

November 23, 2010

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Re: Request for Correction under the Information Quality Act

I hereby submit this Request for Correction (“RFC”) under the Information Quality Act¹ (“IQA”) to correct information disseminated by the U.S. Patent and Trademark Office (“PTO”) in two documents:

The 60-day Notice on Information Collection Request for ICR 0651-0032 (“ICR”) published in the Federal Register at [75 Fed. Reg. 23227](#), May 3, 2010 (“Notice”); and Information Collection Request Supporting Statement for ICR 0651-0032 dated September 2010 (“ICR-SS”).²

The ICR seeks Paperwork Reduction Act (“PRA”) clearance from the Office of Management and Budget (“OMB”) for burdens imposed on the public when preparing and submitting initial patent applications during the three-year period 2011-2013. As one who files patent applications and seeks to analyze PTO Information Collection Requests (“ICRs”) to comment on them, as provided for by law, I am an “individual who uses ... the disseminated information at issue,” and thus am an “Affected Person” as defined under both the government-wide information quality guidelines published by OMB (“OMB IQG”)³ and the agency-specific guidelines published by the PTO (“PTO IQG”).⁴

The Notice provided the PTO’s numerical estimates of the total imposed paperwork burdens and sought comments from the public on these estimates. My comments were among those in response.⁵ The public comments pointed out PTO’s failure to comply with the PRA and both the OMB and PTO IQGs through its assertion of “estimates” and “beliefs” that lack objective support and which cannot be independently verified. Throughout the Notice, PTO “estimates” quantitative values from which burdens or burden components are calculated. There are four

¹ 44 U.S.C. § 3516 note, Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515 (2001).

² PTO submission of ICR for Initial Patent Applications, Supporting Statement, OMB No. 0651-0032, (September 2010) available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=204632&version=0>

³ Office of Management and Budget, “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Notice; Republication, [67 Fed. Reg. 8452-8460](#), (February 22, 2002).

⁴ PTO, “*Information Quality Guidelines*,” online at <http://www.uspto.gov/web/offices/ac/ido/ifoqualityguide.html>.

⁵ Public comments, this ICR at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201009-0651-002.

unnumbered tables in the Notice containing “estimates” of the number of responses, the time per response, or both. For none of these elements does the PTO disclose the objective basis for its “estimate” or show its work. Beyond the specific unsupported estimated burdens, the number of responses are provided with up to six significant digits, yet their sources, derivation methods or time period from which they were obtained are not disclosed. Very little information in these tables is transparent or reproducible, nor are estimates and data outside the tables. The few instances where “explanations” are attempted only confirm their infirmity.

The PTO failed to respond to the substance of the public comments and ignored the agency’s obligations under the PRA and the IQA when it subsequently disseminated these burden estimates in the ICR-SS. In essentially all respects, the ICR-SS ignores the substantive questions in the comments, repeats the same unsupported or otherwise defective information, and provides the same results of non-existent or flawed statistical analyses. This RFC calls on the PTO to correct *all* the information it disseminated in both documents. In explaining the deficiencies of the disseminated information, this RFC only discusses certain examples with specificity. However, this RFC seeks correction of the PTO’s analytical methods, disclosure of sources, and presentation of the derivations for *each* numerical estimate in both documents, including parameters that lead to the disseminated number of responses, burden-hours, average costs and non-hour burdens.

1 AGENCY DATA IN INFORMATION COLLECTION REQUESTS ARE SUBJECT TO THE IQA. THE INFORMATION DISSEMINATED BY PTO IN THIS ICR IS “INFLUENTIAL INFORMATION”

Under the “Needs and Uses” section of the ICR-SS, the PTO acknowledges the applicability of the OMB and PTO IQGs to this ICR:

“The Information Quality Guidelines from Section 515 of Public Law 106-554, Treasury and General Government Appropriations Act for Fiscal Year 2001, apply to this information collection and comply with all applicable information quality guidelines, i.e., the OMB and specific operating unit guidelines [sic]. This proposed collection of information will result in information that will be collected, maintained, and used in a way consistent with all applicable OMB and USPTO Information Quality Guidelines. (See Ref. A, the USPTO Information Quality Guidelines.)”⁶

The first sentence is tautological at best, circularly stating that the IQGs are compliant with themselves. It is ironic that the sentence presumably describing PTO’s quality obligations is itself in need of quality correction, which the PTO refuses to do despite prior public comments pointing out the error. From the second sentence and the PTO’s repeated historical refusal to provide support compliant with the OMB and PTO IQGs with respect to information it disseminates in ICRs, it could be inferred that the PTO believes that the IQA only applies to the information it collects under the PRA but not to the information it disseminates. If so, the PTO is wrong. Congress enacted the IQA to ensure and maximize the quality, objectivity, utility, and integrity of information (including statistical information) *disseminated by Federal agencies* in general and particularly in fulfillment of the purposes and substantive provisions of the PRA. Thus, the PTO is obligated under the IQA to *disseminate* 60-day notices and ICR supporting statements that comply with the OMB and PTO IQGs.

⁶ ICR-SS at 3.

Entrusted by Congress to supervise all agencies' IQA compliance, OMB specifically required that agencies adhere to the OMB IQG when discharging their obligations under the PRA:

“Given the administrative mechanisms required by [the IQA] as well as the standards set forth in the Paperwork Reduction Act, it is clear that agencies should not disseminate substantive information that does not meet a basic level of quality.” (67 FR 8452, Col. 3). ... “[A]gencies **must make their methods transparent** by **providing documentation**, ensure quality by reviewing the underlying methods used in developing the data and **consulting** (as appropriate) with **experts and users**, and keep users informed about corrections and revisions” (67 Fed. Reg. 8453, Col. 2, emphasis added).

These standing compliance obligations arise in the normal course of the agency's business and are **not** triggered only when a party makes a Request for Correction. Pursuant to OMB directives, the PTO IQG adopted OMB's quality standards, established procedures for affected persons to follow when submitting RFCs, and for PTO to follow in responding to them. The PTO committed to comply, stating that “Effective October 1, 2002, information disseminated by the USPTO **will comply** with all applicable OMB and (these) USPTO information quality guidelines”.⁷ In its own IQG, the PTO adopted OMB standards for information quality wherein the term “quality” is an encompassing term comprising *utility*⁸, *reproducibility*⁹ and *objectivity*¹⁰.

The information in the Notice and the ICR-SS is agency-initiated dissemination of information which, by PTO's own acknowledgement, is subject to the OMB and PTO IQGs:

“Agency initiated distribution of information to the public” refers to information that the agency distributes or releases which reflects, represents, or forms **any part of the support of the policies of the agency**. In addition, if the agency, as an institution, distributes or releases **information prepared by an outside party** in a manner that reasonably suggests that the agency agrees with the information, this would be considered agency initiated distribution and hence agency dissemination because of the appearance of having the information represent agency views”¹¹ (emphasis added).

The Notice and the ICR-SS disseminate information describing burdens to be imposed on the

⁷ *Id.*, emphasis added.

⁸ “Utility” refers to the usefulness of the information to its intended users, including the public. In assessing the usefulness of information that the agency disseminates to the public, the agency considers the uses of the information not only from its own perspective but also from the perspective of the public (*Id.* § IV(A)6(b)).

⁹ “Reproducibility” means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision. For information judged to have more (less) important impacts, the degree of imprecision that is tolerated is reduced (increased). With respect to analytical results, “capable of being substantially reproduced” means that independent analysis of the original or supporting data using identical methods would generate similar analytical results, subject to an acceptable degree of imprecision or error (*Id.* § IV(A)7).

