..... (Original Signature of Member)

114TH CONGRESS 1ST SESSION



To provide that certain bad faith communications in connection with the assertion of a United States patent are unfair or deceptive acts or practices, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. BURGESS introduced the following bill; which was referred to the Committee on _____

A BILL

- To provide that certain bad faith communications in connection with the assertion of a United States patent are unfair or deceptive acts or practices, and for other purposes.
 - 1 Be it enacted by the Senate and House of Representa-
 - 2 tives of the United States of America in Congress assembled,

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Targeting Rogue and5 Opaque Letters Act of 2015".

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1SEC. 2. UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN2CONNECTION WITH THE ASSERTION OF A3UNITED STATES PATENT.

4 (a) IN GENERAL.—It shall be an unfair or deceptive 5 act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1))6 7 for a person, in connection with the assertion of a United 8 States patent, to engage in a pattern or practice of send-9 ing written communications that state or represent that the recipients are or may be infringing, or have or may 10 11 have infringed, the patent and bear liability or owe compensation to another, if— 12

13 (1) the sender of the communications, in bad
14 faith, states or represents in the communications
15 that—

16 (A) the sender is a person with the right
17 to license or enforce the patent at the time the
18 communications are sent, and the sender is not
19 a person with such a right;

20 (B) a civil action asserting a claim of in21 fringement of the patent has been filed against
22 the recipient;

(C) a civil action asserting a claim of infringement of the patent has been filed against
other persons;

1	(D) legal action for infringement of the
2	patent will be taken against the recipient;
3	(E) the sender is the exclusive licensee of
4	the patent asserted in the communications;
5	(F) persons other than the recipient pur-
6	chased a license for the patent asserted in the
7	communications;
8	(G) persons other than the recipient pur-
9	chased a license, and the sender does not dis-
10	close that such license is unrelated to the al-
11	leged infringement or the patent asserted in the
12	communications;
13	(H) an investigation of the recipient's al-
14	leged infringement occurred; or
15	(I) the sender or an affiliate of the sender
16	previously filed a civil action asserting a claim
17	of infringement of the patent based on the ac-
18	tivity that is the subject of the written commu-
19	nication when the sender knew such activity
20	was held, in a final determination, not to in-
21	fringe the patent;
22	(2) the sender of the communications, in bad
23	faith, seeks compensation for—
24	(A) a patent claim that has been held to
25	be unenforceable due to inequitable conduct, in-

1	valid, or otherwise unenforceable against the re-
2	cipient, in a final determination;
3	(B) activities undertaken by the recipient
4	after expiration of the patent asserted in the
5	communications; or
6	(C) activity of the recipient that the sender
7	knew was authorized, with respect to the patent
8	claim or claims that are the subject of the com-
9	munications, by a person with the right to li-
10	cense the patent; or
11	(3) the sender of the communications, in bad
12	faith, fails to include—
13	(A) the identity of the person asserting a
14	right to license the patent to, or enforce the
15	patent against, the recipient, including the iden-
16	tity of any parent entity and the ultimate par-
17	ent entity of such person, unless such person is
18	a public company and the name of the public
19	company is identified;
20	(B) an identification of at least one patent
21	issued by the United States Patent and Trade-
22	mark Office alleged to have been infringed;
23	(C) an identification, to the extent reason-
24	able under the circumstances, of at least one
25	product, service, or other activity of the recipi-

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ent that is alleged to infringe the identified patent;

(D) a description, to the extent reasonable under the circumstances, of how the product, service, or other activity of the recipient in-6 fringes an identified patent and patent claim; or

7 (E) a name and contact information for a 8 person the recipient may contact about the as-9 sertions or claims relating to the patent con-10 tained in the communications.

11 (b) AFFIRMATIVE DEFENSE.—With respect to subsection (a), there shall be an affirmative defense that 12 13 statements, representations, or omissions were not made in bad faith (as defined in subparagraphs (B) and (C) of 14 15 section 5(1) if the sender can demonstrate that such statements, representations, or omissions were mistakes 16 17 made in good faith, which may be demonstrated by a preponderance of evidence that the violation was not inten-18 tional and resulted from a bona fide error notwithstanding 19 the maintenance of procedures reasonably adapted to 20 21 avoid any such error.

22 (c) RULE OF CONSTRUCTION.—For purposes of sec-23 tions 3 and 4, the commission of an act or practice that 24 is declared under this section to be an unfair or deceptive 25 act or practice within the meaning of section 5(a)(1) of 1 the Federal Trade Commission Act (15 U.S.C. 45(a)(1))

2 shall be considered to be a violation of this section.

