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ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

MEMORANDUM

July 9, 2014

To: Subcommittee on Commerce, Manufacturing, and Trade Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Markup of 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 H.R. __, the "Targeting Rogue and Opaque Letters (TROL) Act of 2014"

On Wednesday, July 9, 2014, at 4:00 p.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Commerce, Manufacturing, and Trade will meet in open markup session for opening statements on 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 a discussion draft of H.R. __, the "Targeting Rogue and Opaque Letters (TROL) Act of 2014." The Subcommittee will reconvene on Thursday, July 10, 2014, at 10:00 a.m. in room 2123 of the Rayburn House Office Building.

On May 22, 2014, the Subcommittee held a legislative hearing on an earlier version of the patent assertion communications discussion draft. The Subcommittee has not held a legislative hearing on H.R. 4013 or H.R. 4450.

I. H.R. 4013, THE LOW VOLUME MOTOR VEHICLE MANUFACTURERS ACT OF 2014

H.R. 4013 was introduced by Rep. Campbell on February 6, 2014, with Reps. Barrow and Hunter as original cosponsors.[1] The bill would create an exemption from federal motor vehicle safety and emissions standards for up to 1,000 replica motor vehicles per year

[1] The majority is expected to release an amendment in the nature of a substitute that includes several deletions, as well as some changes. This memo discusses some of the provisions expected to be present in that substitute.

manufactured or imported by a low-volume manufacturer.[2] Under the bill, a replica motor vehicle is one that "is intended to resemble the body of another motor vehicle that was manufactured not less than 25 years" earlier, and "is subject to being manufactured under trademark ... from the original manufacturer."[3]

A. Federal Motor Vehicle Safety Standards

Currently, a replica vehicle is required to comply with all Federal Motor Vehicle Safety Standards (FMVSS) in effect on its date of manufacture, not those that would have applied to the vehicle the replica is intended to resemble. H.R. 4013 would direct the National Highway Traffic Safety Administration (NHTSA) to establish a program exempting such vehicles and their manufacturers from all vehicle-based safety standards, such as rear- or side- impact standards, but not from equipment-based standards such as lights or tires.[4] Under the new program, NHTSA would oversee requirements for companies to register as a low-volume manufacturer, affix replica vehicles with a permanent label identifying the standards from which the vehicle is exempt, and report annually to NHTSA on the number and description of vehicles exempted from safety standards under the Act.[5]

NHTSA oversees an existing regulation to grant low-volume manufacturers a temporary exemption from some safety standards. It allows low-volume manufacturers to submit a petition for a temporary exemption from FMVSS, for example, on the basis of substantial economic hardship.[6] The agency considers the petition through a notice and public comment procedure. By contrast, under H.R. 4013, low-volume manufacturers must register with NHTSA, and if the agency has not responded within 60 days, the exemption is automatically granted. The bill does not specify the criteria by which NHTSA would consider and permit or deny exemptions for these vehicles.

B. Emissions Standards

H.R. 4013 also broadly exempts replica vehicles from federal, state, and local motor vehicle emissions standards and requirements. Under the Clean Air Act, new motor vehicles must meet standards limiting their emissions of harmful air pollutants, including pollutants that form smog, particulate pollution, carbon monoxide, and greenhouse gases. The standards cover both tailpipe and evaporative emissions. A manufacturer must test its vehicles and demonstrate that they meet the standards, and state and local inspection and maintenance programs ensure

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[2] The bill defines a "low volume manufacturer" as a motor vehicle manufacturer that is not registered as an importer and whose annual worldwide production is not more than 5,000 motor vehicles. H.R. 4013.

[3] *Id.*

[4] Under the bill, it is unclear which safety standards, if any, these replica vehicles would be required to meet. *Id.*

[5] *Id.*

[6] 49 C.F.R. § 555 (1973).

that the pollution controls continue to perform in use. In addition, new motor vehicles are also subject to fuel economy standards under NHTSA.

The bill exempts replica vehicles from these requirements. In their place, the bill includes minimal requirements that replica vehicles use engines built for motor vehicles that meet the emissions standards, and that such parts be installed according to manufacturers' instructions. However, greenhouse gas emissions and fuel consumption are determined by overall vehicle weight, design, and technologies, not solely through the use of a particular engine. Also, since the vehicles would be exempt from inspection and maintenance programs, there would be no mechanism for tracking performance.

