

A Look at AIA § 3(n)(2): Part Two of a Two-Part Series on AIA § 3(n) Effective Filing Date Provisions

Article By:

M. Paul Barker

Michele C. Bosch

Jill K. MacAlpine, Ph.D.

Amanda K. Murphy, Ph.D.

Adriana L. Burgy

Thomas L. Irving

Interpreting the language of the America Invents Act (AIA) remains an exciting challenge. The effective date provisions of the AIA transition sections 3(n)(1) and 3(n)(2) are no exceptions. Part 1 of this series discussed a recent Patent Trial and Appeal Board (“Board”) [decision interpreting the language of § 3\(n\)\(1\)](#). AIA § 3(n)(1) defines the effective date of the AIA’s amendments to 35 U.S.C. §§ 102 and 103.

In this Part 2 installment, we discuss AIA § 3(n)(2). AIA § 3(n)(2) covers how certain sections of the old pre-AIA law will continue to apply to all claims of some patents *along with* the new AIA law.

(n) EFFECTIVE DATE. —

(1) IN GENERAL. — Except as otherwise provided in this section, the amendments made by this section shall take effect upon the expiration of the 18-month period beginning on the date of the enactment of this Act [*March 15, 2013*], and shall apply to any application for patent, and to any patent issuing thereon, that contains or contained at any time—

(A) a claim to a claimed invention that has an effective filing date as defined in section 100(i) of title 35, United States Code, that is on or after the effective date described in this paragraph; or

(B) a specific reference under section 120, 121, or 365(c) of title 35, United States Code, to any patent or application that contains or contained at any time such a claim.

(2) INTERFERING PATENTS.—The provisions of sections 102(g), 135, and 291 of title 35, United States Code, as in effect on the day before the effective date set forth in paragraph (1) of this subsection [*March 15, 2013*], shall apply to each claim of an application for patent, and any patent issued thereon, for which the amendments made by this section also apply, if such application or patent *contains or contained at any time*—

(A) a claim to an invention having an effective filing date as defined in section 100(i) of title 35, United States Code, that occurs before the effective date set forth in paragraph (1) of this subsection [*March 15, 2013*]; or

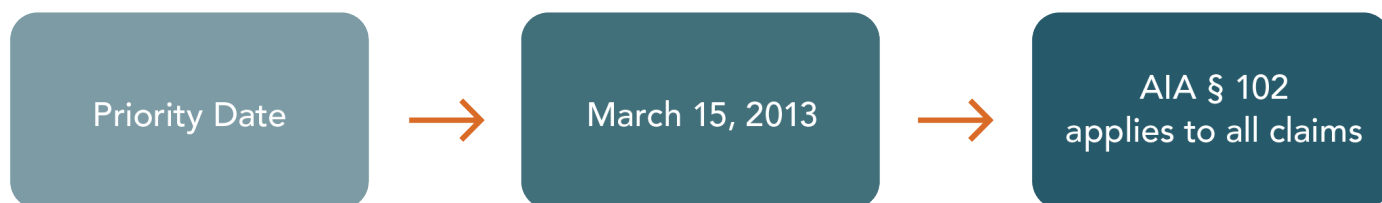
(B) a specific reference under section 120, 121, or 365(c) of title 35, United States Code, to any patent or application that *contains or contained at any time such a claim*.

(Emphasis and bracketed dates added.)

AIA § (3)(n)(2) expressly brings pre-AIA §§ 102(g), 135, and 291 into play for certain patents and applications.^[1]

As seen below, the provisions of AIA § 3(n) give rise to the following three scenarios:

1. If **all** claims in a patent application have an effective filing date **before** March 16, 2013, only the pre-AIA law applies and neither section 3(n)(1) nor 3(n)(2) of the AIA applies.
2. If **all** claims in a patent application have an effective filing date **after** March 15, 2013, the AIA prior art provisions, exceptions, and definitions apply through transition section 3(n)(1).



3. However, if a patent application contains (or ever contained) at least one claim with an effective filing date **before** March 16, 2013, **and** at least one claim with an effective filing date **after** March 15, 2013 (so-called “transition applications”), the AIA law applies **ALONG WITH** pre-AIA §§ 102(g), 135, and 291.^[2]

Takeaways

As the more creative among our readers have likely determined, there may be times when a patent drafter deliberately creates a “transition application,” such as to potentially eliminate a *Metallizing Engineering* forfeiture if an inventor secretly used a claimed process more than a year before applying for patent protection, or to take advantage of the provisions of AIA 35 U.S.C. §102(c) to eliminate a novelty problem for inventions that result from joint research agreements. However, careful consideration must be made of the implications of such a decision, including expanding the temporal and geographic scope of the available prior art available (since all the AIA prior art provisions will apply).

^[1]This means lab notebooks still may be important!

^[2]AIA Section 3(n); 78 Fed. Reg. 11,030 (Feb. 14, 2013).

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