

**Section by Section of H.R. \_\_\_\_**  
**The Trade Protection Not Troll Protection Act**

**Summary**

Patent Assertion Entities (“PAEs”) are firms that purchase and assert patents after a product is already in production. They do not manufacture a competing product in the United States or anywhere else and in most cases do not license their technology to anyone who is producing a competing product. Often they are mere shell corporations set up for the purpose of litigation, are sometimes based overseas, and have few U.S. employees. PAEs are increasingly taking advantage of the International Trade Commission (“ITC”) as another venue in their litigation business model against U.S. companies, alleging that PAEs need trade protection as a domestic industry, despite not engaging in a demonstrable commercial activity. In nearly all recent cases, these entities have judicial recourse for allegedly infringing activities in the U.S. Federal Courts and are pursuing that parallel litigation at the same time as filing in the ITC. The Trade Protection Not Troll Protection Act would effect a narrow set of reforms that will allow the ITC to refocus on its core purpose and restore a rational balance to their patent reviews.

**Section 2. Unfair Practices in Import Trade**

**Domestic Industry Standing:**

PAEs were not contemplated and did not exist in their modern form when the ITC’s statute was last updated in 1988. Since PAEs do not intend to make or sell an alternative product covered by a patent, the bill would modify the current domestic industry standard to clarify that investment in licensing must be substantial and must lead to the adoption and development of articles that incorporate the patent in question (i.e., ex ante licensing). It further clarifies that complainants may not use licensees to establish a domestic industry unless the license entered into by the licensee leads to the production of an article that incorporates the patent for sale in the US.

**Early Domestic Industry Investigation:**

ITC litigation is extraordinarily expensive, roughly twice the cost of district court litigation, due in large part to the speed with which it proceeds. Although domestic industry standing must exist at the time of the filing of a case, the ITC does not turn to the determination until almost half-way through the case. The bill builds upon the ITC’s recent call for an early evidentiary hearing in *Laminated Packaging, Inv. No. 337-TA-874* by requiring the Commission to conduct a preliminary investigation as to the domestic industry standing for any complainant that relies on IP activities in whole or in part. Additionally, it sets forth process protections and limits for the preliminary investigation. Finally, it requires that once a preliminary investigation is initiated, the ITC must conduct an early initial determination as to the domestic industry standing of complainant within 45 days.

**Public Interest Determination and Equitable Defenses**

Because PAEs do not produce alternative products, the cases they bring hurt consumers and the economy by reducing market choice, hampering innovation, and inflicting unnecessary costs. Although Congress provided the ITC with the necessary ability to prevent such harm, it did not require a public

interest determination or, if such a determination is made, provide any guidance on the timing of such a determination. The bill modifies the determination and review process by enabling the Commission to make a public interest determination early in the case (rather than at the end of a case as is customary). When making such determination, the ITC may consider the current statutory provisions plus whether protected articles will be protected by an exclusion order and whether the complainant or its licensees can meet market demand for protected articles. It authorizes the Commission to terminate the case based on this determination, if appropriate. Finally, it clarifies that the Commission may hear all equitable defenses, including equitable defenses and principles considered in US District Courts (i.e., eBay defenses) in making a 337 determination.

### **Consistency in Public Interest Factors**

The bill creates consistency throughout the statute as to the public interest factors considered by the Commission. Specifically, ensures that the Commission considers equitable defenses and principles, if an exclusion order will actually protect any articles, and if the complainant and its licensees can meet market demand.