UNITED STATES PATENT AND TRADEMARK OFFICE

PATENT PUBLIC ADVISORY COMMITTEE MEETING

FEE SETTING HEARING

Alexandria, Virginia

Thursday, September 6, 2018
PARTICIPANTS:

PPAC Members:

MARYLEE JENKINS, Chair
P. MICHAEL WALKER, Vice Chair
JENNIFER CAMACHO
CATHERINE FAINT
MARK GOODSON
BERNARD KNIGHT
DAN LANG
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PAMELA SCHWARTZ
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USPTO:

ANDREI IANCU, Under Secretary of Commerce for Intellectual Property and Director of the USPTO
SCOTT BOALICK, Deputy Chief Judge, Patent and Trial Appeal Board
WILLIAM COVEY, Deputy General Counsel and Director, Office of Enrollment Discipline
SARAH HARRIS, General Counsel
DREW HIRSHFELD, Commissioner for Patents
BRENDAN HOURIGAN, Director, Office of Planning and Budget

SEAN MILDREW, Acting Chief Financial Officer

ANTHONY SCARDINO, Acting Deputy Director

Guest Speakers:

DAVID BOAHENG
Room of Health

ROGER BURLEIGH
Ericsson Inc.

MARK DICKSON
American Bar Association-Intellectual Property Law Section

LISA JORGENSEN
American Intellectual Property Law Association

JOSH MALONE
Inventor

ROLAND McANDREWS
Intellectual Property Owners Association

PAUL MORINVILLE
U.S. Inventor

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MR. WALKER: Well, good morning, everyone, and welcome. I would like to call to order this public meeting on the proposed PTO patent fee schedule. So, I want to thank in particular the members of the public who are here both in the room and online, and the USPTO presenters who are here for this hearing, and a special thank you to all our public presenters who will be sharing their thoughts and opinions with us this morning.

So, first I would like to do some introductions. First, myself, my name's Mike Walker. I'm Vice Chair of the Patent Public Advisory Committee. Our Chair, Marylee Jenkins, who usually runs these meetings is not here; she is online, though, and she'll be listening in and participating online.

At this point, just to introduce everyone around the table, let everyone know who's sitting here and joining the meeting, like to go
around the table and maybe we can introduce ourselves briefly and then come back to you.

Bill, do you want to start?

MR. COVEY:  I'm Will Covey. I'm the Deputy General Counsel and Director of the Office of Enrollment and Discipline.

MS. HARRIS:  Sarah Harris, General Counsel.

MR. BOALICK:  Scott Boalick, Acting Chief Judge of PTAB.

MR. MILDREW:  Hi, good morning. Sean Mildrew, Acting CFO.

MR. HIRSHFELD:  Drew Hirshfeld, Commissioner for Patents.

MR. HOURIGAN:  Good morning. Brendan Hourigan, Director of Planning and Budget in the CFO's Office.

MR. SCARDINO:  Good morning. I'm Tony Scardino. I'm the Acting Deputy Director.

MR. IANCU:  Andre Iancu, Director.

MR. LANG:  Dan Lang, I'm the PPAC and Chair of the Finance Subcommittee.
MR. KNIGHT: Bernie Knight, PPAC.

MR. THURLOW: Peter Thurlow, PPAC.

MS. CAMACHO: Jennifer Camacho, PPAC.

MR. SEARS: Jeff Sears, PPAC.

MR. GOODSON: Mark Goodson, PPAC.

MS. SCHWARTZ: Pam Schwartz, PPAC, and

I'm the President of the Patent Office

Professional Association.

MR. WALKER: Okay. Thank you, everyone.

And then we have two people on the line. I

mentioned Marylee Jenkins, Chair of the PPAC is

online. And then also, Julie Mar- Spinola,

another member of PPAC, is also online on the

phone. I'm introducing them because we've got a

gap between the livestream and the phone, so just

to make it easier, I wanted to introduce them.

So, I'd like to do before we begin is

provide a little context before we get to the

substance of the hearing. As you know, the Smith

-- Leahy-Smith America Invents Act provided the

PTO with limited fee setting authority. Now, as

part of the rulemaking process to set or adjust
fees, the PPAC is required by the AIA to do two
things: first, the PPAC must hold a public hearing
about any proposed fees and the USPTO is required
to help us set up the meeting. So, thank you,
USPTO, for the great job you're doing in setting
up the meeting.

So, as announced in the Federal Register
on August 1, 2018, we're holding this hearing to
obtain input from the public on proposed patent
fee schedule made public and Director Iancu's of
-- to PPAC on August 8, 2018.

Our second requirement is to render a
report that includes public input, as well as PPAC
input, that we hope will assist the Office with
respect to the fee proposals that I just
mentioned.

So, for today's hearing, interested
members of the public were invited to testify
about the proposed patent fees and the questions
that were posted on the PPAC website about the
fees. So, the agenda for today's hearing, which I
hope you saw on the PPAC website, is as follows:
so, I'll make the opening comments, I'll be followed by Dan Lang, who is the Chair of the PPAC Finance Subcommittee, he'll be followed by Director Iancu, and then comments from Deputy -- Acting Deputy Director Tony Scardino, and then further comments on the fee adjustment proposals by Brendan Hourigan, who's Director of the Office of Planning and Budget. And then with that overview and with that introduction, we'll turn to you in the public to get your thoughts and feedback.

So, this fee proposal, obviously very important to the Office, very important to the stakeholder community, and your voice, the public's voice, is very important both to the Office and important to PPAC and we very much look forward to hearing what you have to say about the fee proposal.

So, our procedure for the day very simply is this: After we get through the presentations, we'll turn to the witness part of the hearing. And just ask you to be succinct. We
have quite a few people here, about seven people, who may give their comments. Please keep your comments focused on the fee issues. We know there are a lot of issues with the Office, there always are, but this is really about the fee proposal. That's why we're here. And to be fair to everyone, we ask that the comments be limited to no more than 10 minutes and I have a sense that some of them may be shorter than 10 minutes, but a maximum of 10 minutes, please.

In terms of protocol, the PPAC is here to listen. So, this is your opportunity to speak. So, the PPAC members are in a listen-only mode, so this is not going to be a Q and A, we're just here to listen, not make opinions, render value judgements on what people have to say. The only questions may be very narrow limited questions for clarity, but even those probably pretty few. Because this is really your time to come and be heard and for us to listen, so that's what it's all about.

So, we have schedule witnesses and then
per the Federal Register Notice, time permitting, we may also have unscheduled participation by the audience and I'll have more to say about that later. So, at this point, I'm going to let Dan Lang, who is Chair of the PPAC Finance Committee, give some more details on our process. Dan.

MR. LANG: Thank you, Mike. The PPAC's role is to collect public input and then use that to prepare a report on the USPTO's fee setting proposal. Holding this hearing and listening to the testimony is an important part of that. I am looking forward to hearing different perspectives from the public today and listening very carefully to the testimony.

For those who are not here to testify, but even for those who are, we are also collecting written input. Please write to us at fee-setting@uspto.gov, but do that by September 13th, which is next Thursday. Based on the input we received, we and the PPAC, and I will leave this process, we'll prepare a report. That's our statutory role. We plan to get that report out in
November of this year at the latest. Then after weighing the public input in our report, the PTO will publish a notice of proposed rulemaking inviting further public comment. Ultimately, the USPTO will issue a final rule and implement revised fees.

Thank you very much to the PTO staff for their work on this proposal and their support in -- to us in holding today's hearing. Thanks to all of you who are attending, testifying, and submitting comments. You're what makes the process work. You're the important ones who make it work the way it was intended to. But that's all I have and then now I'll hand it over to -- back to Mike.

MR. WALKER: Thank you, Dan. Dan was modest; as Chair of the PPAC Finance Subcommittee, he is the one who was responsible for preparing the report. So, Dan, on behalf of (laughter) the public and PPAC, we all thank you very much for your work and leading the effort on that report.

So, now it's my pleasure to introduce
MR. IANCU: Good morning, everybody.

And first of all, Vice Chair Walker, Mr. Lang, Members of the PPAC, Members of the public, thank you very much for being here, for holding this hearing, and thank you to everybody in the room and those of you watching online for joining us today for this special hearing focused on patent fees, a very important issue to the Office and to everybody who has business before the Office. This is a very important topic in planning for the future of the USPTO and ensuring that we are in the best possible position to enhance the country's innovation ecosystem by providing strong, reliable, and predictable intellectual property rights.

As I've said before, and I truly believe, the U.S. Intellectual property system is a crown jewel of the nation's economy, culture, and history. Protecting IP is vital to maintaining the incentives for research and
development, creating quality jobs, driving our
economic prosperity, and providing incredible
benefits to society as a whole. The USPTO's
ability to issue timely reliable patents both
today and in the future is a critical part of
that.

As you are aware, the Leahy-Smith --
Smith America Invents Act, also known as the AIA,
which was passed by Congress by -- with bipartisan
support in 2011, made several significant changes
to the U.S. intellectual property system. Among
those changes, and most remain to our discussion
today, was that the Act granted the USPTO
authority to set its own patent and trademark fees
by rulemaking to recover the aggregate estimated
cost of operations for patents and trademarks.
Congress granted us this authority because it
recognized that the USPTO in collaboration with
the larger intellectual property community is
uniquely positioned to determine the most
appropriate fees that will both promote innovation
and provide sufficient revenue to sustain the
USPTO services designed to protect that innovation. It is essential that we remain in touch with our stakeholders as part of this process.

Yes, this public hearing is a required part of the fee adjustment process as specified by the legislation of the AIA. And to that end, the more viewpoints are here, the better information we have to continuously improve the innovation environment for everyone. This is why I've enjoyed working closely with PPAC since joining the USPTO seven months ago and why I look forward to hearing the testimony today and reading the PPAC report about our proposals to set and adjust patent fees.

In a few moments, our Acting Deputy Director, Tony Scardino, will provide us a little more detail about why we are proposing fee adjustments at this time. And our Director of the Office of Planning and Budget, Brendan Hourigan, will provide the details of those proposals. I am sure you're all anxious to hear those details.
since that's what brought you here today. But first, I want to speak briefly about the importance of USPTO's fee setting efforts. The USPTO first exercised its patent fee setting authority in 2013. The results of that effort help the USPTO among other things reduce the patent application backlog and decrease pendency, allowed the Office to begin building a patent operating reserve, and advance key policy considerations while taking into account the cost of individual services. For example, the USPTO introduce in 2013 the 75 percent fee reduction for micro-entities and expanded the availability of the 50 percent fee reduction for small entities, as required by the AIA.

