

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, DC**

**19 CFR Part 210**

Rules of General Application, 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. The intended effect of the proposed amendments is to facilitate compliance with the Commission’s Rules and improve the administration of agency proceedings.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. The rule amendments as stated herein shall apply to investigations instituted subsequent to the aforementioned date.

**FOR FURTHER INFORMATION CONTACT:** Megan M. Valentine, Office of the General Counsel, United States International Trade Commission, telephone 202-708-2301. 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 <https://www.usitc.gov>.

**SUPPLEMENTARY INFORMATION:**

**Background**

This rulemaking is an effort to improve provisions of the Commission’s existing Rules of Practice and Procedure. The Commission proposed amendments to its rules covering investigations under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), as amended (“section 337”), in order to increase the efficiency of its section 337 investigations and reduce the burdens and costs on the parties and the agency.

The Commission published a notice of proposed rulemaking (“NPRM”) in the *Federal Register* at 80 FR 57553-64 (Sept. 24, 2015), proposing to amend the Commission’s Rules of Practice and Procedure concerning rules of general application, adjudication, and enforcement 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. Consistent with its ordinary practice, the Commission invited the public to comment on all the proposed rules amendments. This practice entails the following steps: (1) publication of an NPRM; (2) solicitation of public comments on the proposed amendments; (3) Commission

review of public comments on the proposed amendments; and (4) publication of final amendments at least thirty days prior to their effective date.

The NPRM requested public comment on the proposed rules within 60 days of publication of the NPRM, *i.e.*, by November 23, 2015. The Commission received six sets of comments from organizations or law firms, including one each from the China Chamber of Commerce for Import and Export of Machinery and Electronic Products (“CCCME”); the ITC Trial Lawyers Association (“ITCTLA”); the Intellectual Property Owners Association (“IPOA”); the ITC Working Group (“ITCWG”); the Law Office of T. Spence Chubb (“Mr. Chubb”); and the law firm of Adduci, Mastriani, & Schaumberg LLP (“Adduci”). The ITCWG consists of industry participants, including Apple, Avaya, Broadcom, Cisco, Google, Hewlett Packard, Intel, and Oracle among others.

The Commission has carefully considered all comments that it received. The Commission’s response is provided below in a section-by-section analysis. The Commission appreciates the time and effort of the commentators in preparing their submissions.

### **Regulatory Analysis of Amendments to the Commission’s Rules.**

The Commission has determined that these rules do not meet the criteria described in section 3(f) of Executive Order 12866 (58 FR 51735, October 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 is 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). Moreover, these regulatory amendments are certified as not having a significant economic impact on a substantial number of small entities.

These rules do not contain federalism implications warranting the preparation of a federalism summary impact statement pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999).

No actions are necessary under title II of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (2 U.S.C. 1531-1538) because the rules will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year (adjusted annually for inflation), and will not significantly or uniquely affect small governments.

These rules are not “major rules” as defined by section 251 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 that Act because they contain rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

These rules do not contain any information collection requirements subject to the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

### **Overview of the Amendments to the Regulations**

The final regulations contain eleven (11) changes from the proposals in the NPRM. These changes are summarized here.

First, with regard to rule 201.16(f), relating to electronic service by parties, the Commission has determined that the rule should clarify that the administrative law judge may indicate by order what means are acceptable to ensure the document to be served is securely stored and transmitted by the serving party in a manner that prevents unauthorized access and/or receipt by individuals or organizations not authorized to view the specified confidential business information.

Second, the Commission has determined to amend proposed rule 210.10(a)(6) to remove the stated criteria by which the Commission may determine to institute multiple investigations from a single complaint and substitute the single consideration of efficient adjudication.

Third, the Commission has determined to amend proposed rule 210.10(b)(1) to clarify that the notice of investigation will define the scope of the investigation in plain language so as to make explicit what accused products or category of accused products will be the subject of the investigation in accordance with rule 210.12(a)(12), which governs the contents of the complaint.

Fourth, the Commission has determined to amend proposed rule 210.10(b)(3) to clarify that an initial determination ruling on a potentially dispositive issue in a 100-day proceeding is due within 100 days of institution of an investigation so designated. The rule is also amended to clarify that the presiding administrative law judge is authorized, in accordance with section 210.36, to hold expedited hearings on any such designated issue and will also have discretion to stay discovery of any remaining issues during the pendency of the 100-day proceeding.

Fifth, the Commission has determined to amend proposed rule 210.14(h) to clarify that an administrative law judge may determine to sever an investigation into two or more investigations at any time prior to or upon thirty days from institution of the investigation. The rule will also clarify that severance may be based upon a motion from any party. The administrative law judge's decision to sever will be in the form of an order. The newly severed investigation(s) shall remain with the same presiding administrative law judge unless the severed investigation is reassigned at the discretion of the chief administrative law judge. The new severed investigation(s) will be designated with a new investigation number. The final rule also removes limiting criteria for an administrative law judge to sever an investigation beyond the consideration of efficient adjudication.

Sixth, with regard to proposed rule 210.14(i), the Commission has determined that administrative law judges will not be able to designate potentially dispositive issues for inclusion in a 100-day proceeding following institution of an investigation. Therefore, proposed rule 210.14(i) will not appear in the final rules.

Seventh, the Commission has determined to amend proposed rule 210.15 to clarify that the rule is intended to prohibit the filing of any motions before the Commission during preinstitution proceedings except with respect to motions for temporary relief filed under rule 210.53.

Eighth, regarding proposed rule 210.22, the Commission has determined that administrative law judges will not be able to designate potentially dispositive issues for inclusion in a 100-day proceeding following institution of an investigation. Therefore, proposed rule 210.22, which allows parties to file a request for such designation by motion, will not appear in the final rules.

Ninth, regarding proposed rule 210.32(d)(1), the Commission has determined to amend the proposed rule to clarify that a party may serve subpoena objections within the later of 10 days after receipt of the subpoena or within such time as the administrative law judge may allow. In addition, the proposed rule is amended to clarify that, if an objection is made, the party that requested the subpoena may move for a request for judicial enforcement upon reasonable notice to other parties or as otherwise provided by the administrative law judge who issued the subpoena. Similarly, the Commission has determined to amend proposed rule 210.32(d)(2) to clarify that a party may file a motion to quash a subpoena within the later of 10 days after receipt of the subpoena or within such time as the administrative law judge may allow.

Tenth, regarding proposed rule 210.42(a)(3), because the Commission has determined not to implement proposed rule 210.14(i) allowing administrative law judges to designate potentially dispositive issues, the Commission has determined to remove all references to proposed rule 210.14(i) in the final version of rule. In addition, because the administrative law judges may sever investigations by order, the Commission has determined not to adopt proposed rule 210.42(c)(3). The Commission has also determined to add rule 210.42(h)(7) to specify that an initial determination issued pursuant to proposed rule 210.42(a)(3) will become the Commission's final determination 30 days after issuance, absent review.

Eleventh, regarding the proposed amendments to rule 210.43, the Commission has determined to amend proposed rule 210.43(a)(1) to clarify that petitions for review of an initial determination ruling on a potentially dispositive issue must be filed within five business days after service of the initial determination. The Commission has also determined to amend proposed rule 210.43(c) to clarify that the time for filing responses to petitions for review is five business days.

A comprehensive explanation of the rule changes is provided in the section-by-section analysis below. The section-by-section analysis includes a discussion of all modifications suggested by the commentators. As a result of some of the comments, the Commission has determined to modify several of the proposed amendments, including deleting certain sections in the final rule as summarized above. The section-by-section analysis will refer to the rules as they appeared in the NPRM.

## Section-by-Section Analysis

### 19 CFR part 201

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

##### Section 201.16

Section 201.16 provides the general provisions for service of process and other documents. Subsections 201.16(a)(1)-(3) address allowed methods of service by the Commission and subsection 201.16(a)(4) addresses when such service is complete. In consideration of the Commission's development of the capability to perfect electronic service, the NPRM proposed amending subsections 201.16(a)(1) and (4) to provide that the Commission may effect service through electronic means. Under the proposed rule, electronic service would be complete upon transmission of a notification from the Commission that the document has been placed in an appropriate secure repository for retrieval by the person, organization representative, or attorney being served, unless the Commission is notified that the notification was not received by the party served.

In addition, subsection 201.16(f) authorizes parties to serve documents by electronic means. The NPRM proposed amending subsection 201.16(f) to require parties serving documents by electronic means to ensure that any such document containing confidential business information subject to an administrative protective order be securely transmitted, in addition to being securely stored, to prevent unauthorized access and/or receipt by individuals or organizations not authorized to view the specified confidential business information. All documents must currently be filed electronically by way of the Commission's Electronic Document Information System pursuant to subsection 201.8(d).

##### 201.16(a)(1) and (4)

##### **Comments**

Adduci generally supports the Commission's efforts to effect electronic service. Adduci cautions, however, that allowing electronic service of process or documents on unrepresented parties may lead to notification issues, particularly with respect to service of complaints on named respondents, and result in due process challenges. Adduci proposes accordingly that the Commission delay electronic service until after the entity being served is represented by an attorney. Specifically, Adduci proposes the following language for subsection 201.16(a)(1):

By mailing or delivering a copy of the document to the person to be served, to a member of the partnership to be served, to 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 before the Commission, by mailing, delivering, or serving by electronic means a copy to such attorney....

The CCCME expresses concern with the statement in the proposed amendments to subsection 201.16(a)(4) that electronic service by the Commission is completed upon transmission of a notification from the Commission that the service document has been placed in an appropriate secure repository for retrieval by the appropriate party being served. The CCCME requests that subsections 201.16(a)(4) be worded to state explicitly that electronic service shall be made to the destination designated by the person, organization, representative or attorney being served rather than being placed in an unspecified repository for retrieval.

### **Commission Response**

The Commission considers Adduci's concerns to be adequately addressed by the proposed amendment of subsection 201.16(a)(1) as stated in the NPRM. The proposed rule indicates that service is to be by mailing, delivery, or electronic service as appropriate. If the Commission is unable to effect electronic service because it lacks a viable email address or other electronic contact information for the intended recipient, then service would be by mailing or delivery. Before an investigation is instituted, the Commission typically does not have electronic contact information for proposed respondents or their representatives. Moreover, proposed respondents usually retain counsel before filing answers to the complaint and providing relevant contact information. As such, electronic service on a party before it retains counsel would be rare. If a party is in default, and thus never provides electronic contact information, the Commission would be unable to effect electronic service on that party.

Regarding the CCCME's comments concerning proposed rule 201.16(a)(4), the language requiring that any electronically served documents be placed in an appropriate repository for retrieval is purposely broad to encompass any secure service option, such as two-factor identification for a drop box. In order to avoid confusion and being overwhelmed with individual requests, the Commission declines to accommodate private party requests for specific service destinations unique to that party.

### **201.16(f)**

### **Comments**

The ITCTLA generally supports the proposed amendments to subsection 201.16, but expresses concern regarding the clarity of the proposed amendment to subsection 201.16(f). Specifically, the ITCTLA questions the vagueness of the requirement that service documents "be securely stored and transmitted by the serving party in a manner that prevents unauthorized access and/or receipt by individuals or organizations not authorized to view the specified confidential business information." The ITCTLA notes that the administrative protective order and stipulations between the parties often describe the manner in which to secure and transmit electronic service of documents, and that administrative law judges and parties can continue to designate the manner of such transmission. The ITCTLA does, however, state that it "expects that the proposed language though vague provides sufficient flexibility for the parties and administrative law judges to delineate what it means to 'be securely stored and transmitted.'"

