

association determines is appropriate, taking into consideration the size of an issuer and any other relevant factors.

(2) *Authority to engage compensation consultants, independent legal counsel and other compensation advisers.* The compensation committee of a listed issuer, in its capacity as a committee of the board of directors, may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser. The compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel and other adviser to the compensation committee. Nothing in this paragraph (b) shall be construed:

(i) To require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee; or

(ii) To affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee.

(3) *Funding.* Each listed issuer must provide for appropriate funding, as determined by the compensation committee, in its capacity as a committee of the board of directors, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser to the compensation committee.

(4) *Independence of compensation consultants and other advisers.* The compensation committee of a listed issuer may select a compensation consultant, legal counsel, or other adviser to the compensation committee only after taking into consideration the following factors, as well as any other factors identified by the relevant national securities exchange or national securities association in its listing standards:

(i) The provision of other services to the issuer by the person that employs the compensation consultant, legal counsel or other adviser;

(ii) The amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel, or other adviser;

(iii) The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;

(iv) Any business or personal relationship of the compensation consultant, legal counsel, or other adviser with a member of the compensation committee; and

(v) Any stock of the issuer owned by the compensation consultant, legal counsel or other adviser.

(5) *General exemptions.* (i) The national securities exchanges and national securities associations, pursuant to section 19(b) of the Act (15 U.S.C. 78s(b)) and the rules thereunder, may exempt from the requirements of this section certain categories of issuers, as the national securities exchange or national securities association determines is appropriate, taking into consideration the potential impact of such requirements on smaller reporting issuers.

(ii) The requirements of this section shall not apply to any controlled company.

(iii) The listing of a security futures product cleared by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q-1) or that is exempt from the registration requirements of section 17A(b)(7)(A) (15 U.S.C. 78q-1(b)(7)(A)) is not subject to the requirements of this section.

(iv) The listing of a standardized option, as defined in § 240.9b-1(a)(4), issued by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q-1) is not subject to the requirements of this section.

(c) *Definitions.* Unless the context otherwise requires, all terms used in this section have the same meaning as in the Act. In addition, unless the context otherwise requires, the following definitions apply for purposes of this section:

(1) In the case of foreign private issuers with a two-tier board system, the term *board of directors* means the supervisory or non-management board.

(2) The term *controlled company* means an issuer:

(i) That is listed on a national securities exchange or by a national securities association; and

(ii) That holds an election for the board of directors of the issuer in which more than 50 percent of the voting power is held by an individual, a group or another issuer.

(3) The terms *listed* and *listing* refer to equity securities listed on a national securities exchange or listed in an automated inter-dealer quotation system of a national securities association or to issuers of such securities.

(4) The term *open-end management investment company* means an open-end company, as defined by Section 5(a)(1) of the Investment Company Act

of 1940 (15 U.S.C. 80a-5(a)(1)), that is registered under that Act.

Dated: March 30, 2011.

**Elizabeth M. Murphy,**  
*Secretary.*

[FR Doc. 2011-7948 Filed 4-5-11; 8:45 am]

**BILLING CODE 8011-01-P**

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## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

#### 37 CFR Part 1

[Docket No.: PTO-P-2011-0014]

RIN 0651-AC56

#### Revision of Patent Term Extension and Adjustment Provisions Relating to Appellate Review and Information Disclosure Statements

