

November 28, 2012

The Honorable Patrick Leahy, Chairman
The Honorable Chuck Grassley, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

RE: Law Enforcement Views on ECPA Reform Proposal – H.R. 2471

Dear Chairman Leahy and Ranking Member Grassley,

We have reviewed the amendments proposed by Senator Leahy to H.R. 2471 regarding the Electronic Communications Privacy Act (ECPA). We continue to have concerns relating to the proposed reforms and other issues that are not addressed in the proposal that we believe ought to be included in any effort to update the law. At stake is the ability of law enforcement to conduct effective and efficient investigations to apprehend criminals.

As we wrote in a letter dated September 18, 2012, “the crime scene of the 21st century is filled with electronic records and other digital evidence.” We also wrote that “electronic communications records often hold the key to solving the case. They also hold the key to ruling out suspects and exonerating the innocent. Our ability to access those records quickly and reliably under the law is fundamental to our ability to carry out our sworn duties to protect the public and ensure justice for victims of crime.”

Our concerns and suggestions are outlined below.

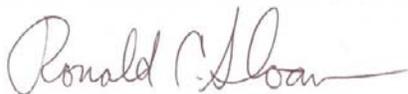
- We continue to encourage a thorough review of constructive measures to enhance service provider responsiveness to legitimate law enforcement process requests to ensure that investigative timelines are as short as possible. There is no requirement in current law for providers to respond in a timely fashion to lawful process requests by governmental entities. Some providers routinely respond in a timely way, but some do not, resulting in unnecessary investigative delays that adversely impact public safety. Any contemplated change in the law that would result in a lengthening of the investigative timeline – including moving to a probable cause standard – should be accompanied by provisions that ensure accountability and prompt response by service providers to legitimate law enforcement requests. These responsiveness issues are important to address even in the absence of an enhanced standard.
- We appreciate the changes made from the original proposal that lengthen the notification and delayed notice time periods, but we continue to have concerns about the notice provision in general. The proposed notice provisions would create unnecessary risks to investigations and undue burdens on law enforcement agencies given the potentially large number of cases in which delays would need to be sought and renewed.
- We believe that the “emergency” provision in current law (18 USC 2702(b)(8)) needs to be revisited. It puts the decision about whether a situation is an “emergency” in the hands of the provider instead of in the hands of the law enforcement experts who are on top of the situation. This has led to situations where response to legitimate law enforcement requests has been

delayed or not forthcoming at all. The proposal currently before the committee does not address this issue.

- Records retention is an issue that should be considered in any effort to update ECPA. Certain types of widely used electronic communications are not retained by some providers, which can hinder law enforcement investigations. This issue is not addressed in the current proposal before the committee and yet it will become even more important in the future.
- Preservation provisions under current law should be revisited to ensure that notification of individuals who may be the subjects of ongoing law enforcement investigations does not jeopardize those investigations. One provision of the amendment the committee is considering would cause prior notification to law enforcement before a provider notifies a customer or subscriber about the existence of a warrant, order, or subpoena, and we believe that provision is important. However, a similar provision relating to preservation should be considered. In addition, the committee should consider whether the 3-day period specified is sufficiently long to assure that the notification does not jeopardize an ongoing investigation.
- Online child exploitation investigations are particularly vulnerable to a change in the standard of proof. It has been argued that law enforcement can get everything it needs in child exploitation cases and/or emergencies because of existing provisions in Sections 2702 and 2258, but that is simply not always the case. Not only do those provisions leave the judgment of what constitutes an emergency in the hands of a provider, it is *voluntary*. A service provider is not required to disclose, even if it acknowledges that an emergency exists.
- Definitions of “content” and “non-content” information need to be clear and comprehensive. Efforts to update ECPA should include consideration of these definitions.

As we wrote in our September letter, we will rigidly adhere to whatever standard of access to electronic evidence Congress deems appropriate – just as we do today. As practitioners who spend our lives protecting citizens, we look forward to continued discussions on this important issue.

Sincerely,



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Cc: Members of the Senate Judiciary Committee