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MARKUP OF

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.

WEDNESDAY, JULY 9, 2014

House of Representatives,

Subcommittee on Commerce, Manufacturing, and Trade,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to call, at 4:00 p.m., in Room 2123, Rayburn House Office Building, Hon. Lee Terry [chairman of the subcommittee] presiding.

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Present: Representatives Terry, Blackburn, Bilirakis, Upton (ex officio), Schakowsky, Welch, and Waxman (ex officio).

Staff Present: Nick Abraham, Legislative Clerk; Gary Andres, Staff Director; Charlotte Baker, Deputy Communications Director; Mike Bloomquist, General Counsel; Sean Bonyun, Communications Director; Matt Bravo, Professional Staff Member; Melissa Froelich, Counsel, CMT; Sydne Harwick, Legislative Clerk; Brittany Havens, Legislative Clerk; Kirby Howard, Legislative Clerk; Peter Kielty, Deputy General Counsel; Paul Nagle, Chief Counsel, CMT; Shannon Taylor Weinberg, Counsel, CMT; Michelle Ash, Minority General Counsel; Jen Berenholz, Minority Chief Clerk; Lisa Goldman, Minority Counsel; Carol Kando-Pineda, Minority FTC Detailee.

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Mr. Terry. All right. We will come to order for today's purpose in this premarkup. This is our opportunity to give opening statements by the members, and I recognize myself for an opening statement.

Tomorrow, we will consider three pieces of legislation: H.R. 4013, the Low Volume Motor Vehicle Manufacturers Act of 2014; H.R. 4450, the Travel Promotion Enhancement and Modernization Act of 2014; and Targeting Rogue and Opaque Letters, or TROL, Act of 2014.

First, let me talk about the Low Volume Motor Vehicle Manufacturers Act, a common sense piece of legislation sponsored by my colleague, John Campbell from California, and John Barrow is a cosponsor. The replica car industry is a different animal. These manufacturers produce a small number of cars every year and cater to a very specific customer. The legislation we will consider tomorrow is narrowly focused on these manufacturers to exempt them from a handful of regulations that need not apply to these very small-scale manufacturers. I also note that the legislation is the product of good-faith negotiations between the different stakeholders, and I am glad they were able to come to a resolution and agreement.

I thank Mr. Campbell and Mr. Barrow for their legislation and am pleased to consider the bill tomorrow in my subcommittee.

The Travel Promotion Enhancement and Modernization Act will also be considered and is authored by my colleague Gus Bilirakis, which would reauthorize the Travel Promotion Act. Under the TPA, the travel and tourism industry operates Brand USA a public-private partnership that

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benefits our districts a great deal. Brand USA comes at no cost to American taxpayers, and its outreach efforts are vital to this investment. Last year, they helped bring in 1.1 million visitors, who spent about \$3.4 billion supporting about 53,181 jobs. I am also pleased that Mr. Bilirakis has done great work in requiring more transparency of Brand USA and making additional expenditures to ensure the Brand USA board has the right mix of expertise, and I thank Mr. Bilirakis, and I look forward to considering this bill tomorrow.

The TROL Act is the last act. Tomorrow, we will consider the TROL Act a piece of legislation that takes on the deceptive patent demand letter problem. Several of us in the House and Senate have endeavored to find a solution to abusive demand letters. Any solution involves difficult balance between First Amendment limitations, legitimate patent holders, and small businesses that are being harmed.

As the inventor Thomas Edison once said, quote, "The most certain way to succeed is to try one more time," end quote. We want to continue to work to get more support but have been pleased with the support shown from such diverse groups as the Innovation Alliance, the App Developers Alliance, DMA, the 4As, the AAJ, and the ACU, and 21C, among many others.

Now, I am also aware of the concerns recently raised by the Federal Trade Commission and echoed by some of the stakeholders in the last couple days. I have looped the commission in on our successive drafts, and the commission staff has helped us draft our savings clause language, so I am a little surprised that now the FTC is worried that

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their ability to get an injunction under Section 5 is compromised under this bill. The bill does not alter the FTC's authority to get an injunction under Section 5. And to make sure courts understand that, we inserted the savings clause with the help of the FTC. Some stakeholders are also arguing that the FTC and State AGs should not have to prove knowledge or impute knowledge to a defendant in order to get civil penalties, despite the fact that in order to get civil penalties under the current law, the FTC has to prove knowledge.

