

USPTO Did Not Provide Adequate Oversight of Monetary Awards to Ensure Patent Examiners Receive Accurate Payments

FINAL REPORT NO. OIG-19-023-A

AUGUST 22, 2019




U.S. Department of Commerce
Office of Inspector General
Office of Audit and Evaluation



August 22, 2019

MEMORANDUM FOR: Andrei Iancu
Under Secretary of Commerce for Intellectual Property
and Director of the U.S. Patent and Trademark Office

FROM: 
Frederick J. Meny, Jr.
Assistant Inspector General for Audit and Evaluation

SUBJECT: *USPTO Did Not Provide Adequate Oversight of Monetary Awards
to Ensure Patent Examiners Receive Accurate Payments*
Final Report No. OIG-19-023-A

Attached is our final report on our audit of the U.S. Patent and Trademark Office's (USPTO's) patent examiner monetary awards. Our audit objective was to determine whether USPTO monetary awards were (a) granted in compliance with the relevant award criteria and (b) sufficiently documented.

We found that USPTO monetary awards were neither (a) granted in compliance with the relevant award criteria, nor (b) sufficiently documented. Overall, USPTO did not provide adequate oversight to ensure patent examiners received accurate award payments. Specifically, we found that USPTO did not

- I. have a standardized process to calculate award payments;
- II. validate the addition or accuracy of examiner-related hours included in award calculations; and
- III. provide adequate evidence to support award payments.

Although we did not find significant errors in awards for full-time examiners, we found that USPTO did not adequately manage the part-time examiners' awards.

On July 19, 2019, we received USPTO's response to the draft report's findings and recommendations, which we include within the final report as appendix E. USPTO concurred with all five report recommendations.

Pursuant to Department Administrative Order 213-5, please submit to us an action plan that addresses the recommendations in this report within 60 calendar days. This final report will be posted on OIG's website pursuant to sections 4 and 8M of the Inspector General Act of 1978, as amended (5 U.S.C. App., §§ 4 & 8M).

We appreciate the cooperation and courtesies extended to us by your staff during our audit. If you have any questions or concerns about this report, please contact me at (202) 482-1931 or Amni Samson, Audit Director, at (571) 272-5561.

Attachment

cc: Drew Hirshfeld, Commissioner for Patents, USPTO
Sean Mildrew, Acting Chief Financial Officer and Audit Resolution Officer, USPTO
Sarah Harris, General Counsel, USPTO
Welton Lloyd, Audit Liaison, Office of Planning and Budget, USPTO



Report in Brief

August 22, 2019

Background

American innovators and businesses rely on patents to protect their innovations. Timely processing and issuance of high-quality patents provides market certainty and advances economic prosperity by cultivating and protecting new ideas, technologies, services, and products.

The timely examination of patent applications is a critical part of the U.S. Patent and Trademark Office's (USPTO's) mission. To help meet its mission, USPTO utilizes various production-based incentives for USPTO employees, including monetary awards. In fiscal year (FY) 2016, more than 7,000 patent examiners received nearly 34,000 monetary awards totaling more than \$48 million.

USPTO patent examiners are eligible for three types of performance awards based on productivity and performance ratings: productivity gainsharing (**gainsharing**) awards, special achievement awards (**SAAs**), and **pendency** awards. The criteria and the amounts of the monetary awards are updated through collective bargaining agreements between USPTO and the Patent Office Professional Association, an independent union that represents all of USPTO's non-managerial patent professionals.

Why We Did This Review

Our audit objective was to determine whether USPTO monetary awards were (a) granted in compliance with the relevant award criteria and (b) sufficiently documented. Our audit scope included awards related to patent examiners' performance and productivity ratings in FY 2016.

U.S. PATENT AND TRADEMARK OFFICE

USPTO Did Not Provide Adequate Oversight of Monetary Awards to Ensure Patent Examiners Receive Accurate Payments

OIG-19-023-A

WHAT WE FOUND

We found that USPTO monetary awards were neither (a) granted in compliance with the relevant award criteria, nor (b) sufficiently documented. Overall, USPTO did not provide adequate oversight to ensure patent examiners received accurate award payments. Specifically, we found that USPTO did not

1. have a standardized process to calculate award payments;
2. validate the addition or accuracy of examiner-related hours included in award calculations; and
3. provide adequate evidence to support award payments.

Although we did not find significant errors in awards for full-time examiners, we found that USPTO did not adequately manage the part-time examiners' awards.

Performance evaluations—such as annual performance appraisals and feedback—supplemented by an effective reward system should help employees understand the connection between their performance and the organization's success. Effective oversight is a key management control to ensure this connection. Without adequate and appropriate oversight, USPTO is unable to detect and prevent (1) erroneous award payments, (2) possible abuse of the award program, and (3) wasted funds that can be put to better use.

WHAT WE RECOMMEND

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office direct the Commissioner for Patents to do the following:

1. Implement guidance to clearly define the policies, process, validation, and oversight responsibilities covering all key components of the award calculation process.
2. Clarify, document, and publish to Supervisory Patent Examiners a list of the examining-related activities eligible for inclusion in gainsharing and SAAs.
3. Establish requirements to document Supervisory Patent Examiner reviews of examining-related activities for inclusion in award calculations and maintain all supporting documentation for subsequent manual adjustments to award calculations.
4. Develop written policies and procedures to identify responsibilities and requirements to review, approve, and validate the accuracy of manual adjustments to monetary award calculations.
5. Ensure award nomination forms are complete and accurate, and maintain all documentation that supports awards included in year-end rating forms.

