Hearing on

"Assessing the Effectiveness of the Transitional Program for Covered Business Method Patents"

House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

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Testimony of Aaron Cooper
Vice President, Global Policy
BSA | The Software Alliance

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Good afternoon Chairman Issa, Ranking Member Johnson and members of the Subcommittee. My name is Aaron Cooper, and I am Vice President of Global Policy for BSA | The Software Alliance.

BSA is the leading advocate for the global software industry in the United States and around the world. Our members are at the forefront of developing cutting-edge software innovations that have a significant impact on U.S. job creation and the global economy. Thank you for the opportunity to testify today on this important topic.

BSA, on behalf of its members, promotes policies that foster innovation, growth, and a competitive marketplace for commercial software and related technologies. Because patent policy is vitally important to promoting innovation that has kept the United States at the forefront of software development, BSA members have a strong stake in the proper functioning of the U.S. patent system.

BSA members are among the nation's leading technology companies, producing much of the software that powers cloud computing, data analytics, artificial intelligence, and cybersecurity tools. Due to the complexity and commercial success of their products and services, these companies are frequently the target of patent infringement claims.

At the same time, BSA member companies are among the nation's leading innovators and hold tens of thousands of patents. Because they are both innovators as well as substantial patent holders, BSA members have a particularly acute interest in properly calibrated mechanisms for ensuring patent quality, while maintaining a non-discriminatory, technology-neutral patent system.

BSA strongly supports technology neutral, efficient mechanisms at the USPTO to challenge wrongfully-issued patents. BSA also supports litigation reforms to reduce the incentive for abusive use of patents. But programs that target specific areas of technology – such as the Transitional Program for Covered Business Method Patents (CBM Program) – are detrimental to the patent system in general, and the software industry in particular.

The CBM Program should be allowed to end as Congress intended, and as the USPTO recommended, in 2020. The recently released Government Accountability Office Report on the "Assessment of the

Covered Business Method Patent Review Program" (GAO Report) does not recommend extending the CBM Program.[1]

Software Innovation is a Key Driver of the U.S. Economy

Software is integrated into nearly every part of our lives—work, home, education, entertainment—and almost everything we use. No longer confined to desktop computers and mainframes, or even to smartphones, software is a critical component of vehicles, home appliances, medical devices, aircrafts, and just about anything else that can be improved with connectivity and computing power. Analytics software is being applied to medicine to invent new ways to treat cancer and design new life-saving drugs. Manufacturers are using software-based systems to retool factory operations more quickly in response to changing consumer preferences, and to manage their supply chains more efficiently. Even simple products without integrated software are often designed using software, or manufactured with robotics or 3-D printing controlled by software.

Software innovations have a direct impact on not only the software industry, but more importantly, industry as a whole. A McKinsey report suggests that if policymakers and businesses leverage software appropriately, connected devices could generate up to $11.1 trillion yearly in economic value by 2025.[2] Part of these gains will be driven by the software industry itself, which is among the most innovative and R&D-intensive sectors of the economy and is a major contributor to economic growth, employment, and exports. Last September, Software.org: The BSA Foundation, released a study with data from the Economist Intelligence Unit (EIU) that showed the software industry alone contributed more than $1.14 trillion to the U.S. GDP in 2016 – a $70 billion increase over the past two years. The study also showed that the software industry is a powerful job creator, supporting over 10.5 million jobs, with a significant impact on job and economic growth in each of the 50 states.[3]

The importance of software innovation extends far beyond the software industry. This is because so many firms *outside* the software industry today are becoming software-driven businesses. According to a recent National Science Foundation study, many non-IT industries—including manufacturing, food processing, pharmaceuticals and medicines, automobiles, aerospace, and medical equipment—currently invest more in software R&D than IT firms do.[4]

There are Multiple Ways to Challenge a Patent that Should Not Have Issued

Patents on true inventions that go through a high-quality examination prior to issuance provide a real incentive for research and development. On the other hand, it is bad for both consumers and the overall economy when vague, non-novel, or obvious innovations are wrongfully awarded as patents.

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[1] *See* US Government Accountability Office, *Assessment of the Covered Business Method Patent Review Program* (March 2018) *available at* https://www.gao.gov/assets/700/690595.pdf.

