

**Federal Register** to revise the regulations for the Olympic Coast National Marine Sanctuary (76 FR 2611). This notice extends the public comment period stated in that proposed rule by an additional 10 days.

**DATES:** NOAA will accept public comments on the proposed rule published at 76 FR 2611 (January 14, 2011) through March 25, 2011. Dates, times, and location of the public hearings mentioned in that proposed rule have not changed.

**ADDRESSES:** The instructions for submitting comments are detailed in the proposed rule published on January 14, 2011 (76 FR 2611).

**FOR FURTHER INFORMATION CONTACT:** George Galasso at (360) 457-6622, extension 12.

Dated: January 28, 2011.

**Daniel J. Basta,**

*Director, Office of National Marine Sanctuaries.*

[FR Doc. 2011-2453 Filed 2-3-11; 8:45 am]

**BILLING CODE 3510-NK-M**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 301

[REG-131151-10]

RIN 1545-BJ89

#### Rewards and Awards for Information Relating to Violations of Internal Revenue Laws

##### *Correction*

In proposed rule document 2011-928 appearing on pages 2852-2853 in the issue of Tuesday, January 18, 2011 make the following correction:

On page 2852, in the third column, in the second paragraph under the heading Background and Explanation of Provision, in the 12th line, "of the information provided z5" should read "of the information provided."

[FR Doc. C1-2011-928 Filed 2-3-11; 8:45 am]

**BILLING CODE 1505-01-D**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

#### 37 CFR Part 1

[Docket No. PTO-P-2010-0092]

RIN 0651-AC52

#### Changes To Implement the Prioritized Examination Track (Track I) of the Enhanced Examination Timing Control Procedures

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The United States Patent and Trademark Office (Office) requested comments on a proposal to provide applicants with greater control over when their utility and plant applications are examined and to promote greater efficiency in the patent examination process (3-Track). The Office, in addition to requesting written comments, conducted a public meeting to collect input, and has subsequently considered the wide range of comments received. The Office is in the process of refining the 3-Track proposal in light of the input. While that process continues, and in light of the fact that the vast majority of public input was supportive of the Track I portion of the 3-Track proposal, the Office proposes by this Notice to proceed with immediate implementation of the Prioritized Examination Track (Track I), providing fast examination for applicants desiring it, upon payment of the applicable fee and compliance with the additional requirements as described below.

**DATES:** *Comment Deadline Date:* Written comments must be received on or before March 7, 2011. No public hearing will be held.

**ADDRESSES:** Comments concerning this notice should be sent by electronic mail message over the Internet addressed to [track\\_I\\_comments@uspto.gov](mailto:track_I_comments@uspto.gov). Comments may also be submitted by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, marked to the attention of Robert A. Clarke, Deputy Director, Office of Patent Legal Administration, Office of the Associate Commissioner for Patent Examination Policy. Although comments may be submitted by mail, the Office prefers to receive comments via the Internet.

Comments may also be sent by electronic mail message over the Internet via the Federal eRulemaking Portal. See the Federal eRulemaking Portal Web site (<http://www.regulations.gov>) for additional instructions on providing comments via the Federal eRulemaking Portal.

The comments will be available for public inspection at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available via the Internet (<http://www.uspto.gov>). Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

**FOR FURTHER INFORMATION CONTACT:** Robert A. Clarke, Eugenia A. Jones, or Joni Y. Chang, Office of Patent Legal Administration, Office of the Associate Commissioner for Patent Examination Policy, by telephone at (571) 272-7735, (571) 272-7727 or (571) 272-7720, or by mail addressed to: Mail Stop Comments Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, marked to the attention of Robert A. Clarke.

**SUPPLEMENTARY INFORMATION:** In June 2010, the Office requested comments from the public on a proposal to provide applicants with greater control over when their original utility or plant applications are examined and promote work sharing between intellectual property offices. See *Enhanced Examination Timing Control Initiative; Notice of Public Meeting*, 75 FR 31763 (June 4, 2010), 1355 *Off. Gaz. Pat. Office* 323 (June 29, 2010) Specifically, the Office proposed to adopt procedures under which an applicant would be able to: (1) Request prioritized examination of an original utility or plant nonprovisional application (Track I); (2) request a delay in docketing the application for examination by filing a request for delay in payment of the search fee, the examination fee, the claims fees and the surcharge (if appropriate) for a maximum period not to exceed thirty months in an original utility or plant application filed under 35 U.S.C. 111(a) (Track III); or (3) obtain processing under the current examination procedure (Track II) by not requesting either Track I or Track III processing.

The Office is proposing to amend the rules of practice to implement the proposal to provide applicants with the option to request prioritized examination at the time of filing of an application upon payment of the appropriate fees (Track I). The Office is limiting requests for prioritized examination under 37 CFR 1.102(e) to a maximum of 10,000 applications for the first year. The Office will revisit this

annual cap at the end of the year to evaluate what the appropriate maximum should be, if any.

