

**ASSESSING THE EFFECTIVENESS OF THE TRANSI-
TIONAL PROGRAM FOR COVERED BUSINESS
METHOD PATENTS**

HEARING
BEFORE THE
SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIFTEENTH CONGRESS
SECOND SESSION

—————
MARCH 20, 2018
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Serial No. 115-54

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Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

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U.S. GOVERNMENT PUBLISHING OFFICE

32-789

WASHINGTON : 2018

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CONTENTS

MARCH 20, 2018

OPENING STATEMENTS

	Page
The Honorable Bob Goodlatte, Virginia, Chairman, Committee on the Judiciary	4
The Honorable Darrell Issa, California, Chairman, Subcommittee on Courts, Intellectual Property, and the Internet, Committee on the Judiciary	1
The Honorable Jerrold Nadler, New York, Ranking Member, Committee on the Judiciary	4
The Honorable Henry C. "Hank" Johnson Jr., Georgia, Ranking Member, Subcommittee Courts, Intellectual Property, and the Internet, Committee on the Judiciary	2

WITNESSES

John Neumann, Director, Natural Resources and Environment, U.S. Government Accountability Office	
Oral Statement	6
David Hale, Chief Privacy Officer and Deputy General Counsel, TD Ameritrade	
Oral Statement	7
Aaron Cooper, Vice President, Global Policy, BSA, the Software Alliance	
Oral Statement	9

ASSESSING THE EFFECTIVENESS OF THE TRANSITIONAL PROGRAM FOR COVERED BUSINESS METHOD PATENTS

TUESDAY, MARCH 20, 2018

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE
INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 2:00 p.m., in Room 2141, Rayburn House Office Building, Hon. Darrell Issa [chairman of the subcommittee] presiding.

Present: Representatives Issa, Goodlatte, Collins, Smith, Chabot, Jordan, Marino, DeSantis, Biggs, Johnson of Georgia, Nadler, Bass, Lieu, Schneider, and Jayapal.

Staff Present: John Lee, Counsel; Carlee Tousman, Clerk; and Jason Everett, Minority Counsel.

Mr. ISSA. Good afternoon, thank you for your patience in the delay; the Committee will now come to order. The Subcommittee on Courts, Intellectual Property, and the Internet will come to order. Without objection, the chair is authorized to declare a recess of the Subcommittee at any time, which will not be necessary because we will get this done before the next vote.

We would like to welcome today all of our guests for this important hearing, Assessing the Effectiveness of the Transitional Program for Covered Business Method Patents. Now, I will recognize myself for a short opening statement.

Low quality patents are bad for the economy, and the Covered Business Methods Patent, or CBMs, are in fact the result directly of the transition from a series of patents that got out that the court today clearly has said the PTO should not grant.

In this transition, it is essential to find an effective and affordable way to overturn bad patents. However, this is, as my introduction said, a program intended to be transitional.

We are here today to consider legislation that could revise, extend, or do nothing to this important piece of legislation, which I believe all of our witnesses will agree. And if we had Apple here, one of the major opposers of it originally, they would agree has done a lot of good to get rid of bad patents.

In the past, patent trolls have abused weak or bad business methods patents for years. They were so broad and vague as to

allow you to sue anyone anywhere on almost anything. Retail stores, hotels, and even public transit systems have been sued by nonpracticing entities with low quality patents alleging covered basic business practices.

And, of course, any time there is a new industry or a new patent, the record is not sufficient for the patent office to actually find the prior art. Only through expensive litigation can the prior art be found.

This system has—the CBMs—for a number of years done a good job of lowering that cost. Today, among others, we will introduce our representatives from the GAO, who have completed an exhaustive study of the program, and the report has just been released.

This, therefore, is a good time to contrast their report, their independent nonbias, nonpartisan, not perfect always, but every attempt to do a good job. And over a long period of time against others who think the bellwether of CBMs may, in fact, be different.

It is now my great pleasure to recognize the Ranking Member of the Subcommittee for his opening statements, the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON of Georgia. Thank you, Mr. Chairman. Today, Mr. Chairman, we will examine the recent report issued by the Government of Accountability Office, the GAO, which examined the Transitional Program for Covered Business Method patents, or the CBM Program.

In July 2014, the Judiciary Committee requested a report from the GAO to study the CBM Program. The GAO has completed their report. And the purpose of this hearing today is to examine the findings of that report and assess the state of the CBM Program. This hearing will give us an opportunity to examine the extent to which the CBM Program has been used to challenge patents, and to examine how the United States Patent and Trademark Office, the USPTO, has engaged with stakeholders to improve proceedings for the program.

I am interested to hear from the witnesses as to whether the CBM Program should be extended, and/or whether there are any modifications or improvements needed for the CBM Program. The Transitional Program for Covered Business Method Patents was created in 2011 when Congress passed the Leahy-Smith America Invents Act; the AIA.

As the GAO report notes, a Covered Business Method Patent is a patent that claims a method or corresponding apparatus for performing data processing, or other operations used in the practice, administration, or management of a financial product or service.

The CBM Program was a temporary proceeding that can be used to challenge a patent at any point in the life of the patent. The program was designed to address the problem of low quality business method patents. These patents were often used by patent asserting entities with the threat of infringement lawsuits to get settlements and to pressure targets to pay for licenses. The CBM Program sunsets in 2020.