The second iteration of patent fee rulemaking under the AIA authority followed a biannual review of fees, costs, and revenues that begun in fiscal year 2015. The fee adjustments that resulted from this review went into effect on January 16, 2018. Targeted adjustments were made that allowed the Office to make progress on a
number of goals, including: Continued work
towards patent pendency goals, the improvement of
quality, and maintaining prudent levels of
financial reserves. The adjustment also allowed
the Office to make investments in -- into our IT
systems, although significant additional work
remains.

Indeed, they are no doubt aware of the
week-long outage that we experienced last month
with regard to our database, a key component of
dozens of internal and external programs that we
use in processing patent applications. Many of
the legacy systems we operate have not had the
major upgrade in years. We are now focused on a
fundamental review of our IT needs and options
going forward. While we were able restore our
services without data loss and in the process make
some upgrades to improve the reliability of pound,
we clearly have much more work to do.

In fiscal year 2017, we conducted
another biannual review of our fees. And
following that review, we have determined that
there is a need for USPTO to once again set and adjust patent fees. It may seem like we just finished adjusting fees and indeed, like I mentioned, the updates fees have been in effect for less than nine months at this point. But setting and adjusting fees is a lengthy process that requires us to look a few years towards the future. We anticipate that the proposals we are making now will take effect in January 2021, three years after the previous adjustments. And therefore, we must consider what the financial needs of the Office will be at that time and beyond.

The current proposals are a result of lengthy and careful consideration. I believe that both the USPTO and the broader IP community will benefit from the proposed fee structure, as it will allow us to identify an advanced policies that deliver a strong, reliable, and predictable patent system. For example, I am focused on improving our information technology systems to better support examination. Further, we all
benefit when the USPTO operates with a sustainable funding model. During previous government-wide shutdowns the USPTO was able to remain open, thanks to our patent and trademark operating reserves.

But the patent operating reserve does more than that; it also allows us to make long-term operational improvements and gives us the means to respond to immediate and temporary changes. It protects us against unexpected increases in patent-related requirements or unexpected declines in patent fee collections. It helps minimize the impact of normal fluctuations in fee collections, allowing us to run more efficiently. Consequently, it is vitally important that we continue to gradually build a patent operating reserve towards this optimal level.

In short, the fees we are proposing will provide us with the resources and flexibility needed to continue reducing the patent application backlog, shortening patent pendency, improving
enhancing patent administration and post-grant processes, engaging effectively internationally, and improving our IT infrastructure. These fees -- these fee proposals will also enable the USPTO to continue to build, retain, and effectively manage the highly educated and talented workforce it needs to properly serve you, our critical stakeholder community.

As many of you know, I came to the USPTO from the private sector. It has been amazing for me to see how the USPTO, despite being a government agency, runs in many respects like a business. We pay very careful attention to our budget, to our user experience, and to the services we provide. As many of you know, we also have a Financial Advisory Board comprised of executives from throughout the organization which performs careful financial planning and budget prioritization to ensure that our spending supports our mission. As I have said before, input on this initial proposal from you, our stakeholders, is critically important.
So, please let us know your thoughts on these proposals and not only the areas where you think we can improve, but also areas where you think our proposals are appropriate. Today's hearing is the first opportunity to offer feedback on the set of proposals. But it will not be your last opportunity. Some of you will offer testimony today, live, on these proposals. In addition, following this hearing, you may also submit written comments. As you've already heard, but as Brendan Hourigan will also give you information on this a bit later, you will find out how to submit those comments and by when.

Additionally, PPAC will provide, as mentioned, a public written report indicating the Committee's comments, advice, and recommendations about our proposals based in part on the oral testimony today and the written comments received in the next week. And next summer, we will plan to publish in the Federal Register a notice of proposed rulemaking which will formally outline our fee proposals for public consideration and
another round of comments.

After receiving PPAC's and the public's
input, we plan to develop our final fee structure
and publish it in the Federal Register in the
summer or fall of 2020. Finally, we anticipate
that the new fees will go into effect January
2021. This process reflects the USPTO's
commitment to fiscal responsibility, financial
prudence, and operational efficiency. It is
critical that our intellectual property system be
balanced and continue to strive towards enhancing
the country's innovation ecosystem and providing
reliable and predictable intellectual property
rights.

As I have said many times, when patent
owners and the public have confidence in the
patents we grant, inventors are encouraged to
invent, investments are made, companies grow, jobs
are created, and science and technology advance to
the benefit of our entire society.

So, thank you, Vice Chair Walker,
Members of the Committee, and all of those
interested in our patent's organization for your
thoughtful consideration of this proposal. Thank
you all and have a great rest of the meeting.

MR. WALKER: Director Iancu, thank you
very much for those opening comments. We
appreciate you being here to share them with the
PPAC and with the public. Now it's my pleasure to
introduce Tony Scardino, Acting Deputy Director of
the USPTO. He'll provide us with some general
commentary on the USPTO fee setting proposal.

Tony.

MR. SCARDINO: Thank you, Mike, for the
introduction and good morning, everyone. I want
to thank those in the room and online for the
interest you have shown in our fee proposal.

Director Iancu has already touched on some of the
reasons we are proposing to adjust patent-related
fees, but I'm going to go into more detail on the
financial aspects of the proposal. And then as
the Director mentioned, I will turn it over to
Brendan Hourigan to give you the details of the
individual fees we are proposing to adjust.
As many of you are aware, the USPTO operates like a business in certain respects. Requests for products and services are made with the expectation that they will be delivered in either the current or future years in accordance with established performance metrics. The total cost of providing patent products and services is funded from the total revenue derived from patent fees and funding from the patent operating reserve.

Every year, more than a half-a-million patent applications are filed, bringing with them both fees and associated patent processing and examination workload. Fees for search and examination are set below cost in order to keep the barriers to entering the patent system low. Issued maintenance fees from granted patent applications subsidize those search and examination costs, including for applications that are ultimately not allowed. The ability to calibrate our fee structure coupled with the operating reserve is essential to helping USPTO
find the right balance to manage a complex funding model that both incorporates responsible public policy considerations and also can sustain effective USPTO operations.

Following the most recent review of our fees and our projected revenue and costs, we've determined we need to adjust some fees for the future. As we look over the five-year planning horizon we use for budgeting, a number of factors led us to project that USPTO's operating costs will continue to increase. One of these factors in inflation. Yes, inflation touches USPTO's pocketbooks in the same ways it impacts yours. Many of the resources we use to provide our service increase in cost every year, driving up our aggregate costs just to maintain the same level of service.

But we want to do more than maintain just the status quo. We're always looking to improve the services we provide to you, our stakeholders, while also advancing policies that deliver a strong, reliable, and predictable patent
system. We'll continue our efforts to identify tools and resources we can provide our examiners to improve our prior art search and consistency of examination. Providing high-quality, efficient examination of patent applications will serve the American economy well, as reliable patent rights are key to economic growth. Increased reliability of patent rights will also promote increased demand and the USPTO must be positioned to respond to this demand for quality and timely services that benefit the American business community.

Related to this, the Office is wrapping up a comprehensive analysis of examination time known as examiner time analysis, the last comprehensive assignment of expectancies for examination time -- a mouthful. In other words, the amount of time examiners are provided to work on each application was done over 40 years ago. Since then, significant changes to the examination process have occurred, including the emergence of new technologies, growth of available prior art that must be searched, impacts of new electronic
tools, the challenges of transitioning to a new
patent classification system, and changes in legal
landscape or examination practices. As we plan
for the future, we must consider how changes such
as these impact the amount of time it takes to
examine an application.

Effecting changes in the examination
process needed to ensure the issuance of reliable
patents while also issuing those patents in a
timely manner means recognizing a potential
increase in our core operating costs. We do not
undertake this lightly and we're moving in the
direction after considering feedback from our
customers, employees, and other stakeholders now
and over the last several years. However, while
we've reached the conclusion that this change is
necessary for the future health of our -- of
America's IP system, absent an increase in revenue
or this increase in our core costs would
inevitably crowd out funding for other necessary
investments such as information technology. We
remain committed to investing in our information
technology.

Director Iancu mentioned that some of our systems were unavailable for a week in August, as we performed emergency maintenance. I know many of you were directly impacted by the outage and I'm sure you weren't happy about it. Neither were we. Also, while the August issue was the second time we have dealt with a multiday systems outage in the past three years, I do want to note that the outage in December 2015 was due to a power outage, not a failure of USPTO IT systems. Regardless, we will continue to strive in our efforts to be better.

Our desire is to provide you with the best systems and services possible and we believe that revenue generated by the proposed patent fees will assist us in that goal. Investing in IT remains a priority for us, as it is inextricably linked to the success of our mission and our desire to provide a reliable, predictable patent system. Therefore, the USPTO will continue to invest in improving our IT infrastructure,
modernizing our IT systems, and retiring these old legacy systems that continue to challenge us.

Our new tools are built on modern, flexible, and more stable infrastructure. Improving our IT systems to better support patent examination, the Patent Trial and Appeal Board or PTAB, and other parts of the Office also includes exploring big data capabilities, data analytics, and the use of artificial intelligence to improve overall performance and fuel data-driven decisions and policy-making. And IT improvements are not restricted to the tools we use internally to do our jobs. We're also planning to improve the user experience on our public-facing IT tools, as well.

We seek to increase efficiencies by providing a uniform platform for conducting business with the Office, including registering, entering, and updating information and paying fees. IT is changing at accelerating rate and one must be able to adapt to a future where our work is more complex and technology-dependent.

Another area where changing
circumstances are driving a change in our operating costs is in the PTAB. PTAB's AIA trial provisions have received a lot of attention recently, with multiple decisions handed down by the Supreme Court this year. We expect that complying with these decisions will increase our costs of conducting an AIA trial. Through both internal study and stakeholder engagement, we will work to ensure that USPTO's review in these proceedings is consistent with the intent of the AIA and the overall goals of predictable, high-quality patent rights. We'll also continue to assess potential improvements in the AIA, trial standards and processes.

The revenue brought in by this proposal will also facilitate our continued efforts regarding education, outreach, and domestic and international IP policy. Through this spending -- though this spending only comprises a small share of USPTO's budget, especially when considered next to the overall costs of patent examination or our IT investments, the USPTO's committed to serving
local innovation economies through our regional Offices and encouraging and supporting future generations of inventors and entrepreneurs to play an active role in America's innovation economy.