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The United States Patent and Trademark Office (Office) is proposing to revise the patent term adjustment and extension provisions of the rules of practice in patent cases. The patent term adjustment provisions of the American Inventors Protection Act of 1999 (AIPA) and the patent term extension provisions of the Uruguay Round Agreements Act (URAA) each provide for patent term extension or adjustment if the issuance of the patent was delayed due to appellate review by the Board of Patent Appeals and Interferences (BPAI) or by a Federal court and the patent was issued pursuant to or under a decision in the review reversing an adverse determination of patentability. The Office is proposing to change the rules of practice to indicate that in most circumstances an examiner reopening prosecution of the application after a notice of appeal has been filed will be considered a decision in the review reversing an adverse determination of patentability for purposes of patent term adjustment or extension purposes. Therefore, in such situations, patentees would be entitled to patent term extension or adjustment. In addition, the AIPA provides for a reduction of any patent term adjustment if the applicant failed to engage in reasonable efforts to conclude prosecution of the application. The Office is also proposing to change the rules of practice pertaining to the reduction of patent term adjustment for applicant delays to exclude information disclosure statements resulting from the citation of information by a foreign patent office in a counterpart

application that are promptly filed with the Office. For example, under the proposed rule, there would not be a reduction of patent term adjustment in the following situations: When applicant promptly submits a reference in an information disclosure statement after the mailing of a notice of allowance if the reference was cited by the Office in another application, or when applicant promptly submits a copy of an Office communication (e.g., an Office action) in an information disclosure statement after the mailing of a notice of allowance if the Office communication was issued by the Office in another application or by a foreign patent office in a counterpart foreign application.

**DATES:** Written comments must be received on or before May 6, 2011. No public hearing will be held.

**ADDRESSES:** Comments concerning this proposed rule should be sent by electronic mail message over the Internet addressed to [AC56.comments@uspto.gov](mailto:AC56.comments@uspto.gov). Comments may also be submitted by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, marked to the attention of Kery A. Fries, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Associate Commissioner for Patent Examination Policy. Although comments may be submitted by mail, the Office prefers to receive comments via the Internet.

Comments may also be sent by electronic mail message over the Internet via the Federal eRulemaking Portal. See the Federal eRulemaking Portal Web site (<http://www.regulations.gov>) for additional instructions on providing comments via the Federal eRulemaking Portal.

The comments will be available for public inspection at the Office of the Commissioner for Patents, located in Madison East, Tenth Floor, 600 Dulany Street, Alexandria, Virginia, and will be available via the Internet (<http://www.uspto.gov>). Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

**FOR FURTHER INFORMATION CONTACT:** Kery A. Fries, Senior Legal Advisor, Office of Patent Legal Administration, by telephone at 571-272-7757, by mail addressed to: Box Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, marked to the attention of Kery A. Fries.

**SUPPLEMENTARY INFORMATION:** Section 532(a) of the URAA (Pub. L. 103-465, 108 Stat. 4809 (1994)) amended 35 U.S.C. 154 to provide that the term of a patent ends on the date that is twenty years from the filing date of the application, or the earliest filing date for which a benefit is claimed under 35 U.S.C. 120, 121, or 365(c). The URAA also contained provisions, codified at 35 U.S.C. 154(b), for patent term extension due to certain examination delays. Under the patent term extension provisions of 35 U.S.C. 154(b) as amended by the URAA, an applicant is entitled to patent term extension for delays due to interference, secrecy order, or successful appellate review. See 35 U.S.C. 154(b) (1995). The Office implemented the patent term extension provisions of the URAA in a final rule published in April of 1995. See *Changes to Implement 20-Year Patent Term and Provisional Applications*, 60 FR 20195 (Apr. 25, 1995) (twenty-year patent term final rule).

