt bill payment. However, e-billing works in tandem with auto-payment to hinder consumers' awareness of third-party charges because most consumers do not take the time to log in to their accounts to inspect their bills. At the same time, telephone companies have little incentive to block third-party billings because they collect a percentage of these charges.

Cramming charges add up, and can cause even more hassles and headaches for consumers than a higher telephone bill. When consumers do notice and contact their telephone companies about a cramming charge, company representatives tell them they must

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[1] *FTC Reply Comment Before the Federal Communications Commission Concerning Placement of Unauthorized Charges on Wireless Bills, Otherwise Known as "Cramming,"* CG Docket Nos. 11-116, 09-158 and 98-170 (July 2012) (P104403) [hereinafter *FTC Reply Comment*].

contest the charges with the third-party billers directly. The third parties in question may be difficult, if not impossible, to locate. Moreover, they often provide scant customer service and insist that consumers have authorized the charges through a text message or some other unverified means. Thus it can be very difficult to get the charges reversed. Cramming victims do not have the same sort of "chargeback" remedies that they have with respect to unauthorized charges on credit cards.

The FCC and FTC continue to debate the best approach for addressing cramming on wired and wireless telephone bills. They share jurisdiction with respect to the overall problem of cramming, to the extent that the FTC regulates the billing aggregators and the FCC regulates the telephone companies. The FTC advocates for stronger regulations to protect consumers against the cramming of unauthorized charges on their wired telephone bills. More specifically, the FTC seeks to change the FCC's allowance for telephone companies to add these charges to consumers' bills. In response to a request by the FCC for comment, the FTC proposed that wireless providers should be required to give customers the option to block all third-party charges from their bills.[2]

Both the FTC and FCC have seen a surge in consumer complaints about unauthorized third-party charges on wired and wireless telephone bills.[3] However, the number of reported complaints undoubtedly understates the full extent of cramming by a substantial amount. This is because consumers often do not discover the charges, let alone have the time or resources to file complaints.[4]

Therefore, this Article proposes a remedy process for efficiently and fairly resolving consumers' complaints regarding third-party charges on their telephone bills. Specifically, it proposes an online dispute resolution ("ODR") mechanism designed to provide consumers a quick, easy to understand, and free (or low-cost) option for reporting and resolving cramming cases. Accordingly, Part II of this Article summarizes some of the issues involved in cramming debates, and Part III briefly sets forth the FCC's most recent rulings regarding cramming. Part IV summarizes the benefits of ODR, and Part V discusses key considerations in crafting online processes that provide economical and fair means for resolving cramming disputes and alerting regulators about likely fraudulent

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[2] *FTC Reply Comment, supra* note 1.

[3] *Id.*

[4] *Id.*

crammers. Part VI concludes with a call for consideration and possible adoption of such an ODR process.

II. Perils of "Cramming"

Paying by phone may be convenient for consumers, but as noted above, cramming creates problems for both telephone companies and consumers.[5] It also creates government costs as regulators attempt to catch crammers with limited time and resources. Moreover, many charges are unauthorized and consumers are left with little recourse when these charges appear on their telephone bills.

A. *Companies' and Consumers' Cramming Struggles*

Providers for both wired and wireless telephone services routinely send out bills to consumers that include not only regular telephone service charges, but also charges for other "bundled" telecommunications services such as Internet access and cable or satellite television. Consolidated billing for telecommunications services, or "bundling," is usually legitimate and beneficial for consumers and companies. It generates time and resource efficiencies for all involved, and allows companies to pass along cost savings and volume pricing to their customers. Companies also may profit from business relationships and linked marketing.

Furthermore, companies and consumers benefit from e-billing and automatic payments. E-billing allows companies to eliminate the costs of sending paper bills, and it frees consumers from additional paper mailings they may accidentally throw out with the junk mail. Automatic payments then help assure companies and consumers that payments will be made by the required due dates. Despite these benefits, e-billing and automatic payments together create an ideal environment for unauthorized cramming.

Cramming occurs when third parties outside of the "bundled" telecommunications providers add charges to consumers' telephone bills. These charges are usually for small amounts, for services ranging from special long distance access, to weekly horoscopes or pay-lot parking. These third-party charges are legiti-

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[5] *Id.*

mate when consumers authorize the charges by telephone, e-mail, or through a written contract.

This third-party billing can benefit both consumers and companies. Consumers can enjoy the convenience of paying by telephone, and delaying bill payment without adding to credit card debt. This can be especially useful for consumers who do not qualify for many credit cards, or otherwise lack other means of payment. Companies can use payment by telephone to cheaply market their services, and to lure consumers into subscriptions that generate on-going payments.

The problem is that many of these third-party charges are not authorized. Instead, third parties often sneak charges into text messages or consumers' acceptance to online contracts. Furthermore, consumers are easily caught off-guard when these charges arise from such seemingly "free" things as scholarship applications.[6] At the same time, some of these third parties are fraudulent companies that operate from undisclosed or foreign locations. They add charges to consumers' telephone bills by simply sending them to the billing companies, which rarely seek to verify the charges.

