

118TH CONGRESS
2D SESSION

S. 4037

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

IN THE SENATE OF THE UNITED STATES

MARCH 21, 2024

Mr. COONS (for himself and Mr. LEE) introduced the following bill; which was
read twice and referred to the Committee on the Judiciary

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 Section 2705(b) of title 18, United States Code, is
7 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.—

14 “(i) IN GENERAL.—Subject to clause
15 (ii), an order granted under subparagraph
16 (A) shall be in effect for a period of not
17 more than 90 days.

18 “(ii) EXCEPTION.—An order granted
19 under subparagraph (A) shall be in effect
20 for a period of not more than 1 year if the
21 nature of the offense for which the govern-
22 mental entity is seeking a warrant, order,
23 or subpoena pertains to child sexual abuse
24 material under section 2256(8), sexual ex-
25 ploitation of children under section 2251,

1 or any Federal, State, Tribal, or military
2 offense that is the substantial equivalent.

3 “(C) OTHER REQUIREMENTS.—

4 “(i) IN GENERAL.—An 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 scribe 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 subparagraph (A) 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 the order to the court or to
23 the government entity that sought the
24 order.

25 “(2) DETERMINATION.—

1 “(A) IN GENERAL.—The court may not
2 grant a request for an order made under para-
3 graph (1), or a request for an extension of such
4 order made under paragraph (3), unless—

5 “(i) subject to subparagraph (B)(ii),
6 the court issues a written determination,
7 based on specific and articulable facts and
8 including written findings of fact and con-
9 clusions of law, that it is likely that not
10 granting the request will result in—

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

13 “(II) flight from prosecution;

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

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

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

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

1 scribe, that is not likely to result in an
2 adverse result as described in subclauses
3 (I) through (V) of clause (i); and

4 “(iii) the court has reviewed the indi-
5 vidual warrant, order, or subpoena issued
6 under section 2703 to which the order
7 issued under paragraph (1) applies.

8 “(B) NATURE OF THE OFFENSE.—

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

13 “(ii) PRESUMPTION.—If the court de-
14 termines there is a reasonable belief that
15 the nature of the offense pertains to child
16 sexual abuse material under section
17 2256(8), sexual exploitation of children
18 under section 2251, or any Federal, State,
19 Tribal, or military offense that is the sub-
20 stantial equivalent, the court may presume
21 that 1 or more of the factors described in
22 subclauses (I) through (V) of subpara-
23 graph (A)(i) are met and may issue an
24 order consistent with this subsection with-

1 out a written decision under subparagraph
2 (A)(i).

3 “(3) EXTENSION.—

4 “(A) REQUEST.—A governmental entity
5 may request 1 or more extensions of an order
6 granted under paragraph (1) of not more than
7 90 days for each such extension.

8 “(B) WRITTEN DETERMINATION RE-
9 QUIRED.—The court may grant a request under
10 subparagraph (A) if the court makes a written
11 determination in accordance with paragraph
12 (2)(A).

13 “(4) NOTIFICATION OF CHANGED CIR-
14 CUMSTANCES.—If the need for the order issued
15 under paragraph (1) or an extension issued under
16 paragraph (3) changes materially, the governmental
17 entity that requested the order shall notify the court
18 within a reasonable period of time (not to exceed 14
19 days) of the changed circumstances, and the court
20 shall reassess the order and modify or vacate the
21 order as appropriate.

22 “(5) OPPORTUNITY TO BE HEARD.—

23 “(A) IN GENERAL.—Upon an application,
24 petition, or motion by a provider of electronic
25 communications service or remote computing

1 service or person acting on behalf of the pro-
2 vider to which an order under paragraph (1) or
3 an extension under paragraph (3) has been
4 issued, the court may modify or vacate the
5 order if—

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

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

10 “(B) STAY OF DISCLOSURE OF NAMED
11 CUSTOMER OR SUBSCRIBER COMMUNICATIONS
12 OR RECORDS.—The obligation of a provider of
13 electronic communications service or remote
14 computing service to disclose the information
15 requested in the warrant, order, or subpoena to
16 which the order in paragraph (1) applies is
17 stayed upon the filing of the application, peti-
18 tion, or motion under this paragraph pending
19 resolution of the application, petition, or mo-
20 tion, unless the court with jurisdiction over the
21 challenge determines, based on a showing by
22 the governmental entity, that the stay should be
23 lifted in whole or in part prior to resolution.

24 “(C) FINALITY OF ORDER.—The decision
25 of the court resolving an application, petition,

1 or motion under this paragraph shall constitute
2 a final, appealable order.

3 “(6) EXCEPTION.—

4 “(A) IN GENERAL.—A provider of elec-
5 tronic communications service or remote com-
6 puting service to which an order under para-
7 graph (1) applies, or an officer, employee, or
8 agent thereof, may disclose information other-
9 wise subject to any applicable nondisclosure re-
10 quirement to—

11 “(i) those persons to whom disclosure
12 is necessary in order to comply with the
13 warrant, order, or subpoena;

14 “(ii) an attorney, in order to obtain
15 legal advice or assistance relating to the
16 order issued under paragraph (1) or the
17 warrant, order, or subpoena to which the
18 order applies; and

19 “(iii) any person the court determines
20 can be notified of the warrant, order, or
21 subpoena.

