



## **INTERNATIONAL TRADE COMMISSION**

### **19 CFR Parts 201 and 210**

**Docket No. MISC-040**

### **Rules of General Application and Adjudication and Enforcement**

AGENCY: International Trade Commission

ACTION: Final rule.

SUMMARY: The United States International Trade Commission (“Commission”) amends its Rules of Practice and Procedure concerning rules of general application, adjudication, and enforcement. The amendments are necessary to make certain technical corrections, to clarify certain provisions, to harmonize different parts of the Commission’s rules, and to address concerns that have arisen in Commission practice.

DATES: This regulation is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: James Worth, Office of the General Counsel, United States International Trade Commission, telephone 202-205-3065.

Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal at 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server at

<http://www.usitc.gov>.

SUPPLEMENTARY INFORMATION:

Background

Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) authorizes the Commission to adopt such reasonable procedures, rules, and regulations as it deems necessary to carry out its functions and duties. This rulemaking seeks to update certain outdated provisions and improve other provisions of the Commission's existing Rules of Practice and Procedure. The Commission is amending its Part 201 rules of general application and Part 210 rules covering investigations under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) ("section 337") in order to increase the efficiency of its section 337 investigations. The Commission published a notice of proposed rulemaking (NPR) in the Federal Register at 77 FR 41120 (July 12, 2012), proposing to amend the Commission's Rules of Practice and Procedure to make certain changes to rules of general application, adjudication, and enforcement.

Although the Commission considers these rules to be procedural rules which are excepted from notice-and-comment under 5 U.S.C. 553(b)(3)(A), the Commission invited the public to comment on all the proposed rules amendments. The NPR requested public comment on the proposed rules within 60 days of publication of the NPR. Subsequently, in response to requests to file comments outside the 60 days, the Commission by letter granted extensions of up to two weeks to the ITC Trial Lawyers Association ("the ITC TLA"), the American Intellectual Property Law Association ("AIPLA"), and Innovation Alliance. The Commission received a total of 8 sets of comments, one each from the American Bar Association, Section of Intellectual Property Law ("the ABA"); AIPLA; the law firm of Adduci, Mastriani & Schaumberg LLP ("AMS"); Broadcom; Cisco; Innovation Alliance; the Intellectual Property Owners Association ("IPO"); and the ITC TLA.

The Commission carefully considered all comments received. The Commission's response is provided below in a section-by-section analysis. The Commission appreciates the time and effort the commentators devoted to provide comments on the NOPR.

### Regulatory Analysis of Proposed Amendments to the Commission's Rules

The Commission has determined that the final rules do not meet the criteria described in section 3(f) of Executive Order 12866 (58 FR 51735, Oct. 4, 1993) and thus do not constitute a significant regulatory action for purposes of the Executive Order.

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) is inapplicable to this rulemaking because it is not one for which a notice of proposed rulemaking was required under 5 U.S.C. 553(b) or any other statute. Although the Commission chose to publish a notice of proposed rulemaking, these regulations are "agency rules of procedure and practice," and thus are exempt from the notice requirement imposed by 5 U.S.C. 553(b).

These final rules do not contain federalism implications warranting the preparation of a federalism summary impact statement pursuant to Executive Order 13132 (64 FR 43255, Aug. 4, 1999).

No actions are necessary under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 et seq.) because the final rules will not result in expenditure in the aggregate by state, local, and tribal governments, or by the private sector, of \$100,000,000 or more in any one year, and will not significantly or uniquely affect small governments, as defined in 5 U.S.C. 601(5).

The final rules are not major rules as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.). Moreover, they are

exempt from the reporting requirements of the Contract With America Advancement Act of 1996 (Pub. L. 104-121) because they concern rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

The amendments are not subject to section 3507(d) of the Paperwork Reduction Act (44 U.S.C. 3507(d)).

### Overview of the Amendments to the Regulations

Many of the final rules set forth in this notice are identical to the correspondingly numbered proposed rules published on July 12, 2012. For many of the proposed rules, only positive comments were received or no comment was received. The Commission found no reason to change those proposed rules on its own before adopting them as final rules (with the exception of § 210.5, for which the Commission provides a further explanation below). Thus, the preamble to those unchanged final rules is as set forth in the section-by-section analysis of the proposed rules found at 77 FR 41120 (July 12, 2012).

The Commission received comments with forty suggestions for modifications. Those suggestions and the views of the Commission are summarized in the section-by-section analysis of this notice of final rulemaking. The commentary in the July 12, 2012, notice is considered part of the preamble to these final rules, to the extent that such commentary is not inconsistent with the discussion below. The final rules differ from the proposed rules for nine of the rules (for a total of 16 changes from the NOPR). The ways in which the final rules differ from the proposed rules are summarized here.

First, with regard to § 201.16, relating to service of process, the Commission has used the term “express delivery” instead of “overnight delivery” in certain instances, and

added a definition for express delivery. Further, the Commission has eliminated unnecessary language from the provision for electronic service in paragraph (f).

Second, with regard to § 210.5, relating to public versions of documents containing confidential business information, the Commission has concluded that parties must upon request provide support in the record for any proposed redactions that parties may submit to an administrative law judge or the Commission for the preparation of the public version of a document consistent with Commission rules 201.6 and 210.4.

Third, with regard to § 210.8, relating to commencement of preinstitution proceedings, the Commission has allowed parties to submit the public version of public interest comments on the day following submission of the confidential version.

Fourth, with regard to § 210.12, relating to the complaint, the Commission has decided that the newly required statement of accused products in plain English in the complaint will not be included in the notice of investigation as originally proposed.

Fifth, with regard to §§ 210.16 and 210.17, relating to default and failures to act other than statutory forms of default, the Commission has clarified that both rules are affected by the rule change regarding default by notice. If the named respondent has not yet responded to the complaint and notice of investigation, then the default resulting from a notice of intent to default is under § 210.16. If the named respondent has responded to the complaint or notice of investigation, then the default resulting from a notice of intent to default is under § 210.17. The Commission has further clarified that a respondent's filing of a notice of intent to default eliminates the need for an order to show cause why the respondent should not be found in default.

Sixth, with regard to § 210.21, relating to termination of investigations, the Commission has clarified the wording of consent order stipulations and what is required in consent orders; clarified that it is respondents who sign consent order stipulations; codified the existing practice that the administrative law judge may, in the exercise of discretion, limit service of settlement agreements to settling parties and the Commission investigative attorney for good cause shown; retained the language that settling parties must aver that there are no other agreements between parties; made a conforming change to require that with terminations under paragraph (a)(1) for withdrawal of the complaint, as with other paragraphs of § 210.21, the parties must submit any settlement agreements; and combined the prohibition on importation in proposed paragraphs (c)(4)(iii) and (c)(4)(iv).

Seventh, with regard to § 210.28, relating to depositions, the Commission has clarified that each notice for corporate designations would only count as one deposition; clarified that related respondents are treated as one entity for purposes of the rule; and eliminated the need to respond to a notice of deposition other than to make objections.

Eighth, with regard to § 210.29, relating to interrogatories, the Commission has clarified that related respondents are treated as one entity for purposes of the rule.

Ninth, with regard to § 210.50, relating to Commission action, public interest, and bonding by respondents, the Commission has provided that parties may file the public version of public interest submissions on the day following submission of the confidential version.

The following section-by-section analysis includes a comprehensive discussion of all rules for which commentators suggested modifications.

## Section-by-Section Analysis

### 19 CFR Part 201

#### Subpart B—Initiation and Conduct of Investigations

##### Section 201.16 Service of process and other documents

The NOPR proposed to amend § 201.16 by adding a paragraph (a)(3) to provide that the Commission may use overnight service to effectuate service. The ABA suggests changing the wording from “leaving a copy at the office of such attorney” to “by serving the attorney by overnight delivery” or “by express delivery.” The Commission adopts the suggested change so that it is clear that the entire paragraph is discussing service by overnight delivery.

The NOPR proposed to further amend § 201.16 by adding a paragraph (a)(4) to provide that service by overnight delivery is complete upon submitting the document to the overnight delivery service or depositing it in the appropriate container for pick-up. The ABA suggests qualifying this by adding “such that delivery can be accomplished by the next business day.” The Commission declines to adopt this suggestion. The Commission notes that if a document being served is submitted for delivery after the overnight delivery service’s last pick up of the day, it is the Commission’s practice to consider the document as being served the following day. As this Commission practice addresses the problem identified by the ABA, the Commission does not adopt the suggestion.

The NOPR proposed to revise § 201.16(e) by adding five calendar days to the response time when overnight delivery is to a foreign country. The ITC TLA suggests using the term “express delivery” instead of “overnight delivery” and defining “express

delivery” to be domestic overnight delivery service or the foreign equivalent thereof. Similarly, the ITC TLA suggests that the Commission use the term “express delivery” in its certificates of service rather than “international” service. The Commission adopts these changes in recognition that so-called “overnight delivery” is not overnight when it is international. In this connection, the Commission substitutes a definition of “express delivery” for “overnight service” in § 201.16(e), explaining that “express delivery” refers to overnight delivery when the delivery is to a location in the United States, and to the equivalent express service when the delivery is to a foreign location.

The NOPR next proposed to amend § 201.16 by revising paragraph (f) to provide that no additional time after service of the document is added for response when electronic service is used. The ABA suggests striking the words “after the service of the document” from the proposed rule because the words are unnecessary. The Commission agrees and adopts the suggestion.

## Part 210

### Subpart A – Rules of General Applicability

#### Section 210.4 Written submissions; representations; sanctions

The ITC TLA suggests that the Commission move towards eliminating the requirement for duplicate service of paper copies. The Commission has determined that this is beyond the scope of the proposed rule, but agrees that this may be a topic for a future rulemaking.

#### Section 210.5 Confidential business information

The NOPR proposed to amend § 210.5 to provide that, absent good cause for an extension of time, the Commission and ALJs would issue any public versions of

confidential documents (e.g., opinions and orders) within 30 days of the issuance of the confidential version. Common practice is for the Commission or the ALJ to solicit proposed redactions from the parties in order to facilitate the preparation of the public version of the document. After deliberation as to whether the proposed rule will allow sufficient time for the preparation of public versions, and in order not to place an undue burden on the ALJs, the final rule explains that, upon request by the Commission (or the presiding ALJ, if the document was issued by an ALJ), parties must provide support pursuant to §§ 201.6 and 210.4 for any proposed redactions that parties may submit to the Commission or an ALJ for the preparation of the public version of a document. The Commission notes that ALJs are free to adjust their ground rules for the provision of proposed redactions, and that parties are expected to comply with the ground rules of the presiding ALJ.

#### Subpart B – Commencement of Preinstitution Proceedings and Investigations

##### Section 210.8 Commencement of preinstitution proceedings

The NOPR proposed to amend § 210.8 to provide that entities filing submissions on public interest issues raised by the complaint file a public version of the submission along with the confidential version. AIPLA and the ITC TLA suggest that the rules allow entities to file the public version on the following business day. AIPLA argues that requiring a public version on the same day would place additional strain on the already tight timeline of Section 337 investigations. ITC TLA states that this would be consistent with the practice in the Commission’s Title VII investigations under Rule 207.3(c).

The Commission adopts the suggested change. In our view, allowing parties to

submit a public version the following business day is reasonable, and is consistent with Commission rule 207.3(c).

### Subpart C – Pleadings

#### Section 210.12 The complaint

The NOPR proposed to amend § 210.12 to revise paragraphs (a)(6)(i) and (ii) to require a detailed statement in the complaint as to whether a domestic industry exists or is in the process of being established (and if the latter, facts showing complainant is actively engaged in steps leading to the exploitation of its intellectual property rights, and that there is a significant likelihood that an industry will be established in the future). The ABA suggests an alternate wording for paragraph (a)(6)(ii), which deals with allegations of violations of section 337(a)(1)(A)(i) and (ii). Specifically, the ABA suggests that the Commission require a detailed description of the “domestic industry affected.” The Commission declines to adopt the suggested change. The ABA’s suggested language “domestic industry affected” is not a sufficient description of the statutory text and the Commission requires specific factual pleading in the cases of domestic industries that exist and also those that are in the process of being established. Moreover, the language of section 337(a)(1)(A)(i) and (ii) speaks in terms of an “industry in the United States” and the “establishment of such an industry.”

The NOPR also proposed to amend § 210.12 by adding a paragraph (a)(12) which requires the complaint to include a statement in plain English of the types of products that are accused. In addition, the NOPR proposed that the notice of investigation published in the Federal Register would include this plain English statement. The ABA suggests that

the Commission make the further provision that the scope of the investigation will be restricted to those products enumerated in the Federal Register notice.

The final rule retains the requirement that the plain English statement must be set forth in the complaint. However, to avoid potential ambiguities regarding the scope of an investigation, the statement in question will not be included in the notice of investigation as originally proposed. The scope of the investigation is defined by the notice of investigation, not by the complaint. The NOPR did not provide adequate notice for public comment purposes that the inclusion of the statement in the notice of investigation would limit the scope of the investigation. As such, the statement will not be listed in the notice of investigation. The Commission proposed that the complaint describe accused products in plain terms for public notice and informational purposes. Therefore, the ABA's suggestion to use this statement to limit the scope of the notice of investigation is beyond the scope of the NOPR and of this rulemaking. The Commission may consider the ABA's suggestion for a future rulemaking.

Section 210.14 Amendments to pleadings and notice; supplemental submissions; counterclaims; respondent submissions on the public interest (consolidation of investigations)

The NOPR proposed to amend § 210.14, inter alia, to allow the administrative law judges to consolidate investigations. The ITC TLA opposes the proposed rule to the extent that the same limits on discovery under proposed rule 210.28(a) would apply to consolidated investigations. The Commission will consider the comment in the context of § 210.28. As such, the final rule is unchanged from the proposed rule.

Subpart D – Motions

Section 210.16 Default and Section 210.17 Failures to act other than the statutory forms of default

The NOPR proposed to amend § 210.17 to provide that a respondent may file a notice of intent to default. The ITC TLA supports the proposed rule.

The ABA points out that the consequence of default is different depending on whether the respondent has responded to the complaint and notice of investigation. Section 210.16 is directed to statutory default under Section 337(g) (which provides for default where “the person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice,” 19 U.S.C. 1337(g)(1)(C)), whereas § 210.17 is directed to failures to act other than the statutory forms of default. The ABA is correct that the proposed rule change regarding default by notice impacts both § 210.16 and § 210.17. The Commission adopts the ABA’s suggestion to amend both §§ 210.16 and 210.17 to provide that if the named respondent has not answered the complaint and notice of investigation (thus satisfying Section 337(g)(1)(C)), then the default by notice may be treated as if under § 210.16, but otherwise the default by notice shall be treated in the same manner as any failure to act under § 210.17.

The ABA argues that it is unclear how a named respondent who had not yet responded to the complaint would be treated, and that it is unclear whether the two-step show cause procedure of Commission rule 210.16(b) would be required after the filing of a notice of intent to default. The ABA suggests that the rule indicate that, after the filing of a notice of intent to default, the ALJ shall issue an ID finding such a respondent in default, and that such a default shall be treated “as if under” Commission rule 210.16. The Commission adopts the suggested change and amends section 210.16 to provide that

the ALJ shall issue an ID finding such a respondent (*i.e.*, a named respondent who has not yet responded to the complaint and notice of investigation when that respondent files a notice of intent to default) in default, thus eliminating the need for the two-step show cause procedure of Commission rule 210.16(b) with the filing of a notice of intent to default. Likewise, a notice of intent to default under Commission rule 210.17 (*i.e.*, by a respondent who has answered the complaint or notice of investigation) will eliminate the need for the two-step show cause procedure.

#### Section 210.21 Termination of investigations

The NOPR proposed to amend § 210.21 to require that parties seeking to terminate an investigation by settlement agreement or consent order provide a copy of any agreements between the parties. The ITC TLA supports the proposed rule. AIPLA suggests that the Commission limit access to all documents to only the Commission, stating that it would not be in the interest of the settling parties for non-settling respondents, who would not otherwise have access to the documents, to have access. The Commission declines to accept the proposed change. The Commission believes that the standard procedure generally requires service on all parties under the protective order to encourage transparency. Nevertheless, the Commission concurs that the administrative law judge may, in the exercise of the administrative law judge's discretion, limit service of a settlement agreement to the settling parties and the Commission investigative attorney on motion for good cause shown.

Upon consideration of the proposed rule, the Commission clarifies the wording of the rule as to what a consent order requires, *i.e.*, a statement of the identity of complainant, the respondent, and the subject articles, and a statement of any allegation in

the complaint that the respondents sell for importation, import, or sell after importation the subject articles in violation of section 337.

Further, upon consideration of the proposed rule, the Commission changes § 210.21(c)(4)(ii) to refer to respondents who submit a consent order stipulation rather than to “parties.” It is only necessary for a respondent to sign a consent order stipulation, even if there is a joint motion with the complainant for termination based on a consent order.