We took the standard in the bill from case law interpreting the FTC's ability to hold the officer of a company liable for restitution on account of such company's unfair or deceptive acts or practices. The difference with our legislation is that the FTC does not need to promulgate rules, nor does it need to have obtained an injunction before pursuing civil penalties. We brought the FTC into our deliberative process on this bill, and I am disappointed in the manner and timing of which these concerns were raised and in the validity of the concerns that I have noted. It is our hope that after hearing the concerns raised at markup, that we will be able to bring the stakeholders back together and further strengthen this legislation.

We sought to have collaborative process, and I am pleased that the staff for Mr. Welch's and Mr. McNerney's offices, as well as minority staff from the committee were invited to all of the negotiations on this legislation. It was an open and collaborative process. So, with so many stakeholders with differing perspectives,

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the process has been difficult, but our product reflects the input of the most divergent interests in this subject. Accordingly, our bill strikes the appropriate balance. For those big patent portfolios that routinely send short licensing communications to other sophisticated actors, this bill protects their business practices and is mindful of their First Amendment protections.

For those who receive trolling letters, the bill provides assurances that if they receive a demand letter, there are two important protections: One, it requires the sender to provide enough information for the recipient to appropriately respond; and two, it bars the sender from making false or misleading statements.

And I would like to thank the stakeholders for their hard work in helping us arrive at this balanced piece of legislation.

And I yield back and now recognize the gentleman from California, the ranking member of the full committee, Mr. Waxman, for 5 minutes.

[The prepared statement of Mr. Terry follows:]

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Mr. Waxman. Thank you very much, Mr. Chairman.

And I want to thank Congresswoman Schakowsky for allowing me to precede her in delivering the opening statement.

We have three bills before us. There are two bills that I find problematic. The first is H.R. 4013, introduced by Mr. Campbell. This bill would create an exemption for replica cars from Federal safety and emission standards. This bill would allow unsafe cars onto our streets. At the same time, these cars could also emit harmful air pollutants.

We have come a long way on vehicle safety, and I want to point that out. H.R. 4013 lets manufacturers make up to 1,000 vehicles that could have 1959 level safety standards. That is a huge step backward for safety, and that is why I oppose this legislation.

The second bill that I think is a problem -- and there is a video that I want at some point to show about the safety features of these cars, but I am not going to show it at the present time.

A second problem bill is Chairman Terry's discussion draft on patent assertion communications. The goal of this bill might be well intentioned, but I worry about the drafting. I think it is flawed. The States have been leaders in fighting false and misleading patent demand letters, yet this bill would preempt the 15 specific laws so far approved by States. In addition, the bill would place a number of additional burdens on State attorneys general and the Federal Trade Commission, particularly in requiring proof that the sender knew that

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representations of the letter were false or misleading. This is a departure from consumer protection law and one that could make investigations and enforcement far more difficult. Furthermore, as FTC staff has explained, the requiring knowledge makes provisions of this bill effectively unenforceable. So I cannot support that legislation.

Lastly, the subcommittee will mark up H.R. 4450, a bill that Mr. Bilirakis and Mr. Welch introduced to extend the Brand USA travel promotion program. Tourism in the U.S. is one of our most important industries. It represents millions of American jobs, billions of dollars in spending, and has untold benefits in creating good will toward the U.S. abroad. I applaud the sponsors of this bill for their ongoing commitment to travel promotion. As this bill moves through the committee, I encourage my colleagues to discuss ways to support Brand USA's long-term viability through robust transparency and accountability measures, as well as a path to self sufficiency, perhaps through greater cash investment from industry. I believe such discussions will help the program grow and continue to benefit communities all over the country, especially in my home district in southern California.

And so, Mr. Chairman, I want to yield back the balance of my time.

Mr. Terry. Thank you very much.

[The prepared statement of Mr. Waxman follows:]

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Mr. Terry. And now recognize the full committee chair, Mr. Upton, for your 5 minutes.

The Chairman. Thank you, Mr. Chairman. I am not going to take 5 minutes.

Let me just say today we are going to begin consideration of three bills: The Low Volume Motor Vehicle Manufacturers Act, the Travel Promotion, Enhancement, and Modernization Act, and the TROL Act. Each of these bills required give and take between all of the stakeholders, and I thank those who worked in good faith to reach an amicable agreement.

