

Patent Term Adjustment PTO Calculation Does Not Fully Reflect 2020 Rule Change

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- The U.S. Patent and Trademark Office (USPTO) released a [final rule](#) on June 16, 2020, revising how it will calculate Patent Term Adjustment (PTA).
- However, the USPTO's PTA algorithm does not yet (as of March 2022) fully account for the final rule.
- Patent applicants may be entitled to additional PTA than what the USPTO has calculated.

On June 16, 2020, and in response to the U.S. Court of Appeals for the Federal Circuit decision *Supernus Pharm., Inc. v. Iancu*, the USPTO published a [final rule](#) (85 Fed. Reg. 36335), revising how it calculates PTA. The rule applies to original utility applications filed on or after May 29, 2000, in which a notice of allowance was mailed on or after July 16, 2020.

Among other things, the final rule revises the calculation of applicant delay to exclude the period of time in which applicants engaged in reasonable efforts to conclude prosecution. For example, applicant submissions after a notice of allowance (*e.g.*, amendments under 37 C.F.R. § 1.312) are *not considered applicant delay if filed in response to a USPTO request*.

But the exclusion for applicant submissions in response to a USPTO request are not registering with the USPTO's current PTA algorithm, which the USPTO confirmed to us in a recent telephone call. Thus, the USPTO's calculations do not currently account for the rule change to 37 C.F.R. § 1.704(c)(10). Other communications with the USPTO, such as comments on the substance of an interview, can also lead to issues with PTA calculations when submitted after allowance.

With over 15,000 granted patents receiving PTA in January 2022 alone (of the 28,387 patents granted in January 2022), USPTO PTA determinations for your recently issued patent may be inaccurate. As such, you should carefully review the USPTO's PTA calculations, because you may be entitled to additional PTA.

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