



# THINK FORWARD

## Is the PTAB Trending Patent Friendly?

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### **Declining IPR Institutions Paired with Increasing Unpatentability Holdings**

Early in its history, the Patent Trial and Appeal Board (“PTAB”) developed a reputation for being unfriendly to patentees. More recently, with former Director Iancu’s oversight, the PTAB’s reputation has swung towards being more friendly to patentees. Looking at the statistics from the last two fiscal years at the U.S. Patent & Trademark Office (“USPTO”), however, it appears that any increased friendliness towards patentees may be focused on the front end (at the institution stage), not the back end (at the final written decision stage).

According to the USPTO’s [published statistics](#), the post-grant institution rate dropped from 63% to 56% from 2019 to 2020 (fiscal years). On the other hand, the rate at which instituted claims were held unpatentable actually increased from 47% to 53% over this same time period.

This means that while it may be more challenging to get an IPR instituted in the recent past, if a petitioner is successful at the institution stage, the petitioner has a greater chance of being successful at the final written decision stage. These statistics illustrate the importance of the institution stage for both patentees and petitioners alike. Patentees should be looking for any opportunity to support denial of a petition, because that may be a patentee’s greatest opportunity to avoid a holding of unpatentability. Petitioners, on the other hand, should spend the time and resources necessary to achieve institution, because once they are over that hurdle, the recent odds are in their favor regarding a holding of unpatentability.