Contents

| | |
|---|-----------|
| Introduction..... | 1 |
| Objective, Findings, and Recommendations | 3 |
| I. USPTO Did Not Have a Standardized Process to Calculate Award Payments | 3 |
| II. USPTO Did Not Validate the Addition or Accuracy of Examiner-Related Hours Included in Award Calculations | 4 |
| A. <i>USPTO did not validate the legitimacy of additional hours into patent examiners’ gainsharing and SAA payment calculations.....</i> | 5 |
| B. <i>USPTO did not ensure SPEs used correct work schedules to calculate pendency award payments.....</i> | 6 |
| III. USPTO Did Not Provide Adequate Evidence to Support Award Payments | 7 |
| A. <i>Award payments were certified based on incomplete, inaccurate, or unvalidated performance rating and award nomination forms</i> | 8 |
| B. <i>USPTO paid pendency awards at higher tiers without adequate support.....</i> | 8 |
| Recommendations | 9 |
| Summary of Agency Response and OIG Comments | 10 |
| Appendix A: Objective, Scope, and Methodology | 12 |
| Appendix B: Monetary Award Types | 14 |
| Appendix C: USPTO Monetary Awards Calculation Process | 15 |
| Appendix D: Monetary Awards Calculation Methodology | 16 |
| Appendix E: Agency Response | 19 |

Cover: Herbert C. Hoover Building main entrance at 14th Street Northwest in Washington, DC. Completed in 1932, the building is named after the former Secretary of Commerce and 31st President of the United States.

Introduction

American innovators and businesses rely on patents to protect their innovations. Timely processing and issuance of high-quality patents provides market certainty and advances economic prosperity by cultivating and protecting new ideas, technologies, services, and products.

The timely examination of patent applications is a critical part of the U.S. Patent and Trademark Office's (USPTO's) mission. To help meet its mission, USPTO utilizes various production-based incentives for USPTO employees, including monetary awards. In fiscal year (FY) 2016, more than 7,000 patent examiners received nearly 34,000 monetary awards totaling more than \$48 million.

USPTO patent examiners are eligible for three types of performance awards based on productivity and performance ratings: productivity gainsharing (**gainsharing**) awards, special achievement awards (**SAAs**), and **pendency** awards.¹ The criteria and the amounts of the monetary awards are updated through collective bargaining agreements between USPTO and the Patent Office Professional Association (POPA), an independent union that represents all of USPTO's non-managerial patent professionals.

Table I summarizes the performance awards available to patent examiners.

Table I. FY 2016 Monetary Awards Available to USPTO Patent Examiners

| Award | Frequency | Monetary Incentive (Percent of salary) | Performance Requirements |
|--------------------------------|-----------|---|--|
| Gainsharing | Annual | 2–7% | 110–135% of production goal and at least a fully successful performance rating |
| SAA | Annual | 3% | 110% of production goal and at least a satisfactory performance rating |
| Pendency | Quarterly | 0.25–0.75% | 110–140% docket management score, at least a fully successful performance rating, and meet specific case management requirements |
| Pendency – Supplemental | Annual | 0.5–1.0% | Sustained pendency performance from FY 2015 quarter 3 through FY 2016 quarter 2 |

Source: USPTO and POPA agreements

¹ Following appendix A—which details the objective, scope, and methodology of our audit—appendix B details the specific basis, criteria, and frequency for each award.

The Supervisory Patent Examiner (SPE) Management Database (SMD)² automatically calculates awards based on

- Patent Application Locating and Monitoring System (PALM) data for biweekly examining time and production totals;
- Docket Management Workflow Planner (DM Planner) scores;
- Production and Award Calculator (PAC) for production scores; and
- performance ratings, examining-related hours, and part-time examiner work schedules, manually entered by the SPEs.

Each quarter, programmers create a report to identify pendency award eligibility, which SMD personnel upload to SMD to calculate pendency awards. Patent examiners can view their progress toward earning pendency awards in DM Planner; in the PAC, they can track their progress toward earning gainsharing and SAA awards. Figure C-I in appendix C shows the various inputs for calculating the awards.

² SMD is a database used by SPEs to process and approve examiner performance ratings and awards.

Objective, Findings, and Recommendations

Our audit objective was to determine whether USPTO monetary awards were (a) granted in compliance with the relevant award criteria and (b) sufficiently documented. Our audit scope included awards related to patent examiners' performance and productivity ratings in FY 2016. Appendix A provides a more detailed description of our audit objective, scope, and methodology. Appendix B details each type of USPTO monetary award. Appendix C shows the various inputs for calculating the awards. Appendix D provides further detail on the calculation methodology we used in this audit. Appendix E includes USPTO's formal response to our draft audit report.

We found that USPTO monetary awards were neither (a) granted in compliance with the relevant award criteria, nor (b) sufficiently documented. Overall, USPTO did not provide adequate oversight to ensure patent examiners received accurate award payments. Specifically, we found that USPTO did not

- I. have a standardized process to calculate award payments;
- II. validate the addition or accuracy of examiner-related hours included in award calculations; and
- III. provide adequate evidence to support award payments.

Although we did not find significant errors in awards for full-time examiners, we found that USPTO did not adequately manage the part-time examiners' awards.

Performance evaluations—such as annual performance appraisals and feedback—supplemented by an effective reward system should help employees understand the connection between their performance and the organization's success. Effective oversight is a key management control to ensure this connection. Without adequate and appropriate oversight, USPTO is unable to detect and prevent (1) erroneous award payments, (2) possible abuse of the award program, and (3) wasted funds that can be put to better use.

I. USPTO Did Not Have a Standardized Process to Calculate Award Payments

The U.S. Government Accountability Office's (GAO's) *Standards for Internal Control in the Federal Government* states that management should clearly communicate control responsibilities to key individuals throughout the organization to reduce the risk of error.³ We found that USPTO personnel responsible for approving and processing awards did not demonstrate a clear understanding of the process or the calculation methodology.

As an illustration of this lack of understanding, USPTO took 4 months to provide us with sufficient information to confirm its awards process. Initially, USPTO personnel stated that the calculation process was automated, with SMD automatically calculating each award based on PALM data. Therefore, we interviewed several other USPTO personnel—

³ Government Accountability Office, September 2014. *Standards for Internal Control in the Federal Government*, GAO-14-704G. Washington, DC: GAO, 56.

including SPEs, Technology Center (TC)⁴ directors, SMD personnel, programmers, and senior management—to understand what data was input into PALM and SMD and who was responsible for overseeing or validating those inputs. Because USPTO had no centralized point of contact or standardized process for calculating award payments, we repeatedly asked multiple personnel the same questions to obtain answers. Without an established process with clearly defined responsibilities, USPTO risks undetected errors in award payments of millions of dollars to patent examiners.

