

Union Calendar No. 273

117TH CONGRESS
2D SESSION

H. R. 7072

[Report No. 117-361]

To amend title 18, United States Code, to modify delayed notice requirements,
and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 15, 2022

Mr. NADLER (for himself and Mr. FITZGERALD) introduced the following bill;
which was referred to the Committee on the Judiciary

JUNE 13, 2022

Additional sponsors: Ms. ROSS, Mr. BUCK, Mr. CICILLINE, Mr. TIFFANY, Mr.
STANTON, and Mr. MCCLINTOCK

JUNE 13, 2022

Reported with an amendment, committed to the Committee of the Whole
House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in *italie*]

[For text of introduced bill, see copy of bill as introduced on December 14, 2021]

A BILL

To amend title 18, United States Code, to modify delayed notice requirements, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 *This Act may be cited as the “NDO Fairness Act”.*

5 **SEC. 2. DELAY OF NOTIFICATION.**

6 *Section 2705(a) of title 18, United States Code, is*
7 *amended to read as follows:*

8 “(a) *DELAY OF NOTIFICATION.*—

9 “(1) *APPLICATION.*—*A governmental entity that*
10 *is seeking a warrant, order, or subpoena under sec-*
11 *tion 2703 may include in the application (or motion*
12 *in the case of an administrative subpoena authorized*
13 *by a Federal or State statute or a Federal or State*
14 *grand jury or trial subpoena) a request to a court of*
15 *competent jurisdiction for an order delaying the noti-*
16 *fication under section 2703 for a period of not more*
17 *than 60 days.*

18 “(2) *DETERMINATION.*—*The court may not grant*
19 *a request for delayed notification to a customer or*
20 *subscriber made under paragraph (1), or an extension*
21 *of such delayed notification requested by the govern-*
22 *mental entity pursuant to paragraph (3), unless the*
23 *court issues a written determination, based on specific*
24 *and articulable facts, and including written findings*
25 *of fact and conclusions of law, that it is substantially*

1 *likely that the notification of the customer or sub-*
2 *scriber of the existence of the warrant, order, or sub-*
3 *poena will result in—*

4 “(A) *endangering the life or physical safety*
5 *of an individual;*

6 “(B) *flight from prosecution;*

7 “(C) *destruction of or tampering with evi-*
8 *dence;*

9 “(D) *intimidation of potential witnesses; or*

10 “(E) *otherwise seriously jeopardizing an in-*
11 *vestigation or unduly delaying a trial.*

12 “(3) *EXTENSION.—The governmental entity may*
13 *request one or more extensions of the delay of notifica-*
14 *tion granted under paragraph (2) for a period of not*
15 *more than 60 days for each such extension. The court*
16 *may only grant such an extension if the court makes*
17 *a written determination required under paragraph*
18 *(2) and the extension is in accordance with the re-*
19 *quirements of such paragraph.*

20 “(4) *EXPIRATION OF DELAY OF NOTIFICATION.—*
21 *Upon expiration of the period of delay of notification*
22 *and all extensions thereof under paragraphs (2) and*
23 *(3) of this subsection, the governmental entity shall*
24 *deliver to the customer or subscriber by at least 2*
25 *methods, which shall be personal service, registered or*

1 *first-class mail, electronic mail, or other means ap-*
2 *proved by the court, as reasonably calculated to reach*
3 *the customer or subscriber within 72 hours of the ex-*
4 *piration of the delay—*

5 “(A) *a copy of the warrant, order, or sub-*
6 *poena; and*

7 “(B) *notice that informs such customer or*
8 *subscriber—*

9 “(i) *of the nature of the inquiry made*
10 *by the governmental entity, with reasonable*
11 *specificity;*

12 “(ii) *that information maintained for*
13 *such customer or subscriber by the provider*
14 *of electronic communications service or re-*
15 *mote computing service to which the war-*
16 *rant, order, or subpoena under section 2703*
17 *was directed, was supplied to or requested*
18 *by the governmental entity;*

19 “(iii) *that notification of such cus-*
20 *tomers or subscribers was delayed by court*
21 *order;*

22 “(iv) *the identity of the court that*
23 *issued such order;*

1 “(v) the provision of law under which
2 the order delaying notification was author-
3 ized; and

4 “(vi) that the governmental entity will,
5 upon request by the customer or subscriber,
6 provide the customer or subscriber with a
7 copy of the information that was disclosed
8 in response to the warrant, order, or sub-
9 poena, or in the event that no information
10 was disclosed, a written certification that
11 no information was disclosed.