The AIPA (Pub. L. 106-113, 113 Stat. 1501, 1501A-552 through 1501A-591 (1999)) further amended 35 U.S.C. 154(b) to include additional bases for patent term extension (characterized as “patent term adjustment” in the AIPA). Original utility and plant patents issuing from applications filed on or after May 29, 2000, may be eligible for patent term adjustment if issuance of the patent is delayed due to one or more of the enumerated administrative delays listed in 35 U.S.C. 154(b)(1). Specifically, under the patent term adjustment provisions of 35 U.S.C. 154(b) as amended by the AIPA, an applicant is entitled to patent term adjustment for the following reasons: (1) If the Office fails to take certain actions during the examination and issue process within specified time frames (35 U.S.C. 154(b)(1)(A)); (2) if the Office fails to issue a patent within three years of the actual filing date of the application (35 U.S.C. 154(b)(1)(B)); and (3) for delays due to interference, secrecy order, or successful appellate review (35 U.S.C. 154(b)(1)(C)). See 35 U.S.C. 154(b)(1). The AIPA, however, sets forth a number of conditions and limitations on any patent term adjustment accrued under 35 U.S.C. 154(b)(1). Specifically, 35 U.S.C. 154(b)(2)(C) provides, in part, that “[t]he period of adjustment of the term of a patent under [35 U.S.C. 154(b)(1)] shall be reduced by a period equal to the period of time during which the applicant failed to engage in reasonable efforts to conclude prosecution of the application” and that “[t]he Director shall prescribe regulations establishing

the circumstances that constitute a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application.” 35 U.S.C. 154(b)(2)(C)(i) and (iii). The Office implemented the patent term adjustment provisions of 35 U.S.C. 154(b) as amended by the AIPA, including setting forth the circumstances that constitute a failure of an applicant to engage in reasonable efforts to conclude processing or examination of an application, in a final rule published in September of 2000. See *Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term*, 65 FR 56365 (Sept. 18, 2000) (patent term adjustment final rule).

The patent term adjustment provisions of the AIPA apply to original (i.e., non-reissue) utility and plant applications filed on or after May 29, 2000. See *Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term*, 65 FR at 56367. The patent term extension provisions of the URAA (for delays due to secrecy order, interference or successful appellate review) continue to apply to original utility and plant applications filed on or after June 8, 1995, and before May 29, 2000. See *id.*

*Revision of Patent Term Extension and Patent Term Adjustment Provisions Relating to Decisions During Appellate Review:* Under the patent term adjustment final rule published in 2000, the Office initially stated that for a decision by the BPAI to be “a decision in the review reversing an adverse determination of patentability” within the meaning of 35 U.S.C. 154(b)(1)(C)(iii), the decision must sustain or reverse the rejection(s) of claims(s) on appeal. See *Changes to Implement Patent Term Adjustment Under Twenty-Year Patent Term*, 65 FR at 56368. The Office further stated that a remand or other administrative order by the BPAI even if by a merits panel would not be considered “a decision in the review reversing an adverse determination of patentability” in the 35 U.S.C. 154(b)(1)(C)(iii). See *id.* at 56369.

The Office subsequently determined that there were a number of BPAI panel remands that conveyed the weakness in the examiner’s adverse patentability determination in a manner tantamount to a decision reversing the adverse patentability determination. See *Revision of Patent Term Adjustment and Extensions*, 69 FR 21704 (April 22, 2004) (2004 patent term adjustment/extension final rule). Generally, the remands resulted in the examiner allowing the application (either with or without further action by applicant) without returning the application to the

BPAI for a decision on the appeal. The 2004 patent term adjustment/extension final rule addressed the situation in which an examiner responds to a remand by a BPAI panel by allowing the application (either with or without further action by applicant), rather than returning the application to the BPAI for a decision on the appeal. *See id.* at 21705. In that situation, the BPAI panel remand was considered “a decision in the review reversing an adverse determination of patentability” for patent term extension and patent term adjustment purposes. *See id.*; *see also* 37 CFR 1.701(a)(3) and 1.702(e). This change in the 2004 patent term adjustment/extension final rule, however, did not apply if, after the BPAI panel remand, appellant filed a request for continued examination under 35 U.S.C. 132(b) (37 CFR 1.114) that was not first preceded by the mailing, after such remand, of an action under 35 U.S.C. 132 or a notice of allowance under 35 U.S.C. 151. *See id.*; *see also* 37 CFR 1.701(a)(3) and 1.702(e).