¹⁰ “Objectivity” involves two distinct elements, presentation and substance. The presentation element includes whether disseminated information is being presented in an accurate, clear, complete, unbiased manner, and within a proper context. Sometimes, in disseminating certain types of information to the public, other information must be disseminated in order to ensure an accurate, complete, and unbiased presentation. Sources of the disseminated information (to the extent possible, consistent with confidentiality protections) and, **in a scientific, or statistical context, the supporting data and models need to be identified, so that the public can assess for itself whether there may be some reason to question the objectivity of the sources**. Where appropriate, **supporting data shall have full, accurate, transparent documentation, and error sources affecting data quality shall be identified and disclosed to users**. The substance element focuses on ensuring accurate, reliable, and unbiased information. In a scientific, or statistical context, **the original or supporting data shall be generated, and the analytical results shall be developed, using sound statistical and research methods**. If the results have been subject to formal, independent, external peer review, the information can generally be considered of acceptable objectivity (*Id.* § IV(A)6(a), both levels of emphasis added).

¹¹ *Id.* § IV(A)(1)(a).

public during the three-year period 2011-2013, which PTO estimates would cost a total of \$12.61 billion. All the information in the Notice and the ICR-SS pertain to the burdens of filing patent applications required to secure key valuable and essential patent rights. Among other purposes, the PTO states it seeks public comments on ways to minimize these burdens, including burdens on small entities. These burdens are substantial; they clearly depend on agency requirements and policies; and their magnitudes are central to applicants' business decisions. Therefore, the disseminated information is “influential,” as defined in both the OMB and PTO IQGs, because it is “information that will have or does have a clear and substantial impact on important public policies or important private sector decisions”.¹²

The PTO IQG commits the PTO to objectivity standards for influential information that it disseminates, and requires that this information be *reproducible*. The PTO states that its IQG supports reproducibility of analytic results and “*when asked the USPTO does provide disclosure of the data sources that have been used and the specific quantitative methods and assumptions (if any) that have been employed*”¹³ (emphasis added). Public comments⁵ on the 60-day notice *asked* the PTO to do just that (evidently, to no avail), and this RFC again asks the PTO to do so with respect to *all* statistical information, *all* “beliefs” and “estimations” and *all* assumptions made in the Notice and the ICR-SS.

The foregoing request is of sufficient particularity since *all* the information provided by PTO in the Notice and the ICR-SS fail the most elementary information quality test under both the OMB and PTO IQGs because it is not transparent and reproducible. No third party (including OMB) can reproduce the PTO’s estimates of the number of responses, burden-hours per response, or non-hour burdens. Nevertheless, the following sections describe several specific deficiencies and errors that are facially and readily evident. Although these examples are taken from the ICR-SS, they should be understood as also referring to the corresponding items in the Notice, which this RFC also asks PTO to correct.

2 BURDEN COMPONENTS MISSING FROM PTO’S ESTIMATES IN THE ICR

The Notice and the ICR-SS purport to account for all PRA-cognizable paperwork burden borne by applicants in gathering the required information, preparing and filing initial patent applications.¹⁴ However, the PTO has omitted significant components of burden. The ICR-SS fails the “Utility” prong of the IQA because the missing information prevents the public from evaluating and commenting on the full burdens proposed by the ICR – an “intended use” of the information. It also fails the “Objectivity” prong of the OMB and PTO IQGs with respect to its two distinct elements - presentation and substance - because the PTO neglected to include substantial burden information in an “accurate, clear, complete, and unbiased manner.”

The subsections below describe several substantial burden components in initial patent applications omitted from the ICR-SS.

¹² *Id.* § IV(A)(3). Indeed, the PTO IQG specifically identifies information on PTO filings – as in this ICR – Influential: “‘Influential Information’ disseminated by the USPTO... consists primarily of statistical information on USPTO filings and operations.” *Id.* §VII(A).

¹³ *Id.* §VII(A).

¹⁴ ICR-SS at 12.

2.1 Unaccounted burdens associated with all PTO forms listed in ICR-SS Table 2

Table 2 lists 39 PTO forms purported to be covered by this ICR. However, estimated burdens to complete each of these forms, including gathering information, preparing, and submitting the forms to the PTO are nowhere to be found in the ICR-SS. It is also apparent that such burdens are not included in the tabulation of “The Burden Hour/Burden Cost to Respondents” in Table 3. For example, the first ten rows of Table 3 show the PTO’s estimated burden associated with preparing utility, design and plant patent applications. With respect to the Application Data Sheet Form, PTO/SB/14, note that in all three application types, the burden shown for applications with Application Data Sheet is identical to that of applications having no Application Data Sheet. This indicates that either the PTO estimates a zero burden in submitting Form PTO/SB/14 or that it did not include the burdens for this form (and possibly all forms identified in Table 2).¹⁵

Indeed, if the PTO had actually included the burdens of any of the 39 forms, neither the ICR-SS nor the Notice make it transparent. The mere fact that Table 3 contains no entries that specify the number of applicant responses incorporating these forms suggests they are all omitted. For example, most applications are not accompanied by the Multiple Dependent Claim Fee Calculation Sheet Form PTO/SB/07. In Table 5, the PTO estimates that 9,840 utility applications per year will be filed with Multiple Dependent Claims fees, but this table only includes the associated fee burdens. To account for the burden-hours for submitting Form PTO/SB/07, the PTO must provide an estimate of the average burden-hours for a single PTO/SB/07 form and multiply this value by its estimated number of responses (presumably 9,840 per year). No such entries are found in Table 3, or anywhere else in the ICR-SS. Another example is the Declaration – Additional Inventors – Supplemental Sheet, Form PTO/SB02. Not all patent applications name more than one inventor and the ICR-SS provides no estimate for the number of such responses. Apparently, Table 3 contains no entries that could account for the burdens associated with this form, either.

The public cannot know the magnitude of these PTO forms’ paperwork burden omissions. While naming 39 forms, the ICR-SS neither discloses information on the number of responses for any of them nor does it provide estimates for the burden-hours per submitted form and show whether or not they are included in Table 3. The PTO must clarify whether and, if so, how it accounted for the burdens associated with *each of the 39 forms* for which it seeks PRA clearance in this ICR.

2.2 Unaccounted burdens for claiming or changing a Small-Entity Status

Although the ICR-SS acknowledges that the PTO “requires a small entity to identify itself as such to obtain the benefits of small entity status”,¹⁶ it conspicuously fails to account for the paperwork burdens of this requirement. This may be because the PTO no longer has a form for doing so. Yet, the existence of genuine burden is obvious from the PTO’s “Forms FAQ” web page:

¹⁵ Form PTO/SB/14 is listed among the information collections published for this ICR at [reginfo.gov](http://www.reginfo.gov). Opening the form (dated 11/08) at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=201819&version=0> reveals a burden estimate of 23 minutes. The derivation of this estimate is, of course, not included on the form itself, but the burden itself is missing from the ICR-SS and Notice.

¹⁶ ICR-SS at 9.

