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The U.S. Federal Trade Commission is about to launch a major study of patent assertion entities (PAEs), sometimes pejoratively called "patent trolls," that purchase patents and attempt to generate revenue by asserting infringement claims against firms practicing the patented technology.

The FTC inquiry will focus on the wireless communications industry, enabling a "case study" of patent assertion practices in the industry, according to FTC Chairwoman Edith Ramirez.

Companies in the wireless industry should thus plan for burdensome information requests seeking both data and documents, related to patent licensing and litigation. The FTC estimates that it will take each company between 90 and 400 hours to respond to the proposed requests.

The Commission is seeking comments through December 16 on the proposed study, and expects to issue demands for information to 25 PAEs and 15 manufacturers and other non-practicing entities engaged in licensing in the wireless sector. The FTC questionnaire must then be approved by the Office of Management and Budget. The questionnaires should therefore be issued in early 2014, with study results published late in the year.

This FTC study follows a workshop held last December by the FTC and Department of Justice to examine the impact of PAE activity on innovation and competition. Workshop panelists provided anecdotal evidence of potential harms and efficiencies of PAE activity. The new study is aimed at collecting more comprehensive quantitative and qualitative empirical evidence on PAE acquisition, litigation and licensing practices, using FTC authority under Section 6(b) of the FTC Act. This provision permits the FTC to issue demands for information, which have the force of a subpoena, even when the FTC is not investigating a potential law violation.

The "case study" is designed to permit the FTC to better understand how PAE conduct compares to that of other patent owners. The FTC is targeting the wireless industry because of the intensity of patent assertion claims in that sector, including by PAEs. The broader investigation into the competitive effect of PAEs, however, will span across a range of industries and is not limited to wireless.

Firms targeted by the FTC can expect burdensome information requests, demanding detailed information and documents regarding the company, its patent portfolios, patent acquisitions and transfers, licensing demands, litigation, and licenses entered, and detailed data on costs and revenues related to patent activities. While the demands are not aimed at FTC enforcement action, the agency could use information collected to allege unfair methods of competition or unfair or deceptive acts or practices, in violation of Section 5 of the FTC Act.

The FTC study is likely to influence congressional debates about legislation aimed at curbing alleged PAE litigation abuses.

The Commission's investigation comes as rhetoric regarding PAEs is heating up. In a November 14 Congressional hearing, members of the House of Representative Oversight and Investigations Subcommittee lashed out against PAEs, describing PAE practices as "extortion, plain and simple," and "an abuse of the patent process." Pending legislation seeks to protect businesses from PAEs by instituting heightened pleading requirements in patent suits and permitting prevailing parties to recover legal costs, including attorney's fees. Recent proposals include a modification to the FTC Act to establish a mandatory registry for patent demand letters.

Firms with questions regarding this FTC study or interested in commenting on the proposed FTC demand for information and documents may contact one of the attorneys listed above.

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