USPTO Responses to Questions for the Record – Chairman Tillis
U.S. Senate Committee on the Judiciary
Subcommittee on Intellectual Property

"Promoting the Useful Art: How can Congress prevent the issuance of poor quality patents?"
October 30, 2019
Witness: The Honorable Andrew Hirshfeld
Commissioner for Patents
U.S. Patent and Trademark Office
Submitted: April 3, 2020

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1. Are patent application filings increasing, decreasing, or staying about the same?

Response: In FY 2019, new utility applications increased by a rate of 4.9% over FY 2018, the highest growth rate since FY 2013. While the USPTO's incoming workload includes many types of filings, such as requests for continued examination (RCEs), reexaminations, design applications, etc., the USPTO believes that the new utility application filings is the best measure of innovation activity.[1]

2. One of the issues that has been raised in our review of Section 101 is that Section 112 – especially Section 112(a) – is applied more rigorously for some industries than others. For example, we have heard from stakeholders that 112(a) is applied much more strictly for life science companies than for technology companies. What are some ways to make Section 112(a) apply equally for all industries?

Response: Section 112 applies to all industries and inventions. Accordingly, the USPTO trains examiners to apply Section 112 to all industries and inventions and does not instruct examiners to apply Section 112(a) more rigorously for some industries than others. However, there is more judicial precedent applying Section 112(a) to inventions in the life sciences than to those in the computer technologies. To ensure consistent application of section 112, the USPTO delivered targeted Section 112 training to examiners in FY 2019 in areas of technology that are perceived as being treated less rigorously under Section 112(a) and is exploring additional guidance and training opportunities to raise examiner awareness on the proper application of Section 112(a) to inventions in those areas of technology.

3. Do you think increasing the examination time for certain art units could help to apply 112(a) equally? Has the USPTO considered additional guidance to address these concerns?

Response: As a result of a USPTO analysis on examination time, the USPTO implemented adjustments to examination time in October 2019. Under these adjustments, all examiners began receiving additional examination time tailored to specific attributes of an application, including the overall number of claims, the length of the specification, and the number of pages in any filed information disclosure statements. Also starting in October 2019, examiners with the least amount of examination time in our production system also began receiving additional time to align their time allotments with the requirements for current patent examination. In October 2020, we plan to make additional examining time increases as we fully transition to an updated process for assigning patent applications to patent examiners that will automatically match each application to the examiner best suited to examine the application, taking into

[1] A utility patent, as opposed to a design patent or a plant patent, may be granted to anyone who invents or discovers any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof.

account the complete technological profile of the applications, the work experience of each patent examiner, and the workload balancing needs of the agency. These time adjustments should afford examiners in all technology areas adequate time to apply all of the patent statutes, including Section 112(a), to inventions in all industries. The USPTO will continue to monitor and evaluate examining time to ensure that assigned times are appropriate and that pendency goals continue to be met.

In January 2019, the USPTO issued additional guidance addressing written description and enablement issues under 35 U.S.C. § 112(a), especially those relating to computer-implemented functional claims that recite only a solution or outcome to a problem without reciting how the solution or outcome is accomplished. The USPTO will continue to monitor the effects of this guidance, including whether additional guidance is needed.

4. Another issue raised during our review of Section 101 is that Sections 102 and 103 are not being applied rigorously to all patents. How can the USPTO improve the examination process under those Sections to ensure that non-novel and obvious patents don't make it through the system?

Response: The USPTO is continuing to improve quality of the examination process, including the application of Sections 102 and 103 through multiple initiatives that are designed to ensure that examiners properly interpret claim scope, perform high-quality prior art searches, properly evaluate the relevant prior art, and apply it to the claims when appropriate, and clearly convey their findings of patentability determinations in their office actions. Providing training and guidance to patent examiners at all levels is critical to producing strong, reliable, and predictable patent rights, and the USPTO is committed to providing the best training to its examiners. Recent training for examiners included the topics of claim interpretation; the principles of Sections 112, 102, and 103; evaluating and analyzing legal arguments; proper techniques in searching for prior art; and discipline-specific training on relevant databases to identify non-patent literature. Additional initiatives undertaken by the USPTO include giving examiners additional time for examining patent applications, improving workload assignments to ensure that each patent application is matched with the examiner best suited to examine the application, providing enhanced resources for prior art searches, and reviewing patent quality more comprehensively.

5. The USPTO publishes first action pendency data on the average number of months until there is a first action. Should Congress ask the USPTO to also publish pendency data on the average number of months until there is a final action (e.g., a final office action or notice of allowance) as an additional quality metric?

Response: As part of its commitment to transparency and keeping the public informed, the USPTO publishes many pendency-related statistics on its public data visualization center (Patents Dashboard).[2] These data include pendency data on the average number of months until final disposition (issuance or abandonment). As part of our continued efforts to improve transparency, the USPTO plans to increase focus on compliance rates with the patent term adjustment statutes, which are congressionally set timeframes for patent examination. The USPTO believes these measures provide greater transparency and certainty to our stakeholders as compared to measures of average pendency.

6. By only randomly selecting Office Actions to review and measure correctness, is the Office missing out on spotting potential poor quality patterns (e.g., patterns that might emerge from

[2] https://www.uspto.gov/dashboards/patents/main.dashxml

comparing multiple Office Actions for the same patent application or comparing first Office Actions issued by an examiner with an above-average rate of granting first-action allowances)?

Response: The random sample of office actions generated for review by the Office of Patent Quality Assurance (OPQA) is representative of the entire patent examining corps. Thus, if there are pockets of behaviors that might affect quality, these factors should be detectable in the large sample. Additional sampling can be used to supplement the random reviews when there is an indication that a deeper level of review would be beneficial. However, the USPTO notes that OPQA's random reviews represent only a fraction of the cases used by the USPTO to identify quality trends. Rather, the largest number of office action reviews used to identify quality trends of individual examiners are conducted by supervisory patent examiners (SPEs) as part of their supervisory duties to rate examiners with respect to quality. As part of these reviews, SPEs routinely compare multiple office actions for the same patent application to identify quality patterns for the examiner handling the application. If a SPE identifies any quality concerns, the SPE will work with the examiner to ensure the examiner is given the assistance needed to improve quality. SPEs also use the same review form that is used by OPQA to record the results of at least some of these reviews to allow the Office to have a richer data set to analyze quality trends across the entire patent examining corps.

In addition to office action reviews, the USPTO also uses process data to help spot quality patterns. For example, as part of the USPTO's Quality Index Reports (QIR) database, SPEs and other managers have access to "process"-type metrics, such as allowance rates and appeal rates for individual examiners. SPEs can compare these metrics to art unit or technology center averages to identify examiners with examination behaviors that are outside of the norm. The SPE can then investigate further to determine whether these behaviors are due to the examiner adopting best practices or because the examiner needs assistance.

7. In addition to the randomly selected Office Actions that the Office reviews to measure correctness, should the Office randomly select and review second and later Office Actions that contain new grounds of rejections based on a new prior art reference without the applicant having amended its claims? Could such additional quality reviews help determine when a first office action was based on a poor quality prior art search and help in developing examiner training so that more first office actions are based on good quality prior art searches?

Response: The routine reviews performed by SPEs described in the answer to the previous question, include reviewing second and later office actions, and whether these later office actions contain new grounds of rejections based on a new prior art reference without the applicant having amended its claims. Based on these reviews, SPEs could then coach, mentor, and further train examiners regarding the quality of the first office actions. At present, the USPTO's IT systems do not allow for targeted identification of office actions that meet the criteria posed in this question (*i.e.,* later Office Actions that contain new grounds of rejections based on new prior art references without amended claims). However, the USPTO is refining its "big data" capabilities to allow such identification in the future.

Since prior art search is critical to the quality of any office action, the USPTO has undertaken other efforts to study its search capabilities in addition to its ongoing quality reviews. For example, the USPTO recently completed a pilot program in which OPQA reviewers used a new, more robust search form to assess the quality of an examiner's recordation of their search. As part of this pilot, OPQA reviewers also conducted a separate search of the case and compared their search results with the examiner's search results. The reviewer then sent this review information back to the examiner and requested the examiner to meet to discuss the search, either in the context of the patent application or in more general terms. The

initial results indicate that both reviewers and examiners found the new review form and subsequent discussion helpful in identifying ways to improve prior art searches.

8. Should Congress request that the USPTO expand its semi-annual stakeholder perception survey of 3000 frequent-filed customers to also include randomly-selected customers?

Response: The USPTO semi-annual survey of frequent filers is designed to monitor changes in quality perceptions. The most efficient and economical method to measure these changes is to limit the surveys to a random sample of those customers that have six or more patent applications in prosecution at any given time, which represents at least 80% of total applications prosecuted. As such, they are likely to base their perceptions on multiple office actions from multiple examiners, which is critical in validating whether internal review findings and customer perceptions are in alignment. With that said, there are several other data collection efforts by the USPTO to obtain perceptions from all customers and stakeholders. In FY2019, the USPTO significantly enhanced its customer experience program, offering random surveys to website visitors and other key touchpoint users to measure satisfaction with products and services. Furthermore, the USPTO continues to monitor feedback provided to contact centers and programs, such as the Patents Ombudsman, to ensure perceptions of all current and potential patent applicants are considered.

9. Should Congress request that the USPTO publish the results of its semi-annual stakeholder perception survey of 3000 frequent-filed customers?

Response: The USPTO frequently shares the findings from its surveys through web-based chats, public presentations at conferences, or as part of its overall communication strategy related to quality, such as during Patent Public Advisory Committee (PPAC) public briefings.

10. The USPTO on its website indicates it is continuing to develop metrics for the "clarity" of its work products. What is the best way for measuring such clarity?

Response: The USPTO recently updated its office action review form to measure and improve clarity and plans to start using this updated review form in FY 2020. The updated review framework acknowledges that clarity has many components. For example, all statutory rejections of patent claims need to be clearly articulated in office actions so that the rejections can be understood. Additional components of clarity include appropriate statements of the meaning of claim terms or claim scope, and reasons for indication that one or more claims are allowable. The updated review form will capture not only whether a rejection is found to be non-compliant, but will also record the specific reasons the reviewer found the action to be non-compliant, including correctness or clarity concerns. This information will enable the USPTO to better identify how clarity impacts the compliance rates of the patent examining corps.

To facilitate improved quality of patent examiner work product, including the clarity of office actions, the USPTO plans to implement a new performance appraisal plan for all examiners in October 2020. This performance appraisal plan provides examiners with a more detailed roadmap for improved clarity in office actions. Furthermore, in addition to the feedback that the OPQA reviews give examiners about concerns in their office actions, the reviewers recently started to provide patent examiners with positive feedback and recognition when their office actions displayed the very best practices of correctness and clarity. The USPTO believes this balanced approach to patent examiner feedback will ensure that examiners are provided with the knowledge and incentives to focus on continued improvement.

11. Do you support ending fee diversion?

Response: Yes, the USPTO supports permanently ending fee diversion by allowing the USPTO to have access to all of the fees that it has collected. Moreover, the USPTO's fee paying customers, the public advisory committees, and intellectual property organizations have also consistently expressed their expectation that fees paid to the USPTO for patent and trademark services should be used to fund USPTO operations and investments.

The USPTO believes that all forms of funding uncertainty serve to impair its ability to effectively plan for long-term personnel and technology needs as well as implement procedures that improve the granting of predictable, reliable, and high-quality intellectual property rights.

12. If Congress were to end fee diversion, how would USPTO use those additional resources to improve patent quality?

Response: The USPTO appreciates that Congress has consistently appropriated funds to the USPTO in amounts consistent with its annual fee collections over the past decade. This stability has allowed the USPTO to invest in many long-term quality enhancement efforts such as examiner training, development of a new automated patent docketing system, and updated IT systems. The permanent end of fee diversion through the creation of a revolving fund, as proposed in pending legislation (S. 2082/H.R. 3666), would ensure that the USPTO can continue to have revenue stability so that it can continue to invest in similar quality enhancement efforts moving forward.

13. Is the USPTO in need of any new technologies or information systems which would enable examiners to conduct a more robust prior art search?

Response: Yes. The USPTO is exploring new technologies and developing prototypes to support the use of artificial intelligence and machine learning to help patent examiners search for relevant prior art. Specifically, we are working on artificial intelligence that will hopefully be able to learn the language of patent applications as it relates to the various and disparate technical disciplines that patent examiners must search for relevant prior art. Additionally, the USPTO is currently pilot testing a new search tool for all examiners that will provide a platform for improved prior art searching of foreign patent documents, as well as facilitate future enhancements for use of artificial intelligence and access to non-patent literature. These technologies will take significant time and effort to develop.

