

**ABUSE OF USPTO'S TELEWORK PROGRAM:
ENSURING OVERSIGHT, ACCOUNTABILITY
AND QUALITY**

JOINT HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
AND THE
**COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM**
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRTEENTH CONGRESS
SECOND SESSION
NOVEMBER 18, 2014

Serial No. 113-117
(Committee on the Judiciary)

Serial No. 113-150
(Committee on Oversight and Government Reform)



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**ABUSE OF USPTO'S TELEWORK PROGRAM:
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AND QUALITY**

TUESDAY, NOVEMBER 18, 2014

HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

AND THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

Washington, DC.

The Committees met, pursuant to call, at 1:42 p.m., in room 2141, Rayburn House Office Building, the Honorable Bob Goodlatte (Chairman of the Committee on the Judiciary) presiding.

Present from the Committee on the Judiciary: Representatives Goodlatte, Forbes, Chaffetz, King, Franks, Gohmert, Poe, Marino, Labrador, Holding, Collins, DeSantis, Conyers, Nadler, Lofgren, Jackson Lee, Johnson, and Cicilline.

Present from the Committee on Oversight and Government Reform: Representatives Issa, Mica, Turner, Jordan, Walberg, Lankford, Amash, Gosar, Meehan, Massie, Cummings, Tierney, Clay, Lynch, Connolly, Speier, Cartwright, Kelly, Davis, Cardenas, and Lujan Grisham.

Staff Present from the Committee on the Judiciary: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; David Whitney, Counsel; Kelsey Deterding, Clerk; (Minority) Perry Apfelbaum, Minority Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; Jason Everett, Counsel; and Rosalind Jackson, Clerk.

Staff Present from the Committee on Oversight and Government Reform: (Majority) Alexa Armstrong, Legislative Assistant; Molly Boyd, Deputy General Counsel and Parliamentarian; Sharon Casey, Senior Assistant Clerk; John Cuaderes, Deputy Staff Director; Lamar Echols, Counsel; Adam P. Fromm, Director of Member Services and Committee Operations; Linda Good, Chief Clerk; Mark D. Marin, Deputy Staff Director for Oversight; Ashok M. Pinto, Chief Counsel, Investigations; Laura L. Rush, Deputy Chief Clerk; Jessica Seale, Digital Director; Andrew Shult, Deputy Digital Director; Jonathan J. Skladany, Deputy General Counsel; (Minority) Portia Bamiduro, Counsel; Meghan Berroya, Chief Investigative Counsel; Krista Boyd, Deputy Director of Legislation/Counsel; Lena Chang,

Counsel; Courtney Cochran, Press Secretary; Jennifer Hoffman, Communications Director; and Juan McCullum, Clerk.

Mr. GOODLATTE. The Committee will come to order.

And, without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to this afternoon's joint oversight hearing of the House Committee on the Judiciary and the Committee on Oversight and Government Reform entitled "Abuse of USPTO's Telework Program: Ensuring Oversight, Accountability, and Quality."

And I will begin by recognizing myself for an opening statement.

The purpose of the United States Patent and Trademark Office is to promote innovation and ensure the integrity and advancement of intellectual property rights by thoroughly examining applications and issuing quality patents and trademarks.

Recent years have brought a great many positive changes to America's patent system and the PTO. Many of these were spurred by changes in law that were championed by Members of the Judiciary Committee, one of the two Committees responsible for conducting this joint oversight hearing today on allegations that relate to abuses at the Agency.

The PTO's telework program has been widely acclaimed as a model for the public and private sector in recent years. Proponents have cited a number of important benefits that are attributable to the Agency's teleworking program.

These include modernizing and improving the Agency's workforce, reducing attrition and the life cycle costs of examiners, enhancing employee quality of life, and diminishing the Agency's need for space and rental expenses.

It is evident that telework and other flexible work programs, when properly managed, can pay enormous dividends to both employers and employees in terms of increased productivity and job satisfaction.

Until this summer, there seemed to be little reason to question whether the PTO's senior leadership has been doing an effective job of properly managing its workforce, which is now dispersed throughout the Nation.

Cracks began to appear in that facade, though, in late July after the Department of Commerce Office of Inspector General published two troubling investigative reports.

The first focused on hiring practices at the Trademark Office where a senior official resigned shortly after a finding that she repeatedly assisted an individual who was apparently not qualified to receive a Federal job at the Agency.

A second inquiry focused on the Patent Trial and Appeal Board, or PTAB. In that case, the OIG found that the lack of work for paralegals resulted in waste totaling more than \$5 million and that senior officials were aware of the situation for years and failed to take action to prevent further waste.

The OIG noted USPTO management provided over \$680,000 in bonuses over a 4-year period, even when the paralegals who received these bonuses did not have enough work to keep them fully engaged. Notwithstanding the absence of work, 95 percent of paralegals reportedly received the highest performance ratings.

Subsequently, the PTO announced it made structural improvements to the paralegal program and it was evaluating ways to eliminate their underutilization and revise the way their performance is measured. To date, though, there doesn't appear to be any effort at the Agency to recalculate the bonuses paid during this period, many of which the OIG regards as improper payments.

Two weeks after these reports were released, the Washington Post published an article entitled "Patent Office Filters Out Telework Abuses in Report to its Watchdog." That article described numerous instances of alleged employee misconduct and suggested agency officials may have revised an initial report to conceal possible abuses and mismanagement in yet another program, the patent examination telework program.

Employing nearly two-thirds of the PTO's workforce, the Patent Examination Program is at the core of the PTO's operation. It has doubled in size in less than a decade as the PTO has grown from one office in Alexandria to include satellite offices in geographic areas as diverse as Dallas, Detroit, Denver, and Silicon Valley.

Approximately half of patent examiners now work from home full-time. Another one-third work from home part-time. This includes some 6,500 employees. There is little doubt that the overwhelming majority of examiners are hard-working, honest, and professional.

However, the Agency concluded in its initial assessment that there are "multiple instances where there was evidence that an employee was potentially engaging in time and attendance abuse." Yet, management would not allow a thorough investigation, nor would management allow records to be used, as evidenced in a disciplinary or adverse action.

This is disturbing and calls into question the objectivity and reliability of subsequent statements by PTO officials that there is only evidence of isolated abuses and no conclusive evidence of systemic abuse.

From my perspective, the issue is not whether telework should continue at the PTO, but, rather, under what terms and conditions it should operate and whether it is being properly and effectively managed.

In addition, today's hearing will touch on other issues that are currently the subject of investigation at the PTO. These include the effects of mortgaging or work credit abuse and end-loading on patent quality. The IG has indicated these practices may present systemic issues as well.

Finally, we will explore the extent to which allegations of time and attendance abuse are not unique to the telework environment, but, instead, may derive from the manner in which the PTO measures performance and conducts its business, including the count system.

With that, I conclude my opening remarks and, in a moment, will turn to the Ranking Member of the Judiciary Committee, the gentleman from Michigan, Mr. Conyers.

In the meantime, I do want to advise the Members of the Committee that I am going to have to step out to the Republican Steering Committee and the gentleman from California, the Chairman

of the Oversight and Government Reform Committee, who has done yeoman's work on this issue, will take the Chair.

I also want to welcome the gentleman from Maryland for his work in this effort as well.

So now I will recognize the gentleman from Michigan for his opening statement.

Mr. CONYERS. Thank you, Chairman Goodlatte.

I begin by welcoming the Committee on Oversight and Government Reform and its leaders to this joint hearing. I think it is very important and very appropriate.

Today's hearing provides an opportunity to examine the telework program of the U.S. Patent and Trademark Office, a program that has recently come under scrutiny.

And as we conduct this examination, there are several factors that should be considered. To begin with, telework programs, if implemented correctly, serve important purposes. They save taxpayer dollars, strengthen worker satisfaction and productivity, and help the environment through reduced traffic congestion.

To its credit, the U.S. Patent and Trademark Office has been at the forefront of developing and implementing this workplace innovation. And since January 2006, eligible patent examiners have been permitted to work from home. In fact, nearly half of all patent examiners currently participate in the telework program.

Considered one of the Nation's leading government telework programs, it has played a critical role in enabling the Patent and Trademark Office to recruit and retain patent examiners with essential expertise.

In fact, the Inspector General of the Department of Commerce issued a report in 2012 documenting the many successes of the Patent and Trademark Office's telework program. Specifically, the Inspector General found that program participants review more patent applications per year than their nonparticipating counterparts, which has helped, of course, to reduce the backlog of patent applications.

The Inspector General also found that the program results in cost savings because of reduced need for office space, which saves American taxpayers about \$20 million each year, according to the Patent and Trademark Office. This, in turn, allows the office to invest more resources in modernizing its information technology systems and offer better training for its patent examiners.

Nevertheless, recent reports of abuse regarding time and attendance by patent examiners participating in this telework program must be taken seriously. It appears that some patent examiners were paid for not working, which is a fraud against taxpayers.

In addition, the Inspector General recently reported that the Patent and Trademark Office paid teleworking paralegals in the Patent Trial and Appeal Board for work they didn't even perform. Together, these reports raise serious concerns about the effectiveness of the office's management and workplace policies.

To maintain the integrity of the telework program, the Patent and Trademark Office must verify the extent of the abuse and undertake immediate action to hold accountable those who committed the fraud. Doing so will send a clear signal that abuse of time and attendance will not be tolerated.

I hope our witnesses discuss other ways to root out abuse and whether such abuse has impacted patent examination quality and patent application backlog. And, finally, we must ensure that the Patent and Trademark Office has the tools to prevent further abuse.

Following the reports of these problems to the Office of Inspector General, the office determined that it lacked sufficient controls to assess the extent of abuse. Such a lack of internal controls raises critical concerns. Fortunately, the office's investigators made several constructive recommendations regarding this problem.

And, Mr. Chairman, that concludes my statement. I yield back the balance of my time and really warmly recognize the witnesses assembled here today for this hearing.

Thank you.

Chairman ISSA [presiding]. Thank you.

Thank you, Mr. Conyers.

I now will recognize myself for a short opening statement.

First of all, I would like to thank Chairman Goodlatte and all the Members here today. It is unusual to have a joint hearing. But this hearing is, in fact, essential that it be joint.

The jurisdiction of the Judiciary Committee over the sanctity of patents, the accuracy, and, in fact, the interest of this Committee to end a backlog that denies inventors any benefit from their applications for longer and longer periods of time—and make no doubt about it.

A 600,000-plus patent backlog is costing the American economy and entrepreneurs far greater than the fees that have been paid by these companies and individuals that are, in fact, in some cases, being misspent by individuals who do not do their full job.

The Patent and Trademark Office does have a responsibility to foster innovation, enabling entrepreneurs and inspiring Americans and non-Americans to enjoy the so-called American dream. I am proud to have worked with this Agency both as an applicant and as a Member of Congress.

On the screen, I have asked to have my historic work, some of the many patents that I was granted during my time in private life. Whether it is my patents, my trademarks, or even my copyrights, I understand that it is a handshake arrangement with the Government.

We pay for the application. We pay the salaries of every employee at the PTO because, in fact, we pay all of the costs of the PTO. And, in some cases, historically, even money is siphoned off from those fees to the general revenue. And this Committee has done yeoman's work to stop that.

But the fact is the applicant is paying for a service and, if that service is delayed under modern patent law, every day an applicant is denied their claim is a day they cannot enforce their patent.

PTO employee telework program has been highly regarded and often touted as a model of telework programs across the Federal Government. Recent revelations make it clear it should not have been touted.

It is recognized that, among other problems, managers have been denied the ability to verify whether the Federal worker is doing their job at all. Make no doubt about it, that cannot continue.

It was after receiving anonymous whistleblower complaints regarding employee abuse of the telework program at the PTO that the Inspector General present here today referred these allegations to the PTO for internal review and requested the PTO supply results to the IG. That is one of our challenges, and that is, in fact, the IG did not, in the ordinary course, do the audit.

I would like at this time to ask unanimous consent that both the long version, the 32 pages, and the short version, the 16-page report, be placed in the record.

Without objections, so ordered.*

When the report came back to the IG, it contrasted with the two reports I just mentioned, a long report that outlined serious flaws in the process, including, as I said, managers saying they did not have the tools 43 or 44 percent of the time to evaluate whether or not the work was being done.

Sadly, in the 16-page filtered report, this was paired down to where it said, "Some said they did. Some said they didn't." That is not acceptable. We all understand that, if nearly half of all managers say they don't have the tools, then, in fact, the tools are certainly not available to them.

The leaked internal 32-page report suggests that problems at the PTO may have been far deeper and, at least to this Member, may have been sanitized in the 16-page report. The 32-page report included stronger guidance to correct the abuses. Unfortunately, many of these recommendations were watered down or filtered out of the report provided to the Office of Inspector General.

Not only is this problematic for the purpose of good governance, but it is an abuse that jeopardizes the quality of PTO work and, in fact, makes us question whether or not any agency ever can, in fact, be assigned internal review by an Inspector General again.

Time and attendance records must be carefully monitored at the time when 600,000 applicants are still backlogged and the number of patent applications increase by 5 percent each year. The success of our inventors and the economy demands no less.

Practices by the PTO employees with names like "end-loading" and "mortgaging" are scams against fee-paying applicants and do nothing to benefit the quality of the examiner's work. And the 32-page internal report found that, of managers interviewed, 77 percent felt they have one or more employees who engage in end-loading, which is waiting till the last minute to complete work on their quotas.

Later we will see graphs of spikes that show a dramatic increase at the end of the time. As, in fact, a historic fee-paying applicant, I can tell you one thing. Some of that is waiting till the end and dusting off final work. And I can accept some of that. But clearly there is an irresistible incentive at the end of a quarter to get something off your desk that often means that what you get is a rejection with a vague statement that you have to overcome.

Their rejection takes only a few moments, but it can cost you thousands or tens of thousands of dollars to simply say, "You didn't get it right. You didn't look at the detail." You were simply trying to get it off your desk.

*See Appendix for submitted material.

These and other abuses by this Committee cannot be tolerated. And the inability of managers to know whether or not the workers are actually performing the work cannot be tolerated by the Committee on Oversight.

So together I am thrilled to hear from our witnesses today.

And I now take the pleasure to yield to my co-partner in this, the gentleman from Maryland, Mr. Cummings.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

I was, first of all, pleased that you and Mr. Goodlatte and certainly Mr. Conyers have called this hearing today.

Unfortunately, we found out that we could not have one of our experts in the Congress, Mr. Connolly, to be a part of the panel without giving up one of our minority witnesses. So, therefore, I am going to yield my time to him. He has worked very, very hard on this issue, spent his blood, sweat, and tears. And so, therefore, I yield my time to him.

Mr. CONNOLLY. I thank my friend from Maryland, and I thank him for his graciousness.

Today's hearing examines the United States Patent and Trademark Office, which Congress has entrusted with a critical mission of turning the words of the copyright clause of the United States Constitution into a living reality for thousands of American inventors and entrepreneurs.

PTO is a unique user-fee-supported agency that relies on zero taxpayer dollars to fund operations, minimizes Federal real property and utility costs, and is fundamentally performance-based in that the organization strives to use real quantitative outcome metrics to measure productivity and incentivize better performance from its patent professionals.

PTO has long prided itself on being a result-driven agency that holds its patent examiners to strict quota requirements. Indeed, it does have much to be proud of, particularly its performance in fiscal year 2014, when it is anticipated that PTO's core of 8,500 patent professionals will act on more than 600,000 patent applications and issue more than 300,000 new patents.

As one of our witnesses will testify today, 2014 is likely to be PTO's most productive year in its 224-year history. However, that is not why we convened today's hearing.

We are here to examine a cloud that threatens to overshadow and undermine much of the positive work cited above. The irresponsible abuse of user fees by a certain subset of examiners who, in the process of committing time card fraud, being unresponsive to patent applicants, and submitting incomplete work not only wastes applicants' dollars, but dishonor and insult the vast majority of dedicated and hard-working PTO employees.

Let me be crystal clear. The isolated, though outrageous, anecdotal reports of abuse transcend partisanship and concern every member of this staff. Significantly, the most outrage and anger I have personally encountered toward the time and attendance abuse has been levied by PTO workers themselves who greatly resent only working long hours to meet stringent performance standards only to have their own collective reputations dragged through the mud by a small minority of cheaters and bad apples.

It is incumbent upon all of us on behalf of PTO's critical constitutional mandate and the thousands of hard-working civil servants who are working hard and playing by the rules every day that we work with PTO to ensure it has effective systems in place to root out and hold accountable those few examiners who would threaten the reputation of everyone.

It is also important that we not oversimplify matters or do more harm than good by overreacting to isolated incidents with bureaucratic, one-size-fits-all solutions, for the reality is that the major challenges facing PTO are neither simple nor easy to overcome.

My hope is today's hearing will move beyond addressing symptoms related to telework to focus on the fundamental PTO problems related to insufficient performance metrics that may be subject to gaming and managers who are stuck in an antiquated "If I can't see you, you must not be working."

The bottom line is that it is striking how the most concerning aspects of this hearing—issues related to balancing the need for quality and quantity and questions over whether the correct incentives are being set—have actually little to do with telework, per se.

These are issues that would face the Agency and, indeed, have faced the Agency whether all of its work is receded in cubicles or working from home or remote locations.

It is important to remember the PTO instituted its telework program to empower the Agency to enhance its workforce capabilities without incurring additional costs in the form of real property expenses and high attrition.

Based on the program's specific goal, PTO's pioneering telework actually has been successful. As Commissioner Focarino will testify, since 2005, PTO has been able to double the number of patent examiners, to total approximately 8,300 today, without incurring additional property costs, while lowering attrition from 9.07 percent to 3.4 percent this year.

In addition, PTO's continuity of operations operations have been approved. For example, during the March 2013 snowstorm that shut down the entire Federal Government, PTO's patent examiners maintained an 83 production rate. Very impressive.

I hope today's hearing is not the opening of an effort to curtail the productivity tools that were enacted by the Telework Enhancement Act of 2010, which I was proud to help write alongside with Mr. Sarbanes and my friend and colleague Mr. Wolf from Virginia.

I want to thank the witnesses for being here today and thank our Chairmen and Ranking Members for holding the hearing.

And, Mr. Chairman, finally, I would ask unanimous consent that a letter addressed to the four of you from the Association of Commuter Transportation be entered into the record.

Chairman ISSA. Without objection and delight, so ordered.

[The information referred to follows:]



November 18, 2014

The Honorable Robert "Bob" Goodlatte (R-VA)
 House Judiciary Committee, Chairman
 2138 Rayburn House Office Building
 Washington, DC 20515

The Honorable John Conyers Jr. (D-MI)
 House Judiciary Committee, Ranking Member
 2142 Rayburn House Office Building
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The Honorable Darrell Issa (R-CA)
 House Committee on Oversight and
 Reform, Chairman
 2157 Rayburn House Office Building
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The Honorable Elijah Cummings (D-MD)
 House Committee on Oversight and Government
 Reform, Ranking Member
 2471 Rayburn House Office Building
 Washington, DC 20515

Dear Chairmen and Ranking Members:

On behalf of the Association for Commuter Transportation (ACT), I write to you today regarding recent findings of fraud and abuse within the US Patent & Trade Office's (USPTO) telework program. The findings of abuse within the USPTO's telework program are not and should not be indicative of what to expect from telework programs. The findings about USPTO's program prove that telework programs need to be held to a high standard with efficient internal controls and effective management; however, those findings do not indicate that telework programs generally are inefficient.

One of the greatest fears related to these findings is that if Federal employees are allowed to telework, their productivity will go down. However, studies have shown the exact opposite. In most cases employees who telecommute, even for a few days a week, are as productive or more productive than their employees who work from a central office five days a week. Major employers, including British Telecom, JD Edwards, and American Express, show home-based employees to be 20-40% more productive than their office counterparts.

A successful telework environment includes several key elements. First, it requires management commitment and technology, including planning and consensus building. When done correctly, the benefits are plentiful. A telework policy can help reduce or replace business-related trips. It helps maintain productivity in the event of disasters or disruptions. In 2010, Washington DC was hit by three major snowstorms in five weeks, virtually crippling the region's transportation system. During that time, 60% of GSA employees were able to work from home because of the agency's telework planning and policies.

A successful telework policy also reduces the need for capital expansion such as office space and parking. Sun Microsystems saves \$70 million a year in real estate alone, while Dow Chemical has seen similar savings in that it reduced a third of its non-real estate costs through telework.

Other benefits include reduced employee absenteeism by 2-4 days per year, increased employee morale, recruitment, retention by 50-65%, extension of work hours without adding staff, and better communication among time zones.

The impact on our environment and the transportation system is another positive side effect. When Los Angeles County began a telework program, it saw an increase of teleworkers by 10%, which led to reduced employee travel time of 335,340 hours annually and eliminated more than 147.6 tons of air pollutants.

1330 Braddock Place, Suite 350, Alexandria, Va., 22314 | Tel: 571.699.3064 | Website: actweb.org



ACT is a strong supporter of the 'Federal Telework Improvement Act'. Prior to that legislation's passage, participation in Federal telework programs lagged far behind similar programs in the private sector and among local governments. Thanks largely to the 'Federal Telework Improvement Act', participation in Federal telework programs has increased dramatically. According to the Washington Council of Governments' 2013 Commuter Connections State of the Commute Report [<http://www.commuterconnections.org/wp-content/uploads/SOC-2013-Telework-Pullout.pdf>]:

Federal agency employees telecommute at a rate of 38%, which is much higher than the regional average (27%). An additional 19% of federal government workers in the Washington metropolitan region could and would telework if given the opportunity. Formal telework programs in this region are most common with employees who work for a federal government agency.

An increase in telework has led to happier and more productive employees and has saved the Federal government significant amounts of funding.

ACT is concerned by the findings of the USPTO telework program review and we recognize that without appropriate internal controls, there may be other instances of abuse. That said, we urge Congress to avoid overreaction to these findings and instead encourage Congress to require tighter internal controls, protocols for accessibility and availability, clear communication standards between managers and telecommuters as well as proper training for Federal managers.

To that extent, the Association for Commuter Transportation and its members stand ready to assist Federal agencies in reviewing their internal controls and providing recommendations to individual agencies on how to improve their telework program management. Additionally, at the onset of the 114th Congress, ACT will submit to your Committees a series of legislative recommendations on how to improve the 'Federal Telework Improvement Act'.

If you have any questions, please contact ACT Government Affairs Director Jason Pavluchuk at Pavluchuk@actweb.org or 202-285-6414.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Wright', is written over a light gray rectangular background.

Mark Wright
Executive Director
Association for Commuter Transportation

Mr. CONNOLLY. I thank the Chair.

I thank my colleague and friend from Maryland for being so gracious.

Chairman ISSA. Does the Ranking Member have anything else?

Mr. CUMMINGS. No.

Chairman ISSA. Thank you.

All Members may have 5 days in which to submit written statements for the record.

With that, we go to our first panel of witnesses. Pursuant to the normal rules, Mr. Wolf will not be sworn. However, I would ask all other witnesses to please rise to take the oath.

Raise your right hands. Do you solemnly swear or affirm that the testimony you give will be the truth, the whole truth, and nothing but the truth?

Thank you. Please be seated. Let the record reflect that all witnesses answered in the affirmative.

Our first witness this morning will be the Honorable Frank Wolf. He is a Member of Congress and has been for many, many years. He is in his 17th term.

He is a senior member of the Virginia delegation and serves as Chairman of the Commerce, Justice, Science, and Related Agencies Subcommittee on the Appropriation Committee. He also serves on the Transportation, Housing and Urban Development Committee.

Prior to being elected to the U.S. House of Representatives in 1981, Congressman Wolf served in the United States Army as a reservist and later became an attorney for the military. He earned his J.D. from Georgetown University Law Center and his undergraduate degree in political science from Pennsylvania State University.

It is, in fact, a great pleasure to have a long-serving and distinguished Member of his standing. And I would ask that—as I understand, you are not going to take questions—but that you give your testimony and then we will go on.

The gentleman is recognized.

TESTIMONY OF THE HONORABLE FRANK WOLF, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. WOLF. I thank you, Mr. Chairman, and thank the Committee Members for allowing me to testify today.

I am pleased to say I am a huge advocate of telework. Time and again, I have said there is nothing magic about strapping yourself into a metal box and driving 40 or 50 miles a day. If you have a job that is conducive to teleworking, then you should be given the opportunity to telework. Many members of my staff regularly telework. Studies show that telework increases worker productivity, reduces traffic, helps the environment, and is also a quality-of-life issue.

But the series of articles in the Washington Post over the last several months detailing problems with the Patent and Trademark Office telework programs are very, very alarming. Secretary Pritzker is well aware of my displeasure. She and I have talked on the phone about the issue, and I have also written in a communication with her. I want to enter in the record my August 11, 2014, letter to her.

It clearly states my unhappiness with PTO and ends with this sentence: "I encourage you to take immediate action to hold these fraudulent employees accountable and send a clear message that this abuse will no longer be tolerated."

I also want to submit to the hearing record my September 15, 2014, letter to the U.S. Attorney for the Eastern District of Virginia urging him to open a criminal investigation into possible fraudulent activities at PTO with regard to time and attendance.

To say that I am extremely disappointed that PTO failed to manage its telework program and, in general, to provide adequate managerial oversight throughout their organization would be an understatement.

Compounding this are attempts, I believe, to minimize the problem. While I am confident that the vast majority of people working at PTO are honest, hard-working Federal employees, there are some, unfortunately, who are abusing the telework program. They should be fired and, in all honesty, they should have been already dismissed.

I firmly believe that PTO and the Commerce Department failed to terminate employees who abuse the system. Other telework programs across the Federal Government could very well be in jeopardy. It is imperative that PTO identify any misconduct and management lapses and work to put in place systems to ensure that it does not happen in the future.

I understand that some mid-level managers at PTO feel like their hands are tied, but there are certain things that can be done and must be done to ensure that staff are actually working their 80 hours a pay period. I also understand that PTO has the capability to know if their employees are in the building or are working on their computers, but these tools are not used.

I would also like to point out that these abuses weren't just perpetrated by telework employees, but that other employees who report every day to the PTO headquarters building in Alexandria have also been gaming time and attendance through the system.

I understand that PTO has brought the National Academy of Public Administration to review its telework program. This is a very, very positive first step. But I would urge the Committee to ask that the NAPA report not only to the PTO, but also to the Committees. You need to make sure that their recommendations are carried out.

NAPA, as you know, was chartered by Congress to assist Federal, state, and local governments at improving the effectiveness, efficiency, and accountability. I have enlisted NAPA on multiple occasions during my tenure as Chairman of the Commerce, Justice, Science and Appropriations Committee.

NAPA played a major huge role in the transformation of the FBI following the 9/11 attacks. But the difference there is Director Mueller really wanted NAPA to be involved. He was encouraging NAPA, and he pretty much said, "We are going to do what NAPA tells us to."

I have asked NAPA to work with the Department of Commerce to study the effects of offshoring the U.S. workforce. In 2013, NAPA worked with NASA to review its security practices, some Chinese espionage, and things like this, and NASA was really not excited

about it. And so they are not sure they are really going to carry it out.

So I would think the Committees ought to get the report from NAPA to make sure that NAPA recommendations are followed. NAPA does good work. It is independent and it is nonpartisan. It would bring a fresh set of eyes to the problem and provide a thorough review of PTO's telework programs and make recommendations to return it to the model program—and it was a model—that it once was.

Again, I appreciate the opportunity to testify. This is an important issue, and Congress has a clear role with regard to the oversight. Moreover, I think telework has an important role to play in improving morale, improving productivity, cutting rents and office overhead costs, and alleviating traffic congestion, and allowing individuals to spend more time with their families, but only if those who participate in these programs follow appropriate and effective management guidelines.

And I thank both the Committees for having the hearing.

[The prepared statement of Mr. Wolf follows:]

Testimony of the Honorable Frank Wolf
Committee on the Judiciary & Committee on Oversight and Government Reform
Joint Hearing on PTO's Telework Program
Tuesday, November 18, 2014

Good afternoon. Thank you for allowing me to testify today.

I am pleased to say I am a huge advocate of telework. Time and again I have said there is nothing magic about strapping yourself into a metal box and driving to an office. If you have a job that is conducive to teleworking, then you should be given that opportunity. Many members of my staff regularly telework. Studies show telework increases worker productivity, reduces traffic and helps the environment. It's also a quality of life issue. Less time sitting in traffic — particularly in this region — means more time doing what you want to do, from coaching Little League to volunteering at your church to just spending more time with your family.

The series of articles in *The Washington Post* over the last several months detailing problems with the Patent and Trademark Office's telework program are alarming. Secretary Pritzker is well aware of my displeasure. She and I have talked on the phone about the issue and I also have been in written communication with her.

I want to enter my August 11, 2014 letter to her into the hearing record. It clearly states my unhappiness with PTO and ends with this sentence: "I encourage you to take immediate action to hold these fraudulent employees accountable and send a clear message that this abuse will no longer be tolerated."

I also want to submit to the hearing record my September 15, 2014 letter to the U.S. Attorney for the Eastern District of Virginia urging him to open a criminal investigation into possible fraudulent activities at PTO with regard to time and attendance.

To say I am extremely disappointed that PTO failed to manage its telework program and, in general, to provide adequate managerial oversight throughout the organization would be an understatement. Compounding this are attempts, I believe, to minimize the problems.

While I am confident the vast majority of people working at PTO are honest, hardworking federal employees, there are some, unfortunately, who are abusing the telework program. They need to be fired. In all honesty, they should already have been dismissed.

I firmly believe if PTO and the Commerce Department fails to terminate employees who abused the system, other telework programs across the federal government could very well be in jeopardy. It is imperative that PTO identify any misconduct and management lapses, and work to put in place systems to ensure that this does not happen in the future.

I understand that some mid-level managers at PTO feel like their hands are tied, but there are certain things that can be done to ensure that staff are actually working their 80 hours a pay period. I also understand that PTO has the capability to know if their employees are in the building or are working on their computers, but that these tools are not used.

I also would like to point out that these abuses weren't just perpetrated by telework employees, but that other employees who report every day to the PTO headquarters building in Alexandria have also been gaming time and attendance through the system.

I understand PTO has brought the National Academy of Public Administration to review its telework program. This is a positive first step but it needs to be required to report back to these two committees.

NAPA, as you know, was chartered by Congress to assist federal, state, and local governments in improving their effectiveness, efficiency and accountability. I have enlisted NAPA on multiple occasions during my tenure as chairman of the Commerce-Justice-Science Appropriations subcommittee. NAPA played a huge role in the transformation of the FBI following the 9/11 attacks. I asked NAPA to work with the Department of Commerce to study the effects of offshoring on the U.S. workforce. In 2013, NAPA worked with NASA to review its security practices.

NAPA does good work. It is independent and non-partisan. It would bring a fresh set of eyes to the problem and provide a thorough review of PTO's telework program and make recommendations to return it to the model program it once was.

Again, I appreciate the opportunity to testify today. This is an important issue and Congress has a clear role in providing oversight. Moreover, I think telework has an important role to play in improving morale, improving productivity, cutting rent and other overhead costs and alleviating traffic congestion. But only if those who participate in these programs follow appropriate – and effective – management guidelines.

####

Chairman ISSA. I thank the gentleman. All the references you made will be included in the record without objection.
[The information referred to follows:]

FRANK R. WOLF
19th District, Virginia

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

CHAIRMAN—COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

STATE AND FOREIGN OPERATIONS

CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION



Congress of the United States
House of Representatives

August 11, 2014

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wolf.house.gov

The Honorable Penny Pritzker
Secretary
Department of Commerce
1401 Constitution Ave NW
Washington DC 20230

Dear Secretary Pritzker:

I was deeply troubled by the A-1 story in today's *Washington Post* about employees of the U.S. Patent and Trademark Office (USPTO) abusing the telework program and that the agency's leadership apparently sought to hide serious findings of abuse in a final report to the department's inspector general.

According to the article: "some of the 8,300 patent examiners, about half of whom work from home full time, repeatedly lied about the hours they were putting in, and many were receiving bonuses for work they didn't do. And when supervisors had evidence of fraud and asked to have the employee's computer records pulled, they were rebuffed by top agency officials, ensuring that few cheaters were disciplined, investigators found." It goes on to describe how the unedited version of the review found "a culture of fraud that is overlooked by senior leaders, lax enforcement of the rules and the resulting frustration of many front-line supervisors."

The article also provides examples of abuse by employees including "an examiner who missed 304 hours of work in a year but was paid for the time. Despite warnings, this examiner kept cheating and was caught twice but not fired. Another examiner claimed to have worked 266 hours for which there was no evidence she was on the job, and she received \$12,533 in pay. She was never charged with time fraud because an assistant deputy commissioner refused her supervisor's request to pull computer records."

This is inexcusable. The employees that have been abusing telework and committing time fraud should be fired today. So too should the senior USPTO managers who sought to hide these troubling findings in the report provided to the inspector general.

I am also asking that you refer these individuals and all relevant findings to the Justice Department for prosecution for any fraud that has taken place. If the department determines criminal fraud has occurred, they should be prosecuted to the full extent of the law. I am also referring this report to the House Oversight and Government Reform Committee and will ask

The Honorable Penny Pritzker
August 11, 2014
Page 2

Chairman Rogers to consider an investigation by the Appropriations Surveys and Investigations subcommittee to ensure that all resources of the committee are being used to address this matter.

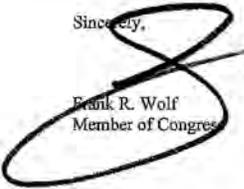
What has happened at USPTO is symptomatic of an agency that has not had leadership for the last 18 months when the last confirmed director left. Because it continues to lack a permanent director, I am asking you to take immediate action to address this matter and to report to the Congress on the steps that have been taken to ensure that this abuse does not occur again.

For the past 20 years, I have been one of the leading advocates for telework – both at federal agencies and in the private sector. I continue to believe that telework, if properly managed, can be an effective tool to boost both productivity and quality of life, while reducing traffic. However, this report also demonstrates what can happen when an agency fails to hold employees accountable – much less tries to cover up alleged criminal fraud committed by employees from the inspector general's office.

I am very disappointed that USPTO, which holds itself up as a telework model for the federal government, has failed to manage this program appropriately. I encourage you to take immediate action to hold these fraudulent employees accountable and send a clear message that this abuse will no longer be tolerated.

Best wishes.

Sincerely,



Frank R. Wolf
Member of Congress

FRANK R. WOLF
10th District, Virginia

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEE:
CHARMAN—COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD
STATE AND FOREIGN OPERATIONS

CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION



Congress of the United States
House of Representatives
September 15, 2014

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110 NORTH COMMONS STREET
WASHINGTON, VA 22001
(840) 851-0880
(800) 855-2463 (In State)

wolf.house.gov

The Hon. Dana Boente
US Attorney
Eastern District of Virginia
2100 Jamieson Ave
Alexandria VA 22314

Dear Mr. Boente:

I am writing to request that you open a criminal investigation into the reported time and attendance abuses at the U.S. Patent and Trademark Office (PTO). For your reference, I have attached several *Washington Post* articles, a related Commerce Inspector General report and two internal PTO reports regarding this matter. These reports describe allegations that certain telework employees have defrauded the federal government by getting paid for and/or receiving bonuses for time they had not worked. To date, I am not aware of any employee or manager involved in this scandal being fired.

I am one of the strongest supporters in Congress of the federal workforce. I regularly speak out on the House floor in defense of federal employees and was once a federal employee myself. I know the overwhelming majority of federal employees – whether at the PTO or elsewhere across the federal government – are honest and hardworking civil servants.

I also have been one of the champions in Congress of telework. I was the author of legislation authorizing and encouraging telework options in the federal workforce and have included language in a number of appropriations bills penalizing agencies for failing to make telework available to federal employees. I strongly believe – and studies have shown – telework increases productivity, reduces overhead costs, creates family-friendly work environments and relieves traffic congestion.

Telework, however, should not be abused. The fraudulent activity at PTO has the potential to undermine telework programs throughout the federal government. There must be a zero tolerance policy for fraud and abuse; federal employees who defraud the government must be held accountable.

While I have spoken with Commerce Secretary Pritzker and understand that she has launched an outside review of these abuses, I believe it is important for federal prosecutors to independently review these allegations for criminal wrongdoing as well. A clear message must be sent to anyone in the government that fraudulent activity is unacceptable and will be met with punishment.

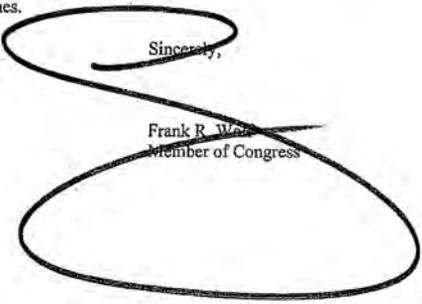
The Hon. Dana Boente
September 15, 2014
Page 2

Please do not hesitate to contact me directly at (202) 225-5136 if you have any questions.

Best wishes.

Sincerely,

Frank R. Wolf
Member of Congress



Chairman ISSA. And I would like to take a short point of personal privilege.

And, Congressman Wolf, Frank, thank you for your many years of service. This may be the last time you testify before this Committee as a current Member. But I suspect we will hear from you in your retirement as you continue to be so dedicated. So thank you for your extra effort here today.

Mr. WOLF. Thank you, Mr. Chairman.

Thank you, Members.

Chairman ISSA. Our second witness today is the Honorable Margaret Focarino. She is the Commissioner of Patents at the United States Patent and Trademark Office.

She was appointed in January 2012 to her present position. But she is, in fact, not new to the PTO. She has been the Chief Operating Officer and she has been responsible for the administration of the patent operation examining policy.

She began her career, though, with the PTO in 1977 as a patent examiner. She was later promoted to senior executive service and served as the Deputy Commissioner for Patents for a time. She earned her certificate in advanced public management at Syracuse University and earned her undergraduate degree in physics at State University of New York.

Thank you and welcome.

Our third witness is the Honorable Todd Zinser. He is the Inspector General of the United States Department of Commerce.

In his position, Mr. Zinser leads the team of auditors, investigators, attorneys, and support staff responsible for improving the Department's business, scientific and economic programs and operations.

Prior to being sworn in as the fifth Inspector General in December of 2007, he served 24 years as a career civil servant in the U.S. Department of Labor and the United States Department of Transportation.

He holds his master's degree from Miami University and his bachelor's degree from Northern Kentucky University. Additionally, he completed the Senior Managers in Government Program at Harvard University's Kennedy Center for Government.

Our next witness is Mr. Robert Budens. Mr. Budens is President of the Patent Office Professional Association. In his position, Mr. Budens represents and protects the interest of more than 8,000 patent examiners and other patent professionals at the United States Patent and Trademark Office. In addition, he serves on the PTO's Patent Public Advisory Committee.

Prior to joining the Association as President in 2006, Mr. Budens served at the PTO as a Ph.D.-level biotechnology examiner who specialized in immunologic methods of detecting and treating HIV and AIDS. That is really technical patent-examining.

Mr. Budens earned his MS in immunology from the University of Texas, Southwestern Medical Center, and his BS and MS in microbiology from Brigham Young University. Wow.

Ms. Esther Kepplinger, our fifth witness, is Chief Patent Counselor for Wilson, Sonsini, Goodrich & Rosati. In her current position, she serves as the firm's liaison to the Patent and Trademark

Office in order to ensure the patents are filed efficiently and enhance the firm's interparty's PTO practice.

Prior to joining the firm in 2009, she served as Deputy Commissioner of Patent Operations at the PTO for a full 5 years. As Deputy Commissioner, she oversaw the patent examination process with the Nation's patent examiners reporting to her.

Ms. Kepplinger pursued her graduate studies in biochemistry and earned her BS in biology from Indiana University of Pennsylvania. And she will testify today in her capacity as Vice Chair of the Patent Public Advisory Committee.

Our last witness today, Mr. William Smith. Mr. Smith is of counsel at BakerHostetler. In his position, Mr. Smith advises clients on issues regarding prosecutions and appeals in patent applications, reissues, and reexamination procedures.

Prior to entering private practice in September of 2007, Mr. Smith served 31 years at the U.S. Patent and Trademark Office, making patent determinations. He also served as an administrative patent judge at the Patent Trial and Appeal Board for a full 19 years.

He earned his J.D. from the University of Baltimore School of Law and his engineering degree from Georgia Institute of Technology. Mr. Smith will testify today in his individual capacity.

I would ask each witness to summarize your testimony. As you saw, we will try to stay as close as we can to 5 minutes. If you will do that, we guarantee your entire written statements be placed in the record.

Ladies first. Ms. Focarino. Thank you.

**TESTIMONY OF MARGARET A. FOCARINO, COMMISSIONER
FOR PATENTS, UNITED STATES PATENT AND TRADEMARK
OFFICE**

Ms. FOCARINO. Chairman Issa and Members of the Committees, thank you for this opportunity to appear before you to discuss the United States Patent and Trademark Office's telework program and recent press reports regarding its operation and management.

We take these reports very seriously, and that is why I want to share with you today how our program works, why it plays a critical part in our Agency's role in advancing innovation, and what we are doing to continue to improve our program.

I would first like to acknowledge Chairman Wolf's leadership on telework issues and thank him for his support of the many improvements we have made to our operations in recent years.

He has raised his strong concerns about abuse in our telework program, which we are doing our best to address, including hiring an independent consultant, the National Academy of Public Administration, to evaluate our telework programs and to advise us on further improvements.

I would also like to acknowledge the work of the Department of Commerce Inspector General. We have worked closely with the IG staff on a number of issues and continue to discuss and consider their recommendations.

Our telework program has been a critical part of improving our patent operations in recent years. No program is perfect, and the USPTO's telework program is no exception. Our own investigation

into whistleblower allegations of time and attendance abuse, as covered in recent press reports, helped shine a light on areas where our telework program needed to be improved.

Our investigation identified isolated abuse. Following the investigation, we took immediate disciplinary action. We also immediately took other actions to improve our program. In July of 2013, submitted a report to the OIG with eight recommendations. We have addressed these recommendations and taken additional steps to strengthen the oversight and management of USPTO's patent telework program.

Since 2012, we developed new, more effective guidance on our patents telework program, ensured that these policies were accessible, and then conducted extensive training sessions to make sure that our supervisors understand and follow the policies so that better controls are in place to help account for hours worked.

We now require the use of electronic collaboration tools for full-time teleworkers to improve the accessibility and interaction between teleworking employees, their supervisors, and their on-campus colleagues, and we have standardized the process for accessing relevant electronic records to be used when investigating alleged violations.

We are clarifying what steps supervisors should take if they suspect any misconduct, and we are ensuring that we proceed appropriately and consistently in those situations.

All of these actions help ensure our programs are effective, that employees are accessible and responsive, and that expectations for both supervisors and employees are clearly communicated and understood.

Further, to ensure that we have the best tools and procedures in place, USPTO has also established two cross-agency teams to explore additional ways to prevent abuse and intervene early and to review the entire conduct process, including consistent, effective enforcement of policies.

USPTO's core mission is to deliver high-quality and timely examination of patent and trademark applications. To effectively manage our increasing workload while maintaining high-quality standards in a constantly evolving technological and legal environment, we have grown and invested in our workforce to enable them to perform their mission to the best of their ability.

Our telework program has increased the USPTO's ability to recruit and retain highly skilled employees with technical backgrounds throughout the country, while producing substantial operational cost-savings. It has allowed us to more than double the number of patent examiners since 2005 without significantly increasing our real estate footprint.

Following the press coverage this summer, our management team conducted briefings for your Committee staffs on the USPTO's telework program, on the reports submitted to the Department of Commerce Inspector General in July of 2013, and on the improvements already implemented. We continue to implement management changes, addressing time and attendance, including through engagement with our unions.

Chairman Issa, we understand that some serious issues were raised in recent press reports. Please be assured that we are taking

many necessary steps to strengthen and improve management controls around our telework program so that it serves our innovators and remains one that is aspired to by all other Federal agencies.
[The prepared statement of Ms. Focarino follows:]

STATEMENT OF
MARGARET A. FOCARINO
COMMISSIONER FOR PATENTS
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE
COMMITTEE ON THE JUDICIARY
AND
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. House of Representatives

Joint Committee Oversight Hearing on USPTO Telework

NOVEMBER 18, 2014

Chairman Goodlatte, Chairman Issa and Members of the Committees:

Thank you for this opportunity to appear before you to discuss the United States Patent and Trademark Office's (USPTO's) telework program and recent press reports regarding its operation and management. We take these reports very seriously, and that is why I want to share with you today *how* our program works, *why* it plays a critical part in our agency's role in advancing innovation, and *what* we are doing to continue to improve our program.

Delivering high-quality and timely examination of patent and trademark applications is a core part of the USPTO's mission. And the USPTO has benefited from the enactment and implementation of the 2011 Leahy-Smith America Invents Act (AIA) which both supported many improvements already occurring at the agency and provided new authorities for the USPTO to improve the patent system. As intellectual property becomes more important in the global marketplace and innovative companies are relying more than ever on their intellectual property to grow their businesses, application filings at our agency continue to increase at significant rates.

To effectively manage this workload, while maintaining high-quality standards in a constantly evolving technological and legal environment, we have grown and invested in our workforce to enable them to perform their mission to the best of their ability. Our pioneering telework program is a critical part of these efforts. Our telework program has increased the USPTO's ability to recruit and retain highly-skilled employees with technical backgrounds throughout the country while producing substantial operational cost savings. It has allowed us to more than double the number of patent examiners since 2005 without significantly increasing our real estate footprint. In FY2014, based on more than 5,000 full-time teleworkers, the USPTO avoided more than \$34 million in rent as a result of its telework program.

Since 2009, we have been able to reduce our backlog of newly filed applications by approximately 20 percent, despite a 5 percent annual increase in filings, and we have shortened total pendency by 18 percent.

But, of course, no program is perfect, and the USPTO's telework program is no exception. The USPTO has one of the oldest and most established telework programs within the Federal workforce and, as a result, sometimes has been the first to encounter unique challenges. Our own investigation in 2012 into whistleblower allegations as covered in recent press reports helped shine a light on areas where our telework program needed to be improved. In that investigation, we found isolated abuse and took actions to address those cases.

As I said, we take these issues very seriously. That is why we moved forward with a number of concrete steps following our 2012 investigation and have continued through today to take steps to strengthen the oversight and management of the USPTO's patent telework program to ensure the integrity of our operations.

We are confident these actions will help ensure that this important program continues to benefit our agency, our employees and our stakeholders while minimizing the potential for abuse.

First, in 2012, after receiving the four whistleblower complaints alleging possible time and attendance abuse, the USPTO investigated the claims, immediately took action to address issues raised during the investigation, and subsequently submitted a report to the Department of Commerce Office of the Inspector General (OIG). In the report to the OIG, we made eight recommendations to improve our program. We began implementing these recommendations and taking other actions even before submitting the report.

Those actions included requiring the use of electronic collaboration tools for full-time teleworkers to improve the accessibility and interaction between teleworking employees, their supervisors, and their on-campus colleagues.

We also revised and strengthened our procedures in a number of ways. We developed new, more effective guidance, made these policies fully accessible and then conducted extensive training sessions to make sure that our supervisors understood and followed the policies so that better controls were in place. Based on our review, we discovered some additional areas where policies, procedures and compliance could be improved and took action accordingly.

Further, we have standardized the process for accessing relevant electronic records to be used when investigating alleged violations. We are clarifying what steps supervisors should take if they suspect any misconduct and we are ensuring that we proceed appropriately and consistently in those situations.

All of these actions help ensure our programs are effective, that employees are accessible and responsive, and that expectations both for supervisors and employees are clearly communicated and understood.

Further, to ensure that we have the best tools and procedures in place, the USPTO has also established two cross-agency teams (including representatives from Patents, Employee Relations, Labor Relations and Office of General Law) to (1) explore *additional* ways to prevent abuse and intervene early, and (2) to review the *entire* conduct process including consistent, effective enforcement of policies.

Also, working closely with the Department of Commerce, at the end of last month we contracted with the National Academy of Public Administration (NAPA). NAPA is an independent, nonpartisan, nonprofit organization chartered by Congress to improve government performance. We engaged this highly respected group to provide a thorough and independent evaluation of our telework programs and to advise us on further opportunities for improvement and the application of any additional best practices in this area.

Following the press coverage this summer, our management team conducted briefings for your committee staffs and also for House Appropriations committee staff on the USPTO's telework program, on the report submitted to the DOC Inspector General in July 2013, and on the improvements already implemented by the USPTO. We will continue to provide your committees with updated briefings upon your request. And, since that time we continue to implement management changes addressing time and attendance, including through engagement with our unions.

Chairman Goodlatte, Chairman Issa, we understand that some serious issues were raised in recent press reports. Please be assured that we are taking many important and necessary steps to strengthen our telework program and improve controls to best manage our program so that it serves our innovators and remains one that is aspired to by all other Federal entities.

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Chairman ISSA. Thank you.
Mr. Zinser.

**TESTIMONY OF THE HONORABLE TODD J. ZINSER,
INSPECTOR GENERAL, U.S. DEPARTMENT OF COMMERCE**

Mr. ZINSER. Chairman Goodlatte, Chairman Issa, Ranking Members Conyers and Cummings, we appreciate the opportunity to testify today.

Earlier this year, internal PTO reports, which were published in the Washington Post, in an investigative report issued publicly by my office concerning waste and mismanagement at the Patent Trial and Appeal Board, have raised serious questions about PTO's management of its workforce, in particular, whether time and telework abuse have become a systemic problem at PTO.

A number of factors place PTO at significant risk for time and telework abuse. These include PTO's increased flexi-time policy, the very large percentage of employees participating full-time in telework programs, limitations placed by PTO's senior management on the use of tools and data when time or telework abuse is suspected, and what is at least perceived to be a culture that has developed over time that has de-emphasized time and attendance rules in favor of patent examiner production results.

The 32-page report produced by PTO investigators contained very candid quotes from more than 75 interviews with supervisors and managers about these risk factors, some of which I will repeat here. We are currently looking into several time and attendance matters and auditing PTO's quality assurance program, including our review of end-loading and patent mortgaging.

End-loading occurs when patent examiners submit large amounts of their work at the end of the quarter rather than consistently throughout the quarter. Supervisors describe the end-loading problem in the following manner: "Some make you question whether the excessive end-loaders were actually working." Another stated, "On its face, it raises the question about how good it can be if it all was done at the end."

Patent mortgaging occurs when examiners deliberately submit incomplete work to get automatic credit necessary to meet their production goals. Unlike end-loading, PTO considers patent mortgaging to be misconduct. But some supervisors believe that PTO overlooks conduct issues as long as an examiner's performance is acceptable. One supervisor summed it up this way: "They overlook conduct issues. They don't care anymore. The only focus is that we are the number one agency with happy employees."

While this may not reflect the views of all supervisors, both end-loading and mortgaging do raise questions about how examiners are actually using their time. The risk created by the increased flexibilities in PTO's work schedules and alternative work locations were reflected by supervisors in the following comment: "There is quite a bit of flexibility for the examiners. The office should continue to work with POPA to allow supervisory patent examiners the tools to account for time and attendance and work performance."

Based on our work and our review of the internal PTO reports, I would offer the following observations:

First, based on the evidence we have seen so far, I do not think that time and telework abuse of PTO has yet reached the systemic level. But the only reason that is not the case is because I am confident that the vast majority of PTO employees are honest. It is, nonetheless, a serious problem.

The findings of our work and PTO's internal investigations indicate that it would be extremely easy, compared to other Federal workplaces, for large numbers of the PTO workforce to cheat on their time if they wanted to do so.

Second, PTO has been taking some corrective steps since learning of allegations of systemic time and telework abuse, but it needs to do more. PTO should go back and adopt the 15 specific recommendations made in the initial 32-page report.

In addition, supervisors and employee relations staff should be able to readily access any available data, when necessary, to resolve questions about an employee's time and attendance and work production.

Finally, PTO senior leaders need to ensure they do not minimize the problem. The first thing that should be done is that PTO senior leadership should recognize and reward the members of the investigative team responsible for documenting the problems and issuing the 32-page report.

Those employees who called our hotline about this problem are certainly whistleblowers, but so are the PTO team members who investigated and candidly reported their results to management. I would ask the senior leadership of PTO to protect them in their careers for their courage in issuing their report.

Chairmen Goodlatte and Issa, this concludes my statement. I look forward to answering any questions the Committee may have.

[The prepared statement of Mr. Zinser follows:]



Testimony of

The Honorable Todd J. Zinser
Inspector General

U.S. Department of Commerce

before a joint hearing of the

Committee on Oversight and Government Reform
and

Committee on the Judiciary
U.S. House of Representatives

***Abuse of USPTO's Telework Program:
Ensuring Oversight, Accountability and Quality***

November 18, 2014

Chairmen Goodlatte and Issa, Ranking Members Conyers and Cummings, and Members of the Committees:

We appreciate the opportunity to testify today concerning the telework programs of the U.S. Patent and Trademark Office (USPTO).

In October 2014, my office issued our annual report on the *Top Management Challenges Facing the Department of Commerce*.¹ We reported that USPTO faces significant workforce management challenges, and our testimony today will detail some of those challenges.

In the summer of 2014, our office issued two public investigative reports: one related to concerns with hiring practices at the Trademark Office, and the other related to waste and mismanagement at the Patent Trial and Appeal Board (PTAB).² In the Trademark Office investigation, we found that a senior official intervened in the hiring process to ensure that a nonselected candidate, who was the fiancé of a close relative of the official, was ultimately selected for a position as a trademark examiner. In the PTAB investigation, we found that managers and supervisors at USPTO were aware that, of their 38–51 paralegals (95 percent of whom participated in USPTO's Patent Hoteling Program), many had insufficient work assigned to them over a 4-year period despite a significant and growing backlog of appeals. As a result, USPTO wasted approximately \$5 million in salary and bonuses over that period on paralegals who had significant idle time and engaged in personal, non-work-related activities while on government time. Although the paralegals billed significant time to a code designated for doing no work, the vast majority of them received the highest performance rating of "outstanding." Moreover, supervisors and senior managers who oversaw the program received over \$700,000 in performance bonuses during the relevant time period.

In addition to our public report on the waste and mismanagement at PTAB, our October 2014 *Top Management Challenges* report also noted that additional challenges exist with the management of USPTO's telework programs. In a 16-page memorandum dated July 8, 2013, USPTO responded to OIG's request that it examine allegations of systemic misreporting of time and attendance and how supervisors did not have the tools, and were not empowered by USPTO senior management, to adequately address it. USPTO concluded that its investigative team "was not able to reach a conclusion on whether some Patent Examiners are accurately reporting T&A [time and attendance] or whether the Agency has effective controls to guard against ... abuses" and that "there are no records that could be relied upon or referenced to support such findings." Essentially, the 16-page memorandum failed to substantiate multiple anonymous allegations of systemic time and attendance abuse occurring at USPTO. The 16-page memorandum did, however, include eight recommendations, including supervisory training and better oversight of such practices as "end-loading" and "patent mortgaging."

¹ U.S. Department of Commerce Office of Inspector General, October 16, 2014, *Top Management Challenges Facing the Department of Commerce*, OIG-15-002, Washington, DC: Department of Commerce OIG.

² See DOC OIG, July 8, 2014, *Review of Conduct by a High-Ranking Official in the Hiring of a Trademark Organization Employee*, 13-0726, Washington, DC: DOC OIG, and *Ibid.*, July 28, 2014, *Review of Waste and Mismanagement at the Patent Trial and Appeal Board*, 13-1077.

After receiving USPTO's July 2013 memorandum, OIG learned of an earlier, 32-page version of the report—which was not officially provided to OIG, and which included findings and recommendations, in much greater detail, in the following areas:

- time and attendance (including claiming time based on work submitted as completed instead of time worked, as well as alleged overtime pay for time not worked)
- *end-loading* (i.e., when employees save significant quantities of their work for the very end of the fiscal quarter, potentially affecting examination quality while meeting or even exceeding production standards)
- *mortgaging* (i.e., when patent examiners knowingly submit incomplete work for credit in the bi-week period before they actually correctly complete the work)
- performance plan issues (e.g., examiners receiving bonuses they might not have earned, the difficulty supervisors have monitoring the quality of the work, and concerns that performance standards have become too easy for examiners to meet)

Unlike the 16-page report, the 32-page report concluded that 12 of 16 specific allegations were substantiated. The 32-page report found that patent examiners are provided wide flexibility in performing their work with a variety of work schedules and programs. However, supervisors are not provided sufficient tools for ensuring that their employees are actually working the hours claimed. Further, USPTO senior management has essentially prohibited supervisors and employee relations personnel from obtaining building and computer records to follow up on employees suspected of misrepresenting time worked on their time sheets—or allowing these records to be used as evidence in a disciplinary action—giving the impression that time and attendance abuse is tolerated at USPTO.

The 32-page report also made 15 specific recommendations, including the following: requiring patent examiners to work in their USPTO office or at their approved telework location; mandating the use of collaboration tools including the presence indicator; enforcing leave requesting procedures; implementing end-loading deterrents; and allowing the full use of building and computer records by managers. (See appendix B for a comparison of the recommendations contained in the two USPTO reports, as well as USPTO's reported status of its implementation of recommendations as of August 14, 2014.)

While these findings and recommendations were not formally issued by the agency, their publication by *The Washington Post* highlights additional controls that may be put in place—and identifies challenges that USPTO must address.

My office has been following up on a number of the issues raised in the internal USPTO reports concerning its telework program. My testimony today will address the following:

- i. Background information on USPTO, including recent legislation affecting the U.S. patent award system, a brief overview of the current status of patents awaiting examinations, and the various flexible schedule options available to patent examiners
- ii. OIG's ongoing USPTO-related audit and investigative work, including analyses of patent mortgaging and end-loading
- iii. USPTO's current and ongoing corrective actions—as well as additional OIG recommendations for further action

i. Background

America Invents Act

USPTO, as the U.S. authority for issuing all patents and trademarks, has a critical role in awarding intellectual property (IP) rights and working on the global stage to further IP policy, protection, and enforcement. As a fee-funded agency with approximately 12,000 employees, USPTO has undergone significant changes over the past 5 years. In September 2011, Congress enacted and the President signed the Leahy-Smith America Invents Act (AIA), representing the most fundamental change to the U.S. patent system in more than 50 years. Among the reforms under AIA, Congress gave USPTO greater authority to set and retain fees, to ensure it has sufficient resources for its operations. In FY 2015, USPTO expects to collect over \$3 billion in revenue from patent and trademark fees. USPTO has also greatly expanded the size of its examiner and patent trial and appeal judge workforce over the past 5 years, while expanding its telework program.

Patent Application Backlogs and Pendency

Although USPTO has made progress in reducing the time an applicant waits to have a new application reviewed (known within USPTO as “pendency”), waiting times for other types of filings have increased (see table 1, next page). The patent application backlog decreased from 718,835 applications in FY 2009 to 616,019 applications as of the third quarter of FY 2014. During that same time, however, waiting times for another type of filing, the request for continued examination (RCE³), increased from 2 months in FY 2009 to 8.7 months as of the third quarter of FY 2014. Pendency also grew for appeals filed with PTAB. Although USPTO has begun to reduce the backlog of RCEs, the rapid rise in the RCE backlog over the last 5 years highlights the challenges USPTO encounters when it prioritizes the review of new applications to the detriment of other types of filings. The steady growth in the appeal backlog and in waiting times also raises concerns about the timely adjudication of IP rights at USPTO.

³ RCEs are patent applications resubmitted for consideration after an examiner has previously rejected the inventor's claims.

Table 1. Backlogs and Pendency at USPTO for New Patent Applications, RCEs, and Appeals FY 2009–FY 2014

FY	Patent Application Backlog	Traditional Patent Pendency (Months) ^a	RCE Backlog	RCE First-Action Pendency (Months) ^b	PTAB Ex Parte Appeal Backlog ^c
2014	605,646	27.4	46,441	6.2	25,658
2013	584,998	29.1	78,272	7.8	25,570
2012	608,283	32.4	95,200	5.9	26,837
2011	669,625	33.7	63,487	4.0	24,927
2010	708,535	35.3	40,939	2.4	17,754
2009	718,835	34.6	14,620	2.0	12,489

Source: USPTO

^a Average number of months between an application's filing and its disposal.

^b Average number of months between the filing of an RCE and the examiner's initial decision.

^c Average number of months between PTAB's assigning an appeal number and its making a decision.

USPTO must also balance the pressure to issue patents in a timelier manner with its responsibility to ensure that it issues high-quality patents. Earlier this year, we initiated an audit of USPTO's quality assurance programs, to determine their sufficiency in preventing the issuance of low-quality patents and assess quality reviews performed by USPTO to measure examiner performance. Included in our work is an examination of the end-loading and mortgaging issues identified by the USPTO's internal reports.

Telework and Work Schedule Flexibilities

USPTO has established eight telework programs for its patent examiner and management workforce—and also permits telework for the other members of its workforce. A list describing USPTO's telework programs is included in appendix A.

In addition, USPTO has implemented an Increased Flexitime Program (IFP), which provides employees increased flexibility with respect to their work schedules (see figure 1, next page, for major elements of the IFP).

Figure 1. Major Elements of the IFP



Source: OIG analysis of USPTO data

The IFP

- allows full-time employees to (a) work their regular 80 hours a pay period in fewer than 10 full work days (but in a minimum of 4 days per work week) and (b) vary the number of hours worked each day, as well as the days worked each week—as long as they satisfy core hour requirements.
- requires employees to be in paid status (e.g., working from home or an alternative site; attending a conference, training, or officially sponsored event; being on travel status) or on approved leave (including compensatory time and credit hours) 1:00–2:00 p.m. each Tuesday (1:00–2:00 p.m. each Thursday for Patent Office Professional Association, or POPA, bargaining unit members).
- permits employees to work between 5:30 a.m. and 10:00 p.m., Monday–Saturday (as well as work credit hours on Sunday).
- enables mid-day flexibility (i.e., employees may work more than 1 work period during the same day).

Further, USPTO's "Employee Responsibilities" note that employees

- are responsible for keeping track of their time and accurately recording their time and attendance;
- must notify their supervisors if they will be absent on a weekly basis, prior to the absence; and
- are required to leave "out of office" notices on their e-mail and phone, as appropriate.

The telework and work schedule flexibilities adopted by USPTO, combined with what are essentially production quotas for patent examinations, present particular challenges and risks for ensuring workforce compliance with time and attendance regulations. In addition to specific allegations of time and attendance abuse currently under OIG investigation, we have also examined the practices of end-loading and patent mortgaging. As discussed below, both end-loading and patent mortgaging have implications for patent quality. Both practices may also occur because some patent examiners may not be working for periods of time during the early bi-weeks (i.e., 2-week pay periods) of each quarter and engage in end-loading or mortgaging in order to meet their production goals for the quarter.

II. Ongoing OIG Work

Time and Attendance Investigations

OIG is currently investigating the following allegations of time and attendance abuse by patent examiners:

- A Trademark examiner and another USPTO employee allegedly go to their offices in the morning—and then immediately leave for other destinations, returning at the end of the day.
- An anonymous complaint reported reading an article online, which included information that a patent examiner had run for election and stated that he was available "at all times."
- USPTO reported that a patent examiner at USPTO allegedly falsified time and attendance records for over 600 hours, amounting to a possible loss of over \$24,000 to the government. (See appendix C for OIG analysis of time and attendance records.)
- An anonymous complaint indicated that a patent examiner had been bragging about producing zero work products for a 6-month period—and that no action had been taken against the examiner.

We are also investigating the following instances of alleged time and attendance abuse reported by lower-level supervisors, then disregarded by more senior management:

- An examiner, falsely claiming to be working for at least 304 hours, was given notice that the behavior was inappropriate; the examiner continued not working but changed behavior to avoid detection; the examiner was permitted to enter into a "last chance agreement."⁴
- Another examiner engaged in time and attendance abuse after already serving a 21-day suspension for the same misconduct; one official proposed the examiner's removal, yet the deciding official offered the examiner a last chance agreement.
- An examiner who engaged in time and attendance abuse as well as mortgaging received performance awards as a result of the mortgaging; however, the USPTO investigator was not permitted to access related computer data, and the employee was ultimately found only responsible for not following the agency hoteling policy.
- An examiner falsely claimed 25 hours, for which there was no evidence of work, and received \$1,333.25 in pay; however, the use of computer data was not permitted and, subsequently, the examiner only received a counseling letter for not staying on schedule.
- Another examiner's supervisor was denied access to review the employee's building badge swipe records by agency management, even after the supervisor obtained evidence that the employee was committing time and attendance abuse.

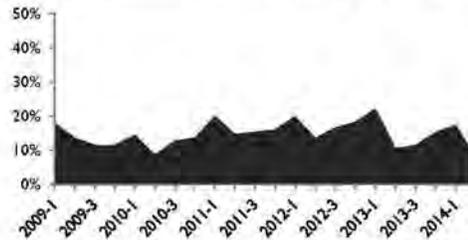
End-Loading

Examiner production is evaluated quarterly; end-loading occurs when patent examiners submit a high volume of written decisions at the end of each quarter instead of submitting work consistently throughout the quarter. USPTO's 32-page report found that 71 percent of the supervisors they interviewed and 90 percent of the 25 directors they interviewed believed that end-loading could compromise the quality of examiner work. Further, while USPTO does not consider end-loading to be misconduct, the 32-page report noted that end-loading "allows examiners great freedom in their work hours, and no real requirement to be present . . . which leads to a lack of accountability towards pay for work performed and the supervisors ability to accurately and truthfully certify WebTA."

To identify end-loading, our quality assurance audit flagged examiners who submitted more than 50 percent of their work in the last 4 weeks of a quarter. Over the last 4 fiscal years, we found that almost one-fifth (approximately 15–20 percent) of examiners end-loaded in any given quarter (see figure 2, next page)—making end-loading a wide-spread practice throughout USPTO.

⁴ In a last chance agreement (LCA) between an agency and employee, the employee agrees to comply with the terms of the agreement in order to avoid an adverse action such as a removal from service. LCAs are a form of alternative discipline that can involve the employee waiving some rights to file an appeal with the Merit Systems Protection Board should they be terminated for violating the agreement.

Figure 2. Percent of Examiners who End-Loaded, by Quarter (FYs 2010–14)



Source: OIG analysis of USPTO data

Unfortunately, USPTO is unable to track all of the quality errors that result from end-loading. Prior to April 2014, when supervisors identified errors in examiner decisions, there was no requirement to track those errors in a supervisory database. Since April 2014, the database tracks some examiner errors. Supervisors have discretion to choose whether errors actually count against examiners' error rates, which affect the quality element of their performance appraisals. In addition, the supervisory database does not track which cases supervisors reviewed to determine examiner error rates—data that could be used to establish patterns. We found that, without knowing all of the cases reviewed by supervisors or other quality specialists, it is difficult for USPTO to evaluate the impact of end-loading on the quality of determinations issued to applicants.

Beyond concerns about its effect on quality, the prevalence of end-loading also raises questions about employee time and attendance. If a fifth of all patent examiners are not submitting the majority of their work until the end of the quarter, questions inevitably arise about how they are spending the rest of their certified work time. Examiners certify that they are working 80 hours every 2 weeks. Some end-loaders may have a legitimate reason for not submitting their work until the end of the quarter: perhaps they conduct their examinations incrementally on multiple reviews before submitting their decisions simultaneously. However, in other cases, end-loading could represent employees actually doing the majority of their work at the end of the quarter.

Even if an examiner can meet production goals for the entire quarter in only half a quarter, that employee is still required to spend the remaining time reviewing additional applications or conducting other official duties. As USPTO's 32-page report notes, "The prevalence of end-loading suggest[s] that there [are] a significant number of examiners [who] are not working for significant periods of time during the early bi-weeks of each quarter since these examiners are only submitting completed work at the end of the quarters and/or year. The end-loading examiners are being paid the same salaries and bonuses as examiners who are consistently submitting work throughout the quarter/fiscal year."

Mortgaging

USPTO's 32-page report also substantiated evidence of mortgaging—a practice that, unlike end-loading, USPTO considers misconduct. Examiners must complete their work in accordance with quarterly production goals, in order to receive performance awards and avoid a progressive number of oral and written warnings for poor production. If examiners are in danger of missing those goals, they may decide to engage in "patent mortgaging," or submitting knowingly incomplete applications to receive credit before actually completing the work. Senior examiners are able to receive credit for their submitted work prior to review. In addition, as a result of a 2010 agreement between USPTO and POPA, GS-12 and GS-13 examiners without signatory authority are also able to receive credit upon submission of certain types of applications without first going through supervisory review. This procedure is referred to as "auto-count."

Although examiners earn credit for incomplete work, those decisions are not directly sent to applicants. Before that happens, all applications are reviewed for completeness by administrative staff at USPTO. If those employees find missing or incomplete administrative information on the application, they return the applications to examiners for correction before they are mailed. Hence, some examiners can deliberately submit incomplete work, receive credit, and then complete the work after knowing it would be returned by the administrative staff.

The number of mortgaging allegations has increased in recent years. Between October 2008 and August 2014, 121 examiners were accused of mortgaging. Over half of these allegations occurred over the 11-month period from October 1, 2013, to August 29, 2014 (see table 2, below).

Table 2. Mortgaging Allegations Received by USPTO

Fiscal Year (FY)	Allegations of Mortgaging	Total Patent Examiner Corps
2009	2	6,243
2010	5	6,225
2011	11	6,780
2012	18	7,935
2013	21	8,051
2014	64	7,986 ^a

Source: OIG analysis of USPTO data received between October 1, 2009, and August 29, 2014.

^a Data as of June 5, 2014.

Unfortunately, mortgaging is not easy to detect. Supervisors can monitor the number of administrative returns for each examiner through a supervisory dashboard. However, there may be legitimate reasons for an examiner to have an application returned. For example, in FYs 2012 and 2013, the majority of patent examiners had at least one application returned by

administrative staff for corrections. Thus, although supervisors can monitor administrative returns, they cannot readily identify mortgaging without analyzing behavioral patterns of these patent examiners.

Further, USPTO applies a wide-range of responses to allegations of mortgaging. The penalties for a first occurrence range from reprimands and counseling to as much as a 14-day suspension (see table 3, below). Given the challenges associated with identifying mortgaging and the wide range of possible disciplinary outcomes, we found that USPTO should consider revising its policy about mortgaging in order to discourage the practice.

**Table 3. Decisions Rendered for Allegations of Mortgaging*
Between October 2009 and August 2014**

Disciplinary Actions or Decisions Rendered for Allegations of Mortgaging	Frequency
Abeyance decision	15
No action taken	13
Suspension: 7 days or less	13
Suspension: 8–14 days	12
Oral counseling	7
Pending	7
Reprimand	7
Counseling letter	6
Resignation	5
Employee exonerated	2
Settlement	2
Suspension: more than 14 days	2
Discharge during probationary period	1
Factual situation unproven	1
Insufficient evidence	1
Rescinded action	1
Retirement (voluntary)	1

Source: OIG analysis of USPTO data

*As of August 2014, 96 of the 121 alleged mortgaging cases reached a final decision and 25 have not been resolved.

If USPTO fails to identify and discipline employees for mortgaging, this can result in examiners receiving performance bonuses they did not earn. As part of our ongoing review of mortgaging, we found that the majority of examiners who had a large number of returns relative to completed patent application reviews—a possible indicator of mortgaging—still received performance awards. Our preliminary analysis indicates that this group of employees, only some of whom may be manipulating the performance system, received millions of dollars in performance bonuses over the last 3 fiscal years. We are continuing to examine this matter;

however, to date, our work suggests that USPTO should respond more effectively to suspected mortgaging.

III. Current and Ongoing USPTO Responses—and Additional OIG Recommendations for Further Response

USPTO Response

According to USPTO, it is currently implementing seven of the eight recommendations from its 16-page report on time and attendance abuse. USPTO conducted additional trainings with supervisory patent examiners—providing information about time and attendance requirements, how to evaluate the quality of examiner work products, and how to determine whether to approve employee time sheets. Additionally, USPTO centralized its policies related to time and attendance and employee misconduct in order to ensure that supervisors have ready access to all relevant requirements.

More substantively, as of June 2013, USPTO required its full-time teleworking examiners to use collaboration tools (e.g. e-mail and instant messaging) while working—but excluded the requirement to use the presence indicator on its supervisory dashboard. Previously, examiners working from home were allowed to remain offline while performing work activities. USPTO now also instructs its supervisory examiners to consider examiner production and responsiveness when determining whether to certify employee time sheets. If examiners have low productivity and are unresponsive to their supervisors' e-mails or phone calls, supervisors are instructed to notify the employee. If the employee does not respond promptly, USPTO will consider the employee absent without leave (AWOL), putting the employee in a nonpay status. Still, since April 2013, only three employees have been charged with being AWOL.

USPTO is also taking some steps to address patent mortgaging and end-loading. USPTO initiated a working group on mortgaging—and, to ensure that it is handled consistently across the organization, the agency report that it has developed guidance for supervisors and employee relations specialists on how to identify and discipline employees for mortgaging. To address end-loading, USPTO piloted an initiative in one of its technology centers that created additional reporting requirements. Under the initiative, if examiners do not submit their work in two pay periods, they are required to meet with their supervisors; if they continue not submitting work for a third pay period, they meet with the technology center director. The agency recently deemed this program successful and plans to expand it to all examiners on October 19, 2014.

Recommendations for Additional Actions

OIG believes that USPTO could take additional actions to prevent and detect employee time and attendance abuse:

- A. Better use the data already available.** USPTO requires its employees to swipe their ID badges upon entering the USPTO building and also collects data on when employees are logged on to their computers. However, USPTO does not require full-

time teleworkers to use the presence indicator, one of the collaboration tools.⁵ USPTO's 32-page report recommended that supervisors should have access to these and other available records and record-gathering methods when investigating employee misconduct. (See appendix D for a brief explanation of tools available for investigating time and attendance abuse at USPTO.)

Instead, supervisors currently must go through a series of steps to obtain this information. A supervisor who suspects time and attendance abuse must first build evidence and present a case to the next-level supervisor, the technology center director. The decision to pull the records must then be authorized by the assistant deputy commissioner (ADC), who supervises the technology center director. Thereafter, each request is reviewed on a case-by-case basis; there are no established thresholds for what constitutes an acceptable standard for pulling the data.

In other words: supervisors must go through a process interviewees described as "burdensome" in order to have access to records which could help them promptly identify or substantiate time and attendance abuse. USPTO's 32-page report identified specific examples of supervisors who tried and failed to obtain these records. One supervisor stated: "ADC said no. We had evidence that the time sheet was not accurate, but they still said no. Was 4–5 months ago and there was a push not to pull records. But my Director felt the situation warranted it and ran it up to the ADC."

- B. Gather additional information.** USPTO does not require its employees to swipe their badges when leaving the USPTO campus. Requiring employees to swipe badges when leaving would, in the event of a time and attendance investigation, provide additional information to help determine whether abuse was taking place.

Further, USPTO decided not to implement a recommendation in both the 32- and 16-page reports that would require examiners who claimed overtime to specify the work product created during overtime. This is an easy-to-implement internal control for preventing overtime abuse. Collecting this information would make it easier for supervisors to ensure that the overtime was warranted.

As noted previously, supervisors do not collect all relevant error information found during supervisory reviews. Collecting this data would help determine the extent examiner behavior (e.g., end-loading) impacts the quality of examiner decisions—and could assist with identifying patterns of potential abuse by specific examiners.

- C. Reassess its production goals.** Many of the allegations of time and attendance abuse state that it is possible because of USPTO's production goals. Nearly all of the individuals interviewed as part of USPTO's reviews believe that performance standards have become easier by providing patent examiners more time to meet their production goals.

⁵ Documents provided by USPTO do not indicate that employees teleworking fewer than 80 hours per pay period are required to log on or use collaboration tools.

Performance goals matter due to potential excess idle time and excess capacity. For example: an examiner who works 80 examining hours, and is expected to complete a patent review every 20 hours, must complete 4 reviews to meet the production goal. Of course, an examiner who needs only 65 hours to complete the reviews for which 80 hours have been allotted can theoretically do nothing for the excess 15 hours and still achieve a fully satisfactory rating. Alternatively, that employee could complete a fifth review and claim 100 hours of work, in order to receive overtime pay—and potentially earn a performance bonus for completing 110 percent of goal.

Reports of end-loading, time and attendance abuse, and telework abuse suggest that at least some examiners have excess capacity in their schedules. However, despite major changes to the technologies used for patent review—for example, examiners today use online databases instead of paper archives—USPTO did not adjust its production goals between 1976 and 2009, and the minimal updates to the production goals since 2009 all resulted in giving examiners more time for the same amount of work. To increase the efficiency of USPTO and reduce the risk of time and attendance abuse, USPTO should ensure that it has established optimal production goals, taking into accounts variations across art units.

Appendix A: Telework Programs Available at USPTO

Table A-1. Programs Available to Patent Examiners and Their Supervisors

PROGRAM	DESCRIPTION
Patents Hoteling Program (PHP)	Participants (must be GS-12 and higher) have the option to perform officially assigned duties at home during paid working hours. It also includes a component whereby participants can remotely reserve workspace in temporary offices located throughout the USPTO's Alexandria, VA campus.
Patents Hoteling Program 50-mile (PHP 50-mile)	PHP provides participants the option to request a change to their official duty station to their home address if they live within 50 miles of the USPTO Alexandria, VA campus. It eliminates the requirement to report to headquarters twice per bi-week.
Telework Enhancement Act Pilot Program (TEAPP)	The program allows employees teleworking full-time to decide, for their own convenience, to live greater than 50 miles from USPTO located in Alexandria, VA, to change their duty station to an alternate worksite in the city in which they live. The employee must travel to USPTO when directed by the office.
National Treasury Employees Union (NTEU) Hoteling Program (PHP-N)	Participants give up their office and use a defined set of temporary generic offices/cubicles when on the Alexandria campus and in the PTO offices at Randolph Square in Arlington, VA.
Patents Telework Program for NTEU 243 (PTP-N)	PTP-N provides the opportunity to telework from one to four days a week.
Patents Management Telework Program (PMTP)	This program for managers and non-bargaining unit employees allows participants telework up to 32 hours bi-weekly.
Patent Telework Program (PTP)	This program permits patent examiners, patent reexamination specialists, and some bargaining unit employees, to work at home: <ul style="list-style-type: none"> • PTP-10: 10-hour option (one day per pay period, up to 10 hours) for GS-9 or 11 • PTP-20: 20-hour option (one day per week up to 10 hours per day) for GS-12 or higher • PTP-32: 32-hour per pay period option for GS-12 or higher and includes telework equipment
PMTP Pilot Hoteling Program	This pilot program allows patent managers to work from home full-time.
Supervisory Patent Examiner/Management Quality Assurance Specialist (SPE/MQAS) Full-Time Telework	This program permits eligible SPEs and MQAS to work full time at home.

Table A-2. Programs Available Within Offices at USPTO

PROGRAM	DESCRIPTION
Office of the Chief Information Officer (OCIO)	In FY 2013, telework participation in OCIO increased by 8 percent over the previous year, with 359 trained teleworkers in OCIO working at an alternate worksite 1–2 days per week or on a situational basis.
Office of the Chief Financial Officer (OCFO)	In FY 2013, 100 percent of all position activities in OCFO were eligible to telework in some capacity. Depending on the position activities, the employee may be eligible to telework episodically or 1–3 days a week. OCFO had 90 percent of employees participating in the OCFO Telework Program.
Office of Administrative Services (OAS)	OAS incorporated telework into its Continuity of Operations Plan (COOP) exercise, which encouraged all business unit COOP managers to telework.
Office of Human Resources (OHR)	At the end of FY 2013, 23 OHR staff telework two days per week, 48 at least 1 day per week and 21 telework on a situational basis.
Office of the General Counsel (OGC)	In FY 2013, OGC had approximately 90 percent of eligible positions in a telework status, an increase of about 12 percent from FY 2012.
Office of Equal Employment Opportunity and Diversity (OEEOD)	Participating employees have been permitted to telework 1–2 days per week.
Patent Trial and Appeal Board (PTAB)	PTAB ended FY 2013 with 98 percent of eligible positions teleworking.
Trademarks	In FY 2013, 91 percent of Trademark employees in all work units had the opportunity to telework 1 or more days per week. In addition, 19 percent of Trademark examining attorneys were participants in the Telework Enhancement Act Pilot Program in 28 different states.
Trademark Trial and Appeal Board (TTAB)	In FY 2013, 85 percent of eligible positions teleworked. During the same fiscal year, TTAB employees were offered additional full-time telework opportunities. Additionally, TTAB established four new dual hoteling offices.

