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(Original Signature of Member)

119TH CONGRESS
1ST SESSION

H. R. _____

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

IN THE HOUSE OF REPRESENTATIVES

Mr. FITZGERALD introduced the following bill; which was referred to the
Committee on _____

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. PRECLUSION OF NOTICE.**

6 (a) IN GENERAL.—Section 2705(b) of title 18,
7 United States Code, is amended to read as follows:

8 “(b) PRECLUSION OF NOTICE.—

9 “(1) APPLICATION.—

1 “(A) IN GENERAL.—A governmental entity
2 that is seeking a warrant, order, or subpoena
3 under section 2703, when it is not required to
4 notify the customer or subscriber, or to the ex-
5 tent that it may delay such notice pursuant to
6 subsection (a), may apply to a court for an
7 order, subject to paragraph (6), directing a pro-
8 vider of electronic communications service or re-
9 mote computing service to which a warrant,
10 order, or subpoena under section 2703 is di-
11 rected not to notify any other person of the ex-
12 istence of the warrant, order, or subpoena.

13 “(B) LENGTH.—An order granted under
14 subparagraph (A) shall be in effect—

15 “(i) for a period of not more than one
16 year if the governmental entity notifies the
17 court of a material change in cir-
18 cumstances, as set forth in paragraph (4),
19 if the nature of the offense pertains to
20 child pornography, as defined in section
21 2256, or sexual exploitation of children, as
22 described in section 2251, or any Federal,
23 including military, State, or tribal offense
24 that is the substantial equivalent; or

1 “(ii) for a period of not more than 90
2 days for all other investigations.

3 “(C) OTHER REQUIREMENTS.—

4 “(i) IN GENERAL.—A application for
5 an order under subparagraph (A) shall
6 state, to the best of the applicant’s knowl-
7 edge, whether the named customer or sub-
8 scriber whose information is sought by the
9 warrant, order, or subpoena under section
10 2703—

11 “(I) is aware of the warrant,
12 order, subpoena, or underlying inves-
13 tigation; and

14 “(II) is suspected of involvement
15 in the commission of the crime under
16 investigation.

17 “(ii) ORDERS.—An order granted
18 under this paragraph may not direct, or
19 otherwise require, a provider of electronic
20 communications service or remote com-
21 puting service to provide notification of the
22 expiration of order to the court or govern-
23 ment entity that sought the order.

24 “(2) DETERMINATION.—

1 “(A) IN GENERAL.—The court may not
2 grant a request for an order made under para-
3 graph (1), or an extension of such order re-
4 quested by the governmental entity pursuant to
5 paragraph (3), unless—

6 “(i) the court issues a written deter-
7 mination, based on specific and articulable
8 facts, and including written findings of
9 fact and conclusions of law, that it is likely
10 that not granting the request will result
11 in—

12 “(I) endangering the life or phys-
13 ical safety of an individual;

14 “(II) flight from prosecution;

15 “(III) destruction of or tam-
16 pering with evidence;

17 “(IV) intimidation of potential
18 witnesses; or

19 “(V) otherwise seriously jeopard-
20 izing an investigation or unduly delay-
21 ing a trial; and

22 “(ii) the order is narrowly tailored
23 and there is no less restrictive alternative,
24 including notification to an individual or
25 organization within or providing legal rep-

1 resentation to the named customer or sub-
2 scriber, that is not likely to result in an
3 adverse result as described in subclauses
4 (I) through (V) of subparagraph (A)(i);
5 and

6 “(iii) the court has reviewed the indi-
7 vidual warrant, order, or subpoena under
8 section 2703 to which the order issued
9 under this paragraph applies.

10 “(B) NATURE OF THE OFFENSE.—

11 “(i) IN GENERAL.—Subject to clause
12 (ii), the court may consider the nature of
13 the offense in issuing a determination
14 under subparagraph (A).

