

**TRADEMARK PUBLIC ADVISORY COMMITTEE  
ANNUAL REPORT 2013**



**UNITED STATES PATENT AND  
TRADEMARK OFFICE**

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# Trademark Public Advisory Committee Fiscal Year 2013 Annual Report

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## I. Introduction

This is the fourteenth annual report of the Trademark Public Advisory Committee (“TPAC”). This report reviews the Trademark organization and the Trademark Trial and Appeal Board of the United States Patent and Trademark Office (“USPTO”) for the fiscal year (“FY”) ending September 30, 2013. TPAC’s mission, which is specified in enabling legislation, 35 U.S.C. § 5(b)(1) and (d)(1), is “to represent the interests of diverse users” of the USPTO and to “review the policies, goals, performance, budget, and user fees” of the USPTO with respect to trademarks.

Pursuant to 35 U.S.C. § 5(d)(2), this report is submitted within 60 days following the end of the Federal fiscal year (FY) and is transmitted to the President, the Secretary of Commerce and the Committees on the Judiciary of the Senate and the House of Representatives. This report is submitted for publication in the Official Gazette of the USPTO. The report will be available to the public on the USPTO Web site, [www.uspto.gov](http://www.uspto.gov).

Members of TPAC As of the end of FY 2013, the following individuals were members of TPAC:

- Anne H. Chasser, Strategic Advisor, Wolfe, Sadler, Breen, Morasch & Colby, LLC, Cincinnati, Ohio (term ends December 6, 2013)
- Deborah Hampton, Senior Intellectual Property Specialist, Katten Muchin Rosenmann LLP, New York, New York (term ends December 6, 2013)
- Cheryl Black, Partner, Goodman Allen & Filetti, PLLC, Richmond, Virginia (term ends December 6, 2013)
- Jody Haller Drake, Partner, Sughrue Mion, LLC, Washington, D.C. (term ends December 1, 2014)
- Ray Thomas, Jr., Owner, Law Office of Ray Thomas, Jr. PLLC, Washington, D.C. (term ends December 1, 2014)
- Linda McLeod, Partner, Kelly IP, New York, New York (term ends December 1, 2014)
- Kathryn Barrett Park (Vice Chair), Senior Counsel, General Electric Corporation, Fairfield, Connecticut (term ends December 1, 2015)
- Dee Ann Weldon-Wilson, Trademark Counsel, Exxon Mobil Corporation, Irving, Texas (term ends December 1, 2015)
- Maury M. Tepper, III (Chair), Member, Tepper & Eyster, PLLC, Raleigh, North Carolina (term ends December 1, 2015)

In addition to the above voting Members, the following people are non-voting TPAC members representing the membership of USPTO unions:

- Harold Ross of the National Treasury Employees Union (“NTEU”) Chapter 243.
- Howard Friedman of NTEU Chapter 245.
- Randall P. Myers of the Patent Office Professional Association.

### **Report Highlights**

During a year of significant external challenges and uncertainty, TPAC is pleased to report that Trademarks continued to achieve exceptional performance. Thanks to talented and dedicated leadership and to an environment of commitment and teamwork, Trademarks was able to adapt to an uncertain economic climate and to unfortunate reductions in its access to fees paid into the Office by users. Although a number of adjustments were required, Trademarks continued to deliver on its core mission of maintaining an accurate, reliable use-based register of trademark rights. Trademarks also managed to continue the development of its new IT systems which represent a significant investment of both time and resource by the trademark community, and which is beginning to deliver valuable enhancements that should pay dividends to the trademark community as this initiative moves on to completion.

TPAC wishes to commend Commissioner for Trademarks, Deborah Cohn, for her vision and leadership during a challenging year. To the external trademark community, the Trademarks organization continued to deliver a high level of service, to actively seek feedback from its customers on enhancements to its practices, to continue raising the bar on its own quality measures and to provide outreach to the business community about the value of trademarks. The Trademarks organization enjoys a very talented group of leaders, and their experience and involvement continue to provide stability and efficiency that is unfortunately too rare in government. TPAC views the ability of Trademarks to attract, promote and retain such a talented group of leaders as one of the keys to its long-term success. TPAC is also very aware that the high level of service provided by Trademarks is the result of the combined efforts of Trademark Examining Attorneys, Trademark Specialists, technical and legal support and the entire staff, and we wish to thank all for their service.

FY 2013 marked a year of dramatic improvement at the Trademark Trial and Appeal Board (“TTAB”), and TPAC commends Commissioner Cohn and Chief Judge Rogers for their cooperation in finding ways to assign the right people to the challenging job of bringing about change and improvements to a system that faced a significant backlog of cases. In particular, Group Director Meryl Hershkowitz accepted an assignment to the TTAB and worked closely with Chief Judge Rogers to achieve results in FY 2013 that mark a turnaround in trends observed over the last several years. We also want to commend the TTAB Interlocutory Attorneys and Trademark Administrative Judges for their significant contribution to these results.

The Office of the Chief Information Officer (OCIO) continues to make progress on the significant task of creating a new, unified architecture that will replace the existing patchwork of legacy systems and programs within Trademarks. OCIO and Trademarks are working closely and in a cooperative manner to ensure that trademark filers will receive the benefits of the significant investment made over the last several years in this project.

The Office of Chief Financial Officer (OCFO) continues to work to maintain as much stability and predictability as is possible in a challenging economic landscape, made even more so by externalities presented by government budgeting and funding procedures and by sequestration (discussed more fully below). Further, OCFO is deploying improved models – Activity Based Information (“ABI”) – to more accurately allocate the use and spending of user fees from trademark customers.

As a whole, TPAC commends these groups for their dedicated service and performance.

## **II. Discussion of Specific Issues**

### **A. Trademark Operations Performance.**

#### **1. Performance Statistics.**

- a. **Increase in Applications.** In FY 2013, trademark application filings increased from FY 2012 levels, to a total of 433,654 classes. This represents an increase of 4.5% from FY 2012.

**Balanced Disposals Met Projections.** Continuing the trend shown in FY 2011 and FY 2012, Trademark Operations maintained high productivity in FY 2013. Total Examining Attorney production was 875,274 Balanced Disposals. A “Balanced Disposal” represents one of three potential actions regarding an application: a first Office Action issued, approval of an application for publication (examination is complete), or abandonment of the application. The FY 2013 total of Balanced Disposals exceeded the Trademark Operations target of 869,600 Balanced Disposals by 1.6%.

