

# PTAAARMIGAN

PATENT AND TRADEMARK ATTORNEYS, AGENTS AND APPLICANTS FOR RESTORATION AND  
MAINTENANCE OF INTEGRITY IN GOVERNMENT

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July 12, 2021

Via Email [FOIARequests@uspto.gov](mailto:FOIARequests@uspto.gov); [efoia@uspto.gov](mailto:efoia@uspto.gov)

USPTO FOIA Officer  
United States Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450

Re: **Freedom of Information Act Request**

Dear FOIA Officer:

PTAAARMIGAN is a not-for-profit § 501(c)(4) social welfare organization, that educates and advocates on behalf of patent and trademark attorneys, agents, and applicants. Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a), PTAAARMIGAN hereby requests the following records from the U.S. Patent & Trademark Office (PTO).

## Definitions.

OMB is the Office of Management and Budget.

OIRA is the Office of Information and Regulatory Affairs.

SBA is the Small Business Administration, including the Office of Advocacy.

“2020 Fee Setting Rule” means the rule (and all subcomponent rules) set forth in Patent and Trademark Office, *Setting and Adjusting Patent Fees During Fiscal Year 2020*, RIN-AD31, *Notice of Proposed Rulemaking*, 84 Fed. Reg. 37398 (Jul. 31, 2019), *Final Rule*, 84 FR 37398 (Jul 31, 2019), correction, 85 Fed. Reg. 58282 (Sep. 18, 2020), and any associated filing, request, communication, inquiry, or approval to or from OMB, OIRA, or SBA relating thereto under Executive Orders 12866 or 13771, the Information Collection regulations (5 C.F.R. Part 1320), the Paperwork Reduction Act, or Regulatory Flexibility Act (the PTO’s notices designate OMB 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) relating to any of the foregoing, any decision *not* to file or seek any of the foregoing, and any guidance, instructions, policy or legal memoranda, economic analyses, surveys, consideration of alternatives, information sought from the public, or other documents concerning legal, procedural, or economic justification in connection with any of the foregoing.

“DOCX rule” means any rule or guidance to require, set fees to encourage, or to otherwise encourage or require patent application filing in DOCX form. The term “DOCX rule” includes but is not limited to the amendment to 37 C.F.R. § 1.16(u) to impose “Non-DOCX Filing Surcharge Fee,” *Submitting Patent Applications in Structured Text Format and Reliance*

on the Text Version as the Source or Evidentiary Copy, 86 Fed. Reg. 29571 (Jun. 2, 2021), and *Directors' Forum, Modernizing patent filing with DOCX*, <https://www.uspto.gov/blog/director/entry/modernizing-patent-filing-with-docx> (May 25, 2021). The term "DOCX rule" includes any associated filing, request, communication, inquiry, or approval to or from OMB, OIRA, or SBA relating thereto under Executive Orders 12866 or 13771, the Information Collection regulations (5 C.F.R. Part 1320), the Paperwork Reduction Act, or Regulatory Flexibility Act (the PTO's notices designate OMB 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) relating to any of the foregoing, any decision *not* to file or seek any of the foregoing, and any guidance, instructions, policy or legal memoranda, economic analyses, surveys, consideration of alternatives, information sought from the public, or other documents concerning legal, procedural, or economic justification in connection with any of the foregoing.

Where a request relates to an agency decision, it includes "reasons supporting it," which are not privileged. *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S.Ct. 777, 786 (Mar. 4, 2021).

### **Request.**

To confine search, requests 1, 2, and 3 are limited to (a) the rulemaking record for rules RIN 0651-AD31, and for Information Collection reviews for OMB control numbers 0651-0012, -0016, -0020, -0021, -0031, -0032, -0033, -0059, -0063, -0064, -0069, and -0075, in each case, as the record stood on or at any time earlier than September 21, 2020, and (b) the rulemaking record for any subsequent guidance documents implementing or interpreting the 2020 Fee Setting Rule or DOCX rule.