The IPOA expresses similar concerns that the proposed language of subsection 201.16(f) lacks detail sufficient to inform parties how to comply with the requirement that service documents be securely stored and transmitted. The IPOA suggests that the proposed rule could be improved by clarifying whether stipulations among the parties describing a manner of service satisfactory to all parties will satisfy the requirements of proposed rule 201.16(f).

The ITCWG generally supports the proposed amendments to subsection 201.16, but expresses concern that the provision in subsection 201.16(f) stating that parties “may serve documents by electronic means in all matters before the Commission” could be construed to improperly include service of third-party subpoenas. The ITCWG asserts that service of third-party subpoenas should continue to adhere to current Commission practice to better ensure actual notification to the subpoenaed party in a timely manner.

The CCCME also expresses concern regarding the meaning of “securely transmitted” in proposed rule 201.16(f).

Mr. Chubb questions the need for the additional language in proposed rule 201.16(f) requiring secure transmission and storage when parties are effecting electronic service of confidential documents. Mr. Chubb notes that subsection 201.16(f) has permitted parties to serve documents, including confidential documents, electronically since 2002 apparently without significant problems. Mr. Chubb suggests the Commission identify the problem with the current rule and address the details by which it expects parties to comply with the new procedures, as well as any additional burdens the new procedures will place on parties beyond those currently experienced. Mr. Chubb further suggests that, in the alternative, the Commission forgo any change to subsection 201.16(f) in favor of current practice.

### **Commission Response**

Regarding the ITCTLA’s and IPOA’s concerns about the vagueness of the language in proposed rule 201.16(f), the ITCTLA is correct that the language is intended to encompass future improvements in technology. However, the Commission agrees that the proposed rule would benefit by specifying that the administrative law judge may indicate by order what means are acceptable. Regarding the ability of parties to stipulate as to the means of secure transmission or storage, any such stipulation would require approval by the administrative law judge, as the parties may suggest means that are not sufficiently secure. Furthermore, as to the CCCME’s comment, the requirement that documents be “securely transmitted” is intended to require parties to ensure transmitted documents are properly encrypted or otherwise formatted to prevent unauthorized access. The Commission does not consider further clarification necessary. Parties are reminded that, if they fail to properly safeguard confidential business information or business proprietary information, they may be subjected to investigations concerning the disclosure of any such information and that sanctions may be imposed for a breach of the administrative protective order.

Concerning the ITCWG’s comments, the Commission agrees that service of third-party subpoenas may not be effected by electronic means. Service of third-party subpoenas may only be effected by mail or delivery.

Lastly, regarding Mr. Chubb’s comments, the proposed amendments are intended to capture the realities of continuing improvements in processes and technology for transmitting information. The Commission is making efforts to continually safeguard confidential business information and business proprietary information, and the rules should reflect this intent while ensuring that parties using new technology are cognizant of the Commission’s concerns regarding the safekeeping of confidential information. Participants in Commission proceedings are reminded of their obligations to comply with Administrative Protective Orders (APOs) and that breaches of APOs are subject to serious sanctions. *See* 19 CFR 210.34; 82 FR 29322 (June 28, 2017).

## 19 CFR part 210

### Subpart C—Adjudication and Enforcement

#### Section 210.10

Section 337(b)(1) states that the “Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative.” 19 U.S.C. 1337(b)(1). Accordingly, section 210.10 provides for institution of section 337 investigations by the Commission based upon a properly filed complaint. *See* 19 CFR 210.10(a). The NPRM proposed adding section 210.10(a)(6) to clarify that the Commission may institute multiple investigations based on a single complaint where necessary to limit the number of technologies and/or unrelated patents asserted in a single investigation.

In addition, subsection 210.10(b) provides that, when instituting an investigation, the Commission shall issue a notice defining the scope of the investigation, including whether the Commission has ordered the presiding administrative law judge to take evidence and to issue a recommended determination concerning the public interest. The NPRM proposed adding subsection 210.10(b)(1) to provide that the notice of investigation will specify in plain language the accused products that will be within the scope of the investigation in order to avoid disputes between the parties concerning the scope of the investigation. New subsection 210.10(b)(2) contains the existing language in subsection 210.10(b), which provides that the Commission may order the presiding administrative law judge to take evidence concerning the public interest.

The Commission has established a “100-day” proceeding to provide for the disposition of potentially dispositive issues within a specified time frame following institution of an investigation. The NPRM proposed adding subsection 210.10(b)(3) to authorize the Commission to direct the presiding administrative law judge to issue an initial determination pursuant to new subsection 210.42(a)(3), as described below, on a potentially dispositive issue as set forth in the notice of investigation. The specified time frame for issuance of the initial determination is subject to an extension of time for good cause shown. As set forth in the pilot program, the presiding administrative law judge will have discretion to stay discovery of all other issues during the pendency of the 100-day proceeding.



The Commission notes that the 100-day proceeding differs from a summary determination in that the administrative law judge's ruling pursuant to this section is made following an evidentiary hearing. These changes are intended to provide a procedure for the early disposition of potentially dispositive issues identified by the Commission at institution of an investigation. This procedure is not intended to affect summary determination practice under section 210.18 whereby the administrative law judge may dispose of one or more issues in the investigation when there is no genuine issue as to material facts and the moving party is entitled to summary determination as a matter of law.

#### 210.10(a)(6)

#### **Comments**

ITCTLA supports the Commission's ability to institute multiple investigations based on a single complaint where necessary to limit the number of unrelated technologies and/or unrelated patents asserted in a single investigation. ITCTLA notes, however, that where the same parties, same or similar accused products, same or similar domestic industry products, or same or similar defenses are presented or implicated by a single complaint, the scope of discovery, relevant issues and administration of the case may so overlap that instituting multiple investigations may lead to increased costs on the parties and use of Commission resources, or create inconsistencies or conflict between investigations, even notwithstanding technically different asserted patent families. The ITCTLA further notes that the circumstance is rare where a single complaint presents such different technologies and issues that institution of multiple investigations or severance of an investigation is in the best interest of the timely and efficient investigation of the complaint. ITCTLA proposed the following amended language for subsection 210.10(a)(6):

The Commission may determine to institute multiple investigations based on a single complaint where necessary to allow efficient adjudication and limit the number of unrelated technologies and products and/or unrelated patents asserted in a single investigation.

The IPOA comments that the proposed amendments addressing the Commission's ability to institute multiple investigations from a single complaint are unnecessary given the existing, inherent power of administrative law judges to manage their dockets and limit the issues to be decided. The IPOA cautions that this power, including for example, requiring parties to present their cases within an allotted time, limiting the number of pages for witness statements, and limiting the amount of time allowed for live direct testimony, could be compromised by a requirement to split any complaint that fails to satisfy certain, currently unarticulated criteria. The IPOA does, however, propose that clear, enumerated factors governing multiple institutions should be indicated in the rule in order to provide notice to potential parties. The IPOA also suggests that the rules clarify whether a decision to institute multiple investigations can be appealed.

The CCCME suggests that the rules be amended to allow respondents to submit a request for severance of an investigation and to object when the Commission determines to sever an investigation. The CCCME also proposes that the Commission provide detailed requirements for severing investigations (or instituting multiple investigations from a single complaint) to

avoid abuse of the provision.

Adduci expresses some skepticism about the need for proposed rule 210.10(a)(6), noting that administrative law judges are already adept at handling multiple-technology, multi-patent investigations and that issues are typically streamlined by the time the evidentiary hearing is held through discovery and other mechanisms, such as *Markman* proceedings. Adduci, however, recommends that the Commission provide the criteria it will consider in evaluating whether to institute multiple investigations based on a single complaint, noting that without such guidance, complainants will face difficulty in determining which technologies and patents to assert in a complaint.

Adduci also notes that the proposed amendment provides no procedure to allow a complainant to avoid institution of multiple investigations under the proposed rule. Adduci contends this failure is potentially problematic as a complainant may not have the resources to litigate simultaneous investigations or may prefer to focus its efforts on a single investigation. Adduci notes that, even if a complainant were to withdraw and/or modify its complaint, there is no procedure through which it may learn what changes are necessary to avoid institution of simultaneous investigations. Adduci therefore proposes including a provision through which the Commission would notify the complainant of the specific bases that, unless modified, may result in institution of multiple investigations. Adduci further recommends modifying the proposed rule to provide the complainant an opportunity, prior to institution, to either withdraw and refile its complaint or to modify its complaint to avoid institution of multiple investigations. Adduci recommends that the Commission provide two weeks' notice to a complainant that it intends to institute multiple investigations and identify how the patents and/or technologies would be split. Adduci recommends that the Office of Unfair Import Investigations could then be consulted and could advise the complainant on how to best modify its complaint to avoid institution of multiple investigations.

Mr. Chubb generally supports the Commission having the authority to institute multiple investigations based on a single complaint. He also suggests the Commission consider whether subsection 210.10(a) should additionally be amended to authorize the Commission to institute consolidated investigations. Mr. Chubb notes that existing subsection 210.10(g) provides for post-institution consolidation, but that the rules do not provide for pre-institution consolidation. Mr. Chubb asserts that, as with situations involving the institution of multiple investigations from a single complaint, pre-institution consolidation would likely be rare. Mr. Chubb notes, however, that the Commission has experienced situations where there have been two pending complaints by a single complainant, and situations where there were two pending complaints by cross-parties. Mr. Chubb also notes that there have been newly filed complaints for which consolidation with an already instituted investigation would be appropriate. Mr. Chubb requests that if his proposed consolidation scheme cannot be considered in this rulemaking that his suggestions be considered for future rulemaking efforts.

### **Commission Response**

Several commentators question the necessity of the proposed amendment to rule 210.10(a)(6), arguing that even where cases are complex, overlapping issues may require a single investigation. Several of the commentators further assert that the administrative law judges

already have the ability to handle complex investigations without the need for the Commission preemptively determining to institute multiple investigations from a single complaint. Assuming the Commission decides to adopt this provision, the commentators are nearly unanimous in stating that the proposed rule should state the criteria by which the Commission will determine to institute multiple investigations pursuant to the proposed rule.

Only the ITCTLA proposed any language suggesting any such criteria, *i.e.*, that the Commission will institute multiple investigations “where necessary to allow efficient adjudication and limit the number of unrelated technologies and products and/or unrelated patents in a single investigation.” Other commentators appear to prefer more precise enumerated criteria, rather than the more open-ended formulation the ITCTLA suggests.

The Commission has determined to implement rule 210.10(a)(6) with the clarification that the Commission may determine to institute multiple investigations based on a single complaint for efficient adjudication. The Commission considers that providing specific criteria for applying the rule would be unduly restrictive and hamper the Commission’s flexibility with respect to managing investigations. The Commission, however, notes that instituting multiple investigations based on a single complaint would likely occur where the complaint alleges a significant number of unrelated technologies, diverse products, unrelated patents, and/or unfair methods of competition or unfair acts such that the resulting investigation, if implemented as one case, may be unduly unwieldy or lengthy.

Several commentators also suggest that the Commission provide complainant(s) with notice when the Commission intends to institute multiple investigations and to allow complainant(s) to withdraw and refile a modified complaint to avoid multiple investigations. Requiring such notice, however, would hinder the Commission’s ability to institute investigations within 30 days as stated in rule 210.10(a)(1). Furthermore, rule 210.14(g) allows the Commission to consolidate investigations, providing a procedural mechanism to reunify investigations instituted based on a single complaint under appropriate circumstances.

The Commission expects, however, that the Office of Unfair Import Investigations (“OUII”) will raise the issue of possible multiple investigations with complainants as part of the pre-institution draft complaint review process when these concerns are apparent from the draft complaint. OUII may also suggest modification of the draft complaint during any pre-filing communications to avoid the institution of multiple investigations. While the Commission anticipates the issue may arise during the pre-institution complaint review process, the Commission will independently determine *sua sponte* whether multiple investigations are appropriate.

