



**UNITED STATES PATENT AND TRADEMARK OFFICE**

OFFICE OF THE GENERAL COUNSEL

**MEMORANDUM TO:** John Farmer  
Chairman, Trademark Public Advisory Committee

Damon Matteo  
Patent Public Advisory Committee

**THROUGH:** James A. Toupin  
General Counsel

Handwritten signature of James A. Toupin in black ink.

**FROM:** William R. Covey  
Deputy General Counsel for General Law

Handwritten initials "WRC" in black ink.

Rachel B. Irish  
Associate Counsel

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Michael G. Lewis  
Associate Counsel

Handwritten signature of Michael G. Lewis in black ink.

**DATE:** August 19, 2009

**SUBJECT:** **Guidance on Public Advisory Committee Meetings**

**SUMMARY**

Recently, there have been questions regarding the manner in which USPTO Public Advisory Committee (PAC) meetings are scheduled, when the public needs to be notified of a meeting, and when it is necessary or proper to hold an executive session. This memorandum provides guidance and procedural requirements for scheduling and conducting PAC meetings, as summarized below under "recommendations."

**DISCUSSION**

**A. Meetings Generally**

The purpose of the PACs is to review the policies, goals, performance, budget, and user fees of the USPTO, and to advise the Director of the USPTO. 35 U.S.C. § 5(d). Each PAC consists of nine voting members who are appointed by and serve at the pleasure of the Secretary of Commerce. Id. at § 5(a)(1). On July 29, 2000, the Secretary signed Charters establishing operating procedures for each of the two PACs – the Patent Public Advisory Committee (PPAC) and the Trademark Public Advisory Committee (TPAC). Ex. 1-2. Each PAC must meet at least twice a year, and

meetings are scheduled at the call of the Chairperson, in consultation with the Director of the USPTO. Ex. 1-2 at D.1.

While there is no specific definition of a PAC “meeting,” we suggest interpreting the term to be any gathering (in-person, telephonic, online or a combination) of a majority of the Committee members. If one of the Committees schedules a conference call, for instance, and a majority of the members are going to be on the phone, this is a Committee meeting (and subject to the notice requirements discussed below). Each PAC consists of 9 members, so any gathering of 5 or more members will constitute a meeting. Each PAC Charter states that meetings can be in-person or online. Ex. 1-2 at D.5. The instant guidance, therefore, applies to meetings held at the USPTO, as well as virtual meetings and conference calls.

This definition of a meeting is consistent with the Federal Advisory Committee Act (FACA) which relies on The Government in the Sunshine Act’s definition of a meeting. 5 U.S.C. App. § 10(d) (Sunshine Act). The Sunshine Act states:

“the term “meeting” means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of agency business . . .”

5 U.S.C. § 552b(a)(2). While the USPTO PACs are clearly exempted from the FACA (Ex. 1-2 at D.11), the FACA provides helpful guidance, especially when a term or action is undefined as it is here. For each PAC, a majority of the members is analogous to the “number of individual agency members required to take action” referenced in the Sunshine Act’s definition of a “meeting.” Like the USPTO PAC charters, which contemplate online meetings, the Sunshine Act has been read to allow for virtual meetings and for meetings to be conducted by conference call.<sup>17</sup> We are suggesting the same interpretation of a meeting here.

The general PAC meeting requirements are set forth in the enabling statute at 35 U.S.C. § 5 and in each of the PAC Charters. The enabling statute states that, “[t]he meetings of each Advisory Committee shall be open to the public, except that each Advisory Committee may by majority vote, meet in executive session when considering personnel, privileged or other confidential information.” 35 U.S.C. § 5(i). The PAC Charters, similarly state that, “Committee meetings will be open to the public, except that the Committee may, by majority vote, meet in executive session when considering personnel or other confidential information.” Ex. 1-2 at D.3. PAC meetings may be conducted online or held in the Washington, D.C. area, in space provided by the USPTO. *Id.* at D.5. The Charters provide for the establishment of PAC Subcommittees, which typically consist of two or three members of the full Committee. *Id.* at D.7. Thus, the PAC Subcommittees can meet in-person or on the phone and it is not considered a “meeting” within the definition suggested here.

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<sup>17</sup> Meetings conducted by conference call or by virtual means are consistent with the Sunshine Act, so long as there is an opportunity for the public to “observe” and members of the public can hear and determine who is speaking. Richard K. Berg, Stephen H. Klitzman, Gary J. Edles, *An Interpretive Guide to the Government in the Sunshine Act*, 53-54 (2d ed., ABA Section of Admin. Law and Regulatory Practice 2005).

## **B. Meeting Notice Requirements**

According to the PAC Charters, “[n]otice of a meeting, including the agenda for the meeting, will be posted on the USPTO Website ([www.uspto.gov](http://www.uspto.gov)) at least two weeks before the meeting date except as the Chairperson may deem necessary.” Ex. 1-2 at D.2. No other notice is required, but notice may be posted in the *Federal Register* and the *Official Gazette*. *Id.* The agenda for each meeting is to be set by the Chairperson, in consultation with the Director. *Id.* The Charters do not elaborate on circumstances in which the Chairperson may deem it necessary to forego the two-week publication requirement of the meeting notice and agenda. If this is done, we suggest that the Chairperson document the decision to waive the public notice requirement and the reasons for doing so.

