United States Patent and Trademark Office (USPTO) response to the GAO Report entitled *Intellectual Property: Patent Office Should Strengthen Its Efforts to Address Persistent Examination and Quality Challenges* (GAO-25-107218)

The GAO report cites challenges in patent examination related to time limitations, application complexity, and technology and training, with time constraints as a common thread to all these challenges to examination and quality. The optimal balance between time, quality and cost is a well-documented challenge that ubiquitously faces the USPTO. Most recently, the UAIA 2024 report, commissioned by the USPTO as part of its fee study report to Congress, extensively discusses the tradeoffs among these factors.[1] In fact, the USPTO regularly reviews these factors and makes necessary adjustments to ensure an optimal balance between them. These efforts are set forth in more detail below and provide a more comprehensive understanding of the ongoing efforts taken by the USPTO offering broader context for the time constraint challenges cited by examiners.

USPTO Has Recently Recalibrated Examination Time

- *A 2019 USPTO study reevaluated examination time in view of changes in technology, prior art, classification and application complexity.*
- *Recent adjustments to examination time and subsequent analyses have demonstrated adequate examination time while maintaining high quality standards.*

In 2019, the USPTO completed a comprehensive reevaluation of examination time. Significant changes in patent prosecution had occurred leading up to this study, among them, new and converging technologies of increasing complexity, a growing volume and sources of prior art, and a change to the U.S. system used to classify patent applications and search for prior art. This reevaluation identified an imbalance that put quality at a disadvantage and accordingly examination time was increased. Starting in FY 20, an updated method of assigning examination time was utilized, based on the application's classification "picture," which represents the full complexity of the technology covered in the application and accounts for multi-disciplinary inventions, as well as specific application attributes including the overall number of claims, the length of the specification, and the number of pages in any filed information disclosure statements. This updated method was fully implemented for examiners at the beginning of FY 20 and addresses concerns for both time limitations and application complexity.

The USPTO's recent production and quality data reflects this update and demonstrates that examiners have adequate examination time. As to production, in FY 23, almost half (>45%) of all examiners reached a high level of annual production (>103% of their goal) while less than 6% produced at an unacceptable level (<88% of their goal); see Figure 1.

[1] The UAIA refers to the Unleashing American Innovators Act of 2022. For the report, see https://www.uspto.gov/sites/default/files/documents/UAIA_Fee_Study_Framework_for_Analysis.pdf

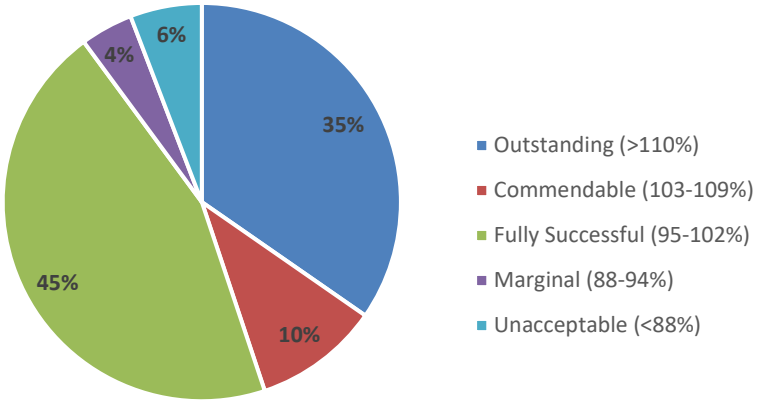

Figure 1: Examiner production achievement in FY 23

As to quality, since implementation of the recalibrated method of assigning examination time, the Agency's patent quality metrics, which are a reflection of Office actions' compliance with each of the four patentability statutes, have dramatically improved in every statute; see Table 1. Additionally, this improvement equates to the issuance of approximately 27% fewer Office actions that included an issue of noncompliance in FY 23; see Table 2.