II. USPTO Did Not Validate the Addition or Accuracy of Examiner-Related Hours Included in Award Calculations

Two types of patent examiner working hours (examining hours and examining-related hours) are included in the calculation for gainsharing awards and SAA payments. However, only examining hours are included in SMD. Because SMD does not include examining-related hours, USPTO permits SPEs, at their discretion, to manually add into SMD the examining-related hours (see subfinding II.A for further details).

We identified varying definitions of examining-related hours within USPTO documentation. The USPTO/POPA agreements do not define eligible examining-related hours. Therefore, we asked USPTO personnel, on multiple occasions, to identify which examining-related activities were eligible for inclusion in award calculations. According to USPTO personnel, SPEs exercise discretion in determining eligible examining-related hours. After interviewing several USPTO officials, as well as consulting senior management, we received two lists of activity codes that SPEs can use as reference when deciding whether an activity is an eligible examining-related activity: one list was an excerpt from a corps-wide SPE management knowledgebase;⁵ the other was a list of activity codes used for signatory authority program requirements.⁶ Neither list references awards or specifically identifies examining-related activities eligible for inclusion in awards calculations. While there were similarities between the two lists, the management knowledgebase only included examples, and the signatory authority requirements were not specific to monetary awards (see subfinding II.A for further details).

In addition, part-time patent examiners can receive prorated pendency awards based on their work schedules.⁷ SPEs must manually input examiner work schedules into SMD to calculate pendency awards for part-time examiners. We found that SPEs did not update

⁴ USPTO has nine TCs with employees who examine patent applications in specific areas.

⁵ The corps-wide SPE management knowledgebase is a collection of memorandums and agreements.

⁶ The Signatory Authority Program evaluates the quality of examiner decisions over a period of time to provide either partial or full signatory authority to examiners. Partial signatory authority allows examiners to approve or disapprove non-final actions whereas full signatory authority allows examiners to approve or disapprove final actions on patent applications.

⁷ POPA, June 18, 2015. *Changes to the Patent Examiner Performance Appraisal Plan, Extension of the Pendency Award, Renewal of the Count System Initiatives, and Other Issues* [online].

http://popa.org/static/media/uploads/Agreements/POPA/DM_CSI_PAP_06182015.pdf, 5 (accessed December 7, 2018).

SMD work schedules when examiners adjusted their work schedules or changed their part-time/full-time status (see subfinding II.B for further details).

A. USPTO did not validate the legitimacy of additional hours into patent examiners' gainsharing and SAA payment calculations

Adequate internal control assists management in achieving desired results through effective stewardship of financial resources. GAO's *Standards for Internal Control in the Federal Government* states that management should design control activities to ensure accurate and timely recording of transactions, while maintaining readily available supporting documentation.⁸ However, we found that USPTO did not have adequate controls in place to determine accurate patent examiner monetary awards. Without these control activities, payment calculation errors will continue to go undetected and risk improper payments and possible fraud.

To illustrate, USPTO permits SPEs to review their patent examiners' timesheets each pay period and include additional examining-related hours in the patent examiner's award calculation. However, factoring in this activity—including whether and how to perform it—is left completely to each SPE's discretion. Additionally, USPTO did not identify anyone with specific responsibilities for reviewing SPE inputs and resulting calculations. Although SMD personnel perform broad data reviews quarterly, USPTO personnel stated that examiners alone identify specific award payment issues. Consequently, some examiners may not receive awards consistent with the award criteria or are awarded more or less than similarly performing peers, depending on their SPEs.

Furthermore, USPTO does not require SPEs to document support for adding examining-related hours. Without documentation to support the added examining-related hours, USPTO cannot validate the sufficiency of SPEs' reviews or the validity of award payments that include examining-related hours. Consequently, there is a risk of over- and underpayments and unequal incentive award payments for work of equal value.

We identified evidence of these risks in our sampling tests. In one example, USPTO paid a patent examiner an additional \$1,300 based on hours that could not be validated. In another example, USPTO underpaid a patent examiner by \$1,160 based on eligible examining-related hours. Of the 78 award-eligible examiners in our sample,⁹ 40 examiners (51 percent) had a total of 79 gainsharing and/or SAA award payment errors,¹⁰ including

⁸ GAO-14-704G, 48.

⁹ This was a judgmental sample and was not a statistical representation of all patent examiners.

¹⁰ Some examiners in our sample received more than one type of award.

- 41 awards included credit for examining-related hours added that were unvalidated,¹¹
- 29 awards excluded credit for qualifying examining-related hours, and
- 9 awards were not prorated for examiners who did not meet full award requirements.

See table 2 for more details.

Table 2. OIG Analysis of FY 2016 Gainsharing and SAA Award Errors and Associated Over-/Underpayments

| Award Error Type | No. of Award Payment Errors | USPTO Award Payments | OIG-calculated Award Payments ^a | USPTO Overpaid | USPTO Underpaid |
|---------------------------|-----------------------------|----------------------|--|------------------|-----------------|
| Unvalidated added hours | 41 | \$ 138,658 | \$ 128,111 | \$ 10,547 | N/A |
| Excluded qualifying hours | 29 | 86,798 | 90,616 | N/A | \$ 3,818 |
| Not prorated | 9 | 32,713 | 23,351 | 9,362 | N/A |
| Total | 79 | \$ 258,169 | \$ 242,077 | \$ 19,909 | \$ 3,818 |

Source: OIG calculations and USPTO award documentation

^a Calculated totals include minor differences due to rounding.

