

## Patent Counseling & Prosecution

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### **USPTO Announces December 14, 2024 for Expiration of After Final Consideration Pilot Program 2.0**

By [Audrey G. Ogurchak](#)

#### **Key Takeaways:**

- Applicants that receive a Final Office action prior to December 14, 2024, should consider submitting a request for consideration under the AFCP 2.0 before the program is terminated.
- After December 14, 2024, applicants should still consider filing an after-final response under 37 CFR 1.116 and requesting examiner interviews that may help place the application in condition for allowance or to resolve issues prior to appeal.

On September 30, 2024, the United States Patent and Trademark Office (USPTO) announced that the last day of the After Final Consideration Pilot Program 2.0 (AFCP 2.0) is set for December 14, 2024.<sup>1</sup> The program was set to run through September 30, 2024, but was extended to December 14, 2024, to accommodate applicants that may be in the process of preparing to use the program. The USPTO announcement comes after commenters expressed concern during a public comment period regarding proposed new fees to recuperate costs affiliated with the submission of a request for consideration under the AFCP 2.0.

#### **AFCP 2.0 Background**

The AFCP 2.0 was introduced on May 19, 2013, as a modification to the After Final Consideration Pilot Program (AFCP), with the goal of improving pendency by reducing the number of Requests for Continued Examination (RCEs) and encouraging increased collaboration between the applicant and the examiner to effectively advance prosecution of the application. The primary factors of the AFCP 2.0 are as follows: (1) an applicant must request to participate in AFCP 2.0, (2) a response to an after final rejection under AFCP 2.0 must include a non-broadening amendment to at least one independent claim, and (3) the examiner will schedule an interview with the applicant if the after-final response did not result in a determination by the examiner that all pending claims in the application were in condition for allowance.<sup>2</sup> AFCP 2.0 was initially scheduled to run for approximately one year and was set to end on September 30, 2014, but was repeatedly extended, with the most recent extension set to end on September 30, 2024.

The USPTO reports that since 2016, applicants have filed more than 60,000 AFCP 2.0 requests annually and that for fiscal year 2022, the USPTO estimates that it has expended more than \$15 million in incurred costs associated with examiners considering the merits of AFCP 2.0 submissions. The USPTO reports that this cost is in addition to the time spent by examiners to initially evaluate the AFCP 2.0 request for program compliance, interview time, and any additional consultation with supervisors.

On April 3, 2024, the USPTO proposed new fees for participation in the AFCP 2.0, to offset the USPTO's costs of administering the AFCP 2.0. The new fees would be charged for filing a request for consideration under the AFCP 2.0 and amount to \$500 for requests filed by undiscounted entities, \$200 for requests filed by entities entitled to the small entity discount and \$100 for requests filed by entities entitled to the micro entity discount. In response to the proposed new fee for participation in the AFCP 2.0, commenters expressed concerns about the program and the fees. Based on the comments provided during the public comment period, the USPTO has determined to terminate the program after a brief extension to December 14, 2024, and has stated it will not consider any request for consideration under the AFCP 2.0 filed after December 14, 2024.

## What Interested Clients Can Do Before and After December 14, 2024

Applicants that receive a Final Office action prior to December 14, 2024, should consider submitting a request for consideration under the AFCP 2.0 before the program is terminated. Benefits of the AFCP 2.0 include, for some patent applications, (1) a reduction of the amount of time to obtain a patent by potentially avoiding filing an RCE, (2) additional opportunity for direct communication between the application and the examiner through an examiner interview, and (3) an increased chance of allowance. Applicants should try to take advantage of these benefits before the program is terminated.

After termination of the AFCP 2.0, applicants still have various options for after final consideration. For example, after a final rejection, proposed amendments that will place the application either in condition for allowance or in a better form for appeal may be entered.<sup>3</sup> Additionally, an examiner may grant an interview after a final rejection if they think that the interview will help place the application in condition for allowance or resolve issues prior to appeal.<sup>4</sup>

Furthermore, if the examiner believes that the amendments fail to place the application in condition for allowance, the examiner is required to issue an Advisory Action that, inter alia, indicates (by a checkbox on the form) whether the amendments raise new issues that would require further consideration and/or an updated search. If such a statement is made by the examiner, and the applicant files an RCE referencing the earlier-filed response, the subsequent Office action should not be designated as final under 37 CFR 1.114, thus preventing the examiner from improperly streamlining the next round of prosecution.<sup>5</sup>

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<sup>1</sup> Extension and Termination of the After Final Consideration Pilot Program 2.0, 89 FR 79899 (October 1, 2024), (see <https://www.federalregister.gov/documents/2024/10/01/2024-22481/extension-and-termination-of-the-after-final-consideration-pilot-program-20>).

<sup>2</sup> United States Patent and Trademark Office, After Final Consideration Pilot Program 2.0, <https://www.uspto.gov/patents/initiatives/after-final-consideration-pilot-20>.

<sup>3</sup> See Amendments and affidavits or other evidence after final action and prior to appeal, 37 CFR § 1.116 (2004).

<sup>4</sup> United States Patent and Trademark Office, Manual of Patent Examining Procedure §§ 713.09, 714.13.

<sup>5</sup> See also United States Patent and Trademark Office, Manual of Patent Examining Procedure § 706.07(h).

# Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

**DMITRY ANDREEV**

Partner

**T: 973.597.6164**

[dandreev@lowenstein.com](mailto:dandreev@lowenstein.com)

**AUDREY G. OGURCHAK**

Associate

**T: 650.433.5702**

[aogurchak@lowenstein.com](mailto:aogurchak@lowenstein.com)

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