The GAO report found several things. First, it found that the USPTO has issued an increasing number of business method patents in the last 20 years. And it also found that from September

2012 to September 2017, petitioners filed 524 Covered Business Method petitions challenging the validity of 359 patents.

Although the rate of CBM filings has fluctuated, the use of the program has declined since 2015. The report also notes that there has been a decline in CBM petitions. According to the GAO report, there are many different reasons that stakeholders argue that there has been a decline in CBM petitions.

I would like to hear from the witnesses about whether petitioners have successfully targeted the lowest quality business method patents. I would also like the witnesses to discuss whether patent owners may be waiting until the CBM Program sunsets to assert their patents. The GAO report found that the stakeholders generally agreed that the CBM Program has reduced patent litigation involving business method patents.

The report also notes that owners of business method patents have adjusted their litigation strategy due to the CBM Program, focusing on higher quality patents that are more likely to withstand CBM review. The GAO has found that more documentation for policies and procedures is needed, although the PTAB has multiple policies and procedures in place to ensure consistency in AIA reviewed decisions.

One of the key issues that will be discussed today is whether the CBM Program should be extended. Supporters of the CBM Program say that it should extend beyond the current sunset date of 2020.

They argue that there is a strong need for the program to still exist, and note that fewer than 400 business method patents have ever been subject to a CBM petition. In their view, many low quality patents still exist, and there is a need for the program to remain in place. They also argue that the USPTO continues to have difficulty examining poor quality business method patents.

On the other hand, we will hear today from a witness who is opposed to the CBM Program being extended. There are several arguments for why this program should be able to sunset. Opponents of extending the sunset argue that CBMs harm innovation and weaken the value of software patents. They also argue that the CBM Program is susceptible to abuse by alleged infringers who unfairly use them to delay infringement litigation.

One of the key arguments that we will hear today by the opponents of extending CBM is that 2020 is a good time for CBM to end. This argument is supported by those who believe that the worst quality business method patents that were issued have been cleared away. They also dispute the view that many poor quality patents remain.

While the purpose of this hearing is to examine the findings of the GAO report, there appear to be many good arguments by those who want the CBM Program extended and by those who want the CBM Program to sunset. I look forward to hearing from the witnesses. And I thank the chairman for holding this hearing. And I yield back the balance of my time.

Mr. ISSA. I thank the Ranking Member. We now go to the Chairman of the full Committee, the gentleman from Virginia, Mr. Goodlatte, for his opening statement.

Chairman GOODLATTE. Thank you, Mr. Chairman. A strong and healthy patent system is important to the economy, and to American technological leadership. A strong patent system requires high-quality patents that are clear, precise, and claim actual innovations. Congress passed the America Invents Act in 2011 because the health of our patent system was in jeopardy.

The system was clogged with numerous low quality patents that had slipped past the Patent and Trademark Office. These patents were vague, overly broad, and often claimed to cover things that had been well-known and widely used for many years. Such patents harm innovation by blocking off broad areas of endeavor, and not giving inventors enough room to innovate.

Further, bad actors discovered they could use these bad patents to hold businesses hostage. Vague patents could be reinterpreted and repurposed to broadly cover products and processes used or sold by many companies. Litigating in court to invalidate even a bad patent could cost millions of dollars and take years.

The consequences of losing often meant the company's existence could be threatened. Small businesses without the resources or expertise to defend themselves from bad patents were particularly at risk. For such businesses, a lawsuit was not even necessary. The mere threat of a lawsuit was often enough to extort a settlement from them.

For many patent trolls, their weapon of choice was a business method patent. Ill-advised court decisions in the late-1990s and 2000s opened the floodgates to overly broad business method patents, in particular those relating to the use of financial services. These patents posed unique challenges to the U.S. Patent System, so the America Invents Act included a specialized procedure to address them, the Covered Business Method Program.

Many stakeholders, including the financial industry and the software industry, worked with Congress as we formulated the program. In 2014, 2 years after CBM patent reviews began, I requested the Government Accountability Office to study the CBM Program so that the committee's oversight could be informed by its unbiased research.

With the sunset date of the program approaching, the GAO's report is timely because the committee is faced with a decision of whether to renew the program. With over 500 cases and over 300 patents having gone through the CBM Program, we now have enough information to assess how effective the program has been, and whether it is accomplishing the goals Congress had in mind for the program.

This information will be important as we examine if the program is still needed. I thank Chairman Issa for overseeing this hearing. And I thank the witnesses for their participation. I look forward to exploring these important issues.

Mr. ISSA. I thank the gentleman. It is now my pleasure to introduce the Ranking Member of the full Committee, my former partner on the Committee, the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, the United States leads the world in innovation because our strong patent system helps translate creativity into economic growth by enabling creators to protect and to exploit their inventions. But main-

taining a strong patent system also requires that only truly novel and useful inventions receive this protection.

Over the last two decades, business method patents have posed a unique challenge to this vibrant patent system for a variety of reasons, including the difficulty in identifying prior art where business methods are concerned; the lack of clear guidelines for what was eligible to be patented; and then overburdened Patent and Trademark office. The significant number of poor quality business method patents began flooding the system starting in the late 1990s when the courts first ruled that business methods could be patented.

