



## **CONGRESS SHOULD NOT RENEW THE TEMPORARY COVERED BUSINESS METHOD PATENT REVIEW PROGRAM**

In 2011, Congress enacted Section 18 of the American Invents Act (“AIA”) to create a temporary program to challenge “covered business method” patents (“CBM”). CBM reviews were intended to allow the Patent Trial and Appeal Board (“PTAB”) at the U.S. Patent and Trademark Office (“USPTO”) to review a narrow set of patents that proponents of the program believed may have been improperly granted as a result of court decisions in the early 1990s and 2000s. The AIA provided for “transitional” CBM reviews, an eight-year program that expired on September 16, 2020.

Congress should reject any efforts to renew or expand the program beyond its specific time and purpose. The past eight years have provided more than enough time for petitioners to challenge covered business method patents. Any further extension would undermine patent rights and drain resources from the USPTO. In recent years, the program was rarely used. The USPTO recommended “adhering to the sunset period and discontinuing CBM proceedings on Sept. 16, 2020.”

### **Renewing the CBM Review Process, Even for a Short Period, Will Continue to Harm Innovation**

- The U.S. patent system has successfully promoted “the progress of science and useful arts” for more than 200 years in part because it has always provided the same incentives for all types of inventions. The CBM review program is an unusual and unprecedented measure singling out an entire class of technology innovation for additional scrutiny.
- The possibility that a patent could be invalidated under CBM review chills innovation in any industry that could potentially be subject to this discriminatory review. The vague definition of “covered business method patent” in the AIA and USPTO regulations has already had a chilling effect on innovation in a number of industries. For instance, the software industry has reported decreased research and development over concerns that software patents could be subject to CBM review. Other related fields could also see a decrease in innovation rates, such as those for artificial intelligence, cybersecurity protocols, and certain cancer therapies, due to the threat of CBM review.
- Moreover, because the AIA permits courts to stay proceedings during the pendency of a CBM proceeding, alleged patent infringers can delay patent owners from enforcing their patent rights in court, while the petitioner continues to infringe and gain market share.
- CBM review may also harm the United States’ relationship with its allies. The process’s discriminatory treatment and misapplication to other patents may violate the United States’ obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and encourage retaliation from trading partners to limit patent protections and pursue exceptions in their own laws protecting particular special interests.

### **Congress Correctly Allowed the CBM Review Program to Sunset as Intended**

- Congress enacted the CBM program as a temporary review process to respond to a very narrow class of financial services-related patents perceived to be improperly issued. Specifically, the process was established for a fixed period of time and made available only to persons sued for or charged with infringement of a business method patent.
- Moreover, the AIA created two other types of proceedings, which have no sunset date, to challenge patents a petitioner believes were improperly issued: *Inter Partes* Review (“IPR”) and Post-Grant Review (“PGR”). IPR and PGR challenges can be brought by any entity to any class of patents, including a business method patent.
- The PTAB’s statistics on the CBM program demonstrate that it should sunset. The number of CBM petitions filed has declined sharply in recent years—from 177 petitions filed in FY2014 to just 22 in FY2019, and only 11 this year.
- Although only a month of data is available, the expiration of the program does not appear to have led to the “explosion” of patent litigation that some feared. New patent filings in district court increased by only 30 cases from September to October 2020—a smaller increase than the same period in 2019.