- b. **Total Office Disposals.** “Total Office Disposals” are made up of the number of applications that either result in issued registrations or are abandoned. Total Office Disposals for FY 2013 were 405,412.
- c. **Average First-Action Pendency in Target Range.** “Average First-Action Pendency” was 3.1 months for FY 2013, falling within the USPTO’s target range of 2.5 to 3.5 months. First-Action Pendency is the time between the filing of a trademark application and the substantive review of that application by the USPTO (which usually results in either an Office Action or a Notice of Publication). TPAC continues to wholeheartedly support and endorse the First-Action Pendency target range set by Trademarks, as we believe that this range represents an appropriate balance between providing a fast response to trademark applicants and maintaining a stable and sufficient inventory of work for the Examining Attorneys.

- d. Average Total Pendency. “Average Total Pendency” is the average time between the filing of a trademark application and final disposition of that application, whether by registration, abandonment, or issuance of a Notice of Allowance.

Average Total Pendency for FY 2013 was 11.7 months when suspended and *interpartes* cases are included, and 10 months when those cases are excluded. An application is suspended if the outcome of another matter must be known before further action on the application can be taken, such as when there is a previously filed application for a confusingly similar trademark that has not yet either registered or been abandoned. An *interpartes* case is an action before the TTAB, such as an opposition to registration.

- e. Overall. Continuing a trend stretching back more than six years, Trademark Operations substantially met or exceeded ALL of its quantitative performance goals for FY 2013. TPAC commends Commissioner Deborah Cohn, her senior staff and all of the dedicated Examining Attorneys, paralegals, document supervisors and others in Trademarks for this outstanding performance. The continued efficiency, reliability and success of Trademarks is particularly remarkable in view of the fluctuations and challenges in the market during the recent past.
2. Quality and Training. TPAC is pleased to note that Trademarks continues to place an emphasis not only on meeting quantitative performance measures, but also on the quality of examination, thereby ensuring that the Trademark Register remains a useful and reliable reflection of the substantive rights of trademark owners.
    - a. Compliance Rate. Currently, examination quality is measured by evaluating applications at two different points during the examining process. The review of random samples of applications in various stages of examination results in a measurement referred to as the “compliance rate” (*i.e.*, the percentage of actions or decisions that have been determined to have no deficiencies or errors). The first point of review and evaluation looks at initial Office Actions that reject applications for registration or that raise other issues regarding formalities that require rectification in the application. The second review occurs at the “final disposition” of applications, either by a final refusal to register or a decision to approve an application for publication. The goal in both instances is to ascertain whether the Examining Attorney’s decisions and written Office Actions comport with bases of refusal set forth in the Trademark Act of 1946.

The goal for FY 2013 was 95.5 percent compliance for first Office Actions and 97 percent for final disposition. For FY 2013, Trademarks achieved 96.3 percent for first Office Action compliance, which exceeded the goal. Also for FY 2013, the Trademark Operation achieved 97.1 percent final disposition compliance.

- b. Exceptional Office Action. In FY 2013, Trademarks continued the standard of comprehensive quality that it instituted in 2011. Instead of simply reviewing legal decision-making and completeness of an Office Action, Trademarks also measures the percentage of first Office Actions that are excellent in all respects.
  - c. The “Exceptional Office Action” standard includes four criteria: (i) the appropriateness of the likelihood of confusion search, (ii) the quality of the evidence provided, (iii) the clarity of the writing (*i.e.*, clear, succinct and concise), and (iv) the quality of decision-making. The Exceptional Office Action metrics show that the Office has exceeded its goal, as 35.1 percent of all first Office Actions met the criteria for the Exceptional Office Action at the close of FY 2013.
  - d. In FY 2013 Trademarks held advanced training on these issues for all Managing Attorneys and Examining Attorneys. TPAC applauds Trademarks for continuing to “raise the bar” on its performance measures and for focusing Examining Attorneys on appropriate metrics for communication, thoroughness and timeliness in a manner that will benefit trademark applicants.
  - e. Training. Continuing with the collaboration with User Groups concerning Examining Attorney training, two educational programs were presented in connection with the entertainment industry and trademark matters associated with that industry, and a program was presented on the new gTLDs landscape relating to the expanding domain name registry.
  - f. The Office provided advanced Section 2(d) training for Examining Attorneys on issues surrounding determinations of likelihood of confusion. In addition, Trademarks completed an analysis of best practices in examination and plans to publish a Best Practices document for Examining Attorneys in the beginning of FY2014.
  - g. Looking ahead, the Office is currently working with user groups on two quality-related projects. First, Trademarks is seeking input from industry experts to update terminology in the Manual of Acceptable Goods and Services. Second, Trademarks has requested external review of a set of approximately 200 issued Office Actions to validate the USPTO’s own quality metrics and to seek information on any areas where the Office may need to focus on additional training. Trademarks expects to complete both of these projects during FY 2014.
3. Initiatives Completed in FY 2013
- a. End of Paper Official Gazette, and release of E-OG

At the beginning of the fiscal year, Trademarks announced that the Government Printing Office (GPO) would discontinue publishing the *Trademark Official Gazette* (TMOG). On December 25, 2012, GPO published the last print edition of the TMOG.

Subscriptions to the paper edition of the TMOG had dwindled in recent years, and at the conclusion of paper circulation on December 24, 2012, there were fewer than 150 paper subscriptions remaining. The elimination of the need to format OG information for paper publication has allowed the USPTO to enhance the format and features of electronic TMOG (e-TMOG) to improve user experiences.

The USPTO solicited stakeholder input on e-TMOG enhancements at two focus group meetings in early October.

Feedback collected from external users and from bulk users was shared with the team of Trademarks and Office of the Chief Information Officer (OCIO) staff responsible for developing the new web-based version of the e-TMOG. In June of 2013, the USPTO released a beta version of the new enhanced e-TMOG and invited user input. The USPTO presented a live demonstration of the beta version at the TPAC Public Meeting held on July 9, 2013. A final version of the new e-TMOG was released at the end of FY 2013.

TPAC applauds Trademarks and OCIO for their collaboration in the architectural engineering of the new e-TMOG and for the expediency and efficiency with which this project was handled. Based on our review of the e-TMOG, TPAC believes that this release will provide significant benefits to the trademark community.

b. TMEP Updates

In October 2012, the USPTO issued the 8<sup>th</sup> edition of the Trademark Manual of Examining Procedure (TMEP) in a new electronic format. The new TMEP is formatted in Reference Document Management Services (RDMS) system. The new TMEP was re-formatted with enhanced search features to make it more user-friendly.

