

May 21, 2013

The Honorable Sylvia Mathews Burwell
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Negative Impact of Sequestration on USPTO Funding and Operations

Dear Director Burwell:

I am writing on behalf of the American Intellectual Property Law Association (AIPLA) to express our serious concerns regarding sequestration as it may apply to the U.S. Patent and Trademark Office (USPTO).

AIPLA is a national bar association with approximately 15,000 members who are primarily lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property, all of whom have a vital interest in a strong and efficient Patent and Trademark Office.

The USPTO is a unique agency in that its operations budget depends solely on user fee collections for the services it provides. It is vitally important for the USPTO to have full access to all its fee collections, to be able to do the best job possible to help secure and maintain our intellectual property system as a key economic driver to attract and protect investment in new technology.

Moreover, and perhaps most importantly, the ability of the USPTO to retain access to all of its fees was at the heart of the Leahy-Smith America Invents Act (AIA), signed into law by President Obama only 20 months ago and strongly supported by his Administration during the legislative process. The USPTO is in the critical early stages of AIA implementation, which includes sweeping changes to USPTO procedures to improve patent quality while promoting a more efficient patent system. The hoped-for improvements from the AIA are starting to be felt as new examiners are hired to tackle the backlog of pending patent applications, essential new IT systems are being developed, and new administrative procedures and proceedings are put into place. The USPTO has already made known some of the negative impacts which sequestration will have on its work, and any delay in these improvements represents a major step back from the commitment of the Administration to the AIA and a fundamental challenge to the innovation and job creation these improvements represent.

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Key to broad, bipartisan support for the AIA was a recognition of the importance of a fully funded USPTO. Toward that end, Congress sought to protect the Office from the negative impacts of uncertain funding and limited fee access, which severely hampered the Office in years past, by creating a Patent and Trademark Fee Reserve Fund. Under Section 22 of the AIA, any fees collected in excess of the appropriated amount for a given fiscal year were to be deposited in the Reserve Fund, and only the USPTO would have access to those funds. This was a significant aspect of the law and was the result of considerable negotiation. In that process, it engendered specific and strong support from the Administration and both House and Senate leadership.

Furthermore, to help fund the new programs and initiatives of the AIA, Section 11 included a 15% surcharge on patent fees, and Section 10 granted the USPTO the authority to set the fees for patent and trademark services. A new patent fee schedule, which included increases for numerous patent services, went into effect on March 19, 2013. Support for these fee increases by AIPLA and others in the user community were based on the understanding that the funds would be available solely to the USPTO to help “implement a sustainable funding model, reduce the current patent application backlog, decrease patent application pendency, improve patent quality, and upgrade the Office’s patent business information technology (IT) capability and infrastructure.” 78 Fed. Reg. 4212 (January 18, 2013).

Reducing funding now so early in the legislation’s implementation, and returning so soon to a discredited funding model, not only contradicts the understandings and agreements that were the foundation of the passage of the AIA, but also undoubtedly risks undercutting major initiatives designed to continue improving the patent system, especially those mandated by the AIA. We understand that the argument might be made that these sequestered funds were never in excess of the appropriated amount and therefore available for sequestration, but believe this is an inappropriate reading of the sequestration process and USPTO funding, and is directly contrary to the spirit of the AIA and the Administration’s position on full access to the fees advocated during its negotiation.

We also believe that the interpretation of the sequestration statute by the Office of Management and Budget (OMB) as it applies to the USPTO is inaccurate and will have a compounding impact on the USPTO’s operations for FY 2013 and into the future. We respectfully request that OMB’s interpretation be amended or otherwise altered to allow for full access by the USPTO to all fees paid into it.

Specifically, we have serious doubts that the USPTO is lawfully subject to sequestration in the first place because it is funded through fee collections, not through government spending. Section 255 of the Balanced Budget and Emergency Deficit Control Act of 1985 (“BBEDCA”) (2 U.S.C. 905) provides a list of exemptions from sequestration including “[a]ctivities financed by voluntary payments to the Government for goods or services to be provided for such payments.” 2 U.S.C. 905(g)(1)(a). A plain reading of the statute suggests that this exemption should apply to the fees collected by the USPTO since they are from voluntary users in exchange for patent and trademark examination and review.