14. It's sometimes said that it's not clear what is meant by "patent quality" and therefore how can you judge whether there's a quality problem at the Patent Office. But isn't this actually simple? Doesn't "high quality" simply mean that a patent satisfies the statutory requirements for getting a patent, and "low quality" means that it doesn't? And with this definition, doesn't the fact that patents are invalidated in IPR and district court litigation at a rate of around 40% clearly demonstrate that there is a quality problem?

Response: The USPTO defines a quality patent as one that was correctly issued in compliance with all the requirements of Title 35 as well as the relevant case law at the time of issuance. However, while the invalidation of a patent could certainly mean that the patent was not of the requisite quality at issuance, invalidations do not always mean that the patent is of poor quality. For example, a patent could be invalidated due to changes in the law since the time of issuance of the patent. This is particularly true with the evolving case law on subject matter eligibility. Additionally, a patent could be invalidated based on legitimate differences of opinion in close-call decisions of patentability. These close-call decisions during district court litigation or IPR proceedings often result in disagreement among judges, as evidenced by the

Court of Appeals for the Federal Circuit overturning the decision, or the presence of a dissenting opinion either at the PTAB or at the Federal Circuit. Finally, a patent could be invalidated based on prior art that was not reasonably accessible to the examiner during examination.

As to invalidity or unpatentability rates in district court and before the PTAB, it is important to put the rate of invalidation at the PTAB and the district court in perspective. There is a significant selection bias in patents being challenged at the PTAB or in district court because, among other things, litigation is expensive, and thus is presumably pursued only if parties think that there is a reasonable chance of winning and the patented technology is valuable. Thus, any metrics from trials are biased toward higher invalidation rates.

To illustrate this point, the USPTO's data indicate that only a tiny fraction of the approximately 3 million patents currently in force have been challenged at the Patent Trial and Appeal Board (PTAB). In FY 2019, just over 665,000 patent applications were filed at the USPTO, and the USPTO issued approximately 370,000 patents. During the same fiscal year, approximately 1,000 patents were challenged through AIA petitions. Generally, about one-third of PTAB challenges are denied by the PTAB for lack of sufficient evidence to proceed or for other reasons, another one-third are settled by the parties, and the remaining one-third reach a final written decision by the PTAB. In all, approximately 25% of all patent claims that are challenged through AIA petitions to PTAB result in invalidation. It is also important to note that challenges to patents at the PTAB are often brought with respect to only a subset of the claims in the patent, which are usually the claims that the challengers believe they are most likely to succeed in invalidating. Thus, even if a challenger succeeds in invalidating some claims, other claims in the patent can still remain valid and enforceable.

15. In a normal private business, employees are closely managed by their supervisors and given regular feedback on the quality of their work. At the Patent Office, this sort of evaluation happens much less frequently, especially with respect to patent examiners who can sign off on their own documents. How could this be done better? What other ways are there to manage the large Patent Office workforce to provide more oversight and help ensure high quality work product?

Response: Primary patent examiners have demonstrated the legal and technical competencies of patent examination and are authorized to sign their own documents (office actions) without an initial review by a supervisor prior to issuance. Achieving the level of primary examiner typically requires at least five years of examining experience and training and culminates in a rigorous, nearly two-year testing and evaluation period where their work is extensively reviewed prior to being granted authority to sign off on their own work. While the USPTO provides primary examiners with a certain level of autonomy, the USPTO understands that there is a balance between autonomy and oversight in order to ensure that the consistency and reliability of issued patents is maintained at a high level. To achieve this balance, once an examiner has achieved the level of primary examiner, their work is subject to periodic supervisory reviews and random reviews conducted by OPQA. Through these periodic supervisory reviews, random OPQA reviews, and by performing statistical comparisons of a primary examiner's data (such as allowance rates, actions per disposal, number of RCE's, etc.) versus statistics of other examiners, a supervisor is able to identify outliers and address any anomalies. In order to bolster the high-quality work that the examining corps already does, the USPTO has been proactive in piloting new programs to ensure the highest quality work product. For example, OPQA recently paired up individual quality reviewers with individual patent examiners to review and provide one-on-one feedback of examiners' prior art search strategies during the examination of applications for patents. This program was positively received by most of the examiner participants, indicating that it helped improve the quality of their prior

art searches. The USPTO is currently looking at developing other potential programs where OPQA staff will partner with and assist examiners in improving their examination skills.

16. The primary way that patent examiners are evaluated is by counting how many actions they take over a two-week period. It's understandable that with such a large workforce this kind of measurement is helpful, but using "counts" as the PTO does tends to encourage certain activity, like meeting production numbers, to the exclusion of delivering high quality. How is the PTO evaluating weather the count system fits into a modern Patent Office that examines patent applications at the cutting edge of technology?

Response: Quality and pendency are both important factors in examination. In an effort to achieve and maintain the right balance, the USPTO evaluates patent examiners based on rigorous workflow and quality requirements that work in tandem and periodically reviews these requirements to make changes as needed. Significant changes affecting patent prosecution have occurred in the years since the current examination time goals were established, including the development of new and converging technologies of increasing complexity, an increase in the volume of prior art, and changes to the system used to classify patent applications and search for prior art. Because of all this, the USPTO is making fundamental updates to the methods and processes that support patent examination, including the method used to allot time for examining patent applications.

As an example of how the USPTO makes changes to maintain the right balance of quality and pendency, the distribution of count credit has been re-structured to place a greater emphasis on a more thorough and complete first action on the merits by assigning most of the count credit at first action, and less credit for follow-on actions. By doing so, the USPTO incentivizes a complete search on first examination, compact prosecution, and an overall thorough and complete first action, which is critical to ensuring high-quality, efficient examination of patent applications.

17. In 2015, the Patent Office created the role of Deputy Commissioner for Patent Quality. The Patent Quality Team at the Patent Office was very active. They acknowledged that improvements can always be made, and engaged with stakeholders to discuss ideas and implement numerous programs to address quality. Recently, there hasn't been much activity from that group. Why is that? Are there plans to reinvigorate this area?

Response: The Deputy Commissioner for Patent Quality and the Patent Quality Team have continued to focus on facilitating improvement to the USPTO's systems and processes, including several initiatives in 2018 & 2019. One of the main initiatives was examiner training, which included improvements to entry-level and refresher training and training on the January 2019 revised subject matter eligibility guidance, restriction practice, interview practice, and 35 U.S.C. §112 and claim interpretation, particularly relating to computer-implemented functions, an examiner trainer development program, non-patent literature (NPL) search training, the peer search collaboration pilot, the Patent Examiner Technical Training Program (PETTP), Site Experience Education (SEE) program, and patent quality chats for patent examiners. The Office of Patent Quality also developed external stakeholder training, such as Stakeholder Training on Examination Practice and Procedure (STEPP), virtual instructor led trainings (VILT), and external patent quality chats. The Office of Patent Quality has continued to conduct the semi-annual Patent Quality Survey to capture internal and external perception of patent quality and has continued to engage with organizations on roadshows and external outreach on ways to improve patent quality. The Office of Patent Quality also created a Customer Experience team whose efforts support USPTO's vision of being a customer-oriented organization that uses customer and user feedback to continuously improve processes, products, tools, and communications. The Patent Quality Team also led several internal

initiatives on quality assessment, including assessing incoming applications, updating the master review form (MRF) to better identify and track data and best practices, implementing an accolades program recognizing quality work from examiners, completing a PTAB Case Study analyzing AIA Trials to better understand prior art trends, and developing the OPQA search feedback pilot. The USPTO will continue to focus on how to most effectively integrate the work of the Office of Patent Quality with the rest of the Patents organization to ensure issuance of the highest quality patents possible.

USPTO Responses to Questions for the Record – Senator Coons
U.S. Senate Committee on the Judiciary
Subcommittee on Intellectual Property

"Promoting the Useful Art: How can Congress prevent the issuance of poor quality patents?"
October 30, 2019
Witness: The Honorable Andrew Hirshfeld
Commissioner for Patents
U.S. Patent and Trademark Office
Submitted: April 3, 2020

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1. You testified that the USPTO is implementing a more flexible approach to allocating examination time. How does the USPTO determine how many hours to allocate for a given application? To what extent does the amount of time depend on the subject matter?

Response: Significant changes affecting patent prosecution have occurred in the years since the current examination time goals were established, including the development of new and converging technologies of increasing complexity, an increase in the volume of prior art, a change to the system used to classify patent applications and search for prior art, and changes to the legal landscape. Because of this, the USPTO is making fundamental updates to the methods and processes that support patent examination, including the method used to allot time for examining patent applications. In doing so, the USPTO took an analytical approach and considered various factors, including the significant changes noted above, the goals and mission of the agency, and stakeholder feedback.

Under the new method, time will be assigned to an application based on its classification "picture," which represents the full scope of technology recited in an application and accounts for multi-disciplinary inventions, as well as the particular attributes of the application, such as the number of claims, the size of the specification, and the number of pages in any filed information disclosure statements.

As we move forward, the USPTO will continually re-evaluate examining time allotments to ensure they enable us to meet our quality and pendency goals.

2. Your testimony referenced an improved patent examiner performance appraisal plan (PAP). Can you provide a copy of that new PAP and explain specifically how it will serve as a roadmap to improved patent quality? If not, can you provide the "enhanced list of exemplary practices for searching, improving clarity of the written prosecution record, and adhering to principles of compact prosecution" that it will include?

Response: Changes to examiner performance appraisals will provide greater emphasis on finding the best prior art as early as possible. The new PAP provides a clearer roadmap of expectations and best practices for examiners, continues to foster the outstanding work that the vast majority of examiners already do, and is a valuable tool to assist in performance improvement. The new PAP places a greater emphasis on search, compact prosecution and clarity, on placing the best art of record in the case at the earliest possible time in prosecution, and on stakeholder interactions. An examiner's performance rating will be based, in part, on the presence of the exemplary activities noted in the new PAP. The exemplary activities demonstrating a comprehensive search include searching the inventive concept as defined at the time of the first action on the merits; citing prior art on the record that is pertinent to significant, though

unclaimed, features of a defined invention or directed to the state of the art; and providing a brief description in the office action for relevant prior art that was cited but not applied in a rejection of the claims. For compact prosecution and clarity, exemplary activities include providing annotations that reasonably indicate where each claim limitation is met by a prior art reference, including proper reasons for allowance when necessary, and providing suggestions for applicants to overcome rejections when appropriate.

A copy of the new PAP, which USPTO plans to implement in FY 2021, is attached to this document. Details on the enhanced list of exemplary practices for searching, improving clarity of the written prosecution record, and adhering to principles of compact prosecution may be found on pages 7-8 of the new PAP.

3. One issue that some stakeholders have raised in the Section 101 debate is that Section 112's clarity and disclosure requirements are applied more rigorously in some areas of technology than others. What steps can Congress and the USPTO take to ensure that Section 112 applies equally to all industries and inventions?

Response: Section 112 applies to all industries and inventions. Accordingly, the USPTO trains examiners to apply section 112 to all industries and inventions and does not instruct examiners to apply section 112(a) more rigorously in some areas of technology than others. However, there is more judicial precedent applying section 112(a) to inventions in the life sciences than to those in the computer technologies. To ensure consistent application of section 112, the USPTO delivered targeted section 112 training to examiners in areas of technology that are perceived as being treated less rigorously under section 112(a) and is exploring additional guidance and training opportunities to raise examiner awareness on the proper application of section 112(a) to inventions in such areas and industries.

4. Former USPTO Deputy and Acting Director Rea testified about international work sharing and the Global Dossier. What specific steps is the USPTO taking to cooperate with other patent offices, and do these efforts yield greater efficiency and more effective examination?

Response: The USPTO continues its stewardship of the Global Dossier, a free set of business services that provide a single point of access to related applications filed in multiple patent offices. The Global Dossier provides stakeholders and users the ability to search, track, and access the file history information regarding a patent application family from all five major IP offices (United States Patent and Trademark Office, European Patent Office, Japan Patent Office, Korean Intellectual Property Office, and National Intellectual Property Administration, PRC). USPTO examiners are able to use Global Dossier services to review the search results and office actions for these related patent applications in other patent offices, which helps to create a more complete patent record and increase patent examination quality and efficiency.

The USPTO participates in additional work sharing efforts such as the Patent Prosecution Highway (PPH), the Collaborative Search Pilot (CSP) and PCT Collaborative Search and Examination (PCT CS&E). The USPTO regularly works with partner offices and stakeholders in these and other work sharing initiatives to modify the programs so that examination efficiency is maximized.

Under the PPH, participating patent offices, such as the Japan Patent Office and the European Patent Office, have agreed that when an applicant receives a final ruling from a first patent office that at least one claim is allowed, the applicant may request fast track examination of corresponding claim(s) in a corresponding patent application that is pending in a second patent office.

