

117TH CONGRESS
2D SESSION

S. 4373

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

IN THE SENATE OF THE UNITED STATES

JUNE 9, 2022

Mr. LEAHY (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. 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
10 that is seeking a warrant, order, or subpoena under

1 section 2703 may include in the application (or mo-
2 tion in the case of an administrative subpoena au-
3 thorized by a Federal or State statute or a Federal
4 or State grand jury or trial subpoena) a request to
5 a court of competent jurisdiction for an order delay-
6 ing the notification under section 2703 for a period
7 of not more than 60 days.

8 “(2) DETERMINATION.—The court may not
9 grant a request for delayed notification to a cus-
10 tomer or subscriber made under paragraph (1), or
11 an extension of such delayed notification requested
12 by the governmental entity pursuant to paragraph
13 (3), unless the court issues a written determination,
14 based on specific and articulable facts, and including
15 written findings of fact and conclusions of law, that
16 it is substantially likely that the notification of the
17 customer or subscriber of the existence of the war-
18 rant, order, or subpoena will result in—

19 “(A) endangering the life or physical safety
20 of an individual;

21 “(B) flight from prosecution;

22 “(C) destruction of or tampering with evi-
23 dence;

24 “(D) intimidation of potential witnesses; or

1 “(E) otherwise seriously jeopardizing an
2 investigation or unduly delaying a trial.

3 “(3) EXTENSION.—The governmental entity
4 may request one or more extensions of the delay of
5 notification granted under paragraph (2) for a pe-
6 riod of not more than 60 days for each such exten-
7 sion. The court may only grant such an extension if
8 the court makes a written determination required
9 under paragraph (2) and the extension is in accord-
10 ance with the requirements of such paragraph.

11 “(4) EXPIRATION OF DELAY OF NOTIFICA-
12 TION.—Upon expiration of the period of delay of no-
13 tification and all extensions thereof under para-
14 graphs (2) and (3) of this subsection, the govern-
15 mental entity shall deliver to the customer or sub-
16 scriber by at least 2 methods, which shall be per-
17 sonal service, registered or first-class mail, electronic
18 mail, or other means approved by the court, as rea-
19 sonably calculated to reach the customer or sub-
20 scriber within 72 hours of the expiration of the
21 delay—

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

24 “(B) notice that informs such customer or
25 subscriber—

1 “(i) of the nature of the inquiry made
2 by the governmental entity, with reason-
3 able specificity;

4 “(ii) that information maintained for
5 such customer or subscriber by the pro-
6 vider of electronic communications service
7 or remote computing service to which the
8 warrant, order, or subpoena under section
9 2703 was directed, was supplied to or re-
10 quested by the governmental entity;

11 “(iii) that notification of such cus-
12 tomer or subscriber was delayed by court
13 order;

14 “(iv) the identity of the court that
15 issued such order;

16 “(v) the provision of law under which
17 the order delaying notification was author-
18 ized; and

19 “(vi) that the governmental entity
20 will, upon request by the customer or sub-
21 scriber made within 180 days after receiv-
22 ing notification under this paragraph, pro-
23 vide the customer or subscriber with a
24 copy of the information that was disclosed
25 in response to the warrant, order, or sub-

1 poena, or in the event that no information
 2 was disclosed, a written certification that
 3 no information was disclosed.

4 “(5) COPY OF INFORMATION DISCLOSED.—

5 Upon expiration of the period of delay of notification
 6 under paragraph (2) or (3) of this subsection, and
 7 at the request of the customer or subscriber made
 8 within 180 days of receiving notification under para-
 9 graph (4), the governmental entity shall promptly
 10 provide the customer or subscriber—

11 “(A) with a description of the information
 12 disclosed and a copy of the information that
 13 was disclosed in response to the warrant, order,
 14 or subpoena; or

15 “(B) in the event that no information was
 16 disclosed, with a written certification that no in-
 17 formation was disclosed.”.

18 **SEC. 3. PRECLUSION OF NOTICE.**

19 Section 2705(b) of title 18, United States Code, is
 20 amended to read as follows:

21 “(b) PRECLUSION OF NOTICE.—

22 “(1) APPLICATION.—A governmental entity
 23 that is seeking a warrant, order, or subpoena under
 24 section 2703, when it is not required to notify the
 25 customer or subscriber, or to the extent that it may

1 delay such notice pursuant to subsection (a), may
2 apply to a court for an order, subject to paragraph
3 (6), directing a provider of electronic communica-
4 tions service or remote computing service to which a
5 warrant, order, or subpoena under section 2703 is
6 directed not to notify any other person of the exist-
7 ence of the warrant, order, or subpoena for a period
8 of not more than either 60 days or the period of
9 delay of notice provided under subsection (a), if any.

10 “(2) DETERMINATION.—The court may not
11 grant a request for an order made under paragraph
12 (1), or an extension of such order requested by the
13 governmental entity pursuant to paragraph (3), un-
14 less—

15 “(A) the court issues a written determina-
16 tion, based on specific and articulable facts, and
17 including written findings of fact and conclu-
18 sions of law, that it is substantially likely that
19 not granting the request will result in—

20 “(i) endangering the life or physical
21 safety of an individual;

22 “(ii) flight from prosecution;

23 “(iii) destruction of or tampering with
24 evidence;

1 “(iv) intimidation of potential wit-
2 nesses; or

3 “(v) otherwise seriously jeopardizing
4 an investigation or unduly delaying a trial;
5 and

6 “(B) the order is narrowly tailored and
7 there is no less restrictive alternative, including
8 notification to an individual or organization
9 within or providing legal representation to the
10 customer or subscriber, to avoid an adverse re-
11 sult as described in clauses (i) through (v) of
12 subparagraph (A).