The agency also plays a leading role in promoting strong and balanced protection and effective enforcement of IP at home and abroad. To keep competitive in an increasingly globalized economy, large and small American businesses need as much certainty as possible in the creation, enforcement, and protection of their IP, both domestically and internationally. We'll continually assess what steps, if any, towards greater harmonization of substantive patent law are advisable and partner with our international counterparts in pursuit of strong IP policies, enforcement, and protection worldwide.

As you consider these new and changing requirements that are driving the need for the proposed fee adjustment, I would like to emphasize that USPTO knows we cannot simply increase fee rates to pay for every desired improvement. We
recognize we have responsibility to you, our
stakeholders, to pursue strategic opportunities
for improvement in an efficient, cost-conscious
manner.

Director Iancu mentioned our Financial
Advisory Board. And let me assure you that during
my time as Chair of that Board, I participated in
many discussions that focused on financial risk
management and determining what is truly necessary
spending versus what we call "nice to have" budget
requests. Each year, the Board reviews multiple
scenarios to determine what level of fee
collections are expected and what our hiring and
spending levels need to be in order to effectively
carry out our mission.

The Board also regularly reviews USPTO
activities to identify opportunities for cost
savings and resources that can be redirected to
higher-priority projects. But given the fact that
critical costs of the agency continue to increase,
we're proposing a fee schedule that seeks to
provide the USPTO sufficient financial resources
to facilitate effective administration of the United States intellectual property system. Proposal also targeted -- has targeted fee adjustments that will encourage desirable practices within the IP system. And Brendan Hourigan will discuss these targeted adjustments momentarily.

But before I turn the floor over to Brendan, I do want to briefly address one other important aspect of the USPTO's financial management and that's our patent operating reserve. Director Iancu talked about this some, but I would like to go into more detail for those of you that are less familiar with it.

Fee funded operations like the USPTO are typically at high risk for cash flow stress. In general, fee funded operation may be forced to make expensive crisis-based decisions if fee collections are lower than expected. The organization may need to make decisions to keep things operate in the short-term rather than making strategic long-term decisions. If the
organization's in the private sector, these --
there are some typical business tools, such as the
ability to borrow money that are available in
times of lowered revenue or if there's a need to
invest in operational or capital improvements.

However, these tools are not available
to the USPTO and most federal agencies.
Therefore, our patent and trademark operating
reserves serve as fiscally responsible internal
lines of credit. They help us cover normal
fluctuations in revenues and therefore sustain
operations and allow us to continue to execute on
the products and services requested by you, our
intellectual property stakeholders. They can also
serve to smooth out major multiyear investments or
near-term spikes, allowing us to set aside funds
in one year to cover major expenses we know we
will need to incur in future years.

To prudently manage these operating
reserves, we've identified both an optimal patent
operating reserve balance and a minimum or a
lower-bound operating reserve level we seek to
retain while building towards the optimal level.

We ended fiscal year 2017 below our minimum operating reserve level. And in addition, despite the fee increases that went into effect in January of this year, we expect to end fiscal years 2018, ’19 and ’20 below the desired minimum reserve level, as well.

We feel these dips below ourself impose minimum are necessary as we continue critical investments in areas such as IT modernization and examine -- and examination initiatives. However, operating reserve balances below the minimum jeopardize the USPTO's ability to respond to emergency situations, such as the unexpected economic downturns or government-wide shutdowns. As recently as earlier this year, the government experience two short-term shutdowns and the USPTO was able to stay open during, using our reserves. When any kind of cash flow risk presents itself, approximately 90 percent of USPTO spending is on things that we don't want to cut or we could easily cut in the short-term, such as rent, paying
our employees, or paying for contracts that
support mission-critical initiatives.

So, when short-term spending cuts are
needed, they almost always come from the areas
where we have the most flexibility, which are IT
device replacement and software development.
The good news is that the operating reserve is
doing its job. We’ve been able to continue our
investments in IT at levels that continue to drive
our goals without making those short-term
crisis-based decisions. The fees we are proposing
are part of a larger, long-term plan to keep the
USPTO on a stable financial footing.

Proposed fees we are discussing today
are not anticipated to go into effect until 2021
and therefore will not change the near-term
outlook. But when they are enacted, they will
help replenish the patent operating reserve and
stabilize USPTO’s finances, enabling us to deliver
reliable and predictable service levels even in
times of financial fluctuations. A more robust
patent operating reserve will also position us to
identify and undertake capital improvements, such as adapting to an ever-increasing technological future.

And I want to stress that the operating reserve will be managed carefully. If the projected operating reserve were to exceed the estimated optimal level by 10 percent for two consecutive years, it is USPTO policy that we would examine the contributing factors and determine whether it would be advisable to lower fee rates.

In conclusion, the aggregate revenue we will receive from the proposed fee structure will provide sufficient funds to continue fulfilling the USPTO’s goals in a financially prudent and stable manner. As the USPTO continues to make progress on its goals and commitments, these will continue to be reviewed and assessed on at least a biannual basis to ensure they’re at appropriate levels.

Speaking of the USPTO's goals, I want to mention quickly that we are currently seeking
comments on our draft 2018-2022 strategic plan. The draft plan which sets out our mission focus goals is available through our performance and planning webpage and public comments are being accepted through September 20th. We'll -- we will consider all comments received by that deadline when finalizing the plan and we anticipate posting the final strategic plan in November of this year. As this fee setting effort moves forward, we will certainly consider the goals in the final 2018-2022 USPTO strategic plan and ensure that all fees are set in support of reaching those goals.

So, hope that I've provided you with a good explanation of USPTO's current financial position and why we are pursuing fee adjustments at this time. We believe our proposal strikes the right balance between increasing revenue and containing our costs. However, this proposal represents only an initial step, a starting point. For those of you who participated in our last two rounds of patent fee setting, you know that we took your input seriously and we made a
number of changes based upon your feedback. Now, can almost guarantee you that there will be changes to the proposed fee structure -- fee schedule between now and the time those adjustments take place, based on the feedback we receive and what we read in the PPAC report. Because I don't know what that feedback (laughs) will be, I cannot say how things will change. Some proposed fees may be lowered and some may increase. But any and all changes made will be done in the interest of the best way to serve the public. And hearing from you is imperative when making those decisions. That's why this hearing is so important and we look forward to hearing your feedback. With that, I will turn things over to Brendan Hourigan to provide more details about the changes we are proposing. Thank you again for your interest in this process.

MR. HOURIGAN: Good morning. I would like to thank you all again for joining us today. We look forward to hearing your comments and
reviewing the PPAC report as we move forward with this fee setting process. As Director Iancu and Acting Deputy Director Scardino mentioned, a main focus of this round of fee setting is to increase revenue and enable the USPTO to enhance the country's innovation ecosystem and provide strong, reliable, and predictable intellectual property rights.

To help meet these goals, we are proposing an increase of approximately 5 percent for most patent-related fees. I will go into a little more detail on this portion of the fee setting proposal near the end of this presentation. In addition to the across-the-board increase, we are also proposing some targeted fee adjustments that align with the Office's four key fee setting policy factors, namely to foster innovation, align fees with the full cost of products and services, set fees to facilitate the effective administration of the patent and trademark systems, and offer application processing options for applicants.
I will now walk you through the details of the targeted fee proposals. For simplicity, the fee rates presented will be for large entities. However, small and micro-entity discounts will continue to be available where allowed by statute.

The first targeted fee proposal is to do -- introduce a surcharge for utility nonprovisional patent filings that are submitted in a format other than the electronic DOCX file format. In other words, this surcharge will apply to filings that are submitted in an electronic document, such as a PDF, that is not saved in the DOCX format. It will also apply to filings that are submitted non-electronically in addition to the existing paper filing surcharge.

This fee would be set at $400 for large entities with discounts for small and micro-entities. This is being introduced for specifications, claims, and abstracts in utility nonprovisional filings. However, it is possible that it could be expanded to other filing types in
the future, as DOCX functionality is added for
additional filing types.

EFS-Web is the USPTO's web-based patent
application and document submission solution.
Using EFS-Web, anyone with a web-enabled computer
can file patent applications and documents without
downloading special software or changing document
preparation tools and processes. Registering as
an EFS-Web e-filer allows enhanced filing,
follow-on processing, save submissions, and more.

EFS-Web registered e-filers have been
able to file specification, abstract, and claims
in DOCX for utility nonprovisional filings since
August 2017. This surcharge will encourage
applicants to use DOCX format, which will improve
examination quality and lower processing costs,
benefiting both the USPTO and users.

Filings that are submitted via DOCX
format can be processed more efficiently by USPTO
and will be easier to use in future searches and
publication materials. DOCX is XML-based, which
simplifies the process for the Office to share the
data with backend systems. Currently, the Office
must convert PDFs to XML using optical character
recognition, which is a source of potential
efforts. Users will also see increased
efficiencies since they will no longer have to
convert their structured text into PDF for filing
and won't have to worry about conversion errors.

The DOCX format will also allow for
greater reuse of content by applicants.
Additionally, the structured text document and
Office actions will be available in the private
Patent Application Information Retrieval or PAIR
system, allowing applicants to more easily use the
text, such as copying and pasting, when drafting
responses. Further, DOCX allows the ability to
perform content-based validation in the
specifications, claims, and abstract, which will
help applicants identify and correct mistakes
prior to submission.

Examples of DOCX validation includes
claims validation for missing claim numbering or
abstract validation for work count. The reduction
of errors helps contribute to compact prosecution, which benefits both the applicants and the Office.

The next proposal is to increase the surcharge for late maintenance payment -- maintenance fee payment within six months following the due date. Over 95 percent of payment renewals are paid before the due date, but some patents are renewed during the six-month period following the due date. The goal of increasing this surcharge is to encourage those patent-holders who are making late payments to instead renew prior to the due date. Encouraging more on-time renewals will benefit the public by increasing the understanding of which patents are still in force and which patent rights have been allowed to lapse.

The proposed fee of $1,000 for large entities is a significant increase from the current fee of a hundred-and-sixty, but brings the USPTO more inline with late payment penalties charged by other IP Offices. Discounts would continue to be available for small and
micro-entities.

