October 29, 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 introducing HR 3309, the "Innovation Act of 2013," legislation 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. We look forward to working with you to enhance this legislation to accomplish these important goals.

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 Main Street 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 patents in the hope of quick settlements.

We particularly 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 appreciate the attempts you have made to address the concerns of end-users. We, however, believe the legislation must go further. Financial firms of all sizes find themselves in litigation as end-users 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 suit 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.

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. We applaud your efforts to ensure that the program is accessible to all applicants by providing the Patent and Trade Office ("PTO") with 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. We have attached suggested language to accomplish this.

The legislation, however, limits patents that can be reviewed by the PTO. The bill would limit the CBM program to only those patents filed *before* the AIA – first to invent patents. This change presupposes that the patents issued between 2011 and the expiration of the program in 2018 will all be of exceptional quality and in no need of review against the best prior art. It is important to remember that the CBM program was created to ensure that patents that could not otherwise be reviewed against the best prior art (due to the bar against use and sale prior art in post-grant review) can be reviewed <u>if the PTO determines that they are more likely than not invalid</u>. As you know, this is an exceptionally high bar, which protects patent holders from abuse and ensures that only the lowest quality patents go through a CBM review. To arbitrarily limit the scope of the program to patents that issued before 2011 is to assume that no low-quality business method patents will issue in the future, an assumption that is not warranted given the realities of the patent-granting process. The CBM program is working as demonstrated by your desire to codify the *Versata* decision. Indeed, <u>we believe that the sunset should be removed without qualification</u>. 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. H.R. 3309, the Innovation Act is an important step forward on which we can build. We appreciate your leadership and look forward to working with you and Members of the Committee as the process moves forward.

Sincerely,

American Bankers Association
American Insurance Association
The Clearing House
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

TO: Chairman Goodlatte
FROM: Financial Services Patent Coalition
ADDENDUM: Proposed Report Language
DATE: 10/28/13

There is a lack of consensus among the financial services industry as to whether a demand letter qualifies as an accusation of infringement. As a result, we respectfully request the following language be included in the Committee report clarifying the original intent of House Committee Report 112-98 at 54:

> As part of the 2011 America Invents Act, Congress created a transitional program to implement a post-grant proceeding for review of the validity of business method patents used in the practice, administration, or management of a financial product or service. As the Committee stated in the House Committee Report at the time, Congress intended that a petition to initiate a review could be granted if the petitioner is first sued for infringement, or if the petitioner is accused of infringement. *See* Rept. 112-98 at 54. To the extent that there is doubt as to what constitutes an accusation of infringement, the Committee clarifies its intent 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. It is the Committee's intent that one may petition for a review proceeding on the basis of such communication.

Thank you for your consideration.