Telephone companies that receive the third-party charges are not legally responsible for ensuring the legitimacy of third-party charges. Verifying every charge would burden these companies, and result in higher telecommunications charges for consumers. Furthermore, there is little incentive for telephone companies to block or alert consumers about such charges. This is because notification would add procedural costs, and the telephone companies profit by collecting a percentage of third-party charges. The findings of a 2011 United States Senate hearing noted that in the past ten years, telephone companies profited over a billion dollars by placing third-party charges on their phone bills.[7] Verizon explained in the hearing leading to the report that it "receives a flat fee between $1 and $2 per charge for placing third-party charges"

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6 One consumer interviewed in producing a consumer outreach film noted how a company sent a scholarship application to a university e-mail list, and simply asked for name, address, and cellular phone number. After that, charges suddenly appeared on his regular phone bill with a major carrier and were ostensibly pursuant to hidden terms in the application. E-mail from Richard Emil Masana, University of Colorado at Boulder (June 1, 2010) (on file with author).

7 *Unauthorized Charges On Telephone Bills: Why Crammers Win and Consumers Lose Before the Comm. on Commerce, Sci., and Transp.,* 112th Cong. 1 (2011) (statement of Sen. John D. Rockefeller IV, Chairman, Comm. on Commerce, Sci., and Transp.) [hereinafter *Senate July 2011 Hearing*].

on its customers' bills.[8] Industry representatives also argue that it would be inefficient to provide disclosures regarding third-party billings, especially at the point-of-sale (at the time accounts are established), since most consumers will not likely face these issues.

Consumers overwhelmingly urge for stronger protections from cramming: They report endless stories of unauthorized charges appearing on their telephone bills, and vent irritations when seeking assistance from the telephone company and government regulators. Moreover, crammers often target elderly and young consumers who may be least likely to notice the charges or have resources for seeking remedies.

B. *FTC's Urgings for Stronger Regulations to Protect Consumers*

The FTC stated in its July 2012 comment to the FCC that "mobile cramming is likely to continue to grow as cramming schemes expand beyond the landline platform and mobile phones are more commonly used for payments."[9] The FTC's comment noted that cramming charges are usually under $10 a month, and thus evade easy detection.[10] Furthermore, consumers may incur these charges by replying to a text message on their wireless phone, or some other unverified means.

For these reasons, the FTC unanimously recommended default blocking of third-party billing for wired telephone bills.[11] It explained that wired third-party billing is almost always fraudulent. However, the FTC did not advocate for automatic blocking with respect to wireless telephone carriers because charities and other legitimate services are beginning to use payment by wireless telephones (often referred to as "mobile billing"). The FTC noted that mobile billing through wireless carriers can benefit consumers and companies, and builds on the expansion of smart phone usage and other mobile technologies.[12]

Still, this expansion of mobile billing opens new portals for cramming. Furthermore, many companies participate in various types of mobile financial service transactions that pose new chal-

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8 *Id.*

9 *FTC Reply Comment, supra* note 1, at 1.

10 *Id.*

11 *Id*. at 3. The Commission votes approving the comment and its submission to the FCC was 5-0. It was submitted on July 20, 2012.

12 *Id.* at 12.

lenges for regulators with respect to security and fraud.[13] At the same time, telecommunications providers claim to follow best practices to ensure fair and proper billing, but it is unclear whether these practices have been consistently followed or are even effective in stopping mobile cramming. Indeed, the FTC and FCC continue to receive a significant number of mobile cramming complaints.

Accordingly, the FTC has urged the FCC to require that all wireless providers at least offer their customers the *option* of blocking all third-party charges. The FTC also has urged wireless providers to clearly and prominently inform their customers that third-party charges may be placed on their bills. Providers also should explain how to block such charges both at the point-of-sale and when accounts are renewed. The FTC has also called for wireless providers to provide a clear and consistent process for customers to dispute suspicious charges and to obtain reimbursement. The FTC believes that such measures should be mandated by law or regulation to ensure that consumers have baseline protections.[14]

III. THE FCC'S RECENT FINAL RULE

The FCC, which regulates telecommunications providers, has not adopted the full panoply of rules that the FTC advocates. The FCC still has not adopted any cramming controls with respect to wireless telecommunication providers, and its regulations for wired providers are less stringent than what the FTC has proposed. The FCC states that it is proceeding with caution in order to minimize regulatory costs and allow the telecommunications industry to find means for policing their own practices.

Specifically, on May 24, 2012, the FCC announced a final rule on Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming") that adopts what it describes as a strong but compromising approach.[15] The rule applicable to only wired telephone carriers requires that:

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13 *See* Mark E. Budnitz, *Mobile Financial Services: The Need for a Comprehensive Consumer Protection Law*, 27 BANKING & FIN. L.REV. 213, 213-29 (2012) (noting challenges and proposing a model law).

14 *Id.*

15 Empowering Consumers To Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in-Billing Format, 77 Fed. Reg. 30915 (May 24, 2012) (to be codified at 47 C.F.R. pt. 64) [hereinafter *FCC May 24 Order*]. *See also Senate July 2011 Hearing*, *supra* note 7 (discussing the issues related to cramming).