The next proposal is to increase the fee to request an expedited examination of a design application, also known as the design rocket docket. Increasing this optional fee will allow the USPTO to better manage staff to match demand for these services. Raising this fee from $900 to $2,000 for large entities also narrows the discrepancy between this fee and the similar fee that exists for utility patent applications, specifically, the request for prioritized examination fee that is currently set at $4,000. Small and micro-entity discounts would continue to be available for this fee.

The next set of proposals deal with the backend fees for utility -- for a utility patent. The total package of fees being proposed in this package does not significantly impact the balance between frontend and backend fees. USPTO continues to set frontend fees below the cost to the Office to provide those services in order to encourage innovation. For a utility patent with
one RCE and lifetime maintenance, frontend fees will continue to be about 18 percent of the total fees paid over the life of the patent. However, as technology lifecycles grow shorter, it is important that the USPTO not rely too heavily on fees paid late in the life of a patent. Therefore, the backend fees have been reconstructed -- restructured to recover the initial search and examination costs earlier in the life of the patent with the issue fee and the first-stage maintenance fee increasing by larger percentages, while the second and third-stage maintenance fees increase at a smaller rate than the across-the-board increase. The issue fee for utility patents and reissues will increase from $1,000 to $1,200 and the first-stage maintenance fee will increase from $1,000 to $2,000. As a result, the combined fee paid for -- fees paid for issue and first-stage maintenance would increase from 16 percent to 19 percent of the total fees paid for a utility patent with one RCE and lifetime maintenance.
However, second and third-stage maintenance fees would only go up by 4 percent, with second-stage increasing from $3,600 to $3,760 and third-stage increasing from $7,400 to $7,700. These adjustments will mark the first time maintenance fee rates have changed since 2013. Small and micro-entity discounts will continue to be available for utility patent issue and maintenance fees.

The next proposal is to introduce an annual active patent practitioner fee. The fee would be $340 with a $100 discount for continuing legal education or CLE completion and a $70 surcharge for filing on paper. For an annual active patent practitioner fee filed on paper, without certifying CLE completion, the fee would be $410. Filing electronically without certifying CLE completion would be $340. Filing on paper with certifying CLE completion would be $310. And filing electronically with certifying CLE completion would be $240.

Currently, the Office of Enrollment and
Discipline or OED has fees for some specific services. But the cost to maintain the patent practitioner roster other -- and other services provided by OED, such as outreach and pro bono support, are largely passed onto patent applicants and owners. Instituting an annual active patent practitioner fee would allow these costs to be recovered directly from patent practitioners. The fees would also promote the integrity of the patent practitioner roster and eliminate the need for periodic surveys of registered practitioners to update the roster.

This fee would be paid by registered patent attorneys, agents, and individuals granted limited recognition, and beginning in the year after they complete the registration examination and join the roster. Adequate notice would be provided to practitioners in advance of the due date for payment of the fee. Failure to comply would result in delivery -- delinquency fee -- a delinquency fee and/or administrative suspension after an additional notice. This is similar to
the annual fees charged by the vast majority of
state and territorial bars.

Practitioners would be asked to certify
whether or not they have completed the recommended
number of (Sealy) hours over the previous two
years at the time they pay their annual active
patent practitioner fee. This includes a
recommended one hour of ethics and five hours of
patent law and practice.

CLE may be completed in several ways,
including: Participation in patent-customer
partnership meetings, USPTO- provided speaking
engagements, or outside CLE. USPTO-provided
speaking engagements will be designed with the
intent that they would also meet state and
territorial CLE requirements. But since
requirements vary, it would ultimately be up to
each state and territorial bar as to whether they
will accept USPTO CLE classes as meeting their own
CLE requirements.

Also, I would like to point out that the
USPTO would like to hear from patent practitioners
as to what would work best in terms of USPTO CLE
delivery. Please keep in mind as you provide
comments to us, for example -- please keep this in
mind as you provide comments to us. For example,
share your preference, if any, in live speaking
engagements versus Webex sessions what type of
content you desire, et cetera.

Practitioners who certify CLE completion
will receive a hundred-dollar discount on the
annual active patent practitioner fee.

Practitioners who certify completion of CLE
credits will also be noted in the OED information
system or OEDIS, which is available to the public
to search for practitioner -- for a practitioner.

Encouraging CLE through the use of a discount will
improve the quality of the bar and therefore the
resulting patents.

Note that the plan is to have check the
box reporting of CLE. As I previously stated,
practitioners would be asked to certify their CLE
completion at the time they pay their annual fee.

There are currently no plans for proactive audits
of CLE completion. Disciplinary actions for false reporting would likely mainly arise when conducting other investigations. While plans are not finalized yet, when practitioners certify CLE completion, there will be a disclaimer regarding making a false statement and the potential implications thereof.

Practitioners will be advised to keep records to show the C -- that CLE was completed. If you believe that a more proactive audit program is appropriate, please include that in your feedback to us, as well. But be aware that a proactive program would incur additional costs and the annual active patent practitioner fee would likely need to be increased.

There would be no fee for practitioners who become voluntarily inactive. However, the existing administrative reinstatement fee would be charged to help cover the costs of react -- reactivation. After two years of inactivity, a practitioner would need to make a showing to the OED Director that they continue to possess the
necessary qualifications to render legal services
to patent applicants or retake the registration
examination to be eligible for reactivation.
After five years of inactivity, the practitioner
would be required to retake the registration
examination to be eligible for reactivation.
The next proposal is to introduce a
petition fee for pro hac vice admission into the
-- those -- admission for those appearing before
the Patent Trial and Appeal Board, PTAB. This fee
of $250 is for counsel who are not registered
practitioners to be granted admission in limited
circumstances, such as where the practitioner is
an experienced litigator who is familiar with the
subject matter involved in the proceeding. This
would shift the cost of PTAB Judges and other
personnel to the process and issue orders with
respect to these petitions to be covered by the
petitioning counsel. This fee is roughly
commensurate with the lowest proposed annual
active practitioner fee and with the median fee
charged by federal and state courts or pro hac
vice administrate -- admission's motions.

Once the petition is granted, the

counsel would be admitted for the entire duration
of the proceeding, even if it extends for several
years. For example, when an interparty's review
proceeds to final written decision and after
appeal of the Federal Circuit is remanded back to
the PTAB for further proceedings.

The Supreme Court decision in SAS
Institute, Incorporated versus Iancu is expected
to impact PTAB costs. PTAB will no longer be able
to institute on less than all claims challenged in
a petition, leading to significant additional
work. Also, PTAB is currently evaluating changes
to its trial processes, including the institution
decision, the claim construction standard
employed, the motion to amend process, and the
conduct of hearings. These will also require
added work. Therefore, the Office is revising the
fee levels for AIA trials to more closely align
the fees with the anticipated costs of the Office
performing these services.
Before the Supreme Court decision, the PTAB set the interparty's review or IPR request fee to be for any petition up to 20 claims and the IPR post-institution fee to be for any institution of review for up to 15 claims. The lower claim number threshold for the post-institution fee was based on the prior authority to institute on a subset of the claims raised in a petition. In view of the Supreme Court decision, however, the PTAB is required to institute as to either all claims addressed in a particular petition for IPR or none.

Accordingly, the Office will set the IPR request fee and the IPR post-institution fee to each be up — be for up to claims. The Office will do the same for the post-grant review or PGR and covered business method or CBM fees. Post-institution fees will continue to be refunded if the proceedings are not instituted by the PTAB.

The fees would be adjusted as follows: the fee for an IPR request up to 20 claims would be increased from $15,500 to $19,500. The IPR
post-institution fee would increase from $15,000 to $18,750 and cover up to 20 claims rather than the previous 15 claims. The excess claims fee for IPR request with more than 20 claims would increase from $300 to $375. The post-institution excess claim fee for IPRs would increase from $600 to $750, but would only be charged for claims in excess of 20 rather than for claims in excess of 15. The PGR and CBM request for -- fee for up to 20 claims would increase from $16,000 to $20,000. The post-institution fee for PGRs and CBMs would increase from $22,000 to $27,500, covering up to 20 claims rather than the previous 15 claims. The excess claims for -- fee for PGR and CBM requests with more than 20 claims would increase from $375 to $475. The post-institution excess claims fee for PGRs and CBMs would increase from $825 to $1,050, but would be only charged for claims in excess of 20 rather than for claims in excess of 15. Finally, among the targeted proposals, USPTO plans to discontinue three patent service
fees and instead provide these services in slightly modified form for free. This will help streamline the patent fee schedule while also focusing USPTO workforce efforts on producing the products that benefit the general public rather than producing outputs for individual customers.

The first fee proposed for discontinuation is for a copy of patent technology monitoring team or PTMT, patent bibliographic extract, and other DVDs. PTMT, patent bibliographic data, is currently available online for free, curtailing the need for USPTO to send out extracts on disc.

The second fee proposed for discontinuation is for a copy of the U.S. patent custom data extracts. With the elimination of this service fee, USPTO would create common customizations and release them online free to the public at the same time the data is released. Further customizations would be discontinued.

While not an official USPTO data source, PatentView meets many of the needs for those
requesting custom data extracts at no charge to
the consumer.

The third fee proposed for
discontinuation is for a copy of selected
technology reports in miscellaneous technology
areas. Selected technology reports are currently
available online for free, curtailing the need for
USPTO to send out paper copies of these reports.

As I stated at the beginning of this
presentation and as Director Iancu and Acting
Deputy Director Scardino previously discussed, a
main focus of this round of fee setting is to
increase revenue to enable USPTO to enhance the
country's innovation ecosystem and provide strong,
reliable, and predictable intellectual property
dights. However, the targeted adjustments I have
just finished explaining would not raise enough
revenue to both keep USPTO on a stable financial
-- keep USPTO on a financial stable track and
allow us to advance policies that enhance the
country's innovation ecosystem.

Therefore, we are proposing an increase
of approximately 5 percent for the patent-related fees not covered by those targeted adjustments, given the -- that nearly three years will have passed between the implementation date of the last fee adjustment and when these fees are expected to take effect. A 5 percent increase to -- is similar to fees increasing by 1.6 percent annually to help USPTO keep up with inflationary cost increases.

To keep the fee schedule simple, USPTO generally rounds fees to multiples of $5. Therefore, some smaller fees will not be changing since a 5 percent increase would round down to the current fee, while other fees would change by slightly more or less than 5 percent, depending on rounding. For a full list of proposed fees, please see the tables on our fee setting webpage.

We look forward to hearing your comments and receiving the PPAC report that summarizes the public opinion of these proposals.

