

1 REFORMING THE ELECTRONIC COMMUNICATIONS PRIVACY ACT

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WEDNESDAY, SEPTEMBER 16, 2015

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United States Senate,

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Committee on the Judiciary,

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Washington, D.C.

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The Committee met, pursuant to notice, at 10:17 a.m.,

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in room SD-226, Dirksen Senate Office Building, Hon. Charles

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E. Grassley, Chairman of the Committee, presiding.

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Present: Senators Grassley, Hatch, Sessions, Cornyn,

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Lee, Flake, Perdue, Tillis, Leahy, Whitehouse, Klobuchar,

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Franken, Coons, and Blumenthal.

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OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S.

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SENATOR FROM THE STATE OF IOWA

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Chairman Grassley. Today's hearing is intended to help

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inform the Committee about the most recent views of a wide

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variety of stakeholders concerning the need to reform the

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Electronic Communications Privacy Act--or as we know it

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around here, "ECPA"--and various ways of fixing it. The

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Committee's last hearing on the topic was 4-1/2 years ago.

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Since then, numerous proposals have been advanced by members

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of the Committee.

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In 1986, Congress enacted ECPA to both protect the

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privacy of Americans' electronic communications and to

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provide the Government with a means to access these

LISA DENNIS COURT REPORTING
(410) 729-0401

1 STATEMENT OF DANIEL SALSBURG, CHIEF COUNSEL,
2 OFFICE OF TECHNOLOGY, RESEARCH, AND INVESTIGATION,
3 BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE
4 COMMISSION, WASHINGTON, D.C.

5 Mr. Salsburg. Chairman Grassley, Ranking Member Leahy,
6 and members of the Committee, I am Dan Salsburg, the Chief
7 Counsel in the Office of Technology, Research, and
8 Investigation in the FTC's Bureau of Consumer Protection.

9 Let me begin by noting that my oral statements and
10 responses to questions are my own and they do not
11 necessarily reflect the views of the Commission or any
12 Commissioner. Having said that, I very much appreciate the
13 opportunity to present the FTC's testimony and explain how
14 proposals to amend ECPA could impact the Commission's civil
15 law enforcement mission.

16 The FTC supports the objectives of ECPA reform and
17 understands the need to update ECPA to account for
18 technological advances and to protection consumers' privacy.
19 In bringing civil law enforcement actions to protect
20 consumers, we rely heavily on our ability to conduct
21 thorough investigations of companies' business practices.

22 As a civil law enforcement agency, the FTC is concerned
23 that recent legislative proposals to update ECPA could
24 impede our ability to obtain certain information from ECPA
25 service providers in future cases. Under recent legislative

1 proposals, to obtain content from an ECPA service provider
2 the Government would need to obtain a criminal warrant,
3 which is not available to the FTC. The proposals would
4 require a warrant for all forms of content even those in
5 which a target has no reasonable expectation of privacy. We
6 are concerned that requiring a criminal warrant in three
7 situations could impede the Commission's future
8 effectiveness.

9 The first of these situations concerns previously
10 public commercial content that advertises or promotes a
11 product or service. We are talking about things like no
12 longer running advertisements, old versions of websites,
13 previously sent spam, and fleeting ads that may appear on a
14 mobile device. This class of content is critical to many
15 FTC investigations. Before determining whether a target has^s
16 made a false representation, we need to find the advertising
17 or promotional material that contains the representation. ✓

18 In many instances, especially fraud cases, the scam
19 artists change websites and electronic marketing materials
20 frequently. When Commission staff investigates complaints
21 about a website, the website currently viewable to the
22 public may be different from the one that the consumer
23 complained about.

24 Current ECPA allows us to compel a provider to produce
25 marketing materials in some circumstances. We have not used

1 this tool often. Most of the time, our investigators are
2 able to track down a target's old marketing materials
3 without needing to seek the materials from the provider.
4 But the increasingly fleeting nature of advertisements--an
5 ad on a mobile device may only appear for a few seconds, for
6 instance--makes it quite likely that we will need to compel
7 old advertising and promotional materials from a provider
8 more often.

9 An exception from the criminal warrant requirement in
10 proposed legislation for previously public commercial
11 content that advertises or promotes a product or service
12 would enable the Commission to obtain such commercial
13 content. At the same time, such an exception would have no
14 impact on privacy rights because the materials would be
15 purely commercial and have been affirmatively published by
16 the target. As a result, the target would not have a
17 reasonable expectation of privacy with respect to Government
18 access.

19 The second situation which should be exempted from the
20 criminal warrant requirement contained in recent ECPA reform
21 proposals is content with the consent of the customer. As
22 cloud computing becomes more widespread, it will be
23 increasingly important for a civil law enforcement agency to
24 be able to compel an ECPA provider to disclose content to
25 civil ^{law enforcement} ~~eliminate~~ with the customer's consent. For example, a

1 I will say that our experience is that in certain cases
2 subscribers provide full emails; in others, they don't. And
3 that becomes clear because, as you subpoena others who were
4 involved in the misconduct, you sometimes find that the
5 other people supply you with emails that the original
6 subscriber did not, and that tells you that the original
7 production was not sufficient.

8 Senator Perdue. Mr. Salsburg?

9 Mr. Salsburg. We have a similar process to the SEC
10 where our civil investigative demands are not self-
11 executing. We do need to go to a court to enforce them as
12 well.

13 In our experience, I think most targets usually comply
14 with our CIDs. If they do not, we have to ~~them~~ make a ✓
15 resource judgment call. Is it worthwhile to pursue an
16 enforcement action which is pretty lengthy and may not
17 result in us being able to get recourse for consumers
18 quickly? Or do we forgo the information and try to find the
19 necessary information in another way?

20 Senator Perdue. Okay. Thank you.

21 Thank you, Mr. Chairman.

22 Chairman Grassley. Senator Franken.

23 Senator Franken. Thank you, Mr. Chairman.

24 Mr. Salsburg, the FTC plays a key role in protecting
25 Americans' privacy, and Americans understandably care deeply