With the use of RDMS, the Office has more flexibility and control over content of the TMEP, and future revisions and incorporation of user comments can be more readily incorporated. The increased control allows the USPTO to provide more frequent updates to the TMEP. The semi-annual editions will incorporate precedential decisions and previously issued examination guides, as well as user-generated feedback collected from IdeaScale. The Office published its first semi-annual edition in April 2013.

c. Examination Guides

In furtherance of its efforts to address training of Examining Attorneys, and in response to stakeholder questions and concerns, the Office issued a detailed Examination Guide on webpage specimens as displays associated with goods. Prior to issuing the Exam Guide, the Office released a draft version for comment by Examining Attorneys and stakeholders. Continuing initiatives in response to feedback from practitioners and other stakeholders expressing a desire to provide constructive input on examination guides, draft versions of two additional examination guides were released in FY 2013. "Geographic Certification Marks was released June 26, 2013, and open for comment to August 15, 2013. "Applications for Marks Comprised of gTLDs for Domain



Name Registration or Registry Services" was released August 9, 2013, and open for comment to October 23, 2013.

d. New Suspension Practice

In response to feedback from practitioners, the Office developed a new suspension practice to address the issue of cited registered marks that may expire or cancel during the examination process. This was an important and welcome change to previous practice.

4. Ongoing Initiatives

a. Pilot Program to Review Post-Registration Specimens

In FY 2012, Trademarks announced a pilot program, to review the extent to which identifications of goods and descriptions of services in post-registration filings are accurate. Under this program, Trademarks has selected 500 filings for review, and has, where appropriate, asked registrants to submit additional specimens where there are multiple goods or services listed in a Class.

This pilot is ongoing, but Trademarks expects to gain valuable data to help better assess the degree to which the Register accurately reflects those goods and services on which a mark is actually in use. TPAC applauds this initiative and the degree to which Trademarks seeks to ensure an accurate Register that can be relied upon by the public.

b. Request for Comments on Trademark Registration Renewals and Technology Changes

Trademarks issued a Request for Comments regarding how best to address the maintenance of trademark registrations that include goods and services that have been impacted by changes in technology. Comments are open until December 1, 2013. TPAC applauds the effort by Trademarks to continue to seek public input and guidance when addressing potential changes to its practices.

5. Outreach Initiatives

a. Law School Clinic Certification Pilot Program

In 2008, the USPTO launched the Law School Clinic Certification Pilot Program. The program expanded in 2010 and further expanded in 2012. Currently, 28 law schools participate in the program, which is administered by the USPTO's Office of Enrollment and Discipline (OED) in collaboration with other departments. Under this program, law students are permitted, under the supervision of a duly certified Faculty Supervisor, to assist clients on a *pro bono* basis, with trademark matters before the USPTO.

On March 12, 2013, OED arranged for Faculty Supervisors and their Student Attorneys to visit the USPTO, as well as the U.S. Supreme Court and U.S. Capitol. In June 2013 and July 2013, the OED conducted 15-minute telephone conferences with each Faculty Supervisor. These calls allowed OED to answer questions, address issues or concerns and get feedback or suggestions on ways to improve the program.

On July 30, 2013, the OED conducted a mandatory webinar/telephone conference. The objective of this annual training session is to educate and update Faculty Supervisors. Each year, OED also sends representatives to visit each participating law school.

Since inception, approximately 1,000 Student-Attorneys have participated in the program. To date, 158 trademark applications were reportedly filed through the program.

TPAC is pleased with this well-organized program for two main reasons. First, it provides the extraordinary opportunity for Student-Attorneys to gain invaluable real-world experience in intellectual property during law school. Second, the program makes quality legal representation affordable for individual entrepreneurs and small business owners desiring to protect their intellectual property rights.

6. International Matters

a. Intellectual Property Rights (IPR) Attaché Program

TPAC's review of the USPTO budget over the past few years raised the issue of Trademarks' investment in the program. In order to learn more about this fairly new program, representatives of the Office of Policy and External Affairs were invited to give a presentation. During TPAC's Public Meeting on October 12, 2012, Shira Perlmutter (Chief Policy Officer, Office of Policy and External Affairs) and Dom Keating (Director, IPR Attaché Program) gave a presentation.

Generally, IPR Attachés are subject matter experts serving as diplomats in foreign countries/regions. In 1992, Japan assigned an IPR Attaché to Switzerland in order to achieve an advantage for Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement negotiations. Realizing the benefits of that strategy, in 1993 the U.S. assigned to Switzerland its first IPR Attaché. Approximately a decade later, the second IPR Attaché was assigned to the U.S. Embassy in Beijing in response to the increasing significance of IPR issues in China. The program was formally instituted in 2006 as a result of the successes of the first two IPR Attachés and the 2005 funding that Congress allocated to international outreach efforts.

To date, IPR Attachés have been assigned to the following countries: Brazil, China, Egypt, India, Mexico, Russia, Switzerland and Thailand. The general objective of the program is to promote U.S. IP policies, which include taking the actions necessary to strengthen the protection and enforcement of IPR of U.S. businesses abroad. The IPR Attachés are supported in their efforts by country/region specific teams in the USPTO's Office of Policy and External Affairs.

In 2010, former Director David Kappos established a task force to evaluate the program and make recommendations regarding its future. The project resulted in 18 proposals, all of which were approved, including expanding the program resulting in an attaché for South Africa and developing better training (addressed within the Office of Policy and External Affairs and work-details in the Office of the Intellectual Property Enforcement Coordinator).

TPAC will continue to monitor the program to ensure that Trademark's investment is proportionate to the percentage of time the IPR Attachés and their support are dedicating to trademark-related matters.

b. Madrid Protocol Updates

As of the dates listed, the following countries acceded to the Madrid Protocol: Philippines (July 25, 2012), Columbia (August 29, 2012), New Zealand (December 10, 2012), Mexico (February 19, 2013), India (July 8, 2013), and Rwanda (August 17, 2013). The USPTO has provided (or will provide) technical assistance to some of the new members, including Mexico and India.

