

USPTO Should Address Risks to Its Pendency Reduction Efforts for Trademark Applications

FINAL REPORT NO. OIG-25-002-A

OCTOBER 24, 2024



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



October 24, 2024

MEMORANDUM FOR: Kathi Vidal
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office

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

SUBJECT: *USPTO Should Address Risks to Its Pendency Reduction Efforts
for Trademark Applications*
Final Report No. OIG-25-002-A

Attached for your review is our final report on our audit of the United States Patent and Trademark Office's (USPTO's) management of trademark pendency. Our objective was to determine whether USPTO exercised effective oversight and management of trademark pendency. Specifically, we assessed USPTO's development, monitoring, and reporting of trademark pendency measures, as well as the effectiveness of selected pendency reduction efforts.

We found that despite some progress in reducing pendency from its highest levels, USPTO still needs to improve oversight of trademark application pendency. Specifically, we found that:

- I. USPTO missed its pendency targets for multiple years and provided insufficient information in its reporting of pendency goals and results.
- II. USPTO's projections of future pendency reduction may not be achievable.

On October 4, 2024, we received USPTO's response to our draft report. In response to our draft report, USPTO concurred with all our recommendations and described actions it has taken, or will take, to address them. USPTO also provided technical comments. Appendix B contains the full text of USPTO's response.

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 our website pursuant to the Inspector General Act of 1978, as amended (5 U.S.C. §§ 404 & 420).

We appreciate the cooperation and courtesies extended to us by your staff during this audit. If you have any questions or concerns about this report, please contact me at (202) 793-2938 or Amni Samson, Director for Audit and Evaluation, at (202) 793-3324.

Attachment

cc: Derrick Brent, Deputy Director, USPTO
David Gooder, Commissioner for Trademarks, USPTO
Jay Hoffman, Chief Financial Officer, USPTO
Sean Mildrew, Deputy Chief Financial Officer and Audit Resolution Officer, USPTO
David Berdan, General Counsel, USPTO



Report in Brief

October 24, 2024

Background

The United States Patent and Trademark Office (USPTO) is responsible for registering trademarks that meet the requirements of the Trademark Act of 1946, as amended. Most of the examination process for trademark applications is performed by examining attorneys, who generally examine applications in the order in which they are filed. As part of its performance management, USPTO sets targets and reports results for two application pendency measures: first action pendency and total pendency. First action pendency measures the average number of months from the date of application filing to the examining attorney's first office action. Total pendency measures the average number of months from date of filing to notice of abandonment, notice of allowance, or registration for applications.

First action pendency increased from under 3 months in fiscal year (FY) 2019 to 8.5 months in FY 2023, and the backlog of unexamined applications grew by 256 percent over the same period. To address the increase, USPTO initially relied on hiring more examining attorneys and increasing the amount of overtime and production incentive awards available to examining attorneys. In FY 2023, USPTO developed a phased pendency reduction plan to be implemented in FY 2024. The plan includes strategies such as a new first-action production incentive award and training on more efficient search techniques. Reducing pendency is important because it affects applicants' ability to make timely business decisions.

Why We Did This Review

Our audit objective was to determine whether USPTO exercised effective oversight and management of trademark pendency.

UNITED STATES PATENT AND TRADEMARK OFFICE

USPTO Should Address Risks to Its Pendency Reduction Efforts for Trademark Applications

OIG-25-002-A

WHAT WE FOUND

We assessed USPTO's development, monitoring, and reporting of trademark pendency measures, as well as the effectiveness of selected pendency reduction efforts. We found that, despite some progress in reducing pendency from its highest levels, USPTO still needs to improve oversight of trademark application pendency. Specifically, we found that:

- I. USPTO missed its pendency targets for multiple years and provided insufficient information in its reporting of pendency goals and results.
- II. USPTO's projections of future pendency reduction may not be achievable.

Weaknesses in USPTO's processes for setting pendency targets and in some of its pendency reduction initiatives create the risk that trademark application pendency will continue at high levels longer than USPTO projects. In particular, USPTO's lack of sufficient long-term strategic goals and workforce plans leaves it vulnerable to changes in application filing trends. Without additional actions, USPTO may not meet applicants' needs for pendency levels that support timely business decisions.

WHAT WE RECOMMENDED

We recommended that the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office direct the Commissioner for Trademarks to:

1. Develop controls to ensure that pendency targets and revisions to the targets are clearly documented and included in any public materials.
2. Adopt a long-term pendency goal that accounts for stakeholder needs to allow for timely business decisions, particularly for international trademark applications subject to the Madrid Protocol.
3. Set targets for the trademark pendency-related key performance indicators in the *2022–2026 Strategic Plan*.
4. Update the trademark production model to include supportable, data-driven estimates of overtime usage.
5. Formalize a methodology for estimating and validating efficiency gains in the trademark production model.
6. Develop and implement a Trademarks workforce action plan that includes strategies to address challenges in recruitment and retention, milestones, roles of key organization components, measures of success, and a process to continuously assess and revise the plan.

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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

The United States Patent and Trademark Office (USPTO) is responsible for registering trademarks that meet the requirements of the Trademark Act of 1946, as amended. Most of the examination process for trademark applications is performed by examining attorneys, who generally examine applications in the order in which they are filed. This process includes a search for conflicting marks and an examination of the written application to determine whether the mark is eligible for registration.