“To either (1) claim small entity status or (2) to notify the USPTO of the loss of entitlement to small entity status, applicant *must* submit an appropriate statement in *a separate letter* signed by the one of the required parties. As mentioned above, a written assertion of small entity status must be signed by a party listed in 37 CFR 1.27(c)(2). A notification of the loss of entitlement to small entity status must be signed by a party listed in 37 CFR 1.33(b)” (emphasis added).¹⁷

The burden of ascertaining the entity status and generating such a legal letter is not inconsequential. Declarants must make a sufficient inquiry and exercise diligence in determining whether the applicant qualifies as a small entity under the legal definitions in Section 3 of the Small Business Act and in 37 C.F.R. § 1.27(a). Improperly claiming such status or failing to *timely* inform the PTO of a change of status may result in allegations of inequitable conduct by improperly claiming small entity status and in possible loss of patent rights.¹⁸ In fact, the burden of inquiry and legal determination of small entity status is not limited to initial application filings, as it is also required prior to any communication with the Office involving payment of fees. The ICR-SS does not account for any such paperwork burdens.

2.3 Unaccounted burden-hours spent by inventors

“The [PTO] calculates that all of the information in this collection will be prepared by an attorney”.¹⁹ This assumption is counterfactual and incompatible with the legal obligations of inventors. The PTO ignores the time and effort required by inventors to assemble information in a manner amenable to use by their patent attorneys, and the time it takes inventors to respond to inquiries their attorneys inevitably make to clarify and elaborate this information. The ICR-SS also ignores the time it takes for inventors to review the final application and claims prior to filing, as required by law.²⁰

2.4 Unaccounted applicant prior art search burden-hours and non-hour costs

Although an applicant’s prior-art patentability search is not technically required by law, the majority of applicants conduct such searches before and/or during the course of preparing their patent application and in keeping with PTO’s recommendation to do so.²¹ Search costs entail not only burden-hours of search specialists but also substantial usage fees charged by database information providers. The ICR-SS does not count the actual patentability search burdens that applicants (or their retained search services) perform as part of their initial patent application process, although the PTO is fully aware of these search results via applicants’ submission of

¹⁷ PTO’s answer to Q.3 in its answers to FAQ related to filling forms at <http://www.uspto.gov/web/forms/qas.html>.

¹⁸ *Nilssen v. Osram Sylvania, Inc.* 504 F.3d 1223, 1233 (Fed. Cir. 2007) (Affirming the district court’s decision finding that all of the patents in suit are unenforceable due to inequitable conduct in improperly claiming small entity status).

¹⁹ ICR-SS at 12.

²⁰ As a minimum, among the legal obligations of inventors pursuant to their oath and declaration under 37 C.F.R. § 1.63(b)(2-3) is to have “reviewed and understood the contents of the application, including the claims, as amended by any amendment specifically referred to in the oath or declaration;” and to have “disclosed to the Office all information known to the person to be material to patentability as defined in § 1.56.” The ICR-SS identifies Form PTO/SB/01 used by inventors to make such an oath and declaration but no accounting for the inventor time to review the application, the claims and the prior art documents is contained in the ICR.

²¹ PTO, *Filing for a Patent - Starting the Process*. Online at <http://www.uspto.gov/smallbusiness/patents/filing.html> (“Step 2: Conduct a search of prior art. A search of all previous public disclosures (prior art) including, but not limited to, previously patented inventions in the U.S. *should* be conducted to determine if your invention has been publicly disclosed and thus is not patentable. While a search of the prior art before the filing of an application is not required, it is advisable to do so.”) (Emphasis added).

Information Disclosure Statements (“IDSs”) that are often filed with the initial application. PTO’s ICR 0651-0031²² estimates that 341,750 IDSs were filed per year. The PTO’s burden “estimate” (2 hours per IDS) is a trivial portion of the true burden, and at best covers the time to review the search results, select and duplicate pertinent references for inclusion, and prepare the IDS form. Although a systematic search is not performed in every application, evidence shown elsewhere indicates that in 2007 such prior art search costs in applications involving a patentability search were about \$10,000 per application.²³ The ICR-SS totally ignores these important paperwork burdens in initial patent applications.

3 UNACCOUNTED DISPROPORTIONAL BURDENS ON SMALL ENTITIES

3.1 Failure to meet the “Objectivity” requirements of the IQA

PRA regulations in 5 C.F.R. § 1320.9 (“Agency certifications for proposed collections of information”) provide in pertinent part the following:

As part of the agency submission to OMB of a proposed collection of information, the agency (through the head of the agency, the Senior Official, or their designee) shall certify (and *provide a record supporting such certification*) that the proposed collection of information --

....

(c) reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency, including with respect to small entities, as defined in the Regulatory Flexibility Act (5 U.S.C. 601(6)), the use of such techniques as:

- (1) establishing differing compliance or reporting requirements or timetables that take into account the resources available to those who are to respond;
 - (2) the clarification, consolidation, or simplification of compliance and reporting requirements; or
 - (3) an exemption from coverage of the collection of information, or any part thereof;...
- (Emphasis added)

The PTO certified on September 30, 2010, pursuant to 5 C.F.R. § 1320.9(c) that this information collection “reduces burden on small entities.”²⁴ but failed to “provide a record supporting such certification.” Instead, Section 5 of the ICR-SS entitled “Minimizing the Burden to Small Entities” merely asserts the absence of disproportionate burdens on small entities:

“No significant impact is placed on small entities, as the rule (37 CFR 1.27) simply requires a small entity to identify itself as such to obtain the benefits of small entity status.”²⁵

The assertion that “no significant impact is placed on small entities” has no support in the ICR-SS, and indeed, it is counterfactual. The PTO fails to disclose information about small entities that are most adversely affected by this ICR’s burdens – those who cannot afford the expense of filing and obtaining a patent and consequently forgo patent protection.²⁶ Thus, the

²² PTO Information Collection Request, ICR Reference No: 201008-0651-002, available at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201008-0651-002

²³ Ron D. Katznelson, PRA comments to OMB for PTO 0651-0031, ICR 200707-0651-005. See Appendix A, Patent search firm’s quotes for patentability search reports. Available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=193230&version=1>.

²⁴ PTO Certification in ICR 0651-0032 at http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201009-0651-002#section9_anchor.

²⁵ ICR-SS at 9.

²⁶ See S.J.H. Graham et al. (2009), *infra* note 27, at 1310-1311 (Figure 4 showing that the most frequently cited reason for startup respondents to forgo patent protection is the high cost of obtaining a patent); U.S. Small Bus. Admin., *A Survey of High Technology Firms*, by J. J. Cordes, H. R. Hertzfeld and N. S. Vonortas, at 58 (1999)

ICR-SS fails the “substantive objectivity” prong of the IQA. Moreover, the statement that small entities are entitled by law to a 50% fee discount is substantively correct but neglects to mention that fees comprise a small percentage of the total burden. It therefore fails to meet the “presentation objectivity” prong of the IQA by failing to put the statutory fee reduction in the proper context and is simply misleading in its conclusion.

One way the PTO could have theoretically discharged its IQA “objectivity” obligation with respect to this claim is to have provided evidence and a proper analysis showing that burdens borne by small entities other than fees are insignificant. Alternatively, the PTO could have arguably brought its statement on fee discount into context by showing that the reduced fees for small entities make up for the extra burdens small entities otherwise incur. The ICR-SS does neither; nor could it, because both theories contradict the facts.

Small entity PTO fee discounts are a small fraction (less than 10%) of their total burden even by PTO’s results. The PTO could have discovered this had it performed any analysis. Indeed, the PTO apparently conducted no separate evaluation of the burdens this information collection places on small entities – i.e., the minimum evaluation required for a truthful certification under 5 C.F.R. § 1320.9(c). Moreover, in some collection items, this ICR ignores burdens on small entities altogether and falsely reports *zero* burden to small entities (see Attachment 1).

