Testimony for the Record
Senate Judiciary Hearing

"The Impact of Abusive Patent Litigation Practices on the American Economy"

March 18, 2015

On behalf of the thousands of financial institutions of all sizes and charters represented by the undersigned trade associations, we are writing to commend you for your leadership in holding a hearing entitled, "The Impact of Abusive Patent Litigation Practices on the American Economy." We respectfully request that this testimony be included as part of the hearing record.

The financial services industry, like many other sectors of the economy, has faced deceptive demand letters and frivolous litigation from patent trolls asserting low-quality patents.

We have serious concerns about the current patent litigation environment as well as the quality of patents granted by the Patent and Trademark Office (PTO). In addition, patent trolls continue to assert low-quality patents through vaguely- worded demand letters with the full knowledge that their targets, our members, are more likely to pay unnecessary licensing agreements than engage in lengthy, costly litigation. The deadweight cost of compliance with demand letters and the threat of litigation are ultimately born by our customers.

To that end, the financial services industry has coalesced around a set of key principles needed to address this critical issue. These principles fall into three distinct yet interrelated baskets that, if enacted, would improve the patent system, promote innovation and discourage the assertion of low-quality patents as a legitimate business model.

1) Efficiency of the Litigation Process: improvements need to be made to make the cost and burdens of patent litigation equitable and more efficient.
2) Enhanced Transparency: abuse of the patent system through the use of vaguely-worded demand letters must be ended by requiring such letters to provide more details about the patent and who claims to assert it.
3) Patent quality: improvements are needed in the post-grant review of patents such as making the Covered Business Method (CBM) permanent and more useable for smaller entities.

Collectively, these principles will go a long way in protecting the financial services sector and the millions of customers our members interact with on a daily basis from the harm wrought by patent trolls. As the issue of patent reform unfolds in the 114th Congress, we look forward to working with you to advance these core principles.

The following summarizes a set of principles that the financial services sector is advocating for inclusion in any patent reform legislation during the 114th Congress:

LITIGATION EFFICIENCY

- Contribution Doctrine: Patent trolls target financial services companies as end-users of a product or service, leaving our members vulnerable and liable for products and services outside of their control. Adding a right of contribution to the patent law would enable a more equitable distribution of liability between end users and vendors. Under common law and certain federal statutes, there is right of contribution (e.g., a tortfeasor, or defendant, has a right to seek contribution from other joint tortfeasors where one tortfeasor has paid more than its fair share of damages to the plaintiff). In the patent context, a right of contribution could arise where a Patent Assertion Entity (PAE) sues the end user of a system, not the upstream supplier of components of the system. Unfortunately, no right of contribution exists under the patent law and state law claims for contribution are preempted.

- End-User Protections: End users should be protected from patent troll lawsuits based on infringements by manufacturers and producers. Trolls should be required to sue the party that is actually responsible for infringement, and end users should be protected by having their cases consistently stayed when the manufacturer is best positioned to fight the patent troll. Definitions should ensure that the stay adequately shields business from all corners of "Main Street" America, including financial services.

- Limitation to Core Discovery Documents: Each party is to pay for the discovery it requests beyond "core" documents. Any discovery requested beyond the "core" documents is at the expense of the party requesting such discovery.

ENHANCED TRANSPARENCY

- Demand Letter Reform: Vaguely-worded demand letters have been used by patent trolls to entice licensing agreements and the payment of royalties even though the facts around infringement may not be compelling. Demand letters should contain greater specificity. This enhanced transparency will help curb abusive lawsuits. Further, demand letters should be filed with regulators and recorded in a public, searchable database. In addition, a demand letter should be sufficient to enable a covered business method review, and State laws that have been enacted to curb abusive demand letters by patent trolls should be viewed as a complement to any federal protections, and not be preempted.

- Enhanced Pleading Standards: Complaints for patent infringement should specifically identify the accused product, the asserted claims and factual basis for infringement.

- Close Marking Loophole: Under current law, a company practicing a patent can only collect past damages if it marks it products, meaning it labels the product as a patented

product. Conversely, a patent troll is entitled to past damages because they have nothing to mark. It is unfair that an entity that does not practice a patent is entitled to more damages than a company that actually employs people and contributes to the economy by selling products and services. To fix this loophole and put operating companies and patent trolls on a level playing field, a plaintiff should only be able to collect damages from the date it provided notice of infringement. Marking a product should be considered adequate notice of infringement.

- Recordation of Patent Sales: Establish public record of patent sales, analogous to the sale of real estate. Each sales record should include: (1) Real Parties in Interest – clear identification of purchaser, parent companies of purchaser, as well as identification of companies and individuals that retain a financial interest in the patents; and (2) Purchase Price. P-patent brokers should have licensing and other oversight requirements to ensure that the market is a level playing field and brokers have the requisite expertise and adhere to ethical business practices. As part of the sales process, an objective, third- party valuation should be required. In addition, there should be a transaction fee to cover the costs associated with licensing brokers and maintaining public sales records.

PATENT QUALITY

- Permanent Covered Business Method program and Improvements to other Post-Grant programs: Post-grant review should be available to all practitioners including those who do not generally possess prior art in the form of patents and printed publications. Congress validated this assertion in the American Invents Act when they created the CBM program. Unfortunately, without intervening action, the CBM program will expire in 2020 once again leaving certain industries exposed to low quality business method patents. The CBM program should be made permanent as it has proven to be a successful low-cost alternative to litigation of covered business method patents. However, additional modifications should be made to inter partes review to ensure that it can be accessed by all practitioners using the very best prior art available. Safeguards should ensure that post-grant proceedings cannot be used to harass patent holders and not so restrictive as to protect low-quality patents from review.

- Language to make CBM Program permanent, include the ability for the PTO to waive or reduce the fee for small entities.

- Lift the prior art bar for inter partes and remove the estoppel bar.

Thank you again for your leadership on patent reform and for allowing us to submit testimony for the record. We look forward to working together on this important issue.

Sincerely,

American Bankers Association

American Insurance Association

The Clearing House

Credit Union National Association

The Financial Services Roundtable

Independent Community Bankers of America

National Association of Federal Credit Unions

The National Association of Mutual Insurance Companies