

Lee vs. Trump: \$ 710 Million Dollar Fee Increase

Lame Duck PTO Director Michelle K. Lee's issuance of a Federal Register notice proposing a \$ 710 million dollar PTO fee increase runs squarely, head on, into the position taken by the Republican Congressional leadership that may block her action.

The following information has been obtained from a highly reliable source with knowledge of the inner workings of the Federal Government:

Trump Rulemaking "Moratorium"; House Letter to Agency Heads: On November 8, 2016, Donald Trump was elected President. The President-elect's website promises to issue a "moratorium on new agency regulations that are not compelled by Congress or public safety." Likewise, on November 15, 2016, the House Republican leadership (led by Majority Leader Kevin McCarthy) sent a letter to all agency heads warning them against "finalizing pending rules or regulations in the [Obama] Administration's last days." The House leadership letter is attached. version of this note.

Lee Fee Hike, "Economically Significant": On October 3, 2016, USPTO Director Lee published in the attached Federal Register notice of proposed rulemaking to increase patent fees by \$710 million over the next five years. Because the public cost of this rule exceeds \$100 million annually, the USPTO acknowledges that the rule is economically "significant" under Executive Order 12866, triggering additional regulatory scrutiny. Public comments on the proposed rule are due December 2, 2016. Once comments are received, the AIA requires that the final fees be published for 45 days before the fees become effective.

What Will Lee Do?: Director Lee can avoid the Trump "moratorium" on pending regulations if the USPTO publishes the final fees by December 6, 2017 (45 days before Donald Trump takes office on January 20, 2017). But, rushing the rules forward in this manner would allow the USPTO just two business days to consider public comments (hardly adequate for rules deemed "significant") and would directly contravene the House Republicans' warning against precisely this kind of "midnight" rulemaking.

Regards,
Hal

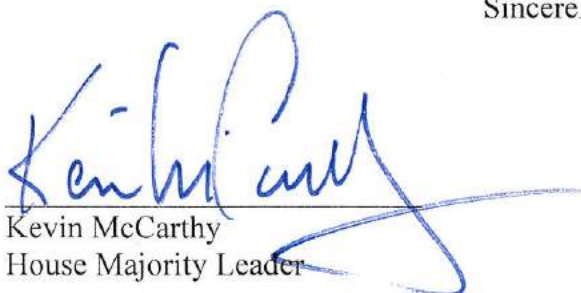
Congress of the United States
Washington, DC 20515

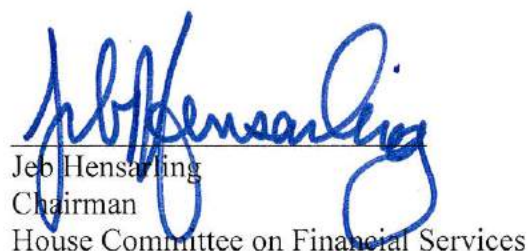
November 15, 2016

Dear Secretaries, Administrators, Directors and Commissioners:

Earlier this year, President Obama's Chief of Staff stated that the Administration will "do audacious executive action throughout the course of the rest of the year."¹ As you are aware, such action often involves the exercise of substantial policymaking discretion and could have far-reaching impacts on the American people and economy. Considering these potential consequences, we write to caution you against finalizing pending rules or regulations in the Administration's last days. By refraining from acting with undue haste, you will ensure that agency staff may fully assess the costs and benefits of rules, making it less likely that unintended consequences will harm consumers and businesses.² Moreover, such forbearance is necessary to afford the recently elected Administration and Congress the opportunity to review and give direction concerning pending rulemakings.³ Should you ignore this counsel, please be aware that we will work with our colleagues to ensure that Congress scrutinizes your actions – and, if appropriate, overturns them – pursuant to the Congressional Review Act.⁴

Sincerely,


Kevin McCarthy
House Majority Leader


Jeb Hensarling
Chairman
House Committee on Financial Services

¹ David Cook, *White House chief of staff promises 'audacious executive action'*, CHRISTIAN SCIENCE MONITOR (Jan. 13, 2016), http://www.csmonitor.com/USA/Politics/monitor_breakfast/2016/0113/White-House-chief-of-staff-promises-audacious-executive-action (emphasis added).

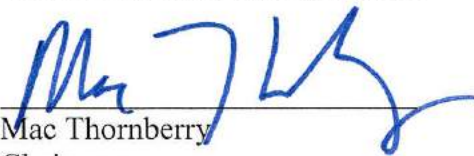
² Other aspects of the rulemaking process are diminished when administrations issue "midnight" rules, lowering the quality of the final product. The Office of Information and Regulatory Affairs (OIRA) has limited opportunity to review "midnight" rules, "and neither agency nor OIRA personnel have sufficiently strong incentives or latitude to conduct searching analyses of whether the rules should or should not be issued or modified." H. COMM. ON THE JUDICIARY, MIDNIGHT RULES RELIEF ACT OF 2016, H. Rep. No. 114-782, pt. 1, at 2 (2016).

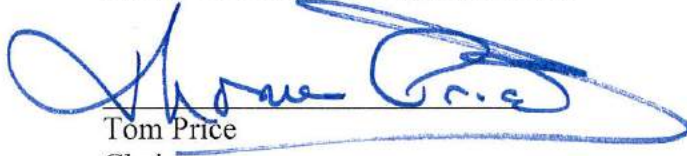
³ On January 20, 2009, President Obama's Chief of Staff requested that the heads of executive departments and agencies refrain from finalizing new rules, writing that "[i]t is important that [the President's] appointees and designees have the opportunity to review and approve any new or pending regulations." We respectfully submit that the sentiment animating President Obama's guidance is as applicable today as it was almost eight years ago, and that democratic accountability requires that all agencies – even so-called independent agencies – temporarily refrain from finalizing rules.


⁴ 5 U.S.C. §§ 601 *et seq.*



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Chairman
House Committee on Agriculture


Hal Rogers
Chairman
House Committee on Appropriations


Mac Thornberry
Chairman
House Committee on Armed Services

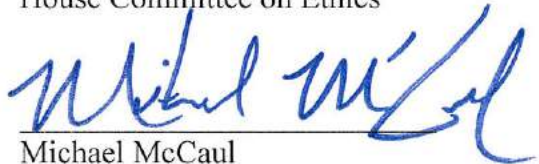

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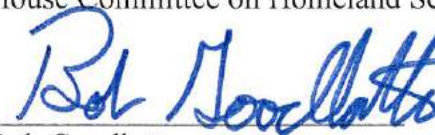

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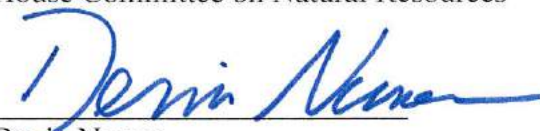

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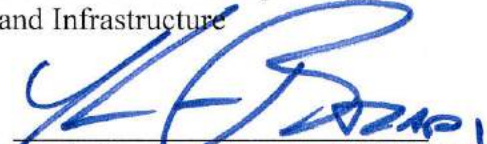
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Chairman
House Committee on Small Business



Bill Shuster
Chairman
Committee on Transportation
and Infrastructure



Jeff Miller
Chairman
House Committee on Veterans' Affairs



Kevin Brady
Chairman
House Committee on Ways and Means

CC: All Federal Executive and Independent Agencies