Sources: FY 2012 Telework Annual Report; FY 2011 Telework Annual Report; Office of Personnel Management, 2013 Status of Telework in the Federal Government

Appendix B: Status of USPTO Recommendations

	32-PAGE REPORT	16-PAGE REPORT	CURRENT STATUS*
1	Management should enforce work schedule policies	Patents should monitor the effectiveness of a new policy on certifying time and attendance (Final report #1)	USPTO reports it is engaged in ongoing monitoring of the new policy
2	Management should require employees to work at USPTO or approved location	Removed	No status
3	Implement "end-loading" deterrents	USPTO should review the quality element in the Performance Appraisal Plan (PAP) (Final report #3)	USPTO reports it has implemented a pilot project where employees have to submit at least one item per month in order to avoid a counseling session. USPTO reports it is developing training on how to work consistently throughout the pay period
4	USPTO should review the quality element in the PAP	USPTO should review the quality element in the PAP (Final report #3)	USPTO reports it is providing training to supervisors on the quality element, and conducting a review of its effectiveness
5	USPTO should revise the docket management element to prevent unjustified "outstanding" ratings and performance awards	USPTO should "continue to evaluate" the docket management element (Final report #4)	USPTO reports that it is meeting regularly with the union to evaluate the docket management element of the PAP
6	Review "auto-count" feature to ensure that it cannot be used for misconduct	Review "auto-count" feature to ensure that it cannot be used for misconduct (Final report #3)	USPTO reports that it is continuing to evaluate the "auto-count" feature
7	Requirement to log in while working	Final report notes that this requirement was recently implemented (Final report #2)	USPTO reports that it has reached an agreement with the union so that full-time teleworkers will have to use certain tools which require being logged in
8	Mandatory use of collaboration tools, including presence indicator	Final report notes that this requirement was recently implemented, but not presence indicator (Final report #2)	USPTO reports that it has reached an agreement with the union so that full-time teleworkers will have to use certain tools which require being logged in
9	Overtime should be made available only to certain employees based on performance, and eligibility should be frequently assessed	USPTO should "explore the reasonableness" of having employees report what they were working on while claiming overtime (Final report #5)	USPTO reports that it has evaluated this and elected not to require examiners to specify what they are doing while claiming overtime
10	Delegate the authority to pull investigative records from ADCs to Employee Relations Division (ER)		USPTO reports that the policy on pulling records, which essentially "case by case," has been communicated to ER
11	Managers should be given full access to investigative records when misconduct is suspected	USPTO should communicate its policy on pulling records to supervisors (Final report #6)	USPTO reports that the policy on pulling records, which essentially "case by case," has been communicated to supervisors

	32-PAGE REPORT	16-PAGE REPORT	CURRENT STATUS*
12	Management should enforce leave requesting procedures	Removed	No status
13	Place policies in a central location	Place policies in a central location (Final report # 7)	USPTO reports that policies have been placed in a central location
14	Provide regular training to supervisors	Provide regular training to supervisors (Final report #8)	USPTO reports that training has been posted, and that supervisors will be required to take it within the first quarter of FY 2015
15	Perform cost benefit analysis on FY 2010 changes to PAP	Removed	No status

Source: USPTO

Note: Rows highlighted in dark orange indicate recommendations that were not included in the 16-page report. Rows highlighted in light orange indicate recommendations with noted differences.

* Implementation status as of August 14, 2014.

Appendix C: Exhibit on Examining Time and Attendance Data

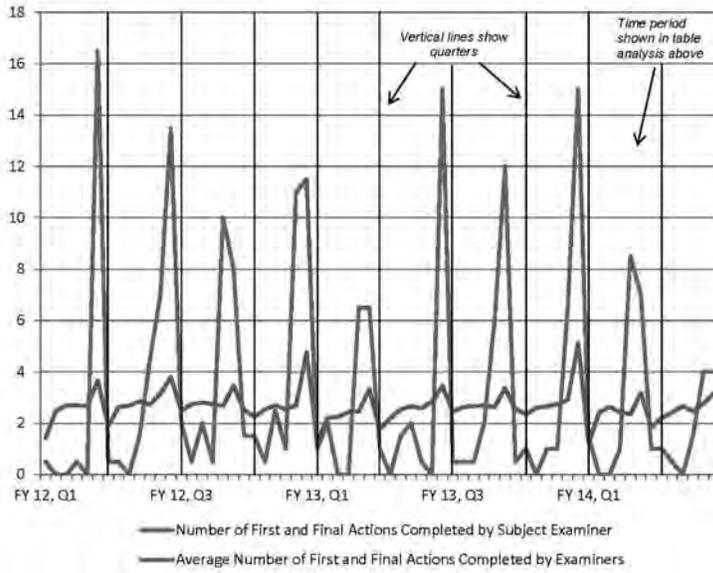
Table C-1. One Quarter of Time and Attendance Data of an Examiner Suspected of Cheating

Date	Badge swipe time in ^a	VPN login	Hours claimed by employee as worked	Discrepancy
10/7/2013	5:09 PM	3:19 PM	10 hours	3 hours, 19 minutes
10/8/2013	10:41 AM	5:30 AM	10 hours	0
10/9/2013	7:28 AM	1:45 PM	10 hours	0
10/10/2013	12:13 PM	5:30 AM	11 hours	0
10/11/2013	No Record	No Record	10 hours	10 hours
10/15/2013	10:32 AM	No Record	11 hours	0
10/21/2013	8:33 AM	No Record	10 hours	0
10/22/2013	No Record	No Record	10 hours	10 hours
10/23/2013	No Record	No Record	10 hours	10 hours
10/24/2013	No Record	No Record	10 hours	10 hours
10/28/2013	10:33 AM	No Record	10 hours	0
10/29/2013	11:39 AM	No Record	10 hours	0
10/30/2013	No Record	No Record	10 hours	10 hours
10/31/2013	No Record	No Record	10 hours	10 hours
11/4/2013	No Record	No Record	10 hours	10 hours
11/5/2013	2:34 PM	No Record	10 hours	2 hours, 34 minutes
11/6/2013	No Record	No Record	10 hours	10 hours
11/7/2013	No Record	No Record	10 hours	10 hours
11/12/2013	2:14 PM	No Record	10 hours	2 hours, 14 minutes
11/13/2013	No Record	No Record	8 hours	8 hours
11/14/2013	No Record	No Record	8 hours	8 hours
11/15/2013	No Record	No Record	8 hours	8 hours
11/18/2013	No Record	No Record	10 hours	10 hours
11/19/2013	No Record	No Record	10 hours	10 hours
11/20/2013	No Record	No Record	8 hours	8 hours
11/25/2013	No Record	11:06 AM	8 hours	0
11/26/2013	No Record	5:30 AM	8 hours	0
12/3/2013	No Record	No Record	10 hours	10 hours
12/4/2013	No Record	No Record	10 hours	10 hours
12/5/2013	No Record	12:25 PM	10 hours	25 minutes
12/6/2013	No Record	5:30 AM	10 hours	0
12/9/2013	No Record	No Record	8 hours	8 hours
12/11/2013	7:56 AM	No Record	12 hours	0
12/16/2013	8:49 AM	10:24 AM	10 hours	0
12/17/2013	12:31 PM	5:30 AM	10 hours	0
12/18/2013	10:27 AM	No Record	10 hours	0
12/19/2013	No Record	No Record	10 hours	10 hours
12/20/2013	1:00 PM	No Record	10 hours	1 hour
12/23/2013	No Record	No Record	11 hours	11 hours
12/26/2013	No Record	12:58 PM	11 hours	1 hour, 58 minutes
12/30/2013	12:52 PM	No Record	12 hours	2 hours, 52 minutes
12/31/2013	No Record	No Record	8 hours	8 hours
Total				
Discrepancy				209 hours, 22 minutes

Source: OIG analysis of USPTO data

^a USPTO does not capture badge swipe data exiting the facility.

Figure C-1. Analysis of Production Data Showing End Loading by a Patent Examiner Suspected of Cheating on Time and Attendance



Source: OIG analysis of USPTO data

Appendix D: Examples of Tools for Investigating Time and Attendance Abuse at USPTO

COMMUNICATION TOOLS	
Telephone/e-mail	Supervisors can call and e-mail their employees if they suspect time and attendance abuse. If an employee is not producing sufficient work and is unresponsive to supervisory inquiries, USPTO instructs the employee in writing to contact their supervisor. If they fail to promptly call their supervisor after this notification, they could be considered AWOL.
Mandatory collaboration tools	USPTO's mandatory collaboration tools include instant messaging, document/desktop sharing, virtual meeting tools, video communication and conferencing equipment. As of June 24, 2013, the use of these collaboration tools while working is mandatory for full-time teleworkers (hotelers), technology center quality assurance specialists, review quality assurance specialists, and patent examiners without full signatory authority who are being trained by senior employees who prefer to communicate via collaboration tools.
Optional collaboration tools	USPTO employees are not required to use a presence indicator while working. The presence indicator shows whether employees are available, busy but online, or offline. The presence indicators would allow supervisors to quickly tell whether their employees were online, but, because using the indicator is not mandatory, they are not currently a useful tool for preventing time and attendance abuse.
BUILDING DATA	
Badge-in records	Employees who work from the USPTO office are required to swipe their employee badges in order to enter the building. During a time and attendance abuse investigation, USPTO could use this information to determine whether onsite employees were actually in the building on days that they reported working.
Parking garage records	Similar information exists for employees who use a monthly parking pass to enter and exit the onsite USPTO parking garages.
Badge-out records	Employees who work from the USPTO office are not currently required to swipe their badges in order to leave the building. During a time and attendance abuse investigation, USPTO could use this information to determine whether onsite employees were actually in the building on days that they reported working.

COMPUTER DATA	
Time and attendance data	Employees enter their work hours every bi-weekly pay period. Supervisors certify employee time and can regularly view this information.
Examiner production data	Supervisors also have access to various databases with information on examiner production, including the Patent Application Location and Monitoring System and the Office Action Correspondence System. These systems allow supervisors to view examiner production (e.g. both decisions and interim actions). Looking at examiner production reports would show supervisors periods of examiner inactivity.
Virtual private network (VPN)	In order to access e-mail, collaboration tools, or USPTO databases, examiners must log on to USPTO's VPN. Employees could be working on hard copies of documents without being logged on to the VPN; nonetheless, during a time and attendance investigation, USPTO could use this information to determine whether employees logged on to their computers at any point on days that they reported working.
Universal laptop records	USPTO also has computer logs that include, for example, programs opened and other computer activities.

Source: USPTO

Note: Rows highlighted in white indicate information that supervisors can use to prevent and detect time and attendance abuse. Rows highlighted in dark orange indicate information that is not currently collected by USPTO. Rows highlighted in light orange indicate information that is collected by USPTO but must be requested by supervisors. This table does not necessarily include all possible data that could be used for resolving time and attendance abuse.

Chairman ISSA. Thank you.
Mr. Budens.

**TESTIMONY OF ROBERT D. BUDENS, PRESIDENT,
PATENT OFFICE PROFESSIONAL ASSOCIATION**

Mr. BUDENS. Chairman Goodlatte, Chairman Issa, Ranking Member Conyers, Ranking Member Cummings, and Members of the Committees, POPA represents more than 8,500 patent professionals at the USPTO, including more than 8,300 patent examiners who determine patentability.

The Washington Post has published articles alleging widespread time and attendance abuse among teleworking examiners. One article discussed a 32-page draft report that differed significantly from a final agency report submitted to the Inspector General.

The article alleged that information had been filtered out to hide the worst telework abuses. Another article alleged the draft report found that thousands of telecommuting and patent examiners had lied about their hours, language that is just not there.

Many assumed that the draft report was some sort of gospel fact rather than what it was, a collection of anecdotes and unsubstantiated allegations. That is why the draft was never sent to the IG in the first place and does not bear the signature of Fred Steckler, the USPTO's chief administrative officer.

Agency culture already ensures that any nonworking examiner will face disciplinary action. The Agency has a performance appraisal plan that tightly controls examiner performance. Examiner performance is tracked and reported every 2 weeks. Both quarterly and yearly performance is reported and used as the basis of disciplinary action.

Production is measured in 6-minute intervals using a page full of statistics. Quality is measured over 19 different examination duties. Docket management requires examiners to complete work within prescribed time periods. This is so complex that it requires computerized calculators now to enable examiners to track performance.

Stakeholder interaction requires examiners to provide courteous and professional service as well as advice on searching and prosecution issues to the public and their peers. Examiner actions are also reviewed by both the inventor and his or her attorney, who have a vested interest in pointing out examiner errors.

Anyone who understands patent-examining and the many tools the Agency has for tracking examiner activities knows that it would be impossible for the agency to have its most productive year ever, yet have thousands of examiners getting paid for not working. There is no systemic plague of poorly performing employees at the USPTO.

Any organization of 12,000-plus employees will have a handful of employees who run into difficulties in the workplace. When it becomes necessary, history shows that the Agency is capable of taking action to deal with employee behavior.

In August 2005, the National Academy of Public Administration issued a major study of the issues facing the USPTO. The NAPA report showed that the Agency removed 18 examiners in a year

when only 210 employees were removed from Federal service across all nondefense Federal agencies. That is almost 10 percent.

Before the Post articles, the Agency and POPA had already resolved some issues raised in the reports. When a few examiners had managed to receive performance bonuses while having overdue cases, we agreed to modify the dock and management award criteria to prevent this situation.

When it became apparent that the number of office actions returned for correction could skew an examiner's docket management performance, we agreed to further modify the element and award criteria to prevent this from happening.

POPA is concerned by the misinformation regarding work credit abuse or mortgaging by examiners. It has been alleged that examiners can intentionally submit incomplete work for credit and use that credit for making production and awards. This is just plain wrong. All the authors already know that mortgaging has never been acceptable behavior condoned either by the USPTO or POPA.

The best that can be said is that they are confusing mistakes for intentional lack of effort. It is a well-recognized practice that actions containing mistakes that are corrected in a timely fashion count as legitimately completed work.

Implementing disruptive procedures to ensure that an examiner is working the full 80 hours per pay period is counterproductive. Patent-examining is mentally demanding work. Much time is spent in activities that do not require being parked in front of a computer, such as reading and becoming familiar with patent applications, reading prior art references, reading applicant responses and appeal briefs, and answering phone calls.

Every time the examiner is interrupted by some tracking procedure, it represents a loss in productivity. Instead of focusing on examination, they have to focus on ensuring that their supervisors are aware that they are working.

The best way to ensure that employees are working is to have a good, objective set of performance goals and then determine if employees meet them. Examiners are paid to accomplish performance goals, not to keep an office chair warm and a light flashing on a supervisor's computer screen.

Thank you very much.

[The prepared statement of Mr. Budens follows:]**

**See Appendix for supplemental material submitted with this statement.



**STATEMENT OF
ROBERT D. BUDENS
PRESIDENT
PATENT OFFICE PROFESSIONAL ASSOCIATION**

Submitted to the

**COMMITTEE ON THE JUDICIARY
and the
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES**

On The Subject Of

**Abuse of USPTO's Telework Program:
Ensuring Oversight, Accountability and Quality**

November 18, 2014

Professional Representation for Patent Professionals

Chairman Goodlatte, Chairman Issa, Ranking Member Conyers, Ranking Member Cummings, and Members of the Committees,

Thank you very much for this opportunity to present the views of the Patent Office Professional Association (POPA) on issues facing the U.S. Patent and Trademark Office (USPTO) and POPA.

POPA represents over 8,500 patent professionals at the USPTO. The vast majority of these, approximately 8,300, are the agency's patent examiners – the engineers, scientists and attorneys who determine the patentability of the hundreds of thousands of patent applications received in the USPTO each year. POPA's members are diligent, highly skilled, hard working professionals. The quasi-judicial work they do is extremely complicated – bridging both technology and intellectual property law. They take great pride in the work they do and are committed to maintaining the quality and integrity of America's patent system.

America's economic struggles over the last several years have highlighted the importance of stimulating innovation and protecting intellectual property in the United States and the world. Throughout its history, America's ability to innovate has been a key driver in reversing economic downturns.

The U.S. patent system is a powerful engine driving innovation in America. It has been the foundation upon which America has built the most powerful and robust economy in history. The vital role of patents to the U.S. and global economies is clearly evidenced by the rapidly expanding efforts of inventors and companies to protect intellectual property throughout the world. And that intellectual property receives protection through the efforts of the many employees of the USPTO, particularly its Examining Corps – the thousands of patent examiners of the USPTO. They are the agency's greatest asset.

In August 2009, after decades of strained labor-management relations that left the USPTO with low morale, high attrition and a 750,000+ backlog of new unexamined patent applications, senior leaders from both the USPTO and POPA came together and agreed to embark on a social experiment to see whether or not we could change the relatively unproductive culture of conflict we had known for so long to a more productive culture of collaboration that would result in effective, workable solutions addressing the many problems facing the agency. Neither side knew whether we would be successful, but both sides knew that we needed to try a

different approach as we faced the many challenges of a massive backlog of work and a rapidly expanding workforce. We had much to gain and little to lose by trying.

Director David J. Kappos, set forth two primary parameters to govern our social experiment. First, he wanted employee performance and conduct problems treated as fixable, not terminal, as they had been treated for so many years. He understood that it usually requires about six years and several hundred thousand dollars to train a single examiner to the level of a primary examiner, i.e., an examiner able to independently examine patent applications and allow patents.

Second, he admonished us to not let the perfect get in the way of the good – find a 70% solution, put it to the test and then make iterative changes to further improve on the 70% solution. We would be much more likely to achieve a successful outcome through the iterative process than to spend considerable time and effort trying to find the perfect solution. To be clear, in 2009 these parameters represented revolutionary concepts in the USPTO labor-management environment.

We formed a joint task force, locked ourselves in a large windowless conference room, unaffectionately referred to as “the bunker,” and set about tackling one of our perennial issues – examiner production goals – the time examiners have to examine patent applications in a given technology. Each examiner has an individually assigned goal or “Expectancy” representing the average amount of time to examine a patent application in the examiner’s assigned technologies. This time is generally expended over about two years of patent prosecution involving multiple Office actions the examiner does during the examination process. Most examiner production goals had been established decades earlier and had not been significantly adjusted since 1976 – before such technologies as cell phones, DVDs, the Internet, and biotechnology even existed.

After months of discussions in the bunker elucidating each side’s issues and interests as well as the pros and cons of various suggested solutions, the joint Task Force, arrived at a set of programs known as the 2010 Count System Initiatives (CSI). The CSI constituted the proof of concept for our social experiment – USPTO management and POPA could come together collaboratively to solve a serious problem. The rest is now history. Since that first CSI Task Force, the agency and POPA have worked together and reached more agreements and resolved more issues than in the preceding forty-five years of collective bargaining combined. In the

process, our attrition dropped to almost negligible levels. This resulted in significant gains in productivity as examiners progressed up the career ladder with its concomitant increases in production goals. Through increased productivity and improved incentive programs, the 750,000+ backlog was reduced significantly. Employee morale improved so much that the USPTO went from the perennial basement of employee satisfaction to one of the very best places to work in the entire Federal government. In 2014, the USPTO had its most productive year in its 224-year history, acting on over 600,000 patent applications and issuing over 300,000 new patents.

Yet, despite these remarkable accomplishments – accomplishments that have been and should be the basis of accolades and case studies in labor-management relations – some have chosen to attack the employees and management of the USPTO with unsubstantiated allegations of wrongdoing, particularly among the agency's many teleworking employees. These allegations and innuendos suggest systemic abuse of USPTO workplace flexibilities available to examiners and other employees such as flexible work schedules and a variety of telework options. Some believe that the USPTO is paying thousands of examiners high salaries and big bonuses for doing nothing. Some have recommended instituting procedures for monitoring every minute of examiners' work time that ignore the practical realities of the patent examination process and are both intrusive and unworkable at the USPTO. Their recommendations suggest that it is far more important for the USPTO to expend its limited resources attempting to know exactly what an examiner is doing every minute of every work day – an impossible goal – than to expend its resources on its Constitutional mission – protecting intellectual property in America by granting patents and trademarks.

POPA begs to differ.

USPTO Performance is Directly Linked to Examiner Performance

In August, 2014, the Washington Post began publishing a string of articles alleging widespread time and attendance abuse among teleworking examiners at the USPTO. One article discussed a leaked draft USPTO report (referred to hereafter as the 32-page report) to the Commerce Inspector General (IG) that differed significantly from the final agency report

submitted to the IG in July, 2013.¹ The article alleged that the USPTO had filtered out significant information from the final report to hide the worst telework abuses. Another article alleged that the 32-page report found “that thousands of telecommuting patent examiners had lied about their hours,” language that is not readily apparent in the 32-page report.² These and many subsequent reports by the Post and other media outlets, assumed that the draft 32-page report was some sort of gospel fact rather than what it was – a draft, heavily biased collection of anecdotes and unsubstantiated allegations. That is why the draft was never sent to the IG in the first place and does not bear the signature of Fred Steckler, the USPTO’s Chief Administrative Officer. It is unfortunate that this leaked draft report has now resulted in such a profound waste of time and resources and distracted so many of us from the important work of the USPTO.

Anyone with a good understanding of patent examining and the many tools at the agency’s disposal for tracking examiner activities, would know that it would be fundamentally impossible for the USPTO to examine some 600,000 patent applications and issue some 300,000 patents, as it did in Fiscal Year 2014, and yet have “thousands” of examiners getting paid for work they did not do. The productivity of the agency is directly linked to the productivity of the examiners. If examiners are not putting out the work, then the agency’s performance suffers and the backlog of unexamined applications would grow quite rapidly. In addition, an allegedly non-working examiner will also be subject to performance-based disciplinary action.

Tracking Examiner Performance

Each examiner at the USPTO is generally responsible for achieving his/her production goal, maintaining an acceptable level of quality across a wide variety of specifically identified examination duties, moving his/her docketed applications through the prosecution process in a timely manner (Docket Management), and provide courteous and appropriate assistance to the public and the examiner’s peers (Stakeholder Interaction). See Attachment 2, Slide Nos. 2-4. Lower-graded examiners, i.e., junior examiners, have lower production requirements and generally require prior instruction from the supervisory patent examiner (SPE) and/or primary

¹ Rein, Lisa, “Patent office filters out worst telework abuses in report to its watchdog,” The Washington Post, August 10, 2014.

² Singletary, Michelle, “Teleworking saves money — but let’s keep it honest,” The Washington Post, August 16, 2014.

examiner before taking action in an application. As new examiners progress through their training and receive promotions to higher GS levels, their production requirements increase and they are responsible for carrying out the examination process. See Attachment 2, Slide No. 5. When an examiner has successfully completed the signatory review program, a significantly heightened review process of the examiner's final rejections and allowances, the examiner is granted the status of primary examiner and is independently responsible for essentially all aspects of the patent examination process.

Each examiner is given a performance appraisal plan (PAP), including a position description (PD), outlining his/her required duties at his/her grade and level of signatory authority. Attachment 1 is a copy of the 28-page FY 2015 PAP/PD for a GS-14 Primary Examiner. Attachment 2 is a slide set providing a detailed description of each examiner PAP element. See Slide Nos. 2-46. Attachment 2 also provides detailed information regarding each of the performance awards available to examiners together with the performance criteria required for each award. See Attachment 2, Slide Nos. 47-58.

Examiner performance is tracked and reported every biweek. In addition, quarterly average performance as well as yearly average performance is measured for each respective time period. Examiners are subject to performance-based disciplinary action for poor performance at the end of every quarter and at the end of each fiscal year. See Attachment 2, Slide Nos. 4-14.

At the beginning of each biweek, an examiner is automatically charged with 80 hours of examining time, i.e., the amount of time for which the examiner is responsible for production. During the course of the biweek, the examiner may spend time doing certain "non-examining" activities. This non-examining time, often referred to as "other" time, is subtracted from the 80 hours of examining time available. By the end of the biweek, the examiner will usually have somewhat less than the 80 hours of examining time for which the examiner must have adequate work credits as calculated according to the Production element of the PAP or face disciplinary action. At the end of each biweek, the examiner and management receive a "Production Report" listing each of the examiner's work credits and a "Statistical Analysis" detailing the examiner's performance in a multitude of metrics. See Attachment 2, Slide No. 45.

Similarly, during each biweek, quarter and fiscal year, an examiner must maintain an acceptable level of examination quality with respect to any of the nineteen different examination

duties set forth in the Quality element of the PAP for which the examiner is responsible at his/her grade and level of authority. The supervisor can review any examiner work product the supervisor desires and charge errors in accordance with the standards set forth in the PAP Quality element criteria for evaluation. See Attachment 2, Slide Nos. 15-27.

In reviewing the quality of an examiner's work, supervisors also regularly have the benefit of insights from both the inventor who is an expert in the technology, and the inventor's attorney who is a legal expert. If the examiner has made errors in the examination process, the inventor and his/her attorney will not usually miss an opportunity to point that out in their response to the examiner's Office action. The supervisor may look at the examiner's action and the applicant's response to see if the examiner has committed an error under the PAP Quality element.

During that same biweek, quarter and fiscal year, the examiner must satisfy his/her Docket Management requirements by moving various types of patent applications and/or actions within the prescribed "average expected days" time period and avoid having any applications or actions reach the "Ceiling Control Days" limit and become a "Ceiling Exceeded" case. See Attachment 2, Slide Nos. 28-35. Failure to meet these various time periods set forth in the Docket Management element of the PAP will result in the examiner facing disciplinary action. Charts showing the various categories and types of applications and/or actions with their respective time periods can be found in the Docket Management section of the examiner PAP, Attachment 1.

During that same biweek, quarter and fiscal year, while balancing his/her production, quality and docket management at an adequate level, the examiner is also responsible for providing courteous and professional service to external stakeholders by returning phone calls and emails, providing work schedules and holding interviews. Examiners must also provide advice on searching and provide other assistance to both the public and their peers in the USPTO. See Attachment 2, Slide Nos. 36-44

As one comes to understand the incredible number of different ways the agency can and does measure examiner performance each biweek, quarter and fiscal year, it should become clear that any allegation that the USPTO is or has been paying "thousands" of examiners' salaries and or bonuses while those "thousands" of examiners were not working is a patently ridiculous

allegation. If “thousands” of examiners were not performing the work they were being paid for, the agency would be taking disciplinary action against those “thousands” of examiners and the agency’s performance metrics would be in the basement instead of shooting to new record levels as they did in FY2014.

USPTO Management Has Many Tools to Change Behavior

POPA strongly disagrees with any assertion that the USPTO has some sort of systemic plague of poorly performing employees, as alleged by the now infamous 32-page draft IG report. We do understand, however, that any organization of 12,000+ employees, whether public sector or private sector, will have some employees who run into difficulties in the workplace. Here too, the USPTO has, over the years, developed effective means for correcting undesirable employee behavior, whether performance or conduct.

When an examiner gets into performance problems, they face a series of progressive disciplinary measures coupled with opportunities for improving their performance. Performance actions include Safety Zone Warnings, Oral Warnings, Written Warnings and Removal. Each action prior to removal is accompanied by a seven-biweek performance improvement period. For many years, this process began with issuance of the Oral Warning. While considering performance appraisal in 2010-2011 in view of Director Kappos’ primary parameter to treat problems as fixable, the PAP Task Force agreed to add the Safety Zone Warning. The Safety Zone Warning was created in view of both the recognized difficulties of the examination process and the significant costs in time and productivity training new examiners as compared with providing help to an existing examiner with performance problems.

In August, 2005, the National Academy of Public Administration (NAPA) issued a major study of the issues facing the USPTO.³ At pages 107-113, the report discusses Employee Relations issues at the USPTO. Data in the report showed that Oral Warnings were a highly effective means of correcting performance issues. For example, the agency issued 329 Oral Warnings in 2004, but only 48 written warnings. Clearly, most employees who received an Oral Warning wisely used the seven-biweek improvement period to change their performance to

³ “US Patent and Trademark Office: Transforming to Meet the Challenges of the 21st Century,” National Academy of Public Administration August 2005

avoid progressing to the Written Warning stage. Similarly, there were only 17 removals at the USPTO in 2004 indicating that written warnings were also effective in providing an employee an opportunity to get out of disciplinary problems.

Interestingly, the NAPA report also showed that, for example, in 2001, the agency removed 18 individuals at a time when only 210 individuals were removed from Federal service across all non-defense federal agencies. Thus, the agency removed almost 10% of all non-defense federal workers removed in 2001. When it becomes necessary, history shows that the agency is capable of taking appropriate action to correct employee behavior.

In conduct issues, the agency is equally capable of taking corrective action. For example, when the agency Chief Information Officer (CIO) identified a problem with some examiners using too much of the agency's available internet bandwidth, USPTO management and POPA came together and worked out a series of progressive disciplinary actions that helped employees understand the "Rules of the Road" regarding agency internet usage and correct their behavior accordingly. Together, the agency and POPA developed a workable solution to this issue that has almost completely eliminated internet usage problems.

USPTO and POPA Work Together to Resolve Issues: Many Issues Have Already Been Resolved

When the USPTO and POPA began our social experiment to build new and effective labor relations based on a culture of collaboration, POPA informed the agency that, when it came to us with data that identified a legitimate issue or reasonable concern, POPA would work with the agency as best we could to find solutions to the issue or concern. The agency and POPA continue to follow Mr. Kappos' directive to find the 70% solution and then rely on the iterative process to continuously improve upon that initial solution.

The USPTO and POPA continue to meet regularly to review the effectiveness of initiatives such as the Count System Initiatives, Performance Appraisal initiatives, etc., and to address deficiencies and/or unintended consequences of our agreements. Even now, we are meeting to review our various telework programs and address agency and union concerns on this topic. Indeed, several concerns and/or recommendations raised in both the 32-page draft report

and the 16-page actual IG report had already been addressed or were being addressed at the time the Washington Post first disclosed the reports.

When it became apparent that a few examiners had managed to receive performance bonuses while having overdue “Ceiling Exceeded” cases on their docket, the agency and POPA came together and modified the criteria for Docket Management awards to prevent this situation. Today, to receive a Pendency Award for docket management, an examiner may have no more than one Ceiling Exceeded case in any Docket Management category within the quarterly award period.

Just recently, when it became apparent that “Returns” of examiners’ office actions for correction could inappropriately skew an examiner’s Docket Management performance, the agency and POPA came together and modified the PAP Docket Management element and award criteria to prevent this from happening.

Every year since the 2010 Count System Initiatives, the USPTO and POPA have met annually to review the effectiveness of these initiatives as well as the PAP initiatives and make any necessary modifications to address both agency and union concerns.

Many people do not realize that, while the public only became aware of the 32-page and 16-page reports after they were disclosed in the Washington Post this past August, the issues disclosed in these reports date back several years. Many of these issues have already been addressed by the USPTO and POPA, working in collaboration over the past several years. And we continue to work today.

Recently, following the recommendations of an independent assessment of labor-management relations at the USPTO performed by Robert Tobias, Director of Key Executive Programs at American University and well-known former national president of the National Treasury Employees Union (NTEU), the USPTO and its three labor unions came together to form a joint USPTO Labor-Management Forum (LMF). The LMF is composed of the senior management of the major business units of the USPTO (i.e., Patents, Trademarks, OCIO, etc.) and the senior leaders of the labor unions. The LMF has already been meeting to further address concerns regarding time and attendance in an attempt to craft solutions applicable across the agency.

One issue of concern to POPA has been the misinformation regarding work credit abuse, or “mortgaging,” by examiners. At page 24 of the 32-page report and in several news articles, it has been alleged that:

Examiners can submit incomplete office actions for credit, called mortgaging, then go back later and complete the office action. As long as the examiner submits an appropriate amount of work by the end of the quarter, the examiner will be eligible to receive a variety of performance awards.

This is just plain wrong and an indication of the personal biases of the authors and lack of rigorous analysis found throughout the 32-page draft report. This allegation is particularly troublesome when one considers that the 32-page report was co-authored by employees of the Employee Relations division of the USPTO Human Resources office (ER) and the Office of General Law (OGL) in the General Counsel’s office (OGC). All these authors already know that mortgaging has never been acceptable behavior condoned by either the USPTO or POPA. Work credit abuse has been an inappropriate conduct issue at the USPTO dating back many years before telework. In fact, the agency and POPA again collaborated to update the agency’s policies on work credit abuse. In June, 2013, the agency issued clear guidance to supervisors to clarify what would constitute mortgaging and what steps supervisors should take when an examiner was found to be mortgaging their work. A copy of the agency’s “Work Credit Abuse” policy is attached as Attachment 4.

Monitoring Attendance in the 21st Century

Much ado has been made in the draft and final IG reports regarding the need to ensure that an examiner is working the full 80 hours per biweek for which he/she is paid. While neither the USPTO or POPA condone employees attempting to intentionally falsify time and attendance, the practical reality here is that there is no way to absolutely ensure that an employee is performing work at the exact time that they report on their time and attendance records. This is not a problem unique to the USPTO either. No employer is capable of monitoring each employee every minute of every day. Even if they tried, the employer would likely find it difficult to find anyone willing to work for them. The only way to truly ensure that an employee is working every minute they claim is to hire an individual supervisor for that employee and

making sure that the employee and supervisor are working together side-by-side every minute of every work day. Obviously, doubling the cost of agency overhead in this manner is both cost prohibitive and, frankly, just plain stupid. Not even the Members of these Committees can ensure that every member of their respective staffs is working every minute of every day. Rather, the Committee Member accepts that his/her staff must have been working appropriately because the Member saw the staff member at a meeting or because the Member received the work product of the staff member – briefing papers, poll statistics on an issue, comments and other information from constituents, etc. – in a timely manner.

Patent examining is both physically and mentally demanding work. Much examination time is spent in activities that do not necessarily require being physically parked in front of a computer. Examiners do an incredible amount of reading every day. They have to read and become familiar with patent applications. They have to read prior art references to determine relevance to the claimed invention. They have to answer phone calls. The list can go on. Every time the examiner is interrupted by some intrusive tracking procedure, it represents a loss in productivity of that examiner. Instead of focusing on examination, they have to focus on ensuring that their supervisor is aware that they are working. In essence, their job goal is now to make sure they are properly tracked, rather than fulfilling the mission of the agency by examining patent applications. The point here is that, even such tools as the so-called “presence indicator” in the agency collaboration tools cannot ensure that an examiner is working every minute of every work day. This is simply not a practical reality at the USPTO in the 21st Century with a workforce spread across the nation.

The best way to reasonably ensure that employees are working appropriately is to have a good, objective set of performance goals and then determine whether or not the employee met his/her goals. This is how the USPTO has become so successful. The USPTO focuses its limited resources on helping examiners achieve their performance goals so that the agency itself can then reach its agency-wide performance goals. It is much more practical and cost effective to measure examiner work output than it is to track an examiner’s whereabouts and activities every minute of every day. Successful organizations have to focus on measuring results in the 21st Century, especially in the age of telework, not creating a workplace GPS system for tracking employee whereabouts. Helping Federal agencies to develop good sets of performance goals

should be the prime focus of both Congress and the President. Then, when an examiner makes his/her goal, there need not be any concern that the examiner was getting paid for not working. The examiner is being paid to accomplish production goals, not to keep an office chair warm and a light flashing on a supervisor's computer screen.

Conclusion

In conclusion, POPA believes that the USPTO is already effectively ensuring that employees are performing the work for which they get paid. USPTO managers have many tools available to them to identify poor performers and take corrective action where necessary. Tools, such as the numerous requirements of the examiner Performance Appraisal Plan, agency Policies, as well as USPTO-POPA labor agreements are all available to assist the supervisor in monitoring examiner performance and taking corrective action where necessary.

History has shown that patent examiners (and virtually all employees everywhere) direct their efforts towards what they understand to be the agency's goals. Similarly, they will respond to performance incentives such as bonuses with enhanced performance. Many examiners work voluntary, non-compensated overtime (VOT) in order to achieve outstanding performance and receive monetary bonuses.

Going forward, POPA will continue to work together with the USPTO to effectively address any reasonable concerns of the USPTO. Our social experiment begun in 2009 has now become a new paradigm for successful labor management relations in a high-performing agency with a nationwide workforce. We work together to keep the U.S. Patent System the very best in the world.

Thank you again for this opportunity to share with you POPA's position and concerns. POPA looks forward to continuing to work with Congress, the Administration and the USPTO to address concerns and ensure that the U.S. Patent System remain the "gold standard" for protecting intellectual property in the 21st Century.

Chairman ISSA. Thank you.
Ms. Keplinger.

**TESTIMONY OF ESTHER M. KEPPLINGER, VICE CHAIR,
PATENT PUBLIC ADVISORY COMMITTEE (PPAC)**

Ms. KEPPLINGER. Good afternoon, Chairman Issa, Ranking Members Conyers and Cummings, Members of the Committees.

It is my great pleasure to be here today on behalf of the U.S. PTO Patent Public Advisory Committee, PPAC, about allegations of misconduct in the patent's telework program.

As intended by Congress, much of the role of the PPAC is to focus on operational issues of patents. We review very large amounts of generated operational data to identify areas that we think are not working well. And in the areas of quality and pendency, we believe we have made valuable contributions.

The past 5 to 10 years have brought incredible changes in the IP arena, including significant legislative changes, many Supreme Court decisions and, within the USPTO, a doubling of the patent-examining corps and development of the telework programs. With these changes come significant operational and management challenges.

The anonymous complaints to the IG were directed primarily to the abuse in the patent telework program. I have several comments.

We believe that this is not a telework issue, per se, but, rather, a broader management issue that should be addressed regarding the entire patent-examining corps.

The identified misconduct is not related to whether or not the individual examiner works on campus or remotely. Unfortunately, instances of T&A abuse, end-loading, and mortgaging all existed prior to the implementation of the telework program.

Occurrences of T&A misconduct and mortgaging have been and continue to be identified through data analysis and, we believe, are being addressed by the management of the USPTO.

The USPTO should identify additional means of monitoring potential abuse, including whether additional reporting by patent examiners is necessary for effective management of the overtime program.

We believe the USPTO is taking these allegations seriously and has already implemented a number of changes to address the concerns of abuse. It is highly improbable that systemic and widespread abuse of T&As exist at the USPTO when one considers the available objective criteria demonstrating their performance.

The backlog of new applications and RCEs has been decreasing. Pendency of the applications continues to decline. And the customer surveys indicate that the quality of the work is increasing.

The existing measures in place consistently show improvement in the performance and output by patent examiners, undercutting any contention of the existence of widespread abuse.

A concern for the PPAC regarding these allegations is the potential impact on the quality of the work. If an examiner waits until the end of the rating periods to complete a very large portion of the work, the quality of that work may suffer.

USPTO utilizes a variety of tools to measure and improve quality. And according to internal measurements, customer feedback, the quality continues to improve.

Therefore, it appears that current tools, along with the new steps being taken by the USPTO, are and will be effective for monitoring and controlling quality. The USPTO must remain vigilant on quality, however, and evaluate whether any additional changes are needed.

While the USPTO did take actions against some examiners, some managers seem to think that the actions are not always taken. This perception is quite serious.

Recently training has been provided to employees and supervisors about the policies. But they should evaluate whether more is needed, particularly to managers, regarding when and how to consider taking employee actions for potential abuse.

The PPAC had considered the allegations of abuse, had conversations with upper management about the issues, and are confident that these issues are being addressed.

In the 2014 annual report, the PPAC strongly recommended that systems be put into place to properly manage the telework programs to measure productivity and monitor potential abuse.

We do not believe the USPTO management would look the other way in the face of evidence of abuse because, in our experience, the USPTO consistently has been working to make improvements in the operations of patents and, in fact, has taken actions against abusers.

In summary, the PPAC shares the Committees' concerns regarding these recent allegations of instances of abuse in the USPTO's telework and other programs. Although it seems that any alleged abuses are not systemic, no abuse should be tolerated.

The PTO believes this issue is a key priority and intends to continue monitoring it and will work with the USPTO and union representatives to identify possible changes to programs to curb abuses in the future.

On behalf of myself and the whole Patent Advisory Committee, we would like to express our appreciation for the opportunity to address this issue.

Thank you.

[The prepared statement of Ms. Keplinger follows:]

**“Abuse of USPTO’s Telework Program: Ensuring Oversight, Accountability
and Quality”**

November 18, 2014

**Joint Hearing by The Committee on the Judiciary and The Committee on
Oversight and Government Reform**

Esther M. Keplinger

Vice Chair, Patent Public Advisory Committee (PPAC)

**Joint Hearing by The Committee on the Judiciary and The Committee on
Oversight and Government Reform**

“Abuse of USPTO’s Telework Program: Ensuring Oversight, Accountability and Quality”

November 18, 2014

Introduction and PPAC Background

Good afternoon Chairman Goodlatte, Chairman Issa, Ranking Member Conyers, Ranking Member Cummings, members of the Committees, it is my great pleasure to be here today on behalf of the Patent Public Advisory Committee (PPAC) to the USPTO. My name is Esther Kepplinger and I am Vice Chair of the Committee.

As you may be aware, the Public Advisory Committees for the USPTO were created by statute in the American Inventors Protection Act of 1999 to advise the Under Secretary of Commerce for Intellectual Property and Director of the USPTO on the management of its patent and the trademark operations. The PPAC members, appointed by the Secretary of Commerce, are selected to represent the interests of the diverse users of the USPTO, such as IP practice, industry/manufacturing, research & development, academia and independent inventors and included are one member from two employee unions. The role of the PPAC is to review the policies, goals, performance, budget, and user fees relating to patent operations, and to advise the Director on these matters. In order to permit consideration of internal USPTO information, during their work, PPAC members are special government employees.

The PPAC is an unbiased politically neutral stakeholder group with the highest degree of expertise in every area of IP and we provide the on the ground daily oversight that the Congress and the public cannot. Many things are addressed by the PPAC with the USPTO outside of the public eye, not because we are protecting the USPTO, but because if the issues are addressed in a timely fashion, there may be no need to take the issue to a higher level or the issue may be averted altogether. However, sometimes it is necessary to raise concerns with the USPTO and you will see those in our annual report that we send to Congress every year.

As intended by Congress, much of the role of the PPAC is to focus on operational issues of Patents, a role which has increased in importance in recent years not only because of the growth of the patent examining corps and accompanying operations, but also because of the new statutory authority provided to the USPTO and the significant implementation of that statute which required substantial public outreach.

The PPAC currently enjoys a healthy, productive relationship with the USPTO and together we work closely with the unions facilitating a collaborative dialog and approach regarding a number of facets of the USPTO patent operations and implications for patent applicants and the public. From our perspective, this positive, open relationship has been conducive to in-depth discussions

resulting in the implementation of a number of programs in the USPTO which provide more flexible options to applicants, and we believe higher quality and more timely review. In the areas of quality and pendency, the PPAC has consistently provided feedback and ideas that have been embraced by the USPTO.

The PPAC has consistently worked closely with the USPTO on various issues and in areas which we think are not working well. Uniformly, the USPTO has listened and attempted to incorporate our advice into modifications and initiatives that address our concerns. We look forward to working collaboratively with the USPTO on this and other issues relating to the patents aspects of the USPTO.

I am honored and appreciative for the opportunity to address you today about the USPTO's telework program and allegations made about potential misconduct. For the last five years, I have served on the PPAC, and am currently the Vice-Chair. I speak today in that capacity, with my comments representing the views of myself and the whole committee. I spent my career at the USPTO, starting as a patent examiner, Supervisory Patent Examiner (SPE), Group Director, and as Deputy Commissioner for Patent Operations from 2000-2005, with all patent examiners in my chain of oversight. During the period of time that the patents side of the USPTO began its telework program, building on the successes realized by the Trademarks area, I was in management positions. I retired from the USPTO in 2005, joined the law firm, Wilson Sonsini Goodrich & Rosati, and since my departure the telework program has expanded dramatically. Having spent nearly thirty-two years in the USPTO and over eight years in a law firm, I believe I have a broad perspective of the challenges and demands of both areas.

Changing Environment

Recent studies have highlighted the important role of Intellectual Property IP in driving the economic growth of the country. According to a study prepared by the Economics and Statistics Administration and the USPTO in 2012, the entire U.S. economy relies on or uses some form of IP and according to a Brookings Institution study from 2013, metropolitan areas with lower than average patent growth showed higher unemployment levels. The effectiveness of the patent system, however, relies on the granting of high quality patents with clear claims of the proper scope which assist and not impede further innovation and business development and the accompanying job growth.

The USPTO is fully fee-funded with Congress appropriating to the USPTO some or all of the fees received. These fees are paid by applicants in exchange for the examination of their patent applications with the expectation that the USPTO will effectively and efficiently utilize those fees. As for all employees, public or private, there is an expectation that employees will meet the work requirements in exchange for the salary received.

The past five to ten years have brought incredible changes in the IP arena, including several significant legislative changes taking the U.S. from a first to invent to a first inventor to file

system; an increasingly active Supreme Court rendering decisions which in some instances dramatically shifted the understanding and assumptions of key areas of the patent statutes; and changes within the USPTO, such as telework programs and the adoption of a number of initiatives directed to improvements or options for applicants. From an operational perspective, the implementation of the telework programs has taken time and efforts to develop programs that are acceptable to USPTO management, the examiners' union, POPA, and USPTO employees. The challenges of managing any large organization, such as the USPTO, are extensive so successfully incorporating all of these significant changes in a short span of time takes energy and sometimes an iterative process. From what the PPAC has witnessed and been told, the USPTO recently has worked well with POPA on many issues and on others is still endeavoring to find resolution that suits all stakeholders.

Over the past five years, the telework programs expanded dramatically at the USPTO and have become a model for other government agencies. With congressional authority for expansions, the USPTO has been successful in developing a nationwide workforce, with employees working at the main campus in Alexandria, Virginia; satellite offices in Detroit, Denver, Silicon Valley and Dallas; Patent Telework Program (PTP) in which employees work on-campus a minimum of three days a week; and a Patents Hoteling Program (PHP) permitting patent examiners to work from their homes full-time. These programs have contributed to increased examiner satisfaction and increased retention of patent examiners, a significant benefit because patent examiners require extensive legal training to become the independent workers on which the USPTO relies to examine the hundreds of thousands of patent applications filed annually. Currently, 59.4% of eligible examiners and 47.3% of all examiners work remotely in one of these programs. Because such a large proportion of patent examiners are participating in PTP and PHP, it is absolutely critical that the programs be well implemented and supervised. These programs have been beneficial to the USPTO in a number of ways and they were validated as effective by the OIG in 2013. However, it is my understanding that the OIG analysis of the programs did not include a review of the time and attendance aspects, which is, of course, important and relevant to all examiners regardless of their physical work location. All groups of patent examiners enjoy very flexible work schedules and work largely independently to complete their examination of patent applications. By its nature, this work is technically and legally challenging and requires thoughtful time of study and review for each patent application. The PPAC believes that the majority of patent examiners abides by the rules of the USPTO and consistently performs the work with integrity, dedication and a high level of quality.

On August 29, 2014, the Office of the Inspector General (OIG) received an anonymous complaint reporting abuse by patent examiners primarily within the telework and hoteling programs. The OIG referred the complaint to the USPTO and requested an internal investigation be conducted and a response to the complaint be provided. The OIG requested that the USPTO address whether there is time and attendance (T&A) abuse and whether there are appropriate internal controls in place to prevent time and attendance abuse. The USPTO performed an

internal investigation interviewing Supervisory Patent Examiners (SPEs), Group Directors and the Assistant Deputy Commissioners for Patent Operations (ADCs) with questions concerning possible abuse of the USPTO time and attendance telework programs. The interviews included questions regarding controls in place for on-campus employees, controls in place for PHP participants, controls in place for teleworking employees, end-loading, overtime and bonuses.

As a result of the investigation, the final report provided by the USPTO indicated that they did not find any objective evidence of T&A abuse, either on regular or overtime hours but the investigation was inconclusive as to whether examiners are accurately reporting T&A or whether the Agency has effective controls in place to guard against T&A abuses by patent examiners.

USPTO Actions

The USPTO is taking the allegations and the investigation seriously and according to our information, already has implemented a number of changes. Regular phone calls are being made at random times to full-time telework employees to check their work status and responsiveness to a supervisor; new guidance was provided to supervisors to ensure proper accounting of hours worked; an education program for supervisors and employees on telework policies has been launched; full-time teleworking employees are required to use collaboration tools (except the presence indicator), including the instant messaging feature, which requires access to the Virtual Private Network (VPN); changes to the Docket Management element of the Performance Appraisal Plan (PAP) have been made to better address cases not being timely acted upon; and heightened quality reviews are made for individual examiners if a very large amount of work is turned in at the end of a quarter or the fiscal year. These represent good steps and the PPAC looks forward to working with the USPTO in identifying additional avenues for addressing any concerns.

PPAC Annual Report

When completing the FY 2014 annual report, the PPAC had considered the allegations of abuse and addressed concerns related to these allegations. The PPAC endorsed the promotion and expansion of the PHP but strongly recommended that systems be put in place to properly manage this program to measure productivity and monitor potential abuse. You will note that the telework and PTAB paralegal issues are barely mentioned in the 2014 annual report because we reviewed the documents, conferred with the USPTO and are confident that these issues have been and are being addressed. We agree with the USPTO that any alleged abuses are isolated incidents and do not represent systemic abuse.

Allegations of Telework T&A Abuse

The anonymous complaints to the OIG were directed primarily at the abuse in the telework programs. However, we believe this is not a telework issue per se, but rather a broader management issue that should be addressed regarding the entire patent examining corps. The

identified concerns- T&A abuse, end-loading (accomplishing a significant proportion of one's work at the end of a rating period), and mortgaging (submitting incomplete work for credit and finishing it later) are employee misconduct issues that are not related to duty station or whether an individual examiner works on-campus or remotely. Unfortunately, instances of employees failing to work all required hours, end-loading and mortgaging all existed prior to the implementation of the telework programs. Occurrences of T&A misconduct and mortgaging have been and continue to be identified through data analysis and addressed by the management of the USPTO. Telework has changed the way and places that we work and perhaps has raised a discomfort in managers about how to effectively manage employees who no longer work right beside them. This is a natural and not unexpected reaction but one that should gradually fade as managers become more adept at handling these new arrangements. Misconduct issues are best handled when the problems are addressed early and intervention occurs early. It is important that management make clear their expectations regarding appropriate behavior and take actions against offenders.

It is highly improbable that systematic and wide-spread abuse of T&As exists at the USPTO when one considers the available objective criteria demonstrating their performance. The backlogs of unexamined applications have been decreasing, the backlog of Requests for Continued Examination (RCEs) was dramatically decreased from about 110,000 in March of 2013 to fewer than 46,000 by September of 2014, pendency of applications continues to decrease, and the customer surveys reflect a response that the quality of the work is increasing. The USPTO is a results oriented agency which demands a high level of performance from the patent examiners. The existing measures in place, and they are extensive, utilized by the USPTO consistently show improvement in the performance and output by patent examiners, undercutting any contention of the existence of wide-spread abuse.

While it may currently be difficult to determine for sure whether or not abuse is occurring and whether or not the existing controls are effective, the PPAC encourages the USPTO to identify additional means of making these evaluations.

Quality & Pendency

A significant concern for PPAC regarding the allegations of patent examiners not working the hours claimed is a potential impact on the quality of the resulting patents. If one asks stakeholders of the patent system what is the most critical mission of the USPTO, most will say that issuing high quality patents remains the number one job of the USPTO. The pendency of patent applications is also important but quality ranks highest. While the interviews held with supervisors was not unanimous that end-loading negatively impacts the quality of the product, most agreed that this is true. For years, critics of the USPTO production system have complained that patent examiners were not afforded sufficient time per application to do a good quality examination. Recently, patent examiners were allocated more time on average per application to contribute to quality examination. However, if an examiner fails to work

consistently or waits until the end of the rating periods to complete a very large portion of the work and thus completes it in a much shorter period of time than normal, it is believed that the quality of that work may suffer. The impact on quality, of course, depends upon the employee, the technology being examined, the circumstances, and the amount of work completed at the end. The USPTO utilizes the quality element of the PAP, Quality Assurance Specialists (QASs), and regular random reviews of the work to ascertain and improve the quality performance of the examiners. According to the USPTO statistics, the quality of the work continues to improve based on internal measurements and stakeholder feedback. The USPTO has established a director working group to determine how cases are counted and the impact of examinations done at the end of an evaluation period. Therefore, it seems that the established tools along with the new steps being taken by the USPTO are and will be effective for monitoring and controlling the quality of the work. The USPTO must remain vigilant on quality, however, because the applicants, competitors, the patent system and the U.S. economy may suffer if poor quality patents are granted.

The salaries of USPTO employees come from the fees paid by patent applicants who expect these fees to be utilized effectively and efficiently in carrying out the mission of the Agency. As with any government agency, it is critical that USPTO ensures that this revenue is spent appropriately. Allegations that overtime is being claimed without the corresponding time being worked are very troubling contentions that deserve scrutiny and further evaluation. Overtime has consistently been an extremely valuable contributor to the successful completion of the large numbers of applications received by the USPTO. It is understood that at the USPTO overtime historically has resulted in work product at a lower cost than that created on regular time. The PPAC encourages the USPTO to review existing controls to determine whether additional reporting by patent examiners is necessary for effective management of the overtime program.

The USPTO has recently modified the docket management element of the Performance Appraisal Plan (PAP) to address some issues relating to the timely movement of applications. This is a positive step and the PPAC suggests that regular monitoring of the effectiveness of these elements should be made to identify if and when tweaks are needed to the bonus program to ensure that the benefits stemming from the bonuses are in alignment with the costs incurred.

Culture

The USPTO has strived to create a professional culture staffed by highly educated and trained patent examiners rooted in expectations of performance and conduct. In any large organization, one may expect some aberrant behavior. While the report indicates that the USPTO has been reluctant to pull electronic records in investigations, most importantly, actions have been taken to correct misconduct. The USPTO indicates that they believe communication, counseling and coaching address problem examiners and this may be true for some or all examiners. However, finding more tools to reasonably assess and address any potential misconduct can only increase confidence that the USPTO is well managed and resources are effectively spent.

According to the report, the USPTO did take performance actions against some examiners although the responses from managers in the interviews may suggest a perception that actions are not always taken or that actions for quality deficiencies are not worth the effort. This is a serious situation because this perception may create a deleterious attitude and undermine the culture of the organization. It appears from the interviews that many managers had not received adequate communications about how to handle potential misconduct issues, what approaches are being taken, or what has been successful and this deficit of information has fostered frustration and a feeling of loss of control over their workers. The USPTO has increased the communication to employees and supervisors about the policies, but they should evaluate whether more communications to patent examiners about the rules, expectations and consequences of misconduct and particularly information to managers regarding management responsibilities and guidance for accomplishing those responsibilities are needed. The PPAC believes it is important not only to deliver a consistent message of the USPTO's quality and performance expectations but also to emphasize that message with fair application of the rules.

Closing

In summary, because telework programs have been demonstrated to be effective and financially beneficial to organizations, they will likely expand and increasingly be adopted by other agencies. For this reason, it is important that these programs are managed as effectively as employees working on-campus.

The PPAC shares the committees' concern regarding the recent allegations of instances of abuse in the USPTO's telework and other programs. In its role in reviewing and advising the USPTO on policies and procedures, the PPAC became aware of the reports when they became public this summer and since then have had discussions with senior management about the reports and the steps taken to address the issues. Although it seems clear that the reported abuses are not systemic, and that the USPTO's telework programs are successful, no abuse should be tolerated. The PPAC intends to continue monitoring this issue and will work with the USPTO and union representatives to communicate USPTO's policies more effectively and to identify possible changes to programs to curb abuses in the future. We commend the committees for focusing on this issue and we intend to make it a priority.

On behalf of myself and the whole Patent Advisory Committee, I would like to express our appreciation for the opportunity to address this issue. I would be happy to answer any questions you may have now or in the future.

Thank you,

Esther M. Keplinger
Vice Chair, Patent Public Advisory Committee

Chairman ISSA. Thank you.

And as I recognize Mr. Smith, your firm is in Seattle, your home is in California, and you came from Japan to address us. And I want to thank you very much for your world traveling necessary to be before this Committee.

Mr. SMITH. Well, if I may just for a second, I did get home at midnight. I live in Arizona. Sunday, I left for the airport for here at 11 a.m. I did have time to say hello and good-bye to my wife and get a new suitcase. But I appreciate the invitation, and Chairman Issa, Ranking Members, and Members of the Committees.

Chairman ISSA. Mr. Smith, if you continue with that you will probably end up in Congress with that travel schedule.

The gentleman is recognized.

**TESTIMONY OF WILLIAM F. SMITH, OF COUNSEL,
BAKERHOSTETLER**

Mr. SMITH. My testimony is from the perspective of one who has spent 42 years working in the wonderful United States patent system. My first career was spent at the PTO where I worked for over 33 years, ending after serving over 19 years as an administrative patent judge. As a PTO employee, I participated in all the alternative work schedule programs the agency created over my years of service, and I appreciate PTO management for being so progressive.

During my last year of service as an administrative patent judge, we moved to South Carolina and I became one of the agency's first remote teleworkers, commuting back from South Carolina, to the office, for my required 16 hours per week.

Since my transition to the private sector in December of 2005, each firm I have worked for has extended me the privilege of being a teleworker. I was not surprised when the current allegations of patent examiner time and attendance abuse were raised as these issues have long been present at the PTO. Throughout my years at the PTO, those patent examiners who wanted to game the system could easily do so, especially those who were high producers of patent examiner accounts.

My 19 years as an administrative patent judge required me to review the written work product of patent examiners in thousands of appeals. My current role in patent prosecution also allows me the opportunity to review the written work product of patent examiners. This experience has shown me that it is relatively simple for a patent examiner to draft an office action that is superficially plausible, yet lacks credibility under scrutiny. Thus, those patent examiners that want to abuse the system can fly under the radar without significant risk of detection as long as they are perceived as being productive.

The patent examination process should be a continuous collegial conversation between a patent examiner and applicant, to find patentable subject matter in a patent application, and claim that subject matter in a clear manner. Unfortunately, the historic compact prosecution system with its outdated final rejection practice does not allow for such a conversation.

The hallmark of the present compact prosecution system is that the second action in each case is normally made final. But that

final rejection artificially halts all momentum in the case and forces the conversation to resume in a request for continued examination filed by an applicant, which can take months or years for the patent examiner to take up for action.

As discussed in my submitted testimony, I have a number of suggestions. First, the patent examiner's productivity metrics must be changed so that a patent examiner is incentivized and rewarded for efficiently and effectively examining a patent application to its ultimate allowance or abandonment, not just to reach a final rejection that artificially halts that process.

Second, as to how the patent examiners account for their examining time. I believe that to the extent patent examiners are not currently required to do so, their time accounting software should be set up so that a patent examiner's daily time is accounted for in terms of the patent application reviewed, and the specific core examine activities performed, such as analyzing patent application disclosures and claims, searching, drafting office actions.

Such a system will allow PTO management to see how a patent examiner is actually spending their submitted examining time on a daily basis. This will allow for corrective action or additional training if a patent examiner is seen to be inefficient in one or more of their core examination activities.

Third, in terms of the present telework program, I urge that it be maintained, but improved. If the above suggested reforms to the management systems in place are instituted, the patent examination process will be more efficient and those patent examiners who want to game the system will have less opportunity to do so.

I suggest that PTO teleworker program should be changed by having patent examiners who newly enter the program to be within commuting distance of the Alexandria campus or one of the four new regional offices so they can be available to management, their colleagues, and applicants as needed for training, mentoring, and most importantly, in-person interviews with applicants that history shows significantly improve the quality and lessen the pendency of patent applications.

Finally, I believe that the most good that can come out of the present situation is for the PTO and POPA to agree that all of these systems need to be changed, commit to do so in an expeditious manner. Such efforts must include the participation and input of stakeholders so that all parties in the patent examination process can work to bring the patent examination systems into the 21st century.

Thank you for your attention.

Chairman ISSA. Thank you, Mr. Smith.

[The prepared statement of Mr. Smith follows:]***

***See Appendix for supplemental material submitted with this statement.

Statement of William F. Smith Before the House Committee on the Judiciary and House Committee on Oversight and Government Reform¹

**ABUSE OF THE USPTO'S TELEWORK PROGRAM: ENSURING OVERSIGHT,
ACCOUNTABILITY, AND QUALITY**

INTRODUCTION

My testimony is based on more than 33 years' experience at the U.S. Patent and Trademark Office ("PTO") and my subsequent nine years in private practice as a patent attorney. I believe we should treat the recent allegations of patent examiners abusing the current telework program as an opportunity to evaluate and strengthen this valuable program to avoid future abuses and to make it as robust as possible. The "compact prosecution" patent examination system and the manner in which patent examiners' productivity is measured create the opportunity for patent examiners to abuse the system, whether purposely or inadvertently. In this statement, I will set forth constructive suggestions regarding strengthening the telework program and will argue that the compact prosecution and examiner count systems urgently need to be modernized. With such modification, I believe patent quality can be significantly improved and pendency significantly decreased.

PERSONAL BACKGROUND

I joined the then-Patent Office in September of 1972 fresh out of engineering school and achieved the rank of Primary Examiner in 1979. Prior to becoming a Primary Examiner, I was awarded a Master's Level Ranking in my art area. Subsequently, I achieved a Generalist Rating indicative of my mastery of examining patent applications in diverse art areas.

¹ Mr. Smith is Of Counsel for Baker & Hostetler, LLP. The views presented herein are those of Mr. Smith and are not to be attributed to the firm or to the firm's or his clients.

Testimony of William F. Smith

I was appointed as an Administrative Patent Judge ("APJ") on the now Patent Trial and Appeal Board. I served in that position until my retirement from the PTO in December 2005. Upon retirement, I transitioned to the private sector, first joining Clements Bernard, an IP boutique in Charlotte NC, and then Woodcock Washburn LLP, another IP boutique, which merged into Baker Hostetler, where I am now employed.

In the private sector, I have prosecuted many patent applications and interacted with many patent examiners. I keep in touch with many friends from my days at the PTO on issues that involve the patent examining system and patent examiners. I am also active in AIPLA and IPO and have served as Vice Chair of the IPO U.S. Patent Office Practice Committee since 2009. I give CLE presentations to various IP associations and bar groups around the country and interact with the attendees to find out how satisfied they are with current state of the patent examination system.

I lived in South Carolina my last year of service as an APJ and telecommuted to the PTO Alexandria Campus at my own expense. The telework plan at the time required me to be physically in my Alexandria office 16 hours a week. Subsequently, I have been a teleworker at each of the law firms for which I have worked. I believe my work and telework experience inside and outside the PTO provide me with a relevant background to testify regarding today's issues.

HISTORIC PTO WORK SCHEDULES²

Like most federal employees, patent examiners' work schedule involves the two week, or bi-week, pay period. Each patent examiner is expected to work 80 hours each bi-week and fills in a time and attendance report each bi-week. When I joined the PTO in September 1972, patent examiners worked an 8.5 hour day from 8:30 am-5:00 pm, Monday-Friday with 40 hours

² This and the following sections on compact prosecution, the patent examiners' count system and supervisory review of patent examiners' work product are meant to be a high level view to provide a background for the subsequent discussion of the issues at hand.

Testimony of William F. Smith

worked per each week of the bi-week. When paid overtime was authorized, patent examiners could work on Saturdays. There were no sign in sheets.

During the 1980's the PTO initiated "flex time," which allowed patent examiners to work alternative work schedules. Workday hours were expanded to 6:30 am-6:00 pm. Eventually, patent examiners could sign up for schedules that allowed them to work more than eight hours per day with the extra hours credited to a flex day(s) in the same bi-week. Sign in sheets were placed in the reception area of each Technology Center, and examiners were expected to sign in and out on an honor system.

Flex time turned into a telework program where examiners were authorized to work from home for some portion of the bi-week. As the PTO hired large numbers of patent examiners in the last decade, space in the Alexandria campus became limited. PTO management implemented a more robust telework program to relieve the strain on space. The program began as a hoteling program where patent examiners could work some hours at home but were required to be at the Alexandria headquarters for a defined number of hours. In time, the requirement to be at the Alexandria headquarters was removed and patent examiners were allowed to move to any location in the United States with no requirement to be at the Alexandria campus or any of the new regional offices for any period.

COMPACT PROSECUTION

The U.S. patent examination system has been operating under the tenets of "compact prosecution" for over 40 years. Prior to the advent of compact prosecution, examiner productivity was measured by the number of office actions mailed each bi-week without regard to the substance of the underlying work product. An examiner could be "productive" by issuing office actions that kept the case moving in a non-substantive manner. That system measurably increased the pendency of patent applications.

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Compact prosecution was introduced in the late 1960's-early 1970's. The gist of compact prosecution is that, after the first exchange of a rejection from examiner and response from applicant, if the case is not allowed, the second office action will normally be made "final." An applicant's response to a final rejection is not entered as a matter of right and is entirely within the examiner's discretion. Prior to the introduction of the Request for Continued Examination ("RCE")³ program in 1999, an applicant's options upon receiving a final rejection were to file a notice of appeal, final abandonment of the application, or to resume prosecution by filing a continuation or divisional application with the subsequent abandonment of the first application. Each continuing or divisional application received a new application number and counted as a separate new application for statistical purposes including measuring productivity. The PTO's bookkeeping was streamlined so the agency could document pendency per application. Once the tenets of compact prosecution kicked in, the PTO could correctly proclaim that pendency per application had been reduced. However, missing from the PTO's analysis was an understanding that compact prosecution did not necessarily reduce the time it took for the patent examiner to resolve the patentability of the claims under review. Rather, the examination process was now spread over many individual cases of shorter duration instead of a single application that had a long pendency. This was the beginning of the patent examiner's duties being viewed as piece work instead of a continuous conversation with applicant to find patentable subject matter.

Compact prosecution did not change when RCEs came into inception in 1999. The second office action was still expected to be a final rejection, thus interrupting the flow of the case, despite the new program that allowed "continued prosecution." However, the PTO did change the patent examiner count system to take into account that the patent application

³ An applicant files an RCE simply by filing a request therefore with the appropriate fee in a patent application. In essence, applicant is paying to reopen prosecution, i.e., remove the finality of the previous rejection so that prosecution can be resumed in the same application.

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actually was not abandoned when an RCE was filed, just that the RCE reopened prosecution in the same application. RCEs were initially docketed as amended cases, which meant the case had to be picked up for renewed consideration by the patent examiner within two months of filing.

THE PATENT EXAMINER COUNT SYSTEM

With the advent of compact prosecution, productivity metrics were changed. Each examiner was assigned a "balanced disposal" time goal. Balanced disposals in a given time period were determined by adding the number of new patent applications initially examined on the merits by the examiner to the number of cases disposed (by way of an allowance or abandonment or the writing of an Examiner's Answer in a case that was appealed) during the relevant time period and dividing the sum by 2. The time aspect of the goal is meant to represent the average amount of time the patent examiner is expected to spend from the time the case is first taken up for review to its final conclusion of allowance, abandonment or appeal.⁴

A patent examiner's productivity for a bi-week is determined by the hours in the bi-week spent on examining activities divided by the number of balanced disposals credited to the patent examiner during the bi-week. Of course some applications are harder to understand and examine and patent examiners will spend examining time on applications for activities during the bi-week that do not result in a count. These vagaries are allegedly captured in the hours per balanced disposal metric.

⁴ The average time spent on an application metric has not proportionately increased with the increase in the complexity of many technologies and the additional duties patent examiners have been required to assume over the decades.

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SUPERVISORY REVIEW OF THE QUALITY OF THE PATENT EXAMINERS' WORK PRODUCT⁵

A primary examiner is authorized to issue each office action and allow patent claims solely on his or her signature. In the normal course of business, a primary examiner's work product is not significantly reviewed in real time. However, it may be reviewed in a delayed manner by way of an appeal to the PTAB or a patent applicant's petition to have an office action reviewed on procedural grounds. A primary examiner can work in isolation without input from peers or supervisors as to the quality of their work product for significant stretches of time.

A non-primary examiner must have each office action reviewed and signed by a primary examiner or supervisor. As the non-primary examiner progresses through the ranks, their work product is expected to improve and is subject to less supervisory review.

Each examiner's productivity is measured and reported on a bi-weekly, quarterly and fiscal year basis. However, a patent examiner may not produce office actions evenly over a bi-week or quarter. This can happen due to the difficulty of the cases drawn during that time period or a lack of effort on the part of the patent examiner during the early part of the bi-week or quarter. This unevenness can result in an "end loading" problem where non-primary examiners may hand in a large number of office actions for review and signature at the end of the bi-week or quarter. This gives rise to "Count Monday."^{6,7}

As the pressure increased on patent examiners regarding meeting productivity goals each bi-week, the PTO and the patent examiners' union, Patent Office Professionals Association ("POPA"), agreed that supervisors would review office actions handed in by non-

⁵ This section discusses only the day to day manner in which a patent examiner's work product is reviewed and does not discuss the various in-house quality review programs the PTO has in place.

⁶ A recent discussion of Count Monday appears at the POPA web site at <http://popa.org/2507/>.

⁷ Primary examiners must also have their office actions in by the appointed time on Count Monday. Thus, those primary examiners who procrastinate and are also end loaders exacerbate the problems that the PTO systems have with processing office actions on Count Monday.

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primary patent examiners in a bi-week by a specified time on the following Monday. Thus, if examiners turn in work late in a bi-week, a supervisor may have a large number of office actions to be review on Count Monday. Keep in mind that the supervisor's own performance rating depends largely on each assigned patent examiner meeting individual productivity quotas, there may be a built in bias for the supervisor to allow suspect work products to go forward.

Last year POPA cautioned examiners about "Work Credit [Count] abuse."⁸ In my experience, and consistent with feedback I have received from practitioners over the last eight years, too many initial office actions are issued that are incomplete or lack credibility. An incomplete initial office action disrupts the prosecution timeframe because typically 1-2 RCEs will be necessary to put the case in the correct posture. Applicants have no meaningful way to obtain an independent review on the merits during the examination process. Poor quality initial examination has resulted in the large number of RCEs being filed and *ex parte* appeals pending at the PTAB.⁹

RCES

Compact prosecution could have, but did not, significantly change when RCEs came into being in 1999. However, the PTO changed the count system to recognize that the patent application was not actually abandoned; instead, the RCE reopened prosecution of the same application. The PTO and POPA agreed to modify the system and created a system where the case had to be picked up for renewed consideration by the patent examiners within two months of filing.

Director David Kappos came into office with a mandate to reduce the unexamined case backlog. In an agreement with POPA, the PTO changed the count system so that a first office

⁸ <http://popa.org/2165/>

⁹ As of September 30, 2014, 25,506 *ex parte* appeals were pending at the PTAB, up from around 1,000 pending appeals circa December 2005.

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action in an RCE received less than a full count credit. This was done to incentivize patent examiners to take unexamined new cases from the back log up for action instead of renewing examination in RCEs. The agreement also changed the manner in which RCEs are docketed to patent examiners. Instead of being docketed as amended cases which meant the patent examiner had to take it back up for action in two months, RCEs were docketed as special new cases which meant the patent examiners only had to take one up for action every 1-2 months.

The consequences of these changes were dramatic. The unexamined new case backlog decreased as intended, but the backlog of unexamined RCEs mushroomed, reaching over 111,000 pending RCEs in early 2013 with an attendant delay of patent examiners taking RCEs up for action, which in some cases stretched into 2-3 years. In response to the criticism received for causing the large backlog of RCEs and the delay in taking them back up for action, the PTO recently re-incentivized patent examiners to take up for action more RCEs than their performance plan would require. As a result, the backlog of RCEs has dropped to just over 40,000 as of September 2014.¹⁰

DISCUSSION

The vast majority of patent examiners I knew and worked with were honest with their timekeeping and I believe that to be the case today. However, if a patent examiner wants to work the system, the compact prosecution and patent examiner count systems are rife with opportunities for them to take advantage. When you measure an employee's productivity by a quota system, you are telling too many employees how *little* work they have to do. If someone is expected to produce 12 widgets in an 80 hour bi-week and through the luck of the draw they

¹⁰ The PTO has a finite capacity under the present management systems to be "productive." One need only to ascertain the total number of counts the present Examining Corps, currently over 8,000 patent examiners, is expected to produce each year. Picture that number as an inflated balloon. When one redirects the patent examiners' work efforts to decrease one aspect of the balloon, the balloon will necessarily bulge outwards in a different area as the total volume of the balloon was not expanded.

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produce the twelve widgets in the first 60 hours of the bi-week, what are they expected to do with the other 20 hours of examining time? Some patent examiners work ahead knowing that the work to do in the next bi-week may be harder. Some patent examiners struggle to make their productivity quota and put in extra, off the books hours, in order to make their quota numbers. Others will work to the quota and carefully tailor their productivity and counts to match the expected hours worked on examining activities that bi-week to meet their assigned quota regardless of whether they could have been more productive. Others unfortunately believe that they accomplished what they are paid to do and can, in essence, take the rest of the time off.

These behaviors existed throughout my career at the PTO regardless of what work schedule was in place. In the rigid 8:30-5:00 regime, examiners who wanted to abuse the system "disappeared" during work hours to do errands and other non-work activities. Some even ran personal businesses from the office during the day. Some examiners would sign in for overtime on Saturday, then, take in a matinee. It was easier for patent examiners who wanted to abuse the system to do so during the flex time regime as they were not necessarily expected to be physically present.

Among the most egregious abuse of the system that I am aware of occurred after I retired and involved a patent examiner that accepted and began employment with a local law firm while continuing his employment with the PTO. As understood, he would simply "sign in" at the PTO and disappear to work at the law firm. This dual employment went on for a significant time until the law firm became aware of the fact that its "new employee" was in fact still employed at the PTO as a patent examiner. It is telling that the law firm discovered the fraud, not the PTO.

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Throughout my career at the PTO, supervisors tended to ignore time and attendance issues involving high count producers. Those patent examiners understood that, if they sufficiently exceeded their production quota, the boss would not be looking for them during the day, nor, typically reviewing the quality of their work product closely.¹¹

I am not familiar with the particulars of the current controversy. However, in my view the solution is not to dismantle the current PTO telework program but, to modernize compact prosecution and the patent examiner count systems to allow for more efficient monitoring and management of the workforce, thus minimizing the opportunity for those who want to cheat the system to do so.

The first significant change I recommend is to do away with the current expectation that examiners are doing a good job simply because they are making their numbers. This expectation reduces the job of a patent examiner to a piece work, assembly line, position where they are paid to simply get a case to a final rejection so they can force applicant to file a RCE to get the second count and pick up the next case to get yet another count quickly. In essence, anyone can make their numbers if they do not care how well the work is done.

In announcing the current Department of Commerce Inspector General investigation to the patent examiners, POPA stated: "[w]hile we know that no wide-spread systemic telework and time abuse problems exist at the USPTO (our performance metrics for 2014 show us to be a very high-producing agency)...."¹² It is this attitude – that if we are making our numbers we are doing a good job--that needs to change. How does one "know" that there is no wide-spread abuse simply by looking at the counts? Working to a number should not be the goal for a position as complex and difficult as being a patent examiner. Making a patentability

¹¹ There was a saying during my tenure at the PTO that a patent examiner never got fired for doing bad quality work, as long as they did a lot of it.

¹² <http://popa.org/2526/>

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determination for a pending patent claim requires a unique blend of legal and technical skills that cannot be reduced to a number. The current management systems needs to change to ones where bringing each case to a successful conclusion, efficiently and at the lowest cost possible, is the goal and appropriately incentivized

The second significant change I recommend is to modernize compact prosecution to eliminate final rejections and the attendant "after final" practice that disrupts the course of a complete examination. The current system, in which issuing of final rejections to achieve quick counts that accrue when an applicant files a RCE, creates artificial stops in the patent examination system. Applicants cannot have an additional amendment/evidence entered into the record after a final rejection is issued as a matter of right. It is solely within the discretion of the patent examiner.

A significant accomplishment of Director Kappos' administration was to emphasize applicant-patent examiner interviews. Interviews have long been a staple of patent prosecution and generally advance prosecution because the direct exchange of ideas can be more productive than trading paper. Examiners were authorized non-examining time¹³ to prepare for and conduct interviews, and the interview program has become more robust. As a consequence of the teleworking program, many teleworking patent examiners are located such that an in-person applicant-patent examiner interview is impossible. History shows that the most productive interviews are held in-person, so the participants can exchange papers, mark up documents and have a frank conversation in real time. While the PTO is implementing software for interactive web interviews, the fact remains that actual face time is important in moving cases forward in a positive direction. The telework program frustrates in-person interviews as there is no requirement for examiners to physically be at any PTO facility to participate in such an interview.

¹³ Non-examining time can be simply seen as time in which a patent examiner is off the production clock.

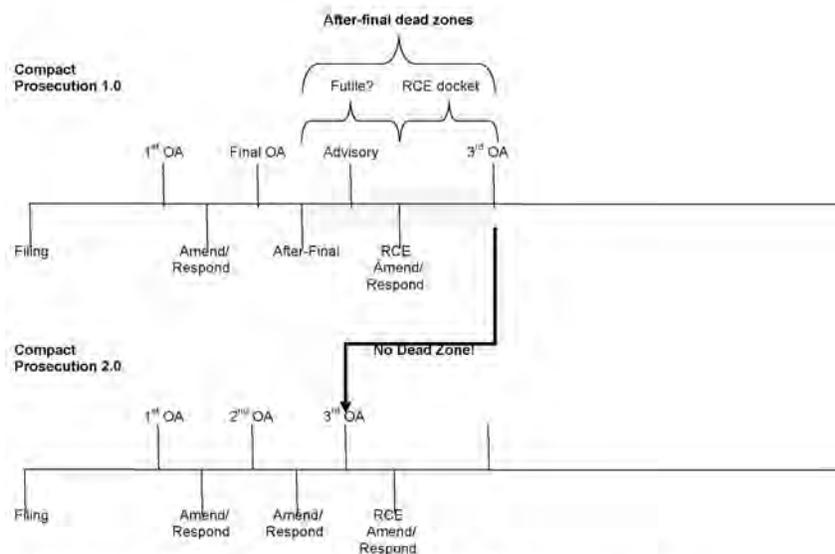
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It is common for an applicant to only fully understand a patent examiner's position once it is explained in a final or subsequent rejection. It is also common for an applicant-patent examiner interview to occur after the issuance of a final rejection where great progress can be reached and perhaps a tentative agreement is reached that additional claim amendments/evidence are needed to place the case in condition for allowance. The current system means that applicant will spend the resources to prepare an after final submission, knowing that in the vast majority of cases the patent examiner will not use their discretion to enter the submission into the record, thus necessitating the filing of an RCE.¹⁴ Patent examiners do not receive a count for the time spent in considering an after final submission.

Meaningless after final submissions wastes the applicant's resources as well as the PTO's because examiners must take time to consider the submission and issue the paper, that in a significant number of cases, informs the applicant that the submission will not be entered and that an RCE must be filed for the patent examiner to consider the submission on the merits. The artificial "dead zones" the present system creates where no meaningful activity is ongoing in an application is illustrated in a paper I co-authored¹⁵ as follows:

¹⁴ The PTO has begun a pilot program to incentivize patent examiners to consider more after final submissions by giving the patent examiners more time to do so. http://www.uspto.gov/patents/init_events/afcp.jsp. It should be noted that this pilot program is also discretionary with the patent examiner as instituting it as a mandatory program would require management negotiating with POPA.

¹⁵ Smith *et al.*, "IN ORDER TO FORM A MORE PERFECT PATENT EXAMINATION SYSTEM—IT IS TIME TO UPDATE COMPACT PROSECUTION TO COMPACT PROSECUTION 2.0" available at <http://www.ipso.org/index.php/publications/member-articles-journal/member-article-journal-patent-section/>. Copy attached as Exhibit A. AIPLA and IPO each recently urged the PTO to modernize compact prosecution in their recent comments submitted in response to the PTO's "Request for Comments on Optimum First Action and Total Patent Pendency," Federal Register, Vol. 79, No. 131, July 9, 2014, pp. 38854-55. AIPLA's submitted comments are attached as Exhibit B and IPO's submitted comments are attached as Exhibit C.



These two dead zones typically result in an initially examined application sitting idle for 2.5-19.5 months.

Modernizing compact prosecution by eliminating final rejections and after final submissions, results in patent applications being before the patent examiner in a more continuous manner. The time a patent application spends in a dead zone is wasted and contributes to longer overall pendency. Some applications go through more than one RCE, subject to being placed a dead zone with each subsequent final rejection.

Eliminating final rejections and the attendant after final practice will breathe life into the RCE program. Each application would receive "continuous" examination with no dead zones. As explained in Exhibit A, this modernization could easily be implemented because the PTO can now set its own fees. Some would argue that the RCE fee will increase if prosecution is not brought to an early conclusion. However, eliminating dead zones will improve the overall pendency of a patent application by keeping it in active prosecution at all times. Patent quality

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also should be expected to increase since the applicant and patent examiner would be continually engaged in a conversation to find patentable subject.

A key to improving both pendency and quality by eliminating the dead zones is to have each response from the applicant docketed to be picked up for review by the patent examiner within two months of filing. This is critical, especially after an applicant-patent examiner interview. The case should be available for immediate action to finalize any understandings reached during an interview and permit the applicant to prepare and submit any needed amendment/evidence. Currently, a productive interview can be held, an RCE filed and the case then not be taken up for action again by the examiner for months or years. The momentum achieved by way of the productive interview is lost.

