

CLIENT ALERT

DOJ Antitrust Division Takes "Extraordinary Step" in Issuing Supplemental Business Review Letter to IEEE

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On September 10, the U.S. Department of Justice took what it described as an “extraordinary step” and issued a [Supplemental Business Review Letter](#) to its previous [2015 Business Review Letter](#) to the Institute of Electrical and Electronics Engineers, Inc. (IEEE). IEEE is a standards development organization (SDO) that has developed thousands of international standards, including the 802.11 family of Wi-Fi standards. The DOJ’s latest letter to IEEE revised significant aspects of the DOJ’s original analysis of IEEE’s 2015 patent policy to align with current DOJ competition policy positions on standards development and SDO policies for providing access to standard essential patents.

In 2015, the IEEE had sought DOJ antitrust review of contemplated licensing-related policies (1) restricting the ability of parties to seek injunctive relief, (2) interpreting the meaning of “reasonable rate” in FRAND licensing, (3) delineating when it was acceptable for a standard essential patent licensor to demand reciprocal licensing, and (4) suggesting limits on the ability of a patent licensor to restrict licensing based on a prospective licensee’s production levels. The DOJ’s 2015 letter indicated that the DOJ did not have any present intention to challenge the proposal in court. And in the years since standards implementers sometimes used the letter against standard essential patent holders attempting to enforce patent rights.

In its Supplemental Business Review Letter, the DOJ emphasized that the 2015 letter had been frequently and incorrectly cited as an endorsement of IEEE’s policies, rather than a mere statement of the DOJ’s antitrust enforcement intention. In addition, citing cases such as the Ninth Circuit’s [recent Qualcomm decision](#), the DOJ also stated that U.S. law has evolved in the past five years. In particular the DOJ claimed that the potential patent hold-up discussed in the 2015 letter had not come to fruition to the degree anticipated. The DOJ also pushed back on limitations on royalties and injunctive relief. In sum, the Supplemental Business Review Letter revised the previous letter to IEEE to align with current administration policy, which is less inclined to treat disputes over FRAND licensing terms as antitrust violations.

The IEEE supplemental letter follows DOJ’s recent [Business Review Letter](#) evaluating the Avanci licensing platform for standard essential patents used in vehicles and other products. The DOJ determined that the proposed platform could enhance essential patent licensing by vehicle manufacturers, and confirmed the DOJ was not inclined to initiate an antitrust enforcement action.

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