IPOA requests that the proposed rule be clarified to indicate whether parties can appeal or object to the Commission’s decision to institute multiple investigations based on a single complaint. Assuming IPOA believes that the decision should be appealable to the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”), under section 337(c), the Commission notes that any decision to institute multiple investigations based on a single complaint is not a final determination on violation, making immediate appeal to the Federal Circuit unavailable. If the complainant objects to the Commission’s decision to institute multiple investigations, there are procedural mechanisms available to the complainant, such as a motion to terminate one or more

of the multiple investigations or claims.

Concerning Mr. Chubb's comment that the Commission should allow pre-institution consolidation of investigations, consideration of such a rule is best tabled until the Commission undertakes a future rulemaking effort.

210.10(b)(1)

### Comments

ITCTLA generally supports the Commission's effort to provide notice and avoid disputes regarding the scope of the investigation. ITCTLA, however, cautions that the language of the proposed rule, *i.e.* "such plain language as to make explicit what accused products will be subject of the investigation," is unclear. Specifically, ITCTLA asserts that it is unclear whether the phrase "plain language" relates to the requirement in current subsection 210.12(a)(12) of a "clear statement in plain English of the category of products accused . . . such as mobile devices, tablets, or computers," or "explicit . . . accused products" refers more specifically to, for example, specific model names or numbers. ITCTLA proposes the following amended language for subsection 210.10(b)(1) to address the potential confusion:

An investigation shall be instituted by the publication of a notice in the Federal Register. The notice will define the scope of the investigation in such plain language as to make explicit what accused products or category of accused products provided in accordance with 210.12(a)(12) will be the subject of the investigation, and may be amended as provided in 210.14(b) and (c).

The IPOA supports proposed rule 210.10(b)(1) to the extent it narrows the variety of products potentially falling within the caption of an investigation to more readily identifiable categories of products, including downstream products. The IPOA, however, questions the meaning of the phrase "such plain language as to make explicit what accused products will be the subject of the investigation." Similar to the ITCTLA, the IPOA suggests replacing this phrase in proposed rule 210.10(b)(1) with language borrowed from subsection 210.12(a)(12) concerning the requirement that a complaint "contain a clear statement in plain English of the category of product accused" to avoid potential inconsistencies.

The IPOA specifically notes that it does not support interpreting the "plain language" phrase as requiring model numbers, which it asserts would be inconsistent with the scope of relief afforded under the trade laws and with longstanding Commission practice. The IPOA also suggests that to the extent the proposed rule is intended to narrow the scope of the notice of investigation in order to narrow discovery, administrative law judges should be permitted to extend discovery beyond the scope of the notice of investigation for good cause shown. Accordingly, the IPOA suggests the following amendments to the proposed rule:

An investigation shall be instituted by the publication of a notice in the FEDERAL REGISTER. The notice will define the scope of the investigation in such plain language, consistent with the requirement to provide in the Complaint a clear statement in plain English of the category of products accused pursuant to

19 CFR 210.12(a)(12), as to make explicit what one or more accused categories of products will be the subject of the investigation, and may be amended as provided in 210.14(b) and (c). Discovery beyond the scope of the investigation will be by leave of the administrative law judge for good cause shown.

The ITCWG supports the proposed rule of subsection 210.10(b)(1) concerning specifying the scope of the investigation in plain language, noting that currently, complainants often seek improper discovery on product types that have not been formally accused. The ITCWG suggests, however, that the Commission may wish to consider modifying the proposed language to provide that the “type of accused products” be specified in the notice and, in particular, requiring that when software is accused, the notice of investigation should enumerate the specific software at issue (*e.g.*, Marshmallow) rather than merely defining the investigation in terms of devices (*e.g.*, smartphones).

The CCCME proposes that the description of the scope of an investigation includes the product code of the named respondents’ alleged infringing product to avoid ambiguity.

Adduci recommends amending the proposed rule to clarify that the *Federal Register* notice should identify the categories of accused products rather than specific accused products. Adduci asserts that its proposed amendment would bring proposed rule 210.10(b)(1) in line with existing rule 210.12(a)(12), which requires that a complaint “[c]ontain a clear statement in plain English of the category of products accused.” *See* 19 CFR 210.1012(a)(12). Adduci suggests, in order to avoid inconsistencies between the complaint and the *Federal Register* notice of institution, that the notice use the same plain language as used in the complaint to define the categories of accused products. Adduci suggests the following amendments to proposed rule 210.10(b)(1):

An investigation shall be instituted by the publication of a notice in the *Federal Register*. The notice will define the scope of the investigation in such plain language as to make explicit what ***categories of*** accused products will be the subject of the investigation, and may be amended as provided in 210.14(b) and (c).

Mr. Chubb discourages implementation of proposed rule 210.10(b)(1), asserting that the rule change would merely add a layer of regulatory complexity to what he calls a straightforward and routine process. Mr. Chubb contends that imposing a formulaic plain language requirement will not prevent disputes from arising as to what the scope of an investigation might be or the burden on the administrative law judge to resolve such disputes. Mr. Chubb cautions that the proposed rule is likely to create confusion by raising questions as to whether the language of the complaint itself continues to play a role in such determinations, especially in view of existing rule 210.12(a)(12), which requires a complainant to describe the accused products in the complaint with “a clear statement in plain English of the category of products accused.” *See* 19 CFR 210.12(a)(12). Mr. Chubb asserts that nothing in the current rules constrains the Commission’s ability to describe the accused products in whatever language it determines is the most appropriate, including “plain language” that makes explicit what the accused products are.

## **Commission Response**

The majority of the commentators support adding the requirement to rule 210.10(b)(1) that the notice of investigation specify the scope of the investigation in plain language. Moreover, most of the commentators suggest that the proposed rule align with the current requirements in rule 210.12(a)(12), which requires the complaint to “[c]ontain a clear statement in plain English of the category of products accused.” 19 CFR 210.12(a)(12). In order to align the scope of the investigation stated in the notice of investigation with the statement concerning the scope as stated in the complaint, the Commission has determined to amend proposed rule 210.10(b)(1) to explicitly specify the correlation between that rule and 210.12(a)(12).

The Commission rejects IPOA’s suggestion that discovery “beyond the scope of the investigation be permitted for good cause” as it is not clear what IPOA means by “beyond the scope of the investigation.”

The Commission has considered ITCWG’s suggestion to require that the notice of investigation indicate specific types of software, and the CCCME’s suggestion that the notice indicate specific product codes. Requiring the notice of investigation to indicate accused products by specific names or model numbers does not comport with Commission practice. In particular, the Commission has long held that its remedies apply to any infringing product, not simply the products specifically adjudicated during an investigation. *See, e.g., Certain Ground Fault Circuit Interrupters and Products Containing the Same*, Inv. No. 337-TA-615, Comm’n Op. (Pub. Version) at 27 (Mar. 26, 2009), *rev’d on other grounds, General Protecht Group, Inc. v. Int’l Trade Comm’n*, 619 F.3d 1303 (Fed. Cir. 2010). Identifying accused products with such specificity invites the risk of unduly restricting the scope, not only of an investigation, but also of any potential remedy the Commission may issue at the conclusion of that investigation.

### 210.10(b)(3)

#### Comments

The IPOA indicates that it generally supports the proposed rule changes involving the 100-day proceeding and that it does not support limiting by example the types of issues that may be designated as potentially dispositive. With respect to the statement in the NPRM concerning proposed subsection 210.10(b)(3) which provides that administrative law judges will have discretion to stay discovery during the pendency of a 100-day proceeding, the IPOA asserts that it is critical that the rules provide for a mandatory stay during the pendency of the proceeding and during any subsequent Commission review. Otherwise, the IPOA cautions, a party subject to a 100-day proceeding faces both a fast-track discovery/hearing on the potentially dispositive issue as well as the normal requirements of Commission discovery on other issues. The IPOA suggests the following amended language for proposed subsection 210.10(b)(3):

The Commission may order the administrative law judge to issue an initial determination as provided in 210.42(a)(3)(i) and (ii) ruling on a potentially dispositive issue as set forth in the notice of investigation. The presiding administrative law judge is authorized, in accordance with section 210.36, to hold expedited hearings on any such designated issue and will also have discretion to stay discovery during the pendency of the 100-day proceeding.

The Commission notes that, although the IPOA argues for a mandatory stay of the remainder of the investigation, the language it proposes leaves the decision to stay within the administrative law judge's discretion.

The ITCWG generally supports implementation of the 100-day proceeding in the rules and urges that the procedure be used in a greater number of cases. The ITCWG does not provide any specific comments concerning the proposed language of subsection 210.10(b)(3). The ITCWG does, however, note that the proposed rules do not require a stay of discovery on non-designated issues during pendency of a 100-day proceeding or during Commission review of the administrative law judge's initial determination on the designated issue. Although the ITCWG acknowledges the comment in the NPRM that the administrative law judge has discretion to stay discovery during the pendency of a 100-day proceeding and subsequent Commission review, the ITCWG contends that any final rule should provide for a mandatory stay. The ITCWG cautions that otherwise, a party subject to a 100-day proceeding faces both fast-track discovery and a hearing on the 100-day issue, as well as the task of conducting normal discovery on the remaining issues, thus increasing the burden and expense of the investigation.

The ITCTLA cautions that many of the provisions associated with the proposed 100-day proceeding present significant problems and invite abuse. The ITCTLA asserts that administrative law judges already have sufficient discretion to consider potentially dispositive or otherwise significant issues on an expedited basis at their discretion and that the proposed amendments may unintentionally invite abuse or hamstring, rather than enlarge, the discretion of the administrative law judges on these issues. The ITCTLA notes the use of *Markman* hearings, during which judges may, at their discretion, take evidence, and where the schedule is set in the judge's discretion, taking into account the particulars of the investigation. The ITCTLA also notes former Chief Judge Luckern's practice of requesting written submissions by the parties on issues of particular concern prior to the evidentiary hearing. The ITCTLA further notes that Judge Lord has issued an order to show cause regarding domestic industry in a situation where the issue was potentially dispositive. The ITCTLA notes that instituting a specific single mechanism for the resolution of potentially dispositive issues may lead to the perception that administrative law judges lack the discretion to address dispositive issues at their own discretion and timeline.

The ITCTLA also asserts that the occasions where a 100-day proceeding would be needed to dispose of an investigation early would be very rare, the potential for abuse in the majority of investigations would be great, and such proceedings would impose an increased burden on administrative law judges at the beginning of most investigations. Moreover, the ITCTLA asserts, were it to become increasingly common to address such issues as domestic industry or validity at the preliminary stages of an investigation, the increased number of hearings and the multi-stage discovery, as well as the resultant delay in proceeding with the investigation should the designated issue not dispose of the investigation, creates a strong potential for increased burden on the resources of the Commission and the parties, likely requiring the extension of target dates.

The ITCTLA also notes that the Commission has not identified what constitutes a "potentially dispositive issue" and that it is unclear whether the issue must be capable of disposing of an entire investigation or whether, for example, lack of domestic industry on a

subset of asserted patents would qualify. The ITCTLA also notes the Commission's statement that the proposed 100-day proceeding differs from summary determination in that the ruling is made following an evidentiary hearing, but cautions that this procedure would increase the number of evidentiary hearings, necessarily duplicating the efforts of the parties and resources of the Commission, while delaying the progress of the investigation.

