



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

THE CHAIRMAN

April 24, 2013

The Honorable Patrick J. Leahy
Chairman
Senate Judiciary Committee
United States Senate
224 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

I write in connection with the Senate Judiciary Committee's upcoming consideration of S. 607, the Electronic Communications Privacy Act Amendments Act of 2013.¹ While I appreciate your efforts to update the privacy protections for e-mail and other electronic communications for the digital age, I am concerned that the bill as currently constituted could have a significant negative impact on the Securities and Exchange Commission's enforcement efforts. For the reasons set forth below, I respectfully ask you to consider the negative impact that the legislation in its current form could have on the Commission's ability to protect investors and to assist victims of securities fraud, and would be interested in discussing with you a modest change in your proposal that would continue to address privacy concerns while also providing the Commission the authority it needs to effectively discharge its critical functions.

In carrying out its mandate to investigate violations of the federal securities laws, the Commission frequently seeks to obtain the contents of e-mail and other electronic communications. Such communications can provide direct and powerful evidence of wrongdoing. Because persons who violate the law frequently do not retain copies of incriminating communications or may choose not to provide the e-mails in response to Commission subpoenas, the SEC often has sought the contents of electronic communications directly from internet service providers (ISPs). Historically, the Commission has relied for this purpose on Section 2703(b) of the Electronic Communications Privacy Act (ECPA), which currently provides that a governmental entity may require from service providers pursuant to an administrative subpoena the disclosure of wire or electronic communications that are more than 180 days old.

A 2010 opinion from the Sixth Circuit Court of Appeals (*U.S. v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010)) has greatly impeded the SEC's ability to serve administrative subpoenas on ISPs absent the consent of the subscriber. In *Warshak*, a case involving the Department of Justice, the court held that the use of a Section 2703(b) subpoena or court order to obtain the contents of e-mails violated the Fourth Amendment's prohibition against warrantless searches. The ECPA amendments being proposed essentially would codify *Warshak*, permitting

¹ The views expressed in this letter are my own and do not necessarily reflect the views of the full Commission.

federal governmental entities to obtain the content of e-mails from ISPs only if it were to obtain a warrant pursuant to the Federal Rules of Criminal Procedure. Such a structure essentially would foreclose the Commission – a civil federal agency – from gaining access to this information directly from ISPs absent consent of the entity being investigated.

Some have asserted that the Commission could avoid the negative consequences of the Act by simply subpoenaing the e-mails directly from the individuals being investigated. Unfortunately, individual account holders sometimes delete responsive e-mails, or otherwise fail to provide them, notwithstanding subpoenas that call for their complete production. Indeed, it is not surprising that individuals who violate the law are often reluctant to produce evidence of their own misconduct. Subpoenas to individuals also can be more effective if the subpoena recipient knows the Commission has the ability to go to an ISP and test whether they have fully responded to the subpoena. If individuals being investigated know the Commission lacks that ability, it could encourage them to be less forthcoming in their productions. In order for the Commission to obtain this important evidence and create a complete investigative record, it needs to preserve the authority to subpoena the ISPs to obtain any deleted or otherwise not available – or not produced – e-mails.

A case filed last year against two individuals demonstrates the importance of the authority. The civil action against these individuals alleged that over a period of years they engaged in a scheme to artificially inflate the financial results of a publicly owned retailer by engaging in a series of fraudulent “round-trip transactions.” As alleged in the complaint, one of the individuals had sent himself an e-mail describing the publicly owned company’s commitment to buy certain products and services at inflated prices, and stating “the fake credits that were negotiated with” the company were being used “to hit certain quarterly numbers.” During the Commission’s investigation (and pre-*Warshak*), the Commission obtained this key e-mail through an ECPA subpoena to the individual’s ISP. This evidence was particularly important because, as alleged in the complaint, the defendants had carefully concealed their scheme. At the time the Commission subpoenaed the ISP, the individual had failed to produce his personal e-mail in response to a document subpoena the SEC had issued him almost a year earlier. Thus, absent ECPA authority to subpoena the ISP directly, the Commission would not have had in its possession this critical piece of evidence.

Others have asserted that the Commission can simply work with the Department of Justice (DOJ) to get criminal search warrants. The reality is that to force the Commission to rely on DOJ to obtain search warrants in this context is impractical in most cases and ignores the significant differences in our respective jurisdictions. First, DOJ only has authority to seek search warrants to advance its own investigations, not SEC investigations. Thus, the Commission cannot request that the DOJ apply for a search warrant on the SEC’s behalf. Second, many SEC investigations of potential civil securities law violations do not involve a parallel criminal investigation, and thus there is no practical potential avenue for obtaining a search warrant in those cases. The large category of cases handled by the SEC without criminal involvement, however, have real investor impact, and are vital to our ability to protect – and, where feasible, make whole – harmed investors.

Instead of effectively foreclosing the Commission from obtaining these electronic communications from the ISP, it would strike a better balance between privacy interests and the protection of investors to provide federal civil law enforcement agencies a viable avenue for obtaining the information in appropriate circumstances upon the approval of a federal district court. Specifically, a mechanism could be included in the proposed ECPA amendments to enable a federal civil agency to obtain electronic communications from an ISP for use in a civil enforcement investigation upon satisfying a judicial standard comparable to the one that governs receipt of a criminal warrant. I believe this approach would continue to address the privacy concerns animating your proposal while at the same time preserving a legitimate mechanism for the SEC, in appropriate circumstances and with court approval, to obtain much needed electronic communications from the ISPs.

I would be happy to discuss these issues with you in more detail or to provide you or your staff with legislative language for your consideration. Thank you in advance for your consideration of the impact S. 607 would have on the Commission's enforcement program. Should you wish to discuss these issues further, please do not hesitate to contact me at (202) 551-2100 or have your staff contact Tim Henseler, Acting Director of the SEC's Office of Legislative and Intergovernmental Affairs, at (202) 551-2015.

Sincerely,



Mary Jo White
Chair

cc: Members of the Senate Judiciary Committee