In 2005, the Office instituted a pilot program to provide an appellant the opportunity to request that a panel of examiners formally review the legal and factual bases of the rejections in his or her application prior to the filing of an appeal brief. *See New Pre-Appeal Brief Conference Pilot Program*, 1260 *Off. Gaz. Pat. Office* 67 (July 12, 2005). In the pilot program, the Office indicated that a decision by a pre-appeal brief conference panel to withdraw any or all of the claims on appeal is not a decision by the panel of the BPAI, and as such, would not result in any patent term adjustment or extension under 35 U.S.C. 154(b). *See id.*

This pilot program has resulted in a number of situations in which prosecution is reopened. The Office has now concluded that it may and, in most situations, should treat a decision in a pre-appeal brief review reopening prosecution and issuing an Office action or notice of allowance as a “decision in the review reversing an adverse determination of patentability” under 35 U.S.C. 154(b)(1)(C)(iii). Prior to 2005, the vast majority of applications in which a notice of appeal and appeal brief were filed were forwarded to the BPAI for a decision on the appeal. That is, prior to 2005, the only notable “decision in the review” of an application on appeal was a decision by the BPAI. Under current Office practice, however, the application in which a notice of appeal has been filed may be subject to a pre-appeal brief review and will be subject to a post-appeal brief review before the application will be forwarded to the BPAI for a decision by

the BPAI. Thus, under current Office practice, the process for seeking appellate review by the BPAI involves at least one decision in the review before the application is forwarded to the BPAI, and a decision in these pre-BPAI reviews may result in the reopening of prosecution and issuance of an Office action or notice of allowance. Since in many such situations the reopening of the application after notice of appeal has been filed is the result of a decision in the pre-BPAI review that there is some weakness in the adverse patentability determination from which the appeal was taken, the Office now considers it appropriate to treat such situations as a “decision in the review reversing an adverse determination of patentability” under 35 U.S.C. 154(b)(1)(C)(iii). Consequently, the Office has determined that it is prudent as a matter of policy to allow for a correspondent positive patent term adjustment when an examiner reverses his or her prior rejection under these circumstances.

Accordingly, the Office is proposing to revise the patent term adjustment and extension provisions to provide, with certain exceptions, that an examiner reopening prosecution will be considered a “decision in the review reversing an adverse determination of patentability,” and therefore result in the possibility of patent term adjustment under 35 U.S.C. 154(b). The Office notes that not all reopening of prosecution after the filing of a notice of appeal will be considered a “decision in the review reversing an adverse determination of patentability.” For example, the reopening of prosecution after a notice of appeal resulting from an applicant filing a request for continued examination (RCE) (proper or improper) will not be considered a “decision in the review reversing an adverse determination of patentability” and will not result in patent term adjustment under 35 U.S.C. 154(b). Furthermore, any reopening of prosecution or issuance of a notice of allowance under 35 U.S.C. 151 resulting from an applicant filing an amendment pursuant to 37 CFR 41.33 canceling all claims on appeal will not be considered a “decision in the review reversing an adverse determination of patentability” and will not result in patent term adjustment under 35 U.S.C. 154(b). Moreover, any reopening of prosecution or issuance of a notice of allowance under 35 U.S.C. 151 resulting from the applicant filing a request to dismiss or withdraw the appeal will not be considered a “decision in the review reversing an adverse determination of

patentability” and will not result in patent term adjustment under 35 U.S.C. 154(b).

If the patent issues after an examiner reopens prosecution after the filing of a notice of appeal, and the reopening of prosecution is considered “a decision in the review reversing an adverse determination of patentability,” then the reopening of prosecution is deemed by the Office to be the “final decision in favor of the applicant” for purposes of a patent term extension or adjustment calculation under 37 CFR 1.701(c)(3) or 1.703(e) (as applicable). The period of extension or adjustment calculated under 37 CFR 1.701(c)(3) or 1.703(e) (as applicable) would equal the number of days in the period beginning on the date on which a notice of appeal to the BPAI was filed under 35 U.S.C. 134 and 37 CFR 41.31 and ending on the date of mailing of the Office action under 35 U.S.C. 132 or a notice of allowance under 35 U.S.C. 151.