(1) Wired carriers that offer blocking of third-party charges must clearly and conspicuously notify consumers of this option on the carrier's website, at the point-of-sale, and on the consumers' bills;
(2) Third-party charges must be placed in a section of the bill distinct from carrier charges; and
(3) The wired carrier must provide separate subtotals on the bill for carrier charges and non-carrier charges.[16]

Overall, the rules aim to require clear disclosures regarding third-party charges on wired telephone bills, but they do not require companies to verify, automatically block or otherwise take responsibility for remedying cramming on consumers' telephone bills.[17] The FCC's rule requiring that third-party charges appear in a separate section of consumers' bills therefore aims to provide means for alerting consumers of these charges. It places the burden on consumers to contact the third party, immediately address any unauthorized charges, and proactively prevent further unauthorized charges from appearing.[18]

On October 26, 2012, the FCC announced that the Office of Management and Budget ("OMB") approved, for a period of three years, the collection of information associated with the Cramming Rule announced on May 24, 2012.[19] The rules, however, did not go into effect on May 24. Instead, the requirement to place disclosures at point-of-sale and on the telephone companies' websites went into effect on November 13, 2012, and the remainder of the requirements became effective on December 26, 2012.[20] Again,

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16 *FCC May 24 Order, supra* note 15.

17 *FCC May 24 Order, supra* note 15; *Consumer Information and Disclosure; Truth-in-Billing and Billing Format*, CG Docket Nos. 11-116 and 09-158, CC Docket No. 98-170, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-42, at 21 (Apr. 27, 2012) [hereinafter *FCC Apr. 27 Report and Order*].

18 *FCC May 24 Order, supra* note 26, at 26, ¶ 65 (stating "[c]arriers that place on their telephone bills charges from third parties for non-telecommunications services must place those charges in a distinct section of the bill separate from carrier charges."). The rule also requires wireline carriers to provide separate totals for carrier and non-carrier charges. *Id*. at 20; *See also FCC Apr. 27 Report and Order, supra* note 17. The FCC has stated that the purpose of the rule is to prevent cramming from happening. *Id.*

19 Empowering Consumers To Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in-Billing Format, 77 Fed. Reg. 65320 (Oct. 26, 2012) (to be codified at 47 C.F.R. pt. 64) [hereinafter *FCC Oct. 26 Order*].

20 *See FCC April 27 Report and Order, supra* note 28. Carriers are required to make disclosures about blocking options on their websites and at the point-of-sale fifteen days after notice of OMB approval, and are required to make changes to their billing systems within sixty days after publication in the *Federal Register* of a notice that OMB approval has been obtained. *Id*. at 41.

these rules only impact wired telecommunications carriers, as the FCC has not yet issued any rules regarding wireless carriers.

As noted above, the FTC has urged the FCC to issue stronger regulations, including a mandate that telephone companies offer consumers the option of blocking all third parties from adding charges to their telephone bills.[21] Consumer advocates also have promoted an opt-in approach, which would go further to require telephone companies to block third-party charges unless consumers opt-in, or approve, the charges. However, the FCC decided that such specific blocking requirements would be premature, citing indicia that some carriers had already started to offer blocking on their own.[22] Furthermore, the FCC limited the disclosure requirement to carriers that already offer blocking options, in order to minimize compliance burdens on small carriers and increased costs of disclosures.[23] Although the FCC has asked for further comment from interested parties with respect to its cramming rulings,[24] it has maintained a measured approach and appears unlikely to shift to a more aggressive approach.[25]

IV. Benefits of ODR and OArb to Address Cramming

Computer-mediated-communication ("CMC") has allowed consumers to regularly communicate with each other and companies via e-mails, Internet chat rooms, blogs, and social networking sites like Facebook and Twitter.[26] CMC also has allowed ODR to flourish, and would be especially useful in resolving cramming disputes. This is because ODR is efficient and convenient for companies and consumers, and would be more effective than the FTC's and FCC's limited and overburdened complaint processes.

Although CMC diminishes the intimacy and relational benefits of face-to-face ("F2F") interactions, it offers flexibility and efficiencies that create great promise for expanded development and

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21 *FTC Reply Comment, supra* note 1.

22 *FCC April 27 Report and Order, supra* note 17, at 35.

23 *Id.* at 69.

24 *Id.* at 21.

25 *Id.* at 63.

26 Indeed, "the great paradox of online mediation is that it imposes an electronic distance on the parties . . . ." *Id.* at 127.

use of ODR.[27] ODR generally includes various dispute resolution processes that minimize or dispel the need for F2F communications by utilizing Skype, instant messaging, e-mail, and other CMC.[28] It is attractive for companies and consumers for the cost and time savings, especially with respect to small claims that consumers often cannot pursue in light of costs related to F2F dispute resolution.[29] This is why the FTC became interested in fostering ODR over twelve years ago.[30]

Since that time, ODR has slowly expanded.[31] Although ODR has uncertainties and security issues, its benefits outweigh its costs. ODR allows for flexible scheduling and asynchronous communication, as well as real-time dialogue.[32] Furthermore, ODR may include a wide range of CMC use, varying from Internet filing to video chat rooms. It also may use various processes as basic as numbers-focused settlement through processes such as Cybersettle's "double-blind-bidding" that use logarithms in arriving at settlement amounts deemed proper for parties' disputes.[33] ODR also has evolved to allow for online mediation and binding online arbitration (OArb).[34]

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27 *See* Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 327–29 (2008) (discussing efficiency benefits of ODR).