3 SEC. 3. ENFORCEMENT BY FEDERAL TRADE COMMISSION.

4 (a) VIOLATION OF RULE.—A violation of section 2
5 shall be treated as a violation of a rule defining an unfair
6 or deceptive act or practice prescribed under section
7 18(a)(1)(B) of the Federal Trade Commission Act (15
8 U.S.C. 57a(a)(1)(B)).

9 (b) POWERS OF COMMISSION.—The Commission 10 shall enforce this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties 11 12 as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were 13 incorporated into and made a part of this Act. Any person 14 15 who violates section 2 shall be subject to the penalties and entitled to the privileges and immunities provided in the 16 17 Federal Trade Commission Act.

(c) EFFECT ON OTHER LAWS.—Nothing in this Act
shall be construed in any way to limit or affect the authority of the Commission under any other provision of law.
SEC. 4. PREEMPTION OF STATE LAWS ON PATENT DEMAND
LETTERS AND ENFORCEMENT BY STATE ATTORNEYS GENERAL.

24 (a) PREEMPTION.—

1 (1) IN GENERAL.—This Act preempts any law, 2 rule, regulation, requirement, standard, or other pro-3 vision having the force and effect of law of any 4 State, or political subdivision of a State, expressly 5 relating to the transmission or contents of commu-6 nications relating to the assertion of patent rights. 7 (2) EFFECT ON OTHER STATE LAWS.—Except 8 as provided in paragraph (1), this Act shall not be 9

9 construed to preempt or limit any provision of any
10 State law, including any State consumer protection
11 law, any State law relating to acts of fraud or decep12 tion, and any State trespass, contract, or tort law.
13 (b) ENFORCEMENT BY STATE ATTORNEYS GEN14 ERAL.—

15 (1) IN GENERAL.—In any case in which the at-16 torney general of a State has reason to believe that 17 an interest of the residents of that State has been 18 adversely affected by any person who violates section 19 2, the attorney general of the State, may bring a 20 civil action on behalf of such residents of the State 21 in a district court of the United States of appro-22 priate jurisdiction—

23 (A) to enjoin further such violation by the24 defendant; or

25 (B) to obtain civil penalties.

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1 (2) MAXIMUM CIVIL PENALTY.—Notwith-2 standing the number of actions which may be 3 brought against a person under this subsection, a 4 person may not be liable for a total of more than 5 \$\$5,000,000 for a series of related violations of sec-6 tion 2.

(3) INTERVENTION BY THE FTC.—

(A) NOTICE AND INTERVENTION.—The at-8 9 torney general of a State shall provide prior 10 written notice of any action under paragraph 11 (1) to the Commission and provide the Commis-12 sion with a copy of the complaint in the action, 13 except in any case in which such prior notice is 14 not feasible, in which case the attorney general 15 shall serve such notice immediately upon instituting such action. The Commission shall have 16 17 the right—

18 (i) to intervene in the action; 19 (ii) upon so intervening, to be heard 20 on all matters arising therein; and 21 (iii) to file petitions for appeal. 22 (B) LIMITATION ON STATE ACTION WHILE 23 FEDERAL ACTION IS PENDING.—If the Commis-24 sion has instituted a civil action for violation of 25 section 2, no State attorney general may bring

1	an action under this subsection during the
2	pendency of that action against any defendant
3	named in the complaint of the Commission for
4	any violation of such section alleged in the com-
5	plaint.
6	(4) CONSTRUCTION.—For purposes of bringing
7	any civil action under paragraph (1), nothing in this
8	Act shall be construed to prevent the attorney gen-
9	eral of a State from exercising the powers conferred
10	on the attorney general by the laws of that State
11	to—
12	(A) conduct investigations;
13	(B) administer oaths or affirmations; or
14	(C) compel the attendance of witnesses or
15	the production of documentary and other evi-
16	dence.
16 17	dence. SEC. 5. DEFINITIONS.
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 17 18 19 20 21 22 	SEC. 5. DEFINITIONS. In this Act: (1) BAD FAITH.—The term "bad faith" means, with respect to section 2(a), that the sender— (A) made knowingly false or knowingly misleading statements, representations, or omis-

false or misleading nature of such statements,
 representations, or omissions; or

3 (C) made statements, representations, or
4 omissions with awareness of the high prob5 ability of the statements, representations, or
6 omissions to deceive and the sender inten7 tionally avoided the truth.

8 (2) COMMISSION.—The term "Commission"
9 means the Federal Trade Commission.

10 (3) FINAL DETERMINATION.—The term "final 11 determination" means, with respect to the invalidity or unenforceability of a patent, that the invalidity or 12 13 unenforceability has been determined by a court of 14 the United States or the United States Patent and Trademark Office in a final decision that is 15 16 unappealable or for which any opportunity for ap-17 peal is no longer available.