



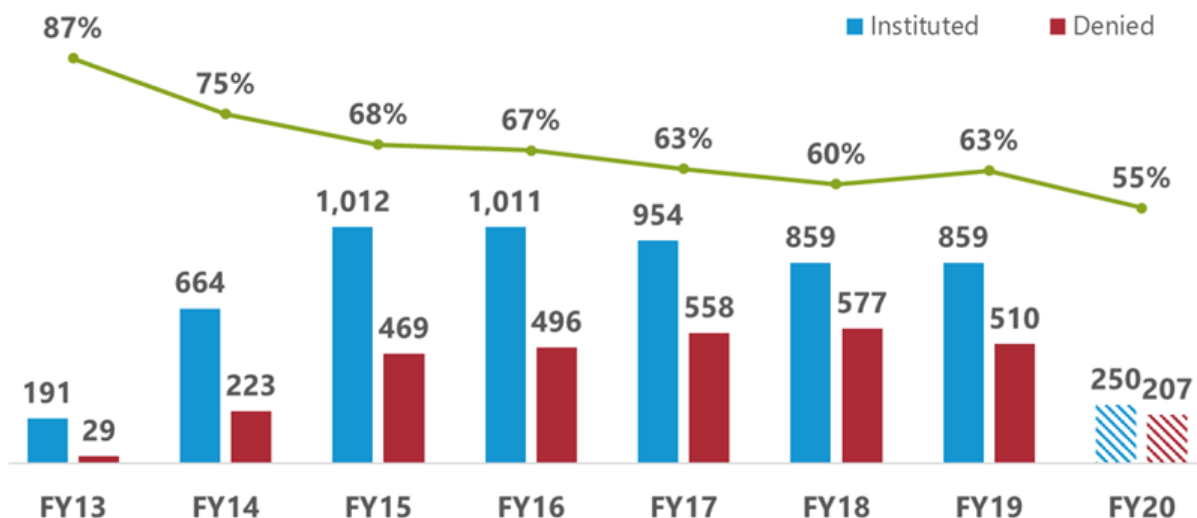
THINK FORWARD

Trending Down: PTAB Institution Rates Continue to Decline

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Back in the glory days of 2013 for petitioners, the Patent Trial and Appeal Board (“PTAB”) instituted a whopping 87% of trial petitions. Fast forward to 2020, and the PTAB’s institution rate has dropped to 55%. The following chart, published March 17, 2020 by the U.S. Patent & Trademark Office, illustrates the overall decline in the PTAB’s institution rate for *Inter Partes* Review (“IPR”), Post Grant Review (“PGR”), and Covered Business Method review (“CBM”) proceedings. The majority of petitions filed (>90%) are IPR petitions.



U.S. Patent & Trademark Office, Patent Trial and Appeal Board, Trial Statistics IPR, PGR, CBM (Feb. 2020) available at https://www.uspto.gov/sites/default/files/documents/Trial_Statistics_2020_02_29.pdf

The trend is clear. The institution rate has fallen and apparently continues to fall. Theories attempting to explain this trend abound. For example, some commentators suggest that patent owners are becoming increasingly selective when they choose which patents to assert, resulting in higher quality asserted patents that are more likely to survive a petition to institute a post-grant proceeding. Others attribute the trend at least in part to the PTAB’s increased reliance on discretionary grounds to deny institution, such as when the patent at issue is subject to another post-grant petition, or when related district court litigation is at an advanced stage.

Whatever the reason, there is no denying that, from a statistics perspective, the PTAB is less likely to institute a post-grant proceeding today compared to seven years ago. So how should this trend impact your litigation strategy?

Patent owners may be more willing to file a district court patent litigation knowing that the chances of it being derailed by a PTAB proceeding are trending lower. They may also have a bit more leverage with respect to any settlement discussions at the outset of a litigation. Further, patent owners may have stronger grounds to oppose a motion to stay the litigation filed by an alleged infringer before the PTAB issues its institution decision, because the PTAB is statistically less likely to institute compared to prior years.

On the flip side, alleged infringers may take greater care in considering whether it makes sense to file a post-grant petition in the first place, in view of the recent institution rates. If institution is denied, patent owners may try to use the PTAB's decision to bolster validity positions in the litigation. Alleged infringers also may spend more time and resources developing a post-grant petition compared to previous years, to increase the possibility of institution. Further, alleged infringers may rely less on a litigation strategy that counts on institution, and more on a strategy that focuses on alternative ways to dispose of the litigation short of trial, such as summary judgment proceedings.

In short, the PTAB's institution rate is trending down. Patent owners and alleged infringers should adapt to the trend and account for it in their strategy.