

# USPTO Director to Consider New Factors for Discretionary Denial Analysis

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On March 11, 2026, Director Squires issued a Memorandum titled “Additional Discretionary Institution Considerations - U.S. Manufacturing and Small Business Use of AIA Proceedings.”<sup>1</sup> The memorandum identifies additional discretionary considerations that will be evaluated when determining whether to institute a post-grant proceeding. Specifically, the Director announced that he will consider whether and to what extent the products implicated in the proceeding are manufactured in the U.S. and whether the petitioner qualifies as a small business when determining whether to institute.

Director Squires explained that substantial segments of the country’s manufacturing have moved overseas over the past several decades, despite the availability of IPRs and PGRs. Thus, “[t]o assist the Office in gathering data about the extent to which AIA proceedings give a tactical advantage to companies that neither manufacture” in the U.S.

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<sup>1</sup> Additional Discretionary Institution Considerations - U.S. Manufacturing and Small Business Use of AIA Proceedings, USPTO (Mar. 11, 2026), [https://www.uspto.gov/sites/default/files/documents/Additional\\_Discretionary\\_Institution\\_Considerations\\_US\\_Manufacturing\\_and\\_Small\\_Business\\_Use\\_of\\_AIA\\_Proceedings.pdf](https://www.uspto.gov/sites/default/files/documents/Additional_Discretionary_Institution_Considerations_US_Manufacturing_and_Small_Business_Use_of_AIA_Proceedings.pdf).

nor invest in such manufacturing, the USPTO is now encouraging parties to identify the following in their discretionary briefing:

1. The extent to which any products accused of infringement in a parallel proceeding are manufactured in the U.S. or related to investments in U.S. manufacturing operations, including:
  - a. Whether the assembly of the final product is made in the U.S.
  - b. The extent to which components of a product are made in the U.S.
  - c. For method claims, whether “the devices used to carry out the method” or their components are made in the U.S.
2. The extent to which any products made, sold, or licensed by the patent owner that compete with the accused products are manufactured in the U.S.
3. Whether the petitioner is a small business that has been sued for infringement of the patent at issue.

The Director will consider “all relevant facts that the parties raise” to determine whether a petitioner is a small business, “including the Small Business Administration’s size standards set forth in 13 C.F.R. §§ 121.801 through 121.805 and 37 C.F.R. § 1.27(a) that would render a person, business, or nonprofit organization eligible for reduced patent fees.” These additional considerations will apply to any and all IPRs and PGRs in which the discretionary brief due date has not yet lapsed as of the date of this Memorandum.

### **Takeaways for Patentees and Patent Challengers**

The March 11, 2026 Memorandum creates yet another hurdle to institution for large companies who perform any manufacturing abroad. While the Director’s policy aims to prevent the exploitation of the IPR/PGR process by foreign state-backed actors, the policy could effectively make it more challenging for large U.S. companies to have their petitions instituted, because if these companies manufacture products abroad, the manufacturing could potentially serve as a basis for denying institution. On the other hand, petitioners that manufacture their products domestically should affirmatively address this factor in their discretionary briefing, as it could potentially weigh in favor of institution. While it is unclear how much weight the Director will afford these new considerations, this policy, at minimum, expands what the Director will now consider when weighing discretionary factors. As a result, institution decisions will continue to be based on more than the prior art asserted and the merits of the petition.

Although this policy could increase the likelihood of institution for small businesses that filed a petition as a defense to an infringement action, it could also increase the number of denials in general, and in particular, for larger companies that manufacture overseas. Already, the institution rate by petition in 2025 has been the lowest in five years, as only 50% of the petitions were instituted.<sup>2</sup> Of the petitions that were denied, approximately 50% were

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<sup>2</sup> PTAB Trial Statistics – 2025 End of Year Outcome Roundup, USPTO, at 7 (last visited Mar. 16, 2026), [https://www.uspto.gov/sites/default/files/documents/Trial\\_StatsFY25\\_Q4.pdf](https://www.uspto.gov/sites/default/files/documents/Trial_StatsFY25_Q4.pdf) [hereinafter 2025 End of Year Outcome Roundup].

denied based on the Director’s discretionary considerations.<sup>3</sup> Furthermore, this policy could lead to an even greater reduction in petitions filed. The PTAB has already seen a sharp decline in the number of petitions filed due to the other policies announced by Director Squires and former Acting Director Stewart. For example, in January and February 2026, only 46 and 27 IPR petitions were filed, respectively.<sup>4</sup> This is a huge drop from 131 and 112 IPR petitions filed in January and February 2025, respectively.<sup>5</sup>

**If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.**

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<sup>3</sup> *Id.*

<sup>4</sup> PTAB Trial Statistics – February 2026, USPTO, at 5 (last visited Mar. 16, 2026), [https://www.uspto.gov/sites/default/files/documents/Trial\\_Stats\\_February\\_2026.pdf](https://www.uspto.gov/sites/default/files/documents/Trial_Stats_February_2026.pdf).

<sup>5</sup> 2025 End of Year Outcome Roundup, *supra* note 2, at 5.