As part of its performance management, USPTO tracks and reports the average time that trademark applications are pending examination. USPTO sets targets and reports on its website and in annual reports results for two application pendency measures: first action pendency and total pendency. First action pendency measures the average number of months from the date of application filing to the examining attorney's first office action.¹ Total pendency measures the average number of months from date of filing to notice of abandonment, notice of allowance, or registration for applications.²

First action and total pendency rose significantly in recent years. For example, first action pendency increased from under 3 months in fiscal year (FY) 2019 to 8.5 months in FY 2023, and the backlog of unexamined applications grew by 256 percent over the same period. A primary driver of trademark pendency is the number of filings USPTO receives. In FY 2020, as the COVID-19 pandemic began, USPTO expected trademark filings, along with general economic activity, to fall. However, in FY 2021 there was a 28 percent increase in trademark filings compared to FY 2020. This was 20 percent higher than USPTO's projections.

To address the increase in pendency, USPTO initially relied on hiring more examining attorneys and increasing the amount of overtime and production incentive awards available to examining attorneys. In FY 2023, USPTO developed a phased pendency reduction plan to be implemented in FY 2024. The plan includes numerous short- and long-term strategies, such as a new first-action production incentive award, training on more efficient search techniques, and increased information technology (IT) resources to combat system downtime and outages.

While USPTO's FY 2025 budget submission projects sustained annual reductions in pendency, USPTO expects pendency to remain higher than previous norms for the next several years. Reducing pendency is important because it affects applicants' ability to make timely business decisions. A first office action can provide feedback on the strength of an applicant's trademark rights, but high pendency levels could delay that feedback and drive businesses to make branding and marketing decisions with less certainty about their rights.

¹ The first office action provides an early indication of the issues that applicants need to address for the examining attorney to approve the application or, alternatively, that the application will be refused registration on legal or procedural grounds.

² This measure excludes applications that were previously suspended or were involved in proceedings at the Trademark Trial and Appeal Board.

We performed this audit to assess USPTO's response to the increase in trademark pendency and identify areas for improvement.

Objective, Findings, and Recommendations

Our objective was to determine whether USPTO exercised effective oversight and management of trademark pendency. Specifically, we assessed USPTO's development, monitoring, and reporting of trademark pendency measures, as well as the effectiveness of selected pendency reduction efforts. See appendix A for a more detailed description of our scope and methodology.

We found that, despite some progress in reducing pendency from its highest levels, USPTO still needs to improve oversight of trademark application pendency. Specifically, we found that:

- I. USPTO missed its pendency targets for multiple years and provided insufficient information in its reporting of pendency goals and results.
- II. USPTO's projections of future pendency reduction may not be achievable.

Weaknesses in USPTO's processes for setting pendency targets and in some of its pendency reduction initiatives create the risk that trademark application pendency will continue at high levels longer than USPTO projects. In particular, USPTO's lack of sufficient long-term strategic goals and workforce plans leaves it vulnerable to changes in application filing trends. Without additional actions, USPTO may not meet applicants' needs for pendency levels that support timely business decisions.

I. USPTO Missed Its Pendency Targets for Multiple Years and Provided Insufficient Information in Its Reporting of Pendency Goals and Results

USPTO develops and publishes annual pendency targets in its congressional budget justifications and publishes its results following the end of each FY in its *Agency Financial Report*. USPTO also publishes performance information throughout the year on its website.³ We reviewed the extent to which USPTO met its pendency targets from FYs 2019 – 2023. We also assessed whether USPTO accurately published its pendency performance information in accordance with federal guidance to properly inform stakeholders and justify resource needs to Congress. The U.S. Government Accountability Office's (GAO's) *Standards for Internal Control in the Federal Government* directs agencies to ensure that they externally communicate the necessary quality information to achieve the agency's objectives.⁴

³ See <https://www.uspto.gov/dashboard/trademarks/>.

⁴ U.S. Government Accountability Office, September 10, 2014. *Standards for Internal Control in the Federal Government*, GAO-14-704G. Washington, DC: GAO, 62 (Principle 15). Available online at <https://www.gao.gov/assets/gao-14-704g.pdf> (accessed December 11, 2023).

Pendency Targets

Since at least FY 2007, USPTO had set first action pendency goals in its strategic plans at less than 3.5 months. However, we found that following a surge⁵ in applications, trademark application first action pendency rose sharply starting in FY 2021. By FYs 2022 – 2023, first action pendency was more than double USPTO’s longstanding goals. USPTO raised its pendency targets repeatedly in response to the rising pendency—and in some cases revised the targets after publication—in the following year’s budget justification without clearly explaining the changes to those targets. This practice makes it harder for stakeholders and the public to understand USPTO’s performance in relation to its targets, its progress in achieving pendency goals, and how it is managing its workload. Table 1 shows USPTO’s first action targets, revised targets, and actual performance. Despite raising the targets, USPTO missed its first action targets in FYs 2021 and 2022.

Table 1. Trademark Application First Action Pendency, FYs 2019 – 2023

FY	First Action Pendency Target (months)	Revised First Action Pendency Target (months)	First Action Pendency Actual (months)
2019	3.5	N/A	2.6
2020	3.5	N/A	3.0
2021	3.5	4.5	6.3 (did not achieve goal)
2022	4.5	7.5	8.3 (did not achieve goal)
2023	6.5	8.5	8.5

Source: OIG analysis of USPTO’s congressional budget justifications

We found a similar pattern for total pendency. USPTO missed its total pendency targets in FYs 2022 and 2023 despite raising those targets and revising them in the following year’s budget justification. Table 2 displays USPTO’s total pendency targets, revised targets, and actual performance.

⁵ USPTO received 738,112 trademark applications in FY 2020 and projected 789,000 in FY 2021; however, it received 943,928 applications.