Filing a patent application that complies with PTO requirements is an essential step for many technology startups and small businesses during their first years of life. Often, their inventors must learn about starting a technology-based business for the first time and must learn (at considerable expense) from outside patent counsel about legal patenting requirements, practices, procedures and related deadlines. For many startups, the cost of acquiring patents is the largest out-of-pocket expenditure before they secure investments or record revenues. It is unclear whether the PTO has ever gathered information required to evaluate these burdens. However, the PTO now has this information readily available. Before taking his appointment as PTO’s chief economist, Dr. Stuart Graham published results of a 2008 survey of 1,300 startup patenting firms across the U.S. that are pertinent to this ICR. The Graham et al. survey showed that startup’s average cost of obtaining a patent was more than \$38,000.²⁷ Subtracting from this amount the drawing costs (\$935 according to this ICR), and about \$2,000 of small entity PTO fees including the issue fee, the average patent application costs estimated for the surveyed startups is over \$35,000. This rough estimate of dollar denominated burden-hours for startups is more than three times the dollar denominated burden-hour estimate disseminated by PTO in

www.sba.gov/advo/research/rs189tot.pdf (Finding patenting costs and enforcement to be small-firms’ most important perceived limitation of patent protection and noting their inability to “cover” with a limited number of patents an area broad enough to keep competitors at bay); W. M. Cohen, R. R. Nelson, and J. P. Walsh, “Protecting Their Intellectual Assets: Appropriability Condition and Why U.S. Manufacturing Firms Patent (or Not)”, *Nat’l Bureau of Econ. Res.*, Working Paper No. 7552, at 15 (2000), available at <http://www.nber.org/papers/w7552> (Finding that the costs of patent enforcement dissuade smaller firms from patenting).

²⁷ S. J. H. Graham, R. P. Merges, P. Samuelson and T. M. Sichelman, “High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey”, *Berkeley Technology Law Journal*, Vol. 24, No. 4, 1255, 1311 (2009). Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1429049. (A survey of more than 1,300 U.S. startup companies from all industry sectors revealed that the average out-of-pocket cost for a respondent firm to acquire its most recent patent was over \$38,000. A respondent executive stated that startups often pay significantly more than incumbents because startups (i) tend to file for patents on inventions that are more important to the company’s core business model than large firms, (ii) usually use outside instead of in-house counsel for patent prosecution; and (iii) often have difficulty monitoring outside counsel to limit overall costs).

Table 3: \$10,790. This raises a substantial question as to the objectivity of PTO’s factual claims about burden estimates for small entities, as reported in the ICR-SS.

Startups are small entities, but those surveyed by Graham et al. may not be fully representative of all small entities as defined by law. Nonetheless, this survey’s findings are consistent with other substantial evidence that, on average, small entities’ patent applications are more complex and costly to prepare than other entities’ applications. Other statistical evidence shows that small entity patents cover more original and broader technologies than large patenting firms as their measured impact level across downstream technologies is broader than that of large entity patents.²⁸ Because small patenting entities are more likely to develop emerging technologies than large firms,²⁹ their patent applications often cover not only multiple new inventions but new ways to practice the inventions. This means that on average, small entity patent applications are more elaborate and contain more information. Small entity patents contain on average 53% more references than those of large entity patents³⁰ and small entity patent applications contain more claims than those of large entities.³¹ Indeed, PTO’s own data in this ICR show that while small entities’ share of all applications is only 25%, their share of all claims in excess of 20 filed in applications is disproportionately 34%.³²

3.2 Failure to meet the “Utility” requirements of the IQA

Without actually evaluating small entities’ *specific* burdens in filing patent applications, the PTO could not have, and indeed had not, shown that its proposed collection minimized such burdens. It could not have evaluated the applicability of potential burden saving techniques as required by 5 C.F.R. § 1320.9(c)(1-3) such as “establishing differing compliance or reporting requirements or timetables that take into account the resources available to [small entities]”; “consolidation, or simplification of compliance and reporting requirements”; or “an exemption [for small entities] from coverage of the collection of information, or any part thereof.” Moreover, without further evaluating the unique causes for burdens of this collection on small entities with fewer than 25 employees, the PTO has no information enabling it to make “efforts to *further* reduce the

²⁸ U.S. Small Bus. Admin., “An Analysis of Small Business Patents by Industry and Firm Size”, by A. Breitzman and D. Hicks, (November 2008), at 8-9. Available at <http://www.sba.gov/advo/research/rs335tot.pdf> (Discussing the study results showing higher Pipeline ‘Originality’ and ‘Generality’ indices for small-entity patents as compared with large entity patents).

²⁹ *Id.*, at 21-24.

³⁰ U.S. Small Bus. Admin., “Small Serial Innovators: The Small Firm Contribution To Technical Change”, by CHI Research, Inc. (February 27, 2003), at 20. Available at <http://www.sba.gov/advo/research/rs225tot.pdf> (The index of patent reference list length takes the value of 1.81 for the small firm patents and 1.18 for the large firm patents); J.R. Allison and M.A. Lemley, “Who’s Patenting What? An Empirical Exploration of Patent Prosecution”, *Vanderbilt Law Review*, **53**, p. 2099, (2000) (reporting on a sample of patents applied for in the early 1990’s in Table 31. At that time, small business patents cited 18.03 references while large entity patents cited an average of 14.31 references).

³¹ See Ron D. Katznelson. “Defects In The Economic Impact Analysis Provided By The USPTO For Its New Claims and Continuation Rules.” Appendix E to *Amicus Curiae* Brief” in *Tafas/GSK v. Dudas*, 541 F.Supp.2d 805 (E.D. Va. 2008), Doc. 258-5, (January 10, 2008), at 14-16. Available at <http://bit.ly/Amicus-Appendix-E>. (Discussing in footnote 62 data showing that small entity applicants submit more claims and will be disproportionately affected by proposed rules limiting the number of claims in their applications).

³² Table 4 of the ICR-SS projects a total of 78,660 utility application filings by small entities and 235,980 by other entities (a 25% share for small entities). Table 5 of the ICR-SS shows projected excess claim fees by entity size, from which Table B hereof imputes in the rightmost column the total number of claims in excess of 20 filed by small entities as 408,940 and 798,216 filed by other entities (a 34% share for small entities).

information collection burden for small business concerns with fewer than 25 employees” (emphasis added), as required by the PRA. 44 U.S.C. § 3506(c)(4).

The ICR-SS and the Notice provide no record to support PTO’s certification made pursuant to 5 C.F.R. § 1320.9(c), that small entity burdens are minimized. Therefore, the ICR-SS and the Notice lack “utility” to the PTO for at least one intended use - supporting a factual PRA certification. The ICR-SS and the Notice also lack “utility” to the public because they fail to provide the necessary information about PTO’s proposed collection to enable the public to “(ii) evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;” and to comment on ways to “(iv) minimize the burden of the collection of information on [small entities] who are to respond...”. 5 C.F.R. § 1320.8(d)(1). Hence, the ICR-SS and the Notice fail to adhere to the OMB and PTO IQGs under both “utility” prongs.