Fiscal Year	35 USC 101	35 USC 102	35 USC 103	35 USC 112
FY 23	98.2%	96.0%	92.2%	94.4%
FY 20	97.7%	94.3%	88.9%	90.7%
improvement	↑ 0.5%	↑ 1.7%	↑ 3.3%	↑ 3.7%

Table 1: Patent Quality Metrics FY 23 v. FY 20

Fiscal Year	Total # of Random Reviews of Office actions	# Of Random Reviews with at least one noncompliance
FY 23	12,027	1,984
FY 20	12,012	2,708
Difference	----	↓ 724
% Decrease by FY 23	----	↓ 26.7%

Table 2: Number of Noncompliant Office actions FY 23 v. FY 20

As evidenced by the data shown above, the recalibrated examination time appears to be striking an appropriate balance between quality and production today and, in fact, has supported quality improvement over this time span.

USPTO Is Driven by Both Pendency and Quality Goals

- *High production (to affect low pendency) can be achieved through enhanced quality by supporting efficiency gains.*
- *Production and quality are equally valued in detailed updates to the examiner performance appraisal plan.*
- *Quality improvement efforts are targeted and data-driven at the TC and Corps levels to limit negative effects on pendency.*

The USPTO aims to achieve target levels of pendency **and** quality – keeping both in constant view enables us to operate efficiently and effectively to meet the expectations of the IP community. These Agency goals directly translate from individual examiner goals of production and quality since higher production rates reduce pendency. The dynamic relationship between examiner production and quality is complex, and while properly calibrated examination time is critical to achieving an appropriate balance between production and quality examination, it is not the sole consideration. Quality itself drives efficiencies through minimizing rework, permitting more effective applicant responses and reaching quicker prosecution resolutions. Efficiencies are also gained through other quality-focused mechanisms, such as leveraging cutting-edge technological tools like AI to modernize and streamline examination in addition to regularly training patent examiners throughout their career so that they examine in accordance with the latest patent laws and remain abreast of new technological advances.

In FY 21, the USPTO updated the examiner Performance Appraisal Plan (PAP) in support of a more granular evaluation of examiners' quality performance. This new examiner PAP aligned examiner and Agency goals with a greater emphasis on search and including the best prior art as early as possible in prosecution. It provides a roadmap for all examiners, regardless of GS level, to enhance quality by offering a collection of exemplary activities that embody best practices in search, clarity of the prosecution record and compact prosecution. The quality element is assessed through both an error rate and the degree to which Office actions reflect best practices. Moreover, the performance elements related to production and quality are equally weighted at 30% as a regular reminder to examiners that quality is no less important than production; see Figure 2.

Performance Element	Critical or Non-critical (C or NC)	MBO	Individual Weights (Sum must total 100)	Element Rating (1-5)	Score
I. Production	C		30%		
II. Quality	C		30%		
III. Docket Management	C		30%		
IV. Professionalism and Stakeholder Interaction	C		10%		
			100%	Total Score	

Figure 2: Examiner PAP Performance Element Weighting

The implementation of the new examiner PAP provided an additional tool to encourage exemplary examination practices, to distinguish different levels of performance, and to hold examiners accountable for patent examination quality. Since FY 21, over 500 examiners have faced adverse actions based on unacceptable quality, over 400 resulting in separation from the

Agency. This updated examiner PAP not only provides a roadmap to performing quality examination, but also affords clear evidence when quality is not achieved.

Beyond maintaining quality demands at the individual examiner level, the USPTO leverages its patent quality data to address quality improvement through targeted Technology Center (TC) quality action plans. For example, in FY 24, TC 2100 leveraged patent quality data from the Office of Patent Quality Assurance (OPQA) to identify deficiencies in writing proper nonstatutory double patenting rejections using either anticipation or obviousness analysis. TC experts, along with training specialists from the Office of Patent Training (OPT), updated double patenting training materials to deliver an engaging, directed training to TC 2100 examiners to improve their understanding of double patenting and writing proper double patenting rejections. Pre- and post-assessments of learners' skills showed an 11% increase in mastery of the learning outcomes of the double patenting training.

