

# Proposed Rules

Federal Register

Vol. 76, No. 133

Tuesday, July 12, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF COMMERCE

### United States Patent and Trademark Office

#### 37 CFR Parts 2 and 7

[Docket No. PTO-T-2010-0073]

RIN 0651-AC49

#### Changes in Requirements for Specimens and for Affidavits or Declarations of Continued Use or Excusable Nonuse in Trademark Cases

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

**ACTION:** Proposed rule.

**SUMMARY:** In order to help assess and ensure the accuracy of the trademark register, the United States Patent and Trademark Office (“USPTO”) proposes to revise the Trademark Rules of Practice and the Rules of Practice for Filings Pursuant to the Madrid Protocol to provide for the USPTO to require: any information, exhibits, and affidavits or declarations deemed reasonably necessary to examine an affidavit or declaration of continued use or excusable nonuse in trademark cases, or for the USPTO to assess the accuracy and integrity of the register; and upon request, more than one specimen in connection with a use-based trademark application, an allegation of use, an amendment to a registered mark, or an affidavit or declaration of continued use in trademark cases. A lack of ability to rely on the trademark register as an accurate reflection of marks that are actually in use in the United States for the goods/services identified in the registration imposes costs and burdens on the public. The proposed rules will allow the USPTO to require additional proof of use of a mark to verify the accuracy of claims that a trademark is in use on particular goods/services. The USPTO anticipates issuing requirements for such proof in a relatively small number of cases to assess the accuracy of the identifications. The proposed rules will facilitate an assessment of the

reliability of the trademark register in this regard, so that the USPTO and stakeholders may determine whether and to what extent a general problem may exist and consider measures to address it, if necessary.

**DATES:** Comments must be received by September 12, 2011 to ensure consideration.

**ADDRESSES:** The USPTO prefers that comments be submitted via electronic mail message to [TMFRNotices@uspto.gov](mailto:TMFRNotices@uspto.gov). Written comments may also be submitted by mail to Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, attention Cynthia C. Lynch; by hand delivery to the Trademark Assistance Center, Concourse Level, James Madison Building—East Wing, 600 Dulany Street, Alexandria, Virginia, attention Cynthia C. Lynch; or by electronic mail message 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 on the USPTO’s Web site at <http://www.uspto.gov>, and will also be available at the Office of the Commissioner for Trademarks, Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia.

**SUPPLEMENTARY INFORMATION:** To benefit the public through a better ability to assess the accuracy of the trademark register, the USPTO proposes to revise the Trademark Rules of Practice (37 CFR part 2) and the Rules of Practice for Filings Pursuant to the Madrid Protocol (“Madrid Rules”) (37 CFR part 7) to provide for the USPTO to require: (1) Any information, exhibits, and affidavits or declarations deemed reasonably necessary to examine a post registration affidavit or declaration of continued use in trademark cases, or for the USPTO to assess the accuracy and integrity of the register; and (2) upon request, more than one specimen in connection with a use-based trademark application, an allegation of use, an amendment to a registered mark, or an affidavit or declaration of continued use in trademark cases.

The proposed revisions will facilitate the USPTO’s ability to verify the accuracy of identifications of goods/services. The accuracy of the trademark register as a reflection of marks that are

actually in use in the United States for the goods/services identified in the registration serves an important purpose for the public. The public relies on the register to clear trademarks that they may wish to adopt or are already using. Where a party searching the register uncovers a potentially confusingly similar mark, that party may incur a variety of resulting costs and burdens, such as changing plans to avoid use of the mark, investigative costs to determine how the similar mark is actually used and assess the nature of any conflict, or cancellation proceedings or other litigation to resolve a dispute over the mark. If a registered mark is not actually in use in the United States, or is not in use on all the goods/services in the registration, these types of costs and burdens may be incurred unnecessarily. Thus, accuracy and reliability of the trademark register help avoid such needless costs and burdens, and thereby benefit the public.

