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| USPTO Seal | **Regulatory Impact**  **Analysis**  **Setting and Adjusting Patent Fees during Fiscal Year 2017 in accordance with  Section 10 of the Leahy-Smith America Invents Act**  **Final Rule**  **U.S. Department of Commerce United States Patent and Trademark Office  November 14, 2017** |
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# EXECUTIVE SUMMARY

* 1. Purpose

The Final Rule to set and adjust patent fees in accordance with section 10 of the Leahy-Smith America Invents Act (Act or AIA) (*see* “Setting and Adjusting Patent Fees during Fiscal Year 2017,” available at <https://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting>) is economically significant and results in a need for a Regulatory Impact Analysis (RIA) under Executive Order 12866 Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). The AIA grants the Director of the United States Patent and Trademark Office (USPTO or Office) authority to set or adjust by rule patent fees established, authorized, or charged under Title 35 of the United States Code (U.S.C.). Patent fees may be set or adjusted only to recover the aggregate estimated cost of the Office’s patent operations, including administrative costs.

This RIA analyzes the alternatives considered for the patent fee schedule presented in the Final Rule and measures the costs and benefits of the fee schedule in the final rule and the three alternatives that the Office considered in comparison to the Baseline (status quo or current fee schedule). The Office follows the guidance set forth in Office of Management and Budget (OMB) Circular A-4, “Regulatory Analysis,” in determining which data to provide in this final rule. Consistent with Circular A-4 and guidance from OMB on regulatory impact analysis, the user fees charged by the USPTO for its services are considered transfer payments that do not affect the total resources available to society, and therefore the changes to patent fees implemented by this rulemaking are transfers, and are not costs of this rulemaking. *See* OMB Circular A-4 and OMB’s “Regulatory Impact Analysis: A Primer,” (“Examples of transfer payments include . . . Fees to government agencies for goods or services provided by the agency”). These transfers are identified below, and consistent with OMB guidance, these transfers are not included in the estimates of the benefits and costs of this rulemaking.

The Office received one written comment related to the RIA in response to the Notice of Proposed Rulemaking (NPRM). This commenter states that the RIA should have considered more costs to the American economy. The Office appreciates the attention paid to the costs and benefits discussed in the RIA. The OMB Office of Information and Regulatory Affairs (OIRA) has indicated that it considers the final rule to be a transfer rule, concerning payments from one group to another that does not affect the total resources available to society. Further, monetizing and quantifying certain impacts of patent fees on the economy and the rate of innovation are inherently difficult due to the number of variables involved, the difficulty in predicting economic activity, and the availability of data, especially data on private sector behavior. The Office does provide some quantitative and qualitative data in the RIA to assist the reader in measuring the cost and benefits of the rulemaking.

* 1. Summary of Analysis

The Office analyzed four alternatives for how well they aligned to the Office’s rulemaking strategies and goals, which are comprised of strategic priorities (goals, objectives, and initiatives) from the *USPTO 2014-2018 Strategic Plan* (Strategic Plan) and the Office’s fee setting policy factors. From this conceptual framework, the Office assessed the absolute and relative qualitative costs and benefits of each alternative.

* Alternative 1: Final Rule Fee Schedule – Setting and Adjusting Patent Fees during Fiscal Year 2017 – The final fee schedule detailed in the final rule.
* Alternative 2: Unit Cost Recovery – A fee schedule that generally sets fees equal to their individual activity-based unit cost (where that information is available) to produce adequate revenue to fund approved budgetary requirements.
* Alternative 3: Across the Board Adjustment – A fee schedule that generally applies a 5.0 percent inflationary factor to the Baseline (Alternative 4) to produce adequate revenue to fund approved budgetary requirements.
* Alternative 4: Baseline – Fee schedule that became effective on January 14, 2017 (revision dated January 14, 2017).

The Office intentionally developed and considered alternatives, aside from the Baseline alternative, that would recover the aggregate cost to the Office, as presented in the Fiscal Year (FY) 2018 President’s Budget Submission (FY 2018 Budget). All four alternative fee schedules apply equally, regardless of an applicant or patent holder’s point of origin, technology, or sector of the economy. In so doing, all four alternatives are origin-neutral and technology-neutral. Likewise, the aggregate increase in revenue over the Baseline for the three remaining alternatives considered is small enough (less than five percent) that the Office does not anticipate any adverse market impacts for consumers, i.e., the marginal change in aggregate patent user fee payments from patent applicants and holders to the Office should not increase consumer prices or the supply of patented goods available in the marketplace. The Office does not anticipate that the adjustments in user fees under this final fee schedule will increase the compliance costs for users to obtain USPTO services. The Office’s analysis in this RIA revolves around two qualitative costs and benefits: (1) fee schedule design and (2) securing aggregate revenue to cover aggregate cost. This analysis does not include any monetized costs and benefits due to the Office’s interpretation of guidance to federal agencies in the OMB Circular A-4, “Regulatory Analysis,” direct guidance from OIRA, and a lack of sufficient data. As noted above, pursuant to Circular A-4 and OMB’s related guidance, the user fees charged by the USPTO for its services are transfer payments, and therefore the changes to patent fees implemented by this rulemaking are transfers, not costs.

Discussions of fee schedule design costs and benefits revolve around if, and how well, an alternative’s fee schedule, both individual fee amounts and their relationship to other fees in the fee schedule, aligns to the Office’s four key fee setting policy factors: foster innovation, align fees with the full cost of products and services, set fees to facilitate the effective administration of the patent and trademark systems, and offer application processing options for applicants. These four policy factors aim to tie individual fee changes to the Office’s core mission and strategic initiatives. The Office’s analysis of the four alternatives revealed that:

* Alternative 1, the Final Rule Fee Schedule, offers fee schedule design benefits due to the way the Office targeted fee changes that are aligned to the four policy factors while remaining uniquely responsive to public opinion as documented in the Office’s response to public comments detailed in the final rule.
* Alternative 2, the Unit Cost Recovery option, presents significant costs related to fee schedule design, because it essentially reverses the Office’s longstanding practice of setting some fees below cost to foster innovation. Instead, entry fees, or those initial fees required to access the patent system like filing, search, and examination fees, are significantly higher under this alternative, potentially serving as a barrier to entry for some innovators. Further, back-end fees (e.g., maintenance fees) are considerably lower under this alternative, which could serve as a motivation for maintaining low-value patents for longer than is beneficial to society.
* For Alternative 3, the Across the Board Adjustment, the fee schedule design offers no costs or benefits beyond the Baseline, because the fee schedule remains intact with changes only to the fee rates.
* Finally, the Baseline (Alternative 4) offers no new fee schedule design benefits or costs.
* In summary, while Alternatives 1, 3, and 4 have acceptable fee schedule designs, the fee schedule adjustments in Alternative 1 offer the greatest benefits over the Baseline.

Securing aggregate revenue to cover aggregate cost to the Office is the factor that assesses if, and how well, an alternative is projected to achieve the minimal level of revenue needed to sustain progress towards the Office’s core patent-related mission programs and the strategic priorities.  The Office discusses these programs and initiatives in detail in both the final rule and the FY 2018 Budget. *See* annual budget available at<http://www.uspto.gov/about-us/performance-and-planning/budget-and-financial-information>. In summary, improving patent quality, optimizing both patent backlog (the inventory of pending applications awaiting examination) and pendency (the time it takes to have a patent application examined), delivering high quality and timely Patent Trial and Appeal Board (PTAB) decisions, continuing investments in information technology (IT) system modernization and improvements, and building the patent operating reserve to the optimal level (three months of operating expenses) are key to the Office’s long-term commitment to help strengthen the intellectual property system.

The Office’s analysis reveals that:

* The Final Rule Fee Schedule (Alternative 1), and Across the Board Adjustment (Alternative 3) secure adequate aggregate revenue to fund the Office’s strategic priorities, but neither achieve the optimal three month patent operating reserve. Both meet the minimum patent operating reserve level in FY 2018 ($300 million) and gradually build towards the optimal three month patent operating reserve in the five year planning horizon.
* The Baseline (Alternative 4) provides sufficient resources to hire the same number of examiners, but will not provide sufficient resources to build the patent operating reserve to its minimum or to the optimal level in the five year planning horizon. Under this alternative, the operating reserve balance becomes negative in FY 2021, and, therefore, is not considered a viable option.
* Unit Cost Recovery (Alternative 2) does not secure the necessary aggregate revenue to sufficiently cover the Office’s strategic priorities to optimize the quality and timeliness of patent processing, deliver high quality and timely PTAB decisions, invest in modernizing the USPTO IT systems and infrastructure, or implement a sustainable funding model for operations. This alternative produces enough revenue to meet the minimum patent operating reserve level by the end of FY 2019, but does not keep building towards the optimal patent operating reserve level and, therefore, is not considered a viable option.
* In summary, there is no demonstrable difference in the benefits associated with Alternatives 1 and 3 for securing aggregate revenue to cover aggregate cost.
* When analyzing costs and benefits from the perspective of fee-paying patent stakeholders, the Office recognizes that any additional fees paid to the Office above the Baseline fee schedule (as is true for Alternatives 1, 2 and 3) represent transfers, in accordance with OMB guidance which states fees paid to government agencies for goods or services provided by the agency are transfer payments. *See* OMB Circular A-4. The Office does not anticipate that the adjustments in user fees under this final fee schedule will increase the compliance costs for users to obtain USPTO services.
* The opportunity cost of fees paid to the Office rather than invested in additional research and development (R&D), commercialization, or other activities that produce immediate and direct value to patent stakeholders warrants consideration in this analysis. However, monetizing and quantifying certain impacts of patent fees on the economy and the rate of innovation are inherently difficult due to the number of variables involved, the difficulty in predicting economic activity, and the availability of data, especially data on private sector behavior. For example, the Office only collects data on innovation activity that results in a patent application or other action. Innovative actions that do not result in fees paid to the Office for a defined service are not captured in the Office’s databases, thus making it challenging to estimate and forecast the true breadth and depth of the IP economy for patents. This analysis does not attempt to monetize these costs.

The Office’s analysis of these qualitative costs and benefits—fee schedule design and securing aggregate revenue to cover aggregate cost—is informed by activity based information, aggregate revenue estimates, and cost estimates related to the Office’s core mission programs and strategic initiatives. Where available, the Office uses this information to aid discussions about the magnitude of these sometimes competing qualitative costs and benefits to better inform discussions of net impacts.

* 1. Conclusion

This RIA concludes that the overall qualitative benefits to patent applicants, patent holders, other patent stakeholders, and society of the final rule fee schedule (Alternative 1) are significant. This RIA concludes that the final fee schedule has qualitative benefits related to the targeted fee changes reflected in the fee schedule design. Moreover, the final fee schedule secures aggregate revenue while adhering to the Office’s fee setting strategies and goals, as described in Part III of the final rule and below. Patent applicants and holders can expect continued progress towards the Office’s strategic priorities of quality enhancements and optimizing the timeliness of patent processing (through reductions to backlog and pendency) and delivering high quality and timely PTAB decisions. The final schedule will also provide the resources the Office estimates are necessary to continue investing in IT improvements for stakeholders of the patent business area and PTAB as they work to improve operations and the customer experience with the USPTO. Along with these improvements, the final schedule will allow the Office to build a viable patent operating reserve that fulfills the need to mitigate operational risk caused by financial resource volatility, i.e., unanticipated funding fluctuations. In addition, in the final rule, the Office focused on being responsive to stakeholder concerns, and scaled back some of the fee increases that had been proposed in the notice of proposed rulemaking.

* 1. Points of Contact
  + **Information:** Brendan Hourigan, Director of the Office of Planning and Budget, by telephone at (571) 272-8966; or Dianne Buie, Office of Planning and Budget, by telephone at (571) 272-6301.

# GENERAL INFORMATION

* 1. Statement of Need for Action

Per the fee setting authority of section 10 of the AIA, the USPTO is issuing a final rule to set or adjust patent fees to secure sufficient aggregate patent fee revenue for the Office. The fee schedule in the final rule will recover the aggregate estimated cost of patent operations while achieving the Office’s strategic goals as detailed in the Strategic Plan, which defines the USPTO’s mission, vision, and long-term goals and presents the actions the Office will take to realize those goals. The final rule supports all three of the patent-related strategic goals: (1) to optimize patent quality and timeliness; (2) to provide domestic and global leadership to improve IP policy, protection, and enforcement; and (3) to achieve organizational excellence.

With the final rule, the Office continues progress that started with the introduction of AIA fee setting authority. From 1982 until the passage of the AIA in 2011, the patent fees that generate most of the patent revenue (e.g., filing, search, examination, issue, and maintenance fees) were set by statute, and the Office could only adjust these fees to reflect changes in the Consumer Price Index for All Urban Consumers (CPI-U), as determined by the Secretary of Labor. Because these fees were set by statute, the USPTO could not realign or adjust fees to effectively respond to market demand or changes in processing costs other than for the CPI-U.

Over the years, a steady increase in patent application workload, insufficient hiring levels, and funding variations (including shortfalls) owing to statutory fees led to significantly longer patent application pendency and a large backlog of patent applications in inventory by 2011. Long pendency and a large backlog of patent applications delay the delivery of patented innovations to market, thereby jeopardizing economic growth and commercialization.

Section 10 of the AIA changed the Office’s fee setting model and authorized the USPTO to set or adjust patent fees through the regulatory process. Section 10 better equips the Office to respond to its rapidly growing workload.

In FY 2013, the USPTO used the AIA’s fee setting authority to align patent fees in a timely, fair, and consistent manner by setting fees to enable sufficient resources needed to meet the Office’s strategic priorities of quality enhancements, backlog and pendency optimization, high quality and timely PTAB decisions, IT improvements, and financial sustainability. With the additional fees collected as a result of the January 2013 Setting and Adjusting Patent Fees Final Rule, the Office has made considerable progress in reducing backlog and pendency: first action pendency fell from 21.9 months in FY 2012 to 16.2 months in FY 2016; total average pendency was reduced from 32.4 months in FY 2012 to 25.4 months in FY 2016; and the patent application backlog was reduced from 608,283 in FY 2012 to 537,655 at the end of FY 2016.

While the Office continues to build on the tangible successes of recent years, data suggests that the recent strengthening of the global economic environment will result in increased incoming application filings. The incoming workloads coupled with follow-on actions resulting from work already performed is projected to lead to larger workloads overall. Thus, the Office recognizes there is still progress to be made to further optimize backlog and pendency. The final rule details how the final fee schedule will produce the aggregate revenue needed to sustain progress towards Strategic Plan goals while also aligning to the key fee setting policy factors introduced in section 1. The goal of the final rule is to establish a fee schedule that better supports patent applicants and patent holders and therefore effects positive change on the innovation economy.

* 1. Scope

The scope of this fee setting effort is patent fees that are established, authorized, or charged under Title 35 of the U.S.C. Using section 10 of the AIA, the USPTO is setting or adjusting 202 patent fees—50 apply to large entities (any reference herein to “large entity” includes all entities other than those that have established entitlement to either a small or micro entity fee discount); 53 apply to small entities; 52 apply to micro entities; and 47 apply irrespective of entity size.