28 ABA Task Force on Elec. Commerce & Alt. Dispute Resolution, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415, 419 (2002) [hereinafter *ABA 2002 Report*] (broadly defining ODR).

29 *See* Ethan Katsh & Leah Wing, *Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future*, 38 U. TOL. L. REV. 19, 19–31 (2006) (discussing benefits of ODR); Philippe Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 OHIO ST. J. ON DISP. RESOL. 301, 302 (2008) (noting use for consumer small claims).

30 FTC, *Public Workshop: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace*, 65 Fed. Reg. 7831 (Feb. 16, 2000); FTC, *Public Roundtable on Dispute Resolution for Online Business-to-Consumer Contracts* (2001), *available at* http://www.ftc.gov/os/2001/01/cbadrfrn.htm (last visited Dec. 29, 2012).

31 *See* Katsh & Wing, *supra* note 29, at 21–31 (explaining ODR's evolution).

32 *See* Gilliéron, *supra* note 29, at 326–33 (explaining how use of ODR provides beneficial and efficient avenues for communication that may transcend benefits of the face-to-face environment in traditional ADR).

33 *See* Debi Miller-Moore & Maryann Jennings, *At the Forefront of ODR: Recent Developments at the AAA*, 62 DISP. RESOL. J. 35, 36–38 (2007) (discussing various uses of the Internet by the American Arbitration Association (AAA), including its partnership with Cybersettle).

34 Referring to binding online arbitration as OArb for ease of reference and to distinguish it from non-binding ODR methods. Amy J. Schmitz, *"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR*, 62 BAYLOR L. REV. 178, 240–43 (2010) (discussing how online arbitration (OArb) opens new avenues for consumers to obtain remedies on their contract complaints).

OArb is especially beneficial for consumers who seek substantive answers on their claims' merits and quick access to remedies. This is because it differs from other ODR processes by culminating in a final third-party determination.[35] In addition, OArb relies on evidentiary submissions, and therefore is less reliant on relational benefits of F2F interactions.[36] This is especially true with respect to cramming claims because they involve small amounts and individuals who have never met each other in person.

Litigation plays an important role in dispute resolution and development of the law, but is not necessary for resolution of all claims and can best fulfill its public functions if alternative dispute resolution ("ADR") keeps these private claims out of court.[37] Furthermore, ODR is an especially cost-effective means of ADR due to its convenience, speed, low-cost, and sustainability. Moreover, OArb offers enhanced potential to provide faster and more concrete results due to its binding nature and reliance on documentary evidence. Moving arbitration online also may help address escalating concerns regarding onerous pre-dispute consumer arbitration clauses.[38] The key is to verify that ODR is properly regulated to ensure proper notice, low cost, convenience, safety, and other indicia of fair procedures.[39]

V. KEY CONSIDERATIONS IN CRAFTING ODR TO ADDRESS CRAMMING COMPLAINTS

Consumers often give up on seeking remedies or a resolution for their cramming claims due to lack of time and resources, especially when telecommunications providers or other billers fail to provide timely resolutions through informal channels such as phone calls and e-mails.[40] Consumers are also dismayed when federal and state regulators do not respond to the cramming claims they file through governmental and other public processes. ODR

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35 *See* Schmitz, *supra* note 34, at 240-47 (discussing benefits of OArb).

36 *See id.* at 178-240.

37 *See generally* Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203 (2009) (discussing Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984), and the respective roles of litigation and settlement, or ADR, in the dispute resolution landscape).

38 *See* Schmitz, *supra* note 34, at 226–44 (discussing ODR benefits).

39 *See id.* at 226–44 (proposing regulated ODR for consumer complaint resolution).

40 *See* Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System,* 39 PEPP. L. REV. 279 (2012).

and OArb may therefore give consumers needed avenues for low-cost and convenient dispute resolution that simultaneously please companies with efficiency benefits. However, as Professors Katsh and Rifkin highlighted with respect to ODR over ten years ago, any process must be designed to address cost, convenience, trust and expertise considerations.[41]

A. *Cost*

Many merchants already include pre-dispute arbitration clauses in their consumer contracts in hopes of escaping class actions and the costs and publicity of litigation. Litigation can be expensive due to court and other legal costs, and opens the door to bad publicity and class claims. Accordingly, merchants adopt binding arbitration programs that contractually protect confidentiality and preclude class relief. Furthermore, e-merchants have become increasingly interested in using OArb programs to avoid the costs of F2F dispute resolution processes.

OArb and other ODR also offer significant savings for consumers. Cost is of course a key factor in consumers' decisions to pursue or forego claims they have against billing companies in cramming disputes, especially because the claim amounts are usually small. Consumers must balance costs of pursuing claims against the size of the claims, and temper this computation with the likelihood they will succeed and actually collect on their claims. Currently, this structure often leads consumers to forego cramming claims, but a well-designed ODR or OArb process could change the equation and make the pursuit of claims worthwhile for consumers.