The ITCTLA concludes that it does not support the addition of a specific mechanism, apart from that set forth in proposed rule 210.10(b)(3) and currently permitted through motions for summary determination and the inherent discretion of the administrative law judges, for the resolution of potentially dispositive issues. Rather, the ITCTLA recommends, administrative law judges should be permitted to continue to exercise their discretion in the timing and conduct of proceedings to address such issues, including any additional hearings. While providing no direct comment on the wording of proposed rule 210.10(b)(3), the ITCTLA urges the Commission to reserve the 100-day proceeding for issues and investigations where it is apparent that the abbreviated proceeding is likely to dispose of the investigation. The ITCTLA cautions that extensive use of the procedure would otherwise delay discovery and proceeding to the merits of investigations for three months, which would also have the effect of extending target dates.

### **Commission Response**

As summarized above, the IPOA and ITCWG generally support the Commission's effort to codify its 100-day program, but request that the rules provide for a mandatory stay of the remainder of the case during pendency of the 100-day proceeding rather than leaving a stay to the discretion of the administrative law judge. The ITCTLA, on the other hand, argues that the 100-day program is unnecessary since administrative law judges already have ability to consider potentially dispositive issues on an expedited basis, for example, through the use of *Markman* proceedings or summary determinations. The ITCTLA asserts that use of the proposed 100-day proceeding could lead to the perception that the administrative law judges lack the authority to address dispositive issues at their own discretion and timeline. However, a purpose of the new rule is to provide the administrative law judges with an additional tool to efficiently adjudicate investigations. Administrative law judges will continue to have all the means currently at their disposal to adjudicate investigations as appropriate.

The Commission notes the ITCTLA's concern regarding the administrative burden on the administrative law judges, Commission, and parties with respect to additional discovery, hearings, and delay. However, the 100-day proceeding is intended to adjudicate only issues which would entirely dispose of an investigation rather than to decide subsidiary issues, which are best addressed under other available procedures, such as the current summary determination procedure. As such, the types of issues appropriate for the 100-day proceeding are limited. However, identifying in the rules every potential issue that may be appropriate for a 100-day proceeding would unduly restrict the Commission's ability to designate any issue it deems suitable and appropriate. Accordingly, the final rule specifies that a potentially dispositive issue is one that would dispose of the entire investigation without enumerating specific issues that would qualify.



Regarding whether the Commission should impose a mandatory stay of the remainder of the investigation during pendency of a 100-day proceeding, the Commission has decided to leave any stays within the discretion of the administrative law judges. As such, the Commission declines to impose a mandatory stay as requested by the IPOA and ITCWG.

### **Section 210.11**

Section 210.11 – in particular, subsection 210.11(a) – provides that the Commission will, upon institution of an investigation, serve copies of the nonconfidential version of the complaint and the notice of investigation upon the respondent(s), the embassy in Washington, DC of the country in which each respondent is located, and various government agencies. Subsection 210.11(a)(2) concerns service by the Commission when it has instituted temporary relief proceedings. The NPRM proposed amending subsection 210.11(a)(2)(i) to clarify that the Commission will serve on each respondent a copy of the nonconfidential version of the motion for temporary relief, in addition to the nonconfidential version of the complaint and the notice of investigation.

No comments concerning the proposed amendments to rule 210.11 were received. The Commission has therefore determined to adopt proposed rule 210.11(a)(2)(i) as stated in the NPRM with a typographical correction.

### **Section 210.12**

Section 210.12 specifies the information that must be included in a complaint requesting institution of an investigation under part 210. In particular, subsection 210.12(a)(9) details the information a complaint is required to include when alleging a violation of section 337 with respect to the infringement of a valid and enforceable U.S. patent. The NPRM proposed amending subsection 210.12(a)(9) by adding the requirement that complaints include the expiration date of each asserted patent.

No comments concerning the proposed amendments to rule 210.12 were received. The Commission has therefore determined to adopt proposed rule 210.12(a)(9) as stated in the NPRM.

### **Section 210.14**

Section 210.14 provides for various pre- and post-institution actions, including amending the complaint and notice of investigation, making supplemental submissions, introducing counterclaims, providing submissions on the public interest, and consolidating investigations. The NPRM proposed amending section 210.14 to add subsection 210.14(h), allowing the administrative law judge to sever an investigation into two or more investigations at any time prior to or upon issuance of the procedural schedule, based upon either a motion or upon the administrative law judge's judgment that severance is necessary to allow efficient adjudication. The Commission sought in particular comments regarding whether the administrative law judge's decision to sever should be in the form of an initial determination pursuant to new subsection 210.42(c)(3) or an order.

The NPRM also proposed adding subsection 210.14(i), which would authorize the administrative law judge to issue an order designating a potentially dispositive issue for an early ruling under the 100-day procedure. The proposed rule would also provide authority for the presiding administrative law judge to hold expedited hearings on such dispositive issues in accordance with section 210.36.

#### 210.14(h)

#### Comments

The IPOA notes several potential “unintended consequences” of the proposed severance rule, including: increased motions practice; motions for severance filed for the purpose of administrative law judge shopping; potential inconsistencies or conflicts in the results of severed investigations; inefficiency due to assigning severed cases to different administrative law judges with differing procedural schedules; and increased cost. The IPOA also notes that severance, presumably by an administrative law judge after institution, “would not only require a change to the notice of investigation, but also would warrant continuing the practice of Commission review.” Moreover, the IPOA proposes that clear, enumerated factors governing severance should be indicated in the rule in order to provide notice to potential parties.

The IPOA also suggests that the rule should not tie the ability of a party to file a motion to sever an investigation pursuant to proposed rule 210.14(h) with issuance of the procedural schedule. The IPOA cautions that doing so could delay issuance of the procedural schedule for a considerable time while the severance motion is briefed and considered by the administrative law judge. The IPOA notes that the rule should also clarify whether severance begins with the administrative law judge’s order or after the Commission affirms, and how any severed investigations will be identified (*e.g.*, with new numbers or by adding a, b, c, etc. to the end of the original investigation number). In addition, the IPOA contends that, consistent with current practice, motions impacting the notice of investigation be rendered by initial determination, an administrative law judge’s decision to sever an investigation should be issued as an initial determination pursuant to current subsection 210.42(c)(1).

The ITCTLA supports allowing administrative law judges to sever an investigation where necessary to allow efficient adjudication. The ITCTLA cautions, however, that where parties, accused products, asserted domestic industry products, and asserted defenses presented in a complaint are similar, even notwithstanding technically different asserted patent families or different technologies, the scope of discovery, issues, and administration of the case may so overlap that severing an investigation into multiple investigations may lead to increased costs to the parties, more use of Commission resources, and/or create inconsistencies between investigations. The ITCTLA states that only in rare circumstances would a single complaint present such different technologies and issues that severance of an investigation would best serve the timely and efficient investigation of the complaint.

As such, the ITCTLA cautions that the proposed rule may unintentionally encourage motions to sever, creating additional workload on administrative law judges at the onset of investigations. In addition, the ITCTLA expresses concern that an administrative law judge presiding over severed investigations would presumably create procedural schedules that either

unduly push one investigation forward more quickly or else delays the second investigation. The ITCTLA also cautions that the need for multiple hearings, subpoenas, and motions where the parties are otherwise the same will likely create inefficiencies and possibly extend target dates. ITCTLA posits that, where issues are so dissimilar as to warrant multiple investigations, the complainant will likely itself limit or separate complaints or the Commission can address severance pre-institution. The ITCTLA also suggests the Commission provide guidelines or identify factors supporting severance in the commentary accompanying the final rule.

Regarding the Commission's request for comments addressing whether the administrative law judge's decision to sever should be in the form of an initial determination or an order, the ITCTLA recommends that an order would be most appropriate so as to eliminate the time it takes to petition for review in the interest of expediting the investigation. The ITCTLA recommends the following amendment to proposed rule 210.14(h):

(h) *Severance of investigation.* The administrative law judge may determine to sever an investigation into two or more investigations at any time prior to or upon thirty days from institution, based upon either a motion or upon the administrative law judge's own judgment that severance is necessary to allow efficient adjudication and limit the number of unrelated technologies and products and/or unrelated patents asserted in a single investigation. The administrative law judge's decision will be in the form of an ~~initial determination order pursuant to 210.41(e)(3).~~

The ITCWG insists that proposed rule 210.14(h) is unnecessary as the Commission and administrative law judges have had no difficulties severing and consolidating investigations where appropriate. The ITCWG cautions that the proposed rule may have several unintended consequences, for example, inviting motions for severance and, thus, leading to increased motions practice. The ITCWG notes that the potential increase could be exacerbated by the proposed rule's silence as to whether severed cases stay with the originally assigned administrative law judge, and that, if not, the rule could invite motions for severance that are actually attempts at "administrative law judge shopping."

The ITCWG suggests certain changes to proposed rule 210.14(h). Specifically, the ITCWG notes the proposed rule requires that the presiding administrative law judge make decisions on severance prior to issuance of the procedural schedule. The ITCWG argues this requirement could delay issuance of the procedural schedule for a considerable time while a severance motion is briefed and considered by the administrative law judge. Furthermore, the ITCWG asserts, it is unclear whether severance would begin with issuance of the administrative law judge's initial determination or after the Commission has affirmed the judge's ruling. The ITCWG also notes that the proposed rule leaves unclear what standard would apply in determining whether patents and technology are sufficiently related. The ITCWG states that reference to the Federal Rules of Civil Procedure may provide guidance, but neglects to identify any specific rules the Commission should consider. Lastly, the ITCWG notes that the Commission should indicate how severed cases would be designated, such as with a new investigation number or with a suffix to the existing investigation number (*e.g.* by adding a, b, c, etc. to the end of the original investigation number).

The CCCME requests that proposed rule 210.14(h) be amended to explicitly allow a respondent to file a motion to sever an investigation. The CCCME also suggests that the proposed rule should state clearly whether, after severance, the investigations will be presided over by the same administrative law judge. The CCCME further suggests the Commission provide detailed requirements for severance to avoid abuse of this procedure.

Although Mr. Chubb generally supports implementation of proposed rule 210.14(h), he cautions that the procedure laid out in the proposed rule (and presumably proposed rule 210.22) would open up the early stages of many investigations to an influx of motions to sever with corresponding uncertainty, which could potentially disrupt the orderly initiation of the discovery process and other aspects of early case development. Mr. Chubb does note, however, that the same concern could be applied to the judge's authority to consolidate cases under existing subsection 210.14(g), which has not in fact proven to be problematic. Specifically, Mr. Chubb points out that subsection 210.14(g) authorizes administrative law judges to consolidate investigations only where both investigations are already before the same judge, making cases where it might have applicability quite rare. Mr. Chubb asserts that this limitation would not be relevant in cases of severance, arguably making the applicability of severance more prevalent.

With respect to whether the administrative law judge's decision to sever should be in the form of an order or an initial determination, Mr. Chubb suggests the decision should be by initial determination since severance significantly impacts the fundamental scope of one or more investigations, as well as the number of investigations the Commission undertakes. Mr. Chubb asserts that these are matters on which the Commission should automatically have a say. Lastly, Mr. Chubb suggests that instead of the currently proposed requirement that an administrative law judge determine whether to sever an investigation "at any time prior to or upon issuance of the procedural schedule," that the proposed rule set a deadline of 30 days after publication of the notice of investigation. Mr. Chubb notes that the issuance of a procedural schedule is completely within a judge's discretion and influenced by numerous factors which affect the timing of when such orders are issued and may vary widely from investigation to investigation.

### **Commission Response**

The majority of the commenters agree that the administrative law judges should be able to sever investigations where a large number of technologies or unrelated patents are at issue. However, the commenters do note that the proposed rule could lead to increased motions practice and resultant delay. Several commenters request that the Commission provide criteria for severance under the rule, presumably suggesting any such criteria be consistent with proposed rule 210.10(a)(6). A majority of the commenters disagree with tying severance to issuance of the procedural schedule, with Mr. Chubb suggesting the Commission require the administrative law judge to act within of 30 days after publication of the notice of investigation. Lastly, the commenters express no consensus regarding whether the administrative law judge's decision to sever should be in the form of an order or an initial determination.