In the alternative, if sorting the rulemaking record into responsive and non-responsive portions is more costly to the Office than simply producing the entire rulemaking record for this rule and its Information Collection reviews, PTAAARMIGAN has no objection. PTAAARMIGAN asks only that the separate files be segregated, designated, and produced with whatever organization and indexing the Office maintains in ordinary course.

To reduce reproduction, for requests 1, 2, and 3, materials available at <https://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting> as of August 4, 2020 may be omitted.

1. Kindly provide the following records insofar as they relate to the "2020 Fee Setting Rule" (including its component DOCX rule):
  - a. Records sufficient to identify the individuals (either by title or by name) that were either required to, or actually did, sign off on the Notice of Proposed Rulemaking of July 31, 2019, Notice of Final Rule of Aug. 3, 2020, and correction of Sep. 18, 2020.
  - b. Any submission to OMB, OIRA or SBA relating to the 2020 Fee Setting Rule. This request includes documents sufficient to identify all persons (by title or by name) that participated in the certification required by 44 U.S.C. § 3506(c)(3) and the date of such submission, and any reply by OIRA and/or SBA.

- c. Any decision to *not* submit to OIRA or to SBA any rule, rule subcomponent, or information collection covered by the 2020 Fee Setting Rule notices, including documents sufficient to identify all persons (by title or by name) involved in such decision.
- d. All records relating to the PTO's decision to characterize the 2020 Fee Setting Rule as "rules of agency practice and procedure and/or interpretive rules." See 85 Fed. Reg. 58282:

**Rulemaking Considerations**

*A. Administrative Procedure Act:* This rulemaking corrects typographical and format errors in a rulemaking setting and adjusting patent fees. The changes in this rulemaking involve rules of agency practice and procedure and/or interpretive rules. See *Perez v. Mortg.*

Accordingly, prior notice and opportunity for public comment for the changes in this rulemaking are not required pursuant to 5 U.S.C. 553(b) or (c), or any other law. See *Perez*, 135 S.

that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), do not require notice and comment rulemaking for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" (quoting 5 U.S.C. 553(b)(A)).

- e. Any communications with OMB, OIRA, or SBA, and any underlying facts, relating to designation of the 2020 Fee-Setting rulemaking or any subcomponent thereof as a "transfer payment," including any guidance or instructions relied on, and any policy or legal memoranda, or economic analyses developed or relied on for any such determination. *E.g.*, at 84 Fed. Reg. 37400 or 85 Fed. Reg. 46935:

alternative. Consistent with OMB Circular A-4, "Regulatory Analysis," the rule involves a transfer payment from one group to another. The Office

alternative. Consistent with the Office of Management and Budget (OMB) Circular A-4, "Regulatory Analysis," this rule involves a transfer payment from one group to another. The Office

- f. All records relating to the "determination" in the 2020 Fee Setting Rule that the rulemaking is "not significant," "significant," or "economically significant" for purposes of Executive Order 12866, and any communication with OMB or OIRA regarding the determination. See 84 Fed. Reg. 37430; 85 Fed. Reg. 46935:

*C. Executive Order 12866 (Regulatory Planning and Review):* This proposed rule has been determined to be economically significant for purposes of Executive Order 12866 (Sept. 30, 1993).

*C. Executive Order 12866 (Regulatory Planning and Review)*

This Final Rule has been determined to be economically significant for purposes of Executive Order 12866 (Sept. 30, 1993). The Office has

- g. On September 18, 2020, the PTO ran a "correction," that the rulemaking was "not significant." 85 Fed. Reg. 58282. Kindly provide all records relating to identification of any error in the earlier designation as "economically significant," and any correction of such error:

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

- h. All records relating to *non-inclusion* of the DOCX rule in the PTO's Regulatory Impact Analysis prepared in connection with the 2020 Fee Setting Rule, [https://www.uspto.gov/sites/default/files/documents/RIA\\_July2019.docx](https://www.uspto.gov/sites/default/files/documents/RIA_July2019.docx)
2. Please provide all communications with OMB or OIRA or SBA relating to the DOCX rule. This includes any communications in advance of the Notice of Proposed Rulemaking of July 31, 2019, and all communications relating to rulemaking RIN 0651-AD31 and Information Collection Control Numbers 0651-0031 and -0032.
3. At *Setting and Adjusting Patent Fees During Fiscal Year 2020*, RIN 0651-AD31, 83 Fed. Reg. 37487-88 (Aug. 1, 2018), 84 Fed. Reg. 37398-440 (Jul. 31, 2019), and 85 Fed. Reg. 46932, 43985 (Aug. 3, 2020) the PTO claims to have obtained OMB approval for the DOCX rule:

*P. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) requires that the Office consider the impact of paperwork and other information collection burdens imposed on the public. This Final Rule involves information collection requirements that are subject to review by the OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3549). The collection of information involved in this Final Rule

have been reviewed and previously approved by the 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. In addition, updates to the aforementioned information collections as a result of this Final Rule have been submitted to the OMB as non-substantive change requests.

Please provide all communications with OMB, OIRA, or SBA, relating to the DOCX rule that was prepared, submitted, and/or approved, and any guidance, instructions, policy memoranda, economic analyses, surveys, consideration of alternatives, information sought from the public, or other documents concerning legal, procedural, or economic justification for the claim developed in preparation for any submission to OMB, OIRA, or SBA, or any decision not to make such a submission. Please include sufficient context to identify the date on which any document was submitted to OMB, OIRA, or SBA.

4. Please provide all documents relating to assessment of burden on the public (as defined in 5 C.F.R. § 1320.3(b)(1)) of the DOCX rule. Please include:
- a. Documents sufficient to identify any effort to “consult with members of the public” as provided by 44 U.S.C. § 3506(c)(2)(A) and 5 C.F.R. § 1320.8(d)(1) concerning the DOCX rule (other than the notice and comment letters reflected at <https://www.uspto.gov/about-us/performance-and-planning/public-comments-setting-and-adjusting-patent-fees> and [PTAAARMIGAN | PTAAARMIGAN@PTAAARMIGAN.ORG | P.O. Box 590372, NEWTON, MA 02459](https://www.uspto.gov/about-us/performance-and-</a></p></div><div data-bbox=)

- [planning/public-comments-setting-and-adjusting-patent-fees-0](#) ), including any survey, any communications to or from the public (including the ABA, AIPLA, IPO, NAPP, IEEE-USA, and similar interested organizations);
- b. Any documents relating to assessment of burden of the DOCX rule under 44 U.S.C. § 3507(d)(1)(A), 5 C.F.R. § 1320.5(a)(3) or § 1320.11(b);
  - c. Any objective support provided to OIRA with any estimate of burden for the DOCX rule.

### **Delivery**

Please provide the requested material in its native electronic form such as Excel, Word or PDF, or other native electronic form that preserves all metadata, underlying electronic properties, and calculation formulae. PTAAARMIGAN prefers to receive the documents by email, at **ptaaarmigan@ptaaarmigan.org**. If the documents will exceed 10Mb, the preferred delivery is via a CD ROM or USB memory to P.O. Box 590372, Newton MA 02459, with a confirmation email.

### **Public Interest Fee Waiver**

Because the requests are confined to the rulemaking record for specific rules and Information Collection reviews, records should be readily located without search. PTAAARMIGAN anticipates that under 37 C.F.R. § 102.11(d)(4), no search fees should be assessed.

In the alternative, PTAAARMIGAN requests a public interest fee waiver because the requested records directly concern and bear upon the government's operations and activities, will be highly informative to the public regarding the PTO's policies, including on matters directly affecting thousands of patent and trademark holders and applicants.

In a second alternative, PTAAARMIGAN requests a public interest fee waiver because PTAAARMIGAN is a § 501(c)(4) public benefit organization, with no commercial, trade or profit interest, and seeks the records in support of its public benefit activities..

Upon receipt, we will make these records or their analysis publicly available on a website for use by journalists, scholars, students, and interested members of the public at no charge, and use the information in advocacy, reports, newsletters, and other public disseminations to advance our educational mission. Therefore, disclosure of the requested information "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."<sup>1</sup>.

We may be reached at the address below, if you have any questions.

Very truly yours,

PTAAARMIGAN

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<sup>1</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 37 C.F.R. § 102.11(k)(1).