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Submitted via email to pra_study_comments@uspto.gov

RE: Request for Comments on Methodology for Conducting an Independent Study of the Burden of Patent-Related Paperwork (75 Fed. Reg. 8649)

Dear Mr. Tamayo,

On behalf of Regulatory Checkbook, I am pleased to submit these comments on the PRA burden estimation methodology consulting report submitted to the Patent Office by ICF International.¹ For the record, Regulatory Checkbook is a nonprofit organization whose mission is to improve the quality of information and analysis used in support of regulatory decision-making. It does not take positions on substantive policy matters, such as what the patent laws should look like. I personally have over 20 years' experience in federal regulatory analysis related to the issues presented in the ICF Report, including 10 years as a staff economist in OMB's Office of Information and Regulatory Affairs (OIRA), which is statutorily responsible for administering the Paperwork Reduction Act (PRA).

I am pleased to see the USPTO is interested in developing credible estimates of the paperwork and recordkeeping burdens it imposes on the public. Armed with this information, the Patent Office will be much better able to tailor its regulatory requirements in ways that minimize paperwork burdens and stop its illegal practice of using the imposition of paperwork burden as a management tool for adjusting its workload and reducing patent pendency. The Paperwork Reduction Act and its implementing regulations expressly forbid agencies from imposing duplicative information collection requirements (5 C.F.R. § 1320.5(d)(1)(ii)) and shifting burdens to the public (5 C.F.R. § 1320.5(d)(1)(iii)). For several recent regulatory actions, however, the USPTO clearly stated in the Regulatory Agenda that its

¹ **ICF International.** "Methodology for Conducting an Independent Study of the Burden of Patents-Related Paperwork; Submitted to United States Patent and Trademark Office, Contract No. GS23F8182H/DOC44PAPT0809009," 2010.

purpose was to “share” the burden of patent examination with its customers.² Meanwhile, the USPTO has never credibly estimated these burdens, which created an obvious need for the ICF project.

In these comments I review the ICF Report as written, then suggest changes and modifications that are essential for the project to be successful.

Introduction

Study Objectives (§ 1.1)

The stated objectives of ICF’s proposed methodology are generally sound. They emphasize both correct procedure (e.g., independence from USPTO officials and senior staff; public vetting) and substance (e.g., substantive objectivity). Also, they do not rely exclusively on *ex ante* estimation but include explicit provisions for *ex post* review and calibration of *ex ante* estimates.

I infer that ICF proposes that each of the specific analyses listed in § 1.2 would be subject to public vetting at a stage that is late enough for the public to know what is being proposed but early enough that changes can be made based on public comments. Moreover, each analysis must be fully disclosed and transparent so that competent third parties can substantially reproduce their work. Neither public vetting without transparency nor transparency too late for meaningful public review have any value.

Specific Analyses to be Addressed in the Study (§ 1.2)

Each of the four listed analyses has potential value, though I have several concerns. First, ambiguity in the task descriptions that may prevent ICF from actually achieving the enumerated study objectives. With respect to Analysis 1, for example, it is true that the stated reasons for significant changes in USPTO burden estimates need to be *validated*, but it is not clear that this can be accomplished

² See, e.g., U.S. Patent and Trademark Office. "Regulatory Agenda #741. Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, And Applications Containing Patentably Indistinct Claims [RIN 0651-AB93]." *Federal Register*, 2005c, 70(209), pp. 64479, ___. "Regulatory Agenda #742. Changes to Practice for the Examination of Claims in Patent Applications [RIN 0651-AB94]." *Federal Register*, 2005b, 70(209), pp. 64479, ___. "Regulatory Agenda #743. Changes to Information Disclosure Statement Requirements and Other Related Matters [RIN 0651-AB95]." *Federal Register*, 2005a, 70(209), pp. 64479-80.

merely by *evaluating* the stated reasons. An *evaluation* could reveal that the stated reasons are insufficient or impermissible under the Information Collection Rule.³ The methodology does not make clear what ICF's next steps would be.