SUGGESTIONS

1. First, do no harm. The ongoing investigation should continue and any transgressors should be appropriately disciplined. However, the investigation must keep in mind the systems examiners are working under and reality may significantly differ from the story told by the reviewed records.
2. Change the timekeeping system so that examining time is tracked by individual application numbers and specific examining activities, e.g., searching, reviewing application, drafting office actions etc. To the extent patent examiners are entering examining time without documenting the application that was under review and specific activities performed, the system is rife for abuse. A more complete time record will allow remote supervisors a more accurate glimpse of how a patent examiner is actually spending their time. Such a system will also provide management with a robust data set that can be mined to study and provide feedback as to how effective and efficient a patent examiner is. For example, if a patent examiner's average search time per application is disproportionately more or less than their peers in the same art area, managers could investigate and determine whether that patent examiner is inadvertently or purposely cutting corners on the searching aspect of their job or wasting time by over searching or inefficiently using the search tools. The same considerations apply to how much time patent examiners take to write an office action. Such data would also give managers a real time opportunity to provide corrective training as needed.

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3. Reduce the emphasis of counts in determining patent examiner productivity. Management, POPA and stakeholders should work in concert to develop new productivity metrics that emphasize the conclusion of an examination through an efficient and effective, modernized compact prosecution system instead of merely reaching a final rejection. We must work to change the mindset that a successful patent examiner is one that merely makes his/her counts without regard to the quality of the underlying work product. It is simply too easy for patent examiners to rush through incomplete office actions to achieve counts at the end of a bi-week, quarter and/or fiscal year. One metric that should be considered is the number of actions per ultimate disposal, rather than per RCE. Patent examiners should be incentivized to reach the ultimate conclusion of each case by having a continuous conversation with applicant with no dead zones.
4. Modernize compact prosecution by eliminating final rejections, after final practice and the resulting dead zones to allow for a truly compact and efficient examination process. The original version of compact prosecution in too many cases a race to a final rejection and the concomitant RCE instead of a focused proceeding to find patentable subject matter in an efficient and effective manner.
5. Improve teleworking by requiring patent examiners to live within commuting distance of the Alexandria campus or one of the regional offices and require presence in a physical office for a defined number of hours per bi-week. As a successful teleworker I can attest to the importance of maintaining a physical presence in an office. When I telecommuted from South Carolina to the Alexandria headquarters in 2004-05, I found people waiting to see me at my office. In private practice, I travel frequently to my firm's other offices as well to those of clients. Patent examiners need not have a travel schedule but they must be available to applicants for in-person interviews. This will add to the robustness of the new regional offices and make them more useful to applicants.

Further, being in an office will make all examiners available for in-person training, mentoring and collaboration. The in-person exchange of views can be more efficient than a telephone conversation. Patent examiners need to collaborate more to insure that each office action is as complete and meaningful as possible.
6. Teleworking, pendency, and quality will all improve if the PTO allows for increased management involvement on the merits of a case. Long pending cases already are

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treated specially and require supervisory input, but this is observed mainly in the breach. By having manager/supervisors become involved on the merits in appropriate cases, an informed discussion can be had by applicant, the patent examiner and a manager/supervisor to put the case on track for an earlier resolution. No one person has a monopoly on good ideas and it is easy for applicant and/or the patent examiner to become entrenched, not understanding the other's position. Appropriate management intervention can provide real time information regarding examiner performance and will allow for additional training as needed. This intervention will also aid applicant in understanding the strength of his or her position and clarify where compromise is needed. This action is especially needed for primary examiners. As discussed above, the work product of a primary examiner is not reviewed to any degree in real time and too often this can cause a needless RCE or appeal. Given the vast changes in law and technology over at least the last decade, it is naïve to think that most primary examiners are up-to-date on either to the extent needed to efficiently bring prosecution to a close.

The world of patent examining is very different and infinitely more complex now than it was when compact prosecution was implemented in the late 1960s-early 1970s. The PTO and POPA should give up on making incremental changes to an anachronistic system. Instead they should take a step back and recognize that a significant overhaul is needed.

CONCLUSION

I sincerely hope that the ongoing investigation will not uncover widespread cheating by patent examiners. To the extent that such cheating is uncovered, the offenders should be subject to appropriate discipline. The Patent Examiner Telework Program is a valuable part of the PTO. However, the current agreement, in essence, has made the program an entitlement, not a right. By having patent examiners located within commuting distance of the Alexandria campus or one of the regional offices, management can suspend the privilege if a patent examiner's performance is not what it should be. Regardless of the outcome of the investigation, the DOC IG should study the examiner count and compact prosecution system as well as how patent examiner time is accounted for. There is much room for improvement in all of these systems that will not only reduce the possibility of cheating in the future but move the patent examination system into the 21st century, reducing overall pendency and improving quality.

Testimony of William F. Smith

PTO management and POPA have much invested in maintaining the status quo. Hopefully, this hearing will provide the impetus that PTO management and POPA need to enter into a meaningful conversation with stakeholders, about changing these systems in order to provide a modern efficient and effective patent examination system.

Chairman ISSA. Anecdotally, I will mention that I have seen those rejections. I have seen the well-thought out rejections to claims, and I have seen the end-of-the-quarter rejections. And sadly, those end-of-the-quarter ones cost just as much to overcome as the ones that are meritorious. Some might say, though, of my 37 patents, some of them perhaps they just closed them out as approved and didn't look carefully enough. We will probably never know if they are not challenged.

Mr. Zinser, the August 10, 2014, Washington Post story detailing the differences between the 32-page internal report and the 16-page report to your office, you were quoted as saying that you had hoped to see from PTO was an unfiltered response, and that such a response was not what was provided to your office. That is an accurate quote, isn't it?

Mr. ZINSER. Yes, sir.

Chairman ISSA. And because you delegated this investigation, if you will, this audit, weren't you entitled to an unfiltered set of information since they were doing work on your behalf and not asked to reach only conclusions?

Mr. ZINSER. I would say yes, sir, and I think if the management wanted to include a management statement on top of the report, which often happens with our own audits, that would have been perfectly acceptable.

Chairman ISSA. But when you were denied work product, it created a lot of questions and The Washington Post asked those.

And Ms. Focarino, let me just ask you a couple of questions. On August 10th in that same report, the CAO Steckler who authored both memos, and as Mr. Budens said, one was unsigned, was quoted as saying that: "The changes between the two memos were because the conclusions were partial and unsupported." You recognize that term? Well, I would like to know for the record, when in fact, the long report said 44 percent of the SPEs said they did not have the tools they needed to address T&A abuse, time and attendance.

Now, that's obviously not unsupported, is it? That is a percentage. Was that percentage accurate based on 75 interviews? So it wasn't partial. It wasn't unsupported and the 16-page report, if I paraphrase it right said, well, some said they did, and some said they didn't.

Do you believe that if you had 44 percent saying that they did not have the tools, that that was something that should have been deleted from the IG report and ultimately from the public?

Ms. FOCARINO. I want to reiterate that we take those allegations very seriously.

Chairman ISSA. Yeah, but you watered them down. They were omitted. Let me go through a couple more quickly. Additionally, partial or unsupported, 38 percent said the agency was willing to overlook conduct issue if performance was acceptable. Now, I think I heard even in the IG's statement that the word some; 38 percent is a heck of a lot. It is not just some. Isn't that true? Wouldn't 38 percent, more than a third said that the agency had this kind of a flaw be worthy of corrective action?

Mr. ZINSER. Yes, sir.

Chairman ISSA. Additionally, 36 percent of directors said that they had requested employee records on potential time and attendance abuse and had been denied. Now, if your managers cannot get the records to show whether somebody is cheating or not, then how can Mr. Budens even tell me that it's a small amount? The fact is, you are not counting, isn't that correct? You don't know what you don't know, isn't that true?

Ms. FOCARINO. Well, records are available.

Chairman ISSA. Yeah, but if they are being denied them and 36 percent of the directors said they were denied them, why were they denied them? Were they denied them because the union contract shields from that kind of checking up after the fact?

Ms. FOCARINO. Sir, I want to reiterate that all of the interview summaries—there were 81 interview summaries—with comments that those statistics were derived from, and all of that information was provided in the final report. Every one of the 81 interviews.

Chairman ISSA. Mr. Zinser, 36 percent said they were denied. Was that in the final 16-page report?

Mr. ZINSER. It was not in the report, sir. The results of the interviews themselves were for the most part removed from the report that went out of our office.

Chairman ISSA. So, the old term, you didn't have the cross tabs to in fact know how deep these problems were; 44 percent said they didn't have the tools; 38 percent said your agency was willing to overlook the time and attendance and other things as long as they hit performance numbers which Mr. Smith said can be artificially given; and 36 percent of the directors said they were denied requests.

Mr. Budens, I'm interested in your statement, I believe I heard you more or less say that it was okay not to work 80 hours as long as you hit the numbers. Well, let me ask you a very simple question as the union rep. If this agency is not able to verify whether people are actually working or not, you say as long as they hit the numbers, how do the American people and the applicants get a fair question when many of these examiners are applying for overtime without any proof?

If they are asking for overtime, do we do that based on attendance? Is this piecemeal and we grant overtime based on excess? The fact is, these individuals are paid by the hour. The report said, as I understand it correctly, that people are asked for overtime, said they earned overtime and didn't have to prove it, and couldn't be double-checked. Isn't that true? Please, yes or no.

Mr. BUDENS. First of all, I have never said that people shouldn't be working, and they get paid for 80 hours.

Chairman ISSA. Well, the question I asked you was, in fact, if in fact the union is protecting from the getting the records to know whether someone is working or not, that means people who apply for overtime, in fact, we can't justify whether or not they made it.

Mr. Zinser, you looked at both reports. Do we have a way to credibly understand whether or not somebody worked more than 80 hours and whether that was justified based on your investigation of the long report?

Mr. ZINSER. There are ways to find out. PTO was not availing themselves of those methods.

Chairman ISSA. Okay, so tools were not used. Mr. Smith, Ms. Kepplinger, if you have anything to add quickly. I left you out and I apologize.

No.

Mr. Smith?

Mr. SMITH. In terms of my experience, especially now in reviewing the patent examiner's work product and advising patent applicants how to respond, I would say overall patent examiners, I give them an A for earnestness, wanting to do the right thing, but in too many cases the written work product is difficult to respond to.

Chairman ISSA. Thank you.

Mr. Conyers.

Mr. CONYERS. Thank you, Chairman, and I want to thank the witnesses for their variety of testimony.

President Budens, let me ask you about the Count Systems Initiative which set examiner production goals. Has that system improved productivity in your view?

Mr. BUDENS. Yes, sir. I think it was an initiative originally instituted by Mr. Kappos, requested because he wanted to accomplish two things: One was to provide more time for examiners to examine patent applications so that we would be able to decrease attrition and increase quality.

The other issue was he wanted to decrease the incentives for what are called RCEs. And so we—

Mr. CONYERS. What are they?

Mr. BUDENS [continuing]. Entered into discussions to try and work out with the agency how to do that.

Mr. CONYERS. What are the RCEs?

Mr. BUDENS. Those are requests for continued examination, and basically when an applicant has gotten to the end of the round of prosecution, if they want to continue to keep the case alive and continue prosecution, they can pay for an RCE and it reopens the prosecution of the case.

Mr. CONYERS. Now, let me ask you about recommendations made in the July 2013, 16-page report, addressing the reported telework abuse. Have any of those been implemented and where do we stand with them now?

Mr. BUDENS. We have done a number of things. I want to make it clear that POPA and the agency have been working together for years now trying to address the issues that face the U.S. Patent and Trademark Office. This is just one of many. Congress has been on our backs about the backlog for quite some time. We are effectively addressing that. We are effectively addressing attrition with things like telework, and being able to hire examiners.

Keep in mind, examiners are a very expensive commodity. It takes a lot of time and money to train an examiner, a minimum—well, basically usually about 6 years, and somewhere upwards of half a million dollars. If we are sitting here losing them, and we were for many, many years, we had to hire two examiners for every one we kept, we were spending tremendous amounts of money in order to do that. So we have created systems now that have reduced our attrition to negligible levels and by so doing, we keep these people. They move up through the grades, and they increase

their productivity, and that's what has allowed us to bring down the backlog of 750,000 plus cases.

Mr. CONYERS. But do you have enough support and equipment and personnel to identify poor performers to take corrective action where necessary?

Mr. BUDENS. I absolutely think we do. Not to want to be flip, sir, but frankly, if the agency wasn't taking actions like that and couldn't track people like that, the union wouldn't really have much of a need of existence. Because a great deal of our time is spent representing employees who have gotten into trouble and we have got to look and see what is the cause, and what we have to do, work with the agency to try and solve the problem, and get the examiner back on good behavior.

Mr. CONYERS. Okay, thank you so much.

Let me ask the commissioner. Ms. Focarino, has the opportunity to telework helped you retain the most qualified examiners?

Ms. FOCARINO. Yes, thank you for that question. It has very much helped us increase the opportunity. As you heard in my testimony, we have more than doubled the size of our patent-examining corps. So we currently have about 8,500 patent examiners and they are helping us reduce the backlog and reduce pendency so that we are continuing to work toward our goal of 10-month first-action pendency, and 20-month total pendency.

And the longer we retain these examiners the more experienced they get, the higher quality work product they put out, and so it is critical that we retain them. Because in order to retrain the people as new hires is extremely expensive to the agency.

Mr. CONYERS. Let me go to Ms. Kepplinger now. How does the Patent Public Advisory Council, PPAC, work with unions to establish an effective approach regarding a number of aspects of the patent operations and implications for patent applicants and the public?

Ms. KEPPLINGER. There are two union representatives on the PPAC. Mr. Budens is one, and there is a Catherine Faint who is from another union also is on the PPAC, and so in collaboration, we look at the data and the things that are not working so well and try together to find ways to address changes that could be made within the system and within the Patent Office that might make for better opportunities for applicants.

Mr. CONYERS. Thank you for your response.

My time is up, and I yield back.

Chairman ISSA. I thank the gentleman.

We now go to Congressman Marino.

Mr. MARINO. Thank you, Chairman.

Good afternoon, ladies and gentlemen.

We have heard a lot of good things of what happens with our Federal employees in the Patent Office, and the Trademark Office, and I agree with most of it. But I haven't heard yet what, if anything, and perhaps someone can educate me on this—we will start with you Mr. Zinser, you are handling the investigation, the inquiries at this point.

And we have over 600,000 patents backlogged. We have paralegals who say they didn't have enough work. But actually, in my opinion as a prosecutor, not only as a State prosecutor, but as a

Federal prosecutor there appears to be fraud and theft by a small number of people, but nonetheless, it seems to have appeared.

And pursuant to the U.S. Code, Title 18 Part 1, let me go through a list of crimes starting in Chapter 19 with the Section 19, conspiracy; Section 31, embezzlement and theft; Section 47, mail fraud and other fraud offenses; Section 63, mail fraud and other fraud offenses, pursuant to the specific act; Section 73, obstruction of justice; Section 101, records and reports; and of course, Section 1001, lying to Federal investigators. And I'm sure I am missing something here. And these crimes totalled, combined, the penalty is decades in prison, and hundreds of thousands of dollars in fines.

Are we pursuing the investigation in any way, shape, or form to prosecute these people if the evidence is there?

Mr. ZINSER. Thank you, Mr. Marino. I would say that there are individual cases that we are pursuing, and if the evidence leads us there, we will refer them for prosecution. I think one of the biggest problems we have along those lines is that the management at PTO has been basically complicit.

If you look at the Patent Trial and Appeal Board matter, those managers knew exactly what was happening with their paralegals; that there wasn't sufficient work, supervisors directed them to enter their time the way they did, and the employees were following their supervisors' instructions.

That kind of decision, or complicity, by the management makes it very difficult to prosecute a case.

Mr. MARINO. I understand that, and I asked the question in the form that I did beginning with you, because of the procedures that you have to go through. And I was aware of the lack of cooperation that you were getting, and the managers being complicit.

But certainly, the managers need to be held accountable, and let's face it, I was in private industry until I was 30. People know when they are doing something wrong, particularly when they are getting paid to do nothing. So I would hope, I would hope that given the fact that some employee says, "Well, my manager allowed me to do that," is like saying that the person driving the get away car in a bank robbery are saying well, you know something, I just went along for the ride. I really didn't point the gun at the bank teller and say give me the money.

So we have to get down to the basis here, and the American people are sick and tired of this occurring and the bureaucrats in the system just getting away with this. It would not occur in private industry; not at all. And if it were, I prosecuted people in private industry, and also in the Federal Government for doing the same thing.

Ms. Focarino, could you please expand a little bit or answer my question pursuing criminal prosecution, and please don't tell me that someone said, well, my boss told me to do it.

Ms. FOCARINO. So as soon as the OIG referred the complaints in 2013 regarding the underutilized paralegals in the Patent Trial and Appeal Board, the agency did take immediate action and has made significant progress toward avoiding the issues raised by the IG; namely, we submitted a report to the IG just recently in September. We implemented a third-party consultant's recommended

changes. We brought in an outside consultant and they did a thorough review.

Mr. MARINO. Okay, let me interrupt you. I understand the review and the changes that you made. My focus primarily is, are those individuals that were getting money for doing nothing going to be prosecuted if the evidence is there?

Ms. FOCARINO. Sir, I don't know the answer to that.

Mr. MARINO. You don't know if the evidence is there, that you wouldn't assist in complaining to a law enforcement agency that they should be prosecuted? Yes or no?

Ms. FOCARINO. As I said, we submitted our report just recently to the OIG. We have concluded our recommendation the—

Mr. MARINO. Well, you being a manager over there, I would like to think that someone in charge would let the American people know that we are not going to tolerate this in my department, in my agency. Can I count on that?

Ms. FOCARINO. So those managers are no longer in their positions in the patent—

Mr. MARINO. But they are still working, aren't they? And they are still getting paid, and they still stole money from the taxpayers and nothing is being done about it?

Ms. FOCARINO. Performance actions were taken against these individuals, sir.

Mr. MARINO. It is theft. It is stealing dollars from the American people. Performance action was taken so they get shuffled into some other position, and we do nothing about it? It is outrageous.

I see my time is about gone and I yield back.

Chairman ISSA. I thank the gentleman. For the IG, he could also answer that question. If the same information was asked came to your attention, what would be your normal procedure, if you don't mind?

Mr. ZINSER. We would refer matters to the U.S. Attorneys' Office to get a determination on whether the case was one that merited prosecution.

Chairman ISSA. I think that's what the former U.S. attorney was getting at. Thank you, I thank the gentleman.

We now go to the gentleman from Maryland.

Mr. CUMMINGS. Thank you very much. Following up right on that, so would it go with a recommendation? In other words, if you were referring it, would there be a recommendation or you just say, here is the evidence?

Mr. ZINSER. Well, you generally—

Mr. CUMMINGS. If you were to refer it, go ahead.

Mr. ZINSER. Yes, sir. There are cases you take to the prosecutor because you are obligated to do that—

Mr. CUMMINGS. Of course.

Mr. ZINSER [continuing]. You don't think the evidence would really get the prosecutor to take the case. There are cases where you would push very hard for a prosecution. We have done that, yes, sir.

Mr. CUMMINGS. Very well.

Commissioner, I want to thank you for being here today. The PTO's telework program has been a model for the Federal Government and we want to ensure that it is managed effectively and effi-

ciently to date. The telework program has helped the agency recruit and retain, as you have already testified, a highly skilled workforce, and it has saved the agency millions of dollars.

I am troubled, however, by the findings of your investigation which identified instances of time and attendance abuse by some of your examiners. As I understand it, the July 8, 2013 report detailed five cases of examiners who claimed time they apparently did not work. Are you familiar? Are you familiar?

Ms. FOCARINO. I am.

Mr. CUMMINGS. Keep your voice up, please.

For instance, the report describes one examiner who received more than \$12,000 for about 265 hours of fraudulently claimed time. And another examiner who received about \$1,300 for 25 hours of fraudulently claimed time. Commissioner, has the PTO taken disciplinary action against these five employees and if so, what actions were taken?

Ms. FOCARINO. Thank you for the question, Congressman.

The individuals identified in the original draft report who were found to have committed time and attendance violations were disciplined. One was removed, two were suspended, and one received a letter of counseling. The fifth case was never referred to our employee relations, and the individual referred to in one of the interviews was never identified. Therefore, no action could be taken.

And I would also like to point out that of these cases, only two of them were teleworking employees.

Mr. CUMMINGS. I think somebody testified a little bit earlier, I can't remember who it was, who said that it is not—I mean, you don't necessarily, say, assume that the subjects of these cases are teleworkers, is that right?

Ms. FOCARINO. That's correct.

Mr. CUMMINGS. So in other words, you have—who said that, somebody?

Ms. KEPPLINGER. I did.

Mr. CUMMINGS. Yeah, they may or may not be, is that right?

Ms. FOCARINO. That's right.

Mr. CUMMINGS. But you're saying out of the five, two to your knowledge, were teleworkers, is that right?

Ms. FOCARINO. That's correct.

Mr. CUMMINGS. Now, has the PTO experienced a substantial increase of time and attendance misconduct since establishing the telework program? Do you know?

Ms. FOCARINO. I don't believe that there has been a significant increase in time and attendance misconduct, but any acts of misconduct related to time and attendance is unacceptable. And when those situations come to our attention, we take action, and we administer the appropriate discipline.

Mr. CUMMINGS. Now, going back to you, Mr. Zinser, and I am going to come right back to you, Commissioner, but to you, one of the things that we have seen in our Committee as folks of some agencies that have come before us, we have seen almost a culture being developed, slowly, but surely, of sometimes complacency.

We saw that with the Secret Service, an inefficiency, and in other agencies, but do you feel like this is a culture that is being developed here, or do you think these are aberrations?

Mr. ZINSER. Sir, I think the interviews that were conducted by the employee relations staff at PTO reflect that there is a cultural issue; that somehow the signal has come down from the senior levels that they do not want to pursue time and attendance abuse to the point where they are going to go and seek additional records and data to help make those cases.

Mr. CUMMINGS. Now, did you hear that, Commissioner? Did you hear what he just said?

Ms. FOCARINO. I did hear that.

Mr. CUMMINGS. I mean, would you agree with that?

Ms. FOCARINO. I do not agree with that.

Mr. CUMMINGS. And why don't you?

Ms. FOCARINO. Any single case of misconduct is unacceptable to us. And when they come to our attention, we take action.

Mr. CUMMINGS. All right, well, the PTO identified eight recommendations to improve its telework program, and is currently in the process of implementing those recommendations.

Commissioner, can you give us an update on where the agency is in that process, and when do you expect all eight recommendations to be complete?

Ms. FOCARINO. Right. Thank you for the question, Congressman.

So let me point out that even after we received the anonymous letters in the summer of 2012, we started taking action. We instructed all of our managers concerning time and attendance procedures, and we included guidance on time and attendance abuse indicators so that they could be more readily spotted. We also reached an agreement with the union which included mandatory use of collaboration tools for full-time teleworkers.

Since the investigative report was submitted to the IG in July of 2013, we started a pilot to reduce the incidence of end-loading which you have heard discussed earlier today. We started an initiative to develop more preventive measures to reduce employee misconduct. We started an employee disciplinary process that looks at the whole conduct process to make sure that employee misconduct is addressed and is addressed consistently across a very large workforce.

We have revised the examiner timeliness or docket management that Mr. Budens has referred to. We've removed the auto counting privilege for examiners that have shown to abuse it. And we have created a center repository of our policies and procedures for our supervisors because we found in certain circumstances where we did have policies in place, like accessing records for examiners, those policies were not known to all of our supervisors.

So we have to make a concerted effort to make sure that we have easy access, a centralized location that our managers are trained on these processes and procedures regularly.

Mr. CUMMINGS. My time is expired.

But let me just ask you one thing. I lost count, there were eight, so have you dealt with all eight?

Ms. FOCARINO. We have implemented all eight recommendations, and as a matter of fact, of the 15 in that initial draft report, 13 of the 15 recommendations have been implemented with only two not being implemented because they do not make good business sense.

Mr. CUMMINGS. Thank you, Mr. Chairman, for your indulgence.
Chairman ISSA. If the gentleman will allow me to ask a clarifying question.

Mr. CUMMINGS. Of course.

Chairman ISSA. You said more or less, people lost their privilege to do auto count if they were shown to have abused?

Ms. FOCARINO. Yes, sir.

Chairman ISSA. Could you describe for us what that abuse means, the numbers, so that we understand why most people apparently still get auto count and what it means?

Ms. FOCARINO. Right. So examiners when they reach a certain grade level are given the privilege of submitting their own work for credit with just cursory review because that goes along with their level of experience.

Some examiners had been found to be submitting work that is not complete, that has several errors that need to be corrected, and they result in many returns that you heard Mr. Budens refer to. And we have suspended that privilege for those examiners.

Chairman ISSA. I thank the gentleman.

Mr. CUMMINGS. Thank you, Mr. Chairman.

Chairman ISSA. Now, we now go to the other patent holder here on the dais, Mr. Massie the gentleman from Kentucky.

Mr. MASSIE. Thank you for not pointing out that I only have 29 patents and you have 37.

Chairman ISSA. Yeah, but I understand some of yours are still valid and mine are mostly expired.

Mr. MASSIE. Well, some of yours were never valid, but we will leave it at that.

Chairman ISSA. You know, Tom, I pointed that out earlier.

Mr. MASSIE. Well, let me just say, I have a great appreciation for what you do, Commissioner Focarino, and Mr. Budens, what the folks that you represent do. It's a constitutional duty and it was prescribed in our Constitution to grant for limited periods of time exclusive rights to the inventions to the inventors.

And I take it very seriously. I want to back up before I get to my specific questions about the subject matter at hand and just say, here in Congress, I think it's our obligation first to do no harm to the patent system. The big picture here, is to encourage and protect innovation in this country. Some would consider this off topic, but I don't think it is.

Mr. Budens, you represent how many patent professionals, examiners and professionals at the Patent Office?

Mr. BUDENS. Approximately 8,500, most of which are examiners.

Mr. MASSIE. So over 8,000. Were you ever called to testify on the Innovation Act?

Mr. BUDENS. Not that I recall specifically for AIA. I have been up here—this is my third trip up here.

Mr. MASSIE. But you wrote a letter last year about the Innovation Act, right?

Mr. BUDENS. Yes.

Mr. MASSIE. Okay. It was actually a year ago today, and you had some concerns with the Innovation Act. Can you tell us what those were?

Mr. BUDENS. I haven't got it fresh in my memory.

Mr. MASSIE. I will just ask you if this is what you said: "A broader concern for POPA is that the Innovation Act appears skewed against small inventors." And that you encouraged us to make sure that anything we passed wasn't skewed against small inventors.

Mr. BUDENS. That would be accurate, I'm sure. I can't say word for word, but I would assume that's the position. That has been the position, both my own personal position, but also the official position of POPA for as long as I have been involved in it, that we support a strong patent system. And we want to make sure that the small inventor never gets squeezed out of this.

Mr. MASSIE. But that was your concern with the Innovation Act. That was my concern, too. That's why I voted up against it. And hopefully, we won't bring that up again, and hopefully, it won't pass the Senate. But that is because we are trying to fulfill our constitutional duty to protect innovation.

Now, let me get directly to the matter at hand. First of all, Commissioner Focarino, I realize this is not such a high bar, but I will tell you my friends who are innovators in the medical device field asked me, why can't the FDA be more like the Patent Office? So that is sort of a back-handed compliment for what you do there. And we appreciate that.

Also, it seems like today we are talking about activity, tracking activity and not so much progress. And a wise person once admonished me, never confuse activity with progress.

But activity is a precursor to progress. You do have to have some activity. So, and what is apparent to me here is that telework is not necessarily as much a productivity enhancer, as it is a recruitment tool. And this was true at my company when we allowed telework. And I can tell you there are some people who are not cut out for telework. They just don't do well independently in their house with kids running around and whatnot.

And so I think it works to your advantage with some employees, and to your disadvantage with others. And I think you have to acknowledge that if you are going to manage people in a telework environment, that not everybody is cut out for it.

Let me ask Mr. Budens. Mr. Smith had what seemed like good advice. A couple of things he mentioned—and get your feedback on this. He said maybe we should break down the hours by patent-examining activities and track it that way instead of just activity. Do you think that would be helpful?

Mr. BUDENS. I think it would be very difficult to do because it would be so varied across technologies. For example, and when I examined—

Mr. MASSIE. Are there some technologies where it might be appropriate? Surely, the manager could adjust?

Mr. BUDENS. It might could be, but I think that it is already relatively built in the system in the goals that we have as examiners of looking at how much time do we have to spend time searching in this particular technology, or that—

Mr. MASSIE. Right. But some of it is done already.

Let me ask you about another one of the suggestions, and correct me if I'm wrong, Mr. Smith. You recommended that perhaps new examiners should be within commuting distance of the office?

Mr. SMITH. New examiners who are newly approved for the teleworking program.

Mr. MASSIE. For the teleworking program. What about that idea?

Mr. BUDENS. It is certainly one to think about. I think that one of the biggest problems we would have initially, is that a lot of the people who want to telework and a lot of the advantages that we have gotten out of telework, were hiring, being able to hire people from pools that were away from the agency. In other words, we have now been able to hire people who work in Silicon Valley—

Mr. MASSIE. There are four branch areas right? Is there one on the West Coast?

Mr. SMITH. Right. Now that we have four regional offices, I think in my view, a prospective patent examiner would have the choice of five very nice, diverse areas that they could relocate to if that was what was needed.

Mr. MASSIE. Commissioner Focarino, do you support mandatory online presence indicators for patent examiners working at home?

Ms. FOCARINO. I'm in favor of any tool that improves collaboration and communication with our examiners. And no tool is going to be a time and attendance tool, so I want to make that clear. But these tools are meant to make communication efficient, and very collaborative. And we have some really great tools, particularly for the interviews that you just mentioned.

Mr. MASSIE. And just a quick yes or no. Mr. Budens, do you support or oppose mandatory online presence indicators, just a quick yes or no. My time is up. I would give you more time if I had it.

Mr. BUDENS. Depends on how they use it. For corroboration, we already do that. Everybody already uses it.

Mr. MASSIE. Do you support mandatory, yes or no?

Mr. BUDENS. I can live with mandatory as long as they are not being used to verify work. Attendance—

Mr. MASSIE. It is activity, not progress, I understand that.

Mr. BUDENS. For collaboration they are wonderful tools.

Mr. MASSIE. Thank you, Mr. Chairman.

Thank you witnesses.

Chairman ISSA. Thank you.

I wonder if the fellow that had the automatic mouse mover as part of his work station, whether or not he would agree that it should only be for collaborative oversight?

Mr. MASSIE. Well, there is the program you can get to defeat the automatic mouse mover tracker, of course.

Chairman ISSA. By now I'm hoping they have it after that report.

The gentlelady from the high-tech capital north of California, Ms. Lofgren.

Ms. LOFGREN. And home of the future Patent Office.

Chairman ISSA. Yes, I'm well aware of your winning out over San Diego due to some unfair competition at the time.

Ms. LOFGREN. Thank you, Mr. Chairman.

I just want to make a quick correction. Mr. Marino mentioned that there was money from the taxpayers, and in fact, there is no taxpayer money here. It is all fees. It doesn't mean that there is a problem, it's okay. It isn't okay. But who is, if there was a loss, it was the patent applicants who lost. It was their money. And they are not happy.

And I hear from a lot of patent applicants in Silicon Valley want to make sure the system is working well, and are not happy about the built up delay time and this news was frustrating. So I just wanted to pass that on to you, Commissioner.

Mr. Zinser, I wanted to address some issues of concern to you. Now, Inspector Generals and their offices are normally just beacons for whistleblowers, and the IG system, I think, has a problem when whistleblowers don't trust them, or even feel threatened by them. And I think you have had a very troubled relationship with whistleblowers that I think is of concern.

In 1996 when you were the Deputy Assistant IG for investigations in the Department of Transportation, the Office of Special Counsel found that you personally retaliated against a whistleblower in your office named John Deans. They determined that you retaliated against Mr. Deans because "he discovered violations and politically embarrassing information about high-level government officials and community leaders," related to the potential diversion of Federal funds. And the OSC described your behavior as draconian in nature and motivated by animus.

OSC also determined that every allegation you made against Mr. Deans when you proposed that he be fired was unsupported, and in fact, a settlement was reached that reinstated Mr. Deans, paid him 11 months of backpay and benefits, paid his attorneys' fees, allowed him to move back to his Denver office and away from you until retirement, and removed any allegations about him from his personnel file because they were completely false.

Now, as disturbing as that was, I don't think it's an isolated case. Last year two of your closest and most senior members in Commerce Office of the Inspector General were found by the OSC to have retaliated against whistleblowers in your office, although they found no "documentary evidence" that you were directly involved. This year, however, the Committee on Science, Space, and Technology has been engaged in a bipartisan investigation of your office involving allegations that you personally, and your newly appointed Deputy IG have been attempting to identify and retaliate against employees in your office that you believe have been cooperating with the congressional investigators and OSC.

Now, I want to raise this relative to the PTO office, because your office conducted an audit in February of 2012 on the PTO's telework program, and your audit found "USPTO's policies for managing PHP comply with applicable telework laws and provide reasonable controls and assurances that the program operates effectively and efficiently." And it concluded that "USPTO has adequate controls over patent-holding programs in key areas."

Now, the report found that telework examiners were actually more productive than other examiners at headquarters, and that the PTO had saved millions of dollars and unavoided costs as part of this program.

Now, it is my understanding that at the same time your office was issuing this report, you were receiving complaints from whistleblowers that the program was rife with abuse and potential fraud, and that rather than investigating those issues raised to you by whistleblowers, that you actually sent those allegations that

could, in fact, be even criminal conduct, back to the agency itself to investigate.

And so I have a concern. I wonder how the audit staff, number one, could have been so far off the mark when they issued their February 2012 report, and how far from the ordinary practice is it for whistleblower allegations that might even constitute crimes to be sent back to the agency itself to investigate rather than the IG's office.

Also, how can you in your office continue to function effectively when you have such a blemished history in your treatment of whistleblowers? And how can we trust that you will stop what appears to be a 20-year pattern of retaliation against whistleblowers.

And finally, I am concerned and would like to know why you did not disclose the John Deans case of retaliation to the Senate during your confirmation hearing to become Commerce Inspector General?

Mr. ZINSER. Well, there's a lot there, Ms. Lofgren, so let me just take your last.

Chairman ISSA. Take your time, and go through them. We will be patient.

Mr. ZINSER. Okay. With respect to my confirmation hearing, the John Deans matter occurred many years earlier, and that matter did not come to my mind when I was going through my confirmation process. It never came up in the FBI investigation. I did not consider myself, at the time anyway, a subject of an OSC investigation. And Mr. Deans' matter was a very complex situation, whereby Mr. Deans himself had allegations against him made by the United States attorney in Colorado that had come under investigation and, yes, we did settle that matter. And both sides of the story have not come out on that case.

With respect to whistleblowers, I think our office has no problem receiving and investigating whistleblower complaints. In fact, I think one of the problems that exists at the Department of Commerce, is that the management at the Department of Commerce has not taken ownership of the problems that are reported over our hotline. We have been working with management for several years now since I have been the Inspector General for the management to take ownership of their problems.

The specific whistleblower allegations that came in about the telework program were not exclusive to the telework program. It was about how the management treated allegations of time and attendance abuse. And none of those made specific allegations against specific individuals that would warrant us opening up a criminal investigation. They were basically rants against the management and in our view, the management needed to hear them, and needed to address them promptly. And that's why we sent them to the management.

Now we are doing additional follow-up investigations and if the investigations lead us to where we need to refer things for prosecution, we will do that.

Ms. LOFGREN. Mr. Chairman, I realize my time is expired, and I did have a long set of questions.

Chairman ISSA. If there's any that were unanswered, you can do a quick followup.

Ms. LOFGREN. I will, but actually what I might do since there are other Members waiting, is to take the opportunity to followup after this hearing to actually inspect the allegations and whistleblower complaints that Mr. Zinser has referenced.

Chairman ISSA. And I would look forward to doing that with you.

Ms. LOFGREN. That would be wonderful. Thank you, and I yield back.

Chairman ISSA. We now go to the gentleman from Georgia for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman, I appreciate it.

This is, again, very frustrating. You know, coming out and coming back to this oversight, not only with both Committees, which I serve on Oversight and Judiciary, and also as one who is a very strong advocate of creators and patents and this whole issue.

Commissioner, one of the issues that I have, I have been a strong advocate of ending the PTO fee diversion and cosponsored legislation with my colleagues on Judiciary to end this, and I have defended the integrity and efficiency and the management of PTO.

To say that I'm disappointed at this point, is beyond the pale. It is hard enough when you prioritize and try and help others understand the prioritization from what I feel like are valuable protections, constitutional protections and statutory protections that are found, and then when we are trying to actually get more help to do that, to find that these are going wrong, is not something that I personally can tolerate. If you can't act really as a good steward of the resources the agency have given you, why should I as a Member of Congress consider giving additional funds or trying to end something that is wrong if at this point you can't better utilize what have you got?

Commissioner, Ms. Focarino?

Ms. FOCARINO. Thank you for the question, Congressman. I want to reiterate, we take these allegations very seriously. We acted immediately, as soon as we got the first whistleblower complaint. We do take our management responsibility seriously. It is a large and complex agency that we are managing, and growing, and it's challenging. But we are very serious about addressing these allegations and the isolated cases of abuse.

Mr. COLLINS. Okay, and, again, I think the biggest disconnect, and I have been up here really 2 years now, the biggest disconnect I have found is, and many times outside the Beltway, there is a difference in correcting a problem than inside the Beltway.

And inside the Beltway is, well, let's study it, work at it, look at it, think about it. Maybe there are be some Members of Congress who will forget about it. Maybe we will have another hearing and then get to it.

In other parts of the world that's not the way it is done, because this is not, to me it has been sort of a longer term problem.

Commissioner or the Inspector General either one, you are familiar with the term end-loading, correct?

Mr. ZINSER. Yes, sir.

Mr. COLLINS. Okay, you are, Commissioner?

Ms. FOCARINO. Yes, I am.

Mr. COLLINS. Okay, go ahead and put the slide up here because this is a concern that I have in the report that was issued. The 32-

page report basically talked about the directors and supervisors believe that end-loading would compromise quality of work.

What you are seeing here is analysis of data showing end-loading by patent examiners suspected of cheating on time and attendance. And as you can see at the end of each quarter, going back to this first quarter of 2012 that there is a direct pattern of end-loading here.

So I have a question, and we talk about finding out stuff, this has been going on for several years. What is the process for end-load monitoring? What was being done to look at this, and why would this not have at least cast a red flag? Either one of you?

Ms. FOCARINO. I will be happy to start answering the question, Congressman. End-loading in and of itself, is not necessarily a problem.

Mr. COLLINS. Well, hold on a second. But in your 32-page report you found 71 percent of supervisors interviewed, and 90 percent of the 25 directors interviewed believed that end-loading could compromise the quality of an examiner's work.

Ms. FOCARINO. And we are concerned that supervisors believe that, and we have mechanisms in place for when that type of output occurs that the supervisor is compelled to do an enhanced quality review on the work product. But as I said before, end-loading in and of itself, is not necessarily a problem. Some examiners do their work in parallel. They do searches together for similar applications, and their end process, and then they submit them for credit in one bulk piece.

Mr. COLLINS. Well, look I think anybody in this room who has ever had a college class, or even a high school class, or even just an online class, yeah, you wait until the end, but that is not the best way to do work.

Ms. FOCARINO. Right.

Mr. COLLINS. And especially when you are dealing with something. And let's take it out of here for just a second. We get to the patent, we get into the court cases, we get into defending these patents, and we have got a lot of other patent troll legislation and everything else, if we can't depend on the right work getting done in the Patent Office to start with, and it not being monitored for 2 years on end-loading, which is, okay some is okay, but this is a pattern here. If you look at this, it is a direct pattern at the end of every quarter. It is not a once-off thing. I think this is the concern that I'm having.

So in my little bit of time left here, because if you cannot understand the frustration in my voice, I am very frustrated at this because as someone who defends creators and wants this to be taken care of, and our business to be a model, to not be able to look at this is a problem. So I'm going to flip it. I don't want to hear what the PTO, you think you should do. I want you to hear—what do you think we should do? What should Congress do when we see this kind of abuse happen? What, especially for those of us who have defended the office, and also defend the fee ending, diversion, what do you tell us? What should I do now?

Ms. FOCARINO. Well, I want to say that I would like to tell you what we are doing to address the problem. And I would like to

preface this by saying when I was an examiner in 1977, end-loading existed.

Mr. COLLINS. Nobody has denied—ma'am, nobody has denied end-loading existed. What we are having a problem with is supervision here.

Ms. FOCARINO. Right.

Mr. COLLINS. This is a pattern the of letting it go without seemingly anyone taking the time to say we have a problem.

Ms. FOCARINO. Yes, sir. We have a quality check in place and we have recently, we piloted a program in a technology center with 1,000 patent examiners to specifically address this issue. It began in December of 2013. It was very successful. It reduced this type of behavior significantly. And now we have implemented that program across the entire corps of 8,500 patent examiners. And we hope to see significant improvements.

So we are very concerned about it. We are focused on it and my point was, that in and of itself, is not necessarily a problem. But it can be. And when it is, we address it.

Mr. COLLINS. Well, I think telework can be a good thing. I worked on the State level, worked on it here. However, what does disturb me is basically what you said when the actual report of your supervisors and your directors said it could be a problem. You just said it is not necessarily a problem and that basically you were upset with your supervisors for saying this.

That is a disturbing—that right there to me is saying there is a disconnect maybe from the top level to the supervisor and director level saying, maybe we are not sure what we should be looking for. I'm going to be following up with followup questions for the record in writing on this, but please understand, this end-loading issue and other issues here for those of us who want to defend this office is not acceptable, and frankly, your answers left me lacking a great deal.

Mr. Chairman, I yield back.

Chairman ISSA. Thank you.

Just for the record since you are answering, as I understand it the supervisors, if you dump or end-load, you dump 16 patents, they only have a matter of hours to respond because they have a timetable. So spiking also denies proper supervision, doesn't it?

Ms. FOCARINO. It certainly makes it challenging to review large volumes of work in a short period of time, so what we typically do is add additional resources. We have quality assurance specialists that look at the work to assist our supervisors when these situations occur.

Mr. COLLINS. Mr. Chairman, could you yield to that? I mean, that—

Chairman ISSA. I would ask unanimous consent that the gentleman have one more minute.

Mr. COLLINS. Just very quick.

So basically what we have done to save money and to save process because end-loading was not properly supervised, we have had to expend extra resources to deal with the end-load dumping that occurs to make sure that these were done right. Is that what I just heard you say.

Ms. FOCARINO. I didn't say that, no. I said we have a quality—

Mr. COLLINS. Exactly what did you say, ma'am?

Ms. FOCARINO. I said we have quality assurance specialists that when this situation exists, they can assist our supervisors in the review process should they not have enough time to review a large volume of work.

Mr. COLLINS. But if they were done at a proper time then they would not have to be as involved with so many at the end. This is absolutely—is going in a circle.

Mr. Chairman, I appreciate the indulgence. Thank you.

Chairman ISSA. I thank you. Mr. Smith and Ms. Kepplinger, you look at the effects of that kind of a spike and not enough time for the supervisors to look at it, don't you? You want to weigh in on what that might do to the patent quality from your experience?

Mr. SMITH. I do have some views here. And I think that's one of the basic problems as a patent practitioner that we run into. I think it's part of this count culture that I think is the biggest cultural change that we need to make in the system where patent examiners are not of the mind-set that they are being paid to do piecework; that there is a continuous consideration of the case until it's ultimately determined to be patentable or not.

The phenomenon known as count Monday, I think is a recipe for disaster. One quick anecdote. A few years ago there was a patent that issued element array, one of the elements specifically said in the patent claim that operated at a speed bigger than the speed of light, which would certainly raise eyebrows of most physicists.

And when I asked the manager in charge of that unit, how could that possibly have been passed through, and he just shrugged his shoulders and said, it came in on count Monday, and the SPE had 50 cases to review.

So I think, again, the take-home lesson is not so much about telework as it is that the underlying management systems need to be reformed.

Chairman ISSA. Thank you.

If you have any other comments—

Ms. KEPPLINGER. Yes, as I indicated, if an examiner does a very large proportion of the work at the end, it does in my mind, raise quality issues. What you have to consider is how much is being done, and what the circumstances are because sometimes it does not equate to a quality issue.

One thing I would observe about the spikes, it's true that you see those spikes which represent to some extent some undesirable end-loading. Some of it actually also is a portion of the work that's sent in by us, the practitioners, which also reflect a cyclic pattern which we had uncovered when I was at the Patent Office. That during a week, the work comes in to peak on Fridays, so the examiners are tasked with doing the work based on those timeframes, too, so it is sort of like, to some extent, a viscous cycle.

Chairman ISSA. Mr. Smith.

Mr. SMITH. Yes. I think that, with the end-loading problem, if my suggestion about changing the time accounting system—these are systems that law firms use all the time.

When I am doing a prosecution matter, I put down our internal client matter and then how many hours I worked on it that day

and then, for those, a slight narrative as to what exactly I did for the client.

On a litigation matter, when you enter the matter number, there is another menu that pops up with 20 activities, appeal work, client counseling, depositions, all of these discrete tasks.

And there is also software that law firms use at the end of the day—it is called time management software—where you get a report based upon your computer usage, your telephone usage as to what activities you actually use.

And I think that, if that software was in place, it would be interesting to see, if a patent examiner did 80 or 90 percent of their productivity at the end of the quarter, how was their time spent in the first month of the quarter. And that can only be tracked by application and task.

Chairman ISSA. Thank you.

The gentlelady from Texas, Ms. Sheila Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Let me just build on the last comment of Mr. Smith because, Commissioner, I think all of us want productivity. We in the Judiciary Committee overhauled patent law to ensure resources and certainly productivity.

I think the number was eight, and that may be incorrect. But how quickly can you implement the recommendations that the Commission has put forward to cure some of these concerns that are legitimate in terms of some documented ones, but also we recognize that there are very good hard-working employees at the Patent Office? How quickly can you move forward?

Ms. FOCARINO. Congressman, are you referring to the eight recommendations—

Ms. JACKSON LEE. Yes.

Ms. FOCARINO [continuing]. In the July 2013 report?

We have actually implemented all of those recommendations.

Ms. JACKSON LEE. So all of those are now implemented?

Ms. FOCARINO. Yes.

Ms. JACKSON LEE. And you heard Mr. Smith, this anchoring of heavy work at the beginning and nothing at the front end.

How do you respond to that?

Ms. FOCARINO. Well, one of the initiatives, one of the pilots, that I described that was very successful in an area with 1,000 patent examiners that was in place for a year has been implemented across the whole entire patent core of 8,500 examiners. And we believe that this end-loading behavior that has existed for quite some time will indeed decrease.

Ms. JACKSON LEE. And do you have your own internal mechanism for assessing whether or not these changes are successful—

Ms. FOCARINO. We do.

Ms. JACKSON LEE [continuing]. Such as not—not heavy loading at the end and nothing in the beginning of the month?

Ms. FOCARINO. Yes. The examiner's output is tracked on a daily and biweekly basis.

Ms. JACKSON LEE. And will you be able to provide those periodical reports to the Congress?

Ms. FOCARINO. Yes.

Ms. JACKSON LEE. If we were to individually ask or the Committee was to ask, would you provide those reports—

Ms. FOCARINO. Yes, we can. Absolutely.

Ms. JACKSON LEE [continuing]. To both the Judiciary and the Oversight Committee?

Ms. FOCARINO. Absolutely. We would be happy to.

Ms. JACKSON LEE. Let me, first of all, indicate that we know this is about service to our genius that is there in America. I have always said that science, patents are the work of America. That is what makes America churn.

Let me go to Mr. Zinser and just refer to some of your testimony. And I am going to go very quickly because I want to get the President of the Professional Association quickly. And why don't I just give you a question and then, hopefully, you will be able to answer it.

And I think you made a very good point about productivity, and I would like to you comment on productivity. I am going to go to Mr. Zinser first.

In what you have seen in the movement of applications through the members of your association, what have you seen in productivity? So I hope you will be prepared to answer that.

But, Mr. Zinser, let me indicate that, in your testimony, you said that managers at PTO were aware that many paralegals had insufficient work assigned to them over a 4-year period. Is that right?

Mr. ZINSER. Yes, Congresswoman.

Ms. JACKSON LEE. And the 2013 report from your office stated that you first received these allegations from employees who worked for the Patent Trial and Appeal Board. And let me say that I applaud whistleblowers. This is not a criticism of them.

But is that where the report came from? The 2013 report from your office stated—

Mr. ZINSER. Yes.

Ms. JACKSON LEE [continuing]. That you first received it from the employees.

Mr. ZINSER. Yes.

Ms. JACKSON LEE. You then turned the allegations over to the PTO to investigate. Is that correct?

Mr. ZINSER. Yes.

Ms. JACKSON LEE. All right. One of the allegations described in the 2013 Inspector General report was the practice by some paralegals classifying their official work time with a cold call, other time while they were actually "doing nothing."

Commissioner, I am going back to you. What did PTO's investigation find with regard to that specific allegation?

Ms. FOCARINO. So the investigation found that the paralegals were—did not have enough work. They were hired at a time anticipating a staffing up of the judges in the Patent Trial and Appeal Board. That didn't occur as swiftly as anticipated; so, the PTAB was left with a contingent of paralegals that, in fact, did not have enough work.

So as soon as the OIG referred the four allegations, the Agency took immediate action. We brought in a third-party consultant. And we have new paralegal managers now. We have a new structure in place. We have a new senior executive that oversees these

paralegals. We have an enhanced workflow model. We have changed the performance appraisal plan of the paralegals. So we have made significant changes to address that situation.

Ms. JACKSON LEE. Let me just say that Mr. Zinser went on with his testimony to find that the paralegals were basically getting paid not to work, despite a growing backlog of appeals.

My question to you, Commissioner: Could these paralegals—now, you have made some changes—have been working to reduce that backlog or were other factors at play? Were your paralegals, in spite of some inconsistencies, driven or directed or supervised toward reducing the backlog?

Ms. FOCARINO. They were, but they were underutilized, frankly.

Ms. JACKSON LEE. And so now you have corrected that?

Ms. FOCARINO. Yes, we have.

Ms. JACKSON LEE. And do you have an answer as to why it may have taken so long to do that?

Ms. FOCARINO. Well, I think the allegations came to our attention in 2013. So as soon as they came to our attention, we immediately brought in a third party. We began our own investigation, and we implemented significant structural changes to address these issues so that they do not happen again.

Ms. JACKSON LEE. The Inspector General indicated that some of them received bonuses in spite of this work record. And so the question would come for the American public to know: Why did they receive bonuses despite not completing what is suggested, sufficient work?

Ms. FOCARINO. I believe our report that was given in September to the Inspector General covers that. And my understanding is that they did get bonuses. And our Office of General Counsel—

Ms. JACKSON LEE. They did—I didn't hear you.

Ms. FOCARINO. That they did get bonuses.

And our Office of General Counsel has rendered a legal opinion that the IG received.

Ms. JACKSON LEE. So you responded back to the IG?

Ms. FOCARINO. Yes. Yes, we did.

Ms. JACKSON LEE. Well, let me conclude on this.

And if the Chairman would continue to indulge me as I try to finish this line of questioning, I would appreciate it.

We all have come to realize it is unacceptable to have any employees sitting around doing nothing while they are getting paid.

Commissioner, were the managers responsible for the employees who were being paid for insufficient work held accountable for allowing it to happen? And what are you doing now to ensure that it does not happen?

Ms. FOCARINO. Right. Thank you for that question.

So the managers were held accountable. They are no longer in their management positions in the Patent Trial and Appeal Board. And we have totally revamped the management structure, the oversight of the management structure, their performance plans, and their workflow model.

Ms. JACKSON LEE. Mr. Budens, I know that you are proud of your associates, members of your organization. You probably see them working hard every day. You obviously come out of that atmosphere and that work to come to be President.

How do you answer the question of your members producing, lowering those application numbers, responding?

Because when we were doing the patent law here in Judiciary Committee, everyone said almost to a one, "We are concerned about those who are seeking a fair assessment of their request because that is what makes America great."

How do you respond to productivity that has occurred in the backdrop of some of these problems?

Mr. BUDENS. Thank you, ma'am.

We are seeing a continuing increase in the productivity of the workforce of the Agency, and that is particularly because we have been able to, first of all, expand the workforce, get more boots on the ground, if you will, but also because we are retaining the people.

Somebody mentioned about telework being a recruitment issue. It is not just a recruitment issue. It is a retention issue.

As we retain examiners and they move up through the grade levels and get promoted, in addition to that, they get increased productivity goals attached to them.

So if we can hire an employee and keep him or her as an examiner, their productivity just naturally increases. That means the productivity of the Agency naturally increases. And that is what we are seeing now.

We have gotten through a big hiring load through the last half of the 2000's, and now we are seeing those examiners start reaching the point where they are going through the program, becoming primary examiners. They are able to work independently. A junior examiner won't need me looking over their shoulder, stuff like that.

So the productivity is going up, and that is reflected in the ability that we are having to move that backlog down; both the backlog of unexamined applications and the backlog of RCEs.

One thing I would say about the backlog, though—and I hope everybody will understand—is that the backlog can't go to zero. The backlog represents the work we do.

And with a workforce of 8,300 or 8,400 examiners, we are going to have a backlog of cases. Four hundred thousand cases, for example, it may be a year's worth of work to keep people going.

So what we are looking at is getting some productivity increased, we are getting the pendency of actions down toward the goal of the 10 months' pendency. And that means the cases are getting out the door.

Just like this past year, 300,000 patents are being issued. That is stimulating innovation. That is doing the job that I think we are supposed to be doing. And I think our workforce is doing that as a whole.

I can't deny that we have—you know, there will be an occasional person that we are going to have to deal with. But the Agency is very effective at dealing with it, and we work with the Agency to change programs when they need it. We do an iterative process. We come back and we keep talking with each other and working each other.

Chairman ISSA. Mr. Budens, I think we got it.

Mr. BUDENS. Thank you.

Chairman ISSA. Mr.—

Ms. JACKSON LEE. Thank you for your indulgence.

Chairman ISSA. Yeah. We are 5 minutes past.

Mr. Zinser, you look like you had something you had to say.

Ms. JACKSON LEE. Thank you, Chairman.

Chairman ISSA. Did you have something in response?

Mr. ZINSER. No, sir.

Chairman ISSA. Okay. In that case, it is my pleasure—you are very welcome.

It is my pleasure to go to the gentleman from Virginia, Mr. Connolly.

Mr. CONNOLLY. Thank you, Mr. Chairman. Welcome to our panel.

Commissioner Focarino, Mr. Budens has made a point in his testimony that you can't have the most productive year in your 224-year history, last year, and be rife with waste, fraud, and abuse, cheating, lying, and time card fraud. It is either one or it is the other. I mean, the one seems to suggest that you can't have the other.

Would you comment.

Ms. FOCARINO. Excuse me? Could you repeat the end of the question, Congressman? Would—

Mr. ZINSER. I think he said, "Would you comment."

Ms. FOCARINO. Oh. Would I comment.

Mr. CONNOLLY. Well, I am asking—

Ms. FOCARINO. Okay.

Mr. CONNOLLY. The end of the question was, "Would you comment."

Ms. FOCARINO. I'm sorry. I thought you said "would you counter."

Mr. CONNOLLY. No. I'm sorry.

Ms. FOCARINO. Comment.

Mr. CONNOLLY. Would you comment—

Ms. FOCARINO. Yes.

Mr. CONNOLLY [continuing]. On his point that—wait a minute.

Looking at the fact we had the most—not one of the most, the most—productive year in 224 years—

Ms. FOCARINO. Yes.

Mr. CONNOLLY [continuing]. Of the history—

Ms. FOCARINO. Right.

Mr. CONNOLLY [continuing]. That would suggest, at—at worst, what has been written about and commented about and what we are certainly looking at in this hearing is contained. In fact, it has not somehow tainted the entire mission or productivity of the Agency.

Ms. FOCARINO. Yes. Thank you for that question.

I agree. We have very objective performance measures. All of our performance measures, whether it is productivity, quality or timeliness, are trending in a very positive direction.

We had a historic year. We have granted more patents than in any year. We examined more applications than in any year. And that does not occur when there is systemic use. But we did find isolated abuse, and we addressed those cases. And we will continued to that.

Mr. CONNOLLY. You have just said it, but I am going to ask you one more time for the record.

Would you say that the incidents of abuse you have uncovered represent a culture of fraud?

Ms. FOCARINO. No. I don't think they do represent a culture of fraud.

Mr. CONNOLLY. The article that has been cited, actually, I believe uses that phrase, "a culture of fraud."

Ms. FOCARINO. No. I have to say that the vast, vast majority of the men and women working at the Patent and Trademark Office are honest, hard-working examiners that are, in fact, willing to put in more than what is required to do the job.

Mr. CONNOLLY. Mr. Zinser, would you agree with the characterization of "a culture of fraud?"

Mr. ZINSER. No, Mr. Connolly. What I testified to was that the problem at PTO had not reached the level of a systemic problem.

Mr. CONNOLLY. Well, no. Wait a minute, Mr. Zinser. English is my native tongue, too. When you say has not yet reached the level, that implies that we are certainly barreling that way.

Now, I want to give you an opportunity to be accurate and very precise. It is one thing to call it an isolated set of examples that does not characterize the culture, let alone rise to a culture of fraud, or there is a trendline here that is so alarming that, although we haven't yet reached that, that seems to be where we are headed.

Which is it you mean?

Mr. ZINSER. What I am basing my comments on are the results of the interviews that the investigators completed, which cited numerous supervisors and managers raising concerns about the lack of tools they have or the lack of tools they are allowed to use to look into some of these suspected cases of time and abuse.

And I think that, if PTO takes steps to address those concerns—and I did correspond with Acting Director Lee to listen to the supervisors—if they take steps to address those concerns, I don't think it will become a systemic problem.

If they do not and they don't put fixes in place, I think you could have a much bigger problem, yes, sir. But I don't think we are barreling toward it. I think that this investigation that was done came at a good time to have PTO address the issue.

Mr. CONNOLLY. Mr. Budens, I would like to give you the opportunity to comment on this.

Mr. BUDENS. I have no interest at all in trying to further the thought that this is some kind of systemic problem. I do not believe it is a systemic problem. I believe there are isolated instances that occur and, when they occur, we deal with them.

I wanted to make one point from way earlier today that goes along with that, as far as time sheets and stuff. We have no agreements, Mr. Issa, that can control who gets access to the time records. That is totally in the control of the Commissioner.

What we have are a whole lot of professional people, all of them with college educations, engineering and science degrees. We didn't get where we are by being idiots or gaming systems or anything else.

We are a bunch of hard-working, honest people who believe in the system, and that is why it is not systemic. And I don't believe

it will be systemic because it is just not the nature of the people we hire.

Mr. CONNOLLY. Let me ask just one final question, Mr. Chairman, if I may.

Chairman ISSA. I am not worried about the length of your question as much as I am concerned about the length of the answers.

Mr. CONNOLLY. Right. Thank you.

Much has been commented about the original draft report and the sort of revised report. We went from a 32-page report to a 16-page report.

Commissioner, why was there a revised draft report?

And, Mr. Zinser, I am going to ask you a follow-up.

Ms. FOCARINO. Okay. Well, the initial draft report was just that. It was a very preliminary draft, in my understanding, and it went through several iterative processes and it resulted in a final report.

As I said, all of the 81 interview summaries were attached in that final report and much of the information, in my understanding, that was in that 32-page report was included in appendices in that 16-page report.

So it was reworked. It was refined. It was comprehensive. We believe it was accurate. And we also know that we provided all of the data in the interview summaries to the Inspector General.

Mr. CONNOLLY. But according to The Washington Post story, the original report used that phrase "a culture of fraud."

And the final report translates into, "The investigation has not found objective evidence of time and attendance abuse or the extent of any abuse."

Well, those are two pretty different thoughts.

Ms. FOCARINO. So the answers in some of the interview summaries were very negative. Again, they were included in the final report.

And we actually were very transparent in that final report about issues which the Agency could not reach a conclusion, and we identified those areas of concern.

But I want to be clear that any of the statements in those 81 interviews troubled us to the point where we immediately started taking action.

Mr. CONNOLLY. Mr. Zinser, did your office comment upon the differences between the draft report and the final report?

Mr. ZINSER. Not until this testimony where we do highlight some differences between the two reports.

Mr. CONNOLLY. And did your office communicate to management at PTO or the Commissioner any concern you had with respect to the two iterations?

Mr. ZINSER. No, sir. The source of the 32-page report, the individual or individuals who provided that to us, did not want their identities disclosed.

They wanted to remain confidential and did express concerns about PTO learning that the IG's office had a 32-page report. So we did not disclose that to PTO.

Mr. CONNOLLY. Well, that is interesting.

You have been criticized personally for your treatment of whistleblowers, but it sounds to me like what you just told us is you have relied on some whistleblowers.

Mr. ZINSER. We rely heavily on whistleblowers.

Mr. CONNOLLY. Thank you.

Thank you, Mr. Chairman.

Chairman ISSA. I thank you.

And before I go to Mr. Cartwright, I just want to quickly ask unanimous consent that the investigative report numbered 13-1077, dated July 28, 2014, be placed in the record.****

And, additionally, Ms. Focarino—I am having a terrible time. I apologize.

Ms. FOCARINO. “Focarino.”

Chairman ISSA. “Focarino.”

Would you commit to include in a timely fashion the NAPA one so we can also put that in the record?*****

Ms. FOCARINO. Yes, sir.

Chairman ISSA. Thank you.

Mr. Cartwright.

Mr. CARTWRIGHT. Thank you, Mr. Chairman.

Mr. Zinser, you are the Inspector General charged with overseeing the Patent and Trademark Office.

Am I correct in that?

Mr. ZINSER. Yes, sir.

Mr. CARTWRIGHT. And we here on the Oversight and Government Reform panel talk to Inspectors General quite a bit because it is part of our task to make sure waste, fraud, and abuse stay out of the workings of the Government and, also, to make sure that the Inspectors General are doing their job and are getting complete cooperation from the agencies that they are investigating.

There were some comments made earlier today by members of the panel that suggested that the Patent and Trademark Office, the PTO, was less than completely cooperative with your office.

And my question to you, categorically, is: Has the PTO cooperated with all of your investigations?

Mr. ZINSER. I believe they have, sir. Yes.

Mr. CARTWRIGHT. Okay. And, now, we did get a chart flashed up on the screen, and these old, tired eyes couldn't quite make out the labels on the chart.

This is for you, Mr. Budens. Am I saying your name right?

Mr. BUDENS. “Budens.”

Mr. CARTWRIGHT. “Budens.” Thank you.

Mr. BUDENS. As a union president, I am used to be calling many things.

Mr. CARTWRIGHT. Just don't call you late for dinner. Right? Yeah. Me, too.

Well, Mr. Budens, are you familiar with that chart enough to comment on what the x- and y-axes were?

Mr. BUDENS. I am not familiar enough with it to tell you exactly what the axes were. I am presuming that one axis was time peri-

****The submitted material, a report entitled “Investigative Report, U.S. Patent and Trademark Office, Review of Waste and Mismanagement at the Patent Trial and Appeal Board,” is not reprinted in this hearing record but is on file with the Committee, and can be accessed at <http://fulltextreports.com/2014/08/01/review-of-waste-and-mismanagement-at-the-patent-trial-and-appeal-board>.

*****The material referred to was not available at the time this hearing record was finalized on January 9, 2015.

ods, probably measured in quarters. And the other axis was probably the amount of work—

Mr. CARTWRIGHT. Units of work. Right?

Mr. BUDENS [continuing]. Committed something.

Mr. CARTWRIGHT. Right. Okay.

And, of course, unfortunately, my colleague from Georgia is not here. That is the way I read it, too, was y-axis would be units of works, perhaps applications reviewed, and the x-axis would be time.

And it looked like the whole idea was that there was a big spiking of work done at the end of reporting periods, whether they were quarters or months or whatever it was, and we called this end-loading.

And my question for you, Mr. Budens, is: To your understanding, is end-loading, getting your work done close to the end of the period—is that misconduct?

Mr. BUDENS. Not necessarily. I mean, the issue would be not misconduct. The issue would be totally in a performance realm. It is not misconduct because you have to understand different people work in different ways and they have different working habits.

And much of the work that we do, as examiners, that contributes to the examination process does not have work credits, per se, that show up on our production reports, the so-called spikes. Only certain actions that we do, as examiners, get counted as work credit that would show up on a production report.

An examiner can be spending many hours during the course of that quarter doing searches on the applications, ordering up prior art references and stuff, reading all that material and figuring out which is relevant to the patent application at hand and which aren't.

So when they are done with all of that, then all of a sudden they start cranking out the office actions that actually get turned in and count as work credit.

Mr. CARTWRIGHT. Well, thank you for that, Mr. Budens.

And the same question to you, Commissioner Focarino: Is it misconduct to get your work done in that fashion?

Ms. FOCARINO. There is a situation where it could be misconduct, and that would be when the work submitted is incomplete work.

Mr. CARTWRIGHT. Okay.

Ms. FOCARINO. And we would take action against that.

Mr. CARTWRIGHT. Okay. Leaving things go so far to the last minute that you can't get it done properly?

Ms. FOCARINO. Yes, sir.

Mr. CARTWRIGHT. Well, certainly that makes sense.

That chart seemed to make it all very simple, didn't it? And that is the question I have.

Is it as simple as all of that, that people are waiting till the last minute to get their work done, or is it more complex than that, Commissioner?

Ms. FOCARINO. It is more complex than that.

Some people are doing, as I said, multiple searches at one time. So they wouldn't submit applications for credit perhaps until toward the end of that performance period or the end of that quarter.

Other examiners work serially. They start with one case. They finish one case. They get the credit. They move on to the next.

So that is why we constantly look at the work, to make sure that we are not having a problem, that the quality is there.

And, as I mentioned, the pilot that we began and have had really successful results, we have expanded it to the entire core. So we hope to see that behavior go down.

It can be a bad habit, in some situations. It is procrastination. And, in others, as I said, it could be misconduct if the work is incomplete.

Mr. CARTWRIGHT. All right. Last question.

This hearing is about teleworkers. And we had our colleague, Congressman Wolf, pretty much give his full-throated support for teleworking, supported by a lot of good reasons for it, including attracting and retaining good workers and bright people.

And, of course, we have had some anecdotal evidence and instances of abuse of this. And you are going to get that, and we all understand that.

My question for any of you on the panel: Do you think we ought to scrap the teleworking program at the PTO? Just go ahead and raise your hand if you think that is what we ought to do.

Mr. Budens, we have a "yes" from you. And I think you better explain that.

Mr. BUDENS. Only if you want to watch the backlog go skyrocketing back up again because of examiners walking out the door or not willing to be suddenly having to transport or move out to Alexandria to work from California.

And, also, be prepared for us having to come back to you for a lot more money because we are going to have to get a lot more real estate.

Mr. CARTWRIGHT. So that is a tongue-in-cheek yes from you, is it, Mr. Budens?

Mr. BUDENS. Somewhat tongue in cheek, sir. Yes.

Mr. CARTWRIGHT. Thank you.

I yield back to the Chairman.

Chairman ISSA. Okay. Just a couple of brief wrap-ups.

Ms. Focarino, if I installed mouse-moving software so as to cause people to think I am working when I am not working, does that fall under tampering of PTO equipment? Would that be grounds for termination?

Ms. FOCARINO. It falls under violation of the rules of the road because it is unauthorized hardware or software. It is an act of misconduct, and that act of misconduct would be dealt with accordingly.

Chairman ISSA. Have you dismissed anyone for doing that?

Ms. FOCARINO. We have disciplined examiners.

Chairman ISSA. Dismissed, ma'am.

Ms. FOCARINO. Sir, I don't know. I would have to check on that.

Chairman ISSA. Okay.

Ms. FOCARINO. But I know specifically we have disciplined examiners for doing that.

Chairman ISSA. So they cheat the Government by deceiving and they get disciplined.

What kind of discipline would it be?

Ms. FOCARINO. Well, there would be discipline ranging anywhere, perhaps, from reprimand, to suspension, to removal.

Chairman ISSA. Anyone lose any pay that you know of?

Ms. FOCARINO. I don't know that for sure, but we can certainly look into that.

Chairman ISSA. Mr. Zinser, do you know of any examples where people were terminated and/or lost pay for that type of conduct?

And would you give us some other examples of conduct—I don't need to know the names—but just misconduct you are currently looking into.

Mr. ZINSER. Yes, sir. It looks like PTO handles about 70 time and attendance cases a year.

Chairman ISSA. Now, of course, that is with 38 percent of the individuals saying they were denied the ability to check on time and attendance. So there could be a lot more if they were allowed to check every suspicious case.

Mr. ZINSER. Yes. And the penalties for those cases do range from a counseling to removal. We have seen that in the data. One is a—

Chairman ISSA. You have seen some removals?

Mr. ZINSER. Yes, sir. The concerning thing about the data about time and attendance cases that PTO has completed is that most, if not all, of them are cases involving employees who work on campus and not cases that involve teleworkers because of the difficulty in gathering evidence or making cases about them.

Chairman ISSA. So if you are not going to work 8 hours, definitely don't come to Alexandria. Be a teleworker. Right?

Mr. ZINSER. It is much more difficult to determine whether or not employees are working their full 80 hours a pay period when they telework full-time. Yes, sir.

Chairman ISSA. Mr. Budens, you talked about some figures on those 18 percent, 10 percent of all people terminated. I looked it up, and it was 2001.

Do you have anything a little more current than a dozen years ago?

Mr. BUDENS. I do not have—that was a NAPA report in 2005.

Chairman ISSA. I mean, George W. Bush was still trying to fight to get confirmed.

Mr. BUDENS. My guess is that we are still probably moving people out the door at a regular pace because we see them come in to request help from the union.

What I don't know is how—

Chairman ISSA. But I am saying these are all union members. You probably would see every single one that finally gets determined to be dismissed. I mean, I can't imagine someone getting fired and not having touch with you and you not knowing it.

So, again, do you know of a year that was similar in number—similar or greater—during the intervening dozen years since 2001?

Mr. BUDENS. Oh. I think the number of people we would see is slowly increasing.

Chairman ISSA. No. But I meant the number terminated.

Mr. BUDENS. What I don't know is people are up for removal.

Chairman ISSA. How many people were terminated last year that—that you know of?

Mr. BUDENS. I don't know the——

Chairman ISSA. The year before?

Mr. BUDENS.—I don't know the exact numbers.

Chairman ISSA. Okay. So you gave us——

Mr. BUDENS. And we would not necessarily——

Chairman ISSA. You gave us a fairly impressive number that was a dozen years ago. I would hope that you would follow up for the record. And perhaps the Agency itself could give us that for the record.

I would like to know——

Ms. FOCARINO. Okay.

Chairman ISSA [continuing]. Out of 8,500 people, with the kind of reports we have received, how many of them actually lost their jobs and how many lost some—some money if they didn't lose their jobs? A reprimand doesn't mean a whole lot if it doesn't cost you anything.

This has been a long and very fruitful hearing. I would only ask if there is something that we didn't ask that you have a passion to tell us that we should know in a couple of minutes or less. I certainly think I want to make sure everyone has their chance.

And I will start with Mr. Smith and go the other way because we did ask both of you, as career professionals and experts, a lot less.

Mr. SMITH. Thank you, Mr. Chairman.

I would have the parting thought—as was discussed many times today, the Patent Office is user-fee-funded. It is not taxpayer-funded. It is the people who benefit from the system that pay for it.

So when we get these poorly prepared office actions that need extra time for us to try to correct, the patent-users are paying two or three times. It is coming right out of their pocket again.

And I would also point out to my good friends in the Patent Office they have to keep in mind that they have no competition. The United States Postal Service learned as they could not efficiently deliver letters and packages, people like FedEx and UPS came in and provided alternatives.

We can't go to an alternative Patent Office. So I think that the Patent Office needs to take a step back and objectively review all of their systems and work with the stakeholders that work with us where we can identify weaknesses from our perspective and work together in a collegial manner to better improve the patent system and prepare it for the next hundred years.

Thank you.

Chairman ISSA. Thank you.

Ms. KEPPLINGER. From PPAC's perspective, we have been working very much with the USPTO. And, in fact, in our annual reports, you will find a number of similar recommendations to those that Mr. Smith has presented.

And we believe that some of the things that we have suggested have been implemented. And we continue to press on issues such as the RCEs getting completed, different alternatives to final rejections.

So there are a number of these issues that we continue—and, with respect to quality, complete first actions being done. So we

have been very active in trying to reform things where we see there may be issues.

Chairman ISSA. Mr. Budens.

Mr. BUDENS. Thank you to Mr. Chairman Issa and the Committee for an opportunity to address you and to help, hopefully, give you some ideas that what has been painted as a gigantic crisis at the PTO is not a gigantic crisis.

There is some isolated instances. And where there are issues that need to be corrected, we work with the Agency to correct them.

We have worked together in collaboration to try and solve problems whenever they have been found and, as we continue to go forward, we will continue to work with the Agency to try and deal with issues before this office. Our goal is to make sure that the U.S. patent system stays the greatest patent system in the world.

Thank you.

Chairman ISSA. Thank you.

Mr. Zinser.

Mr. ZINSER. I would just say that the allegations that came in from whistleblowers were substantiated by PTO's own management staff.

And, as I mentioned, I have corresponded with Acting Director Lee to ask her to pay attention to what the supervisors have said and make sure that the corrective actions necessary are taken.

Chairman ISSA. Madam.

Ms. FOCARINO. I want to say again that we embrace the opportunity to keep getting better, to strengthen our telework programs, to curtail any abuse.

And we look forward to working with the National Academy of Public Administration, as well as the Office of the Inspector General, to do so.

Chairman ISSA. Okay. In closing, I think the American people may be a little confused, not sure of whether this is a major crisis, a minor crisis, whether it is rampant and so on. And I don't know that we have proven either way today.

What I do believe we have is a number of statements that were not included in the final report, including one of the most disturbing, the 36 percent of directors who said they were denied requests for time and attendance records so that they could evaluate whether suspected individuals were not, in fact, working as required.

38 percent of the Agency's executives believe that you were willing, as an agency, to overlook attendance in the name of were they hitting their numbers, and 44 percent said that they didn't have the tools available to them to address time and attendance.

I would hope that the next time a similar study, which I believe is still underway, goes on that we will have a better resolution on what tools have been created to do so.

We certainly have—and I am switching hats from my Oversight hat of the hours to my hat as Member of Judiciary Committee.

The quality of patents is never high enough. The courts are not paid for by the patent applicants, and cases end up in the courts with numerous grantings they should not have, and they get adjudicated at the cost of millions of dollars.

It is a loss for the plaintiff, it is a loss for the defendant if, in fact, you bring a claim that you think is valid and ultimately it isn't. Both sides lose to the tune of millions of dollars.

There are, in fact, more than 72 million hours available with your 8,300 workers. They look at about six patents a month, and they grant about three patents a month. That is a lot of time. It is time to get patents right.

And I have but one objection to what the union rep said here today. And I will say this on behalf of the inventor community.

We were taken away from 17 years from granting, without our permission, without our support, some years ago in the name of harmonization. We have 20 years from application and we have no ability to reclaim any of the time that you put into a convenient backlog.

A year-and-a-half backlog or a 2-year backlog or a 1-year backlog is absurd. This is not Boeing, that you are not looking at when you are going to take another plane off-line. Inventors are losing a full year, on the average, of the time that they deserve to be able to monetize their patents.

The Patent Office must do better. That backlog is not a place to stow future work. The day that there isn't a patent to grab off the shelf and apply for should be a joyous day, and I do not suspect it will come. I believe there will always be a backlog, and it could always be hundreds of thousands.

But until we begin looking at a patent within weeks of it arriving and adjudicating it as fast as we can, the inventor is being denied a constitutionally provided right. And I, for one, as an inventor and as a Member of Judiciary, know we have to do better. I think that was clear today.

And that is the way I would like to close this hearing, is this Committee will continue on the Judiciary side to be committed to make sure that high-quality patents are granted faster on behalf of the American people who apply for them and have a constitutional right to them.

I thank you very much. Oh. And I am required just to say one more general relief. Thank you. I was doing so well.

This concludes today's hearing. We want to thank our witnesses for joining us. Without objection, all Members will have 5 legislative days within which to submit additional written questions for the witnesses and additional materials for the record.

And, with that, I do thank you. We stand adjourned.

[Whereupon, at 4:22 p.m., the Committees were adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Material submitted by the Honorable Darrell E. Issa., a Representative in Congress from the State of California, and Chairman, Committee on Oversight and Government Reform



UNITED STATES PATENT AND TRADEMARK OFFICE

CHIEF ADMINISTRATIVE OFFICER

MEMORANDUM FOR: Jennifer H. Nobles
Director
Complaint Inquiry and Analysis Branch

FROM: Frederick W. Steckler
Chief Administrative Officer

SUBJECT: Inspector General Referral No. PPC-CI-12-1196-H
RE: Abuse of Telework Program at USPTO

Between June 21, 2012 and August 29, 2012, the U.S. Department of Commerce Office of the Inspector General received a series of four complaints alleging systemic abuses within the telework program and time and attendance fraud at the U.S. Patent and Trademark Office.

The following are the allegations contained in the four complaints:

1. Time Fraud

- a. Unnamed Patent Examiners are misrepresenting their time and attendance records, to include claiming overtime that is not being worked.
- b. Unnamed Patent Examiners are misrepresenting their time and attendance records by claiming time based on work completed instead of time worked.
- c. There is a lack of accountability for Patent Examiners to record their time correctly as long as the examiner meets his or her production goals.
- d. The Agency is not policing or monitoring abuse of timesheets.
- e. Conduct issues and time fraud are routinely overlooked as long as an examiner's production levels are acceptable.
- f. There is a lack of accountability for Patent Examiners participating in the Hoteling Program.
- g. Unnamed Patent Examiners are receiving overtime pay for time they are not working.
- h. Management is dissuading supervisors from questioning employees about time and attendance discrepancies.
- i. There is a lack of accountability for Patent Examiners to record their time correctly.

2. End-loading

- a. Unnamed Patent Examiners are only working at the end of the quarter, known as "end-loading" their work and can go from unacceptable performance to award levels in one bi-week by doing 500% to more than 1000% of their production goal.
- b. Supervisors are not equipped to monitor the quality of the work submitted effectively due to "end-loading".

3. Mortgaging of Work

- a. Patent Examiners are submitting incomplete work for credit before the end of a bi-week and then going in after the bi-week to submit valid work.

4. Performance Plan Issues

- a. Unnamed Patent Examiners are receiving bonuses for Docket Management while they have overdue cases in their dockets.
- b. Standards have gotten easier with the implementation of the new PAP in FY 2010 as GS-12s and above can now get credit for the work before it is reviewed.
- c. There is no reasonable way for a supervisor to monitor the quality of the work.
- d. Performance standards became easier with the new count system and examiner PAP.

BACKGROUND

As of this report, the USPTO is an Agency of 11,627 employees; 7,902 are Patent Examiners.

Patent Examiners are divided into different Art Units depending on the type of technology for the patent applications they are responsible for reviewing. There is a Supervisory Patent Examiner (SPE) who leads each Art Unit and is the first-line supervisor for the patent examiners. As of November 2, 2012, the Agency had 557 SPEs (*Exhibit dd*).

Art Units specializing in similar types of art (subject matter) are grouped together and are categorized into Technology Centers (TC). Each Technology Center is led by a team of Directors. The SPEs report to the Directors in their TC. The Agency currently has twenty-six (26) TC Directors in nine TCs.

The TC Directors report to one of the five Assistant Deputy Commissioners for Patents Operations (ADC) who in turn report to the Deputy Commissioner for Patents Operations, Andrew Faile. Andrew Faile reports to the Commissioner for Patents Operations, Peggy Focarino.

An Organization Chart of the Patents organization is provided in Exhibit A.

METHOD OF INVESTIGATION

A Task Force was assembled and conducted an administrative investigation into the above-described allegations and whether the Agency has sufficient controls in place. The Task Force comprised of a team of four Human Resource Specialists in the Office of Human Resources (OHR) Employee Relations Division (ERD), two attorneys of the Office of General Law and an accountant from the Office of the Chief Financial Officer. The members of this team are as follows:

Stacey Fumey – Human Resources Specialist, GS-12 – OHR - ERD
 Jessica Crawford – Human Resources Specialist, GS-13– OHR - ERD
 Martin Koerner – Human Resources Specialist, GS-13– OHR- ERD
 Jessica Patterson – Human Resources Specialist, GS-13– OHR - ERD
 Jennifer Seifert – Associate Counsel, GS-15– General Law Office
 Chieko Clarke – Associate Counsel, GS-15– General Law Office
 Daniel Smith – Accountant, GS-15 – Office of Finance

I. Interviews:

The Investigation team began by conducting administrative interviews.