Specimens of use in use-based trademark applications illustrate how the applicant is using the proposed mark in commerce on particular goods/services identified in the application. Post registration affidavits or declarations of use and their accompanying specimens demonstrate a trademark owner’s continued use of its mark in commerce for the goods/services in the registration. The USPTO anticipates issuing requirements for additional specimens or other information, exhibits, and affidavits or declarations in a relatively small number of cases, to assess the accuracy of the identifications of goods/services.

On April 26, 2010, the USPTO and the George Washington University Law School hosted a roundtable discussion on the topic of “The Future of the Use-Based Register.” Panelists and audience members explored the implications of the decision of the Court of Appeals for the Federal Circuit in *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009), clarifying the high standard for fraud on the USPTO in connection with trademark cases. Specifically, the roundtable focused on *Bose’s* impact on the growing length of identifications of goods and services in U.S. trademark registrations and how to assess whether such identifications accurately reflect actual use or intent to use.

A “brainstorming” session at the conclusion of the roundtable resulted in

a list of suggestions for how to improve the accuracy of identifications of goods/services. These suggestions were not focused on fraud, but rather on accuracy in the register. Several participants made the suggestion that the USPTO require additional specimens, or a specific type of proof of use of a mark, for all, or more than one, of the identified goods/services. Such additional requirements could help provide information about to what extent a problem with inaccuracy exists on the register, and could help discourage inaccuracies.

The Trademark Act gives the Director discretion regarding the number of specimens to require, 15 U.S.C. 1051(a)(1), (d)(1), 1058(b)(1)(C), 1141k(b)(1)(C). However, the current Trademark Rules of Practice and Madrid Rules mandate the submission of only one specimen per class in connection with use-related filings, 37 CFR 2.34(a)(1)(iv), 2.56(a), 2.76(b)(2), 2.86(a)(3) and (b), 2.88(b)(2), 2.161(g), 7.37(g). Similarly, the current rules require only one specimen to be submitted in connection with the amendment to a registered mark, 37 CFR 2.173(b)(3). In addition, although the current Trademark Rules of Practice allow the USPTO to require additional information or exhibits deemed reasonably necessary to the examination of a pending application (37 CFR 2.61(b)), no counterpart rule exists in the post registration context to facilitate proper examination of an affidavit or declaration of continued use or excusable nonuse.

To ensure that the USPTO may properly examine affidavits or declarations, and the nature and veracity of the use claimed therein, additional specimens or other information or exhibits, such as a photograph of the mark appearing on certain goods, may be needed. Accompanying affidavits or declarations to verify information or exhibits may also be needed. One purpose of the rule is to allow the USPTO to require trademark applicants or registrants to submit any additional specimens or other information, exhibits and affidavits or declarations necessary to properly examine an applicant's or registrant's claim to be using the mark. The USPTO wishes to use such requirements as a means to assess and improve the accuracy and integrity of the register. The proposed rules do not focus on fraud issues, but only on the more general concern with ensuring accuracy. Another purpose of the rule is to harmonize the requirements that can be made as part of the examination of use allegations made in post registration

maintenance documents with the requirements currently authorized in the examination of use allegations made prior to registration.

Though the proposed rules allow for the possibility that additional specimens or evidence may be required in any case, the USPTO currently has no plans to implement such requirements in all cases. Rather, the USPTO likely would rely on the proposed rules to seek additional specimens or a specific type of evidence of use in a relatively small subset of cases to assess the accuracy of particular identifications of goods/services. Where an Office action issues requiring additional specimens or evidence, a response must be filed within six months of the Office action, or before the end of the filing period for the Section 8 affidavit, whichever is later, 37 CFR 2.163(b). If no response is filed within this time period, the registration will be cancelled. 37 CFR 2.163(c). If a response is filed but fails to include the required specimens or evidence, the USPTO may deem the Section 8 affidavit unacceptable as to the goods/services to which the requirement pertained and delete them from the registration, or in the case of all goods/services, cancel the registration for failure to file an acceptable Section 8 affidavit. *See* 37 CFR 2.163.