The CSP provides applicants who cross-file their patent applications internationally and designated partner IP office(s), the Japan Patent Office and the Korean Intellectual Property Office, with search results from multiple Offices early in the examination process before any IP office issues an office action, which provides the examiners in all designated partner IP offices with a more comprehensive set of prior art references to consider when making initial patentability determinations.

The PCT CS&E Pilot allows examiners from the IP5 Offices (in their capacity as International Authorities under the PCT), with different working languages, to collaborate on the search and examination of a single international application that results in an international search report (ISR) and written opinion (WO) from the chosen International Searching Authority (ISA) based on contributions from all participating offices.

5. Several years ago, the Government Accountability Office (GAO) raised several concerns about the patent examination process. The GAO indicates that while the majority of its concerns have been fully addressed, some remain open. How is the USPTO responding?

Response: In fiscal year 2018, the USPTO fully addressed and implemented all GAO recommendations to mitigate the audit findings in GAO-16-490, "Patent Office Should Define Quality, Reassess Incentives, and Improve Clarity" and in GAO-16-479, "Patent Office Should Strengthen Search Capabilities and Better Monitor Examiners' Work." The USPTO submitted the required documentation to the GAO for review that supported the implementation of all GAO final report recommendations. Most recently, the GAO requested additional information for the implemented recommendations. In November 2019, the GAO formally closed out its findings in GAO-16-490.

The USPTO is awaiting confirmation from the GAO that open recommendation 3 in GAO-16-479 is officially closed.

PTO-516 -516
(10-2018)

US PATENT AND TRADEMARK OFFICE

CLASSIFICATION AND PERFORMANCE MANAGEMENT RECORD

	NEW
	I/A:
MR#:	
IP#:	

☒ Performance Plan ☒ Performance Appraisal ☒ Performance Recognition ☒ Progress Review ☒ Position Description

Employee's Name:

Position Title: Patent Examiner

Pay Plan, Series, Grade/Step: GS-1224, Grades 5-15

Organization:	1. Department of Commerce		4. Patent Examining Groups	
	2. Patent & Trademark Office		5. Technology Center	
	3. Deputy Commissioner for Patent Operations		6. Art Unit	
Rating Period:				
Covered by		Senior Executive Service		Demonstration Project
	X	General Workforce		Other:

PART A - POSITION DESCRIPTION

POSITION CERTIFICATION – I certify that this is an accurate statement of the major duties and responsibilities of the position and its organization relationships and that the position is necessary to carry out Government functions for which I am responsible. This certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds and that false or misleading statements may constitute violation of such statute or their implementing regulations.

SUPERVISOR'S SIGNATURE	DATE	SECOND LEVEL SUPERVISOR	DATE

CLASSIFICATION CERTIFICATION	OFFICIAL TITLE:								
	PP:	SERIES:	FUNC:	GRADE:	I/A:		YES		NO

I certify that this position has been classified as required by Title 5, US Code, in conformance with standards published by the OPM or, if no published standard applies directly, consistently with the most applicable published standards.

NAME & TITLE OF CLASSIFIER	SIGNATURE	DATE

PART B - PERFORMANCE PLAN

This plan is an accurate statement of the work that will be the basis of the employee's performance appraisal.

NAME & TITLE OF FIRST LINE SUPERVISOR/RATING OFFICIAL	SIGNATURE	DATE

APPROVAL – I agree with the certification of the position description and approve the performance plan.

NAME & TITLE OF APPROVING OFFICIAL OR SES APPOINTING AUTHORITY	SIGNATURE	DATE

EMPLOYEE ACKNOWLEDGMENT – My signature acknowledges discussion of the position description and receipt of the plan, and does not necessarily signify agreement.	SIGNATURE	DATE

PRIVACY ACT STATEMENT – Disclosure of your social security number on this form is voluntary. The number is linked with your name in the official personnel records system to ensure unique identification of your records. The social security number will be used solely to ensure accurate entry of your performance rating into the automated record system.

I. Production	Art Unit	Fiscal Year	Patent Examiner

SECTION 1 – PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name	Date	Sheet No. _____ OF ____

Item 1. Performance Element and Objective (identify as Critical or Non-critical, and if it being tracked at the department level)

[X] Critical [ ] Non-critical [ ] Management–by-Objectives (MBO)

Element: **I. Production**

Objective: To achieve assigned expectancy.

Weighting Factor: (Weights reflect the amount of time devoted to accomplishing the element and/or its importance. Weight for performance plans must total 100.) Enter Weight for this element in the adjacent box: **30**

Item 2. Major Activities (Identify activities or results that need to be accomplished in support of the performance element.)

The examiner examines assigned patent applications from first action to final disposition within an assigned amount of time.

Item 3. Criteria for Evaluation (Use generic performance standards printed in Appendix A. Supplemental performance standards may also be specified below.)

The supplemental performance standards for evaluation of Production are as follows:

Achievement in the Production element shall be measured as the ratio of *Calculated Production Hours* to *Total Examining Hours,* expressed as a percentage:

Production achievement = $\left(\frac{Calculated\ Production\ Hours}{Total\ Examining\ Hours}\right) \times 100$

An examiner shall be assigned a rating with respect to this element as follows:

110% or above	**Outstanding**
103% - 109%	**Commendable**
95% - 102%	**Fully Successful**
88% - 94%	**Marginal***
below 88%	**Unacceptable**

*Note: Continued or repetitive performance at this level adversely impacts upon the efficiency of the service under this performance element.

All percentages shall be rounded off to the nearest whole number (i.e, 109.49% rounds to 109% and 109.50% rounds to 110%.).

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Calculated Production Hours equals the summation of the hours assigned to each action credited to the examiner during a rating period:

$$Calculated\ Production\ Hours = \sum Assigned\ Action\ Hours\ for\ all\ actions\ credited$$

Assigned Action Hours are calculated as follows:

$$\left[\frac{application\ expectancy\ \times count\ value}{2\ \times\ examiner's\ position\ factor}\right] + application\ attributes + learning\ curve\ + prosecution\ attributes$$

Where:

Application expectancy (hours) is determined based on the classification markings on the application.

Attribute adjustments (hours) are additional amounts of time allotted to an action based on characteristics of the application or prosecution.

Application attribute values are assigned based on initial filing of the application. For example:

- Claims = 1 hour, when an application has 4 or more independent claims OR 25 or more total claims
- Pro se = 1 hour, when an application is filed pro se
- Specification size = 1 hour, when an application has 150 pages or more, not including sequence listings

Prosecution attribute values are assigned as they occur. For example:

- Interviews = 1 hour, when, during prosecution, the examiner conducts an interview
- Restrictions = 1 hour, when, during prosecution, the examiner mails a written restriction (this includes written restrictions with elections as part of an FAOM)
- IDS = 1 Hour, when, during prosecution, the listing of documents in a single IDS is 10 or more pages

Examiner position factors are assigned based on the examiner's grade and extra credit items defined in the position description, and are shown in Production-Table 1. If the examiner's position factor changes during a rating period, the Assigned Action Hours for each action will be calculated using the position factor applicable at the time that the action is counted.

Count values available for actions are listed in Production-Table 2.

Learning curve (hours) is an adjustment applied to the time assigned for the first action on the merits done by the examiner, based on the examiner's experience and knowledge in the technology of the application.

The *application expectancy* and *attribute adjustments* for each action will be provided to the examiner at the time that the application is placed on the examiner's docket for action.

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Production - Table 1

Position Factors	Grade Level										
	GS 5	GS 7	GS 9	GS 11	GS 12	GS 13	GS 13/14 PSA	GS 14 FSA	GS 15 Generalist	GS 15 Senior	GS 15 Expert
Utility Examiner	0.55	0.7	0.8	0.9	1.0	1.15	1.25	1.35	1.35	1.35	1.35
Design Examiner	0.48	0.64	0.8	0.88	1.0	1.14	1.14	1.24	n/a	n/a	n/a

Production - Table 2

Count Values	Action by same examiner as previous action				Initial action done by a different examiner than previous action These values are only available if the immediately previous action is an action on the merits done by the previous examiner.	
	- Regular new, - CON, - DIV, - CIP, or - reissue, in which no RCE has been filed, and		RCE: - Regular new, - CON, - DIV, - CIP, or - reissue, in which at least one RCE has been filed.		- Regular new, - CON, - DIV, - CIP, or -reissue, in which no RCE has been filed.	RCE: -Regular new, - CON, - DIV, - CIP, or - reissue, in which at least one RCE has been filed.
	Total credit available = 2.0 counts		Total credit available = 1.75 counts		Total credit available for new examiner = 1.5 counts	Total credit available for new examiner = 1.75 counts
	Before Final	After Final	Before Final	After Final		
Action:	**Counts:**				**Counts:**	
Restriction	0.00	0.00	0.00	0.00	0.00	0.00
FAOM Non-final Rejection	1.25	N/A	1.00	N/A	N/A	1.00
FAOM Allowance	2.00	N/A	1.75	N/A	1.50	1.75
FAOM ex parte Quayle	1.50	N/A	1.25	N/A	1.00	1.25
Ex parte Quayle (not FAOM)	0.25	0.00	0.25	0.00	1.00	1.25
FAOM Final Rejection	1.50	N/A	1.25	N/A	1.00	1.25
Non-Final Rejection (not FAOM)	0.00	0.00	0.00	0.00	0.75	1.00
Final Rejection	0.25	0.00	0.25	0.00	1.00	1.25
Advisory Action	N/A	0.00	N/A	0.00	0.75	1.00
Allowance	0.75	0.50	0.75	0.50	1.50	1.75
Abandonment- Express or failure to respond	0.75	0.50	0.75	0.50	N/A	N/A
RCE Disposal Credit	N/A	0.50	N/A	0.50	N/A	N/A
Examiner's Answer, Interference	0.75	0.50	0.75	0.50	1.50	1.75
Interview Summary	0.00	0.00	0.00	0.00	0.00	0.00
Rule 1.05 Request	0.00	0.00	0.00	0.00	0.00	0.00
Non-compliant and Non-responsive notices	0.00	0.00	0.00	0.00	0.00	0.00

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Item 1. Performance Element and Objective (identify as Critical or Non-critical, and if it being tacked at the department level)

[X] Critical [ ] Non-critical [ ] Management–by-Objectives (MBO)

Element: **II. Quality**

Objective: To formulate or recommend appropriate action in the examination of patent applications.

Weighting Factor: (Weights reflect the amount of time devoted to accomplishing the element and/or its importance. Weight for performance plans must total 100.)
Enter Weight for this element in the adjacent box: **30**

Item 2. Major Activities (Identify activities or results that need to be accomplished in support of the performance element.)

The examiner formulates or recommends action with respect to applicable major quality activities and submits Office actions in the proper form after receiving a level of instruction appropriate with the examiner grade level and delegated Signatory Authority (See M.P.E.P 1004).

The appropriate level of instruction and form of office action are defined in Table 1. The applicable major quality activities are grade and Signatory Authority dependent and are defined in Table 2.

Quality - Table 1

Evaluation Basis	Grade Level								
	GS 5	GS 7	GS 9	GS 11	GS 12	GS 13	GS 13 PSA GS 14 PSA	GS 14 FSA	GS 15
Applicable Major Quality Activities and level of instruction	**Basic** activities 1-3, with specific and detailed preliminary instruction	**Basic** activities 1-6, with preliminary instruction	**Basic** activities 1-6, with no preliminary instruction	**Basic** activities 1-6, **Advanced** activities 7-9, with no preliminary instructions, and **Legal** activity 10, after preliminary instruction.	**Basic** activities 1-6, **Advanced** activities 7-9, with no preliminary instructions, and **Legal** activities 10-13, after preliminary instruction.	**Basic** activities 1-6, **Advanced** activities 7-9, and **Legal** activities 10-13, with no preliminary instruction	**Basic** activities 1-6, **Advanced** activities 7-9, and **Legal** activities 10-16, with no preliminary instruction	**Basic** activities 1-6, **Advanced** activities 7-9, and **Legal** activities 10-19, with no preliminary instruction	
Form of Office Action	All actions are in **DRAFT** form when initially submitted. After review, actions are resubmitted in **FINAL** form with necessary corrections			All non-final Office actions are in **FINAL** form when initially submitted, except for actions containing advanced and/or legal functions which are in **DRAFT** form when initially submitted. After review, actions are resubmitted in **FINAL** form with necessary corrections.	All actions are in **FINAL** form when initially submitted.				

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The examiner will be assigned a rating using the criteria set forth below with respect to the quality major activities assigned to the examiner's grade based on the work products submitted in final form during the period under consideration.

