The Patent Trial and Appeal Board (PTAB) provides a critical mechanism for protecting practicing companies – both large and small – from the thousands of overly broad patents that get over-asserted or used as a threatening tool based on the ability to demand less in licensing fees than the cost of litigation. I am deeply concerned about the increased and seemingly politically motivated use by the PTAB of discretionary denials that leave these invalid patents in force to be asserted in litigation. Shielding invalid patents from cancellation on policy grounds is the opposite of what the PTAB was created to do.

Despite improvements in patent quality, the U.S. Patent and Trademark Office (USPTO) sometimes issues overly broad patents that should not have granted. This problem is largely inevitable due to the high volume of patent applications the USPTO examines each year but underlines the importance of the PTAB – to act as a backstop against improperly granted patents that non-practicing entities (NPEs) take advantage of during litigation campaigns. Gutting the PTAB's ability to examine the merits of invalidity challenges against such patents defeats the PTAB's purpose and the USPTO's over-arching goal of a strong intellectual property system; in fact, it undermines this goal by promulgating illusory patent rights.

Denying challenges for an administration's particular policy goals divorced from the merits means that invalid patents remain in force and must be litigated at significant cost in district court infringement suits. This failure to consider and cancel invalid patents is one of the primary causes of the significant increase in litigation by non-practicing entities in recent months. It is also beyond the statutory authority of the PTAB to craft new rules based on the policy goals of this particular administration. Data shows the USPTO now favors these denials and is increasingly using this rule to deny institution of patent challenges, and the denials primarily benefit litigation-funded NPEs that file in the Eastern or Western Districts of Texas.

Congress and the rest of the federal government should be doing everything within their power to prevent unnecessary and abusive litigation against U.S. companies and employers; they should not be inventing new ways to obstruct those threatened with suit from preventing needless litigation. These denials favor the interests of speculative litigation by shell company plaintiffs that do not make anything or productively employ anyone to the detriment of the real-world manufacturers and service providers that are the backbone of the U.S. economy. They encourage parties to file first and forum shop for rocket dockets to maximize their financial leverage to settle spurious claims. These actions harm the economy and are contrary to the promise of the America Invents Act (AIA).

Thank you very much for taking stakeholder's concerns into consideration.

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