OArb and other ODR are attractive alternatives for resolving consumer claims because they can be carried out more cheaply than in-person dispute resolution processes. OArb and other ODR processes save parties from the substantial expense of traveling to F2F meetings and proceedings. Cost-savings also result from use of asynchronous communication, which allows parties to communicate at different times. Parties can therefore make factual and evidentiary submissions on their own schedules, without having to miss work or arrange for childcare. In addition, these processes

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41 Ethan Katsh & Janet Rifkin, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE, 74–92 (2001) (providing early materials on ODR).

may eliminate or ease parties' legal costs because they are less formal and legalistic than litigation and F2F arbitration.[42]

The low cost of these OArb and ODR services already has prompted some e-merchants to offer these services to its customers for free, or for a relatively low fee. PayPal, for example, offers its customers a free OArb service to access speedy resolution of claims with respect to their purchases on eBay. With this as a model, other companies have become increasingly interested in adopting these OArb programs not only to cut dispute resolution costs but also to garner goodwill by providing consumers with some assurance of a means for pursuing complaints if an issue arises with respect to their purchases. Policymakers also have promoted ODR and OArb for their potential for cheaply and efficiently resolving consumer disputes.

That said, the costs of OArb and ODR services increase with the complexity of the case and process. Some ODR systems may be so complex that they require additional training and legal representation. Disputants also may incur extra costs in purchasing technological equipment and high-speed Internet access necessary for adequately presenting their cases. Services offered by merchants for free also may be biased toward these merchants as repeat players paying the arbitrators' fees. Still, trustmark programs like the Better Business Bureau's ("BBB") seal could be linked with an OArb or ODR program to promote commercial honesty and address bias concerns (discussed below).

Accordingly, a well-designed ODR or OArb system should address these relative cost and bias concerns. With respect to cramming, the FCC or FTC may subsidize the process or require billing companies to share the costs in order to spread the expense for companies and make it free for consumers.[43] Companies also could fund a process controlled by a properly regulated and independent third party.[44] Dispute resolution providers also can ease consumers' up-front costs by allowing for payment of fees after dis-

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[42] *See* Gilliéron *supra* note 29, at 323–24 (addressing OArb's lack of location connections and tendency to rely on general principles).

[43] *See* Thomas Schultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, 6 N.C. J. L. & TECH. 71, 89–93 (2004).

[44] Government-provided dispute resolution services can be very effective and help consumers obtain remedies through a trusted system. *See, e.g.*, Daniel Schwarcz, *Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict*, 83 TUL. L. REV. 735, 742–50, 783–85, 803–04 (2009) (discussing government programs for resolving consumers' financial services claims). However, this may not be feasible or wise in light of budgetary constraints.

putes are resolved. Some providers already allow for allocation of costs in the arbitration award in order to ease access problems caused by high up-front fees, such as those that have been criticized for their "chilling effect" on claims in F2F arbitration.[45] Post-resolution fee payment also may help consumers feel more comfortable in submitting disputes to an unseen online arbitrator for final resolution.

B. *Convenient, Efficient and Effective Communications*

Convenience coincides with costs and efficiency to the extent that both parties generally find dispute resolution processes more convenient if they are relatively cheap and efficient. Companies and consumers also may prefer online to F2F dispute resolution processes due to convenience regardless of clear economic costs. Indeed, individuals pay great amounts for smartphones due to their convenience, and would eagerly pay to be able to resolve their disputes using these devices in lieu of going to court. Convenient and efficient online processes, however, must be secure and should not leave parties dissatisfied by cutting off their ability to adequately present their claims and feel "heard." ODR and OArb processes therefore must be designed with sufficient flexibility and innovation to allow for emotive and effective communications.

1. Flexible Communications

ODR and OArb are generally more convenient than F2F litigation, arbitration, or other ADR processes because they save parties from having to attend hearings or meetings in person. They also save parties from the time and hassle of locating and traveling to hearing sites, let alone facing the difficulties of arranging childcare or missing work.

Asynchronous communication also enhances OArb's convenience. For example, company personnel who handle disputes presumably prefer to respond to work-related ODR communications during the work day. However, consumer complainants may be working or caring for children during the day, and therefore only have the time to deal with their claims in the evening after getting home from work and putting the children to bed. Asynchronous

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[45] *See* Mazera v. Varsity Ford Mgmt. Servs., 565 F.3d 997, 1004 (6th Cir. 2009) (highlighting how up-front payment of arbitration fees can chill consumer claims).

communication therefore addresses these different scheduling challenges.

At the same time, asynchronous communication is usually quite effective in OArb due to its reliance on evidentiary submissions. Furthermore, online processes may be supplemented with Skype or other teleconferencing methods where necessary for cross-examination and full assessment of witness credibility. OArb and other ODR providers should therefore allow for asynchronous submission of party statements, briefs, affidavits, and other evidentiary documents. However, dispute resolution providers must use their discretion to require that the parties have virtual meetings when necessary for real-time witness testimony and party presentations. The key is for arbitrators to foster the flexibility of OArb processes while remaining attuned to the needs of each particular case.