Similarly to NHTSA, the Environmental Protection Agency (EPA) offers small-volume manufacturers some additional compliance flexibility; specifically, it does so without increasing pollution, through existing provisions under the Clean Air Act.[7]

II. H.R. 4450, THE TRAVEL PROMOTION, ENHANCEMENT, AND MODERNIZATION ACT OF 2014

H.R. 4450 was introduced by Rep. Bilirakis and Rep. Welch on April 10, 2014, and includes as original cosponsors Reps. Kinzinger, Castor, Rush, Matsui, Butterfield, Eshoo, Capps, Christensen, and Long. The bill would extend and amend the Travel Promotion Act (TPA) of 2009,[8] which established the public-private Corporation for Travel Promotion, later renamed Brand USA, as a national, coordinated marketing organization to promote international travel to the United States.

A. Brand USA

Brand USA is organized as a public-private partnership. It is governed by a board of directors, whose members have knowledge of international travel promotion and marketing and are appointed by the Secretary of Commerce. Together with several industry advisory groups, Brand USA plans advertising programs and activities designed to promote travel to the United States and develops industry partnerships to help further that goal.

Brand USA is financed by a combination of public and private funds. Private-sector funding may come from either cash or in-kind contributions, with such contributions able to make up a maximum of 80 percent of the private sector's financial contribution to the organization. Public matching funds are contributed from the Travel Promotion Fund, a U.S. Treasury fund sourced by a portion of the Electronic System for Travel Authorization (ESTA) fee, which is collected from foreign visitors to the United States by the Department of Homeland Security. For fiscal year 2012, Brand USA received $100 million in public funding from ESTA fees, matching the private-sector contribution 2-to-1. For fiscal years 2013 through 2015, TPA

[7] 40 C.F.R. § 86 (2010).

[8] *See* Pub. L. No. 111-145.

authorizes a maximum annual public contribution of $100 million at a private-sector matching ratio of 1-to-1.[9]

TPA assigns to the Department of Commerce most Brand USA oversight responsibilities, including approving the organization's annual goals; reviewing private-sector contributions, including assessing the fair market value of in-kind goods and services; and directing Treasury to disburse federal matching funds after having approved Brand USA's requests and documentation. Brand USA is also required to make its budget and the result of an independently conducted annual financial audit available to Congress. TPA requires that Brand USA provide an explanation in its budget for any single expenditure that exceeds $5 million.

B. Reauthorization

Currently, a sunset clause established under the Travel Promotion Act prohibits the Secretary of Commerce from collecting the fee supporting the Travel Promotion Fund after September 30, 2015.[10] H.R. 4450 would reauthorize the Act through September 30, 2020. It directs Brand USA and the Secretary of Commerce to meet biannually to review the procedures to determine the fair market value of goods and service to be received as in-kind private-sector contributions, and lowers the acceptable portion of private-sector contributions that may be in-kind to 75 percent. H.R. 4450 further requires Brand USA to establish performance metrics to measure the impact of its marketing efforts as well as any cost or benefit to the national economy, and to put into place a competitive procurement process for any contracts into which it enters. The bill also directs Brand USA to submit a report to Congress in response to any recommendations it receives from the Government Accountability Office within a 60-day period.

III. H.R. __, THE TARGETING ROGUE AND OPAQUE LETTERS (TROL) ACT OF 2014

The Subcommittee has held two hearings this year on the topic of abusive practices by certain patent assertion entities (PAEs), sometimes known as patent trolls. These included an April 8, 2014, oversight hearing, and a May 22, 2014, legislative hearing on an earlier version of the discussion draft proposed by Rep. Terry, H.R. __, the Targeting Rogue and Opaque Letters (TROL) Act of 2014.[11]

A. Background

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[9] Government Accountability Office, *Brand USA Needs Plans for Measuring Performance and Updated Policy on Private Sector Contributions* (July 25, 2013) (GAO-13-705).

[10] 8 U.S.C. § 1187(h)(3)(B).

[11] Subcommittee on Commerce, Manufacturing, and Trade, *Hearing on Trolling for a Solution: Ending Abusive Patent Demand Letters*, 113th Cong. (Apr. 8, 2014); Subcommittee on Commerce, Manufacturing, and Trade, *Hearing on H.R. __, a Bill to Enhance Federal and State Enforcement of Fraudulent Patent Demand Letters*, 113th Cong. (May 22, 2014).