The Office is also in the process of developing proposed changes to the rules of practice to provide applicants with the option to request a delay in docketing the application for examination by filing a request for delay in payment of the search fee, the examination fee, the claims fees and the surcharge (if appropriate) for a maximum period not to exceed thirty months in an original utility or plant application filed under 35 U.S.C. 111(a) (Track III).

The Office is proposing changes to rules of practice to implement the option to request prioritized examination of an application (Track I) at this time and separately from a proposal to implement Track III so that applicants who want to make use of this option will be able to do so as quickly as possible. The following proposed changes that were considered in the notice published in June of 2010 are *not* being proposed in this rule making: (1) The provision that requires applicant to file a copy of the search report (if any), a copy of the first office action from the foreign office and an appropriate reply to the foreign office action when requesting prioritized examination or to obtain processing under the current procedure; and (2) the provision for requesting a supplemental search from a participating intellectual property granting office.

*Prioritized Examination of a utility or plant patent application:* For some applicants with a currently financed plan to commercialize or exploit their innovation or a need to have more timely examination results to seek additional funding, more rapid examination is necessary. While some programs are currently available to prioritize applications (*e.g.*, the accelerated examination program and the petition to make special program), some applicants neither want to perform the search and analysis required by the accelerated examination program nor can they seek special status based on the conditions set forth in 37 CFR 1.102. For such applicants, the Office is proposing optional prioritized examination upon applicant's request and payment of the appropriate fees upon filing. On granting of prioritized status, the application would be placed in the queue for prioritized examination.

The prioritized examination fee is being proposed to be set at a level to recover the full cost of the resources necessary to increase the work output of the Office so that the non-prioritized applications would not be delayed due

to resources being diverted to process the prioritized applications. In other words, the fee for prioritized examination would include the cost of hiring and training a sufficient number of new employees to offset the production time used to examine prioritized applications. Specifically, the Office plans to hire additional examiners above the number of planned hires, based on the number of requests for Track I prioritization received by the Office, so that the non-prioritized applications would not be delayed due to resources being diverted to process the prioritized applications. Under the Office's current statutory authority, the Office is not permitted to discount the fee for small entity applicants. If legislation is passed providing a fifty percent fee reduction for providing prioritized examination under 37 CFR 1.102(e) for small entities under 35 U.S.C. 41(h)(1) and that the prioritized examination fees be set to recover the estimated cost of the prioritized examination program, the Office would set the prioritized examination fee at \$4,800 (\$2,400 for small entities), since 27.8 percent of the new serialized utility and plant applications filed in fiscal year 2010 were by small entities (based upon data from the Office's Patent Application Monitoring and Locating (PALM) system).

Under Track I prioritized examination, an application would be accorded special status and placed on the examiner's special docket throughout its entire course of prosecution before the examiner until a final disposition is reached in the application. The aggregate goal for handling applications under Track I prioritized examination would be to provide a final disposition within twelve months of prioritized status being granted. The final disposition for the twelve-month goal means: (1) Mailing of a notice of allowance, (2) mailing of a final Office action, (3) filing of a notice of appeal, (4) declaration of an interference by the Board of Patent Appeals and Interferences (BPAI), (5) filing of a request for continued examination, or (6) abandonment of the application, within twelve months from the date prioritized status has been granted. An application in Track I, however, would *not* be accorded special status throughout its entire course of appeal or interference before the BPAI.

The Office is also proposing to require that the application be filed via the Office's electronic filing system (EFS-Web) and be complete under 37 CFR 1.51(b) with any excess claims fees paid on filing, and to limit the number of claims in a prioritized application to

four independent and thirty total claims. Thus, a request for prioritized examination under Track I would require that: (1) The application be an original utility or plant nonprovisional application filed under 35 U.S.C. 111(a); (2) the application be filed via the Office's electronic filing system (EFS-Web) and be complete under 37 CFR 1.51(b) with any excess claims fees paid on filing; (3) the applicant pay the required fees for requesting prioritized examination; and (4) the application contains or is amended to contain no more than four independent claims and thirty total claims. *See* proposed 37 CFR 1.102(e). The request for prioritized examination, the prioritized examination fee set forth in 37 CFR 1.17(c), the processing fee set forth in 37 CFR 1.17(i), and the publication fee set forth in 37 CFR 1.18(d) must be filed with the application. The proposed procedure for Track I would be available only for applications filed on or after the implementation date (including new continuing applications filed on or after the implementation date).

Unlike the accelerated examination program, the time periods set in Office actions for applications in Track I would be the same as set forth in section 710.02(b) of the *Manual of Patent Examining Procedure* (MPEP) (8th ed. 2001) (Rev. 8, July 2010). Where, however, an applicant files a petition for an extension of time to extend the time period for filing a reply, the prioritized examination of the application will be terminated.