Second, the text excludes from review the equally important task of validating the *absence* of significant changes in burden estimates subsequent to any material change in regulation or guidance, whether published or unpublished.⁴ The decision to even consider making a regulatory or nonregulatory change must automatically trigger a paperwork review, with specific attention given to the magnitude of paperwork burden implied and the extent to which existing paperwork burdens have caused or contributed to the problem the regulatory or nonregulatory change is intended to remedy. Currently, the USPTO's burden estimation efforts appear to be completely disconnected from the regulatory development process. They are at best an afterthought, do not contribute to the decision-making process, and begin long after decisions are made. By law, agencies must incorporate information collection analyses at the *beginning* of their regulatory planning and development.⁵ To be successful, the ICF methodology must be modified to ensure that the USPTO's processes are radically reformed. Even a perfect methodology accomplishes nothing if the Patent Office does not implement it.

Third, two of the four proposed analyses are premature. It is premature to attempt to estimate *aggregate* paperwork burden (Analysis 3) when a credible methodology has not yet been demonstrated for estimating *any* paperwork burden (Analysis 2), and when the proposed approach to estimating burdens for individual paperwork requirements has serious defects because it relies on existing surveys. It is never too early to solicit input from affected parties concerning how paperwork

³ The USPTO often relies on the "beliefs" or "expectations" of unnamed Office personnel, which by definition are subjective and thus do not comply with 5 C.F.R. § 1320.8(a)(4) ("specific, objectively supported estimate of burden").

⁴ Unpublished guidance has become a serious problem within the USPTO, both with respect to their paperwork burdens and the fact they always violate applicable government-wide good guidance practices. For the applicable federal policy on guidance, see **Office of Management and Budget**. "Bulletin on Good Guidance Practices," 2007.

⁵ Agencies cannot comply with the planning requirements in 5 C.F.R. § 1320.8 or the certification requirements in 5 C.F.R. § 1320.9 if they wait until the end of the regulatory process to perform their Paperwork Reduction Act responsibilities.

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burdens could be reduced—indeed, the Paperwork Reduction Act requires such consultations. However, proposed Analysis 4 has no content, which strongly suggests that it is merely a placeholder ICF has used to justify future contract work it perhaps hopes to secure on a noncompetitive basis.

Fourth, the methodology all but assumes that ICF's review of the American Intellectual Property Law Association (AIPLA) economic survey⁶ will succeed in validating it for use by the USPTO. This is a huge assumption that is certain to be proved false, at least if ICF performs the validation in accordance with applicable federal statistical policy standards and information quality guidelines.⁷

As noted above, the ICF methodology clearly includes a public vetting process, which I infer to be a conventional public comment. The number and location of the points in the process where public vetting is proposed to occur is not clear, however. There is a serious risk that public vetting will occur too late to be able to ensure that mid-course corrections are made.

While public comment is necessary, it is certain not to be sufficient because the patent community is gravely uninformed about the Paperwork Reduction Act. I strongly urge the USPTO to add a formal, independent peer review process to ensure IQG compliance.⁸ Peer review panels can be created with a mix of patent attorneys and paperwork burden experts, and they need not be chartered under the Federal Advisory Committee Act as long as they are organized and operated by independent third parties. Such panels are uniquely capable of providing the most focused and useful input, and would enable ICF to produce higher quality analyses.

⁶ **American Intellectual Property Law Association**, "Report of the Economic Survey: 2009," 2009. Rockville, Md.: Association Research, Inc.

⁷ The proposed methodology obliquely anticipates this outcome, stating that other information (and possibly new surveys) may be needed. ICF should revise the methodology to make clear to the USPTO now that a major new survey research program will be needed.

⁸ For government-wide guidelines on peer review, see **Office of Management and Budget**. "Final Information Quality Bulletin for Peer Review." *Federal Register*, 2005, 70(10), pp. 2664-67. The proposed version of this guidance is superior in many respects and provides a better starting point for an agency such as the USPTO, which has no experience in peer review. See _____. "Proposed Bulletin on Peer Review and Information Quality; Notice and Request for Comments." *Federal Register*, 2003, 68(178), pp. 54023-29.