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

21 “(4) NOTIFICATION OF CHANGED CIR-
22 CUMSTANCES.—If the need for the order issued
23 under paragraph (2) changes materially, the govern-
24 mental entity that requested the order shall notify
25 the court within 72 hours of the changed cir-

cumstances, and the court shall reassess the order and modify or vacate as appropriate.

“(5) OPPORTUNITY TO BE HEARD.—

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

“(i) the order does not meet requirements provided in paragraph (2); or

“(ii) compliance with the order is unreasonable or otherwise unlawful.

“(B) STAY OF DISCLOSURE OF CUSTOMER OR SUBSCRIBER COMMUNICATIONS OR RECORDS.—A provider’s obligation to disclose the information requested in the warrant, order, or subpoena to which the order in paragraph (1) applies is stayed upon the filing of the application, petition, or motion under this paragraph pending resolution of the application, petition, or motion, unless the court with jurisdiction over the challenge determines based on a

1 showing by the governmental entity that the
2 stay should be lifted in whole or in part prior
3 to resolution.

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

8 “(6) EXCEPTION.—A provider of electronic
9 communications service or remote computing service
10 to which an order under paragraph (2) applies, or
11 an officer, employee, or agent thereof, may disclose
12 information otherwise subject to any applicable non-
13 disclosure requirement to—

14 “(A) those persons to whom disclosure is
15 necessary in order to comply with the warrant,
16 order, or subpoena;

17 “(B) an attorney in order to obtain legal
18 advice or assistance regarding the warrant,
19 order, or subpoena; and

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

22 “(7) SCOPE OF NONDISCLOSURE.—Any person
23 to whom disclosure is made under paragraph (6)
24 (other than the governmental entity) shall be subject
25 to the nondisclosure requirements applicable to the

1 person to whom the order is issued. Any recipient
2 authorized under this subsection to disclose to a per-
3 son information otherwise subject to a nondisclosure
4 requirement shall notify the person of the applicable
5 nondisclosure requirement.

6 “(8) SUPPORTING DOCUMENTATION.—Upon
7 serving a provider of electronic communications serv-
8 ice or remote computing service with an order grant-
9 ed under paragraph (2), or an extension of such
10 order granted under paragraph (3), the govern-
11 mental entity shall include a copy of the warrant,
12 order, or subpoena to which the nondisclosure order
13 applies.

14 “(9) EXPIRATION OF ORDER PRECLUDING NO-
15 TICE.—Upon expiration of an order issued under
16 paragraph (2) or, if an extension has been granted
17 under paragraph (3), expiration of the extension, the
18 governmental entity shall deliver to the customer or
19 subscriber, by at least 2 methods, which shall be
20 personal service, registered or first-class mail, elec-
21 tronic mail, or other means approved by the court as
22 reasonably calculated to reach the customer or sub-
23 scriber within 72 hours of the expiration of the
24 order—

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

3 “(B) notice that informs the customer or
4 subscriber—

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

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

14 “(iii) that notification of such cus-
15 tomer or subscriber was precluded by court
16 order;

17 “(iv) of the identity of the court au-
18 thorizing the preclusion of notice;

19 “(v) of the provision of this chapter
20 under which the preclusion of notice was
21 authorized; and

22 “(vi) that the government will, upon
23 request by the customer or subscriber
24 made within 180 days after receiving noti-
25 fication under this paragraph, provide the

1 customer or subscriber with a copy of the
 2 information that was disclosed in response
 3 to the warrant, order or subpoena, or in
 4 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.—
 8 Upon expiration of the order precluding notice
 9 issued under paragraph (2) or (3) of this subsection,
 10 and at the request of the customer or subscriber
 11 made within 180 days of receiving notification under
 12 paragraph (9), the governmental entity shall
 13 promptly provide the 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
 23 amended by adding at the end the following:

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

1 diciary of the House of Representatives and the Com-
2 mittee on the Judiciary of the Senate, in a manner con-
3 sistent with protection of national security, a report set-
4 ting forth with respect to the preceding calendar year, for
5 each Federal judicial district—

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

10 “(2) the aggregate number of applications re-
11 questing delay of notification pursuant to sub-
12 sections (a)(1) and (b)(1);

13 “(3) the aggregate number of orders under this
14 section either granting, extending, or denying a re-
15 quest for delay of notification;

16 “(4) the aggregate number of orders under this
17 section affecting a member of the news media, in-
18 cluding any conduct related to activities protected
19 under the First Amendment; and

20 “(5) the aggregate number of arrests, trials,
21 and convictions, resulting from investigations in
22 which orders under this section were obtained, in-
23 cluding the offenses for which individuals were ar-
24 rested, tried, or convicted.

1 The Attorney General shall include in the report under
2 this subsection a description of the process and the infor-
3 mation used to determine the numbers for each of para-
4 graphs (1) through (5).”.

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