November 20, 2013

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Goodlatte,

We commend you for your work on the Amendment in the Nature of a Substitute to HR 3309, the "Innovation Act of 2013," to address the continued onslaught of frivolous patent litigation brought by non-practicing entities ("NPEs"). Following the successful implementation of the America Invents Act of 2011 ("AIA"), the Innovation Act holds the promise to further constrain the abuse of the patent system by NPEs by lowering the overall costs of litigation (for both parties) and bringing much needed transparency to the space.

Financial institutions of every size have been targeted by NPEs, often referred to as patent trolls, who in most cases assert low-quality business method patents through vaguely worded demand letters or intentionally vague complaints. Indeed, patent trolls' relatively recent focus on credit unions and community banks threatens to pose additional, unwarranted costs on smaller lenders and the communities they serve. Components of the Innovation Act could help alter the business model of trolls by removing some of their financial incentive to assert low-quality patent infringment in the hope of quick settlements.

In the amendment, we appreciate your focus on enhanced pleading standards and limits on discovery. Enhanced pleading standards will provide much-needed transparency related to the merits or weaknesses of a lawsuit. If plaintiffs are required to specifically identify the accused product as well as asserted claims and factual basis for infringement, would-be defendants will be better able to make determinations regarding licensing or litigation. The limitations on discovery help balance the costs of litigation. In addition, the focus around core documents could save would-be defendants from exorbitant costs related to document production for documents beyond in the needs of any given proceeding. Discovery should not require defendants to provide patent trolls with an unlimited window into a company's business operations. H.R. 3309 will help ensure that the discovery process is no longer abused.

We also appreciate your attempts to address the concerns of end-users. We, however, believe the legislation must go further. As end-users, financial firms of all sizes find themselves in litigation given that virtually all business method patents claim a method or process implemented through some type of technology. Because it is rare for our technology providers to voluntarily step into a lawsuit and stand in the place of their customers, we believe that adding a "right of contribution" or "mandatory joinder" to the patent law would enable a more equitable distribution of liability between end-users and suppliers. Under the "right of contribution," the tortfeaser, or party that committed the tort, would be able to seek contribution from joint tortfeasors where one tortfeasor has paid more than its fair share of

damages to the plaintiff. To accomplish this, the legislation should make clear that state contribution rights are not preempted or enumerate the right of contribution in the Patent Act.

Although the amendment enhances our ability to fight meritless patent assertions, the proposed amendment would, in our view, diminish the effectiveness of both the inter party review ("IPR") and post-grant review ("PGR") by forcing the Patent and Trade Office ("PTO") to conduct claims construction proceedings in a manner similar to the federal courts. This would shift the PTO's current practice from reviewing patents based on the "broadest reasonable interpretation." This shift could weaken the PTO's ability to invalidate or narrow low-quality patents because PTO would no longer be able to examine starting with a broad view of the patent. We recommend this language be removed from the amendment.

Finally, we appreciate your efforts to improve the Transitional Program for the Review of Covered Business Method Patents ("CBM program"), which you helped create as part of the America Invents Act of 2011, specifically providing the PTO with the authority to waive the program fee to accommodate community banks and credit unions. Smaller financial services providers who have fewer resources to deal with demand letters and engage in the lengthy process of fighting the merit-less litigation that patent trolls initiate, will particularly benefit from these provisions. It is imperative that financial services providers of all sizes have access to the CBM program. In that regard, it would be helpful if the Committee could clarify that a demand letter or other pre-litigation communication suggesting that infringement may have occurred shall constitute an accusation of infringement giving rise to a real and substantial controversy for purposes of a CBM program review. The CBM program is working. We believe that the sunset should be removed without qualification. To artificially constrain the program is to ensure that low-quality business method patents remain in the hands of trolls.

Thank you for your efforts to improve patent litigation and prevent its misuse. The Amendment in the Nature of a Substitute to H.R. 3309, the Innovation Act, is an important step forward on which we can build. We appreciate your leadership.

Sincerely,

American Bankers Association
American Insurance Association
The Clearing House
Consumer Bankers Association
Credit Union National Association
Financial Services Roundtable
Independent Community Bankers of America
NACHA—The Electronic Payments Association
National Association of Federal Credit Unions
National Association of Mutual Insurance Companies