



Memorandum

July 7, 2014

To: Members of the Subcommittee on Commerce, Manufacturing, and Trade

From: Majority Committee Staff

Re: Subcommittee Markup of H.R. 4013, Low Volume Motor Vehicle Manufacturers Act of 2014; H.R. 4450, Travel Promotion, Enhancement, and Modernization Act of 2014; H.R. ____, Targeting Rogue and Opaque Letters Act of 2014

On Wednesday, July 9, at 4:00 p.m., in 2123 Rayburn House Office Building, the Subcommittee on Commerce, Manufacturing, and Trade will meet in an open markup session for opening statements regarding H.R. 4013, Low Volume Motor Vehicle Manufacturers Act of 2014; H.R. 4450, Travel Promotion, Enhancement, and Modernization Act of 2014; and H.R. ____, Targeting Rogue and Opaque Letters Act of 2014. The Subcommittee will reconvene on Thursday, July 10, 2014, at 10:00 a.m. for the purpose of considering the legislation.

I. H.R. 4013, the Low Volume Motor Vehicle Manufacturers Act of 2014

A. Background

The replica car industry is comprised predominantly of small businesses who manufacture replicas of cars produced more than 25 years ago, the primary purpose of which is exhibitions, parades, and occasional transportation. The regulatory framework promulgated over the years by the National Highway Traffic Safety Administration (NHTSA) does not account for the unique nature of these low-volume manufacturers. H.R. 4013 creates a safety regulatory regime that addresses the unique safety and financial issues associated with limited-volume production by directing the Secretary to exempt up to 1,000 vehicles from certain safety and labeling standards per low volume manufacturer if such manufacturer produces fewer than 5,000 vehicles globally per year. These cars would also meet current emissions standards by permitting companies to comply with the mandates of the Environmental Protection Agency (EPA) by installing EPA- or California Air Resources Board-certified engines. The cars also must be manufactured under a license from the original manufacturer (or current rights holder) for the product configuration, trade dress, trademark, or patent of the replicated motor vehicle.

B. Legislative History

Representatives John Campbell, John Barrow, and Duncan Hunter introduced H.R. 4013 on February 6, 2014.

C. Section-by-Section

Section 1 – Short Title.

Section 1 provides that the Act may be cited as the “Low Volume Motor Vehicle Manufacturers Act of 2014.”

Section 2 – Exemption from Vehicle Safety Standards for Low Volume Manufacturers.

Section 2 directs the Secretary to exempt from the Federal Motor Vehicle Safety Standards applicable to motor vehicles not more than 1,000 vehicles produced or imported by low volume manufacturers, and to permit the sale of such vehicles. Section 2 also mandates that such manufacturers register with the Secretary, affix a permanent label to any replica car identifying the specific standards and regulations from which the vehicle is exempt, and to send written notice of the exemption to the dealer and the first consumer who purchases the vehicle. Additionally, section 2 requires that manufacturers must submit an annual report to the Secretary detailing the number and description of vehicles exempted and the exemptions listed on the required label. Section 2 defines “low volume manufacturer” as a manufacturer who produces no more than 5,000 motor vehicles, and “replica motor vehicle” as a vehicle produced under the relevant intellectual property licenses obtained from the original vehicle manufacturer or current rights holder. In addition to exempting replica cars from the Federal Motor Vehicle Safety Standards applicable to motor vehicles, this section specifically exempts replica cars from 49 U.S.C. sections 32304 (related to country of origin labeling), 32502 (relating to bumper standards), and 32902 (relating to average fuel economy standards), and 15 U.S.C. section 1232 (relating to window labels).

Section 3 – Vehicle Emission Compliance Standards for Low Volume Motor Vehicle Manufacturers.

Section 3 permits low volume manufacturers to comply with the Clean Air Act by installing either an engine from a motor vehicle granted a certificate of conformity by the Administrator in the model year the replica car is assembled, or an engine granted an Executive Order by the California Air Resources Board in the model year in which the replica car is assembled, provided that certain requirements are satisfied. Section 3 also exempts replica cars from the certification testing and vehicle emission control inspection and maintenance programs required under the Clean Air Act. Section 3 mandates that low volume manufacturers register with the Administrator.

Section 4 – Implementation.

Section 4 requires the Secretary of Transportation and the Administrator of the EPA to issue regulations under the Act within 12 months of enactment.

II. H.R. 4450, Travel Promotion, Enhancement, and Modernization Act of 2014

A. Background

Brand USA is a public-private partnership created by the Travel Promotion Act of 2009 (“TPA”) created to execute the “first global marketing effort to promote the United States as a

premier travel destination and communicate U.S. entry/exit policies and procedures, and identify and correct misconceptions about those policies.”¹ As a public-private partnership, Brand USA is funded by a combination of fees paid by international travelers to the Department of Homeland Security’s Electronic System for Travel Authorization (ESTA) program and, at a minimum, 100 percent matching non-public funds contributed by travel-industry partners. The current program is funded through fiscal year (FY) 2015, and public contributions are capped to \$100 million per year.² In addition to minor programmatic and governance changes, H.R. 4450 reauthorizes the program through FY 2020.

