

**After Final Consideration Pilot Program 2.0 Description
and
Memorandum of Understanding**

September 23, 2014

Description of Pilot:

- 1) The USPTO has determined to modify the previous After Final Consideration Pilot Program 2.0 (AFCP) dated May 13th, 2013. As outlined herein, the pilot involves responses filed after a final rejection pursuant to 37 C.F.R. 1.116. The purpose of this pilot is to determine whether authorization of a limited amount of non-production time for examiners to consider responses after final rejection including a proposed amendment to at least one independent claim will reduce the number of Requests for Continued Examination (RCE).
- 2) The USPTO will allow an applicant to request, once per final office action, consideration under the AFCP when a submission filed under 37 C.F.R. 1.116 includes a proposed amendment to at least one independent claim and where the proposed amendment does not broaden the scope of the independent claim(s) in any aspect. Examiners should use their professional judgment to decide whether the nature and extent of the amendments and/or arguments presented in the response can be given further consideration within the scope of the AFCP program in the limited amount of time authorized by this pilot program. If the examiner determines that further consideration within the scope of the AFCP program of the proposed response would require more time than authorized by the pilot, the examiner will treat the response under pre-pilot practice. If an after-final interview and/or after final response was previously completed prior to the applicant's submission of an AFCP request, the examiner may decline further consideration under AFCP.
- 3) In applications which include an AFCP request, examiners will complete and attach the AFCP 2.0 Decision form in the next action mailed to applicant. The AFCP 2.0 Decision form is included in Appendix B. The AFCP 2.0 Decision form will not be available until November 2014, until such time the automated DM adjustment, discussed in paragraph 4 below, cannot occur and will be made manually. Such request should be made through an SPE.
- 4) The USPTO will authorize examiners to charge a limited amount of non-production time to review responses filed after a final rejection which request consideration under the AFCP. For utility and plant applications, the limited amount of time is up to 3 hours. For design applications, the limited amount of time is up to 1 hour (plus any time attributed to an interview). Additionally the USPTO will provide an automated docket management clock adjustment of 10 days for AFCP requests that are given further consideration within the scope of the AFCP program (the lowest potential score being 0 days). In order to receive the docket management clock adjustment, the examiner should attach the AFCP 2.0 Decision form to the posted action, and must post the case for credit prior to the AFCP request reaching its ceiling date (28 days).
- 5) Consideration under the AFCP:
 - A) The examiner will review a submission under 37 C.F.R. 1.116 to determine if it includes at least the following:

- i. a signed AFCP request form that includes a statement that applicant is requesting consideration under the AFCP;
- ii. a proposed amendment to at least one independent claim that does not broaden the claim scope in any aspect; and
- iii. a statement that applicant is willing and available to participate in any interview initiated by and deemed necessary by the examiner concerning the present response.

If any of the above is not submitted by the applicant, the examiner will treat the response under pre-pilot practice.

B) As with all after-final submissions the examiner will review the proposed amendment. The examiner will then determine whether the proposed amendment should be treated according to pre-pilot procedures or whether further consideration of the amendment, within the scope of the AFCP program, is possible in the limited time provided to the examiner.

- i. If the submission is treated according to pre-pilot procedures non-production time will not be granted under this pilot program.
- ii. If the submission is treated under the AFCP program and the examiner determines that the submission, as filed, places the application in condition for allowance, the examiner will proceed with a notice of allowability. The examiner may charge the appropriate amount of non-production time involved in the further consideration of the applicant's submission - up to 3 hours.
- iii. If the submission is treated under the AFCP program and the examiner determines that the submission does not place the application in condition for allowance and wants to charge any of the available non-production time (up to 3 hours), the examiner will request an interview to communicate the findings of the review to the applicant.

- 1. The interview will be conducted by the examiner in charge of the application. If the examiner does not have negotiation authority, a primary examiner and/or SPE will also participate.
- 2. If the applicant declines the interview or the interview cannot be conducted within ten (10) calendar days from the date the examiner requests the interview, the examiner may proceed with an appropriate response to the after-final submission according to pre-pilot practice. Up to 3 hours of non-production time for plant and utility applications or 1 hour (plus any time attributed to an attempted interview) for design applications and up to a ten (10) day adjustment of the docket management clock can be made, even if the attempted interview is not conducted.

6) If a submission is considered under the AFCP according to the provisions of section 4B above, non-production time can be claimed whether or not the consideration of the amendment results in allowance of the application.

7) The non-production time authorized by this pilot should be recorded under two separate time codes.

