

117TH CONGRESS
1ST SESSION

H. R. 3978

To make it unlawful to send a demand letter in bad faith for a patent relating to COVID–19 related products, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 17, 2021

Mr. BURGESS introduced the following bill; which was referred to the Committee on Energy and Commerce

A BILL

To make it unlawful to send a demand letter in bad faith for a patent relating to COVID–19 related products, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Vaccine Targeting
5 Rogue and Opaque Letters Act of 2021” or the “Vaccine
6 TROL Act of 2021”.

7 **SEC. 2. SUSPENSION OF DEMAND LETTERS RELATED TO**
8 **COVID–19.**

9 (a) SUSPENDING DEMAND LETTERS RELATED TO
10 COVID–19.—For the duration of a public health emer-

1 gency declared pursuant to section 319 of the Public
2 Health Service Act (42 U.S.C. 247d) as a result of con-
3 firmed cases of 2019 novel coronavirus (COVID–19), in-
4 cluding any renewal thereof, it shall be unlawful for any
5 person, in connection with the assertion of a United States
6 patent, to engage in a pattern or practice of sending writ-
7 ten communications that state or represent that the recipi-
8 ents are or may be infringing, or have or may have in-
9 fringed, a patent regarding COVID–19 related products
10 and bear liability or owe compensation to another, if—

11 (1) the sender of the communications, in bad
12 faith, states or represents in the communications
13 that—

14 (A) the sender is a person with the right
15 to license or enforce the patent at the time the
16 communications are sent, and the sender is not
17 a person with such a right;

18 (B) a civil action asserting a claim of in-
19 fringement of the patent has been filed against
20 the recipient;

21 (C) a civil action asserting a claim of in-
22 fringement of the patent has been filed against
23 other persons;

24 (D) legal action for infringement of the
25 patent will be taken against the recipient;

1 (E) the sender is the exclusive licensee of
2 the patent asserted in the communications;

3 (F) persons other than the recipient pur-
4 chased a license for the patent asserted in the
5 communications;

6 (G) persons other than the recipient pur-
7 chased a license, and the sender does not dis-
8 close that such license is unrelated to the al-
9 leged infringement or the patent asserted in the
10 communications;

11 (H) an investigation of the recipient's al-
12 leged infringement occurred; or

13 (I) the sender or an affiliate of the sender
14 previously filed a civil action asserting a claim
15 of infringement of the patent based on the ac-
16 tivity that is the subject of the written commu-
17 nication when such activity was held, in a final
18 determination, not to infringe the patent;

19 (2) the sender of the communications, in bad
20 faith, seeks compensation for—

21 (A) a patent claim that has been held to
22 be unenforceable due to inequitable conduct, in-
23 valid, or otherwise unenforceable against the re-
24 cipient, in a final determination;

1 (B) activities undertaken by the recipient
2 after expiration of the patent asserted in the
3 communications; or

4 (C) activity of the recipient that was au-
5 thorized, with respect to the patent claim or
6 claims that are the subject of the communica-
7 tions, by a person with the right to license the
8 patent; or

9 (3) the sender of the communications, in bad
10 faith, fails to include—

11 (A) the identity of the person asserting a
12 right to license the patent to, or enforce the
13 patent against, the recipient, including the iden-
14 tity of any parent entity and the ultimate par-
15 ent entity of such person, unless such person is
16 a public company and the name of the public
17 company is identified;

18 (B) an identification of at least one patent
19 issued by the United States Patent and Trade-
20 mark Office alleged to have been infringed;

21 (C) an identification, to the extent reason-
22 able under the circumstances, of at least one
23 product, service, or other activity of the recipi-
24 ent that is alleged to infringe the identified pat-
25 ent;

1 (D) a description, to the extent reasonable
2 under the circumstances, of how the product,
3 service, or other activity of the recipient in-
4 fringes an identified patent and patent claim; or

5 (E) a name and contact information for a
6 person the recipient may contact about the as-
7 sertions or claims relating to the patent con-
8 tained in the communications.

9 (b) PRESUMPTION OF BAD FAITH.—A written com-
10 munication is presumed to have been sent in bad faith if,
11 after receiving a written request by the recipient to provide
12 any of the information required in subsection (a)(3) or a
13 patent claim reasonably believed to have been infringed,
14 the sender fails to provide such information to the recipi-
15 ent within 10 business days after the date on which the
16 request is received.

17 (c) AFFIRMATIVE DEFENSE.—With respect to sub-
18 section (a), there shall be an affirmative defense that a
19 statement, representation, or omission was not made in
20 bad faith (as defined in subparagraphs (B) or (C) of sec-
21 tion 4(1)) if the sender can demonstrate that such state-
22 ment, representation, or omission was a mistake made in
23 good faith, which may be demonstrated by a preponder-
24 ance of evidence that the violation was not intentional and
25 resulted from a bona fide error notwithstanding the main-

1 tenance of procedures or policies reasonably adapted to
2 avoid any such error.

