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The proposal amounts to stating that applicants should anticipate every claim they would ever want to make in an initial filing, and should respond to early office actions in such complete detail that no more than four formal responses would ever be required. As a practical matter, this is not possible, and imposing an impossible condition would be a severe blow to all applicants.

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The good feature of current RCE practice is that it simplifies the procedure both for the PTO and for the applicant. In essence, applicant pays a fee, the same as a new application fee, and the examiner commits enough time to look at the claims (often amended) from a different angle. S/he may also cite new art, or consider documents submitted by applicant, but the time investment by an examiner in an RCE has to be considerably less than in a new case, which must first be understood and then searched de novo.

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Divisionals caused by restriction or election requirements – which will continue to be permitted – have the same advantages for applicants - but not for the Office, which must examine the literature as for a new application since it has been declared to be a distinct invention. (However, it might take less time to create the search strategy for a divisional than for a new application!) If the proposal is enacted, applicants will probably increase the number of independent claims initially submitted, to increase the availability of divisionals as backups.

In short, if this proposal is enacted as written, it will dramatically increase the burden on examiners (which could lead to more examiner turnover), without making anything better for applicants in terms of examination, and making preparation considerably more expensive. (Applicants and assignees can expect increased attorney fees – the proposed rules and their commentary are very explicit about wanting everything to be more carefully thought out before filing.)

The proposed rules would also produce a huge increase in appeals. Currently, if a second action by examiner is still off-base in the same way as the first, applicant has to decide between appealing and filing an RCE. While there are exceptions, applicant’s legal costs for filing even a notice of appeal are generally the same as or higher than simply filing an RCE. Hence it is usually faster and more cost effective for applicants to file an RCE, perhaps with a hint (using appeal-like language in spots, for instance), than to actually appeal. If that doesn’t produce progress, then appeal may be warranted. It cannot require a great deal of time for examiners to stonewall a RCE and later give ground upon the notice of appeal, as is frequently seen - at least judging by the usually brief responses. (There is a certain amount of ritualized combat in some of these patterns; applicants, who pay for it all, dislike this!)

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Dear Members: The [next Law Society meeting] will be hosting... who will be presenting on best practices on appeal, oral argument, brief drafting, and the impact of recent and proposed statutory and rule changes on the Board [of Patent Appeals and Interferences]. We are also [hoping] to have the Petitions Office represented.... [This is a tremendous opportunity to better understand how appeals are reviewed and how to craft briefs for a good outcome. This is critical as term extension and proposed limits on RCE practice (emphasis added)] make appeals and petitions integral to client representation..... Space will be limited. To guarantee a spot, pre-register....

The Bar is rising to the occasion, and the Office can expect a flood of appeals from second (or even first) round rejections if the present proposal is implemented - and maybe even if it is not, now that retroactive change has been put on the table by the Office. It seems likely that the appeals process will first jam up, and later perhaps become even more arbitrary than at present. While this may, at first, allow the Office to read a few more new applications, the effect will only be temporary, and the overall effect will be a setback to clearing the backlog. Enactment of the proposal will likely increase hostility to the Office among inventors, large and small, and their companies.

One difficulty in evaluating the Office’s proposal - even without the above problems - is its lack of an overview as to where the bottlenecks actually are in the examination system at present. The phrase “absorb agency resources” is found frequently in the proposal. The proper remedy for “absorption” of its resources should be for the Agency to grow more resources, since its charter, as written in the Constitution, is to grant patents to Inventors to protect their inventions. There is no exception in the Constitution for deference to an executive order to minimize the number of patent examiners (which were not contemplated in the first place...) The Office’s fees are supposed to cover its costs, and if there is still a
surtax on Office receipts for the general fund, prices need to be increased accordingly. I believe that most applicants (Inventors and their assignees) would much rather pay increased fees to the PTO for examining applications, than pay significantly higher amounts to legal representatives to appeal every adverse office action, and to write specifications at twice the level of detail and at least twice the expense.

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In addition, it would in turn be fair that if all patentable claims should be submitted initially, then there should not be a limit on their number, perhaps other than page fees. The co-pending PTO proposal that not more than 20 claims be designated for examination - at any one time - should serve, if adopted, to prevent any increase in the burden on examiners of many pages of claims. Inventors and assignees might find it less expensive to pay to have the extra claims written, than having the specification over-written.

An even worse feature of the proposal is that once it is established that having a second patent “too close” to a previous patent is not allowable, it could well make issued patents vulnerable to a new sources of challenge – that the new patent is too close to an old patent, and thus was obtained fraudulently. Trying to avoid this will also be expensive for applicants - when possible. Unfortunately, the Office isn’t required to consider, even in passing, the costs that may fall on patentees and applicants that are outside of the direct office fees. This is part of the reason why patent prosecution has become so expensive.

There is merit in the objective of requiring prosecution to proceed, and to close in a reasonable time. However, the limit of one RCE and no continuation or CIP is far too severe in its consequences, and is unnecessarily restrictive. The overall objective - of preventing undue delay of prosecution, and wasting Examiner time - could be achieved by allowing RCEs and continuations for several or perhaps even unlimited cycles, but with escalating fees – as with extensions of time. For example, let the second RCE (and/or third continuation or CIP) carry a 50% surcharge on the filing fee, and the next several carry higher and escalating fees - perhaps 100%, 200%, 300%, 400% - essentially as is now done with extensions of time. Perhaps the sixth bite of the apple should be the last, also as with extensions of time, but appealable for reasonable cause. Whether to have a terminal number at all should be determined after experience with the escalation of fees. Such a system would minimize the scope for exploitative stretching of prosecution, while avoiding the sudden death features of the “two strikes and you’re out” feature of the present proposal.

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Also, as one process for reconciling the Office’s various managerial goals with its Constitutional responsibility, the Commissioner might convene a panel representing the Office, registered representatives, and most especially inventors.

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