World Intellectual Property Organization (WIPO) is creating a multi-language database of identifications/recitations of goods/services. WIPO plans for each country to review the contents of the database and indicate which items are acceptable (language, specificity, etc.) to their national Trademark office. The USPTO is participating in the project.

The USPTO is collaborating with WIPO to plan a seminar on advanced Madrid Protocol practice. The seminar would be offered through the USPTO's Global Intellectual Property Academy.

c. TM5 Annual Meetings

By way of background, "Trilateral" references the governmental cooperation established over a decade ago by the USPTO, the Japan Patent Office (JPO) and the Office of Harmonization for the Internal Markets (OHIM) to promote harmonization of trademarks among the members' offices. The name has been changed to "TM5", to reflect the recent addition of the Korean Intellectual Property Office (KIPO) and the State Administration for Industry and Commerce (SAIC) of the People's Republic of China to the group.

The last Annual Meeting was held October 30 - 31, 2012 in Barcelona, Spain. At that time, the Partners discussed various projects including: i) developing a list of identification/recitation of goods/services that will be accepted in all five countries (ID Project); and ii) holding a bad faith filings-seminar being coordinated by the JPO and tentatively planned for late 2013 in Tokyo (Bad Faith Project).

The Partners have designated the KIPO to act as the secretariat for the next Annual Meeting. The event is scheduled for December 5- 6 2013, in Seoul, Korea.

**B. IT and E-Government Issues**

1. Trademarks Next Generation ("TMNG")

In 2009, the Director of the USPTO instructed the Office of the Chief Information Officer ("OCIO") to separate the trademark information-technology infrastructure from the rest of the USPTO IT infrastructure and implement an integrated IT system for end-to-end electronic processing of trademark applications and trademark registration maintenance. Trademarks Next Generation ("TMNG") is intended to replace the patchwork of legacy applications and databases that operate on relatively old software.

Moreover, TMNG is intended to give trademark owners and practitioners, as well as Examining Attorneys, all of the tools needed for end-to-end electronic trademark processing and to accommodate the dynamic information needs of trademark owners.

Although the scope of TMNG has broadened significantly since its inception, and

the transition from existing legacy systems to a new, integrated system will take years, OCIO continues to manage the TMNG project well. In particular, OCIO has improved its communication and cooperation with Trademark Operations, and this has enabled OCIO to identify a number of business priorities for Trademarks and to develop an action item list, grouped by tiers of relative importance.

The priority items have been segregated by fiscal year and, as is typical with any project of this magnitude, priorities have at times shifted within the tier structure according to current need, budget and other factors at the USPTO.

During FY 2013, OCIO made significant progress on several key projects.

- Universal Laptop Deployment
- Separation and virtualization
- Trademark Content Management System
- Madrid Stabilization
- Business priorities and wish list

a. Universal Laptop Deployment (“ULP”)

TPAC congratulates OCIO on the successful rollout of its deployment to Trademark employees of the new universal laptop computers to replace the personal computers and laptops previously used. The new laptops feature both standard software needed by all USPTO employees and, within particular distribution groups, customized software needed by the employees.

For Examining Attorneys, there is a great dependency on FAST, X-Search and SNAG-IT. Maintaining the functionality of these legacy applications presents an ongoing challenge for the

remote use of the laptops by Examining Attorneys. TPAC recognizes that both Trademarks and OCIO must continue to evaluate the correct allocation of resources between maintaining the functionality of legacy applications (such as FAST and X-SEARCH) and building the new, integrated architecture of TMNG, which will eliminate the need for these systems.

During FY 2013, OCIO had to continue to address problems encountered by Examining Attorneys using these systems and to attempt to minimize disruptions to the ability of Examining Attorneys to complete their work in a timely manner. TPAC is pleased to note that, throughout the process, both Trademarks and OCIO have maintained good communication and have worked well together to address these issues while continuing with the development and implementation of TMNG.

b. Separation and Virtualization

Separation of the IT infrastructure for Trademarks from other businesses is intended to mitigate system dependency risks. OCIO is currently working on five legacy systems, and each of those systems are in various stages of testing. These separation projects are currently in accordance with deployment dates announced by OCIO.

Virtualization of the IT infrastructure for Trademarks is intended to increase the agility and scalability of the systems, improve management of the systems, decrease power consumption, and lower maintenance costs. TPAC will focus on two aspects of this project: Trademark Content Management System (TCMS) Phase 1, and Madrid Stabilization.

c. Trademark Content Management System (TCMS)

The goal of TCMS is to improve an internal architectural system used by Examining Attorneys and to give them the ability to accurately review, display and store all content related to a trademark application or registration file, including status and historical information. Currently, Examining Attorneys must retrieve this information from multiple sources; there is no centralized repository for this data. The number one priority of the project is ensuring that all images are migrated into the TCMS. TCMS will accommodate information submitted by applicants as well as content created by the USPTO. There will be different types of content, such as multimedia and video files, and this system will allow for inclusion of other types of file formats that may be developed in the future. Essentially, Examining Attorneys will be able to access all information concerning a case, including multimedia files, through TCMS.

TPAC applauds this effort and strongly encourages OCIO to continue making this project a priority.

d. Madrid Stabilization

OCIO identified a number of issues with the Madrid Processing system. The project to stabilize this system has been categorized into three major areas: 1) improve ability to add new countries as they become members of the Madrid Protocol; 2) implement processing system for transformations that can be incorporated into Trademark docketing systems; and 3) convert incoming paper international applications to XML format.

A Tiger Team Task force has been created to address Madrid stabilization issues. OCIO identified eighty-seven (87) action items related to this project, sixteen of which have been deemed high priority tasks. TPAC congratulates OCIO for focusing on this very important project and for obtaining the necessary funding needed to continue working on the sixteen items.

This project is of great importance to USPTO, particularly because the average cost of processing Madrid Protocol applications is significantly higher per application than traditional trademark applications. Once this project is completed, trademark owners will benefit from reduced processing costs and faster processing time.

e. Business Priorities and Wish List

Trademarks continues to gather input from Managers, employees, the unions that represent them, and from external users of trademark systems on their “wish lists” for TMNG functionality. OCIO has incorporated the wish list into its business priorities. OCIO reviews the business priorities with Trademarks on a quarterly basis and reorders them accordingly. TPAC encourages the representative constituents to continue to discuss such matters as TMNG progresses towards final conclusion and implementation.

