

**AMENDMENT TO RULES COMMITTEE PRINT 118-**

**36**

**OFFERED BY MR. FITZGERALD OF WISCONSIN**

Add at the end of subtitle C of title XVII the following:

1 **SEC. 17\_\_ . NONDISCLOSURE ORDER REFORM.**

2 (a) IN GENERAL.—Section 2705(b) of title 18,  
3 United States Code, is amended to read as follows:

4 “(b) PRECLUSION OF NOTICE.—

5 “(1) APPLICATION.—

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

1           “(B) LENGTH.—An order granted under  
2           subparagraph (A) shall be in effect—

3                   “(i) for a period of not more than one  
4                   year if the governmental entity notifies the  
5                   court of a material change in cir-  
6                   cumstances, as set forth in paragraph (4),  
7                   if the nature of the offense pertains to  
8                   child pornography, as defined in section  
9                   2256, or sexual exploitation of children, as  
10                  described in section 2251, or any Federal,  
11                  including military, State, or tribal offense  
12                  that is the substantial equivalent; or

13                   “(ii) for a period of not more than 90  
14                   days for all other investigations.

15           “(C) OTHER REQUIREMENTS.—

16                   “(i) IN GENERAL.—A application for  
17                   an order under subparagraph (A) shall  
18                   state, to the best of the applicant’s knowl-  
19                   edge, whether the named customer or sub-  
20                   scriber whose information is sought by the  
21                   warrant, order, or subpoena under section  
22                   2703—

23                   “(I) is aware of the warrant,  
24                   order, subpoena, or underlying inves-  
25                   tigation; and

1                   “(II) is suspected of involvement  
2                   in the commission of the crime under  
3                   investigation.

4                   “(ii) ORDERS.—An order granted  
5                   under this paragraph may not direct, or  
6                   otherwise require, a provider of electronic  
7                   communications service or remote com-  
8                   puting service to provide notification of the  
9                   expiration of order to the court or govern-  
10                  ment entity that sought the order.

11                  “(2) DETERMINATION.—

12                  “(A) IN GENERAL.—The court may not  
13                  grant a request for an order made under para-  
14                  graph (1), or an extension of such order re-  
15                  quested by the governmental entity pursuant to  
16                  paragraph (3), unless—

17                  “(i) the court issues a written deter-  
18                  mination, based on specific and articulable  
19                  facts, and including written findings of  
20                  fact and conclusions of law, that it is likely  
21                  that not granting the request will result  
22                  in—

23                  “(I) endangering the life or phys-  
24                  ical safety of an individual;

25                  “(II) flight from prosecution;

1                   “(III) destruction of or tam-  
2                   pering with evidence;

3                   “(IV) intimidation of potential  
4                   witnesses; or

5                   “(V) otherwise seriously jeopard-  
6                   izing an investigation or unduly delay-  
7                   ing a trial; and

8                   “(ii) the order is narrowly tailored  
9                   and there is no less restrictive alternative,  
10                  including notification to an individual or  
11                  organization within or providing legal rep-  
12                  resentation to the named customer or sub-  
13                  scriber, that is not likely to result in an  
14                  adverse result as described in subclauses  
15                  (I) through (V) of subparagraph (A)(i);  
16                  and

17                  “(iii) the court has reviewed the indi-  
18                  vidual warrant, order, or subpoena under  
19                  section 2703 to which the order issued  
20                  under this paragraph applies.

21                  “(B) NATURE OF THE OFFENSE.—

22                  “(i) IN GENERAL.—Subject to clause  
23                  (ii), the court may consider the nature of  
24                  the offense in issuing a determination  
25                  under subparagraph (A).

1           “(ii) PRESUMPTION.—If the court de-  
2           termines there is a reasonable belief the  
3           nature of the offense pertains to child por-  
4           nography, as defined in section 2256, or  
5           sexual exploitation of children, as described  
6           in section 2251, or any Federal, including  
7           military, State, or tribal offense that is the  
8           substantial equivalent, the court may pre-  
9           sume that one or more of the adverse re-  
10          sults described in subclauses (I) through  
11          (V) of subparagraph (A)(i) are met and  
12          may issue an order consistent with this  
13          subsection without a written decision under  
14          subparagraph (A)(i).