Quality - Table 2

Quality Major Activities and Applicable Evaluation Standards and Responsibility	Responsible Grade Level									
	Activity Level	GS5	GS7	GS9	GS11	GS12	GS13	GS13 PSA GS14 PSA	GS14 FSA	GS15
1. Checking applications for (a) compliance with formal requirements of patent statues and rules and (b) technological accuracy	Basic	Non-error based assessment								
2. Treating disclosure statements and claims of priority	Basic	Non-error based assessment								
3. Conducting search	Basic	Error based assessment								
4. Analyzing disclosure and claims for compliance with 35 USC 112	Basic		Error based assessment							
5. Planning field of search	Basic		Error based assessment							
6. Making proper rejections under 35 USC 102 and 103 with supporting rationale, or determining how claims(s) distinguish over the prior art	Basic		Error based assessment							
7. Determining whether amendment introduces new matter	Advanced				Error based assessment					
8. Appropriately formulating restriction requirements, where application could be restricted	Advanced				Error based assessment					
9. Determining whether claimed invention is in compliance with 35 USC 101	Advanced				Error based assessment					
10. Determining where appropriate line of patentable distinction is maintained between applications and /or patents	Advanced				Error based assessment					
11. Evaluating/applying case law as necessary	Legal					Non-error based assessment				
12. Evaluating sufficiency of affidavits/declarations	Legal					Non-error based assessment				
13. Evaluating sufficiency of reissue oath/declaration	Legal					Non-error based assessment				
14. Promoting compact prosecution by including all reasonable grounds of rejections, objections, and formal requirements: (M.P.E.P. 707.07(g), etc)	Legal							Non-error based assessment		
15. Making the record, taken as a whole, reasonably clear and complete	Legal							Non-error based assessment		
16. Properly treating all matters of substance in applicant's response	Legal							Error based assessment		
17. Formulating and independently signing final determinations of patentability (final rejections, allowance, examiner answers and advisory actions)	Legal								Error based assessment	
18. Properly closing prosecution: makes no premature final rejection	Legal								Error based assessment	
19. Properly rejecting all rejectable claims in a final rejection; properly allowing all claims in an allowance	Legal								Error based assessment	

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Item 3. Criteria for Evaluation (Use generic performance standards printed in Appendix A. Supplemental performance standards may also be specified below.)

Clear error under this element will be deemed to have occurred where the examiner's office action(s) or office communication(s):
does not reasonably comply with the major activities set forth in table 2 and could not have been permitted at the time and under the circumstances that the action was taken.

Clear error is not an honest and legitimate difference of opinion as to what action should have been taken. If the action taken by the examiner is reasonable and the action preferred by the SPE is reasonable, this constitutes an honest and legitimate difference of opinion and the action taken by the examiner is free of clear error.

The error rate will be computed by dividing the number of errors charged by the total number of actions submitted in final form for the evaluation period. When multiple errors are charged in a single office action or communication submitted in final form, a single error will be used in the computation of the error rate. Error rate computations are truncated to the second decimal to determine the final error rate. For example, an error rate of 6.4975% is truncated to 6.49%. The types of actions or communications included in the error rate calculation are:

1. Non-final rejection
2. Requirement for restriction/election
3. Pilot – First action interview Office Action
4. Pilot – First action without FA Interview
5. Pilot Pre Interview Communication
6. Notice of Allowability
7. Final rejection
8. Examiner's Answer (including supplemental)
9. Advisory Action
10. Ex Parte Quayle
11. Misc. Action with SSP

At grades GS-11 and below, as shown in Quality Table 3, performance is determined by a non-error-rate based assessment to the extent to which the examiner's actions submitted in final form during the period under consideration comply with office requirements, including statutory compliance, and the indicia listed below.

Indicia 1: Search and Prior Art: The examiner's search and the prior art found encompass the inventive concept as defined in the disclosure for the examined invention. The examiner may demonstrate compliance with this indicia when office actions, or prosecution histories taken as a whole, include some or all of the exemplary activities listed below, as appropriate, or any additional activities or characteristics not listed below that support a comprehensive search:

a) Searching the inventive concept as defined at the time of the first action on the merits.
b) Consulting with an expert in the art when the examiner lacks expertise.
c) Citing prior art on the record which is pertinent to significant though unclaimed features of the defined invention or directed to state of art.
d) Providing a brief description in the office action for relevant prior art that was cited but not applied.

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Indicia 2: Clarity of the Record: The examiner's written prosecution record promotes clarity of the record. The examiner may demonstrate compliance with this indicia when office actions, or prosecution histories taken as a whole, include some or all of the exemplary activities listed below, as appropriate, or any additional activities or characteristics not listed below that support a complete and clear record of the prosecution:

a) Including proper reasons for allowance when necessary.
b) Documenting the examiner's interpretation on the record of claim language that is functional, expresses an intended use/result, or is non-functional descriptive material, or means for language. Such documenting may include but is not limited to the interpretation of claims under 112(f) using the appropriate form paragraphs.
c) Providing annotations that reasonably indicate where each claim limitation is met by the reference.
d) Recording the substance of the interview thoroughly and accurately on the record.
e) Documenting proposed claim amendments discussed during the interview.
f) Indicating whether or not proposed claimed amendments discussed during an interview overcome the prior art of record or rejection.
g) Avoiding unnecessary duplicative rejections.
h) Providing written communication that is clear, concise, and effective.

Indicia 3: Compact Prosecution: The examiner's written prosecution record promotes compact prosecution. The examiner may demonstrate compliance with this indicia when office actions, or prosecution histories taken as a whole, include some or all of the exemplary activities listed below, as appropriate, or any additional activities or characteristics not listed below:

a) Checking applications for (a) compliance with formal requirements of patent statutes and rules and (b) technological accuracy at the earliest possible time.
b) Providing suggestions for applicants to overcome rejections when possible.
c) Drafting Office actions that are complete, correct, and clear such that, absent some unexpected consideration, prosecution proceeds without additional non-final or reopening actions.
d) Completing a substantive Office action even when minor informalities exist in either the original application or the applicant's response.
e) Treating information disclosure statements and claims of priority as early as is reasonable in prosecution.
f) Making a complete restriction/election requirement in the initial restriction/election requirement.
g) Resolving issues proactively by reaching out to applicants using interview practice.
h) Indicating allowable subject matter, as appropriate.
i) Performing a thorough search for the claimed invention as defined in the application at the time of first action.

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The examiner's work product in the assigned major activities will be evaluated using the generic standards and the criteria as set forth below:

Quality Table 3

Criteria for Evaluation	Grade Level								
	GS 5	GS 7	GS 9	GS 11	GS 12	GS 13	GS 13 PSA GS 14 PSA	GS 14 FSA	GS 15
Outstanding	The examiner's oral and written expressions normally convey the examiner's position effectively. Normally the work product is complete and complies with Office requirements, including statutory compliance, requiring only minor revision, **and** Except for rare occurrences, the examiner complies with each of the three indicia listed above.				The examiner's error rate is 0% - 6.49%, **and** Except for rare occurrences, the examiner complies with each of the three indicia listed above.				
Commendable	The examiner's oral and written expressions normally convey the examiner's position effectively. Normally the work product is complete and complies with Office requirements, including statutory compliance, requiring only minor revision, **and** In the majority of all actions, the examiner complies with each of the three indicia listed above.				The examiner's error rate is 0% - 6.49%; **and;** In the majority of all actions, the examiner complies with each of the three indicia listed above.				
Fully Successful	The examiner's oral and written expressions normally convey the examiner's position effectively. Normally the work product is complete and complies with Office requirements, including statutory compliance, requiring only minor revision.				The examiner's error rate is 0% - 6.49%.				
Marginal * Continued or repetitive performance at this level adversely impacts upon the efficiency of the service under this performance element	The examiner's oral and written expressions normally convey the examiner's position, but are commonly impaired by ambiguity, faulty reasoning, or other flaws. Normally the work product is complete and complies with Office requirements, including statutory compliance; minor revisions are frequently required and major revisions may be infrequently required.				The examiner's error rate is 6.50% - 7.49%.				
Unacceptable	Performance is not adequate for the position. In numerous instances, oral or written expressions do not effectively convey the examiner's position. In numerous instances, the work product is incomplete or inaccurate, and often requires major revision.				The examiner's error rate is greater than or equal to 7.50%.				

III. Docket Management | Art Unit | Fiscal Year | Patent Examiner

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Item 1. Performance Element and Objective (identify as Critical or Non-critical, and if it being tacked at the department level)

[X] Critical [ ] Non-critical [ ] Management–by-Objectives (MBO)

Element: **III. Docket Management**

Objective: To conduct examining activities within prescribed timeframes.

Weighting Factor: (Weights reflect the amount of time devoted to accomplishing the element and/or its importance. Weight for performance plans must total 100.)
Enter Weight for this element in the adjacent box: **30**

Item 2. Major Activities (Identify activities or results that need to be accomplished in support of the performance element.)
Except where the SPE, Director, or other appropriate authority has waived, excused, or directed otherwise, the examiner:

1. Handles applications and proceedings awaiting action in accordance with the time period or Special handling instructions prescribed by current Office policy;
2. Forwards work for processing and/or handling promptly or in accordance with prescribed time period.

An examiner will not be held responsible for an application that has been forwarded for action prematurely such that it is not ready for examination. Circumstances that would pause, suspend or restart a clock are described below. See DM-Table 1 below for specific categories and time periods:

DM - Table 1

Cat.	Component (Action Types)	Expected Average Days	Ceiling Control (Days)	Ceiling Exceeded Penalty	Clock Start Dates	Clock Stop Dates
1	**Amendments –e.g.** response to non-final OA, Appeal Briefs	56	83	168	Day 0 is the start of the **biweek[1]** after application is placed on examiner's docket.	A clock will stop when an action is posted for credit or when it exceeds the ceiling control days
2	**Special New -** e.g. PPH, Accelerated Examination, Petitions to Make Special, Track 1, PCT, Reexam, Reissues, etc.	14	27	42	Day 0 is the start of the **biweek[1]** after the previous application is completed or exceeds the ceiling control days	
3	**New - e.g.** Regular New, Continuations in Part (CIPs), Continuations, Divisionals, RCEs	28	55	84	Day 0 is the start of the **biweek[1]** after the previous application is completed or exceeds the ceiling control days	
4	**Expedited -** e.g. After Finals, Responses under 37 CFR 1.312, PUBs Cases (Printer Rushes), Other amendments (such as PPH, Accelerated Examination, Petitions to Make Special, Track 1), Board Decisions/Remands, QPIDS	14	28	42	Day 0 is the day the application is placed on examiner's docket except for board decisions which will start on the 70th day after the board decision date.	

[1] For Docket Management purposes biweeks are equivalent to two-week financial pay periods which start on 1st Sunday at 12:00 AM ET and end on 2nd Saturday at 11:59 PM ET. Holidays and other schedule changes do not impact start or stop dates unless otherwise announced to the corps. For all categories, the count cut-off at the end of the fiscal year does not affect the "start of the biweek".

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Item 3. Criteria for Evaluation (Use generic performance standards printed in Appendix A. Supplemental performance standards may also be specified below.)

Evaluation of this element will be based on an overall document management score determined as set forth below. Based on that score, an examiner shall be assigned a rating for this element as follows:

110% or above	Outstanding
103% - 109%	Commendable
95% - 102%	Fully Successful
88% - 94%	Marginal*
below 88%	Unacceptable

*Continued or repetitive performance at this level adversely impacts upon the efficiency of the service under this performance element.

Each DM Category has an expected average days to complete and a Ceiling Control (see DM - Table 1). The number of days the examiner has taken to complete each action is used to calculate a percentage score for each category that is based on the average actual number of days to complete actions compared to the expected average number of days for that type of action.

$$Category\ Score\ Percentage\ (CS) = (\left(\frac{wf_0 - wf_1}{wf_0}\right) + 1) \times 100$$

Where: wf_0 is the number of expected average days for the particular category; and wf_1 is the average number of days the examiner has taken to post for credit all approved actions in that particular category.

The Category scores are weighted based on the number of actions in each Category to form a contributing score for that Category. The total docket management score is the sum of each of the contributing scores as illustrated in DM-Table 2.

DM - Table 2

Cat.	Action Types	Expected Average Days wf_0	Number of Cases n_o	Average Days wf_1	Category Score ((wf_0-wf_1)/wf_0)+1)*100 CS_1	Contributing Score (n_o/Sum(n_o))*CS_1
1	Amendments	56	100	42	125.00%	73.53%
2	Special New	14	1	12	114.29%	0.67%
3	New	28	12	21	125.00%	8.82%
4	Expedited	14	57	10	128.57%	43.11%
			Sum(n_o)= 170			Overall % Score **126.13%**

All percentages shall be rounded to the nearest whole number (i.e. 109.49% rounds to 109% and 109.50% rounds to 110%.)

