

**EXTENSION OF THE PENDENCY AWARD,  
RENEWAL OF THE COUNT SYSTEM INITIATIVES,  
AND OTHER ISSUES**

April 21, 2016

**Preamble:** This agreement between the United States Patent and Trademark Office (“USPTO” or “Agency”) and the Patent Office Professional Association (“POPA” or “Union”) and the policies announced by Deputy Commissioner Andrew Faile in his memorandum entitled *Extension of the Pendency Award and Count System Initiatives, and Other Issues*, dated April 21, 2016, are the results of the continued efforts of the Patent Examiner Performance Appraisal Plan (PAP) and POPA/Management Count System Initiative task forces. The USPTO and POPA jointly seek to protect the American public by reducing patent term adjustments and by continuing to provide meaningful incentives for examiners to complete work in less time than is allowed under the PAP. This agreement resolves all notification and bargaining obligations for the issues discussed herein, including the FY 2017 PAP, extension of the Pendency Award, extension of the Count System Initiatives, and all other changes described in the memoranda attached to this agreement.

The agreements contained herein, and policies referenced in this document, supersede portions of any agreements, memoranda of understanding, policies, or practices with which they conflict. If any portion of an agreement, memorandum, policy, or practice does not conflict with the provisions and policies set forth herein, that portion of the previous agreement, memorandum, policy, or practice shall remain in force.

**I. Patent Examiner Performance Appraisal Plan**

- A. Attached to this MOU, as Attachment A, is the GS-12 version of the Performance Appraisal Plan to be applied for Patent Examiners beginning in FY 2017, unchanged from FY 2016.

**II. Pendency Award**

- A. The Pendency Award program that was established in an October 22, 2010 agreement between the parties, previously modified on June 12, 2014, and further modified below, will remain in effect through the end of the second quarter of FY 2017. The modified requirements and provisions related to the Pendency Award are set forth in their entirety below, with updates to reflect the extension of the award.

To be eligible for the Pendency Award in any given quarter, an examiner must

- (a) have a most recent rating of record of Fully Successful or better;
- (b) have completed one full year of employment with the USPTO before the first day of the quarter under consideration;

- (c) have a returns category score in the Docket Management element of at least 100%;
- (d) meet the following productivity requirement:
  - i. for any examiner who has either temporary or permanent full signatory authority on both the first and the last day of the quarter, performance at least at the Fully Successful level (95%) in the Productivity element of the PAP for the quarter is required,
  - ii. for all other examiners, performance at least at the Marginal level (88%) in the Productivity element of the PAP for the quarter is required; and.
- (e) meet the award criteria as outlined below in Sections B-F.

B. The Pendency Award Program has three tiers of performance award criteria. Quarterly award payments will be made based on performance achieved during that quarter.

Entry-level Tier: 0.25% of current annual salary, excluding overtime and awards, paid following a quarter in which an examiner meets each of the following criteria:

- At least 110% overall Docket Management score (excluding the Returns category); and
- No ceiling exceeded applications in any category during the period.

Tier 1: 0.5% of current annual salary, excluding overtime and awards, paid following a quarter in which an examiner meets each of the following criteria:

- At least 120% overall Docket Management score (excluding the Returns category); and
- No single category score under 100%; and
- Completion of a number of oldest new or other applications for which asterisk credit is received as set out in Section E. below, which depends on the number of biweeks in the quarter, part-time status and expectancy (hrs/BD); and
- No more than one application exceeds the ceiling in the quarter.

Tier 2: 0.75% of current annual salary, excluding overtime and awards, paid following a quarter in which an examiner meets each of the following criteria:

- At least 140% overall Docket Management score (excluding the Returns category); and
- No single category score under 120% (excluding the Returns category); and
- Returns category must be at least 100%; and
- Completion of a number of oldest new or other applications for which asterisk credit is received as set out in Section E. below, which depends on the number of biweeks in the quarter, part-time status and expectancy (hrs/BD); and
- No more than one application exceeds the ceiling in the quarter.