Overall Approach for Developing the Methodologies

Working Principles and Standards (§ 2.1)

I applaud the ICF report's five working principles, most importantly the commitment to full adherence to standards and principles in the USPTO's Information Quality Guidelines (IQG).⁹ These standards and principles are an integral part of the Paperwork Reduction Act, and any credible methodology for burden estimation must adhere to them.

Compliance with the IQG is a very good start, but it should be understood that it is *only* a start. What the USPTO needs is a process by which an IQA-compliant burden estimation methodology, once completed, is verifiably incorporated into the USPTO's planning and management of all of its PRA responsibilities. In my experience reviewing recent USPTO recent ICR submissions, I have noticed that the Patent Office's has routinely but falsely certified compliance with the IQG.¹⁰ This practice, which betrays an utter absence of agency interest in actual compliance, must be terminated immediately. The Patent Office must not certify compliance with the IQG unless and until it can convincingly demonstrate that its burden estimates actually do comply.

For this reason, I suggest appending to the fifth working principle the following subtask:

⁹ U.S. Patent and Trademark Office. "Information Quality Guidelines," Alexandria, VA, 2002.

¹⁰ Belzer, Richard B. "Cost of Complying with the Proposed IDS Rule," 2007a, _____. "Letter to Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs [October 26, 2007]," 2007b, _____. "Letter to Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget RE ICR 0651-0031," Mt. Vernon, VA, 2008c, 1-120, _____. "Letter to Nicholas A. Fraser, Desk Officer for the U.S. Patent and Trademark Office, Office of Information and Regulatory Affairs, Office of Management and Budget RE: ICR 0651-00xx ["October 14th ICR Comment"]," Mount Vernon, Va., 2008a, _____. "Letter to Nicholas A. Fraser, Desk Officer for the U.S. Patent and Trademark Office, Office of Information and Regulatory Affairs, Office of Management and Budget RE: ICR 0651-00xx: ICs and Burden Estimates ["November 17th ICR Comment"]," Mount Vernon, Va., 2008b.

- *An independently verifiable means of ensuring actual USPTO adherence to IQA-compliant burden estimation methodologies.*

A series of burden-estimation methodologies that prescribe how to perform these tasks is clearly necessary, but cannot be sufficient without a means of independently verifying that the methodologies have actually been followed.

The Importance of Adequate Data, Transparency and Appropriate Granularity (§ 2.2)

ICF is correct that paperwork burdens often are highly variable and that this variability ought to be accounted for. Furthermore, ICF also is correct that the proper way to account for variability is by estimating distributions, not just point estimates. My experience is similar to that of ICF: cost distributions often (and perhaps usually) are positively skewed such that a substantial portion of the affected population faces disproportionately great effects. Further, I agree with ICF that good-faith subjective judgments about the central tendency of asymmetrical distributions tend to be biased toward the mode. I also agree with ICF's claim that public commenters tend to be those whose costs are above average, a fact that I believe reinforces the case for supplementing public comment with expert assistance and independent peer review.

ICF says burdens are distributed unevenly, and I wholeheartedly agree. There are numerous margins for which it would be surprising to discover that they are *not* strong explanatory factors. These margins include such things as the 4-digit art unit code; the applicant's characteristics, experience, and history with the USPTO; and the skill of the applicant's attorney or agent (perhaps estimated by proxy by number of years' experience).

Review of Existing Burden Estimates (§ 2.3)

The sample of ICRs and NPRMs reviewed

The sample of ICRs that ICF proposes to review appears to be reasonable, but the selection of proposed rules is not. The former list includes ICRs 0651-0031 0651-0063, both of which are known to have been highly controversial and on which multiple public comments were submitted. However, the latter list is limited to the 2007 BPAI Rules of Practice NPRM, which lacked the 60-day notice required by law. Obvious by their exclusion are the proposed rules limiting claims and continuations and imposing information disclosure statement requirements.¹¹

¹¹ U.S. Patent and Trademark Office. "Changes To Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications



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These NPRMs contain the 60-day notices that made ICR 0651-0031 controversial. It makes no sense to include the ICRs but not the rules. Their omission must be rectified.