[2] James Manyika et. al, *Unlocking the Potential of the Internet of Things*, McKinsey Global Institute (June 2015), https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/the-internet-of-things-the-value-of-digitizing-the-physical-world.

[3] BSA Foundation, *The Growing $1 Trillion Economic Impact of Software* (Sept. 2017) at 1, https://software.org/wp-content/uploads/2017_Software_Economic_Impact_Report.pdf.

[4] Brandon Shackelford & John Jankowski, *Information and Communications Technology Industries Account for $133 Billion of Business R&D Performance in the United States in 2013*, NATIONAL CENTER FOR SCIENCE AND ENGINEERING STATISTICS, NSF Info Brief 16-309 (Apr. 2016), https://www.nsf.gov/statistics/2016/nsf16309/nsf16309.pdf.

The issuance of invalid patents chills innovation and increases prices for consumers. A potential competitor will either choose not to enter the market out of fear of frivolous litigation or will be forced to pay an unnecessary license fee that ultimately gets passed on to consumers.

But even if the Patent Office is performing high-quality reviews of patent applications prior to issuance, mistakes are inevitable. It is therefore important that review mechanisms are in place that cost-effectively and efficiently weed-out the mistakes.

The GAO Report describes the three new programs created by the 2011 America Invents Act (AIA)[5] to permit challenges to patents that should not have issued, in addition to the existing ex parte reexamination process. Two of these new mechanisms are technology-neutral and apply to all issued patents across fields of technology: Post Grant Review (PGR), for patents issued within nine months of the challenge, and Inter Partes Review (IPR) for patents that were issued beyond the nine-month window. Both of these are important patent quality programs.

The PGR and IPR programs allow the Patent Office to use its expertise and technical knowledge to reconsider the decision to grant the patent if there is a reasonable likelihood that the petitioner would prevail with respect to at least one of the claims challenged in the petition. These programs also involve third-party challengers, which adds a further benefit. The multi-party process leverages the knowledge, expertise, and resources of industry stakeholders. This is particularly important given the increasing complexity of the technologies at issue.

The CBM Program was also created by the AIA. As the GAO Report describes, it applies only to a "covered" business method patent, which is "a patent that claims a method or corresponding apparatus for performing data processing or other operations used in the practice, administration, or management of a financial product or service."[6] The CBM Program is similar to IPR in that it applies throughout the life of the patent, but it is easier for patent challengers because the bases for the challenge are far broader and the challenger does not have to worry about the estoppel provisions that bar later challenges after an IPR.

Congress Correctly Determined to Make the CBM Program Transitional

The CBM Program was enacted to address a discrete issue in the financial services area that occurred because of conflicting Federal Circuit and Supreme Court opinions from the late 1990s and early 2000s. In 1998, the Federal Circuit issued an opinion that led the USPTO to begin issuing patents on methods of doing business.[7] The decision, along with others around that time, created confusion and ambiguity at the USPTO regarding what types of inventions were eligible for patent protection. Many of the business method patents issued in the following years were later determined to be invalid. The House Judiciary

[5] Pub. L. 112-29.

[6] *Id*. sec. 18(d)(1).

[7] *State Street Bank and Trust Co. v. Signature Financial Group, Inc.*, 149 F3d 1368 (Fed. Cir. 1998)

Committee Report for the AIA explained that "[a]t the time, the USPTO lacked a sufficient number of examiners with expertise in the relevant art area."[8]

Those business method patents on financial services caused sufficient disruption such that Congress created the CBM Program to weed them out of the system. As former Senator Tom Coburn (R-OK) explained on the Senate floor: The CBM Program "is designed to address the problem of low-quality business method patents that are commonly associated with the Federal Circuit's 1998 *State Street* decision."[9] The standard applied by the court in *State Street* was later dramatically altered by the Supreme Court in *Bilski v. Kappos*[10] and other subsequent decisions.[11] This is confirmed by this Committee's Report on the America Invents Act, which states, "A number of patent observers believe the issuance of poor business-method patents during the late 1990's through the early 2000's led to the patent 'troll' lawsuits that compelled the Committee to launch the patent reform project 6 years ago."[12]

Since the specific problem was created during a finite period of time – between the *State Street* and *Bilski* decisions – the CBM Program was created to be temporary and transitional. The Senate version of the America Invents Act, which created the CBM Program, had only a four-year transitional period. Ultimately, the enacted bill allowed for eight years, which Congress concluded would be sufficient to address the problem. Senator Chuck Schumer (D-NY), a strong proponent of adding the CBM provision to the AIA, confirmed during the floor debate that eight years is more than enough time to address the problem.[13]

Statistics show that Congress was correct in its predictions. As the GAO Report highlights, USPTO statistics show a sharp decline in the number of CBM challenges in recent years, falling from 177 in 2014 to just 48 last year.

