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1100 Connecticut Avenue NW ▪ Suite 900 ▪ Washington, DC 20036

Phone: 202-293-1550 ▪ www.fleoa.org



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June 10, 2016

The Honorable Charles E. Grassley
Chairman, Judiciary Committee
United States Senate
Dirksen Bldg, Room 224
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member, Judiciary Committee
United States Senate
Dirksen Bldg., Room 152
Washington, DC 20510

Dear Chairman Grassley and Ranking Member Leahy:

The Federal Law Enforcement Officers Association (FLEOA) – the nation's largest non-partisan professional association which represents federal law enforcement officers from every federal law enforcement agency, including the FBI – strongly supports Senator Cornyn's effort to address issues related to Electronic Communication Transactional Records (ECTRs) during the Senate Judiciary Committee's consideration of S. 356, the *Electronic Communications Privacy Act Amendments Act of 2015*. The amendment, referred to as the "ECTR Fix," would update electronic privacy laws and would help the FBI effectively investigate and thwart terrorist plots.

The ECTR amendment would correct an oversight in the law that has impeded the FBI's ability to obtain these records in national security cases on a timely basis. In Counterterrorism and counterintelligence investigations, telephone toll records and electronic communications transactional records are key components. It's important to distinguish that these electronic communications are metadata, not content. Section 2709 of Title 18 permits the FBI to collect this data with a national security letter so long as the information is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." The metadata from these records are critical when the content of terrorist communications are increasingly beyond the reach of lawful process because of the widespread deployment of strong encryption software.

As originally enacted, Section 2709(a) established a duty for wire and electronic service providers to comply with an FBI request for "subscriber information and toll billing records information, or electronic communications transactional records," and subsection (b) provided the means by which the FBI could make such requests. Section 2709(b), however, did not specify the information that the FBI could request. Instead, it referred "any such information and records" as described in subsection (a).

Congress amended Section 2709(b) in 1993 to specify that the "subscriber information" that a certification could request consisted of "name, address, length of service, and toll billing records." No changes were made to the

authority to obtain electronic communications transactional records. However, while Section 2709(a) still required production of electronic communications transactional records, removal of the phrase “any such information and records” left subsection (b) without any specific reference to the electronic communications transactional records referenced in subsection (a). Nonetheless, Congress clearly intended Section 2709 to continue to serve as a means of obtaining electronic communications transactional records, as subsection (a) continued to refer to a duty to produce such records on request, and the title of the provision continued to reference “transactional records.”

For over fifteen years – including the eight years after 9/11 – the FBI continued to use Section 2709 to gather electronic communications transactional records. Significantly, this authority was never used to acquire these records indiscriminately or in bulk. However, the recently-passed USA FREEDOM Act specifically prohibits doing so. In 2009, however, some electronic communications service providers began refusing to comply with these requests, citing the scrivener’s error referenced above. The number of providers refusing to do so has increased over the years. In certain cases, the FBI has sought the records using other authorities, but those authorities take significantly more time and resources than using Section 2709.

This section of the bill would amend Section 2709 to reflect the original intent of Congress by clarifying the types of “telephone toll and transactional records” that the FBI used it to obtain for many years, while explicitly prohibiting the collection of communications content.

In December 2015, FBI Director James Comey summed up the critical importance of the ETCR amendment when he testified before the Senate Judiciary Committee. He said, clarifying this authority “would be enormously helpful. There is essentially a typo in the law that was passed a number of years ago that requires us to get records, ordinary transaction records that we can get in most contexts with a non-court order, because it doesn’t involve content of any kind, to go to the FISA court to get a court order to get these records. Nobody intended that. Nobody I’ve heard thinks that that's necessary. It would save us a tremendous amount of work hours if we could fix that, without any compromise to anyone’s civil liberties or civil rights.”

The ECTR amendment is necessary to protect America from terrorist threats and transnational criminal organizations. I strongly urge you to consider adopting the ETCR Fix as part of S. 356 the Electronic Communications Privacy Act Amendments Act.

Respectively,

Nathan R. Catura

FLEOA National President