ICF's discussion of its review of these two samples is obtuse, and thus fundamentally deficient. A knowledgeable reader can infer that ICF failed to find anything useful in these documents. ICF casually acknowledgement that the burden estimates contained in these documents—to the extent they contained *any* information at all—fail to satisfy the IQG even though the USPTO certified full compliance speaks volumes about how extraordinarily substandard has been the Patent Office's recent performance.

Estimates for requirements that already are being met

The USPTO's past (selective) reliance on the AIPLA economic is emblematic. AIPLA conducts these biennial surveys for its own purposes and thus can choose what data to collect and make of them whatever it wants. However, when the USPTO disseminates AIPLA survey data in a way that conveys agreement or support, or utilizes AIPLA data for burden estimation or any other purpose, the IQG requires the USPTO to demonstrate that these data satisfy applicable information quality standards. As noted below, the AIPLA survey data do not meet federal statistical policy standards, and thus they cannot adhere to the IQG.¹²

Estimates for new requirements

I applaud ICF for specifically proposing to utilize the data submitted by public commenters (including me) on ICRs 0651-0031 and 0651-0063. None of the commenters (including me) have claimed that their estimates are the "last word" on the subject. Rather, commenters correctly noted that the burden "estimates" put forth by the USPTO lacked any credibility whatsoever.

Containing Patentably Indistinct Claims; Proposed Rule [0651-AB93]." *Federal Register*, 2006c, 71(1), pp. 48-61, ___. "Changes To Information Disclosure Statement Requirements and Other Related Matters; Proposed Rule [0651-AB95]." *Federal Register*, 2006a, 71(131), pp. 38808-23, ___. "Changes to Practice for the Examination of Claims in Patent Applications; Proposed Rule [0651-AB94]." *Federal Register*, 2006b, 71(1), pp. 61-69.

¹² **Office of Management and Budget.** "Standards and Guidelines for Statistical Surveys," Washington, D.C.: Office of Management and Budget, 2006.

ICF proposes to “use these estimates in conjunction with ICF’s own estimates.” Unfortunately, the text is sparse with respect to how ICF proposes to use them. It is essential that this not be reduced to a contest in competing opinions or judgments. Commenters’ insights should be considered to the extent that they have objective merit, particularly with respect to the technical expertise related to actually performing the tasks for which burdens are to be estimated. ICF has experience estimating burden based on valid external data, but has no experience actually performing the functional tasks involved.

For this reason, it is essential that the methodology be revised to establish *a priori* principles for the interpretation and disposition of public commenters’ burden estimates. It is unacceptable for ICF to make these decisions subjectively, after the fact, inconsistently, in coordination with (or at the direction of) USPTO staff, or without full and complete documentation. Any methodology that lacks *a priori* principles for evaluating public comments would be *per se* defective and have no credibility.

Other Comments

The ICF Report does not include specific elements related to the clear, accurate and unbiased reporting of paperwork burden estimates, such as in agency Supporting Statements and (most notably) *Federal Register* notices. USPTO *Federal Register* notices are consistently inscrutable. The public is not at all informed when, for example, a 60-day notice says that the estimated time per response ranges from 1.8 minutes to 12 hours.¹³

Public comments will be helpful to calibrate burden estimates, but it will not be sufficient. Public comment has all sorts of limitations, including self-selection and a confounding interest in the substance of regulation that may make strategic behavior in burden estimation difficult to detect.¹⁴ For this reason, I strongly believe that expert peer review should be part of the methodology for each of the four analyses.

¹³ **U.S. Patent and Trademark Office.** "Changes To Information Disclosure Statement Requirements and Other Related Matters; Proposed Rule [0651-AB95]." *Federal Register*, 2006a, 71(131), pp. 38808-23. 38819.

¹⁴ USPTO staff also has a confounding interest in the substance of regulation, which is an important reason why Patent Office estimates have been consistently criticized by public commenters as egregiously underestimated.