TPAC is encouraged by the good communications and cooperation between Trademark Operations and OCIO. TPAC is mindful, however, that much work still needs to be done and that progress has been slower than originally anticipated on a number of projects. TPAC encourages Trademarks and OCIO to continue with the completion and implementation of TMNG, as this system currently represents a significant investment by trademark customers, who look forward to beginning to see the benefits of that investment as TMNG systems come on line. TPAC acknowledges the hard work and partnership of OCIO staff, under the leadership of John Owens (Chief Information Officer), Rajeev Dolas (TMNG Portfolio Manager) and Marcie Lovett (Acting Director, Trademark Systems Division). These three members of OCIO met with the IT Subcommittee of TPAC throughout the year to discuss how best to implement TMNG and to keep us current on progress. TPAC is grateful for their patience with explaining highly technical systems and concepts to non-tech savvy members.<sup>v</sup>

C. Budget and Funding Issues

1. Access to Funds - Treatment of User Fees under Sequester.

Sequestration refers to a section of the Budget Control Act of 2011 (BCA) that went into effect in March 2013 as an austerity fiscal policy with across-the-board spending cuts in all discretionary Federal budgets totaling approximately \$85.4 billion. USPTO fees are not exempt from sequestration. The BCA requires these cuts to be applied to actual fee collections beginning in March 2013 at an annualized rate of 5% for FY 2013. In addition, the spending caps in the BCA continue for 10 years. Unless Congress passes legislation to change the law, it will be in effect until 2023.

Although the USPTO is funded directly by fees paid by its customers (*i.e.*, trademark and patent owners), the Office may not access the fees it collects unless authorized by Congress. Therefore, the USPTO will be impacted by the sequestration. In FY 2013, Trademarks incurred expenses that were less than its budget request, thanks to good financial management practices. Therefore, the sequestration did not require Trademarks to furlough employees or to reduce its level of service during FY 2013

TPAC has significant concerns, however, about the extent to which Trademarks will be able to continue to deliver on its current initiatives and to provide the level of service that trademark owners rely upon in the event sequestration continues for the foreseeable future. Our Committee will work closely with the USPTO to minimize, to the extent possible, the adverse effects of sequestration on future operations.

In our 2012 Annual Report, TPAC applauded the USPTO for seeking comments from users on the adjustment of trademark application filing fees to incentivize complete electronic communication between trademark applicants and the USPTO. The responses from the public indicated a positive reaction to adjustment of fees. However, due to the uncertainty of the budget because of sequestration, it would not be prudent to reduce fees at this time.

Trademarks will need its reserve to make adjustments in its budget with the continuing sequestration of Federal discretionary budgets. The TPAC supports this decision by the USPTO and we will continue to monitor the budget to ensure that the same level of service can be provided for trademark applicants.

2. USPTO use of Activity - Based Cost accounting and expansion to TTAB

Since 1997 the USPTO has had an Activity-Based Information System (ABI). Since 2008, Trademarks has been working to expand it to include a TTAB model. The ABI system has been introduced to various operating divisions within Trademarks. The usefulness of the resulting accounting system has fundamentally changed the operations of the USPTO.

In FY 2012, the TTAB worked with OCFO to improve their ABI model. With the new information provided by the ABI model, the TTAB made management decisions that greatly improved its metrics for FY 2013. TPAC applauds progress in Trademarks and the TTAB for its use of ABI. The model helps to better identify the cost of specific activities. The ABI model should help leadership in Trademarks make more informed decisions related to spending, fee setting and initiatives to support the mission and goals of the USPTO. TPAC recommends that the Office of OCFO provide additional training in management practices to allow the management team in Trademarks to better utilize the extensive information available in ABI for strategic planning and optimal use of internal resources.

3. Maintenance of both Trademark AND Patent Fence

As stated in the 2012 Annual Report, in FY 2011, the America Invents Acts added a “patent fence,” which prohibits patent fees from being used to fund trademark operations. Historically, Title 35 of the United States Code has contained a “fence” provision that prohibits the USPTO from spending trademark user fees to fund patent operations. With the improvements made in the ABI, the ability to track activities of administrative offices, such as Office of Chief Information Officer, Office of Chief Financial Officer, Office of Administrative Officer, Office of Chief Policy Offices and Director of International Affairs, and Office of General Counsel should greatly enhance the ability of the USPTO to appropriately allocate the cost of “shared services” that are common to both Trademarks and Patents.

With the existence of two “fences,” TPAC encourages the Office of the CFO to continue to explore methods that will ensure that an appropriate allocation between trademark and patent fees is made based on the extent of work performed or assigned to either trademarks or patents. While trademark fees account for less than 10% of the total user fees collected by the USPTO, TPAC notes that in certain administrative units, Trademarks contributes a greater percentage of the administrative unit’s expenses.

While this may be appropriate in cases where Trademarks consume a greater share of shared resources, TPAC encourages the Office of the CFO to continue to diligently apply the best available models, including ABI, to ensure compliance with both the “trademark fence” and the “patent fence” set forth in Title 35.

For example, the Office of Policy and International Affairs is the fastest-growing organizational unit within the USPTO. As it expands, this group is consuming an increasing share of revenue from trademark user fees. Currently, Trademarks contributes 35% of the Office of Policy’s budget while Trademark revenues are less than 10% of the total agency budget. While advising the Executive Branch on IP Policy is a mission of the USPTO, TPAC encourages the careful application of ABI to the activities of the Office of Policy and International Affairs, to ensure that trademark user fees contributed to this organization are in proportion to the amount of time spent on trademark-related matters. The ABI model is an excellent tool for tracking the specific activities of the shared-services administrative offices, TPAC applauds the development and adoption of this model within the USPTO, and we encourage the Office of the CFO to carefully apply ABI to ensure compliance with the statutory “fences” when allocating both trademark user fees and patent user fees.

#### **D. Trademark Trial and Appeal Board.**

##### **1. Precedential Decisions**

Continuing the trend of FY 2012, in which there was an increase in the number of precedential decisions (45 as opposed to 38 in FY 2011), the TTAB exceeded its target of 45 decisions for FY 2013, with a total of 49. The increase in the number of precedential decisions is a positive development because these decisions give trademark owners guidance on substantive trademark issues as well as clarifying evidentiary and procedural issues that arise in practice before the Board. During FY 2013, the TTAB released precedential decisions addressing issues that included: nontraditional marks, such as scents, sounds and flavors; functionality and the failure to function as a mark; procedural issues in *inter partes* cases, including those dealing with submissions and filings that were not timely; as well as likelihood of confusion, descriptiveness, adequacy of specimens, and others.