Many of these business method patents were over broad or unclear, and they became prime targets for so-called patent trolls. With these low quality patents in hand, the patent trolls could extort financial settlements from defendants who might reasonably conclude that it made financial sense to settle even a bogus claim rather than to engage in costly litigation.

Although later court decisions and new Patent Office procedures limited the impact of future business method patents would have on the patent system, these improvements could not address the existing patents that were still wreaking havoc, particularly within the financial services sector. It was against this backdrop that Congress created the transitional program for Covered Business Method patents as part of the 2011 America Invents Act, which ushered in a host of reforms to strengthen the patent system and to promote innovation.

At the time that the CBM Program was created, proponents argued that the financial services sector was being especially harmed by low-quality business method patents, and that the other post grant review procedures established by the AIA were insufficient to address this category of patents. Therefore, a special temporary program expiring in 2020 was created specifically to weed out those financial services-related patents that in hindsight should never have been granted in the first place.

By most accounts, the CBM Program has successfully carried out its mandate of offering a cheaper and more efficient process than district court litigation to challenge this subset of business method patents, and to filter out the poor quality patents. This success has spurred some proponents to advocate for a long-term, or even a permanent, extension of the CBM Program. Some have even argued that CBM should be expanded to include other types of patents.

Opponents of extending the program point out that the number of CBM challenges has declined significantly in recent years. And they argue that this is evidence that most of the weak patents have now been eliminated from the system. They also note the value of uniformity within the patent system, which can be upset by carve outs for certain industries and specific types of patents.

While I have supported the limited extension of the CBM Program in the past to ensure that the program can fully complete its job, I am skeptical of any effort to expand it beyond its limited scope, which has significantly lengthened the life of the program. The CBM Program was enacted in part on the premise that it

would be temporary. And I have not seen evidence to date that a dramatic expansion is warranted.

The GAO has written a thorough and detailed report evaluating the CBM Program. And I appreciate the opportunity to hear from Mr. Neumann today about his findings, and to hear the perspectives of our two stakeholder witnesses as well. I thank the chairman for holding this important hearing. And I yield back the balance of my time.

Mr. ISSA. I thank the gentleman. All Members will have 5 days in which to put their opening statements and extraneous material into the record, without objection.

Today, we welcome our distinguished panel of witnesses. If you would all, pursuant to the Committee's rules, rise to take the oath. Please raise your right hand. Do you swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth? Thank you very much. Please be seated. Let the record reflect that all members answered in the affirmative.

Today, our witnesses include Mr. John Neumann, Director of Natural Resources and Environment, U.S. Government Accountability Office, and a key proponent of the report that just came out; Mr. David Hale, Chief Privacy Officer and Deputy General Counsel, TD America; and Mr. Aaron Cooper, Vice President of Global Policy at BSA, the Business Software Alliance.

Pursuant to the rules, each of you will have 5 minutes for your opening statements. You are all experienced. Green means keep going, yellow means you should have probably stopped, and red means that I am going to find the gavel. So with that, Mr. Neumann, please begin.

STATEMENTS OF JOHN NEUMANN, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE; DAVID HALE, CHIEF PRIVACY OFFICER AND DEPUTY GENERAL COUNSEL, TD AMERITRADE; AND AARON COOPER, VICE PRESIDENT, GLOBAL POLICY, BSA, THE SOFTWARE ALLIANCE

STATEMENT OF JOHN NEUMANN

Mr. NEUMANN. Chairman Issa, Ranking Member Johnson, Chairman Goodlatte, and Ranking Member Nadler, and members of the subcommittee thank you for the opportunity to be here today to discuss our recent report on the Covered Business Method Patent Review Program.

As you know, this program was created to provide a less costly and a more efficient alternative to challenge a business method patent's validity at the Patent and Trademark Office rather than having to go through the Federal Courts. This program was established in September 2012, and is slated to sunset in September 2020.

My statement today summarizes the findings from our recent report on this program, which examined three areas: first, the extent to which the Covered Business Method Program has been used to challenge patents. Secondly, the extent to which the Patent and Trademark Office ensures timeliness of trial decisions, reviews decisions for consistency, and engages with stakeholders to improve

proceedings for the program. And lastly, stakeholder reviews on the effects of the Covered Business Method Program and whether it should be extended past its 2020 sunset date.

First, in our review of the extent to which the Covered Business Method Program has been used, our analysis of the data show that since it began in 2012 through September 2017, 524 petitions have been filed with the Patent Trial and Appeal Board to challenge the validity of 359 patents. This has resulted in decisions that invalidated about one-third of these patents.

While the petitions filed has fluctuated over the last 5 years, they generally have declined from an overall average of nine petitions per month to about five per month in the most recent year 2017. Secondly, we found that the Patent Trial and Appeal Board has completed all of its proceedings within statutorily directed timeframes of up to 18 months for the entire process. We also found that the appeal board has several review processes in place to ensure the consistency of its decisions.

But it did not have documented procedures to conduct such reviews. So, based on that we recommended that the Patent Office develop guidance for its appeal board judges to ensure consistency of the decision review process. The Patent Office agreed and has begun to take steps to implement our recommendation.