References below to "the Act," "the Trademark Act," or "the statute" refer to the Trademark Act of 1946, 15 U.S.C. 1051 *et seq.*, as amended. References to "TMEP" or "*Trademark Manual of Examining Procedure*" refer to the 7th edition, October 2010.

#### Discussion of Proposed Rules Changes

The USPTO proposes to revise §§ 2.34(a)(1)(iv), 2.56(a), 2.76(b)(2), 2.86(a)(3), 2.86(b), and 2.88(b)(2) to indicate that the USPTO may, upon request, require more than one specimen, including more than one specimen per class, if the USPTO deems additional specimens reasonably necessary to examine the application or allegation of use. These revisions codify existing practice, where such additional specimens occasionally are requested under § 2.61 as information or exhibits necessary to examination. The Trademark Act gives the Director discretion regarding the number of specimens to require, 15 U.S.C. 1051(a)(1), (d)(1).

The USPTO proposes to revise § 2.61(b) to indicate that accompanying affidavits or declarations may be required along with information or exhibits, and to clarify that the requirement may issue for the Office to

assess the accuracy and integrity of the register.

The USPTO proposes to revise § 2.161(g) and § 7.37(g) to indicate that the USPTO may require more than one specimen in connection with the examination of the affidavit or declaration of continued use. For example, additional specimens may be requested in a case to verify the accuracy and the nature of the use when the identification includes a large number of, or significant disparity in, goods/services. The Trademark Act gives the Director discretion regarding the number of specimens to require, 15 U.S.C. 1058(b)(1)(C), 1141k(b)(1)(C).

The USPTO proposes to add § 2.161(h) and § 7.37(h) to provide that the USPTO may require such information, exhibits, and affidavits or declarations as the USPTO deems reasonably necessary to the proper examination of the affidavit or declaration of continued use, or for the USPTO to assess the accuracy and integrity of the register. These provisions are corollaries to § 2.61(b), which currently allows the USPTO to require additional information or exhibits in connection with the examination of a pending application. These provisions also clarify that accompanying affidavits or declarations may be required.

For example, the USPTO may require a verified photograph showing use of the mark on particular goods in a registration for which an affidavit or declaration of continued use is being examined in order to verify the accuracy of goods/services in the identification. This type of requirement may more likely be made where an identification includes a large number of, or significant disparity in, goods/services. Or, such a requirement may issue as part of an effort to assess and improve the accuracy and integrity of the register.

The USPTO proposes to revise § 2.173(b)(3) to clarify that where an amendment involves a change in the mark, a new specimen must be provided for each class in a multiple-class registration and to add § 2.173(b)(4) to provide that the USPTO may require additional specimens and such information, exhibits, and affidavits or declarations as the USPTO deems reasonably necessary to the proper examination of the proposed amendment.

#### Rule Making Requirements

*Executive Order 12866:* This rule has been determined not to be significant for purposes of Executive Order 12866.

*Executive Order 13563:* The Office has complied with Executive Order 13563. Specifically, the Office has: (1) Used the best available techniques to quantify costs and benefits, and has considered values such as equity, fairness and distributive impacts, (2) provided the public with a meaningful opportunity to participate in the regulatory process, including soliciting the views of those likely affected prior to issuing a notice of proposed rule making, and provided online access to the rule making docket, (3) attempted to promote coordination, simplification and harmonization across government agencies and identified goals designed to promote innovation, (4) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public, and (5) ensured the objectivity of scientific and technological information and processes, to the extent applicable.

*Administrative Procedure Act:* This rule merely involves rules of agency practice and procedure within the meaning of 5 U.S.C. 553(b)(A). Therefore, this rule may be adopted without prior notice and opportunity for public comment under 5 U.S.C. 553(b) and (c), or thirty-day advance publication under 5 U.S.C. 553(d). However, the USPTO has chosen to seek public comment before implementing the rule.

