The Terminator: USPTO Ends AFCP 2.0 Program

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The United States Patent and Trademark Office (USPTO) has decided to terminate the After Final Consideration Pilot (AFCP 2.0) Program. A Notice signed by Director Vidal, which is set to publish in the Federal Register on October 1, 2024, indicates that the AFCP 2.0 Program will be extended until December 14, 2024. After December 14, 2024, however, the USPTO will no longer accept any requests for consideration under AFCP 2.0.

The decision to terminate the AFCP 2.0 Program was made in response to commenters' concerns regarding the USPTO's proposal to begin charging a fee for participation. The USPTO proposed a $500 fee for requests by undiscounted entities and smaller fees for requests by discounted entities. The fee was proposed in an attempt to offset the extensive costs the USPTO determined have been incurred to administer the AFCP 2.0 Program. The USPTO's Notice indicates it expends roughly $15 million per year in administrative costs in addition to the time spent by examiners.

The AFCP 2.0 Program has been widely used since its inception in 2013, when it modified the original After Final Consideration Pilot (AFCP) Program created in 2012. The "pilot program" was extended regularly as it neared each expiration date. Applicants file more than 60,000 requests for consideration under the AFCP 2.0 Program annually, as it provides examiners additional time to review an application, as long as the applicant includes a non-broadening amendment to at least one independent claim after a final office action. The AFCP 2.0 Program streamlines patent prosecution and often helps applicants achieve allowance without having to pay the larger fee required to request continued examination ("RCE").

Although the benefits of the AFCP 2.0 Program will no longer be available to applicants after December 14, 2024, the USPTO's Notice reminds applicants that various options still exist under routine examination practice along with the RCE option. For example, after the close of prosecution, proposed amendments that will place the application either (1) in condition for allowance or (2) in better form for appeal, may be entered. *See* 37 C.F.R. § 1.116(b). Additionally, after-final interviews may be available (at the Examiner's discretion) to advance compact prosecution. *See* MPEP §§ 713.09 and 714.12. Finally, applicants still have the option to file a pre-appeal brief request for review at the time of the filing of a notice of appeal, which provides applicants with the opportunity to have a panel decide if an issue for appeal is present in the record. *See* MPEP § 1204.02.

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