

United States Senate

WASHINGTON, DC 20510-3005

June 3, 2015

The Honorable Mary Jo White
Chair, United States Securities and Exchange Commission
100 F Street, NE
Washington DC 20549

Dear Chair White:

I write to express concern with a recent investment strategy being used by some securities market participants. Certain investment firms have begun using newly created patent proceedings against companies shortly after taking a short position in the companies' securities. I ask whether this strategy is permissible under current SEC interpretations of federal securities laws, including insider trading and anti-manipulation provisions, and whether additional legislation is needed to curb potential abuse.

As you may know, in 2011 Congress passed the America Invents Act to streamline and modernize our nation's patent system. As part of this legislation, Congress created a new post-grant proceeding within the U.S. Patent and Trademark Office under the Patent Trial and Appeal Board. This new Inter Partes Review (IPR) hears challenges on select patentability issues using a streamlined version of patent litigation. Due to the differences in claim construction and evidentiary standards, IPR proceedings have become a far more favorable venue than parallel district court proceedings to strike down a patent. A review by the University of Chicago Law Review found that more than 77 percent of final IPR proceedings end with instituted claims being invalidated or disclaimed, much higher than in traditional district court proceedings.¹

In a troubling development, some investment managers have announced their intention to use these proceedings as part of a wider investment strategy. These managers take a short position in the securities of particularly patent-dependent life sciences companies and then file IPR proceedings against these companies' key patents. The first company targeted by this behavior, a small biopharmaceutical company that patented a treatment to help improve multiple sclerosis patients' mobility, lost 9.7 percent and 4.8 percent of its share value in the immediate aftermath of two such filings.² At least five other biopharmaceutical companies have been targeted using

¹ 81 U Chi L Rev Dialogue 93

² <http://www.bloomberg.com/news/articles/2015-04-02/hayman-s-kyle-bass-targets-shire-in-new-drug-patent-challenges>

the same strategy in the past two months, and according to public comments, one hedge fund plans to use similar tactics against at least 15 life science companies.³

While IPR proceedings were designed to provide an alternative dispute forum, I am concerned by these reports. Such conduct can have negative consequences for targeted companies and their shareholders, and it raises concerns of market manipulation and abuse. While Congress may consider patent litigation reforms, I believe it is also important to address the capital markets issues raised. Therefore I am requesting the SEC's view as to its authority to address such conduct, whether such conduct is permissible under current law, and whether you believe that the SEC needs additional authority to prevent such abuses.

If you have any questions, please contact my counsel Brian Chernoff at brian_chernoff@menendez.senate.gov. Thank you for your prompt consideration of this request.

Sincerely,



ROBERT MENENDEZ
United States Senator

³ <http://www.ft.com/cms/s/0/a2a706a0-969c-11e4-922f-00144feabdc0.html>