

Revised Interim Director Review Process

UPDATE On September 18, 2023, Section 5.A.ii.e was updated. On January 19, 2024, Section 5.C.ii was updated.

The United States Patent and Trademark Office (USPTO or Office) has developed an interim process for the review of decisions of the Patent Trial and Appeal Board (PTAB or Board) by the Director of the USPTO in proceedings under the America Invents Act (AIA).

On July 20, 2022, the 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](#) [↗](#). The comment period for this RFC closed on October 19, 2022, and the USPTO is considering stakeholder comments as it works to formalize the Director Review process.

Until the Director Review process is formalized, the Office continues to clarify and update the interim process. This furthers the USPTO's goals of promoting innovation through consistent and transparent decision-making, and the issuance and maintenance of reliable patents.

Accordingly, as of July 24, 2023, the revised interim Director Review process and the [Appeals Review Panel process](#) replace the Precedential Opinion Panel process. The revised interim Director Review process includes the option to delegate review of a Board decision to a [Delegated Rehearing Panel](#). Any recommendation for Precedential Opinion Panel review filed on or before July 24, 2023 and pending as of July 24, 2023 will continue to be considered by the Precedential Opinion Panel pursuant to Standard Operating Procedure 2 (Rev. 10). Additionally, this revised interim Director Review process allows for parties to also request review of the Board's decisions to institute review, in addition to requests for review of the Board's final written decisions or decisions granting rehearing. Informal feedback on the revised interim process may be submitted by email to Director_Review_Suggestions@uspto.gov.

A listing of all Director Review grants and the status of each request for Director Review may be found on the [Status of Director Review requests web page](#).

[Expand all](#) | [Collapse all](#)

▼ 1. Purpose of Director Review

The Under Secretary of Commerce for Intellectual Property and Director of the USPTO (Director) is a statutory member of the Board. 35 U.S.C. § 6(a). The Director is “responsible for providing policy direction and management supervision for the Office,” *id.* § 3(a)(2)(A), and has “the authority to govern the conduct of proceedings in the Office,” *id.* § 2(b)(2)(A). The Director has an interest in creating binding guidance to increase fairness and efficiency, and for establishing consistency across Board proceedings.

In [United States v. Arthrex, Inc.](#) [↗](#), the Supreme Court explained that “constitutional principles chart a clear course: Decisions by [administrative patent judges (APJs)] must be subject to review by the Director.” 141 S. Ct. 1970, 1986 (2021). The Court held that “the Director has the authority to provide for a means of reviewing PTAB decisions” and “may review final PTAB decisions and, upon review, may issue decisions himself on behalf of the Board.” *Id.* at 1987 (citations omitted). Additionally, the Court in [Arthrex](#) [↗](#) made clear that “the Director need not review every decision of the PTAB” nor did it require the Director to accept requests for review or issue a decision in every case. *Id.* at 1988. Instead, “[w]hat matters is that the Director have the discretion to review decisions rendered by APJs.” *Id.*; see also *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1338 (Fed. Cir. 2022) (noting that the Supreme Court “did not hold that the Director must rehear every Board decision, nor did it require the Director to issue a decision in response to every rehearing request”).

Accordingly, following the statutory authority provided to the Director by Congress and the constitutional principles explained by the Supreme Court, the Office set forth an interim process for the Director to review Board decisions on June 29, 2021. On April 22, 2022, the Office published an “Interim process for Director Review web page,” setting forth more details on the interim process and some additional suggestions for parties who wish to request Director Review. The Office further updated that guidance on May 25, 2022, and June 17, 2022. The Office sought public feedback on the interim process through a Request for Comments posted in the [Federal Register on July 20, 2022](#) [↗](#). The comment period closed on October 19, 2022. The Office received 4,377 comments which are [publicly available](#) [↗](#).

In response to those comments and as the Office works to formalize the Director Review process, the Office sets forth the following revised interim process for the Director to review Board decisions. Further, although the Court's decision in *Arthrex* “concern[ed] only the Director's ability to supervise APJs in adjudicating petitions for *inter partes* review,” and “[did] not address the Director's supervision over other types of adjudications conducted by the PTAB,” the Office also provides a mechanism for Director Review of certain other proceedings before the Board, i.e., post grant review proceedings, derivation proceedings, and decisions whether to institute in AIA trial proceedings. 141 S. Ct. at 1987.