12 “(5) COPY OF INFORMATION DISCLOSED.—Upon
13 expiration of the period of delay of notification under
14 paragraph (2) or (3) of this subsection, and at the re-
15 quest of the customer or subscriber made within 180
16 days of receiving notification under paragraph (4),
17 the governmental entity shall promptly provide the
18 customer or subscriber—

19 “(A) with a description of the information
20 disclosed and a copy of the information that was
21 disclosed in response to the warrant, order, or
22 subpoena; or

23 “(B) in the event that no information was
24 disclosed, with a written certification that no in-
25 formation was disclosed.”.

1 **SEC. 3. PRECLUSION OF NOTICE.**

2 *Section 2705(b) of title 18, United States Code, is*
3 *amended to read as follows:*

4 “(b) *PRECLUSION OF NOTICE.*—

5 “(1) *APPLICATION.*—*A governmental entity that*
6 *is seeking a warrant, order, or subpoena under sec-*
7 *tion 2703, when it is not required to notify the cus-*
8 *tomers or subscribers, or to the extent that it may delay*
9 *such notice pursuant to subsection (a), may apply to*
10 *a court for an order, subject to paragraph (6), direct-*
11 *ing a provider of electronic communications service or*
12 *remote computing service to which a warrant, order,*
13 *or subpoena under section 2703 is directed not to no-*
14 *tify any other person of the existence of the warrant,*
15 *order, or subpoena for a period of not more than ei-*
16 *ther 60 days or the period of delay of notice provided*
17 *under subsection (a), if any.*

18 “(2) *DETERMINATION.*—*The court may not grant*
19 *a request for an order made under paragraph (1), or*
20 *an extension of such order requested by the govern-*
21 *mental entity pursuant to paragraph (3), unless—*

22 “(A) *the court issues a written determina-*
23 *tion, based on specific and articulable facts, and*
24 *including written findings of fact and conclu-*
25 *sions of law, that it is substantially likely that*
26 *not granting the request will result in—*

1 “(i) endangering the life or physical
2 safety of an individual;

3 “(ii) flight from prosecution;

4 “(iii) destruction of or tampering with
5 evidence;

6 “(iv) intimidation of potential wit-
7 nesses; or

8 “(v) otherwise seriously jeopardizing
9 an investigation or unduly delaying a trial;
10 and

11 “(B) the order is narrowly tailored and
12 there is no less restrictive alternative, including
13 notification to an individual or organization
14 within or providing legal representation to the
15 customer or subscriber, to avoid an adverse result
16 as described in clause (i) through (v) of subpara-
17 graph (A).

18 “(3) *EXTENSION*.—A governmental entity may
19 request one or more extensions of an order granted
20 under paragraph (2) of not more than 60 days for
21 each such extension. The court may only grant such
22 an extension if the court makes a written determina-
23 tion required under paragraph (2)(A) and the exten-
24 sion is in accordance with the requirements of (2)(B).

1 “(4) NOTIFICATION OF CHANGED CIR-
 2 CUMSTANCES.—If the need for the order issued under
 3 paragraph (2) changes materially, the governmental
 4 entity that requested the order shall notify the court
 5 within 72 hours of the changed circumstances, and
 6 the court shall reassess the order and modify or vacate
 7 as appropriate.

8 “(5) OPPORTUNITY TO BE HEARD.—

9 “(A) IN GENERAL.—Upon an application,
 10 petition, or motion by a provider of electronic
 11 communications service or remote computing
 12 service or person acting on behalf of the provider
 13 to which an order under paragraph (2) (or an
 14 extension under paragraph (3)) has been issued,
 15 the court may modify or vacate the order if—

16 “(i) the order does not meet require-
 17 ments provided in paragraph (2); or

18 “(ii) compliance with the order is un-
 19 reasonable or otherwise unlawful.

20 “(B) STAY OF DISCLOSURE OF CUSTOMER
 21 OR SUBSCRIBER COMMUNICATIONS OR
 22 RECORDS.—A provider’s obligation to disclose
 23 the information requested in the warrant, order,
 24 or subpoena to which the order in paragraph (1)
 25 applies is stayed upon the filing of the applica-

1 *tion, petition, or motion under this paragraph*
2 *pending resolution of the application, petition,*
3 *or motion, unless the court with jurisdiction over*
4 *the challenge determines based on a showing by*
5 *the governmental entity that the stay should be*
6 *lifted in whole or in part prior to resolution.*

7 *“(C) FINALITY OF ORDER.—The decision of*
8 *the court resolving an application, petition, or*
9 *motion under this paragraph shall constitute a*
10 *final, appealable order.*

11 *“(6) EXCEPTION.—A provider of electronic com-*
12 *munications service or remote computing service to*
13 *which an order under paragraph (2) applies, or an*
14 *officer, employee, or agent thereof, may disclose infor-*
15 *mation otherwise subject to any applicable nondisclo-*
16 *sure requirement to—*

17 *“(A) those persons to whom disclosure is*
18 *necessary in order to comply with the warrant,*
19 *order, or subpoena;*

20 *“(B) an attorney in order to obtain legal*
21 *advice or assistance regarding the warrant,*
22 *order, or subpoena; and*

23 *“(C) any person the court determines can be*
24 *notified of the warrant, order, or subpoena.*

1 “(7) *SCOPE OF NONDISCLOSURE.*—Any person to
2 whom disclosure is made under paragraph (6) (other
3 than the governmental entity) shall be subject to the
4 nondisclosure requirements applicable to the person to
5 whom the order is issued. Any recipient authorized
6 under this subsection to disclose to a person informa-
7 tion otherwise subject to a nondisclosure requirement
8 shall notify the person of the applicable nondisclosure
9 requirement.