Table 2. Trademark Application Total Pendency, FYs 2019 – 2023

FY	Total Pendency Target (months)	Revised Total Pendency Target (months)	Total Pendency Actual (months)
2019	12.0	N/A	9.3
2020	12.0	N/A	9.5
2021	12.0	N/A	11.2
2022	12.0	13.5	13.8 (did not achieve goal)
2023	13.5	14.5	14.6 (did not achieve goal)

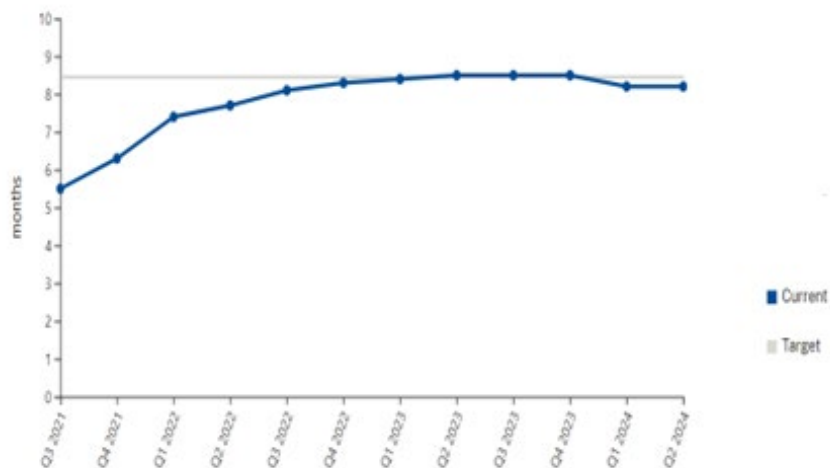
Source: OIG analysis of USPTO’s congressional budget justifications

Pendency target revisions

We found that USPTO’s trademarks dashboard also does not clearly report pendency performance because it does not display different annual targets across time. While the dashboard documents actual pendency levels over the last 3 years, it does not accurately display past pendency targets. Figure 1, which is taken from USPTO’s dashboard, incorrectly implies that the FY 2023 target of 8.5 months was in place in FY 2021. In fact, the FY 2021 target was 4.5 months.

Figure 1. USPTO’s Trademark First Action Pendency Dashboard

First Action Pendency, Last Three Years

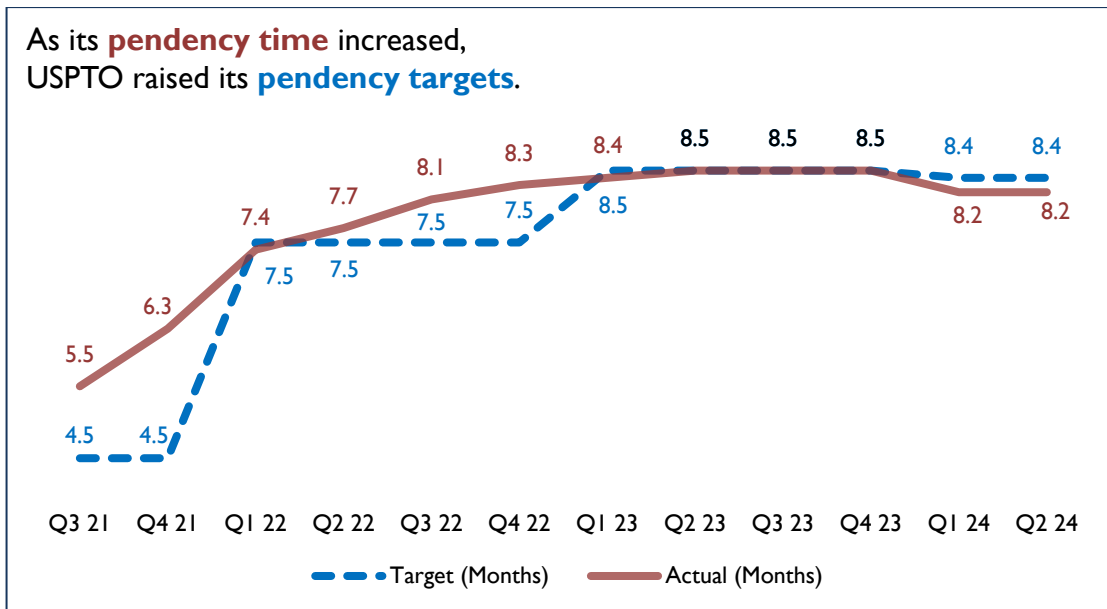


Source: USPTO’s Trademarks Dashboard as of April 30, 2024

Note: The current-year pendency target line extends to previous quarters that had a different target.

Figure 2 more accurately demonstrates USPTO’s performance by displaying the increase in pendency targets along with the increase in pendency.

Figure 2. Increases in First Action Pendency Time and Targets



Source: OIG analysis of USPTO’s Trademarks Dashboard and congressional budget justifications

USPTO officials told us that the pendency target revisions occur during validation of the prior year’s numbers in the current budget cycle. For example, during the submission of the FY 2025 budget, USPTO revalidates its FY 2024 targets. However, the budget justifications do not acknowledge or explain the revisions to the previously published targets. These revisions, combined with an unclear representation of historical pendency targets on the trademarks dashboard, make it difficult for stakeholders and the public to understand USPTO’s pendency targets and performance over time.

Defining long-term pendency goals

Given the repeated revisions to USPTO’s performance targets, we also assessed whether USPTO’s processes to set its pendency targets met GAO best practices. These guidelines stress the importance of defining long-term goals in the management of federal programs.⁶ We found that USPTO lacks long-term trademark pendency goals and measures to guide its planning and decision-making. USPTO did not set specific pendency goals in its 2022–2026 *Strategic Plan*, which it had done in every previous strategic plan dating back to at least 2007.⁷ USPTO officials told us that USPTO did not set a specific pendency goal in the current strategic plan because the application surge made it difficult to project future

⁶ See (1) GAO, July 12, 2023. *Evidence-Based Policymaking: Practices to Help Manage and Assess the Results of Federal Efforts*, GAO-23-105460. Washington, DC: GAO, 15. Available online at <https://www.gao.gov/assets/gao-23-105460.pdf> (accessed March 26, 2024); and (2) GAO, May 13, 2016. *DOD Needs to Incorporate Elements of a Strategic Management Planning Framework into Retrograde and Reset Guidance*, GAO-16-414. Washington, DC: GAO, 28. Available online at <https://www.gao.gov/assets/d16414.pdf> (accessed March 26, 2024).