B. USPTO did not ensure SPEs used correct work schedules to calculate pendency award payments

We also found that USPTO personnel did not validate the accuracy of patent examiners' work schedule hours included in the award calculations. Pendency awards are prorated for patent examiners who worked less than a full-time schedule. SPEs must manually enter examiners' work schedules into SMD to ensure an accurate pendency award payment. However, USPTO does not validate whether the SPEs entered the correct work schedules. According to USPTO personnel, SPEs sometimes forgot to properly update examiner work schedules.

Furthermore, because SPEs are permitted to adjust award calculations manually, coupled with insufficient oversight, the risk for erroneous payments increases. To illustrate, we identified one patent examiner who was eligible for a prorated pendency award of \$522 but—because the SPE did not adjust the examiner's work schedule from full-time to part-time—USPTO paid the full pendency award of \$1,045, an overpayment of

¹¹ Unvalidated hours are the examining-related hours manually added by SPEs that could not be supported due to lack of documentation.

100 percent. Of the 38 award-eligible part-time examiners in our sample,¹² we identified 18 examiners (47 percent) with pendency award payment errors. USPTO granted 32 full-time awards to part-time examiners, 11 awards with prorated payments that were not consistent with examiners' award eligibility amount, and 12 awards that were incorrectly prorated based on examiner's previous work schedule hours. Table 3 provides further details.

Table 3. OIG Analysis of FY 2016 Pendency Award Errors and Associated Over-/Underpayments

| Award Error Type | No. of Award Payment Errors | USPTO Award Payments | OIG-calculated Award Payments | USPTO Overpaid | USPTO Underpaid |
|---|-----------------------------|----------------------|-------------------------------|------------------|-----------------|
| Not prorated | 32 | \$ 29,025 | \$ 19,371 | \$ 9,654 | N/A |
| Prorated payment not consistent with eligible award | 11 | 7,454 | 6,395 | 1,059 | N/A |
| Incorrectly prorated | 12 | 7,417 | 7,627 | 254 | \$ 464 |
| Total | 55 | \$ 43,896 | \$ 33,393 | \$ 10,967 | \$ 464 |

Source: OIG calculations and USPTO award documentation

In addition to the errors that our audit identified, USPTO conducted a separate internal review of pendency awards focusing on errors in part-time examiners' information in SMD. For FY 2016, USPTO identified 90 examiners who received overpayments totaling \$51,000 related to errors in examiner work schedules and incorrect award tiers. In February 2018, USPTO notified affected examiners of the pendency award overpayments.¹³ Additionally, USPTO implemented quarterly reviews to identify and confirm examiner part-time schedules, which SPEs validate for accuracy.

III. USPTO Did Not Provide Adequate Evidence to Support Award Payments

SPEs are required to review and certify the accuracy of monetary awards and the underlying data supporting those awards. This underlying data includes examiner rating forms and award nomination forms. TC directors are required to certify monetary award compliance with award agreements. These certifying measures help ensure USPTO pays patent examiner awards accurately. However, we found instances where USPTO certified award payments based on incomplete, inaccurate, or unvalidated information (see subfinding III.A) and paid awards at higher tiers without adequate support (see subfinding III.B).

¹² This was a judgmental sample and was not a statistical representation of all patent examiners.

¹³ The overpayment notice detailed the overpayment circumstances, the examiner's financial obligations, and a repayment waiver application form.

A. Award payments were certified based on incomplete, inaccurate, or unvalidated performance rating and award nomination forms

The SMD system generates award nomination forms, containing calculation information for each award, which are used to approve monetary awards. The forms require signatures from (1) the examiner's immediate supervisor (i.e., the SPE) to certify accuracy and eligibility for each award, as well as (2) the reviewing/approving official (i.e., the TC director) to certify compliance with the award agreement.

We found that SPEs and TC directors approved monetary awards included in examiner rating forms and award nomination forms¹⁴ without validating the completeness and accuracy of the information. The following examples are errors that we identified:

- Rating forms did not include the total hours used to calculate prorated gainsharing awards and SAAs.
- Award nomination forms for SAAs included unvalidated total hours.
- Rating and award nomination forms did not include work schedules used to calculate pendency awards.
- Award nomination forms included other errors (e.g., the description "infinity" for total hours; prorated awards identified as "not applicable" when the award was actually prorated; and inconsistent prorating such that one examiner received one prorated award and one non-prorated award in the same quarter).

Without accurate and complete information, USPTO cannot ensure examiners receive accurate award payments consistent with the award criteria.

B. USPTO paid pendency awards at higher tiers without adequate support

In accordance with the USPTO and POPA pendency awards agreement, examiners are eligible to earn tier-specific pendency awards.¹⁵ We found that USPTO paid pendency awards at higher tiers without adequate support. For example, we found two examiners who were eligible for five awards totaling \$2,253, but USPTO paid the examiners an additional \$1,567 (or 70 percent more than their earned award). We requested documentation to support the higher tier awards, but USPTO did not provide supporting documentation. According to USPTO personnel, there could be various reasons for the difference (e.g., the examiner submitted additional cases after the original data extraction). When USPTO conducted its own internal review, it was unable to determine why it issued the higher tier awards. USPTO personnel noted that

¹⁴ Award nomination forms are generated for quarters 1–3 only. Quarter 4 awards are included in year-end rating forms.

¹⁵ POPA, June 18, 2015. *Changes to the Patent Examiner Performance Appraisal Plan, Extension of the Pendency Award, Renewal of the Count System Initiatives, and Other Issues* [online]. http://popa.org/static/media/uploads/Agreements/POPA/DM_CSI_PAP_06182015.pdf, 3–4 (accessed December 7, 2018).

there appeared to be a change in the data, but they could not confirm this to be the case.

Without adequate documentation to support the tier awarded, USPTO cannot ensure that examiners were paid pendency awards consistent with award criteria. Consequently, USPTO paid these examiners awards without adequate support.

Recommendations

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office direct the Commissioner for Patents to do the following:

1. Implement guidance to clearly define the policies, process, validation, and oversight responsibilities covering all key components of the award calculation process.
2. Clarify, document, and publish to SPEs a list of the examining-related activities eligible for inclusion in gainsharing and SAAs.
3. Establish requirements to document SPE reviews of examining-related activities for inclusion in award calculations and maintain all supporting documentation for subsequent manual adjustments to award calculations.
4. Develop written policies and procedures to identify responsibilities and requirements to review, approve, and validate the accuracy of manual adjustments to monetary award calculations.
5. Ensure award nomination forms are complete and accurate, and maintain all documentation that supports awards included in year-end rating forms.

Summary of Agency Response and OIG Comments

In response to our draft report, USPTO concurred with all five report recommendations on improving its written policies and guidance on patent examiner awards.

We have summarized details of USPTO's response within this section, as well as provided our comments to USPTO's response. USPTO's complete response to our draft report is included as appendix E.

Agency response. USPTO noted it maintained a standardized process to calculate award payments in FY 2016. The Agency's management database automatically calculated awards based on production, attendance, and performance data, with discretionary input from supervisors in limited situations.

OIG response. We disagree that USPTO maintained a standardized process to calculate award payments. For example, we found SPEs were inconsistent with their input for calculating award payments. Moreover, USPTO personnel responsible for approving and processing awards did not demonstrate a clear understanding of the process or the calculation methodology. However, USPTO acknowledged additional documentation, guidance, and oversight controls on the limited discretion afforded to supervisors would enhance the award process.

Agency response. USPTO noted that our conclusions based on the judgmental sample that included 39 percent part-time examiners could be misconstrued, as part-time examiners made up only approximately 4 percent of the patent examiner corps in FY 2016. USPTO stated the report findings in the title and throughout suggest the issues identified are widespread throughout the patent examiner population, which is not the case based on its own analysis.

OIG response. We disagree that our conclusions could be misconstrued based on our judgmental sample of part-time examiners. As we noted in our report, we found about 5 percent (3 out of 65) full-time examiners had award payment errors as well. More importantly, we identified weaknesses in USPTO's process, and our recommendations address the need for USPTO to improve the oversight of their monetary awards process to ensure all patent examiners receive accurate payments; not just part-time examiners exclusively.

Agency response. USPTO stated it had existing documentation (e.g., patent examiners' time and attendance records with activity codes) to validate the addition of "examining-related" hours. USPTO noted that our characterization of all "examining-related" hours as "unvalidated" to be an overpayment solely because the addition of such hours suggests the Agency lacked any documentation to support awards.

OIG response. We disagree that USPTO had existing documentation to validate the addition of "examining-related" hours. The activity codes manually entered on the examiners' time and attendance records do not explain the basis and qualifiers for the added hours. Without

supporting documentation, USPTO cannot validate the sufficiency of SPEs' reviews or the validity of award payments.

However, we are encouraged that USPTO has implemented a process to improve its award process for part-time examiners and will continue to develop and document additional management guidance to enhance consistency and accuracy in patent examiner award calculations. We look forward to receiving USPTO's action plan that will provide details on its corrective actions.

Appendix A: Objective, Scope, and Methodology

The objective of our audit was to determine whether USPTO monetary awards were (a) granted in compliance with the relevant award criteria and (b) sufficiently documented.

Our scope included awards related to patent examiners' performance and productivity ratings in FY 2016.

To determine whether USPTO awarded patent examiners' bonuses in compliance with the related criteria, we reviewed relevant USPTO and POPA agreements and USPTO policies that detail the performance criteria for each award. Specifically, we reviewed the following:

- *Agreement on Awards and Agreement on Trial Gainsharing Program Between the Patent and Trademark Office and the Patent Office Professional Association*, October 1, 1988
- *Memorandum of Understanding Between the United States Patent and Trademark Office and the Patent Office Professional Association Regarding the 2010 Count System Initiatives and Other Initiatives*, November 3, 2009
- *Docket Management Manual*, version 5.0, Pendency Award, October 1, 2015
- Memorandum from Deputy Commissioner for Patent Operations, *Extension of the Pendency Award, Renewal of the Count System Initiatives, and Other Issues*, April 21, 2016
- *Partnership Agreement Between USPTO and POPA; the National Treasury Employees Union, Local 245, and the National Treasury Employees Union, Chapter 243*, December 13, 1999
- *Payroll and Employee Benefits Process Memo FY 2016*
- Additionally, we interviewed USPTO patent management personnel to review controls over the award process and assess the sufficiency of the documentation of employees' performance and achievements.

To determine our sample, we extracted data as of September 30, 2016, from Momentum—USPTO's accounting system—and determined that 7,018 examiners received at least one award in FY 2016. We randomly selected 67 examiners, of which 65 were full-time examiners and 2 were part-time examiners. During our planning phase, USPTO personnel informed us of potential errors related to awards granted to part-time examiners. To ensure that our sample included an appropriate number of part-time examiners, we judgmentally selected a sample of 40 part-time patent examiners who received at least one monetary award in FY 2016. We judgmentally selected the top 5 part-time patent examiners with the highest award payments from each TC.

To determine the accuracy of the payments, we recalculated the awards according to criteria established in the USPTO and POPA agreements using data from SMD. Specifically, we recalculated 577 monetary awards—78 gainsharing, 78 SAA, 365 pendency, and 56 supplemental—using quarterly award nomination forms, annual performance rating forms, and

other production documentation for each of the 107 patent examiners sampled. (For further details, see appendix D.)

Further, we obtained an understanding of the controls used to grant monetary awards by interviewing USPTO personnel. While we identified and reported on internal control deficiencies, no incidents of fraud, illegal acts, violations, or abuse were detected within our audit. We identified weaknesses in the controls related to the processes and procedures used to grant monetary awards. We relied on computer-processed data from Momentum and SMD and assessed its reliability by interviewing USPTO officials knowledgeable about the data. We determined that the data were sufficiently reliable for the purposes of this report.

We conducted the audit fieldwork between March 2017 and October 2018 at USPTO offices in Alexandria, Virginia.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. We performed our work under the authority of the Inspector General Act of 1978, as amended (5 U.S.C. App.), and Department Organization Order 10-13, dated April 26, 2013.

Appendix B: Monetary Award Types

USPTO patent examiners are eligible for three types of performance awards based on productivity and performance ratings: productivity gainsharing (gainsharing) awards, special achievement awards (SAAs), and pendency awards. Each award has a specific basis, criteria, and frequency. The criteria and the amounts of the monetary awards are updated through collective bargaining agreements between USPTO and POPA, an independent union that represents all of USPTO's non-managerial patent professionals.

Gainsharing awards

USPTO grants annual gainsharing awards at the end of each fiscal year to patent examiners who (a) have at least a fully successful performance rating and (b) achieve at least 110 percent of their assigned production goals over the course of that fiscal year. The awards granted range between 2 and 7 percent of patent examiner's salary based on achieved production. Patent examiners who spend at least 1,400 hours performing examining and examining-related activities receive the full award. Patent examiners performing 700–1,399 hours of examining and examining-related duties receive a prorated award based on their total hours.

SAAs

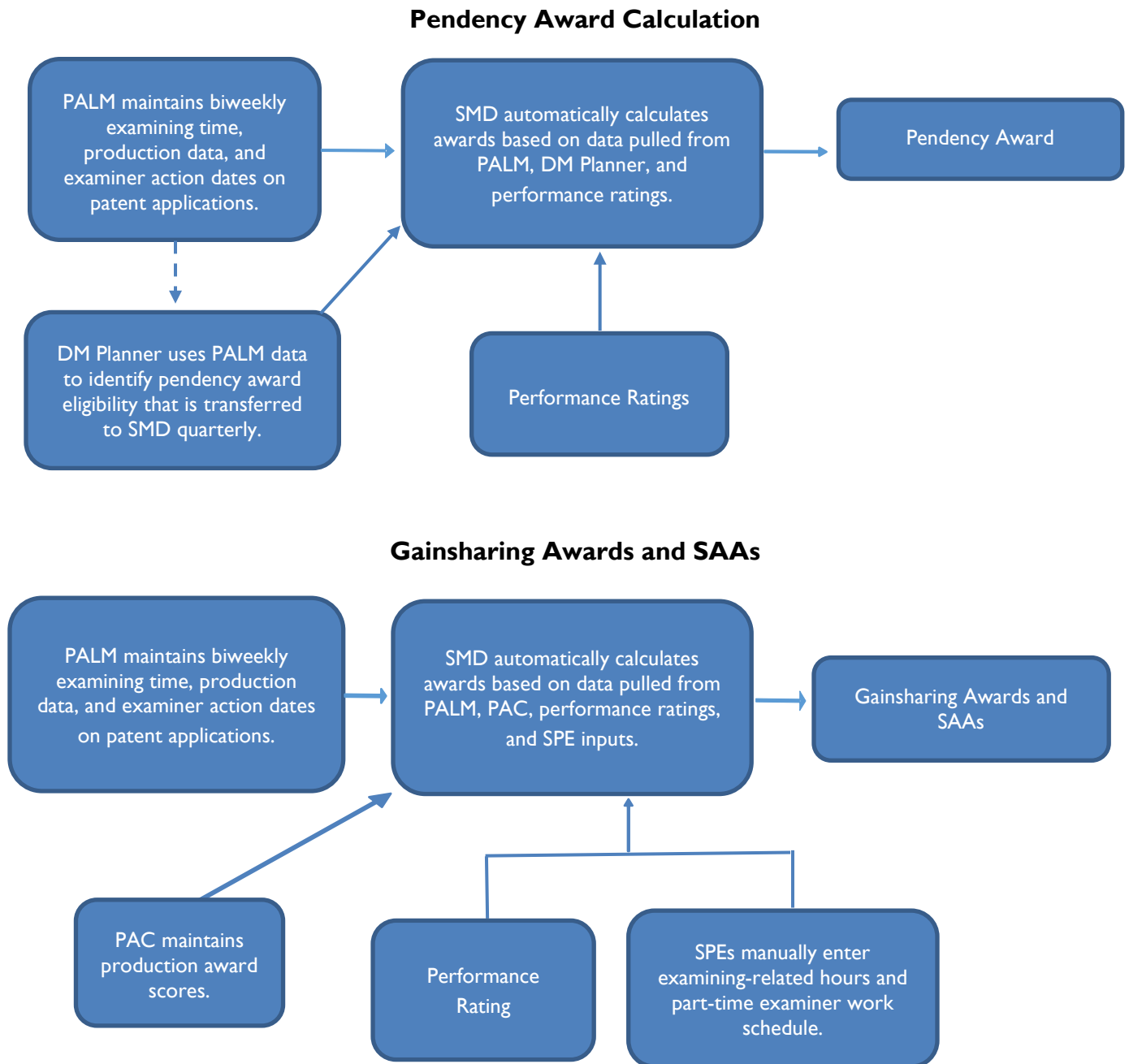
USPTO also grants SAAs once every 4 quarters to patent examiners who (a) have at least a satisfactory level of performance and (b) achieve at least 110 percent of their assigned production goals over 4 consecutive quarters. The awards granted are 3 percent of patent examiner's salary. Patent examiners who spend at least 1,400 hours performing examining and examining-related activities receive the full award. Patent examiners performing 700–1,399 hours of examining and examining-related duties receive a prorated award based on their total hours.

Pendency awards

In addition, USPTO grants quarterly pendency awards to patent examiners for docket management performance (i.e., completing office actions within a specific timeframe). Patent examiners must (a) have at least a fully successful performance rating and (b) have worked at USPTO for at least 1 year prior to the start of the quarter. Examiners are eligible to earn tier-specific awards of 0.25–0.75 percent (i.e., entry-level tier examiners earn 0.25 percent, tier 1 earn 0.50 percent, and tier 2 earn 0.75 percent) of their salary depending on their docket management score and case management performance. For sustained performance over 4 consecutive quarters, patent examiners are eligible for supplemental payments of 0.50 or 1.00 percent at the end of the second quarter of each fiscal year. Part-time patent examiners receive prorated pendency awards based on their part-time work schedule and prorated supplemental awards based on the work schedule used in the majority of quarters.

Appendix C: USPTO Monetary Awards Calculation Process

Figure C-1. USPTO Award Calculation



Source: Created by OIG, based on interviews with USPTO personnel

Appendix D: Monetary Awards Calculation Methodology

Our methodology for assessing the accuracy of patent examiner monetary award payments included interviewing USPTO personnel and obtaining documentation used to support award payments. For eligibility requirements and computation guidelines, we consulted USPTO and POPA agreements for gainsharing awards, SAAs, and pendency awards.

Specifically, we did the following:

- Obtained examiners' FYs 2014–2016 performance rating forms from SMD to identify their rating of record. For examiners no longer employed at USPTO and not listed in SMD, we requested rating forms from USPTO's Office of Human Resources (OHR).
- Obtained each examiner's year-end grade and step identified in the award sample. We also compared it with the grade/step listed in SMD to confirm its accuracy and identified the appropriate salaries using the U.S. Office of Personnel Management special rate tables for patent examiners.
- Obtained examiners' award score production percentages from USPTO's PAC for the applicable time period to identify their overall production.¹⁶
- Identified the last quarter in which each examiner received an SAA to ensure USPTO did not grant the award sooner than every 4 quarters.
- Identified examiners' start date listed in SMD to ensure they started 1 year prior to quarter start, an eligibility requirement for pendency awards.
- Obtained data from USPTO's DM Planner to identify each examiner's quarterly docket management performance. Specifically, we identified examiners' overall docket management scores, individual category scores, number of ceiling exceeded cases, and the number of new cases.
- Obtained approved part-time examiner work schedules from the Part-Time Administrator and confirmed the schedules with reports from USPTO OHR identifying examiner work schedules.
- Identified examining hours for examiners using PAC and added examining-related hours identified in examiners' timesheets using eligible examining-related activity codes listed in USPTO's internal management compilation of memorandums and agreements (i.e., SPE management knowledgebase) to obtain the total applicable examining hours used for prorated award calculations.

Using this information, we identified whether each examiner in our sample was eligible for the awards and calculated monetary award payments that should have been made to eligible examiners based on award criteria identified in each applicable USPTO and POPA award

¹⁶ The information was also available in SMD, but USPTO personnel stated that SPEs typically confirm its accuracy with the PAC.

agreement. Specifically, we multiplied examiner's salaries against the eligible award percentage (identified below) to identify the award payment amount.

To prorate the gainsharing awards and SAAs for any examiner who had 700–1,400 examining and examining-related hours, we multiplied the calculated full award (full award regardless of hours) against total examining and examining-related hours divided by 1,400 hours (Prorated Award = Full Award X [Examining and Examining-Related Hours/1400]). To prorate pendency awards for part-time examiners, we multiplied the calculated full award (full award regardless of hours) against the work schedule divided by 80 hours (Prorated Award = Full Award X [Work Schedule/80]).

To ensure the validity of our calculations, we compared our calculation results to USPTO's award payments and supporting documentation included in rating and award nomination forms. For unreconciled amounts, we met with USPTO personnel to validate the results and requested supporting documentation for identified differences. We excluded minor differences due to rounding.

Gainsharing Awards. Patent examiners are eligible to receive 2–7 percent of their salary based on production goal achievements at the end of each fiscal year.

Table D-1. Gainsharing Award Rates

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

Source: POPA, June 18, 2015. Changes to the Patent Examiner Performance Appraisal Plan, Extension of the Pendency Award, Renewal of the Count System Initiatives, and Other Issues

SAAs. Patent examiners are eligible to receive an SAA of 3 percent of their salary by achieving at least 110 percent of their production goals over any 4 consecutive quarters. There are no additional incentives for achieving greater than 110 percent production.

Pendency Awards. Patent examiners are eligible to receive a pendency award each fiscal quarter, as well as a supplemental payment for sustained docket management performance over 4 consecutive quarters.

Table D-2. Pendency Award Rates

| Criteria | Entry Tier | Tier 1 | Tier 2 |
|--------------------------------|----------------------------------|---|--|
| Award Payout | 0.25% of salary | 0.5% of salary | 0.75% of salary |
| Docket Management Score | At least 110% overall | At least 120% overall and no single category score under 100% | At least 140% overall, no single category score under 120%, and returns category must be 100% |
| Ceiling Exceeded | No ceiling exceeded applications | No more than one ceiling exceeded application in the quarter | |
| New Cases | N/A | Varies dependent upon the quarter length, work schedule (full or part time), and expectancy | |
| Supplemental Award | N/A | Additional 0.5% of salary for at least tier 1 performance in each quarter (FY 2015 Q3–Q4 and FY 2016 Q1–Q2) | Additional 1.0% of salary for tier 2 performance in each quarter (FY 2015 Q3–Q4 and FY 2016 Q1–Q2) |

Source: POPA, June 18, 2015. *Changes to the Patent Examiner Performance Appraisal Plan, Extension of the Pendency Award, Renewal of the Count System Initiatives, and Other Issues*

Appendix E: Agency Response

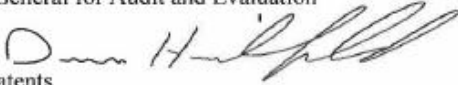


UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

July 19, 2019

MEMORANDUM FOR: Frederick Meny
Assistant Inspector General for Audit and Evaluation

FROM: Andrew Hirshfeld 
Commissioner for Patents
United States Patent and Trademark Office

SUBJECT: Response to Draft Report: *USPTO Did Not Provide Adequate Oversight of Monetary Awards to Ensure Patent Examiners Receive Accurate Payments*

The United States Patent and Trademark Office (USPTO or Agency) appreciates the OIG's review of the patent examiner monetary awards program for fiscal year (FY) 2016. The USPTO also appreciates the OIG's finding that "no incidents of fraud, illegal acts, violations, or abuse were detected" by the audit. (Appendix A, ¶ 6) The USPTO appreciates as well the OIG's determination that it "did not find significant errors for full-time examiners" (Objective, Findings and Recommendations, ¶ 2), which made up approximately 96% of the patent examiner corps in FY 2016.