- **FY14 – 177**
- **FY15 – 149**
- **FY16 – 94**
- **FY17 – 48**

These figures confirm what Congress anticipated in making the program transitional: that by 2020, the main purpose for the CBM Program will have been accomplished and the CBM Program should expire.

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[8] U.S. House of Representatives. America Invents Act, 2011 (Accompany HR 1249) Rpt. 112-98 pt. 1, June 1, 2011, p. 54.

[9] 163 Cong. Rec. S5428 (2011) (statement of Sen. Tom Coburn).

[10] 561 U.S. 593 (2010).

[11] *Alice Corp. v CLS Bank International,* 573 U.S. ___. 134 S. Ct. 2347 (2014); *DDR Holdings, LLC v. Hotels.com, LP*, 773 F3d 709 (Fed. Cir. 2014).

[12] United States. Cong. House. House Judiciary Committee. 112th Cong., 1st sess. H. Rept. 112-98.

[13] 163 Cong. Rec. S5410 (2011) ("On a 20-year patent, it is not hard to wait 4 years to file suit and therefore avoid scrutiny under a section 18 review. It would be much harder, however, to employ such an invasive maneuver on a program that lasts 8 years.") p. 54.

The USPTO has agreed with this conclusion and has recommended "adhering to the sunset period and discontinuing CBM proceedings on Sept. 16, 2020."[14]

The USPTO now has the expertise and tools to adequately examine financial industry business method patent applications. The allowance rate for new patents in this area has dropped dramatically in recent years, and the old patents issued in the 1990s and early 2000s – even those that are valid under current standards – are expiring. The CBM Program's objectives have been met, and the potential harm to software-related inventions now clearly outweighs any further benefit of the Program.

The CBM Program Imposes Unintended Costs on Software Innovation

The CBM Program puts a cloud over patents on software-related inventions, and thereby jeopardizes the jobs and economic gains created by software innovation. While the Program was not intended to apply to core software innovations, in some instances these inventions have been drawn into the Program (*e.g.*, cybersecurity[15] and general database architecture[16]). Technologies from artificial intelligence to blockchain to cybersecurity – which are implemented through software – are put at greater risk because of the CBM Program. This risk reduces the incentives for research and development investment due to a perception that these patents can be more easily challenged than patents in other areas.

A program that makes it easier to challenge patents claiming software-related inventions over other forms of inventions decreases the value of patent protection for software inventions. It is effectively a government program that prioritizes some forms of technology over others.

The uncertainty that the CBM Program creates can make investors hesitant to back new technologies and new entrants in the fields tangentially covered by the CBM program. The effect of making it easier to challenge patents in one field of technology is to decrease the incentive for investment in research and development in the challenged field. The uncertainty that CBM creates around protection for cutting edge software impacts U.S. competitiveness in fields such as artificial intelligence, blockchain, and cybersecurity. The program should be allowed to expire in order to eliminate this uncertainty.

The CBM Program Negatively Impacts International Competitiveness of U.S. Companies

America's most innovative industries have seen a rise in efforts by other governments to establish regulatory regimes that favor their domestic industries at the expense of U.S. interests. These efforts often target the intellectual property rights of U.S. companies and attempt to restrict the availability of protection, erode the effectiveness of protection, or compel the licensing and transfer of cutting-edge technologies. The U.S. government, through the diligent efforts of trade and related agencies, works

[14] United States Patent and Trademark Office, *Study and Report on the Implementation of the Leahy-Smith America Invents Act* (Sept 2015) at p. 39.

[15] *Secure Axcess, LLC v. PNC Bank Nat'l Ass'n*, 848 F3d 1370 (Fed. Cir. 2017).