⁷ USPTO’s 2022–2026 *Strategic Plan* contains an objective to improve trademark application pendency but does not establish a specific goal. USPTO’s four previous strategic plans contained an objective to maintain first action pendency under 3.5 months.

pendency and that they are still discussing long-term pendency goals with stakeholders. However, at this point, developing a long-term pendency goal would help USPTO align its multi-year efforts to reach appropriate staffing levels and reform its business processes.

Further, we found that USPTO has not set targets for all key performance indicators (KPIs) that relate to pendency in its current strategic plan. For example, the plan proposes to measure the use of certain software tools in the examination process and the amount of examination-related work conducted by non-attorneys. USPTO officials told us that they are still evaluating these activities.

USPTO's pendency performance may not meet the business planning needs of trademark applicants. As we noted, the first office action is an important milestone that helps applicants craft the branding and marketing strategies for their product or service. Further, USPTO officials told us that a first action in less than 6 months is important for international applications subject to the Madrid Protocol.⁸ However, USPTO projects that first action pendency will not drop below 6 months until FY 2027. USPTO officials also told us that a return to longstanding first action pendency levels under 3.5 months is unlikely in the foreseeable future.

Recommendations

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office direct the Commissioner for Trademarks to do the following:

1. Develop controls to ensure that pendency targets and revisions to the targets are clearly documented and included in any public materials.
2. Adopt a long-term pendency goal that accounts for stakeholder needs to allow for timely business decisions, particularly for international trademark applications subject to the Madrid Protocol.
3. Set targets for the trademark pendency-related KPIs in the *2022–2026 Strategic Plan*.

II. USPTO's Projections of Future Pendency Reduction May Not Be Achievable

In response to the rise in pendency, USPTO has taken several actions to increase its examination output and expects pendency to fall in future years. We could not assess the actions in USPTO's pendency reduction plan because USPTO was still implementing the plan during our audit. However, we assessed the effectiveness of the tools USPTO uses to adjust production capacity—overtime, production incentive awards, and hiring—and how it uses these and other inputs to project its needs and set pendency targets in light of federal guidance. GAO's *Standards for Internal Control in the Federal Government* directs agencies to ensure that they use quality information to achieve the agency's objectives and to

⁸ The Madrid Protocol, administered by the World Intellectual Property Organization, allows trademark owners worldwide to file one application to register their trademark in multiple countries. Applicants can claim a priority filing date if they file the international application within 6 months of filing a U.S. application. USPTO recommends that applicants wait to file the international application until they receive an office action from USPTO.

demonstrate a commitment to recruit, develop, and retain competent individuals.⁹ In addition, the U.S. Office of Personnel Management’s (OPM’s) *Workforce Planning Guide* provides a framework for comprehensive workforce planning and analysis in federal agencies.¹⁰

A. Production model assumptions may not be valid

USPTO models future application filings, productivity, and other factors over a 5-year period to set pendency targets and determine resource needs, such as additional trademark examining attorneys. For example, USPTO’s FY 2025 trademark production model projects that first action pendency will fall to under 5 months by FY 2029 based on an average of 88 new hires per year (table 3):

Table 3. Pendency and Hiring Projections for FYs 2025 – 2029

FY	First Action Pendency (months)	Total Pendency (months)	New Attorney Hires
2025	7.5	13.5	82
2026	6.3	11.3	87
2027	5.9	10.9	89
2028	5.5	9.5	93
2029	4.9	8.9	91

Source: OIG analysis of USPTO’s congressional budget justifications and FY 2025 production model

We reviewed the production model’s assumptions and outputs related to overtime, hiring, and production incentive awards. We compared these assumptions to recent trends and found that some of the assumptions may be invalid.

Overtime

We found that USPTO’s production model likely overstates the number of overtime hours its attorneys will work in the future. Most notably, the production model assumed that examining attorneys would use 73,034 hours of overtime in FY 2023, but examining attorneys only used 45,708 hours. This was 37.4 percent below USPTO’s projection—and 10.6 percent below overtime hours worked in FY 2019.¹¹ Further, there was a 15.5 percent drop in attorneys working overtime between FY 2019 (291 attorneys) and FY 2023 (246 attorneys). These trends indicate that the usefulness of overtime to increase

⁹ GAO-14-704G, 30 and 59 (Principles 4 and 13).

¹⁰ U.S. Office of Personnel Management, November 2022. *Workforce Planning Guide*. Washington, DC: OPM. Available online at <https://www.opm.gov/policy-data-oversight/human-capital-framework/reference-materials/talent-management/workforce-planning-guide.pdf> (accessed December 11, 2023).

¹¹ We used FY 2019 as a comparison because it was the last full year before the COVID-19 pandemic and the surge in trademark applications.

production may be limited. We found that growth in overtime may be constrained by the salary maximum for General Schedule employees, which caps employee salaries at level IV of the Executive Schedule.¹² Overtime may also be limited by personal preferences among examining attorneys, who, for example, may choose not to work overtime to maintain work-life balance. USPTO has not updated its overtime hours assumptions to account for current usage levels, but officials acknowledged to us that the assumed number of overtime hours in the FY 2025 production model is too high.