The Office of Patent Quality Assurance (OPQA) collaborates with USPTO's Office of Patent Training (OPT) on a regular basis to discuss how nuances of our overall patent quality metrics can inform Corps-wide and/or technology-specific targeted training. OPQA's detailed quality assessment tool, the Master Review Form or MRF, collects a plethora of root-cause reasons that drive statutory compliance and quality. Focusing training on specific issues, like detailed mapping of the claims to the prior art, rather than broad concepts, like anticipation and obviousness, is more impactful as evidenced by skills assessments before and after training. For example, in FY 22, OPQA patent quality data indicated that while overall statutory compliance decisions were consistent with quality data from previous years, clarity of the decisions written in Office actions could be improved. OPT then crafted a data-driven workshop on Clear and Concise Writing that was mandatory for all examiners. Pre- and post-assessments of learners' skills showed an overall 18% improvement in drafting and editing clear and concise Office actions.

USPTO's careful recalibration of examination time, updated examiner performance indicators, accountability for quality and targeted TC and Corps-wide examiner training evidence our constant attention to quality and ensure that quality does not take a back seat to productivity.

USPTO Modernizes Tools to Increase Efficient and Effective Examination

- *Innovative tools are leveraged to assist examination.*
- *State-of-the-art search tools can reduce the time needed for searching and increase the likelihood of identifying the best prior art earlier in examination.*

The USPTO continues to modernize existing tools and innovate new ones to provide state-of-the-art electronic tools to assist examiners in efficiently identifying the most relevant, applicable prior art and to maximize productivity. Continuously leveraging such tools helps to alleviate time constraints overall, and specifically those related to the ever-increasing complexities of applications themselves and the technologies they describe.

For example, to assist examiners in performing more efficient and effective reviews of foreign patent documentation, the Agency recently incorporated AI reverse image search technology,

leveraged across 65 global industrial design authorities, providing augmented examination of design patent applications. Additionally, the USPTO has introduced two new AI-based searching tools, "More Like this" and "Similarity Search," into PE2E Search, which is the modern, web-based platform used by patent examiners to perform prior art searches today. "More Like This" uses AI algorithms to generate a list of domestic or foreign patent documents that are most like a specific patent document; "Similarity Search" inputs examiner-selected application information and uses trained AI models to output a list of domestic and foreign patent documents that are similar to the patent application being searched.

As USPTO's examination tools continue to advance and develop, the challenges of time constraints and application complexity can be effectively offset while maintaining our quality standards. We remain ever-diligent in strengthening examination tools so that examiners are well-outfitted with robust tools to enable efficient and high-quality examination, and we will monitor the balance between complexity and efficiency gains from these tools to ensure examination time continues to be properly calibrated.

USPTO Provides Comprehensive Training for World-class Patent Examiners

- *A comprehensive, continual training program ensures examiners have the skills needed to perform their tasks efficiently and effectively.*
- *A variety of teaching modes e.g., virtual and in-person classroom trainings, one-on-one mentoring, instructor-led, computer-based, for newly hired and experienced examiners, ensures all examiners are well-trained in patent examination.*
- *Focused technical training, again through various modes, augments examiner understanding of the technologies they examine.*

The USPTO takes intense pride in its comprehensive training program which provides patent examiners with an exceptional level of training to equip them with the essential skills needed to efficiently perform assigned job functions at the highest standards in support of mission critical USPTO patent pendency and quality goals. The Office of Patent Training regularly assesses training needs, by analyzing data generated by the Office of Patent Quality Assurance and through an annual training needs assessment survey, and responds with appropriate training or programs. See Appendix 1 and 2 for a listing of learning opportunities for examiners at USPTO in FY 24.

