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The Honorable Andrei Iancu  
Under Secretary of Commerce for Intellectual Property  
Director of the United States Patent and Trademark Office  
U.S. Patent and Trademark Office  
600 Dulany Street  
Alexandria, Virginia 22314

***Comment of the Center for Individual Freedom on the U.S. Patent and Trademark Office's Proposed Changes to Claim Construction Standard Used in Patent Trial and Appeal Board Proceedings (Docket Number PTO-P-2018-0036)***

Dear Under Secretary Iancu:

On behalf of over 300,000 supporters and activists across the nation, the Center for Individual Freedom (CFIF) hereby responds to the United States Patent and Trademark Office's (USPTO's) request for comments on Proposed Rule 83 F.R. 21221, which would alter the claim construction standard for inter-parties review (IPR), post-grant review (PGR) and the transitional program for covered business patent proceedings (CBM) before the U.S. Patent Trial and Appeal Board (PTAB).

CFIF strongly supports the proposed changes for the reasons set forth below.

As an initial matter, CFIF supports the proposed replacement of the "Broadest Reasonable Interpretation" (BRI) standard currently employed by the PTAB in IPR, PGR and CBM proceedings with what's known as the Phillips Standard, which is the standard used by U.S. circuit courts and the International Trade Commission (ITC) to analyze patents. Doing so will ensure greater fairness and predictability to our overall patent system, which will in turn maximize judicial efficiency and minimize economic waste that currently exists.

In contrast to the BRI Standard's overly broad construction, which often allows adjudicating bodies to interpret patent coverage more broadly than intended at conception, the Phillips Standard construes a patent claim from the perspective of a person of ordinary skill in the art and in light of the specification and procedural history of that patent. Accordingly, the Phillips Standard replaces a focus upon the most expansive possible construction with a greater emphasis upon the actual meaning, which will provide greater consistency and predictability in PTAB proceedings.

In patent construction, as in all legal realms, interpretive consistency across adjudicatory bodies is of paramount importance. The proposed changes will encourage that interpretive consistency and thereby heighten patent policy reliability. In turn, that increased consistency and predictability will benefit the U.S. economy by boosting innovator confidence, which is an important factor for any inventor's motivation to develop an invention and bring it to market. Simply put, patent holders depend upon

stability and predictability to mitigate risk aversion, which consequently stimulates the innovative impulse and encourages investment of time and resources into new technology development.

Currently, the inconsistency in applying the BRI and Phillips standards depending upon the forum used unfairly favors patent challengers, who can on the one hand advocate a broader interpretation before the PTAB but then exploit a narrower standard in a district court. That forces patent holders to litigate different claim construction standards, causing needless waste and unpredictability.

Indeed, nearly 90% of patents litigated using the America Invents Act (AIA) in proceedings have been subject to federal court litigation, which only serves to incentivize patent challengers to bring multiple claims against the same patent holder in multiple forums. That not only undermines patent predictability, but wastes judicial and administrative resources, not to mention litigation costs for involved parties. The proposed changes will reduce the incentive for duplicative challenges in multiple forums, and thereby increase the swiftness of adjudication and patent certainty regardless of result.

Accordingly, CFIF supports the proposed adoption of the Phillips Standard, including in all pending proceedings in which the PTAB possesses jurisdiction to reduce the incentive to game the system by filing claims before or following the change. Thank you very much for your attention to this important matter, and please feel free to contact me with any additional questions or concerns.

Sincerely,

Timothy Lee  
Senior Vice President for Legal and Public Affairs