In the summer of 2019, we intend to publish a notice of proposed rulemaking that
incorporates what we read in the PPAC report.

Given the 60-day public comment period following
the MPRM and the time it will take to develop a
final rule that incorporates the public comments
we receive. We currently expect the final rule
from this fee setting effort would be published in
the summer or fall of 2020 with the final --
finalized rates anticipated to take effect in
January 2021.

So, in closing, this presentation and
several other documents explaining the proposed
fee adjustments are available on our fee setting
webpage. We have a few people scheduled to give
testimony here this morning. Those of you who
provide testimony today should also provide a
written copy of your testimony no later than
September 13th for inclusion in the record of the
proceedings.

As Dan mentioned, those of you who do
not speak today also have the opportunity to
provide comments via the fee.setting@uspto.gov
email by September 13th. Because comments will be
made available for public inspection, information
that is not desired to be made public, such as an
address or telephone number, should not be
included in the comments.

I want to thank all of you once again
for joining us this morning. We look forward to
hearing from your -- hearing your testimony and
receiving your written comments.

Public feedback on fee proposals is
vital as we seek to be good stewards of both fee
setting authority granted by the AIA and the fees
we collect. I will reiterate that this is
intended to be a listening session rather than a
question and answer session so that we can hear as
much public feedback as possible during our
limited time here today.

With that, we come to the end of the
presentation portion of today's agenda and are
ready to hear your testimony. Thank you.

MR. WALKER: Thank you very much,
Brendan, for walking us through the details on
that, the fee proposal. And I just -- I'll
mention that in addition to the website link you had there, the PPAC website, thanks to Marylee's leadership, is a rich treasure trove of information, including the transcripts from the last two fee setting hearings, all the details from there, and it has a link to all the information that Brendan referred to. So, if you haven't looked at the PPAC website recently, it's very helpful in this regard.

So, again, thank you, Director Iancu and Acting Deputy Director Scardino, for your comments and for your explanations. So, now the table is set and we're going to transition now and go to the scheduled testimony.

So, I have a list of who will be speaking, so as I recognize you and you come up to the podium, would you just please say your name and the organization that you're representing so that is clear for the transcript?

So, at this point, the Chair recognizes Roger Burleigh. Roger.

MR. BURLEIGH: Good morning. I
apparently drew the short straw to open the public
testimony portion of today's agenda. Thankfully,
I'm followed by a distinguished panel further
experts provide their comments.

My name is Roger Burleigh and I'm
Associate General Counsel for IP for Ericsson.
This is our North American headquarters in Plano,
Texas. Give you a little bit of a brief
introduction to our company. Ericsson is a --
it's a Swedish multinational networking and
telecommunications company headquarter in its
Stockholm. Company was founded in 1876,
contemporary of Alexander Graham Bell. We
currently employ about 95,000 people and we
operate in over a-hundred- and-eighty countries.
We're dedicated to research and
innovation. We lead the development of cellular
technology from 5 -- from 2G to 5G. Around 15
percent of our annual global revenue is invested
in research and development, and we have the
largest patent portfolio in the industry with over
45,000 granted patents globally. We also actively
license our patent portfolio and we're one of only
a handful of companies to have booked over $1
billion annually from patent licensing.

Looking at those revenues, you might
expect that cost is not an issue for us. But just
like the Office, we have to anticipate, you know,
inflation rates, currency exchange rates, and
those all have a cost, is what we take into
consideration on how and when we file our
applications and more importantly where.

Over my 23 -- oh, just quickly, this --
these pictures here represent kind of the
evolution of our business. The first picture, the
black-and-white's, from 1876. That's a picture in
Stockholm, one of the first telephone towers
that's 5,000 wires off of that tower. And that
was operational from 1876 to 1913. It stood
standing -- it remained standing until 1953, when
it collapsed following a fire. Thankfully, our
technology now, although we still require towers,
which you see in the lower right is Ericsson's
patented tube tower technology still require
towers, but no longer require the wires.

Most of you may not be familiar with
Ericsson. We used to have -- we used to sell
cellular telephones. We're mostly an
infrastructure company now focusing on the core of
our business, but all of you use Ericsson
technology every day. Probably every phone you
have in this room has Ericsson- licensed
technology in it. If not, your calls traverse a
network that is enabled by Ericsson technology.

As I look through the fee proposal, and
I've looked through these, you know, the changes
and fees over 23 years, I usually just, you know,
greet them with, you know, resignation. "Okay,
this is what I have to tell my clients it's going
to cost them, or this is how I set my budgets."
When I looked at the proposals this time, a few
things stood out. I have to set a budget, very
large budget, for our global portfolio that
defines how and where we're going to file our
applications and which ones we're going to
maintain. You don't get to a size 4,000 patents
globally without having to periodically do some pruning. So, maintenance fees can have an impact on how we make those decisions, as well as where we take patents to grant.

So, the two changes to the fees is not so much the amount of the fees and the aggregate, but it's the structure of the fees that's important to us. And so I focused primarily today in my comments -- and we'll provide broader written comments on all the changes, but the two key ones for me are the substantial increase in the issue fees and the first maintenance fees.

As stated in the patent fee proposal executive summary, and the emphasis added was here was where appropriate set fees so that during patent prosecution, an applicant pays individual fees at points in time where he/she has more information to make a decision about proceeding with the patent process.

My comment here and a corollary to that is that it's no less important so that -- to set the fees such that after allowance a patentee can
pay fees at points in time where sufficient
information is available to make an appropriate
decision about the commercial merits of obtaining
and maintaining a patent. One of the stated
rationales for the increase in the issue fees and
the first maintenance fees was the apparent
perception that there's a shortened technology
lifecycle. And I don't see that in our industry
and I don't feel it's necessarily the case across
many industries.

To eliminate that a little bit, Ericsson
is a global participant in the telecommunications
ecosystem which requires standard setting process.
We are one of the leaders in that process and it
requires early RND and early application filings
to secure priority dates on our contributions to
the standards bodies. As an example, this past
November we filed what we call our Foundation
Patent. Four-hundred pages and a-
hundred-and-thirty inventors, and that will secure
a priority for us for many subsequent applications
that we believe defines the architecture of future
networks.

Now, as we grow our portfolio and we take cases to issue, we have to periodically prune those. We can't maintain all the patents we grant -- get granted worldwide because we don't always know which ones are going to be adopted by the standards or which may be implemented in our products or our competitors' products. So, we undertake a process which we usually don't begin until we come up on the second or the third maintenance fees to review the patents that we have and decide which ones we will maintain.

When we're getting granted fifteen to 1,600 U.S. Patents every year, that implies we have many hours. At a rough estimate, I say it cost us internal costs $300 to $500,000 when we undertake this process to review those patents. At the first issue fee, we may not have any market insights yet and so typically, we maintain all of those. So, it's the latter patents when we have some -- we understand what the commercial or the licensing value's going to be that we may start
pruning some and maintaining the others.

So, talking -- again, going back to the issue fee. According to the pros -- proposed fee structure, the fees to obtain a basic patent, including file, search, exam, and issue fees, will increase by 11 percent. "To encourage innovation entry fees, just file, search, and examination will increase at a smaller rate, 6 percent," which is basically keeping pace with inflation, as Mr. Scardino noted, "With the larger portion increase, the issue fee, 20 percent, only paid after a patent has been allowed." Again, my comment here: my applicants didn't know -- do not know whether an invention will have commercial value at the time of entry. And it's also often true at the time of issue. Okay?

Maintenance fees. Although in total, maintenance fees are proposed to increase by only 7 percent, again, essentially keeping pace with inflation, the first-stage maintenance fees will see the largest increase, 25 percent, in order to help the USPTO recover costs earlier in the life
of the patent, and the second and third
maintenance fees are proposed to increase by only
4 percent, so less than inflation. My comment
here is that shifting a substantial portion of
full life maintenance fees to the first fee, it
forced many patentees to encourage substantial
costs prior to having sufficient information to
make an appropriate decision about the commercial
merits of maintaining a patent.

Weighting the process more heavily to
the second and third maintenance fees will result
in additional cost being born more likely by those
patentees who have realized commercial value from
their patents and pay those fees willingly.

Getting into some numbers here, I was
interested to see, "Well, what is an alternative
proposal that could meet the Office's need for
their revenue, but not create additional costs on
stakeholders, such as Ericsson, that have large
patent portfolios to determine the commercial
value or potential commercial value of their
patents very early in the lifecycle?" So, the --
The upper table really just focuses on -- and again, I'm just going to focus on the large entity fees as representative. This just shows what the Office's proposal is. I have grouped the total maintenance -- so, total maintenance fees, again, 7 percent inflation rate. But I group the total -- the aggregate of the issue and the maintenance fees together and that combined, despite the 20 percent increase in the utility issue fee, is 8 percent. So, again, just slightly more than inflation.

Again, I grouped them this way because it's not infrequent that I receive an allowance on a case, whether in the U.S. or the EP, and I make a decision. Maybe I have the commercial information at that point to say, "Okay. I got some claims allowed, but this is not going to have value to us." And despite those costs, we decide not to even take that case to grant. Okay?

So, anyway, this is the proposal here. Here's just a model alternative proposal I put
together. Here you see rather than increasing the
utility issue fee by 20 percent, we increase it 7
percent, again, keeping with inflation. Then it's
more of a structured approach with progressive
increases on the existing maintenance fees of the
first, second, and third maintenance fees at 5, 7,
and 9 percent. The bottom line, however, is that
maintenance fees, the aggregate maintenance fees
for full life patent -- and I'll address non-full
life patents in a moment -- is 8 percent, actually
slightly more than what the Office has asked for.
But the total aggregate issue of issue and
maintenance fees for full life is 8 percent just
as it is under the Office's proposal.

MR. WALKER: And, Roger, just to
interrupt for one second, we're getting close to
your --

MR. BURLEIGH: Okay.

MR. WALKER: -- 10-minute time --
timeframe.

MR. BURLEIGH: Sure.

MR. WALKER: So --
MR. BURLEIGH: Thanks.

MR. WALKER: -- if you could wrap it up in another minute.

MR. BURLEIGH: Yep. Okay. So, then I was wondering, "Okay. Well, if there's -- if -- obviously, not all companies maintain their patents." The statistics I looked at is a report from the IP5 in 2016, basically shows that in all the IP5 countries, including USPTO, the maintenance fees drop off at about 20 to 25 percent every four to five years, meaning eventually you get down to 50 percent of patentees are maintaining their patents.