## 2. Performance Statistics

FY 2013 heralded many positive trends at the TTAB. For the first time in several years there were decreases in inventory and/or pendency in many key metrics. The inventory reduction efforts, in particular, resulted in decisions on the merits for older pending cases, and decisions on older contested motions that allowed the cases in which those motions were pending to move forward for eventual settlement or determination on the merits. The Board also developed and released important new dashboards to enable customers to view TTAB data in an understandable visual format. The third edition of the TBMP was also published in a timely fashion. As discussed below in greater detail, with assistance and support from Trademarks, Chief Judge Gerard Rogers and his team worked hard to increase productivity throughout the TTAB, and their collective effort showed.

### a. Oppositions and Cancellation Proceedings

In FY 2013, there was a slight 2.3% increase in the number of oppositions filed, from 5,160 in FY 2012 to 5,278. This continues a trend from FY 2010, where the TTAB began to see a reversal in the decline in filings that had occurred during the economic downturn.

Cancellations rose a bit more over FY 2012 levels, increasing 3.4% to 1,513 (vs. 1463 in FY 2012).

### b. Pendency.

For the first time in many years, pendency of matters before the TTAB decreased in virtually all performance measures, as discussed more fully below. Significantly, during FY 2013, the TTAB also began to publicly disclose goals on pendency and to measure its performance against those goals. These welcome improvements suggest that the TTAB is beginning a turnaround, and TPAC is confident that, if this level of performance continues, pendency will soon stabilize at target levels.

- The pendency of issued final decisions from the ready-for-decision date (RFD) on the merits (that is, either the date the *ex parte* appeal or *inter partes* proceeding is submitted for consideration on the briefs or the date of oral hearing, if one was held), was reduced 26.3% to 17.7 weeks, down from the FY 2012 level, when it peaked at 24 weeks. Significantly, while the first two quarters of FY 2013 saw continuing elevated pendency, the significant increase in production of final decisions by the Board's Administrative Trademark Judges (ATJs) during those quarters cleared out many older cases. This allowed the TTAB to achieve its FY 2013 goal for pendency on final decision (12-14 weeks) during both third quarter (13.9 weeks) and beat it during the fourth quarter (11.3 weeks).

Pendency had dramatically spiked between FY 2009 (when it was at just 6.6 weeks) and FY 2012. TPAC is confident that the lower pendency number reflects a shift toward productivity and output from the TTAB consistent with the volume of cases maturing to

ready for decision, as an increased staff of judges, with more assistance (see below), are now processing final decisions on the merits in a more expeditious fashion.

- The reduction in pendency was achieved by working off cases at a monthly rate faster than the rate by which cases matured to ready for decision on the merits. The Board's ATJs increased the number of cases decided by 26.6% from 534 decided in FY 2012 to 676 decided in FY 2013. This reduced inventory of the number of cases awaiting decision to 88 at the end of FY 2013, as compared to 256 cases at the end of FY 2012, a reduction of nearly 66%. This is a significant step in a positive direction, and TPAC is confident that the TTAB will now focus on stabilizing inventory at a level appropriate for both its staffing level and to account for the rate at which cases mature to ready for decision.
- The average "end to end" or "commencement to completion" pendency of trial cases (i.e., *inter partes* cases) was reduced 6.8% to 189.5 weeks, down from 203.3 weeks in FY 2012, and a further improvement over FY 2011 levels of 213.3 weeks. The median pendency of trial cases was reduced 11.3% to 165 weeks in FY 2013, compared to the FY 2012 median of 186 weeks.
- For appeals in FY 2013, the average "end to end" processing time was reduced 35.2% to 49.8 weeks from an unusually high average pendency in FY 2012 of 76.8 weeks. Since FY 2012 was a high water mark for average appeals pendency, TPAC is hopeful that in FY 2014 the TTAB will approach average appeal pendency levels consistent with FY 2009 and 2010, in which average pendency for appeal was 44 and 45.5 weeks respectively. Median pendency for appeals in FY 2013 was reduced 17% to 44 weeks down from 53 weeks in FY 2012; and with both the third and fourth quarters of FY 2013 below 40 weeks there is reason to believe that a return of average pendency to the 44-45 week range will be achieved.
- Although pendency decreased in many areas, it rose with respect to disposition of contested motions, from 8.7 weeks in FY 2012 to 13.3 weeks in FY 2013; but this was an expected consequence of the Board's concerted focus to work down the inventory of cases with older motions. The Board changed its focus from the average pendency of motions in which decisions were completed and mailed (which left out of the picture motions that were pending and undecided) to focus on reducing the average pendency of motions awaiting decision. In this regard, the Board succeeded. At the end of FY 2012, there were contested motions ready for decision that had been lingering for over one year.

By contrast, at the end of FY 2013, the age of the oldest contested motion was just 16 weeks, meeting the TTAB's target. And the average pendency of motions awaiting decision at the end of the year was slightly more than 6 weeks. This reduction in the age of motions awaiting decision is a very positive development, and TPAC feels confident that average pendency of motions disposed of by mailed decisions will also begin to decline as the interlocutory attorneys are able to work consistently on cases in a timely fashion.

TPAC also applauds the interlocutory attorneys for meeting its target to reduce the inventory of contested motions ready for decisions from 199 at the end of FY 2012, to 130 at the end of FY 2013; this represents a reduction of 34.7%.

TPAC is heartened by the improvement in the overall TTAB performance in FY 2013. After many challenging years, the TTAB for the first time since 2009 began to see substantial improvement across the board in most of its metrics. Total (“end to end”) pendency for appeals, trials and Accelerated Case Resolution (ACR) cases fell, as did the inventory of cases waiting decision at the end of the year and the inventory of contested motions. Under the leadership of Chief Judge Gerard Rogers, the TTAB saw the addition of four new judges in FY 2013, bringing the total up to 22. While this was a very significant contributing factor to the improved performance of the TTAB, other factors were at play too.

