NSBA
National Small Business Association®

America's small business advocate

ISSUE BRIEF

Patent Reform

Small business concerns are fundamental to any discussion concerning patent reform

On September 16, 2011, President Obama signed into law the NSBA-opposed Leahy-Smith *America Invents Act* (AIA), one of the most comprehensive overhauls of the U.S. patent system since its inception. Throughout this legislative process, NSBA argued and continues to argue that it is imperative that any effort to modernize and improve America's patent system carefully consider the effect on the nation's independent inventors, technology startups, and innovative small businesses, which are the fount of breakthrough innovation in the U.S.

Small-patenting companies produce five times as many patents per revenue dollar as large-patenting companies and 20 times as many as universities—and more small-business innovations are commercialized. According to studies commissioned by the U.S. Small Business Administration, small-entity patents cover more original and broader technologies than large-patenting firms, as their measured impact level across downstream technologies is broader than that of large-entity patents. Small-business patenting entities also are more likely to develop emerging technologies than large firms.

NSBA opposed two key elements of this legislation, specifically provisions pertaining to post-grant patent challenges and its radical weakening of the American grace period – a conversion of the U.S. patent system from a first-to-invent to a first-to-file system. The effective elimination of the American grace period puts small-business patentees at greater risk than the previous system and will result in a U.S. patent system strongly tilted in favor of large incumbent firms at the expense of America's small-business innovators.

According patent priority to the invention date rather than the filing date has protected U.S. small-business patentees who are diligent (within their limited means) in reducing their invention to practice, taking time for vetting the viable inventions from those that ultimately fail prior to filing their patent application. Provisions in the AIA that repeal the private activity and disclosure grace period and the first-to-invent system will cause small-business inventors to lose valuable priority rights, weakening or invalidating their patents by "prior art" that is actually after their invention dates.

The AIA, by repealing the invention date as the priority date, compared to prior art, will increase pressure to establish filing date priority and require applicants to file more frequently, at every stage of development, without perfecting their inventions. The costs of increased filings—more frequent invention reviews, earlier and more frequent hiring of outside patent attorneys, and new patenting costs—will be felt most strongly by small businesses. Some small firms will lose their patent protection altogether, as they will be unable to afford a doubling of their application filing rate.

Large patenting firms can afford in-house patent counsels, who can file more applications at every stage of development. These large firms have very little expertise in how small-business patenting firms operate, set priorities, balance resources, and file patent applications. On these matters, the U.S Congress should have deferred to the innovative, small firms and independent inventors. America's independent inventors, technology startups, and innovative small businesses are providing the country with new jobs and its most important breakthrough technologies—not the large, multinational firms that will benefit from gutting the American grace period to the detriment of small businesses.

NSBA urges Congress to look for ways to ease the broad, negative effects AIA will have on small firms and enact targeted legislation to strengthen the U.S. Patent and Trademark Office, improve its patent examination quality, and halt the fee diversion that has robbed the agency of valuable resources needed to hire and retain qualified examiners and address the staggering patent backlog.