



OFFICE OF THE  
INVESTOR ADVOCATE

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

May 25, 2016

The Honorable Charles Grassley  
Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Patrick J. Leahy  
Ranking Member  
Committee on the Judiciary  
United States Senate  
437 Russell Senate Office Building  
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Leahy,

In its current form, the Electronic Communications Privacy Act Amendments Act of 2015 (S. 356) would require government agencies to obtain criminal warrants when they seek emails and other electronic communications from internet service providers. Because the Securities and Exchange Commission does not have criminal law enforcement powers and therefore lacks the authority to apply for search warrants, the bill would inhibit the SEC in its mission of protecting investors and promoting confidence in the U.S. capital markets. I urge you to support a modest amendment to the bill that would give the SEC and similar civil enforcement agencies the ability to obtain important evidence of abusive practices. Such an exception could be narrowly drawn to protect privacy rights by requiring a robust review and approval process that is the functional equivalent of an application for a search warrant.

Prior to joining the SEC as its first official Investor Advocate,<sup>1</sup> I spent most of my career handling enforcement matters at the Office of the Kansas Securities Commissioner. I litigated a variety of cases, from administrative hearings to civil injunctive proceedings to criminal prosecution. As a result, I am familiar with the procedures for obtaining criminal search warrants and civil subpoenas. Unfortunately, I also have witnessed firsthand the devastating

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<sup>1</sup> Pursuant to 15 U.S.C. § 78d(g)(4), the Investor Advocate at the U.S. Securities and Exchange Commission is required to identify problematic products and practices that impact investors, and to recommend to Congress any legislative, administrative, or personnel changes that may be appropriate to mitigate problems identified and to promote the interests of investors. The views expressed herein are my own and do not necessarily reflect the views of the Commission, the Commissioners, or staff of the Commission.

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harm investors can suffer as a result of securities law violations. Nest-eggs built up over a lifetime of hard work are tempting targets for unscrupulous actors, and I have personally dealt with victims whose retirement dreams were shattered and had no recourse but to return to work.

At the federal level, criminal prosecution authority for securities fraud and related crimes rests with the Department of Justice. However, the SEC has a vital role to play through its civil enforcement authority. A core part of its mission—its very reason for existence—is to protect investors, and this is accomplished largely through its enforcement program. Through rigorous enforcement, the SEC punishes wrongdoing and deters future misconduct.

Public confidence in the capital markets is diminished when the SEC is perceived as weak. Regrettably, in its current form, S. 356 would significantly impair the SEC's ability to do its job because bad actors do not tend to produce evidence of their own bad acts. Instead, the evidence must be obtained from third parties. By hamstringing the SEC's investigative abilities, the well-intentioned bill would contribute to a negative perception of the SEC as a weak regulatory agency. In this respect, S. 356 moves in the wrong direction and would further erode investors' confidence in the capital markets.

For these reasons, I urge you to amend the bill to provide a mechanism for civil enforcement agencies to obtain electronic communications from internet service providers and other storage companies under limited circumstances. SEC Enforcement Director Andrew Ceresney, in his testimony before the Committee, and a unanimous Commission, in a letter to Chairman Grassley dated May 11, 2016, suggested requiring civil law enforcement agencies to obtain a court order and satisfy a judicial standard comparable to the one that governs criminal warrants. In my view, it would be preferable to carve out a broad exception for SEC subpoenas rather than requiring the functional equivalent of a search warrant. Nonetheless, in the interest of protecting consumers' important privacy rights, I believe a reasonable compromise can be achieved, and I would encourage you to adopt an amendment along the lines they suggested.

Please call me at (202) 551-3302 if you have any questions.

Sincerely,  
  
Rick A. Fleming  
Investor Advocate

cc: Members of Senate Committee on the Judiciary