4 FAULTY ANALYTICAL METHODS

As indicated above, information on burden estimates in the ICR-SS and the Notice is opaque and therefore not reproducible. Because the actual burden is known to vary across respondents, “presentational objectivity” requires disclosure of the sources used and the degrees of variability found. “Substantive objectivity” further requires that correct analytical and statistical methods be applied in deriving the burden estimates. The ICR-SS and Notice embody none of these elements. One is unable to fully test the hypothesis of “objectivity” with respect to burden estimates because the information provided in the ICR-SS and Notice is not reproducible. While this RFC requests that such objective support be provided for all burden estimates, the following sections address some of the clearly erroneous or flawed burden estimation methods that were detected in a review of the limited information disclosed.

4.1 Improper use of median values

To calculate the respondent cost burden, the ICR-SS uses a median professional hourly rate for attorneys in private firms as published in the 2009 report of the American Intellectual Property Law Association (AIPLA).³³ Apart from the fact that the AIPLA Report is based on a survey which does not meet the requirements of the IQA (see Section 4.6), PTO’s use of the median cost rather than the mean (average) cost produces downwardly biased burden estimates.³⁴ Estimating the burden in a given category requires that the *average* burden in the category (not the median) be multiplied by the number of units or responses in the category. Indeed, OMB regulations in 5 CFR 1320.8(b)(3)(iii) require that agencies provide “[a]n estimate, to the extent practicable, of the *average* burden of the collection” (emphasis added). The PTO does not follow this regulation, and underestimates the total burdens because the hourly rate distribution is skewed with a median rate that is significantly lower than the mean. The PTO used the AIPLA Report median hourly rate of \$325 where the mean hourly rate found in the same report is \$363. This issue was brought to the PTO’s attention at least twice with full explanations in public

³³ American Intellectual Property Law Association, *Report of the Economic Survey*, (July 2009), hereinafter referred to as “AIPLA Report.” See ICR-SS at 12.

³⁴ The ICR-SS and the Notice also use PTO’s “belief” that an hourly “para-professional” rate will be \$100 without providing any objective support for this “belief” and without indicating whether such rate is the median, typical or average rate. ICR-SS at 16, 17, 36 and 37.

comments in a prior information collection request.³⁵ Thus, the PTO was well aware that the median hourly rate cannot legitimately be used to estimate total burden, but it used the median anyway. The PTO specifically defended its practice with the following non-sequitur:

“The agency believes the median figure is an appropriate figure upon which to base estimates given that attorneys charging above the median and below the median would be expected to participate in the appeal process.”³⁶

Adding insult to intellectual injury, the PTO apparently thinks this rationale justifies using medians to estimate some burdens in this ICR but not others, where it uses averages.³⁷

The most plausible explanation for PTO’s use of the median instead of the mean hourly rate is that using the median enabled PTO to understate dollar denominated burden-hours by about 12%, or about \$1.35 billion for the years covered in this ICR. It is remotely plausible, however, that the PTO did not intend to understate burden by \$1.35 billion and instead it simply lacks fundamental, undergraduate-level knowledge of statistics. In the unlikely event that this is true, I am therefore compelled to digress here and attempt yet another explanation, with the knowledge that the OMB and PTO IQGs both require PTO to either correct the error or provide a reasoned, statistically valid defense.

The median is the numeric value separating the higher half of a sample, a population, or a probability distribution, from the lower half.³⁸ Roughly speaking, in a given distribution of burden values, half of the population incurs burdens lower than or equal to the median burden while the other half incurs burdens that are higher than or equal to the median burden. The median burden can therefore be viewed as some form of a “typical” burden. However, the PRA does not require that agencies estimate the “typical” burdens. Information collection burdens must be accounted for *all* responses - not just for typical responses.

OMB regulations under the PRA at 5 C.F.R. § 1320.3(b)(1) define “burden” as “the *total* time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency...”. Moreover, 5 C.F.R. § 1320.5(a)(1)(iv)(B)(5) requires that agencies provide “[a]n estimate of the *total* annual reporting and recordkeeping burden that will result from the collection of information” (emphasis added). There is only one way for the agency to comply with these legal requirements. For a total of N respondents each having possibly different burdens, wherein the burden for the k^{th} respondent is denoted by b_k , the *total* burden of *all* responses, of which the PRA requires an estimate, is easily shown as:

$$\text{Total burden} = \sum_{k=1}^N b_k = N \times \frac{1}{N} \sum_{k=1}^N b_k = N \times (\text{Average Burden})$$

³⁵ Ron D. Katznelson, Comments on ICR-0651-0063 - Board of Patent Appeals and Interferences, (November 17, 2008) at 14-15. <http://www.reginfo.gov/public/do/DownloadDocument?documentID=95757&version=1>; Richard B. Belzer, Comments on ICR-0651-0063 - Board of Patent Appeals and Interferences, (November 17, 2008) at 9. <http://www.reginfo.gov/public/do/DownloadDocument?documentID=93894&version=1>

³⁶ PTO’s Modified Supporting Statement in ICR-0651-0063 (December 2, 2009) at 9. Available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=89627&version=2>.

³⁷ ICR-SS at 15 for average costs of CD-R, padded mailing envelopes, and sending express mail; at 16 for average weight of petition papers, and oversized program listing; at 18 for average number of drawing sheets or photographs in patent applications; at 23-24 for average fees listed in Table 5; at 35 for average capital start-up costs.

³⁸ See the mathematical definition of the median at <http://mathworld.wolfram.com/StatisticalMedian.html>.

In other words, it is the average burden (not the median or typical burden) that must be used in conjunction with the total number of responses to calculate the total aggregate burden incurred by *all* respondents. It is important to recognize that the result thus obtained for the total burden is *independent of the specific form of the statistical distribution* of the b_k values and will always be correct as long as the *average* burden value is used in the calculation.

To see the flaw in PTO's method of using median burden values, consider the following example. Let a total set of respondents be comprised of 10,000 respondents wherein 6,000 respondents each have a burden of \$0 and each of the other 4,000 respondents have a burden of \$1,000. The average burden across all 10,000 respondents is $(6,000 \times \$0 + 4,000 \times \$1,000) / 10,000 = \$400$. The median burden in this case is \$0 because both the 5,000th and the 5,001st (middle) respondents, as ordered by increasing burden values, have \$0 burden. The PTO's method for calculating the total burden uses median burden values multiplied by the number of responses. PTO's method would yield a total burden of $\$0 \times 10,000 = \0 . In contrast, using the average burden of \$400 in the calculation, yields a total burden of $\$400 \times 10,000 = \$4,000,000$, the correct result for the aggregate total burden borne by *all* 10,000 respondents. Clearly, using the median value leads to biased estimation whenever the underlying statistical distribution is skewed.

In this ICR, respondents employ attorneys from various law practices with a range of seniority levels and therefore incur a range of hourly rate burdens. To compute the dollar denominated burden of an attorney-hour incurred by *all* respondents, the equation above shows that one must use the average hourly rate burden – not the median value. Assuming that the relationship of the median and the mean in the AIPLA Report survey distribution is representative of the corresponding relationship in the actual distribution of hourly rates, the PTO's method underestimates total burdens due to this factor alone by $(\$363 - \$325) / \$325 = 11.7\%$. The PTO's method is clearly biased and there can be no doubt that it is unjustified in *any* burden analysis performed to comply with the PRA. An agency using this method commits both a statistical analysis error and a violation of law.