As with proposed rule 210.10(a)(6), the Commission declines to impose any rigid criteria for when an administrative law judge might determine that severing an investigation is appropriate. Rather, the Commission notes that severance may be appropriate where, for example, the complaint alleges a significant number of unrelated technologies, diverse products,

unrelated patents, and/or unfair methods of competition and unfair acts such that the resulting investigation, if it proceeds as a single case, would be unduly unwieldy or lengthy.

Regarding whether the administrative law judge should issue a severance decision by order or initial determination, the ITCTLA suggests the administrative law judge should issue an order, while Mr. Chubb recommends the administrative law judge issue an initial determination. The ITCWG does not explicitly state a preference, but its response seems to assume that the administrative law judge would issue an initial determination. While the Commission agrees with Mr. Chubb's point that severance of an investigation is a significant event, the Commission disagrees that it fundamentally impacts the scope of an investigation since no part of the complaint would be limited or broadened. Rather, only the administrative aspect of the investigation would be affected, which should not require Commission approval beyond the Commission's initial decision to institute an investigation based on the complaint. The Commission has therefore amended proposed rule 210.14(h) to allow the presiding administrative law judge to sever an investigation by order.

Mr. Chubb suggests a requirement that an administrative law judge decide whether to sever an investigation within 30 days after publication of the notice of investigation, noting that the timing for issuance of a procedural schedule varies with each investigation. The Commission agrees that the timing of the administrative law judge's decision to sever should be predictable. The final rule provides that an administrative law judge may determine to sever an investigation at any time prior to or upon thirty days from institution of the investigation.

Lastly, the ITCWG and CCCME request clarification regarding whether newly severed investigations will be assigned to new administrative law judges and how severed investigations will be designated. Regarding the first point, the final rule provides that the "new" investigation(s) will be assigned to the same administrative law judge unless the severed case is reassigned at the discretion of the chief administrative law judge. Moreover, if the Commission has delegated public interest fact finding to the administrative law judge in an investigation, the delegation shall continue to be in effect for any "new" investigations resulting from severance. In addition, the newly severed investigation(s) will be designated with a new investigation number.

#### 210.14(i)

#### **Comments**

The IPOA argues against adoption of a rule providing that a 100-day proceeding may be designated post-institution *sua sponte* by the administrative law judge. The IPOA cautions that the administrative law judge is unlikely to be in a better position than the Commission to make an assessment concerning which issue(s) are appropriate for early disposition 30 days into an investigation. The IPOA further notes a conflict between proposed rules 210.14(i) and 210.22 in that the former allows an administrative law judge 30 days after institution to designate a potentially dispositive issue for early determination, while the latter allows parties to bring a motion for such designation within 30 days of institution. The IPOA suggest that it would be better if the rules stated that parties may bring a motion to designate, or the judge may designate *sua sponte*, within 30 days of institution, and to add a second deadline by which the judge must rule after a motion is fully briefed.

The ITCWG notes a potential conflict between proposed rules 210.14(i) and 210.22 in that, since proposed rule 210.14(i) allows the administrative law judge 30 days after institution to designate an issue for early disposition it could arguably prevent the administrative law judge from ruling on a motion pursuant to proposed rule 210.22 after 30 days. The ITCWG suggests that, if the rules are implemented, the Commission should import 210.14(i) into 210.22, noting that parties may bring a motion to designate, or the judge may designate *sua sponte*, within 30 days.

The ITCTLA argues that the circumstance where a dispositive issue is not raised before the Commission prior to institution, thus enabling the Commission to designate the issue pre-institution pursuant to proposed rule 210.10(b)(3), would suggest that the issue is not amenable to early identification and resolution. As such, the ITCTLA implies that administrative law judges should not be able to designate an issue post-institution, as enabled by proposed rule 210.14(i). The ITCTLA also suggests clarifying the interaction between proposed rules 210.14(i) and 210.22.

Adduci cautions that it is unclear whether proposed rules 210.14(i) and 210.22 can coexist in the present form. Adduci suggests that, if the parties are permitted a certain period of time during which they may move for an order designating a potentially dispositive issue for an early ruling, the administrative law judge's authority to issue such an order needs to exist for some time period thereafter. Adduci notes, however, that there should be a reasonable deadline for any such order, whether requested by the parties or issued *sua sponte*. To address the inconsistency, Adduci recommends that the Commission extend the administrative law judge's authority beyond the current proposal of 30 days, for example, allowing the judge 45 days to issue an order designating an issue for early disposition, which would allow the judge 15 days to rule on a motion filed on the last day of the 30-day window. Alternatively, Adduci suggests the deadline for parties to file a motion could be shortened, providing parties up to 21 days to file a motion under proposed rule 210.22 and setting a 14-day deadline (from the date of filing) for the administrative law judge to rule on the motion. Adduci notes this would allow parties up to three weeks to prepare and file a motion, while allowing the administrative law judge two full weeks to set a briefing schedule, consider the motion, and issue an order.

Adduci suggests that the Commission should retain the 30-day limit allowing an administrative law judge to designate an issue for early disposition *sua sponte* pursuant to proposed rule 210.14. Adduci notes, however, that it is unclear whether the Commission actually intended to give the administrative law judge authority to issue an order designating a potentially dispositive issue for an early ruling *sua sponte*, or whether such an order would need to be in response to a party's motion under proposed rule 210.22 (discussed below). Adduci requests that the Commission amend proposed rule 210.14(i) to explicitly clarify its intent.

Mr. Chubb recommends that the Commission decline to enact proposed rule 210.14(i) until it has more experience with 100-day proceedings. Mr. Chubb asserts that providing administrative law judges with the authority to designate an issue for early disposition is likely to trigger disruptive motions practice with negative consequences, similar to his comments below with respect to proposed rule 210.22. Mr. Chubb cautions that this disruption may outweigh the marginal utility of providing administrative law judges with the authority to designate, *sua sponte*, potentially dispositive issues for early determination. Mr. Chubb notes that judges retain

the authority to grant summary determination motions and the discretion to hold claim construction hearings and to make claim construction rulings prior to any final evidentiary hearing.

### **Commission Response**

Of the three comments submitted regarding proposed rule 210.14(i), two caution against implementation of the rule, although for slightly different reasons. After further consideration and in view of the concerns expressed by the commentators, the Commission has determined not to implement proposed rule 210.14(i) at this time.

### **Section 210.15**

Section 210.15 provides the procedure and requirements for motions during the pendency of an investigation and related proceedings, whether before an administrative law judge or before the Commission. The proposed rule would amend subsection 210.15(a)(2) to clarify that this provision does not allow for motions, other than motions for temporary relief, to be filed with the Commission prior to institution of an investigation.

### **Comments**

Mr. Chubb states that the proposed amendment to subsection 210.15(a)(2) fails to clarify that rule 210.15 is not intended to allow pre-institution motions other than those for temporary relief. Rather, Mr. Chubb states that the proposed language leaves the rule ambiguous as to whether the proposed parties or others are permitted to file motions prior to institution. Mr. Chubb also asserts that the proposed rule mistakenly cites to Commission rule 210.52, which concerns motions for temporary relief filed with a complaint, and should instead cite to rule 210.53, which concerns motions for temporary relief filed after a complaint is filed but before the Commission determines to institute an investigation based on the complaint. Mr. Chubb suggests proposed rule 210.15(a)(2) be reworded as follows to directly state that motions are not permitted prior to institution, except for motions for temporary relief:

(a) \* \* \*

(2) When an investigation or related proceeding is before the Commission, all motions shall be addressed to the Chairman of the Commission. All motions shall be filed with the Secretary and shall be served upon each party. Motions may not be filed during a preinstitution proceeding except for motions for temporary relief as prescribed by 210.53.

Mr. Chubb also suggests that, in a future rulemaking, the Commission rescind Commission rule 210.53 noting that the rule is seldom if ever invoked because situations where circumstances warranting temporary relief arise only between the filing of the complaint and institution 30 days later are almost inconceivable. Mr. Chubb further asserts that the rule runs contrary to the Commission's goal of providing maximum notice and disclosure to proposed respondents and the public that temporary relief is being sought by a complainant.

## **Commission Response**

The Commission agrees with Mr. Chubb that the current wording of proposed rule 210.15(a)(2) should be clarified to indicate that the rule is intended to prohibit the filing of any motions before the Commission during preinstitution proceedings except with respect to motions for temporary relief filed under 210.53. The Commission has determined to amend proposed rule 210.15(a)(2) accordingly.

### **Section 210.19**

Section 210.19 provides for intervention in an investigation or related proceeding. The NPRM proposed amending section 210.19 to clarify that motions to intervene may be filed only after institution of an investigation or a related proceeding.

No comments concerning the proposed amendments to rule 210.19 were received. The Commission has therefore determined to adopt proposed rule 210.19 as stated in the NPRM.

### **Section 210.21**

Subsections 210.21(b)(2) and (c)(2) authorize the presiding administrative law judge to grant by initial determination motions to terminate an investigation due to settlement or consent order, respectively. The subsections further provide that the Commission shall notify certain government agencies of the initial determination and the settlement agreement or consent order. Those agencies include the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service (now U.S. Customs and Border Protection), and such other departments and agencies as the Commission deems appropriate.

Currently, the Commission effects such notice through various electronic means, including posting a public version of the initial determination and public versions of any related settlement agreements or consent orders on its website. The proposed rule would amend subsections 210.21(b)(2) and (c)(2) to clarify that the Commission need not otherwise specifically notify the listed agencies regarding any such initial determination and related settlement agreements or consent orders. This change is intended to conserve Commission resources and does not relieve the Commission of its obligation under section 337(b)(2) to consult with and seek advice and information from the indicated agencies as the Commission considers appropriate during the course of a section 337 investigation. The Commission has consulted with the agencies in question and they have not requested that the Commission provide direct notice beyond its current practice.

In addition, subsection 210.21(c)(3) sets out the required contents of a consent order stipulation while subsection 210.21(c)(4) sets out the required contents of the consent order. The proposed rule would amend subsection 210.21(c)(3)(ii)(A) to conform to subsection 210.21(c)(4)(x), which requires that the consent order stipulation and consent order contain a statement that a consent order shall not apply to any intellectual property right that has been held invalid or unenforceable or to any adjudicated article found not to infringe the asserted right or found no longer in violation by the Commission or a court or agency of competent jurisdiction in



a final, nonreviewable decision. The proposed rule would also amend subsection 210.21(c)(4)(viii) to add the phrase “any asserted patent claims,” delete the phrase “the claims of the asserted patent,” delete the second occurrence of the word “claims,” and add the word “claim” after “unfair trade practice” in the phrase “validity or enforceability of the claims of the asserted patent claims . . . unfair trade practice in any administrative or judicial proceeding to enforce the Consent Order[.]” The proposed rule would further amend subsection 210.21(c)(4)(x) to add the word “asserted” before “claim of the patent...” and to add the word “claim” after “or unfair trade practice . . . .” The proposed rule also would add new subsection 210.21(c)(4)(xi) to require in the consent order an admission of all jurisdictional facts, similar to the provision requiring such a statement in the consent order stipulation (210.21(c)(3)(i)(A)).

## **Comments**

Adduci notes that, while having no specific comments on or issues with the proposed amendments to Commission rule 210.21, it has some concerns with the rule which are not addressed by the proposed amendments. In particular, Adduci notes that Commission rule 210.21(c)(4) states that 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.” Adduci asserts that the language of the rule suggests that the Commission may issue consent orders that use language different from what is included in the rule so long as the proposed consent order does not contain any additional “terms” and is not inconsistent with the rule. Adduci states that the word “terms” could be interpreted either to mean the specific words used in the rule or to mean the general provisions of a consent order outlined in Commission rule 210.21(c)(3).