2. Time-Restricted and Tailored Processes

Convenience and cost-savings disappear when dispute resolution processes are delayed and seem never-ending. Indeed, this is a main criticism of litigation due to courts' backlogs and sometimes indeterminate schedules.[46] Furthermore, F2F arbitration and other ADR processes can suffer similar lag when there are difficulties in setting meetings and hearings that fit parties' varied schedules, as well as the neutrals' own "day job" responsibilities as practicing lawyers or other relevant employment.[47]

Although OArb and other ODR processes can avoid these scheduling and time issues, they can fall prey to delays when the process is not time-restricted. For example, an online process becomes a nuisance if parties do not respond to communications in a timely manner. Processes also are ineffective if parties are permitted to submit additional evidence and arguments indefinitely.

Accordingly, OArb and ODR must be properly controlled and time-limited. Online arbitrators, in particular, should take charge of disputes as the neutrals who issue binding determinations. These arbitrators should insist on timely evidentiary submissions, and exercise their discretion in curtailing the volume of evidentiary submissions. Arbitrators' power to impose sanctions against recal-

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46 *See* James P. George, *Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. L. 293, 300 (2006) (noting that delays in the litigation process, particularly case backlogs, are a criticism of litigation).

47 Unlike judges, arbitrators generally only decide disputes part-time or "on the side," and are often very busy with their own legal practices.

citrant parties also may help ensure parties' compliance with deadlines and evidentiary limits. The arbitrators should then abide by strict rules that require them to issue awards shortly after submissions are closed, usually within seven to fourteen days.

3. Innovative Technologies and Techniques

Tailored and time-restricted ODR and OArb processes should not squelch expression or hinder parties' abilities to adequately present their cases. Regimented blind-bidding processes for trading settlement offers and demands may quickly end disputes, but they do not allow parties to tell their stories or obtain substantive determinations of their claims. Disputants sometimes just want to swap settlement numbers. However, cramming and other disputes often involve evidentiary questions and grey issues the parties want answered. This is where OArb can provide a more satisfactory process than simple number-swapping.

It is therefore important for OArb to remain efficient but allow for various types of presentations and submissions. Currently used CMC methods such as documentary submissions, e-mails, chat rooms, and video-conferencing may be more than sufficient for resolving many cases. However, OArb could make better use of Skype and other teleconferencing methods when necessary for more effective presentation of parties' arguments or witnesses' testimonies. Real-time video also may ease intimidation of writing for some, and enhance the arbitrators' assessment of witness credibility.

In addition, voice transcription programs that convert a computer user's spoken words into text can be helpful for those who have trouble typing.[48] They also can be coupled with translation to bridge lingual divides.[49] Although these programs can be expensive and still are under development, they do help individuals to engage in dialogue regardless of their native languages and typing skills.

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[48] *See, e.g.*, NCH SOFTWARE, http://www.nch.com.au/express/index.html (last visited Dec. 26, 2009).

[49] *See, e.g.*, KWINTESSENTIAL FOREIGN LANGUAGE TRANSLATION AND TRANSCRIPTION SERVICE, http://www.kwintessential.co.uk/translation/transcription.html (last visited Feb. 9, 2013).

C. *Trust*

Trust is important with respect to ODR and OArb, just as it is with any online dealings. Consumers and companies will not submit disputes to a process they do not trust.[50] Merchants that require consumers to resolve disputes through online processes and those that provide these processes must earn trust through forthright, honest and reliable service. They should develop, post, and abide by due process protocols that call for clear notice and how to obtain information regarding resolution processes. Trust also should be fostered through consumer education, provider registration, and verified trustmarks.

1. Disclosure and Consumer Education

An initial step for building trust is to establish merchant disclosure rules for contract terms requiring consumers to resolve disputes through ODR or OArb.[51] This could be done through a required rubric that e-merchants could conspicuously post on their sites with basic information about the merchants' use of OArb, how it works, its binding effects, any consumer fees, and secure links for filing claims and gathering further information. The information could be presented in an easy-to-read grid, like that required for credit card statements. Such a disclosure should be noticeable and user-friendly, and not cause information overload that dissuades consumers from reading the terms.

At the same time, dispute resolution providers could help consumers understand their processes and feel more comfortable resolving disputes online by posting resources and establishing free simulation exercises parties can use in preparing claims. Many providers already explain their processes on their websites, and some post demonstrations and additional resources. For example, the Electronic Courthouse sets forth eight clear steps for how the OArb process works on its website, along with links to its rules of

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50 *See* Katsh & Rifkin, *supra* note 52, at 88.

51 *See* Yeon-Koo Che & Albert H. Choi, *Shrink-Wraps: Who Should Bear the Cost of Communicating Mass-Market Contract Terms?*, JOHN M. OLIN L. & ECON. RES. PAPER SERIES, PAPER NO. 2009–15, 1–4 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1384682 (proposing enforcement of disclosure ("duty to speak") by requiring an easy-to-read format for disclosure or imposing buyer-friendly terms on sellers who fail to provide sufficient disclosures).

procedure and example cases.[52] The website also walks interested parties through a sample case.