To maximize the benefit of Track I, applicant should consider one or more of the following: (1) Acquiring a good knowledge of the state of the prior art to be able to file the application with a clear specification having a complete schedule of claims from the broadest to which the applicant believes he is entitled in view of the state of the prior art to the narrowest to which the applicant is willing to accept; (2) submitting an application in condition for examination; (3) filing replies that are completely responsive to the prior Office action and within the shortened statutory period for reply set in the Office action; and (4) being prepared to conduct interviews with the examiner. What it means for an application to be in condition for examination is discussed with respect to the current Accelerated Examination program at MPEP § 708.02(a) (subsection VIII.C).

#### Discussion of Specific Rules

Title 37 of the Code of Federal Regulations, Part 1, is proposed to be amended as follows:

*Section 1.17:* The Office is proposing optional prioritized examination (Track I) upon applicant's request and payment of a fee at the time of filing of the application, without meeting the requirements of the accelerated examination program (e.g., examination support document). See proposed § 1.102(e). Section 1.17(c) is proposed to be amended to set the fee for filing a request for prioritized examination under § 1.102(e) at \$4,000.00.

*Section 1.102:* Section 1.102 is proposed to be revised to provide for the Track I procedure in which applicant has the option to request prioritized examination on the date the application is filed. Particularly, § 1.102(a) is proposed to be revised by adding a reference to paragraph (e) so that applications may be advanced out of turn for examination or for further action upon filing a request under proposed § 1.102(e). Proposed § 1.102(e) would be added to set forth the requirements for filing a request for prioritized examination, which would provide that a request for prioritized examination will not be granted unless: (1) The application is an original utility or plant nonprovisional application filed under 35 U.S.C. 111(a) filed via the Office's electronic filing system (EFS-Web), that is complete as defined by § 1.51(b), with any fees due under § 1.16 (the filing fee, search fee, examination fee, any applicable excess claims fee, and any applicable application size fee) paid on filing; (2) the request for prioritized examination, including the prioritized examination fee set forth in § 1.17(c), the processing fee set forth in § 1.17(i), and the publication fee set forth in § 1.18(d) are present upon filing; and (3) the application contains or is amended to contain no more than four independent claims, no more than thirty total claims, and no multiple dependent claims.

*Response to Comments:* The Office published a notice in June of 2010 inviting the public to submit written comments and participate in a public meeting to solicit public opinions on an initiative being considered by the Office to provide applicants with greater control over when their applications are examined and to promote greater efficiency in the patent examination process. See *Enhanced Examination Timing Control Initiative; Notice of Public Meeting*, 75 FR 31763 (June 4, 2010), 1355 *Off. Gaz. Pat. Office* 323 (June 29, 2010) (notice). The public meeting was held on July 20, 2010, in which members of the public made oral presentations. The Web cast and transcript of the meeting are available on the Office's Internet Web site

(<http://www.uspto.gov>) at <http://www.uspto.gov/patents/announce/3track.jsp>. The Office received over fifty written comments from government agencies, intellectual property organizations, industry, law firms, individual patent practitioners and the general public. The Office has considered all of the public comments that were received. The comments germane to the changes being proposed in this notice (Track I) and the Office's responses to those comments are provided below.

*Comment 1:* One comment strongly urged that the Office conduct a voluntary pilot as a first step for implementing the three examination tracks and noted that collecting, analyzing, and publishing data on all aspects of the proposal is important for assessing the success of the program and making needed adjustments. Another comment stated that a thorough study of the three-track proposal is needed before adoption, including a study of the fees needed for Track I, expected applicant demand, Office resources needed, projected effects of Track I on other Office operations, examination quality, pendency, and operations management. A few comments encouraged a phased approach for implementation so that any unforeseen problems can be identified before full implementation. Another comment supported a pilot program with a cap as to the number of applications in which an applicant can elect prioritized examination under Track I, in order to keep costs manageable as demand is measured and resources grow, and with a percentage of these applications being reserved for small entities. The comment stated that this would allow the Office to better plan how many new examiners would be needed, and to add and train examiners in a controlled manner.

*Response:* The Office is initially limiting requests for prioritized examination under § 1.102(e) for applications to a maximum of 10,000 applications for the first year. Any requests filed after 10,000 proper requests have been received, will not be processed. This will permit the Office to proceed slowly and closely monitor the number of applications in the different tracks, gauging the ability of the Office to obtain sufficient resources to meet its goals. Elements of prioritized examination, including the ability to track applications and complete examination within accelerated time frames, have already been tested in a number of other programs such as the Accelerated Examination program and the Patent Prosecution Highway (PPH).

Unlike the Accelerated Examination program, which requires the filing of a petition and time spent on deciding the petition, there is no petition requirement for prioritized examination under § 1.102(e).

*Comment 2:* One comment stated that there is no present need to include design patent applications in the three-track proposal and it would not work effectively with many foreign design protection systems (which do not have substantive examination) or the Hague Agreement. The comment stated that the expedited procedure for design patent applications (§ 1.155) is working very well. The comment suggested implementation of the Hague Agreement to achieve the best results for designs.