First, Trademarks assigned one of its most senior staff, Meryl Hershkowitz, Group Director, to assist Chief Judge Rogers in improving the efficiency of the TTAB. Group Director Hershkowitz provided critical guidance and leadership, and the teamwork exhibited by her and Chief Judge Rogers led to many significant accomplishments. TPAC also commends Commissioner Cohn for providing leadership to the process and for being willing to assign one of the valuable members of her leadership team to the important task of helping to set the TTAB on a positive path. TPAC believes that the cooperation and leadership demonstrated by these individuals will pay significant dividends at the TTAB.

Second, the new Managing Attorney for the interlocutory staff, Kenneth Solomon, proved to be a very positive addition to the operation, as he worked with the interlocutory attorneys to bring down the inventory of contested motions. Cheryl Butler, Senior Attorney and Trademark Trial and Appeal Board Manual of Procedure (TBMP) Editor of the Trademark Trial and Appeal Board, also continued to play an important role as the third edition of the TBMP was published on schedule and she contributed in many other ways to improve TTAB processes. Deborah Decker continued to support the Chief Judge and all the administrative operations of the TTAB efficiently and effectively. The development of a strong leadership team at the TTAB has proved well worth the investment as the metrics show. The public who practice before and rely on the TTAB receive the benefit of these improvements.

As TPAC noted last year, the TTAB had just undertaken a work project with examining attorneys from the Trademark Examining Operations being dedicated to assist the judges for approximately four months, working on cases with medium or large records. Some of these attorneys worked on multiple cases consolidated for a single decision, while others worked on multiple, unrelated cases. The size of the respective case records in large part dictated how many cases each participating examining attorney was able to work on. Each participating judge was free to arrange with the detailee how the case work would be done and what tasks the detailee would complete. The arrangements varied but invariably included reviewing and reconciling Trademark Trial and Appeal Board Inquiry System (TTABVUE) prosecution history entries, pleadings, evidence and briefs.

Some cases presented legal issues that required research and briefing. Almost all cases involved evidentiary objections and disagreements of the parties that required discussion and resolution by the detailee and supervising Administrative Trademark Judge (ATJ). Digesting and summarizing evidence not stricken or excluded also was a common task for project participants. When drafting the final decisions on the merits, some participants were tasked with drafting discrete sections of decisions that were merged with work the ATJ completed. Other participants drafted entire decisions for ATJ review. And participants were available to cite check and support the writing being done by the ATJs.

In addition, in FY 2013 the Board utilized law students as summer externs to work on large record cases in both contested and uncontested matters, and on research projects.

While the programs have not been in effect long, and there are undoubtedly best practices and learning that will be developed and shared, it is clear that the use of detailees, and summer externs has helped the TTAB manage caseloads more efficiently. TPAC supports the TTAB as it continues to look at programs like this to help the judges with cases, particularly those cases with large evidentiary records or complicated proceedings.

In its Annual Report for FY 2012, TPAC called upon the TTAB to establish targets, or goals for its performance, and to measure itself against them. The TTAB has done that with respect to certain key metrics, such as pendency for final decisions, inventory of contested motions ready for decision, and cases decided, and is now reporting its performance versus those goals. This is also a welcome improvement, as it allows for greater transparency and gives users of the TTAB expectations as to the time the Board itself anticipates for various types of proceedings.

Because the TTAB is the tribunal of choice for many trademark owners or applicants, bringing a deep understanding of trademark law and also cost efficiencies in dispute resolution, it is important that the Board maintain its reputation as the place to go to resolve trademark disputes. Having greater transparency, faster processing of cases, and faster results is important to maintaining the public trust in and reliance upon the TTAB.

c. Final Decisions

As noted above, the total number of cases decided on the merits increased 26.6% to 676 over FY 2012's level of 534 cases. This figure is the third highest total of cases ever decided in one year by the Board.

d. Active *interpartes* cases filed Under the "Old" Rules.

In November 2007, the TTAB instituted a major rules change that impacted cases filed after that time. For the last several years, the TTAB has been working on resolving all the "old rule" cases, and has made further significant progress in that regard in FY 2013. At the end of FY 2012, 166 cases were still pending under the old rules.

As of the end of FY 2013, there are 58 cases that the TTAB is monitoring – and 30 of these are necessarily suspended because of the pendency of other civil proceedings, Board cases, or for further consideration of an application by an examining attorney.

The TTAB's goals with respect to those “old rule” cases that have been suspended for settlement is to have the cases settle and be removed from the docket, or to move the cases on to discovery and/or trial, under a schedule that allows no further delays. With cases that are “on track”, the TTAB strategy has included having TTAB interlocutory attorneys set schedules to be adhered to, and ensure discovery is completed on schedule and involving the ATJ for a conference if a party proposes to file a motion for summary judgment between the close of discovery and trial. While TPAC recognizes that there are some cases over which the TTAB has no ability to control, such as those suspended because of a Federal court matter, it applauds the TTAB for being proactive with the parties to ensure cases suspended for settlement are not allowed to remain inactive. TPAC, like the TTAB, looks forward to the day when the Board will no longer have to operate under two different sets of rules.

3. TTAB Manual of Procedure (TBMP)

In June, FY 2013, slightly more than a year after the revised Third Edition had been published, the TTAB published the second revision of the Third Edition, which includes practice updates occurring between March 3, 2012, and March 1, 2013, and also incorporates amendments to the Trademark Act, the Trademark Rules of Practice and the Federal Rules, where appropriate and further incorporates, where applicable, the changes to the USPTO's Code of Professional Responsibility that became effective May 3, 2013. Revising the Manual on at least an annual basis has been advocated by TPAC for some time, and TPAC happily acknowledges that the TTAB has made a strong start in keeping the TBMP up to date through three consecutive annual revisions, and thus has maintained a guidance document of higher value to the user community.

Similar to the use of the IdeaScale® tool in Trademarks, TPAC has encouraged the TTAB to offer a version of the TBMP that will allow users to provide comments and input. This functionality was realized in FY 2013 when the Board posted revised Chapter 1200 (ex parte appeals) for public comment and discussion.

4. Accelerated Case Resolution (ACR)

The TTAB continued in FY 2013 to advocate that parties adopt ACR, and those cases in which ACR was agreed to by parties showed that ACR does significantly improve the speed at which a matter is resolved. Because ACR can be adopted by the parties at any time during the pendency of a case, the statistics about ACR are somewhat uneven—greater efficiencies would be realized if parties agreed to ACR options earlier, rather than later in cases. Nonetheless, a close look at available information demonstrates that, even when cases involving later stipulation to use of ACR options are included in the average, ACR provides measurable time-saving benefits. In FY 2013, for example, ACR time pendency was 114.2 weeks, about 40% lower overall (“end to end”) pendency than in a trial involving standard discovery and trial methods.

