Statement of Commissioner Edith Ramirez
Committee on the Judiciary
U.S. Senate
Washington, DC
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Chairman Leahy, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to testify on behalf of the Federal Trade Commission about the competitive effects of injunctive relief for infringement of standard-essential patents, including the impact of International Trade Commission exclusion orders.

These issues are currently front and center in the markets for smartphones and tablets, where the risk of competitive harm from such orders can be especially acute. Complex multi-component products are the norm in IT markets. For example, a smartphone has hundreds of components and technologies that enable it to communicate over wireless networks, stream video, access the internet, and perform all of the functions that consumers expect.

The vast majority of these components and technologies are covered by patents. A conservative estimate of the number of patents that could be in play in a smartphone is in the tens of thousands. Many of these patents are claimed to be essential to a standard.

Standards dictate the design of many parts of a smartphone. To make phone calls, a smartphone must be compatible with a cellular network. Standards make that possible. They also enable many other functions such as WiFi communications and video streaming.

Standards in the IT sector are typically set by standard setting organizations or SSOs, whose members include parties with a commercial stake in how the standard is written, such as patent holders, manufacturers, and large buyers. Through standard setting organizations, these firms engage in a voluntary but formal process to reach consensus on technical standards that permit technologies to work together.

While incorporating patented technologies into a standard greatly benefits consumers, it also creates competitive risks. Patents that cover technology adopted into a standard can empower their owners to demand higher royalty rates and other more favorable licensing terms than they could have demanded before the standard was adopted. This conduct is known as "patent hold-up."

The risk of patent hold-up is inherent in the complex and time consuming standard setting process. A wireless communication standard can take a decade or more to complete and can run many thousands of pages. The final standard is often the result of heated battles between key industry players and is virtually impossible to change piecemeal. Once a technology is embedded in a standard, it is there to stay until the standard is revised, which can be many years down the road. In addition, after a standard is published, firms begin to invest in products and technologies that are tied to the standard.

As a result, owners of standard-essential patents that once faced competition may gain newfound leverage solely as a result of the standard setting process. After technology is adopted into a standard, companies must use that technology to make a standardized product. To reduce the risk of patent hold-up, many SSOs require members to disclose patents that will read on a standard, and to agree to license those patents on reasonable and nondiscriminatory, or RAND, terms. RAND commitments are designed to mitigate the risk of hold-up and encourage competition among standardized products. But a royalty negotiation that occurs under threat of an injunction or exclusion order is weighted heavily in favor the patentee – the very situation the RAND commitment was intended to combat. In the face of an order that will block its products from the market, a company may have no choice but to accept the patentee's demands, reasonable or not.

Let me emphasize that this is more than a private dispute. Over time, hold-up restricts competition and distorts incentives to invest in standardized products and complementary technologies. The result for consumers will be higher prices, fewer choices, and inferior product quality. Hold-up also risks harming the standard-setting process.

The Supreme Court's decision in the *eBay* case reduced the risk of hold-up by making it difficult for standard essential patent owners to obtain injunctions in federal court. But while federal courts are bound by *eBay*, the ITC is not. This raises concerns that some patent holders that would be unlikely to win injunctive relief in federal district court will file suit at the ITC to obtain import bans.

But the FTC believes that the ITC also has a way to limit the potential for hold-up. We think the ITC can and should take a RAND commitment on a patent into account under its public interest analysis before issuing an exclusion order. Under its existing authority, the ITC can prevent the owners of standard-essential patents from side-stepping their licensing commitments, to the detriment of competition, innovation and consumers. The ITC's recent notice of review in its Apple-Motorola investigation suggests it may do just that.

Let me close by emphasizing that the FTC does not take the position that an exclusion order should never issue for standard essential patents. We are instead advocating that the ITC prevent patentees from using a Section 337 investigation as a way to escape their RAND obligations. In our view, this position strikes the right balance between protecting the rights of patent holders and safeguarding the pro-competitive benefits of the standard-setting process.

Thank you. I am happy to answer any questions you may have.