Augmenting and updating the knowledge of patent examiners, as they progress through their career, is key to producing reliable and predictable IP rights. With this in mind, the USPTO provides a comprehensive and continual training program, which involves legal, procedural and technical training, that grows in complexity as an examiner grows in experience. These programs include technology specific examples and/or workshops to target issues faced by examiners in their specific area as well as general training in automation tools, soft skills and search training. This diverse, multi-dimensional training program ensures that examiners stay abreast of changes in patent laws, procedures, and advances in technology thereby maintaining reliability, consistency, and certainty of issued patents.

An examiner's training starts with residency in the Patent Training Academy, which begins with a period that is training-intensive followed by a period where examiners spend most of their time reviewing applications and writing Office actions under the guidance of a coach and mentor (i.e., on-the-job training). Both Instructor-Led and Computer Based Training is offered for experienced examiners designed to keep examination skills sharp. These courses are taught by subject matter experts on examination practice and procedure, automation, and software that target workload management as well as communicating with stakeholders.

In addition to the more formal technical training discussed above, technologists, scientists, engineers, and other experts from industry and academia volunteer as guest lecturers to provide technology training and expertise targeted to the patent examiner's specific technology area under the Patent Examiner Technical Training Program (PETTP). Real-world technologies are also showcased to patent examiners through the Site Experience Education Program (SEE Program) where examiners are hosted by commercial, industrial, and academic institutions, within the continental U.S., to learn about their technologies at their source – the inventors. The organizations who volunteer to host these visits contribute to improving the quality of patent examination by keeping patent examiners updated on the latest technologies and innovations in their field of examination. The USPTO continues to look for innovative mechanisms to provide opportunities to deepen the examiners' understanding of the technology where they examine. For example, under the Technical Training on Demand (TTOD) program, the USPTO has partnered with top AI experts in Carnegie Mellon University to create a specialized 21-course curriculum tailored to the needs of patent examiners. The benefits of this collaboration include access to the latest research, best practices, and cutting-edge knowledge in the field of AI. The structured, curriculum-based approach of the courses provides patent examiners with the opportunity to deepen their understanding of AI and build a strong foundation of knowledge that is applicable in their daily work.

USPTO Accurately Measures Examiner Adherence to Quality Standards

- *Quality achievements in examination are readily publicly available.*
- *Quality achievement data is extensively validated throughout the fiscal year.*
- *Quality review procedures in the Office of Patent Quality Assurance are regularly scrutinized for data strength and process integrity.*
- *Aggregate patent quality metrics are most useful when aligned with customers' perceptions of quality and their requests for individual statutory compliance rates.*

The report incorrectly asserts that the USPTO does not track or communicate overall compliance rates with regard to statutory patentability requirements. The USPTO regularly publishes data related to (1) statutory compliance; (2) process measures; and (3) stakeholder perception surveys. At USPTO.gov, the overall compliance rates are published on the Patent

Quality Metrics page[2] along with updated perception survey data; detailed process measures are regularly updated on the Patents dashboard as found on the Data and statistics page[3].

The statutory compliance metrics generated by the Office of Patent Quality Assurance (OPQA) are validated through a variety of methods, such as internal OPQA audits, TC feedback in a rebuttal process where disagreements with OPQA are resolved, comparisons to quality reviews performed in the TCs and data collected from external perception surveys. In publishing the statutory compliance metrics, the USPTO communicates compliance rates with each of the individual four patentability statutes as well as the compliance rates with all four statutes simultaneously. The goal of the USPTO is for every Office action to be compliant with all of the patentability statutes.

Reported patent quality metrics are generated from random reviews of Office actions performed by Office of Patent Quality Assurance (OPQA); the volume of random reviews has remained steady at 12,000 since FY 16. OPQA has a staff of primary examiners with demonstrated expertise in search and examination that provide a detailed assessment of the compliance of an examiner's Office action. Since OPQA is not within the same organizational oversight as any Technology Center where examiners prepare Office actions, OPQA's assessment of examiner Office actions is performed in an independent and unbiased manner. In addition, OPQA does not have any targets or incentives for the findings of noncompliance, but does monitor the consistency of OPQA reviews as an additional validation.