No score will be entered into the Docket Management calculation until the action is approved or the application exceeds the ceiling. Scores for approved actions will be assessed as of the date of the most recent post-for-credit.

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Returns

Once an Office action is returned, if the action is resubmitted within 14 days no score is generated. If the action is not resubmitted in the 14 days, 14 days will be added to the total days in the category from which the action originated (e.g. a returned amendment will have 14 days added to the amendment score total days). After that, the return is placed in Ceiling Exceeded Status.

Ceiling Exceeded Status

For all categories, if an action isn't posted before midnight on the Ceiling Control date, a penalty score equal to three times the expected average days is entered and the application is moved into Ceiling Exceeded status.

Docket Management Plan

Patent applications that exceed the ceiling control days will be assigned using a Docket Management Plan (DMP). DMP applications are prioritized over all other applications. Up to 3 applications are assigned at the beginning of the biweek and are due at the end of counting for the biweek (2nd Saturday at 11:59 PM ET). Examiners who work between 30-39 examining hours in the pay period will be required to post-for-credit 2 DMP applications. Examiners who work between 20-29 examining hours in the pay period will be required to post-for-credit 1 DMP application. Examiners working fewer than 20 examining hours in a pay period will not be responsible for posting-for-credit a DMP application in that pay period.

Examiners on a part-time schedule who work 32 or more examining hours in the pay period will be required to post for credit 2 DMP applications. Examiners on a part-time schedule who work between 20-31 examining hours in the pay period will be required to post for credit 1 DMP application. Examiners on a part-time schedule working fewer than 20 examining hours will not be responsible for posting-for-credit a DMP application in that pay period.

For all applications in DMP status, failure to post-for-credit a required application within the allotted biweek will result in entry of a penalty score in the category from which the application originated (e.g., an amended case will have the penalty score entered in the amendments). The score entered will escalate after each failure to post for credit as shown in DM-Table 3.

DM - Table 3

				DMP Charge to Score at end of PP				
Category	Reaches Ceiling at	Ceiling Exceeded Penalty	While on Ceiling Status	DMP - PP1 (Days)	DMP - PP2 (Days)	DMP - PP3 (Days)	DMP - PP4 (Days)	DMP >= PP5
1	83 Days	168	Holding - No Clock	168	182	196	210	N+14 Days
2	27 Days	42	Holding - No Clock	42	56	70	84	N+14 Days
3	55 Days	84	Holding - No Clock	84	98	112	126	N+14 Days
4	27 Days	42	Holding - No Clock	42	56	70	84	N+14 Days

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Docket Management adjustments are outlined below. For all types of situations, applications may be reassigned if there is a reasonable expectation that they would have exceeded the ceiling during the time that the examiner is absent or for other business needs. For all types of pauses, if the work or hours requirements of the pause are not met, then the pause will be negated and clocks will be reset to run as if the pause had never occurred.

Docket Management Adjustments:

Pauses

7+ Day Pause: applications in all Categories will be paused for absences of ≥7 consecutive days (excludes AWOL). Restart of clocks for Category 1 amendments received during 14 consecutive days or more pause for FMLA or FMLA-related reasons or an extended Military pause will be staggered so that clocks start at the same rate as they were forwarded to the examiner during the absence.

Military Pause: For those on military leave, applications in all categories, applications that have been returned to the examiner for correction, and DMP will be paused for the duration of the absence.

Part time Pause:
Fourteen day clocks for Expedited cases on a part time examiner's docket will be at zero for 6 days. The clock for these cases will turn one on day 7. This adjustment will not interfere with or replace the pause for 7 or more consecutive days of approved absence. Where the 6 day holding period overlaps with a clock pause for approved absence, the holding period will run concurrently with the pause.

Detail Pause: For 51-80% Details, applications in categories 2-3 and applications originating from those categories that have been returned to the examiner for correction will be paused. For Details greater than 80%, applications in all categories, and applications that have been returned to the examiner for correction, and DMP will be paused. An examiner on a greater than 80% detail will be removed from DM every quarter while on detail. As with the part time pause, expedited cases will be at zero for 6 days.

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Other Adjustments

Supplemental amendments filed in Category 1 Amendments will restart the DM clock such that day 1 is the receipt date of the supplemental amendment.

Any Special New application in Category 2, without a clock, posted-for-credit by the examiner will be credited with a zero day score.

For 14 day Special New cases, the examiner is expected to move the oldest case for each qualifying pay period. A qualifying pay period is one in which the examiner has at least 40 examining hours.

When an application is assigned based on the USPC symbol: A proper Transfer Inquiry entry will pause the DM clock until the Transfer Inquiry is closed. If the Transfer Inquiry results in transfer of the application no score will be entered. If the application is not transferred, the clock will resume. When routing by CPC: A proper symbol challenge will pause the DM clock while the classification picture is validated. If the symbol challenge results in transfer of the application, no score will be entered. If the application is not transferred, the clock will resume.

Entry of a pending Terminal Disclaimer (TD) into PALM will pause the DM clock. The clock will restart from where it left off when the decision is entered into PALM.

Any undecided Critical Petitions or noncompliant preliminary amendments will result in a suspension in the docket management clock. The application is hidden from view on the examiner's docket during the suspension period. The docket management period is restarted from where it left off when the suspension period is over.

DM adjustments will be made in situations when an appeal conference is not scheduled and conducted due to management delay within 14 days after the examiner's request for a conference. Clocks will not be paused, instead, a manual adjustment will be made after the action is counted equivalent to the number of days required to schedule and conduct the conference in excess of 14 days from the request. A written request establishes the date for the purpose of this adjustment. Examiners must contact their SPEs to get this adjustment. Examiner delay or rescheduling due to an examiner being unprepared for the conference does not result in a DM adjustment.

Optional Initial Block	Emp.	Date	Supv.	Date

IV. Prof. and Stakeholder Interaction | Art Unit | Fiscal Year | Patent Examiner

SECTION 1 – PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name	Date	Sheet No. _____ OF ____

Item 1. Performance Element and Objective (identify as Critical or Non-critical, and if it being tacked at the department level)

[X] Critical [ ] Non-critical [ ] Management–by-Objectives (MBO)

Element: **IV. Professionalism and Stakeholder Interaction**

Objective: To provide appropriate service to stakeholders.

Weighting Factor: (Weights reflect the amount of time devoted to accomplishing the element and/or its importance. Weight for performance plans must total 100.) Enter Weight for this element in the adjacent box: **10**

Item 2. Major Activities (Identify activities or results that need to be accomplished in support of the performance element.)

Treat internal/external stakeholders with courtesy and act with professionalism by:

1. Reviewing messages a few times throughout the day, and responding, if necessary, by any appropriate means.
2. Returning messages from stakeholders, within the following parameters or as soon as possible thereafter:
    a. From Management or Trainer - Upon becoming aware, next order of business.
    b. From others – Generally within one business day of becoming aware. Legitimate attempts should be made to reach the stakeholder in order to address the inquiry.
3. Providing voicemail and internal email notice of planned absences of two or more business days.
4. Directing external stakeholders to appropriate office or person, in accordance with a list provided or posted by Management.
5. Conducting interviews (virtual or in person) and other contacts with external stakeholders as scheduled with adequate preparation, in a courteous manner. Further, interviews or other contacts are not arbitrarily or capriciously refused by the examiner.
6. While conducting USPTO business, displaying proper decorum to internal stakeholders in oral and written communications (e.g. art unit meetings, individual and group training).
7. Using agency-provided collaboration tools appropriately and when available, including the presence indicator and camera.
8. Addressing administrative matters within designated timeframes (e.g. administrative matters are timesheets, recertification of telework agreements, returning broken/outdated equipment as directed, moving as directed, financial disclosure, providing schedules; addressing includes good faith effort to do administrative matters correctly).
9. Providing search consultation and other assistance to the public and peers.
10. Completing assigned training within designated timeframes.
11. Normally submitting amounts of work consistent with examining hours throughout the quarter and fiscal year. The submission of work may not be reflective of production. Variations are expected biweek to biweek.

Optional Initial Block	Emp.	Date	Supv.	Date

IV. Prof. and Stakeholder Interaction | Art Unit | Fiscal Year | Patent Examiner

SECTION 1 – PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name	Date	Sheet No. _____ OF ____

Item 3. Criteria for Evaluation (Use generic performance standards printed in Appendix A. Supplemental performance standards may also be specified below.)

The examiner's performance of the major activities will be evaluated based on the criteria set forth below.

Consideration may be given for examiners who voluntarily perform additional duties that support the mission of the Agency (e.g. training, reviewing Office Actions, classification functions, leading QEMs, CFC keyworker) or who voluntarily participate in training activities to increase their professional expertise and knowledge.

Outstanding - Except for rare exceptions, all major activities identified are performed in a timely and courteous manner.

Commendable - In substantially all circumstances, all major activities identified are performed in a timely and courteous manner.

Fully Successful - All major activities identified are normally performed in a timely and courteous manner.

Marginal - Demonstrates some contribution to the element. However, a significant number of documented deficiencies in at least one of the major activities have been identified to the examiner.

Unacceptable - Performance is not adequate for the position, failing to meet the Marginal level. Numerous instances of documented deficiency in at least one of the major activities have been identified to the examiner.

"Business Day" - Monday through Friday except Federal holidays.

"Business Hours" - 8:30 A.M. to 5:00 P.M.

Optional Initial Block	Emp.	Date	Supv.	Date

SECTION II – PERFORMANCE SUMMARY AND RATING

Name:

ITEM 1. INSTRUCTIONS:

1. List each element in the performance plan; indicate whether it is critical/non-critical and what weight has been assigned to it.
2. Assign a rating level for each element: **(5)** Outstanding **(4)** Commendable **(3)** Fully Successful **(2)** Marginal/Minimally Satisfactory (SES) **(1)** Unacceptable/Unsatisfactory. (SES)
3. Score each element by multiplying the weight by the rating level.
4. After each element has been scored, compute total score by summing all individual scores. Total score can range from 100 to 500.

Performance Element	Critical or Non-critical (C or NC)	MBO	Individual Weights (Sum must total 100)	Element Rating (1-5)	Score
I. Production	C		30%		
II. Quality	C		30%		
III. Docket Management	C		30%		
IV. Professionalism and Stakeholder Interaction	C		10%		
			100%	Total Score	

For SES turn to reverse side and continue with Item 3.

ITEM 2. PERFORMANCE RATING: *(Based on total score* ***except that if any critical element is less than fully successful the rating can be no higher than the lowest critical element rating.****)*

☐ Outstanding (460-500) ☐ Commendable (380-459) ☐ Fully Successful (290-370) ☐ Marginal (200-289) ☐ Unacceptable (100-199)

Rating Official's Signature	Title	Date:
Approving Official's Signature	Title	Date:
Employee's Signature *(Indicates appraisal meeting held)*	Employee Comments Attached? ☐ YES ☐ NO	Date:

SECTION III – PERFORMANCE RECOGNITION *(General Workforce Only)*

☐ Gainsharing Award $ (%) Appropriation No.
☐ SAA Award $ (%) Appropriation No.
☐ DM Award $ (%) Appropriation No.
☐ QSI (Outstanding Rating Required, SF-52 is attached)

For performance awards: Has employee been promoted during the appraisal cycle?

☐ YES ☐ NO

Rating Official's Signature	Title	Date:
Approving Official's Signature	Title	Date:
Final Approving Authority's Signature		Date:
Payment Authorized By Personnel Office		Date:

Instructions for Completing the Performance Management Record

A. Performance Planning. Complete Items 1, 2, and 3 of Section I by following these seven steps:

Step 1. Identify the performance elements of the employee's job (Item 1). Performance elements are brief, two or three word descriptions of the major responsibilities. (Fill out a separate Section 1 for each performance element.)

Step 2. Identify each element as critical or non-critical. Specify whether it is management by objective (MBO). (if so, it must be designated as critical.)

Step 3. State the objective of the element by writing a brief statement that defines what the element is intended to accomplish; focus on the overall result. An example of an objective is "To carry out organizational responsibilities by developing and implementing effective administrative procedures."

Step 4. Assign a weight to the element to show the time devoted to accomplishing the element and/or its importance. The total weight of all performance elements in the plan must equal 100.

Step 5. Identify the major activities (Item 2) or results needed to accomplish the performance element, e.g. develop an operating budget for the office, complete performance plans for all staff.

Step 6. Complete Item 3, "Criteria for Evaluation" by listing any performance standards that will be used to supplement the Generic Performance Standards (GPS) listed in Appendix A. The GPS must be used to evaluate employee performance. Supplemental standards must be included if they (a) apply to a particular element and (b) will be used to evaluate the employee's performance of the element.