*Regulatory Flexibility Act:* As prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 or any other law, neither a Regulatory Flexibility Act analysis nor a certification under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is required. See 5 U.S.C. 603. The proposed rules involve rules of agency practice and procedure.

Nonetheless, in an abundance of caution, the USPTO has undertaken an Initial Regulatory Flexibility Act Analysis of the proposed rule.

#### 1. Description of the Reasons That Action by the Office Is Being Considered

The United States Patent and Trademark Office (USPTO) is proposing to require: (1) Any information, exhibits, and affidavits or declarations deemed reasonably necessary to examine an affidavit or declaration of continued use in trademark cases; and (2) upon request, more than one specimen in connection with a use-based trademark application, an allegation of use, an amendment to a registered mark, or an affidavit or declaration of continued use in trademark cases.

These proposed revisions will facilitate the USPTO's ability to verify the accuracy of identifications of good/services. Specimens of use in use-based

trademark applications illustrate how the applicant is using the proposed mark in commerce on particular goods/services identified in the application. Post registration affidavits or declarations of use and their accompanying specimens demonstrate a trademark owner's continued use of its mark in commerce for the goods/services in the registration.

#### 2. Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objective of the proposed rules is to facilitate the USPTO's ability to verify the accuracy of identifications of goods/services in trademark applications and registrations. The proposed rules would ensure that the USPTO may properly examine the nature and veracity of allegations of use made during the trademark application or post registration phase, and upon request, may require additional specimens or other information or exhibits, such as a photograph of the mark appearing on certain goods. Another purpose of the rule is to harmonize the requirements that can be made as part of the examination of use allegations made in post registration maintenance documents, which are currently more limited, with the requirements authorized in the examination of use allegations made prior to registration.

The Trademark Act gives the Director of the USPTO discretion regarding the number of specimens to require, 15 U.S.C. 1051(a)(1), (d)(1), 1058(b)(1)(C), 1141k(b)(1)(C). However, the current Trademark Rules of Practice and the Rules of Practice for Filings Pursuant to the Madrid Protocol Trademark mandate the submission of only one specimen per class in connection with use-related filings, 37 CFR 2.34(a)(1)(iv), 2.56(a), 2.76(b)(2), 2.86(a)(3) and (b), 2.88(b)(2), 2.161(g), 7.37(g). Similarly, the current rules require only one specimen to be submitted in connection with a proposed amendment of a registered mark, 37 CFR 2.173(b)(3). In addition, although the current Trademark Rules of Practice allow the USPTO to require additional information or exhibits deemed reasonably necessary to the examination of a pending application (37 CFR 2.61(b)), no counterpart rule exists in the post registration context to facilitate proper examination of an affidavit or declaration of continued use or excusable nonuse.

#### 3. Description and Estimate of the Number of Affected Small Entities

The USPTO does not collect or maintain statistics in trademark cases on

small versus large entity applicants, and this information would be required in order to estimate the number of small entities that would be affected by the proposed rules. However, the USPTO believes that the overall impact of the proposed rules on applicants and registrants will be relatively minimal.

The proposed rules could apply to any entity filing a use-based trademark application and to any entity filing trademark registration maintenance filings or amendments. With respect to allegations of use in trademark applications, the proposed rules merely codify existing practice, whereby the USPTO already occasionally requests additional specimens or other information under 37 CFR 2.61. Thus, because no change in practice would result from the proposed rules in this regard, they will have no impact in the trademark application context.

After registration, registrants must make periodic filings with the USPTO to maintain their registrations. A Section 8 affidavit of continued use is a sworn statement that the mark is in use in commerce, filed by the owner of a registration, 15 U.S.C. 1058. The purpose of the Section 8 affidavit is to facilitate the cancellation of registrations for marks no longer in use. With respect to post registration maintenance filings, the Office estimates that only a small subset of registrants would be required to provide more than one specimen, or information or exhibits in connection with a Section 8 affidavit. The USPTO is unable to estimate what subset of the registrants would be small entities impacted by the proposed rules. In Fiscal Year 2010, 105,244 Section 8 affidavits were filed.