Going on, just looking at that from a weighted average perspective -- sorry. The -- and the yellow kind of highlights it. I made an assumption here, since I don't have exact date, 95 percent of patents, issued patents, are maintained at the first maintenance fee, 75 percent at the second, 50 percent at the third. And in the far right you'll see that -- yeah, that it is going to be substantially less on the first in the issue
and the first maintenance fees as proposed by the Office. However, that's more than made up by the increase fees on the second and third maintenance fees, resulting in a very minimal difference between these two proposals.

MR. WALKER: Okay.

MR. BURLEIGH: Okay.

MR. WALKER: Thank you very much for your input and for your materials which we hope to receive soon.

MR. BURLEIGH: Thank you.

MR. WALKER: Our next -- Chair recognizes Lisa Jorgenson. And for all the speakers, can you make sure that the microphone is close to you so we can --

SPEAKER: Sure.

MR. WALKER: -- hear in the room and for the people online? Thank you.

MS. JORGENSON: My name is Lisa Jorgenson. I'm the Executive Director for AIPLA, the American Intellectual Property Law Association. We'd like to thank the PPAC for
conducting the hearing on the USPTO for fee
setting proposal and for the opportunity to
express our preliminary views on the proposal.
Most of you know AIPLA. We are a national bar
association of roughly 13,500 members practicing
in every area of intellectual property. Our
comments today are preliminary in nature and we
may adjust our final written comments in view of
the discussions during the proceedings today.
    AIPLA has in the past expressed the view
that fees in the aggregate should recover 100
percent of the costs of the USPTO and that the
relationship between frontend and backend fees
should be maintained. This is to say, for
example, that search and examination fees for
patents should not necessarily be set to recover
the entire cost of frontend processing for patents
and that a portion of such costs should continue
to be born by maintenance and renewal fees. This
approach ensures the balance that frontend fees
remain low enough to allow a wide variety or a
wide range of inventors and businesses to seek
protection, making up the shortfall with the backend maintenance fees.

The proposal contains a multitude of proposed changes, some of which AIPLA does not have concerns with, but other fee increases do concern AIPLA. In either case, it is important that the Office provides more detailed justifications. For example, we note that the Office's strategic plan was released after the fee proposal. The question arises about how the fees may be shifted in light of the implementation of the strategic plan.

If fee increases are to compensate for inflation, many of these fee increases seem to exceed the consensus expected rate of inflation even when projected over the two-year span of the fee setting authority. If these fees are to pay for new or improved services, AIPLA would like to know what are those new and improved services.

Given that many entities have a fixed budget for IP portfolios, many of these fee increases will ultimately increase the cost of
obtaining and maintaining patents and may result in a reduction of patents in the entity's portfolio. Thus, these fee increases need to be well-justified. Applying these fee increases and especially the fee increases of 25 percent or more to large, small, and micro-entities more dramatically impacts the small and micro-entities. While we understand that the Office is statutorily limited in the discounts it can provide to small and micro-entities, AIPLA urges the Office to reconsider the increases that most significantly impact those entities.

What I would like to do is to focus today on a few specific proposed changes. The first is the surcharge for late payment of maintenance fees within six months. There is currently insufficient information to justify the increase. Is the surcharge intended to correct a problem? Is the surcharge necessary to cover any additional services? If the latter, what are the additional services that are to be provided?

Next, the Patent Trial and Appeal Board
fees. The proposed 5 percent increase in fees for ex parte proceedings may appear to be quite reasonable. However, more information justifying this increase could confirm that this increase generally corresponds to inflation over the two-year lifetime of the fees. While AIPLA understands that the proposed 25 percent increase in the fees for interparty's review proceedings and post-grant review proceedings may be justified by the additional work required by the SAS decision, we do not believe that there is sufficient data at this time to determine whether the increase is reasonable. However, by the time of the notice of proposed rulemaking, there should be sufficient data to determine whether the additional work justifies the fees. AIPLA encourages the Office to revisit these fees prior to generating the notice of proposed rulemaking and to provide supporting documentation to justify these fee increases.

AIPLA further notes that most of the additional work required by the SAS decision is
after the institution of the proceeding. AIPLA suggests that the Office consider a way of
 dividing up the fees so that the pre-institution fees bear less of the increased cost than the
 post-institution fees.

With regard to the proposed annual practitioner fee, in principle, AIPLA is not opposed to a fee that adequately and properly funds OED. However, more clarity is warranted on the need for this fee and how it would be used. It should be noted that the Office proposed practitioner fee is part of rulemaking in the early 2000s and it was not adopted at that time. What is the reason that it is being revisited today? For example, more information is needed to understand if the fee is commensurate with the services provided and limited to the OED. More information on how the OED will use these fees for OED's patent-related services is also needed. For example, how is the fee increase related to the OED's mission, responsibilities, workload, and activities?
The Office indicated that this fee is commensurate with fees charged by state bar associations. State bar associations, however, provide more distinct services to the attorneys that they serve than the OED provides to patent practitioners. In addition, OED already charges fees for many services that OED provides. For example, an application fee for admission to the examination for registration, fee for administering the registering examination, and a fee for recognition and registration after disbarment or suspension on ethical grounds.

As a conservative estimate of fee revenue, assuming 40,000 active practitioners and two-thirds of the practitioners paying the minimum fee, $240, the Office would receive $6.4 million annually. Without properly explained cost accounting this amount seems excessive to fund services provided by the OED, especially when considered as an increase to the existing fees collected.

AIPLA also has several concerns as to
how fee collections will be administered. How
will practitioners be notified that the fee is
due? Will practitioners be suspended for not
paying the fee on time? Will documents signed by
a practitioner who has not paid the fee on time be
recognized as signed by a practitioner? If not,
will there be a mechanism for retroactively
validating the documents to prevent unintentional
abandonment of applications or will the remedy be
to file an expensive request for revival of an
unintentional abandoned application? And will
there be a penalty for late payment of the fee?

With regard to the CLE discount, AIPL as
-- AIPLA as a provider of CLE encourages
practitioners to continue their legal education.
We believe, however, that more information is
needed to understand how the proposed discount
would operate. For example, the materials contain
only vague statements of what type of CLE would be
appropriate for the certification, what type of
CLE would qualify. Where could it be obtained?
How will the Office qualify that particular CLE?
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on the fee proposal states, "Practitioners who certify completion of the CLE credits will be noted in the OED information system, OEDIS, which is available to the public to search for a practitioner." AIPLA would like to confirm that when the public searches for a practitioner, there will be a field indication for CLE certification and that lack of an entry in this field reflects that a practitioner did not make the CLE certification.

If this is the case then AIPLA's concerned with a process that notifies the public of practitioners who choose not to or fail to provide the CLE certification, as this could unfairly prejudice practitioners who do not have a state CLE requirement or simply opt to pay the full price. Although the Office indicates that the CLE certification is optional, the public may not understand this distinction. Providing a public record that reports a lack of certification essentially makes the CLE requirement mandatory.
With regards to the surcharge --

MR. WALKER: Please, at this --

MS. JORGENSON: -- filing --

MR. WALKER: I'm sorry. We're just about at 10 minutes, so if you could maybe wrap up in a few seconds here.

MS. JORGENSON: Sure.

MR. WALKER: Okay. Thank you.

MS. JORGENSON: While AIPLA's aware of the benefits for -- of filing documents in a format that is easily text searchable we do have some concerns, such as the ability to modify a DOCX document. AIPLA suggests that the Office consider allowing the applicant to provide both a DOCX file for Office use and a PDF file as the record copy that is made available to the public.

In conclusion, a comment about the reserve fund: AIPLA has supported the establishment of a reserve fund to help improve the financial stability of the USPTO and sustain operations under certain unexpected circumstances. That said, there is insufficient information
provided in the proposal to assess how the fund has been built and used over the years, what is the appropriate target amount, or how these fees will replenish the fund over what period of time.

Thank you again for the opportunity to make these preliminary comments. AIPLA looks forward to submitting our written and more detailed comments before the submission deadline.

MR. WALKER: Thank you very much, Lisa.

Chair recognizes Roland McAndrews.

I'm trying to keep strictly to this 10 minutes because we're supposed to finish at 11:00 and already we may run a little late, so appreciate your consideration there.

MR. McANDREWS: Sure.

MR. WALKER: Please.

MR. McANDREWS: My name is Roland McAndrews. I'm here on behalf of the Intellectual Property Owners Association. Intellectual Property Owners Association is an international trade association representing companies and individuals in all industries and fields of
technology who own or are interested in intellectual property rights.

As Lisa sort of stated, we're here with preliminary thoughts. Sort of given the timeframe, we sort of cobble together all of our sort of thoughts on each of the individual fee increases or fee proposals and we'll just touch on some.

In a brief overview, the concern for IPO is that currently the patent system has many stresses on it. We have the success rate with IPR as we have patent eligibility issues. Fee increases will be another stress on the system and we just want to make sure that with these fee increases that they're well thought out and they sort of strike that balance of being able to properly not stop the barrier to entry to the full patent system and they do not shift behavior. One of the big concerns is these -- each of these fee proposals may shift behavior, in which case we may be raising fees, but actually revenue with the PTO made it -- may go down.
So, the first one I'll talk about is the non-DOCX surcharge. Just a brief point on that: there is concern from the IPO, one, of the large fee for doing that. It seems punitive in nature. Is $400 really necessary to push people to file in a particular format? And two, is there -- there's concern just over the metadata and other aspects of the conversion that may take place with this information as it's being downloaded or uploaded to the PTO. So, there's -- those are the concerns from the IPO on that.

IDS fees, the increase in IDS fees. IDS is a burdensome process with the PTO. Practitioners have always -- it's always been a difficult process and expensive process to maintain the free flow of information with IDS as is very important. So, any increase, any -- in fee, in any aspect of that strikes the IPO as maybe going against that free flow of information. You want to get as much information to the PTO as you can. You want that barrier to that to be as low as possible. So, we do not -- we're not on
board with that increase in fee.

The extension of time fees. With respect to those, these are very large fees. You know, yes, the -- in some situations for -- particularly for smaller companies, these are fees that just happen. And to have a fee of $3,000 to extend your period for response by months when a business is running and they have other things going on seems very high. So, the thought is, we need to put sort of a cap at some point on these extension of time fees. They're really getting burdensome.

