

**AMENDMENT TO THE AMENDMENT IN THE
NATURE OF A SUBSTITUTE FOR H.R. 2668
OFFERED BY M . _____**

Before section 1 of the bill, insert the following:

1 **DIVISION A—CONSUMER**
2 **PROTECTION AND RECOVERY**

In section 1, strike “This Act” and insert “This di-
vision”.

At the end of the bill, insert the following:

3 **DIVISION B—SUSPENSION OF**
4 **DEMAND LETTERS RELATED**
5 **TO COVID-19**

6 **SEC. 11. SUSPENSION OF DEMAND LETTERS RELATED TO**
7 **COVID-19.**

8 (a) SUSPENDING DEMAND LETTERS RELATED TO
9 COVID-19.—For the duration of a public health emergency
10 declared pursuant to section 319 of the Public Health
11 Service Act (42 U.S.C. 247d) as a result of confirmed
12 cases of 2019 novel coronavirus (COVID-19), including
13 any renewal thereof, it shall be unlawful for any person,
14 in connection with the assertion of a United States patent,
15 to engage in a pattern or practice of sending written com-

1 munications that state or represent that the recipients are
2 or may be infringing, or have or may have infringed, a
3 patent regarding COVID-19 related products and bear li-
4 ability or owe compensation to another, if—

5 (1) the sender of the communications, in bad
6 faith, states or represents in the communications
7 that—

8 (A) the sender is a person with the right
9 to license or enforce the patent at the time the
10 communications are sent, and the sender is not
11 a person with such a right;

12 (B) a civil action asserting a claim of in-
13 fringement of the patent has been filed against
14 the recipient;

15 (C) a civil action asserting a claim of in-
16 fringement of the patent has been filed against
17 other persons;

18 (D) legal action for infringement of the
19 patent will be taken against the recipient;

20 (E) the sender is the exclusive licensee of
21 the patent asserted in the communications;

22 (F) persons other than the recipient pur-
23 chased a license for the patent asserted in the
24 communications;

1 (G) persons other than the recipient pur-
2 chased a license, and the sender does not dis-
3 close that such license is unrelated to the al-
4 leged infringement or the patent asserted in the
5 communications;

6 (H) an investigation of the recipient's al-
7 leged infringement occurred; or

8 (I) the sender or an affiliate of the sender
9 previously filed a civil action asserting a claim
10 of infringement of the patent based on the ac-
11 tivity that is the subject of the written commu-
12 nication when such activity was held, in a final
13 determination, not to infringe the patent;

14 (2) the sender of the communications, in bad
15 faith, seeks compensation for—

16 (A) a patent claim that has been held to
17 be unenforceable due to inequitable conduct, in-
18 valid, or otherwise unenforceable against the re-
19 cipient, in a final determination;

20 (B) activities undertaken by the recipient
21 after expiration of the patent asserted in the
22 communications; or

23 (C) activity of the recipient that was au-
24 thorized, with respect to the patent claim or
25 claims that are the subject of the communica-

1 tions, by a person with the right to license the
2 patent; or

3 (3) the sender of the communications, in bad
4 faith, fails to include—

5 (A) the identity of the person asserting a
6 right to license the patent to, or enforce the
7 patent against, the recipient, including the iden-
8 tity of any parent entity and the ultimate par-
9 ent entity of such person, unless such person is
10 a public company and the name of the public
11 company is identified;

12 (B) an identification of at least one patent
13 issued by the United States Patent and Trade-
14 mark Office alleged to have been infringed;

15 (C) an identification, to the extent reason-
16 able under the circumstances, of at least one
17 product, service, or other activity of the recipi-
18 ent that is alleged to infringe the identified pat-
19 ent;

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

24 (E) a name and contact information for a
25 person the recipient may contact about the as-

1 sertions or claims relating to the patent con-
2 tained in the communications.

3 (b) PRESUMPTION OF BAD FAITH.—A written com-
4 munication is presumed to have been sent in bad faith if,
5 after receiving a written request by the recipient to provide
6 any of the information required in subsection (a)(3) or a
7 patent claim reasonably believed to have been infringed,
8 the sender fails to provide such information to the recipi-
9 ent within 10 business days after the date on which the
10 request is received.