*Response:* The proposed rules do not apply to design applications. Design applications can be expedited under § 1.155. In addition, design applications are taken up for examination at a much quicker rate and do not have the same backlog concerns as other applications.

*Comment 3:* The majority of the comments supported having a track that permits an applicant to pay a fee and have examination of their application expedited.

*Response:* Consistent with the majority of the comments, the Office is proposing rule changes that include a prioritized examination track.

*Comment 4:* A few comments were opposed to having such a prioritized track. One comment stated that it rewards those applicants with money and that the patent system should continue to be a level playing field. Another comment stated that it would hurt independent inventors, it goes against historical traditions of the Office, and establishes a new cost barrier to rapid and effective patent protection. The comment stated that the Office should represent the interests of all American citizens and not just the wealthy. As an alternative, the comment suggested raising the patent application fees for all applicants by one hundred dollars. One comment suggested converting the Office to a government-chartered private corporation and ending the practice of fee diversion.

*Response:* The Office will continue to provide low cost rapid patent protection to applicants through its Accelerated Examination Program. The Office will also continue to provide expedited examination for certain applications via its other existing programs such as the Green Technology Pilot Program or the Petition to Make Special procedure based on the applicant's age or health under § 1.102(c), which do not require a fee for the petition. The Office is simply providing an additional program

under which applicants may obtain prioritized examination of an application. Applicants who cannot afford to or do not wish to pay the fees for prioritized examination and who also are not able to participate in any of the other programs for accelerating or expediting examination will still continue to receive examination of their applications in the same time frames as they would have without implementation of Track I. The suggestion that all patent application fees be increased by one hundred dollars is not within the statutory authority of the Office. The suggestion that the Office be converted to a government corporation is not germane to the request for comments and is also beyond the statutory authority of the Office.

*Comment 5:* Several of the comments that supported having a prioritized track raised concerns that the pendency of other applications would increase and questioned how the Office would be able to prevent examination of other applications from being delayed. The comments expressed concerns that resources would be diverted from examination of applications that are not accelerated. One comment questioned how the Office would be able to hire and retain the necessary examiners to avoid delays for other applications, given the problems with examiner hiring and retention. A few comments stated that the Office must institute safeguards to ensure that examination of other applications is not delayed, including meaningful metrics. A few comments wanted to know how the Office intends to measure whether the examination of other applications is adversely affected.

*Response:* The Office will continue to publish its anticipated hiring and pendency targets on the Office's Internet Web site. The prioritized examination fee is being proposed to be set at a level to recover the full cost of the resources necessary to increase the work output of the Office so that the non-prioritized applications would not be delayed due to resources being diverted to examine the prioritized applications. Specifically, the Office will use the revenue generated by the fees paid for Track I applications to hire a sufficient number of additional examiners above planned examiner hires to offset the production time used to examine prioritized applications. The ability of the Office to meet its goals for prioritized examination will be posted on the Office's Internet Web site on a quarterly basis at the work group level.

*Comment 6:* Some comments that supported having a prioritized track

were concerned about the fee. A few comments expressed concerns about the fee being set too high, which would limit access to the program. A few comments expressed concerns about the fee being set too low, which could challenge Office resources to timely examine other applications. Some comments stated that the fee must be used solely for cost recovery for the examination of Track I applications. A few comments raised concerns about fee diversion by Congress and indicated that it is critical that the fee for prioritized examination not be subject to fee diversion. Some comments indicated that the diversion of fees is problematic in determining what fees are appropriate. Some comments expressed concerns about the disproportionate impact on small entities and supported a fee reduction for small entities and micro entities, but recognized that the Office does not currently have the statutory authority to provide such a fee reduction. A few comments questioned how the fee would be set and requested that more detailed information be provided, including information on what the mechanism would be for ongoing assessment or adjustment of the fee.

*Response:* The Office is not setting the prioritized examination fee based on any perceived level of participation in Track I. The prioritized examination fee is being set based on the estimated average cost to the Office of performing the service, per 35 U.S.C. 41(d)(2). As discussed above, the Office plans to hire additional examiners above the number of planned hires based on the number of requests for Track I prioritization received by the Office. The Office is also setting an annual cap on the number of applications that can be granted prioritized examination in Track I to further ensure that the Office will be able to meet its goal of *providing a final disposition within twelve months of prioritized status being granted*. If the appropriations that the Office receives are not adjusted to reflect the projected fee revenue resulting from the prioritized examination program, then the Office will need to consider eliminating the program. The Office will monitor the program closely and will assess the prioritized examination fee on a regular basis and make any needed adjustments through the rule making process. The Office will also continue to seek additional fee setting authority that would allow it to provide for a small entity fee reduction for the fee for prioritized examination.