▼ 2. Availability of Director Review

▼ A. Overview

Back to top [↑](#)

In *Arthrex*, the Supreme Court exclusively addressed the Director's ability to review final decisions of the Board in *inter partes* review proceedings. 141 S. Ct. at 1987. The Court did not address the Board's other areas of jurisdiction. *Id.* Nonetheless, for consistency and uniformity, Director Review requests are available for other areas of Board jurisdiction. Specifically, a party to a Board decision may now request Director Review of the Board's (1) decision whether to institute a trial, (2) final written decision, or (3) decision granting a request for rehearing, subject to the requirements set forth below.

Moreover, although the issues for which a party may request Director Review are limited as defined below, the Director retains unilateral discretion to initiate Director Review of Board decisions *sua sponte*, as discussed in Section 4.C below.

▼ B. AIA Trial Proceedings

In AIA trial proceedings under part 42 of 37 C.F.R., and in lieu of filing a request for rehearing by the Board under 37 C.F.R. §42.71(d), a party may only seek Director Review of the Board's (1) decision whether to institute a trial, (2) final written decision, or (3) decision granting a request for rehearing.

Requests for Director Review of the Board's decision whether to institute an AIA trial, or decisions granting rehearing of such a decision, shall be limited to decisions presenting (a) an abuse of discretion or (b) important issues of law or policy. Both discretionary and merits-based issues may be raised, subject to limitations (a) and (b) above.

Requests for Director Review of the Board's final written decision, or decisions granting rehearing of such a decision, shall be limited to decisions presenting (a) an abuse of discretion, (b) important issues of law or policy, (c) erroneous findings of material fact, or (d) erroneous conclusions of law.

▼ 3. Requesting Director Review

▼ A. Submission

Only a party to a proceeding before the Office may request Director Review. Third parties may not request Director Review or submit comments concerning the review of a decision.

In *inter partes* review, post grant review, and derivation proceedings, a party may submit a Director Review request by concurrently: (1) filing a Request for Rehearing by the Director in the Patent Trial and Appeal Case Tracking System (P-TACTS); and (2) emailing the Director at Director_PTABDecision_Review@uspto.gov, copying counsel for all parties to the proceeding. A Director Review request is not perfected until both submissions are made.

To ensure thorough and timely consideration of each Director Review request, the requesting party shall provide, in the notification email, a priority-ranked list of the issues for which the party seeks review, in the rare instance where a party has more than one issue to raise. This list shall include an express identification of the alleged (a) abuse of discretion, (b) important issue of law or policy, (c) erroneous finding of material fact, and/or (d) erroneous conclusions of law, as appropriate to the type of decision for which review is sought.

In the notification email, requesting parties may also provide a brief explanation of the issue(s) and a brief explanation of the rationale for the prioritized-ranking of the issue. The brief explanation should not exceed a few sentences and is not a substitute for formal arguments on the record.

If the requesting party believes that the request presents an issue of first impression, the notification email shall so indicate.

A party is limited to requesting Director Review or rehearing by the Board, but shall not request both. An improper request for both Director Review and panel rehearing of the same decision will be treated as a request for Director Review only.

▼ B. Timing

A request for Director Review shall be filed within the time prescribed for a request for rehearing under 37 C.F.R. § 42.71(d), as appropriate to the type of proceeding for which review is sought. If a request is untimely, it is not considered.

A timely request for Director Review, pursuant to Section 3.A, is considered a request for rehearing under 37 C.F.R. § 90.3(b) and resets the time for appeal as set forth in that rule.

The Director may, upon a showing of good cause, extend the time period set forth above.

▼ C. Formatting

A Request for Rehearing by the Director shall be subject to the length limitations (i.e., 15 pages) for motions to the Board provided in 37 C.F.R. § 42.24(a)(1)(v). The request must also conform to the applicable formatting requirements of 37 C.F.R. § 42.6(a).

▼ D. Fees

Back to top ↑

Currently, the USPTO does 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.

▼ E. Content

A Request for Rehearing by the Director may not introduce new evidence and, accordingly, exhibits may not be entered in support of the request. The Director will not consider new evidence or new arguments not part of the official record.

Subject to authorization by the Director, which may be requested by submitting an email to Director_PTABDecision_Review@uspto.gov, exceptions regarding new evidence or arguments may be warranted in cases addressing issues of first impression or issues involving intervening changes in the law or USPTO procedures, guidance, or decisions.

Any argument not made within the Request may be deemed waived.

Unless authorized by the Director, no response to the Director Review request is permitted.