Disclosure requirements should not be that difficult or costly to implement, and would benefit consumers and companies alike.[53] Consumers would benefit from the education regarding their e-purchases and options for resolution of disputes. They also value transparency more generally, and clear disclosures ease consumers' negativity toward companies they fear as untrustworthy. Companies therefore may be inclined to accept the minimal costs of increased or regulated disclosure in order to attract customers and foster goodwill.

Independent public and private initiatives also should bolster consumer education about OArb and ODR options, as well as various online complaint processes. Currently, consumers are surprisingly unaware of the online dispute resolution and complaints processes in existence. Accordingly, there should be announcements and independent portals with basic information about existing OArb, ODR, and complaint-handling options. With respect to cramming, the FTC and FCC could bolster these portals at minimal to no cost. These resources must be straightforward, and not simply add to information overload or confuse consumers with superfluous legal jargon.

2. Provider Regulation

Currently, there are no licensing or registration requirements for ODR or OArb providers. Instead, consumers are vulnerable to illegitimate and incompetent services, and some providers are very difficult to contact. They should therefore be subject to registration requirements that mandate, among other things, procedural fairness rules and proper training for mediators and arbitrators. Such registration would help give providers and their neutrals incentive to remain unbiased and balanced, and empower consumers to gain familiarity and comfort with an ODR or OArb process.[54]

Also, such registration would comport with current momentum for enhanced consumer protection initiatives launched by the

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52 The Electronic Courthouse, *How it Works*, http://www.electroniccourthouse.com/how_it_works_page1.php (last visited Feb. 14, 2013) (taking parties through the steps of agreeing to use OArb to obtaining a final and binding decision).

53 *See* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-standard Terms Backfire?*, 104 MICH. L. REV. 837, 838, 845–49 (2006).

54 In addition, some providers may use random arbitrator assignments to enhance independence. *See* Julia Hornle, CROSS-BORDER INTERNET DISPUTE RESOLUTION 239–42 (2009) (discussing the importance of provider and arbitrator neutrality in ODR).

Consumer Financial Protection Bureau ("CFPB"), created by the Dodd-Frank Act to protect consumers from predatory financial products and services.[55] A government entity like the FTC, FCC or the CFPB could undertake provider registration and maintenance of a searchable database. This could help ensure neutrality of the database and registration process, and build the public's trust in legitimate providers and processes.

This database should be freely accessible and easily searchable to allow consumers and companies to research and verify the legitimacy of ODR and OArb providers before using their services. It also should include arbitrators' and mediators' credentials, as well as redacted OArb opinions and reports. These posted opinions need not be complicated or expensive, but instead simply provide the parties' names, award amounts, case types, and minimal explanation.[56] Any personal or sensitive information would be redacted, or sealed if necessary, to protect confidentiality concerns.

Government custody and oversight of this database would create additional costs and duties for already overburdened public entities; however, these costs could be covered by provider registration fees. Another option would be for an independent information and communication technology ("ICT") group or another private organization unaffiliated with the providers to undertake registration and database maintenance tasks. This private independent group could replace the government in hosting a monitored database of registered providers and their neutrals.[57]

3. Oversight Through a Trustmark System

Registration may help augment legitimacy and confidence in OArb and ODR providers, but this should be coupled with a centralized seal or trustmark program for providers and companies that use these online dispute resolution processes.[58] For example, the BBB accredits, and thus provides its trustmark or seal, to com-

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55 David Cho & Michael D. Shear, *Obama Presents Bill to Create Consumer Finance Watchdog*, WASH. POST, (Jul. 1, 2009), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/06/30/AR2009063004187.html (last visited March 6, 2013) (discussing the proposal and lobbying efforts that have already begun).

56 This should add little expense or complication since this information should already be online due to the nature of the OArb process.

57 The database should be monitored and updated to help weed out providers that disappear or fail to maintain required standards.

58 Others also have offered the possibility for a seal program to boost confidence in ODR. *See* Gilliéron, *supra* note 29, at 341 (focusing on the importance and means for building trust in ODR for it to be successful).

panies that agree to and meet the "BBB Standards for Trust."[59] These standards include honoring promises, maintaining honesty and transparency in advertising and selling, and seeking to resolve disputes through internal and external means, including BBB arbitration.[60] Furthermore, companies agree to abide by any BBB arbitration decisions, such as those rendered through BBB's "Autoline Arbitration" for resolving Lemon Law and automobile defect cases between consumers and car manufacturers.[61]

Like the BBB's seal program, a trustmark system for providers and merchants who use these OArb or ODR providers must be streamlined, independent and respected. Trustmarks mean nothing if they lack an imprimatur of authenticity like that of the BBB. Accordingly, a robust trustmark system for merchants' use of OArb or ODR should be independent. The government or the same independent entity or group that maintains the provider registration database could issue and monitor the trustmark. Again, costs could be shared by online dispute resolution providers through registration fees, which they could absorb through reasonable charges to merchants that use their services. This cost-spreading would minimize individual expense for all involved, thus addressing the typical criticism of regulation.