The RCE fees. I think Roger was pointing to this a little bit. Shifting of behavior is something that may happen here. RCE is a decision point for many clients. And so the more you raise those fees -- and these fees are becoming now more expensive as -- with the second RCE than filing a new case. So, you're going to have clients or practitioners or stakeholders deciding that they simply don't want to do that. So, the concern here is by increasing this fee too
much, you're going to either shift people over to filing continuations, which really isn't helpful to the system, or you're going to have a situation where you have people just abandoning their patent application, which would probably negatively affect the revenue or the proposed increase with this fee.

Roger -- IPO is consistent with Roger on the maintenance fees. IPO thinks that spreading it over -- the increase over the entire, four, eight, and twelve would be more appropriate rather than the first one. What that will do, there's a thought that that would move that decision, again, earlier in the process at four years as to whether you want to keep this patent enforced or not and thus, you know, there's a question, "Will there really be an increase in revenue to the PTO or just more people pruning their portfolio earlier?"

The maintenance fee surcharge for late payment. IPO simply doesn't agree that the justification for this fee -- this is very large, 525 percent increase in fee -- doesn't agree with
the justification for this. If you're looking to see if a patent has expired, you wait until four years. It doesn't make a difference. That six-month is just a period you wait. So, to get people to pay that earlier to say that you're getting people to pay that earlier doesn't really justify the reason for that 525 percent increase.

IPO is on board with Lisa with respect to the annual active practitioner fee. The -- this will raise between $11 and $19 million based on the number of active practitioners. And so justification for the expense of that is really necessary here. So, we ask that the PTO provide more details as to what is going to happen with this large revenue from practitioners.

And a 100 percent -- $100 discount for CLE. CLE is expensive, but within its cost and in its opportunity costs. So, $100 really isn't -- doesn't feel like that's going to push people towards CLE.

Design patents, the increase in the expedited examination of designs, designs are
unique. They go after counterfeiters. You really want to have a low barrier for entry to those and they -- sometimes they're needed very quickly. So, the thought is, is that -- and given the expense or the effort that it takes to examine a design patent, $2,000 seems a bit high.

And then finally with respect to the Patent Trial and Appeal fee, the increase there, the thought is that maybe -- IPO understands the expense of that, but maybe do -- apply it more to a claim-by-claim basis, how many claims the effort involved. So, more of a -- not increasing it to 20 claims, but saying, "For five claims, a certain fee; for 10 claims, a certain fee," and that will maybe align those fees a little better with the effort at the PTO.

And hopefully I didn't go over my 10 minutes.

MR. WALKER: Did a very good job, Roland. Thank you very much.

MR. McANDREWS: Thank you.

MR. WALKER: You brought us back right
on time, so I appreciate that. Okay. Next the
Chair recognizes Mark Dickson. Mark.

MR. DICKSON: I am Mark Dickson, Chair
of the Section of Intellectual Property Law from
the American Bar Association, and want to thank
the PTO and the PPAC for allowing us to testify
today.

The American Bar Association is the
world's largest professional membership
organization with nearly 400,000 members. The
Section of Intellectual Property is the oldest
substantive section of the ABA, approaching our
hundred-and-twenty-fifth year anniversary. We're
also the largest intellectual property
organization in the world. Our -- my comments
today are on behalf of the Section of Intellectual
Property. They have not been approved by the ABA
House of Delegates or the Board of Governors and
should not be considered the views of the ABA.

For those of you not familiar with the
American Bar Association, to appear here I have to
have several layers of authority. First, we have
to have policy passed within the section that addresses the issues that we comment on. We then prepare letters and comments and prepare for this kind of testimony and it's all approved by our council and our officers, but that alone is insufficient.

In order to appear here we can go two routes. One is to obtain authority through the main ABA by taking our remarks to the House of Delegates. That 500-member organization which governs ABA only meets twice a year, at the midyear and annual meeting. We do our best to anticipate the need for this kind of testimony, but there's no way we can cover all of that. So, we use what's called blanket authority, in which our prepared remarks are circulated to all sections of the ABA for approval, comment, and opposition.

In this case in particular, we used an expedited form of the blanket authority. It went to a selected group of the sections for approval because this comment period encompassed a major
national holiday. I only mention that because we'd encourage both the Office and PPAC not to schedule over holidays. These 30-day periods are a true fire drill for us. We obtained our BA authority, blanket authority, yesterday afternoon and submitted our letter of comments to the Director yesterday afternoon, as well.

Let me get to my comments. These are the areas that I'm going to summarize from our letter. I'm going to add one to that that's not on the agenda and that is, we are already on record as supporting efforts by the Patent Office to update its information technology systems, including its website and database systems. We think that's essential with Patent Office to both fund those, capitalize those improvements, and prioritize those in order to fulfill its mission. We have commented on that previously and supported those systems.

We're also on record in opposition to the Shared Systems and Shared Services Initiative, which we feel diverts funding and attention from
the Patent Office efforts to improve its systems.
We think the Patent Office systems are unique and
specially tailored to the needs of the patent
practitioners and the PTO, and we'd encourage the
Patent Office to continue its efforts to improve
those systems.

Let me address the things I have listed
on here. We generally support the efforts to use
the DOCX filing systems. We think the surcharge
for the DOCX filing systems would encourage
further efforts at cost-effective and reliable and
non-burdening formats for use by the Patent
Office. We do say -- we do think, however, that
most practitioners can comply, but there are still
entities and small inventors that may not have
access to DOCX systems, so we'd encourage the
Office to apply the surcharge solely to initial
filings on applications and not to every paper
filed in subsequent prosecution. At some point,
it be -- it switches from becoming an incentive to
a real penalty.

Proposed fee increases of up to 5
percent proposed by the Patent Office, we
generally support those in the section as an
effective way to recover the fees and costs that
are needed by the Patent Office for the enumerated
USPTO objectives. We note that those are
effectively a 1.6 percent annual increase, as the
Patent Office has said, and we generally support
those as reasonable and necessary for the PTO
objectives.

The restructuring of issue and
maintenance fees, we believe that this is also a
reasonable way for the Patent Office to recover
its initial examination and search costs and to
recover those a little sooner in the process. We
appreciate the fact that this is charged against
large entities and protects small entities and
small inventors.

There are some proposed fee increases by
the Patent Office that we do not support. In
particular, we do not support those that are more
than a hundred percent fee increases. Those work
as a penalty for independent inventors and small
businesses to the extent they're applied against
those groups. The 525 percent increase in late
payment surcharge for maintenance fees is one of
those.

   We don't disagree with an incentive to
get people to pay their maintenance fees early,
but we think that becomes a substantial penalty.
We would suggest that if a surcharge of this -- of
any size is necessary to further encourage payment
of maintenance fees, that the PTO provide notice
to a patent owner prior to late payment of the
surcharge rather than the method now, that they
receive a notice of a surcharge that's due after
it's (laughs) already become due.

   The hundred-and-twenty-two percent
increase that's proposed for examination of design
applications, we don't generally support quite
that high an increase. We understand the Office
need to recover the costs of expedited
applications, but design applications generally
require much less activity that a expedited
utility application -- and in addition, an
expedited design application, the practitioner
must supply additional search results and other
materials that improve the examiner's ability to
complete that examination. So, we'd ask the
Office to reconsider that's such a large increase.

And finally, I want to comment on the
proposed active patent practitioner fee. We have
a number of concerns and questions regarding the
proposed practitioner fee and a lot of those
concern and center relating to OED activities and
the fees used for OED support. For one thing, we
note prior fee increases institute last January
that were to cover OED services. We think some of
these may be the same services that are discussed
here and we need additional information to
distinguish those.

We'd like to see some apportionment
between new fees -- of the new fees proposed
between OED fees and enrollment fees so that we
understand where the distinction is between what's
being supported at OED and where the enrollment
fees go. And we'd like some further data on the
projected startup costs for this program and the
number of participants that the Patent Office
expects to be involved. We'd also like to see
some apportionment of these new fees for OED
nonpatent-related activities. OED has
responsibility, for example, for trademark
practitioners before the Patent Office and we have
corresponding concerns about patent practitioner fees being used
to underwrite costs related to trademark groups
and other groups that appear before the Patent
Office.

We'd like to see some further details
regarding the structure and cost of accreditation
in the CLE tracking programs proposed by the
Patent Office. Patent -- registered patent
attorneys are generally subject to both discipline
and CLE requirements in most of the states in
which they're members of the bar, so we'd like to
see some additional information as to how these
costs would compare and how the Office intends to
structure the accreditation in CLE tracking.

And we also have some concerns and would
like to see some further information regarding the pro hac vice fee, whether that's tailored to cover all costs of such admission. It may be inline with what's charged in district courts and other places, but we'd like to know that it has some bearing on what the actual costs of administering such a system would be.

A full text of our comments is available in our letter to the Director. We thank, again, the PPAC for this opportunity to appear and we may have further comments as the rulemaking process proceeds.

MR. WALKER: Thank you very much, Mark. Appreciate it. We have two more speakers. Next, the Chair recognizes Paul Morinville. Paul.

MR. MORINVILLE: Hi, I'm Paul Morinville, Founder of U.S. Inventor, and we are independent small inventors. A lot of people claim to be those, but we are actually those people. I'm an inventor and our entire organization of 13,000 is inventors and startups that are -- that make their living because of the
strong patent system. And I'd like -- since I have this microphone, I would like to take this opportunity to thank you, Director Iancu, for putting a focus on the PTAB and on the abstract idea and thank President for appointing you.

My comments are not as directed towards the specifics of the fee increase, but I would like to go through a little bit of history. The 2013 fee increase under the prior Administration was originally listed as economically significant. Economically significant rulemaking means that it has an effective over a hundred-million dollars a year in the economic effect. Money leaves the economy.

In a policy innovation, that was changed to a transfer. So, a transfer, a payment from one party to another in the economy has nothing to do with an economic effect. And I think that's a pretty original innovation in policy because who's the second party? It leaves me as an inventor and goes to someone. If it has no economic effect, it goes to someone else in the economy. That's not
where it goes. It goes to the Treasury; it's a
tax. Paul Ryan even calls it a tax. So, it is
not economically neutral. It is significant
rulemaking.

This most recent fee increase from 2016
-- and I think this might still be the same fee
increase we're talking about now -- was originally
submitted as economically significant. But when
they entered it -- when the Patent Office entered
it into the Federal Register, it was not
registered as economically significant. So,
anybody looking for rulemaking in the transition
to the Trump Administration could not find it. We
filed comments and it was put there.