4.2 Improper statistical analysis based on flawed or made-up samples

In attempting to estimate patent drawing cost burdens, the ICR-SS explains its method as follows:

“Estimates for the patent drawings can vary greatly, depending on the number of figures to be produced, the total number of pages for the drawings, and the complexity of the drawings. Because there are many variables involved, the USPTO is using *the average of the cost ranges* found for the application drawings to derive the estimated cost per sheet that is then used to calculate the total drawing costs.” (ICR-SS at 17, emphasis added)

The fact that “there are many variables involved” does not justify an erroneous statistical treatment, when a statistically valid survey would have included intrinsically the effects of these variables. As Table A shows, the ICR-SS leaps to a counterfactual conclusion that taking the *algebraic* average of two *extreme* cost values found by the PTO (where?, How?) leads to a correct estimate of the mean value of the costs incurred by applicants.

Cost item as identified in the ICR-SS	Min	Max	Algebraic Average	PTO's Estimated "Mean"
Utility drawings per sheet	\$35	\$135	\$85	\$85
Design drawings per sheet	\$35	\$155	\$95	\$95
Plant photographs or drawings per unit	\$35	\$100	\$68	\$68
Provisional drawing per sheet	\$35	\$135	\$85	\$85

Table A. PTO’s flawed use of the algebraic average of the minimum and maximum of sample prices as the mean for the actual distribution of prices. Data from ICR-SS at 18.

This method is flawed for either one of the following reasons: If the PTO considers the minimum and maximum cost for a given item as its only two members of the ensemble over which the mean is calculated, then the calculation of the mean is technically correct (because the mean over a sample of two values is their algebraic average). However, a sample of two values (particularly if they are extreme values) is certain to be unrepresentative of the cost population from which they were drawn except in the special case where the extremes are equidistant from the mean. Without evidence that this special case is in fact present in each of the cost distributions here, this “mean” does not satisfy the objectivity standard contained in the OMB IQG and PTO IQG, at least because a sample of two values is too small for any meaningful statistical inference. If, on the other hand, the PTO had a larger (and more representative) sample than just the two extreme values, the mean over that larger ensemble should have been disclosed and used, and it almost certainly would not have resulted in the values presented in the ICR-SS.

The minimum and maximum prices which the ICR-SS quotes are also suspect. What is the likelihood that the minimum prices for *all* drawing types are exactly the same - \$35? Is this based on an actual survey of price quotes around the nation? How is it possible that the drawings for non-provisional utility applications have the same exact price range as that of provisional applications, when many provisional applications are submitted with informal drawings from inventors’ notebooks or internal engineering documents for which the PTO had no estimate of cost? The PTO must disclose all its data sources and methods.

4.3 Improper use of conditional ensembles in estimating drawing sheet cost burdens

On page 18 of the ICR-SS the PTO states the following “averages” for the number of drawing sheets in patent applications:

- 11 sheets in utility applications
- 4.8 sheets in design applications
- 2 sheets in plant applications
- 7.5 sheets in provisional applications

The ICR-SS provides no information as to how these averages were obtained, whether they were based on actual sampling of applications or sampling of issued patents (which are two distinct populations that do not have the same mean number of drawing sheets); the size of the samples, or what time frame such samples spanned. It is noted that half of these values appear as convenient integers to the nearest decimal digit. The OMB and PTO IQGs require full disclosure and support for these estimates.

From the ICR-SS statement such as “On average, 11 sheets of drawings are submitted in *the* utility applications” (ICR-SS at 18, emphasis added), one may reasonably conclude that this estimated average represents an unconditional average over all *the* utility applications (as opposed to *the* design, *the* plant or *the* provisional applications). This presumably includes utility applications that have 0 drawing sheets. If a conditional average were meant, the ICR-SS should have stated that “On average, 11 sheets of drawings are submitted in the utility applications *which contain at least one drawing sheet.*” Only then, would PTO’s method for multiplying this conditional average by the number of applications that have a drawing sheet be correct. Otherwise, with a non-conditional average, PTO’s method of excluding the number of applications with no drawing sheets from the multiplication step produces erroneous double decrement in the total estimated burden. This is because in this case, the use of the non-conditional average (presumably factoring-in applications with 0 drawing sheets in the ensemble, producing a lower overall average) requires multiplication by the number of *all* applications. The ICR-SS also applies this method to provisional applications. It is unclear which averages the PTO is using here because it does not disclose its methods. If the averages are unconditional, as the plain language in the ICR-SS suggests, PTO’s calculations understate the total burden by 9.9% and 28.2% for utility and provisional applications respectively.

4.4 Analysis employing flawed “guesstimates” of excess fees

The ICR-SS provides in Table 5 the non-hour burden estimates for Application Size and Excess Claims Fees. As in all other sections of the ICR-SS, the sources of the data for all responses (column **a**) and the average fee paid (column **b**) are not disclosed. The IQA requires full disclosure of the sources and methods used to obtain these estimates.

Item	Responses (yr) (a)	Filing Fee for Additional Sheets and Claims (c)	Average Fee (b)	Total Non-Hour Cost Burden (yr) (a x (b))	Imputed average number of units in excess (d)=(b)/(c)	Imputed Total Units in Excess (a) x (d)
Provisional Application Size Fee for Each Provisional Application Cover Sheet, filed for Each Additional 50 Sheets Exceeding 100 Sheets - Other Entity	1,837	\$270.00 per each 50 sheets over 100	\$540.00	\$991,980	2.00	3,674
Provisional Application Size Fee for Each Provisional Application Cover Sheet, filed for Each Additional 50 Sheets Exceeding 100 Sheets - Small Entity	1,709	\$135.00 per each 50 sheets over 100	\$270.00	\$461,430	2.00	3,418
Utility Applications, with independent claims in excess of 3 - Other Entity	71,363	\$220.00 for each claim over 3	\$440.00	\$31,399,720	2.00	142,726
Utility Applications, with independent claims in excess of 3 - Small Entity	25,211	\$110.00 for each claim over 3	\$220.00	\$5,546,420	2.00	50,422
Utility Applications, filed with Claims in Excess of 20 - Other Entity	99,777	\$52.00 for each claim over 20	\$416.00	\$41,507,232	8.00	798,216
Utility Applications, filed with Claims in Excess of 20 - Small Entity	40,894	\$26.00 for each claim over 20	\$260.00	\$10,632,440	10.00	408,940
Utility Application Size Fee for Each Original New Utility Application, filed with each additional 50 sheets exceeding 100 sheets - Other Entity	9,301	\$270.00 for each additional 50 sheets over 100	\$540.00	\$5,022,540	2.00	18,602
Utility Application Size Fee for Each Original New Utility Application, filed with each additional 50 sheets exceeding 100 Sheets - Small Entity	2,358	\$135.00 for each additional 50 sheets over 100	\$270.00	\$636,660	2.00	4,716
Plant Application Size Fee for Each Original New Plant Application, filed with Each Additional 50 Sheets Exceeding 100 Sheets - Other Entity	2	\$270.00 for each additional 50 sheets over 100	\$270.00	\$540	2.00	4
Plant Application Size Fee for Each Original New Plant Application, filed with Each Additional 50 Sheets Exceeding 100 Sheets - Small Entity	1	\$135.00 for each additional 50 sheets over 100	\$135.00	\$135	1.00	1
Design Application Size Fee for Each Original New Design Application, filed for each Additional 50 Sheets that Exceeds 100 Sheets - Other Entity	14	\$270.00 for each additional 50 sheets over 100	\$270.00	\$3,780	1.00	14
Design Application Size Fee for Each Original New Design Application, filed for each Additional 50 Sheets that Exceeds 100 Sheets - Small Entity	4	\$135.00 for each additional 50 sheets over 100	\$270.00	\$1,080	2.00	8

Table B. Application size and excess-claims cost estimates provided by Table 5 of the ICR-SS. The rightmost columns shown in gray were added here. Column **d** shows the imputed average number of units in excess that PTO assumed and the rightmost column shows the imputed total number of units filed in excess.

