

NDO FAIRNESS ACT

Under the Stored Communications Act, the U.S. Government may obtain a warrant to compel electronic communications service providers—including companies like Microsoft, Apple, and Meta—to disclose customers' personal records and information during a criminal investigation. The Government may also obtain a non-disclosure order (NDO) prohibiting the provider from notifying the customer of the Government's request if there is reason to believe that such notice might jeopardize the investigation.

Although NDOs were originally intended to be used only in a small subset of investigations requiring secrecy, large tech companies now receive thousands of NDOs per year. Under current rules, the process of obtaining an NDO leaves little room for judicial review or opportunity for providers to contest the validity of an NDO and leaves customers wholly unable to assert Fourth Amendment challenges to searches of which they are never made aware.

The NDO Fairness Act is a bipartisan bill that would reform the process for obtaining NDOs by imposing more exacting standards and heightened requirements before NDOs can be issued.

BILL SUMMARY

The NDO Fairness Act would reform the process for granting NDO applications by:

- Raising the standard of proof the Government must satisfy before an NDO can be issued;
- Requiring the Government to state in its application whether the target of the search is aware of the search or investigation and whether the target is suspected of the criminal activity under investigation;
- Requiring the court to issue a written determination when granting an NDO application;
- Requiring that the NDO be narrowly tailored;
- Requiring that the NDO be issued initially for no more than 90 days with the option to request 90-day extensions, with exceptions for offenses involving child sexual abuse material or similar offenses;
- Affording service providers an opportunity to file a motion to vacate or modify the NDO; and
- Requiring the Government to notify the court within 14 days if the need for the NDO changes materially.

The NDO Fairness Act has been endorsed by the Rape, Abuse & Incest National Network (RAINN), Reform Government Surveillance, and the Project for Privacy and Surveillance Accountability.