Upon further review of the final rule and source materials, and consistent with OMB Circular A-4 as discussed further below, the OIRA has indicated that it considers the final rule to be a transfer rule, concerning payments from one group to another that does not affect the total resources available to society, and thus does not trigger a detailed analysis of monetized costs and benefits within the meaning of Executive Order 12866 and related directives.  *See*, e.g., OMB’s “Regulatory Impact Analysis: A Primer” (“Examples of transfer payments include . . . Fees to government agencies for goods or services provided by the agency”). In short, the adjustments in patent fees provided for by this rule are transfers for purposes of this analysis, not costs. OIRA also concluded that it is very difficult to precisely monetize and quantify costs and benefits in a transfer rule such as the final rule.  In such cases when monetization of benefits and costs is not easily accomplished, OMB A-4 advises that agencies should “still describe the benefit or cost qualitatively.” Thus, the scope of this RIA for the final rule outlines the transfer and assesses the qualitative costs and benefits that accrue to patent applicants, patent holders, and other patent stakeholders in the United States.

Lastly, it is important to note that the USPTO administers patent examination subject to statutes created by the U.S. Congress and by judicial decisions made by the federal courts. The importance of patenting in the United States goes back to Article I, Section 8, of the Constitution, which gave Congress the power to grant “for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” Congress itself established the USPTO in the Patent Act and most USPTO policies regarding patent examination and post-grant procedures—detailed in the Manual of Patent Examining Procedure (MPEP)—follow directly from statute (found primarily in title 35 of the U.S. Code) or from various court decisions. In other words, the USPTO’s role is to examine patent applications in accordance with these various statutes and court decisions.

In accordance with the patent laws and USPTO’s Strategic Plan, the USPTO places a high priority on (1) the quality of patents issued and (2) the timeliness of patent examination. Timeliness is important from more than a customer-service perspective. Pending patent applications can introduce a high level of uncertainty over the precise nature of any pending claims that may be allowed (or ultimately abandoned). This can slow innovation in those sections of the technology space most highly related to the pending applications in question. The sooner that other players in that technology space know the precise disposition of the pending applications and the precise nature of any claims allowed, the better. This is especially true when the issued patents are of high quality, such that they are issued in compliance with all the requirements of Title 35 of the United States Code as well as the relevant case law at the time of issuance, and the property rights embedded in those patents are clear and well defined. Ultimately the goal of the USPTO is the timely disposition of patent applications, while properly applying the existing law to create clear, well-defined property rights.

* 1. Assumptions and Constraints
     1. Assumptions
* The time horizon for the analysis is FY 2017 – FY 2021.
* The planned effective date for the new fee rates is September 2017.
* As noted in the FY 2018 Budget, the projected patent operating reserve balance at the end of FY 2017 is $245 million.
* The budgetary requirements, developed through the budget formulation process and contained in the FY 2018 Budget, along with target patent operating reserve levels, represent the aggregate cost to the Office over the stated time horizon.
* Applying the guidance in OMB A-4 and guidance from OIRA, the payment of patent fees to USPTO for patent services is a transfer from one group to another that does not affect total resources available to society.
* The Office estimates the amount of transfer payments from patent applicants and patent holders (*see* Tables 3-6, 3-7, and 3-8) and discusses those amounts separately from the analysis of costs and benefits, and thus the analysis is qualified, not quantified (per OMB A-4). The Office also follows the guidance in OMB A-4 as a methodology for discounting transfers, including selecting appropriate discount rates.
* The average annual growth of serialized patent application filings is forecasted to be 1.7 percent over the period from FY 2017 through FY 2021. The Office estimates the growth in application filings using a regression model with real gross domestic product (RGDP) forecasts derived from the Congressional Budget Office (CBO), available at <https://www.cbo.gov/about/products/budget_economic_data>. The Office made calculations based on CBO’s August 2016 estimates.
* All dollar values in this document are in nominal terms, except those specifically identified otherwise (*see* Tables 3-6, 3-7, and 3-8). To calculate constant year (real) estimates for FY 2017 through FY 2021 (Base Year 2017), the Office used the CBO’s “10-Year Economic Projections” for the CPI-U. *See* CBO website, available at <https://www.cbo.gov/about/products/budget_economic_data>.
* All four alternative fee schedules apply equally, regardless of the point of origin, sector of the economy, or technology field of the applicants or patent holders. Based on FY 2015 USPTO data, and consistent with preliminary FY 2016 data on patent filings, the Office estimates that 49.3 percent of patent filings are domestic and 50.7 percent are foreign. This data is available in the workload tables in the Performance and Accountability Report (PAR), available at <https://www.uspto.gov/sites/default/files/documents/USPTOFY16PAR.pdf> .
* The Office used the Patent Pendency Model (PPM) to estimate patent production, workload, changes in backlog and pendency, and associated staffing levels for each alternative. A description of the PPM, including a simulation tool, is available for review at <http://www.uspto.gov/learning-and-resources/statistics/patent-pendency-model>.
* Each year, the Office conducts a rigorous budget formulation process that entails validating current year requirements and formulating the budget and out year requirements based on a number of production models, such as the PPM and the PTAB production models, as well as business cases for new initiatives.  The process is also based on a framework of continuous and comprehensive budget reviews designed to ensure that all operational and administrative costs are reviewed and funds are reallocated when necessary to focus on high-priority and effective programs—primarily core mission activities—and to mitigate risk by retaining operating reserve balances.
* The Office assumes that the relative similarity of the aggregate revenue totals for three of the four alternatives considered over the five-year horizon of this analysis does not produce variation in the PPM estimates. Therefore, all alternatives rely on a single PPM, which explains why backlog, pendency, and patents granted estimates are identical across these alternatives.
  + 1. Constraints
* Monetizing and quantifying certain impacts of patent fees on the economy and the rate of innovation are inherently difficult due to the number of variables involved, the difficulty in predicting economic activity, and the availability of data, especially data on private sector behavior. For example, the Office only collects data on innovation activity that results in a patent application or other action. Innovative actions that do not result in fees paid to the Office for a defined service are not captured in the Office’s databases, thus making it challenging to estimate and forecast the true breadth and depth of the IP economy for patents.
* The Office uses RGDP as a general proxy for the health of the domestic economy.
* Estimates appearing in this RIA should not be taken to mean that the USPTO has calculated specific monetized costs or benefits for purposes of economic impacts. Rather, some dollar values appearing in this RIA are necessary for the Office to comply with the Section 10 requirement that aggregate revenue recover aggregate cost for purposes of setting or adjusting fees for patent services.
* The Office acknowledges that there may be some price elasticity as a result of the fee changes in the Final Rule Fee Schedule (Alternative 1) and Across the Board Adjustment (Alternative 3); however, the Office did not quantify this impact as the change in demand for services is expected to be negligible based on the individual fee adjustment proposals. For the Unit Cost Recovery (Alternative 2), the Office recognizes that there would be elasticity related to both the increased entry fees and the lowered maintenance fee rates. Because of the difficulty in identifying the precise cross price elasticity, for the purposes of this analysis, the Office maintained consistent workloads across the alternatives in order to compare fee schedules on a static base.
* The Office received one written comment related to the RIA in response to the NPRM. This commenter states that the RIA should have included more costs to the American economy. Specifically, the commenter suggested that patent applications, patent issues, and maintenance fee payments would decrease, all of which would lead to lost jobs, lost wages, and an increased trade deficit. The Office appreciates the attention paid to the costs and benefits detailed in the RIA. OIRA has indicated that it considers the final rule to be a transfer rule, concerning payments from one group to another that does not affect the total resources available to society. The Office recognizes that innovation has become a principal driver of the modern economy by stimulating economic growth and creating high-paying jobs. However, monetizing and quantifying certain impacts of patent fees on the economy and the rate of innovation are inherently difficult due to the number of variables involved, the difficulty in predicting economic activity, and the availability of data, especially data on private sector behavior. The Office does provide some quantitative and qualitative data in the RIA to assist the reader in measuring the cost and benefits of the rulemaking. The Office follows the guidance set forth in Circular A-4 in determining which data to provide in this final rule.
  1. Patent System Overview

An analysis of the qualitative costs and benefits associated with the final fee schedule requires a basic understanding of the overall patent system. A detailed description of the patent process can be found on the USPTO Web site at <http://www.uspto.gov/patents/process/index.jsp>.

A U.S. patent is a property right granted to an inventor by the Government of the United States of America to exclude others from making, using, offering for sale, or selling an invention throughout the United States or importing the invention into the United States for a limited time in exchange for public disclosure of the invention when the patent is granted. Patents promote and incentivize innovation by granting inventors certain short-term exclusive rights to their inventions. This limited exclusive right is intended to stimulate inventive activity in multiple ways. First, the exclusivity made possible by a patent incentivizes inventors to undertake R&D and inventive labor. Second, an exclusive patent right incentivizes commercialization of an invention in the marketplace. That is, inventors may bring their inventions to market by self-commercialization or by either licensing (to earn royalties) or selling their inventions to other market participants (e.g., larger companies) who in turn commercialize that invention. Third, patent exclusivity provides a means for inventors to obtain capital financing (e.g., through venture capital) to self-commercialize. In exchange for exclusive rights to the invention, an inventor must disclose the invention to the public. Public disclosure of information helps avoid redundant R&D by others and promotes the dissemination of new technology and the development of innovations that build on current technology. A broad disclosure of the technology occurs when a patent application is published 18 months from the earliest effective filing date. A more specific disclosure on the scope of claims allowed occurs when the patent is granted.

The economy benefits from new products and services that would not otherwise be commercialized. Patented technologies are the source of entirely new industries (e.g., 3D printing technology), help bring new products and services to market (e.g., drugs and medical devices), and support new job creation (*see* Intellectual Property and the U.S. Economy: 2016 Update, available at <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>).

An efficient and effective patent system provides tools to protect new ideas and investments in innovation and creativity. In this way, an effective and efficient patent system benefits both inventors and the economy. Without timely, clear, and effective patent rights, the value of IP and capital decreases, and uncertainty in the legal rights of new products increases. As a result, investments are either misdirected or not undertaken, and costly litigation is more likely to occur. Achieving thisdepends, in part, on the USPTO’s success in optimizing the patent application backlog and pendency—both of which stall the delivery of innovative goods and services to the market and impede economic growth and the creation of high-paying jobs. As noted throughout this document, the final fee schedule, as described in the final rule, aims to continue the Office’s successes over the past three fiscal years through enhancements (quality), optimization (backlog and pendency), and modernizations (IT systems). The changes in fee rates are not expected to have a material adverse impact on the level (or amount) of broad public disclosure and subsequent commercialization. As discussed in the elasticity supplement (*see* “USPTO Setting and Adjusting Patent Fees during Fiscal Year 2017—Description of Elasticity Estimates,” available at <http://www.uspto.gov/patent/laws-and-regulations/america-invents-act-aia/fees-and-budgetary-issues>), the impact of the final fee rate changes on demand for services and the associated public disclosure is expected to be negligible.

On the topic of commercialization, the Office recognizes that securing a patent is an early step in the sometimes long and often expensive process of transforming an innovation into a consumer product. Legal fees, research and development (more expensive in some industries than in others), licensing and royalties (where applicable), marketing, and production are all elements of the commercialization process in addition to patent fees. Given that patent fees are generally a proportionately small expense, the impact of the final fee rate changes on consumers of patented products—in the form of higher prices or fewer market choices—is also projected to be negligible.

# OVERVIEW OF ANALYSIS

* 1. Overview of Alternatives

The Office considered a total of four patent fee schedule alternatives.

* Alternative 1: Final Rule Fee Schedule – Setting and Adjusting Patent Fees during Fiscal Year 2017 – The fee schedule detailed in the final rule.
* Alternative 2: Unit Cost Recovery – A fee schedule that generally sets fees equal to their individual activity-based unit cost (where that information is available).
* Alternative 3: Across the Board Adjustment – A fee schedule that generally applies a 5.0 percent inflationary factor to the Baseline (Alternative 4) to produce adequate revenue to fund budgetary requirements and build towards the optimal three month patent operating reserve level.
* Alternative 4: Baseline – Fee schedule that became effective on January 14, 2017 (revision dated January 14, 2017).
  1. Methodology

The Office considered the qualitative impact of costs and benefits for each alternative, using key indicators when applicable. This section presents three methodologies used to develop information for this RIA: (1) activity-based costing; (2) aggregate patent fee revenue projections; and (3) aggregate patent cost projections.

* + 1. Activity-based costing

The Office used activity-based costing (ABC) methodology to execute the strategy of setting individual fees to further the key fee setting policy factor of aligning fees to the cost for the Office for providing the particular service. The historical cost of a particular service is derived from the Office’s Activity-Based Information (ABI) program. A discussion of the Office’s methodology and results is available in a separate document titled “USPTO Setting and Adjusting Patent Fees during Fiscal Year 2017 – Activity Based Information and Patent Fee Unit Expense Methodology,” available at <https://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting>. The Office used ABI cost data to inform most individual fee amounts in Alternative 2: Unit Cost Recovery.

While the Office does not use historical cost information to directly assess any costs or benefits in this RIA, where available, this information allowed the Office to assess how well different fee amounts aligned to their cost.

* + 1. Aggregate Fee Revenue Projections

The final rule provides an extensive discussion of how the Office projects aggregate fee revenue (the total amount of money transferred to the USPTO by patent applicants and patent holders) by analyzing the RGDP (the broadest measure of economic activity) and other influential factors such as non-domestic patent activity, legislation, process efficiencies, fee changes, and anticipated applicant behavior. Additional detail about the Office’s aggregate fee revenue estimates for each alternative, including projected workloads by fee is available in “USPTO Setting and Adjusting Patent Fees during Fiscal Year 2017 – Aggregate Revenue Tables,” available at <http://www.uspto.gov/patent/laws-and-regulations/america-invents-act-aia/fees-and-budgetary-issues>. For a discussion of how the Office projects revenues for each of the alternatives considered, see the “Setting and Adjusting Patent Fees during Fiscal Year 2017 – Aggregate Revenue Estimating Methodology” supplement, available at <http://www.uspto.gov/patent/laws-and-regulations/america-invents-act-aia/fees-and-budgetary-issues>.

In summary of the supplementary information listed above, to estimate aggregate revenue for the Baseline and other alternatives, the Office analyzed the relevant factors and indicators described above to estimate prospective fee workload volumes for the five-year planning horizon (FY 2017 – FY 2021). For the Baseline and other alternatives, the Office is assuming the same workloads. The differences lie in the fee rates between alternatives and with the inclusion and discontinuation of fees found only in Alternative 1. The Office recognizes that most fees have some price elasticity, especially for the Unit Cost Recovery (Alternative 2), as discussed earlier in 2.3.2 “Constraints.” However, adjusting workloads for this alternative to account for such elasticity is not a part of this analysis. Lastly, the Office also prepares a high-to-low range of fee collection estimates to account for the inherent sensitivity and volatility of predicting fluctuations in the economy and market environment. In this RIA, however, the projections presented are the mid-point fee collection estimates to simplify the analysis. Table 3-1 shows several of the Office’s planning metrics and their forecasted values at the end of the five-year period. The availability of aggregate revenue directly impacts the Office’s ability to deliver services per its performance commitments. The Baseline and three other alternatives use the same planning metrics shown in Table 3-1 when estimating aggregate revenue.