15 “(ii) PRESUMPTION.—If the court de-
16 termines there is a reasonable belief the
17 nature of the offense pertains to child por-
18 nography, as defined in section 2256, or
19 sexual exploitation of children, as described
20 in section 2251, or any Federal, including
21 military, State, or tribal offense that is the
22 substantial equivalent, the court may pre-
23 sume that one or more of the adverse re-
24 sults described in subclauses (I) through
25 (V) of subparagraph (A)(i) are met and

1 may issue an order consistent with this
2 subsection without a written decision under
3 subparagraph (A)(i).

4 “(3) EXTENSION.—A governmental entity may
5 request one or more extensions of an order granted
6 under paragraph (2) of not more than 90 days for
7 each such extension. The court may only grant such
8 an extension if the court makes a written determina-
9 tion required under paragraph (2)(A).

10 “(4) NOTIFICATION OF CHANGED CIR-
11 CUMSTANCES.—If the need for the order issued
12 under paragraph (2) changes materially, the govern-
13 mental entity that requested the order shall notify
14 the court within a reasonable period of time (not to
15 exceed 14 days) of the changed circumstances, and
16 the court shall reassess the order and modify or va-
17 cate as appropriate.

18 “(5) OPPORTUNITY TO BE HEARD.—

19 “(A) IN GENERAL.—Upon an application,
20 petition, or motion by a provider of electronic
21 communications service or remote computing
22 service or person acting on behalf of the pro-
23 vider to which an order under paragraph (2)
24 (or an extension under paragraph (3)) has been

1 issued, the court may modify or vacate the
2 order if—

3 “(i) the order does not meet require-
4 ments provided in paragraph (2) or (3); or

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

7 “(B) STAY OF DISCLOSURE OF NAMED
8 CUSTOMER OR SUBSCRIBER COMMUNICATIONS
9 OR RECORDS.—A provider’s obligation to dis-
10 close the information requested in the warrant,
11 order, or subpoena to which the order in para-
12 graph (1) applies is stayed upon the filing of
13 the application, petition, or motion under this
14 paragraph pending resolution of the application,
15 petition, or motion, unless the court with juris-
16 diction over the challenge determines based on
17 a showing by the governmental entity that the
18 stay should be lifted in whole or in part prior
19 to resolution.

20 “(C) FINALITY OF ORDER.—The decision
21 of the court resolving an application, petition,
22 or motion under this paragraph shall constitute
23 a final, appealable order.

24 “(6) EXCEPTION.—A provider of electronic
25 communications service or remote computing service

1 to which an order under paragraph (2) applies, or
2 an officer, employee, or agent thereof, may disclose
3 information otherwise subject to any applicable non-
4 disclosure requirement to—

5 “(A) those persons to whom disclosure is
6 necessary in order to comply with the warrant,
7 order, or subpoena;

8 “(B) an attorney in order to obtain legal
9 advice or assistance regarding the order issued
10 under paragraph (2) or the warrant, order, or
11 subpoena to which the order applies; and

12 “(C) any person the court determines can
13 be notified of the warrant, order, or subpoena.

14 “(7) SCOPE OF NONDISCLOSURE.—Any person
15 to whom disclosure is made under paragraph (6)
16 (other than the governmental entity) shall be subject
17 to the nondisclosure requirements applicable to the
18 person to whom the order is issued. Any recipient
19 authorized under this subsection to disclose to a per-
20 son information otherwise subject to a nondisclosure
21 requirement shall notify the person of the applicable
22 nondisclosure requirement.

23 “(8) SUPPORTING DOCUMENTATION.—Upon
24 serving a provider of electronic communications serv-
25 ice or remote computing service with an order grant-

1 ed under paragraph (2), or an extension of such
2 order granted under paragraph (3), the govern-
3 mental entity shall include a copy of the warrant,
4 order, or subpoena to which the nondisclosure order
5 applies.