Step 7. On the cover page of this form: (a) the rating official must certify as to the accuracy of the employee's position description (p.d.) and authorize the performance plan; (b) the approving official or SES appointing authority must approve the p.d. certification and the performance plan; and (c) the employee must acknowledge discussion of the p.d. and receipt of the performance plan.

B. Progress Review. At least once, near the mid-point of the appraisal period, the rating official must conduct a progress review with the employee by completing the following three steps:

Step 1. For each element in the performance plan, discuss: (a) The employee's progress toward accomplishing the element; (b) The need for any changes to the plan; and (c) any performance deficiencies noticed, along with recommendations on how to improve them.

Step 2. Complete Item 4, "Progress Review" of Section 1, noting the areas discussed in step 1.

Step 3. Initial and date the appropriate block in Item 4 (for each performance element) and have the employee do the same to indicate that the progress review took place.

C. Performance Appraisal. Near the end of the appraisal period, the employee's performance during the year must be appraised formally on the basis of the performance plan by completing the following steps:

Step 1. The rating official formally notifies the employee of the date and time for the appraisal meeting.

Step 2. The employee may participate in a pre-appraisal meeting with the rating official to present his/her assessment of his/her performance during the appraisal period.

Step 3. The rating official complete Item 5, "Element Rating and Justification," of Section 1 for each performance element, noting specific accomplishments resulting from the employee's performance and relating them to the appropriate rating level (5-Outstanding, 4-Commendable, 3-Fully Successful, 2-Marginal, (Minimally Successful for SES) 1-Unacceptable (Unsatisfactory for SES)). Note: Element ratings of Fully Successful do not require written documentation unless employee requests it. To assign a Fully Successful element rating, the rating official need only document that: (a) the fully successful standards were met and; (b) that the rating was discussed with the employee.

Step 4. The rating official completes Item 1 of Section II, "Performance Summary and Rating," by transferring the appropriate rating information from each performance element to the summary sheet.

Step 5. Item 2, "Performance Rating," of Section II is completed by the rating official and signed by the approving official before the rating is discussed with the employee. NOTE: If any critical element is rated less than fully successful, the final rating can be no higher than the lowest critical element rating.

Step 6. All the information documented in Steps 3-5 above is discussed with the employee at the formal appraisal meeting and a copy of the rating is given the employee. The employee signs the form acknowledging that an appraisal meeting was held.

Step 7. The employee may comment in writing to the approving official on his/her summary rating within 5 days of receipt. The approving official must respond in writing to any comments within 10 days of receipt. If the approving official changes a rating, he/she must document the reasons in Item 5.a. of 396A. A copy of the final rating must be given to the employee.

Step 8. For SES Employees Only - The rating official completes Item 3 and submits the entire form (and any employee comments) to the appropriate Performance Review Board (PRB) for its review and recommendations. The PRB chair signs the correct block in Item 3 and forwards the recommendations and the form to the SES Appointing Authority who then assigns the final rating by completing Item 3.4. A copy of the final rating must be given to the employee.

Step 9. For general workforce employees only - The rating official completes any recommendations for performance awards in Section III, and forwards through the approving official, to the proper channels for processing the award.

APPENDIX A
GENERIC PERFORMANCE STANDARDS

INSTRUCTIONS

The generic performance standards (GPS) are the primary basis for assigning element ratings in the Department of Commerce. The GPS are to be applied to each critical (and non-critical) element in the performance plan. (Summary ratings are assigned by using a point scale after each element has been rated.)

When evaluating an element, the rater should:

1 Read carefully each performance standard level beginning with the fully successful one (it is considered the base level standard.)

2 Determine which level best describes the employee's performance on the element. (Each and every criterion in the standards does not have to be met by the employee in absolute terms for the rater to assign a particular rating level. The sum of the employee's performance of the element must, in the rater's judgment, meet the assigned level's criteria.)

3 Provide in writing, on the appraisal form, specific examples of accomplishments which support the assigned rating level.

Element ratings of fully successful do not require full written documentation unless the employee requests it. To assign a fully successful element rating the rating official need only document in writing that (1) the fully successful standards were met, and (2) that the rating was discussed in detail with the employee.

Occasionally, when rating some elements, a rating official may determine that an employee's performance on an element was not consistent. For example, the employee may have performed at the commendable level on several major activities within a critical element and at the marginal level on several others. In such a case, the rating official must consider the overall effect of the employee's work on the element and make a judgment as to the appropriate rating he/she will assign. The rationale for the decision must be documented on the rating form citing specific accomplishments which support the decision.

Any additional standards that are included in the performance plan must also be considered by the rating official. Such standards are included in performance plans to supplement GPS, not to supplant them. Rating officials should consider such standards within the context of the GPS and rate elements accordingly.

OUTSTANDING

SES

This is a level of rare high-quality performance. The employee has performed so well that organizational goals have been achieved that would not have been otherwise. The employee's mastery of the technical skills and thorough understanding of the mission have been fundamental to the completion of program objectives.

The employee has exerted a major positive influence on management practices, operating procedures, and program implementation, which has contributed substantially to organizational growth and recognition. Preparing for the unexpected, the employee has planned and used alternate ways of reaching goals. Difficult assignments have been handled intelligently and effectively. the employee has produced an exceptional quantity of work often ahead of established schedules and with little supervision.

In writing and speaking, the employee presents complex ideas clearly in a wide range of difficult communications situations. Desired results are attained.

GENERAL WORK FORCE

This is level of rare, high-quality performance. The quality and quantity of the employee's work substantially exceed fully successful standards and rarely leave room for improvement. The impact of the employee's work is of such significance that organizational objectives were accomplished that otherwise would not have been. The accuracy and thoroughness of the employee's work on this element are exceptionally reliable. Application of technical knowledge and skills goes beyond that expected for the position. The employee significantly improves the work processes and products for which he or she is responsible. Thoughtful adherence to procedures and formats, as well as suggestions for improvement in these areas, increase the employee's usefulness.

This person plans so that work follows the most logical and practical sequence; inefficient backtracking is avoided. He or she develops contingency plans to handle potential problems and adapts quickly to new priorities and changes in procedures and programs without losing sight of the longer-term purposes of the work. These strengths in planning and adaptability result in early or timely completion of work under all but the most extraordinary circumstances. Exceptions occur only when delays could not have been anticipated. The employee's planning skills result in cost-savings to the government.

In meeting element objectives, the employee handles interpersonal relationships with exceptional skill, anticipating and avoiding potential causes of conflict and actively promoting cooperation with clients, co-workers, and his or her supervisor.

The employee seeks additional work or special assignments related to this element at increasing levels of difficulty. The quality of such work is high and is done on time without disrupting regular work. Appropriate problems are brought to the supervisor's attention, most problems are dealt with routinely and with exceptional skill.

The employee's oral and written expression are exceptionally clear and effective. They improve cooperation among participants in the work and prevent misunderstandings. Complicated or controversial subjects are presented or explained effectively to a variety of audiences so that desired outcomes are achieved.

SUPERVISORY

The employee is a strong leader who works well with others and handle difficult situations with dignity and effectiveness. The employee encourages independence and risk-taking among subordinates, yet takes responsibility for their actions. Open to views of others, the employee promotes cooperation among peers and subordinates, while guiding, motivating, and stimulating positive responses. The employee's work performance demonstrates a strong commitment to fair treatment, equal opportunity, and the affirmative action objectives of the organization.

COMMENDABLE

SES

This is a level of unusually good performance. It has exceeded expectations in critical areas and shows sustained support of organizational goals. The employee has shown a comprehensive understanding of the objectives of the job and procedures for meeting them.

The effective planning of the employee has improved the quality of management practices, operating procedures, task assignments, or program activities. The employee has developed or implemented workable and cost-effective approaches to meeting organizational goals.

The employee has demonstrated an ability to get the job done well in more than one way, while handling difficult and unpredicted problems. The employee produces a high quantity of work, often ahead of established schedules with less than normal supervision.

The employee writes and speaks clearly on difficult subjects to a wide range of audiences.

GENERAL WORK FORCE

This is a level of unusually good performance. The quantity and quality of work under this element are consistently above average. Work products rarely require even minor revision. Thoroughness and accuracy of work are reliable. The knowledge and skill the employee applies to this element are clearly above average, demonstrating problem-solving skill and insight into work methods and techniques. The employee follows required procedures and supervisory guidance so as to take full advantage of existing systems for accomplishing the organization's objectives.

The employee plans the work under this element so as to proceed in an efficient, orderly sequence that rarely requires backtracking and consistently leads to completion of the work by established deadlines. He or she use contingency planning to anticipate and prevent problems and delays. Exceptions occur when delays have causes outside the employee's control. Cost savings are considered in the employee's planning.

The employee works effectively on this element with co-workers, clients, as appropriate, and his or her supervisor, creating a highly successful cooperative effort. He or she seeks out additional work or special assignments that enhance accomplishment of this element and pursues them to successful conclusion without disrupting regular work. Problems which surface are dealt with; supervisory intervention to correct problems occurs rarely.

The oral and written expression applied to this element are noteworthy for their clarity and effectiveness, leading to improved understanding of the work by other employees and clients of the organization. Work products are generally given sympathetic consideration because they are well presented.

SUPERVISORY

The employee is a good leader, establishes sound working relationships and shows good judgment in dealing with subordinates, considering their views. He/she provides opportunities for staff to have a meaningful role in accomplishing organizational objectives and makes special efforts to improve each subordinate's performance.

FULLY SUCCESSFUL

SES

This is the level of good, sound performance. The employee has contributed positively to organizational goals. All critical element activities that could be completed are. The employee effectively applies technical skills and organizational knowledge to get the job done.

The employee successfully carries out regular duties while also handling any difficult special assignments. The employee plans and performs work according to organizational priorities and schedules.

The employee also works well as a team member supporting the group's efforts and showing an ability to handle a variety of interpersonal situations.

The employee communicates clearly and effectively.

All employees at this level and above have followed a management system by which work is planned, tasks are assigned, and deadlines are met.

GENERAL WORK FORCE

This is the level of good, sound performance. The quality and quantity of the employee's work under this element are those of a fully competent employee. The performance represents a level of accomplishment expected of the great majority of employees. The employee's work products fully meet the requirements of the element. Major revisions are rarely necessary; most work requires only minor revision. Tasks are completed in an accurate, thorough, and timely way. The employee's technical skills and knowledge are applied effectively to specific job tasks. In completing work assignments, he or she adheres to procedures and format requirements and follows necessary instructions from supervisors.

The employee's work planning is realistic and results in completion of work by established deadlines.

Priorities are duly considered in planning and performing assigned responsibilities. Work reflects a consideration of cost to the government, when possible.

In accomplishing element objectives, the employee's interpersonal behavior toward supervisors, co-workers, and users promotes attainment of work objectives and poses no significant problems.

The employee completes special assignments so their form and content are acceptable and regular duties are not disrupted. The employee performs additional work as his/her workload permits. Routine problems associated with completing assignments are resolved with a minimum of supervision.

The employee speaks and writes clearly and effectively.

SUPERVISORY

The employee is a capable leader who works successfully with others and listens to suggestions.

The employee rewards good performance and corrects poor performance through sound use of performance appraisal systems performance-based incentives and when needed, adverse actions, and selects and assigns employees in ways that use their skills effectively.

The employee's work performance shows a commitment to fair treatment, equal opportunity, and the affirmative action objectives of the organization.

MARGINAL

SES

This level of performance, while demonstrating some positive contributions to the organization, shows notable deficiencies. It is below the level expected for the position and requires corrective action. The quality, quantity or timeliness of the employee's work is less than Fully Successful, jeopardizing attainment of the element's objective. The employee's work under this element is at a level which may result in removal from the position.

There is much in the employee's performance that is useful. However problems with quality, quantity or timeliness are too frequent or to too serious to ignore. Performance is inconsistent and problems caused by deficiencies counterbalance acceptable work. These deficiencies cannot be overlooked since they create adverse consequences for the organization or create burdens for other personnel. When needed as input into another work process, the work may not be finished with such quality, quantity and timeliness that other work can proceed as planned.

Although the work products are generally of useable quality, too often they require additional work by other personnel. The work products do not consistently and/or fully meet the organization's needs. Although mistakes may be without immediate serious consequences, over time they are detrimental to the organization.

A fair amount of work is accomplished, but the quantity does not represent what is expected of Fully Successful employees. Output is not sustained consistently and/or higher levels of output usually result in decreased quality. The work generally is finished within expected timeframes but significant deadlines too often are not met.

The employee's written and oral communications usually consider the nature and complexity of the subject and the intended audience. They convey the central points of the information important to accomplishing the work. However, too often the communications are not focused, contain too much or too little information, and/or are conveyed in a tone that hinder achievement of the purpose of the communications. The listener or reader must question the employee at times to secure complete information or avoid misunderstandings.

