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FAQs for Interim Processes for PTAB Workload Management

On March 26, 2025, the United States Patent and Trademark Office (USPTO or Office) issued a [memorandum on interim processes for PTAB workload management](#) (Process Memorandum). Under the Process Memorandum, decisions on whether to institute *inter partes* reviews (IPR) and post-grant reviews (PGR) will be bifurcated between (i) discretionary considerations and (ii) merits and other non-discretionary considerations.

To help facilitate briefing, this page provides answers to frequently asked questions (FAQs) the Office has received about the bifurcated process and the discretionary considerations. The Office may update the FAQs after some experience with the interim processes, so please check back frequently for updates. The information presented in the FAQs controls the interim processes.

FAQs

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▸ Availability and timing

▼ Procedures/processes

8. What procedures will the Director follow if a patent owner timely files a discretionary denial brief?

The Director will receive each petition, discretionary denial brief, opposition brief, and POPR, as well as any evidence the parties have made of record in support of their papers. Similar to the Director Review process, once received, the Director will determine, in consultation with at least three senior PTAB judges who will be separate from judges addressing the merits, whether discretionary denial is appropriate, as set forth in the Process Memorandum. In deciding whether to exercise discretion to institute IPR, the Director may consult with other USPTO employees as needed, as long as those individuals do not have a conflict of interest.

(UPDATED May 7, 2025) When parties present arguments regarding the strength of the merits, the Director will consult with USPTO personnel with relevant technical expertise.

Absent good cause, the Director will issue a decision on discretionary considerations within 1 month of the due date of the last relevant paper filed. The Director's decision will explain why the Director has decided to exercise discretion to deny institution or why a discretionary denial is not appropriate.

9. In cases where the bifurcated process is available, will the Director issue a decision on discretionary considerations in every case, or only those where patent owner files a discretionary denial brief?

If a patent owner chooses not to file a discretionary denial brief, the Director will not issue a decision on discretionary considerations. In that situation, the Office will enter a notice into the docket indicating the case is now before a Board panel to consider the non-discretionary issues.

After such a notice is entered, a Board panel will issue a decision on institution addressing the merits and other non-discretionary considerations the parties have raised in the petition, a POPR, and any additional briefing that the Board panel has authorized. Unless otherwise authorized by the Director, the Board panel will not address discretionary considerations, except where the petition presents an insufficient number of challenges that meet the reasonable likelihood standard indicating that institution is an inefficient use of resources, as explained in *Chevron Oronite Co. LLC v. Infineum USA L.P.*, IPR2018-00923, Paper 9 (PTAB Nov. 7, 2018) (informative) ("*Chevron*") and *Deeper, UAB v. Vexilar, Inc.*, IPR2018-01310, Paper 7 (PTAB Jan. 24, 2019) (informative) ("*Deeper*").

UPDATE

10. In determining whether to exercise discretion to deny institution, is the Director limited to the arguments the parties raise in their briefs?

No, the Director has broad authority to determine whether to exercise discretion to institute an IPR or PGR. While the Director ordinarily will rely on facts and circumstances that the parties raise in their briefs, the Director will consider additional facts and circumstances where appropriate, for example, to maintain consistency with discretionary decisions that the Director has already issued, where there are facts and circumstances within the purview of the Office or Office operations that the parties are not in a position to raise, or where there are facts and circumstances in the record or in the public domain that are relevant to the determination.

11. How is responsibility for institution decisions allocated during the bifurcated process?

Under the bifurcated process, the Director retains authority over institution decisions but delegates certain responsibilities depending on whether a patent owner files a discretionary denial brief.

If a patent owner timely files a discretionary denial brief, unless the Director states otherwise, the Director retains responsibility for resolving whether the proceeding should be denied on discretionary grounds.

If the Director issues a decision determining that discretionary denial is not appropriate, responsibility for preparing the institution decision on the merits and other non-discretionary issues is delegated to a panel of the Board. The Board panel will typically have 2 months to issue the decision on institution.

If a patent owner does not file a discretionary denial brief, responsibility will pass to a Board panel the day after the due date for such a brief. In that situation, after the due date for a discretionary denial brief has passed, the Office will enter a notice into the record indicating the case is before a Board panel.

If a party has a question about a proceeding before the due date for a discretionary denial brief, they may contact the Board at 571-272-9797, from 8:30 a.m. to 5 p.m. ET on weekdays, or email Director_Discretionary_Decision@uspto.gov.

12. What are examples of “discretionary considerations” versus merits or other non-discretionary considerations, as mentioned in the Process Memorandum?

The Process Memorandum includes a non-exhaustive list of issues that may be raised in discretionary briefing. Parties are encouraged to address any fact or circumstance they believe bears on the Director’s discretion to institute, including reasons not discussed in current Board precedent or in the Process Memorandum.

