THE DOJ 2020 BUSINESS REVIEW LETTER TO IEEE: BALANCE RESTORED

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I. INTRODUCTION

On September 10, 2020, the United States Department of Justice Antitrust Division ("DOJ," "Division," or "Department") updated its 2015 business review letter[2] to the Institute of Electrical and Electronics Engineers ("IEEE") standard development organization ("SDO") that evaluated the IEEE's then-imminent revision of its patent policy.[3] The Division undertook this "extraordinary step"[4] in light of an extraordinary and unprecedented set of circumstances, that included systematic misrepresentation of the Division's 2015 business review letter ("2015 BRL"), as well as developments that showed the 2015 BRL's factual and legal predictions did not materialize.

This paper reviews the supplemental 2020 Division business review letter to IEEE ("2020 BRL" or "BRL") and the circumstances against which it was issued. It then analyses certain related aspects, including ongoing bipartisan concern over the impact of the 2015 BRL and its underlying policy, and the need for caution in similar future contexts.

II. THE 2015 BUSINESS REVIEW LETTER TO IEEE

In 2015, the IEEE Standards Association[5] concluded an unusual and controversial process of rewriting its prior 2007 patent policy. Among other things, the revisions:

1. Included, for the first time, a defined term "Compliant Implementation." This provision effectively instilled a compulsory license regime to the benefit of component makers, contrary to existing industry practice, including under the 2007 patent policy;[6]

2. Created a definition of "reasonable rate" that significantly devalued standard essential patents, including by analyzing their value in connection with the "smallest saleable patent practicing unit" and by eliminating the evidentiary value of comparable licenses;[7] and

2 Letter from Renata B. Hesse, Acting Asst. Att'y Gen., U.S. Dep't of Justice, to Michael A. Lindsay, Esq., Dorsey & Whitney LLP (Feb. 2, 2015), https://www.justice.gov/file/1315431/download [hereinafter "2015 BRL"].

3 Letter from Makan Delrahim, Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., to Sophia A. Muirhead, Gen. Counsel & Chief Compliance Officer, IEEE re: Business Review Letter to IEEE (Sept. 10, 2020) https://www.justice.gov/atr/page/file/1315291/download [hereinafter "2020 BRL"].

4 *Id.* at 1.

5 For ease of reference, this paper uses the acronym IEEE to also refer to the IEEE Standards Association which is the standards development arm of the IEEE.

6 See redline showing the 2015 IEEE patent policy revisions, page 1 lines 19-20, 25-26, 39 and page 3 lines 104-105 http://grouper.ieee.org/groups/pp-dialog/drafts_comments/SBBylaws_100614_redline_current.pdf [hereinafter: "2015 Revision Redline"].

7 *Id.* at 2, lines 49-64.

3. Severely limited the injunctive remedies available to standard essential patent owners in response to infringement, regardless of the behavior of the infringers.[8]

Prior to formally adopting the new patent policy, the IEEE requested a business review letter from the Antitrust Division.[9] The Division applied a quick rule of reason analysis that was hinged on a number of elements, including:

(1) a prediction that the revisions would bring about procompetitive benefits likely to outweigh anticompetitive harms;[10] and

(2) a prediction that anticompetitive effects are unlikely because, among other things, the revisions "[we]re not out of step with the direction of [2015] U.S. law interpreting RAND commitments"[11]

The 2015 BRL addressed the significant development process concerns raised with respect to the patent policy revisions, noting contentions that "parties desiring lower royalty rates commandeered IEEE-SA and that the Update was the product of a closed and biased process antithetical to the consensus-based goals of open SSOs."[12] The letter notes that "many of these concerns centered on the composition, formation, and conduct of the Ad Hoc, which was responsible for generating the Update." It nonetheless concluded its analysis with a positive outcome, indicating "no [February 2015] intention to take antitrust enforcement action against the conduct" described, based on the information provided by IEEE.[13]

The 2015 BRL's analysis was critiqued by multiple antitrust experts, who noted its analytical shortcomings[14] as well as its lack of serious consideration of the legality and propriety of the underlying policy revision process.[15]

8 2015 Revision Redline *supra* note 6, at 1, lines 37-39, 3 lines 108-109, and 4 lines 147-156.