OPQA randomizes all Office actions mailed within a previous seven-day period to create a randomized pull list. Reviewers from OPQA are then assigned Office actions for review from the randomized pull list based on their assigned technology area. The random review process provides statutory compliance metrics that have a strong confidence level as evidenced by the sample error rates in Table 3. The yearly volume of reviews provides sufficient data to identify corps-wide trends, provide TC-level insight for select topics, and allows the USPTO to answer many inquiries from our stakeholders in a timely manner.

[2] https://www.uspto.gov/patents/quality-metrics; On this webpage, find Compliance Measures> Review results and click to open the excel spreadsheet for the Data Summary Table; Click on the worksheet tab "Overall" and find at line 35 "Was office action compliant under all statutes?"

[3] https://www.uspto.gov/learning-and-resources/data-and-statistics?MURL=Dashboards; On this webpage, find Patents dashboard to launch detailed processing information from patent operations.

	Sampling Error for TC Estimates				
	102	103	112	101	Overall
1600	1.1%	1.2%	1.5%	0.7%	2.1%
1700	1.1%	1.8%	1.8%	0.3%	2.3%
2100	1.3%	1.9%	1.1%	1.2%	2.4%
2400	1.2%	1.8%	0.8%	0.8%	2.2%
2600	1.1%	1.5%	1.0%	0.9%	2.0%
2800	1.0%	1.1%	0.8%	0.4%	1.5%
2900	0.9%	0.6%	1.8%	0.0%	2.0%
3600	0.8%	1.1%	1.1%	0.8%	1.7%
3700	1.0%	1.3%	1.1%	0.7%	1.8%
Corps	0.4%	0.5%	0.4%	0.2%	0.7%

Table 3: FY 23 Random Reviews Sampling Errors

In evaluating work product under the statutory compliance standard, OPQA reviewers evaluate how an Office action addresses every claim in an application under examination to ensure that any rejection of a claim was proper relative to each statute under which the claim is rejected and that no proper claim rejections were omitted. By evaluating all claims under each statute, the USPTO is performing many statutory compliance evaluations when reviewing an individual Office action. If the review finds that any single claim has an improper determination under any statute (e.g., an improper rejection was included or a proper rejection was omitted) then the entire Office action is identified as noncompliant regardless of how many proper determinations were made or whether the noncompliance is the result of an independent claim or dependent claim. If all the claims treated in the Office action are treated correctly under every statute, then the Office action is found to be compliant. Any Office action where there was at least one claim found to be noncompliant is ultimately verified by an OPQA supervisor and sent to the relevant TC for consideration and any appropriate action.

Patent quality metrics include not only determinations of statutory compliance rates and assessments of process measures but also analysis of customer perception data. Since 2006, USPTO has semi-annually surveyed 3,000 of our frequent-filing customers (i.e., patent practitioners), who are rotated regularly, to leverage impressions of those who utilize our services most. This perception survey asks questions regarding quality overall and for rejections under each of the patentability statutes. Historical data back to FY 09 provides indicators of how practitioners perceive USPTO's quality in patent prosecution; see Figure 3. As a highlight, in FY 24 Q4, for every 6 responses that found patent examination quality Good or Excellent, there is only 1 response that was Poor or Very Poor. The trends of these perceptions, especially in FY 20 – FY 24, mirror an increase in our statutory compliance measures for the same time period; see Figure 5. Earlier perception trends, such as for FY 11 – FY 15, did not align well with USPTO's former quality metric, the quality composite score, as shown in Figure 4. This lack of alignment, in addition to customer requests, prompted reassessment of USPTO's patent quality metrics in FY 16.