**Table 3-1**

|  |  |
| --- | --- |
| **Planning Metrics** | **Baseline and Alternatives** |
| Average First Action Pendency in FY 2021 | 9.9 months |
| Average Total Pendency in FY 2021 | 19.0 months |
| Total Serialized Application Filings FY 2017 – FY 2021 | 2.2 million |
| Total Patents Granted FY 2017 – FY 2021 | 1.6 million |

* + 1. Aggregate Patent Cost

The basis for calculating the aggregate patent cost is the routine USPTO budget formulation and planning process (*see also* Part IV of the final rule). The USPTO budget is a five-year plan (prepared annually) for carrying out base programs and implementing strategic priorities. The estimated budgetary requirements (i.e., those presented in the FY 2018 President’s Budget) are the same for the Baseline and all alternatives. Aggregate patent cost is the total of estimated budgetary requirements and targeted patent operating reserve levels. Table 3-2 provides the projected aggregate patent revenue (including other income) and aggregate patent cost for each alternative.

**Table 3-2**

| **Projected Aggregate Patent Cost and Aggregate Patent Revenue by Alternative (dollars in millions)** | | | | | |
| --- | --- | --- | --- | --- | --- |
|  | **FY 2017** | **FY 2018** | **FY 2019** | **FY 2020** | **FY 2021** |
| **Budgetary Requirements** | $2,986 | $3,176 | $3,231 | $3,273 | $3,365 |
| **Optimal Patent Operating Reserve Level** | $746 | $794 | $808 | $818 | $841 |
| **Alternative 1: Final Rule Fee Schedule –– Aggregate Patent Revenue** | $2,876 | $3,274 | $3,229 | $3,350 | $3,447 |
| *EOY Patent Operating Reserve Alternative 1:* | $245 | $343 | $341 | $418 | $501 |
| **Alternative 2: Unit Cost Recovery – Aggregate Patent Revenue** | $2,883 | $3,221 | $3,235 | $3,311 | $3,363 |
| *EOY Patent Operating Reserve Alternative 2:* | $251 | $296 | $300 | $338 | $336 |
| **Alternative 3: Across the Board Adjustment– Aggregate Patent Revenue** | $2,877 | $3,299 | $3,249 | $3,373 | $3,474 |
| *EOY Patent Operating Reserve Alternative 3:* | $245 | $368 | $386 | $486 | $595 |
| **Alternative 4: Baseline – Aggregate Patent Revenue** | $2,865 | $3,141 | $3,094 | $3,213 | $3,309 |
| *EOY Patent Operating Reserve Alternative 4:* | $233 | $199 | $63 | $4 | ($51) |

Over the five-year timeframe of this analysis (FY 2017 – FY 2021), the Office projects that the Final Rule Fee Schedule (Alternative 1) and Across the Board Adjustment (Alternative 3) would secure a sufficient amount of aggregate revenue to sustain progress on the Office’s core mission programs and strategic initiatives. The Baseline (Alternative 4) does not generate enough revenue to achieve the patent operating reserve minimum balance of $300 million.  While Unit Cost Recovery (Alternative 2), achieves the operating reserve minimum balance, it does not build towards the optimal three month patent operating reserve.  Section 4 provides detailed discussions of each alternative.

* 1. Overview of the Qualitative Costs and Benefits Across Alternatives

A high-level overview of the qualitative costs and benefits assessed in this RIA follows in this section. Section 4 presents a more thorough description of each alternative and assesses the relative costs and benefits. A summary of the identified qualitative costs and benefits for each alternative is contained inTable 3-3 below.

**Table 3‑3**

| **Costs, Benefits, and Transfers** | | | | |
| --- | --- | --- | --- | --- |
|  | **Alternative 4** | **Alternative 1** | **Alternative 2** | **Alternative 3** |
|  | **Baseline** | **Final Rule Fee Schedule** | **Unit Cost Recovery** | **Across the Board Adjustment** |
| **Costs:** | | | | |
| Secure Aggregate Revenue to Cover Aggregate Cost | Significant | *See benefits* | Moderate | *See benefits* |
| Fee Schedule Design Costs | Neutral | *See benefits* | Significant | Neutral |
| **Overall Costs** | **Moderate** | **Neutral** | **Significant** | **Neutral** |
| **Benefits:** | | | | |
| Secure Aggregate Revenue to Cover Aggregate Cost | *See costs* | Significant | *See costs* | Significant |
| Fee Schedule Design Benefits | Neutral | Significant | *See costs* | Neutral |
| **Overall Benefits** | **Neutral** | **Significant** | **Neutral** | **Moderate** |
| **Transfers:** | | | | |
| Aggregate Increase in User Fee Payments | **Neutral** | **Minimal** | **Minimal** | **Minimal** |
| **Overall Net Benefits/Costs** | **Moderate Cost** | **Significant Benefit** | **Significant Cost** | **Moderate Benefit** |

### Qualitative Costs

This section summarizes features of the alternatives that represent a cost to one or more stakeholder groups. Table 3-4 shows the major qualitative costs associated with the alternatives considered in this analysis. If a cost applies to a certain alternative, it is denoted with a checkmark.

**Table 3‑4**

| **Cost Description** | **Alternative 4**  **Baseline** | **Alternative 1**  **Final Rule Fee Schedule –** | **Alternative 2**  **Unit Cost Recovery** | **Alternative 3**  **Across the Board Adjustment** |
| --- | --- | --- | --- | --- |
| Secure Aggregate Revenue to Cover Aggregate Cost | ✓ | -- | ✓ | -- |
| Fee Schedule Design | -- | -- | ✓ | -- |

The Baseline (Alternative 4) and Unit Cost Recovery (Alternative 2) have a cost for securing sufficient aggregate revenue to cover aggregate cost because the revenue they are expected to produce over the five-year period would not allow the USPTO to meet its strategic goals, specifically building towards a three month optimal operating reserve for patents. Alternative 2 also has a cost related to fee schedule design because it is counter to the Office’s general philosophy to charge applicants and holders lower front-end fees and higher back-end fees when they have more information about the relative value of their innovation. These costs will be discussed in more detail in Section 4.

### 3.3.2 Qualitative Benefits

This section summarizes features of the alternatives that represent a benefit to one or more stakeholder groups. Table 3-5 shows the major qualitative benefits associated with the alternatives considered in this analysis. If a benefit applies to a certain alternative, it is denoted with a checkmark.

Table 3‑5

| **Benefit Description** | **Alternative 4**  **Baseline** | **Alternative 1**  **Final Rule Fee Schedule** | **Alternative 2**  **Unit Cost Recovery** | **Alternative 3**  **Across the Board Adjustment** |
| --- | --- | --- | --- | --- |
| Secure Aggregate Revenue to Cover Aggregate Cost | -- | ✓ | -- | ✓ |
| Fee Schedule Design Benefits | -- | ✓ | -- | -- |

Both the Final Rule Fee Schedule (Alternative 1) and Across the Board Adjustment (Alternative 3) secure sufficient aggregate revenue to cover aggregate cost. However, the only alternative that offers benefits beyond the current fee schedule design is Alternative 1. These benefits will be discussed in more detail in Section 4.



### Transfer Estimates

OMB Circular A-4 details the importance of distinguishing between real costs and transfer payments. Circular A-4 states that “benefit and cost estimates should reflect real resource use. Transfer payments are monetary payments from one group to another that do not affect total resources available to society.” OMB’s “Regulatory Impact Analysis: A Primer” cites “fees to government agencies for goods or services provided by the agency” as an example of transfer payments. Circular A-4 states that transfer payments should be addressed “in a separate discussion of the regulation’s distributional effects.”

The distributional effects of the final rule are considered to be minimal given the fee increases contemplated and the equal application of fees to all users of USPTO services, as described herein. The level of transfer payments would increase by less than five percent over five years for all three alternatives. Further, the USPTO’s final fee schedule and the other three alternatives discussed herein apply fees for each service equally, regardless of the customer’s point of origin, technology, or sector of the economy.

The Baseline fee revenue for all patent fees was used to estimate the Baseline transfer amount. This is a reasonable baseline estimate, because these fees represent the current patent fee schedule, in the absence of pending rulemakings.

Circular A-4 states that a discount factor should be used to adjust for differences in timing. As stated in Circular A-4, invested resources “will normally earn a positive return, so current consumption is more expensive than future consumption, since you are giving up that expected return on investment when you consume today.” Similarly, “people generally prefer present to future consumption. They are said to have positive time preference.” Circular A-4 states that estimates should be provided using both three percent and seven percent discount rates, to show the sensitivity of the estimates to the discount rate assumption.

Table 3-6, Table 3-7, and Table 3-8 compare the undiscounted and three and seven percent discounted amounts of transfers for Alternatives 1, 2, and 3 to the Baseline. Dollar values reflected in Table 3-6, Table 3-7 and Table 3-8 are in constant FY 2017 dollars using the CBO estimate of CPI-U as the inflation index. The Office calculates transfers as the total amount of money paid by patent applicants and patent holders to the Office over the Baseline estimate. Across undiscounted and three and seven percent discount rates, the Office estimates the increase in transfers to be the greatest for the Across the Board Adjustment (Alternative 3), when compared to the Baseline. The Final Rule Fee Schedule (Alternative 1) is the next highest for the undiscounted, three and seven percent discount transfers, with Unit Cost Recovery (Alternative 2) as the third highest.

**Table 3‑6**

| **Patent Fee Transfers (Aggregate Fee Revenue)[[1]](#footnote-2) by Alternative – *Undiscounted* (Constant FY 2017 dollars in millions)** | | | | | | |
| --- | --- | --- | --- | --- | --- | --- |
|  | **FY 2017** | **FY 2018** | **FY 2019** | **FY 2020** | **FY 2021** | **Total** |
| **Baseline (Alternative 4) – Fee Revenue** | $2,841 | $3,047 | $2,946 | $3,012 | $3,047 | $14,894 |
| **Alternative 1: Final Rule Fee Schedule – Fee Revenue** | $2,852 | $3,178 | $3,076 | $3,142 | $3,175 | $15,424 |
| *Transfer Amount from Baseline for Alternative 1* | *$11* | *$130* | *$130* | *$130* | *$128* | *$530* |
| **Alternative 2: Unit Cost Recovery – Fee Revenue** | $2,859 | $3,125 | $3,082 | $3,105 | $3,097 | $15,268 |
| *Transfer Amount from Baseline for Alternative 2* | *$18* | *$78* | *$135* | *$93* | *$50* | *$374* |
| **Alternative 3: Across the Board Adjustment– Fee Revenue** | $2,853 | $3,202 | $3,095 | $3,164 | $3,200 | $15,513 |
| *Transfer Amount from Baseline for Alternative 3* | *$12* | *$154* | *$149* | *$151* | *$153* | *$619* |

**Table 3‑7**

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Patent Fee Transfers (Aggregate Fee Revenue)[[2]](#footnote-3) by Alternative – 3% *Discount* (Constant FY 2017 dollars in millions)** | | | | | | | |
|  | **FY 2017** | **FY 2018** | **FY 2019** | **FY 2020** | **FY 2021** | **Total (Net Present Value)** | **Annualized (Net Present Value)** |
| **Baseline (Alternative 4) – Fee Revenue** | $2,758 | $2,872 | $2,696 | $2,677 | $2,628 | $13,631 | $2,976 |
| **Alternative 1: Final Rule – Fee Revenue** | $2,769 | $2,995 | $2,815 | $2,792 | $2,739 | $14,110 | $3,081 |
| *Transfer Amount from Baseline for Alternative 1* | *$11* | *$123* | *$119* | *$115* | *$111* | *$479* | $105 |
| **Alternative 2: Fee Cost Recovery – Fee Revenue** | $2,776 | $2,946 | $2,820 | $2,759 | $2,671 | $13,972 | $3,051 |
| *Transfer Amount from Baseline for Alternative 2* | *$18* | *$74* | *$124* | *$82* | *$43* | *$341* | $74 |
| **Alternative 3: Across the Board Adjustment – Fee Revenue** | $2,770 | $3,018 | $2,833 | $2,811 | $2,760 | $14,192 | $3,099 |
| *Transfer Amount from Baseline for Alternative 3* | *$12* | *$146* | *$137* | *$134* | *$132* | *$561* | $122 |

**Table 3‑8**

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Patent Fee Transfers (Aggregate Fee Revenue)[[3]](#footnote-4) by Alternative – 7% *Discount* (Constant FY 2017 dollars in millions)** | | | | | | | |
|  | **FY 2017** | **FY 2018** | **FY 2019** | **FY 2020** | **FY 2021** | **Total (Net Present Value)** | **Annualized (Net Present Value)** |
| **Baseline (Alternative 4) – Fee Revenue** | $2,655 | $2,662 | $2,405 | $2,298 | $2,172 | $12,192 | $2,974 |
| **Alternative 1: Final Rule Fee Schedule – Fee Revenue** | $2,666 | $2,775 | $2,511 | $2,397 | $2,264 | $12,613 | $3,076 |
| *Transfer Amount from Baseline for Alternative 1* | *$11* | *$113* | *$106* | *$99* | *$92* | *$421* | $103 |
| **Alternative 2: Fee Cost Recovery – Fee Revenue** | $2,672 | $2,730 | $2,516 | $2,369 | $2,208 | $12,495 | $3,047 |
| *Transfer Amount from Baseline for Alternative 2* | *$17* | *$68* | *$111* | *$71* | *$36* | *$303* | $74 |
| **Alternative 3: Across the Board Adjustment – Fee Revenue** | $2,666 | $2,796 | $2,527 | $2,414 | $2,281 | $12,684 | $3,094 |
| *Transfer Amount from Baseline for Alternative 3* | *$11* | *$134* | *$122* | *$116* | *$109* | *$492* | $120 |

* 1. Summary of the Final Rule Fee Schedule (Alternative 1)

The Accounting Statement (as shown in Table 3-9) summarizes the qualitative costs and benefits as well as other impacts of the patent fee schedule set forth in the final rule. Overall, this Final Rule Fee Schedule (Alternative 1) has significant qualitative benefits to patent applicants, patent holders, other patent stakeholders, and society, with no identified qualitative costs.

