

## CLIENT ALERT

### Obama Administration Vetoes ITC Ban on iPhones and iPads

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The Obama Administration on Saturday overturned two orders issued by the U.S. International Trade Commission (ITC or "Commission") barring sales and imports of Apple's older iPhone and iPad models found to infringe a Samsung Electronics Co. Ltd. standard-essential patent (SEP). The Department of Justice (DOJ) and the Federal Trade Commission (FTC) have repeatedly opined that the pursuit of injunctive remedies, including ITC exclusion orders, in cases involving SEPs can harm competition by allowing the SEP owner to unfairly leverage the power conferred on the patent through its incorporation into a technical standard. The recent veto decision signals the Administration's agreement on this point. The Administration issued its veto just one day before the ITC orders were to take effect, the first time the White House has vetoed an ITC exclusion order since 1987, when President Reagan overturned a ban on Samsung memory chips.

In a four-page letter to the chairman of the ITC, Ambassador Michael Froman, the United States Trade Representative (USTR), raised significant concerns with how the entry of exclusion orders on products found to infringe SEPs can affect competitive conditions in the United States, given that "standards, and particularly voluntary consensus-based standards set by [standards developing organizations], have come to play an increasingly important role in the U.S. economy."

Though Apple had argued that Samsung violated the fair, reasonable and non-discriminatory (FRAND) commitment it made to the European Telecommunications Standards Institute by refusing to properly negotiate with Apple, the Commission held that Apple failed to carry its burden of proof, and issued the ban. In vetoing the ban, Ambassador Froman stated that his decision is "not an endorsement or a criticism of the Commission's decision." But the USTR cited extensively to a joint policy statement issued on January 8, 2013, by the U.S. Department of Justice (DOJ) and the U.S. Patent and Trademark Office (PTO), that expressed the widely-held concern that by pursuing exclusion orders, owners of FRAND-encumbered SEPs can "gain[] undue leverage and engag[e] in 'patent hold-up', *i.e.*, asserting the patent to exclude an implementer of the standard from a market to obtain a higher price for the use of the patent than would have been possible before the standard was set."

Ambassador Froman's letter reveals little of the Administration's rationale for choosing to veto the exclusion order in this particular case. The decision is, however, consistent with other recent developments that suggest the Administration's growing concern over the enforcement of SEPs. In addition to the DOJ-PTO joint policy statement, the Federal Trade Commission (FTC) has repeatedly taken the position that the pursuit of an injunctive remedy is inconsistent with a FRAND commitment, most notably in its recent settlement with Google regarding Google's licensing practices with respect to its FRAND-encumbered Motorola Mobility patents.

While the Administration did not provide any real certainty to SEP holders as to when they might permissibly seek injunctive relief in the ITC, the USTR did adopt the DOJ-PTO joint policy statement's suggestion that an exclusion order could still be appropriate where a putative licensee refuses to license on FRAND terms, or where the putative licensee is operating outside the jurisdiction of a court that could award infringement damages.

The USTR also set forth specific procedural recommendations to the ITC to ensure that these issues are resolved earlier in an investigation and that any related factual issues are fully developed. Ambassador Froman stated that he "will look for these elements in any future decisions involving FRAND-encumbered SEPs that are presented for policy review."

Specifically, the USTR suggested that in future cases involving SEPs, the ITC should: (1) "examine thoroughly and carefully on its own initiative the public interest issues presented both at the outset of its proceeding and when determining whether a particular remedy is in the public interest"; and (2) "seek proactively to have the parties develop a comprehensive factual record related to these [FRAND and SEP] issues in the proceedings before the Administrative Law Judge and during the formal remedy phase of the investigation before the Commission, including information on the standards-essential nature of the patent at issue if contested by the patent holder and the presence or absence of patent hold-up or reverse hold-up."

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