SPEs:

The administrative investigation began by interviewing a random sampling of ten percent of the Agency's Supervisory Patent Examiners. The Human Resource Information Systems Division generated a report to provide a randomized list of forty-nine (49) SPEs to be interviewed.

The Task Force compiled the results of the forty-nine (49) SPE interviews to identify if there was validity to the allegations mentioned in the complaints. As the examiners' first line-supervisors, SPEs are able to provide the most insight into the allegations. SPEs are responsible for evaluating Patent Examiners work and for certifying their time and attendance records.

A list of the questions that the SPEs were asked is provided in *Exhibit B*.

Directors:

The Task Force also interviewed all of the twenty-six (26) TC Directors. The Directors were interviewed to acquire insight into management's perspective on the allegations, as well as to gain any other relevant information. Because SPEs report to and consult with Directors on issues related to examiner conduct and performance, the Directors are able to provide clarity on the patterns of the Patent Examiners that are assigned to their TCs. SPEs report any concerns related to conduct or performance issues with a Patent Examiner to their TC Director. The TC Directors provide guidance and support to the SPEs in how to best address the concerns. Also, the TC Directors are well aware of types of concerns that SPEs often run across because prior to being promoted to the TC Director level, all of the Directors were SPEs. Finally, when there are performance or conduct issues that require disciplinary or adverse actions, the TC Director will serve as either the Proposing Official or Deciding Official.

A list of the questions that the TC Directors were asked is provided in *Exhibit C*.

ADCs:

After all of the SPE and TC Director interviews were completed, the Task Force interviewed each of the five ADCs in order to acquire Senior Management's perspective on the allegations that were raised, as well as to gain any other relevant information. The ADCs are aware of the more severe or persistent performance and conduct cases because they serve as Deciding Officials on adverse actions. The ADCs help to formulate the Agency's strategy and processes for handling performance and conduct related issues. The TC Directors will report any ongoing performance or conduct issues to the ADCs that they are not able to resolve.

A list of the questions that the ADCs were asked is provided in *Exhibit D*. There were five (5) graphs shown to the ADCs during their interviews. Those graphs are also in *Exhibit D* and are labeled in the same manner in which they are found in the list of questions.

2. Review of authorities:

Agency Policy and Guidance:

During the course of the Agency's administrative investigation, the Task Force reviewed the following authorities related to the allegations:

- **Patent Examiner Laptop Program (PELP) - *Exhibit E***
- **Patent Telework Program (PTP) - *Exhibit F***
- **Patent Hoteling Program (PHP) - *Exhibit G***
- **Time and Attendance Policy - *Exhibit H***
- **Work Schedule Policy - *Exhibit I***
- **Increased Flexitime Policy - *Exhibit J***
- **Telework Enhancement Act Pilot Program (TEAPP) Operating Procedure - *Exhibit K***
- **50 Mile Radius Agreement and Provision Related to the POPA Hoteling and Telework Programs and IFP - *Exhibit L***
- **Telework Enhancement Act of 2010 - *Exhibit M***
- **OPM's Guide to Telework in the Federal Government - *Exhibit N***
- **USPTO's Telework Policy - *Exhibit O***
- **IG Report on PHP - *Exhibit P***

These authorities set out the standards applicable to the programs and processes identified in the Complaints. They set out controls for monitoring and managing the corresponding programs. A review of these documents was necessary in identifying whether or not the problem was a lack of controls or rather a lack of enforcement of those controls.

3. Review of data:

The Task Force reviewed pertinent data related to the allegations such as Agency reports on overtime claimed, Docket Management awards, ceiling exceeded cases, and end-loading for fiscal year (FY) 2012. The Task Force also considered data from FY 2009 through FY 2012 for these reports to provide the best representation and most relevant information to the concerns raised in the OIG complaints.

Additionally, the Task Force compared the performance standards under the Patent Examiner's current Performance Appraisal Plan (PAP) and the previous Patent Examiner PAP. The administrative investigation evaluated the number of production counts per employee under each PAP to determine if there have been any negative changes as suggested in the OIG complaints filed. The Task force also analyzed the statistics related to pendency to identify if there has been a reduction in the turnaround time for office actions after the implementation of the performance standards.

INVESTIGATIVE RESULTS

Summary of Interviews

Supervisors (Exhibit Q)

Fifty (50) randomly selected Supervisory Patent Examiners were interviewed and asked identical questions about possible abuse of USPTO telework programs and time fraud. These questions were developed to address the issues that were raised in the multiple complaints, including controls in place for on-campus employees, controls in place for teleworking participants, controls in place for PHP participants, end-loading, overtime, and bonuses. The interviewers found that many supervisors had troubling answers to some of the questions that were asked.

Directors (Exhibit R)

All USPTO Patent Technology Center Directors were interviewed and asked identical questions about possible abuse of USPTO time and attendance and telework programs. These questions were developed to address the issues that were named in the multiple complaints, including controls in place for on-campus employees, controls in place for teleworking participants, controls in place for PHP participants, end-loading, overtime, and bonuses.

Assistant Deputy Commissioners for Patent Operations (Exhibit S)

All USPTO Assistant Deputy Commissioners for Patent Operations (ADCs) were interviewed and asked identical questions about possible abuse of USPTO time and attendance and telework programs. These questions were developed to respond to and provide information regarding both issues raised in the SPE and Director interviews, and the issues that were named in the multiple complaints, including overall time & attendance questions, controls in place for on-campus employees, controls in place for PHP participants, controls in place for teleworking participants, end-loading, overtime, and bonuses.

I. Time Fraud

When the SPEs were asked about whether they had the tools needed to address employees claiming hours not worked, twenty-two SPEs (44%) said that they did not have the tools that they needed. The following responses were received when asked this question:

- *"No. I don't waste my time. They can go to POPA and win. I am not aware of 1 person who successfully terminated an examiner for time fraud. The belief is that it cannot be done. No one tries. No one wastes their time" (Exhibit Q, SPE #34)*
- *"I don't know. There has been a liberalization of hours if the work is accomplished" (Exhibit Q, SPE #44)*
- *"When it gets egregious enough. If it is at a low level, then no" (Exhibit Q, SPE #39)*
- *"No, don't really have the tools because the examiners are so flexible. Can't use the technology available either" (Exhibit Q, SPE #12)*
- *"It seems like there is [sic] no tools" (Exhibit Q, SPE #23)*
- *"None, our hands are tied" (Exhibit Q, SPE #45)*

Of the SPEs who felt there were tools available to deal with examiners who they suspected were claiming time not worked, the tool most cited was the Quality element of the PAP.

The SPEs were asked if they ever had requested swipe records or computer records from their director in order to check on an examiner's time when abuse was suspected, and if so, was their request approved or denied. The following responses were received when asked this question:

- *"The Director said we aren't pulling them anymore" (Exhibit Q, SPE #32)*
- *"We have been told that it hard to obtain records, virtually impossible" (Exhibit Q, SPE #38)*
- *"ADC said no. We had evidence that the timesheet was not accurate, but they still said no. Was 4-5 months ago and there was a push not to pull records. But my Director felt the situation warranted it and ran it up to the ADC" (Exhibit Q, SPE #39)*
- *[Request was denied] "They didn't say. Something with the ADCs. There are so many hoops to go through" (Exhibit Q, SPE #42)*
- *[Didn't ask for records] "No, I feel we cannot do anything. Other SPEs feel that way too" (Exhibit Q, SPE #45)*
- *"Denied from above the Director" (Exhibit Q, SPE #47)*
- *"We talked about pulling his records but I was told that could be construed as singling an employee out – so I asked for the whole art unit, but they said no, you can't do the whole art unit" (Exhibit Q, SPE #49)*
- *[Didn't go to Director] "talked to senior SPE and they said there was no way to chase them down and correct behavior unless the person has a performance issue" (Exhibit Q, SPE #23)*

When asked if they thought that the Agency was willing to overlook conduct issues as long as an examiners performance was acceptable at the end of the quarter, nineteen SPEs (38%) said that they felt that the Agency was willing to overlook conduct issues if an examiners performance was acceptable. The following responses were received when asked this question:

- *"I think it would depend upon the conduct issue. Obviously, if it were something like violence absolutely not. If it is just the time stuff, I think the Agency would overlook it as long as the production was good" (Exhibit Q, SPE #7)*
- *"Depends on the conduct" (Exhibit Q, SPE #13)*
- *"I think it is something that they are not aware of. IFP probably has people working past 10. They are not pulling records. I had a high producer who had a mouse mover program on their computer. SPE saw it and took a picture. Showed it to the Director, who talked to the ADC, and then nothing happened" (Exhibit Q, SPE #32) [Note: Mouse mover software gives the appearance that someone is using the computer, and therefore working, when they are not.]*
- *"Yes. They don't care anymore. The only focus is that the Agency is the #1 Agency with happy employees" (Exhibit Q, SPE #47)*

The SPEs were asked if they thought that some examiners wait until the end of the bi-week to see how many counts they have submitted before completing their timesheet so as to control the

number of hours claimed to match the amount of work turned in. Thirty-five SPEs (71%) said yes, they thought examiners did this.

During the Director interviews, thirty-six percent (36%) of Directors said that they had never requested records that could be used to verify employee time and attendance, such as swipe records or computer records for an employee suspected of not working all the hours claimed. Twenty percent (20%) of all the Directors said that they felt the Agency was willing to overlook misconduct as long as the examiners performance was acceptable. Thirty-six percent (36%) said that they had requested records on an employee suspected of not working all of the hours claimed and had their request denied by an ADC. Several Directors said that they did not request records, but that they had heard records couldn't be used. The following statements were made:

- *"Told we cannot use computer records and that we can only use swipe if the issue is escalated" (Exhibit R, Director #3)*
- *"Tried to get computer/VPN records, but couldn't get those records released. The last reason was that we don't do that anymore." (Exhibit R, Director #4)*
- *[regarding an employee the Director wanted records on] "Yes, had to keep repeating, had to counsel him, had to call him in, to this point – we have never been able to have records" (Exhibit R, Director #4)*
- *"But, he has had discussions where the question of whether to pull records has come up for discussion, and it was decided not to pull or use the computer and swipe records" (Exhibit R, Director #8)*
- *"No, lately told that we cannot ask for computer records" (Exhibit R, Director #12)*
- *[regarding asking for records] "Yes, was told I couldn't have them" (Exhibit R, Director #15)*
- *"Office is getting away from swipe records for fear of creating [big brother] effect" (Exhibit R, Director #18)*
- *[when denied use of records] "asking and receiving records may affect the morale of all employees and feel we are big brother" (Exhibit R, Director #19)*
- *"I was asked how their performance was and if they were performing well. Was asked if performing well, why affect their morale. [The TC] was told to cancel several IMs [investigatory meetings]. We were told to have conversation with employees that we had evidence of not working several days and tell them that they needed to be working the hours on their timecard" (Exhibit R, Director #19)*
- *"Agency afraid of following up with bottom 5% behavior problems. Will cast cloud on 95% and might have morale impact" (Exhibit R, Director #19)*
- *"6 months ago I was able to ask for records, not able to do that now. SPE have to counsel employee now, then do it again, and then I counsel, then, maybe I can request records" (Exhibit R, Director #20)*

When ADCs were asked about what they thought about the number of SPEs and Directors who felt that the Agency was willing to overlook misconduct if the examiners performance was acceptable, ADCs disagreed that this was true and generally said that it was a misperception.

Every ADC expressed that communication and interaction between the supervisor and the employee was the primary means for validating that the employee was working. Three out of the five ADCs did not know whether hoteling employees were required to log into the VPN when working. The ADCs discussed a series of documents that they were developing to provide to the SPEs and Directors to assist with time and attendance and conduct issues. There were multiple times when the ADC's responses to questions were that they were too far removed from examining and therefore, they did not know the answers.

To date, the first set of documents referenced by the ADCs has been released. This document is titled *Management Guidance on Certifying Time and Attendance (Exhibit bb)*. The document prescribes two-prong criteria for dealing with time and attendance concerns. SPEs are instructed on how to handle examiners who are **both** unresponsive for at least several days and who have not submitted work. Based on this, the document is intended to address the most serious cases of examiners who submit no work at all for an entire bi-week and fail to respond to their manager's attempts to contact them. While the document is a good first step, and may prove helpful for the most egregious cases, it does not go far enough to address employees missing for entire occasional days when it is less than a bi-week, or those examiners who respond to e-mails but fail to submit any work, both of which are serious misconduct.

The Agency has "swipe records" that record each employee via swiping of their USPTO badge as they enter USPTO buildings. Records of employees holding monthly parking passes entering and exiting the garage are also available. Agency computer log on records, search records, production reports, and time and attendance records are also available. These records are important tools, and when used together, can provide compelling evidence on the activities of an employee. These records would clearly establish and meet the required "preponderance of the evidence" standard for conduct cases.

However, in recent months, Patents management has in several cases refused the use of these records. This interferes with the investigative process. Employee Relations should have full and unmitigated access to any and all records in order to properly investigate any abuse allegations. The reason given for not allowing use of the records was not wanting to create a "big brother" atmosphere. However, this results in a frustrated management team that cannot effectively deal with serious misconduct and feels they are in effect being told to look the other way. This tends to actually have a negative effect on the vast majority of employees who work hard and are diligent about their time and see misconduct being tolerated.

ER has recently investigated several cases related to time and attendance abuse that have caused concern. In one case, the examiner claimed excessive hours on their timesheet for time they never worked, in fact the examiner did not even come into the office at all for at least 304 hours during the time period under investigation. This misconduct occurred for over a year. When the examiner was put on clear notice that the behavior was inappropriate and would not be tolerated, the examiner modified the misconduct in an attempt to continue receiving pay for hours not worked while avoiding further detection while continuing the same misconduct.

The Director proposed the examiner's removal. When the examiner met with the deciding official for the oral reply to the proposed removal, the examiner stated a desire to continue

working at the USPTO and claimed remorse. After the oral reply, the examiner immediately engaged in the same misconduct. Despite the evidence presented by the proposing official in the proposed removal and the fact that the examiner showed no potential for rehabilitation, the deciding official offered the examiner a last chance agreement. In this case, Employee Relations was in possession of additional aggravating evidence, but was told by senior management that it could not be used or disclosed.

In a separate case, an examiner engaged in time and attendance abuse, after already serving a 21-day suspension for the same misconduct. The proposing official proposed the examiner's removal, yet the deciding official offered the examiner a last chance agreement, despite the examiner having shown no potential for rehabilitation.

In January 2012, a SPE had evidence that her employee was not working all of the hours that he claimed. She had noted that he was not in his office on several occasions and that he failed to attend a scheduled meeting. Her request to review his swipe in records was denied at the ADC level. USPTO management demonstrates reluctance to take decisive action when the misconduct is egregious and the evidence is compelling. This may fail to prevent future misconduct in the subject, as well as other employees who undoubtedly see the misconduct occurring. In addition, this has led not only to the failure of preventing future misconduct, but has validated the conception that the Agency will allow misconduct if an employee is performing at an acceptable level. Further, by giving examiners with serious misconduct repeated chances to behave appropriately, the burden to monitor and track these problem employees falls on the SPEs. This is a difficult and time-consuming task and the SPEs are provided with very few tools to help them, since controls are almost non-existent.

In another case, an out-of-state hoteling examiner was being investigated for mortgaging (submitting incomplete office actions for credit) nine office actions at the end of FY 2011 in order to avoid being placed on a performance warning and being rated less than Fully Successful for the fiscal year. Her misconduct also resulted in her being eligible to receive a variety of performance awards (e.g., Docket Management, SAA, COPA). In addition, the examiner is a habitual end-loader who consistently end-loads in the last bi-week of a quarter and at the end of a performance warning. She is currently serving a post-PIP maintenance period and is end-loading in the last bi-week of each period, therefore avoiding failing her post-PIP period and being issued a proposed removal.

During the mortgaging investigation, the ER Specialist discovered that the hoteling examiner had been misrepresenting a substantial amount of hours on her timesheet. The examiner claimed to have worked 265.5 hours for which there was no evidence she was working, and received \$12,533.02 in pay for those fraudulently claimed hours. When the TC was notified of the time fraud, they asked the ADC if they could use the computer records as evidence so she could be charged with misrepresenting her timesheet. The ADC refused to allow the TC to use the computer records as evidence; as such, the examiner was not charged with time fraud. The examiner was, instead, charged with not following the hoteling policy for her lack of responsiveness to her supervisor's repeated attempts to get in touch with her and failure to follow supervisory instructions.

The Agency proposed a 21-day suspension for mortgaging, failure to follow the hoteling policy, and failure to follow supervisory instructions. Both parties entered into an abeyance agreement where the examiner served a ten-day suspension, with eleven days held in abeyance for two years. Sometime after the conclusion of this case, the ADC notified his TCs that he will not approve any requests for swipe or computer records, period.

There was another examiner in the same TC that was investigated around the same time for misrepresenting his time on his timesheet. The examiner claimed approximately 25 hours for which there was no evidence he worked, and received \$1,333.25 in pay for those fraudulently claimed hours. The TC was told they were not permitted to use the computer records as evidence, and as a result, the examiner received a counseling letter for not following his work schedule.

The multiple hurdles and approval levels required to follow through with a time and attendance case, along with senior management's reluctance to sustain proposed disciplinary or adverse action is a likely factor in the SPEs' and Directors' perception that time and attendance abuse is overlooked, or that it is fruitless to request any kind of records as part of an investigation. This leads to an erosion of supervisors following up with employee misconduct.

2. End-loading

End-loading data from FY 2007 through FY 2012 was analyzed (*Exhibit V*). The data indicates that end-loading was slowly decreasing until FY 2009. After FY 2009, end-loading has been generally increasing in the third and fourth quarters of the fiscal year. In the 4th quarter of FY 2012, for example, approximately 20% of examiners (roughly 1,600 examiners) completed 50% or more of their total annual balanced disposals¹ in the last two pay periods (or four weeks) of the quarter (typically six or seven bi-weeks²), and approximately 5% of examiners (roughly 450 examiners) completed 70% or more of their total balanced disposals in the last two pay periods of the quarter.

Comparing the last quarter of FY 2012 to the last quarter of FY 2007, shows that the number of examiners engaging in this behavior has almost doubled (*Exhibit V, p. 2*). In the last quarter of FY 2007, approximately 12.5% of examiners completed 50% or more of their balanced disposals for the quarter in the last two pay periods, equating to approximately 700 examiners, and approximately 4% of examiners completed 70% or more of their balanced disposals for the quarter in the last two pay periods, equating to approximately 225 examiners.

Since the USPTO's workforce increased between FY 2007 and FY 2012, it is important to note that it was not just the raw number of examiners engaging in this behavior that increased. Importantly, the percent of total employees engaging in this behavior was also increasing. The line graph in *Exhibit V* shows that the average percentage of examiners that completed 50% or more of their balanced disposals in the last two pay periods of a quarter increased by 49.5%. The graph also show that the average percentage of examiners that completed 70% or more of their

¹ A balanced disposal is equivalent to two counts

² The Patent Corp uses the term "bi-week" rather than "pay period".

balanced disposals in the last two pay period of a quarter increased by 70.9%. This is a notable increase and confirms the SPEs' and Directors' perception that this behavior has been increasing

The prevalence of end-loading suggested that there is a significant number of examiners that are not working for significant periods of time during the early bi-weeks of each quarter since these examiners are only submitting completed work at the end of the quarters and/or year. The end-loading examiners are being paid the same salaries and bonuses as examiners who are consistently submitting work throughout the quarter/fiscal year.

The SPEs were asked if they had examiners who engaged in end-loading and whether they felt end-loading compromised the quality of the work. Thirty-eight SPEs (77%) said that they have one or more employees who engage in end-loading and thirty-five SPEs (71%) said that they felt that end-loading could compromise the quality of the work. They were also asked if they had the tools to be able to adequately address end-loading, with fourteen SPEs (28%) saying that they did not have tools to be able to adequately address end-loading. For those who believed tools were available, the most cited tool was the quality element of the PAP. However, when discussing using this performance element to address end-loading, the following responses were received:

- *"It is a lot of work for managers to do it" (Exhibit Q, SPE #1)*
- *"We have the tools, but most SPEs don't use them. You have to review the cases, but the SPEs are overwhelmed. It is difficult to address Quality" (Exhibit Q, SPE #2)*
- *"Not to the extent that it is prevalent. If it were isolated, yes. But there are too many examiners doing it" (Exhibit Q, SPE #3)*
- *"No. Quality issues have to be found in a lot of office actions. If there is a flood of actions turned in, it is a disaster to try and evaluate all of those. Especially at mid-year and EOY, when it is very prevalent" (Exhibit Q, SPE #44)*

More than 90% of the Directors stated their belief that when a patent examiner end-loads their work, the quality of their work is negatively affected. The data reports shows that though the Directors estimate that between 5 and 10 percent of patent examiners end load their work, the number of examiners who end-load by doing 50% or more of their quarter's balanced disposals in the last two bi-weeks of the quarter is actually close to 20% (Exhibit V). The overall feeling is that end-loading is not an appropriate practice and that it negatively impacts quality of the work, but that USPTO tolerates it. The following statements were made:

- *"Seems as I spot check, more and more examiners at the mid-point quarter are below FS level and have to climb back up" (Exhibit R, Director #4)*
- *[regarding end-loading] "Auto-count may have created some of it" (Exhibit R, Director #6)*
- *[regarding why end-loading increased] "all the loosening of the guidelines, JFP. It fuels procrastination" (Exhibit R, Director #11)*
- *[regarding end-loading affecting quality] "Our quality standards are low. We aren't looking for good work. We are looking for work that meets minimal requirements" (Exhibit R, Director #19)*

3. Mortgaging of Work

GS-14 Primary Examiners get all actions auto-counted when they post their actions for credit, meaning that when they electronically submit work as complete, it is automatically counted and credit immediately given to the examiner without review or verification of the work by management. GS-12 and GS-13 Patent Examiners also get “non-final” type actions (e.g., non-final rejections) auto-counted upon posting for credit. They get “final” type actions auto-counted when approved by a Primary Patent Examiner. Examiners below GS-12 get all actions auto-counted when actions are approved by a Primary Examiner (*Exhibit ii, Slide 27*).

The new auto-count system allows an employee to submit work, as described above, for credit. This has led to cases where an examiner has submitted mortgaged work for credit, meaning work that was knowingly incomplete, but the examiner is claiming it is complete and accepting credit for the work. This allows the examiner to manipulate the system and get undeserved credit towards their ratings and awards, and credit for meeting deadlines that they have not actually met.

There are a high number of examiners with auto-count that have a large percentage of their work returned for corrections. The data in *Exhibit qq* shows that GS-12 examiners account for a large percentage of examiners with cases returned. GS-12 examiners make up 13.6% of the patent examiners, but they have 21.9% of total returns and 42.47% of total returns in the ceiling exceeded tab (*Exhibit qq*).

4. Performance Plan Issues

In FY 2009, changes were made to the Performance Appraisal Plan (PAP) for examiners (*Exhibits ii, jj, and kk*). *Exhibit ll* is the *Patent Examiner Performance Appraisal Plan Handbook*, which was used prior to the changes made in FY 2009. An example of a GS-12 examiner PAP prior to the changes is provided in *Exhibit mm*. The changes went into effect FY 2010. An example of a GS-12 examiner PAP has been included with all of the changes made except Docket Management (*Exhibit nn*). The final Docket Management changes went into effect in FY 2011, and an example of the GS-12 examiner PAP with those final changes is included (*Exhibit oo*).

Those changes, as evidenced by the interviews with SPEs and Directors, have appeared to make it easier for examiners to meet their individual goals, to the detriment of Agency-level quality, timeliness, and amount of work actually completed by the workforce. Of the forty-nine SPEs interviewed, thirty-one SPEs (63%) said that they felt that the standards for employee performance have gotten easier over the last several years.

More than 50% of the Directors said that the standards for evaluating patent examiners performance had gotten easier under the new PAP. For those that found it has become easier, the main reasons were the additional hours given to examiners to examine a patent, the changes to

the docket management element, and the new quality error rate calculation for the quality element. The following statements were made:

- *“The accountability issue has shifted to the SPEs to be proactive with the examiner. Production is probably easier. An examiner could do all their production in 3 days and then be gone” (Exhibit R, Director #3)*
- *“New PAP in 2012 gave more credit for first action. Do less work and get more. Docket Management element is easier than Workflow standards.” (Exhibit R, Director #17)*
- *[Regarding Docket Management] “The productivity standards reduced, quality element much reduced. DM – some examiners poorly but more examiners are 130% or more, but more overdue cases in TC, higher than ever” (Exhibit R, Director #19)*

The major changes made to the Patent Examiner’s PAP included changes in the critical elements that are used to evaluate Patent Examiners performance and are highlighted below.

Production:

The current PAP that went into effect FY 2010, converted the “Productivity Goal Achievement (Patent Examining)” critical element to a new critical element entitled “Production.” This critical element measures the number of assigned patent applications the examiner examines from first action to final disposition within an assigned expectancy (hours per balanced disposal). The new “Production” element was assigned a weight of 35%. This is compared to a weight of 40% for the former “Production Goal Achievement” element. The way that this critical element was rated also changed. Please note from the chart below that standards for the Unacceptable through Commendable levels changed as a result of the conversion to the new PAP:

Rating	FY 2009 PAP	FY 2010 PAP (Current PAP)
Outstanding	110% & above	110% & above
Commendable	105% - 109%	103% - 109%
Fully Successful	95% - 104%	95% - 102%
Marginal	90% - 94%	88% - 94%
Unacceptable	<90%	<88%

Prior to the new PAP going into effect, an employee performing below 90% of their assigned goal could be placed under an Oral Warning, which consisted of a period during which they needed to show improvement to the Marginal level – 90%. If an employee was unable to show this improvement, the examiner would receive a Written Warning, with an improvement period during which they must improve to the Marginal level. If the examiner did not improve his or her performance to the Marginal level, the examiner could be removed from the Federal service for failure to meet the necessary performance standards. Under the new PAP, in addition to the Marginal level being reduced from 90% to 88%, an additional performance improvement tier was added – the Safety Zone Notice. An examiner performing between 80% - 88% no longer received an Oral Warning. Instead, they receive a Safety Zone letter that counsels them to improve their performance. If they are still Unacceptable at the end of the “Safety Zone

Quarter”, the examiner would be given an oral warning, even if the examiner falls in the Safety Zone range.

These changes allow an employee to perform at an Unacceptable level for a longer period of time before being required to improve their performance. It is important to note that by regulation, Agencies are only required to give an employee one opportunity to improve. In some cases, examiners can get up to three, thereby extending the period of tolerable Unacceptable performance.

In addition, this system uses an auto-counting system designated by a Patent Examiner’s grade level. Under the new DM element, GS-14 Primary Examiners get all actions auto-counted when they post their actions for credit, meaning that when they electronically submit work as complete, it is automatically counted and credit immediately given to the examiner without review or verification of the work by management. GS-12 and GS-13 Patent Examiners, as well as Partial Signatory examiners, get “non-final” type actions (e.g., non-final rejections) auto-counted upon posting for credit. They get “final” type actions auto-counted when approved by a Primary Patent Examiner. Examiners below GS-12 get all actions auto-counted when actions are approved by a Primary Examiner (*Exhibit ii, Slide 27*).

Quality

The PAP that took effect in FY 2010 replaced three critical elements – Patent Examining Functions, Action Taking, and Patentability Determination – with one critical element entitled Quality. The Quality critical element is worth 35% of an examiner overall performance rating. Under the previous PAP, the three elements combined accounted for a weight worth 40% of the overall performance rating. This critical element reviews three categories of errors. GS-11 Patent Examiners or higher are assigned a rating in Quality of examination based on both an error rate and indicia of Outstanding or Commendable performance. The SPE is responsible for assigning a “clear error” when the examiner’s office action(s) or office communication(s) does not reasonably comply with the major activities set forth in the PAP, could not have been permitted at the time and under the circumstances that the action was taken, and is not an honest and legitimate difference of opinion as to what action should have been taken. An examiner’s rating is assigned using the embedded chart:

Rating	Error Rate Range
Outstanding	0 – 4.49%
Commendable	4.50 – 5.49%
Fully Successful	5.50% - 6.49%
Marginal	6.5% - 7.49%
Unacceptable	Greater than or equal to 7.50%

The new Quality element is made up of three types of errors: Categories I, II, and III. For lower graded employees, the entire element is based on Category I. GS-11 – GS-13 examiners are rated based on the average of Category I and Category II. GS-14s are rated on an average of Category I – III. For GS-11s and above, if any one of the categories alone falls below 7.49%, the overall element is capped at either Marginal or Unacceptable based on the calculation of the single category.

This element is structured such that the examiner begins at the Outstanding level and only reduced below Outstanding if a SPE proves that the performance is less than Outstanding. The “averaging” of different categories of errors allows for examiners to subsidize lower performance in one category with higher performance in the other(s). Yet, when an examiner is Unacceptable in one of the categories, any resulting warning is based only on the particular category, as opposed to the Quality element as a whole. Thus, an examiner can successfully complete an improvement period related to one of the categories while still being Unacceptable in Quality by altering the type of work that they perform, for example, no longer doing work that could result in a Category III error.

Several SPEs felt that performance standards had gotten easier, the following responses were received relating to the critical element Quality:

- *“Couldn’t hold a quality error even if they had a gun to your head. Every single case one of my examiners did was ceiling exceeded and they were still Commendable for Docket Management.” (Exhibit Q, SPE #34)*
- *“The level to hold at FS [in relation to quality] is a hurdle that is almost impossible unless there is some major issue” (Exhibit Q, SPE #3)*
- *“Feel the burden to show someone is less than Outstanding takes too much work and the SPEs don’t do it” (Exhibit Q, SPE #46)*
- *“We have a new count system implemented, I’ll define as more safety nets for people who don’t perform” (Exhibit Q, SPE #6)*
- *“The curve has shifted to Outstanding” (Exhibit Q, SPE #27)*
- *“Now the examiner is Outstanding and you have to prove otherwise. One employee can go above and beyond and be Outstanding, and you can have another employee who does the minimum and is also Outstanding” (Exhibit Q, SPE #31)*
- *“There is almost an automatic Outstanding or Commendable. An examiner’s Quality has to be really bad before it can be brought down from Outstanding” (Exhibit Q, SPE #38)*

Docket Management:

The critical element “Docket Management” (DM) replaced the former critical element “Workflow Management” in the new PAP. While “Workflow Management” was assigned a weight of 10% of the examiner’s overall performance rating, “Docket Management” is assigned a weight of 20% of the examiner’s rating. Patent Examiners are assigned DM scores which are calculated using a component score percentage derived from the average of the number of days to complete actions compared to the expected number of days for that action type. The component score percentages is weight-averaged to determine the overall rating for docket management.

Rating	DM Score
Outstanding	110% & above
Commendable	103% - 109%
Fully Successful	95% - 102%
Marginal	88% - 94%
Unacceptable	<88%

Under the previous PAP, an examiner had a designated number of points added to or subtracted from a base line number of points based on how an examiner handled various office actions and examining tasks.

Under the new DM element a system was established to assign a time value, or “clock” for processing office actions. The system is based on an average number of days to complete a Docket Management item. The Docket Management items are organized into several categories or tabs (e.g., Regular New, Amendments, Returns, Ceiling Exceeded, Rejected, Workflow Plan (also known as the Docket Management Plan)).

The Docket Management system assigns each type of office action an expected average number of days to be completed and a maximum, or ceiling number, of days; completion is determined by when the office action is posted by the examiner for credit, approved, or counted. For example, Amendments should be processed in an average of 56 days; Regular New (cases with the oldest new filing date) should be processed in an average of 28 days; and a Returned Case should be processed in an average of 11 days. The ceiling number of days is typically twice the average number of days. Examiners can complete the office actions in fewer than the expected average number of days. If the examiner does not process the office action prior to the maximum number of days, it will be moved to the ceiling exceeded tab.

Cases on the ceiling exceeded tab have no time period or “due dates” associated with them. In fact, once an application is placed in the ceiling exceeded tab, there is no incentive for an examiner to do it at all.

Using a complex mathematical formula, the Docket Management system averages the number of days an examiner took to process the office actions, as compared to the expected average number of days to complete the actions for that category, to come up with an overall total Docket Management score for the bi-week. If an examiner processes enough newer cases, the penalty days for the cases on the Ceiling Exceeded Tab will not have an effect on the examiner’s overall DM score for the bi-week, or examiners can subsidize poor scores in one category of cases by doing well in a different category. Examiners are also permitted to choose which office actions he or she will work on each bi-week.

For cases on the ceiling exceeded tab, the supervisor can move those cases to the Docket Management Plan tab. However, the formula for determining how many cases can be moved to the DMP is so conservative that cases enter the ceiling much faster than they can leave. This has led to examiners who have a large number of ceiling exceeded cases while still being rated well in performance (*Exhibits W, gg, and rr*). Additionally, there is no requirement that the examiner work on the cases placed on the Docket Management Plan immediately. If the examiner has

easier and newer office actions on his or her docket, the examiner can choose to work on all the easy cases first, then the more difficult ones some time later.

The Docket Management clocks can be stopped, paused or restarted based on a variety of circumstances. For example, when an examiner is (1) out of the office for five days or more, (2) out of the office for twenty-eight or more contiguous days on FMLA or sick leave – excludes vacations, or (3) on detail for more than 50% of the time, the examiner's DM clock will be paused. The time period considered for pausing Docket Management clocks includes weekends. If an examiner takes leave on a Friday, and the office is closed Monday and Tuesday due to weather conditions, the examiner's DM clock will be paused until his or her return to the office. The DM clocks can be stopped when an examiner posts a case for credit, approved, or counted. If an applicant files a supplemental amendment, the examiner's DM clock will be restarted for that case.

Examiners qualify for Docket Management awards based on their overall Docket Management score. The examiner can have numerous cases on the ceiling exceeded tab and still be eligible to receive a monetary Docket Management award, as long as they are performing at the Fully Successful level.

A review into the Docket Management element and awards given for Docket Management revealed that changes need to be made to the element and award system. *Exhibit kk* includes the memos and guidance that was issued in 2011 and 2012 regarding the Docket Management awards. In *Exhibit W*, the graph shows the number of examiners who had cases that were past due and have gone into the ceiling exceeded tab, yet they are still rated at Fully Successful or higher for FY 2012. *Exhibit gg* shows a clearer picture in that at the Outstanding level, there were examiners with 40 cases or more, and in some instances, up to 80 cases, past due in the ceiling exceeded tab. There were also some examiners that were rated Fully Successful and Commendable, yet they had past due cases in the ceiling exceeded tab, some to an egregious extent. In *Exhibit rr*, the data shows that there were 3,639 examiners, rated Fully Successful or above, who contributed 26,216 applications to the ceiling exceeded tab throughout FY 2012.

In *Exhibit hh*, the data shows that more than 800 Docket Management awards were paid out in FY 2012 to examiners with cases in the ceiling exceeded tab. The graph is broken down quarterly and it appears to show that the total number of awards being paid out each quarter has almost doubled (*Exhibit hh*). This data suggests that patent examiners are eligible to receive a Docket Management award, even though they have a significant number of overdue cases on their Ceiling Exceeded tab. The Docket Management element of the performance appraisal plan (PAP), as well as, the corresponding docket management award program, needs to be reviewed to ensure that only deserving examiners are granted awards, and that poor performance results can be appropriately assessed and corrected under the performance plan. The new Docket Management element of the PAP does not appear to be able to effectively measure an examiner's performance.

Exhibit X shows that between the first quarter of FY 2012 and the fourth quarter of FY 2012, the number of amendments that went into the ceiling exceeded tab, therefore going past due, more than quadrupled. *Exhibit Y* shows that the number of amendments that were past due, greater

than 112 days, was steadily decreasing until the beginning of FY 2012, when the new changes to the Docket Management element went into effect. Another way to look at this is in *Exhibit cc*, which shows that the average turnaround time for amendments has increased to an average of 56 days, when compared to pre-Docket Management levels, where it was at 54 days. Therefore, it appears that all of the cases in the ceiling exceeded tab are causing USPTO's average amendment turnaround time to increase above pre-Docket Management levels. *Exhibit ee* shows the cumulative number of ceiling exceeded cases at the end of FY 2012. For example, 338 examiners had between 26-50 cases in the ceiling exceeded tab, which contributed to 12,027 (30%) of the total number of ceiling exceeded cases in FY 2012. *Exhibit ff* shows the Amendments that have gone into the ceiling exceeded tab broken down by TC over four separate time periods.

Past due cases not only have a negative effect on the Agency; they also impact the applicant with delays, some substantial. As mentioned above, the average turnaround time is greater, and for cases in the ceiling exceeded tab, the response time continues to grow.

The SPEs were asked about the Docket Management ratings and awards. Five SPEs (10%) said that they had examiners who had received Docket Management awards despite having cases past due in the ceiling exceeded tab. Twenty-two SPEs (44%) said that they had examiners who were rated Outstanding despite having cases in the ceiling exceeded tab. Thirty-five SPEs (71%) said that the Docket Management critical element, formerly called Workflow Management, had gotten easier since the new element went into effect. Forty-three SPEs (87%) said that Docket Management awards in their technology center had increased and twenty SPEs (40%) said that the Agency was not getting reduced pendency, instead cases awaiting examiner action are getting older, with some getting much older than would have been acceptable under the previous PAP standard.

When the Directors were asked about Docket Management awards, Twenty-eight percent (28%) said that there were examiners in their TC who received Docket Management awards while having past due cases in the ceiling exceeded tab, however fifty-three percent (53%) of the Directors did not know the answer to this question. Forty-eight percent (48%) of the Directors said that they had some examiners in their TC that had been rated Outstanding despite having past due cases in the ceiling exceeded tab, although a large percentage of Directors did not know the answer to this question or have the data readily available to check. Seventy-two percent (72%) of the Directors said that awards in their TC had increased since the changes to the Docket Management element went into effect. Yet, thirty-six percent (36%) of the Directors said that there were more cases getting older than before the changes, and an even larger percentage of the Directors did not know the answer to this question. This concerning information was confirmed with the data, as seen in (*Exhibit X and Y*).

It is important to note that Patents Management has reopened discussions with the POPA bargaining unit and is currently involved in discussions to reach an agreement on a revised DM element and award that will possibly address some of these issues.

Stakeholder Interaction:

The PAP adopted in FY 2010 included some changes to the non-critical element "Customer Service" and changed the title to "Stakeholder Interaction." This element is not a critical element in the Examiner PAP and was not discussed in the complaints raised to the OIG and as such will not be analyzed in this report.

Policy review results***Rules of the Road (Exhibit T)***

The PTONet and USPTO Automated Information Systems (AIS) "Rules of the Road" provide guidance for using the USPTO's computing and network facilities responsibly, safely, and efficiently. This document advises employees that they should not have any expectation of privacy on while on government systems. Therefore, employees should not be surprised if their computers records are used in a misconduct investigation. Employees are reminded of the "Rules of the Road" during the required annual IT Security Training that each employee is mandated to take.

Patent Examiner Laptop Program (Exhibit E)

The Patent Examiner Laptop Program work agreement requires that the participant follow established USPTO procedures when requesting and taking leave. They must adhere to their work schedules. This program is for work outside of USPTO, and in addition to their normal work schedule. It includes voluntary overtime and paid overtime and/or compensatory time only. Participants are not permitted to work any regular hour on this program. There is no requirement to log into the Virtual Private Network (VPN) or to be available to other employees and the participant's supervisor through the use of the collaboration tools.

Patents Telework Program (Exhibit F)

The Patent Telework Program (PTP) requires employees to work on-campus a minimum of three days between Monday and Friday. When teleworking, participants must complete six hours of their telework day between the hours of 6:30 a.m. and 7:00 p.m. The document states that, "*All examiners are expected to provide customer service to both internal and external customers by being accessible and available during working hours*" (Exhibit F, Section A, #5). The document also states that, "*When working at the alternate work site, the examiner must perform patent examining functions and related activities ...*" (Exhibit F, Section C, #7). The participants in the program are required to indicate on their timecard when they are working at home. The participants must identify their telework day in advance and have approval from their supervisor. In addition, the document states that, "*participants will notify their supervisor when their work day commences, or prior thereto, of the hours to be worked*" (Exhibit F, Section E, #18).

In the Patent Telework Program document, it clearly states that participants must be accessible and available throughout the work day. This is not possible if the participant is not logged into the VPN. The participant's telephone does not ring if they are not connected to the VPN. The participant is not able to utilize the collaboration tools when they are not connected to the VPN. USPTO has transitioned from desktop workstations to universal laptops for all employees. Therefore, each employee who is participating in any of the numerous telework programs

available at USPTO has access to a laptop, and that laptop should be utilized during the hours that the employee is teleworking.

An employee can effectively work limited amounts of time while not logged into the VPN or using their USPTO issued laptop; however, employees cannot be available and accessible when they are not logged in. Employees must be logged into the VPN to have access to the patent examining systems that are required to perform their work.

Patents Hoteling Program (Exhibit G)

The Patents Hoteling Program (PHP) requires employees to be performing patent examining functions and related activities when working at the alternate work site. The document states that, “*participants will notify their supervisor when their work-day commences, or prior thereto, of the hours to be worked. Employees working a set schedule each week may so notify their supervisors and will not need to meet the daily approval and notification requirements*” (Exhibit G, Section A2, #13). Participants in PHP must also, “*Consult and collaborate with PHP participants and between PHP participants and the USPTO work site*” (Exhibit G, Section A3, #4). As with PTP, PHP participants are, “... *expected to provide customer service to both internal and external customers by being accessible and available during working hours*” and they must also, “*check and respond appropriately to voicemail and e-mail periodically throughout the workday during USPTO business hours*” (Exhibit G, Section A6, #1). There is nothing in the document that states that the participants must log into the VPN.

Settlement Agreement on Patents Hoteling Program (Exhibit U)

The third item in the agreement requires that, “*Semiannually, the Agency will remind hotelers of their commitment to provide internal customer service, including providing their work schedule to trainees or setting up training appointments. Hotelers will be encouraged to respond to calls or e-mails frequently throughout their work day*” (Exhibit U, p. 1). This provision which is an accountability control, is not being enforced.

Time and Attendance Policy (Exhibit H)

The Time and Attendance Policy document articulates the requirements and procedures applicable to time and attendance reporting for the USPTO. This policy outlines the responsibilities of OHR, the supervisor, the T&A Contact Points, the timekeeper and the employee. There are three specific responsibilities that relate to this investigation. The employee is responsible for accurately recording the time actually worked and leave earned and used in 15-minute increments. The employee is also responsible for validating the entry of T&A information each pay period and affirming that the information is correct, as submitted. The supervisor is responsible for certifying the accuracy of T&A data in WebTA.

Work Schedules Policy (Exhibit I)

The Work Schedules Policy document highlights the OPM regulations and United States Code (USC) laws and regulations pertaining to alternative work schedules that apply to employees in the USPTO. It notes that it is the employee’s responsibility for maintaining and keeping accurate time records of the hours they work and for validating their own time on a biweekly basis. Employees at the USPTO have the flexibility in selecting work schedules. Management officials are responsible for approving their employee’s schedules and for ensuring appropriate office

coverage. Outlined in this policy is a definition and explanation on the administration of the various compressed and flexible work schedules. The Work Schedules available to USPTO employees are as follows:

Compressed Work Schedules (CWS)

4/10 - Employee works four 10-hour days each of the two weeks in a pay period.

5/4/9 - Employee works eight 9-hour days and one 8-hour day for a total of nine days in a pay period.

Flexible Work Schedules

Increased Flexitime Policy (IFP) - allows employees to meet their 80-hour biweekly work requirement Monday through Saturday between the hours of 5:30 a.m. and 10:00 p.m., Monday through Saturday. Employees must work a minimum of four days per week and may work a maximum of 12 hours per workday (excluding the required 30-minute meal period). See Appendix A to Workplace Schedules policy.

Maxiflex - (this does not apply to Patent employees). Allows full-time employees to meet their 80-hour biweekly work requirement in less than 10 full days between the hours of 5:00 a.m. and 8:00 p.m., Monday through Saturday. See Appendix B.

SES Maxiflex - allows full-time executives to meet their 80-hour biweekly work requirement in less than 10 full workdays between the hours of 5:30 a.m. and 8:00 p.m., Monday through Friday. Heads of business units may establish 5/4/9, 4/10, 1st 40 or 1st 80 tours of duty within this work schedule. See Appendix C to Workplace Schedules policy.

Patents SES Maxiflex - allows full-time executives in the Patents Cost Center to meet their 80-hour biweekly work requirement in less than 10 full workdays between the hours of 5:30 a.m. and 8:00 p.m., Monday through Friday. Work on Saturday or Sunday may be allowed upon request. See Appendix D Workplace Schedules policy.

Eight-hour Flexible Schedule - allows employees to work eight hours per day Monday-Friday, between 5:30 am and 8:00 pm. Allows midday flex. The policy also outlines guidance on how to administer credit hours, premium pay and excused absences, holidays and meal periods.

Increased Flexitime Program (Exhibit J)

The Increased Flexitime Program (IFP) is the most popular selection for work schedules in the USPTO. This policy provides details on how the Agency is to manage the IFP work schedule. This document articulates the employees' responsibility for keeping track of their own time and accurately recording it in WebTA. Employees must notify their supervisor if they will be absent on a weekday, prior to the absence.

Telework Enhancement Act Pilot Program (Exhibit K)

The Telework Enhancement Act Pilot Program (TEAPP) document explains the pilot program that the USPTO is participating in that allows employees to change their duty station and work full-time anywhere in the continental 48 states. The employees who participate in TEAPP must read and sign the underlying full-time telework program agreement in their business unit to participate. For patent examiners, that telework program is the Patent Hoteling Program (PHP). Aside from that requirement, there is nothing in the TEAPP document that is relative to this investigation.

50 Mile Radius Agreement (Exhibit L)

The 50 Mile Radius Agreement and Provision Related to the POPA Hoteling and Telework Programs and IFP document explains the agreement for examiners living within the 50 mile radius of USPTO, allowing them to waive their bi-weekly reporting requirement. The participants in the 50 mile radius program are still bound by the requirements in the Patent Hoteling Program or the Patent Telework Program.

Telework Enhancement Act of 2010 (Exhibit M)

The Telework Enhancement Act of 2010 document became Public Law 111-292 on December 9, 2010. The law requires that an Agency's telework policy shall, "ensure that telework does not diminish employee performance or agency operations;" (Exhibit M, Section 6502(b)(1)). The law also states that, "teleworkers and non-teleworkers are treated the same for purposes of- (A) periodic appraisals of job performance of employees; (B) training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees; (C) work requirements; or (D) other acts involving managerial discretion ..." (Exhibit M, Section 6503(a)(3)).

Guide to Telework in the Federal Government (Exhibit N)

The Guide to Telework in the Federal Government states that, "customers should not notice that the teleworker is working from an alternative worksite (i.e., work should be seamless)" (Exhibit N, p.29). The Guide also states that, "the manager must be kept apprised of the teleworker's schedule, how to make contact with the teleworker, and the status of all pending work" (Exhibit N, p.29).

USPTO Telework Policy (Exhibit O)

The USPTO Telework Policy is derived from several laws, including the Telework Enhancement Act of 2010 (Exhibit M). The policy states that, "The provisions of this document apply to all employees participating in a USPTO telework program" (Exhibit O, Section IV, p. 2). The policy also states that employees must, "Be available and accessible for communication with the office and perform work tasks as expected to be performed while in telework status" (Exhibit O, Section VII(F)(8), p.14).

Inspector General Report on PHP (Exhibit P)

In February 2012, the Office of Inspector General released its final report, OIG-12-018-A, on the Patent Hoteling Program, entitled *The Patent Hoteling Program is Succeeding as a Business Strategy*. The report was the result of an audit to determine:

- 1) *"how USPTO measures productivity for its PHP participants and whether USPTO's data indicate improvement in productivity;"*
- 2) *"the extent that USPTO has achieved its stated cost saving for the PHP program, including real estate savings; and"*
- 3) *"the extent that USPTO policies and their implementation provide adequate controls over PHP." (Exhibit P, p. 2).*

Several of the Assistant Deputy Commissioners referred to this report to state that USPTO was found to have a successful PHP program, that the USPTO provides adequate control over participants, and that PHP participants spend more time examining patents every year than examiners working full-time at USPTO headquarters.

The report indicates that PHP participants spend more time per year examining patents than full-time on campus employees, because they use less sick and administrative leave, and charge less time to other activities not defined as examining patents. The audit found that PHP participants are equally efficient at reviewing patent applications during the hours they are reviewing patent applications as their counterparts who work full time at USPTO headquarters.

The audit found that USPTO has adequate controls over PHP in key areas. Specifically, the report states that USPTO developed a program that complies with key federal statutes related to telework, addressing employee eligibility and participation, work schedules, the application process, and selection criteria. The audit reviewed a sample of PHP participants to determine whether they met eligibility requirements for the program and that USPTO had appropriate documentation to support the eligibility. The audit also reviewed the USPTO controls over its Internet service provider (ISP) reimbursement policy to ensure adequate controls were in place to prevent improper payments to PHP participants. The audit reviewed the USPTO remote access policies to reduce security risks to USPTO systems and data.

The audit did not review PHP to determine whether mechanisms were in place to ensure that participants were working the hours that they claimed or that they adhered to the work schedules. Therefore, the OIG report cannot be relied upon to show that USPTO has adequate controls in place to ensure PHP participants are working the hours that they have claimed as it does not support or refute the allegation.

SUMMARY

Patent Examiners have been given a considerable amount of flexibility in performing their work duties within a variety of work schedules and programs, which are important for the morale and productivity of the workforce. However, with great flexibility and trust must come accountability. Examiners, both those that work on campus and those who telework, are permitted to work their hours between 5:30 a.m. and 10:00 p.m., Monday through Saturday. They are not required to log on to USPTO systems and they do not have to tell their managers when they intend to work. Management assumes employees are working each bi-week unless no work is submitted at the end of the period. The amount of work submitted is used as an indication of time worked by the employee, as submitted in WebTA, rather than the employee's presence. The SPE interviews (*Exhibit Q*) validate this pattern with more than fifty percent

(50%) of the SPEs stating that performance is a tool for ensuring that employees are working the hours that they claim. For example:

- *"I can determine if they are working based on production" (Exhibit Q, SPE #3)*
- *"If there are no performance issues, there is no need to follow up on T&A" (Exhibit Q, SPE #4)*
- *[...] "work product is key in determining whether T&A info is accurate" (Exhibit Q, SPE #5)*
- *"I don't care so much about the amount of hours as I do about the amount of work that gets done" (Exhibit Q, SPE #7)*
- *"I make no extra effort to see if they are in the office. I see it when cases are turned in. If production is fine, I have no difficulty in knowing that they are doing what they are supposed to" (Exhibit Q, SPE # 21)*
- *"Quite frankly, I don't care what hours they work" (Exhibit Q, SPE #36)*

The controls necessary for ensuring that these programs are used properly and not abused are not in place. This investigation found that while some controls exist, there are so many work programs and policies in place, that it is difficult for management officials to know the rules and requirements of each program and how to enforce them. Disciplining employees for abusing these programs is further complicated by a history of lax enforcement, non-enforcement, and inconsistent enforcement that has rendered the existing controls completely ineffective.

As mentioned earlier, Patents upper management has for the most part prohibited TCs and Employee Relations from using computer and swipe records as evidence against employees found to be misrepresenting time worked on their timesheets. The rationale for not using computer and swipe records is that the Agency does not want to harm employees by having "big brother" watching them. However, as evidenced by the increasing number of OIG complaints regarding time fraud throughout the Patent Corps, some employees are becoming increasingly frustrated by management's lack of enforcement.

In recent years, more and more of the existing controls have been used as bargaining chips with the union to reach agreements on Agency initiatives. This has resulted in a lackadaisical approach to enforcing work schedules and telework programs, as well as a failure to address end-loading and other performance-manipulation issues.

It appears that the loosened controls has either encouraged, or at the very least, failed to discourage end-loading. Examiners can work inconsistently throughout the year, and even fail to be present at work, with little or no consequences. These examiners are receiving the same salary and performance awards as those employees who are consistently turning in work throughout the quarter and fiscal year. Examiners are also engaging in misconduct in order to avoid being placed on performance warnings and be eligible to receive performance awards. Examiners can submit incomplete office actions for credit, called mortgaging, then go back later and complete the office action. As long as the examiner submits an appropriate amount of work by the end of each quarter, the examiner will be eligible to receive a variety of performance awards.

In the course of investigating the OIG complaints, the Agency found multiple instances where there was evidence that an employee was potentially engaging in time and attendance abuse, yet management would not allow a thorough investigation. Nor would management allow these records to be used as evidence in a disciplinary or adverse action. This adds to the impression that time and attendance abuse is tolerated.

The ADCs have developed a series of guidance documents for supervisors in an effort to help address their frustration with the perceived inability to manage employees who are unresponsive and do not appear to be working – commonly referred to by the ADCs as “extreme outliers”

The first document in this three-set program is titled *Management Guidance on Certifying Time and Attendance (Exhibit bb)*. The guidance relies on a two prong test: (1) the amount of work submitted by the examiner in a bi-week, and (2) the level of responsiveness of the examiner. If the examiner does not respond to a supervisor’s e-mails or voicemails, and does not appear to be in the office or hoteling during the workday, the supervisor needs to review the PALM report on the first Tuesday of the new bi-week. If the examiner did not submit a reasonable amount of work for the number of hours he or she claimed to have worked that bi-week, and did not respond to the supervisor’s attempts to contact the examiner, then the supervisor should call and/or e-mail the examiner. If the examiner does not respond, the supervisor should call and/or e-mail the examiner again the next day. If the examiner still does not respond, the supervisor should contact his or her TC Director about the situation, and then contact Employee Relations.

Employee Relations will send the examiner a letter that lets the examiner know the supervisor is concerned about the examiner’s non-responsiveness and lack of work, directs the employee to report to work or sign into the hoteling equipment, provides a variety of options and services available (e.g., FMLA, EAP, LifeCare), and a reminder of the work schedule and leave requesting requirements. If the examiner is still unresponsive, then the supervisor may charge the examiner with Absence Without Leave (“AWOL”) and begin the disciplinary or adverse action process.

This guidance is flawed and ineffective as it relies on a two-prong test – the examiner not submitting work **AND** not being responsive. If the examiner meets one of those two requirements, then the supervisor cannot take further action. Supervisors will once again be faced with the inability to hold examiners AWOL or take disciplinary action against them. The ADCs rely heavily on “coaching, mentoring, and training” examiners on properly recording their time and submitting work. However, when this does not work, it is necessary to take appropriate disciplinary action.

FINDINGS ON EACH ALLEGATION:

1. Time Fraud

- a. Unnamed Patent Examiners are misrepresenting their time and attendance records, to include claiming overtime that is not being worked. This allegation cannot be proved or disproved. The lack of controls such as the requirement to log into USPTO systems and to notify managers of work schedules results in a lack of reviewable records from which a conclusion can be drawn on the time

- a particular examiner is working. Therefore, this allegation is UNSUBSTANTIATED. However, evidence such as the prevalence of end-loading, as well as, the observations of SPEs indicates that this is a problem that requires significant remedial attention.
- b. Unnamed Patent Examiners are misrepresenting their time and attendance records by claiming time based on work completed instead of time worked. This allegation cannot be proved or disproved. The lack of controls such as the requirement to log into USPTO systems and to notify managers of work schedules results in a lack of reviewable records from which a conclusion can be drawn on the time a particular examiner is working. Therefore, this allegation is UNSUBSTANTIATED. However, evidence such as the prevalence of end-loading, as well as, the observations of our SPEs indicates that this is a problem that requires significant remedial attention.
 - c. There is a lack of accountability for Patent Examiners to record their time correctly as long as the examiner meets his or her production goals. This allegation is SUBSTANTIATED
 - d. The Agency is not policing or monitoring abuse of timesheets. This allegation is SUBSTANTIATED
 - e. Conduct issues and time fraud are routinely overlooked as long as an examiner's production levels are acceptable. There is insufficient evidence to substantiate this allegation. However, anecdotal evidence and observation by the SPEs indicates that this is a problem that needs to be addressed uniformly and across all TCs. - UNSUBSTANTIATED
 - f. There is a lack of accountability for Patent Examiners participating in the Hoteling Program. SUBSTANTIATED
 - g. Unnamed Patent Examiners are receiving overtime pay for time they are not working. This allegation cannot be proved or disproved. The lack of controls such as the requirement to log into USPTO systems and to notify managers of work schedules which therefore results in a lack of reviewable records from which a conclusion can be drawn on the time a particular examiner is working. Therefore, this allegation is UNSUBSTANTIATED.
 - h. Management is dissuading supervisors from questioning employees about time and attendance discrepancies - This allegation is SUBSTANTIATED based on the testimony of the interviewed SPEs. However, we cannot determine how widespread this issue is.
 - i. There is a lack of accountability for Patent Examiners to record their time correctly. - As a result of the USPTO's very flexible work schedules, coupled with a lack of controls such as requiring employees to log in to USPTO systems or to notify managers of their work schedules, demonstrates that many managers do not know when or if their employees are working on given days throughout the bi-week. Therefore, this allegation is SUBSTANTIATED
2. **End-loading**
- a. Patent Examiners are only working at the end of the quarter, known as "end-loading" their work and can go from unacceptable performance to award levels in one bi-week by doing 500% to more than 1000% of their production goal. SUBSTANTIATED – Data shows that approximately 20% of examiner end-load.

- b. Supervisors are not equipped to monitor the quality of the work submitted effectively due to "end-loading". SUBSTANTIATED

3. Mortgaging of Work

- a. Patent Examiners are submitting incomplete work for credit before the end of a bi-week and then going in after the bi-week to submit valid work; something the Agency calls "mortgaging" of work - SUBSTANTIATED

4. Performance Plan Issues

- a. Unnamed Patent Examiners are receiving bonuses for Docket Management while they have overdue cases in their dockets. SUBSTANTIATED
- b. Standards have gotten easier with the implementation of the new PAP in FY 2010 as GS12s and above can now get credit for the work before it is checked. SUBSTANTIATED
- c. There is no reasonable way for a supervisor to monitor the quality of the work. SUBSTANTIATED
- d. Performance standards became easier with the new count system and examiner PAP. SUBSTANTIATED

RECOMMENDATIONS

1. *Enforce work schedule policies*

Supervisors should enforce the work schedule hours. The guidelines are very clear on the hours that examiners are permitted to work. Employees should be required to submit their work schedule to their supervisor on a weekly basis, unless they work the same schedule regularly. With the flexibility of work schedules at USPTO, it is difficult for supervisors to know when all their employees are working if they are varying their work hours regularly. Supervisors must know when their employees are working and what their work schedules are in order to accurately certify WebTA. Supervisors should not make exceptions for employees to allow them to violate the guidelines and work regular hours outside of the time bands. Employees should be required to follow policies and procedures, and held accountable if they do not. With the USPTO being promulgated as both a professional environment and model Federal telework Agency, it is a reasonable expectation that employees, including Patent Examiners, can and should follow policies and procedures, thereby providing management with a tool for accountability.

2. *Require employees to work in their USPTO office, or at their approved telework location*

Patents management allows patent examiners to take their USPTO issued government laptop anywhere on campus, as well as to work while on vacation outside of their approved telework location. This makes locating examiners very difficult. SPEs can often not find examiners in their offices, but they cannot always use this as evidence they are not working because when confronted about their whereabouts, employees will say they were working in Dulany Gardens or the cafeteria. Employees should be required to be at their assigned USPTO office so that they are available during duty hours, and held accountable if they do not.

3. Implement End-loading Deterrents

Currently, there is only a quarterly production requirement; this allows examiners to submit large volumes of work at the end of the quarter, rather than working consistently and steadily throughout the period. This practice places a lot of pressure on the SPEs to review large amounts of work in the few days following the quarter's end. As evidenced by the interviews, there is a consensus that this practice has a negative impact on quality. Further, it allows examiners great freedom in their work hours, and no real requirement to be present or to work consistently throughout the quarter and year, which leads to a lack of accountability towards pay for work performed and the supervisors ability to accurately and truthfully certify WebTA.

4. Review Quality Element

Because such a high percentage of interviewees said that the Quality element does not begin a patent examiner at the Fully Successful level and then earning a rating up or down from there, and that the element is often overlooked and not properly addressed because of the exorbitant amount of effort and time required to address quality issues, this element should be reviewed. The USPTO should follow 5 U.S.C. Part 430, in particular, § 430.208(a)(2), which states, "*An agency shall not issue a rating of record that assumes a level of performance by an employee without an actual evaluation of that employee's performance*" (**Exhibit Z**). USPTO should also utilize the guidance provided on OPM's website and seek their assistance if needed.

In OPM's guidance Appraisal Design, it states, "*Designers must decide how much flexibility the program users will need and ensure the design supports reserving the Outstanding level for truly exceptional performance*" (**Exhibit aa, p. 7**). Having a robust Quality element is especially important as the SPEs, Directors, and ADCs agreed that holding examiners accountable for Quality is one of the tools that they have to combat time and attendance misconduct. It is also important in ensuring the Agency's communication means with the Applicants is of the highest quality and accuracy.

5. Revise Docket Management Element

To prevent employees with cases in the Ceiling Exceeded tab from receiving Outstanding ratings of record and unjustified monetary awards, it is recommended that the Docket Management element and award be revised. In addition, the manner with which examiners manipulate the Docket Management system processes and calculations has resulted in the number of cases on the Ceiling Exceeded Tab to more than quadruple since the Docket Management element was revamped (**Exhibits W, X, and Y**).

In FY 2009, the Agency paid out \$448,184.35 in awards for Pendency (Docket Management) (**Exhibit pp**). In FY 2012, the Agency paid out \$10,649,884.77 in awards for Docket Management (**Exhibit pp**). This is an increase of \$10,201,700.42, which is more than a 95% increase. It is recommended that a cost-benefit analysis be thoroughly conducted to ensure that the amount of awards currently being paid out for Docket Management is benefiting the Agency and the applicants. It is also recommended that the ratings in this element more accurately account for the number and age of applications in the examiners' ceiling exceeded tabs.

The Agency has already begun this process and is currently in discussions with the bargaining unit to revise the element and award criteria to address these issues.

6. Review Auto-Count

It is recommended that USPTO review the auto-count function of the production element to ensure that it is not contributing to end-loading and mortgaging. It is also recommended that auto-count be reviewed to ensure that it cannot be manipulated.

It appears that there are a high number of examiners with auto-count that have a large percentage of their work returned for corrections. The data in *Exhibit qq* shows that GS 12 examiners account for a large percentage of examiners with cases returned. GS 12 examiners make up 13.6% of the patent examiners, but they have 21.9% of total returns and 42.47% of total returns in the ceiling exceeded tab (*Exhibit qq*). A potential solution to be considered is whether auto-count could be given as a benefit to an examiner that can be earned and lost depending on their quality and end-loading behavior.

It is important to implement checks on this behavior, as this type of misconduct is very difficult to prove and the union generally will argue that it is a quality error, rather than intentional misconduct.

7. Requirement to log in while working, including teleworking

The USPTO is renowned in both the private and public sectors for its award-winning telework programs. Agency telework representatives are often dispatched to provide guidance and assistance to other agencies and companies in developing, establishing and maintaining a telework program. It is imperative that the USPTO also be able to demonstrate that it does address instances of employees abusing a telework program. If the Agency continues its failure to ignore employee misconduct, it faces a potentially enormous amount of embarrassment on an otherwise successful and pioneering program.

USPTO should require all teleworking employees to log into the Virtual Private Network (VPN) and be active on e-mail and collaboration tools, including the telephone and instant messaging systems, when they are teleworking. This requirement should be present in all teleworking agreements. While an employee does not need to be active on their computer to be working for limited amounts of time, examiners do need to be logged into the VPN to be available to their supervisor, co-workers, and stakeholders (customers). They also must be logged in to use the collaboration tools and examination tools and systems. Telework is intended to be seamless and there should be no difference, except location, when an employee is working from home, or other designated telework location. The OPM Guide to Telework in the Federal Government states that, "*customers should not notice that the teleworker is working from an alternative worksite (i.e., work should be seamless)*" (*Exhibit M, p.29*). The Guide also states that, "*the manager must be kept apprised of the teleworker's schedule, how to make contact with the teleworker, and the status of all pending work*" (*Exhibit M, p.29*).

Furthermore, the ADCs all expressed communication as the means for supervisors to interact and validate their employee is working. When teleworking employees are not logged into the VPN, they are not available by their work phone or work e-mail, and they do not have access to the collaboration tools. Therefore, teleworking employees should be logged in at all times when they are working and be at least periodically active throughout the business day so as to check

for e-mails, telephone calls, and instant messages. All teleworking program documents, training, and agreements should be updated to reflect the requirement to log into the VPN and reflect the requirements in the Guide to Telework in the Federal Government. Management must then enforce these policies by addressing those known to not be adhering to the rules and enforcing consequences for those that do not.

8. Requirement to use collaboration tools

USPTO should require mandatory use of the collaboration tools, including Office Communicator and the presence indicator, by all employees, both on-site and off-site. With so many employees working off-site, it is beneficial to all employees to have the ability to communicate in real time with one another. It is also beneficial for employees to know at-a-glance whether another employee is currently active on their computer and thus available for consultation. Employees should be required to remain active and ensure that their status is up-to-date. The Office Communicator syncs with the Outlook calendar and will alert when an employee is on leave or in a meeting, etc. The collaboration tools should be, and can be, set at a system level to ensure that employees are not able to manipulate them or override settings in an effort to intentionally or unintentionally deceive others regarding their presence.

9. Change OT eligibility requirements

Overtime eligibility should be evaluated on a more frequent, preferably bi-weekly basis. This would assist in eliminating examiners from working overtime when their performance is below Fully Successful. Examiners should be at least Fully Successful in each critical element the bi-week before they request to work overtime. The original memo that addresses the requirements for overtime is outdated. It is recommended that USPTO update and enforce this policy. Further, the overtime and compensatory time eligibility requirements should be consistent to avoid confusion.

10. Delegate approval of investigations

Currently, the pulling and reviewing of all records requires ADC approval. The ADCs are often the deciding officials in proposed conduct actions, and should not be involved in the case prior to receiving the proposed action and supporting documents. It is important that the deciding officials be unbiased and rely only on what is provided in the proposal package. When the ADC/deciding official is involved in the case throughout the entire process and makes the decision on whether or not evidence can be used, the process becomes tainted. It is recommended that the ADCs delegate the authority to approve records and investigations to Employee Relations Division, who conducts the investigations and can determine what records are necessary for each case.

11. Full use of records

Managers should be allowed full access to and use of any available records when investigating suspected misconduct. Based on the interviews with the SPEs and Directors, the most common reason for not allowing the use of records was that it would create an environment of fear for the majority of examiners, or that the records are not reliable. This investigation has found that there is no evidence that employees are afraid of management looking at their records. Furthermore, employees are unaware of management's review of records, unless the review reveals misconduct. This investigation also revealed that the only time that employees are aware that

management has reviewed their records is when they are called into an investigatory meeting to discuss the evidence and any discrepancies or when they receive a disciplinary or adverse action.

As a federal employee, it is reasonable to assume that the Agency has the means and ability to monitor them to some degree. Even if employees hear through the rumor mill that another employee had their records reviewed, honest employees do not have a reason to fear a records review. More importantly, employees use Agency-issued computers, badges, Internet connection, and software on a daily basis and have no right to privacy. The Agency is well within its legal right to routinely monitor employee activity and use of its equipment and systems.

The reliability of the records can be determined by the proposing and/or deciding official. This investigation found that when records from multiple sources are used together, they can provide a compelling case. It is imperative that the Agency not overlook improper conduct, especially time and attendance fraud. If necessary, the Agency should make modifications to the way that data is collected and stored, including the length of time that data is stored, so that there is no concern about the reliability of records.

12. Enforce leave requesting procedures

Management should be sure to enforce leave requesting procedures. Examiners are required to request leave in advance, in writing, except in unforeseen instances or emergencies. Supervisors should not grant leave after it is taken, except in rare instances. The enforcement of the leave requesting procedures should assist in ensuring that examiners are not manipulating their hours or production requirements. This will also provide supervisors with a tool to ensure with more certainty the accuracy of the examiners timecards at the end of the bi-week.

Currently, many examiners are requesting leave at the end of the bi-week, without having informed their supervisor previously. This is unacceptable and a violation of the leave requesting procedures that are in place. Supervisors are compounding the problem by making exceptions which violate policies and procedures. The USPTO has a professional environment with a highly technical and educated workforce that can be expected to follow policies and procedures. In addition, it is important to note that Patent Examiners are permitted to work while on annual leave as a way to artificially boost their productivity numbers. As a result, it is not uncommon for examiners to add leave to their timecard retroactively after knowing how much work they completed for the bi-week. Retroactive use of leave should be prohibited.

13. Consolidate and centralize memos/policies

During the investigation, it became clear that the location and relativeness of policies and memos relating to the rules and regulations at USPTO were scattered and difficult to find. Many supervisors did not know which policy or memo was the current one in place or where to look if they had a question or needed more guidance. It is recommended that USPTO place current policies and memos in a central location and remove outdated and non-applicable policies and memos. Additionally, the policies and memos should be systematically reviewed and updated as necessary. Every effort should be made to update and consolidate all memos and policies so that it is clear to all employees and managers what is current and effective. If changes or updates need to be made to a policy once they are all updated and centralized, it is recommended that an

updated policy or addendum be available once the changes/updates are made instead of sending out memos and that a notification is sent out informing employees that changes/updates have been made.

14. More supervisory training

This investigation revealed that many supervisors, directors, and ADCs are not aware of the current policies in place at USPTO. This is concerning and could lead to the inequitable treatment of employees. The recommendation is that USPTO, in conjunction with centralizing all current policies and memos, provide yearly training to supervisors on the policies in place that affect them and/or their employees.

15. Cost Benefit Analysis

It is recommended that USPTO perform a thorough cost benefit analysis of the patent examiner award structure to ensure that the changes made to the examiner PAP in 2010 and the restructure of the award program is appropriately benefitting the Agency and that it is a justified expense to the Agency and the taxpayers.



UNITED STATES PATENT AND TRADEMARK OFFICE

INTERNAL ADMINISTRATIVE INQUIRY REPORT

TO: Welton Lloyd, Jr.
Audit Liaison, Office of Planning and Budget
United States Patent and Trademark Office

Jennifer Nobles
Director, Complaint Inquiry and Analysis
U.S. Department of Commerce

FROM: Frederick Steckler 
Chief Administrative Officer
United States Patent and Trademark Office

CC: James Payne
Deputy General Counsel, Office of the General Counsel
United States Patent and Trademark Office

DATE: July 8, 2013

SUBJECT: Inspector General Referral No. 12-1196-H
Re: Abuse of Telework Program at USPTO

INVESTIGATOR(S): Jessica Patterson, Human Resources Specialist, GS-13
Jessica Crawford, Human Resources Specialist, GS-13
Stacey Fumey, Human Resources Specialist, GS-12
Martin Koerner, Human Resources Specialist, GS-13
Daniel Smith, Accountant, Office of Finance, GS-15
Jennifer Seifert, Associate General Counsel, GS-0905-15
Chieko Clarke, Associate General Counsel, GS-0905-15

SUBJECT: Claims of systemic time and attendance abuse by Patent Examiners,
primarily in connection with the USPTO telework and hoteling programs

PREDICATION: On August 29, 2012, the Office of Inspector General (OIG) received an
anonymous complaint alleging systemic time and attendance reporting abuse by Patent

Examiners, primarily within the telework and hoteling programs, at the United States Patent and Trademark Office (USPTO or Agency). (Exhibit A). As this was the fourth complaint in a series concerning similar allegations, on September 18, 2012, the OIG referred the complaints to the USPTO and requested that an administrative inquiry be conducted and a response to the complaints be provided. (Exhibit A). OIG also requested that USPTO address whether there are appropriate internal controls in place to prevent time and attendance (T&A) abuse within the telework and hoteling programs. (Exhibit A).

QUESTIONS ADDRESSED:

1. Whether Patent Examiners accurately report their T&A for both regular and overtime work hours?
2. Whether the USPTO has effective internal controls to guard against T&A abuse by Patent Examiners?

FINDINGS AND RECOMMENDATIONS¹

Section I sets forth the findings on the specific allegations made in the complaints, which are laid out in Appendix A. The findings were drawn from the relevant data and interviews, as stated in the "Methodology" section of Appendix A. In summary, the investigation team was not able to reach a conclusion on whether some Patent Examiners are accurately reporting T&A or whether the Agency has effective controls to guard against T&A abuses by Patent Examiners. As will be discussed more fully below, there are no records that could be relied upon or referenced to support such findings and the interview statements were inconsistent.² However, recommendations that address certain other findings by the investigation team are found in Section II.

¹ Appendix A contains a description of the complaints, background and methodology for the report. The background portion addresses the organization of the USPTO, Examiner work schedule options, and Patent Examiner duties and performance measurements, including the critical elements of the Performance Appraisal Plan (PAP) used to evaluate an Examiner's performance (Docket Management, Production and Quality). The methodology portion describes the items reviewed and actions taken which form the basis for the report's findings, conclusions, and recommendations. It also provides a list of the exhibits to the report. The background information in the report and Appendix A, including information describing labor union agreements and matters, are provided for general background purposes only.

² References to the interview responses throughout this report are intended only to provide examples of responses that support or contradict the findings. The interview responses were not quantified in any way. Thus, the citations to specific responses should not be interpreted as providing a quantifiable level of support for any specific finding. The full interview summaries have been provided with the attached exhibits.

I. FINDINGS

A. Whether Patent Examiners accurately report their T&A for both regular and overtime work hours?

Full-time employees are required to work an 80 hour bi-week regardless of their work schedule or production requirements. The complaints allege that an unspecified number of Examiners routinely do not comply with this requirement but rather claim 80 hours of work while achieving or exceeding work production requirements in less time. The investigation has not found objective evidence of T&A abuse or the extent of any abuse, including the payment of overtime for hours not worked. There are no records that could be relied upon or referenced to support such a finding. For example, the USPTO T&A system captures the total number of hours worked on a particular day, but not the particular hours of the day spent working. Additionally, the interview statements were inconsistent, with interview responses ranging from the belief that remote employees are “more dedicated and are generally less distracted,” (Exhibit Q, SPE 5), to the belief that remote workers were more likely to abuse T&A than on-campus employees. (Exhibit Q, SPE 13, 16). While the statements of some Patents managers and the Employee Relations Chief suggest that there may be a problem with T&A abuse routinely occurring with certain Examiners, especially with regard to certain employees working remotely, the statements of other Patents managers were that there was no such abuse. Additionally, many Supervisory Patent Examiners (SPE) express frustration with existing controls on T&A. The specific T&A controls and interview statements suggesting the effectiveness of each control will be discussed further below.

As to overtime, current policies and negotiated union agreements generally require that Examiners be rated fully successful in all critical elements in the prior fiscal quarter and that eligible employees be pre-approved to work overtime hours.³ (Exhibit II, p. 2). Examiners who fail to achieve fully successful in a critical element are prohibited from working overtime in the subsequent quarter. (Exhibit II, p. 2). There has been no allegation that the overtime eligibility requirements are not being enforced. A second topic concerns the practice of Examiners not being required to specifically identify or designate particular work product as having been produced on overtime hours. (Exhibit Q, SPE 14, 36). There is no evidence that SPEs specifically identify particular work product produced on overtime hours. Rather, they verify that additional work is being performed based on work production levels and reports. (Exhibit Q, SPE 12, 26).

According to the PAP, Examiners are responsible for production based on the number of hours they work, and each hour of overtime increases the amount of work for which they are

³ It has been reported that overtime is a cost benefit to the Agency. (Exhibit RR, p. 2). It has found to be a highly efficient way to increase agency production and fee collections, far outstripping the incremental cost of overtime pay. (Exhibit RR, p. 2)

responsible. (Exhibit L, p. 9; Exhibit U, p. 5-6). Under the employee's PAP, an examiner has a certain number of hours to complete an action. Therefore, Examiners are required to submit a certain number of actions based on the total number of examining hours they claim (which includes any overtime hours claimed by the examiner) to be fully successful at the end of the relevant evaluation period.⁴ Examiners have until the end of the quarter, or other relevant evaluation period, to complete the increased level of production required by the overtime hours claimed. If an Examiner doesn't perform at least at the fully successful level by the end of the evaluation period, they may be subject to a denial of a within grade increase, or if the performance is unacceptable, to a performance action. However, because the system is based on average hours and the length of time that an examiner gets to do the work, we cannot tie a specific action to any given hour of overtime claimed.

B. Whether the USPTO has effective internal controls to guard against T&A abuse by Patent Examiners?

This section discusses various controls to provide a check on T&A by an Examiner who meets or exceeds work production requirements, whether the Agency utilizes these controls, and if so, whether the Agency utilizes these controls effectively. In sum, the investigation has found that the Agency uses both non-performance based controls (non-PAP controls) and performance based controls (Performance Appraisal Plan (PAP) controls) for Patent Examiners, but that the Agency's use of some of the controls is inconsistent. The investigation team has not reached a conclusion on the effectiveness of these controls for two reasons. First, as discussed in the section above, interview responses varied on whether interviewees think that T&A abuses are occurring and the investigation has not found any actual evidence of T&A abuse or been able to determine the extent of any such abuse. Without better information it is difficult to measure the efficacy of the controls utilized. Second, the interviews that relate to the effectiveness of the controls are inconclusive. While some interviews suggest that the Agency's controls may not be an effective check on T&A abuse, other interviews and evidence suggests that controls are effective. Many SPEs express frustration with existing controls on T&A. Some of these SPEs report having had at some point an Examiner whom they suspected of not working all the time claimed on the timesheets, though still reporting that they are able to account for and certify time worked by teleworking Examiners. (Exhibit R, questions II.2, III.2, III.7)

I. Institutional Controls

There are non-PAP controls over an Examiner's T&A, such as communication and collaboration tools, discipline, Agency records, and Agency policies such as the T&A reporting policy. These controls are largely the same for on-campus, teleworking and hoteling Examiners, except that for on-campus Examiners, physical presence can serve as an additional control against T&A abuse.

⁴ The number of hours allowed per action is based on an average expected time and the time varies on the expected average difficulty and on the grade of the employee. (Exhibit L, p. 10)

(Exhibit Q, SPE 1). The discussion on non-PAP controls below applies to all Examiners, regardless of whether they are working on-campus or at an alternative work site.

a. Agency Policies

The Agency has various policies to serve as controls on T&A for on-campus, hoteling, and teleworking Examiners. Key policies will be discussed below, along with any objective or anecdotal evidence uncovered regarding their use.

i. Work Schedule Policies

The Agency has approved various work schedules that are each very clear on the hours that Examiners are permitted to work under each work schedule. (Exhibit I). The approved work schedules and the hours that are approved for work can serve as a control on an Examiner's T&A where work schedules are enforced. (Exhibit S, ADC 1). For example, under the increased flextime policy, employees can only work between the hours of 5:00 am and 10:00 pm to meet their 80-hour bi-weekly work requirement (Exhibit J); and when teleworking or hoteling, Examiners must complete six hours of their telework day between the hours of 6:30 am and 6:00 pm. (Exhibit F). Additionally, guidelines require Examiners to submit their work schedule to their supervisors if they are not working the same work schedule regularly. (Exhibit F, p. 8). Patents and the Patent Office Professional Association (POPA) negotiated an agreement on the Patents Telework Program, which states that (1) participants must "indicate on their timesheets (690-E) which days were worked at the alternate worksite;" (2) "participants must identify their telework day in advance and obtain prior Supervisory approval of that day;" and (3) "in order that participants not be disturbed during non-duty hours when at the alternate worksite, participants will notify their supervisor when their work day commences, or prior thereto, of the hours to be worked." (Exhibit F, p. 8). Patents Telework Program (PTP) participants agree to adhere to the terms of this Program document, which can act as a control on an Examiner's T&A. (Exhibit F, Attachment 1).

No evidence was found that these work schedule policies are not being enforced or that there is systemic abuse. However, this finding is limited by the fact that employees are required to record the number of hours worked per day but not the time of the day as to when the hours were worked. Some interviews suggest that work schedule policies are not being consistently enforced.⁵ The range of responses suggests that some SPEs are unaware of the policies regarding work schedule.

⁵ For example, ER stated that policies were not being enforced consistently for on-campus, Patents Hoteling Program (PHP) and PTP employees. (Exhibit T, p. 3). Additionally, when SPEs were asked whether they were familiar with the schedule reporting requirements for hoteling examiners, a range of responses were received including "yes," "to an extent" (Exhibit Q, SPE 3), and that they are the same for working on-campus. (Exhibit Q, SPE 4).

ii. Communication Policies

Communication is another control against T&A abuse. Most Assistant Deputy Commissioners for Patents Operations (ADC) said electronic and personal communications are the primary means for SPEs to interact with and validate whether Examiners are working. (Exhibit S, ADC 1, 3, 4). However, there are only limited Agency policies regarding communication requirements for Examiners. For example, for PIIP participants, the relevant policy states that Examiners working at an alternative site must “check and respond appropriately to voicemail and e-mail periodically throughout the workday during USPTO business hours.” (Exhibit G, p. 6). The 2013 PTP negotiated union agreement states that Examiners working at alternative sites must “check their USPTO voicemail near the beginning and midpoint of their workday, and respond as appropriate” and will “access USPTO email periodically throughout their workday.” (Exhibit E, p. 2). The relevant policies and negotiated union agreements do not define how often “periodically” means or when is “appropriate” for PTP participants to respond to voicemail. (Exhibit E, pp. 2, 6; Exhibit G, p. 6). The PHP and PTP policy on responsiveness would be a more effective control on T&A if it more clearly defined how often Examiners must check and respond to voicemail and email.