#### 4. Description of the Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The proposed rules impose no new recordkeeping requirements on trademark applicants or registrants.

Regarding compliance with the proposed rules, as an initial matter, the USPTO does not anticipate that the proposed rules would have a disproportionate impact upon any particular class of small or large entities. Any entity that has a registered trademark could potentially be impacted by the proposed rules.

The USPTO estimates that in those post registration cases where a requirement for additional information, exhibits, declarations, or specimens is

issued, it will take less than one hour to comply.

While the statement of use is a similar type of filing to those at issue in the proposed rules applied in the post registration context, as the statement of use involves providing one or more specimens of use and an accompanying declaration, the compliance time involved to comply with the proposed rules should be less. Under the proposed rules applied in the post registration context, the type of fact gathering and review of the nature and extent of the use of the mark that underlies a statement of use will already have occurred. Compliance with the proposed requirement will only necessitate gathering and submitting the evidence to demonstrate what has already been assessed.

Assuming the mark is in use, as claimed, the compliance time involves the length of time to secure a specimen, exhibit (such as taking a digital photograph), information, or declaration, plus any time it takes an attorney to communicate with the client in order to obtain what is required and make the necessary filing with the USPTO. In reality, approximately one-third of applications are filed pro se. These applicants and registrants, therefore, would likely have a lower compliance time than the USPTO has estimated, which assumes the involvement of counsel. These proposed rules do not mandate the use of counsel.

The Office does not estimate any change in compliance cost associated with the proposed rules with respect to allegations of use in trademark applications, since the USPTO's current practice already allows for this. The rule change merely codifies existing practice.

##### *5. Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Rule on Small Entities*

The USPTO has considered whether and how it is appropriate to reduce any burden on small businesses through increased flexibility. The following options have been considered, but rejected, by the USPTO.

The alternative of never requiring additional specimens or other information in connection with Section 8 affidavits or exempting small entities from such requirements would have a lesser economic impact on small entities, but would not accomplish the stated objective of verifying the accuracy of identifications of goods/services in trademark registrations. As set forth above, the USPTO will rely on

the proposed rules to assess the accuracy of use allegations. This assessment may provide a better sense of whether significant problems may exist with the accuracy of identifications of goods and services. Thus, exempting small entities would prevent the potential consideration of all Section 8 affidavits for this purpose, and therefore would not achieve the stated objective of verifying accuracy.

The stated objective of the proposed rules also facilitates the cancellation of any registrations for marks that are no longer in use, the policy underlying the statutory requirement for Section 8 affidavits. Exempting small entities from any possible scrutiny regarding use allegations would fail to reach non-use of marks by small entity owners, thereby failing to achieve the objective.

Other options to potentially lessen the impact on small entities have been rejected. For example, the USPTO deems unnecessary extended time periods for small entity compliance because there appears to be no reason that compliance with the requirements in the proposed rules would be more time-consuming for small entities, and because the USPTO's standard six-month time for responding to trademark Office actions allows sufficient time regardless of small entity status.

The USPTO deems any streamlined or simplified compliance mechanism for small entities unnecessary, given the ease of responding to trademark Office actions electronically. Thus, compliance will be as streamlined and simplified as possible for all affected entities. Moreover, where the objective is to verify the accuracy of a claim of use in an affidavit, the proposed requirements of one or more additional examples of the manner of the claimed use, or of other information such as photographic proof already seem to be the least burdensome and complex way to achieve the objective. Any more minimal requirement would not demonstrate use and therefore would not meet the objective to verify use claims.

Use of performance rather than design standards is not applicable to the proposed rule making because the USPTO is not issuing any sort of standard. Rather, the proposed rules will require applicants and registrants to furnish evidence of use, rather than comply with a performance or design standard.