A. For utility and plant applications:

- i. For an application being allowed:

- a. If an interview was conducted, up to 2 hours of non-production time may be charged to the AFCP consideration code and up to 1 hour of non-production time may be charged to the AFCP interview code.
 - b. If an interview was not conducted, up to 3 hours of non-production time may be charged to the AFCP consideration code.
 - ii. For an application not being allowed:
 - a. The examiner must request an interview with the applicant. If an interview is conducted up to 2 hours of non-production time may be charged to the AFCP consideration code and up to 1 hour of non-production time may be charged to the AFCP interview code.
 - b. If the applicant declines the interview or the interview cannot be conducted within ten (10) calendar days from the date the examiner requests the interview, up to 3 hours of non-production time may be charged to the AFCP consideration code.
 - B. For design applications:
 - i. For an application being allowed:
 - a. If an interview was conducted, up to 1 hour of non-production time may be charged to the AFCP consideration code and any time attributed to the interview may be charged to the AFCP interview code
 - b. If an interview was not conducted, up to 1 hour of non-production time may be charged to the AFCP consideration code.
 - ii. For an application not being allowed:
 - a. The examiner must request an interview with the applicant. If an interview is conducted up to 1 hour of non-production time may be charged to the AFCP consideration code and any time attributed to the interview may be charged to the AFCP interview code.
 - b. If the applicant declines the interview or the interview cannot be conducted within ten (10) calendar days from the date the examiner requests the interview, up to 1 hour of non-production time may be charged to the AFCP consideration code.
- 8) The pilot will begin during the 1st quarter of Fiscal Year 2015 and end on September 30th, 2015.

Agreement:

Preamble:

The USPTO has determined to implement the pilot program described above, to be referred to as the After Final Consideration Pilot 2.0 (AFCP or pilot). The USPTO and POPA agree to the following provisions based on this determination:

1. Pilot Data:

Summary data collected during the pilot will be shared with POPA. Upon request, POPA will be provided with the full data used for the pilot evaluation in electronically sortable format. This data may include information such as:

- a) the amount of time being claimed under the pilot;
- b) the number of after final responses that are followed by an allowance of the application;
- c) the number of after final responses that are followed by an advisory action, ex parte Quayle action, a final rejection, or a non-final rejection;
- d) the number of after final responses that are followed by an RCE;
- e) the number of RCEs that are allowed on the first action after filing of the RCE; and
- f) the number of interviews conducted under the pilot.

2. Periodic Meetings to Evaluate and Discuss Changes:

At the request of either party, the parties shall meet to discuss the progress of the pilot and whether the objective is being met in a cost effective manner. Because of the delay in availability of RCE filing data and data on subsequent actions, historical rates may be considered as an indication of the effectiveness of the pilot to the extent possible.

3. Duration and Termination:

The AFCP will begin at the start of the 1st quarter of Fiscal Year 2015 and end on September 30, 2015. Upon prior consultation with POPA, Management may terminate the pilot earlier at its sole discretion

4. Dissemination of Information about the Pilot:

The USPTO will send information on this pilot, including the guidance documents attached hereto as Appendices A and B, via e-mail to all examiners approximately one week prior to the beginning of the pilot. The information will consist of a description of the pilot, as well as providing the time codes to be used to record the time authorized under this pilot.

Signatures

 9/23/14

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

 23 Sep 2014

Robert D. Budens date
President
Patent Office Professional Association

APPENDIX A

Guidelines for Consideration of Responses After Final Rejection under 37 CFR 1.116(b) under the After Final Consideration Pilot

To advance the goal of compact prosecution, the following guidance is provided to highlight situations when entry of an Amendment After Final Rejection under 37 CFR 1.116(b) may lead to earlier allowance of the application without undue burden on the examiner or applicant. Once a final rejection that is not premature has been entered in an application, there is no right to unrestricted further prosecution. In limited situations further amendments or arguments may be considered. Many of the difficulties encountered in the prosecution of a patent application after final rejection may be alleviated if the application includes, preferably at the time of filing, or before a first action by the examiner, claims varying from the broadest to which the applicant believes he or she is entitled, to the most detailed that he or she is willing to accept. See MPEP 714.12. Examiners should conduct an initial search which is as complete as possible, in keeping with the scope of the claims as well as disclosed features and subject matter which the examiner reasonably anticipates might be incorporated into the claims.