[16] *Versata Development Group, Inc. v. SAP America, Inc.*, 793 F3d 1406 (Fed. Cir. 2015).

hard to combat these discriminatory programs abroad. Maintaining a patent program in the United States that discriminates against a field of technology, of which America is the world leader, undermines these efforts and our nation's international competitiveness.

The GAO Report Does Not Support or Justify Extension of the CBM Program

The GAO report released on March 13, 2018, provides a useful background on the history of the CBM program and a single recommendation to the USPTO that it develop guidance for judges reviewing the Patent Trial and Appeal Board's decisions and the processes that lead to them.

The GAO report also includes helpful statistics related to the CBM Program's operations since 2012, drawn from the USPTO's own data. Importantly, the report acknowledges the number of CBM petitions being filed has been "tapering off over time," and that the monthly "average rate has declined since 2015 to fewer than 5 per month in the last fiscal year, with no petitions filed in August or September of 2017."[17] The Report also highlights that "[a]s a point of comparison, the number of petitions for inter partes review has generally increased over the 5-year period."[18] These statistics demonstrate the correctness of Congress's original determination to sunset the CBM Program and have inter partes review continue to thrive as the mechanism by which suspect patents are reviewed.

In assessing the GAO report itself, it is important to distinguish between what the USPTO data objectively shows and statements reflecting the views expressed by the small sample of stakeholders GAO interviewed in connection with the report's preparation.[19]

BSA Continues to Support Cost Effective Ways to Challenge Invalid Patents

BSA remains committed to maintaining tools that deter abusive litigation and promote patent quality. BSA members are some of the world's leading innovators and, because of this, have large patent portfolios. They are also some of the most popular targets for abusive patent litigation. This is why BSA members have consistently supported reforms to the patent system that deter abusive litigation. Over the past few years, BSA has supported this Committee's Innovation Act, which would have further reduced frivolous claims. BSA has also filed multiple amicus briefs, including supporting Inter Partes Review in the *Oil States* case currently before the Supreme Court.[20]

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[17] GAO Report at p.17.

[18] *Id.*

[19] For example, on page 8, the GAO Report claims that in 2014 over 28 percent of the patents issued were "related to business methods." The methodology used by the GAO is flawed and thus, grossly over-estimates the percentage of patents related to business methods being issued by the PTO. The GAO assumes that a patent must be related to "business methods" if it was "assigned to one of the patent classes that appears among the classes assigned to patents challenged under the Covered Business Method program through September 2017." Simply because a CBM-qualifying patent was assigned to a specific "class" does not mean that the others in the class are also business methods. As noted above, cybersecurity-related patents have been pulled into the CBM program - many other cybersecurity patents from these classes are not related to "business methods."

[20] *Oil States Energy Svcs. v. Greene's Energy Group, No. 16-712;* others include: *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, No. 12-1184, Slip Op. Apr. 29, 2014; *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, No. 12-1163, Slip Op. Apr. 29, 2014; *TC Heartland LLC v. Kraft Foods Group Brands LLC*, No. 16-341 (S. Ct. May 22, 2017).

It is also important that Congress and the USPTO ensure the Inter Partes Review Program remains vibrant. The Inter Partes Review Program has been an effective way to challenge invalid patents since it was created by Congress in the AIA. The advantage of using the Inter Partes Review Program is that it is available to challenge weak patents across all technology fields. Unlike CBM, it is a nondiscriminatory and cost-effective way to challenge patents that were mistakenly issued by the PTO. Furthermore, BSA continues to be an ardent supporter of working with the Patent Office to improve patent quality during the application and examination process. In our view, improving the quality of the application process will lead to fewer invalid patents being issued. This will, in turn, lower the amount of frivolous litigation.

Conclusion

BSA is grateful to the Committee for its commitment to ensuring our patent system continues to be the gold-standard for other countries so the United States remains the most innovative country in the world. Because our members are both vibrant owners of patents and attractive targets of frivolous patent litigation, BSA takes a balanced perspective to patent issues. That is why we believe the patent system should be technology-neutral, promote patent quality, and deter frivolous litigation. This means the CBM Program should be allowed to expire; IPR should remain an effective tool; and we should continue to look for ways to curb abusive litigation.

Thank you, again, for the opportunity to testify. I look forward to answering your questions.