In addition, we found that the Patent Office takes steps to engage with stakeholders through a variety of means to get feedback. And has made several changes to its policies and procedures to address stakeholder concerns on various aspects of its trial proceedings.

Lastly, we met with a range of stakeholder groups. Those with direct knowledge and experience with the Covered Business Method Program to obtain their views on the effects of the program, and whether it should be extended past its scheduled 2020 sunset date.

Stakeholders generally agreed that the program has had its intended effect of reducing litigation involving business method patents. Stakeholders also describe some additional effects of the program, including a deterrent effect on patent holders asserting lower quality patents that may be vulnerable to challenges under the program.

According to stakeholders, the Covered Business Method Program has also had a positive effect on patent quality, as applicants are more aware of what steps to take during the patent application process to ensure that a patent will survive a postgrant challenge. Although there are very many differing views on the need to continue the program beyond 2020, stakeholders, for the most part, said there is value in maintaining aspects of the program, or the program in its current form. There were also some opposing views to that as well. And I will be happy to discuss that in further detail.

This concludes my prepared statement. I would be happy to respond to any questions you may have.

Mr. ISSA. Thank you. Mr. Hale.

STATEMENT OF DAVID HALE

Mr. HALE. Chairman Issa, Vice Chairman Collins, Ranking Member Johnson, and members of the committee, thank you for holding

this hearing, and for the invitation to testify on this important topic. I will focus today on the success of the CBM Review Program, and the clear need to make the program permanent.

Due to the necessity of interoperability in the financial services platforms, if a nonpracticing entity, or NPE, asserts a low quality business method patent against one financial institution, it is likely it will assert it against everyone operating in that same space. Given the high and asymmetric cost of patent litigation, companies are heavily incentivized to settle and license rather than litigate, regardless of the merits of the patent in question.

The CBM Program was a landmark effort by Congress to create a relatively cheap alternative to civil litigation for challenging low-quality patents, and to reduce the burden on the courts of dealing with the backwash of invalid business method patents. And it has worked. CBM is a narrowly tailored, carefully constructed program that preserves incentives for innovation while providing an efficient, cost-effective alternative to litigation for the review of questionable business method patents. It has operated precisely as Congress intended.

I can personally attest to this since the implementation of the CBM process, TD Ameritrade has actively used it to combat several of the low-quality patents brought against it. The CBM Program has played a critical role in mitigating the harmful effects that the assertion of low-quality business method patents has on innovation.

This is true not only for established financial institutions such as TD Ameritrade, but for fintech start-ups, small businesses, and local banks. Through July 2017, 358 patents asserted in 1,662 patent infringement lawsuits were the subject of CBM review. On average, each CBM review impacts almost 18 defendants compared to barely seven per IPR. The CBM review has had a significant ripple effect in terms of collateral beneficiaries to the program.

This ripple effect extends far beyond the number of patents asserted or suits filed. Perhaps the most important evidence of CBM's effectiveness is the decline in the number of CBM challenges brought at the PTAB. This decline is a sign that many of the low-quality patents are just not being asserted by NPEs, because an efficient effective review of the validity of those patents is now available.

But we should not confuse temporary deterrents with the elimination of the underlying threat. There are more than 85,000 business method patents issued with thousands more added each year. And while the PTO has made progress, quality business method patents continues to be a problem, which is why the CBM Program should be made permanent. The threat of these patents does not disappear in 2020. Even patents that expire between now and then have the ability to be asserted postexpiration, as patent law allows a look back of up to 6 years.

At present, there is no viable alternative to CBM, particularly for sectors such as financial services against which low-quality business method patents tend to be asserted most frequently. Procedural deficiencies make the three alternatives to CBM poor substitutes. Litigation is expensive, uncertain, and protracted.

In some districts, obtaining a ruling and a validity of a patent before conclusion of the discovery phase is virtually impossible. Postgrant review does not apply to patents issued before March 2013 and requires companies to monitor and ultimately contest every patent that could possibly be asserted against them.

And finally, inter partes review most closely resembles CBM but varies in key ways that makes the current IPR process a poor substitute. Review for patentable subject matter cannot be challenged under an IPR. IPRs also permit fewer types of evidence and restrict review of indefinite claims. CBMs also include safeguards to prevent abuse. They can only be brought in response to litigation or threat of litigation. They have a more likely than not standard for institution. And the estoppel provisions provide a significant detriment to bringing CBMs inappropriately.

The GAO report speculates that abuses to the CBM processes are possible, but notes that abuses appear to be rare. Any process can be abused. And potential abuses identified by the GAO pale in comparison with the historically extensive abuses of district court procedures by holders of low quality patents. The CBM Program has been a success. Letting the CBM Program expire would harm innovation that keeps our industry start-ups, small businesses, and our customers competitive in a rapidly changing economy.

In short, as Congress continues efforts to address the challenge of nonpracticing entities asserting low-quality patents, CBM should remain in place for its core elements, or its core elements should be incorporated in the IPR Program. Thank you, again, for this opportunity. I welcome your questions.

Mr. ISSA. Thank you. Mr. Cooper.