9 Michael A. Lindsay, Dorsey & Whitney LLP Letter to The Honorable William J. Baer, Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div. (Sep. 30, 2014) (published Feb. 2, 2015) https://www.justice.gov/sites/default/files/atr/legacy/2015/02/17/311483.pdf [hereinafter: "IEEE BRL Request Letter"].

10 2015 BRL, *supra* note 2, at 16.

11 2015 BRL, *supra* note 2, at 8.

12 2015 BRL, *supra* note 2, at 7.

13 2015 BRL, *supra* note 2, at 16 ("Accordingly, the Department has no present intention to take antitrust enforcement action against the conduct you have described. … This letter expresses the Department's current enforcement intention and is predicated on the accuracy of the information you have provided").

14 Critics noted Division's failure to conduct a full rule of reason analysis or consider adequately the impact of IEEE-SA policy changes on hold-out, innovation and dynamic competition. See for example, Lisa Kimmel, *Standards, Patent Policies, and Antitrust: A Critique of IEEE-II*, Am. Bar Ass'n Antitrust Magazine, Summer 2015; Stuart M. Chemtob, *Carte Blanche for SSOs? The Antitrust Division's Business Review Letter On The IEEE's Patent Policy Update*, 2 Competition Pol'y Int'l Antitrust Chron., March 2015, https://www.wsgr.com/publications/PDFSearch/chemtob-0315.pdf; Marco Lo Bue, *Are These Cartels? Price Guidelines Adopted by Standard Setting Organisations*, 7(8) J. of Eur. Competition L. & Practice, 537–43 (2016); Nicolas Petit, *The IEEE-SA Revised Patent Policy and Its Definition of 'Reasonable' Rates: A Transatlantic Antitrust Divide?*, 27 Fordham Intell. Prop., Media & Entertainment L.J. 211 (2017); J. Gregory Sidak, *The Antitrust Division's Devaluation of Standard-Essential Patents*, 104 Geo. L.J. Online 48 (2015); Luke Froeb and Mikhael Shor, *Innovators, Implementers, and Two-Sided Hold-Up*, Am. Bar Ass'n Antitrust Source, August 2015, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug15_froeb_7_21f.authcheckdam.pdf; Roy E. Hoffinger, *The 2015 DOJ IEEE Business Review Letter: The Triumph of Industrial Policy Preferences Over Law and Evidence*, 2 Competition Pol'y Int'l Antitrust Chron., March 2015, https://www.competitionpolicyinternational.com/assets/Uploads/HoffingerMar-152.pdf; Hugh M. Hollman, *IEEE Business Review Letter: The DOJ Reveals Its Hand*, 2 Competition Pol'y Int'l Antitrust Chron., March 2015, https://www.competitionpolicyinternational.com/assets/Uploads/HollmanMar-152.pdf.

15 See, e.g. Nicolo Zingales & Olia Kanevskaia, *The IEEE-SA patent policy update under the lens of EU competition law*, 12 Eur. Competition J. no. 2–3, 2016, at 195–235; Nicolas Petit, *The IEEE-SA Revised Patent Policy and Its Definition of 'Reasonable' Rates: A Transatlantic Antitrust Divide?*, 27 Fordham Intell. Prop., Media & Entertainment L.J. 211 (2017); Sidak, *Id.*; Hoffinger *Id.*

III. THE 2020 DOJ BUSINESS REVIEW LETTER TO IEEE

DOJ's recent 2020 BRL to IEEE is premised on four elements, as follows:

(1) **Correcting a longtime misapplication of the 2015 BRL**. The 2020 BRL expresses regret that the 2015 BRL "has been cited, frequently and incorrectly, as an endorsement of the IEEE Policy, which was not [the Division's] purpose or intent."[16] The BRL and public sources reveal that such mischaracterization began soon after the 2015 BRL's issuance, and that Division officials tried to stop such mischaracterization already in 2015.[17] The 2020 BRL also explains that the mischaracterization was especially targeted at the Chinese government and audience,[18] and clarifies that "[a]ny representation by IEEE – or other[s]… - that the Department has endorsed the [2015 IEEE patent] Policy is wrong, causes confusion, and must stop;"[19]

(2) **Noting that the 2015 BRL predictions regarding legal and policy developments for licensing of essential patents have proven incorrect**. The BRL explains that the 2015 BRL's predictions that the IEEE revised policy positions for injunctive relief against infringers and reasonable rate calculation were "not out of step with the direction of [2015] U.S. law interpreting RAND commitments" have proven incorrect or inaccurate through case law and policy developments.[20]