C. Miscellaneous Criteria and Exceptions Applicable to all Tiers

- As noted in the Tier 1 and Tier 2 descriptions above, completion of a minimum number of oldest new asterisk or other applications for which asterisk credit is

received in the quarter is required. The following types of applications count towards the criteria:

- Regular and Continuing New applications which are either marked as oldest or for which asterisk credit is received.
- RCE applications which are either marked as oldest or for which asterisk credit is received.
- All Special New.
- The number of oldest new or asterisk credited applications which must be completed in a quarter to meet the Tier 1 or Tier 2 award criteria depends upon the length of the quarter, the examiner's work schedule (full-time vs. part-time), and expectancy (if over 28 hours/BD, based upon the examiner's average hours/BD for the previous quarter), as follows:

**5 Biweek Quarter Scenario:**

5 Biweek Quarter	Tier 1	Tier 2
Full Time Examiner	5 applications	7 applications
Part time or over 28 hours/BD	4 applications	5 applications

**6 Biweek Quarter Scenario:**

6 Biweek Quarter	Tier 1	Tier 2
Full Time Examiner	6 applications	9 applications
Part time or over 28 hours/BD	4 applications	6 applications

**7 Biweek Quarter Scenario:**

7 Biweek Quarter	Tier 1	Tier 2
Full Time Examiner	7 applications	10 applications
Part time or over 28 hours/BD	5 applications	7 applications

- If an examiner has a small number of cases in categories 1 through 4 (a small number means less than or equal to 5% of the total number of cases included in the total composite score for award purposes) and the score in that category would prevent the examiner from qualifying for an award or higher award level, the category score will not be considered for award purposes.
- Pendency Award payments for part-time examiners will be prorated based on the examiner's part-time work schedule. For example, if an examiner is scheduled to work 40 hours per biweek, the examiner earning an award will receive a payment of 50% of the award payment of a full time examiner at the same grade and step.
- Examiners who change their work schedule from full-time to part-time any time during a quarter, must meet the oldest new /asterisk application award criteria by completing the part-time requirement. The award payment will be based on a

full-time schedule. For subsequent quarters, the examiner award requirement and award payment are both based on the examiner's part-time schedule.

- Examiners who change from a part-time to a full-time work schedule any time during a quarter, must meet the oldest new/asterisk application award criteria by completing the full-time requirement. The award payment will be based on a full-time work schedule.

- D. In addition to the quarterly Pendency Award payments, supplemental payments will be available to examiners who achieve sustained performance at the Tier 1 or Tier 2 level as defined below. The supplemental payments will be available at the end of the second quarter of FY 2017, based on performance in the third and fourth quarters of FY 2016 and the first and second quarters of FY 2017.

Supplemental payments for part-time examiners will be based on the work schedule used to determine the Pendency Award payment in the majority of the quarters. For example, an examiner working part time in the third quarter of FY 2016, but converting to full-time for the fourth quarter of FY 2016 and continuing to work full-time through the second quarter of FY 2017 will be eligible for a supplemental award based on his or her full-time salary if the employee meets the other criteria for the supplemental payment.

The supplemental payments will be as follows:

Tier 1: 0.5% of current annual salary, excluding overtime and awards, to any examiner who has performed at the Tier 1 level or better in a) each of FY 2016 quarter 3 and quarter 4 and FY 2017 quarter 1 and quarter 2; or b) 3 of those quarters if the examiner meets the requirements for the Entry-level Tier award for the remaining quarter.

Tier 2: 1.0% of current annual salary, excluding overtime and awards, to any examiner who has performed at the Tier 2 level in a) each of FY 2016 quarter 3 and quarter 4 and FY 2017 quarter 1 and quarter 2; or b) 3 of those quarters if the examiner meets the requirements for the Tier 1 award for the remaining quarter.

There is no supplemental payment for sustained performance at the Entry-level Tier.

- E. There is no minimum quarterly hour requirement for payment of the Pendency Award except as provided below. Approved absences from the office will affect award determinations as follows.
1. Examiners who are on approved absence for twenty one (21) consecutive days or more for reasons that would qualify under FMLA or sick leave (excludes vacations) may elect to receive a prorated Pendency Award. In this instance, the new application requirement is prorated to the nearest whole application based on the proportion of the days missed from the quarter. The prorated award will be calculated by considering the examiner's performance in the Docket Management element only

during the duty hours in which the examiner worked. If the examiner meets the criteria for any tier based upon performance in the duty hours worked and has at least 150 duty hours worked during the quarter (but fewer than 300 duty hours worked), he/she will receive an award payment X calculated as follows:

$$X = (\text{payout for highest Tier attained}) \times \frac{\text{duty hours worked}}{300 \text{ hours}}$$

where the duty hours worked is between 150 and 299 hours.

The 21 day period may span quarters. An examiner who maintains the required award levels during the quarter may opt to maintain eligibility for the full Pendency Award.

2. Examiners who receive a pro-rated award for any quarter as set forth in 1) above may be eligible for a prorated supplemental payment. All Pendency Award criteria must be achieved for the time worked in each quarter. The supplemental payment will be prorated based on the total duty hours worked for all eligible quarters, using the following formula:

$$\frac{\text{total duty hours worked for all eligible quarters} *}{(\text{total number of eligible quarters}) \times 300 \text{ hours}}$$

\*For purposes of this calculation, each quarter is capped at 300 duty hours.