STATEMENT OF AARON COOPER

Mr. COOPER. Thank you. And good afternoon, Chairman Issa, Chairman Goodlatte, Ranking Member Johnson, and members of the subcommittee. My name is Aaron Cooper. I am Vice President for Global Policy at BSA, the software alliance. Thank you for the opportunity to testify today.

BSA is a leading advocate for the global software industry in the United States and around the world. A well-functioning patent system is important to promoting innovation and, therefore, patent policy is important to BSA and our members. BSA members produce much of the software that power cloud computing, block chain, artificial intelligence, and cyber security tools.

Our member companies are among the Nation's leading innovators and patent holders. Due to the complexity of their products and services, they are also frequently the target of patent infringement claims. As a result, BSA has a unique and balanced perspective on patent policy. For instance, BSA strongly supports efficient non-discriminatory mechanisms at the USPTO to challenge wrongfully issued patents, such as the Inter Partes Review Program.

BSA also supports litigation reforms to reduce frivolous patent litigation. But in our view, programs that discriminate based on the area of technology, such as the Transitional CBM Program, are detrimental to the patent system in general, and the software industry in particular.

In our view, the CBM Program should be allowed to end as Congress intended, and as the USPTO has recommended, in 2020. We appreciate that the GAO report makes one recommendation, and it is not about extending the program.

As Chairman Issa and Chairman Goodlatte said, “Patents on true inventions provide an important incentive for research and development.” On the other hand, overly broad or obvious patents chill innovation and increase prices for consumers. It is, therefore, important that review mechanisms are in place that cost effectively and efficiently weed out mistakes. The 2011 America Invents Act created postgrant review and inter partes review to do just this for patents on a nondiscriminatory basis.

By contrast, the transitional CBM Program, which the AIA also created, applies only to technology areas within the covered definition. The CBM Program was enacted as a transitional program to address a discreet issue in the financial services area. After the Federal Circuit’s 1998 State Street Opinion, the USPTO began issuing patents on methods of doing business in the financial sector.

In 2010, the Supreme Court’s *Bilski* decision effectively reversed the practice, but in the intervening years many business method patents were issued. Since a specific problem was created during a finite period of time—between the State Street and *Bilski* decisions—Congress made the program transitional determining that the 8-year window would be sufficient.

The GAO Report shows that Congress was correct. It includes helpful statistics drawn from the PTO’s data that shows a sharp decline in the number of CBM challenges falling from 177 in 2014, to just 48 last year.

The USPTO has similarly recommended “adhering to the sunset period and discontinuing CBM proceedings on September 16, 2020.” We at BSA agree. The CBM Program imposes unintended costs on the software industry. While the program was not intended to apply to core software innovations, in some instances around cyber security and general database architecture it has been.

A program that makes it easier to challenge patents claiming software related inventions than others decreases the value and respect for software-related patents. And this impact is true regardless of the validity of the patent. It is effectively a government program that picks technology winners and losers. And while this program specifically impacts the software industry, we would have the same concern with a patent program that discriminated against manufacturing, agriculture, or any other industry sector.

In assessing the GAO report, it is important to distinguish between what the PTO data objectively show and statements reflecting the views expressed by the small sample of stakeholders GAO interviewed for the report. While there may be stakeholders that would like the program extended or expanded, there is far broader opposition.

In summary, BSA remains committed to maintaining tools that deter abusive litigation, and improve patent quality. BSA supported the Innovation Act, which was approved by this committee

in the 114th Congress. And has filed numerous Amicus briefs supporting similar reforms in court.

In addition, we urge Congress and the USPTO to resist efforts that would reduce the effectiveness of Inter Partes Review as a patent quality mechanism. But Congress was right to include an end date for the technology specific CBM Program, and the USPTO was right to recommend adhering to it.

BSA is grateful to the committee for its commitment to ensuring our patent system as the gold standard around the world. Thank you, again, for the opportunity to testify. And I look forward to answering your questions.

Mr. ISSA. Thank you. I will now recognize myself for a short round of questioning. And Mr. Cooper, he who is last sometimes is first, so get that drink of water. You know you mentioned the earlier decision in 2010, but the Alice decision in 2014 was, to a great extent, needed because PTO did not get it in 2009, 2010, 2011, correct?

Mr. COOPER. Well, but the patent at issue in Alice was issued, I believe, before the Bilski decision. So, I think we have an issue where there is a period of time where patents were—

Mr. ISSA. Right. Okay, but effectively 2014 was when the PTO began changing its procedures. So, bad patents probably, by today's definitions, came out in 2011, 2012, 2013, correct?

Mr. COOPER. I think it is fair to say that there were patents that should not have been issued that come out in all our areas frequently. And that is one of the reasons why it is so important to have the Inter Partes Review Program and the PGR Program as patent quality improvements.

Mr. ISSA. Mr. Hale, to that point if there were bad patents issues in 2011, 2012, 2013, 2014, and as Mr. Cooper, who would like to see the program go away by his own statement, said, They are still issuing bad patents, right? There are still vague patents that come out that CBM, among those nearly 600, include some that were issued after 2014 that were just as vague and as a result were struck down, correct?