(3) **Providing balance by noting neglect to consider risk of hold-out**. By "focus[ing] on the risk of so-called "hold up" by patent-holders without considering the possibility of "hold out" by patent implementers or the Policy's effect on patent holders' innovation incentives" the 2015 BRL "did not dedicate attention to potentially harmful implementer conduct seeking to undermine the bargaining position of patent owners in the standards development process." The 2020 BRL notes that "hold out can significantly undermine innovation incentives and deserves consideration in SDO licensing policies."[21]

(4) **Finding that the 2015 BRL's prediction of procompetitive benefits did not materialize; instead, the reviewed policy harmed innovation and the IEEE process**. The 2020 BRL explains that the 2015 BRL assumption that the reviewed patent "would create greater clarity and certainty in licensing negotiations and thereby yield procompetitive benefits… do[es] not appear to have materialized and the Policy seems instead to have dampened enthusiasm for the IEEE process." The 2020 BRL describes these negative consequences as follows:

> "Since the Policy went into effect, reports show that negative assurances—those in which a technology contributor declines to give a RAND assurance—have increased significantly, comprising 77% of the total WiFi Letters of Assurance at IEEE between January 2016 and June 2019. As a result, in 2019, the American National Standards Institute—a leading nongovernmental body that accredits US standards—declined to approve two proposed IEEE standards amending the 802.11 WiFi standard. The Policy also appears to have led to delays in disclosures of licensing intentions, reducing the overall clarity of patents potentially relevant to standards under development."[22]

For these reasons, in its 2020 BRL the Division recommends that IEEE reevaluate its policy. "Given the important issues and potential harms identified in th[e BRL] the Department… encourage[s] IEEE to consider whether changes to its Policy may now be warranted"[23]

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16 2020 BRL, *supra* note 3, at 1.

17 2020 BRL, *supra* note 3, at 2, note 5, citing to a former Head of Antitrust Division, Renata Hesse, April 2015 statement attempting to stop such mischaracterization.

18 2020 BRL at 3, note 11, referencing an IEEE article in Mandarin, and at 9 note 47, referencing a blog post with links to a May 2016 Beijing meeting between an IEEE delegation and China's National Development and Reform Commission (NDRC) government agency. According to the press release, at the meeting "IEEE introduced its newly revised standard patent policy and its relationship with antitrust" https://web.archive.org/web/20160525162349/http://jjs.ndrc.gov.cn/gzdt/201605/t20160517_801932.html. See also MLEX – Statement, NDRC Antitrust Chief Meets with IEEE Director (May 17, 2016).

19 2020 BRL, *supra* note 3, at 2-3.

20 2020 BRL, *supra* note 3, at 3-8.

21 2020 BRL, *supra* note 3, at 8-9.

22 2020 BRL, *supra* note 3, at 9, see text around notes 47-49 [footnotes omitted].

23 2020 BRL, *supra* note 3, at 9.

The analysis of the 2020 BRL letter governs to the extent there are any disparities between its legal analysis and that of the 2015 BRL.[24]

IV. ANALYSIS

A. The DOJ Business Review Process and 2020 BRL

The Antitrust Division's business reviews process provides stakeholders with a tool to predict the Division's likely response to proposed business conduct.[25] Division Business review letters convey the "enforcement intention of the Division *as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding* it subsequently comes to believe is required by the public interest.[26] In addition, even when issuing a positive BRL, the Division always "reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect."[27]

The business review procedure is not intended to offer endorsement of any given business arrangement. Indeed, in the context of another business review letter, the Division recently explained that BRLs are not to be interpreted as opinion on 'the ideal process for the development of standards,' nor as an endorsement of any given SDO policy.[28]

In light of the above, the Division was correct and well within its authority to issue the 2020 supplemental BRL. Continuous misrepresentations of a DOJ BRL as a supposed endorsement of the reviewed conduct, despite the Division's repeated pleas, dating as far back as 2015, to stop such misrepresentation or "overreading"[29] is probably unprecedented, and surely unusual. Such misapplication "could undermine the value of the Business Review process to the business and legal communities."[30] Furthermore, the fact that such misrepresentation took place around the world and apparently influenced antitrust enforcement proceedings overseas is highly concerning.[31] A December 2020 speech by Deputy Assistant Attorney General for Antitrust, Alexander Okuliar, expands on these and other public interest considerations surrounding the issuance of the 2020 BRL.[32]

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24 2020 BRL, *supra* note 3, at 2.

