

## Joseph Matal in Law360: 'Patent Policy to Watch In 2021'

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**PRACTICES** Patent Litigation, Patent Office Trials, Intellectual Property

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Haynes Boone Partner Joseph Matal talked with *Law360* about patent policy issues to watch this year.

Below is an excerpt:

With the 2020 election behind us, attorneys will be monitoring how the USPTO [U.S. Patent and Trademark Office] operates in the Biden administration and whether Congress takes a new look at inter partes reviews and patent eligibility.

The office recently received more than 800 comments about whether the Patent Trial and Appeal Board's policy of refusing to review patents when a trial is looming in court should be enshrined in formal rules. There is not enough time for a decision on that to be made before Biden takes office, so it will fall to the new USPTO director.

"The new administration will have its work cut out for it, absorbing those comments and deciding what to do," said Joseph Matal of Haynes Boone, who was acting USPTO director before current leader Andrei Iancu took office in 2018. "There's some question of will they keep these policies in place or will they suspend them at least temporarily while they absorb the comments?"

After Biden is sworn in, Iancu will most likely depart and the USPTO will have an interim leader. But "acting directors aren't in a position to launch any policy initiatives," Matal said, so there may not be any significant changes until later in the year.

### **PTAB Changes From Congress**

The U.S. Supreme Court is currently reviewing a Federal Circuit decision that the way PTAB [Patent Trial and Appeal Board] judges are appointed is unconstitutional and could rule that Congress must enact new legislation so that it passes constitutional muster. But Congress could act to make changes at the board regardless of what happens in that case, Matal said.

The high court case is about whether PTAB judges have sufficient oversight from the USPTO director, although Matal said participants in inter partes reviews have come to believe that the board's judges need more distance from the policy goals of the agency's leadership.

"If the board is taking on the role of court in these IPR cases and adjudicating patent validity and live disputes, it ought to have some of the independence and other procedural protections that you associate with a court," he said.

Lawmakers discussed several ways to achieve that goal at a 2019 hearing after the Federal Circuit's ruling, such as making the PTAB's top officials presidential appointees confirmed by the Senate with the authority to review the board's decisions.

Matal said such a change would better enable individual PTAB judges to decide cases without feeling influenced by USPTO leadership. He called it a "middle of the road, good government" approach that could win congressional support and would be a helpful change, even if the Supreme Court holds that it is not constitutionally required.

"A lot of people are beginning to realize that policy direction and control can be problematic, and you want the board to operate more like a court and just apply the law to the facts," he said.

To read the full article, click [here](#).