Adduci notes that, in recent practice, the administrative law judges and the Commission have interpreted rule 210.21(c)(4) to mean that the language of a proposed consent order must mirror the exact language of the Commission rule (except where otherwise specifically permitted). Adduci cautions that, while this is a reasonable interpretation of the rule, some parties may not be aware of this practice, and extensive public and private resources are sometimes wasted negotiating and reviewing proposed consent orders that differ from the rules and are ultimately deemed noncompliant. Adduci recommends the Commission consider amending the language of rule 210.21(c)(4) to clarify its intent, stating, for example, that the “Commission will not issue consent orders with language that differs from that provided for in this section, except where specifically permitted.” Adduci further suggests the Commission clarify which portions of the consent order can differ from the prescribed language of the rule, such as when addressing disposition of existing inventory. Additionally, Adduci suggests the Commission remove the language stating that it will not issue consent orders that are inconsistent with the rules, arguing that such language is unnecessary since, under the recommended amendments, the rules would already limit the consent order to the prescribed language. Adduci recommends that, in lieu of its suggested amendments, to the extent the Commission will permit deviation from the specific language of rule 210.21(c)(3), the Commission should make clear in which sub-paragraphs it will permit alternate language.

## **Commission Response**

The wording of proposed rule 210.21 is clear that the language of the consent order must be consistent with the language of the consent order stipulation except where otherwise specifically permitted. Because the amendments Adduci suggests were not part of the current rulemaking effort, the Commission has determined to reserve them for future consideration. No comments were received concerning the currently proposed amendments to rule 210.21. The Commission has therefore determined to adopt proposed rule 210.21 substantially as stated in the NPRM.

## **Section 210.22**

The proposed rule would add new section 210.22 to allow parties to file a motion within 30 days of institution of the investigation requesting the presiding administrative law judge to issue an order designating a potentially dispositive issue for an early ruling. The proposed rule would also provide authority for the presiding administrative law judge to hold expedited hearings on such issues in accordance with section 210.36.

## **Comments**

The IPOA argues against adoption of a rule providing that a 100-day proceeding may be designated post-institution by motion. The IPOA cautions that parties are unlikely to be in a better position than the Commission to make an assessment concerning which issue(s) are appropriate for early disposition 30 days into an investigation. The IPOA also asserts that the potential flood of unnecessary motions will take significant administrative law judge and attorney time and could contribute to overall delay. As discussed above, the IPOA further notes a conflict between proposed rules 210.14(i) and 210.22 in that the former allows an administrative law judge 30 days after institution to designate a potentially dispositive issue for early determination, while the latter allows parties to bring a motion for such designation within 30 days of institution. The IPOA suggest that it would be better if the rules stated that parties may bring a motion to designate, or the judge may designate *sua sponte*, within 30 days of institution, and to add a second deadline by which the judge must rule after a motion is fully briefed.

The ITCWG expresses concern that proposed rule 210.22 may invite motions practice that will have no meaningful benefit. Specifically, the ITCWG cautions that it is unlikely that parties or the administrative law judge will be in a better position in the first 30 days of an investigation to assess whether an issue is suitable for early disposition than the Commission will be during its pre-institution review. The ITCWG notes, for example, that even if the parties were to serve discovery on potentially dispositive issues immediately upon institution, responses would not be due until after the expiration of the 30-day period. The ITCWG also notes that the proposed 30-day period for filing a motion to designate an issue for early disposition would effectively foreclose the ability of intervenors to move for assignment in the program given the time a motion for intervention takes to be adjudicated. As discussed above, The ITCWG further notes a potential conflict between proposed rules 210.14(i) and 210.22 in that, since proposed rule 210.14(i) allows the administrative law judge 30 days after institution to designate an issue for early disposition it would likely prevent the administrative law judge from ruling on a motion

filed 30 days after institution pursuant to proposed rule 210.22. The ITCWG suggests that, if the rules are implemented, the Commission should import 210.14(i) into 210.22, noting that parties may bring a motion to designate, or the judge may designate *sua sponte*, within 30 days.

The ITCTLA cautions that, under proposed rule 210.22, many parties will move for the designation of a potentially dispositive issue, even where the issue is likely to be fact-intensive and has historically been examined in the regular course of an investigation. The ITCTLA further warns that such motions create the risk of burdening the administrative law judge with significant motion practice at the onset of many, if not most, investigations.

As noted above, The ITCTLA also suggests clarifying the interaction between proposed rules 210.14(i) and 210.22. The ITCTLA states that, if the administrative law judge must rule on a motion pursuant to proposed rule 210.22 within the 30-day time limit of proposed rule 210.14(i), the deadline for filing such a motion should be sufficiently early to allow the other party to respond and the judge to rule within that timeframe. The ITCTLA notes that, if the administrative law judge is not bound by the time limit indicated in proposed rule 210.14(i), then there appears to be no time limit for ruling on a motion under proposed rule 210.22. In that case, the ITCTLA suggests that proposed rule 210.22 be changed to require the motion to be filed early enough to provide the opposing party an opportunity to respond and to give the administrative law judge an opportunity to rule on the motion in a similar timeframe as set forth in proposed rule 210.14(i). Accordingly, the ITCTLA suggests that proposed rule 210.22 require a moving party to file its request within 14 days of institution of an investigation and that the opposing party be given seven days to respond, allowing the administrative law judge to issue an order within the 30-day time limit set forth in proposed rule 210.14(i).

As noted above, Adduci also cautions that it is unclear whether proposed rules 210.14(i) and 210.22 can coexist in the present form. Adduci suggests that, if the parties are permitted a certain period of time during which they may move for an order designating a potentially dispositive issue for an early ruling, the administrative law judge's authority to issue such an order needs to exist for some time period thereafter. Adduci notes, however, that there should be a reasonable deadline for any such order, whether requested by the parties or issued *sua sponte*. To address the inconsistency, Adduci recommends that the Commission extend the administrative law judge's authority beyond the current proposal of 30 days, for example, allowing the judge 45 days to issue an order designating an issue for early disposition, which would allow the judge 15 days to rule on a motion filed on the last day of the 30-day window. Alternatively, Adduci suggests the deadline for parties to file a motion could be shortened. Adduci cautions, however, that the Commission should be mindful that immediately following institution, many respondents are locating and evaluating counsel and have little time to assess the merits of the case, including whether there is a potentially dispositive issue appropriate for an early ruling. As such, Adduci notes that the Commission should exercise caution in shortening the time during which a party may file a motion under proposed rule 210.22 for an order designating an issue for early disposition.

As a way to balance the concerns of allowing parties sufficient time to retain counsel and determine potentially dispositive issues with ensuring that the administrative law judge has sufficient time to set a briefing schedule and rule on such a motion, Adduci suggests providing parties up to 21 days to file a motion under proposed rule 210.22 and setting a 14-day deadline

(from the date of filing) for the administrative law judge to rule on the motion. Adduci notes this would allow parties up to three weeks to prepare and file a motion, while allowing the administrative law judge two full weeks to set a briefing schedule, consider the motion, and issue an order.

Mr. Chubb recommends the Commission decline to enact proposed rule 210.22 until the Commission and administrative law judges have more experience with 100-day proceedings. Mr. Chubb expresses concern that the Commission and administrative law judges will face significant difficulties if the Commission permits parties to file motions for 100-day proceedings and the judges are given authority to initiate such proceedings upon motion after institution of an investigation. Mr. Chubb cautions that respondents will likely file such motions in many, if not a majority of cases, resulting in disruptive and expensive motions practice from the very beginning of an investigation. Mr. Chubb notes that respondents will have little to lose if their motion is denied, but if their motion is granted, there is the likely prospect of the target date being extended if early disposition proves unsuccessful.

Mr. Chubb suggests that, should the Commission decide to adopt proposed rule 210.22, the Commission shorten the time for parties to file a motion for a 100-day proceeding to 15 days, arguing that allowing any additional time would impede the administrative law judge's ability to rule on such a motion within the 30 days allocated in proposed rule 210.14(i). Mr. Chubb states that, together, proposed rules 210.14(i) and 210.22 would shorten the amount of productive time available in which to conduct a 100-day proceeding and thereby jeopardize the parties' ability to prepare for and effectively participate in the proceeding.

### **Commission Response**

The majority of the commenters recommend that the Commission not permit parties to request designation of potentially dispositive issues by motion, citing potential motions practice abuse, delay, and burden to the parties and the administrative law judge. After further consideration and in view of the concerns expressed by the commentators, the Commission has determined not to implement proposed rule 210.22 at this time.

### **Section 210.25**

Section 210.25 provides for the process by which a party may request, and the presiding administrative law judge or the Commission may grant, sanctions. In particular, subsection 210.25(a)(1) states the grounds for which a party may file a motion for sanctions. The NPRM proposed amending subsection 210.25(a)(1) to clarify that a motion for sanctions may be filed for abuse of discovery under subsection 210.27(g)(3).

In addition, subsection 210.25(a)(2) provides that a presiding administrative law judge or the Commission may raise sanctions issues as appropriate. The NPRM proposed amending subsection 210.25(a)(2) to clarify that the subsection regarding sanctions for abuse of discovery is subsection 210.27(g)(3).

No comments concerning the proposed amendments to rule 210.25 were received. The Commission has therefore determined to adopt proposed rules 210.25(a)(1) and (2) as stated in the NPRM.

### **Section 210.27**

Section 210.27 contains the general provisions governing discovery during a section 337 investigation or related proceeding. The NPRM proposed adding section 210.27(e)(5) to be consistent with Federal Rule of Civil Procedure 26 concerning the preservation of privilege between counsel and expert witnesses. In particular, the proposed rule specifies that privilege applies to communications between a party's counsel and any expert witness retained on behalf of that party and to any draft reports or disclosures that the expert prepares at counsel's behest.

Subsection 210.27(g) details the requirements of providing appropriate signatures with every discovery request, response, and objection, and the consequences for failing to do so. The NPRM proposed amending subsection 210.27(g)(3) to clarify that a presiding administrative law judge or the Commission may impose sanctions if, without substantial justification, a party certifies a discovery request, response, or objection in violation of subsection 210.27(g)(2).

No comments concerning the proposed amendments to rule 210.27 were received. The Commission has therefore determined to adopt proposed rules 210.27(e)(5) and (g)(3) as stated in the NPRM.

### **Section 210.28**

Section 210.28 provides for the taking, admissibility, and use of party and witness depositions. In particular, subsection 210.28(h)(3) provides that the deposition of a witness, whether or not a party, may be used for any purpose if the presiding administrative law judge finds certain circumstances exist. The NPRM proposed adding subsection 210.28(h)(3)(vi) to allow, within the discretion of the presiding administrative law judge, the use of agreed-upon designated deposition testimony in lieu of live witness testimony absent the circumstances enumerated in subsection 210.28(h)(3).

No comments concerning the proposed amendments to rule 210.28 were received except for Mr. Chubb's, expressing his approval and noting that allowing designated deposition testimony in lieu of live witness testimony at hearings would eliminate much disagreement and confusion regarding the propriety of this common practice. The Commission has therefore determined to adopt proposed rule 210.28(h)(3)(vi) as stated in the NPRM.