Reverse calculation using the values of the average fees in column **b** divided by the fee per additional unit in excess (claims or pages) shown in column **c** results in the average number of units in excess that the PTO must have used to obtain its estimates of the average fees in column **b**. The average numbers so imputed are shown in column **d** shaded in gray in Table B, which was added to the right of the last column in Table 5.

Note that *all* values for the average number of units in excess are perfect integers, a remarkable result for statistical averages of applicants' filings variations in all these categories. For example, the PTO estimates with 5 significant digits that 25,211 small entity applications will be filed with more than 3 independent claims and that the average number of claims in excess of 3 averaged over these 25,211 applications will be exactly 2.00. Moreover, the PTO projects that this same precise average number of claims in excess will also be filed in the set of 71,363 applications of other entities. The average units in excess are clearly "guesstimates" that were not analytically derived from actual PTO historical statistics. This can be inferred because several of these "guesstimates" are inconsistent with real data the PTO made available in other proceedings. Based on detailed distribution of the number of independent and total claims in patent applications filed by both size entities,³⁹ it was found that for the set of applications filed with more than 3 independent claims, the average number of independent claims in excess of 3 was 3.03 – not 2.00 as imputed from Table 5. It was also found that for those applications filing total claims in excess of 20, the average number of total claims in excess of 20 was 18.46 – not 8.00 or 10.00 as imputed from Table 5. Note that in both cases, PTO's "guesstimates" understate the burden compared to an actual analysis of real PTO claims data.

PTO's "guesstimates" of the average excess claim fees paid by respondents in column **b** of Table 5 appear to significantly underestimate these average non-hour cost burdens. Indeed, note that by summing the total non-hour cost burdens in rows 3-6 of Table B, the ICR-SS apparently projects that the PTO will collect \$89,085,812 per year from excess claim fees during the years 2011 to 2013. This estimate is grossly inconsistent with PTO's own historical financial records, which indicate that *actual* annual revenues from excess claim fees (in excess of 3 independent and in excess of 20 total claims) have been substantially higher. In FY 2006 - *five years earlier* than a period projected in the ICR, they were \$126.8 million,⁴⁰ - 42% greater. Given that the then-lower prevailing PTO fees per excess claim produced substantially higher excess claim fees, and given the fact that the average number of claims filed in applications have been increasing at approximately 4.5% per year,⁴¹ one can reasonably conclude that PTO's

³⁹ PTO's Administrative Record production in *Tafas v. Dudas* (2007) at A03554-A03620. (Analysis of this claim distribution data shows that 94,765 applications were filed with more than 3 independent claims, wherein the average number of claims in excess of 3 in this set was 3.03. There were 131,141 applications filed with more than 20 total claims, wherein the average number of claims in excess of 20 in this latter set was 18.46).

⁴⁰ PTO's Administrative Record production in *Tafas v. Dudas* (2007) at A07093, "Patent Excess Claims Fees collected by Year," (showing that in FY 2006 the PTO collected a total of \$126.8 M in excess claim fees comprising \$49,535,007 for Independent Claims in Excess of Three and \$77,310,180 for Total Claims in Excess of Twenty).

⁴¹ PTO's Administrative Record production in *Tafas v. Dudas* (2007) at A05620, PTO e-mail from Gregory Morse to Robert Bahr, "Independent and Total Claims in Application at Filing for FY 1998-2007" and at A04369-A04371, PTO e-mail from Peter Toby Brown, "Average Claims for Applications Filed, Allowed and Issued During a Fiscal Year and by Fiscal Year of Filing." (Regression analysis of the data on the average number of total claims excluding the fee-increase transient of 2005 shows a growth rate of about 4.5% per year). This data is presented along with claim growth data in other national patent offices in: Ron D. Katznelson, "Defects in the economic impact analysis provided by the USPTO for its new Claims and Continuation rules" (2008), p. 13, available at <http://bit.ly/Amicus-Appendix-E>.

“guesstimate” underestimates such non-hour burdens in 2013 by a factor of about three. If there were any reversals of historical growth trends that warrant projections of excess claim fee collections during 2011-2013 at levels that are radically lower than those collected in FY 2006, the PTO had not disclosed them. Nor did it provide any rationale or objective support for its downward projections. In view of these clear estimation anomalies, all other integer “guesstimates” in Table 5 are presumptively inaccurate and must all be corrected with full disclosure of their sources and methods.

4.5 Lack of proper forward projection of burdens for 2011-2013

Although the PTO does not disclose the source of data for the number of responses in the ICR-SS, the total number of utility applications and provisional applications it projects therein appear within 0.1% of the number of such applications the PTO published for Fiscal Year 2009 in its Annual Report and its Pendency Model - mere database updating deviations. There is no objective reason to assume that no growth in all number of responses would occur from 2009 to 2013 given the historical growth trends in patent applications. Indeed, the PTO’s budget request for FY 2011⁴² submitted to OMB projects that the total number of utility, plant and reissue applications will increase from the actual 460,924 in FY 2009 to 488,500 in FY 2013 – an increase of 6%. Moreover, pursuant to its authority under 35 U.S.C. § 41(f), the PTO routinely raises its fees based on the Consumer Price Index (“CPI”) at the end of the year. However, throughout the non-hour burden calculations, the ICR-SS and Notice employ the currently prevailing fees to project fee costs in 2011-2013. No objective support is given for the apparent assumption that CPI will break from its traditional growth trend and remain constant, or that the PTO will forgo upward fee adjustments as it must in order to recover its costs. Clearly, the year-over-year burden increases have not been factored-in the ICR-SS and Notice. The PTO must correct this in the ICR-SS and Notice and project the burdens associated with the number of responses it will receive in 2011-2013 based on its own projected application growth (which it had provided to OMB) and based on generally accepted projections of the CPI in 2010-2012.

In addition, the ICR-SS and Notice cite the 2009 AIPLA Report as the source for the hourly rate. Both neglected to disclose that the AIPLA Report is not prospective and that it reported charges prevailing during 2008. If any AIPLA Report hourly rates from 2008 were to be relied on, they must be scaled up based on generally accepted projected index to provide objective estimates for the hourly rates during 2011-2013.

4.6 The AIPLA Report does not meet IQA standards and therefore cannot be relied upon for purposes of PRA burden estimation

Numerical information from the AIPLA Report controls about 90% of the total burden estimated by the ICR-SS and Notice. The PTO was previously informed of the AIPLA Report’s inapplicability for the purposes of PRA burden estimation. For a public comment on a draft burden estimation methodology report prepared for PTO, Dr. Richard Belzer reviewed the survey underlying the AIPLA Report on which the PTO relies and found it wanting.⁴³ The

⁴² *USPTO’s FY 2011 President’s Budget*, (Feb. 2010), <http://www.uspto.gov/about/stratplan/budget/fy11pbr.pdf>, at 26.