The Low Volume Motor Vehicle Manufacturers Act provides folks who make replica or specialty cars a little bit of flexibility on how to comply with its mandates. These manufacturers are typically small businesses who produce a small number of vehicles per year, which makes them uniquely situated compared to the other automobile manufacturers across the country. And in my view, this is a small business and jobs bill that reduces regulatory burden. Small businesses are a bright light, certainly in our fragile economy, and we should do everything that we can to ensure their continued growth.

Another bright spot in our economy is the travel sector. Tourism in the U.S. supports over 14 million jobs and contributes \$450 billion to the United States GDP. The tourism sector brings revenue and jobs to every district across the country represented on this committee, including over a billion dollars in southwest Michigan, my district.

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Tourism dollars that flow through our local economies help boost the very fabric of our communities and should be welcome revenue. Travel Promotion, Enhancement, and Modernization Act, offered by Mr. Bilirakis, would extend the Travel Promotion Act in Brand USA's activities to market the U.S. as a travel destination through 2020.

Finally, the TROL Act targets a not-so-bright spot in today's marketplace, that of so called patent trolls who prey on small business owners. According to the White House, trolls have sent over 100,000 letters to small businesses across the country, letters that amount to a little more than a shakedown. Balancing the need to stem this noxious tide is the need to ensure that we don't make it overly burdensome for legitimate patent holders to protect their property rights.

Balancing these two interests has not been easy, but I want to thank all of the interested parties who have willingly come to the negotiating table to have an honest and thoughtful dialogue in search of a compromise. The overarching intent of this bill is to provide the FTC with an extra set of tools to augment its current Section 5 authority. If the FTC chooses, we want the agency to seek civil penalties under the bill but only for actors who were knowingly or recklessly committing harmful acts. If someone engages in any of the specified activities without the requisite intent, the FTC could still enforce against those individuals using their current Section 5 authority to seek injunctive relief. The same is true for activities

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that are not included in the bill. We want the FTC to continue to be able to use its current authority to seek injunctions as indicated by the savings clause.

Legislating is a process. And today's vote going into tomorrow is one step of many. We will continue to seek feedback, including questions and concerns that will be discussed in this markup and collaborate to strengthen the legislation moving forward to full committee.

I want to thank those involved for their good faith effort to reach a compromise on these nonpartisan bills, and I would hope that my colleagues on both sides would join me in supporting them.

I yield back.

Mr. Terry. Thank you, Mr. Chairman.

[The prepared statement of The Chairman follows:]

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Mr. Terry. I now recognize the gentleman from Vermont for 5 minutes. I am sorry. I was wrong.

The ranking member of the subcommittee is recognized for 5 minutes.

Ms. Schakowsky. Thank you so much, Chairman Terry.

The first bill of the three that we are going to deal with tomorrow is an attempt to address the troubling national problem of patent assertion entities or patent trolls which claim patents they hold are being infringed and send vague and threatening letters to end users of products. Recipients are often small businesses or entrepreneurs, which are given the choice to either settle the infringement claim and continue using the product by paying the troll or to fight the claims in court.

This is fundamentally a fairness issue. Patent trolls should not be able to extort American business men and women out of their hard-earned money. The subcommittee has held two hearings and has worked to put forward legislation that would address the problem without unintended consequences. This has been a challenging task, and I appreciate the effort put in on both sides, but I don't think the TROL Act adequately solves the problem.

First, it is really important to mention that actually State attorneys general and the FTC were not in the room during the stakeholder meeting that occurred. The TROL Act's broad preemption of State laws would prevent the enforcement of tough antipatent troll

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laws where they do exist. It has raised serious concerns at the FTC, which would be responsible for enforcing the new law, over several provisions including the requirement that the commission enforce the law not just based on a violation of the FTC act but based on the intent to commit a violation.

Finally, as written, it wouldn't protect against some of the examples of patent trolls that I have heard about in my office, my district, and in this committee room. My hope is that by the time this legislation goes to full committee, the bill will effectively address the problem of patent trolls while not weakening existing consumer protections.

Another bill we will consider tomorrow is H.R. 4013, the Low Volume Motor Vehicle Manufacturers Act. The subcommittee has not held a single hearing on this legislation or even on this issue. The bill would exempt replica vehicles -- those are vehicles built to resemble cars that are at least 25 years old -- from meeting Federal Clean Air Act standard requirements and auto safety standards. It could also preempt existing State and local safety health and environmental standards for these cars. We don't know how many manufacturers or the total number of vehicles this bill would exempt from those rules, and it really beats me why we would want to put people in new polluting cars without seatbelts or airbags or other lifesaving features. Seems to me we have worked long and hard to make sure that our cars -- and you know, have the outside look great. I like those fins myself.