*Comment 7:* Some comments supported having a single queue for examination of all applications that are

accelerated or prioritized, while some comments were opposed to having such a single queue. Some comments that supported a single queue identified simplicity and administrative efficiency as the reasons. The comments that opposed a single queue primarily focused on the different requirements for the different programs. One comment stated that it seemed unfair to treat applications filed under the Patent Prosecution Highway (PPH) or the Petition to Make Special procedure (Accelerated Examination) the same as applications filed under Track I or the Project Exchange program since applicants under the PPH program or the Petition to Make Special program (Accelerated Examination) have incurred the greater burden in preparing their applications and thus these applications should be placed in separate queues. One comment stated that applications expedited for reasons of infringement should have precedence over applications expedited merely for policy grounds, such as green technology. One comment suggested unifying the programs to provide an extendable three-month time period for replies by applicant. One comment raised concerns about the PPH fee being reinstated if the programs are integrated. One comment wanted to know how the Office would be able to determine the additional examiner workload attributable to Track I applications if there is a single queue. One comment suggested that the Office consider combining all prioritized applications into a single program, not just a single queue, and provide waivers to accommodate variations. One comment requested clarification on whether all applications in the queue are handled on an expedited basis for all stages of prosecution.

*Response:* In view of the mixed comments and the different goals of the different programs, the Office is not proposing to provide a single queue in this notice. The Office will continue to monitor the various programs. If prioritized examination under § 1.102(e) is requested on filing with an application, the examination will be expedited until a final disposition is reached (e.g., the filing of a request for continued examination or a notice of appeal) or the prioritized examination of the application is terminated. Regarding the other programs, the Office has posted a comparison chart of domestic acceleration initiatives on the Office's Internet Web site that identifies to what extent applications in each program are accelerated or expedited. See <http://www.uspto.gov/patents/process/file/>

*accelerated/comp\_chart\_dom\_accel.pdf*. For information on the PPH program, see [http://www.uspto.gov/patents/init\\_events/pph/index.jsp](http://www.uspto.gov/patents/init_events/pph/index.jsp).

*Comment 8:* Some comments supported requiring an applicant who requested prioritized examination to pay the required fee again on filing of a request for continued examination, while other comments stated that a single fee should be sufficient to have prioritized examination throughout the pendency of the application. One comment stated that the Office would need to justify that there is an additional cost to the Office which is not covered by the fee that was paid with the original request for prioritized examination. A few comments indicated that the initial fee should be sufficient to cover the first request for continued examination, but applicants should have to pay the required fee again on filing of any subsequent requests for continued examination if prioritized examination is still desired. A few comments supported requiring a fee for the additional cost of prioritization for the request for continued examination, but questioned whether the fee should be equal to the initial fee.

*Response:* The proposed fee for prioritized examination of an application does not take into account the additional costs incurred by the Office when a request for continued examination is filed in an application. Therefore, the prioritized examination of the application will be terminated if a request for continued examination is filed. The Office is considering a *sui generis* practice for prioritized applications under which an applicant may file a single submission after final for a fee with the next action being made final if the submission does not place the application in condition for allowance.

*Comment 9:* Several comments supported prioritized examination being available at any time during examination or appeal to the BPAI. Several comments indicated that the ability to prioritize an application on appeal was important. One comment that supported the ability to file a request at the appeal stage raised concerns about causing delays in other appeals, particularly those appeals that may have been pending a long time, and suggested implementing a transition period where appeals whose resolution is imminent would remain at the front of the queue. One comment questioned whether the fee would be less if the request for prioritized examination is submitted after a substantial amount of examination has occurred. One comment supported the ability to

transition in and out of Track I at applicant's discretion at any time during prosecution.

*Response:* The proposed fee for prioritized examination of an application does not take into account the additional costs incurred by the Office when an appeal is filed in an application. Therefore, the prioritized examination of the application will be terminated in an application on appeal upon filing of a notice of appeal to the BPAI. The Office is considering a prioritized appeals process.

*Comment 10:* Several comments were opposed to limiting the the number of claims permitted in a prioritized application, while some comments supported limiting the number of claims. One comment supported the Office's proposed limit of four independent claims and thirty total claims as providing sufficient flexibility for applicants. A few comments suggested that the Office consider a lower limit of three independent claims and twenty total claims. A few comments suggested that the Office consider up to six independent claims and forty total claims. One comment suggested that the Office consider different fees for applications of different sizes. One comment that was opposed to limiting the number of claims suggested an additional prioritization surcharge for each excess independent and dependent claim. Another comment suggested that the Office consider a steeper claim fee structure or a tiered claim fee structure for Track I applications. One comment stated that additional surveys or studies should be conducted to ascertain whether the proposed limit on claims is proper. A few comments that supported a limit stated that the Office should perform a cost analysis to determine the relationship between the claim count and the corresponding costs of examination of prioritized applications before specifying a limit on the number of claims. Another comment that expressed concerns about the proposed limitation specifically requested that the Office consider the impact of the proposed limitation on small entities, provide additional information regarding how the Office arrived at the proposed limitation of four independent claims and thirty total claims, and seek comments from small entities on the proposed limitation.