Table 3‑9

| **Agency/Program Office: United States Patent and Trademark Office**  **Rule Title: Setting and Adjusting Patent Fees during Fiscal Year 2017**  **RIN#: 0651-AD02**  **Date: November 14, 2017** | | | | |
| --- | --- | --- | --- | --- |
| ***Category*** | ***Primary Estimate*** | ***Minimum Estimate*** | ***Maximum Estimate*** | ***Source Citation*** |
|  | **FY 2017 – FY 2021** | | |  |
| **BENEFITS (*see* section 4 for a detailed explanation of the benefits related to the baseline and alternatives)** | | | | |
| Incremental Unquantified (Qualitative) Benefits | The final fee schedule allows for enhanced quality and timely patent application processing, continued delivery of high quality and timely PTAB decisions, continued investments in modernizing the USPTO IT systems and infrastructure, and gradually building towards a viable patent operating reserve. This significantly increases the value of patents by advancing commercialization of new technologies sooner and reducing uncertainty regarding the scope of patent rights, which fosters innovation and has a positive effect on economic growth. The fee schedule design is also improved over the current fee schedule to better support key policy factors. | | | RIA Section 4 |
| **COSTS (*see* section 4 for a detailed explanation of the costs related to the baseline and alternatives)** | | | | |
| Incremental Unquantified (Qualitative) Costs | The Office does not anticipate that the adjustments in the final fee schedule will increase the compliance costs for users to obtain USPTO services. | | | RIA Section 4 |

| **TRANSFERS (*see* section 3 for a detailed explanation of Transfers)** | | | | |
| --- | --- | --- | --- | --- |
| Total Monetized Transfers: “On Budget” | $556 | $528 | $584 | RIA Section 3 |
| From Whom to Whom | From patent applicants and patent owners to the U.S. Government | | |  |
| **Other Impacts** | | | | |
| ***Category*** | ***Effects*** | | | ***Source Citation*** |
| Effects on State, Local, and/or Tribal Governments | n/a | | | n/a |
| Effects on Small Businesses | Changes in patent fees can affect further innovation and commercialization by small entities. The patent fee schedule maintains existing and creates new discounts for small and micro entities for certain fees. The estimated impact on small businesses is addressed in the Final Regulatory Flexibility Analysis. | | | Final Regulatory Flexibility Analysis (FRFA) |
| Effects on Growth | The impact of patent fee changes on fostering innovation, which helps drive economic growth, was an important factor in this analysis. The final fee schedule is expected to produce the revenue needed to enhance quality and reduce backlog and pendency, resulting in a decrease in uncertainty. | | | RIA |

The qualitative benefits of the Final Rule Fee Schedule (Alternative 1) are (1) improvements in the design of the fee schedule when bearing in mind key policy factors and (2) securing sufficient aggregate revenue to cover aggregate cost.

As to the first benefit, the design of the Final Rule Fee Schedule (Alternative 1) includes several changes that would better achieve fee setting policy factors than the current fee schedule. Specifically, the final fee schedule continues to foster innovation, competitiveness, and economic growth by keeping front-end fees below the Office’s costs to minimize barriers to entry into the patent system. Also, Alternative 1 consists of carefully targeted fee adjustments rather than increasing all fees. These targeted adjustments have been set to facilitate the effective administration of the patent system. Finally, Alternative 1 provides an additional patent prosecution option for applicants through a new streamlined reexamination option and establishes additional small and micro entity discounts for current services. In the final rule, the Office focused on being responsive to stakeholder concerns, and scaled back some of the proposed fee increases.

The final fee schedule also supports the goal of building a sustainable funding model by securing a minimum patent operating reserve balance in FY 2018 and gradually building from there. With the final fee schedule, the Office focuses on gradually building the patent operating reserve in order to create resiliency against financial shocks. Because the Office scaled back some of the fee increases in response to public comments, the patent operating reserve will grow more gradually than what was presented in the NPRM and the initial RIA. Thus, the operating reserve will not meet the optimal level in the five year planning horizon. While the optimal level will not be met in the five year horizon, the final fee schedule brings the Office closer to achieving the three month reserve target. The reserve would be available during a period of unanticipated reductions in revenue or increases in operating expenses, such as during a domestic or global economic crisis, or major departures from the estimated number of patent applications received.

No qualitative costs are identified for the Final Rule Fee Schedule (Alternative 1).

The transfers identified in the Final Rule Fee Schedule (Alternative 1) represent the aggregate increase in user fee payments. The additional fee revenue will allow the Office to: continue strengthening work products, processes, services, and measurements of patent quality at all stages of the patent process; optimize patent application backlog and pendency (continuing work to decrease the backlog of patent applications in inventory); continue delivery of high quality and timely PTAB decisions; continue investing in modernizing the USPTO IT systems and infrastructure; and gradually build towards the optimal three month patent operating reserve balance.

In summary, based on the analysis of costs and benefits, the overall benefit of the Final Rule Fee Schedule is the most significant. For a negligible cost, Alternative 1 supports key policy factors better than the other alternatives or the Baseline.

# ANALYSIS OF BASELINE AND ALTERNATIVES

The Office identified three alternative patent fee schedules and assessed them against the current patent fee schedule (Baseline) to assess their ability to meet the final rule’s strategies and goals. The subsections below provide a detailed description of the Baseline and other alternatives. Each description contains an overview of the key indicators impacting the costs and benefits of the alternative.

* 1. Baseline (Alternative 4, Current Fee Schedule)

**Table 4-1**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Patent Cost and Revenue by Alternative** | | | | | | |
| **(dollars in millions)** | | | | | | |
|  | **FY 2017** | **FY 2018** | **FY 2019** | **FY 2020** | **FY 2021** | **Total** |
| **Budgetary Requirements** | $2,986 | $3,176 | $3,231 | $3,273 | $3,365 | $16,031 |
| Alternative 4: Baseline – Fee Revenue | $2,841 | $3,117 | $3,070 | $3,189 | $3,285 | $15,502 |
| Other Income | $24 | $24 | $24 | $24 | $24 | $119 |
| **Aggregate Revenue** | $2,865 | $3,141 | $3,094 | $3,213 | $3,309 | $15,621 |
| Operating Reserve | $233 | $199 | $63 | $4 | ($51) | n/a |
| Optimal Operating Reserve | $746 | $794 | $808 | $818 | $841 | n/a |
| **Operating Reserve Surplus (Deficit)** | ($513) | ($595) | ($745) | ($814) | ($892) | n/a |

* + 1. Description of the Baseline

The Baseline for this analysis is the patent fee schedule that became effective on January 14, 2017 (revision dated January 14, 2017). The Office estimates that the Baseline would generate approximately $2.84 billion in patent fees during FY 2017, which is approximately $57 million more than the Office collected in FY 2016.

The Baseline would not secure aggregate revenue to cover aggregate cost presented in the FY 2018 Budget. Under the Baseline, the Office only expects to collect sufficient revenue to continue executing some, not all, of the Office priorities. For example, in FY 2017, it is estimated that 300 examiners will be hired so the Office can continue to reduce the patent application backlog and pendency. The Baseline provides sufficient resources to hire the same number of examiners, but will not provide sufficient resources to build the patent operating reserve to its minimum or to the optimal level in the five year planning horizon. Under this alternative, the operating reserve is completely exhausted by FY 2021, when it would actually have a negative balance by year-end. Without a reserve, the Office would be at greater risk for having financial crises and short-term disruptions in revenue impact operations and progress on strategic goals.

* 1. Alternative 1 – Final Rule Fee Schedule – Setting and Adjusting Patent Fees during Fiscal Year 2017

**Table 4-2**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Patent Cost and Revenue by Alternative** | | | | | | |
| **(dollars in millions)** | | | | | | |
|  | **FY 2017** | **FY 2018** | **FY 2019** | **FY 2020** | **FY 2021** | **Total** |
| **Budgetary Requirements** | $2,986 | $3,176 | $3,231 | $3,273 | $3,365 | $16,031 |
| Alternative 1: Final Rule Fee Schedule – Fee Revenue | $2,852 | $3,250 | $3,205 | $3,326 | $3,423 | $16,058 |
| Other Income | $24 | $24 | $24 | $24 | $24 | $119 |
| **Aggregate Revenue** | $2,876 | $3,274 | $3,229 | $3,350 | $3,447 | $16,177 |
| Operating Reserve | $245 | $343 | $341 | $418 | $501 | n/a |
| Optimal Operating Reserve | $746 | $794 | $808 | $818 | $841 | n/a |
| **Operating Reserve Surplus (Deficit)** | ($502) | ($451) | ($467) | ($400) | ($341) | n/a |

* + 1. Description of Alternative 1

The Final Rule Fee Schedule (Alternative 1) is the recommended fee schedule set forth in the final rule. Transitioning to the final fee schedule in FY 2017 would provide the USPTO with a 0.4 percent increase in fee collections over the Baseline fee collection level, assuming a September 2017 effective date. Once fully transitioned to the new fee collection level, the Office estimates that FY 2018 fee collections would exceed FY 2018 Baseline fee collections by 4.3 percent. The aggregate revenue would be sufficient to recover the aggregate cost of patent operations, to support the Office’s strategic priorities to continue progress on patent quality initiatives, continue reduction of the patent application backlog and pendency, continue delivery of high quality and timely PTAB decisions, continue investing in modernizing the USPTO IT systems and infrastructure, and implement a sustainable funding model for operations. With Alternative 1, the Office projects to meet the minimum patent operating reserve level in FY 2018 and, from there, gradually build toward reaching the optimal patent operating reserve balance. The FY 2021 optimal reserve balance is projected to be $841 million, and the projected reserve level entering the fiscal year is $418 million. The USPTO will continue to assess the patent operating reserve balance against its target balance annually, and at least every two years, the Office will evaluate whether the target balance continues to be sufficient to provide the funding stability needed by the Office. It is important for the Office to balance accomplishing the priorities together so that once it achieves goals, it has sufficient resources to maintain them. The final fee schedule also aligns with the Office’s fee setting policy factors.

Like the Baseline, the Final Rule Fee Schedule (Alternative 1) sets many fees either below or above unit cost consistent with the key policy factors of fostering innovation, facilitating effective administration of the patent system, and offering patent prosecution options for applicants (*see* Table 4-3). The final fee schedule also maintains the front-end/back-end balance that has been the cornerstone of the patent fee schedule design for years.

**Table 4-3**

|  |  |  |
| --- | --- | --- |
| **Utility Patent Fee Rates** | | |
|  | **Baseline Fee Rate** | **Alternative 1 Fee Rate** |
| Filing | $280 | $300 |
| Search | $600 | $660 |
| Examination | $720 | $760 |
| First RCE | $1,200 | $1,300 |
| **Front-End Fees** | **$2,800** | **$3,020** |
| Issue | $960 | $1,000 |
| 1st Stage Maintenance | $1,600 | $1,600 |
| 2nd Stage Maintenance | $3,600 | $3,600 |
| 3rd Stage Maintenance | $7,400 | $7,400 |
| **Back-End Fees** | **$13,560** | **$13,600** |
| **Total Fees** | **$16,360** | **$16,620** |

As shown in Table 4-3, the fees for securing and maintaining a patent through a typical prosecution sequence for its full 20-year term increases by $260 (1.6 percent) under the Final Rule Fee Schedule (Alternative 1). Assuming a three percent discount rate, the net present value of investing in a patent for Alternative 1 is $12,400, compared to a net present value of $12,157 for the Baseline.

Section 4.2.3 presents securing aggregate revenue to cover aggregate cost and the fee schedule design as benefits of this alternative and presents numerous examples of how this alternative is uniquely responsive to stakeholder feedback in ways the other alternatives are not. Section 4.2.2 notes that there are no identified qualitative costs in this alternative.

Table 4-4 presents fee adjustments included in the Final Rule Fee Schedule (Alternative 1) that have the greatest impact on patent revenue. Large, small, and micro entity dollar and percent changes are compared to current large, small, and micro entity fees. A complete list of fee changes for Alternative 1 can be found in the document titled “Table of Patent Fee Changes – Current, Final and Unit Cost Recovery,” available at <http://www.uspto.gov/patent/laws-and-regulations/america-invents-act-aia/fees-and-budgetary-issues>.