▼ F. Processing

After a party submits a request for Director Review, the Office will catalog the request and review it to ensure compliance with the applicable requirements. If the request is compliant, the notification email and the Request for Rehearing by the Director will be entered into the record of the corresponding proceeding. The request will be entered 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. However, if the request is not compliant because it was submitted after the deadline, it will not be considered absent a good cause extension as discussed in Section 3.B above.

▼ G. Communications

All communications from a party to the Office during the pendency of Director Review must copy (cc) counsel for all parties to the proceeding. All communications will be entered into the record of the proceeding.

▼ 4. Determining Whether to Grant Director Review

▼ A. Advisory Committee

After a Director Review request is received and processed, the request will be routed to an Advisory Committee that the Director has established to assist with the process. The Advisory Committee meets periodically to evaluate each request for Director Review and to provide a recommendation to the Director as to whether review should be granted. The Director may also convene the Advisory Committee to make recommendations on decisions that the Director is considering for *sua sponte* Director Review (see Section 4.C below).

▼ i. Advisory Committee Purpose

The Advisory Committee provides a singular recommendation to the Director that includes a consensus recommendation from various business units of the Office, or notes differing views among the Advisory Committee members.

The Advisory Committee provides its recommendations to the Director at regular intervals, promoting the timely consideration of Director Review requests.

▼ ii. Advisory Committee Composition

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

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

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 Director may also consult others in the Office as needed, so long as those individuals do not have a conflict of interest.

▼ B. Director Review Determination

The Director receives each request for Director Review, the underlying decision including the associated arguments and evidence, and the recommendation of the Advisory Committee. From this information, the Director determines whether to grant or deny Director Review, or to delegate further consideration of a decision to a [Delegated Rehearing Panel](#) (Section 5.A.iii below). When reviewing a decision on Director Review, the Director may review the Board's decision whether to institute trial, the Board's final written decision, or the Board's decision granting rehearing of either of those decisions, which incorporate all matters and all orders entered in the proceeding.

The USPTO strives 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.

▼ C. Sua Sponte Director Review

The Director may grant review of Board decisions *sua sponte* (on the Director's own initiative). An order for *sua sponte* Director Review is treated like a timely request for rehearing for the purposes of 37 C.F.R. § 90.3(b) and, therefore, resets the time for appeal to no later than sixty-three (63) days after final resolution of the Director Review process. Typically, however, *sua sponte* Director Review is reserved for issues of exceptional importance. The PTAB has an internal post-issuance review team that alerts the Director that an issued decision may warrant Director Review. The Director retains authority to initiate review *sua sponte* of any other issue, as the Director deems appropriate, within the timeframe noted below.

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.

Absent exceptional circumstances, the Director may initiate review *sua sponte* at any point within 21 days after the expiration of the period for filing a request for rehearing pursuant 37 C.F.R. § 42.71(d), as appropriate to the type of proceeding for which review is sought, and before the filing of a notice of appeal under 37 C.F.R. § 90.3.

▼ 5. Director Review

▼ A. Process

As explained above, Director Review may be requested in:

- AIA trial proceedings where the Board's decision whether to institute trial, or the Board's decision granting rehearing of such a decision, implicates potential (a) abuse of discretion or (b) important issues of law or policy; and
- AIA trial proceedings where the Board's final written decision, or the Board's decision granting rehearing of such a decision, implicates potential (a) abuse of discretion, (b) important issues of law or policy, (c) erroneous findings of material facts, or (d) erroneous conclusions of law.

The Director's decision to grant or deny a request will be communicated directly to the parties in the proceeding. Director Review grants also will be posted on the [Status of Director Review requests](#) web page. Director Review denials can be found on the Director Review status spreadsheet, which is updated monthly.

▼ i. Denial of Director Review

In cases where the Director determines to deny review, an order denying the request will be transmitted to the parties and entered into the record. The Director need not provide reasons for denial.

▼ ii. Grant of Director Review

▼ a) Grant Order

In cases where the Director determines to grant review, whether from a party request or *sua sponte*, the Director will issue a paper so stating, which will be transmitted to the parties and entered into the record.

The Director may issue an initial order granting review and identifying the issue(s) to be addressed. Alternatively, the Director may issue a singular decision, which both grants Director Review and resolves the identified issue(s) in the first instance. In such a circumstance, the Director will resolve the pertinent issue(s) based on the existing record.

▼ b) Briefing, Discovery, and Oral Argument

Director Review decisions are generally made based on the existing record, without the need for responsive or *amici curiae* briefing. Responsive or *amici curiae* 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 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.

