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Intellectual Property Alert

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USPTO terminates “After Final Consideration Pilot Program 2.0 (AFCP 2.0)”

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Applicants still have several options for after-final consideration once the AFCP 2.0 ends on December 14, 2024.



What’s the impact?

- Clients looking to still take advantage of the AFCP 2.0 must request it on or before December 14, 2024.
- Other established after-final options are still available for Applicants after the AFCP 2.0 expires, including claim amendments for allowance or better form for appeal, discretionary Examiner interviewing, pre-appeal brief requests for review, and others.

The United States Patent and Trademark Office (USPTO) recently announced that it has decided to let the AFCP 2.0 expire. In its announcement, the USPTO noted that it plans to accommodate potential applicants by providing a short extension of the program to December 14, 2024, which will be the last day to submit a request for participation under the program.

What is After Final Practice?

After final practice refers to the options available to applicants in response to maintained rejection from a patent examiner. A second, Final Office Action (FOA) to a patent application notifies an applicant that at least one legal or technical issue remains after a first USPTO review and response by the applicant. At this point, by way of example, the applicant may:

- / File a response within two months if quicker examination is desired, which typically results in a faster response from the examiner;
- / File a response after two months if additional time and analysis is required to reply, for example, when waiting for additional inventor input;
- / File a response with a Request for Continued Examination (RCE) if substantive claim amendments are implemented;
- / File a response under the AFCP 2.0 to receive additional review and consideration from the examiner;
- / File a notice of appeal to get issues resolved by more experienced, unbiased examiners/judges;
- / File an additional application to pursue claims of different scope that perhaps (sometimes, although rarely) will be examined by a different examiner; and/or
- / Abandon the application if business reasons do not justify further legal expenses.

An examiner may also grant an interview if convinced that the interview will dispose or clarify issues for appeal with only nominal consideration. Applicants decide between these after final options based on the value and goals for the underlying technology, cost for each option, and other considerations. In particular, applicants have favored the AFCP 2.0 due to its efficiency and low cost compared to RCEs and appeals.

USPTO's AFCP 2.0

The AFCP 2.0 is an initiative launched by the USPTO that gives patent examiners additional time to search and consider a response after an FOA. The additional time also allows for an interview to discuss results of the search and/or consideration, even if the response does not place the application in condition for allowance. With a request for consideration under the AFCP 2.0, applicants are required to file a response with an amendment to at least one independent claim that does not broaden the scope of the claim in any aspect. No additional fees, beyond any requisite extensions of time, are required.

Why is the AFCP 2.0 ending?

The termination of the AFCP 2.0 comes down to cost. A cost-offsetting measure proposed on April 3, 2024, by the USPTO to charge fees for participating in the AFCP 2.0 was rejected by the public. Therefore, the USPTO is terminating the AFCP 2.0 after December 14, 2024.

After-final options for patent applicants

As mentioned above, applicants still have several well-established options available for after-final consideration, including these main options:

- / proposing amendments that will place the application either in condition for allowance or in better form for appeal;
- / holding an interview, at the discretion of the examiner, to advance prosecution; and/or
- / appealing, including filing a pre-appeal brief request when filing a notice of appeal.

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