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(Original Signature of Member)

118TH 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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''NDO Fairness Act''.

SEC. 2. PRECLUSION OF NOTICE.

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

''(b) PRECLUSION OF NOTICE.—

''(1) APPLICATION.—

''(A) IN GENERAL.—A governmental entity that is seeking a warrant, order, or subpoena under section 2703, when it is not required to notify the customer or subscriber, or to the extent that it may delay such notice pursuant to subsection (a), may apply to a court for an order, subject to paragraph (6), directing a provider of electronic communications service or remote computing service to which a warrant, order, or subpoena under section 2703 is directed not to notify any other person of the existence of the warrant, order, or subpoena.

''(B) LENGTH.—An order granted under subparagraph (A) shall be in effect for a period of not more than 90 days.

''(C) OTHER REQUIREMENTS.—

''(i) IN GENERAL.—A application for an order under subparagraph (A) shall state, to the best of the applicant's knowledge, whether the named customer or subscriber whose information is sought by the warrant, order, or subpoena under section 2703—

''(I) is aware of the warrant, order, subpoena, or underlying investigation; and

''(II) is suspected of involvement in the commission of the crime under investigation.

''(ii) ORDERS.—An order granted under this paragraph may not direct, or otherwise require, a provider of electronic communications service or remote computing service to provide notification of the expiration of order to the court or government entity that sought the order.

''(2) DETERMINATION.—

''(A) IN GENERAL.—The court may not grant a request for an order made under paragraph (1), or an extension of such order requested by the governmental entity pursuant to paragraph (3), unless—

''(i) the court issues a written determination, based on specific and articulable facts, and including written findings of fact and conclusions of law, that it is likely that not granting the request will result in—

''(I) endangering the life or physical safety of an individual;

''(II) flight from prosecution;

''(III) destruction of or tampering with evidence;

''(IV) intimidation of potential witnesses; or

''(V) otherwise seriously jeopardizing an investigation or unduly delaying a trial; and

''(ii) the order is narrowly tailored and there is no less restrictive alternative, including notification to an individual or organization within or providing legal representation to the named customer or subscriber, that is not likely to result in an adverse result as described in clauses (i) through (v) of subparagraph (A); and

''(iii) the court has reviewed the individual warrant, order, or subpoena under section 2703 to which the order issued under this paragraph applies.

''(B) NATURE OF THE OFFENSE.—The court may consider the nature of the offense in

issuing a determination under subparagraph (A).

''(3) EXTENSION.—A governmental entity may request one or more extensions of an order granted under paragraph (2) of not more than 90 days for each such extension. The court may only grant such an extension if the court makes a written determination required under paragraph (2)(A) and the extension is in accordance with the requirements of (2)(B).

''(4) NOTIFICATION OF CHANGED CIRCUMSTANCES.—If the need for the order issued under paragraph (2) changes materially, the governmental entity that requested the order shall notify the court within a reasonable period of time (not to exceed 14 days) of the changed circumstances, 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 (3); or

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

"(B) STAY OF DISCLOSURE OF NAMED 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 showing by the governmental entity that the stay should be lifted in whole or in part prior to resolution.

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

"(6) EXCEPTION.—A provider of electronic communications service or remote computing service

to which an order under paragraph (2) applies, or an officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to—

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

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

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

''(7) SCOPE OF NONDISCLOSURE.—Any person to whom disclosure is made under paragraph (6) (other than the governmental entity) shall be subject to the nondisclosure requirements applicable to the person to whom the order is issued. Any recipient authorized under this subsection to disclose to a person information otherwise subject to a nondisclosure requirement shall notify the person of the applicable nondisclosure requirement.

''(8) SUPPORTING DOCUMENTATION.—Upon serving a provider of electronic communications service or remote computing service with an order grant-

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

''(9) EXPIRATION OF ORDER PRECLUDING NOTICE.—Upon expiration of an order issued under paragraph (2) or, if an extension has been granted under paragraph (3), expiration of the extension, the governmental entity shall deliver to the named customer or subscriber, by at least 2 methods, which shall be personal service, registered or first-class mail, electronic mail, or other means approved by the court as reasonably calculated to reach the named customer or subscriber within 5 business days of the expiration of the order—

''(A) a copy of the warrant, order, or subpoena; and

''(B) notice that informs the named customer or subscriber—

''(i) of the nature of the law enforcement inquiry with reasonable specificity;

''(ii) that information maintained for such customer or subscriber by the provider of electronic communications service

or remote computing service to which the warrant, order, or subpoena under section 2703, was directed was supplied to or requested by the government entity;

''(iii) that notification of such customer or subscriber was precluded by court order;

''(iv) of the identity of the court authorizing the preclusion of notice;

''(v) of the provision of this chapter under which the preclusion of notice was authorized; and

''(vi) that the government will, upon request by the customer or subscriber made within 180 days after receiving notification under this paragraph, provide the named customer or subscriber with a copy of the information that was disclosed in response to the warrant, order or subpoena, or in the event that no information was disclosed, a written certification that no information was disclosed.

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

and at the request of the named customer or subscriber made within 180 days of receiving notification under paragraph (9), the governmental entity shall promptly provide the named customer or subscriber—

''(A) with a copy of the information that was disclosed in response to the warrant, order or subpoena (except illicit records, child sexual abuse material, and other illegal material); or

''(B) in the event that no information was disclosed, a written certification that no information was disclosed.

''(11) REDACTIONS.—Any information disclosed pursuant to paragraphs (4) and (5) may be redacted only if a court finds such redactions necessary to preserve the secrecy or integrity of an investigation.''.

SEC. 3. ADDITIONAL PROVISIONS REGARDING DELAYED NOTICE.

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

''(c) ANNUAL REPORT.—On an annual basis, the Attorney General shall provide to the Committee on the Judiciary of the House of Representatives, the Committee on the Judiciary of the Senate, and the Director of the

Administrative Office of the United States Courts, which the Director shall publish on the website of the Administrative Office of the United States Courts, in a manner consistent with protection of national security, a report setting forth with respect to the preceding calendar year, for each Federal judicial district—

''(1) the number of named customers or subscribers with respect to whom, in that calendar year, a warrant, subpoena, or court order was issued pursuant to section 2703;

''(2) the aggregate number of applications requesting delay of notification pursuant to subsection (a)(1), preclusion of notice pursuant to subsection (b)(1), and extensions pursuant to subsection (b)(3);

''(3) the aggregate number of orders under this section either granting, extending, or denying a request for delay of notification or preclusion of notice;

''(4) the aggregate number of orders under this section affecting a member of the news media, including any conduct related to activities protected under the First Amendment; and

''(5) the aggregate number of arrests, trials, and convictions, resulting from investigations in which orders under this section were obtained, in-

cluding the offenses for which individuals were arrested, tried, or convicted.

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