§ 1.805 Replacement or supplement of deposit.

(a) A depositor, after receiving notice during the pendency of an application for patent, application for reissue patent or reexamination proceeding, that the depository possessing a deposit either cannot furnish samples thereof or can furnish samples thereof but the deposit has become contaminated or has lost its capability to function as described in the specification, shall notify the Office in writing, in each application for patent or patent affected. In such a case, or where the Office otherwise learns, during the pendency of an application for patent, application for reissue patent or reexamination proceeding, that the depository possessing a deposit either cannot furnish samples thereof or can furnish samples thereof but the deposit has become contaminated or has lost its capability to function as described in the specification, the need for making a replacement or supplemental deposit will be governed by the same considerations governing the need for making an original deposit under the provisions set forth in §1.802(b). A replacement or supplemental deposit made during the pendency of an application for patent shall not be accepted unless it meets the requirements for making an original deposit under these regulations, including the requirement set forth under §1.804(b). A replacement or supplemental deposit made in connection with a patent, whether or not made during the pendency of an application for reissue patent or reexamination proceeding or both, shall not be accepted unless a certificate of correction under §1.323 is requested by the patent owner which meets the terms of paragraphs (b) and (c) of this section.
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(b) A request for certificate of correction under this section shall not be granted unless the certificate identifies:

(1) The accession number for the replacement or supplemental deposit;
(2) The date of the deposit; and
(3) The name and address of the depository.

(c) A request for a certificate of correction under this section shall not be granted unless the request is made promptly after the replacement or supplemental deposit has been made and the request:

(1) Includes a statement of the reason for making the replacement or supplemental deposit;
(2) Includes a statement from a person in a position to corroborate the fact, and stating that the replacement or supplemental deposit is of a biological material which is identical to that originally deposited;
(3) Includes a showing that the patent owner acted diligently—
   (i) In the case of a replacement deposit, in making the deposit after receiving notice that samples could no longer be furnished from an earlier deposit; or
   (ii) In the case of a supplemental deposit, in making the deposit after receiving notice that the earlier deposit had become contaminated or had lost its capability to function as described in the specification;
(4) Includes a statement that the term of the replacement or supplemental deposit expires no earlier than the term of the deposit being replaced or supplemented; and
(5) Otherwise establishes compliance with these regulations.

(d) A depositor’s failure to replace a deposit, or in the case of a patent, to diligently replace a deposit and promptly thereafter request a certificate of correction which meets the terms of paragraphs (b) and (c) of this section, after being notified that the depository possessing the deposit cannot furnish samples thereof, shall cause the application or patent involved to be treated in any Office proceeding as if no deposit were made.

(e) In the event a deposit is replaced according to these regulations, the Office will apply a rebuttable presumption of identity between the original and the replacement deposit where a patent making reference to the deposit is relied upon during any Office proceeding.

(f) A replacement or supplemental deposit made during the pendency of an application for patent may be made for any reason.

(g) In no case is a replacement or supplemental deposit of a biological material necessary where the biological material, in accordance with §1.802(b), need not be deposited.

(h) No replacement deposit of a biological material is necessary where a depository can furnish samples thereof but the depository for national security, health or environmental safety reasons is unable to provide samples to requesters outside of the jurisdiction where the depository is located.

(i) The Office will not recognize in any Office proceeding a replacement deposit of a biological material made by a patent owner where the depository could furnish samples of the deposit being replaced.


§ 1.806 Term of deposit.

A deposit made before or during pendency of an application for patent shall be made for a term of at least thirty (30) years and at least five (5) years after the most recent request for the furnishing of a sample of the deposit was received by the depository. In any case, samples must be stored under agreements that would make them available beyond the enforceable life of the patent for which the deposit was made.

§ 1.807 Viability of deposit.

(a) A deposit of biological material that is capable of self-replication either directly or indirectly must be viable at the time of deposit and during the term of deposit. Viability may be tested by the depository. The test must conclude only that the deposited material is capable of reproduction. No evidence is necessarily required regarding the ability of the deposited material to perform any function described in the patent application.