Methodologies for the Four Analyses

Analysis 1: Validate Reasons for Changes in Burden (§ 3.2)

ICF's methodology presumes that the information recorded in ROCIS is valid and reliable. This assumption is highly suspect. My review of information uploaded to ROCIS by the USPTO, which admittedly is not nearly as complete a record as ICF proposes to create, indicates that much of the information in ROCIS is suspect, incomplete, or otherwise unhelpful. The "stated reasons" usually given for changes are too vague to be used for the purposes of this analysis¹⁵ or orthogonal to the purpose of burden estimation.¹⁶ The purpose of Analysis 1 should be to develop a valid, reliable, objective, transparent, and reproducible methodology for assigning burden changes to their respective causes, and that all changes are counted exactly once. I am concerned the proposed methodology may stray into an apologia for existing procedures.

This concern is enhanced by the planned interaction between ICF and USPTO staff in this analysis, which could easily compromise ICF's objectivity and independence.¹⁷ As a regular supplier of consulting services to the USPTO, ICF cannot help but be tempted to accommodate suggestions and changes proposed by Patent Office staff irrespective of their technical merit. It makes sense for ICF to consult with USPTO staff for information and to clarify its past procedures and practices, but these consultations must be informational only. Moreover, every consultation must be fully documented, and its results transparently disclosed, publicly vetted, and (in my view) subject to peer review.

Finally, ICF's proposed completion date (12 to 18 months after authorization) is unreasonably distant. A more appropriate schedule is 1 to 3 months. While it is true that the number of existing ICRs that must be reviewed is large, it is highly likely that ICF will very quickly learn what can be known about the stated reasons for changes. If, however, ICF proceeds down this path and performs

¹⁵ To be concrete, agencies have a strategic interest in avoiding clarity in their descriptions of the reasons for a change.

¹⁶ To be concrete, whether a change in burden is the result of statutory change, regulatory change, the issuance or revision of guidance, or some other factor has no effect on the objective magnitude of the burden or the validity of the estimated change. It is worth keeping track of the category because agencies have a strategic interest in attributing the most burdensome changes to Congress.

¹⁷ These interactions are alluded to vaguely on pp. 14-15.



an extended (and unduly expensive) search through the Patent Office's archives and email to uncover the sources of these opinions, ICF (and the USPTO) must be prepared to fully disclose all of the information obtained.¹⁸

Analysis 2: Compare Accuracy of New versus Revised ICR Estimates (§ 3.3)

ICF's proposed approach to this analysis is fundamentally and fatally flawed. It is built from the ground up based on the assumption that the AIPLA economic survey is an acceptable data source for burden estimation. The AIPLA survey is a serious effort, to be sure, but it does not satisfy federal statistical policy standards and thus cannot be used as the basis for USPTO burden estimates.

Sample frame

The 2009 AIPLA survey is not a survey at all; it is a census of 15,395 members and known nonmembers. This sample frame may be representative, but representativeness cannot be simply assumed. Thus, ICF's first task is to determine who in the patent community has relevant information but is not included in this sample frame, and determine if these omissions are randomly distributed across the important margins of patent prosecution.

Response rate

Federal Statistical Policy Standard 1.3 states:

Agencies must design the survey to achieve the highest practical rates of response, commensurate with the importance of survey uses, respondent burden, and data collection costs, to ensure that survey results are representative of the target population so that they can be used with confidence to inform decisions. Nonresponse bias analyses must be conducted when unit or item response rates or other factors suggest the potential for bias to occur.

Standard 3.2 states:

Agencies must appropriately measure, adjust for, report, and analyze unit and item nonresponse to assess their effects on data quality and to inform users. Response rates must be computed using standard

¹⁸ Disclosure is required by presidential directive. See **Obama, Barack**, "Memorandum of January 21, 2009: Freedom of Information Act." *Federal Register*, 2009, 74(15), pp. 4683-84.

formulas to measure the proportion of the eligible sample that is represented by the responding units in each study, as an indicator of potential nonresponse bias.