Finally, with respect to allegations of use in trademark applications, the proposed rules merely codify existing practice, whereby the USPTO already occasionally requests additional specimens or other information under

37 CFR 2.61. Thus, because no change in practice would result from the proposed rules in this regard, any different treatment of small entities in this context would fail to meet the stated objective and likely would generate concern and confusion about a change in practice.

##### *6. Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap or Conflict With the Proposed Rule*

The proposed rules would not duplicate, overlap or conflict with any other Federal rules.

*Unfunded Mandates:* The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, and tribal governments or the private sector.

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

*Paperwork Reduction Act:* The changes in this rule making involve information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The Office will be submitting an information collection request to OMB for its review and approval because the changes in this proposed rule would affect the information collection requirements associated with the information collection under OMB control number 0651-0055.

This rule making will provide for the USPTO to require: (1) Any information, exhibits, and affidavits or declarations deemed reasonably necessary to examine an affidavit or declaration of continued use or excusable nonuse in trademark cases, or for the USPTO to assess the accuracy and integrity of the register; and (2) upon request, more than one specimen in connection with a use-based trademark application, an allegation of use, an amendment to a registered mark, or an affidavit or declaration of continued use in trademark cases.

There is no fee impact for submission of specimens. Additional burden due to postage costs for paper submissions for the post-registration office actions is estimated at \$181, for a total increase in

fee burden by an estimated \$181. The agency estimates the following overall impact on burden: an increase of responses of 3,165; an increase in burden hours of 1,120; and an increase in burden hour costs of \$364,000.

Comments are invited on: (1) Whether the collection of information is necessary for proper performance of the functions of the agency; (2) the accuracy of the agency's estimate of the burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information to respondents.

Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden, to Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, attention Cynthia C. Lynch, or to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Patent and Trademark Office.

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

##### 37 CFR Part 2

Administrative practice and procedure, Trademarks.

##### 37 CFR Part 7

Administrative practice and procedure, Trademarks, International registration.

For the reasons stated in the preamble and under the authority contained in 15 U.S.C. 1123 and 35 U.S.C. 2, as amended, the USPTO proposes to amend parts 2 and 7 of title 37 as follows:

#### PART 2—RULES OF PRACTICE IN TRADEMARK CASES

1. The authority citation for 37 CFR part 2 continues to read as follows:

**Authority:** 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

2. Revise § 2.34(a)(1)(iv) to read as follows:

##### § 2.34 Bases for filing.

(a) \* \* \*

(1) \* \* \*

(iv) One specimen per class showing how the applicant actually uses the mark in commerce. When requested by the Office, additional specimens must be provided.

\* \* \* \* \*

3. Revise § 2.56(a) to read as follows:

##### § 2.56 Specimens.

(a) An application under section 1(a) of the Act, an amendment to allege use under § 2.76, and a statement of use under § 2.88 must each include one specimen per class showing the mark as used on or in connection with the goods, or in the sale or advertising of the services in commerce. When requested by the Office, additional specimens must be provided.

\* \* \* \* \*

4. Revise § 2.61(b) to read as follows:

##### § 2.61 Action by examiner.

\* \* \* \* \*

(b) The Office may require the applicant to furnish such information, exhibits, and affidavits or declarations as may be reasonably necessary to the proper examination of the application, or for the Office to assess the accuracy and integrity of the register.

\* \* \* \* \*

5. Revise § 2.76(b)(2) to read as follows:

##### § 2.76 Amendment to allege use.

\* \* \* \* \*

(b) \* \* \*

(2) One specimen per class showing the mark as actually used in commerce. When requested by the Office, additional specimens must be provided. See § 2.56 for the requirements for specimens; and

\* \* \* \* \*

6. Revise §§ 2.86(a)(3) and (b) to read as follows:

##### § 2.86 Application may include multiple classes.

(a) \* \* \*

(3) Include either dates of use (see §§ 2.34(a)(1)(ii) and (iii)) and one specimen for each class, or a statement of a bona fide intention to use the mark in commerce on or in connection with all the goods or services specified in each class. When requested by the Office, additional specimens must be provided. The applicant may not claim both use in commerce and a bona fide intention to use the mark in commerce for the identical goods or services in one application.