Mr. HALE. Certainly. The, great question, the process has been changed over time at the Patent and Trademark Office, but there is still the possibility of bad patents coming out. Likewise, patents that were issued in 2010 and 2012 or, for that matter, 2002 would still be eligible to be brought past 2020. If I were in possession of a patent that issued in 2005 and considering bringing it today: I would wait.

Mr. ISSA. So, there is still 3 or 4 years of extension just to cover patents from that period where we know that these two decisions found that they were weak. Or patents granted based on things that would not be granted today.

Mr. Neumann, your report obviously sees an effective tool, but a tool that you are not supporting specifically extending, correct?

Mr. NEUMANN. Right. So, we spoke to a wide range of stakeholders, including practitioners, people who are opposed to CBM and have done poorly under it, and those who have done well under it, as well as legal scholars, and a range of companies. So, we feel like we got a good cross-section of views on it.

Mr. ISSA. And so, I mean a yes, I reached the right conclusion that you generally—

Mr. NEUMANN. Right, we did not come out with a position one way or the other. But definitely the stakeholders had some strong views about the benefits of CBM, but a lot of mixed views on how it should be handled in the future.

Mr. ISSA. Well, within your study, you were limited to CBM, which is limited to financial-type transactions. So, you were not able to ask the question of what if CBM was applied to other areas where there are, if you will, Lucy Goosey patents granted.

Mr. NEUMANN. Well, we did hear from stakeholders on that point.

Mr. ISSA. And what did they say?

Mr. NEUMANN. A range of them were suggesting that perhaps that the CBM Program could be extended, for example, by just removing the financial services part of that definition to allow other types of patents related to business methods, or expanded to other areas, or keep some aspects of CBM Program. For example, the various forms of challenges and add that to other proceedings like the inter partes review.

Mr. ISSA. Well, and that brings up the final question for each of you. The Inter Partes Review System is currently a single sort of a system. You go in, you make your pleading basically, and then you go through a process that is dramatically cheaper, but not free, in which if both of you have attorneys, and both of you defend your positions, you will spend some money and some time.

The question is: is there any valid reason that as we are looking at—and I happen to have a judge who is on loan to us from the system working with us. Is there any reason that if we are going to make this program go beyond 2020—I even-outed, John, sorry—that we should not try to consolidate into as few organizations as we can these procedures, including CBM. And I would go to you first, Mr. Neumann.

In other words, purely an efficiency question of if we go to, let's say, 2035 this is no longer a temporary or a transitional program. So, standing on its own does it make sense to have this here, yeah, the ex partes oppositions. In other words, the noninter partes oppositions that go on, the inter parte. And then, obviously, the other courts that we are in. Is there any reason we should not try to at least cut one court down if we are going to keep this for a long time?

Mr. NEUMANN. There was certainly support amongst many of the stakeholders we spoke to do that.

Mr. ISSA. Mr. Hale, I am going to be brief. Any reason that we should not try to at least consider, if we are extending for a long period of time, consolidating the bureaucracy involved in this?

Mr. HALE. We are supportive of the idea of consolidation. I mean, bringing over some of the key aspects of CBM into the IPR process would be an excellent idea.

Mr. ISSA. Mr. Cooper, you are the lone dissenter here because we have a neutral, a for, and then yourself. Briefly, if there were one thing that you could get out of a change at time of extension, if there is one, what would that be?

In other words, you have already you would like to kill it, put a stake in it and it go away, and thank you for having existed. But, if you could just have one item what is the most important item that BSA would say is there that you would like to not see there going forward?

Mr. COOPER. Well, I think what we like about the review processes that exist at the PTO generally is that we experienced the problem of patent trolls. We have a need to be able to oppose patents that should not have been issued. But where we have concerns with the CBM Program in particular is that it identifies a specific area of technology, in this case, software-related.

Mr. ISSA. Okay. So, I will take that, as I give this to Mr. Johnson, that your preference would be we take out that limitation of financial services, and simply make it in some way equal to all types of patents.

Mr. COOPER. Well, no Mr. Chairman, because that would still have it be discriminatory if you just took out the financial services aspect of it. If you applied it across the board—

Mr. ISSA. That is what I said.

Mr. COOPER. I am sorry. Then, yeah, applying it across the board. Yeah.

Mr. ISSA. Take out the limitation it apply to everyone. Mr. Johnson.

Mr. JOHNSON of Georgia. Thank you. To apply the Covered Business Method Program across the board, I guess, Mr. Neumann, you would say that that would create cost deficiencies? It would be cheaper for the stakeholders?

Mr. NEUMANN. Well, yeah. And then some of the stakeholders also noted that the expertise of the patent judges there versus going through the courts where the judges and juries do not have the expertise. That was another benefit of having a procedure that can be used as an alternative to the courts.

Mr. JOHNSON of Georgia. Well, now it is a fact that going through the CBM Program does not bar one from going to court.

Mr. NEUMANN. That is correct. It does not.

Mr. JOHNSON of Georgia. So, it is an additional step that can be costly, or that adds cost to the ultimate end which can come about to change litigation.

Mr. NEUMANN. Right. Or, in many cases it resulted in settlement or the claim being dropped, and then there was no further litigation.