Table 4‑4

| **Alternative 1 – Final Rule Fee Schedule – Setting and Adjusting Patent Fees During Fiscal Year 2017 Current and Final Fees** | | | | | | |
| --- | --- | --- | --- | --- | --- | --- |
| **Description** | **Current Fees** | | | **Final Fees** | | |
| **Large Entity Fee** | **Small Entity Fee** | **Micro Entity Fee** | **Large Entity Fee** | **Small Entity Fee** | **Micro Entity Fee** |
|
|  |
|
| Basic Filing fee – Utility (paper filing also requires non-electronic filing fee under 1.16(t)) | $280 | $140 | $70 | $300 | $150 | $75 |
| **7%** | **7%** | **7%** |
| Basic Filing Fee – Utility (electronic filing for small entities) | n/a | $70 | n/a | n/a | $75  **7%** | n/a |
| Basic Filing Fee – Design | $180 | $90 | $45 | $200 | $100 | $50 |
| **11%** | **11%** | **11%** |
| Basic Filing Fee – Design (CPA) | $180 | $90 | $45 | $200 | $100 | $50 |
| **11%** | **11%** | **11%** |
| Basic Filing Fee – Plant | $180 | $90 | $45 | $200 | $100 | $50 |
| **11%** | **11%** | **11%** |
| Provisional Application Filing Fee | $260 | $130 | $65 | $280 | $140 | $70 |
| **8%** | **8%** | **8%** |
| Basic Filing Fee – Reissue | $280 | $140 | $70 | $300 | $150 | $75 |
| **7%** | **7%** | **7%** |
| Basic Filing Fee – Reissue (CPA) | $280 | $140 | $70 | $300 | $150 | $75 |
| **7%** | **7%** | **7%** |
| Surcharge – Late Filing Fee, Search Fee, Examination Fee or Oath or Declaration, or Application Filed Without at least One Claim or by Reference | $140 | $70 | $35 | $160 | $80 | $40 |
| **14%** | **14%** | **14%** |
| Each Independent Claim in Excess of Three | $420 | $210 | $105 | $460 | $230 | $115 |
| **10%** | **10%** | **10%** |
| Each Reissue Independent Claim in Excess of Three | $420 | $210 | $105 | $460 | $230 | $115 |
| **10%** | **10%** | **10%** |
| Each Claim in Excess of 20 | $80 | $40 | $20 | $100 | $50 | $25 |
| **25%** | **25%** | **25%** |
| Each Reissue Claim in Excess of 20 | $80 | $40 | $20 | $100 | $50 | $25 |
| **25%** | **25%** | **25%** |
| Multiple Dependent Claim | $780 | $390 | $195 | $820  **5%** | $410  **5%** | $205  **5%** |
| Submission of sequence listings of 300MB to 800MB (NEW) | n/a | n/a | n/a | $1,000 | $500 | $250 |
| **n/a** | **n/a** | **n/a** |
| Submission of sequence listings of more than 800MB (NEW) | n/a | n/a | n/a | $10,000 | $5,000 | $2,500 |
| **n/a** | **n/a** | **n/a** |
| Utility Search Fee | $600 | $300 | $150 | $660 | $330 | $165 |
| **10%** | **10%** | **10%** |
| Design Search Fee | $120 | $60 | $30 | $160 | $80 | $40 |
| **33%** | **33%** | **33%** |
| Plant Search Fee | $380 | $190 | $95 | $420 | $210 | $105 |
| **11%** | **11%** | **11%** |
| Reissue Search Fee | $600 | $300 | $150 | $660 | $330 | $165 |
| **10%** | **10%** | **10%** |
| Utility Examination Fee | $720 | $360 | $180 | $760 | $380 | $190 |
| **6%** | **6%** | **6%** |
| Design Examination Fee | $460 | $230 | $115 | $600 | $300 | $150 |
| **30%** | **30%** | **30%** |
| Plant Examination Fee | $580 | $290 | $145 | $620 | $310 | $155 |
| **7%** | **7%** | **7%** |
| Reissue Examination Fee | $2,160 | $1,080 | $540 | $2,200 | $1,100 | $550 |
| **2%** | **2%** | **2%** |
| Utility Issue Fee | $960 | $480 | $240 | $1,000 | $500 | $250 |
| **4%** | **4%** | **4%** |
| Reissue Issue Fee | $960 | $480 | $240 | $1,000 | $500 | $250 |
| **4%** | **4%** | **4%** |
| Design Issue Fee | $560 | $280 | $140 | $700 | $350 | $175 |
| **25%** | **25%** | **25%** |
| Plant Issue Fee | $760 | $380 | $190 | $800 | $400 | $200 |
| **5%** | **5%** | **5%** |
| Petition for the Delayed Payment of the Fee for Maintaining a Patent in Force | $1,700 | $850 | | $2,000 | $1,000 | $500 |
| **18%** | **18%** | **-41%** |
| Request for Continued Examination (RCE) – 1st Request (*see* 37 CFR 1.114) | $1,200 | $600 | $300 | $1,300 | $650 | $325 |
| **8%** | **8%** | **8%** |
| Request for Continued Examination (RCE) – 2nd and Subsequent Request (*see* 37 CFR 1.114) | $1,700 | $850 | $425 | $1,900 | $950 | $475 |
| **12%** | **12%** | **12%** |
| Submission of an Information Disclosure Statement | $180 | $90 | $45 | $240 | $120 | $60 |
| **33%** | **33%** | **33%** |
| Certificate of Correction | $100 | | | $150 | | |
| **50%** | | |
| Processing Fee for Correcting Inventorship in a Patent | $130 | | | $150  **15%** | | |
| *Ex Parte* Reexamination (§ 1.510(a)) Streamlined (NEW) | n/a | n/a | n/a | $6,000 | $3,000 | $1,500\* |
| **n/a** | **n/a** | **n/a** |
| Each Reexamination Independent Claim in Excess of Three and Also in Excess of the Number of Such Claims in the Patent Under Reexamination | $420 | $210 | $105 | $460 | $230 | $115 |
| **10%** | **10%** | **10%** |
| Each Reexamination Claim in Excess of 20 and Also in Excess of the Number of Claims in the Patent Under Reexamination | $80 | $40 | $20 | $100  **25%** | $50  **25%** | $25  **25%** |
| Notice of Appeal | $800 | $400 | $200[[4]](#footnote-5)\* | $800 | $400 | $200\* |
| **0%** | **0%** | **0%** |
| Forwarding an Appeal in an Application or *Ex Parte* Reexamination Proceeding to the Board | $2,000 | $1,000 | $500\* | $2,240 | $1,120 | $560\* |
| **12%** | **12%** | **12%** |
| *Inter Partes* Review Request Fee – Up to 20 Claims | $9,000 | | | $15,500 | | |
| **72%** | | |
| *Inter Partes* Review Post-Institution Fee – Up to 15 Claims | $14,000 | | | $15,000 | | |
| **7%** | | |
| *Inter Partes* Review Request of Each Claim in Excess of 20 | $200 | | | $300 | | |
| **50%** | | |
| *Inter Partes* Post-Institution Request of Each Claim in Excess of 15 | $400 | | | $600 | | |
| **50%** | | |
| Post-Grant or Covered Business Method Review Request Fee – Up to 20 Claims | $12,000 | | | $16,000 | | |
| **33%** | | |
| Post-Grant or Covered Business Method Review Post-Institution Fee – Up to 15 Claims | $18,000 | | | $22,000 | | |
| **22%** | | |
| Post-Grant or Covered Business Method Review Request of Each Claim in Excess of 20 | $250 | | | $375 | | |
| **50%** | | |
| Post-Grant or Covered Business Method Review Post-Institution Request of Each Claim in Excess of 15 | $550 | | | $825  **50%** | | |
| Petition for Revival of an Abandoned Application for a Patent, for the Delayed Payment of the Fee for Issuing Each Patent, or for the Delayed Response by the Patent Owner in any Reexamination Proceeding | $1,700 | $850 | | $2,000 | $1,000 | $500 |
| **18%** | **18%** | **-41%** |
| Petition for the Delayed Submission of a Priority or Benefit Claim, or to Restore the Right of Priority or Benefit | $1,700 | $850 | | $2,000 | $1,000 | $500 |
| **18%** | **18%** | **-41%** |
| Hague International Design Application Fees – Transmittal Fee | $120 | | | $120 | $60 | $30 |
| **0%** | **-50%** | **-75%** |
| Petition to convert an international design application to a design application under 35 U.S.C. chapter 16 | $180 | | | $180  **0%** | $90  **-50%** | $45  **-75%** |
| Petition to Excuse Applicant's Failure to Act Within Prescribed Time Limits in an International Design Application | $1,700 | $850 | | $2,000 | $1,000 | $500 |
| **18%** | **18%** | **-41%** |
| Basic National Stage Fee | $280 | $140 | $70 | $300 | $150 | $75 |
| **7%** | **7%** | **7%** |
| National Stage Search Fee – U.S. Was the ISA | $120 | $60 | $30 | $140 | $70 | $35 |
| **17%** | **17%** | **17%** |
| National Stage Search Fee – Search Report Prepared and Provided to USPTO | $480 | $240 | $120 | $520 | $260 | $130 |
| **8%** | **8%** | **8%** |
| National Stage Search Fee – All Other Situations | $600 | $300 | $150 | $660 | $330 | $165 |
| **10%** | **10%** | **10%** |
| National Stage Examination Fee – All Other Situations | $720 | $360 | $180 | $760 | $380 | $190 |
| **6%** | **6%** | **6%** |
| National Stage – Each Independent Claim in Excess of Three | $420 | $210 | $105 | $460 | $230 | $115 |
| **10%** | **10%** | **10%** |
| National Stage – Each Claim in Excess of 20 | $80 | $40 | $20 | $100 | $50 | $25 |
| **25%** | **25%** | **25%** |
| National Stage – Multiple Dependent Claim | $780 | $390 | $195 | $820 | $410 | $205 |
| **5%** | **5%** | **5%** |
| Late Filing of Sequence Listing (NEW) | n/a | | | $300  **n/a** | $150  **n/a** | $75  **n/a** |
| Copy of Patent Application as Filed | $20 | | | $35 | | |
| **75%** | | |
| Copy of Patent-Related File Wrapper and Contents of 400 or Fewer Pages, if Provided on Paper | $200 | | | **Discontinue** | | |
|
| Additional Fee for Each Additional 100 Pages of Patent-Related File Wrapper and (Paper) Contents, or Portion Thereof | $40 | | | **Discontinue** | | |
|
| Copy Patent File Wrapper, Paper Medium, Any Number of Sheets (NEW) | n/a | | | $280 | | |
| **n/a** | | |
| Copy Patent File Wrapper, Electronic Medium, Any Size (NEW) | n/a | | | $55 | | |
| **n/a** | | |
| Copy of Patent-Related File Wrapper and Contents if Provided Electronically or on a Physical Electronic Medium as Specified in 1.19(b)(1)(ii) | $55 | | | **Discontinue** | | |
| Additional Fee for Each Continuing Physical Electronic Medium in Single Order of 1.19(b)(1)(ii)(B) | $15 | | | **Discontinue** | | |
| Copy of Patent-Related File Wrapper Contents That Were Submitted and are Stored on Compact Disk or Other Electronic Form (e.g., Compact Disks Stored in Artifact Folder), Other Than as Available in 1.19(b)(1); First Physical Electronic Medium in a Single Order | $55 | | | **Discontinue** | | |
| Additional Fee for Each Continuing Copy of Patent-Related File Wrapper Contents as Specified in 1.19(b)(2)(i)(A) | $15 | | | **Discontinue** | | |
| Copy of Patent-Related File Wrapper Contents That Were Submitted and are Stored on Compact Disk, or Other Electronic Form, Other Than as Available in 1.19(b)(1); if Provided Electronically Other Than on a Physical Electronic Medium, per Order | $55 | | | **Discontinue** | | |
| For Assignment Records, Abstract of Title and Certification, per Patent | $25 | | | $35 | | |
| **40%** | | |
| Uncertified Statement Re Status of Maintenance Fee Payments | $10 | | | **Discontinue** | | |
| Petitions for documents in form other than that provided by this part, or in form other than that generally provided by Director, to be decided in accordance with merits. | at cost | | | **Discontinue** | | |
| Recording Each Patent Assignment, Agreement or Other Paper, per Property – if Not Submitted Electronically | $40 | | | $50 | | |
| **25%** | | |
| Labor Charges for Services, per Hour or Fraction Thereof | $40 | | | **Discontinue** | | |
| Unspecified Other Services, Excluding Labor | at cost | | | **Discontinue** | | |
| Additional Fee for Overnight Delivery (NEW) | n/a | | | $40 | | |
| **n/a** | | |
| Additional Fee for Expedited Service (NEW) | n/a | | | $160 | | |
| **n/a** | | |
| Application Fee (Non-Refundable) | $40 | | | $100 | | |
| **150%** | | |
| On Registration to Practice Under §11.6 | $100 | | | $200 | | |
| **100%** | | |
| On Grant of Limited Recognition Under § 11.9(b) (NEW) | $100 | | | $200 | | |
| **100%** | | |
| Certificate of Good Standing as an Attorney or Agent | $10 | | | $40 | | |
| **300%** | | |
| Certificate of Good Standing as an Attorney or Agent, Suitable for Framing | $20 | | | $50 | | |
| **150%** | | |
| Review of Decision by the Director of Enrollment and Discipline Under § 11.2(c) | $130 | | | $400  **208%** | | |
| Review of Decision of the Director of Enrollment and Discipline Under § 11.2(d) | $130 | | | $400 | | |
| **208%** | | |
| Administrative Reinstatement Fee | $100 | | | $200 | | |
| **100%** | | |
| Establish OED Information System Customer Interface Account (ID & Password) – Performed by OED (NEW) | n/a | | | $70  **n/a** | | |
| Roster Maintenance in OED Information System Customer Interface (Change of Address) – Performed by OED (NEW) | n/a | | | $70 | | |
| **n/a** | | |
| Registration Examination Review Session (NEW) | n/a | | | $450 | | |
| **n/a** | | |
| Establish Deposit Account | $10 | | | **Discontinue** | | |
| Computer Records | at cost | | | **Discontinue** | | |
| Copy of Patent Grant Single-Page TIFF Images | n/a | | | $10,400 | | |
| **n/a** | | |
| Copy of Patent Grant Full-Text W/Embedded Images, Patent Application Publication Single-Page TIFF Images, or Patent Application Publication Full-Text W/Embedded Images (NEW) | n/a | | | $5,200 | | |
| **n/a** | | |
| Copy of Patent Bibliographic Extract and Other DVD (Optical Disc) Products (NEW) | n/a | | | $50 | | |
| **n/a** | | |
| Copy of U.S. Patent Custom Data Extracts (NEW) | n/a | | | $100 | | |
| **n/a** | | |
| Copy of Selected Technology Reports, Miscellaneous Technology Areas (NEW) | n/a | | | $30 | | |
| **n/a** | | |
| Self-Service Copy Charge, per Page | $0.25 | | | **Discontinue** | | |

* + 1. Costs of Alternative 1 – Final Rule Fee Schedule – Setting and Adjusting Patent Fees during Fiscal Year 2017

The Office did not identify any qualitative costs to Alternative 1. The fee rates recover enough aggregate revenue to support the Office’s goals, and there is no cost to the fee schedule design.

* + 1. Benefits of Alternative 1 – Final Rule Fee Schedule – Setting and Adjusting Patent Fees during Fiscal Year 2017

The Office identified two benefits for the Final Rule Fee Schedule (Alternative 1): fee schedule design benefits and securing aggregate revenue to cover aggregate cost. The following discussion of the fee schedule design benefits evaluates how the fee adjustments reflect the key fee setting policy factors, namely, fostering innovation, aligning fees with the full cost of products and services, facilitating effective administration of the patent system, and offering patent prosecution options for applicants. This discussion only includes fees for which the Office can draw reasonable conclusions about the benefits as they relate to fee schedule design; therefore, the discussion that follows does not address all of the fees included in Table 4-4. A more detailed discussion of the fee change rationale for each fee is available in Section V of the final rule.

1. ***Fostering innovation by setting select fees below cost:*** Currently, the large entity filing, search, and examination fees for a utility patent recover only a portion of the average unit cost for prosecuting a patent application (*see* USPTO Setting and Adjusting Patent Fees during Fiscal Year 2017 – Activity Based Information and Patent Fee Unit Expense Methodology). This alternative continues the long-standing policy factor of fostering innovation by keeping front-end fees (e.g., filing, search, and examination) below cost with a back-end subsidy.

To help balance aggregate cost with aggregate revenue, the Office is increasing the total filing, search, and examination fees in this alternative to recover slightly more of the average unit cost for processing a patent application while keeping the total fees paid below the Office’s costs (*see* cost at Table 4-7). Maintaining below-cost entry fees as part of the fee schedule design is a benefit and supports the key fee setting policy consideration of fostering innovation*.*

In addition to front-end utility fee rate changes, fee rates for design and plant applications are increasing; still, these fees continue to be partially subsidized by other fees to foster innovation.

The Office will further foster innovation under this alternative by expanding micro entity discounts to five petition fees and to the Hague International Design Transmittal fee; small entity discounts will be expanded to one petition fee and the Hague International Design Transmittal fee. Expanding the number of fees for which small and micro entity discounts are available fosters innovation by helping to ensure that patent services and products are accessible to all users of the patent system.

1. ***Aligning fees with the full cost of products and services:*** The Final Rule Fee Schedule (Alternative 1) better aligns the full cost of products and services without increasing the fee rate for every service. One example of this is the PTAB trial fees. In FY 2016, the PTAB received nearly 1,700 AIA trial filings and the Office expects that number to grow in the coming fiscal years. In order to keep up with demand and continue to provide high quality decisions within the statutory time limits, the Office needs to close the gap between the cost and the fees for performing these services. When the fees for these services were initially set, the Office had to estimate what the costs would be without the benefit of historical cost information. Now that the trials have been in place for three fiscal years, the Office has actual historical cost data available to more accurately set these fees and recover costs. By targeting a fee increase to the AIA trial fees, the Office is reducing the subsidization of these proceedings, allowing for the Office to keep other unrelated fee rates unchanged.
2. ***Facilitating effective and efficient administration of the patent system:*** The Office is creating two new fees to manage handling of sequence listings of 300 MB or more. Pricing for this fee is divided into two tiers, with Tier One for file sizes 300 MB to 800 MB and Tier Two for file sizes greater than 800 MB. The level of effort associated with the handling of mega-sequence listings is significant, because the Office’s systems require extra storage and special handling for files beyond 300 MB. The Office has not yet collected actual cost data for sequence listings with file sizes of 300 MB or greater. However, based on historical data, on average, less than 10 applications per year contained sequence listing files greater than 300 MB. Based on previously filed applications with lengthy sequence listings, the Office determined that some applications disclosed sequence data that met the length thresholds for being included in the sequence listing but that was neither invented by the applicants nor claimed. Mega-sequence listings, in particular, often included sequences that were available in the prior art, were not essential material, and could have been described instead, for example, by name and a publication or accession reference. Further, claims accompanying such applications were frequently directed to the manipulation of sequence data rather than the substance of the sequences themselves. Submission of a mega-sequence listing in these applications would not have been necessary to complete the application if applicants limited the number of sequences that were described in such a way as to be required in a sequence listing. The final fees will encourage applicants to draft their specifications such that sequence data that is not essential material is not required to be included in a sequence listing. A reduced number of mega-sequence listings will benefit the USPTO and the public by reducing the strain on Office resources, thus facilitating the effective administration of the patent system.

