

Subcommittee on Consumer Protection and Commerce  
Hearing on  
“Protecting America’s Consumers: Bipartisan Legislation to Strengthen Data Privacy and Security”  
June 14, 2022

Questions for the Record

Graham Dufault, Senior Director for Public Policy, ACT | The App Association

The Honorable Michael Burgess (R-TX)

1. Mr. Dufault, in the 114th Congress, I was chairman of this subcommittee and introduced a bill to combat patent trolls, called the Targeting Rogue and Opaque Letters – or TROL – Act. I am pleased to see this legislation includes a process to help prevent abusive demand letters. As written, this legislation requires a person seeking a private right of action to first notify the Federal Trade Commission and their State Attorney General with their intent to seek to action and to wait 60 days before proceeding with a private right of action should the FTC and State Attorney General choose not to pursue the case.
  - a. Do you believe this provides sufficient protection against abusive demand letters? If not, do you have suggestions to strengthen this part of the legislation?

Response:

Similar to the Targeting Rogue and Opaque Letters (TROL) Act (H.R. 192), the American Data Privacy and Protection Act (ADPPA, H.R. 8152) preempts state laws directed at the same kind of conduct the Act prohibits. Both bills accompany preemption provisions with additional enforcement authorities beyond the Federal Trade Commission (FTC), empowering state attorneys general to enforce the bills’ respective provisions. However, H.R. 8152 goes a step further by empowering individuals to sue for almost all violations of the Act’s provisions. This additional capability is extraordinary, and experience has shown that private rights of action (PRAs) like this one can lead to serious abuse, which in turn can lead to higher costs and lower quality products and services for consumers<sup>1</sup>—unless there are safeguards in place to limit nuisance suits while optimizing remedies for aggrieved litigants.

---

<sup>1</sup> See ALDA News, “How the Courts and Congress are Battling the ADA “Trolls,”” ASSOC. OF LATE – DEAFENED ADULTS (Jul. 27, 2021), available at <https://alda.org/how-the-courts-and-congress-are-battling-the-ada-trolls/>.

During the hearing, I alluded to situations where small businesses receive abusive demand letters from patent trolls as examples of predatory sue-and-settle tactics that inappropriately leverage rights to sue for profit. Just as opportunists have converted the Telephone Consumer Protection Act (TCPA) and the Americans with Disabilities Act (ADA) into profit centers, patent trolls also induce small businesses to settle by enforcing their rights in situations the law never intended. Even where a patent owner makes a weak argument as to its patent's applicability to a small business's activities, hiring an attorney to fight that assertion is often too expensive for target companies without legal departments; for them, settling is often the only real option. Similarly, a private right of action encouraging trial attorneys to sue for a wide range of violations of a sweeping law could be an invitation for litigants to adopt the same sue-and-settle approach, including by alleging violations that are either insubstantial or unsupported by any facts. H.R. 8152 includes reasonable safeguards against this kind of opportunistic litigation and settlement seeking that lines attorneys' pockets without helping consumers. This Committee could strengthen these safeguards, however, including by requiring litigants to show some level of knowledge on the part of the target of an alleged violation; requiring litigants to show some level of harm to aggrieved consumers; and requiring federal or state enforcement agencies to verify the likelihood of success of a private claim before it can move forward.

b. How does this language provide necessary guardrails for businesses?

**Response:**

The language provides guardrails that help prevent nuisance suits in two primary ways: 1) by giving state and federal enforcers right of first refusal, enabling them to consider whether the agency itself should bring the claim rather than an individual; and 2) by providing small businesses the right to "cure" an alleged violation to avoid unnecessary litigation. A similar right to cure appears in state privacy laws as well<sup>2</sup> and is a commonsense measure that enables small companies to demonstrate they have rectified any alleged violation of the law, saving courts time and precious resources and providing a remedy for consumers without imposing undue costs on small businesses. In my testimony, I pointed out that Sec. 403(c)(2), "Effect of Cure" should reflect earlier provisions, which we believe would merely correct a drafting issue. Specifically, Sec. 403(c)(1) provides that any claim brought against a small business is subject to the 45-day right to cure notice. However, we believe the effect of the cure (providing that if a business effectively cures the issue, liability does not attach) erroneously applies only to injunctions, whereas it should apply with respect to injunctions sought against businesses of any size; and *any* claim brought against a small business, including a claim for damages or other relief. This small change would help clarify what we think H.R. 8152 intends, that small businesses can rest assured that if they fix an alleged violation before a lawsuit is filed, that they will not nonetheless be dragged into court to fight the claim.

---

<sup>2</sup> See Co. Rev. Stat. Sec. 6-1-1311 (2021).