



# Interim process for Director review

Updated July 20, 2022. The United States Patent and Trademark Office (USPTO) issued a Request for Comments (RFC) on [Director review, Precedential Opinion Panel \(POP\) review, and internal circulation and review of Patent Trial and Appeal Board \(PTAB\) decisions](https://www.federalregister.gov/documents/2022/07/20/2022-15475/request-for-comments-on-director-review-precedential-opinion-panel-review-and-internal-circulation) (<https://www.federalregister.gov/documents/2022/07/20/2022-15475/request-for-comments-on-director-review-precedential-opinion-panel-review-and-internal-circulation>), as the USPTO works to formalize the Director review process.

Until the process is formalized, the existing, interim Director review process will remain in place with a few additional [suggestions](https://www.uspto.gov/patents/patent-trial-and-appeal-board/interim-process-director-review#) (<https://www.uspto.gov/patents/patent-trial-and-appeal-board/interim-process-director-review#>) by the Director. The interim process has allowed the USPTO to quickly and efficiently implement [United States v. Arthrex, Inc](https://www.supremecourt.gov/opinions/20pdf/19-1434_ancf.pdf) ([https://www.supremecourt.gov/opinions/20pdf/19-1434\\_ancf.pdf](https://www.supremecourt.gov/opinions/20pdf/19-1434_ancf.pdf)). The interim process will apply to Director review of final written decisions of the PTAB in inter partes review and post-grant review proceedings and, to the extent some are still pending, covered business method patent review proceedings.

The interim process furthers the USPTO's goal of promoting innovation through consistent and transparent decision-making and the issuance and maintenance of strong patents. The Director review process complements three other procedures the USPTO has in place to promote the same goals: panel rehearing; internal review; and the POP.

A listing of all Director review grants and the status of each request for Director review are listed on the [Status of Director Review Requests webpage](https://www.uspto.gov/patents/patent-trial-and-appeal-board/status-director-review-requests) ([/patents/patent-trial-and-appeal-board/status-director-review-requests](https://www.uspto.gov/patents/patent-trial-and-appeal-board/status-director-review-requests)).

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## ▼ 1. How do I request Director review and what are the requirements?

Any party to a PTAB America Invents Act (AIA) proceeding may request review. Parties may request review by the Director using a process similar to the current rehearing procedures under 37 CFR 42.71(d) and [Standard Operating Procedure 2](https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf) ([/sites/default/files/documents/SOP2%20R10%20FINAL.pdf](https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf)). Parties may request Director review of a final decision by concurrently:

- filing a Request for Rehearing by the Director in the Patent Trial and Appeal Board End to End ([PTAB E2E](https://ptab.uspto.gov) (<https://ptab.uspto.gov>)) system for processing AIA reviews; and
- emailing the USPTO at [Director\\_PTABDecision\\_Review@uspto.gov](mailto:Director_PTABDecision_Review@uspto.gov) ([mailto:Director\\_PTABDecision\\_Review@uspto.gov](mailto:Director_PTABDecision_Review@uspto.gov)) and copying counsel for all parties, notifying the parties and the USPTO of the filing of the Request for Rehearing by the Director.

## ▼ 2. Interplay with panel rehearing requests

Under the interim process, parties are limited to requesting either Director review or a rehearing by the original Board panel. Parties may also request Director review of a Board decision that results from a rehearing grant, but not a Board decision to deny rehearing. Requests for both Director review and panel rehearing of the same decision are treated as a request for Director review only.

### ▼ 3. Interplay with the Precedential Opinion Panel (POP) process

This interim process for Director review does not alter the current POP process. The USPTO will be reviewing the POP process in view of the Director review process and welcomes public suggestions regarding potential changes. The USPTO plans to seek stakeholder and public input on the POP process in the same Request for Comments (RFC) that will seek input on the Director review process. If you would like to provide feedback on the POP process before the release of the RFC, please email feedback to [Director\\_Review\\_Suggestions@uspto.gov](mailto:Director_Review_Suggestions@uspto.gov) ([mailto:Director\\_Review\\_Suggestions@uspto.gov](mailto:Director_Review_Suggestions@uspto.gov)). Please submit all feedback by July 11, 2022.