## **C. Public Meeting or Executive Session**

Generally, PAC meetings are open to the public. Ex. 1-2 at D.3. As discussed above, however, by a majority vote of the Committee, personnel, privileged or other confidential information may be discussed in an executive session. *Id.* Since the public notice requirement applies to any PAC meeting, if only an executive session is scheduled, the agenda for that session must provide public notice that the executive session is scheduled to take place. Recently, the PACs have scheduled meetings such as conference calls (treating them as executive sessions) without providing public notice or an agenda. The Charters only require that the agendas “provide notice of each executive session.” *Id.* We suggest providing sufficient detail in the agenda to justify the necessity of holding an executive session. For example, the agenda for an executive session could say “discussion of confidential personnel matter” or “update on Agency deliberations regarding FY2010 Budget.” Unless the Chairperson has waived the two-week notice requirement, the agenda for an executive session should be prepared in consultation with the Director and posted on the USPTO Website at least two weeks prior to the meeting. Again, if the notice requirement is waived, the Chairperson should document that decision and the reasons for the waiver.

## **RECOMMENDATIONS:**

Ensure that each of the PACs receives the following meeting guidance:

- All PAC meetings involving a majority of the Committee members must be open to the public, unless by majority vote, the Committee determines there should be an executive session;
- Notice of any PAC meeting must be published on the USPTO Website at least two weeks before the meeting, and the agenda for the meeting should be published at the same time (notice applies to public and executive sessions);
- The Chairperson, in consultation with the Director, will set the agenda for each public meeting and executive session;
- The decision to hold an executive session is to be made by majority vote of the Committee, and the members should discuss and vote on each proposed agenda item

to determine whether it contains personnel, privileged or other confidential information;

- The Chairperson should keep detailed records of the Committee's voting and meeting-related decisions (when to hold a meeting, public or executive session, waiver of two-week public notice requirement, etc.); and
- Executive session agendas should provide sufficient detail to inform the public of the reason each agenda item is appropriate for the executive session.

If you have any further questions regarding the information contained herein, please do not hesitate to call Michael Lewis at (571) 272-8401 or Rachel Irish at (571) 272-5365.

**cc:** David Kappos, Undersecretary and Director  
Lynne G. Beresford, Commissioner for Trademarks  
John Doll, Commissioner for Patents  
Brian Hanlon, Acting Chief of Staff  
Ann Farson, Senior Program Analyst

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CHARTER OF THE  
PATENT PUBLIC ADVISORY COMMITTEE  
UNITED STATES PATENT AND TRADEMARK OFFICE

A. ESTABLISHMENT

The Secretary of Commerce establishes the Patent Public Advisory Committee (Committee) under the Patent and Trademark Office Efficiency Act, Pub. L. 106-113, Appendix I, § 4714, 113 Stat. 5101A-578 (Nov. 29, 1999), codified at 35 U.S.C. § 5.

B. OBJECTIVES AND DUTIES

1. The Committee will review the policies, goals, performance, budget, and user fees of the United States Patent and Trademark Office (USPTO) with respect to patents and advise the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office (Director) on these matters.
2. Within 60 days after the end of each fiscal year, the Committee will prepare an annual report on the matters referred to in paragraph (1); transmit the report to the Secretary of Commerce, the President, and the Committees on the Judiciary of the Senate and the House of Representatives; and publish the report in the *Official Gazette*.
3. The Committee functions solely in an advisory capacity.
4. The Committee will be available to the Director for consultation.

C. MEMBERS AND CHAIRPERSON

1. The Committee will have nine voting members, who are appointed by and serve at the pleasure of the Secretary of Commerce.
2. Voting members of the Committee—
  - a. will be citizens of the United States;
  - b. will be chosen so as to represent the interests of USPTO diverse users with respect to patents;
  - c. will include members who represent small and large entity applicants located in the United States in proportion to the number of applications filed by such applicants;

- d. will include at least three members who represent small entity patent applicants, including small business concerns, independent inventors, and nonprofit organizations;
  - e. will include at least one independent inventor; and
  - f. will include individuals with substantial background and achievement in finance, management, labor relations, science, technology, and office automation.
3. In making appointments to the Committee, the Secretary of Commerce will consider the risk of loss of competitive advantage in international commerce or other harm to United States companies as a result of such appointments.
  4. Voting members will be Special Government Employees as defined in 18 U.S.C. § 202.
  5. The Committee will have three non-voting members consisting of a representative from each labor organization recognized by USPTO, namely, Locals 243 and 245 of the National Treasury Employees Union (NTEU) and the Patent Office Professional Association (POPA).
  6. The Secretary will appoint a voting member of the Committee as the Chairperson. The Chairperson will serve a three-year term. If the Chairperson is unable to attend a Committee meeting, he or she will appoint a voting member of the Committee to chair the meeting.
  7. Each voting member will serve a three-year term. However, when the first voting members are appointed, three will be appointed for a term of one year, and three will be appointed for a term of two years. No voting member may serve more than two consecutive terms.
  8. When a vacancy occurs in the Committee, a replacement member may be appointed for the remainder of the unexpired term. Vacancies will be filled within three months after they occur. A replacement appointment for less than half of a term will not be counted for the purposes of the term limitation in the preceding paragraph.
  9. Voting members of the Committee are not subject to 35 U.S.C. § 4. The Director has determined that because voting members do not have access to confidential patent information and because 35 U.S.C. § 5(b)(2) requires an independent inventor on the Committee, Congress did not intend for 35 U.S.C. § 4 to bar Public Advisory Committee members from obtaining or prosecuting patents.