Both of these standards are mandatory. The USPTO cannot use the AIPLA survey unless it meets these (and other) statistical policy standards. Operationally, the need for a nonresponse bias analysis kicks in the overall unit response rate is less than 80 % or an item response rate is less than 70%. The 2009 AIPLA includes responses from 3,221 members, a maximum response rate of only 21%.¹⁹

The 2009 AIPLA report states:

All data submitted by respondents were reviewed and evaluated for reasonableness and consistency; data anomalies and outliers were analyzed and corrected or deleted.

How these procedures were performed was not disclosed, a facial violation of the transparency standard in the IQG as well as a presumptive violation of the objectivity standard.

In short, there is no way ICF can credibly validate the results of the AIPLA survey. Despite these fatal defects, ICF proposes that Analysis 2 use AIPLA survey data as benchmarks for evaluating the accuracy of USPTO burden estimates. This procedure has no merit. Of course, it would be valuable for ICF to interview AIPLA staff and its consultants to learn more about its procedures (including professed data quality validation efforts), but these interviews should be used only for guiding the development of a new, IQA-compliant survey.

ICF proposes to conduct this analysis in conjunction with Analysis 3, which is the aggregation of burdens across the myriad ICRs facing multiple classes and types of applicants. Because ICF's proposed Analysis 2 cannot succeed, this plan condemns Analysis 3 to failure. There is no value in aggregating quantities that have no objective merit.

Analysis 3: Estimate total PRA Burdens on Applicants (§ 3.3)

The ICF proposal proceeds from the imaginary state in which Analysis 2 has already produced credible burden estimates for some but not all information collections contained in the sample of ICRs previously listed. The remaining task, it is assumed, is top fill in the gaps. Yet the proposal also says that Analysis 3 is where

¹⁹ The report states that "only" 230 firm representatives completed the survey. The response rate for firms cannot be determined.

ICF would begin “validating data sources” and “addressing issues raised in previous ICR estimates.” If ICF waits until this late stage to *begin validating data*, the entire project is defeated even before it begins.

Validating and estimating burden for existing requirements

ICF’s proposal assumes that the AIPLA survey will provide a valid benchmark for evaluating and calibrating USPTO burden estimates. As noted above, this assumption is false because the AIPLA survey cannot be used for this purpose without violating the IQG and federal statistical policy standards. ICF and USPTO may be correct that AIPLA survey results “often are likely to provide the most credible and up-to-date readily available data.” Even so, the AIPLA data cannot be used simply because they are “readily available” and superior to anything the USPTO has because the USPTO has nothing. The Paperwork Reduction Act does not permit an agency to decline to prepare objectively supported burden estimates because it is hard to do, nor does it permit an agency to rely on readily available data that do not adhere to applicable information quality requirements or violate statistical policy standards.

ICF is correct, though it understates the case, when it says:

It also is plausible that for the purposes of estimating burdens in ICRs and regulatory analyses, the Agency would need additional statistics or a broader representation of the data than are provided in the AIPLA survey reports to more completely characterize the full distribution of cost or to more finely subcategorize the results for USPTO’s purposes, as discussed in Section 2.2 (the importance of data, transparency and appropriate granularity). In addition, previous AIPLA surveys have not collected all of the data that the Agency has needed to estimate burdens in ICRs, such as paraprofessional rates or applicant time (p. 18).

Diplomacy aside, there is no question that the proper thing to do is start over. With the few exceptions noted above, ICF has presented a sound approach to the problem in Section 2. The problem is that Section 3 does not actually propose to implement Section 2.

Section 3 of the ICF methodology must be discarded and replaced with a plan to develop and implement a survey using a representative sample of appropriate size to achieve the necessary statistical power. This survey must comply with the IQG and federal statistical policy standards and guidelines. It is possible that AIPLA,

and perhaps additional professional associations, would be willing to collaborate on the project.²⁰

The ICF Report hints at new surveys, but primarily as “limited follow-on” efforts, yet tactfully recognizes that the need is fundamental and not merely ancillary:

Alternatively, ICF may determine that the best approach for validating the Agency’s use of the AIPLA survey data, as well as to augment it as needed, is to perform an independent survey that specifically targets all of the data required by the study. This would serve not only to provide the data needed for estimating the total PRA burden on patent applicants as described in Section 3.3.3 below, but also would serve as a basis for validating the use of the AIPLA survey data for Agency’s purposes as well as serve as the basis for Analysis 2 (p. 20).