*Response:* The Office is proposing that Track I applications be limited to four independent claims and thirty total claims. The Office has experience expediting examination under the Accelerated Examination program, which has a limit of three independent

claims and twenty total claims. The Office recognizes that many applicants have expressed concerns regarding a limit of three independent claims and twenty total claims as not being sufficient in all cases. At the same time, the Office is aware from its experience in other programs that there does need to be some limit on the number of claims in order for the Office to be able to satisfy its goals for prioritized examination. Thus, the Office is proposing that an application must be limited to no more than four independent and thirty total claims to be eligible for prioritized examination.

*Comment 11:* Some comments were opposed to having other requirements for use of the prioritized track such as limiting the use of extensions of time, while some comments supported limiting the use of extensions of time. Some comments suggested that if an applicant does request an extension of time in a prioritized application, then the application should simply be removed from the prioritized examination (Track I). One comment suggested that the Office consider permitting extensions of time but imposing higher extension fees for Track I applications. One comment stated that the Office should consider setting reduced shortened statutory time periods for replies to Office actions such as one month, with the applicant having the ability to pay for up to a five-month extension of time. One comment opposed shortening deadlines to reply to Office communications or requiring additional information such as an examination support document. One comment stated that any additional requirements should not be punitive in nature.

*Response:* The Office will not prohibit the use of extensions of time for applications that have been granted prioritized examination under proposed § 1.102(e) *per se*. Where, however, an applicant files a petition for an extension of time to extend the time period for filing a reply, the prioritized examination of the application will be terminated.

*Comment 12:* Some comments were opposed to early publication of applications in Track I, while some comments supported it. One comment indicated that early publication should be at applicant's option. A few comments indicated that early publication could affect applicant's ability to file patent applications on related inventions and thus this would discourage applicants from using Track I. A number of comments supported eighteen-month publication of applications for all three tracks.

*Response:* The Office is not proposing to require early publication of applications in Track I. An applicant may, however, request early publication of an application in Track I, if desired. Furthermore, an applicant may request nonpublication under 35 U.S.C. 122(b)(2)(B)(i) of an application in Track I if the applicant can make the certification required by 35 U.S.C. 122(b)(2)(B)(i) and § 1.213(a).

*Comment 13:* One comment questioned whether final disposition for the twelve-month goal means final rejection or allowance, or issuance or abandonment.

*Response:* The final disposition for the twelve-month goal means: (1) Mailing of a notice of allowance, (2) mailing of a final Office action, (3) filing of notice of appeal, (4) declaration of an interference by the BPAI, (5) filing of a request for continued examination, or (6) abandonment of the application, within twelve months from the date prioritized status has been granted. The goal is an aggregate goal for all prioritized applications. The Office plans to post data at the work group level on the Office's Internet Web site that will show whether or not the Office is making its goals. As discussed previously, the prioritized examination of the application will be terminated if applicant files a petition for an extension of time to extend the time period for filing a reply.

*Comment 14:* A few comments questioned whether the Office will refund or at least partially refund the fee if the Office is not able to meet its obligations and prioritization does not occur. One comment suggested that a better tracking and monitoring system is needed for accelerated applications. One comment suggested that the system should have prioritized printing once a notice of allowance is mailed. One comment questioned whether the Office would grant a partial refund for applicants who request prioritized examination and then opt out.

*Response:* The Office will not refund the fee required for requesting prioritized examination under § 1.102(e). The twelve-month time period to final disposition is an aggregate goal of the Office for the examination of all Track I applications. The fact that the Office in a particular application did not meet the goal would not entitle the applicant to a refund. It should also be noted that applicants will have received advancement of examination even if the goals are not met. In addition, even if the prioritized examination of the application is terminated, the Office will not refund the fee. The prioritized examination fee

would not be a fee paid by mistake. Rather, it would simply be a change in purpose on the part of the applicant after payment of the fee. Therefore, the Office would not have the authority to refund the fee under 35 U.S.C. 42(d). As with other applications that have been made special, applications that have been prioritized under § 1.102(e) will be prioritized in the patent publication process. The Office is working on improvements to its tracking and monitoring system as part of its Patents End-to-End Information Technology (IT) project.

*Comment 15:* A few comments were concerned about the availability of prior art for applications in Track I and stated that there may be an adverse effect on quality if examination occurs before certain prior art becomes available, such as applications published at eighteen months. One comment questioned how the Office would ensure that potential prior art that is not yet available to the public be taken into consideration. One comment indicated that the one-year provision for interferences (in 35 U.S.C. 135(b)(1)) would give patents granted earlier under Track I unfair advantages and stated that it would be difficult to justify Track I as long as the U.S. is a first-to-invent country.