Mr. JOHNSON of Georgia. So, now the one-third of the cases filed that has resulted in the patent being invalidated, are there settlements that have taken place that are not included within that one-third? Or, does that one-third include settlements?

Mr. NEUMANN. No, that would not include settlements. Settlements may have taken place in other cases where the patent was not invalidated. Before it went to that point, a settlement was made.

Mr. JOHNSON of Georgia. And the settlement would then preclude litigation I would presume—

Mr. NEUMANN. Presumably.

Mr. JOHNSON of Georgia [continuing]. In most cases in typical cases. So, what percentage of the cases were settled along with

those where the patents were invalidated? What would be the percentage?

Mr. NEUMANN. I do not know that we collected that information, because we looked at the results of the proceedings. I can respond with a response for the record, rather, to see if we did have that information. But that was not included in our report, that information.

Mr. JOHNSON of Georgia. I think that would probably be useful information. Mr. Cooper, you indicated that the stakeholders that Mr. Neumann and the GAO talked to were insufficient in terms of making the determination that there is value in continuing the CBM Program. You take issue with that conclusion, correct?

Mr. COOPER. I think, as you well know, in Congress as you hear from stakeholders, as many stakeholders as possible as you are formulating legislation, that there is an array of views on any one issue. I think the GAO spoke to a number of parties that had an interest in the CBM Program. But I think that if you look broadly across the patent system, both for patent holders and users, you would find that the vast majority oppose having the CBM Program, and would like to see it expire.

Mr. JOHNSON of Georgia. So, I guess your stakeholder group would include nonfinancial services stakeholders. And, Mr. Neumann, I suppose yours included only financial services stakeholders, is that correct?

Mr. NEUMANN. No, that is not correct. We looked at a broad cross section of different stakeholder views, including software companies and other practitioners who have experience in other areas, not just financial services.

Mr. JOHNSON of Georgia. So, is it your opinion, Mr. Neumann, that the CBM Program should remain and be made permanent?

Mr. NEUMANN. We did not reach a conclusion on that. There are many competing interests there and it is a decision best left to the policymakers. What we did do is talk to a range of stakeholders to identify what their concerns would be, either for or against continuing the program. And many saw the value in continuing the program, and some even suggested that there could be changes made to further expand it. But that was not an overwhelming viewpoint.

Mr. JOHNSON of Georgia. Mr. Hale, how has Ameritrade used the CBM process to combat low-quality patents brought against it?

Mr. HALE. Thank you for the question. We have generally used it exactly as intended. When patents have been asserted against us that fall into the category that it falls under the CBM process, we have filed for petitions to initiate reviews. And then, it turned around in the district court litigation that initiated the issue with the patent and filed stays to stop that litigation so that we are not duplicating efforts. And that we are not, as intended under the CBM process, we are not incurring additional costs for both sides. So at any given point there is only one line of litigation, not two.

Mr. JOHNSON of Georgia. Thank you. I yield back.

Mr. ISSA. I thank the gentleman. I believe we now go to the vice chairman of the full committee, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman; I appreciate that. And before I get started, there is a letter that was sent back in 2013.

But I think it reflects the position of BSA and many others on this issue that I would like to submit for the record.

Mr. ISSA. Without objection, so ordered.

Mr. COLLINS. Thank you, Mr. Chairman. Again, Mr. Chairman, thanks for holding this hearing today. And thanks for the witnesses for being here. I think this is something that I am eager to talk about. I think patents, and the U.S. Patent System more broadly and to move forward to ensure that the United States remains a beacon for innovation, and intellectual property rights.

In talking about the Covered Business Method Transition Program, a topic that was a source of considerable debate before this very committee just a few years ago. Just under 3 years ago during this committee markup of the Innovation Act, I opposed an amendment that would have extended the Covered Business Method Transition Program.

I opposed the amendment for various reasons, but the chief among them was that it would have extended the recently created CBM Transition Program 5 years before it was set to expire. At that time, we did not know what the world of patent litigation would look like in 5 years, and we did not know much about the program itself.

Now, we have the benefit of 3 years of information with 2 years to go before the CBM Program is set to sunset. To be clear, I am concerned now as I was then about the potential implications for our economy and U.S. innovation of a program that by its nature discriminates among types of inventions. Additionally, I remain concerned about expanding or extending a program that was specifically implemented to address the well-defined problem, and not intended in perpetuity.

I also want to note that the fact that the recently issued GAO report states that the use of CBM Program has declined since about 2015. I appreciate the input from the GAO and relevant stakeholders about the Covered Business Method Program. And I think that, as Congress, we have a responsibility to review the effectiveness and efficiency and efficacy of these programs.

I am particularly interested today in the hearing on how CBM Program has been operating, its impact on the economy and innovation, and arguments about whether the extension of the Transition Program will be necessary to achieve the Congressional intent behind its creation. Many of these issues affecting patent litigation have also changed in the 3 years since this committee debated the Innovation Act. And this committee will need to consider many of those things again and look at the issues with fresh eyes.

I expect that, ultimately, we will be best equipped to debate the future of the CBM Program in the context of a broader debate on the future of our Patent System, because as we have seen every change to our Patent System has ripple effects that impact the future of innovation and our economy.