Hiring

By overestimating overtime hours, USPTO may underestimate the number of new hires it needs to achieve the pendency targets. This occurs because the hiring target is tied, in part, to the number of expected overtime hours from current attorneys. For example, when we replaced the assumed FY 2023 overtime hours with the actual number of overtime hours worked in the FY 2025 production model, the model showed USPTO would need to hire an additional 53 examining attorneys through FY 2029 to achieve the same pendency targets.

Production incentive awards

The production model also includes projections attributable to production incentive awards. However, we found that the production incentive awards increase USPTO implemented in FY 2020, which USPTO cited for us as an action it took to improve pendency, is unlikely to contribute significantly to higher production. When USPTO removed the highest tier of awards in FY 2019, when pendency was low, the drop in production attributable to the awards was just 2.7 percent of total production. In FY 2023, after the higher award tiers were restored, only 5 percent of examining attorneys achieved the highest tier in every quarter. One examining attorney told us that the apparent monetary value of the awards has fallen because the value has not changed with inflation.

Efficiency gains

We also found that additional assumptions related to production may not materialize. The FY 2025 production model estimates an efficiency gain among examining attorneys that ranges from 1.5 percent to 3.1 percent annually between FY 2025 and FY 2029. This value accounts for expected gains in productivity based on factors that include a greater proportion of simplified applications and enhancements to IT tools. However, USPTO does not have a clearly defined methodology for estimating and validating the efficiency gains and noted that there are internal disagreements with the validity of the values assumed in the model. Moreover, these efficiency gains have not yet materialized; instead, officials reported drags on productivity they attributed to several near-term challenges, such as transitions to new IT systems and increases in leave usage.

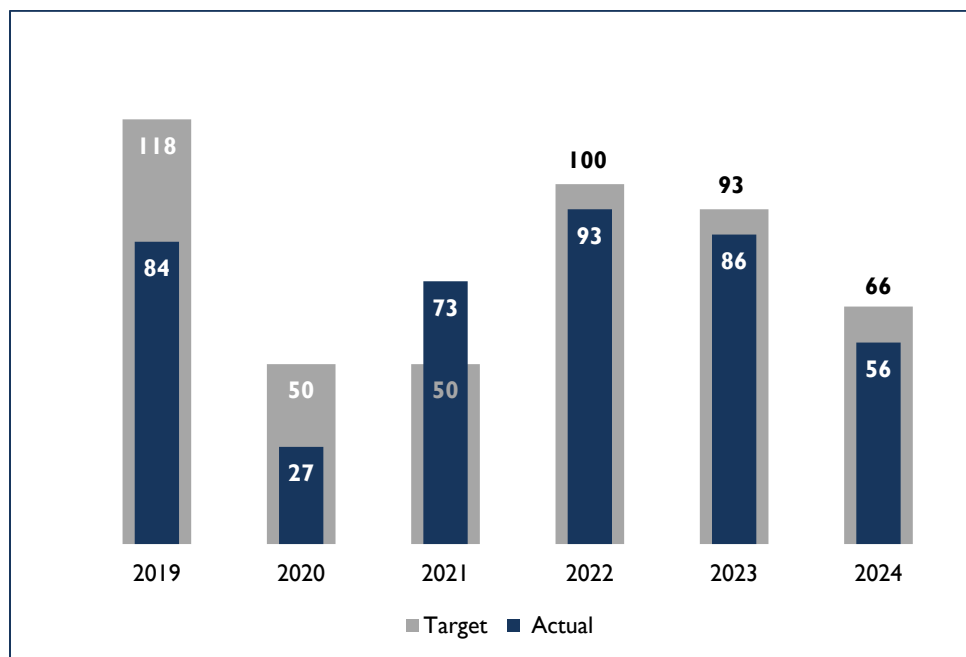
¹² See 5 U.S.C. § 5304(g)(1).

If the estimated efficiency gains do not materialize in the amount the FY 2025 production model assumes, USPTO may underestimate the number of new hires it needs to achieve its future pendency targets. For example, the production model assumes that there will be a 3.1 percent gain in efficiency for FY 2029. When we changed the assumed gain to 0 percent, the model indicated that USPTO would need to hire 68 additional examining attorneys to achieve its pendency target. These additional hires would require USPTO to hire more examining attorneys in 1 year than its maximum institutional capacity, according to USPTO officials. Without a reliable methodology to estimate and validate efficiency gains, USPTO may not have the examination resources to meet its pendency goals.

B. USPTO has not achieved trademark examining attorney hiring goals

We found that USPTO has not met its hiring goals for examining attorneys in recent years. For example, although USPTO had a goal of 66 new hires in FY 2024, it only hired 56 attorneys. From FYs 2019 through 2024, USPTO hired 58 fewer examining attorneys than planned (figure 3).

Figure 3. Trademark Examining Attorney Hiring Targets and Results, FYs 2019 – 2024



Source: OIG analysis of USPTO employee data

Note: USPTO deferred a hiring class from FY 2020 to FY 2021 due to pandemic planning.

USPTO officials told us they have faced challenges in finding a sufficient pool of qualified candidates. Attrition for examining attorneys, which has steadily increased from 4.6 percent in FY 2020 to 6.1 percent in FY 2023, adds to the challenges. We determined that these challenges may be exacerbated by a lack of strategic workforce planning. Workforce planning, as outlined by OPM, serves as the foundation for effective human

capital management. Core components of OPM's workforce planning model include conducting a detailed workforce analysis and developing a workforce action plan, which is continually evaluated and revised. The workforce action plan should emphasize recruitment and retention, retirement, scenario planning, and succession planning.