Director Review decisions also are generally made based on the existing record, without the need for additional discovery. However, the Director has discretion to order additional discovery the Director deems necessary to assist the Director in evaluating the issues presented. 35 U.S.C. § 316(a)(5) (“The Director shall prescribe regulations setting forth standards and procedures for discovery of relevant evidence . . . otherwise necessary in the interest of justice”); 37 C.F.R. § 42.5(a).

Additionally, the Director has the discretion to order an oral hearing.

▼ c) Standard of Review

Under Director Review, the Board’s decision whether to institute trial in an AIA proceeding, or a decision granting rehearing of such a decision, is reviewed for abuse of discretion unless the review engages important issues of law or policy, which are reviewed *de novo*. All other decisions are reviewed *de novo*.

Upon review, the Director may – in whole or in part – affirm, reverse, modify, vacate, or remand the decision to the Board for further proceedings. The Director may make any findings or conclusions that the Director deems proper based on the record.

▼ d) Relation to Underlying Proceeding

By default, the grant of Director Review does not stay the underlying proceeding before the Board; however, the Director maintains authority over all issues in the case during the pendency of Director Review, unless the Director orders otherwise. If a stay of the underlying proceeding is imposed, the Director will issue an order so stating.

For example, if Director Review of the Board’s decision to institute an AIA trial is granted, the underlying trial on the merits is not stayed. The Director may delegate authority back to the Board to handle routine interlocutory matters, conduct conference calls, or attend to other matters outside of the intended scope of the Director Review. If authority is so delegated, the Board will keep the Director apprised of these matters and provide reasonable prior notice of any intended decision, but the Board may handle matters so delegated without direction from the Director.

▼ e) Remands to the Board

In cases where the Director remands a decision to the Board for further proceedings, absent a due date specified in the Director's remand order or extension thereof, the Board has established a goal to issue decisions in cases remanded from the Director as soon as possible. Even for the most complex records, for example, those that may require additional discovery, briefing, and/or an oral hearing, the Board's goal is to issue the decision within six months of the date of the remand unless a due date is specified in the remand order. Accord [SOP 3 \(rev 2, formerly SOP 9\): Procedure for Decisions Remanded from the Federal Circuit for Further Proceedings](#). The procedure and pace of a remand will vary depending on the type of case, the legal and factual issues involved, the specific instructions from the Director, and any other particular circumstances of the case. Upon remand, the Board will issue an order setting forth the date by which a decision on remand will issue.

When issuing a decision upon remand from the Director, the Board shall decide the matter independently and without direction from the Director. See [Interim process for PTAB decision circulation and internal PTAB review](#).

UPDATE

Where the Board issues a decision on remand from the Director, a party may file one request for Director Review of the Board's decision on remand. The Director may also initiate sua sponte Director Review of a remanded decision at her or his discretion.

▼ f) Sanctions

The Director has authority to impose sanctions against a party for misconduct committed during the course of Director Review. 35 U.S.C. § 316(a)(6) ("The Director shall prescribe regulations . . . prescribing sanctions for abuse of discovery, abuse of process, or any other improper use of the proceeding, such as to harass or to cause unnecessary delay or an unnecessary increase in the cost of the proceeding."); 37 C.F.R. §§ 42.11(d) (providing sanctions for misrepresentations), 42.12 (providing a non-exclusive list of misconduct and sanctions); *Apple Inc. v. Voip-Pal.com, Inc.*, 976 F.3d 1316, 1323–4 (Fed. Cir. 2020) ("Section 42.12(b) does not limit the Board to the eight listed sanctions. Rather, the plain reading of Section 42.12(b) allows the Board to issue sanctions not explicitly provided in the regulation.").

▼ iii. Delegated Rehearing Panel

In consideration of the objectives of the Director Review process, the USPTO has set forth processes and procedures for the Director, at her or his discretion, to delegate review of a Board decision to a Delegated Rehearing Panel (DRP). That delegation may occur in cases where Director Review has been requested by a party, or may occur *sua sponte*, on the Director's own initiative.

For example, the Director may designate a DRP to consider whether a material issue of fact or law was misapprehended or overlooked by the Board. When the Director determines to delegate review of a decision to the DRP, the Director will issue an order identifying that review has been delegated to the DRP. In the event that the Director delegates a decision to the DRP to conduct review, including when the Director delegates review of a decision *sua sponte* to the DRP, the DRP panel will determine whether to grant rehearing. More information on the Delegated Rehearing Panel can be found at the [Delegated Rehearing Panel](#) web page.

▼ B. Effect of Director Review Decisions

Director Review decisions may be issued as precedential, informative, or routine decisions. Director Review decisions are, by default, routine decisions as set forth in [Standard Operating Procedure 2](#) (SOP 2).