For all of you here, especially the GAO reporting for the testimonies given, I am not going to go back over a lot of what you said. I think it is very, and Mr. Hale and Mr. Cooper especially in your positions. But I do want to say this this committee has very broad jurisdiction in this area. This is the next step in, I think, the broad based economy for the next 40 to 50 years.

I looked forward and I appreciate the chairman having this hearing today. I think these reports are necessary. But I want to make sure that as I go far as a member of this committee to make sure that our patent, our innovation system, our creative process continues to be the place in which people want to invest.

They want to create, they want to put their emphasis and time because this is where the best ideas we feel like come from. And we do not want that transferred to other countries or other areas simply because they have chose to do a better job dealing with, basically what I call their creative community, that intellectual property space.

When we understand that, and I think that gives us a good basis to go on, I believe the GAO report reflects some things that I thought a few years ago, and some other things that I think we can continue to work on. I do believe as we look forward though this is something we can look at in the picture of a bigger contextual issue of patents. And I look forward to having that debate as we go forward.

So I want to thank you for the report. And I thank you for the information we have. And for Mr. Hale and Mr. Cooper, again, we have had conversations before. I look forward to having continued conversations as we go forward. And with that, Mr. Chairman, and in the interest of time and a wonderful snowstorm outside, I yield back.

Mr. ISSA. The Chairman yields back. We now go to the gentlelady from California, Ms. Bass.

Ms. BASS. Thank you very much. I know votes are going to be called soon, so I will be quick. So just a couple of questions; I wanted to know if—

Mr. ISSA. If the gentlelady would suspend. If other members would like to go vote and come back, we could probably not adjourn at all because there is only one vote. So if a couple of Members would go and then when they come back if we can that would keep us from stopping altogether. Please continue.

Ms. BASS. Okay. So this is a question that maybe all three of you could answer quickly. If it would make more sense to have an independent judicial process, like the district court litigation settle patent disputes between two parties versus the agency that I know some people have said, you know, the agency has its challenges. And I wanted to know how many patents challenged at the PTAB were also challenged in district court, and maybe you could comment on this.

Mr. COOPER. If I may, so I do not have the specific numbers about how many are challenged in court and also at the PTO. I think, you know, representing an association that would like to see the CBM Program sunset, we still believe that it is important that the PTO have a good strong system for reviewing patents that it should not have issued in the first place. I think that is important to be there in addition to having the ability to challenge patents in court if you are sued for patent infringement.

So I think having both is important. Our concern with the CBM Program is that it is effectively the government picking winning technologies and losing technologies, and that is probably not the best way to go.

Ms. BASS. And what do you say to that, Mr. Hale, in terms of picking winning technologies and losing technologies?

Mr. HALE. So I think that there are two aspects to that. One is that, first of all, it seems to have been the sense of Congress and we do not disagree that the financial service industry was particularly susceptible to these types of patents; and this type of resolution mechanism was particularly applicable. That being said, we are not opposed to having this type of review being available to all industries.

The second, to answer your first question you asked, which is with the CBM process in particular, every instance of a CBM in order to initiate a CBM you either have to have been sued or have to have threat of suit. And I believe almost all of them were actually initiated through lawsuits. And because of the CBM's processes stay provision, which is a very strong stay, it actually stops the other suit, stops the district court litigation almost entirely, so that there is only one track going at any given point.

Ultimately, our view is that the CBM process changes the order of consideration, and changes in some cases the person who is making the decision. But it does not duplicate effort because of the stay and estoppel provisions.

Ms. BASS. Mr. Neumann.

Mr. NEUMANN. Yeah, I would say most of the stakeholders we spoke to, and this is a broad cross section of folks, saw value in having cost efficient time, more time sensitive, way to have the Patent Office reconsider poor-quality patents.

In our past work in 2016, we found that 70 percent of patent examiners felt they did not have enough time to do a thorough review of a patent application, which is one of the reasons why there are some poorly written patents out there. And so, many of the stakeholders believe that having these processes was very beneficial to weed out some of those poor quality patents more efficiently, and more cost-effectively.

Ms. BASS. Thanks.

Mr. ISSA. The gentlelady yields back. What we are going to do is we are going to recess. If Mr. Collins comes back here before I do, he will pick it right back up. And the hope is that we will get you out of here, let's say, by 4:00. So, I am going to run to the vote and come right back. We stand in recess.

[Recess]

Mr. COLLINS [presiding]. We have asked and many other members—due to the timing there is going to be no other questions. I will ask this, is there any other member of the panel, I appreciate you staying, would you like to have a brief—anything that you would like to add for this hearing for the record? Mr. Neumann.

Mr. NEUMANN. No, I do not, thank you.

Mr. COLLINS. Mr. Hale.

Mr. HALE. No, thank you.

Mr. COLLINS. Okay, Mr. Cooper.

Mr. COOPER. No, thank you for the opportunity.

Mr. COLLINS. You have all earned great points today. That is a wonderful closing statement. I love it. No, this concludes today's hearing.

Thanks for all our witnesses for attending. Without objections, all members will have 5 legislative days to submit additional material, written questions for the witnesses, and additional materials for the record. With that, this hearing is now adjourned.

[Whereupon, at 3:39 p.m., the subcommittee was adjourned.]