Situations where after a full and complete review, a response after final rejection should be entered:

1. The amendment places the application in condition for allowance by canceling claims or complying with formal requirement(s) in response to objection(s) made in the final office action.
2. The amendment places the application in condition for allowance by rewriting objected-to claims in independent form.
3. The amendment places the application in condition for allowance by incorporating limitations from objected-to claims into independent claims, if the new claim can be determined to be allowable with only a limited amount of further consideration or search.
4. The amendment can be determined to place the application in condition for allowance with only a limited amount of further search or consideration, even if new claims are added without cancelling a corresponding number of finally rejected claims.
5. The amendment can be determined to place the application in condition for allowance by adding new limitation(s) which require only a limited amount of further consideration or search.
6. The response comprises a perfected 37 CFR 1.131 or 37 CFR 1.132 affidavit or declaration (i.e. a supplemental declaration which corrects formal defects noted in a prior affidavit or declaration) which can be determined to place the application in condition for allowance with only a limited amount of further search or consideration. A new 37 CFR 1.131 or 37 CFR 1.132 affidavit or declaration will not be considered a proper submission for the AFCP.

Note: For situations 1 and 2 above, no non-production time will be granted. Such situations would be considered under pre-pilot practice and therefore not be entered into the AFCP.

If a submission under 37 C.F.R. 1.116 includes a request for consideration under the AFCP, an amount of non-production time up to 3 hours for plant and utility applications or up to 1 hour (plus any time attributed to an interview) for design applications can be made whether or not the consideration of the amendment results in allowance of the application, subject to the following limitations:

The non-production time authorized by this pilot should be recorded under two separate time codes.

A. For utility and plant applications:

i. For an application being allowed:

- a. If an interview was conducted, up to 2 hours of non-production time may be charged to the AFCP consideration code and up to 1 hour of non-production time may be charged to the AFCP interview code.
- b. If an interview was not conducted, up to 3 hours of non-production time may be charged to the AFCP consideration code.

ii. For an application not being allowed:

- a. The examiner must request an interview with the applicant. If an interview is conducted up to 2 hours of non-production time may be charged to the AFCP consideration code and up to 1 hour of non-production time may be charged to the AFCP interview code.
- b. If the applicant declines the interview or the interview cannot be conducted within ten (10) calendar days from the date the examiner requests the interview, up to 3 hours of non-production time may be charged to the AFCP consideration code.

B. For design applications:

i. For an application being allowed:

- a. If an interview was conducted, up to 1 hour of non-production time may be charged to the AFCP consideration code and any time attributed to the interview may be charged to the AFCP interview code.
- b. If an interview was not conducted, up to 1 hour of non-production time may be charged to the AFCP consideration code.

ii. For an application not being allowed:

- a. The examiner must request an interview with the applicant. If an interview is conducted up to 1 hour of non-production time may be charged to the AFCP consideration code and any time attributed to the interview may be charged to the AFCP interview code.
- b. If the applicant declines the interview or the interview cannot be conducted within ten (10) calendar days from the date the examiner requests the interview, up to 1 hour of non-production time may be charged to the AFCP consideration code.

APPENDIX B

AFCP 2.0 Decision form	Application No. 	Applicant(s)
	Examiner 	Art Unit

This is in response to the After Final Consideration Pilot request filed _____.

1. **Improper Request** – The AFCP 2.0 request is improper for the following reason(s) and the after final amendment submitted with the request will be treated under pre-pilot procedure.

- ☐ An AFCP 2.0 request form PTO/SB/434 (or equivalent document) was not submitted.
- ☐ A non-broadening amendment to at least one independent claim was not submitted.
- ☐ A proper AFCP 2.0 request was submitted previously in response to the most recent final rejection.
- ☐ Other: _____

2. **Proper Request**

- ☐ **A.** After final amendment submitted with the request will not be treated under AFCP 2.0
The after final amendment cannot be reviewed and a search conducted within the guidelines of the pilot program. The after final amendment will be treated under pre-pilot procedure.
- ☐ **B.** Updated search and/or completed additional consideration
The examiner performed an updated search and/or completed additional consideration of the after final amendment within the time authorized for the pilot program. The result(s) of the updated search and/or completed additional consideration are:
 - ☐ 1. All of the rejections in the most recent final Office action are overcome and a Notice of Allowance is issued herewith.
 - ☐ 2. The after final amendment would not overcome all of the rejections in the most recent final Office action. See attached interview summary for further details.
 - ☐ 3. The after final amendment raises a new issue(s). See attached interview summary for further details.
 - ☐ 4. The after final amendment raises new issues, but would overcome all of the rejections in the most recent final Office action. A decision on allowability could not be made within the guidelines of the pilot. See attached interview summary for further details, including any newly discovered prior art.
 - ☐ 5. Other _____.

Examiner Note: Please attach an interview summary when necessary as described above.

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