

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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April 21, 2015

To: Subcommittee on Commerce, Manufacturing, and Trade Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Markup of “H.R.____, Targeting Rogue and Opaque Letters (TROL) Act”

On Wednesday, April 22, 2015, at 12:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Commerce, Manufacturing, and Trade will meet in open markup of H.R.____, Targeting Rogue and Opaque Letters (TROL) Act.

**SUMMARY OF H.R.____, TARGETING ROGUE AND
OPAQUE LETTERS (TROL) ACT¹**

A. Unfair or Deceptive Acts or Practices

Under section 2 of the discussion draft, a pattern or practice of sending demand letters that does not comply with the conditions set forth in the bill would be an unfair or deceptive act or practice in violation of section 5 of the FTC Act. Specifically, it would be unfair or deceptive for: (1) the sender to make certain false or misleading statements or representations in bad faith, including that the person sending the demand letter is not the person with the right to enforce or license the patent; litigation has been filed against the recipient or others or will be filed against the recipient; the sender is the exclusive licensee of the patent; people other than the recipient purchased a license for the patent; an investigation of the alleged infringement occurred; or the sender previously filed a lawsuit for infringement based on activity that is the subject of the demand letter and that activity had been held in a final determination not to infringe; or (2) the sender to seek compensation in bad faith for an invalid or unenforceable patent, for activities that occurred after the expiration of a patent, or activities that the sender knew were authorized.

¹ The draft that will be marked-up is the same draft that was the subject of the legislative hearing held last Thursday, April 16, 2015.

Also under section 2, it would be an unfair or deceptive practice for the sender of demand letters to fail to include, in bad faith, the following disclosures: (1) the identity of the person attempting to enforce the patent, including any parent entity and ultimate parent entity for non-public companies; (2) the identity of at least one patent allegedly infringed; (3) the identity, to the extent reasonable under the circumstances, of the infringing product; (4) a description, to the extent reasonable under the circumstances, of how the product infringes an identified patent and patent claim; and (5) contact information for a person with whom the assertions in the letter may be discussed.

Currently, to bring a claim against a patent troll on the basis of unfair or deceptive acts or practices, the FTC and state attorneys general do not have to prove any element of knowledge or falsity. However, for these enforcers to find violations of section 2(a) in the discussion draft, they must establish “bad faith” on the part of the sender. Among the substantive changes from the earlier discussion draft, section 5 of the discussion draft defines “bad faith” to mean that the sender made knowingly false or knowingly misleading statements, made the statements with reckless disregard as to the false or misleading nature of the statements, or made the statements, with awareness of the high probability of the statements to deceive and the sender intentionally avoided the truth.

Section 2 also includes an affirmative defense that statements, representations, and omissions were not made in bad faith if the sender can demonstrate that those statements were made in good faith. Evidence that the sender “in the usual course of business” sends letters that do not violate the provisions of this bill is evidence of good faith. The affirmative defense also allows for good faith to be demonstrated by other, unspecified evidence.

B. Enforcement

Section 3 of the discussion draft provides for enforcement of this proposed law by the FTC and allows the agency to seek civil penalties for violations of section 2. Section 3 also includes a savings clause that explicitly states that nothing in this act limits or affects the authority of the FTC under any other provision of law.

Section 4 preempts state laws, regulations, or other provisions having the force and effect of law expressly relating to patent assertion communications.² This section also includes a savings clause that states that this act does not preempt or limit other state laws, including state consumer protection laws, any laws relating to acts of fraud or deception, or any state trespass, contract, or tort laws.

Section 4 also provides for enforcement of this act by state attorneys general in cases in which the state attorney general believes that residents of the state have been adversely affected by violations of section 2. All legal actions brought under this act would be required to be brought in federal court. The remedies available to state attorneys general are limited to an

² Currently, 20 states have laws specific to patent assertion communications and nine more states are currently considering such legislation. Other states may have common law, standards, or requirements relating to patent assertion communications.

injunction and civil penalties capped at \$5,000,000 for all actions brought by all state attorneys general relating to the same violation of section 2. This section also provides for intervention by the FTC at the agency's discretion.

In addition to not being able to sue under their own law and limiting the amount of civil penalties a state could seek, preemption would have a number of other effects. For example, some of the existing state statutes allow their attorneys general and private entities to seek additional remedies not permitted under this bill.