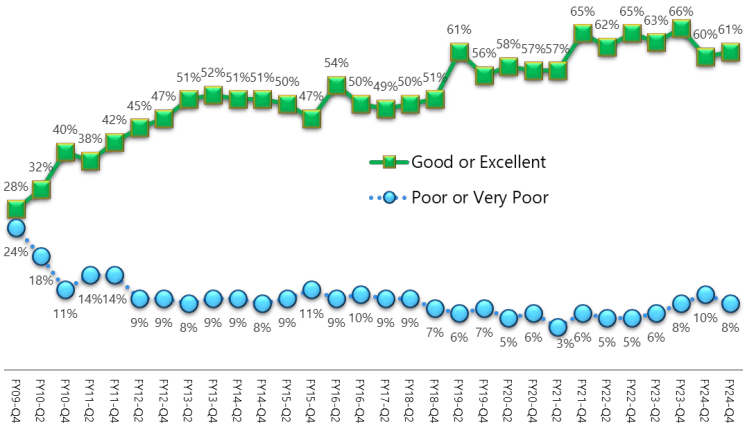

Figure 3: External Stakeholder Perception Survey: "Overall Patent Quality"

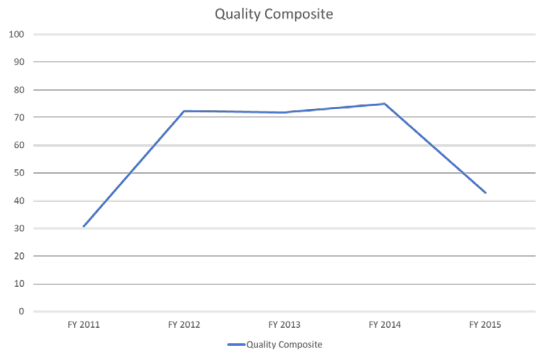

Figure 4: Quality Composite FY 11-15

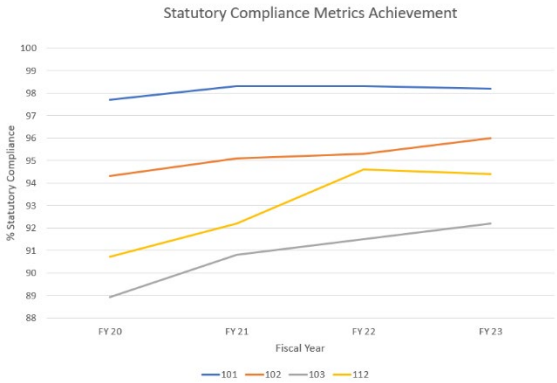

Figure 5: Statutory Compliance Metrics Achievement

The GAO report asserts that "[b]y communicating an overall quality goal, the USPTO would provide stakeholders with a more accurate representation of patent quality." The USPTO and its stakeholders disagree. From FY 11-15, the USPTO communicated an overall quality goal to our stakeholders (i.e., Quality Composite). Our stakeholders expressed that this overall quality goal obfuscated the key drivers of patent quality. As a result, the Agency shifted to the current statutory compliance quality metric approach. Not only did this provide more transparency, it also supported a targeted response to quality issues, and resulted in improved alignment between our internal quality metrics and our external perception survey results. As seen in Figure 4, the quality composite provides little meaning to underlying quality trends. Whereas in Figure 5, one can quickly ascertain the trends for each patentability statute. As such, USPTO maintains that communicating individual statutory compliance metrics is more representative of patent quality than an overall compliance metric and individual metrics are more effective gauges of quality improvements.

As set forth above, the USPTO regularly and accurately measures compliance rates with statutory patentability requirements. The USPTO is committed to assessing the quality of its work products and processes in addition to providing information that is an accurate reflection of examination quality to the public.

USPTO Agile Implementation and Assessment of Trial Programs

- *USPTO's "pilot programs" are distinct from true pilot programs that benefit from all GAO's leading practices.*
- *USPTO's small-scale programs track implementation and performance data along with stakeholder participation to assess effectiveness before launching a full program.*
- *Every USPTO program is publicized at inception and memorialized on a single landing page at USPTO.gov*

The report has assessed the pilot programs of the USPTO based on "GAO Leading Practices for effective pilot design" and determined that "the agency's pilot programs have not consistently followed leading practices," including establishing clear objectives, collecting relevant data, evaluating outcomes, considering scalability and ensuring stakeholder communication. The USPTO appreciates GAO's criteria for programs aiming to "pilot" or test potential changes to practice prior to full-scale transformations. However, the USPTO would distinguish the pilot programs noted in the report as small-scale trials with known benefits rather than pilot programs as more commonly understood. As such, some of the GAO leading practices such as considering scalability may not have been applicable for these small-scale, short-term programs. As set forth below, the USPTO followed GAO's leading practices for pilot programs where applicable.

