

Suspend the Rules and Pass the Bill, H.R. 7072, With an Amendment

(The amendment strikes all after the enacting clause and inserts a new text)

117TH CONGRESS
2^D SESSION

H. R. 7072

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

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.—

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

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

21 “(A) endangering the life or physical safety
22 of an individual;

23 “(B) flight from prosecution;

24 “(C) destruction of or tampering with evi-
25 dence;

1 “(D) intimidation of potential witnesses; or

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

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

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

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

1 “(B) notice that informs such customer or
2 subscriber—

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

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

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

16 “(iv) the identity of the court that
17 issued such order;

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

21 “(vi) that the governmental entity
22 will, upon request by the customer or sub-
23 scriber made within 180 days after receiv-
24 ing notification under this paragraph, pro-
25 vide the customer or subscriber with a

1 copy of the information that was disclosed
2 in response to the warrant, order, or sub-
3 poena, or in the event that no information
4 was disclosed, a written certification that
5 no information was disclosed.

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

13 “(A) with a description of the information
14 disclosed and 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, with a written certification that no in-
19 formation was disclosed.”.

20 **SEC. 3. PRECLUSION OF NOTICE.**

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

23 “(b) PRECLUSION OF NOTICE.—

24 “(1) APPLICATION.—A governmental entity
25 that is seeking a warrant, order, or subpoena under

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

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

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

22 “(i) endangering the life or physical
23 safety of an individual;

24 “(ii) flight from prosecution;

1 “(iii) destruction of or tampering with
2 evidence;

3 “(iv) intimidation of potential wit-
4 nesses; or

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

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

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

23 “(4) NOTIFICATION OF CHANGED CIR-
24 CUMSTANCES.—If the need for the order issued
25 under paragraph (2) changes materially, the govern-

1 mental entity that requested the order shall notify
2 the court within 72 hours of the changed cir-
3 cumstances, and the court shall reassess the order
4 and modify or vacate as appropriate.

5 “(5) OPPORTUNITY TO BE HEARD.—

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

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

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

18 “(B) STAY OF DISCLOSURE OF CUSTOMER
19 OR SUBSCRIBER COMMUNICATIONS OR
20 RECORDS.—A provider’s obligation to disclose
21 the information requested in the warrant, order,
22 or subpoena to which the order in paragraph
23 (1) applies is stayed upon the filing of the ap-
24 plication, petition, or motion under this para-
25 graph pending resolution of the application, pe-

1 tition, or motion, unless the court with jurisdic-
2 tion over the challenge determines based on a
3 showing by the governmental entity that the
4 stay should be lifted in whole or in part prior
5 to resolution.

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

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

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

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

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

24 “(7) SCOPE OF NONDISCLOSURE.—Any person
25 to whom disclosure is made under paragraph (6)

1 (other than the governmental entity) shall be subject
2 to the nondisclosure requirements applicable to the
3 person to whom the order is issued. Any recipient
4 authorized under this subsection to disclose to a per-
5 son information otherwise subject to a nondisclosure
6 requirement shall notify the person of the applicable
7 nondisclosure requirement.

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

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

1 subscriber within 72 hours of the expiration of the
2 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 pro-
11 vider of electronic communications service
12 or remote computing service to which the
13 warrant, order, or subpoena under section
14 2703, was directed was supplied to or re-
15 quested by the government entity;

16 “(iii) that notification of such cus-
17 tomer or subscriber 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

1 made within 180 days after receiving noti-
2 fication under this paragraph, provide the
3 customer or subscriber with a copy of the
4 information that was disclosed in response
5 to the warrant, order or subpoena, or in
6 the event that no information was dis-
7 closed, a written certification that no infor-
8 mation was disclosed.

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

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

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

22 **SEC. 4. ADDITIONAL PROVISIONS REGARDING DELAYED**
23 **NOTICE.**

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

1 “(c) ANNUAL REPORT.—On an annual basis, the At-
2 torney General shall provide to the Committees on the Ju-
3 diciary of the House of Representatives and the Senate,
4 in a manner consistent with protection of national secu-
5 rity, a report setting forth with respect to the preceding
6 calendar year, for each Federal judicial district—

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

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

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

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

21 “(5) the aggregate number of arrests, trials,
22 and convictions, resulting from investigations in
23 which orders under this section were obtained, in-
24 cluding the offenses for which individuals were ar-
25 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).”.