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June 7, 2011

The Honorable Harold Rogers
Chairman
House Committee on Appropriations
H-307, The Capitol
Washington, DC 20515

The Honorable Paul Ryan
Chairman
House Committee on the Budget
207 Cannon House Office Building
Washington, DC 20515

Dear Chairman Rogers and Chairman Ryan,

Thanks for your letter regarding section 22 of H.R. 1249, the "America Invents Act." I appreciate hearing from you.

While I share your desire to steer the Federal government toward a path to fiscal accountability, I disagree with the views expressed in your June 6 letter. Section 22 of H.R. 1249 is an important component of the bill and should be preserved for the following reasons.

First, your point about treating US Patent and Trademark Office ("USPTO" or "Office") discretionary funds as mandatory spending might be compelling if we were talking about true tax revenues derived from the General Treasury. But that's not the case here. The USPTO is completely funded by user fees imposed on inventors and trademark filers – not the taxpayers – who are entitled to receive services in return. It's entirely reasonable for these men and women to expect that the fees they pay should remain within the agency to recover the costs of its operations. Unfortunately, under the current statute, the USPTO Director must deposit all of the funds in a special account in the Treasury and ask Congress for the money back. This hasn't always occurred, with an estimated \$874 million "diverted" from agency coffers since 1991.

The USPTO needs all of the revenue it raises every year for its operations. Surplus funds generally represent new applications that must be completed. Fees must remain within the agency to allow the Director to engage in multi-year budget planning like many of the businesses it serves. This provision will allow the agency to recruit and retain more examiners, upgrade its information technology, and make other improvements to USPTO operations to address its current significant backlog and to ensure longer-term stable operations. With this improved structure, the USPTO will issue patents of higher quality and they will issue them faster.

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Second, a revolving fund will not put the USPTO on auto-pilot. On the contrary, it would actually promote accountability and transparency, creating more channels for oversight than currently exist. Section 22 specifically requires the USPTO to provide Congress with an annual (“look-back”) report that summarizes Office operations, includes the results of the most recent independent audit of the agency, describes its long-term modernization plan, and details progress made toward modernization.

Section 22 further stipulates that the USPTO must provide the House and Senate Committees on Appropriations with a forward-looking annual spending plan. For instance, the USPTO must report specific expense and staffing needs by activity, information on long-term modernization plans, and progress against these plans made in the previous fiscal year. The Director is also required to prepare a “business-type budget” regarding the Office’s new funding mechanism for the President’s review.

Other provisions within H.R. 1249 provide further opportunity for fiscal oversight. Section 10 authorizes the USPTO to raise fees only to the extent necessary to recover operating costs, and then, only after securing the input of its advisory committees, stakeholders, and after notifying Congress. Because the USPTO is required to establish fees in such a collaborative and transparent manner, the bill ensures the USPTO is held accountable.

And finally, under the bill, Congress retains existing forms of meaningful oversight. The USPTO remains a part of the Department of Commerce, and as such, a part of the Commerce, Judiciary, Science, and Related Agencies appropriations bill. Beyond the Appropriations Committee, the Congress will exercise oversight through hearings, may engage the House Surveys and Investigations staff to investigate issues on an ad hoc basis, and may instruct the Government and Accountability Office to conduct audits. Each of these oversight channels ensures that the USPTO does not over-reach its new authority. Moreover, Congress can always direct USPTO spending in appropriations bills and conduct hearings as appropriate – we just can’t limit the Director’s ability to use the fee revenue that the Office collects to support its operations.

At a time of economic stress and high unemployment, the USPTO is an untapped resource for job creation. To illustrate, in April 2010, the US Department of Commerce released a white paper entitled “Patent Reform: Unleashing Innovation, Promoting Economic Growth & Producing High-Paying Jobs.” The authors concisely document that a well-functioning patent system facilitates technological innovation – a “key driver of a pro-growth, job-creating agenda.” Consider:

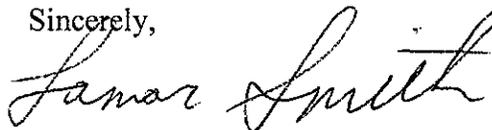
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- Technological innovation is linked to three-quarters of the America's post-World War II growth rate. Much of this is attributable to capital investment and increased efficiency.
- Innovation produces high-paying jobs. Between 1990 and 2007, the average compensation per employee in innovation-intensive sectors increased nearly two and one-half times the national average.
- Innovative firms rely on patent portfolios to attract venture capital; in fact, 76% of startup managers indicate that venture capitalists consider patents when making investment decisions.
- The current US backlog of patent applications potentially costs the American economy billions of dollars annually in "foregone innovation."

The Commerce study and related sources note that the current US patent system "is prone to delay and uncertainty as well as inconsistent quality." On the front end, this means that private investments in innovation are less likely. On the back end, lawsuits that challenge the validity and scope of patents cannot address this "quality deficit." Both scenarios stifle economic growth and job creation. Conversely, a well-functioning and -resourced USPTO that reviews applications in a timely manner and issues quality patents can only lead to greater innovation and higher-paying jobs.

While we may disagree on this matter, I appreciate your letting me share my views. Please let me know if you wish to discuss the bill further.

Sincerely,



Lamar Smith
Chairman
House Judiciary Committee