25 28 C.F.R. § 50.6, see Dep't of Justice, Antitrust Div., *Introduction to Antitrust Division Business Reviews*, https://www.justice.gov/sites/default/files/atr/legacy/2011/11/03/276833.pdf.

26 Antitrust Division Business Review Procedure, 28 C.F.R. § 50.6, Section 9 ('[a] business review letter states only the enforcement intention of the Division *as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding* it subsequently comes to believe is required by the public interest') (emphasis added).

27 See e.g. 2015 BRL, *supra* note 2, at 16 ("In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive"). The Division has held this position for decades, see, *e.g.*, Letter from Joel I. Klein, Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., to Garrard R. Beeney, Esq. (Dec. 16, 1998) at 15 https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/2121.pdf ("In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect").

28 Letter from Makan Delrahim, Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., to Timothy Cornell, Esq. re: GSMA Business Review Letter Request (Nov. 27, 2019) at 2 https://www.justice.gov/atr/page/file/1221321/download ("[i]t is not the Department's role to assess whether AA.35 is the ideal process for the development of standards nor should this letter be read to suggest that the Department endorses any specific process as the correct approach to standards development"); Letter from Makan Delrahim, Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., to Mark H. Hamer, Esq. (July 28, 2020) https://www.justice.gov/atr/page/file/1298626/download ("To be clear, the Department makes no assessment of whether end-device licensing will be successful in the automotive industry or whether it is the correct approach to licensing in this space").

29 Leah Nylen, 'Don't Overread' DOJ Letter to IEEE, Top Official Says (MLex, Apr. 15, 2015) ("[w]e went to great pains to have the letter reflect that it was not endorsement of the policy"; "a lot of the controversy, most of it is out of people overreading the contents of the letter […] Don't overread it"); Charles McConnell, Delrahim hints at IEEE Probe (Global Competition Review January 2018) ("some interpretations of th[e 2015 BRL] seem to be totally inconsistent with antitrust law"); Max Fillion, DOJ's [2015] IEEE letter shouldn't be viewed as broad policy statement, Delrahim says (MLEX, Mar. 16, 2020).

30 2020 BRL, *supra* note 3, at 2.

31 2020 BRL, *supra* note 3, at 2-3 ("the misinterpretation of the 2015 Letter appears to extend around the world and may have influenced foreign enforcement activity. Over the last several years, some foreign competition authorities have misapplied the 2015 Letter in support of enforcement actions against essential patent holders that have no basis under U.S law, raising the prospect that the business review process could be subject to intentional manipulation abroad").

32 Alexander Okuliar, Deputy Asst. Att'y Gen., Dep't of Justice, Antitrust Div., Promoting Predictability and Transparency in Antitrust Enforcement and Standards Essential Patents (Remarks to the Telecommunications Industry Association, Dec. 8, 2020) at 5-7, https://www.justice.gov/opa/speech/file/1344721/download.

B. Concerns over the 2015 BRL and Underlying IEEE Policy Are Bipartisan and Widespread

Concerns over the 2015 BRL and underlying IEEE policy have been bipartisan, widespread, and have been expressed for years. In January 2015, U.S. Senator Christopher A. Coons wrote to DOJ "express[ing] serious concerns" about the proposed IEEE patent policy changes and "encourag[ing] DOJ to consider the broader impact of such policies when crafting a BRL [on the policy change]."[33] Senator Coons was not the only one to raise concerns. Since 2014, the extensive and radical nature of IEEE's 2015 patent policy revision — unprecedented at other SDOs[34] — has led others, including the European Commission,[35] and the IEEE's own policy arm,[36] to express concerns about their potential negative implications for competition, standard development, and innovation.[37]

In 2019 a bipartisan follow-up letter from Senators Thom Tillis and Christopher A. Coons, respective Chair and Ranking Member of the Senate Intellectual Property Subcommittee of Judiciary.[38] The letter expressed "serious concerns with the [2015] BRL and its negative impact on standards development." Such concerns included reports of reduced clarity; misrepresentation of the 2015 BRL overseas (especially in China); and inconsistency between current U.S. law and the 2015 predictions of how the law would develop. In addition to this bipartisan senators' letter, the 2020 BRL also references a bipartisan letter from multiple former leaders of the Antitrust Division, Federal Trade Commission, U.S. Patent and Trademark Office and Court of Appeals for the Federal Circuit that have urged the Division to revisit its 2015 BRL.[39]