3 (d) **RULE OF CONSTRUCTION.**—For purposes of sec-
4 tions 3 and 4, the commission of an act or practice that
5 is declared under this section to be an unfair or deceptive
6 act or practice within the meaning of section 5(a)(1) of
7 the Federal Trade Commission Act (15 U.S.C. 45(a)(1))
8 shall be considered to be a violation of this section.

9 **SEC. 3. ENFORCEMENT BY FEDERAL TRADE COMMISSION.**

10 (a) **VIOLATION OF RULE.**—A violation of section 2
11 shall be treated as a violation of a rule defining an unfair
12 or deceptive act or practice prescribed under section
13 18(a)(1)(B) of the Federal Trade Commission Act (15
14 U.S.C. 57a(a)(1)(B)).

15 (b) **POWERS OF COMMISSION.**—The Commission
16 shall enforce this Act in the same manner, by the same
17 means, and with the same jurisdiction, powers, and duties
18 as though all applicable terms and provisions of the Fed-
19 eral Trade Commission Act (15 U.S.C. 41 et seq.) were
20 incorporated into and made a part of this Act. Any person
21 who violates section 2 shall be subject to the penalties and
22 entitled to the privileges and immunities provided in the
23 Federal Trade Commission Act.

1 (c) EFFECT ON OTHER LAWS.—Nothing in this Act
2 shall be construed in any way to limit or affect the author-
3 ity of the Commission under any other provision of law.

4 (d) ENFORCEMENT BY STATE ATTORNEYS GEN-
5 ERAL.—

6 (1) IN GENERAL.—In any case in which the at-
7 torney general of a State has reason to believe that
8 an interest of the residents of that State has been
9 adversely affected by any person who violates section
10 2, the attorney general of the State, may bring a
11 civil action on behalf of such residents of the State
12 in a district court of the United States of appro-
13 priate jurisdiction—

14 (A) to enjoin further such violation by the
15 defendant; or

16 (B) to obtain civil penalties on behalf of
17 recipients who suffered actual damages as a re-
18 sult of such violation.

19 (2) MAXIMUM CIVIL PENALTY.—Notwithstand-
20 ing the number of actions which may be brought
21 against a person under this subsection, a person
22 may not be liable for a total of more than
23 \$1,000,000 for every death related to COVID–19 in
24 the United States.

25 (3) INTERVENTION BY THE FTC.—

1 (A) NOTICE AND INTERVENTION.—The at-
2 torney general of a State shall provide prior
3 written notice of any action under paragraph
4 (1) to the Commission and provide the Commis-
5 sion with a copy of the complaint in the action,
6 except in any case in which such prior notice is
7 not feasible, in which case the attorney general
8 shall serve such notice immediately upon insti-
9 tuting such action. The Commission shall have
10 the right—

11 (i) to intervene in the action;

12 (ii) upon so intervening, to be heard
13 on all matters arising therein; and

14 (iii) to file petitions for appeal.

15 (B) LIMITATION ON STATE ACTION WHILE
16 FEDERAL ACTION IS PENDING.—If the Commis-
17 sion has instituted a civil action for violation of
18 section 2, no State attorney general may bring
19 an action under this subsection during the
20 pendency of that action against any defendant
21 named in the complaint of the Commission for
22 any violation of such section alleged in the com-
23 plaint.

24 (4) CONSTRUCTION.—For purposes of bringing
25 any civil action under paragraph (1), nothing in this

1 Act shall be construed to prevent the attorney gen-
2 eral of a State from exercising the powers conferred
3 on the attorney general by the laws of that State
4 to—

5 (A) conduct investigations;

6 (B) administer oaths or affirmations; or

7 (C) compel the attendance of witnesses or
8 the production of documentary and other evi-
9 dence.

10 **SEC. 4. DEFINITIONS.**

11 In this Act:

12 (1) **BAD FAITH.**—The term “bad faith” means,
13 with respect to section 2, that the sender—

14 (A) made a knowingly false or knowingly
15 misleading statement, representation, or omis-
16 sion;

17 (B) made a statement, representation, or
18 omission with reckless indifference as to the
19 false or misleading nature of such statement,
20 representation, or omission; or

21 (C) made a statement, representation, or
22 omission with awareness of the high probability
23 of the statement, representation, or omission to
24 deceive and the sender intentionally avoided the
25 truth.

1 (2) COMMISSION.—The term “Commission”
2 means the Federal Trade Commission.

3 (3) FINAL DETERMINATION.—The term “final
4 determination” means, with respect to the invalidity
5 or unenforceability of a patent, that the invalidity or
6 unenforceability has been determined by a court of
7 the United States or the United States Patent and
8 Trademark Office in a final decision that is
9 unappealable or for which any opportunity for ap-
10 peal is no longer available.

○