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August 27, 2020

The Honorable Lindsey Graham
Chairman
The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable Jerrold Nadler
Chairman
The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
House of Representatives

Subject: *Department of Commerce, Patent and Trademark Office: Setting and Adjusting Patent Fees During Fiscal Year 2020*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Commerce, Patent and Trademark Office (USPTO) entitled "Setting and Adjusting Patent Fees During Fiscal Year 2020" (RIN: 0651-AD31). We received the rule on July 28, 2020. It was published in the *Federal Register* as a final rule on August 3, 2020. 85 Fed. Reg. 46932. The effective date of the rule is October 2, 2020, except that the effective date of amendments to one particular provision is January 1, 2022.

According to USPTO, this final rule adjusts fees to provide USPTO a sufficient amount of aggregate revenue to recover the aggregate cost of patent operations in future years. USPTO also stated that the rule allows USPTO to continue progress toward achieving its strategic goals.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). This final rule was published in the *Federal Register* on August 3, 2020. 85 Fed. Reg. 46932. The rule was received by the Senate on July 31, 2020. 166 Cong. Rec. S4727 (daily ed. Aug. 4, 2020). The rule was received by the House of Representatives on August 18, 2020. 166 Cong. Rec. H4303 (daily ed. Aug. 25, 2020). The rule has a stated effective date of October 2, 2020, except that the effective date of amendments to one particular provision is

January 1, 2020. Therefore the rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of USPTO's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive style with a large, looped initial "S".

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Shirley Hassan
Agency Representative
Department of Commerce

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF COMMERCE
PATENT AND TRADE OFFICE
ENTITLED
“SETTING AND ADJUSTING PATENT FEES
DURING FISCAL YEAR 2020”
(RIN: 0651-AD31)

(i) Cost-benefit analysis

The Department of Commerce, Patent and Trademark Office (USPTO), stated that they did not identify any monetized costs and benefits of this final rule, but found that the rule has significant qualitative benefits, with no identified costs. According to USPTO, the qualitative benefits of the rule are that the final patent fee schedule maintains the existing balance of below-cost entry fees and above-cost maintenance fees as one approach to foster innovation. Further, USPTO stated that the fee changes are targeted in support of one or more fee setting policy factors, and the rule secures the aggregate revenue needed to achieve the strategic priorities encompassed in the rulemaking goals and strategies. USPTO additionally stated that the final patent fee schedule allows for optimizing patent quality and timeliness, which, according to USPTO, significantly increases the value of patents by advancing commercialization of new technologies sooner and reducing uncertainty regarding the scope of patent rights, which, USPTO states, fosters innovation and has a positive effect on economic growth.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

USPTO prepared a Final Regulatory Flexibility Analysis. The analysis included (1) a statement of the need for, and objectives of, this final rule; (2) a statement of the significant issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the rule as a result of such comments; (3) the response of USPTO to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made as a result of the comments; (4) a description of and, where feasible, an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available; (5) a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and type of professional skills necessary for preparation of the report or record; and (6) a description of the steps USPTO has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the rule and why each one of the other significant alternatives to the rule considered by USPTO which affect the impact on small entities was rejected.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

USPTO determined that this final rule will not involve a federal intergovernmental mandate that will result in the expenditure by state, local, and tribal governments, in the aggregate, of \$100 million (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 (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On July 31, 2019, USPTO published a proposed rule. 84 Fed. Reg. 37398. USPTO received comments from four intellectual property organizations and 40 individuals, attorneys, law firms, corporations, and other associations. USPTO responded to comments in this final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

USPTO determined that this final rule contains information collection requirements under the Act. According to USPTO, the collection of information involved in the rule has been reviewed and previously approved by the Office of Management and Budget (OMB) under control numbers 0651-0012, 0651-0016, 0651-0020, 0651-0021, 0651-0031, 0651-0032, 0651-0033, 0651-0059, 0651-0063, 0651-0064, 0651-0069, and 0651-0075. USPTO stated that updates to the aforementioned information collections as a result of this rule have been submitted to OMB as non-substantive change requests.

Statutory authorization for the rule

USPTO promulgated this final rule pursuant to section 500 of title 5, United States Code; section 1123 of title 15, United States Code; various sections of title 35, United States Code; Pub. L. No. 112-29, 125 Stat. 284; Pub. L. No. 112-274, 126 Stat. 2456; and section 1 of Pub. L. No. 113-227, 128 Stat. 2114.

Executive Order No. 12,866 (Regulatory Planning and Review)

USPTO determined that this final rule is economically significant under the Order.

Executive Order No. 13,132 (Federalism)

USPTO determined that this final rule does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under the Order.