GENERAL WORK FORCE

This level of performance, while demonstrating some positive contributions to the organization, shows notable deficiencies. It is below the level expected for the position, and requires corrective action. The quality, quantity or timeliness of the employee's work is less than Fully Successful, jeopardizing attainment of the element's objective.

There is much in the employee's performance that is useful. However problems with quality, quantity or timeliness are too frequent or to too serious to ignore. Performance is inconsistent and problems caused by deficiencies counterbalance acceptable work. These deficiencies cannot be overlooked since they create adverse consequences for the organization or create burdens for other personnel. When needed as input into another work process, the work may not be finished with such quality, quantity and timeliness that other work can proceed as planned.

Although the work products are generally of useable quality, too often they require additional work by other personnel. The work products do not consistently and/or fully meet the organization's needs. Although mistakes may be without immediate serious consequences, over time they are detrimental to the organization.

A fair amount of work is accomplished, but the quantity does not represent what is expected of Fully Successful employees. Output is not sustained consistently and/or higher levels of output usually result in decreased quality. The work generally is finished within expected timeframes but significant deadlines too often are not met.

The employee's written and oral communications usually consider the nature and complexity of the subject and the intended audience. They convey the central points of the information important to accomplishing the work. However, too often the communications are not focused, contain too much or too little information, and/or are conveyed in a tone that hinder achievement of the purpose of the communications. In communications to coworkers, the listener or reader must question the employee at times to secure complete information or avoid misunderstandings.

SUPERVISORY

Inadequacies surface in performing supervisory duties. Deficiencies in areas of supervision over an extended period of time affect adversely employee productivity or morale or organizational effectiveness. The marginal employee does not provide strong leadership or take the appropriate initiative to improve organizational effectiveness. For example, he/she too often fails to make decisions or fulfill supervisory responsibilities in a timely manner to provide sufficient direction to subordinates on how to carry out programs, to give clear assignments and/or performance requirements, and/or to show an understanding of the goals of the organization or subordinates' roles in meeting those goals.

UNSATISFACTORY

SES

This is the level of unacceptable performance. Work products do not meet the minimum requirements of the critical element.

Most of the following deficiencies are typically, but not always, characteristic of the employee's work:

* Little or no contribution to organizational goals;
* Failure to meet work objectives;
* Inattention to organizational priorities and administrative requirements;
* Poor work habits resulting in missing deadlines, incomplete work products;
* Strained work relationships;
* Failure to respond to client needs; and/or
* Lack of response to supervisor's corrective efforts.

GENERAL WORK FORCE

The quantity and quality of the employee's work under this element are not adequate for the position. The employee's work products fall short of requirements of the element. They arrive late or often require major revision because they are incomplete or inaccurate in content. The employee fails to apply adequate technical knowledge to complete the work of this element. Either the knowledge applied cannot produce the needed products, or it produces technically inadequate products or results. Lack of adherence to required procedures, instructions, and formats contributes to inadequate work products.

Because the employee's work planning lacks logic or realism, critical work remains incomplete or is unacceptably late. Lack of attention to priorities causes delays or inadequacies in essential work, the employee has concentrated on incidental matters.

The employee's behavior obstructs the successful completion of the work by lack of cooperation with clients, supervisor, and/or co-workers, or loss of credibility due to irresponsible speech or work activities.

In dealing with special projects, the employee either sacrifices essential regular work or fails to complete projects. The employee fails to adapt to changes in priorities, procedures, or program direction and therefore, cannot operate adequately in relation to changing requirements.

The oral and written expression the employee uses in accomplishing the work of this element lacks necessary clarity for successful completion of required tasks. Communication failures interfere with completion of work.

SUPERVISORY

Most of the following deficiencies are typical, but not always, common, characteristics of the employee's work:

* Inadequate guidance to subordinates;
* Inattention to work progress; and
* Failure to stimulate subordinates to meet goals.

***Supervisory standards must be applied to SES and General Work Force supervisors.**

First Year Addendum

The performance of all newly hired patent examiners (including rehired examiners with prior patent examining experience) will be evaluated as described below.

- Evaluation of performance in Element I. Production, Element III. Docket Management, and Element IV. Professionalism and Stakeholder Interaction, will be based on the criteria for evaluation set forth in the PAP for the appropriate grade.

- The following weighting factors will be applicable for each element of the PAP:

First Year Addendum Table 1			
	Element	Weighting Factors	
		First 6 months	Second 6 months
Examiners with no patent examining experience	I. Production	0%	0%
	II. Quality	60%	60%
	III. Docket Management	30%	30%
	IV. Professionalism and Stakeholder Interaction	10%	10%
Examiners with patent examining experience	I. Production	0%	30%
	II. Quality	60%	30%
	III. Docket Management	30%	30%
	IV. Professionalism and Stakeholder Interaction	10%	10%

- Evaluation of performance in Element II. Quality will be based on the generic performance standards with respect to the examiner's demonstrated ability to:
  1) learn and independently perform the assigned functions, and
  2) accept instruction and incorporate feedback with respect to the performance of these functions.

- The assigned functions for Element II. Quality for each grade throughout the first year are shown in the table below. Quality Major Activities are shown in PAP Quality Table 2.

First Year Addendum Table 2		
	Assigned Functions	
	First 6 months	Second 6 months
GS-5 Examiners with no patent examining experience	Quality Major Activities 1-3	
GS-7 Examiners with no patent examining experience	Quality Major Activities 1-3	Quality Major Activities 1-6
GS-9-11 Examiners with no patent examining experience	Quality Major Activities 1-3	Quality Major Activities 1-10
All Examiners with patent examining experience	Quality Major Activities 1-6	All Quality Major Activities assigned to the examiners' current grade.

After 12 months all examiners are evaluated based on their actual grade for all assigned functions as described in the PAP.

USPTO Responses to Questions for the Record – Senator Blumenthal
U.S. Senate Committee on the Judiciary
Subcommittee on Intellectual Property

"Promoting the Useful Art: How can Congress prevent the issuance of poor quality patents?"
October 30, 2019
Witness: The Honorable Andrew Hirshfeld
Commissioner for Patents
U.S. Patent and Trademark Office
Submitted: April 3, 2020

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1. **As you know, the patent system is complex and technical. Many small inventors lack the knowledge and resources to navigate the system. For that reason, I am a major proponent of the Patent Pro Bono Program, which ensures that the patent system is open to any inventor with a good idea and is not just available for the wealthy and well-connected.**

The Pro Bono Program is also important to the patent quality debate. First, it gives inventors the help they need to submit clear and precise patents. Second, it ensures that as the PTO cracks down on poorly drafted patents, it does not unintentionally harm inventors with valid inventions but without the resources to hire top-dollar attorneys.

a. Does the Pro Bono Program improve the quality of patent applications?

Response: Yes. The Pro Bono Program improves patent application quality by providing independent inventors and small businesses access to registered practitioners, when they could not otherwise afford one, who will help avoid common patent application preparation and filing pitfalls. One study has shown that pro se filed applications were more likely to receive certain types of formality rejections and more likely to have their applications go abandoned compared to applicants represented by a registered practitioner.[3] A registered practitioner through the Pro Bono Program thus can help ensure that the patent application has the correct formatting and content to increase the likelihood of the issuance of a better quality patent.

b. Do you believe that the Pro Bono Program helps small inventors avoid unintended harms that could be caused by efforts to reduce the issuance of poor quality patents?

Response: As noted on the USPTO's website, preparation and prosecution of a patent application requires knowledge of patent law and rules, USPTO practice and procedures, as well as knowledge of the scientific or technical matters involved in the particular invention. The Pro Bono Program can help an independent inventor or small business navigate the various bodies of law and procedure that affect patent examination and thus avoid any unintended harms that may result by efforts to increase patent quality.

In addition, assistance from the Pro Bono Program makes applicants less vulnerable to invention promotion schemes and the associated costs and the poor-quality patent applications that are associated with such schemes. Anecdotally, the USPTO has heard from individual inventors who stated that the Pro Bono Program has helped them avoid these very invention promotion schemes.

[3] https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0033141 (accessed November 15, 2019).

2. I'm sure you and the USPTO are familiar with Professor Wasserman and Frakes' research finding that the USPTO's budget structure may create incentives to approve poor quality patents. They argue that this is the case for two reason. First, the agency relies on fees on issued patents – such as issue fees and renewal fees – for nearly half its annual funding. As a result, the more patents the agency grants, the more money it receives. Second, they find that, in response to the USPTO's backlog of unexamined applications, patent examiners improperly approve patents.

a. Are these concerns valid?

b. If not, why not?

c. If so, has the USPTO taken any steps to address the issues raised in this research

Response: For a number of reasons, the findings by Professors Wasserman and Frakes related to USPTO budget structure and patent examination are not valid. Their analysis inappropriately models the USPTO fee setting process using a profit-maximizing framework that economists apply to private companies. The USPTO is a public agency and its patent fees are based on the amount of revenue necessary to recover the aggregate costs for its patent operations and associated administrative costs. *See* 35 U.S.C. § 42. The USPTO sets fees by undertaking an extensive, multiparty evaluation and approval process that includes public comment opportunities as well as reviews by the Congressionally-mandated Patent Public Advisory Committee. This process does not involve instructions to examiners or directives about how to examine patent applications. While it is true that the bulk of USPTO's operating funds come from post-grant maintenance fees, this fee structure is intentionally designed to keep initial filing costs low to allow financially constrained inventors, such as those from underrepresented communities, to use the patent system, which enhances U.S. innovation and economic growth. The quality of patent examination, which is an explicit goal in the agency's strategic plan, is reviewed using random quality assessments and other oversight mechanisms that are separate from the fee setting process. The decision to allow a patent application is based on whether the patent meets all of the statutory requirements and is not based on the size of patent backlogs or considerations about patent fees.

USPTO Responses to Questions for the Record – Senator Hirono

U.S. Senate Committee on the Judiciary
Subcommittee on Intellectual Property

"Promoting the Useful Art: How can Congress prevent the issuance of poor quality patents?"
October 30, 2019
Witness: The Honorable Andrew Hirshfeld
Commissioner for Patents
U.S. Patent and Trademark Office
Submitted: April 3, 2020

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1. What role does patent quality play when evaluating a patent examiner's performance? And, how is patent quality measured?

Response: The examiner's performance appraisal plan (PAP) includes a critical quality element, which sets forth what is required of examiners at various grade levels with respect to the quality of submitted work products. This element accounts for 35% of the examiner's annual rating under the PAP. At the individual patent examiner level, Supervisory Patent Examiners (SPEs) are required to review the work product of their examiners so that they can assess the examiner's performance relative to the standards of the PAP. At the aggregate level, the Office of Patent Quality Assurance (OPQA) reviews the quality of randomly selected office actions to identify overall Office quality trends and areas of improvement.

In FY2021, the USPTO plans to update the PAP for all patent examiners. This new PAP provides a clearer roadmap of expectations and best practices for examiners, and places a greater emphasis on the patentability search, compact prosecution, and clarity of office actions.

2. Earlier this year, you co-authored a blog post with Patent and Trademark Office (PTO) Director Andrei Iancu touting that the PTO had met its goals of "under 15 months for first office actions and under 24 months for total pendency, on average."

a. What factors did the PTO consider when setting these specific goals?

Response: At the close of FY 2011, USPTO's first action pendency stood at 28.0 months and total pendency was 33.7 months, both far in excess of acceptable levels. The goals of under 15 months for first office actions and under 24 months for total pendency, on average by the end of FY2019, were chosen to keep the patent examination corps focused on continued improvement of patent application pendency and to maximize compliance with Congressionally established timeframes. Moving forward, the USPTO plans to increase focus on compliance rates with the patent term adjustment statutes, which are congressionally set timeframes for patent examination.[4] The USPTO believes these measures provide greater transparency and certainty to our stakeholders as compared to measures of average pendency.

b. What allowed the PTO to meet these goals—e.g., more patent examiners, increased efficiency, introduction of new technology?

Response: Our success in meeting these goals is the direct result of the efforts of our employees, at all levels, to drastically improve analyses, streamline processes, and clarify approaches that benefit all

[4] *See* 35 USC § 154

applications. At the patent examining level, supervisors and examiners undertook and implemented complex data analyses to better prioritize applications and balance workloads across technologies, without sacrificing quality. At the application processing level, the team focused on increasing efficiencies to accelerate the overall patent examination process. For example, the technical support staff reduced the processing time of applicant responses to patent examiner office actions from an average of 26.2 days to 6.8 days, thus significantly reducing overall pendency of patent applications. These significant efforts, in conjunction with an increase in examiner ranks and improved examiner training, allowed the USPTO to successfully achieve pendency goals.