Although some SPEs reported that they have no problem locating their on-campus, teleworking or hoteling Examiners (Exhibit Q, SPE 8, 22), some other SPEs reported that Examiners are sometimes not in their offices and that it is sometimes difficult to locate or contact hoteling or teleworking Examiners. (Exhibit Q, SPE 16, 18, 23). If a SPE could not locate or communicate with on-campus, teleworking or hoteling Examiners at some point during their designated work hours, such inability would not necessarily indicate T&A abuse. There is no policy requiring on-campus employees to work in their offices or teleworking examiners to work at their approved telework location all of the time. Examiners are generally permitted to take their USPTO issued government laptop anywhere on-campus, as well as to work outside of their generally approved telework location, though employees are prohibited from using their USPTO issued laptop outside the United States. As indicated above, there is a policy dictating that an employee should “periodically” respond to a supervisor’s communications, and this policy can serve as a control against T&A abuse. Also, Examiners are generally expected to respond to communications from external customers within one business day. (Exhibit F, p. 7). It is Employee Relations (ER) belief that POA has reportedly taken the position that “external customers” does not include supervisors, such that Examiners would not be expected to respond to supervisors within one business day. (Exhibit T, p. 4).

The Agency has collaboration tools available to Examiners to accomplish work and communicate with supervisors, such as Office Communicator and the “presence indicator.” For teleworking or hoteling employees, logging onto USPTO’s Virtual Private Network (VPN) allows the Examiner to interface with the agency Collaboration tools, such as instant messaging.

Office Communicator allows employees to communicate in real time with one another; it also synchronizes with the Outlook calendar and the employee's status automatically changes when the employee is on leave or in a meeting, etc. Although not dispositive, the "presence indicator" allows other employees to see when another is "available," "busy," "away," or "idle," and could serve as a check on employees' T&A, if required to be used on-campus, or via VPN if off-campus. (Exhibit T, p. 5). There was previously no policy requiring Examiners to use collaboration tools or log onto the USPTO's VPN when working. (Exhibit E, p. 1; Exhibit F, p. 4). However, pursuant to a Memorandum of Understanding ("MOU") between POPA and USPTO that was signed on June 24, 2013, full-time teleworking employees are now required to use collaboration tools (except the presence indicator). (Exhibit OO). This MOU also requires full-time teleworking employees to use the instant messaging feature of the collaboration tools, which necessarily requires access to the USPTO's VPN in order to have functionality. (Exhibit OO).

iii. T&A Policy

The Agency has a T&A policy which articulates the requirements and procedures for T&A reporting. (Exhibit H). This policy directs that employees are responsible for accurately recording the time actually worked and leave earned and used in 15-minute increments. (Exhibit H, p. 7). Employees are also responsible for validating the entry of T&A information each pay period and affirming that the information is correct, as submitted. (Exhibit H, p. 7). Supervisors are responsible for certifying the accuracy of Examiners' T&A data in a web based T&A system known as WebTA. (Exhibit H, p. 5). This policy does not advise how supervisors are to certify the accuracy of T&A data in WebTA. Note, however, that the Agency recently adopted the *Management Guidance on Certifying T&A*, as discussed below.

There was no objective evidence found of any systemic abuse of reporting procedures. This conclusion is limited though by a lack of records that might point to a conclusion either way. As stated above, while the statements of some Patents managers and the Employee Relations Chief suggest that there may be a problem with T&A abuse routinely occurring with certain Examiners, especially with regard to certain employees working remotely, the statements of other Patents managers were that there was no such abuse.⁶

ER is the unit that provides advice on pursuing employee discipline for conduct and performance issues and assists supervisors in taking disciplinary action. ER reported that they have received

⁶ Some of the interviews support the allegation of systemic abuse of reporting procedures in that some SPEs reported that they have had reason to suspect that at least one of their employees at some point was working less than the total hours claimed on the timesheets. (Exhibit Q, SPE 12). Some SPEs reported that some of their on-campus Examiners are not in their offices when they go to find them and/or that some hoteling and teleworking Examiners take a long time to respond to messages or do not respond at all. (Exhibit Q, SPE 1). Conversely, other SPEs reported that they never had reason to suspect that any of their employees was working less than the hours claimed on the timesheet. (Exhibit Q, SPE 2).

complaints from SPEs about suspicions that some Examiners are not working hours claimed on their timesheet even though they are meeting or exceeding work requirements. (Exhibit T, p. 4). ER also reported that they perceive that SPEs often fail to enforce applicable procedures with respect to these on-campus, hoteling and teleworking employees. (Exhibit T, p. 3).

iv. *Management Guidance on Certifying T&A* (April 2013)

Management is taking steps to control nonresponsive Examiners and take employee discipline actions for those who show indicia of T&A abuse. The ADCs recently developed a guidance document titled *Management Guidance on Certifying T&A* to guide SPEs in managing Examiners who are unresponsive and do not appear to be working at required performance levels. (Exhibit M). The interviews with ER and some ADCs state that the guidance is a response to needs expressed by some SPEs. (Exhibit T, p. 5). The guidance advises that absent any concern or direct knowledge of T&A abuse, managers generally should certify an Examiner's bi-weekly electronic timesheets. (Exhibit M, p. 1). However, if a manager recognizes clear signs of abuse in an Examiner's T&A records, such as the Examiner having low work production in a bi-week, not responding to a supervisor's e-mails or voicemails, and not appearing to be in the office or hoteling during the workday, the guidance advises the supervisor to review the Examiner's production on the first Tuesday of the new bi-week. (Exhibit M, pp. 2-3). If the Examiner's behavior suggests T&A abuse, such as inconsistent workload activity, non-responsiveness to supervisory communications, customer complaints, and failure to follow work schedule requirements, the guidance advises that the SPE should call and/or e-mail the Examiner, and after two days, seek ER's assistance if the Examiner remains unresponsive. (Exhibit M, p. 2-3). At that point, ER will advise charging the Examiner with Absence Without Leave ("AWOL") and begin the disciplinary or adverse action process. (Exhibit M, p. 3; Exhibit T).

Management Guidance on Certifying T&A serves as a control on an Examiner's potential or perceived T&A abuse. (Exhibit T, p. 5). The full effectiveness of the guidance is not yet known as it was only recently distributed on April 17, 2013.

b. Employee Discipline on T&A

The possibility of progressive employee discipline ordinarily should serve as a deterrent against T&A violations or abuse. However, the interview with ER suggests that the level of T&A enforcement through progressive discipline may not be at a level to act as an effective and consistent control against Examiners who meet or exceed work production requirements but who claim time not worked. While there have been some employee discipline cases for T&A abuse, the number of investigations and cases taken – and the overall effectiveness of enforcement as a control against such Examiners claiming time not worked – could not be accurately determined.

Interviews are varied on whether SPEs are enforcing agency T&A policies. Some SPEs reported enforcing policies, such as a SPE who reported going to his Technology Center (TC) Director to discuss an employee suspected of claiming hours not worked and who also reported taking at least two disciplinary actions for on campus employees for misconduct associated with T&A

abuse. (Exhibit Q, SPE 24). Yet, at least one SPE reported that he does not “waste his time” and that he was not “aware of one person who successfully terminated an examiner for time fraud. The belief is that it cannot be done. No one tries. No one wastes their time.” (Exhibit Q, SPE 34).

The investigators could not accurately identify the number of cases in recent years involving Examiners who meet or exceed work production requirements but who claim time not worked. ER and SPE interviews provide some support for the proposition that most discipline for such Examiners is limited to on-campus Examiners, with few disciplinary actions for teleworking and hoteling Examiners claiming time not worked. (Exhibit T, p. 3; Exhibit Q, SPE 3, 16; Exhibit R, Director 19). Yet, there is no corresponding data that is definitive on this point because ER does not specifically track such cases. Furthermore, Patents also uses informal counseling to address suspected instances of T&A abuse, which is not tracked by ER. (Exhibit MM).

Additionally, there is evidence that the number of conduct actions for T&A abuse may be affected by a lack of full access to records that could support T&A cases. The Agency maintains a number of records that ER and some SPEs believe would be useful in a case involving T&A. (Exhibit T, p. 3-5; Exhibit Q, SPE 11, 12). These include “swipe records” that record each employee via the swiping of their USPTO badge as they enter USPTO buildings; computer log records such as internet/email usage; search records; phone records; and “puck” records of employees holding monthly parking passes, which reflect the entry and exit from the USPTO garages. (Exhibit T, p. 3). ER stated that these records can be important tools which, when used together with other information, can provide compelling evidence on the activities of an employee, particularly if employees were required to log on and share work schedules. (Exhibit T, p. 3; Exhibit MM). However, most of the ADCs were skeptical as to the utility and need for records. (Exhibit S, ADC 1, 4, 5). The reason for not wanting to pull monitoring records includes a belief that the records are generally unreliable and a desire to not be seen as “big brother,” through constant electronic surveillance. (Exhibit T, p. 3; Exhibit R, Director 19; Exhibit S, ADC 1, 2). There is no tracking of when or how often such records have been used or denied.

Access to monitoring records is usually requested when ER and the manager believe they have valid concerns about an Examiner’s conduct. (Exhibit MM). Within Patents, approval to pull these records for a Patent Examiner must come from an ADC, and generally, the manager must at least show that they have first warned the Examiner about the misconduct. (Exhibit MM). ER reported the belief that other business units do not have this approval process and usually allow ER to pull any records that would support or disprove the allegations. (Exhibit MM). According to ER, records are only pulled for on-campus Examiners under certain circumstances. (Exhibit MM).

The exact threshold for obtaining records that would support T&A cases is not in a disseminated policy and is unclear. ER and some SPE and Director statements reflect a belief that Patents has either precluded the use of such records or that the threshold for obtaining such records is so high as to effectively preclude investigations and conduct actions for T&A actions. (Exhibit Q, SPE 2, 3, 9, 16, 24, 32, 38, 42, 49; Exhibit R, Director 2-4, 6, 10, 15, 16, 17, 20; Exhibit T, p. 2-3).

ER reported that Patents management stated that they do not want to take cases based on records like swipe in, puck records or computer usage, and often decline to allow the use of records. (Exhibit MM). Furthermore, ADCs report that they have been advised by their supervisors that certain kinds of records like computer and puck records should not be used to verify T&A. (Exhibit S, ADC 1-5). ER also reported that, as a result, they routinely decline to investigate suspected T&A abuse for off-campus employees and fewer T&A actions are taken overall. (Exhibit I, pp. 2-4). Pursuant to the 2003 PIP policy, employee use of Agency equipment (specifically computers), software and other materials is voluntary. (Exhibit I, p. 4). However, the employee is required to access their email periodically throughout the workday and during USPTO business hours. (Exhibit I, p. 4). The updated 2013 PIP policy states that Examiners at the GS-12 grade level and above, with at least one year of continuous USPTO service are permitted to telework twenty (20) hours per bi-week without any computer access, where they can perform work-related activities without use of their computer. (Exhibit E, p. 1).

On one hand, ER stated that without the use of monitoring records, T&A actions for time claimed but not worked are substantially more difficult to support. (Exhibit T, p. 3). ER reported that the only cases taken for time claimed but not worked without the use of monitoring records, is where the Examiner admits to misconduct. (Exhibit T, p. 3). As noted above, however, there also is a desire not to be seen as “big brother,” through the use of electronic surveillance. This may particularly be the case in the context where an Examiner already is meeting or exceeding required levels of work performance.⁷

On the other hand, some SPEs reported successfully pulling records in the past, though the dates of those actions were not noted. (Exhibit Q, SPE 16, 19, 24, 32, 39). Furthermore, a fair number of SPEs believed that management would support them if they wanted to take T&A cases against an Examiner. (Exhibit Q, SPE 6, 12, 14, 17, 19, 20, 22, 30, 36).

Patents management encourages the use of communication and mentoring as tools to combat perceived T&A abuse, and believes them to be effective controls against T&A abuse. When SPEs suspect T&A abuse, they are advised to direct their employees to work or direct them to log in. (Exhibit S, ADC 1). Therefore, currently, T&A enforcement actions for time claimed but not worked are mostly limited to “failure to follow” cases after a Direct to Work order has been issued. (Exhibit I, p. 4). In these situations, the SPE will direct the Examiner to come to work, and if they fail to comply, they will be charged with a “failure to follow” misconduct action. (Exhibit T, p. 4). Additional advice to deal with perceived T&A abuse is provided in the new *Management Guidance on Certifying T&A*. (Exhibit M).

⁷ Examiners have specific productivity and timeliness requirements that can be monitored by the SPE on a daily basis regardless of an employee's work site location. (Exhibit P; Exhibit U).

2. Employee PAP Controls

Several SPEs cited the Performance Appraisal Plan (PAP) elements as controls available to them to ensure that employees are performing work during work hours, including while working remotely. (Exhibit Q, SPE 10, 13, 14). This section sets forth findings regarding whether the critical PAP elements are effective guards against T&A abuse.

Some complaints generally alleged that management “tolerates” T&A abuse since Examiners are provided multiple opportunities to improve work performance pursuant to the “safety zone” agreement negotiated with POPA, under which an examiner has an opportunity to improve unacceptable performance before being given an oral warning. (Appendix A). There are no records or statistical data to support or disprove this assertion; however, interviews provided some anecdotal information. For example, some SPEs and ER are dissatisfied with the current system of “safety zones,” which is believed to lengthen the time required to deal with poor work performers. (Exhibit Q, SPE 9, 11, 14; Exhibit T). In fact, safety zone letters are intended to allow Examiners’ work performance to fluctuate temporarily without initiation of performance related discipline. (Exhibit JJ; Exhibit T). Because of this, some SPEs and ER contend that Examiners have no incentive to improve performance until the threat of removal kicks in. (Exhibit Q, SPE 9, 14; Exhibit T). These interviews are inconclusive, though, as interviews also show that some SPEs have found that the system in place for dealing with poor performers is effective. (Exhibit Q, SPE 3, 4, 5, 10). Other SPEs viewed this system as “somewhat effective” depending on the employee involved. (Exhibit Q, SPE 16, 22). Finally, while more severe performance actions may take longer under the current system, ER has acknowledged that Patents consistently takes performance actions. (Exhibit T).

Based on these findings, it cannot be concluded that Patents “tolerates” T&A abuse as a result of the established performance structure. Rather, the system established is one that initially focuses on communication, training, mentoring, and rehabilitation to improve deficient performance.

a. Production Element

In 2011, Utility and Plant Examiners received an adjustment of 2.5 hours to their base production expectancy, while at the same time receiving a reduction in credit to other types of work completed. (Exhibit NN, p. 1-3). Many, though not all, of the interviewees felt this was a lessening of work production requirements. (Exhibit Q, SPE 4, 42; Exhibit R, Director 1, 3, 9; Exhibit S, ADC 1; Exhibit T). However, it was pointed out that while the uniform grant of additional production time may not have been needed for Examiners in some art units, other art units needed the additional time to produce quality work. (Exhibit R, Director 9). Along those lines, some interviewees believe that the additional time balances out the increased difficulty of the examining function. (Exhibit R, Director 24).

Some Examiners perform large percentages of their work at the end of the quarter (known as “end-loading” their work) to make up time claimed but not actually worked. (Exhibit T, p. 6). There is no policy that prohibits end-loading. However, it is widely believed that end-loading

produces a lower quality work product and, thus, is not a desired practice. (Exhibit T, p. 6; Exhibit Q, SPE 1, 8)

Though end-loading exists, it was also pointed out that end-loading pre-existed the current PAP. (Exhibit Q, SPE 25, 42; Exhibit R, Director 20). Further, end-loading does not equate to time not worked. For example, the nature of the work on some cases or in certain art units may require longer examining periods before submitting office actions. (Exhibit Q, SPE 37). Also, some Examiners' workflow is to spend long periods on search and examination because they are fearful of quality and want to make their actions perfect prior to submitting it to the SPE. (Exhibit Q, SPE 7, 20, 37, 49). In such cases, Examiners would have fulfilled their bi-weekly hourly work requirement even though they appear to be "end-loading." There is no practical way to immediately distinguish between these situations and end-loading with time not worked. There is no policy that prohibits end-loading and thus there are no conduct cases taken on this basis. (Exhibit T). The 2011 PAP guidelines, which were recently updated on April 11, 2013, state that where an Examiner submits a grossly disproportionate amount of work at the end of a quarter or fiscal year, the Examiner's work may be subject to a heightened quality review. (Exhibit N, p. 43; Exhibit U, p. 44).

Nevertheless, there is some objective evidence that end-loading is occurring. ER compiled data on the number of Examiners who completed over 50% of the total quarter's office actions in the last two pay periods of each quarter in FY 2009 and FY 2012. (Exhibit FF). The same data was pulled for Examiners completing over 70% of the total office actions for the quarter in the last two pay periods of those years. (Exhibit FF). This data, compiled into graph form, indicates that the percentage of Examiners who appear to be end-loading was slowly decreasing in FY 2009. Yet, in FY 2012, the percentage of Examiners who appear to be end-loading increased in all four quarters. (Exhibit FF). However, as already stated, there is no way to determine whether some or all of these Examiners have fulfilled their bi-weekly hourly work requirement even though they appear to be "end-loading."

b. Quality Element

It is widely accepted that consistent work performance throughout the bi-week – rather than engaging in practices such as end-loading – generally produces higher quality work. However, some interviewees disagreed that quality is necessarily negatively affected by end-loading. (Exhibit Q, SPE 18, 24; Exhibit R, Director 3). Though there is no statistical data to support a conclusion that quality is not being consistently enforced as a PAP element, some SPEs stated that they find the element too difficult and complex to apply and enforce. (Exhibit Q, SPE 1, 3, 49). At least one TC has provided assistance to the SPEs by providing quality assistance volunteers to review work at the end of year. (Exhibit Q, SPE 50).

Some interviewees cited the fact that the quality element allows for the use of auto-count, whereby Examiners at the GS-12 grade level and above are able to submit work for credit without prior review, as possibly contributing to T&A abuse. (Exhibit Q, SPE 4; Exhibit R, Director 7). Auto-count allegedly enables Examiners to manipulate T&A by earning production and Docket Management credits for incomplete work submitted as a result of improper end-

loading and making up time previously not worked. Though it is widely believed that this behavior of submitting incomplete actions for credit (known as mortgaging) takes place, such behavior existed prior to the requirements and allowances of the current Examiner PAP. (Exhibit T). That said, ER reports an increase in mortgaging cases taken over the last year and believes the number would be higher, but that most actions for mortgaging are on hold pending further discussions regarding how to address this issue. (Exhibit T). Improper end-loading and mortgaging can be associated with T&A abuse. However, there are also reasons that work may be returned for correction that would not fall under a clear error standard. (Exhibit U, p. 38).

Some data suggests that the perceived increase in mortgaging cases may be attributable to the increased use of auto-count. PALM data pulled and compiled into chart form by ER in Exhibit GG lists the percentage of cases returned for correction in the ceiling exceeded tab, broken down by grade level for FY 2012. The data shows that a high number of Examiners that utilize auto-count have a large percentage of their work returned for corrections. (Exhibit GG). GS-12 examiners make up only 13.6% of all Examiners, but they have 21.9% of total returns and 42.47% of total returns in the ceiling exceeded tab. (Exhibit GG). This is significant because GS-12 Examiners are able to submit all office actions in final form, receiving credit for all non-final actions upon submission, without any quality check. (Exhibit X, slide 27).

c. Docket Management Element

Docket management (DM) is meant to incentivize the movement of cases off the Examiner's docket.

The interviewees' opinions varied with regard to this element. Some interviewees criticized the DM standards as too easy and able to be manipulated (as with mortgaging). (Exhibit Q, SPE 3, 7; Exhibit R, Director 6). Other interviewees disagreed. (Exhibit S, ADC 2, 4). And a couple of the interviewees found the DM system "confusing." (Exhibit Q, SPE 22; Exhibit R, Director 3).

There is some evidence that the DM element does not effectively measure an Examiner's performance or act as a T&A safeguard, as Examiners with overdue cases on their Ceiling Exceeded Tab continue to receive DM awards and be rated fully successful or higher.⁸ For example, Exhibit AA shows the number of Examiners with cases in the Ceiling Exceeded Tab for FY 2012 and reveals that 2,607 Examiners each have between one and six ceiling exceeded cases (totaling 6318 ceiling exceeded cases) and seven Examiners have more than 100 cases each (totaling 1045 cases). (Exhibit AA). PALM data assembled by ER also shows that nearly 800 Docket Management awards were paid out in FY 2012 to Examiners with cases in the Ceiling Exceeded Tab. (Exhibit BB). Similarly, at the end of FY 2012, 3639 Examiners that were rated

⁸ Examiners qualify for DM awards based on their overall DM score. An Examiner may be able to have numerous cases on the Ceiling Exceeded Tab and still be eligible to receive a DM award by timely completing other work for credit. Examiners may work excessive hours or be tempted to mortgage cases in order to meet their DM deadlines.

above 95%, or fully successful, had accumulated a total of 26,216 ceiling exceeded cases. (Exhibit HH).

Despite the above, DM is a new element and it is believed that the element will be refined and strengthened over time. (Exhibit S, ADC 3, 4). On April 1, 2013, it was announced that USPTO and POPA agreed to changes that would strengthen the DM element. (Exhibit W). The changes are intended to specifically address the growing number of ceiling exceeded cases. (Exhibit W). The changes include more cases being moved off of the Ceiling Exceeded Tab to the Docket Management Plan Tab, which imposes increased penalties for an Examiner's failure to act on the case, as well as increased penalties for cases reaching their ceiling control number. (Exhibit W).

II. RECOMMENDATIONS

While this investigation found the interview responses inconclusive as to whether T&A abuse is occurring and found no records that could be relied upon or referenced to support such a finding, it did point out a number of areas that would benefit from improvements. To the extent that any of the following recommendations contemplate USPTO management potentially changing the terms and conditions of employment of bargaining unit members, the Agency would need to evaluate any potential obligations or standard practices involving labor unions.

1. *Management Guidance on Certifying T&A* (April 2013)

Patents should closely monitor the effectiveness of its new policy, *Management Guidance on Certifying T&A* that was distributed on April 17, 2013. This policy gives guidance and tools to help ensure proper completion of T&A, and to guard against T&A abuse. For example, the policy outlines a series of steps for a manager to take when suspecting an Examiner has not worked an entire 80-hour bi-week. This is a new policy and thus there has not been an opportunity to evaluate its implementation or effectiveness, and so feedback should be gathered and this course of action adjusted and improved as needed.

2. Communication Tools

The USPTO and POPA recently reached an agreement making the use of collaboration tools (except the presence indicator) mandatory for full-time teleworking Examiners. Among the mandated collaboration tools is instant messaging, which necessarily requires the use of USPTO's VPN in order to function. This should allow supervisors to better communicate with Examiners in real time when necessary. The USPTO should evaluate the effectiveness of these recent requirements and continue to explore whether further changes are necessary. Where appropriate, management could enforce these policies by addressing those known to not adhere to the rules and enforcing consequences for them. Management should also consider issuing a guide to best practices when teleworking to all employees participating in one of the Agency's many teleworking programs, and/or creating a teleworking awareness campaign on the USPTO's Intranet site, including a "Teleworking Tips of the Month" or something similar.

3. Quality Element in PAP

Examiners who provide a consistent work product spread over a bi-week, rather than making up time worked at the end of a quarter, are generally believed to have a higher quality of work product. However, many SPEs report that the quality element is too complex and difficult to enforce and, as such, this element can be overlooked and quality issues may not be properly addressed. Thus, this element does not appear to provide a strong deterrent to improper end-loading (which can be indicative of T&A abuse). The USPTO should explore increasing training on this element, revising this element so that SPEs can more meaningfully apply and enforce the standards, and increased use of Technical Quality Assurance Specialists (TQAS) resources to provide reviews as is currently being done in at least one TC. Consideration of whether the auto-count allowances set forth in the PAP are contributing to improper end-loading and mortgaging should also be given. Finally, management should consider following the reopening provisions for the Examiner's PAP, as outlined in the October 22, 2010 MOU between POPA and USPTO, on issues related to the Examiner PAP. (Exhibit V). This provision requires that, at the request of either party, POPA and management shall meet in order to assess the need for further changes to the Examiner PAP. (Exhibit V, p. 10)

4. Docket Management Element in PAP

The USPTO and POPA recently reached an agreement to revise the DM standard to address the increasing number of cases that are at or above the ceiling control number. The USPTO should continue to evaluate the DM element after implementation of the recent changes and explore whether further steps are necessary to strengthen the DM element.

5. Overtime Reporting

There is no requirement that an Examiner specifically identify particular work product produced on overtime hours. The USPTO should explore the reasonableness and utility of a requirement that Examiners specifically identify or designate such work produced on OT hours rather than simply relying on work production reports as proof of time worked.

6. Use of Records

Cases for violations or T&A abuse should be referred to ER, consistent with the new *Management Guidance on Certifying T&A*.

Patents should communicate to ER and supervisors its policy regarding pulling and using records in support of T&A cases against Examiners who meet or exceed work production requirements. If there is a threshold showing necessary prior to pulling and using records in such situations, Patents should identify clearly that threshold to both ER and supervisors. Finally, Patents and ER should examine and discuss whether that threshold impedes T&A cases and should be revised. Patents should consider providing a centralized contact person for communicating with ER on this subject.

7. Consolidation of Memoranda and Policies

During the investigation, it was realized that the numerous policies and memoranda relating to the relevant rules and regulations at the USPTO were sometimes difficult to find. Many of those interviewed did not know the particular requirements of programs they are tasked with enforcing. It is recommended that the USPTO place current policies and memos in a central location and remove outdated and non-applicable materials. Additionally, the policies and memos should be systematically reviewed and updated as necessary. Changes and updates should continue to be communicated to SPEs and employees.

8. Supervisory Training

The USPTO should provide regular training to supervisors on the requirements of the various flexible work policies, including how to monitor and enforce accurate T&A reporting under the new *Management Guidance on Certifying T&A*.

Instructions for Completing the Performance Management Record

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

Step 1. Identify the performance elements of the employee's job (Item 1). Performance elements are broad, not as broad as descriptions of the major responsibilities. (Fill out a separate Section 1 for each performance element.)

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

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

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

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

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

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

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

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

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

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

C. Performance Appraisal. Near the end of the appraisal period,

the employee's performance during the year must be appraised formally on the basis of the performance plan by completing the following steps:

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

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

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

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

Step 5. Item 2, "Performance Rating," of Section II is completed by the rating official and signed by the approving official. Before the rating is discussed with the employee. After the rating official or rated has that date associated with the rating, not the date of the final rating element rating.

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

Step 7. The employee may comment in writing to the approving official on his/her summary rating within 3 days of receipt. The approving official must respond in writing to any comments within 10 days of receipt. If the approving official changes a rating, he/she must document the reasons in Item 3.A. of 366A. A copy of the final rating must be given to the employee.

Step 8. For SES Employees Only. - The rating official completes Item 1 and submits the entire form (and any employee comments) to the appropriate Performance Review Board (PRB) for its review and recommendations. The PRB chair signs the correct block in Item 3 and forwards the recommendations and the form to the SES Appointing Authority who then assigns the final rating by completing Item 3.4. A copy of the final rating must be given to the employee.

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

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U.S. Department of Commerce

APPENDIX A GENERIC PERFORMANCE STANDARDS

INSTRUCTIONS

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

When evaluating an element, the rater should:

1. Read carefully each performance standard level beginning with the fully successful one (it is considered the best level to describe).
2. Determine which level best describes the employee's performance on the element. (Each and every criterion in the standards must be met by the employee in absolute terms for the rater to assign a particular rating level. The sum of the employee's performance on the element, in the rater's judgment, must be assigned level 1, 2, or 3.)
3. Provide in writing, on the appraisal form, specific examples of accomplishments which support the assigned rating level.

Element ratings of fully successful do not require full written documentation unless the employee requests it. To assign a fully successful element rating the rater should:

1. Document in writing that (1) the fully successful standards were met, and (2) that the rater was discussed in detail with the employee.
2. Occasionally, when rating some elements, a rating official determines that an employee's performance on an element was not consistent. For example, the employee may have performed at the commendable level on several major activities within a critical element and at the superior level on several others. In such a case, the rating official must consider the overall effect of the employee's work on the element and make a judgment as to the appropriate rating before he assigns. The rationale for the decision must be documented on the rating form using specific accomplishments which support the decision.

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

OUTSTANDING

SES

This is a level of rare (top-quality) performance. The employee has performed so well that organizational goals have been exceeded that would not have been expected. The employee's mastery of the technical skills and thorough understanding of the process have been demonstrated in the completion of program objectives.

The employee has met or exceeded objectives on management practices, operating procedures, and program implementation, which has contributed substantially to organizational growth and reputation. Preparing for the unexpected, the employee has planned and shared alternate ways of reaching goals. Difficult assignments have been handled courageously and effectively; the employee has produced an exceptional quantity of work under stress of established schedules and with close supervision.

The rating will be based on the employee's present accomplishments, standards results are assured.

GENERAL WORK FORCE

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

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

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

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

The employee's oral and written expression are exceptionally clear and effective. They improve cooperation among participants in the work and present teamwork. Completed or commercial products are presented or explained effectively to a variety of audiences so that desired outcomes are achieved.

SUPERVISORY

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

COMMENDABLE

SES

This is a level of actually good performance if few success expectations in initial areas and strong sustained support of organizational goals. The employee has shown a comprehensive understanding of the objectives of the job and procedures for meeting them. The effective planning of the employee has improved the quality of management practices, including

procedures, task assignments, or program activities. The employee has developed or implemented reliable and cost-effective approaches to meeting organizational goals. The employee has demonstrated an ability to get the job done well in more than one way, while handling difficult and unexpected problems. The employee produces a high quality of work, often ahead of established schedules with less than normal supervision.

The employee's ideas and actions clearly are difficult subjects to a wide range of audiences.

GENERAL WORK FORCE

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

The employee plans the work under this element so as to proceed in an efficient, timely manner that rarely requires backtracking and, consequently, needs to complete the work by established deadlines. He or she uses contingency planning to anticipate and prevent problems and delays. Exceptions occur when delays have caused outside the employee's control. Cost savings are considered in the employee's planning.

The employee works effectively on this element with co-workers, clients, as appropriate, and his or her supervisor, creating a highly successful cooperative effort. He or she handles full additional work or special assignments that enhance accomplishment of this element and carries them to successful conclusion without disrupting regular work. Problems which surface are dealt with, expeditiously, in order to correct problems promptly.

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

SUPERVISORY

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

FULLY SUCCESSFUL

SES

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

The employee successfully applies technical skills and while also handling and difficult special assignments. The employee plans and performs work according to organizational procedures and schedules.

<p>The employee also reacts well as a team member supporting the group efforts and showing an ability to handle a variety of interpersonal situations.</p> <p>The employee communicates ideas and effectively.</p> <p>As employees of this level and others have followed a management system by which work is planned, tasks are assigned, and objectives are met.</p> <p>GENERAL WORK FORCE</p> <p>This is the level of good, sound performance. The quality and quantity of the employee's work under this element are those of a fully competent employee. The performance reflects a level of accomplishment expected of the great majority of employees. The employee's work products fully meet the requirements of the element. Major reviews are made regularly; most work requires only minor revision. Tasks are completed in an accurate, thorough, and timely way. The employee's technical skills and knowledge are applied effectively to specific job tasks. In completing work assignments, he or she adheres to procedures and formal requirements and follows necessary instructions from supervisors.</p> <p>The employee's work planning is realistic and results in completion of work by established deadlines. Priorities are duly considered in planning and performing assigned responsibilities. Work reflects a consideration of cost to the government when possible.</p> <p>In accomplishing element objectives, the employee's interpersonal behavior toward supervisors conforms and users grows; attainment of work objectives and poses no significant problems.</p> <p>The employee completes special assignments in a timely and cost-effective manner and requires little or no supervision.</p> <p>The employee works and writes clearly and effectively.</p> <p>SUPERVISORY</p> <p>The employee is a capable leader who works cooperatively with others and listens to suggestions.</p> <p>The employee rewards good performance and corrects poor performance through sound use of performance appraisal systems, performance-based incentives and when needed, adverse actions, and reassigns and assigns employees in ways that use their skills effectively.</p> <p>The employee's work performance shows it is commensurate to his training, equal opportunity and the affirmative action objectives of the organization.</p>	<p>personnel. When needed as input into another work process, the work may not be finished with such quality, quantity and timeliness that other work can proceed as planned.</p> <p>Although the work products are generally of average quality, they often may require additional review by other personnel. The work products do not consistently and/or fully meet the organization's needs. Although mistakes may be without immediate serious consequences, over time they are detrimental to the organization.</p> <p>A fair amount of work is accomplished, but the quality does not represent what is expected of Fully Successful employees. Output is not sustained consistently and/or higher levels of output usually result in decreased quality. The work generally is finished within expected timeframes, but significant deadlines too often are not met.</p> <p>The employee's written and oral communications usually consider the nature and complexity of the subject and the intended audience. They convey the central points of the information required to accomplish the work. However, too often the communications are not focused (contain too much or too little information) and/or are conveyed in a form that hinders achievement of the purpose of the communications. The listener or reader must question the employee at times to secure complete information or avoid misunderstandings.</p> <p>GENERAL WORK FORCE</p> <p>This level of performance, while demonstrating some positive contributions to the organization, shows notable deficiencies in it below the level expected for the position and requires corrective action. The quality, quantity or timeliness of the employee's work is less than Fully Successful, representing attainment of the element's objective.</p> <p>There is much in the employee's performance that is useful. However, problems with quality, quantity or timeliness are too frequent or too serious to ignore. Performance is inconsistent and problems caused by deficiencies contribute to appreciable work. These deficiencies cannot be overlooked since they create adverse consequences for the organization or cause burden for other personnel. When needed as input into another work process, the work may not be finished with such quality, quantity and timeliness that other work can proceed as planned.</p> <p>Although the work products are generally of average quality, too often they require additional review by other personnel. The work products do not consistently and/or fully meet the organization's needs. Although mistakes may be without immediate serious consequences, over time they are detrimental to the organization.</p> <p>A fair amount of work is accomplished, but the quality does not represent what is expected of Fully Successful employees. Output is not sustained consistently and/or higher levels of output usually result in decreased quality. The work generally is finished within expected timeframes, but significant deadlines too often are not met.</p> <p>The employee's written and oral communications usually consider the nature and complexity of the subject and the intended audience. They convey the central points of the information required to accomplish the work. However, too often the communications are not focused (contain too much or too little information) and/or are conveyed in a form that hinders achievement of the purpose of the communications. In communications to managers, the listener or reader must question the employee at times to secure complete information or avoid misunderstandings.</p> <p>SUPERVISORY</p> <p>There is much in the performance of performing supervisory duties. Deficiencies in areas of supervision are not infrequent and/or of some adverse consequence.</p>	<p>personnel or morale or organizational effectiveness. The marginal employee does not provide strong leadership to take the appropriate initiative to improve organizational effectiveness. For example, he/she may offer little or no feedback, or full supervisory responsibilities in a timely manner to provide sufficient direction to subordinates as to how to carry out assignments, to give clear assignments, under performance requirements, and/or to show an understanding of the goals of the organization or subordinates' role in meeting those goals.</p> <p>UNSATISFACTORY</p> <p>SES</p> <p>This is the level of unacceptable performance. Work products do not meet the minimum requirements of the position element.</p> <p>Most of the following deficiencies are typical, but not always characteristic of the employee's work:</p> <ul style="list-style-type: none"> • Little or no contribution to organizational goals. • Failure to meet work objectives. • Inattention to organizational priorities and administrative requirements. • Top work results resulting in missing deadlines, incomplete work products. • Strained work relationships. • Failure to respond to client needs, and/or • Lack of response to supervisor's corrective advice. <p>GENERAL WORK FORCE</p> <p>The quality and quantity of the employee's work under this element are not adequate for the position. The employee's work products fail almost all requirements of the element. They are late or often require major revision because they are incomplete or inaccurate in content. The employee fails to apply adequate technical knowledge to complete the work of this element. Either the knowledge applied cannot produce the desired products or it produces technically inadequate products or results. Lack of adherence to required procedures, instructions, and formats contributes to inadequate work products.</p> <p>Because the employee's work planning lacks logic or method, critical work remains incomplete or is unacceptably late. Lack of attention to priorities causes delays or misallocations in essential work. The employee has concentrated on incidental matters.</p> <p>The employee's behavior obstructs the successful completion of the work by lack of cooperation with clients, supervisor, and/or coworkers, or lack of creativity due to unresponsive approach to work activities.</p> <p>In dealing with special projects, the employee either sacrifices essential regular work or fails to complete projects. The employee fails to adjust to changes in priorities, procedures, or program direction and therefore cannot operate adequately in relation to changing requirements.</p> <p>The oral and written expression the employee uses in accomplishing the work of this element is inadequate for successful completion of required tasks. Communications failures impede work completion of work.</p> <p>SUPERVISORY</p> <p>Most of the following deficiencies are typical, but not always characteristic of the employee's work:</p> <ul style="list-style-type: none"> • Inadequate guidance to subordinates. • Inattention to work progress, and, • Failure to stimulate subordinates to meet goals. <p>Supervisory standards must be applied to SES and General Work Force supervisors.</p>
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Production	Art Unit	Fiscal Year: 2015	GS-1224-14 FSA														
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Name		Date															
		Sheet No. <u>1</u> of <u>11</u>															
<p>Item 1. Performance Element and Objective (Identify as Critical or Non-critical, and if it being tracked at the department level)</p> <p><input checked="" type="checkbox"/> Critical <input type="checkbox"/> Non-Critical <input type="checkbox"/> Management-by Objectives (MBO)</p> <p>Element: I. Production</p> <p>Objective: To achieve assigned expectancy.</p> <p>Weighting Factor: (Weights reflect the amount of time devoted to accomplishing the element and/or its importance. Weight for performance plans must total 100.) Enter Weight for this element in the adjacent box: 35</p>																	
<p>Item 2. Major Activities (Identify activities or results that need to be accomplished in support of the performance element.)</p> <p>The examiner examines assigned patent applications from first action to final disposition within an assigned expectancy (hours per balanced disposal (BD)).</p>																	
<p>Item 3. Criteria for Evaluation (Use generic performance standards printed in Appendix A. Supplemental performance standards may also be specified below.)</p> <p>An examiner shall be assigned a rating with respect to Production as follows:</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%;">110% or above:</td> <td style="width: 50%;">Outstanding</td> </tr> <tr> <td>103% - 109%:</td> <td>Commendable</td> </tr> <tr> <td>95% - 102%:</td> <td>Fully Successful</td> </tr> <tr> <td>88% - 94%:</td> <td>Marginal*</td> </tr> <tr> <td>below 88%:</td> <td>Unacceptable</td> </tr> </table> <p>*Note: Continued or repetitive performance at this level adversely impacts upon the efficiency of the service under the performance Element.</p> <p>All percentages shall be rounded off to the nearest whole number (i.e., 109.49% rounds to 109% and 109.50% rounds to 110%).</p> <p>With respect to this element your goal in the docket to which you have been assigned is listed on the Productivity Attachment. It should be noted that if your GS position factor changes during the fiscal year your evaluation will be based on a composite goal pro-rated for the periods in each GS position factor.</p> <p>The supplemental performance standards for evaluation of production are follows: Achievement shall be recognized in terms of percentage achievement of $\frac{\text{Calculated Production Hours}}{\text{Total Examining Hours}}$</p> <p>Where, Calculated Production Hours = (Balance Disposals (BD) Achieved) x (Adjusted Expectancy for the period) and; Total Examining Hours = Total Examining Hours for the period</p> <p style="text-align: right;">Optional Initial Block:</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 25%; border: 1px solid black;">Emp.</td> <td style="width: 25%; border: 1px solid black;">Date</td> <td style="width: 25%; border: 1px solid black;">Supv.</td> <td style="width: 25%; border: 1px solid black;">Date</td> </tr> </table>				110% or above:	Outstanding	103% - 109%:	Commendable	95% - 102%:	Fully Successful	88% - 94%:	Marginal*	below 88%:	Unacceptable	Emp.	Date	Supv.	Date
110% or above:	Outstanding																
103% - 109%:	Commendable																
95% - 102%:	Fully Successful																
88% - 94%:	Marginal*																
below 88%:	Unacceptable																
Emp.	Date	Supv.	Date														

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When calculating the number of BDs achieved, the higher of the following two calculations shall be used:
Option 1) BD = $\frac{(N+D)}{2}$ where N is the number of First Actions on the Merits and D is the number of Disposals.
 If Option 1 is used, your goal is the "Actual Expectancy (Exp/PF)"

Option 2) BD = $\frac{(Counts)}{2}$ where the number of counts is the sum of the counts earned for actions as shown in the table below. If Option 2 is used, your goal is the "Adjusted Actual Expectancy (Exp/PF = Adj.)"

Action	Action by same examiner as previous action				Initial action by different examiner than previous action				
	Regular new - COI, - DIV, - CDF or - Release, in which no RCE has been filed, and - RCEs, other than those listed in Items 1-3 in the footnote below	1st RCE - Regular new, - COI, - DIV or - Release, in which one RCE has been filed	2nd or subsequent RCE - Regular new - COI, - DIV, - CDF or - Release, in which two or more RCEs have been filed	Final or subsequent RCE - Regular new - COI, - DIV, - CDF or - Release, in which two or more RCEs have been filed	Regular new - COI, - DIV, - CDF or - Release, in which no RCE has been filed	1st RCE - Regular new - COI, - DIV, - CDF or - Release, in which one RCE has been filed	2nd or subsequent RCE - Regular new - COI, - DIV, - CDF or - Release, in which two or more RCEs have been filed	Total credit available for new examiner = 1.75 counts	Total credit available for new examiner = 1.75 counts
Counts:	A	B	C	D	E	F	G	H	I
Express Abandonment	0.25	0.00	0.75	0.50	0.75	0.50	N/A	N/A	N/A
Restriction	0.00	0.00	0.50	0.00	0.00	0.00	0.00	0.00	0.00
FAGM Non-final Rejection	1.25	N/A	1.00*	N/A	0.75*	N/A	N/A	1.00*	1.00*
FAGM Allowance	2.00	N/A	1.75*	N/A	1.50*	N/A	1.50	1.75*	1.75*
FAGM ex parte Quayle	1.50	N/A	1.25*	N/A	1.00*	N/A	1.00	1.25*	1.25*
Ex parte Quayle (not FAGM)	0.25	0.00	0.25	0.00	0.25	0.00	1.00	1.25	1.25
FAGM Final Rejection	1.50	N/A	1.25*	N/A	1.00*	N/A	1.00	1.25*	1.25*
Non-Final Rejection (not FAGM)	0.00	0.00	0.00	0.00	0.00	0.00	0.75	1.00	1.00
Final Rejection	0.25	0.00	0.25	0.00	0.25	0.00	1.00	1.25	1.25
Advisory Action	N/A	0.00	N/A	0.00	N/A	0.00	0.75	1.00	1.00
Advance	0.75	0.50	0.75	0.50	0.75	0.50	1.50	1.75	1.75
Abandonment for failure to respond	0.75	0.50	0.75	0.50	0.75	0.50	N/A	N/A	N/A
RCE Disposal Credit	N/A	0.50	N/A	0.50	N/A	0.50	N/A	N/A	N/A
Examiner's Answer, interference, etc.	0.75	0.50	0.75	0.50	0.75	0.50	1.50	1.75	1.75
Interview Summary	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Rule 1.55 Request	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Non-compliant and Non-response history	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

* This count value applies to 1) any RCE FAGM which exceeds the ceiling control days set forth in the Desktop Management element of the PAF; 2) in the first quarter of the fiscal year, the first three non-appealing RCE FAGMs for which credit is received; and 3) in the second, third, and fourth quarters of the fiscal year, the first four non-appealing RCE FAGMs for which credit is received.

First Actions on the Merits shall not include first action restriction requirements. However, an examiner will be assigned an appropriate amount of non-examining time for drafting all restriction requirements which do not include an action on the merits and are in compliance with current Office policy.

Optional Initial Block

Emp. _____	Date _____	Supv. _____	Date _____
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The examiner will be assigned a rating using the criteria set forth below with respect to the major activities for which the examiner is responsible based on the work product submitted in final form which has been credited for the period under consideration.

Quality Major Activities	Activity Level	Prorog. Category	Evaluation Level															
			GS 5	GS 7	GS 8	GS 11	GS 12	GS 13	GS 14/15/16	GS 17/18/19/20	GS 21/22/23/24	GS 25/26/27/28	GS 29/30/31/32	GS 33/34/35/36				
1. checking applications for (a) compliance with formal requirements of patent statutes and rules and (b) technological accuracy	Basic	1	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
2. treating disclosure statements and claims of priority	Basic	2	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
3. analyzing disclosure and claims for compliance with 35 USC 112.	Basic	2	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
4. planning field of search;	Basic	1	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
5. conducting search;	Basic	1	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
6. making proper rejections under 35 USC 102 and 103 with supporting rationale, or determining how claim(s) distinguish over the prior art;	Basic	2	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
7. determining whether amendment introduces new matter;	Advanced	2	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
8. appropriately formulating restriction requirements, where application could be restricted	Advanced	1	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
9. determining whether claimed invention is in compliance with 35 USC 101;	Advanced	2	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
10. evaluating/applying case law as necessary;	Legal	*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
11. determining where appropriate line of patentable distinction is maintained between applications and/or patents;	Legal	1	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
12. evaluating sufficiency of affidavits/declarations;	Legal	*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
13. evaluating sufficiency of reissue oath/declaration	Legal	1	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
14. promotes compact prosecution by including all reasonable grounds of rejections, objections, and formal requirements; (M.P.E.P. 707.07(g), etc.);	Legal	1	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
15. makes the record, taken as a whole, reasonably clear and complete;	Legal	1	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
16. properly treats all matters of substance in applicant's response;	Legal	1	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
17. formulates and independently signs final determinations of patentability (final rejections, allowance, examiner answers and advisory actions)	Legal	*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
18. properly closes prosecution; makes no premature final rejection	Legal	2	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
19. properly rejects all rejectable claims in a final rejection; properly allows all claims in an allowance	Legal	3	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

*Errors for these items will be charged under another major activity.

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<small>i. Quality</small>	<small>Art Unit</small>	<small>Fiscal Year:</small> 2015	<small>GS-1224-14 FSA</small>						
SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD									
<small>Name</small>	<small>Date</small>	<small>Sheet No. 5 of 11</small>							
<p>Item 3. Criteria for Evaluation (Use generic performance standards printed in Appendix A. Supplemental performance standards may also be specified below.)</p> <p>Clear error under this element will be deemed to have occurred where the examiner's office action(s) or office communication(s):</p> <ol style="list-style-type: none"> 1. does not reasonably comply with the major activities set forth in table 2, and 2. could not have been permitted at the time and under the circumstances that the action was taken, and 3. is not an honest and legitimate difference of opinion as to what action should have been taken. If the action taken by the examiner is reasonable and the action preferred by the SPE is reasonable, this constitutes an honest and legitimate difference of opinion and the action taken by the examiner is free of clear error. <p>The examiner will be assigned a rating using the criteria set forth below with respect to the major activities for which the examiner is responsible (See Table B) based on the work product submitted in final form which has been credited for the period under consideration.</p> <p>The examiner shall be assigned a rating with respect to the quality of examination in 3 categories.</p> <p>Category 1 errors may be charged after several occurrences of the same error when individual mentoring and training has failed to eliminate the problem. After commission of a category 1 error the Agency may rely upon mentoring and training provided during the previous and current fiscal years.</p> <p>Category 2 and Category 3 errors may be charged after a single occurrence.</p> <p>In a single action:</p> <ul style="list-style-type: none"> • Multiple errors in a single category will be charged as one error. • If an error can be held in more than one category, it will be charged as an error in the highest category. • Both a Category 1 and a Category 2 error may be charged in the same action if they are unrelated. • Both a Category 1 and a Category 3 error may be charged in the same action if they are unrelated. • Category 2 and Category 3 errors may not be charged in the same action even if the errors are unrelated. <p>The maximum error rate will be a combined score based on each of the three factors listed below weighted equally:</p> <table style="width: 100%; border: none;"> <tr> <td style="text-align: center;"><u>Category 1 Errors (CAT 1)</u></td> <td style="text-align: center;"><u>Category 2 Errors (CAT 2)</u></td> <td style="text-align: center;"><u>Category 3 Errors (CAT 3)</u></td> </tr> <tr> <td style="text-align: center;">All Actions</td> <td style="text-align: center;">All Actions</td> <td style="text-align: center;">Final Rejections plus Allowances</td> </tr> </table> <p style="text-align: center;">Combined Error Score = $\frac{CAT\ 1 + CAT\ 2 + CAT\ 3}{3}$</p> <p>However, if the examiner's error rate in any category is greater than or equal to 7.50%, the overall rating for the element shall be unacceptable.</p> <p>Outstanding – The error rate is 0% - 4.49%. Except for rare occurrences, the examiner complies with indicia 1-3 of the "Indicia of Outstanding or Commendable Performance" as identified below:</p> <p>Commendable – The error rate is 4.50% - 5.49%. In substantially all actions the examiner complies with indicia 1-3 of the "Indicia of Outstanding or Commendable Performance" as identified below:</p> <p>Fully Successful – The error rate is 5.50% - 6.49%.</p> <p>Marginal* – The error rate is 6.50% - 7.49%.</p> <p>Unacceptable – The error rate is greater than or equal to 7.50%.</p> <p>Truncation Rule: Truncate to the second decimal. For example, an error rate of 5.49X = 5.49.</p>				<u>Category 1 Errors (CAT 1)</u>	<u>Category 2 Errors (CAT 2)</u>	<u>Category 3 Errors (CAT 3)</u>	All Actions	All Actions	Final Rejections plus Allowances
<u>Category 1 Errors (CAT 1)</u>	<u>Category 2 Errors (CAT 2)</u>	<u>Category 3 Errors (CAT 3)</u>							
All Actions	All Actions	Final Rejections plus Allowances							
<small>Optional Initial Check</small>	<small>Emp.</small>	<small>Date</small>	<small>Supv.</small>						
			<small>Date</small>						

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<p>^aNote: Continued or repetitive performance at this level adversely impacts upon the efficiency of the service under this performance element.</p> <p>Indicia of Outstanding and Commendable Performance</p> <p>1. The examiners' statements of rejection, objection, and response to arguments clearly and concisely present the positions taken or recommended in the resulting Office actions including a thorough substantive explanation to convey those positions to the applicant.</p> <p>2. The Office actions as well as the file record clearly indicate that the examiner fully complies with the principles of compact prosecution. Note the principle of compact prosecution comprises conducting an initial search which is as complete as possible including consultation with an expert in the art where the examiner lacks such expertise; placing art of record in the application which meets both the concept and the wording of the claims as well as other art which is pertinent to significant though unclaimed features of the disclosed invention; and issuing a first Office action which clearly explains the examiner's position on each essential issue in such detail that absent some unexpected consideration the next Office action may be made final.</p> <p>3. The record developed by the examiner usually shows an indication of allowable subject matter at the earliest time which is consistent with the file record and prosecution of the application.</p> <p>Note: No rating shall be reduced more than one level (i.e., Outstanding to Commendable or Commendable to Fully Successful) based upon the determination that the examiner did not meet the indicia above.</p>			
Optional Initial Block	Comp.	Date	Supv.
<div style="display: flex; justify-content: space-between;"> Form CD-396A (Rev. 7/87) USCOMM-DC 87-1650 </div>			

III. Docket Management	Art Unit	Fiscal Year: 2015	GS-1224-14 FSA																											
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Name	Date	Sheet No. <u>7</u> of <u>11</u>																												
<p>Item 1. Performance Element and Objective (Identify as Critical or Non-critical, and if it is being tracked at the department level.)</p> <p><input checked="" type="checkbox"/> Critical <input type="checkbox"/> Non-Critical <input type="checkbox"/> Management-by-Objectives (MBO)</p> <p>Element: III. Docket Management</p> <p>Objective: To conduct examining activities within prescribed timeframes.</p> <p>Weighting Factor: (Weights reflect the amount of time devoted to accomplishing the element and/or its importance. Weight for performance plans must total 100.) Enter Weight for this element in the adjacent box: 20</p>																														
<p>Item 2. Major Activities (Identify activities or results that need to be accomplished in support of the performance element.)</p> <p>Except where the SPE, Director, or other appropriate authority has waived, excused, or directed otherwise, the examiner:</p> <p>1) Handles all applications and proceedings awaiting action in accordance with the time period or Special handling instructions prescribed by current Office policy;</p> <p>2) Forwards all work for processing and/or handling promptly or in accordance with prescribed time period.</p> <p>See table below for specific categories and time periods:</p> <table border="1" style="width: 100%; border-collapse: collapse; text-align: center;"> <thead> <tr> <th>Code</th> <th>Component (Actual Types)</th> <th>Expected Average Days</th> <th>Quality Control (WPI)</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Amendments (response to non-final OA, Appeal Briefs)</td> <td>56</td> <td>98¹</td> </tr> <tr> <td rowspan="2">2</td> <td>Special New² e.g. PPI, Accelerated Examination, Petition to Make Special, Track 1, PCT, Biosim, Reissues, etc.</td> <td>14</td> <td>28</td> </tr> <tr> <td>Special Amended e.g. PPI, Accelerated Examination, Petition to Make Special, Board Decisions/Remands</td> <td>14</td> <td>28</td> </tr> <tr> <td>3</td> <td>New³ Regular New, Continuations in Part (CIPs), Continuations, Divisionals, NCEs</td> <td>28</td> <td>56</td> </tr> <tr> <td>4</td> <td>Expedited e.g. After Final, Responses under 37 CFR 1.312, PUIR Cases (Printer Rushes)</td> <td>14</td> <td>28</td> </tr> <tr> <td>5</td> <td>Returns (Returned by TSS & Reviewer)</td> <td>14</td> <td>28</td> </tr> </tbody> </table> <p>¹ A "qualifying pay period" is one in which the examiner has at least 40 examining hours or the examiner's hourly production goal, whichever is greater.</p> <p>² In these categories additional cases will be identified so the examiner can work ahead provided the oldest case in the component is completed in the pay period.</p> <p>³ When an amendment exceeds the 90 day ceiling a 150% score (equivalent to 136 days) will be recorded for the application.</p>				Code	Component (Actual Types)	Expected Average Days	Quality Control (WPI)	1	Amendments (response to non-final OA, Appeal Briefs)	56	98 ¹	2	Special New² e.g. PPI, Accelerated Examination, Petition to Make Special, Track 1, PCT, Biosim, Reissues, etc.	14	28	Special Amended e.g. PPI, Accelerated Examination, Petition to Make Special, Board Decisions/Remands	14	28	3	New³ Regular New, Continuations in Part (CIPs), Continuations, Divisionals, NCEs	28	56	4	Expedited e.g. After Final, Responses under 37 CFR 1.312, PUIR Cases (Printer Rushes)	14	28	5	Returns (Returned by TSS & Reviewer)	14	28
Code	Component (Actual Types)	Expected Average Days	Quality Control (WPI)																											
1	Amendments (response to non-final OA, Appeal Briefs)	56	98 ¹																											
2	Special New² e.g. PPI, Accelerated Examination, Petition to Make Special, Track 1, PCT, Biosim, Reissues, etc.	14	28																											
	Special Amended e.g. PPI, Accelerated Examination, Petition to Make Special, Board Decisions/Remands	14	28																											
3	New³ Regular New, Continuations in Part (CIPs), Continuations, Divisionals, NCEs	28	56																											
4	Expedited e.g. After Final, Responses under 37 CFR 1.312, PUIR Cases (Printer Rushes)	14	28																											
5	Returns (Returned by TSS & Reviewer)	14	28																											
Optional Initial Block																														
Emp.	Date	Supv.	Date																											

III. Docket Management Art Unit Fiscal Year: 2015 GS-1224-14 FSA

SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name _____ Date _____ Sheet No. 8 of 11

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

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

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

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

All percentages shall be rounded to the nearest whole number (i.e., 109.49% rounds to 109% and 109.50% rounds to 110%). However, the examiner will not be held responsible for an application that is not ready for examination.

Docket Management performance waivers will be available in the following instances:

1. ≥5 consecutive days away for short day cases**
2. Four or more contiguous weeks (28+ days) absence for reasons that would qualify under FMLA or sick leave (excludes vacations).
3. Details of 50% or more

Additional guidance on waivers can be found in the PAP Guidelines for Docket Management.

**If an examiner is away for five consecutive days or more (excluding AWOL), there will be an adjustment for After Finals, Responses under 37 CFR 1.312, PUBS Cases (Printer Rushes), Petitions/Special Programs Amendments and Corrections unless the application is already past the "Expected Average Days" requirement (set forth in table above) prior to the beginning of the days away.

Examiners planning vacations and other absences may work ahead on new case components in Category 3 of this element. If the examiner completes the oldest case as marked during the pay period the examiner may also submit other cases marked with an asterisk in the same component and receive a "0" day for those cases.

As set forth in detail in the Docket Management section of the PAP Guidelines, patent applications (cases) that exceed the ceiling control number of days will be handled through a Docket Management Plan (DMP). A DMP will be in effect and will remain in effect whenever an examiner has one or more ceiling-exceeded cases. Under a DMP, on a biweekly basis and in accordance with the PAP Guidelines, the examiner's supervisor will assign a number of ceiling-exceeded cases which must be posted for credit by the end of counting for that biweek. If a case assigned per the DMP is not posted for credit by the end of counting for that biweek, that case will count as another entry at the ceiling level towards the examiner's component and composite Docket Management scores for that biweek. Cases not posted for credit by the end of counting for that biweek will count using a varying scale as outlined in the PAP Guidelines and summarized in the table below.

Component	Rating	Total no. cases	Average 15 Score at End of PP				DMP
			0-10	11-20	21-30	31-40	
1	0-10 Days	100	110	110	110	110	0 (15 Days)
2	11-20 Days	100	110	110	110	110	0 (15 Days)
3	21-30 Days	100	110	110	110	110	0 (15 Days)
4	31-40 Days	100	110	110	110	110	0 (15 Days)

Optional Initial Block: Emp _____ Date _____ Supv. _____ Date _____

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III. Docket Management Art Unit Fiscal Year: 2015 GS-1224-14 FSA

SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD

Name _____ Date _____ Sheet No. 9 of 11

Calculating Docket Management Composite Score

The docket management element is based on the actual average number of days between an action being placed on an examiner's docket (See "Start Date" Chart below) until posting for credit or ceiling exceeded. For all components other than category 1, a ceiling exceeded score equal to the Ceiling Control days is entered for the calculation of the actual average. For category 1, a ceiling exceeded score of 196 days is entered for calculation of the actual average.

Cat.	Component (Action Type)	Clock Start Dates
1	Amendments	Start of the 60-week after the application is placed on examiner's docket.
2	Special New	A new application is added the 60-week after the previous case was completed.
	Special Amended	Date when application is placed on examiner's docket except for board decisions which will start 60 days after last decision date.
3	New	A new application is added the 60-week after the previous case was completed.
4	Expedited	When application is placed on examiner's docket.
5	Returns	Date returned to Examinee.

The actual average number of days for a given component (application type) is then compared to the expected average days for that component. There are 6 distinct components, with expected average days ranging from 14-days to 56-days. For each component, a score is calculated using the formula $((w_e/w_a + 1) * 100)$, where w_e represents expected average days for the component, and w_a represents the actual average days for the component. The component scores are weighted based on the number of actions in each component to form a contributing score for that component. The total docket management score is the sum of each of the contributing scores as illustrated in the example below:

Cat.	Component (Action Types)	Expected Average Days (w_e)	Number of Cases (n_i)	Average Days (w_a)	Component Score $((w_e/w_a + 1) * 100)$ (CS_i)	Contributing Score $(n_i / \text{Sum}(n_i)) * CS_i$
1	Amendments (in response to nonfinal OIA Appeal Briefs)	56	100	24	157.1%	88.9%
2	Special New e.g. PPH, Accelerated Examination, Petition to Make Special, Trademark, Reissue, etc.	14	12	12	114.3%	5.8%
	Special Amended e.g. PPH Acceleration Examination, Petitions to Make Special, Exam Decisions/Priorities	14	10	12	114.3%	4.9%
3	New Regular New, Continuations, Continued in Part (CIPs), Divisional, RCEs	28	52	14	150.0%	33.2%
4	Expedited e.g. After Final: Responses under 31 CFR 1.312, PUA Cases (Printer Rushes)	14	57	8	142.9%	34.7%
5	Returns (Returned by USPTO Examiners)	14	4	8	142.9% (110%)	1.0%
				Sum(n_i) = 235	Overall % Score 147.4%	

¹ The US returns portion of the return component score is capped at 20% of the overall docket management score.

EMPLOYEE INITIAL TRACK

Emp.	Date	Supv.	Date
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Form CO-396A (Rev. 7-87) USCOMM-DC 87-1650

IV. Stakeholder Interaction	Art Unit	Fiscal Year: 2015	GS-1224-14 FSA
SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD			
Name	Date	Sheet No. <u>10</u> of <u>11</u>	
<p>Item 1. Performance Element and Objective (Identify as Critical or Non-critical, and if it is being tracked at the department level.)</p> <p style="text-align: center;"><input type="checkbox"/> Critical <input checked="" type="checkbox"/> Non-Critical <input type="checkbox"/> Management-by-Objectives (MBO)</p> <p>Element: IV. Stakeholder Interaction</p> <p>Objective: To provide appropriate service to stakeholders.</p> <p>Weighting Factor: (Weights reflect the amount of time devoted to accomplishing the element and/or its importance. Weight for performance plans must total 100.) 10 <small>Enter Weight for this element in the adjacent box:</small></p>			
<p>Item 2. Major Activities (Identify activities or results that need to be accomplished in support of the performance element.)</p> <p>1. Treat external stakeholders with courtesy and professionalism by:</p> <ul style="list-style-type: none"> a. Returning phone calls from external stakeholders generally in one business day. b. Reviewing email messages generally at least once every workday, and responding, if necessary, by any appropriate means. c. Providing normal schedule information via voice mail if working other than a Monday through Friday schedule. d. Providing voice mail notice of extended absences of three or more business days. e. Directing external stakeholders to appropriate office or person, in accordance with a list provided or posted by Management. f. Conducting all interviews and/or other contacts with external stakeholders as scheduled with adequate preparation, and in a courteous manner. Further, no interview and/or other contact is arbitrarily or capriciously refused by the examiner. g. Displaying proper decorum in official communications (e.g., Office action or interview summary) to external stakeholders. <p>2. Providing search consultation and other assistance to the public and peers.</p>			
<p>Item 3. Criteria for Evaluation (Use generic performance standards printed in Appendix A. Supplemental performance standards may also be specified below.)</p> <p>Ratings will be based on demonstrated behavior of the following criteria:</p> <p style="padding-left: 40px;">Outstanding - All major activities identified are routinely performed in a timely and courteous manner and, except for rare exceptions, the employee demonstrates all of the identified indicia.</p>			
Supervisor Initials (Block)			
Emp.	Date	Sup.	Date

IV. Stakeholder Interaction	Art Unit	Fiscal Year: 2015	GS-1224-14 FSA
SECTION 1 - PERFORMANCE PLAN, PROGRESS REVIEW AND APPRAISAL RECORD			
Name	Date	Sheet No. <u>11</u> of <u>11</u>	
<p>Commendable - All major activities identified are routinely performed in a timely and courteous manner and the employee demonstrates all of the identified indicia in substantially all circumstances.</p> <p>Indicia:</p> <ul style="list-style-type: none"> *Routinely uses interview practice to facilitate compact prosecution *Is accessible and responsive regardless of physical location *Provides appropriate information to address stakeholder inquiries *Responds to internal stakeholders in a timely manner *Responds appropriately to requests for personal interviews in a timely manner *Is always well prepared for interviews <p>Fully Successful - All major activities identified are normally performed in a timely and courteous manner.</p> <p>Marginal - Demonstrates some contribution to the element. However, a significant number of documented deficiencies in at least one of the major activities have been identified to the examiner.</p> <p>Unacceptable - Performance is not adequate for the position, failing to meet the Marginal level. Numerous instances of documented deficiency in at least one of the major activities have been identified to the examiner.</p> <p>"Business Day" - shall refer to each Monday through Friday except Federal holidays. Business hours shall run from 8:30 A.M. to 5:00 P.M. Eastern Time.</p> <p>"Work Day" - is defined as a normal Monday through Friday and when the examiner is working for a substantial portion of the day. Such excludes holidays, days in which adjusted work dismissal occurs, day in which "the employees is not expected to work" (or Agency is closed), and days in which employees are excused from duty early.</p>			
Optional Initial Block			
Emp.	Date	Supv.	Date

I. Production Name: _____

Item 4. Progress Reviews (Indicate progress toward accomplishing this element, the need for any adjustments to the plan, or areas where performance needs to be improved)

Employee's Initials	Date	Employee's Initials	Date
Supervisor's Initials	Date	Supervisor's Initials	Date

Item 5. Element Rating & Justification (support rating in space below)

5- Outstanding 4- Commendable 3- Fully Successful 2- Marginal 1- Unacceptable

Enter Rating 1-5 in adjacent block.

Item 5.a. Approving/Appointing Authority Comments and Signature (Required only if approving/appointing authority changes rating official's element rating in Item 5.)

Approving/Appointing Authority Signature	Date
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II. Quality Name:

Item 4. Progress Reviews (Indicate progress toward accomplishing this element, the need for any adjustments to the plan, or areas where performance needs to be improved)

Employee's Initials	Date	Employee's Initials	Date
Supervisor's Initials	Date	Supervisor's Initials	Date

Item 5. Element Rating & Justification (support rating in space below)

5- Outstanding 4- Commendable 3- Fully Successful 2- Marginal 1- Unacceptable

Enter Rating 1-5 in adjacent block.

Item 5.a. Approving/Appointing Authority Comments and Signature (Required only if approving/appointing authority changes rating official's element rating in Item 5.)

Approving/Appointing Authority Signature Date

III. Decket Management Name: _____

Item 4. Progress Reviews (Indicate progress toward accomplishing this element, the need for any adjustments to the plan, or areas where performance needs to be improved)

Employee's Initials	Date	Employee's Initials	Date
Supervisor's Initials	Date	Supervisor's Initials	Date

Item 5. Element Rating & Justification (support rating in space below)

5- Outstanding 4- Commendable 3- Fully Successful 2- Marginal 1- Unacceptable

Enter Rating 1-5 in adjacent block.

Item 5.a. Approving/Appointing Authority Comments and Signature (Required only if approving/appointing authority changes rating official's element rating in Item 5.)

Approving/Appointing Authority Signature	Date
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IV. Stakeholder Interaction Name: _____

Item 4. Progress Reviews (Indicate progress toward accomplishing this element, the need for any adjustments to the plan, or areas where performance needs to be improved)

Employee's Initials	Date	Employee's Initials	Date
Supervisor's Initials	Date	Supervisor's Initials	Date

Item 5. Element Rating & Justification (support rating in space below)

5- Outstanding 4- Commendable 3- Fully Successful 2- Marginal 1- Unacceptable

Enter Rating 1-5 in adjacent block.

Item 5.a. Approving/Appointing Authority Comments and Signature (Required only if approving/appointing authority changes rating official's element rating in Item 5.)

Approving/Appointing Authority Signature	Date
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SECTION II - PERFORMANCE SUMMARY AND RATING					
Name: _____					
ITEM 1. Instructions					
1. List each element in the performance plan, indicate whether it is critical/non-critical and what weight has been assigned to it. 2. Assign a rating level for each element: (5) Outstanding (4) Commentable (3) Fully Successful (2) Marginal/Minimally Satisfactory (1) Unacceptable/Unsatisfactory (SES) 3. Score each element by multiplying the weight by the rating level. 4. After each element has been scored, compute the total score by summing all individual scores. Total score can range from 100 to 500.					
Performance Element	Critical or Non-critical (C or NC)	MBO	Individual Weights (Sum must total 100)	Element Rating (1-5)	Score
I. Production	C		35%	0	0
II. Quality	C		35%	0	0
III. Docket Management	C		20%	0	0
IV. Stakeholder Interaction	NC		10%	0	0
			100%	TOTAL SCORE	0
For SES: Turn to reverse side and continue with Item 3.					
ITEM 2. PERFORMANCE RATING					
(Based on total score <i>except that if any critical element is less than fully successful the rating can be no higher than the lowest critical element rating</i>)					
<input type="checkbox"/> Outstanding (400-500) <input type="checkbox"/> Commentable (300-400) <input type="checkbox"/> Fully Successful (200-300) <input type="checkbox"/> Marginal (100-200) <input type="checkbox"/> Unacceptable (100-199)					
Rating Official's Signature		Title		Date:	
Approving Official's Signature		Title		Date:	
Employee's Signature (indicates appraisal meeting held)		Employee Comments Attached <input type="checkbox"/> Yes <input type="checkbox"/> No		Date:	
Section III. - PERFORMANCE RECOGNITION (General Workforce only)					
<input type="checkbox"/> Performance Award: \$ _____ (_____ %) For performance awards: Has employee been promoted during the appraisal cycle? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> QSI (Outstanding rating required) Appropriation No: _____					
Rating Official's Signature		Title		Date:	
Approving Official's Signature		Title		Date:	
Final Approving Authority's Signature				Date:	
Payment Authorized by Personnel Office				Date:	

Position Description – GS-14FSA

PD 40-17–
GS-1224-14
Full Signatory Authority
Art of Bachelors Level with
Designated Complexities

FACTOR I. Nature and Extent of Performance of Examining Functions:

Incumbent independently performs "Basic", "Advanced", and "Legal" patent examining functions (e.g., the application of legal precedents, the determination of double-patenting situations, the evaluation of petitions to the Commissioner and affidavits of patentable relevance, etc.) with no preliminary instructions from the supervisor. References used to determine whether or not the claimed invention is new and patentable are rarely, if ever, reviewed. All official Patent Office actions, including the substantive evaluation in terms of both statutory and precedent law of the legal sufficiency of evidence submitted by the applicant, are presented to the supervisor in final form for approval, except as modified in Factor II below.

Incumbent's determinations are reviewed, if at all, for conformance with Patent Office policy only upon final allowance or rejection of an application. This review normally is restricted to such matters as may determine (1) the extent to which the Patent Office will assist or advise inventors, or (2) the nature and extent of evidence required to warrant reopening the examination of a case which has been previously rejected.

FACTOR II. Contact and Commitment Authority:

Incumbent, having been officially delegated FULL SIGNATORY AUTHORITY, makes and effects wholly independent determinations with respect to any Patent Office action -- either his/her own or that of another -- including actions which result in the final allowance or rejection of an application.

FACTOR III. Technological Complexity of Art:

Art of Bachelors Level with designated complexities. Incumbent is recognized as examining in art of considerable technical difficulty. This difficulty arises, and is indicated below, either from the nature of the systems examined or from the requirements of the examination process itself. In this respect, the incumbent's own area of examination has been found to be complicated by either of the following:

- A. Multiple systems
The system for which a patent is sought is composed of two or more sub-systems, each of which is based on the fundamentals of different technological disciplines.
- B. Complex systems
The system is substantially dynamic rather than static in nature and is composed of a network of components, the voluminous interrelationships of which are expressed in concepts involving either a very high level of abstraction or requiring such detail that numerous pages of drawings and specification become necessary.

USPTO

--OR by two or more of the elements below:

() A. Highly competitive art:

The art is a very active one in which, owing to the commercial importance of the subject matter, the cases are vigorously contested by eminent counsel -- both as to ex parte and inter partes matters -- resulting in extended prosecution and the consideration of numerous special scientific and legal papers.

() B. Very broad fields of search:

The art requires fields of search which are widely divergent and which present numerous problems in the consideration of analogous art, the necessity of evaluating extremely fine technical distinctions, the great number of permutations and combinations, and the practical requirement of limiting the areas searched to those likely to produce the best results.

() C. Variety of subject matter:

The art embraces subject matter, which requires for its comprehension and application a mastery of the scientific or technical concepts basic to more than one discipline.

FACTOR LEVELS AND POINTS CREDITED:

Factor	Level	Points
1	A	45
2	F	15
3	B	5
	Total Points	65
	Grade	14

Position Description – GS-14FSA Generalist

PD 40-18--
 GS-1224-14
 Full Signatory Authority
 Art of Bachelors Level with
 Designated Complexities
 Generalist

FACTOR I. Nature and Extent of Performance of Examining Functions:

Incumbent independently performs "Basic", "Advanced", and "Legal" patent examining functions (e.g., the application of legal precedents, the determination of double-patenting situations, the evaluation of petitions to the Commissioner and affidavits of patentable relevance, etc.) with no preliminary instructions from the supervisor. References used to determine whether or not the claimed invention is new and patentable are rarely, if ever, reviewed. All official Patent Office actions, including the substantive evaluation in terms of both statutory and precedent law of the legal sufficiency of evidence submitted by the applicant, are presented to the supervisor in final form for approval, except as modified in Factor II below.

Incumbent's determinations are reviewed, if at all, for conformance with Patent Office policy only upon final allowance or rejection of an application. This review normally is restricted to such matters as may determine (1) the extent to which the Patent Office will assist or advise inventors, or (2) the nature and extent of evidence required to warrant reopening the examination of a case, which has been previously rejected.

FACTOR II. Contact and Commitment Authority:

Incumbent, having been officially delegated FULL SIGNATORY AUTHORITY, makes and effects wholly independent determinations with respect to any Patent Office action -- either his/her own or that of another -- including actions which result in the final allowance or rejection of an application.

FACTOR III. Technological Complexity of Art:

Art of Bachelors Level with designated complexities. Incumbent is recognized as examining in art of technical difficulty. This difficulty arises, and is indicated below, either from the nature of the systems examined or from the requirements of the examination process itself. In this respect, the incumbent's own area of examination has been found to be complicated by either of the following:

- A. Multiple systems
 The system for which a patent is sought is composed of two or more sub-systems, each of which is based on the fundamentals of different technological disciplines.
- B. Complex systems
 The system is substantially dynamic rather than static in nature and is composed of a network of components, the voluminous interrelationships of which are expressed in concepts involving either a very high level of abstraction or requiring such detail that numerous pages of drawings and specification become necessary.

USPTO

– OR by two or more of the elements below

- A. Highly competitive art.
The art is a very active one in which, owing to the commercial importance of the subject matter, the cases are vigorously contested by eminent counsel – both as to ex parte and inter partes matters – resulting in extended prosecution and the consideration of numerous special scientific and legal papers.
- B. Very broad fields of search.
The art requires fields of search which are widely divergent and which present numerous problems in the consideration of analogous art, the necessity of evaluating extremely fine technical distinctions, the great number of permutations and combinations, and the practical requirement of limiting the areas searched to those likely to produce the best results.
- C. Variety of subject matter.
The art embraces subject matter which requires for its comprehension and application a mastery of the scientific or technical concepts basic to more than one discipline.

ADDITIONAL CREDIT, GENERALIST:

The incumbent has been granted official recognition as Generalist on the basis of evidence which demonstrates that: (a) He/she possesses clearly unique and extraordinary personal qualifications, capacities and recognized professional stature in his/her assigned area of technology; (b) the subject-matter area upon which the incumbent's recognition rests normally equates in terms of technological complexity to no less than Level B of Factor III and normally embraces all arts (i.e., from 10 to 15 man-year dockets) over which his/her organizational unit has jurisdiction; (c) the incumbent is, on a regular and recurring basis, utilized as an acknowledged "troubleshooter" both within his/her assigned organization unit as well as outside that unit; and (d) the incumbent has demonstrated a foundation in patent examining functions at least the equivalent of that described at Level B of Factor I.

FACTOR LEVELS AND POINTS CREDITED:

Factor	Level	Points
1	A	45
2	F	15
3	B	5
Extra Credit	G	5
	Total Points	70
	Grade	14

USPTO

Position Description – GS-14FSA Senior

PD 40-12–
GS-1224-14
Full Signatory Authority
Art of Bachelors Level with
Designated Complexities
Senior Examiner

FACTOR I. Nature and Extent of Performance of Examining Functions:

Incumbent independently performs "Basic", "Advanced", and "Legal" patent examining functions (e.g., the application of legal precedents, the determination of double-patenting situations, the evaluation of petitions to the Commissioner and affidavits of patentable relevance, etc.) with no preliminary instructions from the supervisor. References used to determine whether or not the claimed invention is new and patentable are rarely, if ever, reviewed. All official Patent Office actions, including the substantive evaluation in terms of both statutory and precedent law of the legal sufficiency of evidence submitted by the applicant, are presented to the supervisor in final form for approval, except as modified in Factor II below.

Incumbent's determinations are reviewed, if at all, for conformance with Patent Office policy only upon final allowance or rejection of an application. This review normally is restricted to such matters as may determine (1) the extent to which the Patent Office will assist or advise inventors, or (2) the nature and extent of evidence required to warrant reopening the examination of a case which has been previously rejected.

FACTOR II. Contact and Commitment Authority:

Incumbent, having been officially delegated FULL SIGNATORY AUTHORITY, makes and effects wholly independent determinations with respect to any Patent Office action -- either his/her own or that of another -- including actions which result in the final allowance or rejection of an application.

FACTOR III. Technological Complexity of Art:

Art of Bachelors Level with designated complexities. Incumbent is recognized as examining in art of technical difficulty. This difficulty arises, and is indicated below, either from the nature of the systems examined or from the requirements of the examination process itself. In this respect, the incumbent's own area of examination has been found to be complicated by either of the following:

 A. Multiple systems

The system for which a patent is sought is composed of two or more sub-systems, each of which is based on the fundamentals of different technological disciplines.

 B. Complex systems

The system is substantially dynamic rather than static in nature and is composed of a network of components, the voluminous interrelationships of which are expressed in concepts involving either a very high level of abstraction or requiring such detail that pages of drawings and specification become necessary.

USPTO

-- OR by two or more of the elements below:

- () A. Highly competitive art:
The art is a very active one in which, owing to the commercial importance of the subject matter, the cases are vigorously contested by eminent counsel -- both as to ex parte and inter partes matters -- resulting in extended prosecution and the consideration of numerous special scientific and legal papers.
- () B. Very broad fields of search:
The art requires fields of search which are widely divergent and which present numerous problems in the consideration of analogous art, the necessity of evaluating extremely fine distinctions, the great number of permutations and combinations, and the practical requirement of limiting the areas searched to those likely to produce the best results.
- () C. Variety of subject matter:
The art embraces subject matter which requires for its comprehension and application a mastery of the scientific or technical concepts basic to more than one discipline.

ADDITIONAL CREDIT, SENIOR EXAMINER:

The incumbent has been granted official recognition as senior Examiner on the basis of evidence which demonstrates that: (a) He/she possesses clearly unique and extraordinary personal qualifications, capacities and recognized professional stature in his/her assigned area of technology; (b) the subject-matter area upon which the incumbent's recognition rests normally equates in terms of technological complexity to no less than Level B of Factor III and comprises a significant portion (i.e., at least a two man-year docket) of the total subject matter in the art to which he/she is assigned; (c) the incumbent normally spend no less than 50% of his/her time working in the cited area of expertness; and (d) the incumbent has demonstrated a foundation in patent examining functions at least the equivalent of that described at Level B of Factor I.

FACTOR LEVELS AND POINTS CREDITED:

Factor	Level	Points
1	A	45
2	F	15
3	B	5
Extra Credit	G	5
Total Points		70
Grade		14

USPTO

Position Description – GS-14FSA Master

PD 40-19--
GS-1224-14
Full Signatory Authority
Art of Masters Level

FACTOR I. Nature and Extent of Performance of Examining Functions:

Incumbent independently performs "Basic", "Advanced", and "Legal" patent examining functions (e.g., the application of legal precedents, the determination of double-patenting situations, the evaluation of petitions to the Commissioner and affidavits of patentable relevance, etc.) with no preliminary instructions from the supervisor. References used to determine whether or not the claimed invention is new and patentable are rarely, if ever, reviewed. All official Patent Office actions, including the substantive evaluation in terms of both statutory and precedent law of the legal sufficiency of evidence submitted by the applicant, are presented to the supervisor in final form for approval, except as modified in Factor II below.

Incumbent's determinations are reviewed, if at all, for conformance with Patent Office policy only upon final allowance or rejection of an application. This review normally is restricted to such matters as may determine (1) the extent to which the Patent Office will assist or advise inventors, or (2) the nature and extent of evidence required to warrant reopening the examination of a case which has been previously rejected.

