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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 17-169; FCC 18-78]

Protecting Consumers from Unauthorized Carrier Changes and Related Unauthorized Charges

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission takes measures to strengthen our rules to protect consumers from slamming and cramming by codifying rules against sales call misrepresentations and cramming and revising rules to improve the effectiveness of the third-party verification (TPV) process. Slamming is an unauthorized change in a consumers' telephone provider and cramming is the placement of an unauthorized charge on the consumers' telephone bill.

DATES: Effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Richard D. Smith, Consumer and Governmental Affairs Bureau (717) 338-2797, e-mail Richard.Smith@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, document FCC 18-78, adopted on June 7, 2018, and released on June 8, 2018, in CG Docket No. 17-169. The full text of document FCC 18-78 will be available for public inspection and copying via the Commission's Electronic Comment Filing System (ECFS), and during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to

fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (844) 432-2272 (videophone), or (202) 418-0432 (TTY).

CONGRESSIONAL REVIEW ACT

The Commission will send a copy of document FCC 18-78 to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

FINAL PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

The *Report and Order* does not contain any new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Pub. L. 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Pub. L. 107-198, *see* 44 U.S.C. 3506(c)(4).

SYNOPSIS

Misrepresentations on Sales Calls

1. The Commission's recent enforcement actions reveal that misrepresentations on sales calls are a continuing source of slamming. The Commission therefore codifies a rule to prohibit material misrepresentation, including material omissions, in sales calls to further reduce the incidence of slamming. A codified rule is consistent with the Commission's statutory authority and prior enforcement actions. In addition, codifying this prohibition in our rules will provide carriers and consumers with more specific information and notice of this prohibited practice. In so doing, the Commission notes that it revised the *Slamming and Cramming NPRM's* proposed rule, published at 82 FR 37830, August 14, 2017, on sales calls by deleting the reference to "deception." The Commission finds that this term is vague and subject to an unclear interpretation absent a record to define it.

2. Upon a finding of material misrepresentation in the sales call, the consumer's authorization to change carriers will be deemed invalid even if the carrier has some evidence of consumer authorization of a switch. In this regard, our enforcement cases make clear that sales

misrepresentations may not be cured by a facially valid TPV. When a consumer's decision to switch carriers is predicated on false information provided in a sales call, that consumer's authorization to switch carriers can no longer be considered binding.

3. A codified rule is consistent with the Commission's statutory authority and prior enforcement actions. Section 201(b) of the Act states, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service [by wire or radio], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful."

The Commission has found that misrepresentations made by interstate common carriers constitute unjust and unreasonable practices under section 201(b) of the Act. Sales calls that contain misrepresentations undermine the effectiveness of the carrier's validation procedures under section 258 of the Act, and thus are an unjust and unreasonable practice that is "in connection with" the communication service that is the subject of the verification process.

4. *Material Violations.* The Commission bans only "material" misrepresentations on sales calls. In so doing, the Commission acknowledges that occasional minor or trivial inaccuracies that have no bearing on the consumer's decision to switch carriers can occur and may not rise to a level warranting enforcement action, consistent with how the Commission has exercised its enforcement discretion in the past. The Commission declines, however, to require that such misrepresentations also be "intentional." The Commission has never articulated an intentionality standard when it has penalized carriers for misrepresentations on sales calls in the past. Rather, the Commission's forfeiture policies already require that, when determining the appropriate adjustment to a base forfeiture amount (rather than whether the act is a violation), the Commission considers "egregious conduct" and "intentional violation" consistent with section 503 of the Act. The Commission believes this allows sufficient flexibility to take "intent" into consideration as an aggravating or mitigating factor when a violation of this rule occurs.

5. *Defining "Sales Call."* The Commission's slamming rules are designed to prevent a provider from switching a consumer's preferred carrier without the consumer's permission. section 258 of the Act makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." Thus, for purposes of the slamming rules, the Commission clarifies that a "sales call" is any telephone call in which a carrier encourages a subscriber to submit or execute a change in the subscriber's provider of telephone exchange service or telephone toll service.

6. *Recording Sales Calls.* The Commission declines to mandate that sales calls be recorded. Although the Commission agrees with commenters that recordings would aid in determining whether a misrepresentation occurred, the record contains unrebutted evidence that any such mandate would necessitate industry-wide installation of recording technologies, amending existing protocols with vendors that make such calls on carriers' behalf, recording large numbers of calls, and storing those records for some specified period when the vast majority of these calls do not result in consumer complaints. The principal consumer benefit of a recording mandate would be to aid enforcement, but the Commission is confident in light of the success of our prior enforcement actions that we can continue to enforce our rules even without a mandate, and nothing in the record persuades us otherwise.

