



Testimony of
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Committee on Oversight and Government Reform
Subcommittee on Government Operations

U.S. House of Representatives

***Time and Attendance Abuse at the U.S. Patent and
Trademark Office***

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Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee:

I appreciate the opportunity to testify today about the Office of Inspector General (OIG) report on the time and attendance recording by patent examiners at the United States Patent and Trademark Office (USPTO).

In August 2016, my office issued a report detailing a minute-by-minute review of the work habits for virtually all of USPTO's patent examiners. We conducted an extensive analysis of potential time and attendance abuse within the patent examiner ranks and offered insights to assist USPTO in preventing and detecting future abuse. The analysis compared the time examiners claimed for computer-related work on their certified time and attendance records against four sets of data that evidenced such work. For the hours that examiners claimed but lacked any supporting data—such as turning on their computer or using a government-issued ID to enter a USPTO building—we considered those hours to be “unsupported.” The OIG included the data for around 8,400 examiners. Approximately 50% of the examiners analyzed teleworked full-time, 30% teleworked part-time, and 20% did not telework at all. Our analysis focused on two overlapping periods: a 9-month period and a 15-month period. Over the 15-month period, the report identified approximately 288,000 hours not supported by the data, equating to over \$18 million in potential waste.

Evidence of substantial abuse by some patent examiners is particularly troubling, because my office analyzed the data in a light most favorable to the patent examiners. As a result, we excluded a significant amount of time in order to ensure that the methodology did not make unfair assumptions regarding examiner work habits. For example, the OIG assumed that for examiners working on-campus, such as non-teleworkers and examiners who telework part-time, all computer-related work time was supported from the time of arrival until 10:00 p.m., the permissible end of the examiner workday, regardless of when they actually left the office. We also dropped several hundred employees from the analysis when we encountered what appeared to be errors in USPTO's datasets. Overall, our methodology combined digital data with logical inferences favorable to examiners when determining the amount of time supported by the data.

Although these numbers are disconcerting, I want to emphasize that most patent examiners covered in the analysis had few unsupported hours. In other words, most examiners appeared to be working the hours certified on their timesheets. This conclusion corroborates the findings of a July 2015 National Academy of Public Administration (NAPA) report on telework independently commissioned by the USPTO, as neither report found evidence of widespread abuse. However, our approach also identified pockets of substantial abuse. Specifically, 415 examiners accounted for approximately 124,000 unsupported hours over a 15-month period. This group of examiners accounted for almost 45 percent of the total unsupported time my office identified in our analysis. Of additional concern, approximately three

quarters of the 415 examiners received above-average annual performance ratings, and 30 percent of unsupported hours for these high performers were overtime hours.

To place this in context, at least 10% of the time analyzed for each of these 415 examiners lacked support. Fifty-six of the 415 examiners averaged 24 or more unsupported hours per 80 hours of analyzed time, which equates to three days of work for every two weeks of analyzed time. Seventy other examiners averaged between 16 and 24 unsupported hours per 80 hours of analyzed time. Although we found that this potential abuse, which could amount to millions of wasted dollars, was not widespread, it was significant enough to warrant strengthening USPTO's internal controls.

There is substantial evidence that our methodology was actually overly generous. When we analyzed the data for examiners who switched to a router that provided more precise indication of on-line activity, the OIG found that the total number of unsupported hours doubled. In addition, we found that the use of a less conservative methodology for on-campus examiners—using computer logoffs and other online activity to determine work stoppage—also increased the total unsupported hours by an additional 327,000 unsupported hours. This change in the methodology, on its own, more than doubled the reported figures.

The OIG recognizes that examiners could conceivably perform examination-related work offline. Our analysis took extensive measures to account for such a possibility. For example, we excluded a large swath of examiners from the analysis because the USPTO did not require examiners teleworking part-time to log into the USPTO network while teleworking. We also used two analytical periods — one period in which every full-time teleworker was required to login to the USPTO network when performing any type of work, and another that showed a more comprehensive trend analysis. Considering the modifications we made to our methodology regarding this issue, we are comfortable that our analysis treats fairly those examiners who may have worked offline.

In light of our finding that pockets of the workforce appeared to be committing time and attendance abuse, the OIG made six recommendations to the agency. First, due to the substantial amount of regular and overtime unsupported hours uncovered by the analysis, we recommended that the USPTO reevaluate its examiner production goals for each group of examiners, called an art unit, and revise them to the extent necessary. Production goals were last set by art unit in 1976 and much has changed since then. Reviewing certain types of patent applications may be far more complicated, necessitating additional time, while technological improvements may help reduce the time required for a review in other areas. We do not have an opinion as to whether production goals should be increased or decreased for any given art unit, only that a reevaluation appears necessary. We also recommended that the USPTO consider deploying USPTO

routers to all teleworkers so that the agency could more accurately account for the time teleworkers claim to be performing online examination-related work.