Another fee change that will facilitate the effective administration of the patent system is a new fee to encourage timely filing of sequence listings in international applications. When an applicant does not provide a sequence listing in searchable format with the international application or provides a defective sequence listing, the United States, acting as International Searching Authority (ISA/US) or as International Preliminary Examining Authority (IPEA/US), must issue an invitation to the applicant to provide the missing or corrected sequence listing. This additional process creates a delay in the issuance of the International Search Report (ISR) or International Preliminary Report on Patentability (Chapter II). The most recent data shows that the ISA/US issues ISRs within 16 months of the priority date for 75 percent of all international applications searched by the ISA/US. However, when the ISA/US issues an invitation to provide a sequence listing, the ISA/US issues ISRs within 16 months in only 28 percent of those international applications. The time limit for issuance of the ISR under Patent Cooperation Treaty (PCT) Rule 42 in most circumstances is 16 months from the priority date. This new fee will help compensate the Office for the extra work associated with issuing the invitation and handling the response, while better positioning the Office to meet applicable treaty timeframes. The fee is similar in size and scope to fees charged by other international IP offices.

Additional examples of fee schedule design changes that facilitate effective and efficient administration of the patent system include the change to the Information Disclosure Statement (IDS) and Certificate of Correction fee rates. The IDS adjustment optimally sets the fee to encourage early submission of an IDS when possible. The certificate of correction fee rate adjustment would encourage applicants to submit accurate information initially, while at the same time not increasing the rate too much above unit cost recovery to discourage disclosure of needed corrections when an error has been identified.

Finally, under this alternative, the Office is implementing several adjustments to enhance the clarity of the fee schedule. As thoroughly detailed in the final rule, the changes to both Patent Enrollment Fees and Patent Service Fees will increase clarity of the fee schedule. In some cases, the Office is creating new fee codes where currently a single fee code covers multiple services or products. In other cases the Office is discontinuing fee codes for services that are no longer being utilized. Additionally, the Office is adjusting the fee code descriptions in some cases. The Office is also establishing set fee rates for several services that are currently charged “at cost.” All of these changes will provide increased clarity to stakeholders regarding the products and services the USPTO offers and their associated fee rates.

1. ***Offering new patent prosecution options:*** The Office is establishing a new fee for smaller, streamlined reexamination filings. The streamlined filings will reduce the cost to the USPTO, allowing the Office to pass on the cost savings to applicants. Providing lower fees for smaller requests serves the public interest by making the reexamination process more accessible as a post-grant proceeding. Faster prosecution serves the public interest by providing greater certainty. This offering benefits applicants and furthers key policy factors of fostering innovation and providing additional patent prosecution options for applicants.

***Summary of Fee Schedule Design Benefits for Alternative 1:*** The Final Rule Fee Schedule (Alternative 1) captures the most fee schedule design benefits of any of the alternatives examined. The Office designed the fee schedule around the key fee setting policy factors referenced throughout this document and the final rule. As demonstrated by the continuation of a front-end/back-end subsidy structure and the new and revised fees discussed in this section, this alternative designs the fee structure in a way to achieve the Office’s final rule and operational strategies and goals and to benefit patent stakeholders.

***Summary of Secure Sufficient Aggregate Revenue to Cover Aggregate Cost for Alternative 1:*** The final fee schedule secures sufficient aggregate patent revenue to allow for continued efforts related to continuing progress on patent quality initiatives and optimizing patent application backlog and pendency, delivering high quality and timely PTAB decisions, investing in modernizing the USPTO IT systems and infrastructure, and gradually building a viable patent operating reserve.

* 1. Alternative 2 – Unit Cost Recovery

Table 4-5

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Patent Costs and Revenue by Alternative** | | | | | | |
| **(dollars in millions)** | | | | | | |
|  | FY 2017 | FY 2018 | FY 2019 | FY 2020 | FY 2021 | Total |
| **Budgetary Requirements** | $2,986 | $3,176 | $3,231 | $3,273 | $3,365 | $16,031 |
| Alternative 2: Unit Cost Recovery – Fee Revenue | $2,859 | $3,197 | $3,211 | $3,287 | $3,339 | $15,893 |
| Other Income | $24 | $24 | $24 | $24 | $24 | $119 |
| **Aggregate Revenue** | $2,883 | $3,221 | $3,235 | $3,311 | $3,363 | $16,012 |
| Operating Reserve | $251 | $296 | $300 | $338 | $336 | n/a |
| Optimal Operating Reserve | $746 | $794 | $808 | $818 | $841 | n/a |
| **Operating Reserve Surplus (Deficit)** | ($495) | ($498) | ($508) | ($480) | ($505) | n/a |

* + 1. Description of Alternative 2

The Unit Cost Recovery (Alternative 2) is a fee structure that would set most individual large entity fees at the historical cost of performing the activities related to the particular service in FY 2015. This alternative continues existing and offers new small and micro entity discounts where eligible under AIA authority. It is important to note that the Alternative 2 fee rates for FY 2017 through FY 2021 are based on FY 2015 historical costs. The Office recognizes that this approach does not account for inflationary factors that could likely increase the costs of certain patent services and necessitate higher fees in the out-years. However, the Office contends that the FY 2015 data is the best unit cost data available to inform this analysis.

Unit Cost Recovery (Alternative 2) would not generate enough aggregate revenue to sufficiently cover the aggregate cost of patent operations and support the Office’s strategic priorities to optimize the quality and timeliness of patent processing, deliver high quality and timely PTAB decisions, invest in modernizing the USPTO IT systems and infrastructure, or build a sustainable operating reserve. This alternative produces enough revenue to meet the minimum patent operating reserve level by the end of FY 2019, but does not keep building towards the optimal patent operating reserve level. It is important for the Office to balance accomplishing priorities together so that once it achieves the goals, it has sufficient resources to maintain them.

As shown in Table 4-6, the fee schedule in the Unit Cost Recovery (Alternative 2) includes the highest combined filing, search, and examination fees and the lowest maintenance fees of any of the alternatives. The fees for securing and maintaining a patent through a typical prosecution sequence for its full 20-year term decreases by $4,500 (27.5 percent) for Alternative 2. Assuming a three percent discount rate, the net present value of investing in a patent for this alternative is $9,972, compared to a net present value of $12,157 for the Baseline. For a unit cost recovery fee schedule, in particular, the difference in front-end fees is concerning. The front-end fees under this fee schedule would be $6,440 ($6,131 net present value assuming three percent discounting), instead of $2,800 ($2,652 net present value assuming three percent discounting) under the Baseline fee schedule.

**Table 4-6**

|  |  |  |
| --- | --- | --- |
| **Utility Patent Fee Rates** | | |
|  | **Baseline Fee Rate** | **Alternative 2 Fee Rate** |
| Filing | $280 | $280 |
| Search | $600 | $1,780 |
| Examination | $720 | $2,200 |
| First RCE | $1,200 | $2,180 |
| **Front-End Fees** | **$2,800** | **$6,440** |
| Issue | $960 | $320 |
| 1st Stage Maintenance | $1,600 | $860 |
| 2nd Stage Maintenance | $3,600 | $1,700 |
| 3rd Stage Maintenance | $7,400 | $2,540 |
| **Back-End Fees** | **$13,560** | **$5,420** |
| **Total Fees** | **$16,360** | **$11,860** |

This alternative could present significant barriers to those seeking patent protection, because front-end fees would increase significantly for all applicants, even with small and micro entity fee reductions. Further, this alternative is counter to the Office’s general philosophy to charge applicants and holders lower fees when they have less information about the relative value of their innovation. During the initial application stages, applicants often are not sure of the value of their innovation, thus lower front-end fees serve to encourage innovation, even though these front-end services are more costly to the Office. At the back-end (i.e., for maintenance fee payments) applicants know more about the commercial value of their innovation and can therefore make more informed decisions regarding maintenance fee payments.

Setting fees at cost recovery is a common practice in the Federal Government. OMB Circular A-25: *User Charges* provides guidance stating that user charges (fees) should be sufficient to recover the full cost to the Federal Government of providing the service, resource, or good when the government is acting in its capacity as sovereign. However, there are several complexities in achieving individual fee cost recovery for the patent fee schedule. The most significant is the AIA requirement to provide a 50 percent discount on fees to small entities and a 75 percent discount on fees to micro entities. The Office considered several options for designing this alternative. For example, the Office considered increasing the fee paid by large entities to recover the lost revenue associated with the 50 and 75 percent discounts. However, this would seem to be unduly punitive to large entities. Instead, the Office decided to adjust the large entity fee so that it reflects the full cost of the service provided, and recover lost revenue from small and micro entity discounts through other fees. However, because most fees are set at individual large entity fee cost recovery, there are not many remaining fees available to provide subsidies to recover the revenue shortfall. There are some fees for which cost data is not available; for these fees the Office chose to retain the current fee rates in this alternative.

An additional complication is that the Office did not receive revenue equal to the full cost of examining the applications currently comprising the backlog when those applications were filed (the Office has consistently set application fees below their cost of the Office). Therefore, if the Office were to implement this alternative, the Office would need to address this funding gap as well. (*See* section 1.3 describing how the Office operated prior to fee setting authority under the AIA).

Given these complexities, the Office requires more revenue to sustain operations than a simple cost recovery alternative would generate. Therefore, the Office adjusted maintenance fee rates such that aggregate revenue was roughly equivalent to the aggregate cost presented in the FY 2017 Budget. (For consistency, the fee rates were not updated from the RIA that accompanied the NPRM.) As a result, this alternative includes maintenance fees set at approximately half of the amount of current maintenance fee rates.

The Office does not attempt to estimate the elasticity impacts to application filings and renewal rates (e.g., filing, search, examination, and maintenance fees) due to a lack of historical data that could inform such a significant shift in the Office’s fee setting methodology. However, the Office theorizes that the high costs of entry into the patent system could lead to a decrease in the incentives to invest in innovative activities among all entities, and especially for small and micro entities. There is a strong possibility that funds previously used for issue and maintenance fee payments could offset the higher front-end costs for some users, but the front-end costs could prove insurmountable for other innovators. Again, the Office lacks historical data to estimate this cross price elasticity.

The Office also recognizes that the lower maintenance fee rates would likely lead to increased renewal rates. Patents that are maintained beyond their useful life could weaken the IP system by slowing the rate of public accessibility and follow-on inventions, which is contrary to the Office’s policy factor of fostering innovation.

Additional information about the fee cost calculation methodology, including the cost components related to respective fees, is available at <http://www.uspto.gov/patent/laws-and-regulations/america-invents-act-aia/fees-and-budgetary-issues> in the document titled “USPTO Setting and Adjusting Patent Fees during FY 2017 – Activity Based Information and Patent Fee Unit Expense Methodology.” A summary of the unit costs associated with the major fees is presented in Table 4-7. This unit cost information was used to inform the large entity fee rates used in this alternative.

