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My Prepared Remarks before the Senate Staff CBM Patent Briefing

By [Jonathan Zuck](#) | On Friday, January 31 st, 2014 | [no Comments](#)



The Senate had a briefing this morning for staff working on patent legislation. I was invited to make a presentation on the controversial covered business method patent extension which was dropped from the House bill to ensure its passage there. I outlined the reasons why the Senate should leave it out as well:

Good morning. Thanks for the invitation to participate in this essential conversation. As a software developer, I've had a lot of experience tracking down pernicious bugs in complex systems and they often require a non-linear, trial and error approach to excise. I'm not a lawyer like my fellow panelists at the table so I leave room for the possibility that there is some nuance I am missing but this seems to be a case of beginning with good intentions and clinging to those intentions despite considerable evidence to the contrary. I believe the expansion and extension of the CBM program would be a bad idea for three reasons.

First, all of us agree that patent quality should be our primary objective but the best place to accomplish that is on the front of the system, not the back end. Software developers have a saying "garbage in, garbage out" but you might think of it as an ounce of prevention versus a pound of cure. There's a great deal that is already happening and more that could be happening to improve the [patent application](#) evaluation process. That should be the primary focus of our attention. Whether it's training, shifting incentives or more comprehensive prior art examinations there is simply no question, we will get the most bang for our buck at the front door of the patent office, not by diverting precious time, money and energy to a duplicative review process after the fact. Not only will CBM do nothing to improve patent quality, it will distract us from the initiatives that will.

Second, far from adding clarity and precision to our patent system, expanding another indefinite reexamination process, like CBM, will create additional uncertainty. When we build a factory, we protect it with fences and guard dogs. When we invent something our only recourse is to keep it a secret or get a patent. Patents provide protection to investors who might not otherwise take a chance on something intangible. That's not everyone's business model but there are myriad examples of innovators who have successfully secured financing and staved off interlopers by patenting their invention. ACT member Galleria closed its doors for a year, sustained by [second mortgages](#) and loans, to solve a problem their bigger competitors, such as Oracle, had not solved in the retail space-planning space. They solved the problem and patented it and reentered the marketplace with leverage, got financing and now successfully compete in a market dominated by huge corporations. A CBM process hanging out there is like a sword of Damocles, indefinitely, eroding that leverage by creating uncertainty. Why not steal their idea—we can buy two years with CBM? For the patent system to work, one must eventually be granted a patent and that grant has to mean something.

Finally, and perhaps most importantly, the expansion and extension of the CBM program will hurt small businesses the most. The engine of our innovation economy is these small businesses and they are hurt most by a system designed to give patent infringers yet another bite at the apple. We see time and time again, attempts by large infringers to bleed an innovative small business dry rather than license their IP. Not only is the CBM program unfortunately architected to perpetuate this trend, the evidence suggests that even during its infancy, it has begun to do so. ACT member Ameranth, winner of a dozen technology awards and three National Science Foundation (NSF) grants, pioneered and patented data synchronization inventions that have been widely adopted and deployed to enable modern hospitality IT systems to be completely synchronized across functions such as online/mobile ordering, reservations, ticketing, and [payment processing](#). A much larger competitor infringed on their patents and when Ameranth challenged them, that competitor was able to embroil them in a CBM review that stalls the legal process and leaves Ameranth vulnerable to competitors for two years while they go through this proceeding. In fact, over 70% of the cases that have been accepted into the CBM program involve small, on-going businesses being sued by enormous competitors or former customers. Look at the list. These aren't patent trolls, they're small businesses struggling to succeed in a market dominated by giants.

While I think we all recognize that a problem exists, extending CBM review is just not going to help small business innovators. Telling a company facing a \$20,000 settlement that they should spend \$250,000 to pursue CBM litigation is not a viable alternative. It's even less attractive for that company knowing it might lose bringing the case to PTO. Far from being a way to address the problems of patent trolls and patent quality, CBM is an expensive, cumbersome, abused distraction from those very objectives. If you want to improve the lives of small innovators, fix the system on the front end. Adding more litigation through CBM to fix patent quality is like looking to recalls as the solution to improve automobile quality. Many had hoped that CBM would be the silver bullet to rid us of patent trolls, but we've all come to realize that the program simply doesn't work for small businesses and startups. That explains why so many app developers wrote to the House Judiciary Committee [opposing the CBM extension](#) and why it was left out of the House bill that passed by a wide margin. Let's focus instead on patent quality so we can get to the root of the problem of bad patents.