The “merits” considerations refer to whether there is a reasonable likelihood that a petitioner would prevail with respect to at least one of the claims challenged in an IPR petition, or whether it is more likely than not that at least one of the claims challenged in a PGR petition is unpatentable or the PGR petition raises a novel or unsettled legal question that is important to other patents or patent applications.

In addition to the discretionary considerations involving whether a petition presents a sufficient number of grounds/challenges of claims that meet the reasonable likelihood standard, as discussed in FAQ 9 (see *Chevron* and *Deeper*), non-discretionary considerations include those relevant to, for example, 35 U.S.C. §§ 311, 312, 315(a), (b), and (e), 322, and 325(a) and (e). Such considerations also may include, for example: (1) claim construction issues (see, e.g., *Cambridge Mobile Telematics, Inc. v. Sfara, Inc.*, IPR2024-00952, Paper 12 (PTAB Dec. 13, 2024)); or (2) whether a petition meets the requirements of 37 C.F.R. § 42.104(b) (see, e.g., *Adaptics Ltd. v. Perfect Co.*, IPR2018-01596, Paper 20 (PTAB Mar. 6, 2019) (informative)).

13. If a patent owner argues merits in a discretionary denial brief, and the Director determines that discretionary denial is not appropriate, will the Board panel consider merits arguments made in a discretionary denial brief or related briefing, such as an opposition brief by a petitioner?

No. Once the Director determines that discretionary denial is not appropriate, the Board panel will not consider papers filed by parties relating to discretionary considerations. Parties must make all their arguments (citing evidence, as needed) on the merits and other non-discretionary considerations in the petition, POPR, and any authorized reply or sur-reply. A Board panel will consider only arguments and evidence cited in those papers when determining whether to grant or deny institution.

However, the Director will consider the merits in the merits briefing if the parties ask the Director to do so. Parties should not repeat their merits arguments verbatim but should briefly explain why the merits are relevant.

14. If the Director's discretionary consideration decision addresses the strength of the merits in a petition (e.g., as part of *Fintiv* factor 6), is the Board panel bound by such findings or conclusions in rendering a decision on institution?

A Board panel is not bound by merit findings or conclusions in a discretionary consideration decision but must explain in the decision on institution why the panel's findings and/or determination are different (citing the parties' evidence of record as relevant), if that occurs.

15. When should a petitioner file a *Sotera* or *Sand* stipulation if they wish to do so? What happens if a petitioner files a *Sotera* or *Sand* stipulation after the Director issues a decision on discretionary considerations?

A petitioner should file a *Sotera* or *Sand* stipulation as soon as practicable, so that a patent owner may address the impact of the stipulation in its discretionary denial brief. The Director will take into account whether the stipulation materially reduces overlap between the proceedings. Where the petitioner is relying on corresponding system art in a co-pending proceeding and/or several other invalidity theories, a stipulation may not be particularly meaningful because the efficiency gained by any AIA proceeding will be limited.

16. Will cases involving motions for joinder be handled differently with respect to processes or timing?

No, such cases will be handled the same way as discussed above. Thus, in a proceeding involving a motion for joinder, if a patent owner files a POPR (or the deadline for filing a POPR passes) after March 26, 2025, the bifurcated process is available. By contrast, if a patent owner had filed a POPR (or the deadline for filing a POPR had passed) on or before March 26, 2025, the bifurcated process is not available.

A decision on whether to grant a joinder motion and join a party to an instituted proceeding will be decided by a Board merits panel. To the extent a party disagrees with the Board's decision, that party may file a request for Director Review.

17. What is the process for requesting a reply brief to a petitioner's discretionary denial opposition brief?

A patent owner who wants to request a reply should send an email request, with a copy to counsel for all parties, to Director_Discretionary_Decision@USPTO.gov.

18. Who determines whether good cause exists for a petitioner to file a reply to a POPR or for a

18. Who determines whether good cause exists for a petitioner to file a reply to a POPR, or for a patent owner to file a sur-reply to such a reply?

The Board panel. For example, as noted in the Consolidated Trial Practice Guide (Nov. 2019) (pp. 51–52), submission of patent owner testimonial evidence at the preliminary stage may warrant granting the petitioner a reply to such evidence. A request to file a reply to a POPR must make a showing of good cause. A decision concerning whether the petitioner will be afforded a reply and the appropriate scope of such a reply rest with the Board panel.

19. Who decides pro hac vice motions and other procedural motions that do not relate to discretionary considerations?

The Board panel will decide procedural motions that do not relate to discretionary considerations regardless of when those motions are filed. To facilitate resolution of procedural motions, the PTAB will assign a Board panel to the case before the Director issues a decision on discretionary decisions. That Board panel will decide all procedural motions.

› Briefing requirements

› Requests for rehearing by the Board panel or Director Review

› Conflicts of interest

› New paper types for discretionary denial briefing

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