

From: Easwaran_David
To: Fee_Setting
Subject: Comments On Setting and Adjusting Patent Fees During Fiscal Year 2017
Date: Friday, December 02, 2016 11:24:21 PM

To Whom It May Concern,

Thank you in advance for considering the following comments regarding the Notice of Proposed Rulemaking (NPR) regarding adjustment of patent fees. Please note that these comments are my own and do not necessarily reflect the view of others at my firm or those that I represent in my practice before the USPTO.

My comments focus on the proposed increases in RCE fees.

The NPR provides the following justification for the proposed \$100 increase in the cost of the first RCE fee and the proposed \$200 increase in the cost of the second and subsequent RCE fee:

"The Office's proposed increase would more closely align the fee rates with the cost of processing RCEs, as calculated using the most recently available cost data (FY 2015)."

My understanding of this quote and the related discussion of RCE fee adjustment in the NPR is that the goal of the proposed RCE fee adjustments is to "bring collections closer to cost and therefore reduce the subsidy for RCE filings currently provided by other patent fees." This is a reasonable goal. However, because these fee adjustments are ostensibly designed specifically for reducing the subsidy for RCE processing (rather than for achieving a broader goal of cost recovery for patent operations generally), evaluating the veracity of the unit cost calculations for processing each RCE is critical to a proper evaluation of the merit of these proposed increases.

Fundamentally, the process used to arrive at the unit cost estimates for RCE processing is opaque and the underlying data does not appear to be publicly available. Documentation available on the USPTO website provides some description of the broad contours of how these unit costs are calculated. See <https://www.uspto.gov/sites/default/files/documents/ABI%20Cost%20Supplement.docx> <<https://www.uspto.gov/sites/default/files/documents/ABI%20Cost%20Supplement.docx>>, stating that "[f]or the examination activity, the examiners charge a single PPA code, PPEAAM-0000-112012, for any work associated with the primary examination activities. This activity code averaged 45% of Patent direct expense during the past three fiscal years" and that "[i]n order to break out the expense of this PPA code into the discrete activities that constitute the examination process, an annual survey is conducted to determine the percentage of time spent performing each activity."

A first problem with the unit cost estimates for RCE processing is that the survey data that is relied-upon does not appear to be available publicly. Accordingly, the public is unable to evaluate that the survey has been administered in an appropriate manner, or whether the survey data includes enough data points to provide a statistically meaningful result. But perhaps a more problematic issue underlies the use of survey data of this nature in this context: survey data of time required by patent examiners for undertaking various activities is likely to be skewed as a result of the peculiar nature of the examiner compensation scheme (examiners are given a predefined number of counts for discrete patent examining activities, and this number of counts translates into a specific number of hours of examiner time, thus predisposing examiners to reporting in a survey response that each activity in question took at least the allotted amount of time). Although the above-cited methodology document from the USPTO provides an ostensible justification for use of survey data for granular cost estimation, that justification relies on survey use by other Federal agencies that do not have a similar production-based compensation scheme for their employees. *Id.* at 8, stating that "[s]elected reports from the GAO study on Managerial Cost Accounting practices at major Federal agencies (GAO-06-1002R, Sep 21 and 2006 and GAO-06-599R, Apr 18, 2006) highlight the use of surveys to allocate expense." Ultimately, without access to the survey data, it is impossible to evaluate the adequacy of the survey on the above bases.

Moreover, other data on the USPTO website suggests that the relied-upon RCE unit cost calculations are unreliable or incorrect for other reasons. The NPR states that the unit cost to examine a first RCE in FY 2015 was \$2,187. See 81 Fed. Reg. 68162. Corroborating this statement, a first Table of Patent Fees available on the USPTO website provides unit cost estimates for processing a first RCE of \$1,864 in FY 2013, \$1,776 in FY 2014, and \$2,187 in FY 2015. See <https://www.uspto.gov/sites/default/files/documents/Table%20of%20Patent%20Fees%20-%20Current%2C%20Proposed%20and%20Unit%20Cost.pdf>. But a second Table of Patent Fees provided by the USPTO suggests that the first RCE unit cost was \$1,503 in FY 2012, \$1,474 in FY 2013, and \$1,348 in FY 2014. See <https://www.uspto.gov/sites/default/files/documents/Table%20of%20Patent%20Fees%20-%20Current%20Proposed%20and%20Unit%20Cost.pdf>. The two documents provide conflicting data regarding the unit cost estimates for FY 2013 and FY 2014. Although this second Table of Patent Fees does not provide unit cost estimates for FY 2015, the trend in this second document is downward year over year, while the trend in the first document is upward. Given that the documents contain directly conflicting data, that the RCE unit cost estimate data in these documents have year-over-year trends going in different directions, and that the survey data underlying these unit cost calculations is not readily available for review, the public has no ability to determine which of these documents is correct, or even if either of them present realistic unit cost estimates for processing a first RCE.

Finally, the first Table of Patent Fees reports a \$411 jump in the estimated unit cost for processing a first RCE from \$1,776 to \$2,187. No explanation has been provided for this significant increase in cost. It is possible that the examination requirements have changed to cause this upwards jump in cost, but the USPTO should provide an explanation to this effect if this is the purported reason for the significant change in this estimated unit cost. An alternative explanation is that the survey data used to calculate these unit costs is not sufficiently reliable and thus is prone to causing wild changes in cost estimates. Yet another explanation would be that the increase is due to the allocation of a larger amount of overhead patent expense to the first RCE unit cost estimate. And a final possibility is that the USPTO has changed its unit cost estimation methodology. Under any of these possibilities besides the first, however, it would be inappropriate to suggest that the proposed increase in RCE fees is based on an increase in RCE processing costs rather than some other cause.

Ultimately, the publicly available data regarding the estimated unit costs for RCE processing leave more questions than answers. Given that these unit costs are ostensibly the impetus behind the proposal to increase RCE fees significantly, prudence suggests that a more focused look at these unit cost estimates is warranted prior to imposing a heavier burden on patent applicants.

Thank you for your consideration.

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