### ▼ 4. Timing

To satisfy the timing requirements of 37 CFR 42.71(d), the Request for Rehearing by the Director must be filed within 30 days of the entry of a final written decision or a decision granting rehearing by a PTAB panel. A timely Request for Rehearing by the Director will be considered a request for rehearing under 37 CFR 90.3(b) and will reset the time for appeal or civil action as set forth in that rule.

As a general matter, the Director will not consider untimely requests for rehearing of decisions. The Director may, however, choose to extend the rehearing deadline for good cause if a party requests such an extension before the due date for a request for rehearing.

### ▼ 5. Page limits and formatting requirements

The page limit for a Request for Rehearing by the Director is 15 pages, similar to current page limits under 37 CFR 42.24(a)(1)(v). Formatting must conform to the requirements of 37 CFR 42.6(a), including the font type (Times New Roman), font size (14pt) and one-inch margins. A Request for Rehearing by the Director may not introduce new evidence, and, accordingly, exhibits may not be entered in support of the Request for Rehearing.

### ▼ 6. No fees

During implementation of the interim process, the USPTO will not charge a fee for a Request for Rehearing by the Director. The USPTO may consider whether to charge a fee for such requests in the future.

### ▼ 7. No additional evidence or arguments

The Director will not consider new evidence or arguments not part of the official record. Parties should also generally avoid citing cases not cited in the official record. Exceptions are issues of first impression or issues involving intervening changes in the law or USPTO procedures, guidance, or decisions.

### ▼ 8. Scope of review

Under the interim process, parties may request Director review of any issue of fact or law in any final written decision issued in a PTAB AIA proceeding: inter partes reviews, post-grant reviews and covered business method patent reviews. At this time, the Office does not accept requests for Director review of decisions on institution or of ex parte appeal decisions. To request review of other types of decisions, such as institution decisions of AIA proceedings or decisions in ex parte appeals, parties may request review by the **Precedential Opinion Panel (POP)** ([/patents/ptab/decisions/precedential-opinion-panel](https://www.uspto.gov/patents/ptab/decisions/precedential-opinion-panel))), which, by default, includes the Director, the Commissioner for Patents, and the PTAB Chief Judge, as outlined in **Standard Operating Procedure 2** (<https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf>).

#### ▼ 9. Standard of review

Under the interim process, all issues of law or fact are reviewed de novo.

#### ▼ 10. Focusing and Prioritizing Issues

To ensure thorough and timely consideration of each Director review request, the Director strongly encourages parties to provide a priority-ranked list of issues being raised. The list should be provided in the email notifying the parties and the USPTO of the filing of the Request for Rehearing by the Director. Requesting parties may provide a brief explanation of the issue and a brief explanation of the rationale for the prioritized-ranking of the issue. The brief explanations should not exceed a few sentences. Issues that may warrant review by the Director include issues that involve an intervening change in the law or USPTO procedures or guidance; material errors of fact or law; matters that the PTAB misapprehended or overlooked; novel issues of law or policy; issues on which PTAB panel decisions are split; issues of particular importance to the Office or patent community; or inconsistencies with Office procedures, guidance, or decisions. Parties should raise any additional issues sparingly, if at all. If the requesting party believes that the issue presented for Director review is an issue of first impression, the party should indicate in the email requesting Director review that the issue is an issue of first impression.

#### ▼ 11. Responsive or amicus briefing

Under the interim process, decisions are generally made based on the existing record, without the need for responsive or amicus briefing. Responsive or amicus briefing may only be submitted if requested by the Director. If a request for either is made by the Director, the USPTO will set forth the procedures to be followed.

Any amicus brief submitted by a party with whom the Director or other decision-maker has a conflict will be struck. This process is consistent with Federal Rule of Appellate Procedure 29(a)(2) as adopted by the United States Court of Appeals for the Federal Circuit.

#### ▼ 12. Third parties

Under the interim process, third parties may not request Director review or submit comments concerning the review of a decision.

### ▼ 13. Internal review and Director initiated review

The PTAB currently has an internal review team that alerts the Director that a decision may warrant Director review. In the interim process, the Director has discretion to initiate review (*sua sponte*) of a decision, whether or not the parties request review. The Director may initiate review at any point before the filing of a notice of appeal under 37 CFR 90.3 or before the time for filing such a notice has passed. If Director review is initiated *sua sponte* by the Director, the parties to the proceeding will be given notice and may be given an opportunity for briefing. If briefing is requested, the USPTO will set forth the procedures to be followed.