3. Prof. Colleen Chien put forth a proposal earlier this year that would allow patent applicants to defer examination for patent eligible subject matter until after other issues relating to patentability are exhausted. This would allow the applicants and patent examiner to initially address other, more-settled bases of patentability and turn to the more-controversial topic of patent eligibility only if necessary.

a. Is this something the Patent Office would consider doing? Why or why not?

Response: The USPTO has considered the idea of deferred examination of patent eligibility, but has chosen not to implement such a change. The USPTO believes that the most efficient patent prosecution results when compliance with each of the patentability statutes are evaluated simultaneously and as early as possible in patent prosecution. Each of the patentability statutes plays an important role in patent prosecution, and delaying examination of any particular statute would result in unnecessary extension of prosecution and significant uncertainty for applicants and the public. For example, if subject matter eligibility examination were deferred, an applicant could spend many months, or even years, addressing non-subject matter eligibility issues with the office, only to have to then address subject matter eligibility rejections, which may or may not be overcome by the applicant. Furthermore, should the applicant overcome the subsequently applied subject matter eligibility rejections by amending the claims for patent protection, it is possible that the amendments would necessitate new non-subject matter eligibility rejections, thus causing the applicant and the office to cycle through an inefficient patent prosecution.

b. Is it possible to incorporate this idea within compact prosecution—for example, by requiring examiners to address patent eligibility only after identifying all other rejections in a single office action?

Response: While it is possible to defer examination of subject matter eligibility issues, the USPTO believes that such a change would not result in compact prosecution for the vast majority of patent applications, and would result in extended prosecution for these applications.

4. Prof. Melissa Wasserman testified regarding an analysis she performed that suggests patent examiner grant rates increase by as much as 13 to 29 percent as they rise from pay grade GS-7 to GS-14. Prof. Wasserman concluded that the increase in grant rate is driven by the decrease in time given to more senior patent examiners to review patent applications.

a. Has the PTO performed its own analysis of the impact of decreased examiner time allocations on patent grant rate? If it has, what were the results of that analysis? If it has not, why not?

Response: Yes, the USPTO's Office of the Chief Economist performed an analysis of the relationship between examiner seniority and patent allowance rates. This analysis identified various weaknesses in the 2017 academic article by Professors Frakes and Wasserman. For example, the article fails to exclude the influence of other decision makers besides the patent examiner, such as the inventor, assignee, or

applicant's attorney. The article also fails to account for increases in examination skill and efficiency that occur over the course of an examiner's career. One example of such improvement is increased use of "examiner's amendments" by which examiners proactively work with attorneys to limit claim scope. Properly accounting for such factors substantially weakens the link between grant rates and examiner grade. The results of the USPTO analysis suggests that other factors besides examiner time are influencing patent application outcomes and that more research is needed in this area.

b. What is the basis for the current amounts of time allocated to patent examiners to review applications?

Response: Significant changes affecting patent prosecution have occurred in the years since the current examination time goals were established, including the development of new and converging technologies of increasing complexity, an increase in the volume of prior art, a change to the system used to classify patent applications and search for prior art, and changes to the legal landscape. Because of this, the USPTO is making fundamental updates to the methods and processes that support patent examination, including the method used to allot time for examining patent applications. In doing so, the USPTO took an analytical approach and considered various factors, including the significant changes noted above, the goals and mission of the agency, and stakeholder feedback.

Under the new method, time will be assigned to an application based on its classification "picture," which represents the full scope of technology recited in an application and accounts for multi-disciplinary inventions, as well as the particular attributes of the application, such as the number of claims and the size of the specification.

As we move forward, the USPTO will continually re-evaluate examining time allotments to ensure they enable us to meet our quality and pendency goals.

c. Does the PTO agree with Prof. Wasserman's conclusion that the decrease in time given to more senior patent examiners to review patent applications results in an increase in patent grant rate? If not, to what does the PTO attribute the increase in patent grant rate associated with more senior patent examiners as found by Prof. Wasserman?

Response: The USPTO does not agree with Prof. Wasserman's conclusion about the relationship between the examination time given to more senior patent examiners and the patent grant rate. The exemplary weaknesses mentioned in response to Question 4(a) undermine this conclusion. Accounting for examiner's amendments and first-action allowances, the USPTO found that the relationship between examination time, examiner seniority, and grant rates posited by Frakes and Wasserman (2017) does not hold. The USPTO analysis shows that first action allowance rates increase only slightly as examiners progress in grade. The key to this finding is the improved use of examiner's amendments throughout examiners careers. As an examiner's skill, knowledge, and confidence increase with experience, they are more likely and better able to work with applicants to properly limit the claims to allowable subject matter, resulting in a slightly higher grant rate. This pattern is supported both by statistical analyses and the personal experiences of many USPTO managers.

d. In view of Prof. Wasserman's analysis, does the PTO plan to make any changes to the amount of time allocated to examiners to review patent applications? Why or why not?

Response: The USPTO is in the process of adjusting examination time for all GS levels. When determining how to adjust the allotment of time, we took an analytical approach and considered various factors, including the goals and mission of the agency, stakeholder feedback, and the significant changes

affecting patent prosecution that have occurred over the past several decades, including the development of new and converging technologies of increasing complexity, an increase in available prior art, and changes to the legal landscape.

As part of the analytical analysis, the agency reviewed a variety of studies, including Professor Wasserman's analysis.

In the new method of determining examination time, time will be assigned to an application based on its classification picture, which represents the full scope of technology recited in an application and accounts for multi-disciplinary inventions, as well as the particular attributes of the application, such as the number of claims, the size of the specification, and the number of pages in any filed information disclosure statements.[5]

5. Prof. Melissa Wasserman testified regarding an analysis she performed that suggests the PTO grants more patents during times when it faces budgetary pressure, presumably to make up for any budgetary shortfall through additional issuance fees. Her analysis further suggests that the PTO's increased grant rate tends to occur in areas that will maximize the increase in revenue—i.e., by granting a higher rate of patents to large entities and to applications from high renewal rate technologies.

a. What impact does the PTO's financial situation have on the percentage of patents it grants?

Response: The USPTO's financial situation does not have any impact on the percentage of patents we grant. The analysis Professor Wasserman and Frakes apply inappropriately models the USPTO fee setting process using a profit-maximizing framework that economists apply to private companies. The USPTO is a public agency and its patent fees are based on the amount of revenue necessary to recover the aggregate costs for its patent operations and associated administrative costs. *See* 35 U.S.C. § 42. The USPTO sets fees by undertaking an extensive, multiparty evaluation and approval process that includes public comment opportunities as well as reviews by the Congressionally-mandated Patent Public Advisory Committee. This process does not involve setting goals for allowance rates and does not, in any way, influence examiners to allow patents for financial reasons. Patent examiners and supervisors make patentability determinations based on the patent statutes, and relevant precedent from the courts.

b. What impact does the PTO's financial situation have on the types of patents it grants?

Response: The USPTO's financial situation does not have any impact on the types of patents we grant.

c. Does PTO management instruct examiners to preferentially grant applications of certain types—such as applications filed by large entities or applications from high renewal rate technologies—in times of budgetary pressure?

Response: No, the USPTO does not instruct any examiners to preferentially grant any such applications in times of budgetary pressure.

[5] More information on the updates to patent examination time can be found on the following section of the USPTO website: https://www.uspto.gov/patent/laws-and-regulations/examination-policy/updates-patent-examination-time-application-routing.

d. Is the PTO aware of any effort by patent examiners to preferentially grant applications of certain types—such as applications filed by large entities or applications from high renewal rate technologies—in times of budgetary pressure?

Response: No, the USPTO is not aware of any efforts by patent examiners to preferentially grant any such patent applications in times of budgetary pressure.

USPTO Responses to Questions for the Record – Senator Leahy
U.S. Senate Committee on the Judiciary
Subcommittee on Intellectual Property

"Promoting the Useful Art: How can Congress prevent the issuance of poor quality patents?"
October 30, 2019
Witness: The Honorable Andrew Hirshfeld
Commissioner for Patents
U.S. Patent and Trademark Office
Submitted: April 3, 2020

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1. The PTO recently responded to concerns about potential uncertainty stemming from the Supreme Court's *Alice* cases by issuing subject matter eligibility guidance.

a. Under this guidance, are you confident that patent examiners will be able to evaluate applications in a way that reduces uncertainty and improves predictability and reliability?

Response: Yes. The USPTO is confident that in the context of patent examination, its 2019 guidance on patent eligibility has reduced uncertainty and improved predictability and reliability, particularly in critical technological areas, such as artificial intelligence.

2. In 2011, the America Invents Act allowed third parties to submit information related to a pending application.

(a) What has been the result of this change?

Response: Since the inception of Section 122(e), the USPTO has seen an increase in the amount of information filed by third parties. The USPTO receives about 1,000 proper preissuance submissions by third parties a year. Through such submissions, the USPTO has received over 17,000 documents. These documents have aided examiners in evaluating the patentability of the corresponding applications in view of information that, in some cases, might not have otherwise been available to the examiners in the relatively small number of applications in which the submissions have been received.

(b) Is there any indication that allowing third party intervention during the application period has improved the quality of patents?

Response: Since September of 2012, third-party pre-issuance submissions have only been filed in a very small percentage of eligible applications, as noted in the previous question. Prior studies have shown a benefit from such submissions. The vast majority of examiners surveyed who had the benefit of the third party prior art considered the prior art to be helpful to them in making patentability determinations.

(c) Teresa Rea, former Acting Under Secretary of Commerce for Intellectual Property and former Acting Director of the United States Patent and Trademark Office, praised the third party submission change generally in her testimony. But she also said that the process was "not as robust as originally anticipated" and she requested that Congress find ways to

encourage third party submissions. Is Ms. Rea correct, and if so, how would you suggest Congress encourage third party submissions?

Response: As noted in response to the previous question, third party pre-issuance submissions have only been filed in a very small percentage of eligible applications. However, the third-party submission program has been helpful to USPTO's examiners when they have had the benefit of reviewing these third party prior art submissions. USPTO also supports encouraging more robust participation in the program and welcomes the opportunity to work with Congress in figuring out how to encourage more participation.

3. Another reform in the America Invents Act was the creation of Inter Partes Review (IPR). The PTO recently proposed rules placing the burden on patent challengers in IPR proceedings to show that a proposed amendment is unpatentable. Under the proposed rules, not only does the patent owner not have to show that its proposed amendment is patentable, but there is also no obligation on the PTO to examine the proposed amendment to ensure that the resulting claims would be patentable.

(a) Why does the PTO believe this burden should solely rest with the challenger? Should the PTO have a role in examining proposed amendments, and if not, why?

Response: On October 22, 2019, the USPTO issued a notice of proposed rulemaking (NPRM) that would assign the burdens of persuasion relating to motions to amend filed in America Invents Act (AIA) trial proceedings. This NPRM was issued in response to decisions from the United States Court of Appeals for the Federal Circuit, as well as public comments received in response to an October 2018 Request for Comments (RFC) on a proposed pilot program relating to motion to amend practice. The majority of commenters who responded on the issue were in favor of the USPTO engaging in rulemaking on the burden issue and allocating the burden as the USPTO now proposes in the NPRM. The USPTO also issued the NPRM in the interest of providing greater clarity, certainty, and predictability to parties participating in AIA trials before the Patent Trial and Appeal Board (Board).

The Board evaluates proposed motions to amend to determine (1) whether the patent owner has shown that the motion meets the applicable statutory and regulatory requirements, and (2) whether the petitioner has met its burden of persuasion to show unpatentability. Notwithstanding that the burden of persuasion rests with the petitioner, the Board may exercise its discretion to reach a determination regarding patentability where a petitioner does not oppose an amendment or does not meet its burden of persuasion in relation to any proposed substitute claim when doing so would be in the interests of justice. The Board is in the process of promulgating a rule on the burdens applied to a motion to amend.

In addition, under the motion to amend pilot program, if a petitioner ceases to participate altogether in an AIA trial in which the patent owner has filed a motion to amend, the Board may exercise its discretion to proceed with the case. In that context, under the pilot program, the Board may solicit patent examiner assistance that may include preparation of an advisory report that provides an initial discussion about patentability of the proposed substitute claims based on, for example, prior art provided by the patent owner and/or obtained in prior art searches by the examiner.

4. The PTO's Patents for Humanity program provides awards in the form of Acceleration Certificates to patent owners who have taken steps to use their inventions to further humanitarian needs.

(a) Do you believe the program would be more effective if Congress authorized the certificates to be transferable? Why or why not?

Response: Yes. The Patents for Humanity program has been successful in promoting innovation by inventors who have developed ways to provide affordable, scalable, and sustainable solutions for the less fortunate. By recognizing those who use technology to meet global humanitarian challenges, the program promotes and incentivizes these inventors for the good of the U.S. and the entire world and making the certificate transferable would provide further incentives for these inventions.