(b) An amendment to allege use under § 2.76 or a statement of use under § 2.88 must include, for each class, the required fee, dates of use, and one

specimen. When requested by the Office, additional specimens must be provided. The applicant may not file the amendment to allege use or statement of use until the applicant has used the mark on all the goods or services, unless the applicant files a request to divide. See § 2.87 for information regarding requests to divide.

\* \* \* \* \*

7. Revise § 2.88(b)(2) to read as follows:

##### § 2.88 Filing statement of use after notice of allowance.

\* \* \* \* \*

(b) \* \* \*

(2) One specimen of the mark as actually used in commerce. When requested by the Office, additional specimens must be provided. See § 2.56 for the requirements for specimens; and

\* \* \* \* \*

8. Amend § 2.161 by revising the introductory text of paragraph (g) and adding paragraph (h) to read as follows:

##### § 2.161 Requirements for a complete affidavit or declaration of continued use or excusable nonuse.

\* \* \* \* \*

(g) Include one specimen showing current use of the mark for each class of goods or services, unless excusable nonuse is claimed under § 2.161(f)(2). When requested by the Office, additional specimens must be provided. The specimen must:

\* \* \* \* \*

(h) The Office may require the owner to furnish such information, exhibits, and affidavits or declarations as may be reasonably necessary to the proper examination of the affidavit or declaration under section 8 of the Act, or for the Office to assess the accuracy and integrity of the register.

9. Amend § 2.173 by revising paragraph (b)(3) and adding paragraph (b)(4) to read as follows:

##### § 2.173 Amendment of registration.

\* \* \* \* \*

(b) \* \* \*

(3) If the amendment involves a change in the mark: One new specimen per class showing the mark as used on or in connection with the goods or services; an affidavit or declaration under § 2.20 stating that the specimen was in use in commerce at least as early as the filing date of the amendment; and a new drawing of the amended mark. When requested by the Office, additional specimens must be provided.

(4) The Office may require the owner to furnish such information, exhibits, and affidavits or declarations as may be reasonably necessary to the proper

examination of the amendment, or for the Office to assess the accuracy and integrity of the register.

\* \* \* \* \*

## PART 7—RULES OF PRACTICE IN FILINGS PURSUANT TO THE PROTOCOL RELATING TO THE MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS

10. The authority citation for 37 CFR part 7 continues to read as follows:

**Authority:** 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

11. Amend § 7.37 by revising paragraph (g) and adding paragraph (h) to read as follows:

### § 7.37 Requirements for a complete affidavit or declaration of continued use or excusable nonuse.

\* \* \* \* \*

(g) Include a specimen showing current use of the mark for each class of goods or services, unless excusable nonuse is claimed under § 7.37(f)(2). When requested by the Office, additional specimens must be provided. The specimen must meet the requirements of § 2.56 of this chapter.

(h) The Office may require the holder to furnish such information, exhibits, and affidavits or declarations as may be reasonably necessary to the proper examination of the affidavit or declaration under section 71 of the Act, or for the Office to assess the accuracy and integrity of the register.

Dated: June 29, 2011.

**David J. Kappos,**

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

[FR Doc. 2011-17121 Filed 7-11-11; 8:45 am]

BILLING CODE 3510-16-P

## POSTAL SERVICE

### 39 CFR Part 111

#### Changes to Move Update Standards

**AGENCY:** Postal Service™.

**ACTION:** Proposed rule, revised.

**SUMMARY:** The Postal Service proposes to revise *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM®) to add 602.5.0 and 602.6.0, and to revise the Move Update standards regarding change of address orders, by including in the revised standards change of address notices filed by postal employees. The Postal Service also deletes multiple sections throughout the DMM to

centralize Move Update and ZIP Code™ accuracy standards under section 602.