11 (c) AFFIRMATIVE DEFENSE.—With respect to sub-
12 section (a), there shall be an affirmative defense that a
13 statement, representation, or omission was not made in
14 bad faith (as defined in subparagraphs (B) or (C) of sec-
15 tion 13(1)) if the sender can demonstrate that such state-
16 ment, representation, or omission was a mistake made in
17 good faith, which may be demonstrated by a preponder-
18 ance of evidence that the violation was not intentional and
19 resulted from a bona fide error notwithstanding the main-
20 tenance of procedures or policies reasonably adapted to
21 avoid any such error.

22 (d) RULE OF CONSTRUCTION.—For purposes of this
23 section, the commission of an act or practice that is de-
24 clared under this section to be an unfair or deceptive act
25 or practice within the meaning of section 5(a)(1) of the

1 Federal Trade Commission Act (15 U.S.C. 45(a)(1)) shall
2 be considered to be a violation of this section.

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

18 (c) EFFECT ON OTHER LAWS.—Nothing in this divi-
19 sion shall be construed in any way to limit or affect the
20 authority of the Commission under any other provision of
21 law.

22 (d) ENFORCEMENT BY STATE ATTORNEYS GEN-
23 ERAL.—

24 (1) IN GENERAL.—In any case in which the at-
25 torney general of a State has reason to believe that

1 an interest of the residents of that State has been
2 adversely affected by any person who violates section
3 2, the attorney general of the State, may bring a
4 civil action on behalf of such residents of the State
5 in a district court of the United States of appro-
6 priate jurisdiction—

7 (A) to enjoin further such violation by the
8 defendant; or

9 (B) to obtain civil penalties on behalf of
10 recipients who suffered actual damages as a re-
11 sult of such violation.

12 (2) MAXIMUM CIVIL PENALTY.—Notwith-
13 standing the number of actions which may be
14 brought against a person under this subsection, a
15 person may not be liable for a total of more than
16 \$1,000,000 for every death related to COVID-19 in
17 the United States.

18 (3) INTERVENTION BY THE FTC.—

19 (A) NOTICE AND INTERVENTION.—The at-
20 torney general of a State shall provide prior
21 written notice of any action under paragraph
22 (1) to the Commission and provide the Commis-
23 sion with a copy of the complaint in the action,
24 except in any case in which such prior notice is
25 not feasible, in which case the attorney general

1 shall serve such notice immediately upon insti-
2 tuting such action. The Commission shall have
3 the right—

4 (i) to intervene in the action;

5 (ii) upon so intervening, to be heard
6 on all matters arising therein; and

7 (iii) to file petitions for appeal.

8 (B) LIMITATION ON STATE ACTION WHILE
9 FEDERAL ACTION IS PENDING.—If the Commis-
10 sion has instituted a civil action for violation of
11 section 2, no State attorney general may bring
12 an action under this subsection during the
13 pendency of that action against any defendant
14 named in the complaint of the Commission for
15 any violation of such section alleged in the com-
16 plaint.

17 (4) CONSTRUCTION.—For purposes of bringing
18 any civil action under paragraph (1), nothing in this
19 division shall be construed to prevent the attorney
20 general of a State from exercising the powers con-
21 ferred on the attorney general by the laws of that
22 State to—

23 (A) conduct investigations;

24 (B) administer oaths or affirmations; or

1 (C) compel the attendance of witnesses or
2 the production of documentary and other evi-
3 dence.

4 **SEC. 13. DEFINITIONS.**

5 In this division:

6 (1) **BAD FAITH.**—The term “bad faith” means,
7 with respect to section 2, that the sender—

8 (A) made a knowingly false or knowingly
9 misleading statement, representation, or omis-
10 sion;

11 (B) made a statement, representation, or
12 omission with reckless indifference as to the
13 false or misleading nature of such statement,
14 representation, or omission; or

15 (C) made a statement, representation, or
16 omission with awareness of the high probability
17 of the statement, representation, or omission to
18 deceive and the sender intentionally avoided the
19 truth.

20 (2) **COMMISSION.**—The term “Commission”
21 means the Federal Trade Commission.

22 (3) **FINAL DETERMINATION.**—The term “final
23 determination” means, with respect to the invalidity
24 or unenforceability of a patent, that the invalidity or
25 unenforceability has been determined by a court of

1 the United States or the United States Patent and
2 Trademark Office in a final decision that is
3 unappealable or for which any opportunity for ap-
4 peal is no longer available.