The trustmark could be similar to the BBB's seal, and ODR and OArb providers could post the seal on their websites after successful registration. Merchants who promise to use these providers to resolve disputes with consumers could also post the seal to indicate this commitment to ODR or OArb, and provide consumers with this assurance of an online means for seeking remedies for purchase problems. A trustmark symbol on a company's website could then be electronically linked with the registration website so that consumers could easily verify the legitimacy of the trustmark, and learn about required rules for provider neutrality, training, and quality. Consumers also could consult the registration database when disputes arise in order to research individual ODR and OArb providers while choosing providers suited to resolve their disputes.

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59 *Code of Business Practices (BBB Accreditation Standard*s), http://www.bbb.org/us/bbb-accreditation-standards (last visited Mar. 30, 2013) (requiring companies seeking the BBB seal to respond to consumer claims and seek to resolve those claims without litigation).

60 *Id.*

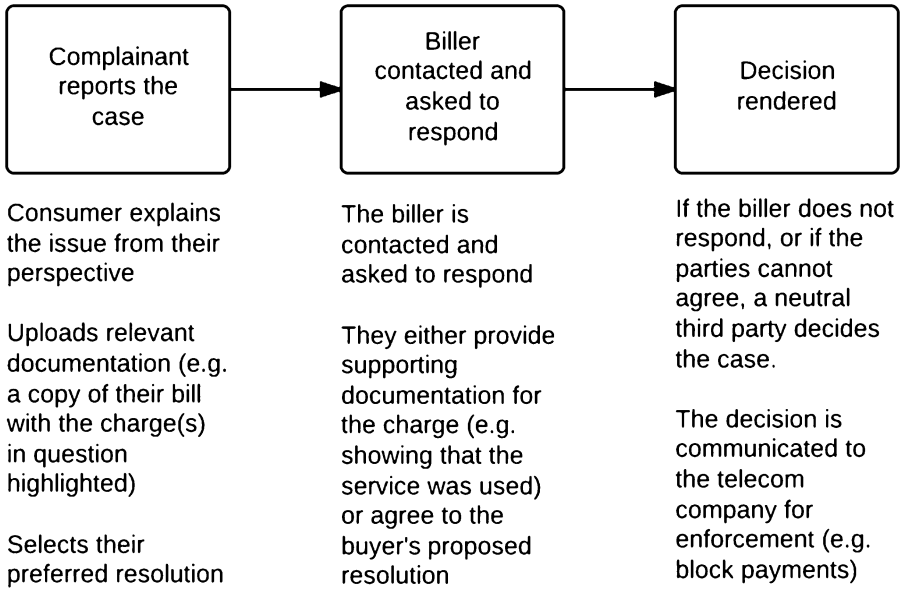
61 BBB, *Description and Rules (For All States Except California)*, *available at* http://www.bbb.org/us/auto-line/us-process/#thirtythree (last visited Mar. 6, 2013).

VI. Conclusion and Call for Consideration of a Concrete Proposal

The discussion above provides various ideas for consideration in crafting ODR and OArb processes to address consumer claims in general, but especially with respect to cramming claims. Cramming is a growing problem that deserves immediate attention, making it imperative for policymakers, researchers, consumer advocates, and industry groups to collaborate in developing means for resolving disputes regarding fraudulent third-party charges on consumers' telephone bills. This Article thus concludes with a more concrete proposal for resolving these disputes in order to advance this collaboration, and inspire development of a functioning OArb process.

To that end, I am collaborating with Mr. Colin Rule at Modria (a Silicon Valley company that designs and provides ODR and OArb processes) to create an online resolution process for efficiently and fairly resolving consumers' complaints regarding third-party charges on their telephone bills. This process is designed to provide consumers a quick and easy-to-understand option for reporting and resolving cramming cases.

The proposed design for handling cramming complaints is as follows:



- Independent dispute resolvers who are trained in the issues around cramming would handle the cases.
- Only consumers will be eligible to file cases. This would build goodwill for the companies that adopt the program.
- Telephone companies that issue the bills with the third-party charges would enforce the decisions rendered by providing refunds to their customers and blocking future charges from the third-party billers in question.
- The online process would then provide an additional portal for the companies to seek reimbursement from these billers, and report fraudulent practices to the FCC, FTC, and relevant state regulators.
- At the same time, a "trigger mechanism" would alert the FTC, FCC and other state regulators when there is an inordinate number (a defined number or a percentage based on the number of complaints filed) of proven complaints against a particular third-party biller. This would greatly assist federal and state regulators in deciding what enforcement actions to pursue with their limited resources.
- The system will be funded by relatively small contributions from the telephone companies. The online platform and efficient process, however, will keep costs low and the potential benefits of the system for the companies should outweigh these costs.
- Eventually, the costs could be shifted away from the telephone companies, and the process could be handled and paid for through the registration and trustmark systems proposed above.

Again, this is only at the proposal stage, and we eagerly invite comments and criticisms. Further research, development, and consideration are a must. Moreover, this rubric is simple at this stage, and will require more tailoring. The hope is to address the growing problems associated with cramming. It is time to generate proactive and positive discussions, and ultimately provide consumers and companies with cost-effective, convenient, and fair means for resolving cramming disputes.