These long-standing bipartisan and global concerns should undercut efforts to characterize the 2020 BRL's analysis as partisan, imbalanced, or somehow tied to Assistant Attorney General Delrahim's own policy views. A solid body of evidence gathered between 2015 and 2020 shows that the procompetitive benefits predicted in the 2015 BRL have not materialized. Instead, as predicted by multiple commentators, the new policy resulted in negative consequences including the deterioration of standards development at IEEE, with increased inefficiencies in the standards development process and a reduction in clarity of FRAND assurances and standard quality.

Furthermore, the Division's position regarding balanced SDO patent policies, as expressed in the 2020 BRL, is consistent with the longtime broad U.S. government positions expressed in OMB Circular A-119, as revised in 2016. In particular, the circular states that SDO intellectual property rights policies "should . . . take into account the interests of all stakeholders, including the IPR holders and those seeking to implement the standard."[40]

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33 Letter from Sen. Chris Coons to Eric Holder, U.S. Att'y Gen., and Renata Hesse, Assistant U.S. Att'y Gen. (Jan. 14, 2015), https://www.ipwatchdog.com/materials/1-14-2015-Coons-IEEE.pdf.

34 For example, three European SDOs have explicitly stayed out of commercial negotiations of FRAND rates. See CEN-CENELEC, CEN and CENELEC position on Standard Essential Patents and Fair, Reasonable and Non-Discriminatory (FRAND) Commitments (September 2016), https://www.cencenelec.eu/News/Policy_Opinions/PolicyOpinions/EssentialPatents.pdf; Sophia Antipolis, *ETSI's Director General issues public statement on IPR policy*, ETSI (Dec. 3, 2018), https://www.etsi.org/newsroom/news/1458-etsi-s-director-general-issues-public-statement-on-ipr-policy.

35 Leah Nylen and Lewis Crofts, *EU Warns of Impact of IEEE Patent Policy Change*, MLex (Jan. 27, 2015) (describing a Jan. 5, 2015 letter by European Commission Director Gerard De Graaf warning that the "change in the IEEE policy...may risk having a significant impact" and calling for the new policy to be "carefully examined" before its adoption).

36 MLEX - Official Statement, IEEE-USA passes motion expressing concerns about changes to intellectual property policy (MLEX, Nov. 21, 2014).

37 See e.g. Adam Mossoff, *Reality Check: Weakening wireless technology patents hurts everyone*, RCR Wireless News (Jan. 28, 2015), https://www.rcrwireless.com/20150128/opinion/reality-check-weakening-wireless-technology-patents-hurts-everyone-tag10; David Long, *IEEE's controversial proposed Intellectual Property Rights ("IPR") Policy Amendments*, Essential Patent Blog (Feb. 3, 2015), https://www.essentialpatentblog.com/2015/02/ieee/; Letter from J. Gregory Sidak, Chairman, Criterion Economics, to Renata Hesse, Deputy Assistant Att'y Gen. (Jan. 28, 2015), https://www.criterioneconomics.com/docs/proposed_ieee_bylaw_amendments_affecting_frand_licensing_of_seps.pdf; Lee Terry, *Don't Stop WiFi*, The Hill (Jan. 8, 2015), https://thehill.com/blogs/congress-blog/technology/228817-dont-turn-off-wi-fi.

38 2020 BRL, *supra* note 3, at 3, note 11.

39 Letter from James F. Rill, et al., to The Honorable Makan Delrahim, RE: The Antitrust Division's 2015 Business Review Letter to IEEE-SA (Feb. 7, 2020), *Id.*

40 2020 BRL, *supra* note 3, at 11, note 55, referencing Off. of Mgmt. and Budget, Exec. Off. of the President, Revision of OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," 81 Fed. Reg. 4673 (Jan. 27, 2016) https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A119/revised_circular_a-119_as_of_1_22.pdf.