There are four other changes from the proposed rule. The final rule retains the language of the current paragraph (b) that the settling parties must aver that there are no other agreements between the parties. Second, the final rule requires that parties seeking to terminate the investigation under paragraph (a)(1) on the basis of withdrawal of the complaint or good cause must provide any settlement agreements. The proposed rule provided that parties seeking to terminate the investigation by consent order under paragraph (c), as with settlement agreements under paragraph (b), must provide any settlement agreements between the parties. As all other types of termination under section 210.21 would require parties to submit any agreements for review in light of relevant public interest considerations, the final rule recognizes that paragraph (a)(1) should not be a gap or loophole. Thus § 210.21(a)(1) will require submission of any settlement agreements as well. Third, the final rule changes the wording of § 210.21(c)(3) to clarify the type of statements required in a consent order stipulation. Fourth, the final rule changes § 210.21(c)(4) to combine the prohibition on importation of proposed paragraph (iii) and the exceptions for consent of proposed paragraph (iv), and to renumber the remaining paragraphs in the final rule accordingly.

Subpart E – Discovery and Compulsory Process

### Section 210.28(a) Depositions (limit on the number of depositions)

The NOPR proposed to amend § 210.28 to limit the number of depositions that parties could take absent stipulation or order for good cause shown, such that complainants would be limited to no more than 5 fact depositions per respondent and no more than 20 total, whichever is greater, respondents as a group would be limited to no more than 20 fact depositions, and if the investigative attorney is a party, he or she could take 10 fact depositions and participate in all depositions taken by any party in the investigation. This proposed rule seeks to prevent an undue burden on parties, consistent with Federal Rule of Civil Procedure 30(a). The Commission notes that ALJs have inherent authority to limit discovery, e.g., depositions, interrogatories, witness statements, and exhibits, in their ground rules, subject only to due process constraints.

Cisco argues that the Federal Circuit bench and bar has favorably looked upon Federal Rules of Civil Procedure 30(a)(2)(A)(i), which limits each side to taking ten depositions total, and that a similar rule should apply to the Commission. Cisco suggests that the proposed rule should be modified to limit the total number of fact depositions that may be taken of any one party or third party and their affiliates to ten, absent a stipulation or order on written motion to the ALJ for good cause shown. AIPLA cautions against applying the Federal Rules of Civil Procedure to Section 337 investigations and suggests keeping the current practice, whereby the ALJs limit discovery through their ground rules. AIPLA also suggests that the rule provide specifically for the case of consolidated investigations.

IPO argues that there is an imbalance, stating that if there are 21 respondents then complainants could take 105 depositions, while the respondents, who may be unrelated to

each other, would be limited to 20 depositions. IPO further argues that there may be more than 20 named inventors for respondents to depose. IPO next states that it is unclear whether it would count as more than one deposition if a party designates more than one person to testify on its behalf. IPO suggests that the Commission enumerate what factors would constitute good cause to increase the number of depositions, and that the Commission clarify whether any deposition in which a person is designated to testify on one or more topics counts as a separate deposition.

The ABA argues that it is unclear whether the maximum for complainants is 20 depositions total or 5 depositions per respondent, that related respondents should be treated as a group, and that it is unclear whether 30(b)(6) notices are counted as one deposition. The ABA suggests that each 30(b)(6) notice be treated as one deposition but that parties be limited to two Rule 30(b)(6) notices of each other party, that the ITC adopt the 30(b)(6) language of the Federal Rules of Civil Procedure, and that each person deposed be subject to a seven hour, one-day limitation present in the Federal Rules absent permission of the ALJ for additional time.

The ITC TLA agrees with the principle of limiting the number of depositions, but suggests that the administrative law judge set limits for depositions in each investigation after the parties confer and each party submits a proposed list of depositions. The ITC TLA argues that the number of necessary depositions will vary from investigation to investigation based on the number of asserted patents, the number of named inventors on the patents, the quantity of prior art that needs to be authenticated, and whether the Commission has delegated the taking of evidence on the public interest to the administrative law judge. Additionally, the ITC TLA argues that the proposed rule

would have the unintended consequence of limiting discovery depending on the number of corporate representatives designated to respond to a Rule 30(b)(6) notice. AMS suggests that no limitation should be placed on the number of depositions, but should the Commission decide to adopt the proposed rule, AMS suggests that Rule 30(b)(6) depositions, inventor depositions, and third party depositions be excluded from the proposed limitation.

The rule is unchanged from the proposed rule, with the clarifications that (a) each notice for corporate designations (akin to Rule 30(b)(6) practice under the Federal Rules) would include all corporate representatives designated to respond, and would only count as one deposition for purpose of the rule, and (b) that related respondents would be treated as one entity for purpose of the rule. With regard to the ABA's comment that the rule appears ambiguous with regard to the maximum number of fact depositions permitted for the complainants, the Commission clarifies that the rule provides that the complainants may take a maximum of 20 fact depositions or five fact depositions per respondent, whichever is greater. The Commission does not believe that a special rule is required for consolidated investigations although consolidation of investigations may constitute good cause for an increase in the number of depositions at the discretion of the administrative law judge. While the Commission agrees with the ITC TLA that the number of depositions required may vary from investigation to investigation, the proposed rule allows the administrative law judge to increase the number of allotted depositions for good cause shown. However, the purpose of the rule is to reduce the burdens and costs of discovery by imposing reasonable limits on discovery, and in doing so to avoid excessive motions practice before the ALJs. Adopting the ITC TLA's

suggestion that the ALJ set limits in each investigation may not accomplish the purpose of the rule. Thus, the rule sets a reasonable limit on discovery while allowing the ALJs to exercise discretion to modify the limit for good cause shown.

As to IPO's argument that the number of depositions would be excessive if there are many respondents, the Commission notes that if there are different respondents, it may be necessary to take discovery from each respondent (or group of related respondents) to the investigation.

Section 210.28(c) Depositions (response and objections to notice of deposition)

The NOPR proposed to amend § 210.28 to provide that parties may respond and object to a notice of deposition within ten days of service of the notice of deposition. The ITC TLA suggests that the rule provide that parties may object to a notice within 10 days but suggests eliminating the proposed provision for a response to the notice. The ITC TLA argues that the recipient of the notice of deposition may not be able to identify the corporate designees within 10 days. The Commission adopts the suggestion so that the recipient must make any objections within 10 days, and state the reasons therefor, but the recipient need not identify the corporate designees within this time frame because 10 days may not be enough time to identify the corporate designees.

Section 210.29 Interrogatories (limit on the number of interrogatories)

The NOPR proposed to amend § 210.29 to limit the number of interrogatories that any party may serve on any other party to 175. Cisco agrees with the effort of the rules to limit the number of interrogatories but suggests that the Commission limit the number of interrogatories that may be served on a party to forty. Cisco points to Federal Rules of Civil Procedure 33(a)(i), which limits each party to serving twenty-five interrogatories on

any other party absent stipulation or leave of court. Cisco cites several recent Section 337 investigations in which the respondents filed thousands of pages in response to interrogatories. Cisco also suggests that related parties (*i.e.*, parties and their affiliates) be grouped together for purposes of the rule. AIPLA cautions against applying the Federal Rules of Civil Procedure to Section 337 investigations and suggests keeping the current practice, whereby the ALJs limit discovery through their ground rules. AIPLA also suggests that the rule provide specifically for the case of consolidated investigations. IPO suggests a presumptive limit of 50 to 100 interrogatories, which it argues would be higher than the Federal Rules of Civil Procedure and sufficient to allow adequate discovery while helping to limit the cost of responding to written discovery. The ITC TLA and AMS support the proposed rule. The ITC TLA points out that the proposed rule is consistent with the ground rules of the administrative law judges.

The final rule is unchanged from the proposed rule with the clarification that related respondents are treated as one entity for purposes of the rule. The proposed rule is consistent with the ALJ ground rules and allows a change to the number of allowed interrogatories for good cause. The default number of 175 interrogatories (or subparts) has worked well in current practice, allowing parties sufficient discovery while minimizing motions practice. The Commission does not believe that a special rule is required for consolidated investigations, although consolidation of investigations may constitute good cause for an increase in the number of interrogatories at the discretion of the administrative law judge.

#### Section 210.31 Requests for Admissions

Cisco suggests that the Commission amend § 210.31 to limit each party to 40 requests for admission (or subparts thereof) from any other party (including affiliates thereof).

This proposal is beyond the scope of the Commission's Notice of Proposed Rulemaking. The Commission may consider this topic for a future rulemaking.

#### Section 210.32 Subpoenas

Broadcom and Cisco suggest that the Commission amend § 210.32 to allocate the burden to the party that is seeking discovery from a third party to move to compel rather than requiring a third party to move to quash a subpoena.

This proposal is beyond the scope of the Commission's Notice of Proposed Rulemaking. The Commission may consider this topic for a future rulemaking.

#### Subpart G – Determinations and Action Taken

##### Section 210.43 Petitions for review [and the summary thereof in Appendix A]

The NOPR proposed to amend § 210.43 to make a technical correction to change the time for a response to a petition of a summary determination that would terminate the investigation from 10 business days to 10 calendar days. AIPLA opposes this change, stating that shortening the time period for a response would present difficulties for attorneys. The ITC TLA also opposes the change, stating that it may be prejudicial on foreign parties. This was intended to be a technical correction, as the summary table in Appendix A to the rules already provides for 10 calendar days. The rule is unchanged from the proposed rule because it merely makes the technical correction. The rule provides only two fewer days for a petition for review of a summary determination that

would terminate the investigation than are provided for a petition for review of a final ID and there are typically fewer issues in a summary determination ID than in a final ID.

The NOPR further proposed to provide an express statement prohibiting parties from evading the page limits for petitions and responses by incorporating other pleadings by reference. AIPLA argues that it is “against the interest of the investigation” to limit pages because arguments not contained in the brief are waived. The ITC TLA points out that parties are required to state their arguments in detail. AIPLA and the ITC TLA suggest that either there should be no page limits or the Commission should allow the parties to petition the Commission for additional pages.

The proposed rule did not revisit the issue of page limits which were provided in the 2008 rulemaking, 73 FR 38319, 38325 (July 7, 2008). The proposed rule merely explained that parties cannot evade these page limits through incorporation of other pleadings by reference. The Commission believes that the existing page limits are adequate for the parties to avoid waiver of arguments not raised in the briefs and views incorporation by reference to be inconsistent with the existing rule.

#### Section 210.50 Commission action, public interest, and bonding by respondents

The NOPR proposed to amend § 210.50 to provide that entities filing submissions on public interest issues raised by the ID file a public version of the submission with the confidential version. AMS points out that this shortens the time for filing a public version from 10 calendar days, which is the default time period for filing public versions provided by Commission rule 210.4(f)(7)(ii)(A)(3). AMS submits that the NOPR does not provide a reason for the requirement of concurrent filing and argues that this would create an undue burden on the party filing. AIPLA and the ITC TLA make a similar

argument. The Commission adopts the AIPLA's suggestion to allow parties to file the public version on the next business day following submission of the confidential version. Allowing parties to submit a public version the following day is reasonable, and is consistent with Commission rule 207.3(c).

The ABA further suggests amending Commission rule 210.50(a)(4) to allow 45 days for submission of public interest submissions because, under the proposed Commission rule 210.5, the public version of the initial determination and the recommended determination on remedy would have issued 30 days after the confidential version, and submissions relating to the public interest would be due on the same day. This proposal is beyond the scope of the Commission's Notice of Proposed Rulemaking, but may be revisited in a future rulemaking. The Commission notes that the Commission practice is to publish a notice in the Federal Register following the issuance of the recommended determination, soliciting public interest submissions. This notice summarizes the recommended determination in order to provide notice to the public.

#### Subpart I – Enforcement Procedures and Advisory Opinions

##### Section 210.75(b)(Formal enforcement proceedings) and 210.76 (modification proceedings)

The NOPR proposed to amend § 210.75(b) to shorten the period for determining whether to review an enforcement ID in a formal enforcement proceeding from 90 days to 45 days. The NOPR further proposed to amend § 210.75(b) to provide 10 (calendar) days for petitions and to provide 5 business days for responses thereto. Similarly, the NOPR proposed to amend § 210.76 to provide 10 (calendar) days for comments and 5 business days for responses thereto.

The ITC TLA supports expediting final resolution of an enforcement proceeding but suggests 60 days for the period for determining whether to review the ID, stating its concern that 45 days may not be adequate for sufficient consideration by the Commission if the ITC TLA's suggestion for briefing were accepted. Specifically, the ITC TLA proposes 10 business days for petitions for review, as for current rule 210.43. The Commission declines the ITC TLA's suggestion that the Commission set the deadline for determining whether to review an enforcement ID to be 60 days from service of the enforcement ID. There is a statutory mandate to conclude an investigation and make a determination on violation at the earliest practicable time, 19 U.S.C. § 1337(b). The Commission believes that, in most enforcement proceedings, 45 days is a sufficient period for its decision on whether to review the enforcement ID, and notes that this time period is comparable to that for determining whether to review a summary determination that would terminate an investigation. These two types of decisions are comparable in terms of the tasks the Commission needs to accomplish. The Commission has found the 45 day limit to be workable in the context of summary determinations that would terminate an investigation, and therefore concludes that the same time limit should be applicable for enforcement proceedings.

#### List of Subjects

##### 19 CFR Part 201

Administration practice and procedure, Reporting and record keeping requirements.

##### 19 CFR Part 210

Administration practice and procedure, Business and industry, Customs duties and inspection, Imports, Investigations.

For the reasons stated in the preamble, 19 CFR parts 201 and 210 are amended as set forth below:

## **PART 201—RULES OF GENERAL APPLICATION**

1. The authority citation for part 201 continues to read as follows:

Authority: Sec. 335 of the Tariff Act of 1930 (19 U.S.C. 1335), and sec. 603 of the Trade Act of 1974 (19 U.S.C. 2482), unless otherwise noted.

### **Subpart B—Initiation and Conduct of Investigations**

2. Amend § 201.16 by:

- a. Adding paragraphs (a)(3) and (4);
- b. Revising paragraph (c)(1);
- c. Revising paragraph (e); and
- d. Revising the third sentence of paragraph (f).

The additions and revisions read as follows:

#### **§ 201.16 Service of process and other documents.**

(a) \* \* \*

(3) By using an express delivery service to send a copy of the document to the principal office of such person, partnership, corporation, association, or other organization, or, if an attorney represents any of the above before the Commission, by serving the attorney by express delivery.

(4) When service is by mail, it is complete upon mailing of the document. When service is by an express service, service is complete upon submitting the document to the

express delivery service or depositing it in the appropriate container for pick-up by the express delivery service.

\* \* \* \* \*

(c) \* \* \*

(1) Each document filed with the Secretary to the Commission by a party in the course of an investigation (as provided in § 201.8 of this part) shall be served on each other party to the investigation (as provided in § 210.4(i) of this chapter for investigations under 19 U.S.C. 1337).

\* \* \* \* \*

(e) *Additional time after service by express delivery.* Whenever a party or Federal agency or department has the right or is required to perform some act or take some action within a prescribed period after the service of a document upon it and the document is served by express delivery, one (1) day shall be added to the prescribed period if the service is to a destination in the United States, and five (5) days shall be added to the prescribed period if the service is to a destination outside the United States. “Service by express delivery” refers to a method that would provide delivery by the next business day within the United States and refers to the equivalent express delivery service when the delivery is to a foreign location.

(f) \* \* \* If electronic service is used, no additional time is added to the prescribed period. \* \* \*

**PART 210–ADJUDICATION AND ENFORCEMENT**

3. The authority citation for part 210 continues to read as follows:

Authority: 19 U.S.C. 1333, 1335, and 1337.

**Subpart A—Rules of General Applicability**

4. Amend § 210.3 by adding a definition of *Ancillary proceeding* in alphabetical order to read as follows:

**§ 210.3 Definitions.**

\* \* \* \* \*

*Ancillary proceeding* has the same meaning as *related proceeding*.

\* \* \* \* \*

5. Amend § 210.4 by revising paragraph (f)(3) to read as follows:

**§ 210.4 Written submissions; representations; sanctions.**

\* \* \* \* \*

(f) \* \* \*

(3) Responses to a complaint, briefs, comments and responses thereto, compliance reports, motions and responses or replies thereto, petitions and replies thereto, prehearing statements, and proposed findings of fact and conclusions of law and responses thereto provided for under §§ 210.4(d), 210.13, 210.8, 210.14, 210.15, 210.16, 210.17, 210.18, 210.19, 210.20, 210.21, 210.23, 210.24, 210.25, 210.26, 210.33, 210.34, 210.35, 210.36, 210.38, 210.40, 210.43, 210.45, 210.46, 210.47, 210.50, 210.52, 210.53, 210.57, 210.59, 210.66, 210.70, or 210.71; and submissions filed with the Secretary pursuant to an order of the presiding administrative law judge shall be filed electronically, and true paper copies of such submissions shall be filed by 12 noon, eastern time, on the next business day.

