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## USPTO to Sunset the After Final Consideration Pilot (2.0) Program

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The After Final Consideration Pilot Program 2.0 (AFCP 2.0) has been a valuable tool for U.S. patent applicants since its inception in 2013. By offering a streamlined process for submitting amendments after a final office action, AFCP 2.0 endeavored to reduce the overall pendency of patent applications and improve collaboration between applicants and examiners. However, due to increasing costs and stakeholder discourse, the USPTO recently announced in the Federal Register ([89 FR 79899](#)) that the AFCP 2.0 program will end on December 14, 2024.

### WHAT IS AFCP 2.0?

AFCP 2.0 is a program offered by the United States Patent and Trademark Office (USPTO) that allows patent applicants to submit amendments to their patent applications after a final office action. It was created to provide a more efficient way for applicants to address the examiner's objections and potentially move their applications towards allowance. Typically, Applicants submit the AFCP form with at least one non-broadening, after-final amendment and expect either an allowance or an examiner interview (before further prosecution).

### KEY FEATURES OF AFCP

- **An alternative to RCEs:** AFCP 2.0 could be requested by an applicant after a final office action as an alternative to a Request for Continued Examination (RCE), which can be a costly and time-consuming process.
- **Benefits for applicants:** AFCP 2.0 could help applicants save time and money by avoiding RCEs. It can also help to improve the chances of obtaining a patent by encouraging collaboration. Such amendments might include incorporating subject matter previously indicated by the examiner as allowable, e.g., in order to expedite a positive disposition for the case.
- **Benefits for examiners:** AFCP 2.0 helped examiners to process patent applications more efficiently. For instance, with an AFCP request, an examiner would see the case in the docket sooner and be permitted to spend extra time (e.g., three hours) reviewing the proposed amendments and preparing for an interview with the applicant's representative.

### USPTO'S REPORTED USAGE AND COSTS OF AFCP 2.0

According to the USPTO, AFCP 2.0 has been a popular program with patent applicants. Since 2016, applicants have filed more than 60,000 AFCP 2.0 requests annually. However, the program is apparently expensive to administer.

The USPTO estimates that it spends more than \$15 million per year on costs associated with examiners considering AFCP 2.0 submissions.

### USPTO PROPOSED A FEE FOR PARTICIPATION IN AFCP IN APRIL 2023

In April 2023, the USPTO issued a notice in the Federal Register ([89 FR 23226](#)) proposing a new fee for participation in AFCP 2.0. The proposed fee structure was \$500 for undiscounted applications, \$200 for applications with a small entity discount, and \$100 for applications with a micro entity discount.

The USPTO said that the proposed fee was to offset the costs of administering the AFCP 2.0 program.

## TERMINATION OF AFCP 2.0

Due to public concerns about the proposed fees, the USPTO has decided to terminate the AFCP 2.0 program. The program was expected to be renewed to extend well beyond the prior termination date of September 30, 2024, but a termination was announced instead. There are no announced plans to modify or replace the program.

Rather than terminate AFCP abruptly, to accommodate those who may be in the process of preparing to use the program, the USPTO has provided a short extension of the expiration of the program until December 14, 2024.

## ALTERNATIVES FOR AFTER FINAL CONSIDERATION IN THE FUTURE

After the AFCP 2.0 program ends, it is important for applicants to be aware of the alternative options for after-final consideration. A final office action from the USPTO will still not mean an absolutely “final” rejection. At that point, there are many paths to consider before walking away from one’s significant investment of time and resources in the patent prosecution process.

For instance, some of the options include:

- **Routine examination practice:** Applicants can submit amendments to their patent applications under routine examination practice. These amendments must place the application in condition for allowance or in better form for appeal. (37 CFR 1.116(b)).
- **Triggering an Advisory Action:** Applicants responding after a final office action might lead to an advisory action from the examiner, but, if the applicant files a reply more than two months after the mailing date of the final, additional correspondence could trigger fees for extension(s) of time.
- **Examiner-initiated interviews:** Examiners may initiate interviews with applicants to discuss their patent applications. (MPEP sections 713.09 and 714.12)
- **Pre-appeal brief request for review:** Applicants can file a pre-appeal brief request for review at the time of filing a notice of appeal. This option allows applicants to have a panel decide if an issue for appeal is, in fact, present in the record. (MPEP section 1204.02)
- **Request for Continued Examination (RCE):** Applicants can file an RCE to continue prosecution of their patent application. However, RCEs can be costly and time-consuming. In accordance with the April announcements, the USPTO fee schedule is planned to steeply increase in January 2025.

## PROACTIVE PLANNING FOR POST-AFCP PATENT PROSECUTION

The termination of AFCP 2.0 will have far-reaching implications for patent applicants and examiners. With AFCP no longer in the toolbelt, Applicants will undoubtedly still try to maximize their proverbial bites at the apple. Examiners will likely continue to look for balance in closing pending cases while managing their allotted time. AFCP was not perfect for every situation, but it was attractive for many circumstances.

Moving forward, by appreciating all the available options and how the examiners might consider after-final prosecution, applicants can make better informed plans prosecuting their patent applications. With the help of the right patent practitioners, personalized strategies should be considered early in the patent application process—perhaps even before filing the patent application.



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