*Response:* The Office currently examines applications where potential prior art is not yet available. For example, during examination of an application, the examiner may have knowledge of an unpublished application that may soon be published or patented, and that would be available as prior art in the application under examination upon publication or patenting. In these situations, the Office may suspend an application that is otherwise allowable until the prior art reference becomes available. Furthermore, when a Track I application is being allowed, the examiner would conduct a search of unpublished applications for interference purposes. Applicants must copy claims from a U.S. patent or U.S. patent application within one year under 35 U.S.C. 135(b). Issuing patents earlier as a result of Track I will encourage earlier resolution of interference situations, which would be to the public's benefit. This, of course, assumes that the Office failed to suspend the application that issued as a patent to await the prior art reference.

*Comment 16:* A few comments questioned whether all of the provisions of the proposal would be implemented prospectively and thus only apply to applications filed on or after the implementation date or whether any of the provisions, such as prioritized examination, would be available for all

pending and future applications. Another comment questioned whether continuing applications would be eligible for Track I, whether this would depend on whether the parent application was filed after the implementation date, and whether the parent application was in Track I. One comment questioned whether additional examiners for Track I would need to be hired before the program can be implemented. Another comment supported the availability of Track I for reissue applications and continuing applications.

*Response:* The provisions will be available only for applications (including new continuing applications) filed on or after the date of implementation. Track I will not be available for reissue applications since reissue applications are already treated as special applications. *See* MPEP § 1442. Additional examiners for Track I will not need to be hired before the program can be implemented.

*Comment 17:* One comment suggested that the Office consider techniques to encourage compact prosecution for applications in Track I such as providing an incentive for the use of interviews, liberalizing after-final practice, and offering incentives to encourage applicants to reply more promptly. A few comments were concerned about maintaining examination quality for Track I applications. One comment suggested that Track I include measures to maintain high quality examination such as mandatory examiner interviews before a first Office action, required information disclosure statement (IDS) submissions, examination only by primary examiners or supervisory patent examiners, specialized examiner training for fast track processing, incentives for final resolution of the application, extension of the period in § 1.99 for a third party to submit references after publication to four months, and clear instructions for applicants including detailed guidelines. One comment emphasized that the level of review for Track I applications should be the same as other applications and the record should be complete, notwithstanding the accelerated time frame. A few other comments also supported providing for an examiner interview prior to a first Office action in Track I applications at applicant's option.

*Response:* The Office has been encouraging compact prosecution techniques in all applications and emphasizing the importance and use of interviews over the past few years. It is noted that the suggestion regarding after

final practice would likely increase the number of Office actions and not encourage applicants to present the best reply after the first Office action, which would extend the examination process and make it less likely that the Office would be able to meet its goals. Furthermore, as discussed previously, the Office is considering a *sui generis* practice for prioritized applications under which an applicant may file a single submission after final for a fee with the next action being made final if the submission does not place the application in condition for allowance. The level of review for Track I applications will be the same as for other applications and examiners will be expected to make the record complete and provide the same high quality examination as they do for other applications. It is noted that there does not appear to be any need as a result of implementation of Track I to increase the time period in § 1.99 for a third party to submit references after publication.

*Comment 18:* One comment suggested a bidding system for Track I in which patent applicants could bid on their place in line, with the highest bids being given the highest priority, which could create a large increase in fee payments and a surplus of resources which could be used to decrease the time for other applications to be examined. Another comment suggested having a nominal fee for Track I, instead of a substantial fee, and permitting any business entity to have a certain number of Track I applications per year, which would keep the number and costs down.

*Response:* The Office does not have the statutory authority to implement the suggested bidding system. Likewise, the Office does not have the authority to set a nominal fee for requesting prioritized examination. The Office only has the statutory authority to establish fees to recover the estimated average cost of performing the service.

### Rulemaking Considerations

*A. Regulatory Flexibility Act:* For the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that changes proposed in this notice will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 605(b).

This notice proposes changes to implement an optional prioritized examination process. The primary impact of the change on the public is that applicants will have the option to

request prioritized examination by paying appropriate fees, filing a complete application via the Office's electronic filing system (EFS-Web) with any filing and excess claims fees due paid on filing, and limiting their applications to four independent claims and thirty total claims. No applicant is required to employ this optional prioritized examination process to obtain examination of his or her application under the current procedures for examination of an application for patent, or to obtain a patent provided that the application meets the current conditions for the applicants to be entitled to a patent. In addition, the availability of this prioritized examination process will not have any negative impact on any applicant who elects not to request the prioritized examination process. Therefore, the changes proposed in this notice will not have a significant economic impact on a substantial number of small entities.

*B. Executive Order 12866 (Regulatory Planning and Review):* This rule making has been determined to be significant for purposes of Executive Order 12866 (Sept. 30, 1993).

*C. Executive Order 13132 (Federalism):* This rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

*D. Executive Order 13175 (Tribal Consultation):* This rule making will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

*E. Executive Order 13211 (Energy Effects):* This rule making is not a significant energy action under Executive Order 13211 because this rule making is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

*F. Executive Order 12988 (Civil Justice Reform):* This rule making meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

*G. Executive Order 13045 (Protection of Children):* This rule making does not concern an environmental risk to health or safety that may disproportionately

affect children under Executive Order 13045 (Apr. 21, 1997).