FACTOR II. Contact and Commitment Authority:

Incumbent, having been officially delegated FULL SIGNATORY AUTHORITY, makes and effects wholly independent determinations with respect to any Patent Office action -- either his/her own or that of another -- including action which result in the final allowance or rejection of an application.

FACTOR III. Technological Complexity of Art:

Art of Master Level. The incumbent's assignments in the art are such that they present technological problems of a highly advanced level of difficulty requiring the incumbent to have a mastery of the concepts involved in examining applications in the art.

The incumbent's mastery of the concepts required for performing assignments at this highly advanced level of technological complexity is evidenced by official recognition that (a) the technological subject matter encompassed by his/her docket embraces a significant number and diversity of concepts which, on the basis of prerequisites, cannot normally be acquired through an undergraduate education; (b) the incumbent has demonstrated through his/her work and the testimony of his/her supervisors, that he/she has thoroughly mastered and actual employs such concepts in his/her examination of applications, and (c) such concepts arise in a significant number of cases on which the incumbent works at least 25% of his/her time.

USPTO

FACTOR LEVELS AND POINTS CREDITED:

Factor	Level	Points
1	A	45
2	F	15
3	A	10
	Total Points	70
	Grade	14

ATTACHMENT 2

	
	<p style="text-align: center;">Measuring and Rewarding Examiner Performance at the U.S. Patent and Trademark Office</p> <p style="text-align: center;">Robert D. Budens Patent Office Professional Association November 2014</p> <p style="text-align: right;">1</p>

	<p style="text-align: center;">Performance Appraisal Plan (PAP)</p>
	<ul style="list-style-type: none">▪ Examiners are rated on:<ul style="list-style-type: none">▪ Production▪ Quality▪ Docket Management▪ Stakeholder Interaction <p style="text-align: right;">2</p>

	<h2 style="text-align: center;">Performance Appraisal Plan (PAP)</h2>
	<ul style="list-style-type: none"> ▪ Production, Quality and Docket Management are considered "Critical Elements" of the PAP. ▪ An End-of-Year rating of "Marginal" or "Unacceptable" in a critical element means that the examiner's overall yearly performance rating can be no higher than Marginal or Unacceptable and the examiner could be subject to disciplinary action.

	<h2 style="text-align: center;">Performance Appraisal Plan Productivity</h2>
	<ul style="list-style-type: none"> ■ Each Examiner's "Expectancy" (Production Goal) Is Determined by: <ul style="list-style-type: none"> – The Examiner's Position Factor based on GS grade, signatory authority level and extra credit items (e.g. Senior or Expert status). – Complexity of technologies on the examiner's docket (Hours/Production Unit, Hrs/PU).

Performance Appraisal Plan Productivity	
<u>Grade</u>	<u>Position Factor</u>
GS-5	0.55
GS-7	0.7
GS-9	0.8
GS-11	0.9
GS-12	1.0
Certification Exam Required For Promotion above GS-12	
GS-13	1.15
GS-13, Partial Sig	1.25
GS-14, Full Sig	1.35
GS-15, Senior	1.40
GS-15, Expert	1.50

Performance Appraisal Plan Productivity	
<ul style="list-style-type: none"> ■ Each patent application has a total of two work credits (counts) available. ■ Examiners receive different amounts of work credit for completed work depending on the type of application and the type of examiner office action. ■ PAP Production Element sets forth the work credit for each particular action. 	

	<h3>Performance Appraisal Plan Productivity</h3>
	<ul style="list-style-type: none">■ Note that examiners DO NOT receive production credit for all the work they do. They only receive production credit for First Actions, Final Rejections and Disposals.

	<h3>Performance Appraisal Plan Productivity</h3>
	<ul style="list-style-type: none">■ Examiners perform many activities that take time but do not count toward biweekly production credit including:<ul style="list-style-type: none">– Helping Public and Peers.– Filling out Time and Attendance records (WebT&A).– After Final Advisory Actions.– Telephone Restriction Practice.– 2nd & Subsequent Non-Final Actions.– Printer Inquiries.

	<h2 style="text-align: center;">Performance Appraisal Plan Productivity</h2>
	<ul style="list-style-type: none"> ■ Examiners perform many activities that take time but do not count toward biweekly production credit including (con't): <ul style="list-style-type: none"> – Preparing for Pre-Appeal and Appeal Conferences. – Classification of Applications. – Researching and initiating application transfer requests. – Explaining examiner actions to supervisors. – Computer Downtime.

	<h2 style="text-align: center;">Performance Appraisal Plan Productivity</h2>
	<ul style="list-style-type: none"> ■ Production Unit = Balanced Disposal (i.e. the time to complete prosecution of patent application, start to finish). ■ Production Unit = $(N+F+D)/2$ where: <ul style="list-style-type: none"> N = Credits for First Actions (FAOM). F = Credits for Final Rejections. D = Credits for Allowances, Abandonments, Interferences, Examiner's Answers on Appeal.

Performance Appraisal Plan Productivity			
Samples of Technology Complexity at GS-12 & GS-14			
<u>Technology</u>	<u>GS-12 Hrs/PU</u>	<u>GS-12 Hrs/PU*</u>	<u>GS-14 Hrs/PU*</u>
Mech. Engineering	18.0	20.5	15.8
Organic Chemistry	18.4	20.9	16.1
Chem. Engineering	19.5	22.0	16.9
Material Handling	20.5	23.0	17.7
Electrical/Optical	22.5	25.0	19.2
Communications	24.0	26.5	20.3
Biotechnology	25.9	28.4	21.7
Computer Networks	31.6	34.1	25.9
Business Methods	31.6	34.1	25.9

* Adjusted to include 2.5 Hour Count System Initiatives (CSI) Increase in time added to each examiner's individual expectancy. 11

Performance Appraisal Plan Productivity	
Examiner Production Calculation:	
Expectancy = (GS-12 Complexity ÷ Position Factor) + 2.5*	
Expected PUs = Examining Hours ÷ Expectancy	
% Achievement of Goal (Production) =	
(Achieved PUs ÷ Expected PUs) X 100	
*2.5 hours additional time from Count System Initiatives.	

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Performance Appraisal Plan Productivity
<p style="text-align: center;">Sample Production Calculation</p> <p>GS-14 Primary Examiner in Biotechnology (25.9 Hrs/PU) w/64 Hrs of examining time and 3 PUs completed:</p> <p>Expectancy = (GS-12 Complexity/Position Factor) + 2.5 = (25.9 Hrs/PU/1.35 GS-14 PF) + 2.5 = 21.7 Hrs/PU</p> <p>Expected PUs = Examining Hours/Expectancy = 64 Ex. Hrs/21.7 Hrs/PU = 2.95 Expected PUs</p> <p>% Production = (Achieved Pus/Expected PUs) X 100 = 3 PUs Achieved/2.95 PUs Expected X 100 = 102%</p> <p style="text-align: right;"><small>13</small></p>

Performance Appraisal Plan Productivity										
<p>■ Productivity Rating:</p> <table style="width: 100%; border: none;"> <tr> <td style="padding-left: 20px;">– Outstanding</td> <td style="padding-left: 100px;">110% and above</td> </tr> <tr> <td style="padding-left: 20px;">– Commendable</td> <td style="padding-left: 100px;">103% - 109%</td> </tr> <tr> <td style="padding-left: 20px;">– Fully Successful</td> <td style="padding-left: 100px;">95% - 102%</td> </tr> <tr> <td style="padding-left: 20px;">– Marginal</td> <td style="padding-left: 100px;">88% - 94%</td> </tr> <tr> <td style="padding-left: 20px;">– Unacceptable</td> <td style="padding-left: 100px;">Below 88%</td> </tr> </table> <p style="text-align: right;"><small>14</small></p>	– Outstanding	110% and above	– Commendable	103% - 109%	– Fully Successful	95% - 102%	– Marginal	88% - 94%	– Unacceptable	Below 88%
– Outstanding	110% and above									
– Commendable	103% - 109%									
– Fully Successful	95% - 102%									
– Marginal	88% - 94%									
– Unacceptable	Below 88%									

	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none">■ Quality measurement is divided into three distinct categories of major activities:<ul style="list-style-type: none">– Category 1: basic patent examining duties.– Category 2 – patent examining duties requiring analysis of application compliance with patent statutes and making proper rejections.– Category 3 – determining patentability or non-patentability of patent claims. <p style="text-align: right;">15</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none">■ Category 1 Activities:<ul style="list-style-type: none">– Checking applications for compliance with formal requirements of patent statutes and rules and for technological accuracy.– Treating Information Disclosure Statements (IDS) and claims for priority.– Planning and conducting prior art searches.– Formulating proper restriction requirements when application can be restricted. <p style="text-align: right;">16</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none">■ Category 1 Activities (con't):<ul style="list-style-type: none">– Determining where appropriate line of patentable distinction is maintained between applications and/or patents.– Evaluate sufficiency of reissue oath/declaration.– Promote "Compact Prosecution" by including all reasonable grounds of rejection, objections and formal requirements.– Makes the record, as a whole, reasonably clear and complete. <p style="text-align: right;">17</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none">■ Category 1 Activities (con't):<ul style="list-style-type: none">– Properly treat all matters of substance in Applicant Responses.■ Not all examiners are responsible for all Category 1 activities. Some lower-graded examiners may only be responsible for Category 1 activities after prior instruction. <p style="text-align: right;">18</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none">■ Category 2 Activities:<ul style="list-style-type: none">– Analyzing application disclosure and claims for compliance with 35 USC 112.– Making proper rejections under 35 USC 102 and 103 with supporting rationale, or determining how claim(s) distinguish over the prior art.– Determine whether Applicant's amendment(s) introduce new matter to the application.– Determining whether claimed invention is in compliance with 35 USC 101. <p style="text-align: right;">18</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none">■ Category 2 Activities (con't):<ul style="list-style-type: none">– Properly closes prosecution and does not make a premature final rejection.■ Examiners GS-11 and above are responsible for most Category 2 activities. Examiners GS-13 and above are responsible for all Category 2 activities except for closing prosecution/final rejections. Lower-graded examiners have limited responsibility for a few Category 2 activities after prior instruction. <p style="text-align: right;">20</p>

	Performance Appraisal Plan Quality
	<ul style="list-style-type: none">■ Category 3 Activities:<ul style="list-style-type: none">– Properly rejects all rejectable claims in a final rejection.– Properly allows all patentable claims in an allowance.■ Only Primary Examiners are responsible for Category 3 Activities and for Category 2 activity of closing prosecution/final rejection. <p style="text-align: right;">21</p>

	Performance Appraisal Plan Quality
	<ul style="list-style-type: none">■ Quality Performance is measured using the "Clear Error" standard. Clear Error occurs when the examiner's action:<ul style="list-style-type: none">– does not reasonably comply with the major activities of the Quality Element; and– could not have been permitted at the time and under the circumstances that the action was taken; and– is not an honest and legitimate difference of opinion between the examiner and a reviewer as to what action should have been taken. <p style="text-align: right;">22</p>

	<h2>Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> ■ NOTE: If an action taken by an examiner is reasonable and the action preferred by the supervisor or reviewer is reasonable, the examiner's action represents an honest and legitimate difference of opinion and the action taken by the examiner is free of Clear Error. The examiner may be asked to change his/her action to that preferred by the supervisor, but the examiner has not committed Clear Error.

	<h2>Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> ■ Quality Combined Error Score*: <ul style="list-style-type: none"> – CAT1 = Category 1 Errors/Total Actions Done – CAT2 = Category 2 Errors/Total Actions Done – CAT3 = Category 3 Errors/(Finals + Allowances) – Combined Error Score = $\frac{(CAT1 + CAT2 + CAT3)}{3}$ <p>*If an examiner's error rate in any Category is greater than or equal to 7.50%, the overall Quality rating will be Unacceptable.</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none">■ The Quality rating is based on the Combined Error Score and compliance with three Indicia of Outstanding or Commendable Performance.■ Quality Indicia:<ul style="list-style-type: none">– Examiner’s statement of rejection, objection, and response to arguments clearly and concisely present the positions taken or recommended in the resulting Office actions including a thorough substantive explanation to convey those positions to the applicant. <p style="text-align: right;">19</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none">■ Quality Indicia (con’t):<ul style="list-style-type: none">– The Office actions as well as the file record clearly indicate that the examiner fully complies with the principles of compact prosecution.– The record developed by the examiner usually shows an indication of allowable subject matter at the earliest time which is consistent with the file record and prosecution of the application. <p style="text-align: right;">26</p>

	<h2>Performance Appraisal Plan Quality</h2>
	<ul style="list-style-type: none"> ■ Quality Element Rating: <ul style="list-style-type: none"> – Outstanding: Error rate is 0% - 4.49% and, except for rare occurrences, the examiner complies with all three Indicia. – Commendable: : Error rate is 4.50% - 5.49% and in substantially all actions the examiner complies with all three Indicia. – Fully Successful: The error rate is 5.50% - 6.49%. – Marginal: The error rate is 6.50% - 7.49%. – Unacceptable: The error rate is 7.50% or greater. <p style="text-align: right;"><small>27</small></p>

	<h2>Performance Appraisal Plan Docket Management</h2>
	<ul style="list-style-type: none"> ■ Unless otherwise directed by management, examiners are required to: <ul style="list-style-type: none"> – Handle all applications and proceedings awaiting action in accordance with the time period or Special handling instructions prescribed by current policy. – Forward all work for processing and/or handling promptly or in accordance with prescribed time periods. ■ Docket Management (DM) separates each type of application and/or action (component) into different categories. Each category may have several different types of component applications/actions included in the category. <p style="text-align: right;"><small>28</small></p>

	<h2 style="text-align: center;">Performance Appraisal Plan Docket Management</h2>
	<ul style="list-style-type: none"> ■ Each category has a particular "Expected Average Days" time period which is determined to be at the 100% performance level. ■ Each category also has a particular "Ceiling Control Days" time period which is determined to be at the unacceptable level of performance. ■ If examiner moves an application sooner than the "Expected Average Days" time period, then DM performance for that application would exceed 100%. If later than the Expected Average Days, performance would be less than 100%. <p style="text-align: right;"><small>28</small></p>

	<h2 style="text-align: center;">Performance Appraisal Plan Docket Management</h2>
	<ul style="list-style-type: none"> ■ Components in Each Docket Management Category: <ul style="list-style-type: none"> – Category 1: Amendments. – Category 2: Special New and Special Amended applications (e.g., Accelerated prosecution, Patent Prosecution Highway, Petition to make special, Track 1, Reissue, etc.). – Category 3: New Applications (e.g., Regular New Applications, Continuations, Continuations-in-Part, Divisionals, RCEs). <p style="text-align: right;"><small>29</small></p>

	<h2>Performance Appraisal Plan Docket Management</h2>
	<ul style="list-style-type: none"> ■ Docket Management Categories. <ul style="list-style-type: none"> – Category 4: Expedited (e.g., After Final Amendments, Rule 1.312 Amendments, Printer Rushes, etc.). – Category 5: Returns (Actions returned for corrections by either Technical Support Staff (TSS) or supervisor/reviewer).

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	<h2>Performance Appraisal Plan Docket Management</h2>																												
	<table border="1"> <thead> <tr> <th><u>Category</u></th> <th><u>Action Type</u></th> <th><u>Average Days</u></th> <th><u>Ceiling Control</u></th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Amendments</td> <td>56</td> <td>98</td> </tr> <tr> <td>2</td> <td>Special New</td> <td>14</td> <td>28</td> </tr> <tr> <td>2</td> <td>Special Amended</td> <td>14</td> <td>28</td> </tr> <tr> <td>3</td> <td>New Applications</td> <td>28</td> <td>56</td> </tr> <tr> <td>4</td> <td>Expedited</td> <td>14</td> <td>28</td> </tr> <tr> <td>5</td> <td>Returns</td> <td>14</td> <td>28</td> </tr> </tbody> </table> <p>DM clocks generally start counting when the application is placed on the examiner's docket and stop when the examiner submits the application for work credit.</p>	<u>Category</u>	<u>Action Type</u>	<u>Average Days</u>	<u>Ceiling Control</u>	1	Amendments	56	98	2	Special New	14	28	2	Special Amended	14	28	3	New Applications	28	56	4	Expedited	14	28	5	Returns	14	28
<u>Category</u>	<u>Action Type</u>	<u>Average Days</u>	<u>Ceiling Control</u>																										
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Performance Appraisal Plan Docket Management

- Component Applications in some DM categories occur much more frequently on examiner dockets than do applications in other categories.
- Example: Amendments and New applications are more numerous on examiners' dockets than are Rule 1.312 Amendments.
- Component DM scores are weighted based on the number of actions in each component to form a contributing score. Contributing scores are added together to determine the Overall DM Score.

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Performance Appraisal Plan Docket Management

- Docket Management Rating
 - Outstanding: 110% or above
 - Commendable: 103% to 109%
 - Fully Successful: 95% to 102%
 - Marginal: 88% to 94%
 - Unacceptable: Below 88%

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	<h2 style="text-align: center;">Performance Appraisal Plan Docket Management</h2>
	<ul style="list-style-type: none"> ■ DM time periods may only be paused or reset in a few limited circumstances. ■ To allow examiners to plan ahead for vacations or other absences or to earn awards, examiners may work ahead on certain cases that are "asterisk" cases (generally the next four oldest cases in the category). For example, when the examiner completes his/her oldest new case, then the examiner may choose to work on additional new cases with asterisks for additional DM credit.

	<h2 style="text-align: center;">Performance Appraisal Plan Stakeholder Interaction</h2>
	<ul style="list-style-type: none"> ■ All examiners are responsible for performance under the Stakeholder Interaction Element. ■ Major Activities: <ul style="list-style-type: none"> – Courteous & Professional Treatment of External Stakeholders by: <ul style="list-style-type: none"> ■ Generally returning phone calls in 1 business day. ■ Generally reviewing/responding to emails every day. ■ Providing work schedule information to customers via voice mail.

Performance Appraisal Plan Stakeholder Interaction

- Courteous & Professional Treatment of External Stakeholders by generally (con't):
 - Providing voice mail notice of extended absences (3 or more business days).
 - Directing callers to correct office or person.
 - Conducting all interviews and/or other contacts with external stakeholders as scheduled, with adequate preparation and courtesy.
 - No interview and/or other contact is arbitrarily or capriciously refused.

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Performance Appraisal Plan Stakeholder Interaction

- Courteous & Professional Treatment of External Stakeholders by generally (con't):
 - Use proper decorum in official communications.
- Provide search consultation and other assistance to the public and peers.

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	Performance Appraisal Plan Stakeholder Interaction
	<ul style="list-style-type: none">■ Examiner performance is also measured against a defined set of indicia of performance:<ul style="list-style-type: none">– Routinely uses interview practice to facilitate compact prosecution.– Examiner is accessible and responsive regardless of physical location (teleworking).– Provides appropriate information to address stakeholder inquiries.

	Performance Appraisal Plan Stakeholder Interaction
	<ul style="list-style-type: none">■ Performance Indicia (con't):<ul style="list-style-type: none">– Responds to internal stakeholders in a timely manner.– Responds appropriately to requests for personal interviews in a timely manner.– Examiner is always well prepared for interviews.

	<h2 style="text-align: center;">Performance Appraisal Plan Stakeholder Interaction</h2>
	<ul style="list-style-type: none">■ Rating is based on demonstrated behavior relative to the Major Activities and Performance Indicia.<ul style="list-style-type: none">– Outstanding: All major activities identified are routinely performed in a timely and courteous manner and, except for rare exceptions, the employee demonstrates all of the identified indicia. <p style="text-align: right;">41</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Stakeholder Interaction</h2>
	<ul style="list-style-type: none">■ Stakeholder Interaction Rating (con't).<ul style="list-style-type: none">– Commendable: All major activities identified are routinely performed in a timely and courteous manner and the employee demonstrates all of the identified indicia in substantially all circumstances.– Fully Successful: All major activities identified are normally performed in a timely and courteous manner. <p style="text-align: right;">42</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Stakeholder Interaction</h2>
	<ul style="list-style-type: none">■ Stakeholder Interaction Rating (con't).<ul style="list-style-type: none">– Marginal: Demonstrates some contribution to the element. However, a significant number of documented deficiencies in at least one of the major activities have been identified to the examiner.– Unacceptable: Performance is not adequate for the position, failing to meet the Marginal level. Numerous instances of documented deficiency in at least one of the major activities have been identified to the examiner. <p style="text-align: right;">-3</p>

	<h2 style="text-align: center;">Performance Appraisal Plan Tracking Performance</h2>
	<ul style="list-style-type: none">■ Examiner performance is measured bi-weekly, quarterly and yearly.■ Examiners are at risk for performance-based disciplinary action at the end of every quarter and at the end of fiscal year.■ The USPTO generates numerous different reports to measure examiner and agency performance.■ Every bi-week, examiners receive reports on their achievement towards their production and docket management goals. Examples of two reports are on the next slides. <p style="text-align: right;">-4</p>

Rewarding Performance

- The USPTO provides three types of examiner performance award incentives for production or docket management:
 - Special Achievement Award.
 - Productivity Gainsharing Award.
 - Pendency Award.
- Examiner performance awards represent the best return on investment (“bang for the buck”) of any program at the USPTO.

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Rewarding Performance

- Special Achievement Award (SAA)
 - Requires an average of 110% Production over any 4 consecutive quarters and fully successful performance in other critical elements.
 - 3% of annual salary.
 - Requires minimum 700 hours of examining time for pro-rated minimum award, 1400 examining hours for maximum award.

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	<h2>Rewarding Performance</h2>
	<ul style="list-style-type: none"> ■ Productivity Gainsharing Award <ul style="list-style-type: none"> – Based on Fiscal Year Production Goal Achievement. – Requires minimum 700 hours of examining time for pro-rated minimum award, 1400 examining hours for maximum award.

	<h2>Rewarding Performance</h2>														
	<p style="text-align: center;">Productivity Gainsharing Award (con't)</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;"><u>Goal Achievement*</u></th> <th style="text-align: left;"><u>Award (% of Base Salary)</u></th> </tr> </thead> <tbody> <tr> <td>110 – 114%</td> <td>2%</td> </tr> <tr> <td>115 – 119%</td> <td>3%</td> </tr> <tr> <td>120 – 124%</td> <td>4%</td> </tr> <tr> <td>125 – 129%</td> <td>5%</td> </tr> <tr> <td>130 – 134%</td> <td>6%</td> </tr> <tr> <td>135% or more</td> <td>7%</td> </tr> </tbody> </table> <p><small>*Requires at least Fully Successful performance in all other critical elements. 30</small></p>	<u>Goal Achievement*</u>	<u>Award (% of Base Salary)</u>	110 – 114%	2%	115 – 119%	3%	120 – 124%	4%	125 – 129%	5%	130 – 134%	6%	135% or more	7%
<u>Goal Achievement*</u>	<u>Award (% of Base Salary)</u>														
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120 – 124%	4%														
125 – 129%	5%														
130 – 134%	6%														
135% or more	7%														

Rewarding Performance

- Pendency Award
 - Based on examiner performance in docket management element.
 - Pendency Awards are paid quarterly with an annual Supplemental Award for sustained high performance over four consecutive quarters (mid-year to mid-year).

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Rewarding Performance

- Eligibility for Pendency Award:
 - Most recent Rating of Record Fully Successful or better.
 - Completed one full year at USPTO before first day of the award quarter under consideration.
 - Have a "Returns" category score in the DM element of at least 100%.
 - Meet Pendency Award Criteria.

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Rewarding Performance

- **Entry-Level Tier Award**
 - 110% overall DM score (excluding returns).
 - No Ceiling Exceeded applications in any DM category.
 - 0.25% of current annual salary.

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Rewarding Performance

- **Tier 1 Award**
 - 120% overall DM score (excluding returns).
 - No DM component score under 100%.
 - Complete predetermined amount of oldest/asterisk new applications depending on number of biweeks in quarter, part-time status, and Hrs/PU.
 - No Ceiling Exceeded applications in any DM category.

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	<h2>Rewarding Performance</h2>
	<ul style="list-style-type: none">▪ Tier 1 Award Criteria<ul style="list-style-type: none">▪ No more than one application of any DM type going Ceiling Exceeded in the quarter.▪ Pays 0.5% of current annual salary. <p data-bbox="1117 913 1140 934">55</p>

	<h2>Rewarding Performance</h2>
	<ul style="list-style-type: none">▪ Tier 2 Award Criteria<ul style="list-style-type: none">▪ 140% overall DM score (excluding returns).▪ No DM component score under 120%.▪ Complete predetermined amount of oldest/asterisk new applications depending on: Number of biweeks in quarter, part-time status, and Hrs/PU. <p data-bbox="1117 1627 1140 1648">56</p>

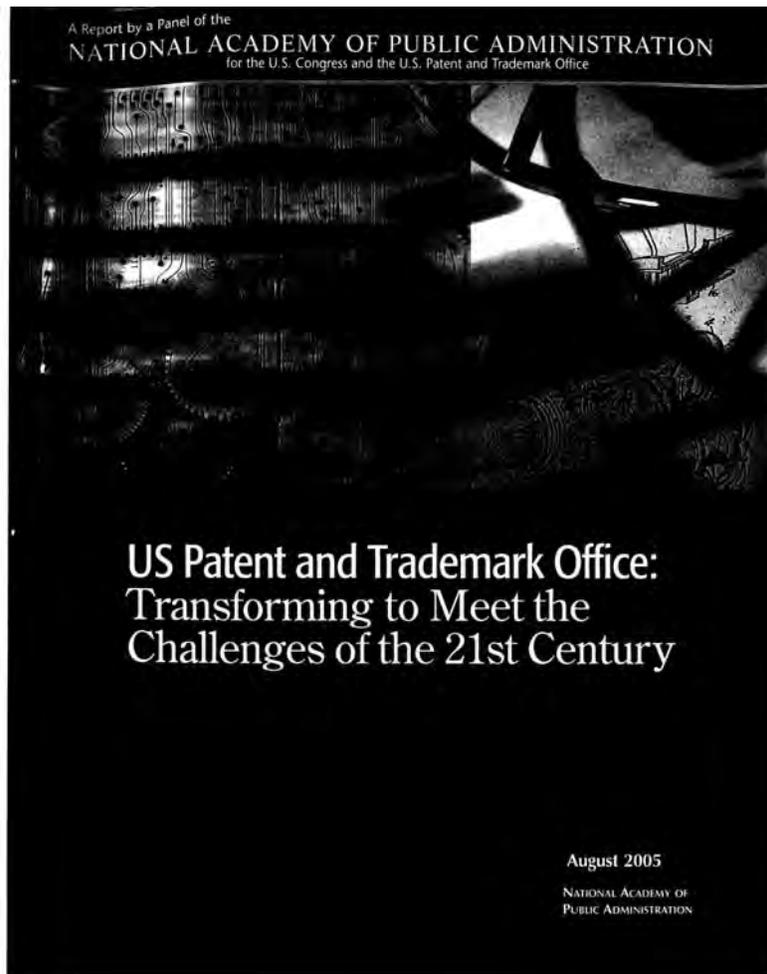
	Rewarding Performance
	<ul style="list-style-type: none">■ Tier 2 Award Criteria<ul style="list-style-type: none">■ No more than one application of any DM type going Ceiling Exceeded in the quarter.■ Pays 0.75% of current annual salary. <p data-bbox="1117 913 1144 934">57</p>

	Rewarding Performance
	<ul style="list-style-type: none">■ Supplemental Award<ul style="list-style-type: none">– Tier 1: additional 0.5% of current salary for four consecutive quarters of Tier 1 performance or better.– Tier 2: additional 1.0% of current salary for four consecutive quarters of Tier 2 performance or better.– No Supplemental Award for Entry Level Tier. <p data-bbox="1117 1627 1144 1648">58</p>

	<h2>Conclusion</h2>
	<ul style="list-style-type: none">▪ USPTO managers constantly monitor virtually every aspect of examiner performance down to six minute intervals.▪ The PAP together with other USPTO policies as well as relevant labor agreements provide managers with sufficient tools to identify any poor performers and take corrective action as needed. <p style="text-align: right;">59</p>

	<h2>Conclusion</h2>
	<ul style="list-style-type: none">▪ Examiners direct efforts to Agency goals as set forth in, and measured by the PAP.▪ Examiners respond to performance incentives with increased performance to further assist the USPTO in achieving its mission. <p style="text-align: right;">60</p>

ATTACHMENT 3



particularly in measuring performance in two-quarter award periods and establishing additional intervals for production awards, higher possible awards for top performers, and separate awards for quality and for assisting SPEs with training. Consistent with Paul Light's definition of the "robust" organization,¹⁰⁴ USPTO needs to follow through with its vision, use its money where it is consistent with changing mission needs and priorities, and set clear goals for high performance.

As a management entity, USPTO has not done what many other federal organizations have done to spur innovation through, for example, competition for pilot program seed money or recognition of innovation from outside parties, such as the 18-year old Innovation in American Government Award, sponsored by Harvard University.

Recommendations: USPTO Awards System

The Academy Panel recommends that USPTO:

- **Update the production and quality standards and awards.**
- **Examine historical data on production and quality to ensure new proposals, to be negotiated with POPA, mesh with agency priorities and reflect current best practices.**
- **Create a group award to spur innovation in work processes and overcome the "production loner" concept.**
- **Establish a competitive innovation fund to provide seed money for organizational elements seeking to pilot work process simplification, ways to reduce pendency, or improve quality.**
- **Tie special act awards and SES bonuses to effective innovation.**

If USPTO is to develop a "culture of success," its award system needs to be consistent across the staffing spectrum, flexible, and reflective of shared agency priorities. While not subject to collective bargaining, incentives for SES managers need to be aligned with those of the patent workforce. Recognizing executives and employees who have contributed to USPTO as successful change agents sends the signal that change is welcome and expected.

USPTO EMPLOYEE RELATIONS

If an organization's ability to move people and respond to changing mission needs is important in attaining a "robust" state of health, then its relationships with individual employees and the organizations that represent them are an important barometer (See Chapter 5 for further discussion of USPTO labor-management relations). For USPTO, this is particularly true when

¹⁰⁴ Light, Paul, C., *The Four Pillars of High Performance*, McGraw-Hill, 2005, p. 130.

labor-management relations limit the organization's ability to adapt; when individual performance and conduct-related actions directly or indirectly lead to the departure of the employee or decrease their productivity—potentially adding to USPTO pendency; or when the organization expends an increasing or disproportionate amount of resources to resolve employee problems.

While USPTO has grown dramatically over the past several decades and it is logical to expect a proportional multiplier effect in the number of employee relations cases, for the most part the increase has exceeded the rate of population growth. Until FY 1983, the agency had less than 100 employee relations cases per year. The rate spiked in the mid-1990s, reaching a new high of over 500 cases, dropped down for three years and then spiked again to over 500 in FY 2000. Since then, the rate has continued to climb, with the number of cases now at an all-time high of 928 in FY 2005. These recent increases are not proportional to the agency's growth. In FY 2002, the population grew about 5.5 percent, but the employee relations cases grew by 20 percent. In FY 2003 and 2004, the population varied by less than 1 percent, but the agency employee relations cases increased by 12 percent and 14.5 percent respectively.

Employee Performance

Data for FYs 1999 through 2004 show that, in addition to increased attrition, the agency has taken an increased number of performance-based actions against its employees, and it is this class of employee relations cases that have contributed most to the overall increasing caseload. Some management officials have linked this rise in actions to the onset in 2000 of liberalized time scheduling, known to many in the federal sector as maxiflex, but known in USPTO as Increased Flexitime Program (IFP). IFP gave PEs wide latitude to schedule their work over a seven-day week, with no specific schedule required and no advance notice to supervisors. The labor contract management proposed in March 2005 contains a proposal to require advance notice to the supervisor of a specific schedule for the coming week.

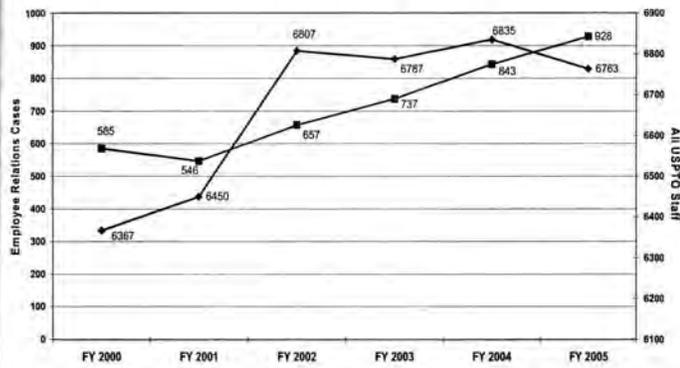
As a result of past practice, USPTO is required to give its employees an oral warning prior to a written warning. This is not required by federal regulations for most other civil servants, who receive a written warning before management proceeds to removal or other adverse action. USPTO patent examiners who fail their production goals for a quarter therefore have an additional quarter during which they can correct their performance before an adverse action proceeds.

An employee might therefore receive a confirmed oral warning that they had not met production goals for the period January through March, continue to fail in quarter two, April through June, receive a written warning in July, then improve in quarter three and thereby avoid adverse action. USPTO could therefore see decreased production for three months longer than other federal entities.

USPTO informed POPA, in March 2005 that, as part of their contract proposal, the agency is proposing to eliminate this additional oral warning. This management proposal—along with the rest of the term contract—will be subject to negotiation and, given the history of labor management relations, is not likely to be implemented for at least a few years.

Figure 4-3 shows growth in the USPTO workforce between FYs 2000 and 2005 (from 6,367 to 6,763) and the concurrent increase in employee relations actions (from 585 to 928). For the most part, the increase in the number of cases exceeded the population growth. For example, the population grew about 5.5 percent in FY 2002, but employee relations cases grew by 20 percent. In FY 2003 and FY 2004, the population changed by less than 1 percent, yet the cases increased by 12 percent and 14.5 percent respectively. Most cases are in patents, which is where most of USPTO's workforce is.

Figure 4-3
Growth in USPTO Workforce and Employee Relations Actions
FYs 2000-2005



To summarize some of the PE employee relations issues facing agency management:

- Oral warnings for the patent corps have jumped to 329 in FY 2004, up from 70 in FY 1999, 101 in 2000, 132 in 2001, 171 in 2002, and 252 in 2003. In FY 2005, as of February 2005, USPTO gave 163 warnings.
- Written warnings—the second stage—have increased as well, with 48 in FY 2004, up from 36 in 2003, 41 in 2002, 35 in 2001, 19 in 2000. In FY 2005, as of February 2005, there were 31 written warnings.
- Probationary discharges within the first year of employment have remained more stable, with 22 in 2004, 36 in 2003, 31 in 2002, 24 in 2001, and 27 in 2000. In FY 2005, as of February 2005, there were 5 probationary discharges.
- Removals—the most procedurally demanding process—were 17 in 2004, 24 in 2003, 10 in 2002, 18 in 2001, and 12 in 2000. In FY 2005, as of February 2005, there have been 6 removals.
- Denials of within-grade—the federal longevity increase—also rose in number with 56 in 2004, 51 in 2003, 22 in 2002, 36 in 2001, and 11 in 2000. In FY 2005, as of February 2005, there were 21 denials of WIGs.

Almost
10%
from
USPTO

The probationary discharge number is a critical one in that removing a probationary employee is easier for management and less costly than if the person is removed after they have served in excess of one year, when the employee has redress they do not have prior to the one-year mark. From FY 1999 through the start of FY 2005, USPTO had 183 probationary discharges or 5.7 percent of its 3,216 POPA bargaining unit hires. By contrast, OPM conducted a study of new hires in FY 2001 and FY 2002 and found that of the government's 145,000 new hires, just over 3 percent (fewer than 5,000) were terminated during probation.

Removal rates for POPA bargaining unit members have ranged from a low of .27 percent in FY 2002 to a high of .65 percent in FY 2003. As a point of comparison, the entire Centers for Disease Control, including their non-professional population, had a removal rate for FY 2002 of .09 percent. A Cato Institute study of removal for performance across non-defense federal agencies showed that in 2001 the government fired only 210 workers or .02 percent (1 in 5000). The State Department has fired only six employees for poor performance from 1984 through 2001.¹⁸⁵ JPO rarely removes an employee for performance.

The distribution of employee relations cases across USPTO is skewed for performance-based cases, the vast majority of which are related to production failure. While the POPA workforce

¹⁸⁵ "Federal Government Should Increase Firing Rate," Cato Institute Tax & Budget Bulletin, No. 10, November 2002, p. 1.

comprises 58 percent of the total USPTO population, the bargaining unit has, since 2001 through 2005, accounted for almost 90 percent of the agency's performance cases.¹⁵⁸

Employee Conduct

Conduct-related cases are much more proportional, with 52 percent of the cases in October-February 2005 attributable to POPA bargaining unit members.

Conduct cases¹⁵⁷ have, however, also been rising in the patent corps:

- 140 in 2001
- 175 in 2002
- 173 in 2003
- 200 in 2004

In FY 2005, as of February, there have been 40 conduct-related cases.

Conclusions: USPTO Employee Relations

USPTO management follow-through on employee relations cases shows a commitment to reducing pendency through production and is the logical, if negative, corollary to an incentive system based on quantifiable measures. As a PBO, the agency is, by design, focused on measuring performance, and within this new organizational construct, management may be more inclined to take action with respect to performance issues. USPTO has been able to take these sustainable performance-based actions against some patent corps employees because the employees are subject to PAPs that contain specific and quantifiable production goals. Performance accountability outside of patent operations is substantially less quantifiable.¹⁵⁶

The Panel understands that the liberalization of workday flexibilities in 2000 contributed to the volume of employee relations cases and that the agency has taken steps in its March 2005 contract proposals to try to impose additional workplace structure. This added flexibility, is not, however, the root cause of the increase in employee relations cases as much as a symptom. Added workforce flexibility should not necessarily translate into workforce problems.

The fact that the number of patent corps employee relations cases has been spiraling should cause UPSTO management to question whether there is something wrong in their recruitment

¹⁵⁶ Performance-based actions can be based on failure to meet one or more elements of a PAP; for a patent examiner typical critical elements are production, workflow, patentability, patent examining functions, and action taken. The most common cause for a performance-based action is failure to meet production criteria.

¹⁵⁷ Some examples of conduct violations are the wide-ranging "conduct unbecoming a federal official," to the more specific, such as making false statements, sleeping on the job, criminal activity (theft, assault, forgery, destruction of evidence, misappropriation of funds), misuse of government equipment, violent behavior, misuse of position (such as for personal financial gain or for the gain of a related individual), or other violations of the agency's published standards of conduct. Agencies typically publish a table of offenses and a range of possible disciplinary measures appropriate for each offense.

¹⁵⁸ Employees outside of Patent Operations considered here are the employees of the Chief Financial Officer, the Chief Information Officer, the Office of the Under Secretary, and the Office of General Counsel.

plan or in the workplace. While the work force understands the system and finds it reassuring to know the requirements up front, USPTO's relationship with its primary union has limited the organization's ability to change even these quantifiable standards to reflect the evolving nature of the work and the impacts of technology on work processes. An organization that is frozen in time is not an agile organization and not likely an employer of choice for the most highly productive. An organization locked into performance requirements is not likely to be a model of "continuous improvement." When an organization expends an increasing or disproportionate amount of resources to resolve employee problems, as has USPTO over the last several years, the lost resources—dollars and people and organizational energy—are going to unproductive ends and contributing to decreased efficiency and increased pendency.

Lastly, given the SPE workload and the ever-increasing number of new hires they must train, USPTO needs to institutionalize the way it brings new hires into the agency and into the "world of work." Mentors outside the supervisory chain can help guide the new hires, give them career advancement tips, work process advice to speed their production and increase their quality, and perhaps most importantly, listen to their concerns and give them feedback outside the official loop. Employees who have multiple sources of feedback and a seasoned confidante are more productive contributors.

Recommendations: USPTO Employee Relations

USPTO has some actions underway that the Academy Panel believes to be consistent with sound management practices:

- The certification and recertification programs for patent staff
- Systems to measure casework and the automated tracking system to follow up with those who fail to meet quarterly production goals
- Management's March 2005 proposals to negotiate requirements for more workday structure

In addition, the Panel recommends that USPTO:

- Analyze data from mandatory exit surveys to understand recruiting pitfalls that result in hiring individuals not well-suited to patent examination work.
- Provide resources to managers who make hiring decisions, such as:
 - recruiting sources that have historically produced accepted job offers and provided successful employees
 - points to consider when hiring to ensure a good match between employee and USPTO
 - examples of pitfalls and best practices so as to learn from others' experiences.

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- **Establish a mentor program, with a requirement that all new hires have a mentor outside their supervisory chain.**

A strong OHR can resurrect this program, match new hires with available mentors, provide training to mentors and those mentored, supply tools, such as Individual Development Plan guides and training resources, and monitor pair progress. While a mentoring program is yet one more initiative competing for scarce USPTO resources, such coordination and consultation would be a logical fit should the agency implement its draft enterprise training initiative, which is slated to include a USPTO Development Center and e-learning project.

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Many federal agencies use formal mentoring programs to develop and maintain a well-trained and versatile workforce. For example, the Department of Energy (DOE) has a structured mentoring program that began with a 1995 pilot program and is now supported by an Internet-based *Mentoring Program Guide*. Recognizing that mentoring can divert time and money from other job training programs and that some agencies lack sufficient top-level mentors for the "face-to-face" variety, OPM began, in January 2004, to offer online "e-mentoring," available through OPM's multi-agency Web portal, GoLearn.gov. Portal users—numbering about 20,000 annually—find experts in their fields in minutes.

with

A survey conducted in 2004 shows that senior-level executives recognize the value of mentors. Although 60 percent of women and 72 percent of men did not have a mentor, more than half of the respondents said a mentor helped them succeed.¹⁹⁹ While a mentor cannot and should not replace supervisory guidance or technology specific orientation, a mentor can help a new employee feel more connected to the larger organization, provide longer term and broader perspective on day-to-day challenges, and provide the employee with a sounding board and additional source of feedback. Orientation to the program, including written guidance and a defined set of boundaries, should ensure that all parties involved understand the parameters of the program and maximize its usefulness to the agency and employee. Establishment of such a program also sends a signal to employees that they are valued for more than today's production; an agency that is willing to invest in its employees typically gets a return-on-investment, particularly improved retention and improved morale as employees look beyond this week's paycheck and focus on their personal development and a lifetime career.

¹⁹⁹ Lisagor, Megan, "E-mentoring: A tool for federal workers," January 24, 2005, <http://www.few.com/fcw/articles/2005/01/24/mgi-mentor-01-24-05.asp>.

ATTACHMENT 4

Work Credit Abuse

Work credit abuse (a.k.a. mortgaging) is an act of misconduct, which occurs when an employee knowingly posts for credit for work which is substantively incomplete, either through the absence of rejections, or the presence of rejections that are inappropriate, for production gain, docket management gain or both (e.g. to receive an award, to avoid a performance warning, etc.). The standard for determining misconduct is a preponderance of the evidence; i.e., whether it is more likely true than not, the employee committed work credit abuse.

The determination as to whether or not mortgaging has occurred is fact-based and is initially made at the TC level by the SPE, in consultation with the Group Director and optionally the TC ER Liaison. SPEs should therefore be careful not to confuse work credit abuse with poor quality work under the PAP, considering the Quality Major Activities for which the examiner is responsible. Managers should address concerns about possible work credit abuse through oral discussion and mentoring, when those concerns arise, in order to lessen the likelihood of repeat or escalating occurrences. Before proceeding down the conduct path and potential disciplinary action, SPEs should consider the known facts and the context in which the examiner's action occurred. For example:

1. What is the nature of the work product; i.e., was there a *bona fide* attempt to complete the work?
2. Was there a 'gain' involved for the employee, and if so, what is the nature of the 'gain'?
3. Were the actions called into question auto-counted?
4. What level (if any) of signatory authority does the employee have?
5. How many applications are involved?
6. Were there known problems with automated systems that could be relevant to the situation?
7. When discovered, did the examiner bring the problem to the attention of the SPE?

Examples of work credit abuse may include, but are not limited to:

1. Posting for credit blank office actions;
2. Posting for credit office actions with only trivial issues generically expressed or addressed, with no substantive objections or rejections;
3. Posting for credit office actions that contain only rejections that can be written with a cursory review of the claims (e.g. simple §112, 2nd paragraphs) where the search history reflects that only a limited superficial search was conducted;
4. Posting for credit an office action including only a superficial "shotgun"-style rejection (e.g. "claims 1-50 are rejected") where the rejection reflects that there was no *bona fide* attempt to complete the office action prior to posting for credit;
5. Posting for credit office actions that contain only text copied from a previous Office action such as wherein:
 - o the pending claims don't correspond to those in the cut and pasted Office action;
 - o the claims were substantively amended and the art applied is no longer properly applicable (as in the case when a previous action was copied); or
 - o the action is being made final with no address of applicant's response to the previous Office action.
6. Posting for credit complete Office actions that are from a different application which are not applicable to the application at hand.
7. Posting for credit an action with an omission resulting in a return by TSS (e.g., missing 1449), where the Office action is subsequently significantly rewritten prior to mailing.
8. Office actions that contain only the claims to be mapped.

When the determination of misconduct has been made, these and additional inquiries again form part of the Douglas factor analysis that will determine the degree of penalty proposed. For work credit abuse situations, the range of penalty proposed for a first occurrence will generally fall within counseling to a 14-day suspension; however, the specifics of the case may warrant a penalty outside of that range. If the employee's behavior is egregious, oral discussion or mentoring only may not be effective or appropriate. The specifics of each case should be considered carefully. Employee Relations assists managers in conducting the Douglas Factor analysis, and in recommending penalties consistent with progressive discipline. SPEs should fully explain the facts, in their patent examining context, to the Employee Relations Specialist.

The Douglas Factors include:

- (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- (3) the employee's past disciplinary record;
- (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) consistency of the penalty with any applicable agency table of penalties;
- (8) the notoriety of the offense or its impact upon the reputation of the agency;
- (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- (10) potential for the employee's rehabilitation;
- (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

**Supplemental Material submitted by William F. Smith,
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EXHIBIT A



**IN ORDER TO FORM A MORE PERFECT PATENT EXAMINATION SYSTEM—IT IS TIME TO UPDATE
COMPACT PROSECUTION TO COMPACT PROSECUTION 2.0**

Authors:

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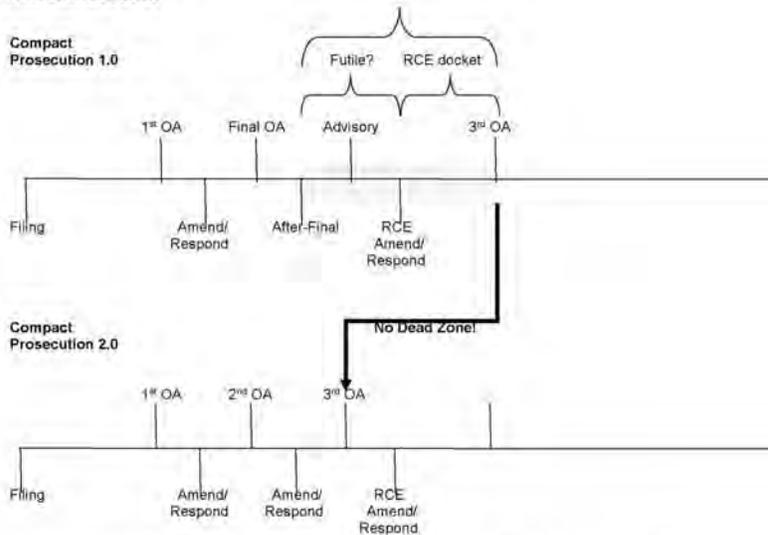
This paper was created by the authors for the Intellectual Property Owners Association U.S. Patent Office Practice Committee to provide background to IPO members. It should not be construed as providing legal advice or as representing the views of IPO.

Views expressed herein are those of the authors and are not to be attributed to their clients, their firms or their firms' clients.

I. Overview

The U.S. patent examination system has been operating under the tenets of "compact prosecution" ("Compact Prosecution 1.0") for over 40 years. During this time the backlog of unexamined patent applications has exploded which is now exacerbated by large inventories of work in progress – RCEs waiting for action and *ex parte* appeals awaiting decision by the Patent Trial and Appeal Board ("PTAB"). While Compact Prosecution 1.0 is not entirely to blame for these large backlogs, we have identified two significant dead zones in Compact Prosecution 1.0 that needlessly delay the ultimate disposition of a patent application once examination on the merits is initiated—final rejections and the manner in which RCEs are docketed, which can be illustrated as:

After-final dead zones



These two dead zones typically result in an initially examined application sitting idle for 2.5-19.5 months.

We believe the elimination of the two dead zones will result in a more efficient patentability determination once a patent application is initially examined and provide a more appropriate balance between the competing goals of reducing the unexamined new case backlog and completing the examination of applications in a timely efficient manner once the examination process has started.

COMPACT PROSECUTION 2.0

Thus, we propose a makeover of the current patent examination system to transition from Compact Prosecution 1.0 to Compact Prosecution 2.0. The hallmark of Compact Prosecution 2.0 is, once a patent application is initially examined, the examination process continues without artificial stops until the case is allowed, appealed or abandoned, i.e., no dead zones. By keeping the case under constant consideration, it is believed that the overall efficiency of patent prosecution will be significantly enhanced. Under Compact Prosecution 2.0, the issues will be more quickly narrowed and focused so that final resolution of the patentability issues will be more efficiently and effectively concluded which will result in increased capacity in the Examining Corps to reduce the backlog of unexamined patent applications.

There are various ways in which Compact Prosecution 2.0 can be implemented at the USPTO. Complementary to the proposed Compact Prosecution 2.0 system, we also outline a possible implementation that focuses on changes to the how patent examiner productivity and docket management are measured. In addition, changes are proposed to the manner in which a patent examiner's work product is reviewed and evaluated.

It is believed that the changes proposed herein do not require any change in legislation, only changes in the rules and policies which govern the patent examination system. It is understood that certain of the proposed changes will require consultation and/or negotiation with the patent examiners' labor union, the Patent Office Professional Association ("POPA"). However, absent any unforeseen need for legislation, all that is needed to improve the patent examination system is the will to change. As George Bernard Shaw is credited with stating, "Progress is impossible without change, and those who cannot change their minds cannot change anything."

II. Background

The basic ebb and flow of the patent examination system in the United States is provided by the Patent Act of 1952. 35 U.S.C. § 131 tasks the Director to "cause an examination" and 35 U.S.C. § 132(a) provides for an applicant's response to any rejection, objection or requirement made as a result of the "examination." 35 U.S.C. § 132(b) provides authority for the PTO to promulgate regulations that provide for continued examination upon the paying of a fee, i.e., RCEs. 35 U.S.C. § 2(b)(2)(A) provides for the PTO to establish "regulations, not inconsistent with law...[to] govern the conduct of proceedings in the [PTO]."

Thus, one looks to Title 37 of the Code of Federal Regulations in order to determine how the day to day interactions between patent examiners and patent applicants during the examination of a patent application are to occur and the Manual of Patent Examining Procedure ("MPEP") for guidance as to the specifics for how patent examiners and practitioners put the patent examination process into effect.

COMPACT PROSECUTION 2.0

In the late 1960s to the early 1970s, the PTO implemented Compact Prosecution 1.0 and concomitantly changed the metrics of measuring patent examiners productivity performance from counting total actions mailed to the current hours per balanced disposal system. The key to Compact Prosecution 1.0 is the PTO policy that, normally, the prosecution of every patent application can be carried out in a single round consisting of an office action and an applicant response, such that, in the event that the applicant response does not place the application in condition for allowance, every second office action on the merits should be a final rejection.

However, in the decades which have passed since the advent of Compact Prosecution 1.0, the landscape of patent examination has changed so dramatically that it is believed that events have overtaken and indeed overwhelmed the concepts of Compact Prosecution 1.0. Examples of the changing landscape from the late 1960s to the early 1970s include:

- Significant technological changes, e.g.,
 - The change from analog to digital technology and the attendant explosion of digital devices and computer implemented processes
 - The *Chakrabarty* decision and the attendant explosion of biotechnology patent applications
- Significant legal changes, e.g.,
 - Change from 17 year patent term from date of grant to 20 year patent term from date of filing
 - Advent of the Federal Circuit
 - PTO and applicants need to take into account the court's continuing clarification of claim construction both inside and outside the PTO
 - Understanding and putting into practice through claim language the court's decisions on what constitutes infringement of a patent claim
 - Understanding of the evolving law of obviousness, written description and patent eligible subject matter
 - Transitioning to the AIA
- Significant administrative changes, e.g.,
 - PTO became a user fee funded agency
 - Paper files replaced by the IFW
 - Computer based searching

- Significant economic changes, e.g.,
 - Increased value of patents

The technological changes mean that many patent applications no longer fit the two office action model. Specifications are more complex and claim sets are more expansive to take into account the complexity of the technology and provide adequate protection of the technology in light of Federal Circuit precedent. Consideration of modern patent applications and patentability issues is significantly more complex than 40 years ago. Prosecution under a 20 year term from filing date is different than under the previous 17 year term from date of grant. Delays in prosecution were tolerable under the previous 17 year term provision while the 20 year term provision requires that the patent application be constantly moving in the examination system in a positive direction. The many decisions of the Federal Circuit that the PTO and applicants now have to take into account require careful thought as to the precise language used to define the technology in the specification and claims. As we transition to the AIA, both the PTO and the applicants will be practicing in two different legal landscapes which will require careful thought and consideration to avoid traps for the unwary. With the PTO now being supported by user fees, the emphasis on generating revenue upon a per application basis as before is no longer relevant as the PTO can provide for new services and charge an appropriate fee. The advent of the IFW and computer based searching provide efficiencies that could not be imagined 40 years ago. All of these facts lead to the conclusion that the Compact Prosecution 1.0 policy of making every second office action final is outdated and needs to be replaced.

The hours per balanced disposal patent examiner productivity metric is also outdated. This metric first focuses examiners on how many of the 80 hours each pay period are chargeable to time spent on examining activities followed by a calculation as to how many "counts" they need for those hours. Productivity is measured every pay period with a mid-year performance review given to each patent examiner in April to discuss the patent examiner's performance for the first six months of the fiscal year. Each patent examiner then undergoes a full fiscal year performance review after the conclusion of the fiscal year in September. Patent examiners are eligible for cash awards for exceeding productivity and docket management expectations. For example, PTO management have changed the value of various counts in recent years to incentivize patent examiners to prioritize the initial examination of patent applications at the expense of picking up RCEs.

Over the years that have passed since the advent of Compact Prosecution 1.0 there has been minimal change to the patent examiner's productivity expectations. PTO management makes changes to the patent examiners' docket management criteria based in large part of which cases have policy priority. For example, when the current administration began its focus on reducing the number of unexamined patent applications, it changed the docketing system for RCEs so the examiners were no longer required to take an RCE up for action within two months of its filing. Instead RCEs are docketed such that a

COMPACT PROSECUTION 2.0

patent examiner need only take one RCE up for action every 1-2 months. This artificial dead zone is inconsistent with the "continued" part of a RCE.

Thus, the PTO can and has used the patent examiner's performance review and cash award programs to influence examiner behavior to implement its policy decisions as to work priorities. Despite the efforts over the last 13 years to reduce the unexamined patent application backlog under Compact Prosecution 1.0 using various manipulations of the patent examiner's count and docket management systems, the backlog remains high and is now accompanied by significant RCE and *ex parte* appeal backlogs.

Building upon the experiences of operating under Compact Prosecution 1.0, we propose a makeover of the current patent examination system to transition from Compact Prosecution 1.0 to Compact Prosecution 2.0. The goal of Compact Prosecution 2.0 is to increase efficiency by eliminating prosecution dead zones. The hallmark of Compact Prosecution 2.0 is, once a patent application is initially examined, the examination process continues without artificial stops until the case is allowed, appealed or abandoned. By keeping the case under constant consideration, it is believed that final resolution of the patentability issues will be more efficiently and effectively concluded. Complementary to the proposed Compact Prosecution 2.0 system, we also propose changes to the how patent examiner productivity and docket management are measured. In addition, changes are proposed to the manner in which a patent examiner's work product is reviewed and evaluated. All of the proposed changes are with one thought in mind—once started, prosecution does not come to an artificial stop or extended pause.

III. Proposed changes to the patent examination system

A. End Compact Prosecution 1.0 and shift to Compact Prosecution 2.0

We believe that the elimination of "final" rejections and the attendant after final practice is long overdue. The practice of making a rejection "final" is in essence an administrative convenience that allows the PTO and examiners to measure productivity. While such a time out in the examination process may have made sense during the era of paper files and 17 year term from date of grant, the practice now causes a needless disruption in the examination process. This especially seen in that after final practice on the part of patent examiners is all but extinct. One only needs to look at the RCE backlog to understand this and to look at the need of PTO management to provide patent examiners an additional three hours to consider after final submissions in the After Final Consideration Pilot 2.0 ("AFCP 2.0").¹

The PTO in recent years has encouraged interviews in patent applications to improve communications and assist in bringing about a prompt resolution of the issues in the case. Experience and statistics show that interviews are helpful in these regards. However, a patent applicant is not

¹ Use of the additional time provided in AFCP 2.0 is **optional** on the part of patent examiners. It is understood that a mandatory institution of the pilot program would need to be negotiated with POPA.

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entitled to an interview after a final rejection as a matter of right. In the majority of cases where an interview is granted the usual response from a patent examiner is to urge applicants to file an RCE in order to have any claim amendments considered, no matter how innocuous. It is especially frustrating to have an after final interview and believe that an agreement is at hand only to be told to file a RCE and then, not have the RCE promptly picked up for action. All too often the delay in picking up a RCE means that all positive momentum in the case has dissipated.

Compact Prosecution 2.0 promises to enhance efficiency by shortening the examination cycle and improving quality, ensuring that the examination process occurs while the subject matter is fresh in everyone's mind.

B. Compact Prosecution 2.0**1. Eliminate the dead zones**

By eliminating final rejections, the initial examination period will provide two office actions on the merits with amendment and/or presentation of evidence permitted after each office action as a matter of right. It is expected that initial examination fees would be adjusted to account for increased work of considering a full response to a second office action. If needed, a third office action will be issued. However, any response thereto must be accompanied by a RCE fee per 35 U.S.C. § 132(b). The RCE fee will provide two additional office actions with amendment and/or presentation of evidence permitted after each office action as a matter of right. Any response to each subsequent second office action must be accompanied by an increasing RCE fee.

Approval must be sought prior to all third office actions in the initial examination and each second office action in a RCE. It is understood that is a departure from present practice in terms of primary examiners but experience tell us that an independent, meaningful review of a case can be important.² Statistics show that a significant number of final rejections are ultimately determined to be in error through pre-appeal brief conference requests, appeal conferences triggered by the filing of an appeal brief and PTAB decisions reversing the examiner's rejection at least in part. With over 7,000 patent examiners and a robust hoteling program where patent examiners work in most part in isolation of each other, it is too much to expect that there will be consistency between art units and individual patent examiners, especially with significant changes in the law and the rapidity with which technology is advancing.

Approval of a proposed third (or fourth, fifth, etc.) office action would preferably be by way of a conference with the examiner and two neutral conferees. Conferees should have the authority to remove any pending rejection but the ultimate decision to allow claims would remain with the patent examiner.

² However, the departure would be consistent with current policy, see MPEP § 707.02 ("The supervisory patent examiners are expected to personally check on the pendency of every application which is up for the third or subsequent Office action with a view to finally concluding its prosecution.")

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It is believed that these conferences will promote collegiality and consistency. They also will provide constant feedback to patent examiners as to their patentability determinations and provide PTO managers with real time feedback as to the effectiveness of examiners in making patentability determinations. A cadre of independent conferees who are up to date on significant changes in patent law and jurisprudence as well as PTO policy and practice should noticeably decrease the overall pendency of patent application due to their informed judgments of the propriety of maintaining rejections. If these conferences are independent and meaningful, they will carry weight with patent applicants as they will understand that the issues have been independently considered. Such conferences should bring more "finality" to a case than does the present final rejection practice.

2. Interviews after the third office action in the initial examination and after initial office action in each RCE are expected

In keeping with the thought of narrowing and focusing the issues in a more expeditious manner, it is expected that interviews would be encouraged at this stage to avoid just another exchange of papers. Knowing that the office action has been vetted by the independent approval process, applicants will have a better idea which way the application should go so such interviews should be productive. A SPE should participate in each interview in cases handled by non-signatory authority examiners and it is suggested that a SPE can participate in interviews in cases handled by a primary examiner at the request of the primary examiner or applicant. Again, a collaborative process with meaningful input from all parties can only help to bring the examination process to an end.

3. Applicant may appeal to PTAB after second rejection under 35 U.S.C. § 134(a)

If Compact Prosecution 2.0 is adopted it is expected that the need for *ex parte* appeals will diminish. For example, there will be less incentive to appeal after the second office action since an applicant has already paid for a third office action with conference. In addition, the periodic meaningful conferences provided by Compact Prosecution 2.0 will provide useful input to both the patent examiner and applicant thereby allowing each to objectively evaluate the real strength of their respective positions.

Viewed another way, Compact Prosecution 2.0 provides a modified version of the current multi-stage appeal process by keeping the spirit of the pre-appeal brief conference yet providing ample reason to avoid an early appeal as the constant consideration of the case and improved review of office actions will provide an increased understanding of the issues and narrowing of the differences.

a) Applicant has the option of attending the Appeals Conference

If despite the more intense scrutiny by both the patent examiner and applicant, the case does go on appeal, we propose that applicant have the option of attending the appeal conference that is now held

internally to consider appellant's brief. This will help to enhance collaboration and avoid unnecessary appeals.

b) Applicant has the option of requesting mediation after receiving the Examiner's Answer

If applicant and the examining corps remain in disagreement and the application continues along the appeal trajectory, we propose that applicant have the option of requesting mediation after the briefing is completed. Given the large increase in the number of APJs, it is suggested that an individual APJ serve as the mediator. As needed, a conference between the patent examiner and applicant can be moderated by mediator. It is envisioned that the mediator be empowered to order withdrawal of any of the pending rejections but the ultimate decision to allow a patent application remains with the examiner.

IV. Proposed changes to patent examiners' count and docket management metrics

A. End the concept of balanced disposal

It is believed that using the "balanced disposal" metric has lost its usefulness and causes undue disruption and delay in completing an examination once started as the examiner is actually "rewarded" for stopping and then re-starting the examination. Instead, each patent examiner should be assigned an expectation of initially examining "X" number of unexamined cases per fiscal year.³ "X" should be based upon factors such as complexity of technology and applications; experience level of examiner; and historic analysis of the number of claims examined in the first office action on the merits in the art area as now used. Other factors will become apparent to ensure that "X" is a rational number.

This change will allow patent examiners to use their professional judgment as to how much time the initial examination of each application will need instead of the present assigned hours/balanced disposal, keeping in mind that "X" number of cases needs to be initially examined each fiscal year. The provision of a finite goal of new cases entering the pipeline each fiscal year provides incentive for examiners to resolve cases (abandonment/allowance/appeal) in the pipeline expeditiously in order to pick up new cases, thus, providing a more appropriate balance between new work and work in progress. It is envisioned that patent examiners would be eligible for cash awards for exceeding the "X" number.

B. End the concept of measuring examiner docket activity based upon a pay period

It is proposed that each response and office action be docketed in such a manner that the next office action is due no later than two-three months from the filing date of the response. Extending the deadline to three months from the current two months will allow the patent examiner to better balance

³ Alternatively, each examiner could be assigned an expectation of disposing of "X" number of cases per fiscal year, with disposals only be measured by appeals, abandonments and allowances. Both metrics encourage the examiner to resolve cases holistically rather than piecemeal.

workloads of new work and work in progress. Patent examiners should be eligible for cash awards as they approach a two month or better average response time.

It is also proposed that all office actions should be submitted for mailing/review no later than two-three months from the filing date of applicant's response, not by the end of the pay period where that date falls as is the present case. This is similar to applicant's deadline to respond to office actions and spreads the resources needed for processing the patent examiner's work product and SPE review thereof over a month instead of concentrating it during, or all too often at the end of the pay period. This would result in the elimination of so-called "Count Monday" where SPEs are inundated with work to review and approve. Procedures should be instituted including appropriate incentives to avoid end loading. SPEs should have at least 3-5 working days to approve all submitted work regardless of when it is submitted.

C. Institute an actions per disposal performance metric for patent examiners

An efficient patent examination system balances new work with work in progress. Measuring actions per disposal more accurately reflects true time it takes to dispose of an application and provides an accurate metric for measuring that balancing effort. As mentioned, the present hours per balanced disposal rewards examiners for artificially stopping and re-starting the examination process as well encouraging "tailoring" productivity by managing "counts" to fit the number of examination time hours per pay period. Emphasis should be on rewarding successful conclusion of the examination process in an effective and efficient manner instead of artificially "disposing" of an application by issuing a final rejection.

An added benefit of this metric would be the curtailing of the ubiquitous "additional" search for the mythical reference that is rarely found that currently routinely provides the reason for not entering an after final amendment or considering an after final submission. One focus of the prescribed conferences should be why any further search is needed except for a true update of the existing search. This will encourage a thorough search during the initial examination.

D. Docket the first continuation and divisional application based upon priority date

This will avoid needless term loss in continuations and term extension in divisionals under the safe harbor of 35 U.S.C. § 121. This action will provide the opportunity to pick these cases up while the parent examination is fresh, thus, providing more efficiency in the patent examination process.

E. Docket continuation-in-part, second and subsequent continuation and divisional applications based upon filing date

Since a continuation-in-part is in large part a new application, it should not receive priority in the examination queue. Further, applicants in second and subsequent continuation and divisional applications have by definition already obtained a complete examination of at least one application.

Thus, this provides an appropriate balance to reducing the unexamined case backlog versus continuing cases.

V. Proposed quality initiatives

A. Continue with present quality review of actions in real time with proposed office actions randomly selected and reviewed for quality purposes before the action is mailed

It is believed such a procedure, especially if performed by independent personnel outside of the TC, will provide significant input as to how well patent examiners are performing. Since productivity would no longer be measured on a count system and monitored based upon pay periods, the review can take place in an orderly, timely manner. This system would provide instant feedback to patent examiners and PTO management on quality of work. It is important that proposed office actions be reviewed prior to mailing and those determined to need revision are not mailed so as to not waste applicant's resources responding to an obviously deficient office action.

B. Establish an interim ombudsman program that helps resolve aggravated cases on the merits in real time

If the proposed conferences are implemented and are meaningful, the need for such a program would diminish over time. The present program requires QASs, ombudsmen and SPEs to defer to primary examiners which experience tells leads to a significant number of RCEs and *ex parte* appeals. Again, management authority is limited to directing the primary examiner to remove pending rejections. The ultimate decision as to allowing the case remains with the primary examiner but any subsequent proposed rejection should be reviewed by a manager.

C. Publish data that inform the patent community of how individual art units are performing in relevant prosecution and appeal areas

Such real time data will allow the patent community to recognize high achieving art units and temper expectations when cases are assigned to low achieving art unit. It will also ensure that the patent community is being provided with accurate data. Appeal decisions should be analyzed on an issue-by-issue and art unit-by-art unit basis to identify outliers and guide appropriate corrective action.

VI. Conclusion

Despite intense efforts over the past thirteen years through two administrations to lower the unexamined new case backlog, it remains stubbornly high and is now accompanied by high numbers of RCEs and *ex parte* appeals. The efforts over the years to lower the number of unexamined new cases have been based on making tweaks to Compact Prosecution 1.0. History tells us that Compact Prosecution 1.0 has run its course and it is time to change. Compact Prosecution 2.0 offers a break from the past system that has resulted in the present circumstances and provides a new path to accomplishing

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the twin goals of reducing the unexamined new case backlog and expeditiously concluding the examination process once it is started.

EXHIBIT B



September 8, 2014

The Honorable Michelle K. Lee
Deputy Under Secretary of Commerce for Intellectual Property and
Deputy Director of the United States Patent and Trademark Office
United States Patent and Trademark Office
600 Dulany Street
Alexandria, VA 22314

Via email: patent_pendency2014@uspto.gov

**Re: Response to the Request for Comments on Optimum First Action
and Total Pendency, 79 Fed. Reg. 38854 (July 9, 2014)**

Dear Deputy Under Secretary Lee:

The American Intellectual Property Law Association ("AIPLA") is pleased to have the opportunity to present its views on the United States Patent and Trademark Office ("Office") Request for Comments on Optimum First Action and Total Pendency as published in the July 9, 2014 issue of the Federal Register, 79 Fed. Reg. 38854 ("Request").

AIPLA is a U.S.-based national bar association comprising approximately 15,000 members that are primarily lawyers in private practice and corporate practice, government service, and the academic community. AIPLA members represent a diverse spectrum of individuals, companies, and institutions, and are involved directly and indirectly in the practice of patent, trademark, copyright, unfair competition, and trade secret law, as well as other fields of law affecting intellectual property, in the United States and in jurisdictions throughout the world.

The Request seeks public input on optimal first action and total pendency target levels. The current targets of ten month average first action pendency and twenty month average total pendency were established with stakeholder input in the development of the USPTO 2010-2015 Strategic Plan. The current request for comment stems from an initiative in the USPTO 2014-2018 Strategic Plan to "work with stakeholders to refine long-term pendency goals, while considering requirements of the IP community." The Office seeks comments on seven specific questions and welcomes any additional input regarding the optimal pendency goals.

AIPLA considers the optimization of patent quality and timeliness to be the most important goal for improvement of the U.S. patent system, and commends the Office for making this its paramount strategic goal for 2014-2018. While AIPLA fully supports the work of the Office in these critical areas, we also appreciate the opportunity to comment on the long-range goals of the Office in working toward the highest quality patent examination and grant system possible. Receiving a first office action on filed applications and completing prosecution within reasonable

timeframes are essential to a meaningful patent system, which in turn contributes to the economic growth and innovation in the United States. Patent pendency has always been an important issue to patent applicants, but is even more critical with the patent term of twenty years from the filing date. AIPLA has been encouraged by the progress made by the Office in the area of first action and total pendency towards the goals set in the USPTO 2010-2015 Strategic Plan, but we have some suggestions and comments for changes to the goals to better serve the needs of patent applicants.

1) Are the current targets of ten month average first action patent pendency and twenty month overall total patent pendency the right agency strategic targets for the Office?

Upon completion of the Strategic goals and setting of these targets, AIPLA endorsed the targets as reasonable timeframes for pendency of patent applications that would permit business decisions to be made by both applicants and the public. The time periods of ten months first action pendency and twenty months total pendency remain acceptable.

However, because those targets are averages and not absolutes, the relatively large backlogs of patent applications and different staffing levels within the Office have the unfortunate result that, while the average target across the whole Corps might be met, many individual technology offices will not meet these targets. Consequently, more uncertainty exists relative to actual timing of examination completion, and many applicants may be disappointed in the pendency of their applications.

The American Inventors Protection Act (AIPA) provides for patent term adjustment (PTA) for certain examination delays. As a matter of public policy as well as providing timely service for fees paid, setting pendency targets utilizing the PTA timeframes of 14-4-4-36 is a more desirable goal than the current average pendency targets. Specifically, setting a target that a certain percentage of applications meet the 14 and 36 month pendency targets creates targets grounded in legislative timeframes rather than the current arbitrary ten and twenty month average targets. Meeting the PTA timeframes in most applications will decrease the amount of PTA awarded to patents, provide greater certainty to the public about when the patent will expire and become available for public utilization, and drive more uniform pendency from one application to another. These targets are valuable to keep the applications moving through the Office and provide more concrete expectations for actual completion of each step of prosecution.

Without knowing the exact percentage of applications that currently meet the PTA timeframes, AIPLA has selected some numbers as targets to open this dialog. A suggested first action pendency target is that 80% of all applications will receive a first office action within 14 months and no more than 4% will receive a first office action later than 18 months. Then after two years, these could be increased to 90% of all applications receiving a first office action within 14 months and no more than 1% of applications receiving a first office action later than 18 months. Additionally, the targets should provide upper limits for completion of a first office action,

requiring that all applications receive a first office action by 22 months. This target should be adjusted downwards over time.

A suggested target for total pendency is for 80% of all applications to complete prosecution within 3 years with no more than 4% exceeding a total pendency of 4 years. After two years, these numbers could be increased to 90-95% of all applications completing prosecution within 3 years and no more than 1% of applications exceeding 4 years of total pendency. Even with extensions of time being utilized by applicants, the Office should be able to achieve the total pendency target because on average most prosecutions last about 12 months following a first office action.

In many other patent offices, a dialog transpires between the patent examiner and the applicant without any arbitrary forced break in prosecution. In the U.S., however, the procedures dictate that the second action is generally a final rejection, typically resulting in a significant hiatus in the process. It is believed that few amendments after final are entered, meaning that after final practice is nearly non-existent and even if a Request for Continued Examination (RCE) is filed, there is usually a long break before an office action is received on the RCE. These two periods result in significant delays in obtaining a patent and render the process less efficient because momentum and some knowledge are lost with each hiatus. To drive prosecution and decrease total pendency, it is suggested that fundamental changes in the patent prosecution process need to be made to eliminate these gaps in the patent prosecution timeline.

Returning RCEs to their status as amended applications on the examiner's dockets would help provide this continuous timely dialog, drive down the backlog of RCEs and maintain the level of RCEs at a reasonable level. An RCE is in fact a Request for Continued Examination and a quicker continued examination is beneficial for both applicants and the Office because the details of the application are still fresh in the minds of all participants in the process. Alternatively, setting a target of issuing an action on the RCE within four months of filing, thus eliminating PTA, would also make a more efficient process. This should not be set as an average goal, but rather the Office should require that all RCEs are completed within four months of filing.

In addition, allowing the applicant on the filing of an RCE to request that an interview with the examiner be held prior to issuing an office action, other than a Notice of Allowability, would also serve to enhance dialog between the Office and the applicant.

AIPLA appreciates the programs begun by the Office to provide more options for applicants. Among these, the AFCP 2.0 program is noted as a good start toward facilitating more flexible handling of after final amendments. However, it has been the experience of many practitioners that few of these requests lead to entry of the after final amendment. It is suggested that this pilot be made permanent and that examiners be encouraged to enter more of these amendments. It is understood that some amendments propose limitations that are significantly different than the previous concepts which were examined, and therefore might be more appropriate for consideration in an RCE. In many instances, however, even minor amendments are refused entry and this seems to undermine the entire AFCP 2.0 program and concept. For example, an

amendment which combines the limitations of two separate dependent claims (i.e., neither depended from each other) into the independent claim should not raise new issues that require further search. Since each claim should already have been searched, consideration of the combination of two claims should typically not entail a significant additional effort.

Additionally, some believe that too many final rejections are premature, thus effectively cutting off applicant's opportunity to advance prosecution without filing an RCE. It is believed that in some instances a complete first action search is not performed, but the final rejection includes new prior art which could have been applied against the claims in the first action. Improving the first action searches to ensure application of all pertinent prior art would assist in pendency reduction.

Another suggestion for pendency reduction is to permit applicant participation in pre-appeal and/or appeal conferences. The Office statistics themselves demonstrate the effectiveness of interviews in advancing to allowance, and anecdotally, even more progress appears to occur when several Office employees participate in the interview. The ability to have the perspectives of several other examiners along with the examiner of record would assist in advancing prosecution, reducing the need for filing RCEs and reducing appeals to the Patent Trial and Appeal Board (PTAB).

In addition to ensuring faster handling of RCEs (as amended applications or within four months of filing), it is suggested that completing prosecution without the need for RCEs is a good objective. Applicants have a part to play in the process of ensuring that the claims at filing are complete, understandable, and of reasonable scope compared to the prior art. However, the current count system incentivizes examiners to not consider after final rejections, but rather to require that an RCE be filed to continue prosecution. Efforts should be made to incentivize considering after final amendments and to discourage examiners from requiring RCEs. Perhaps reducing the credit for RCEs might assist in this effort. Providing some incentives for telephoning applicants to work out details and get to allowance faster could reduce pendency.

Alternatively, changing the process to permit two responses to be entered as a matter of right instead of only one before an RCE must be filed would aid in advancing prosecution, help in establishing a continuous dialog between the Office and the applicant, and hopefully decrease the need for filing RCEs and appeals to the PTAB. If the process is modified to permit more actions in an application, it is believed that fewer RCEs will be filed and the Office can balance actions on RCEs and new applications.

The changes to the count system now provide credit for final rejections. The Office should examine what effects, if any, this has had on the number of final rejections being made compared to the many years when final rejections did not receive any credit. Incentives for a particular result often encourage that result.

2. Should the measure of pendency be the current average or should the measure be a percentage of applications meeting the targets?

As noted above, averages are problematic. While the target of ten months first action pendency on average might be met, there could be a significant range of pendencies across various technological areas with large numbers of applications not achieving the stated target. This leads to applicant frustration, uncertainty and a lack of concrete expectations about when one can expect a first office action.

The use of percentages of applications being completed within stated timeframes would give applicants a better idea of when to expect action on his/her application. Such targets must be coupled with another target to form a range of dates (upper and lower dates) for completion of the vast majority of applications. In addition, there should be a target by which all applications must receive a first office action. For example, suggested targets for first action pendency could be completion of 80% of all applications within 14 months and no more than 4% of applications being completed later than 18 months, with an upper limit of 22 months for completion of a first office action in all applications. These targets should be increased over a few years to increase the percentages to 90% and 95%, lowering those above 18 months to 1% or 0.5%, and lowering the date for completion of all applications. This would afford applicants better alignment of their expectations and what the Office promises to deliver.

3. Should the Office consider more technology level pendency targets? Should all Technology Centers have the same pendency target?

While it is true that some industries are more interested in receiving quick patents than others, it is also true that within technologies, some applicants want fast patents and others wish for slower patents. Fortunately, the Office already provides Track One, which permits an applicant to receive very fast action on their application by paying a fee. Consequently, speed of activity is already available to those applicants desiring a quicker prosecution. For that reason, and also because the Office should have consistent goals across technologies without favoring one technology over another, we believe the goals should not differ among technologies. It would be unfair to designate some technologies as faster than others because there are legitimate differing desires for timing even within the same technology. Start-up companies in biotechnology and pharmaceutical compositions, for example, frequently want a quick patent to attract funding. Thus, we believe the targets for all technologies should be uniform.

4. Should the Office utilize PTA as targets, for example, tie first action pendency to a percentage of applications being completed within 14 months? Should the Office utilize other PTA timeframes as targets?

Yes, see answers to questions 1 and 2 above.

Also, currently, action on applications is being driven by a series of artificial goals and timeframes with the results not necessarily satisfying either the applicants' or the public's needs

and expectations. As a result of large backlogs, many applications are currently receiving significant amounts of patent term adjustment, an outcome that is not in the interest of the public who expect a patent term to end twenty years after the filing date. The goal of achieving 10 months average first action and twenty months average total pendency does not address the mandate set by Congress of achieving certain timeframes or providing PTA extending the patent term. Applications currently are placed on certain examiner dockets and picked up in turn based on their effective filing date without taking into account the amount of PTA which might accrue on each application given that order of action. For example, Continuations (CONs) and RCEs are on the same docket and handled according to the effective filing date of each application. CONs, however, begin accruing PTA 14 months after the filing date, while RCEs (technically amended cases) begin receiving PTA 4 months after the filing date of the RCE. To reduce PTA, RCEs should be picked up for examination quicker than CONs because the PTA begins to accrue sooner after filing than for CONs.

A better goal for pendency is to focus on reducing pendency for first office actions on the merits, overall pendency, and also importantly reducing PTA given to applications. Prioritizing the actions on applications based on the amount of PTA which would accrue is a goal which addresses all applications without allowing any technology to languish and form a backlog, while other technologies groups are handled preferentially.

The PTA timeframes set forth by Congress address most application pendency times within the Office. Therefore, setting the goal of reducing PTA given in applications necessitates action in all groups of applications. Ideally, goals should address the applications during various stages of the examination process, including having a goal of 4 months to first action for RCEs. This focus would address several aspects of pendency:

- (1) it focuses on the Congressional mandate of examination timing;
- (2) it is better public policy because it reduces the PTA provided in patents and thus results in more certain patent terms and the ability of the public to utilize the technologies being disclosed;
- (3) it addresses the interest and needs of applicants to get quicker action on their applications; and
- (4) it translates to better actual time for first action and total pendency for all applications because it does not consider pendency as an average across all applications and technology centers.

Granting PTA in applications should be the exception, not the rule.

5. Would the benefits of a prompt first action outweigh potential concerns of the Office action being issued too quickly due to the possibility of "hidden" prior art ?

More transparency of Office processes and capabilities is needed to fully answer this question. Having a complete search of the prior art, including that which is not yet published, is desired to reduce the instances of a patent issuing on an invention disclosed earlier by another inventor.