B. Legislative History

Representatives Bilirakis, Welch, Kinzinger, Castor, Rush, Murphy, Matsui, Butterfield, Eshoo, Capps, Christensen, and Long introduced H.R. 4450, the Travel Promotion, Enhancement, and Modernization Act of 2014, on April 10, 2014. On May 7, 2013, the Subcommittee held a hearing titled, “Vacation Nation: How Tourism Benefits Our Economy.” Members received testimony from Roger Dow, President & CEO, U.S. Travel Association; Kathleen Matthews, Executive Vice President and Chief Global Communications and Public Affairs Officer, Marriott International, Inc.; Brian Rothery, Assistant Vice President, Government Affairs, Enterprise Holdings; Lori Gaytan, Senior Vice President Americas HR and Global Reward, InterContinental Hotels Group; Hudson Riehle, Senior Vice President Research & Knowledge Group, National Restaurant Association; J. William Secombe, President & CEO, Visit Florida; Sharon Zadra, Board Member, Reno-Sparks Convention and Visitors Authority, and Councilwoman, City of Reno, NV; Gina Speckman, Executive Director, Chicago’s North Shore Convention and Visitors Bureau; Ralph Witsell, Executive Director, Discover Torrance Visitors Bureau; and Beverly Nicholson-Doty, Commissioner, U.S. Virgin Islands Department of Tourism.

C. Section-by-Section

Section 1 – Short Title.

Section 1 provides that the Act may be cited as the “Travel Promotion, Enhancement, and Modernization Act of 2014.”

Section 2 – Board of Directors.

Section 2 amends the requirements for the Board of Directors of Brand USA to expand the list of potential candidates to individuals with promotion or marketing experience, and requires that the Board must be comprised of individuals with a particular expertise and experience.

Section 3 – Annual Report to Congress.

¹ Brand USA, Frequently Asked Questions, available at <http://www.thebrandusa.com/Help-FAQs#sthash.NBc82V6K.dpuf>.

² In 2013, 339 travel-industry partners contributed \$139 million in services and cash to Brand USA. Michael Scaturro, “Rebranding America: Can the U.S. Sell Itself to International Tourists?” *The Atlantic*, published January 14, 2014, 5:02 pm ET, available at <http://www.theatlantic.com/international/archive/2014/01/rebranding-america-can-the-us-sell-itself-to-international-tourists/283061/>.

Section 3 requires the annual marketing campaign report to include a description and rationale for focusing on specific countries and populations and media channels and usage ratios in the campaign.

Section 4– Biannual Review of Procedures to Determine Fair Market Value of Goods and Services.

Section 4 creates a new biannual review of the procedures used to determine the fair market value of goods and services received from non-Federal sources tracked for matching purposes. Additionally, this section requires that the fair market value of goods and services provided by non-public funding may only account for 75 percent of the matching requirement in any fiscal year.

Section 5– Extension of Travel Promotion Act of 2009.

Section 5 extends the scope of Brand USA to include all territories of the United States along with all 50 States and the District of Columbia, and reauthorizes 100 percent matched public funding of the Travel Promotion Fund through FY 2020. The Travel Promotion Fund Fee is extended through FY 2020 by an amendment to the Immigration and Nationality Act (8 U.S.C. § 1187(h) et seq.).

Section 6 – Accountability; Procurement Requirements.

Section 6 requires Brand USA, within 90 days of final passage, to establish performance metrics to measure the impact of its marketing efforts and to demonstrate any cost or benefit to the economy of the United States. Section 6 requires Brand USA to respond to Congress within 60 days if the GAO sends the organization a report with recommendations. Finally, section 6 requires the establishment of a competitive procurement process and certification in its annual report to Congress that any contracts entered into are in compliance with that procurement process.

III. H.R. ____, Targeting Rogue and Opaque Letters Act of 2014

A. Background

In recent years, unscrupulous patent holders have targeted thousands of small businesses from coffee shops and restaurants, to grocers, community banks, hoteliers, and realtors, with letters demanding payments of license fees for alleged patent infringement.³ These demand letters, sent by the hundreds or thousands, often instruct the recipient to either pay the license fee within a short period of time or face litigation for infringing the sender's vaguely defined and often specious intellectual property rights. The claims often involve widely-used technology, and the infringing activity generally involves the use of another person's product, such as scanning-to-email function on a copier or printer, or using a commercially available router for wireless internet connectivity. Often, these letters allege the assertion of patents that are expired or were invalidated.

³ One estimate places the number of threatening demand letters sent in 2012 at over 100,000. See Executive Office of the President, *Patent Assertion and U.S. Innovation* at 6 (June 2013), available at http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf. For examples of actual demand letters sent by a PAE, visit <https://trollingeffects.org/search/node/>.

Congress, the Federal Trade Commission (FTC), and several States have focused increasing attention on these bad actors, often called patent assertion entities (PAEs) or “patent trolls,” due to the outcry from small businesses that are on the receiving end of such letters.⁴ While it is these bad actors that dominate the headlines, there are legitimate companies with legitimate patent holdings who send demand letters to communicate or enforce their property rights, or to engage other companies in lawful negotiations.