*H. Executive Order 12630 (Taking of Private Property):* This rule making will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

*I. Congressional Review Act:* Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the United States Patent and Trademark Office will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the Government Accountability Office. The changes in this notice are not expected to result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this notice is not expected to result in a "major rule" as defined in 5 U.S.C. 804(2).

*J. Unfunded Mandates Reform Act of 1995:* The changes proposed in this notice do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. See 2 U.S.C. 1501 *et seq.*

*K. National Environmental Policy Act:* This rule making will not have any effect on the quality of environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. See 42 U.S.C. 4321 *et seq.*

*L. National Technology Transfer and Advancement Act:* The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rule making does not contain provisions which involve the use of technical standards.

*M. Paperwork Reduction Act:* This rulemaking is proposed to implement an optional prioritized examination process. The primary impact of the



change on the public is that applicants will have the option to request prioritized examination by paying appropriate fees, filing a complete application via the Office's electronic filing system (EFS-Web) with any filing and excess claims fees due paid on filing, and limiting their applications to four independent claims and thirty total claims.

An applicant who wishes to participate in the program must submit a certification and request to participate in the prioritized examination program, preferably by using Form PTO/SB/424. The Office of Management and Budget (OMB) has determined that, under 5 CFR 1320.3(h), Form PTO/SB/424 does not collect "information" within the meaning of the Paperwork Reduction Act of 1995. Therefore, this rule making does not impose additional collection requirements under the Paperwork Reduction Act which are subject to further review by OMB. Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

**List of Subjects in 37 CFR Part 1**

Administrative practice and procedure, Courts, Freedom of Information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

For the reasons set forth in the preamble, 37 CFR part 1 is proposed to be amended as follows:

**PART 1—RULES OF PRACTICE IN PATENT CASES**

1. The authority citation for 37 CFR part 1 continues to read as follows:

**Authority:** 35 U.S.C. 2(b)(2).

2. Section 1.17 is amended by adding paragraph (c) to read as follows:

**§ 1.17 Patent application and reexamination processing fees.**

\* \* \* \* \*

(c) For filing a request for prioritized examination under § 1.102(e)—\$4,000.

\* \* \* \* \*

3. Section 1.102 is amended by revising paragraph (a) and adding paragraph (e) to read as follows:

**§ 1.102 Advancement of examination.**

(a) Applications will not be advanced out of turn for examination or for further action except as provided by this part, or upon order of the Director to expedite

the business of the Office, or upon filing of a request under paragraph (b) or (e) of this section or upon filing a petition or request under paragraph (c) or (d) of this section with a showing which, in the opinion of the Director, will justify so advancing it.

\* \* \* \* \*

(e) A request for prioritized examination under this paragraph may be filed only with an original utility or plant nonprovisional application under 35 U.S.C. 111(a) filed via the Office's electronic filing system (EFS-Web), that is complete as defined by § 1.51(b), with any fees due under § 1.16 paid on filing. A request for prioritized examination under this paragraph must be present upon filing and must be accompanied by the prioritized examination fee set forth in § 1.17(c), the processing fee set forth in § 1.17(i), and the publication fee set forth in § 1.18(d). Prioritized examination under this paragraph will not be accorded to a design application or reissue application, and will not be accorded to any application that contains or is amended to contain more than four independent claims, more than thirty total claims, or any multiple dependent claim.

\* \* \* \* \*

Dated: February 1, 2011.

**David J. Kappos,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2011-2585 Filed 2-3-11; 8:45 am]

**BILLING CODE 3510-16-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-R05-OAR-2009-0805; FRL-9261-8]

**Approval of Air Quality Implementation Plans; Indiana and Ohio; Disapproval of Interstate Transport State Implementation Plan Revision for the 2006 24-Hour PM<sub>2.5</sub> NAAQS**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** Pursuant to its authority under the Clean Air Act (CAA), EPA is proposing to disapprove the portions of submittals by the Indiana Department of Environmental Management (IDEM) and the Ohio Environmental Protection Agency (Ohio EPA) that pertain to requirements of the CAA to address interstate transport for the 2006 24-hour fine particle (PM<sub>2.5</sub>) National Ambient Air Quality Standards (NAAQS). EPA is

not, however, currently taking action on the remainder of the State Implementation Plan (SIP) submittals from IDEM and Ohio EPA concerning other basic or "Infrastructure" elements required under the CAA.

**DATES:** Comments must be received on or before March 7, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R05-OAR-2009-0805, by one of the following methods:

1. *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.

2. *E-mail*: [mooney.john@epa.gov](mailto:mooney.john@epa.gov).

3. *Fax*: (312) 692-2551.

4. *Mail*: John M. Mooney, Acting Chief, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

5. *Hand Delivery*: John M. Mooney, Acting Chief, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

**Instructions:** Direct your comments to Docket ID No. EPA-R05-OAR-2009-0805. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA