

# The Department Needs to Strengthen Its Ethics Oversight for USPTO Patent Examiners

FINAL REPORT NO. OIG-24-013-I

FEBRUARY 14, 2024



U.S. Department of Commerce  
Office of Inspector General  
Office of Audit and Evaluation



February 14, 2024

**MEMORANDUM FOR:** Kathi Vidal  
Under Secretary of Commerce for Intellectual Property and  
Director of the United States Patent and Trademark Office

Leslie B. Kiernan  
General Counsel  
U.S. Department of Commerce

A handwritten signature in black ink, appearing to read "Frederick J. Meny, Jr.", written over a horizontal line.

**FROM:** Frederick J. Meny, Jr.  
Assistant Inspector General for Audit and Evaluation

**SUBJECT:** *The Department Needs to Strengthen Its Ethics Oversight for  
USPTO Patent Examiners*  
Final Report No. OIG-24-013-I

Attached for your review is our final report on our evaluation of the United States Patent and Trademark Office's (USPTO's) and the U.S. Department of Commerce's (the Department's) ethics oversight of USPTO patent examiners. Our evaluation objective was to determine whether USPTO and the Department effectively administered ethics rules to prevent financial conflicts of interest by USPTO patent examiners.

Overall, we found that USPTO and the Department did not effectively administer the Department's ethics program to protect against potential conflicts of interest by patent examiners. Specifically, we found the following:

- I. USPTO and the Department did not ensure examiners filed confidential financial disclosure reports (CFDRs) as required.
- II. The Department did not identify or resolve potential financial conflicts in CFDRs.
- III. USPTO and the Department did not provide specialized training or guidance to examiners on potential ethics conflicts.

On January 8, 2024, and January 23, 2024, respectively, we received USPTO's and the Department's responses to our draft report. In response to our draft report, USPTO and the Department's Office of General Counsel (OGC) concurred with all our recommendations and described actions they have taken, or will take, to address them. OGC provided technical comments or suggested report revisions as part of its response to recommendations 3 and 7. We considered those comments but did not revise our report. Appendix B of the final report contains the full text of USPTO's and the Department's responses.

Pursuant to Department Administrative Order 213-5, please submit to us an action plan that addresses the recommendations in this report within 60 calendar days. This final report will be posted on our website pursuant to the Inspector General Act of 1978, as amended (5 U.S.C. §§ 404 & 420).

We appreciate the cooperation and courtesies extended to us by your staff during this review. If you have any questions or concerns about this report, please contact me at (202) 793-2938 or Amnoiphorn Samson, Director for Audit and Evaluation, at (202) 793-3324.

Attachment

cc: Derrick Brent, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director, USPTO  
David L. Berdan, General Counsel, USPTO  
Jay Hoffman, Chief Financial Officer, USPTO  
Sean Mildrew, Deputy Chief Financial Officer and Audit Resolution Officer, USPTO  
Vaishali Udupa, Commissioner for Patents, USPTO



# Report in Brief

February 14, 2024

## Background

The United States Patent and Trademark Office (USPTO) promotes and protects U.S. intellectual property by reviewing and granting patent and trademark applications. In fiscal year 2022, USPTO maintained a workforce of more than 8,000 patent examiners responsible for determining whether to grant patents. Because they have a critical role in ensuring the integrity of the application process, examiners cannot hold financial interests (such as stock holdings) that conflict with performing their duties or participate in matters that could directly and predictably affect their financial interests.

To prevent conflicts of interest, most examiners must file confidential financial disclosure reports (CFDRs), in which they self-disclose assets held and sources of income. The U.S. Department of Commerce's (the Department's) Office of the General Counsel (OGC) oversees the ethics program for all Department bureaus, including USPTO. Within OGC, the Ethics Law and Programs Office (ELPO) administers the financial disclosure program—which includes reviewing CFDRs to identify and resolve potential conflicts—and provides ethics training and advice to examiners.

## Why We Did This Review

In 2022, we received hotline referrals alleging that several patent examiners violated ethics rules by owning stock in one or more companies that could be affected by their decisions on patent applications.

Our evaluation objective was to determine whether USPTO and the Department effectively administered ethics rules to prevent financial conflicts of interest by USPTO patent examiners.

## UNITED STATES PATENT AND TRADEMARK OFFICE

### The Department Needs to Strengthen Its Ethics Oversight for USPTO Patent Examiners

OIG-24-013-I

## WHAT WE FOUND

Overall, we found that USPTO and the Department did not effectively administer the Department's ethics program to protect against potential conflicts of interest by patent examiners. Specifically, we found the following:

- I. USPTO and the Department did not ensure examiners filed CFDRs as required.
- II. The Department did not identify or resolve potential financial conflicts in CFDRs.
- III. USPTO and the Department did not provide specialized training or guidance to examiners on potential ethics conflicts.

## WHAT WE RECOMMENDED

We recommended that the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office direct the Chief Administrative Officer to

- Strengthen controls to ensure that human resource officials identify examiner appointments to positions requiring financial disclosure and notify ELPO in a timely manner.

We recommended that the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office

- Ensure USPTO subject-matter experts work with agency ethics officials to develop specialized training that describes how the industry sector rule is applied.

We recommended that the Department's General Counsel direct the Chief of the Ethics Law and Programs Office to

- Implement processes to ensure that all examiners with filing obligations are captured in the FD Online system and examiners submit CFDRs as required.
- Implement processes or procedures to ensure ELPO conducts thorough conflict-of-interest analyses during CFDR reviews to identify and address potential conflicts.
- Ensure ELPO leverages subject-matter expertise from USPTO to carry out reviews of CFDRs that comply with regulations and internal policies.
- Develop and deliver specialized training for patent examiners that includes an explanation of the exemptions, including the industry sector rule and how it applies.
- Ensure patent examiners receive clear and accurate guidance in response to CFDR filings and specific requests.
- Develop and implement a written process to identify and track conflict-of-interest risks and ensure risk assessment results are used to inform ethics training and guidance given.

# Contents

<b>Introduction</b> .....	<b>1</b>
<b>Objective, Findings, and Recommendations</b> .....	<b>3</b>
I. USPTO and the Department Did Not Ensure Examiners Filed CFDRs as Required .....	3
Recommendations .....	4
II. The Department Did Not Identify or Resolve Potential Financial Conflicts in CFDRs.....	5
Recommendations .....	8
III. USPTO and the Department Did Not Provide Specialized Training or Guidance to Examiners on Potential Ethics Conflicts .....	8
A. <i>Ethics training was not specialized for patent examiners</i> .....	9
B. <i>Some examiners received unclear guidance from ethics officials</i> .....	9
Recommendations .....	12
<b>Summary of Agency Response and OIG Comments</b> .....	<b>14</b>
<b>Appendix A: Objective, Scope, and Methodology</b> .....	<b>16</b>
<b>Appendix B: Agency Response</b> .....	<b>20</b>
I. USPTO .....	20
II. Department.....	22

*Cover: Herbert C. Hoover Building main entrance at 14th Street Northwest in Washington, DC. Completed in 1932, the building is named after the former Secretary of Commerce and 31st President of the United States.*

# Introduction

The United States Patent and Trademark Office (USPTO) is the federal agency that promotes and protects U.S. intellectual property by reviewing and granting patent and trademark applications, among other things. In fiscal year (FY) 2022, USPTO received nearly 600,000 patent applications and maintained a workforce of more than 8,000 patent examiners responsible for determining whether to grant patents. Because these examiners have a critical role in ensuring the integrity of the patent application process, they are—like other executive branch employees in positions of responsibility—held to high standards of ethical conduct. Those standards include that “employees shall not hold financial interests that conflict with the conscientious performance of duty.”<sup>1</sup> Furthermore, they may not participate “personally and substantially” in a “particular matter” that, to the employee’s knowledge, could have a “direct and predictable effect” on their financial interest.<sup>2</sup> Financial interests include stocks owned by the examiner, their spouse, or their dependent children.

From March 2022 to October 2022, we received multiple hotline referrals alleging that several USPTO patent examiners violated ethics rules by owning stock in one or more companies that could be affected by examiners’ decisions on patent applications.<sup>3</sup> Noncompliance with these ethics rules erodes public trust in the U.S. Department of Commerce (the Department) and risks compromising the integrity of USPTO’s patent approval process.

## *Confidential financial reporting requirements*

To prevent conflicts of interest, regulations require that certain government employees report their financial interests to their agency.<sup>4</sup> There are two types of filing methods: public and confidential (nonpublic). High-level government officials, such as those in the senior executive service, must publicly disclose their financial interests. Confidential filers include less senior government employees who occupy positions that require exercising significant judgment, such as patent examiners who review and grant patent applications. Our evaluation focused on confidential financial disclosure report (CFDR) filers.

At USPTO, all patent examiners working at grade levels 13 to 15 on the general schedule (GS)<sup>5</sup> must file a CFDR<sup>6</sup> through a system called FD Online.<sup>7</sup> To complete these reports, examiners

---

<sup>1</sup> 5 Code of Federal Regulations § 2635.101(b)(2).

<sup>2</sup> 18 U.S.C. §208, *Acts affecting a personal financial interest*; 5 C.F.R. Part 2635 Subpart D—*Conflicting Financial Interests*.

<sup>3</sup> A share of stock is a unit of ownership in a company.

<sup>4</sup> 5 C.F.R. Part 2634, *Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture*, Subpart A—General Provisions, Subpart B—*Persons Required to File Public Financial Disclosure Reports*, and Subpart I—*Confidential Financial Disclosure Reports*.

<sup>5</sup> The GS is a pay scale for federal employees. The higher the grade level, the more authority and independence the examiner has.

<sup>6</sup> U.S. Department of Commerce United States Patent and Trademark Office, June 5, 2013. *Guidance for Determining Confidential Financial Disclosure Report Filers*. Alexandria, VA: USPTO.

<sup>7</sup> FD Online is a secure application the Department uses to prepare, store, and review electronically filed financial disclosures.

self-disclose assets held and sources of income, including any stock holdings over \$1,000.<sup>8</sup> At the time of filing, the examiner “must certify that the information contained in the report is true, correct, and complete to their best knowledge.”<sup>9</sup> These reports assist USPTO employees and the Department in avoiding conflicts by ensuring that employees consider and acknowledge their financial holdings on an annual basis and that the Department reviews those holdings.

### *Oversight Responsibilities*

The Department’s Office of the General Counsel (OGC) oversees the ethics program for all Department bureaus, including USPTO.<sup>10</sup> Within OGC, the Ethics Law and Programs Office (ELPO) coordinates and manages patent examiner compliance with conflict-of-interest statutes and regulations. In this role, ELPO administers the financial disclosure program and provides ethics training and advice to examiners. Accordingly, ELPO is responsible for reviewing CFDRs to identify and resolve potential financial conflicts of interest.<sup>11</sup> The Department’s Designated Agency Ethics Official oversees these functions.

While USPTO does not have direct responsibility for the ethics program, it does support ELPO. For example, USPTO’s Office of Human Resources (OHR) is responsible for identifying examiners required to file CFDRs and notifying ELPO of those filers. Further, supervisory patent examiners become involved when an examiner notifies them of a conflict that requires recusal from working on a particular matter.<sup>12</sup> When a recusal is necessary, the supervisor takes action to remove the assigned work from the examiner to avoid the conflict.

---

<sup>8</sup> The CFDR is also known as Office of Government Ethics Form 450.

<sup>9</sup> 5 C.F.R. §2634.602(a).

<sup>10</sup> DOC, September 28, 2012. *Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office*, Department Organization Order 10-14 [online]. [https://www.osec.doc.gov/opog/dmp/doors/doo10\\_14.html](https://www.osec.doc.gov/opog/dmp/doors/doo10_14.html) (accessed March 31, 2023).

<sup>11</sup> 5 C.F.R. §2638.104(c), *Responsibilities of the DAEO*.

<sup>12</sup> Recusal occurs when the employee is barred from working on a matter because of a conflict of interest.

# Objective, Findings, and Recommendations

Our evaluation objective was to determine whether USPTO and the Department effectively administered ethics rules to prevent financial conflicts of interest by USPTO patent examiners. The evaluation focused on USPTO and Department policies and procedures to administer and comply with ethics rules for financial conflicts of interest in calendar year (CY) 2022. See appendix A for a more detailed description of our scope and methodology.

Overall, we found that USPTO and the Department did not effectively administer the Department's ethics program to protect against potential conflicts of interest by patent examiners. Specifically, we found the following:

- I. USPTO and the Department did not ensure examiners filed CFDRs as required.
- II. The Department did not identify or resolve potential financial conflicts in CFDRs.
- III. USPTO and the Department did not provide specialized training or guidance to examiners on potential ethics conflicts.

These issues occurred because (1) USPTO and the Department did not timely identify and notify examiners with filing obligations; (2) ELPO held a narrow interpretation of its regulatory responsibilities for determining conflicts; (3) ELPO did not adequately coordinate with USPTO subject-matter experts; and (4) the Department lacked written processes to identify common and emerging risks useful in tailoring ethics training content. An effective ethics program is vitally important to minimize the risk of ethics violations and ensure that patent application decisions are free from personal bias.

## I. USPTO and the Department Did Not Ensure Examiners Filed CFDRs as Required

Consistent with regulations requiring certain government officials to report their financial investments, all examiners in grade levels GS-13 to GS-15 must file a CFDR.<sup>13</sup> We reviewed various internal records, including FD Online reports. We found that of the 7,034 examiners required to file reports in CY 2022, 53 examiners did not. The failure to file occurred because USPTO and the Department did not timely identify and notify examiners of their filing requirements. As previously stated, both USPTO's OHR and the Department's ELPO share responsibility for ensuring that examiners obligated to file CFDRs are identified and notified of their filing requirements. Of those 53 examiners who did not file CFDRs,

- USPTO did not timely identify and inform ELPO that 35 of those individuals were required to file; and
- for the remaining 18 examiners, USPTO did identify them and inform ELPO, but ELPO officials did not notify the examiners of those obligations.

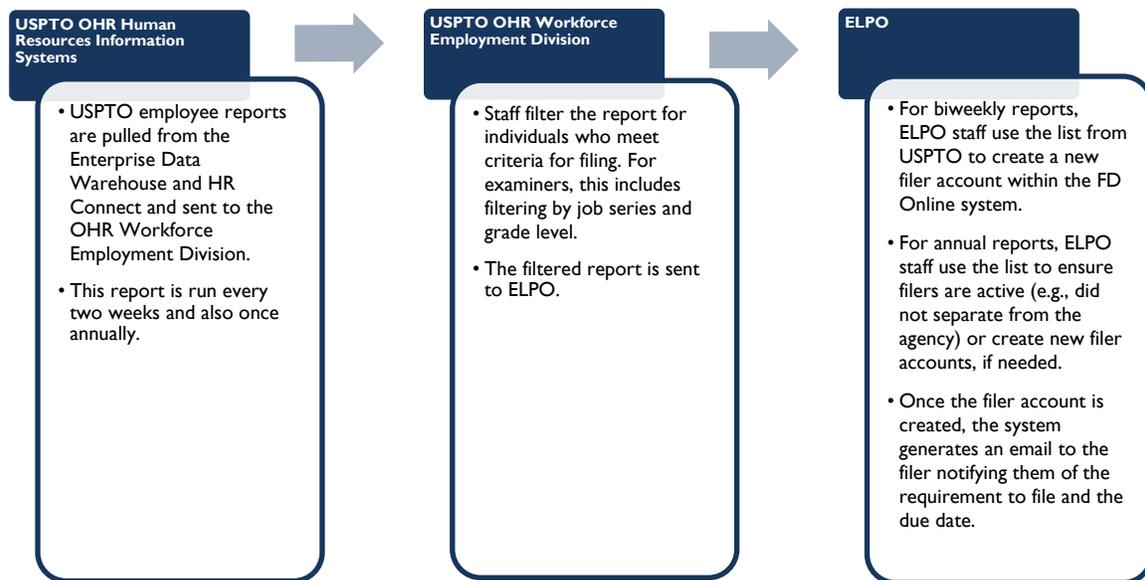
---

<sup>13</sup> See 5 C.F.R. §2634.903, 5 C.F.R. §2634.904, and USPTO *Guidance*.

More than half of the 53 examiners who did not file were new entrants.<sup>14</sup> The process for identifying new entrant filers is a manual one that requires USPTO to pull data from a system, filter the information, and email the information to ELPO officials. After receiving the information, ELPO officials manually enter it into the FD Online system. A high degree of manual input in any process increases the likelihood that mistakes could occur.

Figure I describes the process of identifying required filers and notifying them of their obligations to submit CFDRs.

**Figure I. USPTO Filer Identification and Notification Process**



Source: OIG analysis of documentation from USPTO and ELPO and interviews with USPTO and ELPO employees

While the number of examiners that did not file CFDRs is low, the gap signifies a risk to the integrity and credibility of the patent examination process. When examiners do not file CFDRs, there is an increased risk that potential conflicts could go undetected and unresolved. Therefore, the Department should improve its administration of the ethics program to ensure that (1) it has the information it needs to effectively administer the program and (2) examiners fulfill their ethical obligation to file these reports upon entry to a covered position and annually thereafter.

## Recommendations

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office direct the Chief Administrative Officer to

<sup>14</sup> In general, an individual is a new entrant if their previous position(s) did not require filing and they have assumed a new position that does. In CY 2022, new entrant CFDR filers included patent examiners either (1) hired as new employees in the GS-13 to GS-15 grade levels or (2) promoted to the GS-13 grade level during the CY.

1. Strengthen controls to ensure that human resource officials identify examiner appointments to positions requiring financial disclosure and notify ELPO in a timely manner.

We recommend that the Department's General Counsel direct the Chief of the Ethics Law and Programs Office to

2. Implement processes to ensure that all examiners with filing obligations are captured in the FD Online system and examiners submit CFDRs as required.

## II. The Department Did Not Identify or Resolve Potential Financial Conflicts in CFDRs

For the Department to meet its regulatory obligations to identify and address potential conflicts in CFDRs, it should ensure it conducts thorough conflict-of-interest analyses. As discussed below, we found that in some cases the Department did not identify or resolve potential conflicts. This occurred because ELPO (1) held a narrow interpretation of its regulatory responsibilities and (2) did not adequately coordinate with USPTO subject-matter experts.

### *Conflict-of-interest analysis*

As part of the CFDR review process, ELPO staff must conduct a conflict-of-interest analysis to identify potential conflicts and advise employees on how to remedy them.<sup>15</sup> Specifically, a reviewer must examine the CFDR to determine that no interest disclosed on the report violates or appears to violate relevant ethics laws and regulations.<sup>16</sup> If the report is satisfactory, the reviewer certifies it—indicating that the report is complete and discloses no conflicts of interest.<sup>17</sup> However, if the reviewer finds the CFDR may indicate a potential violation, they must notify the filer, give them an opportunity to respond, and if necessary, determine what remedial actions they should take to bring the report into compliance.<sup>18</sup>

To evaluate the CFDR review process, we tested a sample of 73 patent examiners—6 judgmentally selected and 67 statistically selected.<sup>19</sup> We considered an examiner to have a potential conflict if the examiner reported on their CFDR that they held stock in a company that does work related to their assigned subject-matter area, called an art unit.<sup>20</sup> For

---

<sup>15</sup> U.S. Office of Government Ethics, December 2018. *Confidential Financial Disclosure Guide: OGE Form 450*. Available online at

[https://www.oge.gov/web/OGE.nsf/0/A685AEC70F057115852585B6005A202F/\\$FILE/Confidential%20Fin%20Disc%20Guide\\_Jan2019.pdf](https://www.oge.gov/web/OGE.nsf/0/A685AEC70F057115852585B6005A202F/$FILE/Confidential%20Fin%20Disc%20Guide_Jan2019.pdf) (accessed October 2, 2023).

<sup>16</sup> 5 C.F.R. §2634.605, *Review of Reports*.

<sup>17</sup> DOC Ethics Law and Programs Office. *Standard Operating Procedures for the Executive Branch Confidential Disclosure OGE Form 450 Program*. Washington, DC: DOC. These procedures were effective in CY 2022.

<sup>18</sup> 5 C.F.R. §2634.605, *Review of Reports*.

<sup>19</sup> See appendix A for our statistical projection methodology.

<sup>20</sup> Patent examiners are organized into subject-matter groupings, called art units, that are managed by supervisory patent examiners. Similar art units are grouped into technology centers managed by a director.

example, if an examiner worked in an art unit that covered aeronautics and held stock in an aerospace company, we considered that a potential conflict.

We found that 26 of 73 CFDRs had potential financial conflicts that the Department did not identify and evaluate to determine if additional remedial actions were required.<sup>21</sup> However, the ethics officials who reviewed them certified that the filer was “in compliance with applicable laws and regulations.” Those officials did not identify or ask the filers about the potentially conflicting stocks that we identified. Based on the sample results, we estimated that in CY 2022, about 2,100 patent examiner CFDRs—or 29.9 percent—had potential financial conflicts that ethics officials failed to identify.<sup>22</sup>

### *Exemptions for stock interests*

While the law prohibits executive branch employees from participating in particular matters in which the employee has a financial interest, the Code of Federal Regulations (C.F.R.) provides exceptions in cases where the nature and size of the interest are unlikely to affect an employee’s official actions.<sup>23</sup> For stock holdings in publicly traded companies,<sup>24</sup> a patent examiner may review applications when the examiner (including their spouse and dependent children) owns

- up to \$15,000 of stock in a company whose patent application they are reviewing or
- up to \$25,000 of stock in one or more companies within a group or industry sector in which the examiner reviews applications.<sup>25</sup>

These exceptions may determine whether a financial conflict requires remedial action, such as recusal from working on a certain patent application. While examiners are not required to report the dollar value of their stock ownership on their CFDRs, reviewers can request additional information from filers as needed to assess compliance.<sup>26</sup> In the 26 cases where we identified potential conflicts, ethics officials did not ask about the dollar value of the examiner’s stock holdings. An ELPO official told us that report reviewers are not required

---

<sup>21</sup> Per 5 C.F.R. §2634.605(b)(3), “[d]isclosures will be taken at ‘face value’ as correct.” Consistent with this, we did not evaluate the sampled CFDRs to determine if disclosures were correct. We also did not seek written evidence of stock values for examiner holdings to determine if potential financial conflicts found met the thresholds of a disqualifying interest.

<sup>22</sup> The 29.9 percent represents 20 of 67 statistically sampled patent examiners we found to have potential conflicts. We did not include the six judgmentally selected examiners in our statistical projections. See appendix A for our statistical projection methodology.

<sup>23</sup> 5 C.F.R. Part 2640, *Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting a Personal Financial Interest)*.

<sup>24</sup> “Publicly traded” means the company is registered with the U.S. Securities and Exchange Commission pursuant to section 12 of the Securities and Exchange Act of 1934 and listed on a national or regional securities exchange or traded through NASDAQ.

<sup>25</sup> As we discuss in finding III, there are different exemption rules and amounts depending on the filer’s situation. We identified the amounts applicable to patent examiners because they work on particular matters. Although the regulatory language that is the basis for the \$25,000 exemption refers to the aggregate value of stock holdings “in the securities of all affected entities,” patent examiners are specifically advised that they may not hold more than \$25,000 in stock in the “industry sector” in which they review patents.

<sup>26</sup> 5 C.F.R. §2634.605(b)(4), *Requests for, and Review Based on, Additional Information*.

to ask about this value and generally would not do so as a balance between employee privacy and the Department's need to know. Still, when the CFDR discloses stock(s) presenting a potential conflict, ethics officials need to know at a minimum if the value of examiner stock holdings exceeds the previously mentioned dollar thresholds so they can respond accordingly to resolve the potential conflict, as necessary.<sup>27</sup> This would ensure that ethics officials provide the best advice to examiners, which ultimately minimizes the risk of ethics violations.

We also found that in 12 of the 26 instances, the examiners were assigned patent applications for companies reported on their CFDR. If the value of any of these stock holdings exceeded the above-mentioned exemptions, the examiner would be prohibited from working on those patent applications and possibly others. Because ethics officials generally do not ask examiners the value of their stock ownership, they cannot effectively identify and assist examiners in mitigating potential conflicts.

*ELPO held a narrow interpretation of its regulatory responsibility for determining conflicts*

Ethics officials are responsible for carrying out an effective financial disclosure program by using CFDR information to prevent and resolve potential conflicts of interest.<sup>28</sup> According to an ELPO official, the Department's current CFDR review process meets regulatory requirements because it provides ethics advice to examiners. However, our review of the advice sent to examiners found that it was too general. It only reminded examiners of applicable ethics rules; it did not specify the stocks that may pose a potential conflict nor provide guidance on how to resolve the conflict, if necessary.<sup>29</sup>

An ELPO official also asserted that ethics officials are not required to identify specific stocks that pose a potential conflict. Instead, it is the examiner's responsibility to comply with ethics laws and regulations and contact ELPO for an opinion when potential conflicts arise. While we agree that examiners are responsible for compliance with ethics requirements, identifying potentially conflicting stocks is a critical step in the CFDR review process. Since ELPO held a narrow interpretation of its regulatory responsibilities, we found that ethics officials did not conduct a thorough conflict analysis to identify and resolve potential conflicts.

Furthermore, employees can better adhere to ethics responsibilities only when they are fully aware of what constitutes a conflict. Three USPTO technology center directors and multiple patent examiners told us that the \$25,000 industry sector rule is not completely clear. To effectively prevent and resolve conflicts, ethics officials should proactively act on information disclosed in CFDRs and ensure that examiners have a clear understanding of what constitutes a conflict so they can avoid those issues.

---

<sup>27</sup> Resolution does not mean that the filer must or should take specific remedial actions, such as recusal. If the examiner's stock holdings are below the exemption thresholds, the ethics official may determine that the interests do not create a conflict and no further actions are required to address the conflict concerns.

<sup>28</sup> 5 C.F.R. §2638.104, *Government ethics responsibilities of agency ethics officials*.

<sup>29</sup> As discussed in Finding III, for 9 of the 26 examiners we found with potential conflicts, the general guidance given to them was not suitable.

*ELPO did not adequately coordinate with USPTO subject-matter experts*

When reviewing a CFDR, the ethics official may request an intermediate review by the filer's supervisor or another reviewer.<sup>30</sup> However, examiners' supervisors were not involved in the CFDR review process. An ELPO official stated that supervisory involvement could create tension between employees and supervisors. It is our view that ELPO can involve supervisors without disclosing an examiner's stock holdings, thus easing concerns. Supervisory patent examiners could share their expertise about patent application subject matter in their art unit with CFDR reviewers, helping to educate ethics officials on the types of patents and identify companies whose stocks may present a potential conflict. This is especially important if ethics officials are not experts in the work performed in the examiner's art unit. Alternatively, there may be other subject-matter experts, who can assist ethics officials when they evaluate examiner CFDRs for potential conflicts. Leveraging supervisory patent examiners or other USPTO personnel knowledgeable in the subject-matter areas could help to identify potential conflicts and ease the burden on ELPO, particularly when the office is understaffed.<sup>31</sup>

If the Department does not improve its CFDR review process by proactively determining conflicts and improving coordination between ELPO and USPTO subject-matter experts, it risks not only the integrity of the patent system but also USPTO's reputation. Examiners' motives for granting or denying patents could be questioned if there is the appearance of widespread conflicts of interest, ultimately decreasing public confidence in the patent system. This could also lead to increased challenges to patent examiner decisions, costing USPTO time and resources to review and defend those decisions.

## Recommendations

We recommend that the Department's General Counsel direct the Chief of the Ethics Law and Programs Office to

3. Implement processes or procedures to ensure ELPO conducts thorough conflict-of-interest analyses during CFDR reviews to identify and address potential conflicts.
4. Ensure ELPO leverages subject-matter expertise from USPTO to carry out reviews of CFDRs that comply with regulations and internal policies.

### III. USPTO and the Department Did Not Provide Specialized Training or Guidance to Examiners on Potential Ethics Conflicts

An effective ethics program teaches employees how to identify ethics issues and get help in complying with government ethics laws. Agencies educate employees through a combination of training and personalized guidance. We found that ELPO (1) did not provide specialized training to patent examiners and (2) provided guidance that was unclear.

<sup>30</sup> 5 C.F.R. §2634.605(b)(1), *Initial Review*.

<sup>31</sup> As of June 2023, ELPO had only 16 staff members to review CFDRs—a 37 percent vacancy rate.

USPTO patent examiners at the GS-13 grade level and above are required to complete annual ethics training. The training must focus on government ethics and appropriate regulations for employees. Additionally, to assist in complying with ethics laws, agency ethics officers give advice and guidance to employees as needed. Employees with questions about regulations for particular situations should seek advice from Department ethics officials.

*A. Ethics training was not specialized for patent examiners*

The C.F.R. establishes that agency ethics officials are responsible for carrying out an effective ethics education program. According to the Office of Government Ethics (OGE),<sup>32</sup> providing specialized training to groups that may have a unique ethics situation is considered a best practice in carrying out an ethics program.<sup>33</sup> Examiners fall into this unique category because companies often cross sectors. We reviewed the annual ethics training material used to train examiners in 2022 and found that it was not specialized for patent examiners. For example, the training material did not mention the \$25,000 exception threshold that applies for companies in the particular industry sector in which the examiner reviews patents. We refer to this threshold as the industry sector rule. Although the ethics training material for new employees did mention this rule, it did not include a clear definition of “industry sector” and how it should be applied in examiners’ work. This creates difficulty in identifying what patent applications the examiner is prohibited from working on when the value of their stock holdings in affected companies exceeds \$25,000.

The reason for the rule restricting examiners to \$25,000 or less of stock ownership in affected companies is that every company that manufactures or markets devices or processes similar to the subject of a patent application has an interest in the application’s outcome. Consequently, if a patent examiner has a financial interest in any company that manufactures or markets devices or processes covered in their art unit, they must recuse themselves from reviewing all patent applications in the art unit unless the value of their stock ownership in affected companies is below \$25,000.<sup>34</sup> Industry sectors are ambiguous, and guidance is necessary to help examiners identify ethics issues that may arise from the work they perform. For example, a company typically known as a technology company holds a patent for livestock management. This means it may not be readily apparent to an examiner evaluating a patent for livestock management that a conflict exists if they own stock in the technology company above the dollar threshold.

*B. Some examiners received unclear guidance from ethics officials*

In response to their CFDR filings, examiners receive emails containing ethics guidance that is intended to be customized based on the information they disclosed. We

---

<sup>32</sup> OGE leads and oversees the executive branch ethics program, which works to prevent financial conflicts of interest to help ensure government decisions are made free from personal financial bias.

<sup>33</sup> OGE. *Education through Training & Advice* [online]. [https://www.oge.gov/web/oge.nsf/ethicsofficials\\_education-through-training](https://www.oge.gov/web/oge.nsf/ethicsofficials_education-through-training) (accessed June 15, 2023).

<sup>34</sup> For example, if a patent examiner owns more than \$25,000 in a group of bank companies, that patent examiner is not permitted to review patent applications of any companies that are part of the banking industry.

reviewed these emails, which are stored in FD Online, and found that 9 of the 26 examiners who had potential conflicts of interest received unsuitable guidance in response to their CFDR filings. Regulations outline different monetary exceptions for stock holdings depending on whether the employee's work relates to matters involving specific parties or matters of general applicability.<sup>35</sup> Table I outlines the differences between the exemptions.

**Table I. Comparison of Exemption Criteria for Stock Holdings**

Exemption Requirements for Matters Involving Specific Parties	Exemption Requirements for Matters of General Applicability
An employee may participate in any particular matter if:	An employee may participate in matters of general applicability, such as rulemaking, if:
<ul style="list-style-type: none"> <li>the aggregate market value of the holdings in all affected parties does not exceed \$15,000, or</li> </ul>	<ul style="list-style-type: none"> <li>the market value does not exceed \$25,000 in any one affected entity, or</li> </ul>
<ul style="list-style-type: none"> <li>the aggregate market value of holdings in all affected parties and non-parties does not exceed \$25,000.</li> </ul>	<ul style="list-style-type: none"> <li>The market value does not exceed \$50,000 in all affected entities.</li> </ul>

Source: 5 C.F.R. §2640.202

Examiners evaluate patent applications involving specific companies or inventors and therefore must follow the rules that apply for matters involving specific parties. However, we found these 9 examiners received guidance for matters of general applicability, which state that disqualification rules apply if they cumulatively own more than \$50,000 in companies affected by the matter. This guidance does not apply to examiners' work and leads examiners to believe they can own up to \$50,000 in stock within the same industry as the patent applications they review. While the guidance may be appropriate for other filers, it was not suitable for patent examiners given their known work on matters involving specific parties. Figure 2 compares ELPO policy guidance to the advice given to examiners.

<sup>35</sup> 5 C.F.R. §2640.202, *Exemptions for interests in securities*.

**Figure 2. USPTO Guidance to Examiners**

<i>ELPO guidance said:</i>	<i>But ELPO told an examiner:</i>
<p>"[Y]ou may not invest in closely held companies or in publicly traded securities of...more than <b>\$25,000 total</b> in stock in the industry sector in which you review patents."</p>	<p>"If your holdings exceed \$25,000 in an individual company (or <b>\$50,000</b> in companies in the same sector), not only are you barred from matters specifically involving the company, but you are also barred from policy matters that could affect the company as a member of its industry."</p>

*Source:* Excerpt of 2021 ethics guidance on investments for patent examiners and excerpt of ethics advice sent to examiner in April 2022, respectively

When interviewed about the guidance given to some examiners, an ELPO official disagreed that the guidance given was inappropriate. The official said that guidance should be tailored to the specific situation and the reviewer has discretion to choose the type of guidance provided. The official also stated that it is the examiner's responsibility to comply with laws and regulations and seek advice if they have further questions. We agree it is the employee's responsibility to adhere to conflict-of-interest statutes. However, it is the responsibility of agency ethics officials to appropriately tailor advice to employees to help them avoid conflicts. When examiners receive guidance suggesting they can own up to \$50,000 in stock in a particular industry, it can confuse them and lead them to erroneously believe they can hold stock valued at more than the allowed amount. This increases the risk that an examiner may unintentionally engage in a matter with a conflict.

In addition, we identified four instances where employees who sought specific guidance related to potential financial conflicts of interest received inadequate responses to their questions. For example, one examiner asked ethics officials for clarity pertaining to the \$25,000 exemption threshold as it relates to their work. However, instead of answering the examiner's question, the ethics guidance provided only included a statement regarding the \$15,000 limit for a single company.

ELPO has template language that can be used to develop guidance in response to CFDR filings. That template includes advice that examiners do not invest in companies whose patent applications come before their art unit. However, 12 of the 26 examiners we found with potential conflicts did not receive that guidance. Additionally, 17 of the 20 examiners we interviewed indicated they had not received clear guidance that explains what industries are covered under their unit. Ethics regulations place significant responsibility on examiners to identify and avoid conflicts of interest, and ELPO depends on examiners to identify conflicts. Therefore, examiners should be equipped with all the necessary information to make an informed decision regarding stock investments. ELPO

should administer an effective ethics education program and provide accurate guidance to assist examiners in identifying and avoiding conflicts of interest.

*ELPO did not effectively identify and respond to ethics risks*

ELPO did not provide specialized training or clear guidance to patent examiners because it did not have formal processes to identify and respond to risks associated with the USPTO ethics program. In response to an annual ethics program questionnaire, ELPO stated that it assessed risks to help inform the content, format, and timing of ethics education and communications. However, an ELPO official stated that the office does not have a written policy or process that describes or tracks how risk areas are identified. The official also indicated that ELPO does not prepare a written report identifying those risks, even though OGE suggests that agencies use the results of risk and needs assessments to identify and appropriately tailor ethics content to different audiences.<sup>36</sup> Doing so ensures that training material is relevant and appropriate to mitigate the risks identified. It will also help the Department to identify when specialized training is needed and will help to structure the training content given to address common and emerging risks. Therefore, to effectively tailor ethics content to patent examiners, ELPO should develop a process for identifying risks and documenting results to ensure they are carried over to training materials and used in providing guidance.

Without tailored training and clear guidance, examiners are at risk of violating ethics laws and losing impartiality in carrying out official duties. Examiners need clear rules governing the criteria that qualify as conflicts, including examples of how the rules apply to their specific work. This is especially important because of the degree of responsibility placed upon examiners to self-identify and report potential conflicts. Additional training on interpreting “industry sector” as it relates to matters of specific parties and how it applies will reduce the likelihood of ethics violations and protect the integrity of the patent application process.

Importantly, ethics rules apply to all employees regardless of grade level. While this evaluation focused on examiners required to file CFDRs, examiners below GS-13 are not required to file these reports or take annual ethics training, which increases the risk that these individuals may be less aware of their ethical obligations.

## Recommendations

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office

---

<sup>36</sup> OGE, April 4, 2019. *Ethics Education: Using the Regulation to Maximize Effectiveness*, PA-19-05 [online]. [https://www.oge.gov/Web/OGEnsf/0/AD93D77821CC4D7A852585BA005BEC21/\\$FILE/PA-19-05.pdf](https://www.oge.gov/Web/OGEnsf/0/AD93D77821CC4D7A852585BA005BEC21/$FILE/PA-19-05.pdf) (accessed August 17, 2023).

5. Ensure USPTO subject-matter experts work with agency ethics officials to develop specialized training that describes how the industry sector rule is applied.

We recommend that the Department's General Counsel direct the Chief of the Ethics Law and Programs Office to

6. Develop and deliver specialized training for patent examiners that includes an explanation of the exemptions, including the industry sector rule and how it applies.
7. Ensure patent examiners receive clear and accurate guidance in response to CFDR filings and specific requests.
8. Develop and implement a written process to identify and track conflict-of-interest risks and ensure risk assessment results are used to inform ethics training and guidance given.

# Summary of Agency Response and OIG Comments

On January 8, 2024, and January 23, 2024, respectively, we received USPTO's and the Department's responses to our draft report. In response to our draft report, USPTO and the Department's OGC concurred with all our recommendations and described actions they have taken, or will take, to address them. Of note, OGC provided technical comments or suggested report revisions as part of its response to recommendations 3 and 7. We considered those comments but did not revise our report. We have summarized portions of OGC's responses to recommendations 3 and 7 in our discussion below. Appendix B contains the full text of USPTO's and the Department's responses.

## *Recommendation 3*

Agency response. OGC stated that it initiated improvements that included additional substantive training for filers and reviewers, more intensive oversight of reviews, and more comprehensive resources and guidance for filers and reviewers. OGC commented that the report language suggests that ELPO follow a formal process whenever an examiner holds an asset that creates a potential conflict, but ELPO is only required to follow that process when an examiner's CFDR reveals an actual or potential violation.

OIG response. As we stated in our report, ethics officials' process did not include a thorough analysis to identify and resolve potential conflicts. These analyses are necessary to ascertain whether an examiner's ownership of a stock presents a potential violation—i.e., whether the examiner owns a disqualifying amount of the stock.

Agency Response. OGC suggested we revise the report to note that it does not violate conflict-of-interest rules for a patent examiner to merely hold a financial interest. Rather, the violation only occurs if the examiner participates in a particular matter that would affect their financial interests, and this report did not identify any instances where a violation occurred.

OIG response. As we identified in the report, to be considered a potential conflict, the stock needed to be in a company that does work related to the examiner's assigned subject-matter area (art unit). Furthermore, the report identifies the exemption thresholds for stock holdings and explains that patent examiners may review applications in which they have a financial interest if their stock holdings are below the dollar thresholds. Identifying whether violations occurred was outside the scope of our review, and we referred potential violations of law to our Office of Investigations.

## *Recommendation 7*

Agency response. OGC agreed that examiners should receive clear and accurate guidance and noted that examiners did receive initial guidance informing them that they are prohibited from participating in certain matters in which they have a financial interest. OGC stated the report language suggests that ELPO should not tell patent examiners about the threshold for matters

of general applicability because it is less relevant to the examiners' work. Lastly, OGC believes the advice given to examiners was reasonable and clear.

OIG response. Our report made no assertion that ELPO should not tell patent examiners about the threshold for matters of general applicability. However, the guidance provided to examiners in these instances did not distinguish between thresholds that would apply for matters involving specific parties and matters of general applicability. As the report states, examiners evaluating patent applications must follow the rules that apply for matters involving specific parties, which have lower dollar thresholds. We found the guidance provided to some examiners was for matters of general applicability and not for matters involving specific parties. Receiving this guidance increases the risk of unintentional violations by leading examiners to believe they can hold stock valued at more than the allowed amount. While the guidance given may be appropriate for other filers, it was not suitable for patent examiners given their known work on matters involving specific parties.

We appreciate both USPTO's and the Department's commitment to improving the ethics program. We look forward to reviewing their proposed action plans for implementing our recommendations.

# Appendix A: Objective, Scope, and Methodology

The objective of our evaluation was to determine whether USPTO and the Department effectively administered ethics rules to prevent financial conflicts of interest by USPTO patent examiners.

The scope of this evaluation focused on USPTO and Department policies and procedures to administer and comply with ethics rules for financial conflicts of interest in CY 2022. Annual disclosure reports filed in 2022 cover assets held in the previous CY—January 1 through December 31. The project included evaluation of the Department’s review of and response to CFDRs filed by USPTO patent examiners.

To accomplish our objective, we performed the following actions:

- Reviewed applicable laws and regulations, as well as USPTO and Department policies and procedures relevant to financial conflicts of interest, including
  - 18 U.S.C. §208, *Acts affecting a personal financial interest*
  - 5 C.F.R. Part 2634, *Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture*; 5 C.F.R. Part 2635, *Standards of Ethical Conduct for Employees of the Executive Branch*; 5 C.F.R. Part 2638, *Executive Branch Ethics Program*; and 5 C.F.R. Part 2640, *Interpretation, Exemptions, and Waiver Guidance Concerning 18 U.S.C 208 (Acts Affecting a Personal Financial Interest)*
  - Department Organization Order 10-14, *Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office*, dated September 28, 2012
  - USPTO Memorandum, *Guidance for Determining Confidential Financial Disclosure Report Filers*, dated June 5, 2013
  - ELPO, *Standard Operating Procedures for the Executive Branch Confidential Disclosure OGE Form 450 Program*
- Interviewed officials and staff from USPTO’s Office of General Law and OHR, as well as technology center directors and patent examiners.
- Interviewed officials in the Department’s ELPO.
- Gathered data from the National Finance Center (NFC) Payroll and Processing System to select a total of 73 examiners for testing from a universe of 7,034 patent examiners (see *Statistical Sampling* for more information).
- Gathered evidence from FD Online and other internal records held by USPTO and Department offices.
- Coordinated with our Office of Counsel for legal guidance and our data analytics group to develop the methodology for detailed testing of examiner filings.

- Met with an OGE leader to coordinate our oversight work.
- Evaluated whether USPTO and the Department met requirements for patent examiners to file CFDRs for all 7,034 patent examiners in the universe.
- Evaluated the Department’s review of and response to CFDRs to identify and resolve potential conflicts and assessed actions to mitigate and resolve potential conflicts for the 73 sampled examiners.
- Reviewed patent examiner CFDRs for investments related to the examiner’s work area, email communication, and guidance given to the examiners. To understand if a potential conflict existed, we also obtained information as needed on the companies in which examiners held stock, such as patents held by a company.
- Evaluated the sufficiency of counseling, guidance, and training content provided to examiners by reviewing training material given, including obtaining ethics training certificates for the 73 sampled examiners.
- Referred potential violations of law to our Office of Investigations.

### *Statistical Sampling*

To determine whether the Department took action to identify and resolve potential conflicts found in CFDRs, we evaluated a sample of patent examiner filings. We selected examiners from a universe of 7,034 patent examiners as identified by job series 1224 or 1226 who were working in grade levels GS-13 to GS-15 during CY 2022. We used employee data from the NFC Payroll and Processing System, the Department’s HR system of record.

From the universe, the team judgmentally selected six examiners for testing based on risk. From the remaining population, the team statistically selected 67 examiners proportional to the population of patent examiners, stratified by the latest technology center group the examiner was assigned to. This stratification ensured the selected sample was representative of examiners from various art units. The team selected a total of 73 examiners for detailed testing. The sample size was based on a 90 percent confidence level and a margin of error no greater than 10 percentage points. Table A-I details the team’s sampling selection methodology.

**Table A-I. Sampling Selection by Strata of Patent Examiners**

<b>Technology Center by Strata</b>	<b>Total Patent Examiners (GS-13 to GS-15)</b>	<b>Percent of Universe</b>	<b>No. Selected</b>
Beginning with “1”	1,332	19.0%	13
Beginning with “2”	3,710	52.8%	35
Beginning with “3”	1,986	28.2%	19
Sampling Universe	7,028	100.0%	67
High-Risk Examiners	6	--	6
<b>Total</b>	<b>7,034</b>	<b>--</b>	<b>73</b>

Source: OIG sampling methodology using data from the NFC Payroll and Processing System

We found that 20 of the 67—or 29.9 percent—statistically sampled examiners had potential conflicts of interest and projected these results onto the population of 7,028 examiners. Based on the results of testing, the team weighted the results and estimated that at a 90 percent confidence level, about 2,100 GS-13 to GS-15 patent examiners had potential financial conflicts of interest in CY 2022 with a margin of error of about 9.5 percentage points. Table A-2 details the team’s statistical projections along with the upper and lower bound estimates.

**Table A-2. Statistical Projections**

Category	Point Estimate (Projection)	Margin of Error	90% Confidence Interval	
			Lower Limit	Upper Limit
Estimated number of examiners with potential conflicts	2,101 (29.9%)	+/- 9.5 percentage points	1,438 (20.5%)	2,766 (39.4%)

Source: OIG data analytics results projected over the universe

### Data Reliability

In satisfying our project objective, we obtained computer-processed data from

- NFC’s payroll and processing system;
- FD Online; and
- USPTO’s Patent Application Locating and Monitoring (PALM) system, which contains examiner docket records showing patent application assignments.

To assess the reliability of data from the NFC’s Payroll and Processing system, we (1) performed electronic testing for obvious errors in accuracy and completeness, (2) worked with agency officials knowledgeable about the system to identify any data problems, and (3) traced a sample of key fields in the data to source documents. To assess the reliability of the Department’s FD Online data, we (1) performed electronic testing for obvious errors in accuracy and completeness, (2) worked closely with agency officials to identify any data problems, and (3) traced a sample of data to source documents. To assess the reliability of USPTO’s PALM data, we (1) performed electronic testing for obvious errors in accuracy and completeness, (2) reviewed a contractor evaluation report on data verification, and (3) traced a sample of data to source documents. We determined that the data were sufficiently reliable to support the findings and conclusions in this report.

We conducted our evaluation from March 2023 through November 2023 under the authority of the Inspector General Act of 1978, as amended (5 U.S.C. § 401-424), and Department Organization Order 10-13, as amended October 21, 2020. We performed our fieldwork remotely.

We conducted this evaluation in accordance with *Quality Standards for Inspection and Evaluation* (December 2020) issued by the Council of the Inspectors General on Integrity and Efficiency. Those standards require that the evidence must sufficiently and appropriately support evaluation findings and provide a reasonable basis for conclusions and recommendations related

to the objectives. We believe that the evidence obtained provides a reasonable basis for our findings, conclusions, and recommendations based on our review objective.

# Appendix B: Agency Response

## I. USPTO



### UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND  
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

January 8, 2024

MEMORANDUM FOR Frederick J. Meny, Jr.  
Assistant Inspector General for Audit and Evaluation

FROM: Katherine K. Vidal, <sup>Users, Vidal,</sup> <sup>Digitally signed by Users, Vidal, Katherine (Kath)</sup>  
Under Secretary of Commerce for Intellectual Property and <sup>Date: 2024.01.08 09:50:12 -0500</sup>  
Director of the United States Patent and Trademark Office

SUBJECT: Response to Draft Report, “The Department Needs to Strengthen Its Ethics Oversight for USPTO Patent Examiners”

#### Executive Summary

We appreciate the effort you and your staff made in reviewing the United States Patent and Trademark Office’s (USPTO) administration of ethics rules to prevent financial conflicts of interest by USPTO patent examiners. Providing high-quality, efficient examination of patent applications is key to the issuance of robust and reliable patent rights. The USPTO continually works to equip our examiners with the guidance, training, tools, advanced technology, and procedural resources they need to meet this challenge. More pointedly, the USPTO concurs with the Office of the Inspector General’s (OIG) observation that examiners have a critical role in ensuring the integrity of the patent application process. Patent examiners are—like other executive branch employees in positions of responsibility—held to high standards of ethical conduct, including that “employees shall not hold financial interests that conflict with the conscientious performance of duty.” The USPTO is committed to continuing to collaborate and fortify its partnership with the Department of Commerce’s (Department) Ethics Law and Program Office (ELPO) to strengthen its ethics oversight for USPTO patent examiners.

In response to the issues specifically raised in the report, the USPTO is committed to ensuring that eligible patent examiners are notified timely of their requirement to comply with the completion of the confidential financial disclosure report. The OIG found that less than 1% of the patent examiners required to file financial disclosure reports were not informed they needed to do so, but the USPTO agrees that universal compliance is important to the integrity and credibility of the patent examination process. In addition, the USPTO is committed to ensuring that patent examiners participate in all training provided by the ELPO to assist in the identification of ethics issues. With respect to the industry sector rule, the USPTO concurs that it presents a unique challenge in the administration of the Federal ethics rules for patent examiners. The USPTO looks forward to working with the ELPO to ensure that examiners receive informative and useful guidance on the application of this rule so that they can confidently comply with their ethical obligations.

**USPTO Response to OIG Draft Report:**

“The Department Needs to Strengthen Its Ethics Oversight for USPTO Patent Examiners”

The USPTO’s responses to the OIG’s individual recommendations are discussed in detail below and the USPTO’s technical comments are attached.

**OIG Recommendations**

OIG recommendation that the Undersecretary of Commerce and Director of the U.S. Patent and Trademark Office take the following actions:

1. *Direct the Chief Administrative Officer to strengthen controls to ensure that human resource officials identify examiner appointments to positions requiring financial disclosure and notify ELPO in a timely manner.*

USPTO Response:

The USPTO concurs with recommendation and has implemented a process that will alleviate much of the manual data pull for timely information to be sent directly to the ELPO. The Office of Human Resources (OHR) will pull data directly from our personnel system on a biweekly basis and validate that the information is accurate through the use of data analytic tools. In addition, the OHR will collaborate timely with the ELPO to ensure we are creating best practices for further implementation and compliance.

5. *Ensure USPTO subject-matter experts work with agency ethics officials to develop specialized training that describes how the industry sector rule is applied.*

USPTO Response:

The USPTO concurs with this recommendation and has already assembled a team of representatives from all technology centers who will be able to serve as subject-matter experts for the ELPO on industry sector issues for patent examiners. The USPTO believes specialized training on how the industry sector rule applies is critical to ensuring examiners are able to understand and comply with their ethical obligations, and we welcome the opportunity to work with the ELPO on this training.

**Conclusion**

In closing, we appreciate your work and thank the Assistant Inspector General for Audit and Evaluation for providing us with this report. The USPTO will continue to look for ways to identify process improvements that will ensure that we are providing our stakeholders a patent system that is reliable and free of doubt.

If additional information is needed please contact Lari Washington, Director, Office of Human Resources, USPTO at (571) 272-5187 or [Lari.Washington@USPTO.GOV](mailto:Lari.Washington@USPTO.GOV).

## II. Department



**UNITED STATES DEPARTMENT OF COMMERCE**

**Office of the General Counsel**

Washington, DC 20230

January 22, 2024

MEMORANDUM FOR Frederick J. Meny, Jr.  
Assistant Inspector General for Audit and Evaluation

FROM: Leslie B. Kiernan **LESLIE**  
General Counsel **KIERNAN**

Digitally signed by  
LESLIE KIERNAN  
Date: 2024.01.23  
18:16:12 -05'00'

SUBJECT: Response to Draft Report “The Department Needs to Strengthen Its Oversight for USPTO Patent Examiners”

The Department of Commerce Office of General Counsel (“OGC”) appreciates the opportunity to review and comment on the above-referenced draft report by the Commerce Department Office of Inspector General (“OIG”). We value the work, perspective, and skill OIG brings to its audits. They provide valuable insights into Department operations and useful recommendations for refining and strengthening performance.

As detailed below, OGC concurs in the recommendations made in the draft report. The Ethics Law and Program Office (“ELPO”) underwent a leadership transition in February 2022 and has implemented a range of enhancements to the Department’s ethics program. Work on additional improvements is underway. The draft report’s recommendations align with many of these measures. OGC values its partnership with the United States Patent and Trademark Office (“USPTO”) and looks forward to working closely with it to further implement the recommendations in the draft report.

### **OIG Recommendations**

OIG recommends that the Department’s General Counsel direct the Chief of the Ethics Law and Programs Office to:

2. *Implement processes to ensure that all examiners with filing obligations are captured in the [FDonline] system and examiners submit CFDRs as required.*

OGC concurs that strong processes for the appropriate identification of all patent examiners with filing obligations for the assignment of reports in the electronic filing platform, FDonline, is essential. OGC has already initiated these improvements with the issuance of a directed memorandum to the Office of Human Resources Management in August 2022, which led to the August 2023 publication of the [Human Resources Bulletin FY23-267](#), Human Resources Offices’ Responsibilities Related to the Commerce Government Ethics Program. This policy articulates the requirements to timely identify new financial disclosure filers to ELPO as soon as practicable, but no later than 15 days after the individuals onboard. It also affirms the responsibility of principal human resource managers to determine whether personnel actions that


**UNITED STATES DEPARTMENT OF COMMERCE**
**Office of the General Counsel**

Washington, DC 20230

could affect filing status (promotions, etc.) incorporate an affirmative determination of the impacted employee's CFDR status. Further, ELPO requested USPTO to designate an ethics program liaison with direct responsibility to coordinate and ensure accountability for the proper and timely identification of examiners with filing obligations as well as to help ensure examiners timely comply with the CFDR filing and training requirements. ELPO continues efforts to improve compliance, including additional reporting to, and coordination with, USPTO leadership to ensure timely completion of programmatic requirements, especially the identification of filers, timely filing, and training completion.

3. *Implement processes or procedures to ensure ELPO conducts thorough conflict-of-interest analyses during CFDR reviews to identify and address potential conflicts.*

OGC concurs with the necessity of processes and procedures to ensure thorough conflict-of-interest analysis during CFDR reviews. Indeed, OGC initiated such improvements in 2022. Following a leadership transition in February 2022, ELPO implemented heightened substantive oversight of conflict-of-interest reviews for CFDR. This includes additional substantive training for filers and reviewers, more intensive oversight of the reviews being conducted, and more comprehensive resources and guidance for filers and reviewers.

ELPO requires reviewers to familiarize themselves with art unit areas of responsibility and assess whether reported financial interests have matters that could arise before the art unit. This may include review of existing resources, including publicly available information about existing patents and applications, and consultation with USPTO subject matter experts, as appropriate, including a newly hired ethics attorney with significant patent examiner experience. ELPO has detailed employees from USPTO to ensure better SME coordination. With these ongoing improvements, most examiners receive ethics guidance specific to their reported interests to familiarize them with their obligation to refrain from work on matters that they know will impact the financial interests of companies in which they have an interest. This is further supplemented by the annual ethics training they receive, which covers both financial and personal conflicts of interest.

ELPO provides appropriate guidance when an examiner holds an asset that could create a conflict of interest. Specifically, consistent with Office of Government Ethics guidance, ELPO may provide advice "on the application of the ethics statutes and regulations to the filer's disclosed interests and official duties."<sup>1</sup> The filer then has the responsibility to "disqualify [themselves] from participating in a particular matter" if they know that they have a financial interest that will be directly and predictably affected by the matter.<sup>2</sup> The employee disqualifies themselves by not participating in the matter.<sup>3</sup>

<sup>1</sup> Office of Government Ethics, *Confidential Disclosure Guide: OGE Form 450* (October 2023).

<sup>2</sup> 5 C.F.R. § 2640.103(d).

<sup>3</sup> *Id.*



**UNITED STATES DEPARTMENT OF COMMERCE**  
**Office of the General Counsel**  
 Washington, DC 20230

The draft report seems to suggest that, instead, EPLO should follow a formal process whenever an examiner holds an asset that could create a potential conflict of interest. This process—which consists of formal notice to the employee, an opportunity to respond, a determination of compliance, and orders for remedial action—is reserved for circumstances where a CFDR reveals an actual or potential *violation* of federal ethics laws.<sup>4</sup> ELPO is not required to follow that process whenever an examiner holds an asset that could require disqualification from some matters, and the draft report should be revised to clarify and correct this issue.

The draft report should also be revised to note that it does not violate conflict-of-interest rules for a patent examiner to merely hold a financial interest. Instead, an examiner violates conflict-of-interest rules if they participate personally and substantially in a particular matter which they know will directly and predictably affect their financial interests. The draft report should also note that the audit did not identify any circumstances where such a violation occurred.

4. *Ensure ELPO leverages subject-matter expertise from USPTO to carry out reviews of CFDRs that comply with regulations and internal policies.*

OGC concurs with this recommendation. ELPO has already coordinated with USPTO to identify subject matter experts to support CFDR reviews. This included the designation of an ethics program liaison and closer coordination with USPTO Office of General Counsel for the proper identification of subject matter experts to support CFDR reviews. In 2023, ELPO requested and had USPTO provide detailed presentations to ensure ethics officials are familiar with the USPTO organizations, workstreams, and potential conflict risk profiles.

ELPO continues to work with USPTO leadership to identify and implement additional conflict and risk mitigation best practices and procedures, such as possibly leveraging subject matter experts for interim reviews of CFDRs to ensure timely and accurate identification of potential conflicts of interest.

ELPO continues to collaborate with USPTO leadership to address critical issues such as how to apply regulatory exemptions, including pending legal and programmatic guidance on application of exemptions such as the industry sector rule.

6. *Develop and deliver specialized training for patent examiners that includes an explanation of the exemptions, including the industry sector rule and how it applies.*

OGC concurs with this recommendation. In 2023, ELPO provided customized ethics training for patent examiners that included an explanation of the exemptions, including the industry sector rule and how it applies. The program included specialized training for supervisors on their responsibilities in supporting compliance and conflict-of-interest mitigation and resolution. ELPO will continue educational communications with USPTO patent examiners related to the

<sup>4</sup> See 5 C.F.R. § 2634.605(b)(5) (establishing process for when a disclosure “may reveal a violation of applicable laws and regulations”).



**UNITED STATES DEPARTMENT OF COMMERCE**  
**Office of the General Counsel**  
 Washington, DC 20230

most relevant conflict-of-interest rules, standards of conduct regulations, and how they apply. Even before 2023, ethics training, whether initial or annual, discussed the financial and personal conflict rules using relevant examples to explain how the rules apply based on the audience in attendance.

Given the fact-specific complexity of defining what is an industry sector for purposes of a conflict-of-interest analysis based on the particular patent application under review as well as the ever-evolving nature of patent applications, the Department looks forward to working with USPTO to update technology centers and art units to better align the patent application review process to more readily define industry sectors. This will aid in finalizing the ELPO draft legal guidance memorandum, currently under review by USPTO, to provide greater clarity on the identification of the industry sector exemption based on the evolving nature of patent applications.

7. *Ensure patent examiners receive clear and accurate guidance in response to CFDR filings and specific requests.*

OGC concurs with this recommendation and agrees that patent examiners should receive clear and accurate guidance in response to CFDR filings or specific requests. Examiners received initial financial conflict-of-interest guidance following the submission of their CFDR. This guidance clearly articulated, in part, that “[t]here is a criminal statute that prohibits [the examiner] from participating in certain matters in which [the examiner] have a financial interest.” This guidance was then supplemented by guidance issued following the conflict-of-interest review. Further, ELPO resources for examiners include general and tailored guidance on the conflict rules and exemptions. See [Ethics Rules | Office of the General Counsel \(commerce.gov\)](#).

Specific to the four instances referenced in the draft report, once OIG identified the individuals, in November 2023, ELPO transmitted more detailed guidance to these individuals on the conflict rule, possible applicable regulatory exemptions, including discussion on the industry sector exemption and how it might apply.

OGC disagrees with the draft report’s assertion that specific guidance provided to some patent examiners was unclear. Under federal law, patent examiners (and other federal employees) have different exemption thresholds for particular matters involving specific parties and particular matters of general applicability. Specifically:

1. **Specific Parties:** Patent examiners may not knowingly participate personally and substantially in a particular matter involving specific parties (e.g., a patent application) if they have a financial interest worth \$15,000 or more in the affected parties, or a financial interest worth \$25,000 or more in the affected industry sector.
2. **General Applicability:** Patent examiners also may not knowingly participate personally and substantially in a particular matter of general applicability (e.g., development of



**UNITED STATES DEPARTMENT OF COMMERCE**  
**Office of the General Counsel**  
 Washington, DC 20230

substantive guidance for an art unit) if they have a financial interest worth \$25,000 or more in one affected entity, or financial interests worth \$50,000 or more in all affected entities.

The draft report asserts that ELPO should not tell patent examiners about the thresholds for particular matters of general applicability because it is less relevant to patent examiners' work and could confuse an examiner. On this basis, the draft report states that ELPO provided unclear guidance. ELPO respectfully disagrees and believes this advice was reasonable and clear.

Templates aid in ensuring timely tailored guidance is provided, and ELPO continues to update templates to try to improve clarity and accuracy as well as make them relatable and digestible for patent examiners as well as other CFDR filers. This includes more examples and information about steps required to recuse, the need to notify supervisors, and seek additional guidance from ethics officials where a patent examiner is unsure how the rule or exemptions apply. The updates include guidance that examiners should be aware that investments in companies whose patent applications come before their art unit are likely to pose a conflict. These efforts complement the renewed vigor and oversight of the conflict-of-interest review to ensure more tailored guidance is provided to patent examiners based on their art units and disclosed interests, whether financial or otherwise.

8. *Develop and implement a written process to identify and track conflict-of-interest risks and ensure risk assessment results are used to inform ethics training and guidance given.*

OGC concurs with this recommendation. The ethics program regulatory regime and ELPO practices assess conflict-of-interest and other risks continuously during the year to identify trends, emerging areas of concern, and help inform programmatic initiatives such as educational needs. For example, annually, upon submission of the OGE Annual Questionnaire, the trends of the prior calendar year are used to help identify topics requiring additional focus for ethics training in the coming year. Throughout the year, as trends emerge, ELPO assesses what risk mitigation measures may be necessary to avoid conflicts of interest. OGC agrees that these practices would benefit from a written process.

### **Conclusion**

In closing, OGC appreciates your work and thanks the Assistant Inspector General for Audit and Evaluation for the opportunity to review this draft report. OGC will continue to seek to enhance the provision of legal advice on matters of ethics and the operation of financial disclosure and ethics training programs. For further information, please contact Erica Dornburg, Chief, Ethics Law and Program Office at (202) 482-7938 or edornburg@doc.gov.

I0USPTO00449