The USPTO's patent examiner awards provide a cost-effective approach to increasing patent examiner productivity and timeliness that reduces the USPTO's need to hire additional patent examiners. This provides a cost savings to those that utilize the patent system and therefore benefits the American public. The USPTO remains committed to administering its award programs accurately and fairly.

As always, the Agency recognizes the opportunity for strengthening internal controls and welcomes the OIG's recommendations. We concur with the OIG's recommendations focused on improving the written policies, guidance, and documentation for patent examiner awards. We also note that the concerns raised by the OIG relate principally to awards for part-time patent examiners, who formed about 4% of the patent examiner corps in FY 2016. However, the Agency has concerns about the report's broad characterization of the Agency's oversight of awards and disagrees with the scope of the report's findings.

The Agency Maintains a Standardized System to Calculate Awards

With regard to the OIG's conclusion in Section I of the report, the Agency did have a standardized process to calculate award payments in FY 2016. As the OIG describes the award calculation process in Appendix C, the Agency's management database automatically calculated awards based on production, attendance, and performance data, with discretionary input from

supervisors in limited situations. The OIG's broad conclusions about the Agency's ability to detect and prevent errors do not recognize that the Agency's standardized process and existing documentation resulted in accurate award payments to virtually all patent examiners, based on the Agency's own analysis. The Agency acknowledges, however, that within this standardized award process, additional documentation, guidance, and oversight controls on the limited discretion afforded to supervisors, as the OIG recommends, will enhance the award process.

The Findings Primarily Relate to Part-Time Patent Examiners

The OIG acknowledges that it "did not find significant errors for full-time examiners" and that the findings primarily relate to part-time patent examiners. (Objective, Findings and Recommendations, ¶ 3) While the OIG's judgmental sample included 39% part-time patent examiners, the report does not note that part-time patent examiners made up only approximately 4% of the patent examiner corps (323 out of 8993 patent examiners) in FY 2016. (See Appendix A, ¶ 4) Without this information, the OIG's conclusions could be misconstrued. For example, the OIG found 51% of award-eligible patent examiners in its judgmental sample had SAA or gainsharing award payment errors (Section II.A, ¶ 4), yet 95% of these patent examiners were part-time.

Similarly, the OIG found a pendency award payment error based on work schedule information, but the report did not make clear that all of the patent examiners even potentially affected by this error were part-time. (See Section II.B, ¶ 3) Of note, prior to the start of the audit, the USPTO had self-identified this potential error, and reported it to the OIG during the initial stages of the audit when the scope of the error became clear. The Agency also implemented a process improvement to avoid this error going forward.

While the Agency agrees with the OIG's recommendation for additional controls, the OIG makes unqualified findings in the title and throughout the report (e.g., "USPTO did not have adequate controls in place to determine accurate patent examiner monetary awards" (see Section II.B, ¶ 3)) that suggest the issues identified are widespread throughout the patent examiner population, which is not the case based on the Agency's own analysis.

The Agency Had Documentation to Validate Its Awards

The Agency acknowledges that the documentation supporting award calculations can be improved and appreciates the OIG's recommendations. However, the OIG's conclusion that the USPTO did not validate the addition or accuracy of hours included in its FY 2016 award calculations does not acknowledge that the Agency had existing documentation (e.g., patent examiners' time and attendance records with activity codes) that allowed for validation by the Agency in virtually all cases.

For example, the OIG's characterization of all "examining-related" hours as "unvalidated" (e.g., in footnote to Section II.A, ¶ 4) suggests that the Agency lacks *any* documentation to support examiner awards. As a result, the report considers the portion of any SAA or gainsharing award based on "examining-related" hours to be an overpayment solely because of the addition of such hours. (Section II.A, ¶ 4 and Table 2) However, the Agency is in fact able to validate the accuracy of most of these additions with existing documentation (e.g., patent examiners' time and attendance records with activity codes).

The Agency Values the Work of the OIG

Because the Agency takes seriously the work of the OIG, the Agency asked the OIG about its statement that the Agency took four months to provide sufficient documentation to confirm its award process. (Section I, ¶ 2) In response, the OIG expressly told Agency management that USPTO's staff were responsive to the OIG's requests throughout this period of time. We are committed to providing the OIG all requested information in a timely manner, and we appreciate how improved documented award procedures will enhance internal controls. The USPTO sees the work of the OIG as an important part of the Agency's continuous improvement culture.

OIG Recommendations

OIG Recommends that the Under Secretary and Director of the USPTO:

- (1) Implement guidance to clearly define the policies, process, validation, and oversight responsibilities covering all key components of the award calculation process.*
- (2) Clarify, document, and publish to SPEs a list of the examining-related activities eligible for inclusion in gainsharing and SAAs*
- (3) Establish requirements to document SPE reviews of examining-related activities for inclusion in award calculations and maintain all supporting documentation for subsequent manual adjustments to award calculations.*
- (4) Develop written policies and procedures to identify responsibilities and requirements to review, approve, and validate the accuracy of manual adjustments to monetary award calculations.*
- (5) Ensure award nomination forms are complete and accurate, and maintain all documentation that supports awards included in year-end rating forms.*

USPTO Response:

While the Agency has concerns with the scope and characterization of the findings, as discussed above, the USPTO concurs with the OIG's recommendations focused on improving the written policies and guidance on patent examiner awards. The USPTO agrees with the importance of clear and consistent processes and well-defined responsibilities for effective award management. To that end, the Agency has already implemented quarterly reviews to identify and confirm examiner schedules, which first-line managers validate for accuracy. The USPTO will continue to develop and document additional management guidance to enhance consistency and accuracy in patent examiner award calculations, including additional guidance on consideration of examining-related activities and manual adjustments to award calculations. Finally, the USPTO will consider and implement any necessary additional controls to increase the quality and accuracy of year-end ratings forms.