



**National Retail Federation Comments  
re: Revision to Rules of Practice Before the Patent Trial and Appeal Board**

December 2, 2025

The National Retail Federation (NRF) appreciates the opportunity to comment on the U.S. Patent and Trademark Office's (USPTO) October 17, 2025 Notice of Proposed Rulemaking (NPRM) on inter partes review (IPR) institution standards. NRF is the world's largest retail trade association, representing retailers of all sizes and formats, from Main Street shops and online sellers to national brands. Our members collectively employ more than 52 million American workers and support millions more through their supply chains.

NRF strongly opposes both key elements of the proposed rule: the mandatory stipulation requirement and the categorical bars to IPR institution. Together, these provisions would drastically limit access to IPR for legitimate businesses, increase exposure to abusive patent litigation, and undermine Congress's intent when it enacted the America Invents Act (AIA).

**The Retail Perspective on IPR**

Retailers sit at the end of long and complex supply chains, relying on vendors, logistics providers, and technology companies to deliver the tools and systems that power modern commerce. While retailers themselves rarely file IPR petitions, they are among the most affected by the program's success or failure. IPR allows upstream suppliers to challenge low-quality patents before they can be weaponized against downstream users, including retailers accused of infringement for simply using standard e-commerce software, wireless routers, or point-of-sale systems.

When weak patents are invalidated through IPR, litigation campaigns targeting hundreds of small retailers never materialize. This protection saves businesses and consumers alike from wasteful legal expenses and inflated technology costs. By contrast, when access to IPR is curtailed, the retail industry becomes a favored target for non-practicing entities (NPEs) that exploit the high cost of litigation to extract nuisance settlements.

## **The PTO Has Already Restricted Access to IPR**

Even before this NPRM, access to IPR had already narrowed. Recent USPTO memoranda have introduced non-statutory, discretionary factors—such as patent age or parallel litigation—that effectively block institution regardless of a petition’s merits. As a result, many strong petitions never proceed to a hearing. In fact, just a few weeks ago, the USPTO denied thirteen IPR applications without even explaining the grounds for denial. Retailers are already feeling the impact of these changes: patent demand letters and lawsuits involving basic digital retail technologies are rising again, echoing the pre-AIA environment. The proposed rule would codify and worsen this situation.

## **NRF’s Opposition to the Proposed Rule**

The proposed rule contains several deeply concerning provisions:

### **1. Mandatory Stipulation Requirement (Proposed §42.108(d))**

This provision would require petitioners to forfeit their right to raise any §102 or §103 invalidity arguments in other forums as a condition for IPR institution. This is inconsistent with the statute and unworkable in practice as the proposed rule would foreclose the right to contest patent validity on grounds statutorily unavailable to petitioners in IPR (e.g., non-printed prior art). Retailers and their suppliers often face complex litigation involving multiple parties and venues. Forcing petitioners to make a blanket stipulation could deter IPR filings entirely, depriving downstream businesses of the protections the AIA intended.

### **2. Categorical Bars to Institution (Proposed §42.108(e) and (f))**

The categorical bars preventing IPR when another tribunal has ruled on validity, or is likely to rule first, would allow patent owners to shield weak patents simply by suing an end user early. In the retail context, NPEs could target a single small retailer to foreclose any subsequent IPR by a supplier or technology provider. This outcome contradicts the AIA’s purpose of providing an efficient, expert forum for addressing invalid patents.

### **3. Overly Narrow “Extraordinary Circumstances” Exception (Proposed §42.108(g))**

The proposed exception is illusory. By excluding new prior art, expert testimony, or Federal Circuit precedent from the definition of extraordinary circumstances, it ensures that nearly all petitions would remain barred. This rigidity undermines fairness and limits the PTO’s ability to correct its own examination errors.

## **Economic and Competitive Impact**

For retailers, patent abuse is not an abstract concern—it directly affects business operations and consumer prices. Before the IPR process was established, NPE campaigns routinely targeted small retailers for using basic website features or inventory systems. These suits diverted resources from hiring, store improvements, and customer experience. IPR brought accountability to the patent ecosystem. The proposed rules would undo that progress, harming both businesses and consumers by raising costs and discouraging innovation.

## **Recommendations**

NRF respectfully urges the USPTO to:

- Withdraw the proposed rule in its current form.
- Retain open access to IPR for all petitioners, including those acting on behalf of downstream users.
- Remove or narrow the mandatory stipulation requirement.
- Eliminate the categorical bars that shield invalid patents from review.
- Expand the “extraordinary circumstances” exception to include new prior art, new evidence, and intervening case law.
- Conduct a full economic impact analysis focused on downstream industries such as retail, where litigation costs and supply-chain dependencies amplify harm from low-quality patents.

## **Conclusion**

The IPR system can be an effective tool to promote patent quality and deter abusive litigation. For retailers, the proposed changes would discourage innovation, reduce affordability, and erode consumer trust. NRF therefore strongly opposes the NPRM and urges the USPTO to maintain, rather than restrict, equality of access to inter partes review.