The Federal Trade Commission (FTC) has authority under section 5 of the FTC Act to investigate and take legal action against people or entities that engage in unfair or deceptive acts or practices, including senders of unfair or deceptive patent demand letters.[12] The FTC's primary remedy under section 5 is an injunction, with the Commission unable to directly levy civil penalties under this general FTC Act authority.

B. Unfair or Deceptive Acts or Practices

Under section 2 of the discussion draft, a pattern or practice of sending demand letters that do not comply with the conditions set forth in the bill would be an unfair or deceptive act or practice in violation of section 5 of the FTC Act. Under section 2, it would be unfair or deceptive for: (1) the sender to make certain false or misleading statements or representations in bad faith, including that the person sending the demand letter is not the person with the right to enforce or license the patent, litigation has been filed against the recipient or others or will be filed against the recipient, the sender is the exclusive licensee of the patent, people other than the recipient purchased a license for the patent, an investigation of the alleged infringement occurred, or the sender previously filed a lawsuit for infringement based on activity that is the subject of the demand letter and that activity had been held in a final determination not to infringe; or (2) the sender to seek compensation in bad faith for an invalid or unenforceable patent, for activities that occurred after the expiration of a patent, or activities that the sender knew were authorized.[13]

Also under section 2, it would be an unfair or deceptive practice for the sender of demand letters to fail to include, in bad faith, the following disclosures: (1) the identity of the person attempting to enforce the patent, including any parent entity and ultimate parent entity for non-public companies; (2) the identity of at least one patent allegedly infringed; (3) the identity, to the extent reasonable under the circumstances, of the infringing product; (4) a description, to the extent reasonable under the circumstances, of how the product infringes an identified patent and patent claim; and (5) contact information for a person with whom the assertions in the letter may be discussed.[14]

Currently, to bring a claim against a patent troll on the basis of unfair or deceptive acts or practices, the FTC and state attorneys general do not have to prove any element of knowledge or falsity. However, for these enforcers to find violations of section 2(a) in the discussion draft, they must establish "bad faith" on the part of the sender. Among the substantive changes from the earlier discussion draft, section 5 of the discussion draft defines "bad faith" to mean that the sender made knowingly false or knowingly misleading statements, made the statements with reckless disregard as to the false or misleading nature of the statements, or made the statements, with awareness of the high probability of the statements to deceive and the sender intentionally avoided the truth.[15]

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[12] 15 U.S.C. § 45.

[13] H.R.__.

[14] *Id.*

[15] *Id.*

Section 2 also includes an affirmative defense that statements, representations, and omissions were not made in bad faith if the sender can demonstrate that those statements were made in good faith. Evidence that the sender "in the usual course of business" sends letters that do not violate the provisions of this bill is sufficient to demonstrate good faith. The affirmative defense also allows for good faith to be demonstrated by other, unspecified evidence.[16]

C. Enforcement

Section 3 of the discussion draft provides for enforcement of this proposed law by the FTC and allows the agency to seek civil penalties for violations of section 2. Section 3 also includes a savings clause that explicitly states that nothing in this act limits or affects the authority of the FTC under any other provision of law.

Section 4 preempts state laws, regulations, or other provisions having the force and effect of law expressly relating to patent assertion communications.[17] This section also includes a savings clause that states that this act does not preempt or limit other state laws, including state consumer protection laws, any laws relating to acts of fraud or deception, or any state trespass, contract, or tort laws.

Section 4 also provides for enforcement of this act by state attorneys general in cases in which the state attorney general believes that residents of the state have been adversely affected by violations of section 2. All legal actions brought under this act would be required to be brought in federal court. The remedies available to state attorneys general are limited to an injunction and civil penalties "on behalf of residents who suffered actual damages," capped at $5,000,000 for all actions brought by all state attorneys general relating to the same violation of section 2. This section also provides for intervention by the FTC at the agency's discretion.

In addition to not being able to sue under their own law and limiting the amount of civil penalties a state could seek, preemption would have a number of other effects. For example, some of the existing state statutes allow their attorneys general and private entities to seek additional remedies not permitted under this bill.

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[16] *Id.*

[17] Currently, 15 states have laws specific to patent assertion communications and two more states have such laws awaiting approval by the governor. Other states may have common law, standards, or requirements relating to patent assertion communications.