MEMORANDUM

To: All Patent Applicants and Patent Practitioners

From: John A. Squires
Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office

CC: Barry J. Schindler, Acting Commissioner for Patents

Subject: Subject Matter Eligibility Declarations (SMEDs) under 37 CFR 1.132 – Flowchart for Analysis and Best Practices

Date: September 29, 2026

I. Overview of Last Year's Efforts on Subject Matter Eligibility

Over the last year as Director, I have been actively engaged in efforts on subject matter eligibility. In September 2025, on my first full day confirmed as Director, my first official act was to sign into issuance two patents: one in the field of distributed ledger/crypto technologies and another in medical diagnostics. In issuing these patents, I recognized the importance of such critical technologies.

That same week, I authored an Appeals Review Panel decision in *Ex parte Desjardins*, which I also designated as precedential to ensure the case reasoning binds all examination and appeals activity. *Desjardins* addressed the subject matter eligibility of an improved method of training a machine learning model to address "catastrophic forgetting:" a concrete, technical improvement to how computers function. The decision reaffirmed that 35 U.S.C. §§ 102, 103, and 112 are the traditional and appropriate tools to limit patent protection to its proper scope.

In December 2025, the USPTO published an Advance Notice of Change to the Manual of Patent Examining Procedure in Light of *Ex Parte Desjardins* to ensure current guidance is readily available to patent examiners and the public. Previously, the USPTO issued a reminder memorandum to examiners in software-related arts, including artificial intelligence and machine learning, to remind them of particular provisions in the MPEP to guide them in evaluating eligibility under Section 101.

Additionally, in December 2025 and April 2026, I issued guidance on the use of Subject Matter Eligibility Declarations (SMEDs) to aid patent practitioners, patent applicants, and examiners in clarifying the record and assessing the eligibility of a claimed invention through objective

evidence.[1] The USPTO also delivered training to Office personnel on recent subject matter eligibility updates in 2025 and SMEDs to make certain that the recent guidance is applied in a consistent manner. The training is available at links found below.

II. Introduction

We indicated in our April 2026 SMED memo that we would provide periodic updates on subject matter eligibility. Accordingly, this memorandum is being issued as an addendum to the April 2026 SMED memo and supplements the information found therein. More specifically, it is being issued to provide a flowchart to demonstrate the analysis for reviewing SMEDs and to emphasize best practices with respect to SMEDs.

This memorandum does not revise the December 4, 2025 SMED memo to examiners. The flowchart will be shared with the patent examining corps later this week. This memorandum is consistent with existing USPTO guidance and does not announce any new USPTO practice or procedure.

As a reminder, the submission of a SMED by applicant is optional. It can be useful, however, in clarifying the record or in overcoming a subject matter eligibility rejection.

III. Flowchart to Analyze SMEDs

The attached flowchart is being provided to show the analysis for evaluating a SMED. This flowchart is consistent with the guidance on declarations and affidavits[2] under 37 CFR 1.132, found in MPEP 716 and 2106.07, and does not introduce any new practice or procedure. For further details on each inquiry, refer to the appropriate MPEP section in the flowchart.

The first part of the flowchart summarizes how an examiner should review SMEDs for formal compliance. The second part of the flowchart summarizes how an examiner should review a SMED on the merits when the SMED meets the formalities requirements. To provide support for examiners in evaluating SMEDs and patent eligibility in general, each Technology Center has Subject Matter Experts who are available to answer questions as necessary. The ultimate determination of eligibility resides with the Primary Examiner.[3]

IV. Best Practices for Submitting a SMED

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[1] Memorandum entitled *Subject Matter Eligibility Declarations* to the Patent Examining Corps published on December 4, 2025 ("December 4, 2025 SMED memo to examiners"); Memorandum entitled *Best Practices for Submission of Rule 132 Subject Matter Eligibility Declarations (SMEDs)* to patent applicants and patent practitioners published on April 30, 2026 ("April 2026 SMED Memo"), which superseded the Memorandum entitled *Best Practices for Submission of Rule 132 Subject Matter Eligibility Declarations (SMEDs)* to patent applicants and patent practitioners published on December 4, 2025.

[2] Affidavits are rare, so, for simplicity, the term "declaration" will be used throughout the remainder of this Memorandum.

[3] *See* MPEP 1004.

The following is a discussion of best practices for submitting a SMED. While these best practices are not requirements, applicants may find them helpful when prepararing and submitting a SMED.

- **Consider submitting SMEDs separately from other evidence.**

  Though it is permissible to file a single declaration under 37 CFR 1.132 addressing rejections under multiple statutory requirements, applicants are encouraged to submit a *separate* declaration to address subject matter eligibility. By providing objective evidence directed solely to the subject matter eligibility of the claimed invention, the applicant may avoid the risk of intertwining issues of enablement, written description, novelty, and non-obviousness with those of subject matter eligibility.

  If filing the SMED electronically in Patent Center (at *https://patentcenter.uspto.gov*), the applicant should use the document code "AF/D.SMED" and document description "Subject Matter Eligibility Declaration" when filing a SMED apart from other declarations. This will make the SMED more readily identifiable during prosecution.

- **Submitting the SMED as early as possible in prosecution may be advantageous.**

  A SMED may be filed at any time prior to the close of prosecution. After prosecution is closed, a SMED is not timely unless filed under certain conditions.[4] Therefore, applicants should consider filing a SMED as early as possible in prosecution. For example, this could include filing the SMED prior to first action on the merits. This may avoid complications in submitting one later in prosecution and allows the examiner to consider the SMED while initially evaluating subject matter eligibility.

- **Evidence from disinterested parties may be more persuasive than those from interested parties.**

  When assessing the probative value of an expert opinion, examiners consider the nature of the matter sought to be established, the strength of any opposing evidence, the interest of the expert in the outcome of the case, and the presence or absence of factual support for the expert's opinion. A declaration of an applicant as to the advantages of applicant's claimed invention may not be disregarded for that reason alone but is less persuasive than that of a disinterested person.[5]

  Further, evidence from a neutral third party may provide a factual basis to support an expert's opinion. For example, a trade article outlining limitations or challenges in a technology that were known at the time of filing could support an expert's opinion that

[4] *See e.g.,* MPEP 716.01.
[5] *See* MPEP 716.01(c), subsection III.

one having ordinary skill in the art would have recognized that the specification disclosed a technological improvement and that the claims reflect the disclosed improvement.

- **Be specific in identifying why the SMED is being filed.**

  Where an applicant submits a SMED, it is helpful to identify which aspect of the rebuttal is supported by the evidence provided. For instance, an applicant may specify that they are submitting a SMED to establish that, under Step 2A Prong One, a claim limitation(s) cannot be practically performed in the human mind. By clearly identifying why the SMED is being submitted, applicant will facilitate the examiner's understanding of the SMED and the accompanying evidence.

- **Interviews may be helpful to advance prosecution.**

  Discussions between an applicant and an examiner are often indispensable to advance the prosecution of a patent application. For example, interviews that improve the mutual understanding of specific issues related to subject matter eligibility, including those relating to a SMED, should be promoted. Properly conducted, an interview can bridge the gap between an examiner and an applicant about subject matter eligibility in an application. Interviews often help to advance prosecution and identify patentable eligible subject matter.[6]

V. USPTO Resources on Subject Matter Eligibility

Resources are available on the USPTO's subject matter eligibility page including recently issued guidance memoranda, examples, and training. A 101 Quick Reference Guide ("101 QRG"), which provides a concise overview of the USPTO's subject matter eligibility guidance for examiners, is available at this page. It is intended to serve as a reference and should be used with the guidance found in MPEP 2106 and applicable USPTO guidance memoranda. The 101 QRG will be shared with the patent examining corps later this week.

Recently delivered training on subject matter eligibility and SMEDs can be found here:

- 2025 Subject Matter Eligibility Updates; and
- Subject Matter Eligibility Declarations under 37 CFR 1.132.

Training on declaration practice under 37 CFR 1.132 can be found here:

- Declaration practice under 37 CFR 1.132 (Rule 132).

[6] *See* MPEP 713.