While USPTO did conduct some elements of workforce planning, such as analyzing workforce supply and demand and tracking annual hiring and attrition targets, it did not develop a formal workforce action plan that would address all relevant planning questions. USPTO should do so, given that it has not yet (1) updated its agency-wide strategic human capital plan to complement its current strategic plan or (2) developed a Trademarks-specific strategic human capital plan as it had intended.¹³ These plans help agencies identify future workforce demands and challenges and the human capital management initiatives agencies should use to meet them.

If hiring challenges persist, combined with the potential underestimation of hiring needs, USPTO may not be able to hire enough qualified staff to meet its pendency goals. Considering that 22 percent of examining attorneys were eligible for retirement as of February 2024, it is imperative that USPTO meet its hiring goals. While decreases in application filings below USPTO projections in FYs 2022 and 2023 have helped USPTO reduce pendency, filings may again exceed projections in future years. As a result, pendency could begin to rise again if USPTO does not hire sufficient staff.

Recommendations

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office direct the Commissioner for Trademarks to do the following:

4. Update the trademark production model to include supportable, data-driven estimates of overtime usage.
5. Formalize a methodology for estimating and validating efficiency gains in the trademark production model.
6. Develop and implement a Trademarks workforce action plan that includes strategies to address challenges in recruitment and retention, milestones, roles of key organization components, measures of success, and a process to continuously assess and revise the plan.

¹³ USPTO's *2011–2015 Strategic Human Capital Plan* stated that each business unit is required to develop a human capital plan that will target the human capital issues specific to that area.

Summary of Agency Response and OIG Comments

On October 4, 2024, we received USPTO's response to our draft report. In response to our draft report, USPTO concurred with all our recommendations and described actions it has taken, or will take, to address them.

USPTO also provided technical comments. We considered those comments and determined that no changes in the final report were needed. The first technical comment related to revisions to pendency targets in its budget justifications. USPTO noted that the budget justifications in our audit scope included a discussion of target revisions in either the executive summary or an appendix. While we acknowledge that the referenced congressional budget justifications discuss pendency target revisions in the Trademarks Five-Year Outlook sections, the discussion is limited to revisions from a baseline target of 3.5 months. There is no discussion of revisions to specific targets published in the previous FY's budget justification, as we explain in our finding. In addition, a separate technical comment identified USPTO's efforts to improve the production incentive award process. We became aware of these efforts in the course of our work, but the new awards were not in place long enough for us to assess them.

Appendix B contains the full text of USPTO's response. We are encouraged by the description of USPTO's efforts to address trademark pendency and look forward to reviewing its action plan for implementing our recommendations.

Appendix A: Objective, Scope, and Methodology

Our objective was to determine whether USPTO exercised effective oversight and management of trademark pendency. Specifically, we assessed USPTO's development, monitoring, and reporting of trademark pendency measures, as well as the effectiveness of selected pendency reduction efforts.

Our audit work focused on USPTO's trademark pendency management and reduction efforts from FY 2019 through the middle of FY 2024. To accomplish our objective, we performed the following actions:

- Reviewed the following regulations and documents:
 - GAO-14-704G, *Standards for Internal Control in the Federal Government*, dated September 2014
 - OPM's *Workforce Planning Guide*, dated November 2022
 - GAO-23-105460, *Evidence-Based Policymaking: Practices to Help Manage and Assess the Results of Federal Efforts*, dated July 2023
 - GAO-16-414, *DOD Needs to Incorporate Elements of a Strategic Management Planning Framework into Retrograde and Reset Guidance*, dated May 2016
 - USPTO's congressional budget justifications and submissions, FYs 2019 – 2025
 - USPTO's performance and accountability reports, FYs 2019 – 2021, and agency financial reports, FYs 2022 – 2023
 - USPTO's strategic plans: 2007 – 2012; 2010 – 2015; 2014 – 2018; 2018 – 2022; and 2022 – 2026
 - USPTO's *2011 – 2015 Strategic Human Capital Plan*
 - *Memorandum of Understanding between U.S. Patent and Trademark Office and National Treasury Employees Union, Chapter 245 Regarding Performance and Incentive Awards*
- Obtained an understanding of USPTO's processes for setting, monitoring, and reporting pendency and related performance and hiring goals by interviewing responsible USPTO officials.
- Assessed USPTO's trademark production model by validating the assumptions in the model.
- Assessed USPTO's monitoring of pendency levels and achievement of reported pendency and other performance targets, such as hiring and staffing goals.
- Analyzed USPTO's performance requirements and productivity data for trademark examining attorneys, including overtime hours worked, production incentive awards received, leave usage, and IT system downtime logged in time and attendance records.

- Interviewed a judgmental sample of 10 trademark examining attorneys and four managing attorneys to obtain an understanding of specific examination and hiring challenges USPTO faces. Because we judgmentally selected the interviewees, our results are limited to the examining attorneys and managers interviewed and cannot be projected to the population of all examining attorneys.

We gained an understanding of internal control processes significant within the context of the audit objective by interviewing USPTO officials and reviewing documentation for evidence of internal control procedures. We assessed USPTO internal controls that were significant to the audit objective in the components of control environment, risk assessment, information and communication, and monitoring. We identified weaknesses in the controls related to USPTO's development and public reporting of pendency targets and its recruitment and retention of qualified staff. While we identified and reported on internal control deficiencies, our audit found no instances of fraud, waste, or abuse.

In satisfying our audit objective, we did not rely solely on computer-processed data. However, we relied on computer-processed data from USPTO to analyze individual examining attorney production hours, overtime hours, and production incentive awards for FYs 2019 and 2023. We reviewed 1,440 attorney records in total, which included all examining attorneys for those FYs. Although we could not independently verify the reliability of all the information we collected, we compared it with other available supporting documents to determine data consistency and reasonableness. Based on these efforts, we believe the information we obtained is sufficiently reliable for this report.