Routine Director Review decisions may be nominated for precedential or informative designation, and such nominations will follow the procedure set forth in SOP 2. If a Director Review decision is designated as precedential or informative, it will be added to the PTAB's [precedential and informative](#) web page 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 [PTAB Decision Nomination web form](#), which may be submitted anonymously, or by sending an email to PTAB_Decision_Nomination@uspto.gov.

This process places no limitation on the authority of the Director to designate or de-designate an issued decision or portion thereof as precedential or informative at any time, at the Director's sole discretion.

▼ C. Review of Director Review Decisions

▼ i. Appeal

Director Review decisions of Final Written Decisions in AIA trial proceedings are appealable to the United States Court of Appeals for the Federal Circuit using the same procedures for appealing other Board decisions. 35 U.S.C. §§ 141(c), 319. Director Review decisions of Board decisions on institution are not appealable. 35 U.S.C. § 314(d); *Thryv, Inc. v. Click-to-Call Techs., LP*, 140 S.Ct. 1367 (2020).

▼ ii. Requests for Rehearing

Back to top ↑

Within the time frame allotted under 37 C.F.R. § 42.71(d), a party may file one request for rehearing of a Director Review decision, subject to the requirements explained below. Such requests should be rare, however, and only for very focused purposes. A request for rehearing of a Director Review decision is not an opportunity to raise new issues, reargue issues, or disagree with determinations by the Director. Instead, the rehearing request must specifically identify what matter the Director Review decision misapprehended or overlooked. *Accord* 37 C.F.R. § 42.71(d).

UPDATE

A party dissatisfied with a Director Review decision may file a single request for rehearing without prior authorization, and that party carries the burden of showing the Director Review decision should be modified. A party requesting rehearing must also email the Director at Director_PTABDecision_Review@uspto.gov, copying counsel for all parties to the proceeding. A response to a request for rehearing is not permitted unless expressly authorized. A party may not file a request for rehearing of the Director's decision to deny Director Review.

A party may submit a request for rehearing of a Director Review decision in accordance with the submission requirements identified above, including the timing, page limits, and formatting requirements set forth above.

During the pendency of a request for rehearing of a Director Review decision, jurisdiction over the proceeding remains solely with the Director. The Board may not take any action in the proceeding while the request for rehearing is pending, without express authorization from the Director.

▼ D. Conflicts of Interest

If the Director, a member of the Advisory Committee, any DRP or Board member, or other USPTO employee has a conflict of interest, they shall recuse themselves from the Director Review process for that decision.

In determining whether a conflict of interest exists, the USPTO follows the guidance set forth in the Standards of Ethical Conduct for Employees of the Executive Branch at 5 C.F.R. Part 2635 and will consult with the Department of Commerce Ethics Law and Programs Office, as necessary, to resolve any questions pertaining to conflicts of interest. Conflicts may include, for example, involvement in the examination or prosecution of the underlying patent or a related patent at issue.

Additionally, the Office has set forth procedures that the Office will follow in the event of an actual or potential conflict of interest by the Director or Deputy Director of the USPTO. See "[Director Recusal Procedures](#)" at *Office of the Under Secretary and Director*.



As a matter of policy, PTAB Administrative Patent Judges who are also Advisory Committee or DRP members will additionally follow the guidance on conflicts of interest set forth in the PTAB's [Standard Operating Procedure 1](#) and will recuse themselves from any discussion or analysis involving cases or related cases on which they are paneled.

▼ E. Status and Questions

The status of Director Review requests can be found on the [Status of Director Review requests](#) web page. Parties may further inquire as to the status of their request by submitting an email to Director_PTABDecision_Review@uspto.gov or by calling the PTAB at (571) 272-9797.

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 Director_PTABDecision_Review@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 Director_PTABDecision_Review@uspto.gov.


Was this page helpful?  

 [Share this page](#)  [Print this page](#)

[Additional information](#) about this page

Receive updates from the USPTO

Enter your email to subscribe or update your preferences

[Back to top](#) 

your@email.com

Subscribe

[About the USPTO](#) • [Search for patents](#) • [Search for trademarks](#)

[US Department of Commerce](#)

[Accessibility](#)

[Privacy Policy](#)

[Financial and Performance Data](#)

[Vulnerability Disclosure Policy](#)

[Freedom of Information Act](#)

[Inspector General](#)

[NoFEAR Act](#)

[USA.gov](#)



Follow us



Back to top ↑