The USPTO regularly implements small-scale programs related to expedited and/or prioritized examination. These would include the First-Time Filer Expedited Examination Pilot, Cancer Moonshot Expedited Examination Program, Climate Change Mitigation Pilot Program, Semi-Conductor Technology Pilot Program, and COVID-19 Prioritized Examination Pilot Program as identified in Figure 5 of the GAO report. In assessing these programs, the report finds that none have considered scalability[4]. The USPTO disagrees.

It is the USPTO's position that this leading practice is not applicable to the COVID-19 Prioritized Examination Pilot Program because it was only intended to be a temporary program (e.g., only during the COVID pandemic). Moreover, data was tracked and participation assessed and final results were evaluated to draw the conclusion that the programs would not be continued due to low participation; see Table 4.

Expedited/Prioritized Examination Small-Scale Program	**Limit of Participation** (i.e., granted petitions)	**Participants** (i.e., granted petitions)
First-Time Filer Expedited Pilot Program	1,000	405
Cancer Moonshot Expedited Examination Program	1,000	57
Climate Change Mitigation Pilot Program	4,000	898
Semi-Conductor Technology Pilot Program	1,000	126
COVID-19 Prioritized Examination Pilot Program	N/A	708

Table 4: Participation in Expedited/Prioritized Examination Programs

[4] In GAO's leading practice "Consider scalability: Develop a detailed data-analysis plan to track the pilot program's implementation and performance and evaluate the final results of the project and draw conclusions on whether, how, and when to integrate pilot activities into overall efforts" as quoted in the GAO report, Table 3.

The report additionally found these programs lacked in "ensur[ing] stakeholder communications". The USPTO disagrees. At USPTO.gov, a landing page for each of these programs is readily found see Table 5, which provides current information to stakeholders regarding the programs. Additionally, the landing pages provide, for example, public comments, questions and answer, and/or "Contact us" information. Each program is robustly advertised via USPTO emails and regular notice is provided via the Federal Register.

Program	**Website**	**Advertised via email**	**Listed in the Federal Register**
First-Time Filer Expedited Pilot Program	https://www.uspto.gov/patents/initiatives/patent-application-initiatives/semiconductor-technology-pilot-program	3/8/2023 3/8/2024 (ext) 3/7/2025 (end)	88 FRN 14607
Cancer Moonshot Expedited Examination Program	https://www.uspto.gov/patents/initiatives/patent-application-initiatives/cancer-moonshot-expedited-examination	12/8/2022 7/18/2024 (virtual event)	87 FR 75608
Climate Change Mitigation Pilot Program	https://www.uspto.gov/patents/laws/patent-related-notices/climate-change-mitigation-pilot-program	6/3/2022 5/31/2023 (ext)	87 FR 33750
Semi-Conductor Technology Pilot Program	https://www.uspto.gov/patents/initiatives/patent-application-initiatives/semiconductor-technology-pilot-program	Press release 11/30/2023	88 FR 83926
COVID-19 Prioritized Examination Pilot Program	https://www.uspto.gov/initiatives/covid-19-prioritized-examination-pilot	5/18/2020 1/3/2022 (ext) 3/24/2022 (ext) 6/28/2022 (ext) 2/13/2023 (ext)	85 FR 23932

Table 5: Programs, Websites, and Exemplary Stakeholder Communications

USPTO Follows Evidence-based Policymaking Practices

- *USPTO's initiatives include clear goals and performance measures, and data collection to support evaluation*

The USPTO relies on evidence-based policymaking practices to manage and assess results. For example, in FY 22, Patents executives recognized a training need based on data from the Office of Patent Quality Assurance (OPQA) and a training needs assessment survey that is given annually to examiners and their supervisors. The data and survey feedback warranted training on basic writing principles to improve the quality of written correspondence with applicants throughout prosecution. Patent examination is based on a written record and as such, the ability for an examiner to convey the Agency's patentability determinations in a clear

and concise manner effects the efficiency of examination process and impacts the ability of patents to withstand challenge.