We conducted this audit from October 2023 through September 2024 under the authority of the Inspector General Act of 1978, as amended (5 U.S.C. §§ 401–24), and Department Organization Order 10-13, as amended October 21, 2020. We performed our fieldwork remotely.

We conducted this performance audit in accordance with generally accepted government auditing standards. These standards require that we plan and perform our audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

Appendix B: Agency Response

USPTO's response begins on the following page.



UNITED STATES PATENT AND TRADEMARK OFFICE

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

MEMORANDUM

October 3, 2024

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

FROM: Kathi K. Vidal, Katherine (Kathi) Users, Vidal,
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office

SUBJECT: Response to Draft Report, "USPTO Should Address Risks to
Its Pendency Reduction Efforts for Trademark Applications"

Digitally signed by Users,
Vidal, Katherine (Kathi)
Date: 2024.10.03 17:32:07
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Executive Summary

We appreciate the effort you and your staff made in reviewing the United States Patent and Trademark Office's (USPTO) oversight and management of trademark pendency.

First action and final action (or total and disposal) pendency are the most visible metrics the USPTO shares with its domestic and international stakeholders. Trademark application pendency and the quality of examination remain the top priorities for the Commissioner for Trademarks and the USPTO.

For 15 years, maintaining first action pendency between 2.5 and 3.5 months and total pendency under 11.5 months was achievable given normal growth in the annual number of trademark applications. Following the COVID-19 pandemic related global and nationwide quarantines through the summer of 2020, new trademark applications began to rise culminating in stunningly high levels of filing in the fourth calendar quarter. This surge led to significant and unexpected increases in inventory and pendency. Since early 2021, the Commissioner for Trademarks has focused on pendency reduction through numerous initiatives, including increasing hiring, the launch of the Trademark Academy (to facilitate increased virtual onboarding and training), offering increased overtime and increased award payments to examiners, accelerating information technology improvements, and amending previous examination practices in an attempt to increase overall workflow. As a result, the growth in pendency and unexamined inventory essentially flattened. With additional initiatives that were launched in December of 2023, first action pendency decreased from an annual average of 8.5 months in FY 2023 to an annual average of about 7.5 months by the end

of FY 2024. During that same period, unexamined inventory decreased by approximately 100,000 classes, or about 20%.

The USPTO's responses to OIG's individual recommendations are discussed in detail below, and the USPTO's technical comments are attached.

OIG Recommendations

The OIG recommendation that the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office direct the Commissioner for Trademarks to take the following actions:

- 1. Develop controls to ensure that pendency targets and revisions to the targets are clearly documented and published.*

USPTO Response: The USPTO concurs with this recommendation.

The USPTO is keenly aware of the importance of transparency and communicating quality information to its internal and external stakeholders, especially regarding trademark pendency. The agency already communicates information regarding trademark pendency in several publications, available to the public, including:

- USPTO's annual Congressional Budget Justifications, which communicate pendency targets and any adjustments, if applicable (available on the [USPTO's Budget and Financial Information webpage](#)). For more information, see Technical Comment for Page 6, Paragraph 1, Sentence 3.
- USPTO's annual reports, which satisfy legislative reporting requirements and contain pendency targets and performance (available on the [USPTO's annual reports webpage](#)). For the past 22 years, the USPTO has received the [Certificate of Excellence in Accountability Reporting](#) award for its annual reports.
- The Trademarks Dashboard, which displays information about trademark pendency and targets, quality, and filings, and is updated quarterly (available on the USPTO [Data Visualization Center webpage](#)).
- The USPTO actively engages with the Trademark Public Advisory Committee (TPAC). The TPAC reviews policies, goals, performance, budget, and user fees of trademark operations and advises the Director of the USPTO on these matters. TPAC meetings run quarterly and are open to the public. Letters to Congress, TPAC meeting transcripts, and TPAC annual reports are published on the [TPAC webpage](#).

In FY 2025, the USPTO will enhance documentation of budget and reporting policies, to include a review of pendency-related publications by the newly created Strategic Management Division within the Trademark Office of Performance, Planning, and Financial Management. Additionally, to increase clarity to stakeholders, the agency is in

the process of adjusting the Trademarks Dashboard to display annual pendency targets for prior years, in addition to the current year. The dashboard enhancement is expected to publish in the first quarter of fiscal year 2025 (Q1, FY 2025).

- 2. Adopt a long-term pendency goal that accounts for stakeholder needs to allow for timely business decisions, particularly for international trademark applications, subject to the Madrid Protocol.*

USPTO Response: The USPTO concurs with this recommendation.

Trademarks is working to finalize a long-term pendency goal starting in FY 2025. For the past year, we have communicated a first action pendency goal of 4.5 months, which reflects the feedback we have received from stakeholders, balanced with optimizing operational needs. This goal appears to address stakeholder needs for timely business decisions, but also allows sufficient time for applicants to know whether it makes sense for them to file an international application based on the U.S. application via the Madrid Protocol.

- 3. Set targets for the trademark pendency-related KPIs in the 2022–2026 Strategic Plan.*

USPTO Response: The USPTO concurs with this recommendation.

In prior year Strategic Plans, the USPTO specified the pendency goal of “Maintain first action pendency between 2.5 and 3.5 months with 12 months or less for disposal pendency” because pendency had been maintained at that range for well over a decade. However, the agency entered FY 2022 with a significant inventory of unexamined applications attributed to the unprecedented increase in trademark filings in FY 2020 and FY 2021.

Although Trademarks had already embarked on plans to reduce pendency, there was justifiable uncertainty about setting pendency and pendency-related targets during the timeframe in which the 2022-2026 Strategic Plan was completed. However, the USPTO continued to actively set and manage pendency-related targets in our budget submissions and performance reporting to our internal and external stakeholders. The USPTO will include pendency-related KPI targets in the next (FY 2026-FY 2030) Strategic Plan.