22 “(B) SCOPE OF NONDISCLOSURE.—

23 “(i) RECIPIENTS OF INFORMATION.—
24 Any person to whom disclosure is made
25 under subparagraph (A), other than the

1 governmental entity, shall be subject to the
2 nondisclosure requirements applicable to
3 the person to whom the order is issued.

4 “(ii) NOTIFICATION.—Any recipient
5 authorized under this paragraph to disclose
6 to a person information otherwise subject
7 to a nondisclosure requirement shall notify
8 the person of the applicable nondisclosure
9 requirement.

10 “(7) SUPPORTING DOCUMENTATION.—Upon
11 serving a provider of electronic communications serv-
12 ice or remote computing service with an order grant-
13 ed under paragraph (1), or an extension of such
14 order granted under paragraph (3), the govern-
15 mental entity shall include a copy of the warrant,
16 order, or subpoena to which the nondisclosure order
17 applies.

18 “(8) EXPIRATION OF ORDER PRECLUDING NO-
19 TICE.—Upon expiration of an order issued under
20 paragraph (1) or, if an extension has been granted
21 under paragraph (3), expiration of the extension, the
22 governmental entity shall deliver to the named cus-
23 tomer or subscriber, by not less than 2 methods,
24 which shall be personal service, registered or first-
25 class mail, electronic mail, or other means approved

1 by the court as reasonably calculated to reach the
2 named customer or subscriber within 5 business
3 days of the expiration of the order—

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

6 “(B) notice that informs the named cus-
7 tomer or subscriber—

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

10 “(ii) that information maintained for
11 such customer or subscriber by the pro-
12 vider of electronic communications service
13 or remote computing service to which the
14 warrant, order, or subpoena under section
15 2703, was directed, supplied to, or re-
16 quested by the government entity;

17 “(iii) that notification of such cus-
18 tomer or subscriber was precluded by court
19 order;

20 “(iv) of the identity of the court au-
21 thORIZING the preclusion of notice;

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

1 “(vi) that the government will, upon
2 request by the customer or subscriber
3 made within 180 days after receiving noti-
4 fication under this paragraph, provide the
5 named customer or subscriber with a copy
6 of the information that was disclosed in re-
7 sponse to the warrant, order or subpoena,
8 or in the event that no information was
9 disclosed, a written certification that no in-
10 formation was disclosed.

11 “(9) COPY OF INFORMATION DISCLOSED.—
12 Upon expiration of the order precluding notice
13 issued under paragraph (1) or (3), and at the re-
14 quest of the named customer or subscriber made
15 within 180 days of receiving notification under para-
16 graph (8), the governmental entity shall promptly
17 provide the named customer or subscriber—

18 “(A) with a copy of the information that
19 was disclosed in response to the warrant, order,
20 or subpoena, except for—

21 “(i) illicit records;

22 “(ii) records or materials pertaining
23 to child sexual abuse material under sec-
24 tion 2256(8), sexual exploitation of chil-
25 dren under section 2251, or any Federal,

1 State, Tribal, or military offense that is
2 the substantial equivalent; or

3 “(iii) other illegal material; or

4 “(B) in the event that no information was
5 disclosed, a written certification that no infor-
6 mation was disclosed.

7 “(10) REDACTIONS.—Any information disclosed
8 under paragraph (8) or (9) may be redacted only if
9 a court finds such redactions necessary to preserve
10 the secrecy or integrity of an investigation.”.

11 **SEC. 3. ADDITIONAL PROVISIONS REGARDING DELAYED**
12 **NOTICE.**

13 Section 2705 of title 18, United States Code, is
14 amended by adding at the end the following:

15 “(c) ANNUAL REPORT.—

16 “(1) IN GENERAL.—On an annual basis, the
17 Attorney General shall provide to the Committee on
18 the Judiciary of the Senate, the Committee on the
19 Judiciary of the House of Representatives, and the
20 Director of the Administrative Office of the United
21 States Courts, which the Attorney General shall
22 publish on the website of the Department of Justice,
23 in a manner consistent with the protection of na-
24 tional security, a report setting forth, with respect to

1 the preceding calendar year, for each Federal judi-
2 cial district—

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

7 “(B) the aggregate number of applications
8 requesting delay of notification pursuant to
9 subsection (a)(1), preclusion of notice pursuant
10 to subsection (b)(1), and extensions pursuant to
11 subsection (b)(3);

12 “(C) the aggregate number of orders under
13 this section either granting, extending, or deny-
14 ing a request for delay of notification or pre-
15 clusion of notice;

16 “(D) the aggregate number of orders
17 under this section affecting a member of the
18 news media, including any conduct related to
19 activities protected under the First Amendment
20 to the Constitution of the United States; and

21 “(E) the aggregate number of arrests,
22 trials, and convictions, resulting from investiga-
23 tions in which orders under this section were
24 obtained, including the offenses for which indi-
25 viduals were arrested, tried, or convicted.

1 “(2) INCLUSION.—The Attorney General shall
2 include in the report under this subsection a descrip-
3 tion of the process and the information used to de-
4 termine the numbers for each of subparagraphs (A)
5 through (E) of paragraph (1).”.

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