3. For all other planned absences, defined as any absence for which an examiner has at least one working day advance knowledge, the examiner should plan ahead and position his/her docket in anticipation of the absence. An examiner who is on approved absence will receive the Docket Management adjustments as detailed in their current PAP and the current PAP Guidelines.
- F. If an examiner leaves his or her position after having two qualifying full quarters (Tier 1 or Tier 2), a supplemental award will be paid, but will be prorated to 50% of the full amount. If the examiner has three qualifying full quarters (Tier 1 or Tier 2), the supplemental award will be 75%.

#### G. Extension and Termination Procedures

1. Extension Procedures of the Pendency Award

The extension of the Pendency Award described above expires at the end of the second quarter of FY 2017. No later than the second quarter of FY 2017, the Agency and POPA will meet to discuss the Docket Management element, Pendency Award, Count System Initiatives, and related topics, including whether the Pendency Award will continue, and, if so, the availability and level of the supplemental payment.

## 2. Termination Procedures of the Pendency Award

- a. Upon providing notice of termination to the members of the bargaining unit, the Pendency Award program shall terminate at the end of the fiscal quarter in which notice is given. Eligibility standards and award amounts shall be prorated relative to a yearly basis depending on the quarter in which termination is effective.
- b. If the USPTO terminates the Pendency Award, it will provide notice to POPA. POPA will be given an opportunity to bargain over the impact resulting from termination of the Pendency Award. This will not affect USPTO's right to terminate the Pendency Award as set out in paragraph II.G.2.a. above.
- c. If a decision is made to terminate the Pendency Award, USPTO will provide POPA with Pendency Award cost information and productivity and pendency data for at least the last two full fiscal years.

## III. Extension of Count System Initiatives

Except as noted below, Section III of this Agreement supersedes all Agreements, Memoranda of Understanding (MOUs) and Agency policy memoranda regarding the Count System Initiatives(CSI) signed by the parties in 2009, 2010, 2011, 2012, 2013, 2014, and 2015.

Section III of this Agreement constitutes the continuation of the FY 2010 Count System Initiatives.

- A. The USPTO and POPA agree to extend and modify the initiatives known as the Count System Initiatives which were originally captured in the *MOU between the United States Patent and Trademark Office and the Patent Office Professional Association Regarding the 2010 Count System Initiatives and other Initiatives* on November 3, 2009.
- B. The CSI (as begun in FY 2010) shall continue in operation through FY 2017 as modified in the language below and in the revised memoranda referenced in the language below.
- C. This Agreement covers the continuation and implementation of the following memoranda, which remain in effect and unchanged:
  - "FY 2011 Examiner-Initiated Interviews," issued August 31, 2010,
  - "Certification and Recertification Programs," issued November 3, 2009,
  - "FY 2013 Category 3 Quality Performance Element," issued November 27, 2012,
  - "FY 2013 Timing of Patent Examiners' Work Credit," issued November 27, 2012,
  - "FY 2014 Examiner Production Credits and Revisions to Examiner Expectancies," issued September 30, 2013.

- D. This agreement and the memoranda referenced above constitute a package known as the Count System Initiatives (referred to in this agreement as CSI or Package). The union acknowledges that the Agency has met its obligation to negotiate over the impact and implementation of the changes discussed in this Package.
- E. All provisions of this Agreement and the memoranda referenced within Section III are effective on October 1, 2016, unless otherwise indicated.
- F. The Agreement on Trial Gainsharing between the Patent and Trademark Office and the Patent Office Professional Association signed on October 6, 1988, and first modified on November 3, 2009, remains modified from the original as follows:

Section 1. A. 1 is replaced with the following:

1. For Patent Examiners:

Production Goal Achievement*	% of Current Base Salary
110-114%	2%
115-119%	3%
120-124%	4%
125-129%	5%
130-134%	6%
135% or higher	7%

\*Requires at least fully successful performance in all critical elements.

- 1. This modification applies to Productivity Gainsharing Awards for work done in FY 2017 only. Unless the parties agree otherwise, section I.A. I will revert back to the 1988 language for work done on or after October 1, 2017.
- 2. No single Award may exceed the threshold which requires OPM approval (\$10,000.00 as of the date of signing this Agreement).

