

# EXHIBIT 11

# **The Patent Prospector**

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June 23, 2007

## **Accountability**

Two groups representing diverse interests met with officials from the Office of Management and Budget (OMB) at the White House on June 14 & 15 to thwart the patent office's proposed rule changes to limit continuations and change examination procedures. USPTO thoughtlessness and misconduct at the highest level of management appear egregious.

The meeting records can ostensibly be found on the OMB site. While the June 14 meeting record is extant, the June 15 meeting was not properly put on the OMB site - the page reads, with poetic irony: "Pollution Prevention;" your tax dollars at FUBAR.

The June 14 meeting was initiated by the Innovation Alliance, carrying with it words of support from the American Bar Association, The Bar Association of the District of Columbia, and American Intellectual Property Law Association (AIPLA).

The June 15 meeting had the following participants:

- David Rostker - OMB/OIRA
- Lisa Branch - OMB/OIRA
- Rob Alderfer - OMB
- Nikesh Jindal - OMB
- Aaron Flynn - OSTP
- Peter Robbins - DOC/OGC
- Carrol Barnes - SBA/Office of Advocacy
- John Love - USPTO
- Jennifer McDowell - USPTO
- David Boundy - Cantor Fitzgerald
- Mike Strickland - GlaxoSmith Kline

Accompanying documents submitted to the OMB for the June 15 group include a letter to Susan Dudley, Administrator of the Office of Information and Regulatory Affairs (OIRA) of the OMB. The signatories include patent practitioners and technology companies in a variety of industries. Here is a copy of the attachment materials provided to OMB for the meeting (the file is 3.5 MB, so be patient).

The two groups made similar points. Salient highlights of the attachment material, which is extensive:

- The pendency problem of application backlog likely owes to management mandate of internal disincentives to examiners, not the application rate. "Examination resources are not allocated based on either level of effort required to perform a competent and thorough examination, or the social value of the application." The "flat rate" count system imposed, supposedly an incentive program, but disdained by examiners, has resulted in "misallocation of resources." (Pages F-8 to F-11) As the Innovation Alliance letter pointed out: "The PTO has chosen remedies for its backlog problem that will not actually eliminate or even substantially reduce the backlog."
- The patent office apparently did no study to identify the source of its backlog problem. (Page C-4, Footnote 24)
- The PTO has not met its obligations of candor and good faith in light of the Administrative Procedure Act and Freedom of Information Act (FOIA), by failing to disclose its data, assumptions, and models, refusing to provide them when required, further refusing to provide them in response to a FOIA request, only making them available selectively. (Page C-3, and Attachments L, N(1) (first FOIA request) and N(2) (second FOIA request))
- The rationales provided by the patent office did not meet the requirements of Executive Order 12,866 (Attachment D), and the PTO violated both the Executive Order and Administrative Procedure Act by failing to discuss alternatives to the proposed rules in the Notices of Proposed Rulemaking. (Attachment D, pages I-1 to I-6)
- The PTO rulemaking breached statutory obligations, including the Information Quality Act (Attachment K). The proposal to retroactively apply the rule changes violates the law. (Page E-3; an assertion also made by the Innovation Alliance)
- The paperwork burden estimated for Examination Support Documents, which were noted to be extraordinarily burdensome by many of the comment letters, were estimated by PTO to be zero. (Attachment M) Perhaps the reason for the estimate of zero was stated by John Whealan, PTO Solicitor, at a Duke Symposium, when he noted that the requirements were so burdensome that he expected that no applicant would actually use the ESD. (Page M-6)

To gather information about the patent agency's furtive moves, two Freedom of Information Act (FOIA) requests had been filed last year. The first FOIA request was information about agency operations, focused on pendency, USPTO hiring and attrition. The second FOIA request was for internal USPTO files related to patenting changes the agency intends to effect-

RIN 0651-AB93 "Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Application: Containing Patentably Indistinct Claims" (71 Fed. Reg. 48, January 3, 2006)

RIN 0651-AB94 "Changes to Practice for the Examination of Claims in Patent Applications" (71 Fed. Reg. 61, January 3, 2006)

RIN 0651-AB95 "Changes to Information Disclosure Statement Requirements and Other Related Matters" (71 Fed. Reg. 38808, July 10, 2006)

The response by the USPTO to the FOIA was measly: selectively redacting, keeping the smoking guns hidden. John Whelan, an experienced litigator who should know better, now Solicitor and General Counsel for Intellectual Property, was in the section of the USPTO responsible for replying to the FOIA. Whelan, who seem to be virulently anti-patent, is now being seconded from the PTO to advise the Senate on patent reform.

Current USPTO management comprise Bush administration appointees, people who exude a waft of disregard for the rule of law, a culture that permeates the administration.

To put your two cents in, write Susan Dudley immediately, as she needs time to collate, and the deadline dat for her decision as to whether OMB will step in is July 9.

The Honorable Susan E. Dudley  
Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
Washington, DC 20503

Susan Dudley's Fax: (202) 395-7245

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Posted by Patent Hawk at June 23, 2007 9:01 PM | The Patent Office

### Comments

Update - OMB finally got the June 15 meeting posted properly:  
<http://www.whitehouse.gov/omb/oira/0651/meetings/619.html>

Also, the OMB web site now lists meetings on June 25 by PhRMA and Nano Business Alliance. The materials were not yet available from the site, but they are of the same tenor as the others: management has turned th USPTO into a rogue organization.

<http://www.whitehouse.gov/omb/oira/0651/meetings.html>  
<http://www.whitehouse.gov/omb/oira/0651/meetings/624.html> (Nano)  
<http://www.whitehouse.gov/omb/oira/0651/meetings/626.html> (PhRMA)

Soon we'll find out whether the fix was in, wailing and gnashing of teeth withstanding.

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Posted by: Patent Hawk at June 29, 2007 1:00 PM

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