10 “(8) *SUPPORTING DOCUMENTATION.*—Upon serv-
11 ing a provider of electronic communications service or
12 remote computing service with an order granted
13 under paragraph (2), or an extension of such order
14 granted under paragraph (3), the governmental entity
15 shall include a copy of the warrant, order, or sub-
16 poena to which the nondisclosure order applies.

17 “(9) *EXPIRATION OF ORDER PRECLUDING NO-*
18 *TICE.*—Upon expiration of an order issued under
19 paragraph (2) or, if an extension has been granted
20 under paragraph (3), expiration of the extension, the
21 governmental entity shall deliver to the customer or
22 subscriber, by at least 2 methods, which shall be per-
23 sonal service, registered or first-class mail, electronic
24 mail, or other means approved by the court as reason-

1 *ably calculated to reach the customer or subscriber*
2 *within 72 hours of the expiration of the order—*

3 “(A) *a copy of the warrant, order, or sub-*
4 *poena; and*

5 “(B) *notice that informs the customer or*
6 *subscriber—*

7 “(i) *of the nature of the law enforce-*
8 *ment inquiry with reasonable specificity;*

9 “(ii) *that information maintained for*
10 *such customer or subscriber by the provider*
11 *of electronic communications service or re-*
12 *mote computing service to which the war-*
13 *rant, order, or subpoena under section 2703,*
14 *was directed was supplied to or requested*
15 *by the government entity;*

16 “(iii) *that notification of such cus-*
17 *tomers or subscribers was precluded by court*
18 *order;*

19 “(iv) *of the identity of the court au-*
20 *thorizing the preclusion of notice;*

21 “(v) *of the provision of this chapter*
22 *under which the preclusion of notice was*
23 *authorized; and*

24 “(vi) *that the government will, upon*
25 *request by the customer or subscriber, pro-*

1 *vide the customer or subscriber with a copy*
 2 *of the information that was disclosed in re-*
 3 *sponse to the warrant, order or subpoena, or*
 4 *in the event that no information was dis-*
 5 *closed, a written certification that no infor-*
 6 *mation was disclosed.*

7 “(10) *COPY OF INFORMATION DISCLOSED.*—Upon
 8 *expiration of the order precluding notice issued under*
 9 *paragraph (2) or (3) of this subsection, and at the re-*
 10 *quest of the customer or subscriber made within 180*
 11 *days of receiving notification under paragraph (9),*
 12 *the governmental entity shall promptly provide the*
 13 *customer or subscriber—*

14 “(A) *with a copy of the information that*
 15 *was disclosed in response to the warrant, order*
 16 *or subpoena; or*

17 “(B) *in the event that no information was*
 18 *disclosed, a written certification that no infor-*
 19 *mation was disclosed.”.*

20 **SEC. 4. ADDITIONAL PROVISIONS REGARDING DELAYED**
 21 **NOTICE.**

22 *Section 2705 of title 18, United States Code, is amend-*
 23 *ed by adding at the end the following:*

24 “(c) *ANNUAL REPORT.*—On an annual basis, the At-
 25 *torney General shall provide to the Committees on the Judi-*

1 ciary of the House of Representatives and the Senate, in
2 a manner consistent with protection of national security,
3 a report setting forth with respect to the preceding calendar
4 year, for each Federal judicial district—

5 “(1) the number of customers or subscribers with
6 respect to whom, in that calendar year, a warrant,
7 subpoena, or court order was issued pursuant to sec-
8 tion 2703;

9 “(2) the aggregate number of applications re-
10 questing delay of notification pursuant to section
11 2705;

12 “(3) the aggregate number of such orders either
13 granted, extended, or denied;

14 “(4) the aggregate number of such orders tar-
15 geting a member of the news media, including any
16 conduct related to activities protected under the First
17 Amendment; and

18 “(5) the aggregate number of arrests, trials, and
19 convictions, resulting from investigations in which
20 such orders were obtained, including the offenses for
21 which individuals were arrested, tried, or convicted.

22 The Attorney General shall include in the report under this
23 subsection a description of the process and the information
24 used to determine the numbers for each of paragraphs (1)
25 through (5).”.

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