May 20, 2013

The Honorable Sylvia Mathews Burwell
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Sequestration of USPTO Funding

Dear Director Burwell:

I am writing on behalf of the American Bar Association to express our serious concerns regarding sequestration of funding for the U.S. Patent and Trademark Office. Although funded entirely by user fees paid by its customers, with no taxpayer funds involved, for many years at the end of the 20th century and the beginning of the 21st the USPTO was crippled by the withholding of substantial portions of the user fees collected. The ABA strongly opposed that diversion of funds, and we are pleased to note that the Obama Administration has ended that practice and has consistently and successfully supported congressional appropriation to the Office of the full amount of user fees collected, including in the current fiscal year.

Regrettably, sequestration has the same effect as the discredited practice of diversion by appropriation, with the same damaging effect on the ability of the USPTO to provide services to the creative and developmental sectors that are essential to the economic health of our nation.

With strong support from the Obama Administration, the 112th Congress enacted the America Invents Act – the most far-reaching modernization of U.S. patent laws and practice in over half a century – and provided for additional funding to implement those improvements. The announced sequestration of almost 9% of all fees collected by the USPTO after March 1 of this year is likely to seriously impair the delivery of ongoing USPTO services and to substantially slow if not shut down implementation of improvements provided for in the AIA.

The result may be made more damaging to the operations of the USPTO due to the fact that it appears there is no specific provision made for the Office to recapture the user fees that are sequestered. In the case of user fees that are not made immediately available to the Office because they exceed the amount appropriated for that fiscal year, the AIA and annual appropriations Acts direct these funds into a Reserve Fund to later be made
available through reprogramming. However, since the user fees that are sequestered are not in excess of the appropriation, this avenue of recovery does not appear to be open. We understand the concerns that led to the decision to resort to broad-based sequestration, which in a global sense is based on the relationship between government spending and revenue to support that spending. However, a self-funded agency like the USPTO would not seem to be subject to those concerns. In this regard, we note that Congress may have attempted to accommodate this situation through the provision of law that provides an exemption from sequestration of “activities financed by voluntary payments to the Government for goods or services to be provided for such payments.” (2 U.S.C. 905 (g)(1)(A).)

While it is important to determine if the unique funding mechanism for the USPTO falls under the objectives of and technical rules for sequestration, this is not the most important consideration. Most important to consider are the negative consequences that the sharp reduction in resources will have on the ability of our nation’s inventors and innovators to comply in a timely fashion with the requirements of our intellectual property laws, which are absolute prerequisites to the production and marketing of their inventions and innovations. From past experience with user fee diversion, and from evaluation of the measures announced and anticipated to comply with the requirements of sequestration, we know that sequestration as currently applied will necessitate suspension of hiring of personnel, including patent examiners and administrative law judges needed to implement new programs and improvements mandated by Congress in the AIA, as well as drastic reductions in funding for training, travel, and improvements in information technology. These and other curtailment of resources will produce system-wide reductions in the timeliness and quality of the services provided by the USPTO, where timeliness and quality are essential to the ability of the Office to serve our creative community effectively and to support the United States in the increasingly competitive world economy, where intellectual property is our leading asset.

For these reasons, the American Bar Association urges you to reconsider the application of sequestration to the funding of the U.S. Patent and Trademark Office.

Sincerely,

Thomas M. Susman