### ▼ 14. How does the Director review process work?

When a party submits a Request for Rehearing by the Director to [Director\\_PTABDecision\\_Review@uspto.gov](mailto:Director_PTABDecision_Review@uspto.gov) ([mailto:Director\\_PTABDecision\\_Review@uspto.gov](mailto:Director_PTABDecision_Review@uspto.gov)), the USPTO catalogs the request and reviews it to ensure compliance with the interim Director review requirements. If the request is compliant, it is entered into the record of the corresponding proceeding as "Exhibit 3100 – Director Review Request." If the request is not compliant, the USPTO will attempt to work with the party making the request to rectify any areas of non-compliance. If the request is not compliant because it was submitted after the deadline (see Timing above), it will not be considered because it will be considered untimely.

The request is then routed to and considered by the Advisory Committee that the Director has established to assist with the process. The Director may also consult others in the USPTO on an as-needed basis, so long as those individuals do not have a conflict. (See How does the USPTO handle conflicts of interest? below). The Director is then presented with each Director review request, the associated arguments and evidence, and the recommendation of the Advisory Committee to determine whether to grant or deny the request. The Director's decision to grant or deny a request will be communicated directly to the parties in the proceeding through PTAB E2E. Director review grants will be posted on the [Status of Director Review Requests](https://patents/patent-trial-and-appeal-board/status-director-review-requests) ([/patents/patent-trial-and-appeal-board/status-director-review-requests](https://patents/patent-trial-and-appeal-board/status-director-review-requests)) webpage. Director review denials can be found on the Director review status spreadsheet, which is updated monthly.

Director review decisions may be issued as precedential, informative, or routine decisions. Routine Director review decisions may be nominated for precedential or informative designation, and such nominations will follow the procedure set forth in [Standard Operating Procedure 2](https://sites/default/files/documents/SOP2%20R10%20FINAL.pdf) ([/sites/default/files/documents/SOP2%20R10%20FINAL.pdf](https://sites/default/files/documents/SOP2%20R10%20FINAL.pdf)). If a Director review decision is designated as precedential or informative, it will be added to the PTAB's [precedential and informative webpage](https://patents/ptab/precedential-informative-decisions) ([/patents/ptab/precedential-informative-decisions](https://patents/ptab/precedential-informative-decisions)) and an email notification will be issued to inform the public of its precedential or informative designation. Stakeholders and the public may submit nominations for precedential or informative designation using the anonymous [PTAB Decision Nomination web form](https://patents/ptab/ptab-decision-nomination) ([/patents/ptab/ptab-decision-nomination](https://patents/ptab/ptab-decision-nomination)) or by sending an email to [PTAB Decision Nomination@uspto.gov](mailto:PTAB_Decision_Nomination@uspto.gov) ([mailto:PTAB\\_Decision\\_Nomination@uspto.gov](mailto:PTAB_Decision_Nomination@uspto.gov)).

Decisions made on Director review are not precedential by default and instead are made and marked precedential only upon designation by the Director. Final written decisions by the Director are appealable to the United States Court of Appeals to the Federal Circuit using the same procedures for appealing Board final written decisions.

### ▼ 15. When can I expect a decision?

The USPTO works to provide timely consideration of Director review requests. The amount of time it takes to reach a decision depends on the complexity and number of issues raised. Denials of requests are usually provided within four to six weeks of submission. Grants can often take six weeks or longer and depend on whether the decision is routine or precedential.

▼ **16. How do I check on the status of a Director review request?**

The status of Director review requests can be found on the [Status of Director Review requests web page](https://patents/patent-trial-and-appeal-board/status-director-review-requests) ([/patents/patent-trial-and-appeal-board/status-director-review-requests](https://patents/patent-trial-and-appeal-board/status-director-review-requests)). Parties may further inquire as to the status of their request by submitting an email to [PTAB DirectorReview Request@uspto.gov](mailto:PTAB_DirectorReview_Request@uspto.gov) ([mailto:PTAB\\_DirectorReview\\_Request@uspto.gov](mailto:PTAB_DirectorReview_Request@uspto.gov)) or by calling the PTAB at (571) 272-9797.