\* \* \* \* \*

6. Amend § 210.5 by adding paragraph (f) to read as follows:

**§ 210.5 Confidential business information.**

\* \* \* \* \*

(f) When the Commission or the administrative law judge issues a confidential version of an order, initial determination, opinion, or other document, the Commission, or the presiding administrative law judge if the administrative law judge has issued the confidential version, shall issue any public version of the document within 30 days, unless good cause exists to extend the deadline. An administrative law judge or the Commission may extend this time by order. Upon request by the Commission, or the administrative law judge if the administrative law judge has issued the confidential version, parties must provide support in the record for their claim of confidentiality, pursuant § 201.6 of this chapter and § 210.4 of this subpart for any proposed redactions that parties may submit to the Commission or the administrative law judge for the preparation of any public version.

7. Revise § 210.6 to read as follows:

**§ 210.6 Computation of time, additional hearings, postponements, continuances, and extensions of time.**

(a) Unless the Commission, the administrative law judge, or this or another section of this part specifically provides otherwise, the computation of time and the granting of additional hearings, postponements, continuances, and extensions of time shall be in accordance with §§ 201.14 and 201.16(d) and (e) of this chapter.

(b) Whenever a party has the right or is required to perform some act or to take some action within a prescribed period after service of a document upon it, and the document was served by mail, the deadline shall be computed by adding to the end of the prescribed period the additional time allotted under § 201.16(d), unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise.

(c) Whenever a party has the right or is required to perform some act or to take some action within a prescribed period after service of a Commission document upon it, and the document was served by express delivery, the deadline shall be computed by adding to the end of the prescribed period the additional time allotted under § 201.16(e), unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise.

8. Amend § 210.7 by revising paragraphs (a)(2) and (c) to read as follows:

**§ 210.7 Service of process and other documents; publication of notices.**

(a) \* \* \*

(2) The service of all initial determinations as defined in § 210.42, all cease and desist orders as set forth in § 210.50(a)(1), and all documents containing confidential business information as defined in § 201.6(a), issued by or on behalf of the Commission or the administrative law judge on a private party, shall be effected by serving a copy of the document by express delivery, as defined in § 201.16(e), on the person to be served, on a member of the partnership to be served, on the president, secretary, other executive officer, or member of the board of directors of the corporation, association, or other organization to be served, or, if an attorney represents any of the above in connection

with an investigation under this subtitle, by serving a copy by express delivery on such attorney.

\* \* \* \* \*

(c) *Publication of notices.* (1) Notice of action by the Commission or an administrative law judge will be published in the FEDERAL REGISTER only as specifically provided in § 201.10, paragraph (c)(2) of this section, by another section in this chapter, or by order of an administrative law judge or the Commission.

(2) When an administrative law judge or the Commission determines to amend or supplement a notice published in accordance with paragraph (c)(1) of this section, notice of the amendment will be published in the FEDERAL REGISTER.

9. Amend § 210.8 by:
- a. Adding a sentence after the first sentence of paragraph (b) introductory text;
  - b. Adding a sentence after the fourth sentence of paragraph (c)(1) introductory text; and
  - c. Adding a second sentence to paragraph (c)(2).

The additions read as follows:

**§ 210.8 Commencement of preinstitution proceedings.**

\* \* \* \* \*

(b) \* \* \* If the complainant files a confidential version of its submission on public interest, it shall file a public version of the submission no later than one business day after the deadline for filing the submission. \* \* \*

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \* If a member of the public or proposed respondent files a confidential version of its submission, it shall file a public version of the submission no later than one business day after the deadline for filing the submission. \* \* \*

\* \* \* \* \*

(2) \* \* \* If the complainant files a confidential version of its submission, it shall file a public version of the submission no later than one business day after the deadline for filing the submission.

\* \* \* \* \*

### **Subpart C–Pleadings**

10. Amend § 210.12 by:

- a. Revising paragraph (a) introductory text;
- b. Revising the first sentence of paragraph (a)(6)(i) introductory text;
- c. Revising paragraph (a)(6)(ii);
- d. Revising paragraph (a)(11); and
- e. Adding paragraph (a)(12).

The revisions and addition read as follows:

### **§ 210.12 The complaint.**

(a) *Contents of the complaint.* In addition to conforming with the requirements of §§ 210.4 and 210.5 of this part, the complaint shall—

\* \* \* \* \*

(6)(i) If the complaint alleges a violation of section 337 based on infringement of a U.S. patent, or a federally registered copyright, trademark, mask work, or vessel hull design, under section 337(a)(1) (B), (C), (D), or (E) of the Tariff Act of 1930, include a statement as to whether an alleged domestic industry exists or is in the process of being established as defined in section 337(a)(2), and include a detailed description of the relevant domestic industry as defined in section 337(a)(3) that allegedly exists or is in the process of being established (*i.e.*, for the former, facts showing significant/substantial investment and employment, and for the latter, facts showing complainant is actively engaged in the steps leading to the exploitation of its intellectual property rights, and that there is a significant likelihood that an industry will be established in the future), and including the relevant operations of any licensees.\* \* \*

\* \* \* \* \*

(ii) If the complaint alleges a violation of section 337 of the Tariff Act of 1930 based on unfair methods of competition and unfair acts in the importation or sale of articles in the United States that have the threat or effect of destroying or substantially injuring an industry in the United States or preventing the establishment of such an industry under section 337(a)(1)(A)(i) or (ii), include a detailed statement as to whether an alleged domestic industry exists or is in the process of being established (*i.e.*, for the latter, facts showing that there is a significant likelihood that an industry will be established in the future), and include a detailed description of the domestic industry affected, including the relevant operations of any licensees; or

\* \* \* \* \*

(11) Contain a request for relief, including a statement as to whether a limited exclusion order, general exclusion order, and/or cease and desist orders are being requested, and if temporary relief is requested under section 337(e) and/or (f) of the Tariff Act of 1930, a motion for such relief shall accompany the complaint as provided in § 210.52(a) or may follow the complaint as provided in § 210.53(a).

(12) Contain a clear statement in plain English of the category of products accused. For example, the caption of the investigation might refer to “certain electronic devices,” but the complaint would provide a further statement to identify the type of products involved in plain English such as mobile devices, tablets, or computers.

\* \* \* \* \*

11. Amend § 210.13 by revising the first sentence of paragraph (b) to read as follows:

**§ 210.13 The response.**

\* \* \* \* \*

(b) \* \* \* In addition to conforming to the requirements of §§ 210.4 and 210.5 of this part, each response shall be under oath and signed by respondent or his duly authorized officer, attorney, or agent with the name, address, and telephone number of the respondent and any such officer, attorney, or agent given on the first page of the response.\* \* \*

\* \* \* \* \*

12. Amend § 210.14 by:

a. Revising the section heading;

- b. Adding a sentence at the end of paragraph (a);
- c. Adding a sentence after the second sentence of paragraph (b)(1); and
- d. Adding paragraph (g).

The revision and additions read as follows:

**§ 210.14 Amendments to pleadings and notice; supplemental submissions; counterclaims; consolidation of investigations.**

(a) \* \* \* If, prior to institution, the complainant seeks to amend a complaint to add a respondent or to assert an additional unfair act not in the original complaint, including asserting a new patent or patent claim, then the complaint shall be treated as if it had been filed on the date the amendment is filed for purposes of §§ 210.8(b) and (c), 210.9, and 210.10(a).

(b) \* \* \*

(1) \* \* \* A motion to amend the complaint and notice of investigation to name an additional respondent after institution shall be served on the proposed respondent.\* \* \*

\* \* \* \* \*

(g) *Consolidation of investigations.* The Commission may consolidate two or more investigations. If the investigations are currently before the same presiding administrative law judge, he or she may consolidate the investigations. The investigation number in the caption of the consolidated investigation will include the investigation numbers of the investigations being consolidated. The investigation number in which the

matter will be proceeding (the lead investigation) will be the first investigation number named in the consolidated caption.

**Subpart D–Motions**

**§ 210.15 [Amended]**

13. Amend § 210.15 by removing the second sentence in paragraph (a)(2).
14. Amend § 210.16 by:
  - a. Revising paragraph (b)(1);
  - b. Redesignating paragraph (b)(3) as (b)(4);
  - b. Adding new paragraph (b)(3);
  - c. Adding subject headings to paragraphs (c)(1) and (2); and
  - d. Revising the last sentence of paragraph (c)(2).

The additions and revisions read as follows:

**§ 210.16 Default.**

\* \* \* \* \*

(b) \* \* \*

(1)(i) If a respondent has failed to respond or appear in the manner described in paragraph (a)(1) of this section, a party may file a motion for, or the administrative law judge may issue upon his own initiative, an order directing respondent to show cause why it should not be found in default.

(ii) If the respondent fails to make the necessary showing pursuant to paragraph (b)(1)(i) of this section, the administrative law judge shall issue an initial determination

finding the respondent in default. An administrative law judge's decision denying a motion for a finding of default under paragraph (a)(1) of this section shall be in the form of an order.

\* \* \* \* \*

(3) If a proposed respondent has not filed a response to the complaint and notice of investigation pursuant to § 210.13 or § 210.59(c) of this chapter, the proposed respondent may file a notice of intent to default under this section. The filing of a notice of intent to default does not require the administrative law judge to issue the show-cause order of paragraph (b)(1) of this section. The administrative law judge shall issue an initial determination finding the proposed respondent in default upon the filing of a notice of intent to default. Such default will be treated in the same manner as any default under this section.

\* \* \* \* \*

(c) \* \* \*

(1) *Types of relief available.* \* \* \*

(2) *General exclusion orders.* \* \* \* The Commission may issue a general exclusion order pursuant to section 337(g)(2) of the Tariff Act of 1930, regardless of the source or importer of the articles concerned, provided that a violation of section 337 of the Tariff Act of 1930 is established by substantial, reliable, and probative evidence and that the other requirements of 19 U.S.C. 1337(d)(2) are satisfied, and only after considering the aforementioned public interest factors and the requirements of § 210.50(c).

15. Amend § 210.17 by:

- a. Revising the section heading;
- b. Revising paragraph (f);
- c. Removing paragraph (g);
- d. Redesignating paragraph (h) as paragraph (g); and
- e. Adding new paragraph (h).

The revisions and addition read as follows:

**§ 210.17 Other failure to act and default.**

\* \* \* \* \*

(f) Failure to respond to a petition for review of an initial determination, a petition for reconsideration of an initial determination, or an application for interlocutory review of an administrative law judge's order; and

\* \* \* \* \*

(h) *Default by notice.* If a respondent has filed a response to the complaint or notice of investigation under § 210.13 of this chapter, the respondent may still file a notice of intent to default with the presiding administrative law judge at any time before the filing of the final initial determination. The administrative law judge shall issue an initial determination finding the respondent in default upon the filing of a notice of intent to default. Such default will be treated in the same manner as any other failure to act under this section. The filing of a notice of intent to default does not require the administrative law judge to issue an order to show cause as to why the respondent should not be found in default.

\* \* \* \* \*

16. Amend § 210.21 by:

- a. Revising the second sentence of paragraph (a)(1);
- b. Adding a sentence after the third sentence of paragraph (a)(1);
- c. Revising the second sentence of paragraph (b)(1);
- d. Adding a sentence at the end of paragraph (b)(1);
- e. Adding four sentences to the end of paragraph (c) introductory text;
- f. Revising the third sentence of paragraph (c)(1)(ii);
- g. Revising paragraph (c)(3); and
- h. Adding paragraphs (c)(4) and (5).

The revisions and additions read as follows:

**§ 210.21 Termination of investigations.**

\* \* \* \* \*

(a) \* \* \*

(1) \* \* \* A motion for termination of an investigation based on withdrawal of the complaint, or for good cause, shall contain a statement that there are no agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation, or if there are any agreements concerning the subject matter of the investigation, all such agreements shall be identified, and if written, a copy shall be filed with the Commission along with the motion. \* \* \* On motion for good cause shown, the administrative law judge may limit service of the agreements to the settling parties and the Commission investigative attorney. \* \* \*

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \* The motion for termination by settlement shall contain copies of the licensing or other settlement agreements, any supplemental agreements, any documents referenced in the motion or attached agreements, and a statement that there are no other agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation. \* \* \* On motion for good cause shown, the administrative law judge may limit the service of the agreements to the settling parties and the Commission investigative attorney.

\* \* \* \* \*

(c) \* \* \* A motion for termination by consent order shall contain copies of any licensing or other settlement agreement, any supplemental agreements, and a statement that there are no other agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation. If the licensing or other settlement agreement contains confidential business information within the meaning of § 201.6(a) of this chapter, a copy of the agreement with such information deleted shall accompany the motion. On motion for good cause shown, the administrative law judge may limit service of the agreements to the settling parties and the Commission investigative attorney. If there are no additional agreements, the moving parties shall certify that there are no additional agreements.

(1) \* \* \*

(ii) \* \* \* The stipulation shall comply with the requirements of paragraph (c)(3) of this section. \* \* \*

\* \* \* \* \*

(3) *Contents of consent order stipulation.* (i) Every consent order stipulation shall contain, in addition to the proposed consent order, the following:

(A) An admission of all jurisdictional facts;

(B) A statement identifying the asserted patent claims, copyright, trademark, mask work, boat hull design, or unfair trade practice, and whether the stipulation calls for cessation of importation, distribution, sale, or other transfers (other than exportation) of subject articles in the United States and/or specific terms relating to the disposition of existing U.S. inventories of subject articles.

(C) An express waiver of all rights to seek judicial review or otherwise challenge or contest the validity of the consent order;

(D) A statement that the signatories to the consent order stipulation will cooperate with and will not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of this part;

(E) A statement that the enforcement, modification, and revocation of the consent order will be carried out pursuant to subpart I of this part, incorporating by reference the Commission's Rules of Practice and Procedure;

(F) A statement that the signing thereof is for settlement purposes only and does not constitute admission by any respondent that an unfair act has been committed, if applicable; and

(G) A statement that the consent order shall have the same force and effect and may be enforced, modified, or revoked in the same manner as is provided in section 337 of the Tariff Act of 1930 and this part for other Commission actions, and the Commission may require periodic compliance reports pursuant to subpart I of this part to be submitted by the person entering into the consent order stipulation.

(ii) In the case of an intellectual property-based investigation, the consent order stipulation shall also contain—

(A) A statement that the consent order shall not apply with respect to any claim of any intellectual property right that has expired or been found or adjudicated invalid or unenforceable by the Commission or a court or agency of competent jurisdiction, provided that such finding or judgment has become final and nonreviewable;

(B) A statement that each signatory to the stipulation who was a respondent in the investigation will not seek to challenge the validity of the intellectual property right(s), in any administrative or judicial proceeding to enforce the consent order

(4) *Contents of consent order.* The Commission will not issue consent orders with terms beyond those provided for in this section, and will not issue consent orders that are inconsistent with this section. The consent order shall contain:

(i) A statement of the identity of complainant, the respondent, and the subject articles, and a statement of any allegation in the complaint that the respondents sell for importation, import, or sell after importation the subject articles in violation of section 337 by reason of asserted patent claims, copyright, trademark, mask work, boat hull design, or unfair trade practice;

- (ii) A statement that the respondents have executed a consent order stipulation (but the consent order shall not contain the terms of the stipulation);
- (iii) A statement that the respondent shall not sell for importation, import, or sell after importation the subject articles, directly or indirectly, and shall not aid, abet, encourage, participate in, or induce the sale for importation, the importation, or the sale after importation except under consent, license from the complainant, or to the extent permitted by the settlement agreement between complainant and respondent;
- (iv) A statement, if applicable, regarding the disposition of existing U.S. inventories of the subject articles.
- (v) A statement, if applicable, whether the respondent would be ordered to cease and desist from importing and distributing articles covered by the asserted patent claims, copyright, trademark, mask work, boat hull design, or unfair trade practice;
- (vi) A statement that respondent shall be precluded from seeking judicial review or otherwise challenging or contesting the validity of the Consent Order;
- (vii) A statement that respondent shall cooperate with and shall not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of the Commission's Rules of Practice and Procedure, 19 CFR part 210;
- (viii) A statement that Respondent and its officers, directors, employees, agents, and any entity or individual acting on its behalf and with its authority shall not seek to challenge the validity or enforceability of the claims of the asserted patent claims, copyright, trademark, mask work, boat hull design, or unfair trade practice in any administrative or judicial proceeding to enforce the Consent Order;

(ix) A statement that when the patent, copyright, trademark, mask work, boat hull design, or unfair trade practice expires the Consent Order shall become null and void as to such;

(x) A statement that if any claim of the patent, copyright, trademark, mask work, boat hull design, or other unfair trade practice is held invalid or unenforceable by a court or agency of competent jurisdiction or as to any articles that has been found or adjudicated not to infringe the asserted right in a final decision, no longer subject to appeal, this Consent Order shall become null and void as to such invalid or unenforceable claim; and

(xi) A statement that the investigation is hereby terminated with respect to the respondent; provided, however, that enforcement, modification, or revocation of the Consent Order shall be carried out pursuant to Subpart I of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

(5) *Effect, interpretation, and reporting.* The consent order shall have the same force and effect and may be enforced, modified, or revoked in the same manner as is provided in section 337 of the Tariff Act of 1930 and this part for other Commission actions. The Commission will not enforce consent order terms beyond those provided for in this section. The Commission may require periodic compliance reports pursuant to subpart I of this part to be submitted by the person entering into the consent order stipulation.

\* \* \* \* \*

#### **Subpart E–Discovery and Compulsory Process**

17. Amend § 210.28 by:

- a. Adding three sentences at the end of paragraph (a); and
- b. Adding a sentence after the second sentence of paragraph (c).

The additions read as follows:

**§ 210.28 Depositions.**

(a)\* \* \* Without stipulation of the parties, the complainants as a group may take a maximum of five fact depositions per respondent or no more than 20 fact depositions whichever is greater, the respondents as a group may take a maximum of 20 fact depositions total, and if the Commission investigative attorney is a party, he or she may take a maximum of 10 fact depositions and is permitted to participate in all depositions taken by any parties in the investigation. Each notice for a corporation to designate deponents only counts as one deposition and includes all corporate representatives so designated to respond, and related respondents are treated as one respondent for purposes of determining the number of depositions. The presiding administrative law judge may increase the number of depositions on written motion for good cause shown.

\* \* \* \* \*

(c)\* \* \* A party upon whom a notice of deposition is served may make objections to a notice of deposition and state the reasons therefor within ten days of service of the notice of deposition.\* \* \*

\* \* \* \* \*

18. Amend § 210.29 by adding three sentences to the end of paragraph (a) to read as follows:

**§ 210.29 Interrogatories.**

(a) \* \* \* Absent stipulation of the parties, any party may serve upon any other party written interrogatories not exceeding 175 in number including all discrete subparts. Related respondents are treated as one entity. The presiding administrative law judge may increase the number of interrogatories on written motion for good cause shown.

\* \* \* \* \*

19. Amend § 210.34 by revising paragraphs (b) and (c) to read as follows:

**§ 210.34 Protective orders; reporting requirements; sanctions and other actions.**

\* \* \* \* \*

(b) *Unauthorized disclosure, loss, or theft of information.* If confidential business information submitted in accordance with the terms of a protective order is disclosed to any person other than in a manner authorized by the protective order, lost, or stolen, the party responsible for the disclosure, or subject to the loss or theft, must immediately bring all pertinent facts relating to such incident to the attention of the submitter of the information and the administrative law judge or the Commission, and, without prejudice to other rights and remedies of the submitter of the information, make every effort to prevent further mishandling of such information by the party or the recipient of such information.

(c) *Violation of protective order.* (1) The issue of whether sanctions should be imposed may be raised on a motion by a party, the administrative law judge's own motion, or the Commission's own initiative in accordance with § 210.25(a)(2). Parties, including the party that identifies an alleged breach or makes a motion for sanctions, and the Commission shall treat the identity of the alleged breacher as confidential business

information unless the Commission issues a public sanction. The identity of the alleged breacher means the name of any individual against whom allegations are made. The Commission or administrative law judge shall allow the parties to make written submissions and, if warranted, to present oral argument bearing on the issues of violation of a protective order and sanctions therefor.

(2) If the breach occurs while the investigation is before an administrative law judge, any determination on sanctions of the type enumerated in paragraphs (c)(3)(i) through (iv) of this section shall be in the form of a recommended determination. The Commission may then consider both the recommended determination and any related orders in making a determination on sanctions. When the motion is addressed to the administrative law judge for sanctions of the type enumerated in paragraph (c)(3)(v) of this section, he shall grant or deny a motion by issuing an order.

(3) Any individual who has agreed to be bound by the terms of a protective order issued pursuant to paragraph (a) of this section, and who is determined to have violated the terms of the protective order, may be subject to one or more of the following:

- (i) An official reprimand by the Commission;
- (ii) Disqualification from or limitation of further participation in a pending investigation;
- (iii) Temporary or permanent disqualification from practicing in any capacity before the Commission pursuant to § 201.15(a) of this chapter;
- (iv) Referral of the facts underlying the violation to the appropriate licensing authority in the jurisdiction in which the individual is licensed to practice;

(v) Sanctions of the sort enumerated in § 210.33(b), or such other action as may be appropriate.

\* \* \* \* \*

**Subpart G – Determinations and Actions Taken**

20. Amend § 210.42 by revising paragraphs (a)(1)(i) and revising paragraph (c) to read as follows:

**§ 210.42 Initial determinations.**

(a)(1)(i) *On issues concerning violation of section 337.* Unless otherwise ordered by the Commission, the administrative law judge shall certify the record to the Commission and shall file an initial determination on whether there is a violation of section 337 of the Tariff Act of 1930 in an original investigation no later than 4 months before the target date set pursuant to § 210.51(a)(1).

\* \* \* \* \*

(c) *On other matters.* (1) The administrative law judge shall grant the following types of motions by issuing an initial determination or shall deny them by issuing an order: a motion to amend the complaint or notice of investigation pursuant to § 210.14(b); a motion for a finding of default pursuant to §§ 210.16 and 210.17; a motion for summary determination pursuant to § 210.18; a motion for intervention pursuant to § 210.19; a motion for termination pursuant to § 210.21; a motion to suspend an investigation pursuant to § 210.23; or a motion to set a target date for an original investigation exceeding 16 months pursuant to § 210.51(a)(1); or a motion to set a target

date for a formal enforcement proceeding exceeding 12 months pursuant to § 210.51(a)(2).

(2) The administrative law judge shall grant or deny the following types of motions by issuing an initial determination: a motion for forfeiture or return of respondents' bonds pursuant to § 210.50(d) or a motion for forfeiture or return of a complainant's temporary relief bond pursuant to § 210.70.

\* \* \* \* \*

21. Amend § 210.43 by:

- a. Revising the first and third sentences of paragraph (a)(1);
- b. Removing the Note to Paragraph (b)(1);
- c. Revising paragraph (b)(2); and
- d. Revising paragraph (c).

The revisions read as follows:

**§ 210.43 Petitions for review of initial determinations on matters other than temporary relief.**

(a) \* \* \*

(1) Except as provided in paragraph (a)(2) of this section, any party to an investigation may request Commission review of an initial determination issued under § 210.42(a)(1) or (c), § 210.50(d)(3), § 210.70(c), or § 210.75(b)(3) by filing a petition with the Secretary.\* \* \* A petition for review of an initial determination issued under § 210.42(c) that terminates the investigation in its entirety on summary determination, or an

initial determination issued under § 210.50(d)(3), § 210.70(c) or § 210.75(b)(3), must be filed within 10 days after service of the initial determination. \* \* \*

\* \* \* \* \*

(b) \* \* \*

(2) The petition for review must set forth a concise statement of the facts material to the consideration of the stated issues, and must present a concise argument providing the reasons that review by the Commission is necessary or appropriate to resolve an important issue of fact, law, or policy. If a petition filed under this paragraph exceeds 50 pages in length, it must be accompanied by a summary of the petition not to exceed ten pages. Petitions for review may not exceed 100 pages in length, exclusive of the summary and any exhibits. Petitions for review may not incorporate statements, issues, or arguments by reference. Any issue not raised in a petition for review will be deemed to have been abandoned by the petitioning party and may be disregarded by the Commission in reviewing the initial determination (unless the Commission chooses to review the issue on its own initiative under § 210.44), and any argument not relied on in a petition for review will be deemed to have been abandoned and may be disregarded by the Commission.

\* \* \* \* \*

(c) *Responses to the petition.* Any party may file a response within eight (8) days after service of a petition of a final initial determination under § 210.42(a)(1), and within five (5) business days after service of all other types of petitions, except that a party who has been found to be in default may not file a response to any issue as to which the party has defaulted. If a response to a petition for review filed under this paragraph exceeds 50

pages in length, it must be accompanied by a summary of the response not to exceed ten pages. Responses to petitions for review may not exceed 100 pages in length, exclusive of the summary and any exhibits. Responses to petitions for review may not incorporate statements, issues, or arguments by reference. Any argument not relied on in a response will be deemed to have been abandoned and may be disregarded by the Commission.

\* \* \* \* \*

22. Amend § 210.50 by:

- a. Revising the third sentence of paragraph (a)(4) introductory text;
- b. Adding a sentence at the end of paragraph (a)(4)(iii); and
- c. Revising paragraphs (d)(1)(i) and (ii).

The revisions and addition read as follows:

**§ 210.50 Commission action, the public interest, and bonding by respondents.**

\* \* \* \* \*

(a) \* \* \*

(4) \* \* \* Submissions by the parties under this paragraph in response to the recommended determination are limited to 5 pages, inclusive of attachments.

\* \* \* \* \*

(iii) \* \* \* If a party, interested person, or agency files a confidential version of its submission, it shall file a public version of the submission no later than one business day after the deadline for filing the submission.