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 90 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).

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 a reasonable period of time (not to

1 exceed 14 days) of the changed circumstances, and  
2 the court shall reassess the order and modify or va-  
3 cate as appropriate.

4 “(5) OPPORTUNITY TO BE HEARD.—

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

13 “(i) the order does not meet require-  
14 ments provided in paragraph (2) or (3); or

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

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

1           diction over the challenge determines based on  
2           a showing by the governmental entity that the  
3           stay should be lifted in whole or in part prior  
4           to resolution.

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

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

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

18                 “(B) an attorney in order to obtain legal  
19                 advice or assistance regarding the order issued  
20                 under paragraph (2) or the warrant, order, or  
21                 subpoena to which the order applies; 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 named cus-  
21 tomer or subscriber, by at least 2 methods, which  
22 shall be personal service, registered or first-class  
23 mail, electronic mail, or other means approved by  
24 the court as reasonably calculated to reach the



1 named customer or subscriber within 5 business  
2 days of the expiration of the order—

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

5 “(B) notice that informs the named cus-  
6 tomer or 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           named customer or subscriber with a copy  
4           of the information that was disclosed in re-  
5           sponse to the warrant, order or subpoena,  
6           or in the event that no information was  
7           disclosed, a written certification that no in-  
8           formation 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 named customer or sub-  
13          scriber made within 180 days of receiving notifica-  
14          tion under paragraph (9), the governmental entity  
15          shall promptly provide the named customer or sub-  
16          scriber—

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

20                         “(i) illicit records;

21                         “(ii) records or materials pertaining  
22                         to child pornography, as defined in section  
23                         2256, or sexual exploitation of children, as  
24                         described in section 2251, or any Federal,

1 including military, State, tribal, or offense  
2 that is the substantial equivalent; or

3 “(iii) other illegal material; or

4 “(B) in the event that no information was  
5 disclosed, a written certification that no infor-  
6 mation was disclosed.

7 “(11) REDACTIONS.—Any information disclosed  
8 pursuant to paragraphs (9) and (10) may be re-  
9 dacted only if a court finds such redactions nec-  
10 essary to preserve the secrecy or integrity of an in-  
11 vestigation.”.

12 (b) ADDITIONAL PROVISIONS REGARDING DELAYED  
13 NOTICE.—Section 2705 of title 18, United States Code,  
14 is amended by adding at the end the following:

15 “(c) ANNUAL REPORT.—

16 “(1) IN GENERAL.—On an annual basis, the  
17 Attorney General shall provide to the Committee on  
18 the Judiciary of the House of Representatives, the  
19 Committee on the Judiciary of the Senate, and the  
20 Director of the Administrative Office of the United  
21 States Courts, which the Attorney General shall  
22 publish on the website of the Department of Justice,  
23 in a manner consistent with protection of national  
24 security, a report setting forth with respect to the

1 preceding calendar year, for each Federal judicial  
2 district—

3 “(A) the number of named customers or  
4 subscribers with respect to whom, in that cal-  
5 endar year, a warrant, subpoena, or court order  
6 was issued pursuant to section 2703;

7 “(B) the aggregate number of applications  
8 requesting delay of notification pursuant to  
9 subsection (a)(1), preclusion of notice pursuant  
10 to subsection (b)(1), and extensions pursuant to  
11 subsection (b)(3);

12 “(C) the aggregate number of orders under  
13 this section either granting, extending, or deny-  
14 ing a request for delay of notification or pre-  
15 clusion of notice;

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

21 “(E) the aggregate number of arrests,  
22 trials, and convictions, resulting from investiga-  
23 tions in which orders under this section were  
24 obtained, including the offenses for which indi-  
25 viduals were arrested, tried, or convicted.

1           “(2) PROCESS.—The Attorney General shall in-  
2           clude in the report under this subsection a descrip-  
3           tion of the process and the information used to de-  
4           termine the numbers for each of subparagraphs (A)  
5           through (E) or paragraph (1).  
6           ”.