⁴³ Richard B. Belzer, Letter to Raul Tamayo RE: Request for Comments on Methodology for Conducting an Independent Study of the Burden of Patent-Related Paperwork (75 *Fed. Reg.* 8649) (2010), at http://www.uspto.gov/patents/announce/prastudy_regchkbk.pdf, at 10-11. This analysis was included in

survey is actually a census of 15,395 AIPLA members and known non-members, of whom the maximum response rate was only 21%. OMB statistical policy standards and guidelines require a nonresponse bias analysis in any case where a survey response rate is less than 80% or an item response rate is less than 70%.⁴⁴ No such analysis was provided for the AIPLA survey in the ICR-SS or the Notice.

Of course, the AIPLA can employ whatever quality standard it sees fit for its purposes and OMB's standard does not apply to the AIPLA survey directly. Rather, OMB survey requirements arise from the PTO's decision to utilize the AIPLA survey in lieu of performing its own. The OMB IQG requires agencies to meet applicable information quality guidelines whenever they disseminate third-party information in a manner that reasonably conveys the impression of endorsement. Indeed, the PTO IQG acknowledges this obligation by stating that "if the agency, as an institution, distributes or releases *information prepared by an outside party* in a manner that reasonably suggests that the agency agrees with the information, this would be considered agency initiated distribution and hence agency dissemination because of the appearance of having the information represent agency views"⁴⁵ (emphasis added). Therefore, the ICR-SS and Notice do not adhere to both the OMB and PTO IQGs and must be corrected accordingly.

5 CONCLUSION

The corrections requested in this RFC benefit PTO by providing its leadership valid and much better information upon which to base important decisions on pending process reforms. Without a correct record of applicant burden, PTO officials are virtually assured of choosing options that do not reflect their intent. Because PTO's existing estimates are systematically biased to understate burden, and in many cases missing entirely, it would be easy for the PTO's leadership to choose process reform options that unwittingly increase burden, thereby violating the PRA's clear objective of reducing burden at every reasonable opportunity. In short, systematically biased estimates of burden such as are found in the ICR-SS and Notice cannot have practical utility to the PTO.

Moreover, the corrections requested in this RFC benefit the public by permitting it to provide informed comment, as the PRA clearly requires. Both the Notice and the ICR-SS are seriously deficient in this regard. They are neither transparent nor reproducible; where they provide useful information, it is demonstrably biased to understate actual burdens; and therefore, these information disseminations do not allow the public to provide meaningful comment, as required by law.

For these reasons, I request that PTO correct the specific errors identified or referenced herein; disclose all data, models, methods, and analyses necessary to reproduce its estimates; republish the Notice in the Federal Register as a new 60-day notice in order to permit the public to comment on its substance, as corrected.

Dr. Belzer's comments in this ICR (see Richard B. Belzer, 0651-0032 Comment: Initial Patent Applications, (July 2, 2010). Available at <http://www.reginfo.gov/public/do/DownloadDocument?documentID=204565&version=0>).

⁴⁴ Office of Management And Budget, *Standards and Guidelines for Statistical Surveys*. Guidelines 3.2.9-10 (2006), http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/statpolicy/standards_stat_surveys.pdf, at 16-17.

⁴⁵ PTO IQG, § IV(A)(1)(a).

Please contact me at the phone number or the email listed below if there are any questions pertaining to this RFC.

Thank you for your attention to this matter

Sincerely,

/Ron Katznelson/

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ATTACHMENT 1



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IC Title: Papers filed under 1.41, 1.48, and 1.53(c)(2) Agency IC Tracking Number:

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Obligation to Respond: Required to Obtain or Retain Benefits

CFR Citation: 37 CFR 1.53(b) and 1.53(c)(2) 37 CFR 1.41(a)(2) and 1.48

Information Collection Instruments:

Document Type	Form No.	Form Name	Instrument File	URL	Available Electronically?	Can Be Submitted Electronically?	Electronic Capability
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Federal Enterprise Architecture Business Reference Module

Line of Business: Economic Development

Subfunction: Intellectual Property Protection

Privacy Act System of Records

Title:

FR Citation:

Number of Respondents: 7,500

Number of Respondents for Small Entity: 0

Affected Public: Private Sector

Private Sector: Businesses or other for-profits

Percentage of Respondents Reporting Electronically: 0 %

	Requested	Program Change Due to New Statute	Program Change Due to Agency Discretion	Change Due to Adjustment in Agency Estimate	Change Due to Potential Violation of the PRA	Previously Approved
Annual Number of Responses for this IC	7,500	0	7,500	0	0	0
Annual IC Time Burden (Hours)	5,625	0	5,625	0	0	0
Annual IC Cost Burden (Dollars)	379,575	0	379,575	0	0	0

Documents for IC

Title	Document	Date Uploaded
No associated records found		

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View Information Collection (IC)

IC Title: Petition to Accept Non-Signing Inventors or Legal Representatives/Filing by Other Than All the Inventors or a Person not the Inventor
Agency IC Tracking Number:

Is this a Common Form? No

IC Status: Modified

Obligation to Respond: Required to Obtain or Retain Benefits

CFR Citation: 37 CFR 1.43 37 CFR 1.47 37 CFR 1.42

Information Collection Instruments:

Document Type	Form No.	Form Name	Instrument File	URL	Available Electronically?	Can Be Submitted Electronically?	Electronic Capability
<p><u>Federal Enterprise Architecture Business Reference Module</u> Line of Business: Economic Development Subfunction: Intellectual Property Protection</p>							

Privacy Act System of Records Title:

FR Citation:

Number of Respondents: 1,950

Number of Respondents for Small Entity: 0

Affected Public: Private Sector

Private Sector: Businesses or other for-profits

Percentage of Respondents Reporting Electronically: 0 %

	Requested	Program Change Due to New Statute	Program Change Due to Agency Discretion	Change Due to Adjustment in Agency Estimate	Change Due to Potential Violation of the PRA	Previously Approved
Annual Number of Responses for this IC	1,950	0	0	-450	0	2,400
Annual IC Time Burden (Hours)	1,950	0	0	-450	0	2,400
Annual IC Cost Burden (Dollars)	391,190	0	0	-90,322	0	481,512

Documents for IC

Title	Document	Date Uploaded
<i>No associated records found</i>		

Blank fields in records indicate information that was not collected or not collected electronically prior to July 2006.

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View Information Collection (IC)

IC Title: Petition to Accept Unintentionally Delayed Priority/Benefit Claim Agency IC Tracking Number:

Is this a Common Form? No

IC Status: Modified

Obligation to Respond: Required to Obtain or Retain Benefits

CFR Citation: 37 CFR 1.55 37 CFR 1.78

Information Collection Instruments:

Document Type	Form No.	Form Name	Instrument File	URL	Available Electronically?	Can Be Submitted Electronically?	Electronic Capability
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Federal Enterprise Architecture Business Reference Module

Line of Business: Economic Development

Subfunction: Intellectual Property Protection

Privacy Act System of Records

Title:

FR Citation:

Number of Respondents: 1,090

Number of Respondents for Small Entity: 0

Affected Public: Private Sector

Private Sector: Businesses or other for-profits

Percentage of Respondents Reporting Electronically: 0 %

	Requested	Program Change Due to New Statute	Program Change Due to Agency Discretion	Change Due to Adjustment in Agency Estimate	Change Due to Potential Violation of the PRA	Previously Approved
Annual Number of Responses for this IC	1,090	0	0	170	0	920
Annual IC Time Burden (Hours)	1,090	0	0	170	0	920
Annual IC Cost Burden (Dollars)	1,537,565	0	119,900	221,085	0	1,196,580

Documents for IC

Title	Document	Date Uploaded
No associated records found		

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