7. Nonetheless, the Commission encourages carriers and their agents to record sales calls. The Commission clarifies that a consumer's allegation of a sales call misrepresentation shifts the burden of proof to the carrier making the sales call to provide persuasive evidence to rebut the claim. The Commission believes that in those instances in which a consumer has provided credible evidence of a misrepresentation that a carrier is uniquely positioned via its access to sales scripts, recordings, training, and other relevant materials relating to sales calls to proffer evidence to rebut those claims if they are without merit. In most instances, the consumer will not have access to these same materials. An accurate and complete sales call recording may be a carrier's

best such evidence, and the record indicates that at least some carriers already record calls for training and monitoring purposes. Those carriers that do not and/or choose not to record sales calls will have to develop other means to rebut credible consumer allegations of misrepresentations on sales calls.

Unauthorized Charges on Telephone Bills

8. The Commission codifies a prohibition on the placement of unauthorized charges on telephone bills. Although cramming has been a long-standing issue addressed in various enforcement actions, and the Commission has adopted truth-in-billing rules to help detect it, the Commission has never codified a rule against cramming. The Commission thus codifies in a new § 64.2401(g) of the Commission's truth-in-billing rules the prohibition against cramming that it has long enforced under section 201(b) of the Act. The Commission believes codifying the cramming prohibition for wireline and wireless carriers will act as a deterrent to this conduct. In so doing, the Commission agrees with commenters that codifying a ban against cramming provides greater clarity to interested parties and will aid its enforcement efforts. In addition, codifying this prohibition into its rules will provide consumers with more specific information and notice of this prohibited practice.

9. The Commission agrees with those commenters who contend that wireless consumers should be afforded the same consumer protections as wireline consumers when such unauthorized charges appear on their telephone bills. This approach is also consistent with the Commission's prior enforcement investigations conducted under section 201(b) holding wireless providers accountable for alleged unauthorized charges that appeared on wireless bills.

Third-Party Verification

10. *Authorizing Individual Services.* The Commission eliminates the requirement in § 64.1120(b) of its rules that carriers must obtain the authorization for each individual service sold when the carrier is selling more than one telecommunications service to a subscriber. The Commission agrees with those commenters who suggest there is minimal benefit to asking

consumers if they want to separately switch individual services based on regulatory classifications that may be outdated and unfamiliar to them.

11. *TPV Abuses.* The Commission remains concerned that the TPV process has been misused in some instances to fraudulently verify consumer authorization to switch providers. Its prior enforcement actions confirm instances of abuse of the TPV process. Although the current record does not contain a sufficient basis to eliminate this widely-used verification mechanism, the Commission believes that these documented abuses warrant additional oversight. As a result, the Commission concludes that any carrier that becomes the subject of a Commission forfeiture order through abuse of that process will be suspended for a period of five years from using the TPV process to confirm consumer switches. That will necessitate that these carriers use other recognized sources of evidence under our rules, such as a letter of agency, to confirm a consumer switch during the pendency of that suspension. The Commission notes that this suspension process will be applied only going forward from the effective date of the rules adopted in document FC 18-78. Thus, carriers and verifiers will be afforded an opportunity to take proactive measures to correct any deficiencies that have resulted in prior enforcement actions. In addition to strengthening its requirements in this action, the Commission reminds carriers that it takes violations of its rules seriously and the Commission will continue to use its enforcement authority to stop bad actors, including through substantial monetary penalties and revocation of Commission operating authorization.

Other Measures

12. In light of the enhanced consumer protections afforded by the rules adopted in document FCC 18-78, the apparent diminishing nature of the slamming and cramming problem as evidenced by recent complaint data, and the potential costs of compliance with additional requirements, the Commission declines to mandate any other changes to its rules.

FINAL REGULATORY FLEXIBILITY ANALYSIS

13. As required by the Regulatory Flexibility Act of 1980, as amended (RFA) an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Slamming and Cramming NPRM*. The Commission sought written public comment on the proposals in the *Slamming and Cramming NPRM*, including comments on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need For, and Objectives of, the Proposed Rules

14. This document FCC 18-78 adopts rules to strengthen consumer protections from slamming and cramming. Slamming is the unauthorized change of a consumer's preferred interexchange telecommunications service provider, and cramming is the placement of unauthorized charges on a consumer's telephone bill. Despite existing slamming and truth-in-billing rules, recent enforcement actions indicate that the most vulnerable consumers, including the elderly and non-English speakers, remain at significant risk of being the victims of these fraudulent practices because unscrupulous carriers often make it difficult to detect such conduct. Specifically, the Commission adopts rules designed to provide greater clarity of these existing prohibitions and assist in our enforcement actions where such conduct occurs.