6 “(9) EXPIRATION OF ORDER PRECLUDING NO-
7 TICE.—Upon expiration of an order issued under
8 paragraph (2) or, if an extension has been granted
9 under paragraph (3), expiration of the extension, the
10 governmental entity shall deliver to the named cus-
11 tomer or subscriber, by at least 2 methods, which
12 shall be personal service, registered or first-class
13 mail, electronic mail, or other means approved by
14 the court as reasonably calculated to reach the
15 named customer or subscriber within 5 business
16 days of the expiration of the order—

17 “(A) a copy of the warrant, order, or sub-
18 poena; and

19 “(B) notice that informs the named cus-
20 tomer or subscriber—

21 “(i) of the nature of the law enforce-
22 ment inquiry with reasonable specificity;

23 “(ii) that information maintained for
24 such customer or subscriber by the pro-
25 vider of electronic communications service

1 or remote computing service to which the
2 warrant, order, or subpoena under section
3 2703, was directed was supplied to or re-
4 quested by the government entity;

5 “(iii) that notification of such cus-
6 tomer or subscriber was precluded by court
7 order;

8 “(iv) of the identity of the court au-
9 thorizing the preclusion of notice;

10 “(v) of the provision of this chapter
11 under which the preclusion of notice was
12 authorized; and

13 “(vi) that the government will, upon
14 request by the customer or subscriber
15 made within 180 days after receiving noti-
16 fication under this paragraph, provide the
17 named customer or subscriber with a copy
18 of the information that was disclosed in re-
19 sponse to the warrant, order or subpoena,
20 or in the event that no information was
21 disclosed, a written certification that no in-
22 formation was disclosed.

23 “(10) COPY OF INFORMATION DISCLOSED.—
24 Upon expiration of the order precluding notice
25 issued under paragraph (2) or (3) of this subsection,

1 and at the request of the named customer or sub-
2 scribe made within 180 days of receiving notifica-
3 tion under paragraph (9), the governmental entity
4 shall promptly provide the named customer or sub-
5 scribe—

6 “(A) with a copy of the information that
7 was disclosed in response to the warrant, order
8 or subpoena except—

9 “(i) illicit records;

10 “(ii) records or materials pertaining
11 to child pornography, as defined in section
12 2256, or sexual exploitation of children, as
13 described in section 2251, or any Federal,
14 including military, State, tribal, or offense
15 that is the substantial equivalent; or

16 “(iii) other illegal material; or

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

20 “(11) REDACTIONS.—Any information disclosed
21 pursuant to paragraphs (9) and (10) may be re-
22 dacted only if a court finds such redactions nec-
23 essary to preserve the secrecy or integrity of an in-
24 vestigation.”.

1 (b) ADDITIONAL PROVISIONS REGARDING DELAYED
2 NOTICE.—Section 2705 of title 18, United States Code,
3 is amended by adding at the end the following:

4 “(c) ANNUAL REPORT.—

5 “(1) IN GENERAL.—On an annual basis, the
6 Attorney General shall provide to the Committee on
7 the Judiciary of the House of Representatives, the
8 Committee on the Judiciary of the Senate, and the
9 Director of the Administrative Office of the United
10 States Courts, which the Attorney General shall
11 publish on the website of the Department of Justice,
12 in a manner consistent with protection of national
13 security, a report setting forth with respect to the
14 preceding calendar year, for each Federal judicial
15 district—

16 “(A) the number of named customers or
17 subscribers with respect to whom, in that cal-
18 endar year, a warrant, subpoena, or court order
19 was issued pursuant to section 2703;

20 “(B) the aggregate number of applications
21 requesting delay of notification pursuant to
22 subsection (a)(1), preclusion of notice pursuant
23 to subsection (b)(1), and extensions pursuant to
24 subsection (b)(3);

1 “(C) the aggregate number of orders under
2 this section either granting, extending, or deny-
3 ing a request for delay of notification or pre-
4 clusion of notice;

5 “(D) the aggregate number of orders
6 under this section affecting a member of the
7 news media, including any conduct related to
8 activities protected under the First Amendment;
9 and

10 “(E) the aggregate number of arrests,
11 trials, and convictions, resulting from investiga-
12 tions in which orders under this section were
13 obtained, including the offenses for which indi-
14 viduals were arrested, tried, or convicted.

15 “(2) PROCESS.—The Attorney General shall in-
16 clude in the report under this subsection a descrip-
17 tion of the process and the information used to de-
18 termine the numbers for each of subparagraphs (A)
19 through (E) or paragraph (1).”.