\* \* \* \* \*

(d) \* \* \*

(1)(i) If one or more respondents posts a bond pursuant to 19 U.S.C. 1337(e)(1) or 1337(j)(3), proceedings to determine whether a respondent's bond should be forfeited to a complainant in whole or part may be initiated upon the filing of a motion, addressed to the administrative law judge who last presided over the investigation, by a complainant within 90 days after the expiration of the period of Presidential review under 19 U.S.C. 1337(j), or if an appeal is taken from the determination of the Commission, within 30 days after the resolution of the appeal. If that administrative law judge is no longer employed by the Commission, the motion shall be addressed to the chief administrative law judge.

(ii) A respondent may file a motion addressed to the administrative law judge who last presided over the investigation for the return of its bond within 90 days after the expiration of the Presidential review period under 19 U.S.C. 1337(j), or if an appeal is taken from the determination of the Commission, within 30 days after the resolution of the appeal. If that administrative law judge is no longer employed by the Commission, the motion shall be addressed to the chief administrative law judge.

\* \* \* \* \*

23. Amend § 210.51 by revising paragraph (a) to read as follows:

**§ 210.51 Period for concluding investigation.**

(a) *Permanent relief.* Within 45 days after institution of an original investigation on whether there is a violation of section 337, or an investigation which is a formal enforcement proceeding, the administrative law judge shall issue an order setting a target

date for completion of the investigation. After the target date has been set, it can be modified by the administrative law judge for good cause shown before the investigation is certified to the Commission or by the Commission after the investigation is certified to the Commission.

(1) *Original investigations.* If the target date does not exceed 16 months from the date of institution of an original investigation, the order of the administrative law judge shall be final and not subject to interlocutory review. If the target date exceeds 16 months, the order of the administrative law judge shall constitute an initial determination. Any extension of the target date beyond 16 months, before the investigation is certified to the Commission, shall be by initial determination.

(2) *Formal enforcement proceedings.* If the target date does not exceed 12 months from the date of institution of the formal enforcement proceeding, the order of the administrative law judge shall be final and not subject to interlocutory review. If the target date exceeds 12 months, the order of the administrative law judge shall constitute an initial determination. Any extension of the target date beyond 12 months, before the formal enforcement proceeding is certified to the Commission, shall be by initial determination.

\* \* \* \* \*

#### **Subpart H—Temporary Relief**

24. Amend § 210.54 by revising the first sentence to read as follows:

**§ 210.54 Service of motion by the complainant.**

Notwithstanding the provisions of § 210.11 regarding service of the complaint by the Commission upon institution of an investigation, on the day the complainant files a complaint and motion for temporary relief, if any, with the Commission (see § 210.8(a)(1) and (a)(2) of subpart B of this part), the complainant must serve non-confidential copies of both documents (as well as non-confidential copies of all materials or documents attached thereto) on all proposed respondents and on the embassy in Washington, DC of the country in which each proposed respondent is located as indicated in the Complaint. \* \* \*

25. Amend § 210.56 in paragraph (a) by revising the first sentence of the second undesignated paragraph to read as follows:

**§ 210.56 Notice accompanying service copies.**

(a) \* \* \*

Upon receipt of the complaint, the Commission will examine the complaint for sufficiency and compliance with 19 CFR 210.4, 210.5, 210.8, and 210.12. \* \* \*

\* \* \* \* \*

26. Amend § 210.58 by revising the third sentence to read as follows:

**§ 210.58 Provisional acceptance of the motion.**

\* \* \* Before the Commission determines whether to provisionally accept a motion for temporary relief, the motion will be examined for sufficiency and compliance with §§ 210.52, 210.53(a) (if applicable), 210.54 through 210.56, as well as §§ 210.4 and 210.5.

\* \* \*

27. Amend § 210.59 by revising paragraph (b) introductory text and paragraph (c) to read as follows:

**§ 210.59 Response to the motion and the complaint.**

\* \* \* \* \*

(b) The response must comply with the requirements of §§ 210.4 and 210.5 of this part, and shall contain the following information:

\* \* \* \* \*

(c) Each response to the motion for temporary relief must also be accompanied by a response to the complaint and notice of investigation. Responses to the complaint and notice of investigation must comply with §§ 210.4 and 210.5 of this part, and any protective order issued by the administrative law judge under § 210.34 of this part.

28. Amend § 210.60 by:

a. Revising the section heading;

b. Designating the existing text as paragraph (a) and revising its first two sentences; and

c. Adding paragraph (b).

The revision and addition read as follows:

**§ 210.60 Designating the temporary relief phase of an investigation more complicated for the purpose of adjudicating a motion for temporary relief.**

(a) At the time the Commission determines to institute an investigation and provisionally accepts a motion for temporary relief pursuant to § 210.58, or at any time

thereafter, the Commission may designate the temporary relief phase of an investigation “more complicated” pursuant to § 210.60(b) for the purpose of obtaining up to 60 additional days to adjudicate the motion for temporary relief. In the alternative, after the motion for temporary relief is referred to the administrative law judge for an initial determination under § 210.66(a), the administrative law judge may issue an order, sua sponte or on motion, designating the temporary relief phase of the investigation “more complicated” for the purpose of obtaining additional time to adjudicate the motion for temporary relief. \* \* \*

(b) A temporary relief phase is designated more complicated owing to the subject matter, difficulty in obtaining information, the large number of parties involved, or other significant factors.

**Subpart I—Enforcement Procedures and Advisory Opinions**

29. Amend § 210.75 by adding a sentence at the end of paragraph (b)(1) and revising paragraph (b)(3) to read as follows:

**§ 210.75 Proceedings to enforce exclusion orders, cease and desist orders, consent orders, and other Commission orders.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \* These proceedings are authorized under section 337(b) as investigations on whether there is a violation of section 337 in the same manner as original investigations, and are conducted in accordance with the laws for original

investigations as set forth in section 1337 of title 19 and sections 554, 555, 556, 557, and 702 of title 5 of the United States Code and the rules of this part.

\* \* \* \* \*

(3) The Commission, in the course of a formal enforcement proceeding under this section, may hold a public hearing and afford the parties to the enforcement proceeding the opportunity to appear and be heard. The Commission may delegate the hearing to the chief administrative law judge for designation of a presiding administrative law judge, who shall certify an initial determination to the Commission. A presiding administrative law judge shall certify the record and issue the enforcement initial determination to the Commission no later than three months before the target date for completion of a formal enforcement proceeding. Parties may file petitions for review, and responses thereto, in accordance with § 210.43 of this part. The enforcement initial determination shall become the determination of the Commission 45 days after the date of service of the enforcement initial determination, unless the Commission, within 45 days after the date of such service, shall have ordered review of the enforcement initial determination on certain issues therein, or by order shall have changed the effective date of the enforcement initial determination.

\* \* \* \* \*

30. Amend § 210.76 by adding paragraph (c) to read as follows:

**§ 210.76 Modification or rescission of exclusion orders, cease and desist orders, and consent orders.**

\* \* \* \* \*

(c) *Comments.* Parties may submit comments on the recommended determination within 10 days from the service of the recommended determination. Parties may submit responses thereto within 5 business days from service of any comments.

31. Revise appendix A to read as follows:

**Appendix A to Part 210–Adjudication and Enforcement**

Initial Determination concerning:	Petitions for Review Due:	Response to Petitions Due:	Commission Deadline for Determining Whether to Review the Initial Determination:
1. Violation § 210.42(a)(1)	12 days from service of the initial determination	8 days from service of any petition	60 days from service of the initial determination (on private parties)

2. Summary initial determination that would terminate the investigation if it became the Commission's final determination § 210.42(c)	10 days from service of the initial determination	5 business days from service of any petition	45 days from service of the initial determination (on private parties)
3. Other matters § 210.42(c)	5 business days from service of the initial determination	5 business days from service of any petition	30 days from service of the initial determination (on private parties)
4. Forfeiture or return of respondents' bond § 210.50(d)(3)	10 days from service of the initial determination	5 business days from service of any petition	45 days from service of the initial determination (on private parties)
5. Forfeiture or return of complainant's temporary relief bond § 210.70(c)	10 days from service of the initial determination	5 business days from service of any petition	45 days from service of the initial determination (on private parties)
6. Formal enforcement proceedings § 210.75(b)	10 days from service of the enforcement initial determination	5 business days from service of any petition	45 days from service of the enforcement initial determination (on private parties)

32. Add appendix B to read as follows:

**Appendix B to Part 210–Adjudication and Enforcement**

Recommended Determination concerning:	Comments Due:	Response to Comments Due:
Modification or Rescission § 210.76(a)(1)	10 days from service of the recommended determination	5 business days from service of any comments

By Order of the Commission.

Lisa R. Barton  
Acting Secretary to the Commission

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