A pedagogy selected was a 3-part, discipline-specific (Chemical, Design, Electrical, Mechanical) workshop that used independent video learning (Part 1 - recorded by a professional writing coach contracted by the USPTO), Part 2 - a hands-on editing exercise, and Part 3 - instructor-led (TC resources) follow-up discussion to achieve the learning outcomes.

Participants who chose to attend the first session for each discipline agreed to take a pre-video and post-discussion assessment in addition to completing the editing exercise. Assessments were scored using a rubric with 9 standards each rated on a scale of 1-3. The standards were based on the writing principles and common pitfalls taught in the Part 1 video and reinforced in the Part 3 instructor-led discussion.

The assessment results indicated learner writing skills improved 12% from pre-assessment to editing exercise after viewing the video and improved 6% from editing exercise to post-assessment after participating in the instructor-led discussion. Overall improvement from pre-assessment to post-assessment was 18%, which clearly indicated that the learning outcomes were met. Based on this success, the training class was made mandatory for examiners in FY 22.

Patent Invalidation Rates by U.S. Courts and PTAB Are Not Necessarily an Accurate Measure of Patent Quality [5]

- *Litigated patents do not accurately reflect the entirety of USPTO-issued patents often being selected for their commercial success.*
- *Post-grant patent challenges are also distinct from patent prosecution and do not represent patent examination quality.*

While general patent quality perceptions may be informed by court-based and Patent Trial and Appeal Board (PTAB) invalidation rates, it is difficult to draw a conclusion on the overall quality of patents issued by the USPTO using this data. USPTO maintains that this data does not accurately reflect patent examination quality at the USPTO.

As explained in the Sunwater Policy Report on US Patent Quality, adjudicated patents are not a representative sample of the overall population of patents. Rather, such patents are subject to selection biases both in terms which patent claims are challenged and which cases go to final adjudication. In addition, such patents are selected for validity challenges are likely to cover innovations that have been proven to be commercially valuable. This not only raises strong selection bias effects governing which patents are litigated, but also allows for significantly more extensive and expensive prior art searches by litigating parties after the patent has issued that are unavailable to a patent examiner at the time of initial prosecution of the patent

[5] Sunwater Policy Report on US Patent Quality (September 30, 2024): https://sunwater.org/wp-content/uploads/2024/09/SWI-Policy-Report-Patent-9-23-2024.pdf

application. As such, patent invalidation rates are more reflective of the driving factors of litigation and settlement rather than patent quality.

Moreover, post grant challenges under the America Invents Act (AIA) at the PTAB at the USPTO have an extensive time between when the patent application was examined and the AIA challenge as evidenced by OPQA's study of final written decisions issued in 2021.[6] As illustrated in the study, significant changes in patent law and technological advancements occurred during this time; in fact, 93% of the grounds studied relied on at least one prior art reference that was not before the examiner during prosecution. Additionally, the PTAB judges often relied on new information provided by both parties (e.g., expert testimony and analysis of disclosures in references) introduced for the first time in the post grant proceeding leading to a different outcome than found during *ex parte* prosecution.

Altogether, the USPTO maintains that the distinct time periods and driving factors during patent examination versus post grant challenges/patent litigation supports the view that invalidation rates are not necessarily reflective of patent examination quality.

[6] OPQA Study: "A study of unpatentability findings in *inter partes* review (IPR) final written decisions (FWDs): https://www.uspto.gov/sites/default/files/documents/ppac-aia-ipr-study-20241121.pdf