It is our understanding that OMB has attempted to draw a distinction between collections arising from “business-like transactions with the public” and those “derived from the Government’s exercise of its sovereign power.”¹ OMB has cited as examples of the former “services provided to the public (e.g., passports and admission to national parks)” and of the latter “Government regulatory service or Government licenses, [including], for example ... passport fees and patent and trademark fees.”² While this may be an appropriate distinction for governmental accounting purposes, it is a distinction without a difference for interpreting the BBEDCA provision relating to voluntary payments and is not supported by that statute.

This interpretation appears to be contradicted by OMB itself in its text purportedly defining the terms even further.³ Here “sovereign power” is defined as “payments from the public that result primarily from the Government’s exercise of its sovereign power **to tax or otherwise compel payment**” [emphasis added] versus “business-like transactions with the public” which include “payments from the public in exchange for goods and services.” It is quite clear that fees paid to the USPTO are not a tax or otherwise compelled, but are indeed voluntary.

Alternatively, even if USPTO funds were lawfully subject to sequestration, we are concerned about the procedures being applied to those funds. We understand that OMB has changed the methodology used to calculate the sequestration amount, specifically from using the President’s FY13 Budget Request as the baseline for determining the amount of spending authority subject to sequestration, as it was originally announced⁴ and which is apparently still applying to non-fee funded agencies, and is now applying the sequestration formulae to the actual fees collected on a daily basis. We believe that this unjustifiably restricts the spending authority of fee funded agencies and impacts them asymmetrically and unfairly relative to non-fee funded bodies. We respectfully request that the justification for this change be made available, and that OMB reverse this position and apply the sequestration (if at all) to the original FY13 Budget Request.

It is our further understanding that OMB has directed that these sequestered fees will be reserved in the same general fund in the Treasury where over \$2 billion of user fees paid over the last 20 years have been reserved, and where they are essentially unavailable to the USPTO. If any USPTO funds are sequestered, we strongly recommend that they be reserved in the Patent and Trademark Fee Reserve Fund where they would have the same effect as sequestration as placing them in the General Treasury, but would be available later to the USPTO when the sequestration requirements have been eliminated.

¹ <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/receipts.pdf>, p. 227.

² Ibid.

³ http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s20.pdf, pp. 27-28 of Section 20.

⁴ “OMB Report to the Congress on the Joint Committee Sequestration for Fiscal Year 2013”, March 1, 2013, p. 12; “Budget ‘Sequestration’ and Selected Program Exemptions and Special Rules, Congressional Research Service, March 22, 2013, p. 4.

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President Obama recognized the vital need for resources at the USPTO both when he signed the AIA in September 2011, and when he released his budget for FY 2014 on April 10, 2013, stating that the Administration will, “[c]ontinue to support the U.S. Patent and Trademark Office’s efforts to accelerate and improve patent processing by providing full access to its Fee collections.” OMB’s apparent reinterpretation of sequestration’s impact on the USPTO runs counter to that goal, counter to the agreement underlying the adoption of the AIA and the Administration’s strong support for it, and will send the wrong message about the Administration’s support of the innovation community.

Sincerely,



Jeffrey I.D. Lewis
President
American Intellectual Property Law Association

cc: The Honorable Bob Goodlatte Chairman House Judiciary Committee	The Honorable Patrick Leahy Chairman Senate Judiciary Committee
The Honorable John Conyers, Jr. Ranking Member House Judiciary Committee	The Honorable Chuck Grassley Ranking Member Senate Judiciary Committee
The Honorable Howard Coble Chairman House Subcommittee on the Courts, Intellectual Property and the Internet	The Honorable Melvin Watt Ranking Member House Subcommittee on the Courts, Intellectual Property and the Internet
The Honorable Harold Rogers Chairman House Appropriations Committee	The Honorable Barbara Mikulski Chairwoman Senate Appropriations Committee
The Honorable Nita Lowey Ranking Member House Appropriations Committee	The Honorable Richard Shelby Ranking Member Senate Appropriations Committee

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The Honorable Frank Wolf
Chairman
House Appropriations Subcommittee
on Commerce, Justice, Science and
Related Agencies

The Honorable Rebecca M. Blank
Acting Secretary of Commerce

The Honorable Louis J. Foreman
Chair
Patent Public Advisory Committee

The Honorable Chaka Fattah
Ranking Member
House Appropriations Subcommittee
on Commerce, Justice, Science and
Related Agencies

The Honorable Teresa Stanek Rea
Acting Under Secretary of Commerce
for Intellectual Property and
Acting Director of the United States
Patent and Trademark Office

The Honorable Maury M. Tepper, III
Chair
Trademark Public Advisory Committee