

of manufacturing MDE that meets the 17-inch low transfer height. The Board also seeks information about whether transfer to a phlebotomy chair would be necessary, or whether procedures can be performed on patients while they remain in their wheelchairs.

**Question 4.** How much time would manufacturers need to be able to develop a sufficient number of examination chairs (other than dental chairs) and tables with a minimum low transfer height of 17 inches to meet market demand? How long will it take the market to adjust so that prices for examination tables and chairs with a minimum low transfer height of 17 inches are comparable to those that are 18 and 19 inches? Does this length of time, if any, vary depending on the specialty in which the equipment is used?

**Question 5.** Are there other resources, data, or information the Board should consider with respect to its proposed minimum low transfer height requirement of 17 inches?

The Board asserts that the benefits provided to the millions of Americans that use mobility devices and medical professionals and caregivers assisting those individuals transfer outweighs the potential costs of requiring a low transfer height of 17 inches for medical diagnostic equipment. Specifically, the Board finds that there is a significant need for accessible medical diagnostic equipment and that the safety of both the patient and caregiver are affected by ensuring as many individuals as possible that are capable of independent transfer are provided the opportunity to effectuate that transfer with a height of medical diagnostic equipment that is level to their current mobility device. These benefits, which include the health care cost savings from preventing injuries to the patient and health care worker outweigh the costs to comply with the proposed 17-inch low height provision, especially considering the significant increase of MDE that currently attains a lower transfer height than even five years ago; However, as noted above, the Access Board is unaware of who would incur these potential costs and to what extent, based on the structure of this rulemaking. Additionally, the Access Board expects that when rulemaking agencies propose to enforce the MDE Standards, they will carry out regulatory assessments that provide specific cost and benefit estimates relevant to their rules.

#### B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires Federal agencies to analyze the impact of regulatory actions on small

entities, unless an agency certifies that the rule will not have a significant impact on a substantial number of small entities. 5 U.S.C. 604, 605 (b). The MDE Standards do not impose any mandatory requirements on any entity, including small entities. Therefore, we did not prepare a final regulatory flexibility analysis.

#### C. Federalism (Executive Order 13132)

The Access Board has evaluated this notice of proposed rulemaking in accordance with the principles and criteria set forth in Executive Order 13132. We have determined that this action will not have a substantial direct effect on the States, the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications.

#### D. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (codified at 2 U.S.C. 1531 *et seq.*) (“UMRA”) generally requires that Federal agencies assess the effects of their discretionary regulatory actions that may result in the expenditure of \$100 million (adjusted for inflation) or more in any one year by the private sector, or by state, local, and tribal governments in the aggregate. The MDE standards do not impose any mandatory requirements on state, local, or tribal governments or the private sector. Therefore, the Unfunded Mandates Reform Act does not apply.

#### E. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA), Federal agencies are generally prohibited from conducting or sponsoring a “collection of information: as defined by the PRA, absent OMB approval. *See* 44 U.S.C. 3507 *et seq.* The MDE Standards do not impose any new or revised collections of information within the meaning of the PRA.

#### F. Congressional Review Act

This notice of proposed rulemaking is not a major rule within the meaning of the Congressional Review Act (5 U.S.C. 801 *et seq.*)

#### List of Subjects in 36 CFR Part 1195

Health care, Individuals with disabilities, Medical devices.

For the reasons stated in the preamble, and under the authority of 29 U.S.C. 794f, the Board proposes to amend 36 CFR part 1195 as follows:

### PART 1195—STANDARDS FOR ACCESSIBLE MEDICAL DIAGNOSTIC EQUIPMENT

■ 1. The authority citation for part 1195 continues to read as follows:

**Authority:** 29 U.S.C. 794f.

■ 2. Amend appendix to part 1195 by:

- a. Revising M301.2.1;
- b. Removing M301.2.2;
- c. Revising M302.2.1; and
- d. Removing M302.2.2.

The revisions read as follows:

#### Appendix to Part 1195—Standards for Accessible Medical Diagnostic Equipment

\* \* \* \* \*

M301 Diagnostic Equipment Used by Patients in Supine, Prone, or Side-Lying Position

\* \* \* \* \*

M301.2.1 \* \* \*

A. A low transfer position at a height of 17 inches (430 mm);

\* \* \* \* \*

M302 Diagnostic Equipment Used by Patients in Seated Position

M302.2.1 \* \* \*

A. A low transfer position at a height of 17 inches (430 mm);

\* \* \* \* \*

Approved by vote of the Access Board.

**Christopher Kuczynski,**  
General Counsel.

[FR Doc. 2023–10827 Filed 5–22–23; 8:45 am]

**BILLING CODE 8150–01–P**

### DEPARTMENT OF COMMERCE

#### Patent and Trademark Office

#### 37 CFR Part 42

[Docket No.: PTO–P–2023–0024]

#### Request for Comments Regarding the Motion To Amend Pilot Program and Rules of Practice To Allocate the Burdens of Persuasion on Motions To Amend in Trial Proceedings Before the Patent Trial and Appeal Board

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Request for comments.

**SUMMARY:** The United States Patent and Trademark Office (USPTO or Office) currently implements a pilot program for motion to amend (MTA) practice and procedures in trial proceedings under the America Invents Act (AIA) before the Patent Trial and Appeal Board (PTAB or Board). The USPTO seeks public comments on whether the MTA Pilot Program’s procedures should be

made permanent, and if so, whether any modifications would be beneficial. Additionally, the USPTO previously issued rulemaking covering the allocation of the burdens of persuasion in MTA proceedings. The USPTO seeks public input on the practical effects of the rules on the parties and AIA proceedings, and whether modifications to the rules, or additional guidance on implementing the rules, would be beneficial. Lastly, the USPTO seeks input on whether the Board should have broader authority to raise sua sponte grounds in the MTA process.

**DATES:** *Comment Deadline Date:* To ensure consideration, commenters must submit written comments on or before July 24, 2023.

**ADDRESSES:** For reasons of government efficiency, comments must be submitted through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). To submit comments via the portal, enter docket number PTO-P-2023-0024 on the homepage and click “Search.” The site will provide a search results page listing all documents associated with this docket. Find a reference to this proposed rulemaking and click on the “Comment” icon, complete the required fields, and enter or attach your comments. Attachments to electronic comments will be accepted in ADOBE® portable document format (PDF) or MICROSOFT WORD® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal ([www.regulations.gov](http://www.regulations.gov)) for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions regarding how to submit comments by mail or by hand delivery, based on the public’s ability to obtain access to USPTO facilities at the time.

**FOR FURTHER INFORMATION CONTACT:** Miriam L. Quinn, Acting Senior Lead Administrative Patent Judge; or Melissa Haapala, Vice Chief Administrative Patent Judge; at 571-272-9797 ([Miriam.Quinn@uspto.gov](mailto:Miriam.Quinn@uspto.gov) or [Melissa.Haapala@uspto.gov](mailto:Melissa.Haapala@uspto.gov), respectively).

**SUPPLEMENTARY INFORMATION:**

**Background**

*Motion To Amend Pilot Program*

In 2019, the Office implemented an MTA Pilot Program based on public feedback. See Notice Regarding a New Pilot Program Concerning Motion To Amend Practice and Procedures in Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board, 84 FR 9497 (March 15, 2019) (MTA Pilot Program notice). The MTA Pilot Program provides a patent owner with two options if it chooses to file an MTA in an AIA trial. The MTA Pilot Program notice (see 84 FR 9497–9507) presents information regarding these two options, timelines of due dates, and other details, including replies to comments received in response to a prior request for comments published on October 29, 2018 (see Request for Comments on Motion To Amend Practice and Procedures in Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board (83 FR 54319)) (seeking public comments on a previously proposed procedure for MTAs, the Board’s MTA practice generally, and the allocation of burdens of persuasion after *Aqua Products, Inc. v. Matal*, 872 F.3d 1290 (Fed. Cir. 2017) (en banc) (*Aqua Products*)) (2018 RFC).

Under the current program, as discussed in the MTA Pilot Program notice, a patent owner may choose to request preliminary guidance from the Board concerning the originally filed MTA. This non-binding preliminary guidance, typically in the form of a short paper, provides feedback about whether there is a reasonable likelihood that the MTA meets statutory and regulatory requirements for an MTA. MTA Pilot Program notice at 9497, 9499. The preliminary guidance also provides feedback on whether the petitioner (or the record then before the Office, including any opposition to the MTA and accompanying evidence) establishes a reasonable likelihood that any of the substitute claims are unpatentable based on the preliminary record. *Id.* at 9497. The preliminary guidance focuses on the limitations added in the MTA and does not address the patentability of the originally challenged claims. *Id.*

The patent owner may additionally or alternatively choose to file a revised MTA after receiving the petitioner’s opposition to the original MTA and/or after receiving the Board’s preliminary guidance (if requested). *Id.* at 9498. A revised MTA includes one or more new proposed substitute claims in place of previously presented substitute claims and also may provide new arguments

and/or evidence, but only in a manner that is responsive to issues raised in the preliminary guidance and/or the petitioner’s opposition to the MTA. *Id.*

A patent owner can avail itself of either, both, or neither of these two options. If the patent owner chooses neither of the two options, the patent owner can pursue an MTA in practically the same way as before the pilot program began. *Id.* at 9498.

The MTA Pilot Program is designed to provide a standardized framework of MTA procedures and timelines for actions that would reasonably fit within the one-year statutory period from institution to a final written decision. See, e.g., *id.* at 9506–07 (providing Appendices 1A (PO Reply Timeline) and 1B (Revised MTA Timeline)).

Shortly after the Office implemented the MTA Pilot Program, it issued a Notice Regarding Options for Amendments by Patent Owner Through Reissue or Reexamination During a Pending AIA Trial Proceeding (April 2019), 84 FR 16654 (April 22, 2019) (reissue and reexamination notice). The Office issued this notice in response to comments and questions from stakeholders requesting clarification regarding existing reissue and reexamination procedures at the Office available while an AIA trial proceeding, including any appeal to the U.S. Court of Appeals for the Federal Circuit, involving the patent is pending. *Id.* at 16654–55. The reissue and reexamination notice provides a summary of various pertinent practices regarding existing Office procedures that apply to reissue and reexamination, including after a petitioner files an AIA petition challenging claims of the same patent, after the Board institutes a trial, and after the Board issues a final written decision in an AIA trial proceeding. *Id.* at 16655–58. The notice also provides summary information about factors the Office currently considers when determining whether to stay or suspend a reissue proceeding, or stay a reexamination, that involves a patent involved in an AIA proceeding, and also when and whether to lift such a stay or suspension. *Id.* at 16656–58.

In determining whether the MTA Pilot Program should be made permanent in its current form, modified in some manner, or replaced, the Office seeks the benefit of the public’s experience with the program.

*Rules of Practice To Allocate the Burdens of Persuasion on Motions To Amend*

In light of *Aqua Products*, as well as public comments in response to the 2018 RFC and a relevant notice of

proposed rulemaking dated October 22, 2019 (see Rules of Practice To Allocate the Burden of Persuasion on Motions To Amend in Trial Proceedings Before the Patent Trial and Appeal Board (84 FR 56401)), in 2020 the Office revised the rules of practice in AIA trials to allocate the burdens of persuasion for MTAs with respect to the patentability of proposed substitute claims. 37 CFR 42.121(d), 42.221(d); see Rules of Practice to Allocate the Burden of Persuasion on Motions to Amend in Trial Proceedings Before the Patent Trial and Appeal Board, 85 FR 82923 (December 21, 2020) (MTA burden-allocation rules package). The rules assign the burden of persuasion to the patent owner to show, by a preponderance of the evidence, that an MTA complies with certain statutory and regulatory requirements. 37 CFR 42.121(d)(1), 42.221(d)(1). The rules also assign the burden of persuasion to the petitioner to show, by a preponderance of the evidence, that any proposed substitute claims are unpatentable. 37 CFR 42.121(d)(2), 42.221(d)(2). Finally, the rules further specify that irrespective of those burdens, the Board may, in the interests of justice, exercise its discretion to grant or deny an MTA, but “only for reasons supported by readily identifiable and persuasive evidence of record.” 37 CFR 42.121(d)(3), 42.221(d)(3); *Hunting Titan, Inc. v. DynaEnergetics Europe GmbH*, IPR2018–00600 (PTAB July 6, 2020) (Paper 67) (*Hunting Titan*). 85 FR at 82924, 82926–27. The MTA burden-allocation rules package explained that the Office expects the Board will exercise its discretion only in “rare circumstances.” 85 FR at 82928. Such situations may include, for example, those in which “the petitioner has ceased to participate in the proceeding or chooses not to oppose the motion to amend, or those in which certain evidence regarding unpatentability has not been raised by either party but is so readily identifiable and persuasive that the Board should take it up in the interest of supporting the integrity of the patent system, notwithstanding the adversarial nature of the proceedings.” 85 FR at 82924, 82927 (citing *Hunting Titan*, Paper 67 at 12–13, 25–26). In instances in which the Board exercises its discretion in the interests of justice, the Board will provide the parties with an opportunity to respond before rendering a final decision on the MTA. *Id.* at 82927; see also 37 CFR 42.121(d)(3), 42.221(d)(3) (“Where the Board exercises its discretion under this paragraph, the parties will have an opportunity to respond.”).

As noted in the MTA burden-allocation rules package, “[i]n the vast majority of cases, the Board will consider only evidence a party introduces into the record of the proceeding.” *Id.* Thus, “[i]n most instances, in cases where the petitioner has participated fully and opposed the motion to amend, the Office expects that there will be no need for the Board to independently justify a determination of unpatentability.” *Id.* at 82927–28. That said, the Board may consider, for example, “readily identifiable and persuasive evidence already before the Office in a related proceeding (*i.e.*, in the prosecution history of the challenged patent or a related patent or application, or in the record of another proceeding before the Office challenging the same patent or a related patent).” *Id.* at 82927. Likewise, “the Board may consider evidence that a district court can judicially notice under Federal Rule of Evidence 201.” *Id.*; see also 37 CFR 42.121(d)(3), 42.221(d)(3) (“[T]he Board may make of record only readily identifiable and persuasive evidence in a related proceeding before the Office or evidence that a district court can judicially notice.”).

Subsequent to the issuance of the burden-allocation rules, the United States Court of Appeals for the Federal Circuit issued a precedential decision in *Hunting Titan, Inc., v. DynaEnergetics Europe GmbH*, 28 F.4th 1371 (Fed. Cir. 2022). The court stated that no court precedent has “established that the Board maintains an affirmative duty, without limitation or exception, to sua sponte raise patentability challenges to a proposed substitute claim.” *Id.* at 1381 (citations omitted). The court also stated that “confining the circumstances in which the Board should sua sponte raise patentability issues was not itself erroneous.” *Id.* The court, however, found it “problematic” that the USPTO confined the Board’s discretion to only rare circumstances. *Id.* It also noted that the USPTO’s “substantial reliance on the adversarial system . . . overlooks the basic purpose of [inter partes review] proceedings: to reexamine an earlier agency decision and ensure ‘that patent monopolies are kept within their legitimate scope.’” *Id.* (citations omitted); see *id.* at 1385 (concurrence expressing concern that the burden-allocation rule’s requirement for “readily identifiable and persuasive evidence” may prevent the Board from raising grounds “even when no one is around to oppose a new patent monopoly grant”).

The court also clarified that it was “not decid[ing] whether the Board has an independent obligation to determine

patentability of proposed substitute claims.” *Id.* at 1382. Under the rules as currently written, the Board retains discretion to raise, or to not raise, grounds of unpatentability.

In light of the court’s commentary on both the revised rules and the Board’s *Hunting Titan* decision, and the Office’s desire to support the integrity of the patent system and to issue robust and reliable patent rights, the Office seeks public comments on whether the Board should have broader authority to raise sua sponte grounds in the MTA process. Additionally, the Office seeks public comments on whether, and under what circumstances, the Office should solicit patent examiner assistance regarding an MTA or conduct a prior art search in relation to proposed substitute claims.

Furthermore, if the Board exercises its discretion and raises its own grounds of unpatentability under 37 CFR 42.121(d)(3), the burden-allocation rule does not specifically state where the burden of persuasion lies for Board-raised grounds. One interpretation of current Board authority would be that, because this scenario is outside of the adversarial process, neither party bears the burden of persuasion. The Office seeks public comments on whether the burden-allocation rule should be revised to clarify who bears the burden of persuasion for grounds of unpatentability raised by the Board under 37 CFR 42.121(d)(3) or 42.221(d)(3); see also *Nike, Inc. v. Adidas AG*, No. 2021–1903, 2022 WL 4002668, at \*4–10 (Fed. Cir. Sept. 1, 2022) (finding “it unnecessary to determine here whether, in an *inter partes* review, the petitioner or Board bears the burden of persuasion for an unpatentability ground raised sua sponte by the Board against proposed substitute claims,” after determining the outcome in the case would be the same regardless).

#### Questions Regarding the Pilot Program and Burdens of Persuasion in Motions To Amend

The Office welcomes any comments from the public on the pilot program and burdens of persuasion for MTAs, and in particular, requests feedback on the following questions:

(1) Has the MTA Pilot Program positively or negatively impacted a patent owner’s ability to successfully amend claims in an AIA proceeding? Has it made it more likely that a patent owner will avail itself of the MTA process?

(2) Are there circumstances in which reexamination and/or reissue proceedings are better options for patent owners seeking to amend claims

challenged in an AIA proceeding, as compared to the MTA Pilot Program? Is there anything more the Office can do to make the MTA process more useful to patent owners?

(3) Should the Office modify any aspect of the MTA Pilot Program? Should the Office continue to provide the options of receiving preliminary guidance and being able to revise an MTA, as currently implemented?