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Receiving a first action allowance only to later discover that there was unpublished prior art that was not applied would frustrate the patent owner and undermine the patent system. As the first action pendency is reduced, the Office should provide more explanation of their capabilities and systems for examiners to perform the searches of the internal files of submitted patent applications to ensure that such analysis is done prior to the issuance of patents.

Having a prompt first action is the desired outcome, but ensuring quality examination is paramount.

Applicants who are concerned about hidden prior art may file a petition for deferred examination under 37 C.F.R. §1.103(d) to ensure that the examiner has access to all relevant prior art before examination commences.

6. Should the Office be cautious about going too low in first action pendency because patent application filing could be affected by recent case law, uncertainty around user fees or global IP activities?

Case law has been in almost constant fluctuation recently but examination must continue taking into account the current state of the art and case law. Adjustments can be made when new law is made which changes the approaches that must be taken for claimed subject matter.

To be sure, setting the pendency targets must be done to allow for variations in filing rates to ensure that the Office does not run out of work. However, setting the targets consistent with PTA timeframes should permit the Office sufficient numbers of applications to allow a "soft landing," that is, achieving the goals while maintaining an adequate inventory of applications per examiner. Indeed, a target linked to PTA is likely better in this regard than the current average goals because averages drive some areas with very low pendency to make up for the areas with higher pendency.

The Office should move forward with setting targets despite the changing case law and some uncertainty about filing rates.

7. What other metrics should the Office utilize to measure pendency or timeliness throughout the prosecution process? What metrics should be measured for RCEs and should these be applied to Continuations, continuations-in-part or divisionals?

The goals of 10 and 20 months for pendency do not take into consideration the pendency from filing to receiving an action or the total pendency of RCEs. Considering that roughly one-third of all applications filed are RCEs, the Office should set a target for providing an action in those applications as well. As noted above in the answers to questions 1 and 2, setting a goal consistent with the PTA mandate of achieving an action within four months is an acceptable goal, although returning the RCEs to the amended docket is preferable.

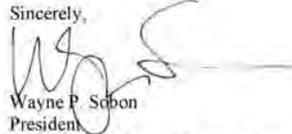
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Current total pendancy numbers reported by the Office as the main total pendancy do not include RCEs, which are a very significant number of the applications being filed and examined by the Office. When an RCE is filed, there is an abandonment credited to the examiner, and pendancy of that application ends for inclusion in the Traditional Total Pendancy statistics. Any subsequent pendancy¹ time for the RCE is not captured in the Traditional Total Pendancy calculations, but rather is reported as a separate RCE statistic and in another statistic called Traditional Total Pendancy Including RCEs. Because the pendancy numbers have traditionally not included the RCEs, AIPLA acknowledges that including them now might be challenging. It is suggested that, however, at the very least, the numbers including RCEs should be reported along with the traditional numbers, not just shown on the Dashboard. Additionally, the Office should report serialized filings, which are filings that are not RCEs, to reflect a truer picture of actual new invention development. The Office should also consider transitioning to metrics that treat RCEs as actual continued examination processing rather than as a new application filing to better reflect the true purpose for establishing the RCE program. The RCEs should not be placed on the same docket as new applications because technically, they are amended applications, not new filings.

* * *

AIPLA appreciates the opportunity to comment on the Request for Comments on Optimum First Action and Total Pendancy. We look forward to further dialog with the Office with regard to the issues raised above.

Sincerely,



Wayne P. Sobon
President
American Intellectual Property Law Association

¹ It is our understanding that RCEs are counted as new applications at filing, but not included in the backlog numbers because they are already examined (so considered amended applications) and then placed on the examiner's docket with continuations and divisional as continuing new applications. It is also believed that in the past RCEs were picked up according to their actual filing date, but to reduce the backlog of RCEs they are now handled according to their effective filing date.

EXHIBIT C



September 15, 2014

The Honorable Michelle K. Lee
Deputy Under Secretary of Commerce for Intellectual Property
and Deputy Director of the U.S. Patent and Trademark Office
600 Dulany St.
Alexandria, VA 22313-1450

Via email: patent_pendency2014@uspto.gov

Re: IPO Comments on "Request for Comments on Optimum First Action and Total Patent Pendency," Federal Register, Vol. 79, No. 131, July 9, 2014

Dear Deputy Director Lee:

The Intellectual Property Owners Association (IPO) submits the following comments in response to the request published in the Federal Register on July 9, 2014.

IPO is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in intellectual property rights. IPO's membership includes more than 200 companies and over 12,000 individuals who are involved in the association either through their companies or as inventor, author, executive, law firm, or attorney members.

We want to congratulate the Office on its diligent efforts in recent years to address patent application pendency. Our comments are directed to patent application pendency and the seven specific issues requested in the Federal Register notice. Thank you for this opportunity to comment.

A. Patent Application Pendency

The PTO has historically measured two types of patent application pendency to guide the examination process—average first action patent pendency and average total pendency.

Average first action pendency is a relevant metric, but it would be most useful on a technology center or narrower basis. Patent applicants need reliable information to plan and budget prosecution expenses in specific art areas, not on an Office-wide basis. A more reliable basis for planning budgets and business activities based upon an expected first office action in a specific technology area will allow for better assignment of resources by patent applicants.

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Average total pendency, which is the initial pendency of a patent application until issuance, abandonment, or the filing of a first request for continued examination (RCE), may be less useful. Average total pendency is not relevant to the extent that it continues to include pendency until the filing of a first RCE. The goal of patent applicants is to receive a valid, enforceable patent in an efficient examination process that does not impose arbitrary stops and unnecessary expense. The manner in which the examination system has evolved with the advent of RCEs and the emphasis of reducing the new case unexamined backlog has resulted in historic levels of RCEs and *ex parte* appeals despite higher fees and a large increase in the number of patent examiners.

The PTO should take this opportunity to review the entire examination process and consider the vast changes in law and technology that have occurred since compact prosecution was introduced in the late 1960s. Today it is more useful for patent applicants to know the average pendency of patent applications from initial filing to ultimate allowance or abandonment without regard to how many RCEs have occurred between those two points in time. IPO recommends publication of this data on an art unit or technology center basis. The PTO should also adopt this metric in measuring performance of patent managers and examiners.

IPO also recommends publication of a metric that measures the average patent term adjustment (PTA) for granted patents on an art unit or technology center basis. This data would be of interest to patent applicants, industries, and the public.

B. Specific Questions from the Federal Register Notice

1. Are the current targets of ten month average first action patent pendency and twenty month average total patent pendency the right agency strategic targets for the USPTO, stakeholders, and the public at large?

Further outreach may be needed to determine a so-called "optimal" first office action pendency as pendency before a first office action involves a tradeoff between the desire to receive an early first office action and the risk of later finding prior art that was unpublished at that time or subsequently uncovered by other IP offices.¹

Patent applicants already have options like Track 1 to receive a first office action out of normal order. The PTO should develop other programs to give patent applicants flexibility in being able to have early first office actions when needed. The tradeoff between a relatively later first office action based upon a more complete view of the prior art as opposed to a quicker first office action is one that is best made by the patent applicant based upon its perceived needs.

Moreover, the target of issuing a first office action based upon a thorough search is important but needs to be based upon the circumstances of a given art area. In certain art areas, the issuance of a relatively quick first office action that cites the most relevant prior art can be important to patent applicants in determining whether a patent application should be published. In other art areas it may be more important to receive search results from other patent agencies and begin prosecution from a more comprehensive understanding of what the relevant prior art is.

This is not to say that each patent application should not receive a high quality search at the PTO. To provide the needed flexibility, the PTO should continue to improve the search capabilities

¹ It might be more efficient for the PTO to modernize the current version of compact prosecution as outlined below and then optimize pendency parameters based upon the modernized system.

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of patent examiners both in terms of access to relevant databases and increased training and mentoring so that all patent examiners can use the limited time assigned to each patent application for search and examination to its fullest extent.

IPO suggests that the PTO explore new avenues for a patent applicant to receive an earlier than normal first office action accompanied by a high quality search. For example, patent applicants who have a demonstrated need for an advanced first office action in order to be considered for or receive capital funding might be considered for an earlier first action. Any fees needed to advance the prosecution for such reasons should be less than the fee charged for a Track 1 filing.

A metric that measures "total" pendency without taking into account the time that RCEs take, e.g., the current target of twenty month average total patent pendency, is less meaningful. To the extent that it is of interest, IPO believes that this metric should not be applied as a one-size-fits-all standard.

2. **Should the USPTO have first action pendency and total pendency targets be met by nearly all applications (e.g., 90 or 95 percent of applications meeting the pendency target) rather than an average first action pendency and total pendency targets?**

As discussed above, IPO believes that the first action pendency should not be office-wide, but should be on an art unit or technology center basis. IPO takes no position on whether the metric should be changed from an average to a given percentage of applications, noting that the PTO should be able to measure and publish metrics based upon any basis that the public finds to be useful. The published metrics need not be limited to a single metric if other metrics are seen to be widely useful.

3. **Should the USPTO consider more technology level patent pendency targets, for example, at the Technology Center level? If so, should all the Technology Centers have the same target?**

As discussed above IPO believes that the metrics should be on an art unit or technology center basis. There is no reason for a pendency target that is common to all technology centers. Rather, further outreach and input should be solicited based upon art areas to see if tailored pendencies are appropriate, taking into account the complexity of the art area as well as the business needs of the relevant patent applicant.

4. **PTA considerations.**

IPO believes further attention to this issue is warranted after the PTO publishes current data on the average PTA awarded to patents on an art unit or technology center basis. Patent applicants working in art areas that have market-ready products having rapid improvement cycles and/or short product lifetimes are typically not aided by PTA, while patent applicants in art areas that have longer development times before a product is ready to market and/or products that have a long market lifetime are aided by PTA.

IPO also suggests that the PTO develop and publish data on the so-called "A," "B," and "C" delays incurred in granted patents on a technology center or art unit basis. PTA is of concern to the public as well as patent applicants and breaking down the PTA data by way of specific delays will

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allow the PTO, public, and patent applicants to identify where the patent examination system needs improvement in order to minimize PTA.

a. Should the USPTO consider using a first action pendency target tied to minimizing the number of applications in which a first action is not mailed within fourteen months?

IPO favors the PTO measuring and making public more data, rather than less, in regard to the various stages of the patent examination process. IPO is concerned, however, that published PTO metrics that become standards for evaluating the performance of managers and patent examiners tend to skew the path of the patent examination process as managers and patent examiners strive to meet the newly emphasized metrics. For example, the number of RCEs and *ex parte* patent appeals exploded when the Office emphasized the metric of reducing the unexamined new case backlog.

Common sense indicates that patent applicants viewed the quality of the first office actions issued in the effort to reduce the unexamined new case backlog to be less than optimal. Thus, any increased emphasis on reducing the time to first office action must be accompanied by additional training and supervisory resources to ensure that those first office actions are meaningful and of appropriate quality. It is difficult for the patent examination process to recover from a less than meaningful first office action as it typically takes a first RCE to get the case on track and subsequent RCEs to make meaningful progress.

b. Should the USPTO also consider using some of the other PTA specific timeframes for their optimal pendency targets?

IPO believes that the patent community and the public would be interested in a metric that provides data on an art unit or technology center basis in regard to the amount of patent term that is lost during examination of RCEs that is not recoverable by way of PTA. Given the large increase in the number of RCEs and the docketing changes made that have resulted in increasing time before RCEs are picked up for resumed examination by patent examiners, many patent applicants are needlessly forfeiting patent term because of the manner in which RCEs are docketed and examined. Knowledge of such data will allow the PTO, stakeholders, and the public to engage in a conversation as to how RCE examination can be made more efficient.

5. Would the benefits of a prompt first Office action outweigh potential concerns of the Office action being issued too quickly?

One benefit of a prompt first office action is that if it is issued in time to prevent publication of the application the patent applicant will have the opportunity to abandon the application prior to publication and maintain the technology as a trade secret. Providing a patent applicant with a meaningful first office action can eliminate incentives for the patent applicant to fight for marginal patents because the invention is now public. Fewer published patent applications will take away guess work as to the ultimate scope the claims provided in published publications and can minimize intervening rights issues upon publication.

However, the issuance of a first office action in order to meet an artificial goal set by the PTO that is less than optimal does not help the patent applicant, the public, or the agency.

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6. **There have been suggestions that many changes are occurring in the IP system, and the USPTO should be cautious at this point in time to avoid going too low in first action pendency. The USPTO welcomes comments on these potential concerns.**

a. Some potentially significant case law decisions are pending which may impact large categories of inventions and possibly lead to reduced patent filings.

Given the continuing significant unexamined new case backlog, IPO believes that the effect of any reduction in new case filings is years away. This issue should be revisited if such a reduction occurs.

b. It has been just over one year since patent fees were adjusted. See Setting and Adjusting Patent Fees, 78 FR 4211 (January 13, 2013). User practices and business decisions based on the adjusted fee levels may not have stabilized yet.

IPO believes that this is a valid concern but one that must be viewed in the context of the overall cost of prosecuting patent applications in the current environment of the need for numerous RCEs and *ex parte* appeals. The more efficient the current system can be made, the more resources patent applicants can devote to filing more new applications.

c. There is a lot of activity in the global IP arena which may impact patent filing activity and IP practices in the United States.

As mentioned above, given the continuing significant unexamined new case backlog, the effect of any reduction in new case filings is years away. This issue should be saved until such a reduction occurs as it is unclear how global IP activity will affect new case filings in the future.

7. **In addition to seeking public input on optimal patent first action and total pendency levels, the USPTO also is interested in knowing if there are other activities where pendency or timeliness should be measured and reported. While the USPTO reports on a number of different patent pendency measures displayed on the Data Visualization Dashboard of the USPTO's Internet Web site (www.uspto.gov):**

a. What other metrics should the USPTO consider utilizing to measure pendency or timeliness throughout the examination process?

The PTO should make public the actual pendency data as measured from the date of filing of the patent application to the ultimate grant as a patent or abandonment of the patent application including the time spent for all RCEs on an art unit or technology center basis.

b. Specifically regarding RCEs, what other metrics should the USPTO consider utilizing to measure the pendency or timeliness regarding RCEs?

Given the large increase in the number of RCEs and the docketing changes made that have resulted in increasing time before RCEs are again picked up for resumed examination by patent examiners, it is believed that many patent applicants are needlessly forfeiting patent term because of

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the manner in which RCEs are docketed and examined. Knowledge of such data will allow the PTO, stakeholders and the public to engage in a conversation as to how RCE examination can be made more efficient.

c. Should these metrics also be considered for other continuing-type applications (i.e., continuation, continuation-in-part, and divisional applications)?

Yes, these metrics should also be considered for other continuing-type applications including continuation, continuation-in-part, and divisional applications.

C. Suggestions to Improve Quality and Pendency

I. Modernize compact prosecution

IPO applauds the PTO's initiative in reaching out to the patent community concerning pendency issues. This initiative is based on the current patent examination process, however, which we believe needs to be modernized if the PTO is going to make meaningful progress in improving pendency and quality. The current version of "compact prosecution" has been in effect since the late 1960s, and at least since the 1980s has been premised on nearly every second office action being a "final" rejection. In the five decades in which compact prosecution has been the standard, significant changes have occurred in technology and patent law as well as the number and the work locations of patent examiners. Modern biotechnology and the advent of the digital age have added many challenges to the efficient administration of the patent system, yet the basic process that determines in large part pendency and quality, "compact prosecution," has not been revisited in any fundamental way.

Although the PTO has changed various productivity and docket management elements of the patent examiner's Performance Review Plan and various cash bonus programs in an attempt to influence patent examiner behavior, the PTO has not adapted compact prosecution to the changing legal and technical environment. The PTO should modernize the compact prosecution examination regime to take into account the changes that have occurred in the patent system. In so doing, the PTO should identify and eliminate artificial roadblocks in the current systems that can put a patent application in a status on a patent examiner's docket where it can languish for months and years without any activity after the initial examination. By keeping a patent application constantly in front of the patent examiner, the examination process can become a continuing conversation between the patent examiner and applicant directed to finding patentable subject matter.

Today's after-final practice is problematic and can delay the time in which a patent application is put in front of the patent examiner for actual consideration of an after-final submission. If RCEs are docketed to patent examiners such that they need to be picked up for consideration within two months of filing, the patent examination process becomes a continuum where patent examiners and applicants remain focused on the details of the case and can guide it to an ultimate conclusion. The patent examination process needs to become more seamless.

IPO understands that under the current count system by which the productivity of patent examiners is measured, the filing of an RCE awards the patent examiner with an "abandonment" count and another count when the first office action is issued in the RCE. We believe the present count system needs review.

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In modernizing the present compact prosecution system, IPO believes it is important for experienced PTO managers to become involved on the merits of cases where the initial efforts of the patent examiner and applicant have resulted in a stalemate. The sooner such resources can be involved in a case, the sooner a reasonable conclusion can be reached. This is especially important in view of the number of patent examiners that have been hired and will be hired in the near future. Although the current telework program has benefits for the office, it appears to make it difficult to schedule in-person interviews with patent examiners and their primaries or SPEs. Also, there have been significant changes in patent law including the advent of the AIA and recent Supreme Court cases. In light of these changes, personal access to the examiner and the primary examiner and/or SPE is now more important for minimizing pendency and increasing quality.

IPO realizes that modernizing compact prosecution and the metrics by which a patent examiner's performance is measured must be done in consultation with the patent examiners' labor union, the Patent Office Professional Association ("POPA"). IPO believes a modernized system where a patent examiner can take possession of a case upon initial examination without the system imposing unneeded start and stops in the process will be attractive to patent examiners. The record number of RCEs and *ex parte* appeals pending, along with the large number of patent examiners that have been and will be hired, are strong evidence that compact prosecution needs to be modernized.

IPO stands ready to assist with any efforts the PTO makes toward modernization.

2. Improve petition practice transparency and timeliness

The Office of Petitions could improve its responses to inquiries regarding petition status and expected date of decision. IPO has been made aware of petitions that have languished before the Office of Petitions for years only to have events overtake the case. Responses to phone inquiries to the Office of Petitions are often answered with the message that the petition is pending but no estimate as to when it will be picked up for decision is given. Such undue delays can needlessly lead to extended RCEs and pendency as prosecution moves forward. IPO suggests that the operation of the Office of Petitions be reviewed and improvements be considered such as providing an acknowledgement of receipt of the petition and an estimated time frame for its decision. IPO also suggests that decisions on petitions be posted on the PTO website in a searchable manner similar to PTAB decisions to enhance transparency and consistency with respect to the merits.

* * *

IPO thanks the PTO for considering these comments and would welcome any further dialogue or opportunity to provide additional information to assist in the Office's efforts on application pendency issues.

Sincerely,



Herbert C. Wamsley
Executive Director

Material submitted by the Honorable Jackie Speier, a Representative in Congress from the State of California, and Member, Committee on Oversight and Government Reform

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No. CB1208960027U1

SPECIAL COUNSEL,
ex rel. John L. Deans

v.

DEPARTMENT OF TRANSPORTATION,
OFFICE OF INSPECTOR GENERAL

PETITION FOR ENFORCEMENT

The Special Counsel (OSC) hereby files this Petition for Enforcement of the Board's stay Opinion and Order issued in this matter on May 23, 1996, under the provisions of 5 C.F.R. § 1201.182(b).

I. Background

On May 23, 1996, Board Vice Chair Beth S. Slavet stayed the removal of special agent, criminal investigator, John L. Deans for 45 days, i.e., through and including July 7, 1996. Vice Chair Slavet ordered the Department of Transportation Office of Inspector General (hereinafter "the agency") to place Deans back into a GS-1811-12, Special Agent, Criminal Investigator, position in Denver, Colorado.

II. The Noncompliance

On June 4, 1996, Deans informed OSC that he has not been returned to his former GS-12 special agent, criminal investigator, position in Denver, Colorado. Instead, on June 3, 1996, Deans was informed telephonically by agency San Francisco office Special Agent in Charge James Baldwin that Deputy Assistant Inspector General (DAIG) for Investigations Todd Zinser had directed that Deans be placed on administrative leave from May 23 through July 7, 1996. Baldwin also reported to Deans that Zinser wanted Deans to remain on standby so that he could be subjected to a drug test, physical examination, and security clearance update. See affidavit at Attachment 1.

This agency action, placing Deans on administrative leave for the duration of the 45-day stay, does not conform to the Board's order which mandates that Deans be returned to a GS-12 special agent, criminal investigator, position in Denver. Placing Deans on administrative leave contravenes the purpose of the stay which is to preserve the status quo ante and minimize the adverse consequences of the prohibited personnel practice while the matter is being resolved. Thus, Deans must be returned to active duty status, not placed on administrative leave, to preserve the status quo. Special Counsel v. I.R.S., 65 M.S.P.R. 146, 148-149 (1994).

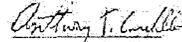
III. Conclusion

The agency's DAIG for Investigations, Todd Zinser, is averse to returning Deans to his GS-12 special agent, criminal investigator, position in Denver. The Board should order Zinser to immediately assign Deans the duties of his former GS-12 special agent, criminal investigator, position. 5 U.S.C. § 1204(a)(2). Moreover, under the provisions of 5 U.S.C. § 1204(e)(2)(A), the Board should order that Todd Zinser not receive payment for service as an employee from May 23, 1996, until Deans is returned to his former position, i.e., until the agency complies with the Board's May 23, 1996, Opinion and Order.

Respectfully submitted,

Kathleen Day Koch
Special Counsel

William E. Reukauf
Associate Special Counsel
for Prosecution


Anthony T. Cardillo
Attorney

Office of Special Counsel
Dallas Field Office
1100 Commerce Street
Suite 7C30
Dallas, Texas 75242
(214) 767-8871
FAX (214) 767-2764

Dallas, Texas
June 6, 1996

Affidavit

I, Anthony T. Cardillo, Attorney, Dallas Field Office, U.S. Office of Special Counsel (OSC), 1100 Commerce Street, Suite 7C30, Dallas, Texas 75242, make the following statement under oath:

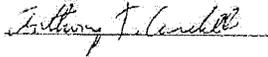
I am the Prosecution Division attorney assigned to Special Counsel, ex rel. John L. Deans, v. Department of Transportation (CB-1208-96-0027-U-1). On Tuesday morning, June 4, 1996, I spoke with John Deans by telephone. Mr. Deans advised me that he had spoken with James Baldwin, the Department of Transportation Office of Inspector General Special Agent in Charge of the San Francisco Field Office. Mr. Baldwin informed Mr. Deans that Deputy Assistant Inspector General for Investigations Todd Zinser had telephoned him on Sunday evening, June 2, 1996. Mr. Zinser told Mr. Baldwin to inform Mr. Deans that he would be placed on administrative leave from May 23 through July 7, 1996. Mr. Zinser also directed Mr. Baldwin to inform Mr. Deans to remain on standby during this 45-day period so that he could be subjected to drug testing, a physical examination, and a security clearance update. Mr. Baldwin conveyed Mr. Zinser's orders to Mr. Deans in a telephone conversation on June 3, 1996.

On the afternoon of June 4, 1996, I telephoned agency representative Roger P. Williams to inform him that I would be filing a Petition for Enforcement because Mr. Zinser had not complied with the Board's order to put Mr. Deans back into his former GS-12 special agent, criminal investigator, position. The secretary who answered the phone indicated that Mr. Williams was unavailable. I told her that I

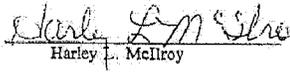
would like Mr. Williams to return my call, and if he did not return my call by close of business on Wednesday, June 5, 1996, I would be filing this petition.

Mr. Williams did not telephone me on June 5, 1996.

I, Anthony T. Cardillo, have read this statement consisting of two pages. I fully understand the contents of the entire statement made by me. The statement is true and complete to the best of my knowledge and belief. I have made this statement freely without hope or promise of benefit or reward, without threat of punishment, and without coercion.



Subscribed and sworn before me, a person authorized by law to administer oaths, this 4 day of June 1996 at Dallas, Texas.


Harley J. Mellroy



The Special Counsel

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

May 20, 1996

The Honorable A. Mary Schiavo
Inspector General
Department of Transportation
400 Seventh Street, S.W.
Room 9210
Washington, DC 20590

Re: *OSC File No. MA-95-1615*

Dear Ms. Schiavo:

Pursuant to 5 U.S.C. § 1214(a)(1)(A), the Office of Special Counsel (OSC) conducted an investigation into allegations that John L. Deans, a GS-12 Criminal Investigator with the Department of Transportation, Office of Inspector General, Lakewood, Colorado was removed from federal service because he made protected disclosures and exercised his first amendment freedom of speech rights.

Upon review of the information obtained during our investigation, I have determined that there are reasonable grounds to believe that Mr. Deans was removed from federal service because of his protected activity in violation of 5 U.S.C. § 2302(b)(3) and (b)(11). Accordingly, as required by 5 U.S.C. § 1214(b)(2)(A), and in keeping with your responsibilities under 5 U.S.C. § 2302(c) to prevent such violations within your agency, I am reporting my findings to you and hereby recommend that you take corrective action to return Mr. Deans permanently to the position from which he was removed and to otherwise make him whole. Today, I am also asking the Merit Systems Protection Board to order a stay of Mr. Deans' removal for 45 days under the provisions of 5 U.S.C. § 1214(b)(1)(A). Enclosed is a report of prohibited personnel practices which sets forth OSC's factual and legal determinations in this matter.

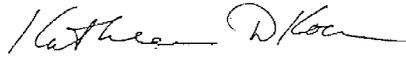
ATTACHMENT

The Special Counsel

The Honorable A. Mary Schiavo
Page 2

Please respond to this recommendation no later than 30 days from receipt of this letter. See 5 U.S.C. § 1214(b)(2)(B). If you do not take corrective action within a reasonable time, I may request the Merit Systems Protection Board to order such action. Thank you in advance for your personal attention to this matter. Your designee may contact Anthony Cardillo, an attorney on my staff at (214) 767-8871.

Sincerely,



Kathleen Day Koch

Enclosure

cc: The Honorable Ben L. Erdreich
The Honorable James B. King

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No.

SPECIAL COUNSEL,
ex rel. John L. Deans

v.

DEPARTMENT OF TRANSPORTATION
OFFICE OF INSPECTOR GENERAL

CERTIFICATE OF SERVICE

I, David J. Gorman, an attorney with the Office of Special Counsel, hereby certify that on this day I served the Special Counsel's Request for Stay of Personnel Action on the following in the manner indicated:

Federal Express Overnight Delivery

Roger P. Williams, Esquire
Department of Transportation
Office of Inspector General
400 Seventh Street, S.W.
Suite 9210
Washington, D.C. 20590

Regular Mail

Mr. John L. Deans
c/o Jerre Dixon, Esquire
Dixon and Snow, P.C.
425 South Cherry Street
Suite 1000
Denver, Colorado 80222


David J. Gorman
Attorney

Office of Special Counsel
1730 M Street, N.W.
Suite 300
Washington, DC 20036-4505

May 20, 1996

RECEIVED

MAY 23 1996

DIXON & SNOW

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No.

SPECIAL COUNSEL,
ex rel. John L. Deans

v.

DEPARTMENT OF TRANSPORTATION
OFFICE OF INSPECTOR GENERAL

Request for Stay of Personnel Action

I. INTRODUCTION

Pursuant to 5 U.S.C. § 1214(b)(1)(A), the Special Counsel (OSC) hereby requests that the Merit Systems Protection Board (the Board) stay for a period of 45 days the Chapter 75 removal of John L. Deans, a GS-1811-12 Special Agent in the Department of Transportation (DOT), Office of Inspector General (OIG), in Denver, Colorado. Based upon the facts and arguments set forth herein, OSC has reasonable grounds to believe that Deans was removed from his criminal investigator position because he made protected disclosures and exercised his first amendment right of free speech. More specifically, Deans uncovered and reported to his superiors information about possible diversions of funds from the Denver airports which had the potential to be politically embarrassing to high level government and community leaders, and he commented on what he believed to be a suspicious temporal link between Denver

U.S. Attorney Henry Solano's trip to Washington, D.C. and the release of grant funds to the City of Denver by the Federal Aviation Administration (FAA). Deans was detailed to San Francisco in March 1995, and removed from his position on June 26, 1995.

As addressed in detail below, the evidence establishes that the specific charges that formed the basis for Deans' removal are unsupported. Deans was charged with improperly referring matters to the OIG audit staff. In fact, the referral was made by another OIG employee. Deans was accused of making improper comments in a public forum. In fact, the comments were made during a private conversation, and there is nothing to indicate that the comments were improper. Deans was also charged with "tracking" other OIG employees, concealing information from his supervisors, engaging in willful insubordination and acting so as to create a conflict of interest. The evidence does not support any of these allegations. On the other hand, it is clear that Deans' removal was ordered at the behest of Deputy Assistant Inspector General (DAIG) for Investigations, Tod Zinser, who strongly objected to Deans' protected conduct.

Deans filed a request for OSC action on June 26, 1995. On July 26, 1995, the matter was referred to the OSC Dallas Field Office (DFO) for investigation. From October 1995 through the present, DFO Investigator John Coates conducted on-site interviews in and around Fort Worth, Texas, Denver, Colorado, and Washington, D.C. Based on the results of the investigation, OSC has a reasonable basis to believe that Deans was removed from federal service because of his protected activity and

that a stay of the termination of his employment is warranted. Furthermore, on May 20, 1996, pursuant to 5 U.S.C. § 1214(b)(2)(A), the Special Counsel filed a report of investigative findings and recommendations with the DOT OIG, the Board, and the Office of Personnel Management. (See Attachment).

II. STATEMENT OF FACTS

A. Background

Deans had been employed as a GS-12 Criminal Investigator with the DOT OIG in Lakewood, Colorado, since March 1990. He is an experienced criminal investigator with previous employment in federal agencies, including the Federal Bureau of Investigation.

During 1994 and early 1995, Deans developed information on diversions of funds from Stapleton and Denver International Airports (DIA) to unauthorized expenditures by the City of Denver during the mayoralties of DOT Secretary Frederico Pena and Wellington Webb, the current mayor of Denver. Deans provided information on his findings orally and in writing to his supervisors, Special Agent in Charge (SAC) Glynn Snee, Assistant SAC Daniel Truxal, Deputy Assistant IG (DAIG) for Investigations Todd Zinser and DAIG for Audit Lawrence Weintrob. On January 26, 1995, he met with Snee, Zinser and Weintrob to discuss the diversion issues and Deans provided a draft list of potential subjects to his superiors. Deans stated that this list was a compilation of his investigative notes. Also present at this meeting, at Weintrob's request, was Scott Macey, a DOT auditor with experience in

airport revenue issues. Weintrob decided to refer Dean's list of subjects to the Audit Division, and he immediately briefed Cynthia Rich, Assistant Administrator of the FAA on the issues because the FAA was about to approve a \$35 million grant to DIA, and she might want to withhold the funds until Dean's information could be substantiated. Snee stated that it was the consensus of the group at the meeting that the issues would be referred for audit. On February 16, 1995, at Snee's request, Deans sent an updated list of potential subjects to Snee. On February 20, 1995, Snee referred Dean's list of airport diversion issues to the Audit Division.

In 1994, Deans had developed information about the construction of a road for the Utah Sports Authority Olympic Park which was intended to support the Olympic Park, but enhanced the property values of wealthy, politically connected landowners near the road. Another road had to be built to service the Olympic Park. Deans and Snee met with Denver Assistant U.S. Attorney (AUSA) Paul Johns in September 1994 to discuss the investigation. Snee and Truxal had concerns about Deans working cases in Utah because in January 1994, Deans had been indicted in Utah for alleged violation of the federal wiretap laws. The case was dismissed in April 1994 for insufficient evidence after the prosecution presented its case-in-chief. At the September meeting, Snee and Johns agreed that Deans could investigate the Utah case because it could be handled by the Denver U.S. Attorney's Office (USAO), and Deans would not have to work with the Utah USAO. Johns opened a file on the matter.

In December 1994, Deans sent letters requesting information to a number of Utah State officials in which he stated that the USAO was interested in the matter and provided Johns' name and telephone number if they had any questions. He sent copies of all but two of these letters to Johns. In late January 1995, when Deans learned that the money for the road had come from state, not federal funds, he informed Johns of that fact and Johns decided to close the file. An attorney from the Utah Attorney General's office contacted Johns about the letters, stating that he thought it was a conflict of interest for Deans to send investigative requests to persons against whom he had filed a claim for civil damages in connection with the 1994 indictment. Another person to whom Deans had sent an investigative request told Johns that he thought that Deans had leaked information about the investigation to the press. Johns told both individuals that the case was probably going to be closed.

On February 3 and 8, 1995, Denver U.S. Attorney's Office (USAO) Civil Division Chief Linda Surbaugh and AUSAs Ken Buck and Johns met with Deans to discuss several issues related to his investigations. At one of these meetings Johns told Deans that he should not use the name of the USAO or Johns in his requests for information. Deans said that he had made reference to AUSAs in requests for information on other occasions, and he had never been told it was improper. He agreed not to do it again. He also told Johns that his failure to provide two of the letters was an oversight, and that he would send them. Johns also told Deans about the allegations of conflict of interest; Deans was surprised that such a charge would be made because the matters were unrelated. Johns stated that the issue was moot

because the case was going to be closed. Johns wrote a memorandum dated January 25, 1995, about the contacts with the Utah State officials.

Surbaugh and Johns also told Deans that he was suspected of leaking information to the press. They informed him that Denver City Attorney Dan Muse complained to Solano in early February 1995 about the investigative requests and told him that on the same day he received Dean's request, newspaper reporters had inquired about similar matters. This caused Muse to believe that Deans leaked information about the investigation to the press. Deans denied leaking information to the media. Deans believed that Solano was concerned that he was getting too close to DOT Secretary Pena, who was the mayor of Denver when some of the Stapleton Airport diversions occurred. Deans and other witnesses stated that Solano and Pena are political allies, and that Pena's brother was Solano's personal attorney. Deans stated that he developed information about the diversions from reading articles in the newspapers. He said that allegations about diversions had been made the previous fall in the context of the Denver mayoral campaign, and that reporters had been asking questions about diversions during that time.

The last issue addressed in the meeting was AUSA Buck's investigation into public integrity matters involving Construction Management Technical Services (CMTS). CMTS was included on the list of airport diversion issues Deans had provided to Weintrob, Zinser and Snee which were to be referred to the DOT Audit Division. In developing information about the issue, Deans had interviewed a witness in the Denver Mayor's office who was a target of Buck's public integrity

investigation. Buck informed Deans that the witness was a target, briefed Deans generally on the scope of the criminal investigation, and told him not to interview any of the witnesses who were involved in the criminal aspect of the case or continue any investigative activity which had the potential to jeopardize the USAO's case. Deans agreed to refrain from interviewing possible witnesses, and to coordinate with Bucks on any information related to the case. Deans informed Snee and Truxal that he had been instructed not to interview certain members of the current and former mayors' staffs on issues related to the public corruption matter in his February 16, 1995, case status update. Truxal confirmed to OSC that Deans told him that he was not to work on the case involving a public corruption subject. Johns wrote a memorandum on the February 3 and 8, 1995, meetings.

Solano and Buck met with DOT IG A. Mary Schiavo and Deputy DOT IG Mario Lauro while attending an Attorney General's Advisory Committee meeting in Washington, D.C. from February 14-16, 1995. Solano asked Schiavo for a team of auditors and special agents to assist Buck's public corruption investigation. However, he specifically asked that Deans not be appointed to the team. Solano told Schiavo and Lauro that he suspected Deans of leaking information to the media, that Deans had mentioned the U.S. Attorney in requests for information, and that Deans was involved in conflict of interest issues. Schiavo agreed to provide assistance on the case. However, Deans was not informed that the OIG was providing audit and investigative assistance to the USAO. Solano stated that at this point the USAO's problems with Deans were under control; he had been excluded from Buck's

investigation and he understood the USAO's criminal and civil investigations procedures.

On February 16, 1995, Johns informed Deans that he had a conversation with an FAA attorney who informed him that the FAA considered the money involved in the diversion issues to be state money, and the USAO could not act on the cases unless the FAA sent a request for judicial intervention. The FAA would send such a request only after an audit had disclosed improper use of airport funds and the sponsor refused to repay the money. The FAA advised that Deans refer the matters for audit. Johns told Deans that the USAO had determined that the matters which he identified fell within the administrative resolution as interpreted by the FAA. Deans told Johns that he did not agree with the FAA, and that the issues related to the use of what he believed to be federal monies were not for the FAA to decide. Deans told Johns that he was going to issue his report to the DOT IG when it was completed. Johns told him that it was within the authority of the USAO to decide interpretive issues, and that the USAO would not proceed further until they received a referral from DOT or the FAA along with guidance from the FAA. Johns stated that he told Deans that he should do whatever he felt that he was required to do, and to send him a copy of his report. Johns wrote a memorandum on the issue dated February 16, 1995. Deans said that he did not disagree with Johns' view of the issues, but that he told Johns that he needed to continue investigating the matter so it could be referred for audit if appropriate. He said that diversion of funds could be a civil matter

appropriate for OIG audit even if it was not under the purview of the USAO, and that he had a responsibility to express his opinion to Johns.

On February 23, 1995, Deans spoke to Johns at a youth coaches meeting, commenting on the fact that the FAA, which previously was not going to release \$35 million in funds to the City of Denver, did release the funds after Solano went to Washington. Johns believed that Deans was suggesting that Solano, Schiavo, and DOT Secretary Pena somehow improperly conspired to persuade the FAA to release the funds. Johns stated that other people were within five or six feet of them, that he was uncomfortable with Deans' comments and he thought that Deans might say something about the public integrity investigation, so he changed the subject. Johns memorialized the incident in a memorandum which he gave to Surbaugh. Deans denies that the comments were made within the hearing distance of anyone else.

On March 6 or 7, 1995, Deans met with James Kram and Alvin Schenkelberg, DOT auditors who were in Denver, and discussed with them some of the cases which had been referred for audit. Deans expressed some concern that the audit would interfere with his investigations, and was assured that there would be no interference.

On or about March 10, 1995, the Denver USAO faxed to the DOT OIG the four memoranda, dated January 25, February 8, 16, and 24, 1995, written by Johns about Deans. The memoranda were reviewed by Lauro and Zinser. Solano said he wanted to alert Lauro to the fact that the USAO continued to have problems with Deans. On March 14, 1995, Zinser traveled to the Denver USAO to meet with Solano, Surbaugh, Johns, and Buck to determine the extent of the problems with

Deans. These Denver USAO officials told Zinser they were interested only in excluding Deans from working on the public corruption case which was being handled by Buck's project team.

On March 15, 1995, Zinser met with the DOT OIG Audit staff in Denver and discovered that one of the issues in their revenue diversion audit plan involved CMTS. Zinser recognized this issue as part of the public corruption investigation that Deans was told not to work on, and told the auditors to delete it from the plan. Auditor Kerry Barras told Zinser that it was Deans who had referred the CMTS issue to the auditors. Based on his meeting with Solano and the AUSAs the previous day, Zinser understood that Deans was not to be reviewing issues pertaining to CMTS. Zinser viewed Deans' purported inclusion of CMTS as an effort to continue his inquiry into a public corruption matter he had been told by the Denver USAG to avoid. Zinser instructed Kram and Schenkelberg not to talk to Deans about the diversion issues. Zinser did not provide any explanation for his instruction, and told them not to ask any questions. On the same day, Deans talked to Kram and Schenkelberg and mentioned that he had heard that OIG personnel were in Denver asking about his cases and asked them if they knew anything about other investigators. Pursuant to Zinser's instructions, the auditors did not give Deans any information. Deans told them that if other investigators were involved, they might be obstructing his investigation, and if he thought that was the case, he would not hesitate to refer the matter to the FBI. Kram told Zinser about the conversation and Zinser asked him to write a memorandum on it. In the memorandum, Kram and

Schenkelberg reported their conversation with Deans and stated that they felt intimidated by the idea of being charged with obstruction of justice. Kram and Schenkelberg both stated that they felt they were caught in the middle of a conflict and felt vulnerable, but that Deans had not intended to intimidate them.

On March 15, 1995, Zinser told Solano that Deans had referred the public integrity case issue to the DOT auditors on or about February 16, 1995. Solano told Zinser that he did not want Deans working on Denver USAO cases, and Zinser told Solano that the OIG would do nothing to exclude Deans from USAO matters until the OIG received a letter from Solano. Solano denied that the OIG had asked him to write a letter. Solano did write a letter to Schiavo on March 20, 1995, in which he stated that Deans would no longer be permitted to participate in the investigation of any cases which could possibly be prosecuted by the District of Colorado. Solano stated that he concluded that his office could no longer work with Deans after Zinser told him that Deans had referred the CMTS matter to the auditors after being told by the Denver USAO not to participate in the public corruption case. Solano referred to the alleged CMTS audit referral as a "last straw" incident which influenced him to write the March 20, 1995, letter to Schiavo.

During the weekend of March 18, 1995, Lauro and Zinser traveled to San Francisco to discuss Deans with Mike Gottlieb, the OIG SAC in the San Francisco Office. Lauro and Zinser wanted to detail Deans to San Francisco for 90 days to see how he performed there. Lauro also said they wanted to give Deans a second chance, and that they would not remove him from federal service unless the charges in the

four memoranda by Johns could be proven. Gottlieb advised Lauro and Zinser to assign an impartial investigator to look into the Denver USAO accusations against Deans, but Zinser decided to investigate the Deans matter himself. On March 20, 1995, Gottlieb notified Deans in writing that he was being detailed to the San Francisco Regional Office. Deans was ordered not to contact anyone in the Utah, Wyoming, or Colorado USAOs. Gottlieb, after supervising Deans for a couple of months, described him as a good worker and seasoned investigator. Gottlieb indicated that he would be pleased if the DOT OIG wanted to reassign Deans to San Francisco permanently.

On May 17, 1995, Zinser proposed to remove Deans from his position for conduct unbecoming a criminal investigator (Reason 1), insubordinate action in pursuing unauthorized investigations (Reason 2), and conflict of interest through use of his official position for personal gain (Reason 3).

B. The Charges

Reason 1. Conduct Unbecoming a Criminal Investigator

Specification 1. The specification states that Deans was directed by the USAO not to pursue investigative activity concerning a specific public corruption investigation and that he referred the subject to the OIG audit staff, thereby potentially compromising an ongoing criminal investigation. The notice further stated that Deans continued to actively pursue the investigation after being instructed to cease investigative activity. In addition the notice referenced the fact that Deans had annotated the CMTS issue on his February 16, 1995, list with the words "Federal

Grand Jury" and "Audit Assistance required" and stated that the USAO did not require audit assistance in the grand jury matter.

The evidence shows that Deans discussed the airport diversion issues with Snee, Weintrob and Zinser in January 1995, that he gave them a draft list of subjects, that Weintrob, with the concurrence of the others, referred the matters to audit, that on February 16, 1995, Deans prepared an updated list of subjects and faxed it to Snee at Snee's request, and that it was Snee, not Deans, who gave the list to the OIG audit staff. Moreover, even if Deans had referred the matter to the auditors, he would have been acting in accordance with directions given to him by Johns, who told him to refer all revenue diversion issues to audit. Johns told OSC that he found nothing improper with the referral of the CMTS issue to the DOT auditors. Snee told OSC he believed that referring a matter for audit is not investigative activity and the auditors were not under Deans' direction. In addition, the evidence shows that Solano had requested audit assistance from the OIG in connection with Buck's case, of which CMTS was a part.

Specification 2. Zinser charged Deans with disagreeing with a USAO's decision that airport revenue diversion issues should be referred to the FAA. Zinser also accused Deans of suggesting in a public forum that Solano, Schiavo, and Secretary Pena had conspired to induce the FAA to release grant funds to the city of Denver. The notice stated that Deans exhibited a lack of judgment with respect to these two incidents.

The evidence shows that Deans disagreed with Johns and advised him that they needed to continue investigating the funds diversion issues so that they could be referred within the OIG as an administrative matter. The evidence does not show that this conduct was unbecoming a criminal investigator. With regard to the charge of suggesting conspiracy in a public forum, the evidence establishes that Deans did make comments to Johns about Solano, Schiavo and Pena. It also shows that Johns and the agency interpreted Deans' comments as inferring that Deans believed that there was some impropriety with respect to the release of federal money to the airport.

Specification 3: Zinser charged that Deans had failed to inform his supervisors about the true extent of his problems with the USAO. The notice stated that he failed to advise his supervisors that: (1) he made investigative demands on Utah State officials by improperly mentioning the U.S. Attorney in the letters, (2) he was advised by the USAO that they had concerns that he was the source of press leaks, (3) he had effectively been removed from an on-going public corruption investigation, and (4) he had been advised to provide all copies of his demands for information to the USAO. The notice stated that Deans' requests for information to the Utah State officials could have been construed as a Department of Justice civil investigative demand (CID), which only the Attorney General may authorize.

The evidence shows that Snee thought that Deans should have been more diligent in informing him about the meetings with the USAO, but that he thought none of the matters were of great importance. Truxal stated that there was nothing wrong

with Deans' letters because the USAO had opened a case on the Utah matter. Snee stated that Deans should have sent the letters through him for approval, but that his failure to do so was not a basis for disciplinary action. He stated that he would have approved the letters if they had been sent through him. Deans stated that he had made similar references to USAOs in the past and no one had told him it was improper.

Nor does the evidence establish that Deans concealed from his supervisors the fact that the USAO had asked him to refrain from investigating the CMTS matter. Truxal stated that Deans told him that he had been removed from a public integrity investigation, and Deans informed Snee and Truxal in writing in his February 16, 1995, update that he had been instructed not to interview certain members of the current and former mayors' staffs. Deans did not feel that Linda Surbaugh's questions about media leaks were important enough to tell Truxal or Snee. He stated that if he had been accused of leaking information he would have notified his superiors. Snee stated that he did not think the allegations were important enough to report to him, and that the Denver USAO should have contacted him if they truly believed that Deans was leaking information to the press.

Specification 4. Zinser charged Deans with tracking his movements and those of Weinrob, and with threatening the two DOT OIG auditors, Kram and Alvin Schenkelberg. The notice stated that it was unacceptable for a law enforcement officer to spend official time tracking the movements of DAIGs and threatening other OIG employees with criminal sanctions.

The evidence shows that Zinser had instructed Kram and Schenkelberg not to discuss the audits with Deans, even though Deans was the investigator who developed the case. Deans questioned them about a rumor that other DOT OIG representatives were in the Denver area looking into the same funds diversion issues he was investigating. Deans felt that he had a right to know if they had uncovered something pertinent to his investigation. Truxal too believed that Deans had a right to know if other OIG officials had uncovered any information germane to his investigation. Kram and Schenkelberg stated that they were uncomfortable with Deans' questions because they had been placed in the middle and Zinser had told them not to discuss the matter with Deans. They stated that they were intimidated by the prospect that Deans might accuse them of obstruction of justice for not talking to them about the audit, but that Deans had not intended to intimidate them. Both auditors denied making any statements to the effect that Deans was tracking Zinser or Weintrob and they had no reason to believe that Deans was "tracking" them. Deans denied tracking Zinser and Weintrob; he did not know that they were in Denver.

Reason 2. Insubordination

Zinser accused Deans of "willful insubordination" by concealing from his superiors the fact that he was conducting unauthorized investigations in Utah after he had been directed by his supervisors not to conduct investigations in that jurisdiction. In addition, the notice stated that Deans' supervisors did not know that he had sent the letters and stated that he did not have signature authority for letters to outside parties and such letters must be cleared through them.

The evidence shows that Snee felt that Deans should minimize his activities in Utah since he had recently been acquitted of alleged criminal activity there. However, he denied that Deans had been instructed not to conduct investigations there. In fact, Snee met with Deans and Johns in September 1994 to discuss the Olympic Park case. Johns agreed to open a file on the matter since it could be prosecuted out of the USAO in Denver. Snee and Johns agreed that Deans could investigate the matter since he would not have to work with the Utah USAO. Truxal stated that he suggested to Deans that he stay out of Utah because he had been unfairly prosecuted there, but he did not order him to stay out of Utah. He denied that Deans' investigation in Utah was unauthorized.

While Snee agreed that Deans should have coordinated the request letters with him, he stated that if he had learned about the letters, he would have counseled Deans to clear them with him in the future, but he did not consider the matter a basis for disciplinary action. Truxal disputed the charge that Deans lacked the authority to sign the letters. He stated that while it is the practice for the agents to sign the requests for Snee, there is no prohibition against an agent signing his own request, and that other agents have signed their own requests with impunity.

Reason 3. Conflict of Interest

Specification 1. Zinser charged that Deans had initiated an unauthorized investigation against Utah State officials while intending to file a claim against the State, that this was a clear conflict of interest, and that Deans' requests for

information concerning the Olympic Park were in support of his claim for damages and were not related to official government business.

The evidence shows that Deans' investigation was neither concealed nor unauthorized, and that Snee and Johns agreed that he should investigate the matter. It also shows that Deans did file a notice of claim to preserve his right to claim damages incurred by the unsubstantiated indictment. Neither Snee, Truxal, nor Deans could comprehend how this could be a conflict since Deans' claim against Utah State officials involved his wrongful prosecution for alleged wiretap violations. More importantly, Deans began the Olympic Sports Park road investigation before he was indicted. As soon as Deans discovered that the road was not built with federal funds, he recommended to Johns that the investigation be terminated. Johns stated that Deans was surprised that his investigative requests would be construed as a conflict of interest. As stated *supra*, neither of Deans' supervisors thought there was anything wrong with the request letters and they were aware of both the investigation and the indictment. There was no evidence that Deans was using this investigation to promote his notice of claim against the State of Utah.

Specification 2. Zinser charged Deans with inappropriate use of a government fax machine because he transmitted his notice of claim for damages to the state of Utah on a DOT OIG fax machine.

The evidence shows that Deans admitted faxing his notice of claim on the OIG fax machine. However, both Truxal and Snee felt that it was appropriate for Deans

to use the DOT OIG fax machine because he was trying to recover losses from an unfair indictment which resulted from the performance of official duties.

In the notice of proposed removal, Zinser referenced Deans' disagreement with Johns and stated that insubordination with respect to the authority of the USAO could not be tolerated. Both Snee and Truxal noted that Deans could not have been insubordinate to Johns because Johns had no supervisory authority over him, and that the OIG was not required to agree with the USAO. Furthermore, the evidence does not show that Deans was insubordinate.

Zinser also stated in the notice that in considering the penalty, he took into consideration the fact that Deans had on one occasion disregarded his instructions because Deans had contacted him about a matter on which Zinser had instructed him to contact Snee. The evidence shows that Snee told Deans to contact Zinser because he did not know the answer on a matter that was being decided at headquarters. Snee stated that it was inappropriate for Zinser to reference that situation.

The notice also stated that Deans had been counseled regarding his attitude and lack of appropriate respect for authority and he had failed to heed his supervisors' warning. Deans, Snee and Truxal all stated that Deans had not been counseled or warned.

Deans always received annual ratings of "fully successful" or better during his time as a DOT OIG employee. Truxal stated that he would have rated Deans "outstanding" on performance for the year if he had not been removed. Snee was shocked that Zinser and Schiavo dismissed Deans without consulting him or Truxal,

and stated that if the USAO had problems with Deans, they should have reported to them. Snee and Truxal also stated that Deans had done nothing to warrant removal, and that they were not consulted in the matter. Johns felt that Solano had over-reacted to the problems they were having with Deans. Johns also stated that he thought his problems with Deans had been resolved, and he knew of nothing which warranted Deans' removal from federal service. He said that Deans was a good investigator and he would have no problem in working with him again. Gottlieb stated that he was shocked that Deans was removed without an internal review which gave Deans an opportunity to present his side of the story. He said that Deans was a good agent and a seasoned investigator and he should have been reassigned to San Francisco. Solano and Surhaugh stated that they never thought that the DOT IG would remove Deans. Solano opined that progressive discipline would have been more appropriate. Solano stated that it was unusual for employees to be removed without prior serious disciplinary action.

III. ARGUMENT

Under the Whistleblower Protection Act of 1989 (WPA), the Special Counsel may request any member of the Board to stay any personnel action for a period of 45 days if the Special Counsel determines that there are reasonable grounds to believe that a personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. The Board member shall order the stay unless the member determines that a stay would be inappropriate. 5 U.S.C. § 1214(b)(1)(A)(ii).

Moreover, the Board should rely on the judgment of the Special Counsel and grant a request for a stay as long as it "falls within the range of rationality." *In re Kass*, 2 M.S.P.R. 79, 86 (1980). In making this determination, the Board is to view the Special Counsel's request for an initial stay in the most favorable light. *Special Counsel v. Dept. of Air Force*, 61 M.S.P.R. 229, 230-231 (1994); *Special Counsel v. Federal Emergency Management Agency*, 44 M.S.P.R. 544, 545-546 (1990). Although Deans has already been removed, the Board has the authority to stay a removal action after its effective date. *Special Counsel v. Dept. of Transportation*, 59 M.S.P.R. 552, 555 (1993); *Special Counsel v. Dept. of Veterans Affairs*, 58 M.S.P.R. 225 (1993).

Federal employees are protected from adverse personnel actions that are taken because they engage in certain protected activities, including making protected whistleblower disclosures and exercising their first amendment rights. To establish a *prima facie* violation of reprisal for whistleblowing under 5 U.S.C. § 2302(b)(8), OSC must demonstrate that: (1) Deans made protected disclosures; (2) he was subjected to a personnel action; (3) the supervisor(s) who recommended or took the personnel actions had actual or constructive knowledge of his protected disclosures, and (4) the protected disclosures were a contributing factor in the adverse personnel decision. *Caddell v. Dept. of Justice*, 52 M.S.P.R. 529, 533 (1992); *Rychen v. Dept. of Army*, 51 M.S.P.R. 179, 183 (1991); *McDaid v. Dept. of Housing and Urban Development*, 46 M.S.P.R. 416, 421-423 (1991); see also 5 U.S.C. §§ 1214(b)(4), 1221(e); 5 C.F.R. § 1209.7.

Deans engaged in protected activity under section 2302(b)(8) when he reported to his supervisors, Snee and Zinser, on January 26 and February 16, 1995, that the Denver Airport funding diversion case he was investigating involved seventeen investigative issues, some which had potential for criminal prosecution. As the assigned investigator, Deans was in a unique position to observe and appreciate the potential seriousness and illegality of the purported revenue diversions. *See Geyer v. Dept. of Justice*, 63 M.S.P.R. 13 (1994).

Zinser was aware of Deans' protected disclosures, as they were either made to Zinser or cited in Zinser's May 17, 1995, letter of proposed removal. The references to Deans' protected disclosures in the proposed removal letter and the fact that most of the charges in the notice were unsubstantiated are evidence that Deans' protected activity was a contributing factor in the decision to remove Deans. *See Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), *citing* 135 Cong. Rec. 5032-33 (1988)(explanatory statement on S.20). In addition, the disparity between Deans' actions and the penalty is so great that it supports a finding that the decision was motivated by animus. Ordinarily, employees, like Deans, with no prior disciplinary record are subjected to progressive discipline. They are not removed from the federal service for a first offense, as was the case with Deans. Thus, there are reasonable grounds for believing that Deans was removed from his position because of his protected whistleblowing.

The first amendment rights of federal employees are protected by OSC under 5 U.S.C. § 2302(b)(11), which prohibits taking or failing to take a personnel action

which violates a law rule or regulation which implements or directly concerns one of the merit system principles at 5 U.S.C. § 2301. Section 2301(b)(2) states that employees should receive fair and equitable treatment in all aspects of personnel management with proper regard for their constitutional rights. The first amendment implements and directly concerns the merit system principle at 5 U.S.C. § 2301(b)(2), which states: "All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management ... with proper regard for their privacy and constitutional rights." To establish a claim of reprisal for exercise of first amendment rights, OSC must prove (1) the employee's speech was protected by the first amendment, and (2) the speech was a substantial or motivating factor in the action taken against the employee. The agency can use the defense set forth in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), which held that an agency may prevail in a first amendment case if it can show that the adverse action would have been taken absent the employee's protected activity. The leading cases on speech rights of public employees are *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Meyers*, 461 U.S. 138 (1983). In these cases the Court set forth a number of tests for balancing the rights of employees to comment on matters of public concern and the rights of a public employer in promoting the efficiency of government. The factors which weigh in favor of finding a federal employee's speech protected include:

Whether the speech concerned a matter of general public interest, *Pickering*, 391 U.S. at 571.

The degree to which the public interest is served by encouraging such speech, *id.*

Whether the agency had other alternatives available to protect its interests which would have intruded less on the employee's first amendment rights. *id.*, at 572.

On the other hand, the factors which weigh against finding speech protected include:

Whether the speech interfered with maintaining discipline by supervisors or harmony among co-workers, *Pickering*, 391 U.S. at 579.

Whether the speech undermined a close working relationship in which personal loyalty and confidence are essential to the effective functioning of government, *id.*

Whether the speech damaged the professional reputations of the government officials, *id.*

Whether the speech fomcated controversy or conflict within the agency or between the agency and the public, *id.*

Whether the speech impeded the employee's proper performance of his daily duties, *id.*, at 572.

Whether the speech interfered with the regular operation of the agency generally, *id.*

Deans' comments to Johns about his suspicion that there was a connection between Solano's trip to Washington and the release of the federal grant money by the FAA is protected speech because it was perceived by Johns and agency officials as an inference that Solano, Schiavo, and Pena had engaged in improper behavior. The issue of whether high public officials had engaged in improper conduct is clearly a matter of public interest. In addition, none of the factors which would weigh in favor

of the agency's actions are present in this case. Furthermore, the timing of actions by Solano and Zinser is persuasive evidence that Deans' was removed because of his protected speech. Solano's transmittal of Johns' memoranda, including the one in which he described Deans' comments related to the release of the FAA funds, occurred soon after Deans made the statements, and Zinser's trip to Denver followed a few days after he learned of Deans' comments. It should also be noted that apart from the issue of whether Deans' statement to Johns was protected speech, the comments were made in a private conversation, and there is no indication that anyone overheard them. Finally, as noted earlier, Zinser's reaction to Deans' protected first amendment speech, as well as his protected whistleblowing, was draconian in nature. Indeed, the last event leading to Deans' removal from federal service was his private conversation with Johns. The animus displayed by Zinser's severe overreaction could only have been engendered by Deans' protected activity, and not by the other transparent reasons offered by Zinser.

Based on the foregoing, the evidence obtained to date supports a reasonable belief that Deans was removed from his position because he made whistleblower disclosures protected by 5 U.S.C. § 2302(b)(8) and because of his exercise of his first amendment rights.

IV. CONCLUSION

In summary, this request for stay clearly falls within the "range of rationality" test articulated in *Kass*, 2 M.S.P.R. at 96. As stated, on May 20, 1996, the Special

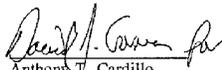
Counsel filed her report of investigative findings and recommendations with the DOT
OIG, the Board, and the Office of Personnel Management. The granting of a stay
would permit OSC additional time to receive a response to the report and
recommendations.

Accordingly, the Special Counsel respectfully requests the Board grant a 45-day
stay of the removal of John L. Deans, and return him to duty as a criminal
investigator in Denver, Colorado.

Respectfully submitted,

Kathleen Day Koch
Special Counsel

William E. Reukauf
Associate Special Counsel
for Prosecution



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May 20, 1996
Washington, D.C.



UNITED STATES DEPARTMENT OF COMMERCE
Office of Inspector General
Washington, D.C. 20230

January 16, 2014

The Honorable Carolyn N. Lerner
Special Counsel
1730 M Street, N.W., Suite 300
Washington, DC 20036

Re: OSC File Nos. MA-12-4640 and MA-13-1126

Dear Ms. Lerner:

This letter responds to your correspondence to the United States Department of Commerce (Commerce) Inspector General, Todd J. Zinser, dated September 16, 2013, regarding the above-referenced Office of Special Counsel (OSC) Files. Inspector General Zinser has asked me to provide this response. The Commerce Office of Inspector General (OIG) would like to express its gratitude for the OSC's courtesies in providing us with several extensions to respond to your letter, and in conducting negotiations towards a mutually-agreeable resolution of the findings summarized in your letter and set forth in OSC's September 16, 2013 report regarding these Files. We are pleased that the OIG and OSC have been able to reach such an agreement based upon the corrective measures that the OIG has taken or intends to take to resolve the OSC's concerns, as discussed more fully below.

We appreciate the OSC's efforts in bringing its concerns to our attention. It is important to note, however, as I and OIG representatives have discussed with your staff, that there is disagreement with a number of the factual findings and legal positions set forth in OSC's report. Moreover, by taking the corrective measures discussed below, the OIG is not admitting that its employees committed any prohibited personnel practices. Nevertheless, we recognize that the OSC has raised serious concerns, and, accordingly, the OIG has taken or will undertake the following corrective measures, which we believe constitute meaningful and significant steps that will effectively address these concerns:

1. The OIG will employ an employee relations (ER) specialist in the Commerce OIG human resources office. The ER specialist will be responsible for counseling and advising OIG managers and supervisors on employee performance, employee appraisals, performance plans, EEO matters, EEO settlement and separation agreements, and other issues. This individual would report to the Director of Human Resources.

The Honorable Carolyn N. Lerner
January 15, 2014
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2. The OIG will recuse the Counsel to the IG from employee relations matters for two years. The OIG will appoint an OIG staff attorney for day-to-day routine employee relations matters and obtain an outside counsel to work on employee relations matters of a more serious nature requiring significant management actions. The attorney or outside counsel will report directly to the Deputy IG, without reporting to the Counsel for the IG.
3. The Commerce OIG will conduct performance counseling for both of the involved executives. The OIG will identify and ensure that the executives take relevant training over the next two years to improve their knowledge of employee relations matters and proper documentation of performance issues.
4. Wade Green's and Rick Beitel's performance appraisals will reflect their inappropriate judgment and inadequate performance in connection with the interim appraisals and separation agreements discussed in OSC's report. Their performance appraisals, which become part of their permanent performance record, will contain strongly worded language admonishing them for their lapses in judgment. Mr. Green and Mr. Beitel will not be awarded performance bonuses, resulting in a minimum loss of about \$8,000 for each of the executives.
5. The Commerce OIG will establish a uniform separation/settlement policy and template agreement using best practices in the federal government sector, to include OSC and EEO. The Deputy IG's approval/signature will be required on all future agreements.
6. The Commerce OIG will establish greater independence in matters of day-to-day management and operations between the Office of Counsel and the Office of Investigations. OIG has hired attorney investigators to provide greater independence in legal reviews of investigative matters. The Office of Counsel will not conduct any internal investigations or management reviews of OI.
7. The Commerce OIG will establish a Memorandum of Understanding with another OIG to conduct internal investigations of special agents or investigative staff, as necessary.
8. The Commerce OIG will review best practices and Departmental policy regarding interim appraisals for departing employees, and develop an OIG policy that ensures that interim appraisals are given on a fair and consistent basis. The OIG will also ensure that supervisors and managers receive training developed from best practices and Departmental policy.
9. The Commerce OIG will make changes in executive assignments and responsibilities. This would include, at a minimum, taking Rick Beitel out of the chain of command over the OIG Whistleblower Protection Ombudsman, and removing "whistleblower protection" from Mr. Beitel's title. In addition, the OIG will issue a

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written communication to its employees to let them know that if they have concerns that they would like to address in a discrete manner that they can go to the Ombudsman, confidentially to the Office of Special Counsel (OSC), or directly to the Deputy IG. OIG has established a separate mailbox, visible to the Deputy IG only, that employees can send e-mails with suggestions or concerns to and has notified OIG staff of the mailbox's availability for their use to communicate directly and privately with the Deputy IG.

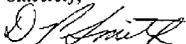
10. The Commerce OIG will remove supervisory duties from Mr. Beitel for a period of no less than one year, due to his role as a supervisor in administering the failing interim performance rating. Mr. Green will be removed from supervisory duties over matters involving employee relations, EEO cases and settlement/separation agreements for a period of two years for his role in negotiating and issuing the settlement/separation agreements.
11. The Commerce OIG will destroy any copies of [REDACTED] 2011 interim performance appraisals in its possession.
12. The Commerce OIG will take all of the above-referenced actions within sixty (60) days of the date of this letter. Further, the OIG will report to OSC within seventy-five (75) days the dates upon which the above-referenced actions were taken.

Pursuant to the agreement between the OIG and the OSC, it is my understanding that as a result of the corrective measures described above, OSC will close out its case, end its investigation of the above-referenced Files, and will take no action to pursue the disciplinary actions recommended in the September 16, 2013 Report. If this understanding is in any way incorrect, I trust that you will notify me at your earliest opportunity.

Although the 12 numbered items above may be summarized in communications with third parties, the OIG does not authorize the release of a copy of this letter to any other party. If OSC receives a request under the Freedom of Information Act for disclosure of this letter, please forward the request to me for a response by the OIG.

Again, I want to express the OIG's appreciation for the OSC's willingness to negotiate this agreement and its courtesies throughout this process. Please contact me or Glenn Harris if there are any questions or concerns.

Sincerely,



David P. Smith
Deputy Inspector General

cc: Todd J. Zinser, Inspector General



U.S. OFFICE OF SPECIAL COUNSEL

Report of Prohibited Personnel Practices
OSC File Nos. MA-12-4640 and MA-13-1126

[REDACTED]
Investigation and Prosecution Division Attorney

[REDACTED]
Complaints Examining Unit Attorney

September 16, 2013

By providing this report to the Department of Commerce (Commerce) for the sole purpose of aiding its determination of whether to take corrective or disciplinary action, the U.S. Office of Special Counsel (OSC) does not waive any protections or privileges that may apply to information disclosed in the report or to the sources of that information. In addition, neither the report nor the information contained herein may be disclosed to any individual not deemed essential to the determination of whether to take corrective or disciplinary action, unless OSC consents in writing to such disclosure. Specifically, it is requested that Commerce not disseminate any information provided by OSC to the subject officials of this investigation to potential witnesses in any future litigation that may arise should this matter not be resolved informally. Moreover, if Commerce receives a Freedom of Information Act (FOIA) request to which this report is responsive, Commerce shall not release the report to the requester, but rather promptly advise OSC of the FOIA request and advise the FOIA requester that OSC will provide a reply with respect to the report. Please contact OSC immediately and return this report if Commerce objects in any way to these conditions. Questions regarding this paragraph should be directed to OSC's Office of General Counsel at (202) 254 - 3600.

REPORT OF PROHIBITED PERSONNEL PRACTICES
OSC CASE NOS. MA-12-4640 and MA-13-1126

I. INTRODUCTION

This Prohibited Personnel Practices Report (Report) contains the investigative findings in Office of Special Counsel (OSC)¹ File Nos. MA-12-4640 and MA-13-1126. These complaints were filed on behalf of two former Department of Commerce, Office of Inspector General (OIG) employees, hereafter referred to as John Doe 1 and John Doe 2, or collectively, the whistleblowers.² The complaints allege that the whistleblowers were coerced into signing separation agreements containing non-disparagement provisions preventing them from going to OSC, Congress, or the media in retaliation for their perceived whistleblowing and engagement in the Equal Employment Opportunity (EEO) process. OSC's investigation uncovered strong evidence of retaliation warranting corrective and disciplinary action.

Pursuant to 5 U.S.C. §§ 1214 and 1215, OSC is charged with independently investigating prohibited personnel practice (PPP) retaliation cases and, if warranted, seeking appropriate corrective and disciplinary action. This investigation concerns three types of PPPs: whistleblower retaliation (5 U.S.C. § 2302(b)(8)), retaliation for the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation (5 U.S.C. § 2302(b)(9)), and taking a personnel action in violation of a law, rule, or regulation implementing a merit system principle (5 U.S.C. § 2302(b)(12)) (collectively, protected activity). The non-disparagement provisions at issue essentially functioned as "gag clauses" which prevented the whistleblowers from making protected disclosures to OSC, Members of Congress, or the media. The use of gag clauses to chill employees from engaging in further whistleblowing runs directly counter to the purpose and intent of the Whistleblower Protection Act. While the Department of Commerce, at OSC's request, ensured that going forward the gag provisions would not be enforced, the willful retaliation in this case warrants additional action to discipline the wrongdoers and to deter future retaliation. Agency officials must be held accountable for committing PPPs, especially retaliation for engaging in protected activity.

This Report summarizes OSC's investigative and legal findings in these cases. OSC provides this Report to assist the Department of Commerce and the Department of Commerce OIG in determining the appropriate corrective and disciplinary action in these matters. OSC is not waiving any protections or privileges that may apply to the information included in this Report or the sources of that information.

¹ OSC investigates allegations of prohibited personnel practices and is authorized to seek corrective action from the Merit Systems Protection Board to remedy abuses of the merit system, and to initiate disciplinary action against civilian government officials who commit prohibited personnel practices. In establishing OSC, Congress emphasized OSC's mandate to protect whistleblowers. S. Rep. 95-969, at 24 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2746.

² John Doe 1 filed the complaint identified as OSC File No. MA-13-1126. John Doe 2 is considered a primary witness in this investigation. Due to the sensitivity of these cases, John Doe 1 and John Doe 2 have requested that they not be identified by name in this report.

The evidence demonstrates that the whistleblowers were coerced into signing the separation agreements at the heart of this case. Moreover, the record shows that OIG management knew that both employees had engaged in protected activity, and several witnesses described the employees as “perceived whistleblowers” who were trying “to report the abuse” within the OIG.

The two primary management officials involved in the separation agreements were Richard C. (“Rick”) Beitel, Principal Assistant Inspector General for Investigation and Whistleblower Protection (PAIGI), and Wade Green, Chief Counsel to the OIG. PAIGI Beitel and Mr. Green engaged in retaliatory acts after being informed that the whistleblowers had obtained new positions outside of the OIG. In short, Wade Green and PAIGI Beitel worked together to ensure that the whistleblowers would leave the OIG on Mr. Green’s and PAIGI Beitel’s terms—quietly and with no recourse to make protected disclosures about the OIG. After the whistleblowers found jobs at other federal agencies, PAIGI Beitel drafted unfounded, failing performance appraisals as leverage to get the employees to sign separation agreements. While there were numerous departing OIG employees in 2011, only the whistleblowers were issued failing interim appraisals or presented with separation agreements containing non-disparagement clauses, indicating that these actions were taken because of protected activity and/or perceived whistleblowing.

Mr. Green drafted the separation agreements and negotiated the gag clauses. OIG management used its authority, including the threat of failing performance ratings and delayed release dates, to effect these separation agreements. In return, the employees gave up their right to make disclosures to OSC, Congress, or the media and they withdrew their pending EEO complaints and/or Freedom of Information Act (FOIA) requests. The whistleblowers would not have signed such agreements if not for the retaliatory and coercive acts by management.

Section II sets forth the relevant facts OSC gathered in its investigation. Section III provides a legal analysis of the alleged PPPs in this matter. Section IV sets forth OSC’s recommendations regarding the respective culpability of the two subject officials. Finally, Section V concludes this report.

II. SUMMARY OF RELEVANT FACTS

A. Background

Todd Zinser was appointed Inspector General (IG) of the Department of Commerce (Commerce) on December 26, 2007, following Senate confirmation. His appointment succeeded Johnny Frasier, who resigned from the position after concerns of fiscal improprieties and whistleblower reprisal were raised by Congress and OSC.

Prior to IG Zinser’s arrival, the OIG was fragmented between employees who supported IG Frasier and those who were involved in the investigations concerning his alleged wrongdoing. Several members of IG Frasier’s senior staff, including his Chief

Counsel and Assistant Inspector General for Investigations (AIGI), left the OIG within the first two years of IG Zinser's tenure.

IG Zinser filled several of the OIG Senior Executive Service (SES) positions with former colleagues from the Department of Transportation, Office of Inspector General (DOT OIG), where he was employed from 1991 to 2007. Because these selections involved unusual circumstances and were effected with little transparency, many OIG employees and witnesses in OSC's investigation believed the selections violated the merit system principles. One of these selections was the hiring of Rick Beitel in October 2009 for a temporary detail from DOT OIG, and his later selection for the Principal Assistant Inspector General for Investigation and Whistleblower Protection (PAIGI) position in or around June 2010.³

[REDACTED]

B. Protected Activity and Adverse Actions

This section provides the significant facts relating to the reprisal allegations, arranged in approximate chronological order.

1. Protected Activity

a. John Doe 1

1. EEO:

John Doe 1 filed an EEO complaint with [REDACTED] on or around June 14, 2011. In his complaint, he alleged discrimination based on age and disability. [REDACTED] forwarded a summary of John Doe 1's allegations to IG Zinser, [REDACTED] PAIGI Beitel, and Mr. Green on or around June 30, 2011. In her e-mail, she explained that John Doe 1 was in the "informal or pre-complaint" EEO process.

On July 1, 2011, Mr. Green forwarded [REDACTED] June 30, 2011, e-mail to IG Zinser, [REDACTED] and PAIGI Beitel. He asked them to review John Doe 1's complaint and to provide him with their recollection of events so that he could formulate a response on behalf of the OIG.⁴

³ Rick Beitel accepted a detail to Commerce OIG, in part because of an ongoing EEO complaint filed against him at the DOT OIG. During PAIGI Beitel's detail, IG Zinser petitioned OPM for another SES position. The request claimed that PAIGI Beitel would create a whistleblower protection division for the OIG. From 2009 to the present, no designated staff has been hired for whistleblower protection, and these duties are collateral to PAIGI Beitel's function as the PAIGI. Nevertheless, the hiring was a non-competitive transfer, and OSC did not find that this selection violated any of the PPPs.

⁴ It is unusual for an agency to provide a written response at the informal stage of the EEO process.

██████████ testified that IG Zinser “made disparaging comments” about John Doe 1 filing an EEO complaint and that he believed that IG Zinser was “angry” that John Doe 1 filed the complaint. PAIGI Beitel testified that “there was mutual consensus that the complaint had no merit.” Filing an EEO complaint is protected activity under 5 U.S.C. § 2302(b)(9).

2. FOIA Request:

On August 9, 2011, John Doe 1 submitted a FOIA request to Mr. Green. In his request, John Doe 1 asked for copies of all documents relating to the hire of an independent computer forensics firm, which was tasked with identifying and searching the e-mail files of OIG employees in June or July 2011. John Doe 1 was concerned that the forensics firm was hired through a sole-source contract and believed that responsive documents to his FOIA request would potentially implicate IG Zinser, ██████████ PAIGI Beitel, and/or Mr. Green in Federal Acquisition Regulation (FAR) violations or violations of other laws, rules, or regulations.

b. John Doe 2

1. EEO:

In or around June 2011, John Doe 2 drafted an EEO complaint alleging discrimination based on age, race, and veteran status. In the draft complaint, he reported “a pattern of abusive conduct and hostile management practices directed towards [him] and other OI [Office of Investigation] managers.” He specifically discussed hiring improprieties, mismanagement of PAIGI Beitel’s Office of Special Investigations (OSI), and concerns about a firearms investigation.

Although John Doe 2 did not file his EEO complaint, Mr. Green testified that he knew that John Doe 2 “had an informal [EEO complaint] ... if not, he had a threatened one, I think.” ██████████ additionally testified that he discussed a draft complaint with IG Zinser, Mr. Green, and possibly PAIGI Beitel. He was unsure if it was an EEO complaint or a complaint to the Council of the Inspectors General on Integrity and Efficiency (CIGIE).

2. FOIA Request:

John Doe 2 submitted a document request in or around July 2011 for documents related to an acquisition of MP5 fully-automatic submachine guns (MP5) and the OIG’s Special Purpose Firearms (SPF) policy. The OIG Office of Counsel (OC) refused to comply with this request. The following month, through his attorney, John Doe 2 submitted a FOIA request for these documents, including various drafts of the SPF policy and e-mail communications between himself and several OIG supervisors and attorneys related to the drafting and supervisory/counsel review process for that policy. John Doe 2 requested documents that he believed would show that he did not unilaterally change the SPF policy to circumvent the prior OIG approval process. John Doe 2 testified that

he submitted the draft SPF policy to counsel in 2009 for review. John Doe 2 believed that it was an abuse of authority by OIG management to hold him responsible for changes to the SPF policy that were reviewed by OIG counsel and more senior OIG management officials, and that the requested documents would support this belief.

3. Draft CIGIE Complaint:

In or around May 2011, John Doe 2 drafted a CIGIE complaint and provided a copy to several co-workers for their review and comment. The complaint concerned his belief that IG Zinser, Mr. Green, PAIGI Beitel, and ██████████ were “engaged in a pattern of abusive conduct toward employees, favoritism and prohibited personnel practices in the discipline, hiring and selection of managers and other employees.” Although this complaint was never submitted to CIGIE, ██████████ testified that he discussed John Doe 2’s draft EEO complaint or draft CIGIE complaint with IG Zinser, Mr. Green, and possibly PAIGI Beitel.

c. John Doe 1 and John Doe 2 were Perceived Whistleblowers

John Doe 1’s and John Doe 2’s participation in the above activities led to the perception that they were whistleblowers. When asked whether he/she would describe John Doe 1 and John Doe 2 as perceived whistleblowers, a witness responded, “[Y]eah absolutely, yeah.” The witness further testified that “everybody knew ... that there were all kinds of different avenues that they [John Doe 1 and John Doe 2] were trying to go down to report the abuse.” The witness noted that these avenues included EEO complaints. The witness testified that he/she believed that PAIGI Beitel and others “went apoplectic” when John Doe 1 filed a FOIA request based on the office atmosphere the day the FOIA request was filed. ██████████ a Senior Analyst with the OIG, also testified that he would describe John Doe 1 and John Doe 2 as perceived whistleblowers and that non-disparagement language was added to their separation agreements to keep them quiet.

2. PAIGI Beitel and Wade Green Refused to Provide Timely Release Dates to the Whistleblowers

John Doe 1 and John Doe 2 both accepted positions outside of the OIG in August 2011. ██████████ OIG Senior Human Resources (HR) Specialist, e-mailed PAIGI Beitel on August 12, 2011, concerning John Doe 1’s acceptance of a position at another federal agency. In his e-mail, he told PAIGI Beitel that the agency had requested an August 28, 2011, release date, and asked if PAIGI Beitel approved the release date or wanted to counter with a different date. PAIGI Beitel forwarded ██████████ e-mail to IG Zinser, ██████████ Assistant Inspector General for Administration (AIG), and Mr. Green later that day. Mr. Green immediately responded that OIG “invokes our 30 day right.”

Several days later, on August 15, 2011, PAIGI Beitel e-mailed John Doe 1's first-level and second-level supervisors, ██████████ to inform them that John Doe 1 had accepted a position with another federal agency and that he would be "coordinating with HR and OC on the release date; same with John Doe 2." ██████████ responded that he had already spoken with John Doe 1 and ██████████, an OIG HR Specialist, and had approved John Doe 1's request for an August 27, 2011, release date based on John Doe 1's minimal workload. PAIGI Beitel then replied that he "just asked ██████████ to hold off for the time being pending internal coordination." PAIGI Beitel later forwarded the e-mail chain to ██████████ supervisor.

██████████ counseled ██████████ for providing John Doe 1 with a release date before obtaining PAIGI Beitel's approval. In her August 15, 2011, e-mail to AIG Leiphart, ██████████ explained that ██████████ had approved the August 27, 2011, release date, and that she was used to "calling the immediate supervisor for the release date." She additionally testified that, prior to John Doe 1, the release date process did not require SES approval or involvement.

On August 29, 2011, ██████████ e-mailed her staff, including ██████████ and ██████████ that "[i]f John Doe 2 gets a release date, HR staff needs to let Wade Green know ASAP before proceeding with further action."

██████████ testified that she was relaying requests from the front office and that she assumed that they were considering some sort of action if OC was involved. However, other OIG employees being investigated by OC were given release dates without SES interference.

In fact, another OI supervisor was being investigated by OC for alleged Government Owned Vehicle (GOV) violations. This supervisor did not engage in any protected activity or make protected disclosures. His release date was not delayed by Mr. Green or PAIGI Beitel. The OC was also investigating an OI Special Agent for her alleged role in the acquisition of Glock handguns and shotguns. This employee did not engage in protected activity or make protected disclosures. Her release date was not delayed by Mr. Green or PAIGI Beitel.

3. The Whistleblowers Were Issued Failing Interim Performance Appraisals

On August 24, 2011, almost two weeks after John Doe 1 informed the OIG that he had obtained a new position, PAIGI Beitel presented John Doe 1 with a failing interim performance appraisal. The regular performance cycle ended on September 30, 2011. PAIGI Beitel rated John Doe 1 as a "Level 1" performer, with a total score of 115/ 500 points.

The following month, again weeks after John Doe 2 informed the OIG that he had obtained new employment, PAIGI Beitel gave him a failing interim performance

⁵ ██████████

appraisal. He was also rated a “Level 1” performer with a total score of 100/500 points. Unacceptable performance, such as a “Level 1” rating can be cause for removal under 5 C.F.R. Part 752 or placement on a Performance Improvement Plan (PIP) under 5 C.F.R. Part 432.

