

NDO FAIRNESS ACT

SECTION BY SECTION

Section 1 – Short Title

Section 2 – Preclusion of Notice

This section amends section 2705(b) of title 18, United States Code, as follows:

- Subsection 1: Application – This subsection permits the government, when seeking a warrant, order, or subpoena under section 2703 of title 18, to apply for a court order (an “NDO”) instructing the electronic communications service provider to which the warrant, order, or subpoena is directed not to notify anyone, including the relevant customer, about the warrant, order, or subpoena. If the government’s application is granted, the NDO can be in effect for a period of not more than 90 days for most offenses and not more than one year for offenses pertaining to child sexual abuse material and similar offenses. The application must state whether the customer whose information is sought is aware of the search or investigation and whether the customer is suspected of the criminal activity under investigation. Finally, this subsection states the NDO cannot require the electronic communications service provider to notify the government or court when the NDO expires.
- Subsection 2: Determination – This subsection requires the court to issue a written determination, including findings of specific and articulable facts and conclusions of law, when granting an NDO application from the government. In order to grant an application, the court must find that it is more likely than not that one or more of the following five adverse results will occur if the application is denied: (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 trial. Any NDO granted must be narrowly tailored, and there cannot be a less restrictive alternative, such as notifying the customer’s legal representative, that would avoid the adverse results. The court must review the individual warrant, order, or subpoena to which the NDO applies. The court may consider the nature of the offense when ruling on an NDO application. If the offense pertains to child sexual abuse material or sexual exploitation of children, or if the offense is substantially equivalent to those offenses, the court may presume that one or more of the adverse results is likely to occur and may issue an NDO without providing a written determination.
- Subsection 3: Extension – This subsection permits the government to request one or more extensions of an NDO. Each extension may not exceed 90 days. When granting an application for an extension, the court must once again make a written determination, including findings of specific and articulable facts and conclusions of law.

- Subsection 4: Notification Of Changed Circumstances – This subsection requires the government to notify the court within 14 days if the need for the NDO changes materially.
- Subsection 5: Opportunity To Be Heard – This subsection affords electronic communications service providers an opportunity to file a motion to vacate or modify the NDO if the NDO does not meet the narrow tailoring or likelihood of an adverse result requirements or if compliance with the NDO is unreasonable or otherwise unlawful. The obligation of the electronic communications service provider to disclose the information requested in the warrant, order, or subpoena is stayed upon the filing of the motion to vacate or modify pending resolution of the motion, unless the court determines, based on a showing by the government, that the stay should be lifted in whole or in part. The court's decision on the motion to vacate or modify constitutes a final, appealable order.
- Subsection 6: Exception – This subsection allows electronic communications service providers subject to an NDO to disclose information to (i) persons to whom disclosure is necessary in order to comply with the warrant, order, or subpoena; (ii) an attorney, in order to obtain legal advice regarding the NDO or the warrant, order, or subpoena; and (iii) any person the court determines can be notified of the warrant, order or subpoena. Any person to whom disclosure is made under this subsection shall be subject to the NDO's requirements.
- Subsection 7: Supporting Documentation – This subsection requires the government to include a copy of the warrant, order, or subpoena when serving an electronic communications service provider with an NDO.
- Subsection 8: Expiration Of Order Precluding Notice – This subsection requires the government, upon expiration of the NDO, to provide the customer with a copy of the warrant, order, or subpoena and notice that informs the customer (i) of the nature of the law enforcement inquiry; (ii) that the customer's information was requested by a warrant, order, or subpoena; (iii) that notification to the customer was precluded by court order; (iv) of the identify of the court; (v) of the provision under which the NDO was authorized; and (vi) that the government will, upon request, provide the customer with the information that was disclosed by the electronic communications service provider.
- Subsection 9: Copy Of Information Disclosed – This subsection requires the government, upon the customer's request, to provide a copy of the information disclosed by the electronic communications service provider, except illicit records, child sexual abuse material, and other illegal material, or, if no information was disclosed, a written certification affirming so.

- Subsection 10: Redactions – This subsection permits the government to redact information disclosed under subsections 8 and 9 only if the court finds such redactions necessary to preserve the secrecy or integrity of an investigation.

Section 3 – Additional Provisions Regarding Delayed Notice

This section amends section 2705 of title 18, United States Code, by adding the following at the end:

- Annual Report – This section requires the Attorney General to provide to the Senate Judiciary Committee, House Judiciary Committee, and the Administrative Office of the United States Courts an annual report setting forth (i) the number of customers with respect to whom a warrant, subpoena, or order was issued pursuant to section 2703; (ii) the number of filed NDO applications and extensions; (iii) the number of NDOs granted, extended, or denied; (iv) the aggregate number of NDOs affecting a member of the news media; and (v) the aggregate number of arrests, trial, and convictions resulting from investigations in which NDOs were obtained. This section also directs the Justice Department to publish the reported information on its website.