

January 31, 2018

The Honorable Wilbur Ross  
Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, District of Columbia 20230

The Honorable Andrei Iancu  
Under Secretary of Commerce for Intellectual  
Property and Director of the United States  
Patent and Trademark Office  
United States Patent and Trademark Office  
600 Dulany Street  
Alexandria, Virginia 22313

RE: Preserving American Leadership in Standards, Licensing, and Innovation; and Significant Concerns with DOJ AAG Announcements on December 7, 2018

Dear Secretary Ross and Under Secretary Iancu:

The undersigned cross-sectoral group of trade associations, representing over \$4.5 trillion contributed annually to the United States' gross domestic product (GDP) and over 54 million American jobs across a range of interests and sectors, write to express our deep concern with Department of Justice (DOJ) Assistant Attorney General (AAG) Makan Delrahim's recently announced plans regarding standard-essential patents (SEPs). We also request your support in maintaining a U.S. policy that promotes the development of standards, appreciates the relationship between standards development and intellectual property rights, and seeks to avoid the harmful effects of SEP abuse.

Our members not only rely on strong intellectual property rights and actively participate in standards development, but they also understand the importance of open standards to innovation and competition. Our members are also concerned about SEP abuse and the ways in which that abuse can stifle competition. Open standards drive innovation and interoperability today and will only continue to do so as new verticals, such as the auto and manufacturing industries, incorporate new technology to realize greater efficiencies and productivity. Together, we have long advocated for U.S. policies that will ensure that standards advance investment, innovation, and job creation. For example, in mid-2018, we jointly released a white paper titled *Standards, Licensing, and Innovation: A Response to DOJ AAG's Comments on Antitrust Law and Standard-Setting*<sup>1</sup> that elaborates further on our views, which we append to this letter.

On December 7, 2018, AAG Delrahim announced in a speech that the Antitrust Division is withdrawing its assent to the 2013 joint DOJ-U.S. Patent & Trademark Office "Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments" (2013 Policy Statement) and further indicated that the Antitrust Division will investigate and bring enforcement actions to address alleged collusion in standard setting organizations (SSOs).<sup>2</sup> At this critical time, we write to request your support in maintaining pro-innovation policies with regard to the intersection of standards, intellectual property, and competition.

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<sup>1</sup> [https://actonline.org/wp-content/uploads/05302018\\_Multi-Assn\\_DOJ-SEP-White-Paper\\_FINAL.pdf](https://actonline.org/wp-content/uploads/05302018_Multi-Assn_DOJ-SEP-White-Paper_FINAL.pdf)

<sup>2</sup> <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-19th-annual-berkeley-stanford>

The 2013 Policy Statement represents a thoughtful and deliberate multi-agency approach to standardization, patents, and competition developed through extensive consultations with the diverse range of public and private sector stakeholders affected by the policy. The 2013 Policy Statement provides much-needed guidance regarding the intersection of standardization, intellectual property, and the vital role of competition law; and it has discouraged abusive tactics, such as improperly using injunctions, used to assert pressure on would-be innovators that utilize standards to compete. The 2013 Policy Statement is also supported by a strong (and still growing) body of precedent developed across federal circuits, all of which affirm the role of competition law in upholding FRAND licensing commitments to maintain competition and innovation. These announced steps disregard the vital role competition law plays in the success of standard and SEP licensing, and they are inconsistent with well-established U.S. case law. This announcement represents an abandonment of a cornerstone pro-innovation American policy, and it will jeopardize American growth and job creation by undermining the vital role standards play in promoting ingenuity and interoperability, ultimately ceding U.S. global leadership in innovation policy.

We note our confusion with AAG Delrahim's assertion that hold-up by owners of SEPs is not an antitrust problem. AAG Delrahim's view contradicts U.S. courts and competition authorities around the world, which have long recognized that clear, enforceable rules regarding the ability of a SEP owner to exploit the market power created by the inclusion of its SEP in a popular standard are necessary to realize successful pro-competitive standardization. Reducing competition law's role from the SEP licensing ecosystem would harm those that utilize standards to innovate as well as the entire ecosystem that builds on such a standard, including American consumers and small businesses.

We also emphasize that standards participants voluntarily agree to FRAND commitments in return for their technology being included in a widely adopted global standard and are free to withhold their patented technologies from standards. AAG Delrahim's assertion that FRAND licensing is compulsory contradicts the reality of enforcement of voluntary licensing in both definitions. Such a statement introduced further uncertainty into the SEP licensing ecosystem. Simply put, the FRAND commitment does not infringe on the fundamental right of the patent holder to exclude competitors.

Further, SSOs need the ability to make policy changes in response to their members' needs to foster collaboration, support, and inspiration, ultimately benefiting consumers who enjoy increased access to cutting-edge products and services at lower costs. We are therefore concerned with AAG Delrahim's stated focus on investigating alleged collusion within SSOs in response to SSOs making policy changes in response to membership. At the same time, AAG Delrahim indicated that he believes SSOs should enforce FRAND terms on an SSO's members when that is the role of the courts.

The SEP licensing ecosystem now must attempt to square AAG Delrahim's announcement with established U.S. law and licensing norms. A U.S. policy shift away from the approach taken in the 2013 Policy Statement jeopardizes reasonable access to SEPs and standards for our members, leaving us wondering how they can compete in existing and emerging markets. We also note that, despite our efforts to initiate a dialogue with AAG Delrahim, our contribution to the public debate through our joint white paper remains unanswered by AAG Delrahim, and he has not responded to our invitation for a dialogue.

**It is vital to the tens of millions of American jobs we provide that the Department of Commerce and the USPTO support the 2013 Policy Statement. We call on the Department of Commerce and USPTO to maintain support for the important policies in the 2013 Policy Statement moving forward. Without the clarity provided for in the 2013 Policy Statement, untold investment and countless American jobs are at risk.**

We support your continued leadership as Commerce Secretary and urge your careful consideration of our views on these crucial topics. We stand ready to further elaborate on our views in future discussions or to assist you further in any way helpful.

Sincerely,

ACT | The App Association  
Alliance of Automobile Manufacturers  
Computer & Communications Industry Association (CCIA)  
High Tech Inventors Alliance (HTIA)  
National Retail Federation  
Software & Information Industry Association (SIIA)

cc:

The Honorable Jerrold Nadler, Chairman, House Judiciary Committee  
The Honorable Doug Collins, Ranking Member, House Judiciary Committee  
The Honorable Lindsey Graham, Chairman, Senate Committee on the Judiciary  
The Honorable Dianne Feinstein, Ranking Member, Senate Committee on the Judiciary