(4) Assuming the MTA Pilot Program should remain, should any aspect of preliminary guidance, as currently provided by the Board, be changed?

(5) What barriers, if any, exist that the Office can address to increase the effectiveness of the MTA procedure?

(6) Should the Office modify its practice of when the Board can or should raise a new ground of unpatentability, and if so, how? For example, should the PTAB's decision in the *Hunting Titan* case continue to guide when and how the Board can and should raise a new ground of unpatentability? If so, why and how?

(7) Should the Office involve patent examiner assistance in relation to MTAs? Should the Office conduct a prior art search in relation to proposed substitute claims in certain situations? If so, under what circumstances? And should examiner assistance or prior art searches be limited in any way?

(8) Should the Office clarify in its rules where the burden of persuasion for Board-raised grounds lies? Who should bear that burden?

(9) Should any other aspects of the MTA rules (37 CFR 42.121, 42.221), including as they relate to the Board's discretion to grant or deny an MTA, be changed, and if so, how?

**Katherine K. Vidal,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2023-10565 Filed 5-22-23; 8:45 am]

**BILLING CODE 3510-16-P**

## POSTAL SERVICE

### 39 CFR Part 111

#### Priority Mail Express Refunds

**AGENCY:** Postal Service™.

**ACTION:** Proposed rule.

**SUMMARY:** The Postal Service is proposing to amend *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM®) to discontinue Priority Mail Express® postage refunds for guaranteed service for Alaska and Hawaii.

**DATES:** Submit comments on or before June 22, 2023.

**ADDRESSES:** Mail or deliver written comments to the Director, Product Classification, U.S. Postal Service, 475 L'Enfant Plaza SW, Room 4446, Washington, DC 20260-5015. If sending comments by email, include the name and address of the commenter and send to [PCFederalRegister@usps.gov](mailto:PCFederalRegister@usps.gov), with a subject line of "Priority Mail Express Refunds". Faxed comments are not accepted.

#### Confidentiality

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

You may inspect and photocopy all written comments, by appointment only, at USPS® Headquarters Library, 475 L'Enfant Plaza SW, 11th Floor North, Washington, DC, 20260. These records are available for review on Monday through Friday, 9 a.m.–4 p.m., by calling 202-268-2906.

#### FOR FURTHER INFORMATION CONTACT:

Catherine Knox at (202) 268-5636 or Garry Rodriguez at (202) 268-7281.

**SUPPLEMENTARY INFORMATION:** Currently, except as provided in DMM 604.9.5.5, the Postal Service offers postage refunds for guaranteed service.

The Postal Service has determined that operationally we cannot meet the service commitments for Priority Mail Express expected by customers for Alaska and Hawaii.

As a result, the Postal Service is proposing to discontinue postage refunds for guaranteed service for Priority Mail Express pieces destined to or originating from Alaska or Hawaii. Postage refunds for loss will still be available for pieces destined to or originating from Alaska or Hawaii.

The Postal Service is proposing to implement this change effective August 1, 2023.

We believe the proposed revision will provide customers with a more efficient mailing experience.

#### List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Although exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553(b), (c)) regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service invites public comment on the following proposed revisions to *Mailing Standards of the United States Postal Service*, Domestic Mail Manual

(DMM), incorporated by reference in the Code of Federal Regulations. *See* 39 CFR 111.1.

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

Accordingly, 39 CFR part 111 is proposed to be amended as follows:

#### PART 111—[AMENDED.]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401–404, 414, 416, 3001–3018, 3201–3220, 3401–3406, 3621, 3622, 3626, 3629, 3631–3633, 3641, 3681–3685, and 5001.

■ 2. Revise the *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM) as follows:

#### Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)

\* \* \* \* \*

#### 600 Basic Standards for All Mailing Services

\* \* \* \* \*

#### 604 Postage Payment Methods and Refunds

\* \* \* \* \*

#### 9.0 Exchanges and Refunds

\* \* \* \* \*

#### 9.5 Priority Mail Express Postage and Fees Refunds

\* \* \* \* \*

#### 9.5.5 Refunds Not Given

Postage will not be refunded if the guaranteed service was not provided due to any of the following circumstances:

\* \* \* \* \*

*[Re number items i and j as j and k, and add new item i to read as follows:]*

i. The postage refund requested is other than for loss, and the Priority Mail Express piece was destined to or originated from Alaska or Hawaii.

\* \* \* \* \*

**Sarah Sullivan,**

*Attorney, Ethics and Legal Compliance.*

[FR Doc. 2023-10911 Filed 5-22-23; 8:45 am]

**BILLING CODE 3510-16-P**