G. Evaluation Criteria

Information to be considered in evaluation of the package and other initiatives may include:

- Actions per disposal
- Allowance Rates
- Examiner-initiated Interviews
- First Action Allowance Rate
- Joint Surveys (examiners, tech support, managers)
- New (non RCE) backlog, pendency to first action
- RCE Filings (first, second, and subsequent); FAOM (first, second and subsequent), pendency to first action, and mix(general patterns and examiner level patterns)

- Award Program-Cost, distribution of employees, comparison between years (in vs. out; levels)
- Certification pass rates
- Performance Actions
- Attrition Rates
- Productivity
- Docket Management
- Quality
- Revenue
- How often the safety net was used, for what purpose, and why(if a reason can be determined)
- IT Impacts-load data, end of biweek, end of quarter, distribution of counts/transactions
- Transferred applications/ inherited amendments

#### H. Providing Information and Data to the Union

So that both parties can participate in evaluation of the initiatives, the Agency will provide the Union with any evaluation data as gathered for the criteria set out above, as well as any other information the Agency considers when evaluating the impact of the initiatives. The information and data shall be provided promptly so that both parties may analyze the data contemporaneously.

The Agency will gather and share with the Union information on the time taken for each reviewer to review work. In November the parties will meet to discuss the collected information to determine if any further information or analysis is needed and if any further action is to be taken regarding the posting and reviewing of work. Where possible, information will be at the level of individual reviewer and may be redacted.

The information will address the following considerations:

- Number of actions reviewed within particular timeframes
- Timeliness (number of days) of reviews
- Number of actions returned by the reviewer per day of the biweek
- Number of actions submitted to the reviewer per day of the biweek
- Agregates or averages of the preceeding items

#### I. Safety Net

1. The Agency shall maintain PALM functionality until the end of FY 2018 so that an examiner's performance may be calculated under the count system in effect at the end of FY 2009.
2. When the need to make performance determinations arises, (e.g. annual performance ratings, performance actions, promotions, WIGs, award eligibility, and

determinations regarding the retention or non-retention of probationary or trial period examiners), a "safety net" shall be applied until the end of FY 2018, under which the examiner's production shall be calculated using both the count system in effect at the end of FY 2009 and the prevailing count system(s), except as described in 4, below. The best result for the employee will be used to determine the production goal achievement element in the PAP and/or to inform probationary or trial period retention decisions.

3. The safety net will be maintained until the end of FY 2018. The safety net will continue to be available in FY 2019 and beyond only in the following circumstances:
  - a) An examiner receives a performance warning (oral or written warning) in the Production element in FY 2018 and either
    - o remains on that warning or a resulting further warning after the start of FY 2019 (e.g., the examiner fails his FY 2018 Q4 oral warning in Production and receives a written warning in FY 2019 Q1), or
    - o serves or continues to serve a post-PIP maintenance period after the start of FY 2019, where the maintenance period relates to a performance warning in Production that was issued during FY 2017 or 2018.
  - b) For evaluating an examiner's compliance with a settlement or abeyance (i.e., "last chance agreement") agreement that measures performance in the Production element and that became effective on or before the last day of FY 2018.

For all other purposes- including, for example, evaluating promotion periods that begin in FY 2018 and end in FY 2019 - the safety net will not be available for determinations made after the end of FY 2018.

4. For the duration of the safety net, to evaluate production for all purposes (including evaluation of compliance with last chance agreements) other than performance actions, the Agency will evaluate an examiner's performance for the period at issue under (a) the count system in effect at the end of FY 2009, and (b) the prevailing count system, and use the better of the two results for determining the employee's production. For the duration of the safety net, to evaluate production for performance actions, the Agency will evaluate an examiner's performance for the entire period at issue under (a) the count system in effect at the end of FY 2009, and (b) the count system set forth in this Agreement, and use the better of the two results for determining the employee's production.
5. Situations not specifically addressed above that are relevant to the impacts of the new count system will be jointly addressed with the goal being to reach a reasonable decision in an expedient manner.
6. At the request of either party, the parties will meet to discuss modification to the Package or related issues.