The other things that we filed comments
on is the economic evaluation that was performed
under that rulemaking, only considered large
entities and did not consider small entities.
That's pretty important because small entities,
little guys like Josh Malone, who is here, like
me, like the Members of U.S. Inventor, are the
primary job creation engine of this country. I
mean, you're going to raise fees without even considering economically whether or not that affects them. The economic considerations need to be beyond just whether the inventor can pay it. But if they don't pay it, what happens? They don't -- they can't get funding to start a company, there's a, you know, they go to China, they go other places. And that economic analysis did not happen.

Money's transferring from the -- from examination to the PTAB to fund the PTAB. I find (laughs) this -- not only is it illegal under the America Invents Act, but I find it completely absurd that you would take money where you're creating the asset that can attract capital to start companies to the (laughs) very entity that destroys the asset.

MR. WALKER: Paul, just -- I mean, this is really focused on the specific fees that we're talking about. I think I see the context there, but can you just keep your comments focused on that? And some of the language you use doesn't
strike me as directly for this fee setting hearing.

MR. MORINVILLE: Well, it really does. This does, because we're increasing fees again for the small entities on examination. And we are also increasing them on the PTAB, but if you file for a PTAB and they don't answer to you, you get 75 percent of that money back. So, (laughs) I think that the shift needs to be on the PTAB and there needs to be an economic evaluation before we increase fees on small entities.

There are other comments -- we got a lot of other comments on the specifics of what these fees are and these extra fees, but I'm going to reserve that to put in on paper. Thank you.

MR. WALKER: Okay. Thank you, Paul. Our last speaker is Josh Malone. So, Chair recognizes Josh.

MR. MALONE: Thank you. My name's Josh Malone and I'm an inventor; I'll be speaking for myself today. I think it's somewhat representative of experience of a lot of small
entities and stakeholders.

The hearing today has been about fees. The information provided by the Patent Office and the previous Witnesses has been very helpful and thorough as to the fees and how they are used. I will touch on the fees, but I will focus my comments on the interrelated concept of value.

How do we determine if the fees are too high or too low? What is the right number? The number -- the answer to the number is tied to the value of the products or services provided in exchange for the fees.

As business owners and consumers, we think about cost in relation to value. It's not a question of the absolute cost, it's a question of the value. It all depends on what you get. We go to Walmart and you want a value, so you get a product that it may not be very reliable and it may not last, but it's cheap. So, if we want low costs, we go to Walmart. On the other hand, if we want an extremely high-quality durable product perhaps for commercial use instead of a consumer
use, we pay more for that version of the product. It would be a high cost. But both approaches might result in a similar value.

What we don’t want to do is pay a high
cost for a low-quality or unreliable product.
This discussion about the fee increase has thus far been based on an unrealistic and aspirational view of the value proposition. So, the budget for the Patent Office for 2019 is $3.6 billion funded primarily by these fees, along with the reserve fund that was discussed. So, is $3.6 billion too much or too little for the product that’s being provided? What do we get?

As a small entity when I applied for my patents, the fees were about $1,200. Application, examination, search issuance. So, in one regard that’s not a lot of money. $1,200, I was able to pay that. You have to compare that to, “What do I get for the $1,200?” If you ask Tom Pierson, the Founder and CEO of TAS Energy in Houston, one of the inventors profiled in the new documentary and validated the shredding of the U.S. patent system,
he points to his wall. Our first one, our second
one, our third one, our fourth one, all
invalidated.

These were his patents for his invention
of a high-efficiency turbine power plant, an
invention that he commercialized and built a
company around. His patents were nothing more
than a plaque that he hung on the wall.
Reflecting on his useful -- useless patents and
millions of dollars he had wasted, he commented,
"I guess it's better than having an empty wall."
Even at $1,200 that's an overpriced plaque. Of
course, he paid much more than $1,200. It was
several more thousand in filing RCE issuance,
reissue, and maintenance fees and several million
in attorney fees at the PTAB, all wasted. The PTO
fees were much too high for these patents. But if
he had received a real patent backed by the full
faith and credit of the United States government,
he would have had a good value. He would have
been happy to pay the higher fees that are being
proposed today. And we all would.
The agency fees are one aspect of this. Of course, the legal fees that go along with it are a concern, as well. Lisa's organization, the AIPLA, did a study a couple of years ago and determined that the median legal cost to defend a patent in the PTAB and subsequent appeal is $350,000. Tom Pierson had four of those, I've had eight. David Monroe had 28; that sunk his San Antonio company. Patrick Ross at Smart Flash had 68. (Inaudible) Emphany had a hundred-and-twenty-five, at $350,000 each. How about the fee increase include a fund for these inventors to defend their patents or an advocate of the PTO to defend the examination on behalf of inventors of modest means? $350,000 is the median and I can tell you that's not enough. The best PTAB lawyers and experts cost much more than that and they lose more often than not in the PTAB. They cannot protect us from endless attacks. Very, very few applicants have this kind of money and very, very few applicants understand that obtaining a real
patent, one approved by the PTAB, costs $350,000. They will learn about this fee increase and they will believe that they can get a patent that protects their invention for $1,400, a $200 increase.

Why isn't the Patent Office defending the patents that is issued? Should the fees come with a defense of those patents against the tax by would-be infringers? I understand the America Invents Act and I understand the creation of PTAB, but this is not error correction, this is destruction. These are phony patents. It seems to me that the Patent Office should be defending the patents. It's very shocking and incredulous that the lawyers that work here -- I'm talking about the PTAB APJs and the Solicitor's Office -- spend almost all their time attacking patents instead of defending them.

This is driving our cost to many orders of magnitude greater than the proposed fees that we're talking about today. So, back to the question of value. It all depends on what we get.
Does this proposed fee increase come along with
the full faith and credit of the United States
government behind the patents? Then I say
fantastic, this is a great proposal, I
wholeheartedly support it. On the other hand, is
this fee increase for more plaques to hang on the
call like Tom Pierson did? That's kind of silly.
Really, I think if you look at the PTAB
statistics, there's a lot of numbers floating
around. And I attend and listen to these
quarterly meetings at PPAC and I see the reports
and frankly, they're very speculative, they're
based on a lot of assumptions.

There's a very simple approach to
whether we can depend on the patents that are
being issued or not. The PTAB has issued 1,998
final written decisions as of yesterday. 1,690 of
those had one or more claims invalidated. 305
patents survived; that's an 85 percent defect
rate. And that's the only number we have. All
these reports on settlements, non-institutions,
pending cases are all irrelevant; they're all
unknown. They're all plaques.

The other $2.5 million unexpired patents, all unknown, standing here today. All in
limbo, standing legal right, but they are good enough to hang on the wall. From what I can tell,
they do not come with the full faith and credit of the United States as to any legal right in the
claimed invention.

And even if you don't accept my numbers -- and you should, because these are the only
numbers we know anything about -- there's 305 patents that have passed PTAB mustard, but they're
still exposed to further attacks, so that's the best case. But maybe it's 70 percent, 60 percent,
50 percent. Whatever the number is, it's horrendous. No business could survive a scenario
where their product reliability level is in the 50 percent range. For more than half the product
that's going out the door, signed and sealed, is meeting the requirements.

So, what kind of business or agency would propose a fee increase when their defect
rate is in the 50 to 90 percent range? If that is 
what we are getting with this fee increase, this 
is a pretty outrageous proposal to increase the 
fees. Given the current reliability levels as 
determined by the PTAB, the fees are incredibly 
excessive. I mean, how much is an invalid patent 
worth? Fifty dollars, a hundred dollars? And 
that's what these are.

The millions of patents that are printed 
every Tuesday in batches of 5 or 6,000, they have 
a pretty new cover, you can hang it on the wall, 
but it doesn't take $3.6 billion to produce this. 
Let's lower the fees, let's pay the cost of 
printing, let's switch to rubber stamps. If the 
Patent Office is not going to back its product, 
they have no business increasing the fees.

Now, I know this has been uncomfortable 
and probably from the moment you heard I was 
testifying, it -- you get a little hot under the 
collar. And it's a damper on what, Director 
Iancu, you've been casting as, properly, 
leadership for restoring predictability,
reliability of the patent right. And I believe in
that vision. We're not there yet. It's not
comfortable when the child in the crowd tells the
emperor that he has no clothes; no one wants to be
in that room. But this is not an empire, this is
America. And you guys know deep down that what
I'm saying is true. And you don't have to accept
it; it's not just your job, it's not just your
constituent's job.

There's going to be closing remarks here
in a minute. Your hands are not tied. You can go
with me over to the capital. I can ask
Congressman Issa to give us a hearing on this
situation. Director Iancu's right. He's doing
everything he can here. And Congress wants to sit
around and kick this down the road and wait until
next session, maybe they can clean it up. But I
want you to go with me.

Mark, I want you to go with me. Peter,
I want you to go with me. Bernie, Director Iancu,
Mr. Hirshfeld, Lisa, Mark, Paul, we'll go there.
We'll tell Congressman I said that we're trying to
set fees for the Patent Office and we need to tell
these applicants what they're going to get. "Give
us a hearing. Before you go home and retire, give
us a hearing about the patent system and how we
need to fix it." We need to do it next week or
the week after.

I'll be here afterwards. Please join
me. Thank you.

MR. WALKER: Okay. Thank you, Josh.
Okay. Thanks to all the members of the public who
were able to join us today to provide scheduled
testimony. As I mentioned earlier, time
permitting, we would have unscheduled
participation, unscheduled testimony, but we're
already over our scheduled time of 9:00 to 11:00
a.m., so I'm going to say that we are not going to
have any unscheduled testimony at this hearing.

Anyone who has further comments, as we
said all along, you've heard it from everybody,
the PTO and PPAC really want to hear what you have
to say, so I strongly emphasize that on our
behalf. Please comment. As Dan and others have
mentioned, the deadline for comments is September 13th. Want to have your input and so please comment soon so that PPAC can do its statutory job to prepare a report and provide guidance and input to the Patent Office on this fee adjustment proposal.

So, with that, I bring the meeting to a close. Thank you all for joining us. So, meeting is over.

(Whereupon, at 11:05 a.m., the PROCEEDINGS were adjourned.)
CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Carleton J. Anderson, III

(Signature and Seal on File)

Notary Public in and for the Commonwealth of Virginia

Commission No. 351998

Expires: November 30, 2020