Table 4‑7

| **Fee Description** | **Unit Cost** | | |
| --- | --- | --- | --- |
| **FY 2013** | **FY 2014** | **FY 2015** |
|
|
| Basic Filing fee – Utility (Paper Filing – Also Requires Non-Electronic Filing Fee under 1.16(t)) | $262 | $257 | $277 |
| Basic Filing Fee – Utility (Electronic Filing) | $262 | $257 | $277 |
| Basic Filing Fee – Design | $262 | $257 | $277 |
| Basic Filing Fee – Design (CPA) | $707 | $772 | $884 |
| Basic Filing Fee – Plant | $262 | $257 | $277 |
| Provisional Application Filing Fee | $152 | $144 | $154 |
| Basic Filing Fee – Reissue | $260 | $256 | $277 |
| Basic Filing Fee – Reissue (CPA) | $707 | $772 | $884 |
| Utility Search Fee | $1,063 | $2,020 | $1,773 |
| Design Search Fee | $354 | $425 | $397 |
| Plant Search Fee | $1,603 | $2,020 | $1,773 |
| Reissue Search Fee | $1,603 | $2,020 | $1,773 |
| Utility Examination Fee | $1,981 | $2,195 | $2,205 |
| Design Examination Fee | $560 | $566 | $608 |
| Plant Examination Fee | $1,981 | $2,195 | $2,205 |
| Reissue Examination Fee | $1,981 | $2,195 | $2,205 |
| Utility Issue Fee | $270 | $280 | $314 |
| Reissue Issue Fee | $270 | $280 | $314 |
| Design Issue Fee | $270 | $280 | $314 |
| Plant Issue Fee | $270 | $280 | $314 |
| Petition for the Delayed Payment of the Fee for Maintaining a Patent in Force | $115 | $113 | $121 |
| Request for Continued Examination (RCE) – 1st Request (*see* 37 CFR 1.114) | $1,864 | $1,776 | $2,187 |
| Request for Continued Examination (RCE) – 2nd and Subsequent Request (*see* 37 CFR 1.114) | $1,322 | $1,310 | $1,540 |
| Other Publication Processing Fee | $39 | $27 | $31 |
| Request for Voluntary Publication or Republication | $115 | $113 | $121 |
| Request for Expedited Examination of a Design Application | $115 | $113 | $121 |
| Processing Fee for Provisional Applications | $39 | $27 | $31 |
| Filing a Submission After Final Rejection (*see* 37 CFR 1.129(a)) | $1,864 | $1,776 | $2,187 |
| For Each Additional Invention to be Examined (*see* 37 CFR 1.129(b)) | $1,864 | $1,776 | $2,187 |
| Certificate of Correction | $69 | $74 | $93 |
| Request for *Ex Parte* Reexamination | $26,046 | $28,503 | $23,288 |
| Request for Supplemental Examination | $5,490 | $5,445 | $6,224 |
| Reexamination Ordered as a Result of Supplemental Examination | $26,338 | $29,140 | $22,347 |
| Petitions to the Chief Administrative Patent Judge Under 37 CFR 41.3 | n/a | $4,762 | $4,596 |
| Notice of Appeal | n/a | $33 | $45 |
| Filing a Brief in Support of an Appeal in an *Inter Partes* Reexamination Proceeding | n/a | $16,545 | $20,874 |
| Request for Oral Hearing | n/a | $1,657 | $1,483 |
| Forwarding an Appeal in an Application or *Ex Parte* Reexamination Proceeding to the Board | n/a | $4,736 | $4,815 |
| *Inter Partes* Review Request Fee – Up to 20 Claims | n/a | $20,467 | $22,165 |
| *Inter Partes* Review Post-Institution Fee – Up to 15 Claims | n/a | $15,263 | $12,674 |
| Post-Grant or Covered Business Method Review Request Fee – Up to 20 Claims | n/a | $23,589 | $16,213 |
| Post-Grant or Covered Business Method Review Post-Institution Fee – Up to 15 Claims | n/a | $34,721 | $23,060 |
| Petition for a Derivation Proceeding | n/a | $24,193 | $51,949 |
| Petitions Requiring the Petition Fee Set Forth in 37 CFR 1.17(f) (Group I) | $307 | $211 | $244 |
| Petitions Requiring the Petition Fee Set Forth in 37 CFR 1.17(g) (Group II) | $307 | $211 | $244 |
| Petitions Requiring the Petition Fee Set Forth in 37 CFR 1.17(h) (Group III) | $115 | $113 | $121 |
| Petition for Revival of an Abandoned Application for a Patent, for the Delayed Payment of the Fee for Issuing Each Patent, or for the Delayed Response by the Patent Owner in any Reexamination Proceeding | $307 | $211 | $244 |
| Petition for the Delayed Submission of a Priority or Benefit Claim, or to Restore the Right of Priority or Benefit | $307 | $211 | $244 |
| Filing an Application for Patent Term Adjustment | $115 | $113 | $121 |
| Request for Reinstatement of Term Reduced | $115 | $113 | $121 |
| Extension of Term of Patent | $115 | $113 | $121 |
| Initial Application for Interim Extension (*see* 37 CFR 1.790) | $115 | $113 | $121 |
| Subsequent Application for Interim Extension (*see* 37 CFR 1.790) | $115 | $113 | $121 |
| Basic National Stage Fee | $338 | $350 | $343 |
| National Stage Search Fee – U.S. Was the ISA | $272 | $300 | $324 |
| National Stage Search Fee – Search Report Prepared and Provided to USPTO | $1,603 | $2,020 | $1,773 |
| National Stage Search Fee – All Other Situations | $1,603 | $2,020 | $1,773 |
| National Stage Examination Fee – All Other Situations | $1,981 | $2,195 | $2,205 |
| Transmittal Fee | $328 | $310 | $302 |
| Search Fee – Regardless of Whether There is a Corresponding Application (*see* 35 U.S.C. 361(d) and PCT Rule 16) | $1,979 | $1,839 | $1,911 |
| Supplemental Search Fee When Required, per Additional Invention | $1,979 | $1,839 | $1,911 |
| Transmitting Application to Intl. Bureau to Act as Receiving Office | $11 | $5 | $5 |
| Preliminary Examination Fee – U.S. Was the ISA | $824 | $827 | $866 |
| Preliminary Examination Fee – U.S. Was Not the ISA | $824 | $827 | $866 |
| Supplemental Examination Fee per Additional Invention | $824 | $827 | $866 |
| Application Fee (Non-Refundable) | n/a | $194 | $225 |
| Registration to practice or grant of limited recognition under §11.9(b) or (c) | n/a | $427 | $493 |
| Certificate of Good Standing as an Attorney or Agent | n/a | $34 | $39 |
| Certificate of Good Standing as an Attorney or Agent, Suitable for Framing | n/a | $42 | $49 |
| For Test Administration by Commercial Entity | n/a | $410 | $476 |
| For Test Administration by the USPTO | n/a | $584 | $676 |
| Review of Decision by the Director of Enrollment and Discipline Under § 11.2(c) | n/a | $1,769 | $2,044 |
| Review of Decision of the Director of Enrollment and Discipline Under § 11.2(d) | n/a | $1,581 | $1,827 |
| Application Fee for Person Disciplined, Convicted of a Felony or Certain Misdemeanors Under § 11.7(h) | n/a | $2,845 | $3,297 |
| Administrative Reinstatement Fee | n/a | $813 | $940 |
| Delinquency Fee | n/a | $150 | $173 |
| Unspecified Other Services, Excluding Labor | n/a | $65 | $75 |
| Registration to Practice for Change of Practitioner Type | n/a | $69 | $80 |
| Registration Examination Review Session (NEW) | n/a | $445 | $515 |

Even though the Unit Cost Recovery (Alternative 2) produces enough revenue to meet the minimum patent operating reserve level by the end of FY 2019, it does not keep building towards the optimal patent operating reserve level; and it reverses the policy of fostering innovationvia lower front-end fees. Under this alternative, the increase in front-end fees is the greatest of any of the alternatives considered.

Table 4-8 presents the major fee changes between the Baseline and the Unit Cost Recovery (Alternative 2). A complete list of fee changes for Alternative 2 is available at <http://www.uspto.gov/patent/laws-and-regulations/america-invents-act-aia/fees-and-budgetary-issues> in the document titled, “FRFA Fee Tables.”

Table 4‑8

| **Alternative 2 – Unit Cost Recovery Current and Final Fees** | | | | | | |
| --- | --- | --- | --- | --- | --- | --- |
| **Description** | **Current Fees** | | | **Final Fees** | | |
| **Large Entity Fee** | **Small Entity Fee** | **Micro Entity Fee** | **Large Entity Fee** | **Small Entity Fee** | **Micro Entity Fee** |
|
|  |
|
| Basic Filing fee – Utility (paper filing also requires non-electronic filing fee under 1.16(t)) | $280 | $140 | $70 | $280 | $140 | $70 |
| **0%** | **0%** | **0%** |
| Basic Filing Fee – Utility (electronic filing for small entities) | n/a | $70 | n/a | n/a | $70  **0%** | n/a |
| Basic Filing Fee – Design | $180 | $90 | $45 | $280 | $140 | $70 |
| **56%** | **56%** | **56%** |
| Provisional Application Filing Fee | $260 | $130 | $65 | $160 | $80 | $40 |
| **-38%** | **-38%** | **-38%** |
| Basic Filing Fee – Reissue | $280 | $140 | $70 | $280 | $140 | $70 |
| **0%** | **0%** | **0%** |
| Utility Search Fee | $600 | $300 | $150 | $1,780 | $890 | $445 |
| **197%** | **197%** | **197%** |
| Design Search Fee | $120 | $60 | $30 | $400  **233%** | $200  **233%** | $100  **233%** |
| Utility Examination Fee | $720 | $360 | $180 | $2,200 | $1,100 | $550 |
| **206%** | **206%** | **206%** |
| Design Examination Fee | $460 | $230 | $115 | $600  **30%** | $300  **30%** | $150  **30%** |
| Utility Issue Fee | $960 | $480 | $240 | $320 | $160 | $80 |
| **-67%** | **-67%** | **-67%** |
| Request for Continued Examination (RCE) – 1st Request (*see* 37 CFR 1.114) | $1,200 | $600 | $300 | $2,180  **82%** | $1,090  **82%** | $545  **82%** |
| Request for Continued Examination (RCE) – 2nd and Subsequent Request (*see* 37 CFR 1.114) | $1,700 | $850 | $425 | $1,540 | $770 | $385 |
| **-9%** | **-9%** | **-9%** |
| Maintenance Fee Due at 3.5 years | $1,600 | $800 | $400 | $860 | $430 | $215 |
| **-46%** | **-46%** | **-46%** |
| Maintenance Fee Due at 7.5 years | $3,600 | $1,800 | $900 | $1,700 | $850 | $425 |
| **-53%** | **-53%** | **-53%** |
| Maintenance Fee Due at 11.5 years | $7,400 | $3,700 | $1,850 | $2,540 | $1,270 | $635 |
| **-66%** | **-66%** | **-66%** |
| Notice of Appeal | $800 | $400 | $200 | $40  **-95%** | $20  **-95%** | $10  **-95%** |
| Forwarding an Appeal in an Application or *Ex Parte* Reexamination Proceeding to the Board | $2,000 | $1,000 | $500 | $4,820  **141%** | $2,410  **141%** | $1,205  **141%** |
| *Inter Partes* Review Request Fee – Up to 20 Claims | $9,000 | | | $22,160 | | |
| **146%** | | |
| *Inter Partes* Review Post-Institution Fee – Up to 15 Claims | $14,000 | | | $12,680 | | |
| **-9%** | | |
| Post-Grant or Covered Business Method Review Request Fee – Up to 20 Claims | $12,000 | | | $16,220 | | |
| **35%** | | |
| Post-Grant or Covered Business Method Review Post-Institution Fee – Up to 15 Claims | $18,000 | | | $23,060 | | |
| **28%** | | |
| Petition for Revival of an Abandoned Application for a Patent, for the Delayed Payment of the Fee for Issuing Each Patent, or for the Delayed Response by the Patent Owner in any Reexamination Proceeding | $1,700 | $850 | | $240  **-86%** | $120  **-86%** | $60  **-93%** |
| Petition for the Delayed Submission of a Priority or Benefit Claim, or to Restore the Right of Priority or Benefit | $1,700 | $850 | | $240 | $120 | $60 |
| **-86%** | **-86%** | **-93%** |
| Petition to Excuse Applicant's Failure to Act Within Prescribed Time Limits in an International Design Application | $1,700 | $850 | | $1,700  **0%** | $850  **0%** | $425  **-50%** |
| Basic National Stage Fee | $280 | $140 | $70 | $340 | $170 | $85 |
| **21%** | **21%** | **21%** |
| National Stage Search Fee – U.S. Was the ISA | $120 | $60 | $30 | $320 | $160 | $80 |
| **167%** | **167%** | **167%** |
| National Stage Search Fee – Search Report Prepared and Provided to USPTO | $480 | $240 | $120 | $1,780 | $890 | $445 |
| **271%** | **271%** | **271%** |
| National Stage Search Fee – All Other Situations | $600 | $300 | $150 | $1,780  **197%** | $890  **197%** | $445  **197%** |
| National Stage Examination Fee – All Other Situations | $720 | $360 | $180 | $2,200  **206%** | $1,100  **206%** | $550  **206%** |
| Application Fee (Non-Refundable) | $40 | | | $220  **450%** | | |
| Registration to practice or grant of limited recognition under §11.9(b) or (c) | $100 | | | $500  **400%** | | |
| Review of Decision by the Director of Enrollment and Discipline Under § 11.2(c) | $130 | | | $2,040  **1469%** | | |
| Review of Decision of the Director of Enrollment and Discipline Under § 11.2(d) | $130 | | | $1,820  **1300%** | | |
| Administrative Reinstatement Fee | $100 | | | $940 | | |
| **840%** | | |

* + 1. Costs of Alternative 2 – Unit Cost Recovery

Costs for the Unit Cost Recovery (Alternative 2) consist of fee schedule design costs. Individual fee amounts and their relationship to other fees in the fee schedule affect the fee schedule design costs.

The following discussion of the fee schedule design evaluates how well the fee adjustments reflect the key policy factors, namely fostering innovation, facilitating effective administration of the patent system, and offering patent prosecution options for applicants. This discussion only includes fees for which the Office can draw reasonable conclusions about the costs; therefore, the discussion that follows does not address all of the fees included in Table 4-8. A complete list of fees for the Unit Cost Recovery (Alternative 2) can be found on the USPTO Web site, available at <http://www.uspto.gov/patent/laws-and-regulations/america-invents-act-aia/fees-and-budgetary-issues>, in the document titled, “FRFA Fee Tables.”

1. ***Utility—Basic Filing, Search, and Examination:*** Unit Cost Recovery (Alternative 2) offers the most significant change to the current fee schedule of any of the alternatives. It reverses the Office’s long-established policy consideration to set front-end fees below the cost to the Office in order to foster innovation. Setting the basic utility patent application fees (i.e., filing, search, and examination) at the cost to the Office ($4,260 for a large entity) could create a barrier for entry into the patent system. For some patent applicants—whether large, small, or micro entities—this fee amount could cause them to completely forgo seeking patent protection. As a result, this alternative has the largest potential reduction in public disclosure of information of all the alternatives examined. The potential costs to society from reduced innovation include less or inefficient R&D that would not as effectively support economic growth and the creation of high-paying jobs.
2. ***Request for Continued Examination (RCE):*** An RCE is sometimes used to resolve prosecution issues during examination. Setting the RCE fees at the cost to the Office, $2,180 for the first and $1,540 for 2nd or subsequent, could limit access to this patent service. When combined with the increased basic utility application fees (*see* above), this higher RCE fee might have a significant adverse impact upon applicants, especially those with the fewest resources (e.g., small and micro entities). Setting all RCE fees to recover the cost to the Office to perform these services is contrary to the fee setting policy factors of fostering innovation and offering patent prosecution options for applicants, because they would increase fees for applicants to prosecute a patent application at a time when an applicant has less information about the value of their invention.
3. ***Appeal Fees:*** Setting the total large entity appeal fees at unit cost recovery to be paid upon filing a notice of appeal and the unit cost recovery rate to forward it to the Board ($4,820) would create a barrier to using this service and would not foster innovation.
4. ***Publication Fee for Early, Voluntary, or Normal Publication (PG Pub) & Utility Issue Fee:*** As mentioned earlier, Unit Cost Recovery (Alternative 2) does not provide for a subsidy of front-end application fees. Instead, setting the front-end application fees (i.e., filing, search, and examination) (discussed earlier) at unit cost recovery does not require these back-end fees to also be set above unit cost recovery (i.e., the PG Pub/Issue fee would decrease to $320 from $960). This fee design structure does not support the policy factor of fostering innovation.
5. ***Maintenance Fee – 1st, 2nd, and 3rd Stages:*** The Office’s cost to process maintenance fee payments is minimal. However, in order to cover aggregate patent cost with aggregate patent revenue, maintenance fee rates would need to be set at $860 (1st stage), $1,700 (2nd Stage), and $2,540 (3rd Stage) for large entities. As shown in Table 4-8, these fees are less than the Baseline maintenance fees. Setting maintenance fees too low could serve as motivation for maintaining a patent that has low value to the patent holder for longer than is beneficial to society.

***Summary of Fee Schedule Design Costs for Alternative 2***

In summary, after analyzing the fee schedule design costs, the Office concludes that while Unit Cost Recovery (Alternative 2) represents the standard approach to fee setting in the Federal Government, this approach does not support the Office’s rulemaking strategies and goals, especially the important policy factors that go into the Office’s individual fee setting strategy. The largest fee schedule design cost is the loss of a front-end subsidy designed to foster innovation, but the impacts of much costlier patent prosecution options (e.g., RCEs and appeals) are also noticeable. Overall, Alternative 2 would not offer adequate benefits and would produce appreciable costs, especially when compared to the Final Rule Fee Schedule (Alternative 1).

* + 1. Benefits of Alternative 2 – Unit Cost Recovery

The Office did not identify any benefits under Unit Cost Recovery (Alternative 2). This alternative neither generates enough aggregate patent revenue to meet the Office’s strategic priority to implement a sustainable funding model for operations (this alternative produces enough revenue to meet the minimum patent operating reserve level by the end of FY 2019, but does not keep building towards the optimal patent operating reserve level) nor does it have any fee schedule design benefits.