#### **IV. Duration of the Agreement**

1. The Agreement shall remain in effect until the end of FY 2017 with the exception of the provisions related to the safety net (III.I.) above. If the Agreement is not extended or modified by mutual agreement, all working conditions set forth as part of the Package shall return to their status as of September 30, 2009.
2. The parties shall commence meeting no later than the second quarter of FY 2017 to determine if the Agreement will lapse or be continued for an agreed period of time. By September 1, 2017, employees will be notified of the status of the Agreement.
3. Termination for the Proper Functioning of the Agency during the Term of the Agreement
  - a) If the Agency determines that it must terminate any aspect of the Package for the proper functioning of the Agency, the entirety of the Package shall be terminated unless the parties reach agreement on an alternative prior to the date of termination.
  - b) If the Agency determines that it must terminate the Package prior to the expiration of the Agreement, the Agency will provide the union with at least a two week notice including a brief statement of the reasons for termination. During that time, the parties shall meet to determine if the Package can be modified to avoid termination.
  - c) In the case of termination, all working conditions changed as a result of the Package shall return to their status as of September 30, 2009. Upon notification of termination, the Union will have ten days to request post-implementation negotiations over the termination.
4. Termination upon Modification or Revocation of Memorandum on Change of Examiner Expectancies
  - a) On November 27, 2012, Deputy Commissioner for Patent Operations Andrew Faile issued a memorandum titled "Change to Patent Examiners' Expectancies." The Union agrees that any bargaining obligations stemming from that memorandum have been satisfied.
  - b) The "Change to Patent Examiners' Expectancies" memorandum is separate from the Package, except that if that memorandum is modified or terminated before September 30, 2016, then - at the Union's election- all components of the Package will terminate and all working conditions set forth as part of the Package shall automatically return to their status as of September 30, 2009.

- c) Termination of the Package, whether due to expiration or for the proper functioning of the Agency, does not require the Agency to modify or terminate the "Change to Patent Examiners' Expectancies" memorandum. This memorandum will remain in effect unless modified, terminated, or otherwise replaced by a new policy following notice to the Union and the opportunity to bargain.

**V. Status of Memoranda**

- A. The following memorandum attached to this Agreement will be distributed to the examining corps:

*Extension of the Pendency Award and Count System Initiatives, and Other Issues,*  
from Deputy Commissioner for Patents Andy Faile, dated April 21, 2016.

- B. While the language of the preamble controls, Attachment C provides a list of active policy memoranda and agreements issued in conjunction with either the Count System Initiatives or Patent Examiner PAP Task Forces since 2009.

**VI. Within Grade Increase (WGI) Guidance Information**

The Agency will generate a WGI document including qualifications, time periods, reconsideration, and other pertinent information. This document will be distributed to all examiners by the end of 3rd Quarter FY 2016. The Agency will make available to examiners their particular WGI due date before November 1, 2016. The Agency will create an electronic method for examiners to identify their WGI due date. When this electronic information is available, an announcement will be made promptly.

**VII. Guidance for DM Adjustments due to Automation Outages**

The Agency has determined to promptly issue the attached memorandum regarding DM adjustments related to automation outages.

**Signatures:**



Andrew Faile  
Deputy Commissioner  
for Patent Operations  
U.S. Patent and Trademark Office

4/21/16

Date



Pamela R. Schwartz  
President  
Patent Office Professional Association

4/21/16

Date

Attachment A- PAP

Attachment B – *Extension of the Pendency Award and Count System Initiatives, and Other Issues* from Deputy Commissioner for Patents Andy Faile, dated April 21, 2016

Attachment C-

- *"Extension of the Pendency Award and Count System Initiatives, Changes to the Patent Examiner Performance Appraisal Plan, and Other Issues,"* from Deputy Commissioner for Patents Andy Faile, dated June 18, 2015
- "Certification and Recertification Programs", issued November 3, 2009
- "FY 2011 Examiner-Initiated Interviews", issued August 31, 2010
- "Transition for Examiners with Performance-based Abeyance Agreement", issued October 22, 2010
- "Procedures for Considering Transfers of Examiners", issued October 22, 2010
- "Examiner Requested Transfer Between Art Units and/or Technology Centers" form, issued Fiscal Year 2014
- "Effect of New Examiner Performance Appraisal Plans on Signatory Authority Program", issued October 22, 2010
- "Letters of Reprimand and Witness Statements for POPA Bargaining Unit Employees", issued October 22, 2010
- "Application of Oral and Written Warnings and Statutory Performance Improvement and Maintenance Periods", issued October 27, 2010
- "Safety Zones and Repeated Performance Warnings under the new Examiner Performance Appraisal Plan", issued October 27, 2010
- "FY 2013 Category 3 Quality Performance Element", issued November 27, 2012
- "FY 2013 Timing of Patent Examiners' Work Credit", issued November 27, 2012
- "Changes to Patent Examiners' Expectancies", issued November 27, 2012
- "FY 2014 Examiner Production Credits and Revisions to Examiner Expectancies," issued September 30, 2013
- "Information regarding Personal Hardship Situations including Medical Conditions", issued June 12, 2014

- "Memorandum of Understanding Between the United States Patent and Trademark Office and the Patent Office Professional Association Regarding the 2011 Examiner Performance Appraisal Plan and Other Matters", issued October 22, 2010 (except as superseded)
- FY 2013 3 and 6 Month Inventory Chart, issued November 19, 2012