

# Patent Reform Uncertainties

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# Status of Reform Legislation

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- ▶ Several bills pending at end of last Congress—but clean slate after Democrats took control in November
- ▶ No reform bills yet introduced in present Congress
- ▶ House held patent reform hearing in February; IP subcommittee chair promises reform bill soon
- ▶ No action by Senate—but there are rumors of cooperation with House leadership in drafting a bill
- ▶ Limited window of opportunity

# Strategic Planning Opportunity

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- ▶ Three proposed reforms present opportunities for improved strategic planning
- ▶ Strategic planning: ability to identify and deal with problematic patents before commercialization
- ▶ Critical for regulatory-intensive medtech industry
- ▶ First step is to identify patents that pose a threat by searching patent literature

# All Patent Applications Published

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- ▶ All applications now published after 18 months
- ▶ Opting out no longer an option
- ▶ No more submarine patents
- ▶ Patent literature searching is more effective

# Heightened Willful Infringement Standard

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- ▶ Currently, willful infringer may be liable for treble damages
- ▶ Threat of treble damages often viewed as deterrent to patent searching
- ▶ Reform proposal: patent owner required to send written notice
- ▶ No risk of willful infringement liability by simply searching patent literature

# Postgrant Opposition Procedure

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- ▶ Adversary proceeding for challenging validity of granted patent
  
- ▶ Basic features
  - Interested party files detailed opposition request
  - Patent owner files response
  - Only limited discovery available
  - Decision by panel of three patent judges
  
- ▶ Use to weed out poor quality patents identified through searching

# Looking Forward

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- ▶ Three reforms taken together provide opportunity for improved strategic planning
- ▶ Benefits of these reforms available to both large and small medtech companies
- ▶ Take advantage: conduct patent searches throughout the product development process as part of a strategic planning effort