The draft bill balances the need to address the growing problem of so-called patent “trolls” sending false or deceptive written communications against the rights of legitimate patent holders to assert their lawful property rights. In doing so, the bill enumerates a list of prohibited false or misleading statements and requires the communications to provide, to the extent reasonable under the circumstances, enumerated disclosures in order to help recipients understand the infringement allegations and respond appropriately. The draft would replace various State laws with a single Federal regime enforced by the FTC, which is empowered to seek civil penalties for violations. Additionally, State Attorneys General would be authorized to enjoin violations and seek civil penalties.

B. Legislative History

The Subcommittee on Commerce, Manufacturing, and Trade held an oversight hearing on April 8, 2014, titled “Trolling for a Solution: Ending Abusive Patent Demand Letters.” Members received testimony from Rheo Brouillard, President & CEO, Savings Institute Bank and Trust Company on behalf of American Bankers Association; Mark Chandler, Senior Vice President & Chief Compliance Officer, Cisco Systems Incorporated; Michael Dixon, Ph.D., President & CEO, UNeMed Corporation; Dennis Skarvan, Deputy General Counsel, Intellectual Property Group, Caterpillar Inc.; Jason Schultz, Associate Professor of Clinical Law, New York University School of Law; and, the Honorable William Sorrell, Attorney General, State of Vermont. Previously, the Committee’s Oversight and Investigations Subcommittee held a hearing titled, “The Impact of Patent Assertion Entities on Innovation and the Economy” on November 14, 2013. Members received testimony from Justin Bragiel, General Counsel, Texas Hotel & Lodging Association; Lee Cheng, Chief Legal Officer, Newegg, Inc.; Charles Duan, Director of the Patent Reform Project, Public Knowledge; Robin Feldman, Director of the Institute for Innovation Law, University of California Hastings College of the Law, Jamie Richardson, Vice President, Government and Shareholder Relations, White Castle System, Inc.; and Daniel Seigle, Director of Business Operations, FindTheBest.com.

The Subcommittee subsequently held a legislative hearing on a draft bill on May 22, 2014. The Subcommittee received testimony from Rob Davis, Counsel, Venable, on behalf of the Stop Patent Abuse Now Coalition; Lois Greisman, Associate Director, Bureau of Consumer Protection, FTC; Adam Mossoff, Professor of Law, George Mason University; Jon Potter, President & Co-Founder, Application Developers Alliance; Alex Rogers, Senior Vice President, Legal Counsel,

⁴ PAEs are non-practicing entities (NPEs) that purchase patents from inventors or other rights-holders on the open market and then prosecute that patent against alleged infringers. All PAEs are NPEs because they do not practice the patent they hold, but not all NPEs are PAEs, however. For instance, a university often develops and patents their innovations, but they do not monetize – or “practice” – the technology, process, or invention that is the subject of the patent. In addition, the university’s patents are, most frequently, developed in-house rather than purchased on the open market.

Qualcomm; and, Wendy Morgan, Chief of the Public Protection Division, Office of the Attorney General of Vermont.

C. Section-by-Section

Section 1 – Short Title.

Section 1 provides that the Act may be cited as the “Targeting Rogue and Opaque Letters Act of 2014.”

Section 2 – Unfair or Deceptive Acts or Practices In Connection With the Assertion of a United States Patent.

Section 2 establishes that it is an unfair or deceptive act or practice under the FTC Act to engage in a pattern or practice of sending demand letters if the communications, in bad faith, include any of the twelve prohibited elements enumerated in paragraphs (1) or (2), or fails to include any of the five elements enumerated in paragraph (3). Additionally, section 2 sets forth an affirmative defense that statements, representations, or omissions were not made in bad faith if the sender can demonstrate that such statements, representations, or omissions were mistakes, including by evidence that the sender does not send letters in violation of this Act in the usual course of business.

Section 3 - Enforcement by Federal Trade Commission.

Section 3 establishes that a violation of section 2 shall be treated as a violation of a rule defining an unfair or deceptive act or practices prescribed under section 18(a)(1)(B) of the FTC Act, enabling the FTC to seek civil penalties for violations. Section 3 also makes clear that the FTC’s existing powers and enforcement authority are preserved.

Section 4 - Preemption of State Laws on Patent Demand Letters and Enforcement by State Attorneys General.

Section 4 preempts State laws, rules, regulations, standards, and other provisions having the effect of law expressly relating to the transmission or contents of patent demand letters, while preserving other State laws of general applicability, such as a State’s mini-FTC statute. Section 4 also permits State Attorneys General to enforce the Act and to seek civil penalties for violations. Finally, section 4 requires the attorney general of a State to provide the FTC with prior written notice of any action taken under paragraph (1) and also provides the FTC authority to intervene in the action. It further provides that no State action may be brought if the FTC has a civil action pending against any named defendant.

Section 5 – Definitions.

Section 5 defines certain terms used throughout the draft legislation, including “bad faith” as it pertains to the representations or omissions enumerated in section 2.