### **Section 210.32**

Section 210.32 provides for the use of subpoenas during the discovery phase of a section 337 investigation. In particular, subsection 210.32(d) provides for the filing of motions to quash a subpoena that the presiding administrative law judge has issued. The NPRM proposed amending subsection 210.32(d) to clarify that a party upon which a subpoena has been served may file an objection to the subpoena within ten days of receipt of the subpoena, with the possibility of requesting an extension of time for filing objections for good cause shown. The

NPRM also proposed amending subsection 210.32(d) to clarify that any motion to quash must be filed within ten days of receipt of the subpoena, with the possibility of requesting an extension of time for good cause shown. The proposed amendment is intended to bring the Commission's subpoena practice into closer conformity with the Federal Rules of Civil Procedure. The Commission requested in particular comments concerning any potential conflicts that may arise from copending objections and motions to quash.

In addition, subsection 210.32(f) authorizes the payment of fees to deponents or witnesses subject to a subpoena. The NPRM proposed amending subsection 210.32(f)(1) to clarify that such deponents and witnesses are entitled to receive both fees and mileage in conformance with Federal Rule of Civil Procedure 45(b)(1) and to correct the antecedent basis for "fees and mileage" as recited in subsection 210.32(f)(2).

### **Comments**

The IPOA supports the proposed amendment to subsection 210.32(d) permitting service of objections to subpoenas. The IPOA does, however, express concern that having objections and motions to quash due within the same short ten-day period will not provide adequate opportunity for parties to negotiate subpoena-related issues before a motion to quash must be filed. Accordingly, the IPOA recommends allowing 20 days to move to quash, which would permit parties some time to meet and confer regarding subpoena objections and possibly avoid motions practice without unduly delaying the investigation. The IPOA questions whether the removal of "motions to limit" from the proposed rule was intentional and intended to be subsumed into the new objections process. The IPOA also argues that the requirement for parties to show good cause for an extension of time to serve objections or to file motions to question unduly restricts an administrative law judge's ability to allow parties additional time or to permit parties to jointly agree on extensions. The IPOA suggests the following amendment to proposed rule 210.32(d):

(d) *Objections and motions to quash.* (1) Any objection to a subpoena shall be served in writing on the party or attorney designated in the subpoena within the later of 10 days after receipt of the subpoena or within such other time as the administrative law judge may allow or the party serving the subpoena may permit. ~~The administrative law judge may, for good cause shown, extend the time in which objections may be filed.~~

(2) Any motion to quash a subpoena shall be filed within ~~10~~ the later of 20 days after receipt of the subpoena or within such other time as the administrative law judge may allow. ~~The administrative law judge may, for good cause shown, extend the time in which motions to quash may be filed.~~

The ITCTLA states that it appreciates the Commission's efforts to bring its subpoena practice into closer conformity with the Federal Rules of Civil Procedure. The ITCTLA, however, expresses several concerns with the effect and clarity of proposed rule 210.32(d) and, in particular, the respective roles of objections and motions to quash. In particular, the ITCTLA notes that it supports the addition of a mechanism, like in Federal District Court, that permits a third party subject to a subpoena to serve objections to the subpoena. Specifically, the ITCTLA

notes that proposed rule 210.32(d)(1) does not indicate the effect of filing such objections, whereas Fed. R. Civ. P. 45(d)(2)(B) provides that, if an objection is made, the party serving the subpoena may move for an order compelling compliance. The ITCTLA asserts that the proposed rule is unclear as to whether upon service of objections, the party has discharged its obligations with respect to the subpoena (thus shifting the burden to the party that requested the subpoena to move for a request for judicial enforcement) or whether the party subject to the subpoena must now simultaneously file both objections and a motion to quash if it seeks to limit a subpoena. The ITCTLA suggests that, if the intent of the proposed rule is the former, which would be more in keeping with the federal rules, the Commission amend the proposed rule as indicated below.

The ITCTLA also questions the removal of the “motion to limit” language, noting that if the intent is to permit the option of filing objections if a party objects in part to a subpoena and to file a motion to quash if the subpoenaed party objects in full, such is not clear from the proposed rules or the NPRM. Lastly, the ITCTLA expresses concern over the requirement of good cause shown for any extension of time beyond ten days to serve objections or file a motion to quash. The ITCTLA asserts that the proposed rule unduly limits the ability of administrative law judges to permit additional time in their ground rules or to permit parties to jointly agree on extensions for objections without the need for a motion. In view of its comments, the ITCTLA suggests the following amendments to proposed rule 210.32(d):

(d) *Objections and motions to quash.* (1) Any objection to a subpoena shall be served in writing on the party or attorney designated in the subpoena within the later of 10 days after receipt of the subpoena or within such time as the administrative law judge may allow or the party or attorney designated in the subpoena may permit. ~~The administrative law judge may, for good cause shown, extend the time in which objections may be filed.~~ If an objection is made, the party that requested the subpoena may move for a request for judicial enforcement.

(2) Any motion to quash a subpoena shall be filed within the later of 10 days after receipt of the subpoena or within such time as the administrative law judge may allow. ~~The administrative law judge may, for good cause shown, extend the time in which motions to quash may be filed.~~

Adduci expresses concern that the 10-day deadline in proposed rule 210.32(d)(2) for filing motions to quash, particularly in light of the proposed 10-day deadline for objections under proposed rule 210.32(d)(1), will result in unnecessary motions to quash and waste private and public resources. Adduci states that, in practice, a party served with a subpoena should first serve its objections (as proposed in rule 210.32(d)(1)), and should thereafter have an opportunity to meet and confer with the requesting party on those objections before being required to file a motion to quash. Adduci notes that parties are often able to resolve disputes over a subpoena without the need for a motion to quash. Accordingly, Adduci recommends the Commission modify the language of proposed rule 210.32(d)(2) to require that any motion to quash be filed within twenty days of receipt of the subpoena. Furthermore, Adduci suggests the rule make clear that a motion to quash may be filed only if the movant: (1) timely served objections pursuant to proposed rule 210.32(d)(1), and (2) met and conferred with the requesting party to make a good faith effort to resolve any issues that it has with the subpoena. Adduci states that offsetting the

deadlines for objections and motions to quash would provide notice of the receiving party's objections and allow sufficient time for the parties to attempt to resolve those issues without resorting to motions practice.

Mr. Chubb notes that, in practice, motions to quash subpoenas are rarely filed within 10 days, since the parties will generally discuss the breadth of the subpoena before reaching an impasse that necessitates a motion to quash. Mr. Chubb suggests that, since it appears the Commission's intent is that the time for motions to quash ultimately be determined by the administrative law judge, proposed rule 210.32(d)(2) should state so directly by expressly giving the judge the ability to set the time for filing motions to quash in the first instance, rather than the current proposal which is directed to extension of time for such motions. Mr. Chubb suggests the following language for proposed rule 210.32(d)(2):

(d) \* \* \*

(2) Any motion to quash a subpoena shall be filed within 10 days after receipt of the subpoena or within a period of time set by the administrative law judge. The administrative law judge may, for good cause shown, extend the time in which motions to quash may be filed.

### **Commission Response**

The Commission notes that the commenters seem to be conflating objections and motions to quash. As stated in Rule 45 of the Federal Rules of Civil Procedure, motions to quash are generally allowed only in specific circumstances. *See* FRCP 45(d)(3). The Federal Rules do not apply such strictures on the filing of objections to a subpoena. Rather, when a subpoenaed entity files an objection, the burden shifts to the requesting party, requiring the requester to file a motion to compel after notifying the subpoenaed entity. *See* FRCP 45(d)(2)(B). It is this precise burden shifting the Commission intended to capture with the proposed rule. Objections and motions to quash are generally intended to be mutually exclusive procedures though there may occasionally be overlap in how they are utilized. The Commission therefore disagrees with Adduci's assumption that motions to quash may be filed only after the failure of negotiations following an objection pursuant to proposed rule 210.32(d)(1).

The IPOA's assumption that motions to limit were intended to be subsumed into the new objections process is partially correct. The Commission's purpose is to align the Commission's practice to Rule 45, which requires the requesting party to prove that information it seeks from the subpoenaed party is relevant and not burdensome.

In keeping with the Federal rules, the Commission has determined to clarify proposed rule 210.32(d)(2) to require, akin to current rule 210.33(a), which addresses motions to compel, that after an objection is made and negotiations fail, the requesting party must provide notice before seeking judicial enforcement. With respect to the requirement that administrative law judges can extend the time for filing objections or motions to quash only for good cause, the Commission accepts the solution proposed by the commenters to allow the judges to otherwise set the time.



Based on the above discussion, the Commission has determined to adopt the amendments to rule 210.32(d) proposed by the ITCTLA, with the addition of the notice language from rule 210.33. That language indicates that the requesting party may also move for a request for judicial enforcement upon reasonable notice or as provided by the administrative law judge. For example, the administrative law judge may require that the parties meet and confer prior to the filing of the request for judicial enforcement. The Commission does not, however, accept the ITCTLA's suggestion that the party or attorney designated in the subpoena may agree on the timing of responses without the input and approval of the administrative law judge.

No comments were received concerning proposed rule 210.32(f). The Commission therefore adopts proposed rule 210.32(f) as stated in the NPRM with a typographical correction.

### **Section 210.34**

Section 210.34 provides for the issuance of protective orders and for the remedies and sanctions the Commission may impose in the event of a breach of a Commission-issued administrative protective order. Subsection 210.34(c)(1) provides that the Commission shall treat the identity of any alleged breacher as confidential business information unless the Commission determines to issue a public sanction. Subsection 210.34(c)(1) also requires the Commission and the administrative law judge to allow parties to make submissions concerning these matters. The NPRM proposed amending subsection 210.34(c)(1) to remove the provision requiring the Commission or the administrative law judge to allow the parties to make written submissions or present oral arguments bearing on the issue of violation of a protective order and the appropriate sanctions therefor. The Commission and the administrative law judge continue to have discretion to permit written submissions or oral argument bearing on administrative protective order violations and sanctions therefor. In the interest of preserving the confidentiality of the process, the Commission has decided that notification of all parties in an investigation regarding breach of a protective order may be inappropriate in many cases. Submissions from relevant persons will be requested as necessary and appropriate.

### **Comments**

The IPOA supports the Commission and the administrative law judge having the discretion to permit parties to make written submissions or present oral arguments concerning administrative protective order violations. The IPOA contends, however, that it is unclear whether the proposed changes will affect the notice of an alleged or actual breach provided under current Commission rule 210.34. The IPOA therefore recommends leaving current rule 210.34(c)(1) unchanged.

The ITCWG cautions against implementation of proposed rule 210.34(c), arguing that the rule and the accompanying comment in the NPRM appear inconsistent. Specifically, ITCWG notes, the comment states that "notification of all parties in an investigation regarding breach of a protective order may be inappropriate in many cases," while the proposed rule refers to the initiation of a sanctions inquiry by party motion, which presumably must be served on all parties to the investigation and filed on EDIS. The ITCWG states that the Commission's comment that notice of an alleged administrative protective order breach will be provided at its discretion is at odds with the goal stated in the Strategic Plan that the Commission wishes to promote

transparency and understanding in investigative proceedings. The ITCWG contends that the proposed rule appears to allow no notice to parties who are not directly involved in the alleged breach even though, the ITCWG insists, such knowledge could prove valuable in helping better secure the aggrieved party's confidential business information going forward. The ITCWG argues that the Commission's comment appears to suggest the Commission need not notify a party whose confidential business information may have been disclosed, presumably if it wasn't that party who brought the potential breach to the Commission's attention. The ITCWG cautions that, under the proposed rule, there is too much uncertainty regarding how much notice will be provided and how the process will operate, which could make parties reluctant to produce confidential business information in an investigation.