**D. ADMINISTRATIVE PROVISIONS**

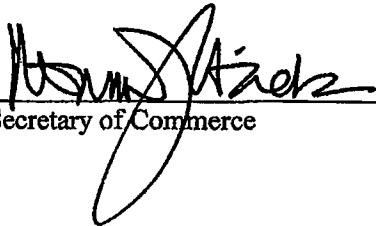
1. The Committee will meet at least twice a year, but will not serve more than 60 days during any period of 365 consecutive days. Meetings will be held at the call of the Chairperson, in consultation with the Director.

2. Notice of a meeting, including the agenda for the meeting, will be posted on the USPTO Web site ([www.USPTO.gov](http://www.USPTO.gov)) at least two weeks before the meeting date except as the Chairperson may deem necessary. No other notice is required, but notice may also be published in the *Federal Register* and the *Official Gazette*. The Chairperson, in consultation with the Director, will set the agenda for each meeting.
3. Committee meetings will be open to the public, except that the Committee may, by majority vote, meet in executive session when considering personnel or other confidential information. The agenda will provide notice of each executive session.
4. Members of the public may file written statements with the Committee prior to the meeting concerning matters on the Committee's agenda. The Chairperson may permit members of the public to submit written statements on such matters within a specified time after the Committee meeting. Oral presentations at the Committee meetings by members of the public will not be permitted except upon invitation of the Chairperson.
5. Committee meetings may be conducted online. Meetings not conducted online will be held in the metropolitan Washington, D.C. area in space provided by USPTO.
6. Transcripts of Committee meetings open to the public will be posted on the USPTO Web site.
7. Procedures for the Committee decision-making process will be developed by the Committee. The Chairperson may appoint subcommittees subject to such conditions as the Chairperson may prescribe.
8. USPTO will provide clerical and other support services for the Committee, as the Director may determine to be necessary and proper. The estimated annual budget for such support including compensation, travel, lodging, meeting room, and staffing is \$94,000.00.
9. If necessary, in order to fulfill the duties of the Committee, the Chairperson may request USPTO to provide access to existing records created and used by USPTO in the ordinary course of business. Unless the request is for personnel or other privileged information and information concerning patent applications required to be kept in confidence by 35 U.S.C. § 122, access to the records or copies of the records will be provided. The Chairperson will submit requests for records to the Office of the Director.
10. A voting member of the Committee will be compensated for each day, including travel time, during which such member is attending Committee meetings or is otherwise engaged in the business of the Committee. Compensation will be at the rate that is the daily equivalent of the annual rate of basic pay in effect for level III of the Executive Schedule under 5 U.S.C. § 5314. While the member is away from his or her home or regular place of business, they will be compensated for travel expenses, including per diem as defined in 5 U.S.C. § 5703.



11. The Federal Advisory Committee Act (5 U.S.C. App.) does not apply to the Committee.
12. The Director will issue protocols for the efficient operation of the Committee and for effective and timely interaction between the Committee and other USPTO units.
13. This charter may be amended by the Secretary of Commerce.

July 29, 2000  
Date

  
Secretary of Commerce

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2. Within 60 days after the end of each fiscal year, the Committee will prepare an annual report on the matters referred to in paragraph (1); transmit the report to the Secretary of Commerce, the President, and the Committees on the Judiciary of the Senate and the House of Representatives; and publish the report in the *Official Gazette*.
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1. The Committee will have nine voting members, who are appointed by and serve at the pleasure of the Secretary of Commerce.
2. Voting members of the Committee—
  - a. will be citizens of the United States;
  - b. will be chosen so as to represent the interests of USPTO diverse users with respect to trademarks; and
  - c. will include individuals with substantial background and achievement in finance, management, labor relations, science, technology, and office automation.
3. In making appointments to the Committee, the Secretary of Commerce will consider the risk of loss of competitive advantage in international commerce or other harm to United States companies as a result of such appointments.

4. Voting members will be Special Government Employees as defined in 18 U.S.C. § 202.
5. The Committee will have three non-voting members consisting of a representative from each labor organization recognized by USPTO, namely, Locals 243 and 245 of the National Treasury Employees Union (NTEU) and the Patent Office Professional Association (POPA).
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