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The Honorable Fred Upton
Chairman
House Energy and Commerce Committee
2183 Rayburn House Office Building
Washington, DC 20515

The Honorable Frank Pallone
Ranking Member
House Energy and Commerce Committee
237 Cannon House Office Building
Washington, DC 20515

Dear Chairman Upton and Ranking Member Pallone:

On behalf of the more than one million members of the NATIONAL ASSOCIATION OF REALTORS® (NAR), I write to express NAR's concerns with the Targeting Rogue and Opaque Letters Act ("TROL Act") recently approved by the Commerce, Manufacturing and Trade Subcommittee. This legislation is intended to strengthen enforcement and reduce the number of bad faith demand letters that our members receive. Unfortunately, for reasons explained in detail below, the current draft provides too many options for trolls to continue their patterns of harassment with little consequence. As we explained in our written testimony provided by Vince Malta, NAR's Liaison for Law and Policy, before the Commerce Manufacturing and Trade Subcommittee hearing on February 26, 2015, this bill must be strengthened if it is to adequately and properly address the problems our members experience with abusive demand letters.

Real estate businesses, tenants, and service providers have been threatened and targeted with spurious patent infringement claims, in contexts that include the following:

- Real estate brokers implementing website technology to allow zooming in to located points of interest on a map and creating a home search alert function;
- Building owners and tenants using standard, off-the-shelf routers to provide Wi-Fi access for hotspots in lobbies, restaurants, atriums, and other common areas of buildings;
- The Multiple Listing Service, a critical tool for real estate agents, using location-based search capabilities to identify homes and other properties available for sale or lease; and
- Businesses attaching scanned documents to emails to execute contracts, closings, and other commonplace real estate transactions.

Rather than researching and litigating patent infringement claims, our members wish to channel their resources to serve their core functions to satisfy the real estate needs of the American people – and create jobs in the process.

In particular, we urge the Committee to:

1. **Remove the requirement of "a pattern or practice of sending" demand letters.** The "pattern or practice" language creates unnecessary ambiguity about the number of letters that must be sent. Removing the term would make clear that even a single communication sent in "bad faith" would be considered an unfair or deceptive act or practice and allows a court more flexibility in identifying misconduct covered by the statute.
2. **Remove the definition of "bad faith."** In the original proposed text, "bad faith" was defined in terms of the sender's knowledge or awareness of the false or misleading nature of representations or omissions. In the mark-up, this definition was removed to be more consistent with current consumer protection law, which focuses on the effect on consumers rather than the knowledge of the violator. Indeed, recipients of demand letters can be harmed by misrepresentations or omissions regardless of whether the party making them knows them to be false or misleading. Instead of defining bad faith, we

suggest listing misconduct that can be considered "factors" in determining bad faith, including making representations without basis in fact or law, seeking compensation for invalid, unenforceable, expired patents or licensed activity, or failing to include critical information regarding the asserted patent and alleged infringement.

3. **Remove the separate "bad faith" requirement from the listed factors.** In the original bill text, certain factors evidencing "bad faith" also required a separate showing that the listed conduct was performed in "bad faith." Requiring that "bad faith" be demonstrated to establish a violation, however, could nullify the Act's provisions. For example, under the original draft, the failure to include any of the information required by section 2(b) (5) would have been a violation only if the information was omitted with knowledge or awareness of a high probability to deceive. This would have the effect of nullifying the Act's disclosure requirements.
4. **Separate misrepresentations relating to third party licensees (factor 2) and prior knowledge of non-infringement (factor 3).** We suggest separating these items as their own factors instead of including them within factor 1, which requires a separate showing that assertions were made without a reasonable basis in fact or law. The conduct covered in factors 2 and 3, on the other hand, is, by definition, without reasonable basis in fact such that a separate showing is not necessary.
5. **Add a list of material information (factor 5).** We suggest adding a fifth factor that, in effect, requires the sender to identify allegedly infringed claims. The Supreme Court's *Twombly* and *Iqbal* decisions require that a complaint include a plausible basis for relief, which, in the patent context, would require a specific identification of infringed claims. Failure to include such information in a demand letter is evidence that the assertion is objectively baseless and thus made in bad faith
6. **Remove the affirmative defense.** The affirmative defense would create a loophole that avoids application of the Act even if the sender was found to have acted in bad faith. Instead of an affirmative good faith defense, we propose a list of factors relevant to showing a sender has not acted in bad faith.

NAR appreciates your consideration of these much needed changes to the TROL Act and look forward to working with you further. Without these changes, the TROL act may in fact cause more difficulties for our members who are the victims of demand letter activity by patent trolls.

Sincerely,

Chris Polychron
2015 President, National Association of REALTORS®

cc: House Energy and Commerce Committee