Our report also included policy recommendations to help the USPTO prevent and detect time and attendance abuse. We recommended that the USPTO require all examiners in a telework status to log on to the USPTO network when teleworking. Currently, the USPTO does not require examiners teleworking part-time to log on to their computers on telework days even though examiners teleworking full-time, performing the same job function, must log on regardless of the type of work they are performing. We do not believe that the USPTO should treat examiners in full-time telework programs differently from examiners in part-time telework programs in this regard. Moreover, without extending the policy to examiners teleworking part-time, it is difficult, if not impossible, for the agency to track when those examiners are working, and complicates the process by which the USPTO monitors time and attendance abuse.

We also recommended that the USPTO require all examiners to provide their work schedules to their supervisors in advance. The data indicates that the majority of examiners with unsupported hours received average or better performance ratings. However, under USPTO's current policy, only the worst performers and problematic employees are required to provide their schedules in advance. Advance knowledge of *all* patent examiners' weekly work schedules allows supervisors to cross-reference those schedules with the examiners' actual work status, and gives the supervisors an additional tool to monitor time and attendance abuse.

In addition, we recommended that the agency require examiners to use their USPTO-issued ID cards to swipe out of the building when working on the USPTO campus during normal working hours. While the USPTO removed this requirement in 2008, we believe that reinstating the policy will assist the agency in deterring time and attendance abuse.

Finally, we recommended that the USPTO review its policies, procedures, and practices pertaining to overtime hours to identify and eliminate the areas susceptible to abuse.

I am aware of both the July 2015 NAPA report on telework internal controls and the June 2016 GAO report on patent quality. Each report had a slightly different focus and adopted different methodologies for analyzing issues related to time and attendance abuse, patent quality, and examiner productivity. Despite these differences, it is notable that each report recommended that the USPTO conduct a review of the production standards to ensure that they are set appropriately.

Our report and the NAPA report offer different recommendations to strengthen internal controls, but agreed that the vast majority of examiners are not time and attendance abusers. Additionally, the OIG and NAPA agreed that both teleworkers and on-campus examiners could commit time and attendance abuse. However,

unlike NAPA, we analyzed USPTO datasets and claimed work hours, and uncovered hundreds of thousands of hours without evidence supporting work. That finding prompted us to make more fulsome recommendations that will help USPTO strengthen its internal controls regarding time and attendance recording and monitoring.

Overall, the GAO report and our report are complementary. However, while GAO surveyed a sample of examiners and found that some examiners felt they needed more time to perform their work, our investigation reviewed work data and found that some examiners were able to spend less time working while meeting their production targets. Both reports concluded that the USPTO needs to reevaluate its production goals – some art units may need more time, while others may need less. We recommended that USPTO strengthen their supervisory controls and reevaluate the system it uses to monitor productivity.

In closing, we note that the OIG interpreted the exceptions to the Computer Matching and Privacy Protection Act of 1988 to prohibit pursuing criminal prosecution or civil remedies, naming those examiners engaged in misconduct, and recommending administrative action. However, we were able to share our methodology and algorithm with the USPTO so that the agency could run the analysis and look for indicators of time and attendance abuse on its own.

I want to thank the Subcommittee for the opportunity to testify today, and I look forward to your questions.

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David Smith serves as the Deputy Inspector General of the Office of Inspector General, U.S. Department of Commerce. At present he also performs the functions and duties of the Inspector General.

Mr. Smith has also served as Assistant Inspector General for Intellectual Property and Special Program Audits at USPTO. In that role, Mr. Smith provided additional executive direction to ongoing acquisition/contract and intellectual property related audits and OIG's efforts to build up its dedicated oversight presence at the U.S. Patent and Trademark Office. Before that, he was the Deputy Inspector General with oversight responsibilities for OIG audits, investigations and administration.

He joined OIG in December 2012 from the Department of the Treasury, where he served as Chief of Internal Review in the Office of Financial Stability, identifying risks, assessing controls, and verifying compliance related to the Troubled Asset Relief Program. Before that, he served as the Acting Deputy Chief Financial Officer in the Department of Defense, where he oversaw the military services' and defense agencies' financial management practices.

Mr. Smith also served as the Deputy Inspector General in the U.S. House of Representatives, the Director of the Accounting and Finance Domain under the Department of Defense's Business Management Modernization Program and as the Deputy Director, Office of Internal Review for the Defense Finance and Accounting Service. He has also worked as an auditor and accountant in the private sector.

He passed the Certified Public Accountant's exam in May 1994, and has a Masters' Degree in accounting and a Bachelor of Business Administration in Accounting, both from the University of North Florida.