15. Section 258 of the Act makes it unlawful for any telecommunication carrier to "submit or execute a change in accordance with such verification procedures as the Commission shall prescribe." The rules adopted in document FCC 18-78 will strengthen the Commission's ability to deter slamming by addressing misleading statements made in sales calls which the record confirms are a substantial factor in slamming. For example, when a consumer's decision to switch carriers is made based on false information provided in a sales call, that consumer's authorization to switch carrier will no longer be considered binding. In addition, the Commission streamlines the carrier change process by eliminating the requirement that the consumer's authorization be obtained for every service to be switched when selling more than one telecommunications service. This will improve the efficiency for both carriers and consumers

when making carrier change requests by eliminating unnecessary regulatory impediments. Finally, any telecommunications carrier that is the subject of a Commission forfeiture action will be suspended for a period of five years from using that process to confirm a consumer switch. This will ensure that greater care is taken by both carriers and verifiers to avoid TPV abuses.

16. The Commission has found on numerous instances that cramming is an “unjust and unreasonable” practice in violation of section 201(b) of the Act but has never codified a prohibition against cramming in our rules. Doing so in document FCC 18-78 provides greater clarity of this long-recognized prohibition to interested parties and will assist in our enforcement efforts of this prohibited practice.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

17. One comment was filed that specifically addressed the proposed rules and policies presented in the IRFA. Although supporting the adoption of the two proposed rules contained in the *Slamming and Cramming NPRM*, NTCA argues that the IRFA was deficient because the other measures discussed therein were vague and lacked specificity.

Response to Comments by Chief Counsel for Advocacy of Small Business Administration

18. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration, and to provide a detailed statement of any change made to the proposed rules as a result of those comments.

19. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

Small Entities Impacted

20. The rules adopted in document FCC 18-78 will affect obligations of Wireline and Wireless telecommunications carriers.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

21. In document FCC 18-78, the Commission adopt rules to enhance the existing consumer protections from slamming and cramming. Specifically, the Commission adopts rules to codify a ban on: i) material misrepresentations on sales calls for voice services; and ii) unauthorized charges on telephone bills. Although the Commission has previously held that these practices are unjust and unreasonable practices under section 201(b) of the Act, its rules have not expressly prohibited them. Because these prohibitions have been long recognized pursuant to our enforcement actions, however, they should not necessitate any new burdens for those carriers that in compliance. In addition, the Commission takes steps to improve the effectiveness of the existing carrier change process by eliminating the requirement that carriers obtain the authorization to switch each individual service when selling more than one service and by suspending any carrier for a five-year period from using the TPV process when it becomes the subject of a Commission forfeiture action.

Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

22. The RFA requires an agency to describe any significant, specifically small business alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.”

23. The rules adopted in document FCC 18-78 codify long-recognized consumer protections from slamming and cramming. In prior enforcement actions, the Commission has previously held that these practices are unjust and unreasonable practices under section 201(b) of the Act. As a result, the economic impact on affected carriers should be minimal because they impose no new requirements. In declining to adopt other measures discussed in the *Slamming and*

Cramming NPRM, the Commission has taken into consideration the potential burdens on carriers, including smaller carriers, in determining that such actions are not justified at this time. In these instances, the Commission has taken into consideration the concerns of industry commenters that the potential costs and delays that may result from these measures outweigh the potential benefits to consumers.

Ordering Clauses

Pursuant to sections 1-4, 201(b), and 258 of the Communications Act of 1934, as amended, 47 U.S.C. 151-154, 201, 258, document FCC 18-78 is ADOPTED, and part 64 of the Commission's rules, 47 CFR 64.1120 and 64.2401 are AMENDED.

The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of document FCC 18-78 to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of document FCC 18-78, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 64

Communications common carriers, Telecommunications.

Federal Communications Commission.

Marlene Dortch,
Secretary,
Office of the Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 is revised to read as follows:

Authority: 47 U.S.C. 154, 201, 202, 218, 222, 225, 226, 227, 228, 251(e), 254(k), 403(b)(2)(B), (c), 616, 620, 1401-1473, unless otherwise noted.

2. Amend § 64.1120 by revising paragraphs (a)(1)(i) and (b) to read as follows:

§ 64.1120 Verification of orders for telecommunications services.

(a) ***

(1) ***

(i) Authorization from the subscriber, subject to the following:

(A) Material misrepresentation on the sales call is prohibited. Upon a consumer's credible allegation of a sales call misrepresentation, the burden of proof shifts to the carrier making the sales call to provide persuasive evidence to rebut the claim. Upon a finding that such a material misrepresentation has occurred on a sales call, the subscriber's authorization to switch carriers will be deemed invalid.

(B) [Reserved]

(b) Any telecommunications carrier that becomes the subject of a Commission forfeiture action through a violation of the third-party verification process set forth in paragraph (c)(3) of this section will be suspended for a five-year period from utilizing the third-party verification process to confirm a carrier change.

3. Amend § 64.2401 by adding paragraph (g) to read as follows:

§64.2401 Truth-in-Billing Requirements.

* * * * *

(g) *Prohibition against unauthorized charges.* Carriers shall not place or cause to be placed on any telephone bill charges that have not been authorized by the subscriber.

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