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Move to the Front of the Line: USPTO Announces Prioritized Examination for COVID-19 Related Applications

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The United States Patent & Trademark Office ("USPTO") remains focused on mitigating the harm caused by COVID-19. As part of that effort, the USPTO has just announced two new prioritization programs for COVID-19 related patent and trademark applications. These new programs are well timed for organizations looking to take advantage of the current increase in demand for technology, products, and services dealing with COVID-19.

Patent Applications

On May 8, 2020, the USPTO announced a new COVID-19 Prioritized Pilot Patent Program ("Pilot Program"). Since the announcement, the USPTO has provided potential applicants additional details about the Pilot Program. The Pilot Program offers an accelerated examination process similar to the USPTO's existing TrackOne Prioritized Examination Program ("TrackOne") without requiring the associated fees. Like TrackOne, the request for participation in the Pilot Program must be submitted with the initial filing of an original non-provisional application or shortly after filing a request for continued examination ("RCE"). Applicants must also meet specific requirements to participate in the Pilot Program. A few highlights include:

- **COVID-19 related** – To qualify as COVID-19 related, the applicant must certify that at least one of the pending claims covers a product or process related to COVID-19 and that such product or process is subject to an applicable FDA approval for COVID-19 use.
- **Priority to no more than one non-provisional U.S. application** – The applicant may not claim priority to more than one prior non-provisional application or one prior international application designating the United States. U.S. provisional applications and foreign patent applications do not count towards this total.
- **Small or micro entity status** – The applicant must qualify as a small or micro entity.
- **Limited to 500 qualifying patent applications** – The Pilot Program is set to expire once 500 requests for prioritized examination are accepted. The USPTO has left open the possibility of extending or terminating the program.

The USPTO encourages the use of form PTO/SB/450, titled "Certification and Request for COVID-19 Prioritized Examination Pilot Program under 37 CFR 1.102(e)," to make the request for prioritized examination under the Pilot Program. The USPTO estimates that it can achieve final disposition in six months if applicants provide more timely responses to notices and actions from the USPTO (i.e. within 30 days of a notice by the USPTO), as compared to those required by Track One.

For a full description of eligibility requirements and program details, please view the USPTO's announcement in the Federal Register. While the official notice in the Federal Register states the Pilot Program will begin on July 13, 2020, the USPTO announced that this date was erroneous and the official start date was May 14, 2020. As of June 11, 2020, the USPTO had received 102 requests to participate in the Pilot Program, with 26 applications receiving acceptance into the program.

Trademark and Service Mark Applications

On June 15, 2020, the USPTO announced a prioritized examination program for trademark and service mark applications. The USPTO states that the goal of the prioritized examination program is to expedite the initial examination process for qualifying applications. Applicants must request entry into the program by filing a "Petition to the Director" through the Trademark Electronic Application System ("TEAS"). For an application to be eligible for prioritized examination, the application must seek registration for one or more of the following qualifying COVID-19 medical-related goods and services:

- Pharmaceutical products or medical devices such as diagnostic tests, ventilators, and personal protective equipment, including surgical masks, face shields, gowns, and gloves, 'that prevent, diagnose, treat, or cure COVID-19 and are subject to approval by the United States Food and Drug Administration.
- Medical services or medical research services for the prevention, diagnosis, treatment of, or cure for COVID-19.

The approvals by the United States Food and Drug Administration for pharmaceutical products or medical devices may include, but are not limited to, an Investigational New Drug (IND) application, an Investigational Device Exemption (IDE), a New Drug Application (NDA), a Biologics License Application (BLA), a Premarket Approval (PMA), or an Emergency Use Authorization (EUA).

As long as some of the products and services in an application meet this requirement, the application may include other products and services.

The USPTO estimates that the program advances the start of the examination process by about two months. The USPTO also states that applicants can further expedite the process by responding promptly to any Office action, phone call, or email from the examining attorney.

For description of eligibility requirements and program details, please view the USPTO's notice. The USPTO began accepting petitions for prioritized examination on June 16, 2020.

Thinking Forward

The prioritized examination programs can help companies achieve swift protection of their innovations related to the current COVID-19 pandemic. Qualifying entities should balance all of the advantages and risks associated with a prioritized examination process to determine the best path for their innovations. Due to the changing nature of this pandemic, qualifying entities seeking to utilize these programs should act expeditiously before the programs expire.