▼ **17. What is the composition of the Advisory Committee?**

The Advisory Committee has 11 members and includes representatives from various USPTO business units who serve at the discretion of the Director. The Advisory Committee presently comprises members from the following business units of the USPTO:

- Office of the Under Secretary (not including the Director)
- Patent Trial Appeal Board (not including members of the original panel for each case under review)
- Office of the Commissioner for Patents (not including any persons involved in the examination of the challenged patent)
- Office of the General Counsel
- Office of Policy and International Affairs

▼ **18. What are the duties of the Advisory Committee?**

The Advisory Committee meets periodically to evaluate each request for Director review and recommends to the Director which decisions to review. The Director may also convene the Advisory Committee to make recommendations on decisions that the Director is considering for sua sponte Director review.

The Director review process utilizes the Advisory Committee in a similar manner to the “cert. pool” of the Supreme Court of the United States. The “cert. pool” is a labor-saving process for managing petitions for certiorari that involves a law clerk reviewing a petition and circulating a memorandum to several of the Justices that includes a recommendation as to whether the Court should review the case. Similarly, the Advisory Committee provides a singular recommendation to the Director that includes a consensus recommendation from various business units of the USPTO, or notes differing views among the Advisory Committee members.

Advisory Committee meetings may proceed with less than all members in attendance. A quorum of seven members must be present for each meeting. Additional individuals, such as technical or subject matter experts, or others assisting in an administrative support capacity, may participate in Advisory Committee meetings but do not provide recommendations to the Director.

The Advisory Committee makes an advisory recommendation for each request for Director review. The Advisory Committee provides its recommendations to the Director at regular intervals, promoting the timely consideration of Director review requests.

#### ▼ 19. How does the USPTO handle conflicts of interest?

In determining whether the Director or any other USPTO employee, including members of the Advisory Committee, has a conflict of interest and therefore cannot participate in the Director review process, the USPTO follows the guidance set forth in the United States Department of Commerce’s [Summary of Ethics Rules](https://ogc.commerce.gov/page/ethics-rules) (<https://ogc.commerce.gov/page/ethics-rules>).

#### ▼ 20. Director recusal

Pursuant to the [procedure for handling the Director’s conflicts](https://www.uspto.gov/sites/default/files/documents/Director-Memorandum-on-Recusal-Procedures.pdf) (<https://www.uspto.gov/sites/default/files/documents/Director-Memorandum-on-Recusal-Procedures.pdf>), if the Director has a conflict with parties, counsel, or patent(s) in the decision, she will be recused, and the Deputy Director will take the required action. If the position of the Deputy Director is vacant, or if the Deputy Director also has a conflict of interest, the Commissioner for Patents (or, if none, the Acting Commissioner of Patents) will take the required action.

#### ▼ 21. Advisory Committee recusal

No member of the Advisory Committee will participate in the consideration of a request for Director review if that member has a conflict of interest.

Additionally, PTAB Administrative Patent Judges who are also Advisory Committee members will follow the guidance on conflicts of interest set forth in the PTAB's [Standard Operating Procedure 1](https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf) (<https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf>) and will recuse themselves from any discussion or analysis involving cases or related cases on which they are paneled. Similarly, if any member of the Advisory Committee was directly involved in the examination of the underlying patent or a related patent, that member will likewise recuse themselves.

In the event of a conflict of interest, the member(s) will notify the other members of the Advisory Committee that a conflict exists and will not participate in the discussion of the conflicted matter.

## ▼ 22. Director review of institution decisions

Although the Office does not accept requests for Director review of institution decisions in AIA proceedings, the Director has always retained and continues to retain the authority to review such decisions sua sponte after issuance (at the Director's discretion). If Director review of an institution decision is initiated sua sponte by the Director, the parties to the proceeding will be given notice and may be given an opportunity for briefing. The public also will be notified and the Director may request amicus briefing. If briefing is requested, the USPTO will set forth the procedures to be followed.

## ▼ 23. Questions?

If a party has additional questions regarding the implications of Director review for a particular proceeding, they can submit case-specific questions (e.g., request a call with the PTAB) to [Trials@uspto.gov](mailto:Trials@uspto.gov) (<mailto:Trials@uspto.gov>).

If a member of the public has a general question regarding Director review but does not have a case pending before the PTAB, they can submit that question to [Trials@uspto.gov](mailto:Trials@uspto.gov) (<mailto:Trials@uspto.gov>).

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