* 1. Alternative 3 – Across the Board Adjustment

**Table 4-9**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Patent Costs and Revenue by Alternative** | | | | | | |
| **(dollars in millions)** | | | | | | |
|  | **FY 2017** | **FY 2018** | **FY 2019** | **FY 2020** | **FY 2021** | **Total** |
| **Budgetary Requirements** | $2,986 | $3,176 | $3,231 | $3,273 | $3,365 | $16,031 |
| Alternative 3: Across the Board Adjustment – Fee Revenue | $2,853 | $3,275 | $3,225 | $3,349 | $3,450 | $16,152 |
| Other Income | $24 | $24 | $24 | $24 | $24 | $119 |
| **Aggregate Revenue** | $2,877 | $3,299 | $3,249 | $3,373 | $3,474 | $16,271 |
| Operating Reserve | $245 | $368 | $386 | $486 | $595 | n/a |
| Optimal Operating Reserve | $746 | $794 | $808 | $818 | $841 | n/a |
| **Operating Reserve Surplus (Deficit)** | ($501) | ($426) | ($422) | ($332) | ($246) | n/a |

* + 1. Description of Alternative 3

Prior to the enactment of the AIA, the Office used its statutory authority to adjust statutory fees annually according to changes in the CPI-U, which is a commonly used measure of inflation. Building on this former approach, the Across the Board Adjustment (Alternative 3) uses the Office’s Section 10 fee setting authority to apply an inflationary adjustment of 5.0 percent to the Baseline in order to achieve aggregate patent revenue roughly equivalent to the Final Rule Fee Schedule (Alternative 1) and Unit Cost Recovery (Alternative 2) and to cover the aggregate cost presented in the FY 2018 Budget.

As shown in Table 4-9, transitioning to the Across the Board Adjustment (Alternative 3) fee schedule in FY 2017 would provide the USPTO with a 0.4 percent increase in fee collections from the Baseline fee collection levels, assuming a September 2017 effective date. Once fully transitioned to the new fee levels, however, the Office estimates that FY 2018 fee collections under Alternative 3 would exceed FY 2018 Baseline fee collections by approximately 5.1 percent. The aggregate revenue would be sufficient to recover the aggregate cost of patent operations, to support the Office’s strategic priorities to continue progress on patent quality initiatives, continue reduction of the patent application backlog and pendency, continue delivery of high quality and timely PTAB decisions, continue investing in modernizing the USPTO IT systems and infrastructure, and implement a sustainable funding model for operations. Alternative 3 builds the minimum patent operating reserve by the end of FY 2018 and starts gradually building towards the optimal three month patent operating reserve thereafter. It is important for the Office to balance accomplishing priorities together so that once it achieves the goals, it has sufficient resources to maintain them.

As shown in Table 4-10, the Across the Board Adjustment (Alternative 3) retains the same fee relationships and subsidization policies as the Baseline. The fees for securing and maintaining a patent through a typical prosecution sequence for its full 20-year term increases by $840 (5.1 percent) for Alternative 3. Assuming a three percent discount rate, the net present value of investing in a patent for Alternative 3 is $12,782, compared to a net present value of $12,157 for the Baseline.

**Table 4-10**

| **Utility Patent Fee Rates** | | |
| --- | --- | --- |
|  | **Baseline Fee Rate** | **Alternative 3 Fee Rate** |
| Filing | $280 | $300 |
| Search | $600 | $640 |
| Examination | $720 | $760 |
| First RCE | $1,200 | $1,260 |
| **Front-End Fees** | **$2,800** | **$2,960** |
| Issue | $960 | $1,000 |
| 1st Stage Maintenance | $1,600 | $1,680 |
| 2nd Stage Maintenance | $3,600 | $3,780 |
| 3rd Stage Maintenance | $7,400 | $7,780 |
| **Back-End Fees** | **$13,560** | **$14,240** |
| **Total Fees** | **$16,360** | **$17,200** |

For example, this alternative maintains the status quo ratio of front-end and back-end fees, given that all fees would be adjusted by the same escalation factor, thereby fostering innovation and allowing applicants to gain access to the patent system through fees set below the cost to the Office while patent holders pay issue and maintenance fees above the cost to the Office to subsidize the reduced front-end fees. The Across the Board Adjustment (Alternative 3), nevertheless, fails to implement policy factors and deliver benefits beyond what exists in the Baseline fee schedule (e.g., no fee adjustments to offer new patent prosecution options or facilitate more effective administration of the patent system).

Table 4-11 presents the major fee changes between the Baseline and the Across the Board Adjustment (Alternative 3). A complete list of fee changes for Alternative 3 is available at <http://www.uspto.gov/patent/laws-and-regulations/america-invents-act-aia/fees-and-budgetary-issues> in the document titled, “FRFA Fee Tables.”

**Table 4‑11**

| **Alternative 3 – Across the Board Adjustment Current and Final Fees** | | | | | | |
| --- | --- | --- | --- | --- | --- | --- |
| **Description** | **Current Fees** | | | **Final Fees** | | |
| **Large Entity Fee** | **Small Entity Fee** | **Micro Entity Fee** | **Large Entity Fee** | **Small Entity Fee** | **Micro Entity Fee** |
|
|  |
|
| Basic Filing fee – Utility (paper filing also requires non-electronic filing fee under 1.16(t)) | $280 | $140 | $70 | $300  **7%** | $150  **7%** | $75  **7%** |
| Basic Filing Fee – Utility (electronic filing for small entities) | n/a | $70 | n/a | n/a | $75  **7%** | n/a |
| Basic Filing Fee – Design | $180 | $90 | $45 | $180 | $90 | $45 |
| **0%** | **0%** | **0%** |
| Basic Filing Fee – Plant | $180 | $90 | $45 | $180 | $90 | $45 |
| **0%** | **0%** | **0%** |
| Provisional Application Filing Fee | $260 | $130 | $65 | $280 | $140 | $10 |
| **8%** | **8%** | **8%** |
| Basic Filing Fee – Reissue | $280 | $140 | $70 | $300 | $150 | $75 |
| **7%** | **7%** | **7%** |
| Each Independent Claim in Excess of Three | $420 | $210 | $105 | $440 | $220 | $110 |
| **5%** | **5%** | **5%** |
| Each Claim in Excess of 20 | $80 | $40 | $20 | $80 | $40 | $20 |
| **0%** | **0%** | **0%** |
| Multiple Dependent Claim | $780 | $390 | $195 | $820  **5%** | $410  **5%** | $205  **5%** |
| Utility Search Fee | $600 | $300 | $150 | $640 | $320 | $160 |
| **7%** | **7%** | **7%** |
| Design Search Fee | $120 | $60 | $30 | $120 | $60 | $30 |
| **0%** | **0%** | **0%** |
| Utility Examination Fee | $720 | $360 | $180 | $760 | $380 | $190 |
| **6%** | **6%** | **6%** |
| Design Examination Fee | $460 | $230 | $115 | $480 | $240 | $120 |
| **4%** | **4%** | **4%** |
| Utility Issue Fee | $960 | $480 | $240 | $1,000 | $500 | $250 |
| **4%** | **4%** | **4%** |
| Design Issue Fee | $560 | $280 | $140 | $580  **4%** | $290  **4%** | $145  **4%** |
| Plant Issue Fee | $760 | $380 | $190 | $800 | $400 | $200 |
| **5%** | **5%** | **5%** |
| Request for Continued Examination (RCE) – 1st Request (*see* 37 CFR 1.114) | $1,200 | $600 | $300 | $1,260  **5%** | $630  **5%** | $315  **5%** |
| Request for Continued Examination (RCE) – 2nd and Subsequent Request (*see* 37 CFR 1.114) | $1,700 | $850 | $425 | $1,780 | $890 | $445 |
| **5%** | **5%** | **5%** |
| Maintenance Fee Due at 3.5 years | $1,600 | $800 | $400 | $1,680 | $840 | $420 |
| **5%** | **5%** | **5%** |
| Maintenance Fee Due at 7.5 years | $3,600 | $1,800 | $900 | $3,780 | $1,890 | $945 |
| **5%** | **5%** | **5%** |
| Maintenance Fee Due at 11.5 years | $7,400 | $3,700 | $1,850 | $7,780 | $3,890 | $1,945 |
| **5%** | **5%** | **5%** |
| Notice of Appeal | $800 | $400 | $200 | $840 | $420 | $210 |
| **5%** | **5%** | **5%** |
| Forwarding an Appeal in an Application or *Ex Parte* Reexamination Proceeding to the Board | $2,000 | $1,000 | $500 | $2,100 | $1,050 | $525 |
| **5%** | **5%** | **5%** |
| *Inter Partes* Review Request Fee – Up to 20 Claims | $9,000 | | | $9,450 | | |
| **5%** | | |
| *Inter Partes* Review Post-Institution Fee – Up to 15 Claims | $14,000 | | | $14,700  **5%** | | |
| Post-Grant or Covered Business Method Review Request Fee – Up to 20 Claims | $12,000 | | | $12,600  **5%** | | |
| Post-Grant or Covered Business Method Review Post-Institution Fee – Up to 15 Claims | $18,000 | | | $18,900  **5%** | | |
| Basic National Stage Fee | $280 | $140 | $70 | $300 | $150 | $75 |
| **7%** | **7%** | **7%** |
| National Stage Search Fee – U.S. Was the ISA | $120 | $60 | $30 | $120 | $60 | $30 |
| **0%** | **0%** | **0%** |
| National Stage Search Fee – Search Report Prepared and Provided to USPTO | $480 | $240 | $120 | $500  **4%** | $250  **4%** | $125  **4%** |
| National Stage Search Fee – All Other Situations | $600 | $300 | $150 | $640 | $320 | $160 |
| **7%** | **7%** | **7%** |
| National Stage Examination Fee – All Other Situations | $720 | $360 | $180 | $760 | $380 | $190 |
| **6%** | **6%** | **6%** |
| National Stage – Each Independent Claim in Excess of Three | $420 | $210 | $105 | $440  **5%** | $220  **5%** | $110  **5%** |
| Enrollment – Application Fee (Non-Refundable) | $40 | | | $40 | | |
| **0%** | | |
| On Registration to Practice Under §11.6 | $100 | | | $105 | | |
| **5%** | | |



### Costs for Alternative 3 - Across the Board Adjustment

The Office did not identify any qualitative costs for Alternative 3. The fee rates recover enough aggregate revenue to support the Office’s goals, and there is no cost to the fee schedule design.

### Benefits of Alternative 3 – Across the Board Adjustment



When compared to the Baseline, one benefit is produced by the Across the Board Adjustment (Alternative 3)—securing aggregate revenue to cover aggregate cost. The benefit is significant, as it would allow for continued efforts related to enhancing patent quality and optimizing patent application backlog and pendency, delivering quality and timely PTAB decisions, investing in modernizing the USPTO IT systems and infrastructure, and gradually building towards an optimal patent operating reserve balance. Specifically, the Office estimates that, under this alternative, the patent operating reserve will meet its minimum acceptable balance ($300 million) in FY 2018 and, from there, gradually build towards the optimal target (three months of patent operating expenses).

# ACHIEVEMENT OF THE FINAL RULE STRATEGIES AND GOALS

* 1. Achievement of the Final Rule Strategies and Goals

Given the economic significance of the final rule to set and adjust patent fees in accordance with Section 10 of the AIA, the Office conducted this RIA, which analyzed four alternatives for how well they aligned to the Office’s rulemaking strategies and goals. As noted throughout this document, the final rule strategies and goals are comprised of strategic priorities from the Strategic Plan and the Office’s fee setting policy factors. Based on the costs and benefits identified for this RIA, namely (1) fee schedule design and (2) securing aggregate revenue to cover aggregate cost, the Final Rule Fee Schedule (Alternative 1) offers the highest net benefits. With a fee schedule that maintains the existing front-end/back-end balance, while offering targeted fee schedule design changes and securing the aggregate revenue needed to achieve the strategic priorities, the benefits of Alternative 1 clearly outweigh those of the other alternatives considered.

The way the Office chose alternatives was purposeful. As stated earlier, the Unit Cost Recovery (Alternative 2) represents the standard methodology that federal agencies use to set user fees per OMB A‑25, i.e., agencies should set fees to recover the individual unit cost of the good or service provided. In the case of the USPTO, where front-end services are much costlier than back-end services, a unit cost methodology does not align with the Office’s purposeful subsidization of entry fees as a means to foster innovation. Similarly, many stakeholders would agree that if the Office seeks more revenue than the Baseline fee schedule is projected to provide, an acceptable and logical solution would be an Across the Board Adjustment (Alternative 3) that would secure the required revenue. Given that the Office’s prior fee setting authority revolved around CPI-U adjustments to the existing fee schedule, there is a precedent for such increases. However, this alternative does not take full advantage of the AIA Section 10 flexibilities that allow the Office to readjust relationships between fees in ways that both benefit applicants (e.g., additional processing options) and the Office (e.g., discouraging low-value, high-cost services). In these ways, the Final Rule Fee Schedule (Alternative 1) again offers more net benefits and allows the Office to provide greater value to stakeholders.

* 1. Closing

In closing, unlike traditional regulatory actions that seek to change behavior, redistribute costs and benefits to different stakeholder groups, or both, this RIA is essentially an analysis of the costs and benefits associated with increases to the fees transferred from patent stakeholders to the Office. Given that the Final Rule Fee Schedule (Alternative 1) and the Across the Board Adjustment (Alternative 3) are the only alternatives that provide necessary revenue to maintain progress on operational and strategic priorities, the differentiator between them is how their fee schedule is designed. While Alternatives 1, 3, and the Baseline all apply the Office’s fee setting policy factors in one or more ways, Alternative 1 is the only one that does so via the prudent targeting of fee adjustments and the incorporation of stakeholder feedback. For this reason, Alternative 1 offers the greatest benefits to the patent stakeholder community and the USPTO.

# APPENDIX A: Acronyms

ABC – Activity-based costing

ABI – Activity-based information

AIA – Leahy-Smith America Invents Act

CBO – Congressional Budget Office

CPI-U – Consumer Price Index for All Urban Consumers, as determined by the Secretary of Labor

FY – Fiscal Year

IDS – Information Disclosure Statement

IP – Intellectual Property

IPEA/US – International Preliminary Examining Authority

IRFA – Initial Regulatory Flexibility Analysis

ISA/US – International Searching Authority

ISR – International Search Report

IT – Information Technology

NPRM – Notice of Proposed Rulemaking

OIRA – Office of Information and Regulatory Affairs

OMB – Office of Management and Budget

PCT Patent Cooperation Treaty

PPAC – Patent Public Advisory Committee

PPM – Patent Pendency Model

PTAB – Patent Trial and Appeal Board

R&D – Research and Development

RCE – Request for Continued Examination

RGDP – Real Gross Domestic Product

RIA – Regulatory Impact Analysis

U.S.C. – United States Code

USPTO – United States Patent and Trademark Office

1. Does not include “other income” such as reimbursements. The revenue in the transfer tables are solely from fee collections. [↑](#footnote-ref-2)
2. Does not include “other income” such as reimbursements. The revenue in the transfer tables are solely from fee collections. [↑](#footnote-ref-3)
3. Does not include “other income” such as reimbursements. The revenue in the transfer tables are solely from fee collections. [↑](#footnote-ref-4)
4. \* Third-party filers are not eligible for the micro entity fee. [↑](#footnote-ref-5)