There is considerable information on the TTAB Web site on the availability of ACR, including a list of cases in which it has been used, which was updated in the fourth quarter of FY 2013. The Web site also includes “plug and play” options, including one set suggested by American Intellectual Property Law Association (AIPLA), and another set of possible approaches proposed by the TTAB. Through utilization of any of these options, as proposed or as the parties may wish to amend them, parties can determine a certain time frame for the various steps in its proceedings and tailor the case to fit within the time frame.

The TTAB also continued, throughout the year, to publicly advocate use of ACR; and the Board’s attorneys routinely discuss the options with parties to trial cases, during phone conference, and suggest consideration of ACR in written orders on contested motions.

ACR has been adopted in a variety of ways by parties. In some cases, the parties have stipulated that the briefs and evidence filed in conjunction with a summary judgment motion can be used as the trial record and briefs, thereby presenting the case for final decision on the merits without the need for traditional trial and briefing. This approach requires the parties to expressly stipulate that the Board can resolve any issues of material fact not stipulated to by the parties or which may have been overlooked or unforeseen by the parties. Another common approach to ACR involves the parties agreeing upon alternatives to traditional discovery, trial and briefing. Indeed, a key benefit of ACR is that it is very flexible and the parties can design an approach that meets the needs of their case. One major hurdle that precludes the adoption of ACR more broadly has been a lack of awareness on the part of practitioners as to its availability and flexibility. To that end, the TTAB has been very active over the last few years promoting ACR with information on the TTAB Web site, through the major IP organizations with articles, presentations and the like, and through public speeches.

While the TTAB has consistently promoted ACR, its adoption is still relatively infrequent. While in FY2012 there were nine cases in which the litigants opted for ACR, in FY2013 there were again only nine cases in which the parties elected some form of ACR. TPAC applauds the efforts of the TTAB to publicize the benefits of ACR and to make ACR readily available to parties with matters pending before the Board. It is the hope of TPAC that parties to TTAB proceedings will increasingly take advantage of this valuable method to more quickly and efficiently resolve disputed trademark issues. TPAC encourages intellectual property associations, Continuing Legal Education (CLE) providers and others to assist in making practitioners more aware of the availability of ACR options in proceedings before the TTAB and in discussing the significant benefits available through the use of ACR.

#### 5. TTAB Roundtable on ACR

On November 28, 2012, Chief Judge Gerard Rogers convened a TTAB Roundtable to obtain user feedback on the use of Accelerated Case Resolution in TTAB *InterPartes* Proceedings. TPAC was represented at the Roundtable by Kathryn Barrett Park, and TPAC Member Linda MacLeod also participated, in her capacity as a representative of AIPLA. Moderating the discussion were Chief Judge Rogers and Administrative Trademark Judge Peter Cataldo.

During the Roundtable, the following issues were examined

- a. What lessons have been learned from ACR cases and other cases employing ACR style efficiencies? How have stakeholders reacted to model schedules for ACR posted on the Board's web page? What circumstances militate in favor of adopting a model schedule, or for not adopting a model schedule?
- b. What impediments exist to broader use of Accelerated Case Resolution options by parties to Board *interpartes* proceedings? How can reluctance of parties to agree to ACR options be overcome? Are certain types of claims more suited to resolution by an ACR procedure than others? Are certain parties more amenable to ACR?
- c. Since a very small percentage of Board cases are processed on a full schedule of discovery, trial and briefing, should one or more ACR processing options be considered for adoption as the default approach for discovery and trial in Board trial proceedings? If so, what showing should a party have to make to obtain full discovery, trial and briefing options? Should the Board consider the default *interpartes* proceeding to allow full discovery but require an ACR approach to trial and briefing?
- d. ACR now can be pursued as an alternative to traditional discovery, trial and briefing only on consent of the parties. Should the rules be amended to allow for a Fast Track proceeding that would allow one party to move for utilization of an ACR procedure upon a particularized showing of need for rapid resolution of the case? If so, what type of showing would be required, and what should be the deadline for seeking utilization of a Fast Track option? Should plaintiffs seeking a Fast Track option have to plead and prove a more significant damage element? Should defendants seeking a Fast Track option have to plead and prove potential damage from the uncertainty created by delay of an application or a cloud on a registration?
- e. Open discussion of related issues and future opportunities to dialogue.

Many suggestions were made by the Roundtable participants, and a transcript of the discussion in its entirety is available on the TTAB website.

The TTAB also actively seeks public suggestions on ACR with its dedicated mailbox for ACR: [ACRsuggestions@uspto.gov](mailto:ACRsuggestions@uspto.gov). TPAC hopes that the suggestions are further considered by the Board, and that appropriate action, such as proposed rule-making to implement ACR, are undertaken in FY 2014.

TPAC also would like to see further appropriate actions undertaken that reflect comments received during the Roundtable on processing times at the TTAB. TPAC reported on that Roundtable in the Annual Report in FY 2012. As discussed above, TTAB has set some performance measures, which TPAC trusts are the first wave of a robust set of metrics against which the Board will report its performance publicly.

6. Creation of TTAB Dashboard

In FY 2013, the TTAB introduced a new TTAB Dashboard, to provide users with easy-to-understand visuals showing important TTAB statistics, which is now part of the USPTO Data Visualization Center.

The TTAB dashboards which are in beta, are available to the public and open for public comment, [TTABdashboards@uspto.gov](mailto:TTABdashboards@uspto.gov).

The dashboards report on a quarterly basis the following statistics:

- pendency of final decisions and contested motions
- the volume and types of new filings
- the number of different proceedings pending
- pending appeals maturing to Ready-for-Decision (“RFD”)
- pending appeals in inventory
- the age of pending appeals
- pending oppositions and cancellations maturing to RFD
- pending oppositions and cancellations in inventory
- the age of pending trial cases
- trial case contested motions(by type) that are ready for decision
- trial case contested motions (by type) in inventory and the age of pending motions (by type)

While still being tested, it is clear that these visuals are an enhanced service to the public as they present key metrics in a simple and easy to understand format.

The TPAC is excited about the TTAB Dashboards, and very encouraged that further enhancements of the dashboards are contemplated that will contain additional data that users seek, as well as more historical data, which will show trends at the TTAB.