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As a firm believer that we need to reduce carbon pollution, I can't support a bill that would allow an entire class of cars to avoid basic emission inspections. As a lifelong consumer advocate, I can't support legislation that would undermine basic safety requirements, like roll bars, airbags, seatbelts. I am strongly opposed to moving forward on H.R. 4013 in its current form.

And the final bill we will consider is H.R. 4450, the Travel Promotion, Enhancement, and Modernization Act. I strongly support Brand USA's mission of promoting U.S. tourism in foreign countries, and I have heard from travel and tourism professionals across my district, including my constituent, Gina Speckman, who testified at a hearing we held on travel and tourism last year about the need to reauthorize the program.

While I believe we should have held a hearing to specifically consider two GAO reports that highlighted opportunities to improve the program, I am glad that my colleagues, Mr. Bilirakis and Mr. Welch, have placed the bill before us so that we may examine some of the changes they propose as well as other opportunities to further improve the Brand USA program. I look forward to discussing how the subcommittee can help ensure that Brand USA builds on its existing successes over the long term.

Mr. Chairman, in my remaining seconds, I would recommend that you look at a Web site on Brand Peru or Marca, Peru, which brings Peruvians to Peru, Nebraska, to celebrate that they are really Peruvians. It

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is a great promotional -- we may want to copy it in some way.

Anyway, I yield back. Thank you.

Mr. Terry. Thank you. And Peru is just about an hour south of my district. Haven't been there, though.

[The prepared statement of Ms. Schakowsky follows:]

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Mr. Terry. I now recognize the gentleman from Florida, Mr. Bilirakis, on behalf of these bills that I assume you are going to spend a lot of time on TPA.

Mr. Bilirakis, you are recognized for 3 minutes.

Mr. Bilirakis. Thank, Mr. Chairman. I appreciate it very much.

I appreciate consideration of H.R. 4450, the Travel Promotion, Enhancement, and Modernization Act, which would reauthorize Brand USA for a limited time and adds numerous accountability and transparency measures to the public-private partnership that promotes increased tourism in the United States.

And I appreciate my good friend, all of his good work on this, my co-sponsor, prime co-sponsor, Mr. Welch. Thank you very much for all your suggestions.

So passage of the H.R. 4450 will strengthen economic growth. A recent analysis performed by the independent firm, Oxford Economics, estimated that in fiscal year 13, Brand USA generated 1.1 million additional international visitors who spent an estimated \$3.4 billion generating economic revenue and supporting job creation in communities across America. Brand USA does not impose a cost upon the Federal Government. In fact, it has helped reduce the deficit during the last 2 fiscal years and is expected to continue to do so.

To be clear, Federal taxpayer dollars are not used to fund Brand USA, period. Brand USA is supported by international visitors and private sector contributors. After it receives voluntary

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contributions from the private sector, Brand USA can only collect up to \$100 million in matching funds from fees paid by foreign travelers. Amounts collected in excess of that cap are returned to the Treasury for deficit reduction.

Finally, given the benefits to the economy across State lines, as well the competitive nature of foreign competitors and travel promotion, Congress is well within its authority under the Commerce Clause to extend the Travel Promotion Act. Small State and local tourism offices and local small businesses across America are some of the strongest supporters of the Travel Promotion Act and benefit greatly from international tourism. Brand USA helps bridge these communities and opens up new markets to American competition. I appreciate consideration of this legislation, and I strongly support this prudent and narrow reauthorization of the Travel Promotion Act.

Thank you, Mr. Chairman, for agendaing this bill, and I yield back.

Mr. Terry. Thank you.

[The prepared statement of Mr. Bilirakis follows:]

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Mr. Terry. The chair now recognizes the gentleman from Vermont, Mr. Welch, for 3 minutes.

Mr. Welch. Thank you, Mr. Chairman.

And thank you, Mr. Bilirakis, for your leadership on this.

Florida is a big tourist State. Vermont is as well, and this is like a practical piece of legislation. It doesn't happen around here all that often, bipartisan. We really appreciate it.