The evidence indicated that in 2011, despite the high number of departing employees, only the whistleblowers were issued failing interim appraisals. In fact, no other departing employee received any appraisal at all, much less a career-threatening failing appraisal. Thus, issuing a rating to a departing employee outside of the regular rating cycle was highly unusual. As noted in section “c.” below, PAIGI Beitel, who was aware of the whistleblowers protected activity, acknowledged that he was primarily responsible for coming up with the idea to issue failing interim ratings to the whistleblowers.

a. 2011 Interim Failing Rating is Unfounded

1. Summary Rating Narratives Did Not Accurately Describe Whistleblowers’ Performance for the 2010 - 2011 Performance Period

a. John Doe 1:

In the interim failing appraisal, in his summary rating narrative for John Doe 1, PAIGI Beitel discussed alleged performance deficiencies that occurred “in the current and previous rating periods.” The majority of these alleged deficiencies involved John Doe 1’s failure to timely close four investigations. PAIGI Beitel stated that John Doe 1 kept these cases open “during current and previous rating periods” to justify his “robust staffing level and/or to avoid scrutiny from the upcoming CIGIE peer review.” Even though John Doe 1 credibly denied that this was his intention, PAIGI Beitel included his theory in John Doe 1’s appraisal.

PAIGI Beitel also cited John Doe 1’s failure to “properly use OIG’s authorized system of records for case management (IG CIRTS).” However, PAIGI Beitel knew that John Doe 1’s unit’s primary focus was providing assistance to open investigations and that IG CIRTS was not used to track investigation support. In fact, PAIGI Beitel directly received John Doe 1’s weekly spreadsheet of work performed. This spreadsheet was created to track his work in lieu of IG CIRTS. PAIGI Beitel also cited John Doe 1 for not providing his spreadsheet to OC for legal review. However, PAIGI Beitel never instructed John Doe 1 to submit his spreadsheet to OC prior to his August 24, 2011, interim rating, even though he had received a copy of the weekly spreadsheet for several months.

Finally, PAIGI Beitel held John Doe 1 responsible for not being timely placed on a performance plan. He stated, “[I]f [John Doe 1] thought he was not on an approved plan, he should have asked his former supervisor to provide an approved plan and elevated the issue within OIG as necessary.” The evidence indicates that John Doe 1 notified his previous supervisor, [REDACTED], on several occasions that he was not on an

approved performance plan, and reported to ██████████ on May 26, 2011, that he did not believe he was on a “signed plan despite asking for one several times.” He further noted that, although he was not on an approved plan, ██████████ did give him a signed mid-year review. John Doe 1 forwarded this e-mail chain to PAIGI Beitel later that day, prior to PAIGI Beitel citing the lack of an approved performance plan as a basis for the failing interim appraisal.

Collectively, the evidence does not support any of the cited bases for the retaliatory interim appraisal issued to John Doe 1 after his announced departure from the OIG.

b. John Doe 2:

PAIGI Beitel similarly discussed alleged performance deficiencies that occurred outside of the performance period in his summary rating narrative for John Doe 2. His narrative concentrated on three areas: (1) the CIGIE peer review; (2) OIG policies; and (3) the acquisition of MP5 fully automatic submachine guns (MP5s).

Specifically, PAIGI Beitel held John Doe 2 responsible for his alleged failure to track recommendations from the 2008 CIGIE peer review. PAIGI Beitel wrote that John Doe 2 was “shirking what clearly were his responsibilities,” even though the record demonstrates that OIG senior management never informed John Doe 2 that he was expected to track these recommendations. Accordingly, John Doe 2 was held responsible in a 2011 interim performance appraisal for a duty that he was never instructed to perform and that was not included in his performance plan in any year following the 2008 CIGIE peer review. Moreover, since PAIGI Beitel contended that John Doe 2 should have performed these tracking functions beginning in 2008, the majority of these alleged violations occurred outside of the 2010-2011 performance period, and should have not been included in the interim appraisal.

PAIGI Beitel further claimed that John Doe 2’s Quality Assurance Review (QAR) report, drafted in preparation for the 2011 peer review, was deficient because it stated that OIG was “fully compliant” on several QAR entries without providing qualifying notations. When John Doe 2 was questioned about these entries, the record indicates that he agreed to provide qualifying notations. ██████████ a former Department of Justice SAC hired by OIG on a temporary basis to prepare for the 2011 peer review, testified that John Doe 2’s QAR had identified deficiencies, but that the real problem was lack of direction from OIG management.

In addition, the interim failing performance appraisal cited John Doe 2 for failing to accurately report an OIG recovery. However, the recovery took place in a previous performance period, and John Doe 2’s prior performance appraisals, which occurred prior to his protected activity, did not address this issue. The interim failing performance appraisal cited John Doe 2 for not conducting a revision of the OIG’s Government Owned Vehicle (GOV) policy. The record indicates that he was never tasked with conducting such a revision by his chain of command, and PAIGI expected the revisions to be done *sua sponte* by John Doe 2.

PAIGI Beitel concentrated most of his critique in the failing interim appraisal on John Doe 2's role in the OIG's acquisition of MP5s and his revision of OIG policy related to that acquisition. Specifically, PAIGI Beitel cited John Doe 2 for acquiring the MP5s without IG approval, and for deleting the requirement for IG approval from the OIG policy. However, the evidence indicates that OIG management was aware that John Doe 2 informed his first-level supervisor about the acquisition, and thus reasonably assumed that his management appropriately notified IG Zinser. PAIGI Beitel attributed all responsibility for the MP5 acquisition and policy change to John Doe 2, even though several other employees were involved. In what became a highly charged matter in the OIG, the lowest level employee involved was held accountable in an interim failing appraisal for an issue that other managers knew of and for which they held greater responsibility. Finally, both of these events occurred in 2009, well outside of the 2010-2011 performance period.

Collectively, the evidence does not support any of the cited bases for the retaliatory, interim appraisal issued to John Doe 2 after his announced departure from the OIG.

c. Rick Beitel was Primarily Responsible for Interim Performance Appraisals

Although [REDACTED] signed the whistleblowers' interim performance appraisals, the weight of the evidence shows that PAIGI Beitel was primarily responsible for drafting and issuing the interim appraisals. [REDACTED] testified that PAIGI Beitel wrote the interim appraisals. Although he did not disagree with PAIGI Beitel's assessment of the whistleblowers' performance, he felt the ratings were "harsh." He further testified that he signed the appraisals as the approving official, and believed that, as the approving official, his role was to defer to the rating official's judgment. He testified that he "recognized that he had little to no power or authority to do anything" concerning the treatment of the whistleblowers, and that he was "actively looking for another job." [REDACTED] additionally testified that, in retrospect, he felt he could have "come out stronger" in disagreeing with PAIGI Beitel's interim performance ratings for the whistleblowers.

PAIGI Beitel testified that both he and [REDACTED] felt that the interim appraisals were appropriate, and that the issuance of the appraisals was "our idea, but I certainly take a measure of ownership of that." He further testified that "it was a decision obviously that I made ... you know, I prepared it, signed it."

2. The Summary Rating Narratives are not Based on the Whistleblowers' Performance During the 2010-2011 Performance Period

The Code of Federal Regulations provides that "a rating of record shall be based only on the evaluation of actual job performance for the designated appraisal period." See 5 C.F.R. § 430.208(a)(1). As mentioned above, the majority of the whistleblowers' alleged performance issues cited in PAIGI Beitel's summary narratives occurred outside of the 2010-2011 appraisal period. All of the cited cases in his summary narrative for

John Doe 1 were investigated and resolved during prior appraisal periods – some as early as 2006 – and were not reviewed and rated during those periods, prior to John Doe 1’s protected activity. Similarly, many of the issues raised in PAIGI Beitel’s summary narrative for John Doe 2 occurred in previous rating periods, including the MP5 acquisition and associated policy change, and were not reviewed and rated during those periods and prior to John Doe 2’s protected activity.

A key witness familiar with the OIG rating process testified that OIG senior staff “constantly do performance appraisals for things that happen outside of the performance period ... particularly during this period when they’re trying to nail people on stuff.” The witness further testified that PAIGI Beitel did so in an effort to discourage employees from reapplying to the OIG or to deter legal action. The witness testified that PAIGI Beitel specifically told him/her that he would “write this really negative appraisal and we’ll put it in our drop file so that ... if anything happens where [the employee] sues us or whatever the case may be, we can bring [it] out.” OSC found this witness highly credible.

3. There Was No Legitimate Basis to Issue the Whistleblowers Interim Performance Appraisals

Although one witness estimated a seventy percent OIG employee attrition rate from May 2011 to December 2012, of the departing employees only the whistleblowers were given “interim” or “close-out” performance appraisals. PAIGI Beitel testified that he and ██████ decided to write interim performance appraisals for the whistleblowers because the Office of Personnel Management (OPM) OIG peer review team was coming in and there were a “number of deficiencies that the various OIG senior management, senior leadership reviews had disclosed and identified” and that it was “something that we needed to memorialize appropriately.”

This testimony appears disingenuous because several employees, including one manager, who were also described as poor performers were not given interim appraisals when they left OIG. More significantly, PAIGI Beitel drafted John Doe 1’s and John Doe 2’s failing performance appraisals *after* they gave notice that they were leaving the OIG. If there were legitimate concerns about the whistleblowers’ performance, PAIGI Beitel and/or ██████ should have addressed these deficiencies when they occurred, and/or should have taken steps to place John Doe 1 and John Doe 2 on PIPs. Moreover, since interim appraisals are not typically included in employees’ Official Personnel Folders (OPFs), providing John Doe 1 and John Doe 2 with interim appraisals would not effectively warn new employers of their alleged performance deficiencies.

4. The Whistleblowers Have Historically Been - and Currently Are - Highly Rated Federal Employees

For the majority of their extensive government careers, the whistleblowers have received the highest numerical rating, “Level 5”, or “Outstanding” performance reviews. John Doe 1 was consistently rated 500/500 – the highest rating possible under the OIG’s

performance system. Under [REDACTED] John Doe 1's and John Doe 2's ratings dropped slightly, but never below a "Fully Successful" level.

Before departing the OIG in or around May 2011, [REDACTED] provided the whistleblowers and his other subordinates mid-year progress reviews. On April 26, 2011, [REDACTED] rated John Doe 1 as performing at Level 3 or higher on all critical elements, providing that he was performing his assigned duties well. [REDACTED] provided John Doe 2 with a mid-year progress review on or around April 26, 2011, also rating him as performing at Level 3 or higher on all critical elements. These mid-year progress reviews were issued only four months before PAIGH Beitel's interim appraisals, and prior to the whistleblowers' protected activity. PAIGH Beitel asserted that he did not endorse [REDACTED] reviews, but provided no credible basis for issuing the interim appraisals to the whistleblowers and no other departing OIG employees.

Since leaving OIG for other federal agencies, the whistleblowers have been again rated as "Level 5" or "Outstanding" employees, and have received 500/500 total performance points.

4. *The Whistleblowers Executed Separation Agreements in Order to Leave the OIG with Clean Performance Records*

Mr. Green placed undue pressure on the whistleblowers to sign separation agreements before they could be released from their OIG positions. Even though numerous employees left the OIG for positions with other federal agencies during this timeframe, the whistleblowers were the only OIG employees presented with separation agreements⁶ and were coerced into signing the agreements under the threat of interim failing performance appraisals.

The separation agreements, which Mr. Green and his staff drafted, reviewed, edited, and negotiated, required John Doe 1 and John Doe 2 to withdraw their FOIA requests and John Doe 1's EEO complaint and to agree to release their rights to future administrative relief before the EEO, Merit Systems Protection Board (Board), and Congress. The separation agreements additionally contained the non-disparagement provisions/gag clauses at issue. These provisions provided that John Doe 1 and John Doe 2 could not:

[D]isparage the Agency in any communications to any person or entity, including but not limited to Members of Congress and their staff, the Office of Special Counsel, and the media. However, nothing in this Agreement shall prevent, prohibit or impair [John Doe 1 and John Doe 2] from responding truthfully to direct questions posed to him in writing or in the course of a formal hearing before any legislative, executive, or judicial body. (Emphasis added).

⁶ An OC employee, Employee X, executed a 'settlement agreement' containing similar non-disparagement language in 2011. A discussion of this agreement is located on page 14 of this Report.

In exchange for withdrawing their BEO complaints and/or FOIA requests, releasing their rights for any future administrative relief, and waiving their rights to contact Members of Congress and/or the media or file complaints with OSC, John Doe 1 and John Doe 2 received release dates to leave the OIG and guarantees that their new agencies would not see their failing interim performance appraisals. PAIGI Beitel and Mr. Green made it clear that if they did not execute separation agreements, their new agencies would be provided with copies of the failing interim appraisals, which could potentially devastate their careers as federal employees.

a. The Non-Disparagement Provisions Prevented the Whistleblowers From Making Protected Disclosures to OSC, Congress, or the Media

Both John Doe 1 and John Doe 2 testified that they interpreted the non-disparagement provisions in their separation agreements as prohibiting them from filing complaints with OSC, Congress, or the media. John Doe 1 testified that his separation agreement “says that I’m not allowed to file any complaints or anything like this.” As reason for not filing a complaint with OSC, he testified, “even though I firmly believe that I had grounds to do so, [I didn’t file a complaint] because I believe and I still, and I still do to some extent, that my hands are tied and I could not come to [OSC] and file a complaint because of that stupid separation agreement.” John Doe 2 testified that “the day I went in to sign that separation agreement I had never been more scared in my life.” He explained that he believed the separation agreement prevented him from filing complaints and that “it wasn’t worth the risk of bringing [complaints to OSC or Congress]... I just saw them coming after me.”

Wade Green testified that the non-disparagement provisions did not interfere with the employees’ whistleblowing rights because those rights are something that “everybody knows you have and that can’t be interfered with.” He further testified that disparagement is “different from whistleblowing,” because it is “about truthfulness, veracity,” and stated that this definition of disparage is “common in the IG community.” Mr. Green did not define disparage in the separation agreements, however, and made no effort to explain to John Doe 1, John Doe 2, or their respective counsels, that it was not the OIG’s intention to prevent them from blowing the whistle.

In contrast, the evidence indicates that Mr. Green intended to prevent the whistleblowers from contacting Congress or the media, or from filing complaints with OSC. Mr. Green’s stated understanding of the scope of the non-disparagement language is not supported by the text of the provision when read in its entirety. The second half of the non-disparagement provision, states:

However, nothing in this Agreement shall prevent, prohibit or impair [John Doe 1 and John Doe 2] from responding truthfully to direct questions posed to him in writing or in the course of a formal hearing before any legislative, executive, or judicial body.

This section carves out instances when John Doe 1 and John Doe 2 would be allowed to contact Congress, OSC, or the media under the terms of the agreement. By specifically listing parameters for permissible contact with these bodies, it indicates that all other contact, including making protected disclosures, is prohibited under the agreement.

Second, Mr. Green provided no evidence to suggest that his stated definition of “disparage” was commonly used within the OIG, or necessary to include in the whistleblowers’ separation agreements. In fact, a former OC employee directly contradicted the definition put forth by Mr. Green, testifying that “disparage” is a “negative statement” that “does not have to be false.” Moreover, Mr. Green offered no credible basis to conclude that either John Doe 1 or John Doe 2 had made any false accusations against the OIG. To the contrary, witnesses consistently described the whistleblowers as men of integrity. Mr. Green presented no evidence suggesting a need to insert the non-disparagement provision into the agreement, even if it was limited to untrue statements.⁷ In contrast, as described above, the whistleblowers had engaged in protected activity. The weight of the evidence suggests that Mr. Green’s intent was to prohibit further protected activity, rather than inaccurate statements.

Third, the non-disparagement provision was extremely important to Mr. Green. Indeed, the evidence shows that he insisted that the non-disparagement provisions remain in the separation agreements. The non-disparagement language was initially drafted for use in a settlement agreement between the OIG and another employee who engaged in protected activity (Employee X).⁸ This agreement was negotiated between Mr. Green and Employee X’s attorney. Employee X’s attorney removed the non-disparagement language twice, and both times, Mr. Green reinserted it. Mr. Green testified that he “certainly put [the non-disparagement provision] in there” and “probably required that it stay in there as a negotiation point.” Significantly, Mr. Green also removed a provision drafted by Employee X’s attorney, which would have allowed for his client “to file an EEO or Special Counsel complaint.” Accordingly, the weight of the evidence suggests that the scope of the agreement precluded protected activity, such as an EEO or Special Counsel complaint, and not only untruthful statements.

Finally, Mr. Green demonstrated a motive to chill protected communications by whistleblowers. To illustrate, in an e-mail to [REDACTED] dated November 17, 2010, Mr.

⁷ It is worth noting that under 5 U.S.C. § 2302(b)(8), a disclosure does not need to be accurate in order to be protected. This subsection of the statute provides that, for a disclosure to be protected, an employee or applicant must “reasonably believe” that he or she is disclosing a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Accordingly, a false or incorrect disclosure could be protected if the employee or applicant had a reasonable belief that the disclosure was true, based on their professional opinion or experience. Therefore, even if “disparage” is defined as a false, untruthful or inaccurate statement, the non-disparagement provisions in the whistleblowers’ separation agreements would still prevent them from making lawful protected disclosures to OSC and others.

⁸ This settlement agreement is not specifically discussed herein because it differs greatly from those in the separation agreements at issue. For example, Employee X agreed to a \$25,000 buy-out payment and was allowed to retire early with a clean record. In addition, the OIG produced substantial evidence going back several years that Employee X had legitimate performance problems.

Green stated the importance of protecting IG Zinser's and the OIG's reputations, and provided advice on how to manage OI employees. He told [REDACTED]

If there is one thing you can fix in your first year it would be to improve how OI plays with others. It would be one thing if they just self-destructed—but it won't be that clean. When they hit that wall at 100 MPH it will splash on [Todd Zinser] the OIG as an agency, and all our reputations—and we never would have had an opportunity to stop or mitigate the damage because we have no visibility into OI. It is my job to safeguard the Client from these events—and I will.

The evidence indicates that Mr. Green inserted non-disparagement provisions into the whistleblowers' separation agreements because, as OI employees, he was concerned that they would damage IG Zinser's reputation, his reputation, and the OIG.

b. The Whistleblowers Were Given Separation Agreements Because They Engaged in Protected Activity

Three OI managers were identified as having performance deficiencies in 2011. Each of these managers was being investigated by the OC for alleged violations of the SPI and/or GOV policies. Nevertheless, only two managers—John Doe 1 and John Doe 2—engaged in protected activity. Unlike the whistleblowers, the third manager, who did not engage in protected activity or whistleblowing, was not required to execute a separation agreement containing a non-disparagement provision and was not given a failing interim performance appraisal before his departure from the agency. Because all three of these managers had alleged performance issues and were being investigated for purported infractions, the only difference between them was that the third manager was not a perceived whistleblower and did not engage in any protected activity.

The fact that the non-disparagement provisions specifically list Congress, the media, and OSC, further shows that Mr. Green intended to prevent John Doe 1 and John Doe 2 from whistleblowing. In addition to an OIG, the main avenues for federal employees to make protected disclosures are through OSC, Congress, or the media. By preventing the whistleblowers from initiating contact with these bodies, it appears that Mr. Green intended to interfere with the whistleblowers' ability to make disclosures against the OIG.

c. PAIGI Beitel and Wade Green Appear to Have Coordinated on the Provisions of the Separation Agreements

PAIGI Beitel provided John Doe 1 with John Doe 1's failing interim performance appraisal on August 24, 2011, the same day that Mr. Green presented him with the separation agreement. As discussed above, PAIGI Beitel decided to give John Doe 1 an interim performance appraisal after he learned that John Doe 1 had accepted a position with another federal agency. PAIGI Beitel presented John Doe 2 with his failing interim

entered into on behalf of Commerce, including settlement agreements involving the OIG.⁹

Both [REDACTED] and [REDACTED] testified that Mr. Green did not submit John Doe 1's and John Doe 2's separation agreements to OGC for legal review per standard practice. In fact, [REDACTED] and [REDACTED] testified that they first received John Doe 1's separation agreement from the Commerce Office of Civil Rights in or around November 2012, and learned of John Doe 2's separation agreement during OSC's investigation. To their knowledge, John Doe 1's and John Doe 2's separation agreements were the first legal agreements entered into by the OIG without OGC approval or concurrence.

Mr. Green testified that John Doe 1's and John Doe 2's separation agreements were not routed through OGC "because it was based on the template that OGC had approved for [a previous settlement agreement], and I felt that was good enough." The referenced settlement agreement had key differences with those signed by the whistleblowers. It involved an employee who was already on a PIP, and received fair consideration for entering into the agreement, to include a \$25,000 voluntary buy-out and early retirement. In contrast, as discussed, the whistleblowers only received timely release dates and notice that their new employers would not be given copies of their failing interim performance appraisals. The only similarity between the agreements was the non-disparagement provision, which, as previously discussed, was originally drafted by Mr. Green for inclusion in Employee X's settlement agreement. In addition, the non-disparagement provision in Employee X's settlement agreement differed from the provisions in John Doe 1's and John Doe 2's separation agreements, because it also prohibited the OIG from "disparaging" the employee.

Although [REDACTED] and [REDACTED] both reviewed and signed Employee X's settlement agreement, they both testified that, to their knowledge, OGC had never in its practice included such non-disparagement provisions in any Commerce settlement agreement. Both testified to their belief that such provisions could chill whistleblowing. They further testified that Mr. Green did not use the OGC settlement agreement template. [REDACTED] testified that he was "dumbfounded" that the non-disparagement provision was in Employee X's settlement agreement and that he signed it as an OGC department representative. He believed it was an oversight and should not have been included in any Commerce settlement agreement.

⁹ OGC derives its authority to review all settlement agreements on behalf of the agency from Department of Commerce Department Organization Order 10-6, which describes the Office of General Counsel. Mr. Guenther testified that he has always relied on Section 4.01.b, which delegates to the General Counsel responsibility for "[t]he preparation, or examination for legal form and effect, of all legal instruments, such as contracts, cooperative agreements, leases, licenses, and bonds, entered into by the Department," to support the requirement that his office must concur in settlement agreements and resolution agreements.

e. PAIGI Beitel and Wade Green Signed John Doe 1's and John Doe 2's Separation Agreements

PAIGI Beitel signed the whistleblowers' separation agreements as "Management Official," and Mr. Green signed the agreements as "Counsel to the Inspector General." By signing the agreements, PAIGI Beitel and Mr. Green represented that they reviewed the agreements and agreed to the terms.

██████████ and IG Zinser did not sign the agreements. IG Zinser testified that, prior to OSC's investigation, he had not reviewed the whistleblowers' separation agreements and was unaware of the non-disparagement provisions contained within them. ██████████ testified that he first learned of the whistleblowers' separation agreements during OSC's investigation. Both Mr. Green and PAIGI Beitel testified that they neither discussed the terms of the separation agreements with IG Zinser, nor showed him a copy of the agreements.

III. LEGAL ANALYSIS

There is compelling evidence of whistleblower retaliation warranting corrective action for John Doe 1 and disciplinary action against PAIGI Beitel and Mr. Green.¹⁰

A. Legal Standard: 5 U.S.C. §§ 2302(b)(8) and (b)(9):

It is a prohibited personnel practice to take or threaten to take a personnel action against an employee because of any disclosure of information that the employee "reasonably believes" evidences a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8). It is also a prohibited personnel practice to take or threaten to take a personnel action against any employee or applicant for employment because of: (1) the filing of an appeal, complaint, or grievance right granted by law, rule, or regulation; (2) testifying for or otherwise lawfully assisting any individual in filing an appeal, complaint, or grievance right granted by law, rule, or regulation; or (3) cooperating with or disclosing information to the Inspector General of an agency or the Special Counsel. 5 U.S.C. § 2302(b)(9).

B. Burden of Proof for Corrective and Disciplinary Action

1. Corrective Action

To prove violations of 5 U.S.C. §§ 2302(b)(8) or (b)(9) of the Whistleblower Protection Act (WPA) warranting corrective action, OSC must demonstrate with preponderant evidence that: (1) a protected disclosure of information was made or the employee engaged in protected activity; (2) the proposing or deciding officials had actual or constructive knowledge of the protected activity; (3) official(s) with authority to take,

¹⁰ Although OSC's investigation demonstrated evidence of whistleblower retaliation against John Doe 2, he did not formally file a complaint with OSC, and therefore, OSC cannot seek corrective action on his behalf.

recommend, or approve a personnel action took or threatened to take personnel actions;¹¹ and (4) the protected disclosure or protected activity was a contributing factor in the personnel action at issue. See *Fidmann v. Merit Sys. Prot. Bd.*, 976 F.2d 1400, 1407 (Fed Cir. 1992) (explains (b)(8)) and Section 101(b)(1) of S. 743, the Whistleblower Protection Enhancement Act of 2012 (Pub. L. 112-199) (amending 5 U.S.C. § 1221(e)(1) to apply to cases involving protected activity under (b)(9)).¹²

Once OSC establishes a *prima facie* case of whistleblower reprisal, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the same action absent the disclosure. *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1364 (Fed. Cir. 2012). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard of proof than preponderance of the evidence, and as the Federal Circuit pointed out in *Whitmore*, “is reserved to protect particularly important interests in a limited number of cases.” 5 C.F.R. § 1209.4(d), *Whitmore*, 680 F.3d at 1367.

2. Disciplinary Action

In any case in which the Board finds that an employee has committed a PPP under 5 U.S.C. §§ 2302(b)(8) or (b)(9)(A)(i), (B), (C), or (D), the Board may impose disciplinary action if it finds that the activity protected under these sections was a significant motivating factor, even if other factors also motivated the decision, for the employee’s decision to take, fail to take, or threaten to take or fail to take a personnel action, unless that employee demonstrates by a preponderance of the evidence that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action in the absence of such protected activity. Section 106 of S. 743, the Whistleblower Protection Enhancement Act of 2012 (Pub. L. 112-199) (amending 5 U.S.C. § 1215(a)(3)).

C. Establishment of *Prima Facie* Cases of Reprisal

1. Protected Activity

John Doe 1 filed an EEO complaint on or around June 14, 2011, which constitutes protected activity under 5 U.S.C. § 2302(b)(9). He also submitted a FOIA request on or around August 9, 2011, for documents concerning alleged computer surveillance in possible violation of FAR regulations. The evidence also shows that PAIGI Beitel and Mr. Green viewed John Doe 1 as a possible or perceived whistleblower under 5 U.S.C. § 2302(b)(8) because the FOIA requested information could potentially implicate

¹¹ PAIGI Beitel and Mr. Green both exercised the personnel action authority required under 5 U.S.C. §§ 2302(b)(8) and (b)(9).

¹² The Board has held that, if the evidence establishes that subject officials would have taken the personnel action in the absence of the protected disclosures, the significant factor test cannot be met. See generally *Special Counsel v. Costello*, 75 M.S.P.R. 562, 611 (1997).

IG Zinser, PAIGI Beitel, and/or Mr. Green in wrongdoing if, for example, regulations were not followed, as the whistleblowers reasonably believed.

John Doe 2 submitted a document request in July 2011 and a FOIA request in August 2011 for documents or other information concerning the MP5 acquisition and SPF policy. As with John Doe 1's FOIA request, these requests concerned sensitive issues that John Doe 2 reasonably believed could inculpate IG Zinser, PAIGI Beitel and/or Mr. Green in misconduct. John Doe 2 also drafted an EEO complaint and a CIGIE complaint in or around June 2011. These FOIA requests and draft complaints gave the appearance that John Doe 2 was concerned about issues at the OIG and had either engaged in, or was considering engaging in, protected activity.

The perception of whether an employee is a whistleblower is sufficient to establish engagement in protected activity. *King v. Dep't of the Army*, 116 M.S.P.R. 689, 695-696 (2011). The Board found that whether a perceived whistleblower "made a protected disclosure is immaterial," and focused instead on whether the agency *perceived* the employee to be a whistleblower, *i.e.*, whether agency officials appeared to believe that the employee engaged or intended to engage in whistleblowing activity. *Id.*

Here, the record is replete with evidence showing that Mr. Green, PAIGI Beitel, IG Zinser, and ██████████ perceived John Doe 1 and John Doe 2 as whistleblowers based on the substance of their FOIA requests and EEO complaints. As discussed above, several witnesses described them as "perceived whistleblowers." This perception is further demonstrated by the inclusion of the gag clauses in their separation agreements and the requirements that they withdraw their FOIA requests and EEO complaints.

2. Knowledge

Shortly after receiving John Doe 1's EEO complaint, ██████████ contacted Mr. Green on June 30, 2011, to notify him of the complaint and to invite him to provide a written response. Even though John Doe 1's EEO complaint was in the informal stage, Mr. Green forwarded ██████████ e-mail to IG Zinser, ██████████ and PAIGI Beitel—the named subject officials in the complaint—and asked them to "formulate [their] recollection of the events described" in order to "respond on behalf of the Agency." Accordingly, Mr. Green, PAIGI Beitel, IG Zinser, and ██████████ all had knowledge of John Doe 1's engagement in protected activity.

Although John Doe 2 did not file his draft EEO complaint or submit his draft CIGIE complaint, ██████████ testified that he discussed a draft complaint of John Doe 2's with Mr. Green, IG Zinser, and PAIGI Beitel. Mr. Green further testified that he believed that John Doe 2 had either filed an informal EEO complaint or had threatened to do so. This testimony indicates that, even though he did not actually file his EEO complaint or submit his CIGIE complaint, OIG management viewed him as a perceived whistleblower.

In addition, as OIG Chief Counsel, Mr. Green processed all agency FOIA requests. He testified that he had knowledge of John Doe 1's and John Doe 2's FOIA requests, and

that his office sent out FOIA search requests to individuals identified as potentially having responsive documents or information. A key witness testified that PAIGI Beitel and others “went apoplectic” when John Doe 1 filed a FOIA request. Thus, the evidence indicates that Mr. Green and PAIGI Beitel had knowledge of the FOIA requests.

3. *Personnel Actions Were Taken Against John Doe 1 and John Doe 2 Because of Their Perceived Whistleblowing and/or Engagement in Protected Activity*

The evidence clearly shows that John Doe 1’s and John Doe 2’s EEO complaints and/or perceived whistleblowing significantly factored into the personnel actions OIG management took or threatened.

a. *Failing Interim Performance Appraisals*

The failing interim performance appraisals, as chapter 43 performance evaluations, constitute personnel actions under 5 U.S.C. § 2302(a)(2)(A)(viii), or at a minimum, threatened personnel actions.

As discussed above, PAIGI Beitel issued John Doe 1 and John Doe 2 failing interim performance appraisals in conjunction with their separation agreements. These appraisals were drafted and issued after OIG management learned that John Doe 1 and John Doe 2 had accepted positions with other federal agencies. The timing and content of these appraisals shows that they did not reflect PAIGI Beitel’s honest assessment of their performance. Both employees had received outstanding performance evaluations in previous years, and had recently received satisfactory appraisals. Neither had been placed on a PIP. The failing appraisals were issued neither at the usual time nor in the usual manner. The unfounded failing appraisals reflected that, despite recent satisfactory performance, John Doe 1’s and John Doe 2’s performance had suddenly dropped to failure in every element.

PAIGI Beitel issued the whistleblowers failing interim performance appraisals approximately one month after they engaged in protected activity, *i.e.*, engaging in the EEO process and/or submitting FOIA requests potentially implicating OIG management in wrongdoing. The law presumes that a disclosure is a contributing factor in a personnel action when the official who took or recommended the action had knowledge of the protected disclosure and took the personnel action within a period of time that would lead a reasonable person to conclude that the disclosure was a contributing factor. *Reid v. Merit Sys. Prot. Bd.*, 508 F.3d 674, 678-79 (Fed. Cir. 2007). The Board has held that a connection exists between a disclosure and a personnel action even in cases where the personnel action occurs more than a year after the disclosure. *See e.g., Inman v. Dep’t of Veterans Affairs*, 112 M.S.P.R. 280, 283-4 (2009) (personnel action occurred 15 months after disclosure); *Redschlag v. Dept of Army*, 89 M.S.P.R. 589, 626-27 (2001) (personnel action occurred 18 months after disclosure).

Here, based on the knowledge-timing test, the whistleblowers meet the contributing factor standard. The failing performance ratings were issued approximately one month

after John Doe 1 and John Doe 2 filed EEO complaints and/or submitted FOIA requests. Accordingly, the protected activity was a contributing factor in the retaliatory ratings. 5 U.S.C. § 1221(e)(1).

b. Non-Disparagement Provision/Gag Clauses

The separation agreements' non-disparagement provisions constitute a personnel action under 5 U.S.C. 2302(a)(2)(A)(xi). As set forth below, the provision significantly changed the whistleblowers' "duties, responsibilities, or working conditions."

Specifically, it is a fundamental condition of federal employment that an employee has a right, and an ethical duty, to report wrongdoing to appropriate authorities. See Whistleblower Protection Act of 1989, Pub. L. No. 101-12, Sec. 2(b) (1989) (purpose of the WPA is "to strengthen and improve protection for *the rights of Federal employees*, to prevent reprisals, and to help eliminate wrongdoing within the Government[.]") (emphasis added); 5 C.F.R. § 2635.101(b)(11) (2012) ("Employees *shall disclose* waste, fraud, abuse, and corruption to appropriate authorities.") (emphasis added); see also E.O. 12674, Sec. 101(k)(1989)(same).¹³

Contractually requiring an employee to give up that fundamental right, or not to perform that required duty, constitutes a "significant change in duties, responsibilities, or working conditions" within the meaning of 5 U.S.C. § 2302(a)(2)(A) (defining "personnel action"). The legislative history of the 1994 WPA amendments indicates that the term "any other significant change in duties, responsibilities, or working conditions" should be interpreted broadly, to include "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system." *Covarrubias v. Social Sec. Admin.*, 113 M.S.P.R. 583, ¶ 15 n.4 (citing 140 Cong. Rec. H11, 421 (daily ed. Oct. 7, 1994) (statement of Rep. McCloskey); *Roach v. Department of the Army*, 82 M.S.P.R. 464, ¶ 24 (1999)). The non-disparagement provisions in John Doe 1's and John Doe 2's separation agreements have a chilling effect on whistleblowing.

Under the *per se* knowledge/timing test, the whistleblower's perceived whistleblowing was a contributing factor in Mr. Green's issuance of the separation agreements. Mr. Green, who coerced the whistleblowers into signing the separation agreements, had knowledge of their protected activity and presented the separation agreements in close temporal proximity to their protected activity.

¹³ Federal employees also have a statutory obligation to report criminal wrongdoing by other employees to the Attorney General, 28 U.S.C. § 535(b) (2012). In addition, there are a variety of other statutes and regulations that mandate particular types of reporting and/or reporting by certain categories of employees. See, e.g., 48 C.F.R. § 3.104-7 (2011) (violations of the Federal Acquisition Regulation); 31 U.S.C. §§ 1351, 1517(b) (2012) (violations of the Antideficiency Act); 38 C.F.R. § 1.201 (2011) (employee's duty to report violations of Veterans Affairs laws or regulations); 45 C.F.R. §§ 73.735-1301, -1302 (2011) (employee's duty to report violations of fraud, waste or abuse in programs of the Department of Health and Human Services); 40 U.S.C. § 611 (2006) (General Services Administration).

c. Per-se Retaliation

Non-disparagement provisions/ gag clauses have been deemed *per se* retaliation in analogous circumstances. For example, as discussed in “Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes”:

Agreements that attempt to bar individuals from filing a charge or assisting in a Commission investigation run afoul of the anti-retaliation provisions because they impose a penalty upon those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission. By their very existence, such agreements have a chilling effect on the willingness and ability of individuals to come forward with information that may be of critical import to the Commission as it seeks to advance the public interest in the elimination of unlawful employment discrimination.

Enforcement Guidance, EEOC Notice No. 915.002 (April 10, 1997), available at <http://www.eeoc.gov/policy/docs/waiver.html> (emphasis added).

EEOC has consistently recognized in federal sector cases that an agency’s restraint of or interference with the EEO process, including attempts to chill EEO activity through prior restraint, constitutes *per se* retaliation for protected EEO activity – ***even though no personnel action has been taken and no protected activity has occurred.*** For example, in *Jasper v. Runyon*, the Postmaster stated generally at a supervisors’ meeting that too many managers were filing EEO complaints and that these filings would do the managers no good. The Commission found that such a statement would have a potentially chilling effect on the filing of EEO complaints. Based on its duty to insure the integrity of the EEO process, the Commission found that the Postmaster’s statement constituted *per se* retaliation. *Jasper v. Runyon*, EEOC Request No. 05920370, 1992 WL 1374793, at *4 (Aug. 7, 1992).¹⁴

OSC reasonably believes that an agency’s prior restraint or interference with whistleblowing and/or going to OSC constitutes *per se* retaliation under 5 U.S.C. § 2302(b)(8) and/or (b)(9), and thus a prohibited personnel practice. The non-disparagement provisions in the separation agreements on their faces constitute a prior restraint against a signing employee’s whistleblowing and/or going to OSC. Moreover,

¹⁴ See also *Donahue v. Holder*, EEOC Appeal No. 0120073680, 2009 WL 591068, *1 (Feb. 26, 2009) (finding *per se* reprisal where manager made statements at meeting that employees had the right to challenge his recent assignments and “could file grievances or EEO complaints, but they will lose”); *Bensing v. Danzig*, EEOC Appeal No. 01970742, 2000 WL 33541925, *3-4 (Oct. 3, 2000) (supervisor’s objections to employee’s contacts with EEO office and union representatives constituted *per se* reprisal); *Simpson v. Rubin*, EEOC Request No. 05930570, 1994 WL 1841189, *5 (March 11, 1994) (agency policy that precluded employee from serving in acting supervisory capacity solely because employee was an EEO counselor constituted *per se* reprisal); *Marr v. Widnall*, EEOC Appeal No. 01941344, 1996 EEO PUBL EXIS 2637, *18 (June 27, 1996) (finding unlawful interference where supervisor attempted to dissuade witness from testifying in EEO matter by calling her to private meeting in smoking area and stating that it was “in [her] best interest not to get involved.”).

since the non-disparagement provisions also restrain or interfere with a signing employee's exercise of the right to petition Congress, the agreements also constitute a *per se* violation of 5 U.S.C. § 2302(b)(12), and thus a prohibited personnel practice. As the Second Circuit reasoned in similar circumstances: "Although the act of inducing an employee to relinquish his rights as provided by the [Energy Reorganization Act] through means of a settlement agreement is less obvious than more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet." *Connecticut Light & Power v. Secretary of Labor*, 85 F.3d 89, 95-96 & n.5 (2d Cir. 1996) (affirming Dep't of Labor ruling that act of offering settlement agreement which would restrict individual from reporting unlawful conduct to the government violated anti-retaliation provision of Energy Reorganization Act of 1974).

Here, the evidence demonstrates that Mr. Green included the non-disparagement provisions in the whistleblowers' separation agreements with the specific intention of keeping the whistleblowers quiet. He drafted the separation agreements that clearly provided that the whistleblowers' new employers would receive copies of their failing interim performance appraisals unless they agreed to waive their rights to make disclosures to OSC, Congress, and the media.

D. OIG Cannot Meet its Rebuttal Burden

In order to rebut a *prima facie* case of reprisal under 5 U.S.C. § 2302(b)(8), the OIG must show by "clear and convincing" evidence that it would have issued John Doe 1's and John Doe 2's failing interim performance appraisals and executed separation agreements containing non-disparagement provisions even if they had not engaged in protected activity.

The "clear and convincing" evidentiary standard imposes a high burden on the agency that is difficult to satisfy. In *Whitmore*, the Federal Circuit quoted the following from the WPA legislative history:

"Clear and convincing evidence" is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action – in other words, that the agency action was "tainted." Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.

The evidence demonstrates that the OIG will not be able to meet this high burden. First, the OIG will not be able to show that John Doe 1's and John Doe 2's interim performance appraisals were justified. As discussed in section II(b)(6) above, PAIGI Beitel decided to draft and issue the interim performance appraisals after John Doe 1 and

John Doe 2 gave notice that they had accepted positions with other federal agencies. They were the only departing OIG employees given “interim” or “close-out” appraisals, despite the fact that numerous employees left the OIG in 2011. The appraisals were, in part, based on events that occurred outside of the performance period, and the ratings do not appear to be based on their actual performance, especially considering the fact that they were given satisfactory progress reviews less than four months earlier. Moreover, PAIGI Beitel’s testimony that the interim appraisals were drafted to explain the OIG’s alleged issues to the peer review committee is not credible, in that several reports had already been drafted by himself and ██████████ to address these alleged concerns.

The OIG has also asserted that John Doe 1 and John Doe 2 were represented by counsel when they executed their separation agreements and that they willingly entered into the agreements. Whether John Doe 1 and John Doe 2 were represented by counsel, however, does not by itself establish that the agreements were not coercive.

To prove coercion, John Doe 1 and John Doe 2 must show that: (1) they involuntarily accepted the terms of the agreements; (2) circumstances permitted no other alternative; and (3) such circumstances were the result of coercive acts. *See Kent v. Dep’t of the Air Force*, 2013-3034, 2013 WL 1352582, *2 (Fed. Cir. April 5, 2013); *Candelaria v. U.S. Postal Service*, 31 M.S.P.R. 412, 413 (1986). Here, there is sufficient evidence to establish that the OIG coerced John Doe 1 and John Doe 2 into signing the separation agreements.

First, the evidence indicates that John Doe 1 and John Doe 2 involuntarily accepted the terms of the separation agreements. The Federal Circuit has noted that the most probative evidence of involuntariness is the length of time between the employer’s alleged coercive act and the action. *Terban v. Department of Energy*, 216 F.3d 1021, 1024 (Fed. Cir. 2000).¹⁵ Here, Mr. Green provided John Doe 1 with his separation agreement—the same day PAIGI Beitel gave him his failing interim performance appraisal—just four days before he was expected to begin his new position at a different federal agency. John Doe 2 received his separation agreement before receiving his failing interim performance appraisal; however, the terms of his agreement denote that he would not be given a timely release date, that OIG would potentially tell his future employer that his departure from OIG was not voluntary, and that some adverse action would likely be taken against him if he failed to sign the separation agreement. He received his failing interim performance evaluation on his last day with OIG.

Next, the complainants had no alternative but to sign the agreements. If they did not sign them immediately, their release dates to their new employers would be postponed, and their new employers would receive the failing performance appraisals. Potentially, the new employers had the option of rescinding the employment offers. Additionally, if the whistleblowers chose not to sign the agreements and instead challenged the failing appraisals, the agency made clear its intent to postpone the release dates and issue the failing appraisals. Unlike in *Kent*, where the employee remained free

¹⁵ While *Terban* involves retirement, it has also been cited in cases involving settlement agreements. *See Parrott v. Merit Sys. Prot. Bd.*, 519 F.3d 1328, 1334 (Fed. Cir. 2008).

to refuse to sign a settlement agreement and insist on a ruling by the administrative judge on his removal, John Doe 1 and John Doe 2 would have suffered immediate, negative consequences if they refused to sign the agreements. *Id* at *3.

Finally, the failing interim performance appraisals and the separation agreements were the result of coercive acts. In *Bowie v. U.S. Postal Serv.*, the Board held that “a threatened action by an agency is ‘purely coercive’ if an employee can show that the agency knew or should have known that the reason for the threatened action could not be substantiated.” *Bowie*, 72 M.S.P.R. 42, 44 (1996) (threatened removal in settlement discussion before the Board) (citing *Schultz v. United States Navy*, 810 F.2d 1133, 1136-37 (Fed.Cir.1987) (employee’s resignation was involuntary where agency improperly denied leave and threatened adverse action for AWOL)).¹⁶

In this case, Mr. Green told John Doe 1 and John Doe 2 that if they entered into the separation agreements, the OIG would agree not to provide their new employers with copies of their failing interim performance appraisals. He further threatened that if they refused to sign the separation agreements, the OIG would not provide their requested release dates, and would instead hold them at OIG for the maximum time allowed, despite the fact that they had minimal work to perform and no outstanding projects.

Equally significant, the failing interim performance appraisals were unfounded. Prior to these appraisals, John Doe 1 and John Doe 2 worked at the agency for many years and had never received appraisals below “Fully Successful”. Their performance at the time these failing appraisals were issued was at least at the “Fully Successful” level. The OIG knew that it could not substantiate the failing interim appraisals. In addition, the ratings were issued out of cycle. It is not the OIG’s common practice to issue “interim” or “close-out” ratings before an employee leaves the agency. In fact, no employee, with the exception of John Doe 1 and John Doe 2, has received a close-out appraisal. The evidence shows that the failing performance appraisals were presented to John Doe 1 and John Doe 2 solely to coerce them into signing the separation agreements, and thus, prevent them from engaging in further protected activity.

In addition, the OIG did not have a legitimate reason to threaten to postpone John Doe 1’s and John Doe 2’s release dates. The evidence shows that there was no reason to require John Doe 1 and John Doe 2 to remain at the agency. They no longer had work to complete and would be lingering at the agency with nothing to do. PAIGI Beitel did not assert that he or anyone at the OIG was considering postponing the release dates for some legitimate reason, such as the need for John Doe 1 and John Doe 2 to complete an assignment. Where an agency’s action does not have a solid or substantial basis in personnel practice or principle it is an unjustifiable coercive act. See *Michael Roskos v. the United States*, 549 F.2d 1386 (Fed. Cir. 1977) (where there was no acceptable good-of-the-service rationale for employee’s reassignment, the reassignment was a coercive act

¹⁶ The Board has applied *Schultz* in the context of a settlement agreement. See *Merrweather v. Department of Transportation*, 64 M.S.P.R. 365, 371 (1994), *aff’d*, 56 F.3d 83 (Fed.Cir.1995) (last chance agreement).

and employee's subsequent retirement was involuntary); *Caveney v. Office of Administration*, 57 M.S.P.R. 667 (1993) (employee's retirement was involuntary where the reassignment preceding retirement had no solid or substantial basis in personnel management or management principles). The failing interim performance appraisals and threats to postpone the whistleblowers' release dates have no substantial basis in personnel practice or principle, and are thus coercive acts. Lastly, the whistleblowers were targeted for disparate treatment. A similarly situated employee who did not engage in protected activity was not issued a failing interim performance appraisal or a separation agreement when he departed the OIG during the same time period.

Accordingly, for all of these reasons, the OIG cannot meet its burden of showing by "clear and convincing" evidence that it would have issued John Doe 1 and John Doe 2 failing interim performance appraisals and separation agreements, absent their perceived whistleblowing or participation in protected activity.

E. Significant Factor Burden-Mosaic of Retaliation

OSC's investigation uncovered compelling evidence of a pattern of retaliation against the complainants for whistleblowing, perceived whistleblowing, and engaging in protected activity. Evidence showing a pattern or "convincing mosaic" of retaliation can be used to prove the significant factor element in a retaliation case. Such mosaic includes pieces of evidence that "[w]hen taken as a whole, provide strong support if all [pieces] point in the same direction...." *Crump v. Dep't of Veterans Affairs*, 114 M.S.P.R. 224, 229-230 (2010). As a general rule, this mosaic has been defined to include three general types of evidence: (1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. *Rhee v. Dep't of Treasury*, 117 M.S.P.R. 640, 653 (2012) (quoting *Kohler v. Department of the Navy*, 108 M.S.P.R. 510, 515 (2008)).

There is strong evidence of suspiciously close timing between John Doe 1's and John Doe 2's protected activity and the interim failing appraisals and separation agreements. John Doe 1 and John Doe 2 engaged in protected activity over a period of several months from May through September 2011. The whistleblowers were issued "Level 1" interim appraisals and presented with separation agreements containing non-disparagement language in August and September 2011. The proximity between the protected activity and the agency's actions is very close—including actions taken within just days or weeks of the protected activity—giving rise to a strong inference of retaliation.

In addition, John Doe 1 and John Doe 2 were treated less favorably than a similarly situated employee. Like John Doe 1 and John Doe 2, another OI manager was identified as having performance deficiencies in 2011 and was being investigated by the OC for alleged violations of agency policy. This manager, however, was not required to execute a separation agreement containing a non-disparagement provision and was not given a

failing interim performance appraisal before his departure from the agency. Unlike John Doe 1 and John Doe 2, this manager did not engage in protected activity. The only difference between these three OI managers was that John Doe 1 and John Doe 2 engaged in protected activity.

Moreover, there is evidence that the agency's stated reasons for its actions are pretextual. The interim appraisals do not accurately describe John Doe 1's and John Doe 2's performance and primarily address issues outside of the 2010-2011 appraisal period. In addition, PAIGI Beitel's reasons for issuing the appraisals are pretextual. He testified that one reason for issuing the failing interim appraisals was to explain deficiencies to the OPM OIG peer review team. However, this explanation also seems disingenuous considering there were several other employees who were not similarly given interim appraisals when they left OIG, despite their poor performance. In sum, PAIGI Beitel did not find it necessary to document the poor performance of other departing employees who were not whistleblowers.

The agency's stated reasons for executing separation agreements containing non-disparagement language was also pretextual. Mr. Green testified that he inserted the non-disparagement language to prevent John Doe 1 and John Doe 2 from being untruthful about the OIG, not to prevent them from blowing the whistle. As noted above, there is no evidence that John Doe 1 or John Doe 2 were dishonest or deceitful; rather, witnesses consistently described them as men of integrity. In addition, while numerous employees left the OIG for employment with other agencies, John Doe 1 and John Doe 2 were the only employees presented with separation agreements. It is suspect that Mr. Green was not concerned with preventing other allegedly poor performing employees from "disparaging" the OIG. Here, the suspicious timing, evidence that similarly situated employees were treated more favorably, and evidence that the agency's stated reasons for its actions were pretextual demonstrates a convincing mosaic of retaliation.

F. The Separation Agreements Violate 5 U.S.C. § 2302(b)(12) as Violations of the Lloyd-LaFollette Act

It is also a prohibited personnel practice to take a personnel action if taking such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles. 5 U.S.C. § 2302(b)(12). An employee's right to petition Congress is protected under the Lloyd-LaFollette Act of 1912, 5 U.S.C. § 7211. Several legislators explicitly cited "gag rules" that forbade federal employees to communicate directly with Congress on pain of dismissal as the reason for enacting the Lloyd-LaFollette Act. *Bush v. Lucas*, 462 U.S. 367, 382-84 & nn.19-24 (1983). The non-disparagement provisions in the separation agreements, on their face, violate the Lloyd-LaFollette Act, and thereby 5 U.S.C. § 2302(b)(12).¹⁷ See 5 U.S.C. § 2302(b) ("This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to the Congress.").

¹⁷ The Lloyd-LaFollette Act implements 5 U.S.C. § 2301(b)(9).

IV. CULPABILITY OF RESPONSIBLE OFFICIALS AND RECOMMENDATIONS

There is compelling evidence that OIG management engaged in a series of adverse actions against the complainants in retaliation for their protected activity and/or perceived whistleblowing and to chill future whistleblowing. The evidence shows that Mr. Green drafted and/or reviewed, negotiated, and insisted on the inclusion of the non-disparagement language in the separation agreements. However, he did not, and could not, act alone. Without PAIGI Beitel's failing interim performance appraisals, the agency would have lacked leverage to coerce the whistleblowers into signing the separation agreements, in which they waived their rights to make protected disclosures to OSC, Members of Congress, and the media.

Although there is inconsistent testimony regarding the involvement of Mr. Green, PAIGI Beitel, and other members of OIG senior management, the weight of the testimony and documentary evidence demonstrates that Mr. Green and PAIGI Beitel were the key players in drafting the separation agreements, signing the agreements, and issuing the failing interim performance appraisals. More significantly, the evidence shows that Mr. Green and PAIGI Beitel manifested the strongest motive to retaliate against John Doe 1 and John Doe 2.

A. Wade Green

The record is replete with evidence establishing that Wade Green retaliated against the whistleblowers. He admitted to drafting or directing that an OC attorney draft the whistleblowers' separation agreements, and signing the agreements. He testified that he drafted and/or reviewed the non-disparagement provisions, and that he insisted that they remain in the agreements. Importantly, in negotiating Employee X's settlement agreement—the agreement upon which the non-disparagement provisions in the whistleblowers' separation agreements were based—he removed a provision drafted by Employee X's attorney, which would have allowed for his client “to file an EEO or Special Counsel complaint.”

The evidence also shows that Mr. Green reviewed John Doe 1's and John Doe 2's failing interim performance appraisals before drafting the separation agreements, and included the provisions that the failing appraisals would not be provided to John Doe 1's and John Doe 2's future employers if they agreed to the terms of the agreements. Mr. Green also made clear to John Doe 1 and John Doe 2 that the OIG would hold them for 30 days if they refused to sign the agreements—despite the fact that their workloads were minimal and there was no justification to delay their release dates.

The evidence demonstrates that Mr. Green was motivated to retaliate against the whistleblowers for two reasons: (1) he wanted to protect IG Zinser, himself, and the OIG from potential damaging statements and (2) he wanted the whistleblowers to withdraw their EEO and FOIA requests. The documents sought from the requests could potentially implicate him and/or IG Zinser or PAIGI Beitel in wrongdoing.

Mr. Green testified that if OSC found a violation based on the separation agreements, he accepted responsibility for the violation due to his position as "Chief Legal Officer." As such, particularly for an Inspector General's office, Mr. Green would have been familiar with the WPA and should have prevented violations of the Act by the OIG. Instead, the evidence shows that he used his position to draft separation agreements containing non-disparagement provisions aimed at keeping whistleblowers quiet, and used retaliatory failing performance appraisals as leverage to compel the whistleblowers to sign the agreements.

Based on the preceding, OSC recommends that Commerce take substantial disciplinary action against Wade Green.

B. PAIGI Beitel

The record is also replete with evidence establishing that PAIGI Beitel retaliated against the whistleblowers by drafting their unfounded failing interim performance appraisals. The evidence indicates that he coordinated with Mr. Green on the separation agreements. Specifically, he drafted and provided Mr. Green with copies of their failing interim performance appraisals. In addition, he testified that the interim appraisals and the separation agreements work together and are "contemporaneous." Finally, in his capacity as an OIG management official, he signed the separation agreements containing the non-disparagement provisions.

The evidence demonstrates that PAIGI Beitel was motivated to retaliate against the whistleblowers for their engagement in protected activity and/or their perceived whistleblowing. In particular, he was named as a subject official in John Doe 1's EEO complaint, and, according to a key witness, went "apoplectic" when John Doe 1 submitted a FOIA request concerning sensitive documents that could potentially implicate him in wrongdoing.

PAIGI Beitel's behavior is particularly egregious based on his position as the OIG's expert on whistleblower protection. He has worked on whistleblower issues for well over a decade, has received training on prohibited personnel practices, and was allegedly selected for an SES position at OIG in order to establish a whistleblower protection unit. Based on this knowledge and experience, PAIGI Beitel was clearly familiar with the WPA and should have taken steps to prevent retaliatory actions.

As to the appropriate penalty for PAIGI Beitel, because he neither drafted nor was consulted on the non-disparagement provision, his involvement in the separation agreements was less than Mr. Green's. Thus, OSC recommends that a lower level of discipline be taken against PAIGI Beitel.

C. Todd Zinser and [REDACTED]

There is insufficient evidence to establish that IG Zinser reviewed the separation agreements prior to OSC's investigation or was informed about the non-disparagement

clauses. Wade Green testified that he neither provided IG Zinser with a copy of the separation agreements, nor informed him that the separation agreements contained non-disparagement provisions. PAIGI Beitel additionally testified that IG Zinser was not involved with the drafting or issuance of the whistleblowers' failing interim performance appraisals. IG Zinser did not sign any of these documents, and OSC found no documentary evidence showing IG Zinser's knowledge or involvement with the whistleblowers' interim performance appraisals or separation agreements. Accordingly, OSC has insufficient evidence to seek disciplinary action against IG Zinser for a violation of 5 U.S.C. §§ 2302(b)(8), (b)(9), or (b)(12).

Similarly, OSC has insufficient evidence to establish that ██████ committed a prohibited personnel practice. Although ██████ signed the whistleblowers' interim performance appraisals, the evidence indicates that his role in these appraisals was minor as compared to PAIGI Beitel's. Further, ██████ credibly testified that he was unaware of the whistleblowers' separation agreements prior to OSC's investigation. Although ██████ failed to protect the whistleblowers from retaliatory actions, there is insufficient evidence to seek disciplinary action against him for a violation of 5 U.S.C. §§ 2302(b)(8), (b)(9) or (b)(12).

V. CONCLUSION

Congress included protection for whistleblowers in the Civil Service Reform Act to assure federal employees "will not suffer if they help uncover and correct administrative abuses." S. Rep. No. 95-969, at 8 (1978), *reprinted in* 1978 U.S.C.A.N. 2723, 2730. In this matter, OSC's investigation uncovered willful, concerted acts of retaliation that necessitate disciplinary action. Holding management accountable for engaging in prohibited personnel practices is essential to assuring employees that they can blow the whistle or engage in other protected activity without fear of reprisal.

Accordingly, and for the reasons set forth herein, the Department of Commerce should take appropriate disciplinary action against PAIGI Beitel and Mr. Green for their retaliatory actions in violation of 5 U.S.C. §§ 2302(b)(8), (b)(9), and (b)(12).



December 4, 2014

The Honorable Bob Goodlatte
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The Honorable John Conyers, Jr.
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The Honorable Darrell E. Issa
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The Honorable Elijah Cummings
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**Re: Hearing on "Abuse of USPTO's Telework Program:
Ensuring Oversight, Accountability and Quality"**

Dear Chairmen Goodlatte and Issa, and Ranking Members Conyers and Cummings:

I am writing on behalf of the American Intellectual Property Law Association ("AIPLA") to express our views in relation to the hearing on November 18, 2014, entitled "Abuse of USPTO's Telework Program: Ensuring Oversight, Accountability and Quality." We are grateful for the opportunity to provide the Committees with AIPLA's perspective on the importance of telework to United States Patent and Trademark Office (USPTO or Office) operations generally and on the importance of finding management processes that can address any abuses by USPTO employees without sacrificing the essential benefits that a flexible work environment provides to the USPTO mission. We would ask this statement be included in the record of the hearing.

AIPLA, with nearly 15,000 members, is in a unique position to comment on the importance of the patent system and the need for careful stewardship of that system by the USPTO. Founded in 1897, AIPLA members represent both owners and users of intellectual property, as well as those who litigate intellectual property (IP) rights and file and prosecute patent and trademark applications before the USPTO. As customers of the USPTO, AIPLA members have a keen interest in ensuring that the USPTO is operating both efficiently and effectively to provide the highest quality of patent examinations.

Introduction

The USPTO provides an indispensable service to U.S. innovators and the economy by granting quality patents for the protection of valuable IP assets. Quality patents are the cornerstone of the U.S. patent system, providing confidence in the U.S. intellectual property system and ensuring the incentives for innovation. Thus, high quality examinations must be the number one priority of the Office.

The USPTO telework program is an important element in the pursuit of quality patents. Generally speaking, it provides an economical way to accommodate a growing workforce of examiners, benefitting the agency, and users of the U.S. patent system. For employees, the program eliminates commuting costs, provides flexibility, and introduces a positive balance to work life and personal or family needs. For the Office, the program saves money on space rental, increases employee retention and efficiency, and enhances employee morale. For users of the U.S. patent system, the program contributes to the retention of experienced USPTO employees who perform high quality examinations at reduced operating costs.

Working from home is becoming more and more common in American businesses. According to the Bureau of Labor Statistics, 23 percent of employed persons in 2013 did some or all of their work at home.¹ Advancements in technology have allowed for the growth of such teleworking programs. At the USPTO, ever-improving IT systems have given teleworking examiners access to the same patent examination tools that are used at the USPTO campus. Current IT systems are intended to allow examiners to work from home in a virtual environment in the same manner as examiners that come into the office every day.

The title of the November 18th hearing referred to abuses of the USPTO telework program, but some of the problems discussed concern issues of general management and supervision that are not necessarily unique to teleworking. While many of the problems identified do occur with teleworking, similar concerns have been raised at times about the examination system as a whole. This is not to minimize the seriousness of the problems, because any abuse of the system is intolerable. That said, testimony at the hearing suggested that lapses in oversight, accountability, and quality probably arise in a small proportion of all of the Office's activities, and thus we are confident that the majority of USPTO workers—both remote and at the office—are dedicated and professional employees.

However, the USPTO must ensure that examiners are not abusing the flexibilities of their work plan, whether as teleworker or not, by not working the hours expected. Users of this fee-funded agency who bear its entire operational cost (over \$3 billion in fiscal year 2014) are entitled to expect in return for their fees the highest quality performance of USPTO employees as well as the necessary management to produce that result. USPTO managers must ensure that examiners spend the time needed to conduct thorough prior art searches, to complete detailed evaluations of patentability, to produce clear and comprehensive Office Actions, and to fully consider applicant responses.

¹ See American Time Use Survey—2013 Results, USDL-14-1137 (U.S. Bureau of Labor Statistics, June 18, 2014). Available at <http://www.bls.gov/news.release/pdf/atus.pdf>.

The benefits of a flexible work arrangement, whether for teleworkers or office workers, are only justified when there are sufficient controls in place to ensure that quality examination is not sacrificed. Patent applicants and others using the patent system deserve a full and complete examination in return for the fees users pay to the agency.

With the freedoms and flexibilities of the USPTO telework programs comes the need for responsibility and accountability as to both employees and managers. Some USPTO employees and managers have reported to the Inspector General of the Commerce Department incidents of a variety of behaviors at the USPTO, including time fraud, “end-loading,” and “mortgaging.” To the extent that problematic behaviors have occurred, they *must* be corrected. Not only are these behaviors wrong, but they also threaten the integrity of the Office, the federal government, and the public confidence in our patent system.

There must be appropriate supervision of all employees, including teleworkers, to ensure that the Office is maintaining the highest standard of quality as it strives to meet its productivity goals. First line managers must be given the tools to do their job, that is, to ensure a proper high quality examination, and they should not be hindered from doing that job through lax policies.

Goals That Should Be Pursued

In considering the problems identified by the reports to the Office of the Inspector General and at the hearing, AIPLA believes that the USPTO should pursue the following goals that are applicable to both teleworkers and office workers.

Examiner accessibility. Quality examination of a patent application often requires a collaborative process between the applicant and the examiner, and yet we have heard reports of examiners who were either inaccessible or unresponsive to applicant communications. We urge the Office to enhance the opportunities for applicants and examiners to interact as we believe this leads to higher level of understanding and better examination results.

AIPLA has expressed support for several new programs at the USPTO, including the First Action Interview Program, the Track One option, the After Final Consideration Pilot (2.0), the Pre-Appeal Program, and the Quick Path Information Disclosure Statement option. (AIPLA Comments on USPTO Strategic Plan FY 2014-2018). We see these as opportunities for greater interaction between examiners and applicants. We also urge the USPTO to continue promoting interviews as an effective tool for identifying and addressing issues during prosecution. In order for these programs to work effectively, examiners must be accessible to applicants. We understand that this has been emphasized in examiner training, and we encourage the Office to continue those efforts.

We also acknowledge the April 2013 Guidance on how to address nonresponsive examiners and the agreement with Patent Office Professional Association (POPA), the patent examiner union, to strengthen the document management element. AIPLA looks forward to working with the USPTO to assess how the steps already taken to address telework concerns are working, and whether further steps are needed.

Cost-effectiveness. The USPTO is an agency funded by user fees, and therefore dependent on customers paying fees for patent and trademark services. Congress recently gave the Office authority to set its own fees, and this authority includes the responsibility to provide users what they pay for – a quality examination.

Efficiency. Efficiency in any operation is an important goal, but efficiency is not achieved when the cost of speed and productivity is a reduction in the quality of the work. Great harm to the patent system would result if the USPTO were to sacrifice quality in order to get its work completed.

As for hiring additional examiners, the USPTO should not do so without putting in place adequate accountability, supervisory, and training measures. Training a patent examiner is a costly and time-consuming commitment, and it often takes several years for an examiner to learn to work independently. If the USPTO finds that flexible work plans are getting in the way of proper training and oversight, corrections must be made.

Culture of accountability. The managerial issues noted in the reports to the Inspector General demonstrate a culture where the policies for monitoring and supervising the work being done are not always clear or are not being enforced. If supervisors at the USPTO feel that they are not supported in monitoring, overseeing, and enforcing rules and policies, upper management at the USPTO needs to take note and act accordingly.

It is improper for any examiner to manipulate the system to claim more hours than actually worked and to meet productivity goals without actually completing the work or by producing low quality work. It is equally improper for supervisors to forego the review of examiners or to be discouraged from correcting any identified problems. There are supervisors who feel they have not been given the tools to appropriately manage employees, or if they have the tools they are unable to use them. The USPTO must correct these problems before the vast majority of employees who follow the rules and produce high quality work become disenchanted with the lack of oversight.

The USPTO reports that steps are being taken to address concerns raised by the internal review of the telework program. We understand that the Office has reached an agreement with POPA on the use of collaboration tools. While these are positive steps, the open question is whether further actions are necessary. For example, we note that the use of the “presence indicator” has been excluded. We encourage the USPTO to explore other ways to measure responsiveness, collaboration, and customer service by all of its employees, regardless of location.

As AIPLA stated in a letter to the USPTO in 2013, a renewed emphasis on quality management is a critical issue facing the USPTO, requiring adequate metrics for patent quality not only for the patent document itself but also for examination procedures. (AIPLA Comments on USPTO Strategic Plan FY 2014-2018). The USPTO recently announced a series of public meetings for early 2015 to gain feedback from stakeholders on ways to enhance the quality measures at the USPTO, and AIPLA looks forward to participating in those meetings.

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December 4, 2014
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Additionally, we also understand, based on a comment by Deputy Director Lee during the Opening Plenary Session at the AIPLA 2014 Annual Meeting, that a third-party company audit of the patent telework program is to be conducted. It was recently announced that the National Academy of Public Administration (NAPA) has been contracted to take on this process. AIPLA stands ready to offer assistance to the USPTO and/or NAPA in evaluating the telework program.

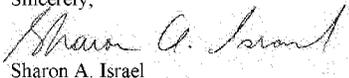
Conclusion

Ultimately, the benefits of allowing examiners to telecommute are worth the risks associated with the flexibilities afforded to employees. However, systems need to be in place to ensure the high quality examination of each and every patent application and the issuance of patents of proper scope when justified.

It is apparent that there is more work to be done to address the problems identified in the reports to the Inspector General. Although most examiners follow the rules and procedures in place, any findings of abuse in the system are objectionable. Additionally, the Office must provide supervisors with the tools and support to do their jobs of training their examiners, monitoring the quality of the work product, and monitoring compliance with the rules and policies for patent examiners.

AIPLA looks forward to working with the Committees and the USPTO to enhance operations at the Office, to ensure high-quality patent examination through adequate supervision of examiners, and to ensure that our members are getting the services for which they are paying. We thank you in advance for your consideration of these comments and we would be pleased to answer any questions they may raise.

Sincerely,



Sharon A. Israel
President
American Intellectual Property Law Association





QUESTIONS FOR THE RECORD

related to the

Testimony of

The Honorable Todd J. Zinser
Inspector General

U.S. Department of Commerce

before a joint hearing of the

Committee on Oversight and Government Reform
and
Committee on the Judiciary
U.S. House of Representatives

***Abuse of USPTO's Telework Program:
Ensuring Oversight, Accountability and Quality***

November 18, 2014

Questions for the Record from Representative Zoe Lofgren:

1. (John Deans whistleblower case and proper disclosure)

Mr. Zinser, during the November 18, 2014 Patent and Trademark Office (PTO) hearing I asked you about why you failed to disclose your role in the 1996 John Deans whistleblower case during your 2007 Senate confirmation hearing to become Commerce IG. You said: *"I did not consider myself, at the time anyway, a subject of an OSC investigation,"* referring to the Office of Special Counsel (OSC) that investigated this case and your retaliation against whistleblower John Deans. I don't find your response to be a credible answer based on the documents I have seen from OSC in this case. I request that you re-read the OSC's "Request for Stay" and "Petition for Enforcement" documents attached and answer the following questions:

- **1a.** After reading the OSC's "Request for Stay" and "Petition for Enforcement" documents in the 1996 John Deans case, do you now believe that you were the subject of the OSC's investigation in this case?

As noted, this matter occurred 18 years ago. The matter was styled as "Special Counsel, ex. rel., John L. Deans v. Department of Transportation, Office of Inspector General." As such, it is my understanding that the subject was the Department of Transportation, Office of Inspector General. I am not otherwise familiar with the criteria, if any, used by the Office of Special Counsel to designate individual "subjects" of their investigations and I am not aware of how any such criteria may have been applied in the case of John Deans.

- **1b.** In hindsight do you believe you should have disclosed your involvement in the John Deans case to the U.S. Senate Committee on Commerce, Science, and Transportation during your October 2007 confirmation process to become Commerce IG?

As noted, this matter occurred 18 years ago. The matter was styled as "Special Counsel, ex. rel., John L. Deans v. Department of Transportation, Office of Inspector General." As such, it is my understanding that the subject was the Department of Transportation, Office of Inspector General. I am not otherwise familiar with the criteria, if any, used by the Office of Special Counsel to designate individual "subjects" of their investigations and I am not aware of how any such criteria may have been applied in the case of John Deans.

2. (Credibility of the Office of Special Counsel-OSC)

In response to my question on the John Deans matter you also implied that the Office of Special Counsel investigation into your behavior in the Deans case was inaccurate or misleading. You said: *"And both sides of the story have not come out on that case."* Clearly you were questioning the credibility and conclusions of the OSC's investigation. More recently, in the OSC investigation concluded last year that found two of your closest aides had engaged in prohibited personnel practices against whistleblowers in your own office you suggested in a letter to the Chairman and Ranking Member of the Subcommittee on Oversight of the Committee on Science, Space & Technology that the whistleblower allegations were

not "credible" and that the OSC investigation was not "objective." You even tried to have the Council for Inspector Generals on Integrity and Efficiency (CIGIE) reinvestigate the case because you disagreed with the OSC's findings and their comprehensive report, but CIGIE refused your request.

- 2. Do you believe that the Office of Special Counsel (OSC) is a credible organization and helps to protect whistleblowers against retaliation, abuse and prohibited personnel practices by federal officials?

As stated in my correspondence with Chairman Wolf and Chairman Issa in January 2013, I have great respect for the mission of the Office of Special Counsel. Similar to Offices of Inspector General, the Office of Special Counsel would benefit from periodic peer reviews.

I requested that the CIGIE Integrity Committee review the matter based on the April 1, 2014, demand from the House Science Committee that I terminate the employment of my then-Counsel and then-Principal Assistant Inspector General for Investigations. The Committee's demand came more than 2 months after OSC and my office had mutually agreed on corrective actions in this case. Since OSC and my office had already reached a settlement on the matter, I requested the review by the CIGIE Integrity Committee, as an independent authority, to obtain its assessment on whether the corrective actions agreed to by OSC and my office in this case were appropriate or whether additional action was warranted. The Inspector General Act established the Integrity Committee and granted it the authority and responsibility to review allegations against Inspectors General and designated officials of Offices of Inspector General—which, in this case, included my then-Counsel and then-Principal Assistant Inspector General for Investigations.

3. (Commerce OIG Referrals to PTO)

As I mentioned at the PTO hearing I am concerned with how your office treats whistleblowers and handles referrals of potentially criminal cases often sending them back to the agency to investigate. You offered two explanations for your actions, saying: *"The specific whistleblower allegations that came in about the telework program did not, was not, were not exclusive to the telework program it was about how the management treated allegations of time and attendance abuse. And none of those allegations made specific allegations against specific individuals that would warrant us opening up a criminal investigation."* Your first explanation suggested that the complaints were not "exclusive" to the telework program but related more generally to "time and attendance abuse." In fact, the complaints that came to your office and posted by *The Washington Post* all made very specific and clear reference to the PTO telework or "hoteling" program as the primary offender of time and attendance abuse at the agency. The second explanation you offered was that no specific individuals were named in those complaints. This also appears to be an inaccurate statement.

- 3a. In your testimony you claimed that your office received no *"specific allegations against specific individuals"* and you described the complaints your office did receive as *"basically rants against the management."* However, I understand that your office did receive at least one complaint about a specific individual, one of the Chief Judges at the Patent Trial and Appeal Board (PTAB), who was alleged to have approved "non-

production time" for employees at the PTAB. Despite that you referred these specific allegations back to the agency. Please explain why you referred a complaint involving potentially criminal conduct about a senior agency official back to the Agency to investigate?

We referred the matter to USPTO so that the USPTO management could take action to address the mismanagement reported in the complaint. Referring matters to Departmental management for their action does not preclude OIG from also pursuing an investigation of the matter and, in this case, we did pursue additional investigation.

- **3b.** In the case referenced above, I understand that PTO substantiated the OIG complaints that alleged PTAB management had authorized and approved pay for time that no work was conducted by PTO employees. In addition, I understand that PTO took some corrective actions, including an analysis of staffing requirements, and the appointment of an outside specialist to advise the Agency on corrective actions. While I do not believe it was appropriate to refer this case to PTO in the first place, why did the Commerce OIG re-investigate this case regarding the use of "non-production" time at the PTAB that resulted in millions of dollars paid to paralegals for time they had not worked, after this allegation had been investigated and confirmed by PTO?

Based on our assessment of the review carried out by USPTO, we determined that additional investigation was warranted. For example, OIG found that USPTO did not identify nearly \$700,000 in bonuses paid to the paralegals and their supervisors, based on the vast majority of the paralegals receiving outstanding performance ratings. USPTO also did not report how the paralegals spent their "other time," while our investigation found that they spent their time engaged in a variety of personal activities such as watching television and shopping on the internet.

- **3c.** In February 2012 your office issued an audit report that called the PTO telework program a great success. The report titled: "The Patent Hoteling Program Is Succeeding as a Business Strategy," found the PTO program "operates effectively and efficiently" and "has adequate controls" over the program. For unknown reasons, your audit gave the PTO telework program a clean bill of health. In the wake of recent substantiated claims of widespread abuse in the PTO telework program has your office gone back to review why your audit team missed any signals of abuse in this program? If so, please summarize the findings of this review and explain any corrective actions you have taken to ensure your auditors are better equipped to identify fraud in the future.

The objectives of our audit of the USPTO Patent Hoteling Program (PHP)—one of more than 15 distinct telework programs at USPTO—were to determine (1) the extent to which USPTO policies and their implementation provide adequate management controls for the PHP, (2) how USPTO measures productivity for its PHP participant, and (3) the extent to which USPTO has contained costs and achieved its stated costs savings. Our audit was initiated in February 2011, well before the allegations at issue here were received by OIG. Our audit was designed as a performance audit, not an audit to identify time and attendance fraud. Our report with associated recommendations was issued in February 2012.

For the audit, we developed two econometric models that relied on USPTO data, including time and attendance data, entered into USPTO systems. Appendix B of the report contains details of our methodology including an explanation of the "limitations of our econometric model and data," as follows:

We used data collected and recorded by USPTO for our models. Relying on this data presented three major limitations to our analysis. First, because we relied on self-reported data submitted into time and attendance records, we cannot confirm the actual number of exam hours and non-exam hours that an examiner worked in a biweekly period. While there may be instances where examiners did not accurately portray how they allocated their time, there is no basis for assuming that inaccuracies are more prevalent in the groups of examiners participating in the PHP versus examiners working from headquarters.

Second, there is no independent source of information on examiner production and time spent examining patents other than the data that are entered into USPTO's electronic systems. Thus, we could not perform tests to trace each transaction to paper documentation. We assessed the reliability of our data by conducting numerous electronic tests to ensure the data appeared complete and accurate.

Finally, we did not test the IT security internal controls of each data system, and no published reports on data quality existed for these systems during our analysis. We reviewed the overall data entry policies with system users to ensure that there were segregation of duties. However, we did not conduct an extensive test on the overall IT security.

Given these limitations, we have no evidence that any potential inaccuracies or tampering would be more likely to occur with PHP participants versus eligible patent examiners who do not participate in PHP. We used the same data that USPTO management relies on to make management decisions. Therefore we believe that the data is sufficiently reliable to assess the differences between examiners in the PHP program and those who work at headquarters.

When interpreting our productivity analysis, it is important to recognize the limits of generalizing our model's results to other workplaces. USPTO has unique features, such as explicit, measurable performance expectations and extensive tracking of productions. While our results explain the effect of the PHP program from January 2006 to March 31, 2011, the results of our work will need to be replicated in other hoteling programs before it is appropriate to generalize these findings to other workplaces.

4. (PTO Telework Complaint Records)

To help understand how your office has handled allegations of abuse in the PTO's telework program and allegations of time and attendance fraud in the past, please provide a list of all complaints made to the Commerce OIG, either through your Hotline or some other means, involving the PTO's telework program and issues of time and attendance fraud from January 2010 to present. This list should include the disposition of the complaint by your office, whether it was investigated by your office internally, referred back to the agency to investigate, and the ultimate findings of either the Agency or the Commerce OIG. Please indicate if complaints were initially referred to the Agency and then re-investigated or audited by the Commerce OIG. This list should include the date the initial complaint was made to the IG's office, the date the complaint was referred to the Agency, the date the

OIG initiated its own audit or investigation of the complaint (if that occurred), and the date the Agency or OIG investigation/audit was completed. Please provide copies of all supporting documentation or records, including copies of the complaint logs for each case related to the PTO's telework program or time and attendance issues at the PTO since January 1, 2010.

Upon receiving a Committee request for these records, we would respond to the request.

Questions for the Record from Representative Jackie Speier:

1. The attached report¹ and Petition for Enforcement,² which I would like to submit for the record, lay out serious ethical issues regarding your conduct. I found your answers to Congresswoman Lofgren's question regarding this incident to be inadequate. I find it hard to believe that you can claim that this report was not about you, given the following statement from the report:

"Zinser's reaction to Deans' protected first amendment speech, as well as his protected whistleblowing, was draconian in nature ...The animus displayed by Zinser's severe overreaction could only have been engendered by Deans' protected activity, and not by the other transparent reasons offered by Zinser." (pg 25).

In fact, OSC found you so directly responsible for misconduct that they ordered that your pay be docked until Mr. Deans was reinstated, as is documented on the attached Petition for Enforcement.

This should have been disclosed to Congress during your confirmation hearing. Could you explain why you lied on your written disclosure forms?

I did not lie on my written disclosure forms. My pay was never "docked" or withheld. As mentioned in my testimony, the John Deans matter was a very complex situation where Mr. Deans himself had allegations against him made by the United States Attorney in Colorado that had come under investigation. The John Deans matter with OSC was settled with neither party admitting any wrongdoing and the Special Counsel signed the settlement agreement.

2. There was another Office of Special Counsel investigation³ conducted just last year, which is attached here for the record. This investigation examined you and your two closest advisors, once again in response to allegations that you engaged in whistleblower retaliation. This time, the OSC found "no documentary evidence" regarding your personal involvement. But they did find strong and compelling evidence that two top officials in your department did retaliate against whistleblowers. These officials produced false, failing performance reviews. They then threatened to release the damaging reviews if the whistleblowers did not sign a separation agreement that prohibited them from communicating with Congress, OSC, and the media.

¹ Filename: John Deans-Todd Zinser - Request for Stay by OSC - highlighted.pdf

² Filename: John Deans-Todd Zinser - Petition of Enforcement by OSC - highlighted.pdf

³ Filename: Redacted Version of Sept. 2013 OSC Report and Jan. 2014 Agreed Actions Letter.pdf

This is totally unacceptable behavior in an Inspector General's office, made even worse by the fact that one of these officials, Rick Beitel, was the assistant inspector general responsible for whistleblower protection. Your office is supposed to be a safe harbor for whistleblowers, and as the IG, it is your responsibility to hold your management team to the highest standards – or at least not to directly contradict the entire purpose of your office. Can you explain how you did not notice that these two top officials were engaging in egregious retaliation against whistleblowers?

OSC's investigation concluded that there was no testimonial or documentary evidence indicating that I was involved in the separation agreements, failing performance reviews, or alleged retaliation. I did not even serve as the third-level manager of the employees who were subject to the performance reviews or retaliation. Additionally, I am not an attorney and relied upon my then-Counsel (at the time of the misconduct, my Counsel was Wade Green) to appropriately review legal agreements and any significant clauses contained within those agreements.

After reviewing OSC's report and consulting with independent legal counsel provided to me under a memorandum of agreement with another Office of Inspector General because of the conflict caused by my then-Counsel, I entered into settlement negotiations with OSC and self-identified and implemented a number of corrective actions that OSC described as "meaningful." Moreover, I referred OSC's report to CIGIE's Integrity Committee for further review—which included reviewing whether the corrective actions were sufficient in response to OSC's report. The Integrity Committee refused my request for review. After receiving the Integrity Committee's response, I appealed its decision refusing to review the matter. That appeal was also denied by the Integrity Committee.

Finally, when I hired an employee relations specialist—who was independent of my then-Counsel, Wade Green—I requested that the employee relations specialist review OSC's report, relevant documents, and corrective actions to determine whether additional steps needed to be taken. As a result of that review, I proposed and subsequently decided on the removal of Rick Beitel and Wade Green from employment with the Department of Commerce Office of Inspector General.