**DATES:** We must receive your comments on or before August 11, 2011.

**ADDRESSES:** Mail or deliver written comments to the manager, Product Classification, U.S. Postal Service,® 475 L'Enfant Plaza, SW., Room 4446, Washington, DC 20260-5015. You may inspect and photocopy all written comments at USPS® Headquarters Library, 475 L'Enfant Plaza, SW., 11th Floor North, Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday. Email comments, containing the name and address of the commenter, may be sent to:

*MailingStandards@usps.gov*, with a subject line of "Move Update." Faxed comments are not accepted.

**FOR FURTHER INFORMATION CONTACT:** Jim Wilson at 901-681-4600, or Bill Chatfield at 202-268-7278.

**SUPPLEMENTARY INFORMATION:** On September 21, 2010, the Postal Service published a proposed rule in the **Federal Register** (75 FR 57410-57412) to include all changes-of-address, whether filed by customers or postal employees, as subject to Move Update requirements. In addition, the proposal announced that the online publication, *Guide to Move Update*, is the appropriate source for additional information and procedures for meeting the Move Update requirements.

The prior proposal also would have changed the timeframe for providing address correction and nixie notices without charge for First-Class Mail®, Standard Mail®, and Bound Printed Matter (BPM) pieces eligible for full-service Intelligent Mail® prices. The Postal Service is not including that initiative in this rule; for now, we will retain the current timeframe for notices without charge for pieces eligible for full-service prices.

In this notice we provide an overview of the revised proposal, a summary of comments on the original proposal, our response to those comments, and the proposed new mailing standards to implement this proposal.

#### Change of Address Orders

The Postal Service proposes that the Move Update standards are met, not only by updating address records from customer-filed change-of-address (COA) orders, but also from COA orders supplied by postal employees. Customers occasionally move from a street address or allow their Post Office™ Box service to expire without providing a new address to redirect their mail. In these instances, the customer no longer receives mail at that

address, and the postal employee files either a "Moved Left No Address" (MLNA) or a "Box Closed No Order" (BCNO) COA order. These two types of COAs are included in the address change databases the Postal Service maintains. To comply with the new proposed Move Update standards, mailers must not include pieces in presorted mailings to these undeliverable addresses once the effective date of the COA is older than 95 days.

However, the Postal Service understands that some mailers may have difficulty isolating MLNAs and BCNOs in their mailing processes. Therefore, to allow mailers sufficient time to modify their mailing systems to properly handle MLNA and BCNO occurrences, MLNAs and BCNOs with effective dates older than 95 days would not be classified as failures to update a COA by Performance Based Verification (PBV) Move Update verifications until a year after publication of the final rule. After the one-year grace period, MLNA/BCNO addresses with effective dates between 95 days and 18 months would be treated by PBV verifications for commercial mailings of First-Class Mail and Standard Mail pieces as failures to update a COA.

#### Guide to Move Update

The online USPS publication *Guide to Move Update* (available on the RIBBS® Web site at <http://ribbs.usps.gov>) provides general information and recommendations about each authorized Move Update method. This publication also provides specific information on the best use of the methods available for meeting the Move Update standards. It describes in detail the four primary and the two alternative Move Update methods available for updating mailing lists.

Since the amount of information on Move Update involves numerous technical details in addition to the basic standards, it is not appropriate to include all the information within the DMM. Therefore, we reference the *Guide to Move Update* where relevant and appropriate in sections of the DMM. The *Guide to Move Update* is accessible online at: [ribbs.usps.gov/move\\_update/documents/tech\\_guides/GuidetoMoveUpdate.pdf](http://ribbs.usps.gov/move_update/documents/tech_guides/GuidetoMoveUpdate.pdf).

#### Comments and USPS Responses

##### General

We received comments from two customers and eight mailer associations. A general comment recommended that the Postal Service explain the financial and other service-related benefits to