But Brand USA, what is great about it, it is a public-private partnership. It is not taxpayer dollars. It is a recognition that we have got this private sector that has a real commitment to branding the USA and where the participants in that program all have a common stake in making a visitor's experience the best possible experience, whether it is in Florida during the summer or winter or it is in Vermont during leaf-peeping season. We want those folks to come. Yeah, you ought to come sometime. But fall is incredible. And we are going to show you sometime how beautiful it is. But it is a big deal in Vermont. It is like 20,000 Vermont jobs are connected to this. It is about \$250 million in tax revenue in our small State. So this is really quite amazing, and it all produces benefits to the State at no cost to the taxpayer. And it gives a lot of jobs, and a lot of those jobs, by the way, are young people. It is their first opportunity to get in the labor sector, and it gets them on their way. So this really is important.

Our bill reauthorizes this program through 2020. It increases

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accountability and transparency. We all say we are for that. This bill does it. Brand USA will be required to submit an annual report to Congress that includes rationales for advertising methods and any response to GAO recommendations. So the folks we are representing here all are willing to be accountable.

Brand USA would be required to meet with Commerce Department folks twice per year to determine the value of in-kind contributions, so it wouldn't be just something that they assert. It would have to pass, in effect, an audit, and it would have to establish performance metrics to measure the impact of advertising in our tourism economy.

So other countries operate government-run travel promotion programs. Brand USA is a public-private partnership that has been efficient and effective in producing real benefits to our States.

So, Mr. Bilirakis, your State has got so much to do in this industry, and it puts you in a place of leadership, but our smaller States, this is a big part of what is essential to our economy and our way of life. So my hope is that, with your leadership and our chairman here, we are going to get this passed by the full committee.

Mr. Terry. Thank you, Mr. Welch, and you are more than welcome to come to Nebraska and see our tree.

[The prepared statement of Mr. Welch follows:]

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Mr. Terry. At this time, I recognize the gentlelady from Tennessee, Mrs. Blackburn, the vice chair of the committee. You are recognized for your 3.

Mrs. Blackburn. Thank you, Mr. Chairman, and maybe we in Tennessee should give you a tree or two that you can plant out there. I am so pleased that we are taking the time to mark this bill up.

I had the opportunity to start my week this week by doing a tourism roundtable in historic Franklin, Tennessee, and the State's tourism commissioner was there along with many industry stakeholders. And we just had a grand discussion about Mr. Bilirakis' bill and about Brand USA and the important role that that plays.

Now, Mr. Welch has talked a little bit about the Brand USA program and what it does in marketing the U.S. What we thought was really wonderful is when people are queried about, through Brand USA, about the places that they would like to visit in the U.S., coming in at number three on those charts is the great State of Tennessee. Now, while we know and appreciate that there are 1.2 million American jobs that are tied to international visitation and that it is bringing \$180 billion annually into the U.S. economy, we in Tennessee are pleased to know that some of the places our international visitors want to go is stops like Graceland and the Grand Ole Opry and Music City USA, and Dollywood, and the beautiful Smoky Mountains and see these spots that are in Tennessee.

Tennessee and our tourism industry in the State generates \$15.36

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billion to our State's economy. That is what it generates for our State. And Mr. Welch has 20,000 jobs in Vermont that are tied to tourism. We have 117,000 jobs in Tennessee that are tied to tourism. So the benefits to our State are so vital and so important. The impact that tourism has on our communities and whether people are coming, as I said, to see Graceland or the Grand Ole Opry, whether they are coming for CMA week or the CMA awards or to see some of the homes of the stars for country music or going up in east Tennessee for Dollywood, or going through west Tennessee through the Civil War trails and to the Shiloh battlefield, what we find regularly is that they are intrigued. They know that our southern hospitality is always there to welcome them, that our doors are open.

And so we applaud Mr. Bilirakis for his efforts, and I yield back.

[The prepared statement of Mrs. Blackburn follows:]

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Mr. Terry. Well, seeing no other folks here for opening statements, the chair then calls up the discussion draft and asks the clerk to report the bill.

The Clerk. Discussion draft 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.

Mr. Terry. Without objection, the first reading of the bill is dispensed with, and the bill will be open for amendment at any point.

Hearing no objection, so ordered.

[The information follows:]

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Mr. Terry. For the information of members, we are now on the discussion draft, entitled the "Targeting Rogue and Opaque Letters," the TROL bill, and the subcommittee will reconvene at 10:00 a.m. tomorrow morning.

I remind members that the chair will give priority recognition to amendments offered on a bipartisan basis, and I look forward to seeing everyone tomorrow morning.

Without objection, the subcommittee stands in recess.

[Whereupon, at 4:33 p.m., the subcommittee was adjourned.]