C. IEEE Never Alleged a Hold-Up Problem

As the 2020 BRL observes, the "2015 [BRL] focused on the risk of so-called "hold up" by patent-holders without considering the possibility of "hold out" by patent implementers or the Policy's effect on patent holders' innovation incentives.[41] Given that observation, it is significant to note that the IEEE letter to DOJ that requested the BRL, in and of itself, did not describe or argue a problem of hold-up even once.[42] Furthermore, a November 2014 motion by IEEE-USA, IEEE's policy arm, "convey[ed] the concerns of IEEE-USA… regarding the…patent policy changes" and requested evidence or identification of problems that needed to be corrected.[43] There is nothing to suggest that such problems or evidence were ever conveyed in response to the motion. In other words, the underlying information provided by IEEE to DOJ did not include evidence of a hold-up problem, nor allege such problem existed.

D. Evidence of Negative IEEE Patent Policy Effects Postdates the 2015 BRL

Although obvious, it is worth highlighting that the 2015 BRL was issued before the 2015 IEEE patent policy took effect. Therefore, its analysis relied on predictions about the future ramifications of the policy and future developments of U.S. law.[44] While, in hindsight, it is easy to see that these predictions did not materialize, such 2020 observations should not be taken as criticism of the 2015 BRL.

Management guru Peter Drucker is credited with the saying "trying to predict the future is like trying to drive down a country road at night with no lights while looking out the back window." While opining on this metaphor without undertaking such driving exercise would be imprudent, it is clear that a rule of reason analysis of proposed future conduct is an exercise at predicting the future, and thus no easy feat. Such prediction is even more challenging when a patent policy is extreme and unprecedented. The 2015 BRL predicted the 2015 IEEE patent policy revision would bring about procompetitive ramifications, while other commentators and policy makers predicted negative implications from same. Both predictions were feasible when made. However, having the benefit of hindsight, five and half years after the policy took effect, the 2020 BRL's recount of the policy's actual effects is in the best public interest because of these unusual circumstances whereby subsequent events demonstrate that the Division's predictions did not materialize.

E. Proceed with Caution

The Division may respond to a business review request, in one of the following three ways: (a) stating it has no present intent to challenge the conduct under review; (b) declining to issue a BRL; or (c) informing the requesting party of its intent to challenge the proposed conduct if the requester chooses to purse it.[45]

The history of the IEEE 2015 patent policy – an unprecedented policy developed through a process characterized by many as closed and imbalanced – serves as a cautionary tale. In the future, the Division would be well advised to take a more cautious approach in matters involving unprecedented circumstances that are very different from industry practice or that involve novel issues whose outcome is unpredictable. To avoid errors, the Department should decline to issue BRLs for untested conduct whose implications are unclear at the time of the request for business review, as it has done in the past.[46] Furthermore, where the Division does issue a BRL, it should use careful language that curtails misunderstanding or later attempts to misrepresent it as going beyond what a BRL is. Such helpful language has been used in other Division BRLs over the past year.[47]

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41 2020 BRL, *supra* note 3, at 8.

42 IEEE BRL Request Letter, *supra* note 9.

43 See Official Statement, *IEEE-USA passes motion expressing concerns about changes to intellectual property policy* (MLEX, Nov. 21, 2014) (containing a link to a Nov. 21 IEEE-USA motion approved by the IEEE-USA Board of Directors).

44 See *supra* notes 11 and 12.

45 *Introduction to Antitrust Division Business Reviews*, *supra* note 24.

46 See e.g. Letter from Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., William J. Baer to Garrard R. Beeney re: Intellectual Policy Exchange International Inc. Business Review Request (Mar. 26. 2013) https://www.justice.gov/sites/default/files/atr/legacy/2013/03/28/295151.pdf.

47 See *supra* note 28.

V. CONCLUSION

The 2020 BRL is a welcome step towards a well-balanced antitrust policy on SDOs and SDO patent policies. It reflects longstanding bipartisan U.S. government consensus on U.S. standardization policy and the need for balance and due process, as described in OMB Circular A-119. It also unveils broad bipartisan concerns over the 2015 BRL and underlying IEEE policy, and over systematic IEEE misrepresentation and other "overreading" of the 2015 BRL. The Division makes it clear that such misrepresentation is "wrong, causes confusion, and must stop."

Finally, the 2020 BRL demonstrates that the 2015 BRL's prediction that the IEEE 2015 patent policy would bring about procompetitive benefits did not materialize. Instead, it describes evidence that the revised IEEE patent policy harmed innovation and the IEEE process, and therefore encourages IEEE to consider whether changes to its policy may now be warranted.

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