- 4. Update the trademark production model to include supportable, data-driven estimates of overtime usage.*

USPTO Response: The USPTO concurs with this recommendation.

In FY 2019, prior to the pandemic, overtime usage was increasing 12% percent year-over-year. Consequently, the production model built in the expectation that pre-pandemic increases would return, especially with the introduction of financial incentives.

But that did not happen, resulting in projections being higher than actuals. The USPTO plans to account for this finding and adjust overtime hours downwards in the FY 2026 President's Budget submission.

- 5. Formalize a methodology for estimating and validating efficiency gains in the trademark production model.*

USPTO Response: The USPTO concurs with this recommendation.

Efficiency gains within the Trademark production model integrate historical observations, case studies, and benchmarking. Some initiatives affecting overall productions levels allow for direct numerical analysis. Other long-term, or more overarching initiatives, such as IT modernization and process changes, take longer to realize efficiency gains. The production model accounts for expected improvements for these types of initiatives, and when gains are realized, they are incorporated directly. By FY 2026, the Office of Performance, Planning, and Financial Management will document the methodology used to account for actual efficiency gains.

- 6. Develop and implement a Trademarks workforce action plan that includes strategies to address challenges in recruitment and retention, milestones, roles of key organization components, measures of success, and a process to continuously assess and revise the plan.*

USPTO Response: The USPTO concurs with this recommendation.

The USPTO has already advanced a number of actions to address these challenges. Trademarks realigned the organization in FY 2024 and created the Workforce Planning and Programs Office. This new group has hired Trademarks' first workforce planner and human resources (HR) liaison. The workforce planner forecasts staffing needs, addresses skill gaps, and helps develop proactive strategies to avoid misalignments that could negatively impact operations. The HR liaison focuses on improving collaboration between hiring managers and the USPTO's Office of Human Resources to refine job descriptions, attract better candidates, and bring more efficiency to the process.

Over the next year, the workforce planner will conduct an in-depth analysis of the current workforce's skills. Based on this analysis, the planner will develop a Trademarks Workforce Action Plan with targeted, written recommendations for closing identified gaps and associated measures of success. The planner will establish a process to continuously assess and revise the plan in coordination with Trademark senior leaders and managers. The USPTO expects to implement the plan in FY 2026.

The Workforce Planning and Programs Office is a critically important addition to Trademarks, but it will also leverage and incorporate the ongoing work of established committees that focus on the expansion of recruiting, hiring, training, and retention of examining attorneys. For example, in FY 2024, Trademarks staff participated in eight

recruitment events for examining attorneys, including visits to law schools, expos, conferences, and career fairs. Additional accomplishments towards these goals this year include the creation of a video highlighting the career benefits of becoming an examining attorney and hosting a virtual summit connecting examining attorneys with the public to answer questions about the position. Trademarks also completed a statistical analysis of the January 2024, hiring pool to help focus its recruitment and outreach efforts in underrepresented regions. Most recently, Trademarks staff met with two historically black colleges and university (HBCU) law schools to discuss the potential development of a recruitment webinar for students.

These recruitment efforts have shown results and continue to be expanded, but the USPTO also recognizes that retention of new staff is equally critical. Therefore, Trademarks recently introduced new training programs to support examining attorneys in their first two years; and uses employee engagement interviews and exit interviews and surveys to reduce turnover.

With the introduction of the Workforce Planning and Programs Office, Trademarks is well-positioned to significantly advance its HR and workforce planning capabilities. Trademarks' robust Workforce Action Plan will enhance the existing workforce planning efforts and strategically inform the organization's hiring plan.

Technical Comments:

Page 6, Paragraph 1, Sentence 3, “However, the budget justifications do not acknowledge or explain the revisions to the previously published targets”:

The FY 2019 Congressional Budget Justification’s Appendix VIII included sections for adjustments to performance targets, as applicable. Since then, the location for discussion of any target revisions moved to the Trademarks Five-Year Outlook section in the Executive Summary or to a separate Five-Year Outlook appendix. For details, see:

- [FY 2019 Congressional Budget Justification](#), Appendix VIII – FY 2019 Annual Performance Plan/FY 2017 Annual Performance Report, pages 139-140
- [FY 2022 Congressional Budget Justification](#), Executive Summary, Patent and Trademark Businesses: Five-Year Horizon, Trademark Business: Five-Year Horizon, page 12
- [FY 2023 Congressional Budget Justification](#), Executive Summary, Patent and Trademark Businesses: Five-Year Horizon, Trademark Business: Five-Year Horizon, pages 13-14
- [FY 2024 Congressional Budget Justification](#), Appendix I - Patent and Trademark Businesses Five-Year Outlook, pages 136-137
- [FY 2025 Congressional Budget Justification](#), Appendix I - Patent and Trademark Businesses Five-Year Outlook pages 112-113

Page 9, Paragraph 3, Sentence 2, “However, we found that the production incentive awards increase USPTO implemented in FY 2020, which USPTO cited for us as an action it took to improve pendency, is unlikely to contribute significantly to higher production.”

The FY 2020 production awards, despite being set at higher levels, did not result in higher production. Prior to FY 2020, about 70% of all examining attorneys took advantage of these awards. Recent data, as of FY 2024, indicated that about 55% of the examiners were participating in the incentive production program. This decrease in participation led the USPTO to implement a different production incentive award in FY 2024, aimed at increasing production. In addition to individual monthly awards, the USPTO introduced a group first action award. Subsequently, first actions increased more than the workload model had forecast. As of June 30, 2024, the model estimated an increase of 7.7% in completed first actions compared to that date in 2023, while actual first actions increased 12.5% more in that timeframe.