The USPTO should recognize the wisdom of this advice, however indirectly it has been offered. Continuing to treat this project as a conventional but limited burden-estimation exercise will ensure that it fails. Numerous survey research firms, possibly including ICF, are capable of developing and implementing a survey instrument that meets these criteria. The USPTO should publish a new RFP specifically designed for that purpose.

Analysis 3 should be redesigned to utilize information obtained from a new survey for the purpose of estimating burden. Unless and until such a survey is built and administered, the objectives set out for Analyses 2 and 3 cannot be achieved.

Potential opportunity for additional input

ICF proposes, albeit obliquely, to solicit input from genuine experts. The plan should be amended to establish and implement formal procedures for performing the consultations already required by law but which the USPTO does not do. Given the Patent Office’s history of estranged relations with its customers, a much better approach would be to establish formalized procedures for soliciting input through a FACA-chartered advisory group and separately contracting for the conduct of rigorous external and independent peer review.

²⁰ A comprehensive review of the AIPLA survey is likely to reveal defects so large that AIPLA no longer has confidence in it.

Analysis 4: Identify Options for Reducing Applicant Burden

Analysis 4 is, quite simply, premature. This is self-evident in the abbreviated discussion in the ICF Report. When the major problems inherent in the ICF methodology are taken into account, it becomes clear that the resources ICF proposes to devote to Analysis 4 should be redirected elsewhere.

Suggested Modifications to the ICF Proposed Methodology

The previous sections have taken the ICF Report at face value and commented on their technical merits. In this section, specific modifications are suggested to improve it on a more fundamental level.

Postpone premature analyses

Until a credible methodology is developed for estimating paperwork generally, no effort should be devoted to estimating aggregate burden (Analysis 3). Similarly, Analyses 1 and 4 are worth doing but ought not be included *in this project*. Analysis 1 has nothing to do with burden estimation, and Analysis 4 concerns overcoming the USPTO's historic disregard for minimizing burden as required by law. All of the effort here should be expended on the development of a credible and implementable procedure for estimating burden generally. At this time, everything else is a distraction.

Learn lessons from, but do not even consider using, the AIPLA survey

Analysis 2 is the core of the Report, but ICF goes about the task incorrectly by presuming that the AIPLA economic survey can be used as is, or with a few minor tweaks, as the basis for USPTO burden estimation. Although much can be learned from the AIPLA survey, this plan is mistaken and should be abandoned because it will fail.

Inventory paperwork burdens

A much more promising approach is to build a *de novo* inventory of information collections (ICs) based on a systematic review of USPTO regulations and guidance. Many can be matched to existing ICs in one or another existing ICR. However, we now know from our experience with ICRs 0651-0031 and 0651-0063 that many significant USPTO paperwork burdens do not have valid OMB Control Numbers. These information collections are illegal. Only a comprehensive review of the paperwork burdens of existing rules and guidance can reveal the magnitude of this problem, and no burden estimation methodology will succeed if it ignores the problem of illegal information collection.



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Devise a new survey

The USPTO should candidly recognize that it cannot credibly use the AIPLA survey. A new survey should be designed from the ground up that meets applicable federal statistical policy standards and the IQG. It can be built from the ground up with modules derived from the *de novo* inventory of information collections recommended above. This could be done within the existing ICF project, but I recommend that it be removed from the methodology study and conducted as a separate, freestanding effort subject to a new RFP to ensure that it is performed by the best available survey research team, as determined by a fully competitive bidding process.

Concluding Comments

The ICF Report provides a welcome first start toward a credible methodology for estimating paperwork burdens related to USPTO activities. The Report is especially strong in its theoretical elements. But the methodology ultimately fails because it relies on the use of available data, and the available data are insufficient to implement it.

Sincerely,



President
Regulatory Checkbook