*Revisions of Patent Term Extension and Patent Term Adjustment Provisions Relating to Information Disclosure Statements:* Section 1.704(c) provides that the submission of an information disclosure statement either that is after a notice of allowance or that requires a supplemental Office action results in a reduction of any patent term adjustment under 37 CFR 1.703. *See* 37 CFR 1.704(c)(6), 1.704(c)(8), 1.704(c)(9), and (c)(10). Section 1.704(d) provides that an information disclosure statement will not result in a patent term adjustment reduction under 37 CFR 1.704(c)(6), 1.704(c)(8), 1.704(c)(9), or (c)(10) if it is accompanied by a certification (statement) that each item of information contained in the information disclosure statement was first cited in a communication from a foreign patent office in a counterpart application and that this communication was not received by any individual designated in 37 CFR 1.56(c) more than thirty days prior to the filing of the information disclosure statement. 37 CFR 1.704(d) permits applicants to submit information first cited in a communication from a foreign patent office in a counterpart application to the Office without a reduction in patent term adjustment if an information disclosure statement is promptly (within thirty days of receipt of the communication) submitted to the Office.

Recent decisions by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) underscore the importance of making information cited and Office actions issued in related copending foreign and domestic applications of record. *See Dayco Products, Inc. v. Total Containment, Inc.*, 329 F.3d 1358 (Fed.

Cir. 2003) and *McKesson Info. Solutions, Inc. v. Bridge Medical, Inc.*, 487 F.3d 897 (Fed. Cir. 2007); see also *Larson Mfg. Co. v. Aluminart Products Ltd.*, 559 F.3d 1317 (Fed. Cir. 2009) (relating to disclosure in a U.S. reexamination proceeding of U.S. Office actions that were issued in a continuation application of the patent under reexamination). The Office is proposing to revise 37 CFR 1.704(d) to also embrace information first cited in a communication from the Office, as well as the communication (e.g., Office action) in a counterpart foreign or international application or from the Office itself.

Obviously, meeting the conditions set forth in 37 CFR 1.704(d) does not substitute for compliance with any relevant requirement of 37 CFR 1.97 or 1.98.

### Discussion of Specific Rules

Title 37 of the Code of Federal Regulations, Part 1, is proposed to be amended as follows:

*Section 1.701:* Section 1.701(a)(3) is proposed to be amended to take into account the situation in which the Office reopens prosecution after a timely notice of appeal has been filed but before any decision by the BPAI and issues an Office action under 35 U.S.C. 132 (i.e., a new non-final or final Office action) or notice of allowance under 35 U.S.C. 151. The reopening of prosecution in this situation will in most circumstances also be considered a decision in the review reversing an adverse determination of patentability as that phrase is used in 35 U.S.C. 154(b)(2) as amended by the URAA, and a final decision in favor of the applicant under § 1.701(c)(3). An examiner's answer containing a new ground of rejection is not an Office action under 35 U.S.C. 132, and is not the Office reopening prosecution. Section 1.701(a)(3) is also proposed to be amended by adding a sentence to provide that a reopening of prosecution after a notice of appeal has been filed will not be considered a decision in the review reversing an adverse determination of patentability as provided in § 1.701(a)(3) if appellant files a request to withdraw the appeal, an amendment pursuant to § 41.33 canceling all of the claims on appeal, or a request for continued examination under 35 U.S.C. 132(b).

*Section 1.702:* Section 1.702(e) is proposed to be amended to take into account the situation in which the Office reopens prosecution after a timely notice of appeal has been filed but before any decision by the BPAI and issues an Office action under 35 U.S.C.

132 (i.e., a new non-final or final Office action) or notice of allowance under 35 U.S.C. 151. The reopening of prosecution in this situation will in most circumstances also be considered a decision by the BPAI as that phrase is used in 35 U.S.C. 154(b)(1)(A)(iii), a decision in the review reversing an adverse determination of patentability as that phrase is used in 35 U.S.C. 154(b)(1)(C)(iii), and a final decision in favor of the applicant under § 1.703(e). An examiner's answer containing a new ground of rejection is not an Office action under 35 U.S.C. 132, and is not the Office reopening prosecution. Section 1.702(e) is further amended by adding a sentence to provide that a reopening of prosecution after a notice of appeal has been filed will not be considered a decision in the review reversing an adverse determination of patentability as provided in § 1.702(e) if appellant files a request to withdraw the appeal, an amendment pursuant to § 41.33 canceling all of the claims on appeal, or a request for continued examination under 35 U.S.C. 132(b).

*Section 1.704:* Section 1.704(d) is amended to change "any communication from a foreign patent office in a counterpart application" to "any communication from a patent office in a counterpart foreign or international application or from the Office" and add "or is a communication that was issued by a patent office in a counterpart foreign or international application or by the Office." This change revises § 1.704(d) to also embrace information first cited in a communication from the Office, as well as the communication (e.g., Office action) in a counterpart foreign or international application or from the Office itself. For example, under the proposed rule, there would not be a reduction of patent term adjustment in the following situations: (1) When applicant promptly submits a reference in an information disclosure statement after the mailing of a notice of allowance if the reference was cited by the Office in another application, or (2) when applicant promptly submits a copy of an Office communication (e.g., an Office action) in an information disclosure statement after the mailing of a notice of allowance if the Office communication was issued by the Office in another application or by a foreign patent office in a counterpart foreign application.

### Rulemaking Considerations

*A. Regulatory Flexibility Act:* For the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark

Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that changes proposed in this proposed rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 605(b).

This rule making involves: (1) Indicating that in most circumstances an examiner reopening prosecution of the application after a notice of appeal has been filed will be considered a "decision in the review reversing an adverse determination of patentability" for patent term adjustment or extension purposes; and (2) indicating that the exception to the patent term adjustment reduction for filing an information disclosure statement after a notice of allowance or that requires a supplemental Office action for information disclosure statements for information cited by a foreign patent office in a counterpart application that are promptly filed with the Office is expanded to also embrace information first cited by the Office in another application. This proposed rule does not propose to add any additional requirements (including information collection requirements) or fees for patent applicants or patentees. Therefore, the changes proposed in this proposed rule will not have a significant economic impact on a substantial number of small entities.

*B. Executive Order 12866 (Regulatory Planning and Review):* This rule making has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

*C. Executive Order 13563 (Improving Regulation and Regulatory Review):* The Office has complied with Executive Order 13563. Specifically, the Office has: (1) Used the best available techniques to quantify costs and benefits, and has considered values such as equity, fairness and distributive impacts; (2) provided the public with a meaningful opportunity to participate in the regulatory process, including soliciting the views of those likely affected prior to issuing a notice of proposed rule making, and provided on-line access to the rule making docket; (3) attempted to promote coordination, simplification and harmonization across government agencies and identified goals designed to promote innovation; (4) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (5) ensured the objectivity of scientific and technological information and processes, to the extent applicable.

*D. Executive Order 13132 (Federalism):* This rule making does not contain policies with federalism

implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

*E. Executive Order 13175 (Tribal Consultation):* This rule making will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

*F. Executive Order 13211 (Energy Effects):* This rule making is not a significant energy action under Executive Order 13211 because this rule making is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

*G. Executive Order 12988 (Civil Justice Reform):* This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

*H. Executive Order 13045 (Protection of Children):* This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

*I. Executive Order 12630 (Taking of Private Property):* This rulemaking will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

*J. Congressional Review Act:* Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the United States Patent and Trademark Office will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the Government Accountability Office. The changes in this proposed rule are not expected to result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this proposed rule is not expected to result in a "major rule" as defined in 5 U.S.C. 804(2).

*K. Unfunded Mandates Reform Act of 1995:* The changes proposed in this proposed rule do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

*L. National Environmental Policy Act:* This rulemaking will not have any effect on the quality of environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

*M. National Technology Transfer and Advancement Act:* The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions which involve the use of technical standards.

*N. Paperwork Reduction Act:* The rules of practice pertaining to patent term adjustment and extension have been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) under OMB control number 0651-0020. As discussed previously, this rulemaking involves: (1) Indicating that in most circumstances an examiner reopening prosecution of the application after a notice of appeal has been filed will be considered a "decision in the review reversing an adverse determination of patentability" for patent term adjustment or extension purposes; and (2) indicating that the exception to the patent term adjustment reduction for filing an information disclosure statement after a notice of allowance or that requires a supplemental Office action for information disclosure statements for information cited by a foreign patent office in a counterpart application that are promptly filed with the Office is expanded to also embrace information first cited by the Office in another application. This proposed rule does not propose to add any additional requirements (including information collection requirements) or fees for patent applicants or patentees. Therefore, the Office is not resubmitting information collection packages to OMB for its review and approval because the

changes proposed in this proposed rule do not affect the information collection requirements associated with the information collections under OMB control number 0651-0020.

Notwithstanding any other provision of law, no person is required to respond to nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

#### List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of Information, Inventions and patents, Reporting and record keeping requirements, Small Businesses.

For the reasons set forth in the preamble, 37 CFR part 1 is proposed to be amended as follows:

#### PART 1—RULES OF PRACTICE IN PATENT CASES

1. The authority citation for 37 CFR part 1 continues to read as follows:

**Authority:** 35 U.S.C. 2(b)(2).

2. Section 1.701 is amended by revising paragraph (a)(3) to read as follows:

**§ 1.701 Extension of patent term due to examination delay under the Uruguay Round Agreements Act (original applications, other than designs, filed on or after June 8, 1995, and before May 29, 2000).**

(a) \* \* \*

(3) Appellate review by the Board of Patent Appeals and Interferences or by a Federal court under 35 U.S.C. 141 or 145, if the patent was issued pursuant to a decision in the review reversing an adverse determination of patentability and if the patent is not subject to a terminal disclaimer due to the issuance of another patent claiming subject matter that is not patentably distinct from that under appellate review. If an application is remanded by a panel of the Board of Patent Appeals and Interferences and the remand is the last action by a panel of the Board of Patent Appeals and Interferences prior to the mailing of a notice of allowance under 35 U.S.C. 151 in the application or if the Office reopens prosecution after a notice of appeal has been filed but before any decision by the Board of Patent Appeals and Interferences and issues an Office action under 35 U.S.C. 132 or notice of allowance under 35 U.S.C. 151, the remand or issuance of an Office action under 35 U.S.C. 132 or notice of allowance under 35 U.S.C. 151 shall be

considered a decision in the review reversing an adverse determination of patentability as that phrase is used in 35 U.S.C. 154(b)(2) as amended by section 532(a) of the Uruguay Round Agreements Act, Public Law 103-465, 108 Stat. 4809, 4983-85 (1994), and a final decision in favor of the applicant under paragraph (c)(3) of this section. A remand by a panel of the Board of Patent Appeals and Interferences shall not be considered a decision in the review reversing an adverse determination of patentability as provided in this paragraph if there is filed a request for continued examination under 35 U.S.C. 132(b) that was not first preceded by the mailing, after such remand, of at least one of an action under 35 U.S.C. 132 or a notice of allowance under 35 U.S.C. 151. A reopening of prosecution after a notice of appeal has been filed shall not be considered a decision in the review reversing an adverse determination as provided in this paragraph if appellant files a request to withdraw the appeal, an amendment pursuant to § 41.33 of this chapter canceling all of the claims on appeal, or a request for continued examination under 35 U.S.C. 132(b).

\* \* \* \* \*

3. Section 1.702 is proposed to be amended by revising paragraph (e) to read as follows:

**§ 1.702 Grounds for adjustment of patent term due to examination delay under the Patent Term Guarantee Act of 1999 (original applications, other than designs, filed on or after May 29, 2000).**

\* \* \* \* \*

(e) Delays caused by successful appellate review. Subject to the provisions of 35 U.S.C. 154(b) and this subpart, the term of an original patent shall be adjusted if the issuance of the patent was delayed due to review by the Board of Patent Appeals and Interferences under 35 U.S.C. 134 or by a Federal court under 35 U.S.C. 141 or 145, if the patent was issued under a decision in the review reversing an adverse determination of patentability. If an application is remanded by a panel of the Board of Patent Appeals and Interferences and the remand is the last action by a panel of the Board of Patent Appeals and Interferences prior to the mailing of a notice of allowance under 35 U.S.C. 151 in the application or if the Office reopens prosecution after a notice of appeal has been filed but before any decision by the Board of Patent Appeals and Interferences and issues an Office action under 35 U.S.C. 132 or notice of allowance under 35 U.S.C. 151, the remand or issuance of an Office action under 35 U.S.C. 132 or notice of

allowance under 35 U.S.C. 151 shall be considered a decision in the review reversing an adverse determination of patentability as that phrase is used in 35 U.S.C. 154(b)(1)(C)(iii), and a final decision in favor of the applicant under § 1.703(e). A remand by a panel of the Board of Patent Appeals and Interferences shall not be considered a decision in the review reversing an adverse determination of patentability as provided in this paragraph if there is filed a request for continued examination under 35 U.S.C. 132(b) that was not first preceded by the mailing, after such remand, of at least one of an action under 35 U.S.C. 132 or a notice of allowance under 35 U.S.C. 151. A reopening of prosecution after a notice of appeal has been filed shall not be considered a decision in the review reversing an adverse determination as provided in this paragraph if appellant files a request to withdraw the appeal, an amendment pursuant to § 41.33 of this title canceling all of the claims on appeal, or a request for continued examination under 35 U.S.C. 132(b).

\* \* \* \* \*

4. Section 1.704 is amended by revising paragraph (d) to read as follows:

**§ 1.704 Reduction of period of adjustment of patent term.**

\* \* \* \* \*

(d)(1) A paper containing only an information disclosure statement in compliance with §§ 1.97 and 1.98 will not be considered a failure to engage in reasonable efforts to conclude prosecution (processing or examination) of the application under paragraphs (c)(6), (c)(8), (c)(9), or (c)(10) of this section if it is accompanied by a statement that each item of information contained in the information disclosure statement:

(i) Was first cited in any communication from a patent office in a counterpart foreign or international application or from the Office and this communication was not received by any individual designated in § 1.56(c) more than thirty days prior to the filing of the information disclosure statement; or

(ii) Is a communication that was issued by a patent office in a counterpart foreign or international application or by the Office and this communication was not received by any individual designated in § 1.56(c) more than thirty days prior to the filing of the information disclosure statement.

(2) The thirty-day period set forth in paragraph (d)(1) of this section is not extendable.

\* \* \* \* \*

**Teresa Stanek Rea,**

*Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office.*

[FR Doc. 2011-8275 Filed 4-5-11; 8:45 am]

**BILLING CODE 3510-16-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 168**

[EPA-HQ-OPP-2009-0607; FRL-8862-2]

RIN 2070-AJ53

**Pesticides; Regulation to Clarify Labeling of Pesticides for Export**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to revise the regulations on labeling of pesticides and devices intended for export. Internal review of the regulations revealed that the current regulations needed clarification and restructuring to increase understandability and ease of use.

**DATES:** Comments must be received on or before June 6, 2011.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA-HQ-OPP-2009-0607, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305-5805.

*Instructions:* Direct your comments to docket ID number EPA-HQ-OPP-2009-0607. EPA's policy is that all comments received will be included in the docket without change and may be made