Mr. Chubb states that he agrees with the Commission's proposal to remove the mandatory provision from subsection 210.34(c)(1) that currently requires the Commission or the administrative law judge to allow all parties to make written submissions or present oral arguments on alleged protective order violations and sanctions, regardless of whether they are the alleged breacher or compromised party. Mr. Chubb notes that the proposed rule provides the Commission with the flexibility to accommodate the interest other parties may have in a protective order violation dispute and permit participation to an appropriate extent.

### **Commission Response**

The comments from IPOA and the ITCWG reflect some basic differences between administrative protective order breach investigations that occur before administrative law judges and those that occur before the Commission. Breach investigations before administrative law judges may be more adversarial in nature, with notice being provided to the parties and parties having the opportunity to file submissions. Proceedings before the Commission, however, are more limited, with information concerning potential breaches provided on a need-to-know basis. The comments appear to be relevant primarily to proceedings before administrative law judges.

As the preamble to the rule in the NPRM states, the proposed rule recognizes that notification of all parties regarding a breach investigation may not be appropriate in many cases, in particular, those initiated before the Commission. The proposed amendment, which removes the provision requiring the Commission or the administrative law judge to allow the parties to make written submissions or present oral arguments bearing on the issue of violation of a protective order and the appropriate sanctions, does not affect the ability of administrative law judges, or the Commission when deemed appropriate, to request such briefing.

ITCWG raises the concern that the proposed rule suggests the Commission need not notify a party whose confidential business information may have been breached if that party did not notify the Commission of the potential breach. The Commission is concerned with preserving the confidentiality of the alleged breacher when an investigation into a potential breach of an administrative protective order is initiated before the Commission. The Commission does not currently notify parties not directly involved in the alleged breach. However, in most situations, it is the owner of the confidential information who brings the need for an investigation to the Commission's attention. Moreover, under section 210.34(b), which remains unchanged, the alleged breacher is required to notify the submitter of the confidential information.

The Commission has therefore determined to adopt proposed rule 210.34 as stated in the NPRM.

### **Section 210.42**

Section 210.42 provides for the issuance of initial determinations by the presiding administrative law judge concerning specific issues, including violation of section 337 under subsection 210.42(a)(1)(i), on motions to declassify information under subsection 210.42(a)(2), on issues concerning temporary relief or forfeiture of temporary relief bonds under subsection 210.42(b), or on other matters as specified in subsection 210.42(c).

The NPRM proposed adding subsection 210.42(a)(3), authorizing the presiding administrative law judge to issue an initial determination ruling on a potentially dispositive issue in accordance with a Commission order under new subsection 210.10(b)(3). In addition, the proposed rule would require the administrative law judge to certify the record to the Commission and issue the initial determination within 100 days of institution pursuant to 210.10(b)(3). The 100-day period may be extended for good cause shown. These changes are intended to provide a procedure for the early disposition of potentially dispositive issues identified by the Commission at institution of an investigation. This procedure is not intended to affect summary determination practice under section 210.18 whereby the administrative law judge may dispose of one or more issues in the investigation when there is no genuine issue as to material facts and the moving party is entitled to summary determination as a matter of law. Rather, this procedure differs from a summary determination proceeding in that the administrative law judge's ruling pursuant to this section is made following an evidentiary hearing.

The NPRM also proposed adding subsection 210.42(c)(3), authorizing the presiding administrative law judge to issue an initial determination severing an investigation into two or more investigations pursuant to new subsection 210.14(h).

In addition, subsection 210.42(e) provides that the Commission shall notify certain agencies of each initial determination granting a motion for termination of an investigation in whole or part on the basis of a consent order or settlement, licensing, or other agreement pursuant to section 210.21, and notice of such other initial determinations as the Commission may order. Those agencies include the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service (now U.S. Customs and Border Protection), and such other departments and agencies as the Commission deems appropriate. The rule further states that the indicated agencies have 10 days after service of any such initial determinations to submit comments. Currently, the Commission effects such notice through various electronic means, including posting a public version of the initial determination on its website so that paper service is unnecessary. The NPRM proposed amending section 210.42(e) to remove the explicit requirement that the Commission otherwise provide any specific notice of or directly serve any initial determinations concerning terminations under section 210.21 on the listed agencies. This change is intended to conserve Commission resources and does not relieve the Commission of its obligation under section 337(b)(2) to consult with and seek advice and information from the indicated agencies as the Commission considers appropriate during the course of a section 337 investigation. The Commission has consulted with the agencies in question and they have not requested that the

Commission provide direct notice beyond its current practice.

210.42(a)(3)

### **Comments**

The IPOA, in accordance with its recommendation not to implement proposed rules 210.14(i) or 210.22, suggests the following amended language for proposed subsection 210.42(a)(3):

(a) \* \* \*

(3) *On potentially dispositive issues.* The administrative law judge shall issue an initial determination ruling on a potentially dispositive issue in accordance with a Commission order pursuant to section 210.10(b)(3) ~~or an administrative law judge's order issued pursuant to section 210.14(i) or section 210.22.~~ The administrative law judge shall certify the record to the Commission and shall file an initial determination ruling on the potentially dispositive issue designated pursuant to 210.42(a)(3)(i) within 100 days, or as extended for good cause shown, of when the issue is designated by the Commission pursuant to 210.10(b)(3) ~~or by the administrative law judge pursuant to 210.14(i) or 210.22.~~

The IPOA also argues that the proposed rules provide no deadline for the Commission to determine whether to issue its own determination on a 100-day proceeding or to determine whether to review the administrative law judge's 100-day initial determination. The IPOA proposes the following addition to subsection 210.42(h):

210.42 Initial determinations. \*\*\*

(h) Effect. \*\*\*

(7) An initial determination filed pursuant to 210.42(a)(3) shall become the determination of the Commission 30 days after the date of service of the initial determination, unless the Commission has ordered review of the initial determination or certain issues therein, or by order has changed the effective date of the initial determination.

Mr. Chubb notes the Commission's statement in the NPRM that proposed rule 210.42(a)(3) is not intended to affect summary determination practice. Mr. Chubb suggests the Commission confirm that motions for summary determination on any potentially dispositive issue that is the subject of a 100-day proceeding are still permitted, but that such motions should not become a basis for extending such proceedings beyond the 100 days.

### **Commission Response**

The Commission has determined that clarification is needed regarding when an initial determination pursuant to proposed rule 210.42(a)(3) would become the Commission's final determination. Commission rule 210.42(h) concerns the timing of when an initial determination

shall become the determination of the Commission absent review. Commission proposed rule 210.43(d)(1) (as discussed below) states that the Commission has 30 days to determine whether to review an initial determination concerning a dispositive issue. As such, the Commission adopts the IPOA's proposed addition of subsection 210.42(h)(7) to specify that an initial determination issued pursuant to proposed rule 210.42(a)(3) will become the Commission's final determination within 30 days after service of the initial determination, absent review.

Regarding Mr. Chubb's comment, the Commission does not intend the 100-day procedure to affect summary determination practice during the course of a regular investigation. Therefore there is no need to change the current procedure for summary determinations as provided in Commission rule 210.18.

Because the Commission has determined not to implement proposed rule 210.14(i) allowing administrative law judges to designate potentially dispositive issues, the Commission has determined to remove all references to proposed rule 210.14(i) in the final version of rule 210.42(a)(3). As noted above, the Commission has also determined to add rule 210.42(h)(7) to specify that an initial determination issued pursuant to proposed rule 210.42(a)(3) will become the Commission's final determination within 30 days after service of the initial determination, absent review.

### **210.42(c)(3)**

With respect to proposed rule 210.14(h) regarding severance of investigations by administrative law judges, the ITCTLA recommends the Commission authorize judges to act by order rather than initial determination, rendering proposed rule 210.42(c)(3) unnecessary. Mr. Chubb, on the other hand, argues that a decision to sever should be in the form of an initial determination.

As stated above, the Commission has determined to allow administrative law judges to sever investigations by order. Accordingly, the Commission has determined not to adopt proposed rule 210.42(c)(3).

### **210.42(e)**

No comments concerning the proposed amendments to rule 210.42(e) were received. The Commission has therefore determined to adopt proposed rule 210.42(e) as stated in the NPRM.

## **Section 210.43**

Section 210.43 provides for the process by which a party may request, and the Commission may consider, petitions for review of initial determinations on matters other than temporary relief. In particular, subsection 210.43(a)(1) specifies when parties must file petitions for review based on the nature of the initial determination, and subsection 210.43(c) specifies when parties must file responses to any petitions for review. The NPRM proposed amending subsection 210.43(a)(1) to specify when parties must file petitions for review of an initial determination ruling on a potentially dispositive issue pursuant to new subsection 210.42(a)(3).

The NPRM further proposed amending subsection 210.43(c) to specify when the parties must file responses to any such petitions for review. Under the proposed rule, parties are required to file a petition for review within five calendar days after service of the initial determination and any responses to the petitions within three business days after service of a petition.

Subsection 210.43(d)(1) provides for the length of time the Commission has after service of an initial determination to determine whether to review the initial determination. The NPRM proposed amending subsection 210.43(d)(1) to specify that the Commission must determine whether to review initial determinations on potentially dispositive issues pursuant to new subsection 210.42(a)(3) within 30 days of service of the initial determination.

In addition, subsection 210.43(d)(3) provides that, if the Commission determines to grant a petition for review, in whole or in part, and solicits written submissions on the issues of remedy, the public interest, and bonding, the Secretary of the Commission shall serve the notice of review on all parties, the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service (now U.S. Customs and Border Protection), and such other departments and agencies as the Commission deems appropriate. Currently, the Commission effects such notice through various electronic means, including posting a public version of the notice on its website such that paper service is unnecessary. The NPRM proposed amending subsection 210.43(d)(3) to remove the explicit requirement that the Commission provide by way of direct service any such notice to the indicated agencies, thus conserving Commission resources. This change is intended to conserve Commission resources and does not relieve the Commission of its obligation under section 337(b)(2) to consult with and seek advice and information from the indicated agencies as the Commission considers appropriate during the course of a section 337 investigation.

## **Comments**

The CCCME cautions that the time limits for filing petitions for review and petition responses under the proposed rule are too short for foreign parties. The CCCME recommends allowing seven calendar days for petitions for review and five business days for petition responses.

Adduci notes that Commission rule 201.14 states that, for any deadline less than seven days, intermediate Saturdays, Sundays, and Federal legal holidays are excluded, effectively transforming a five calendar day deadline into a five business day deadline. Adduci therefore suggests the Commission modify proposed rule 210.42(a)(3) to require parties to file petitions for review of initial determinations pursuant to proposed rule 210.42(a)(3) within five business days, rather than five calendar days, thus bringing the proposed rule into conformity with the requirements of Commission rule 201.14.

The ITCWG states that it does not support the proposed changes to rule 210.43(d)(3) that would change the method by which the Commission is required to provide notice of a grant of petition for review to the designated agencies. The ITCWG states that it does not believe the conservation of Commission resources by foregoing actual service in lieu of merely posting notice of the grant on the Commission's website outweighs the burden placed on other agencies to monitor the Commission's website for relevant notices for which they may wish to provide

comment.

### **Commission Response**

With respect to proposed rule 210.43(a)(1), Adduci suggests that the rule should require that petitions for review of an initial determination ruling on a potentially dispositive issue be filed within five business days after service of the initial determination. CCCME argues that the proposed time, *i.e.* five calendar days, is too short for foreign parties. Adduci's suggestion increases the time for filing to include any subsumed weekends, thus addressing CCCME's concern. The Commission therefore has determined to amend proposed rule 210.43(a)(1) in accordance with this suggestion.

Concerning proposed rule 210.43(c), the CCCME again argues that the proposed time for responding to such a petition, *i.e.*, three business days, is too short for foreign parties. The Commission agrees and has determined that responses to petitions for review of initial determinations issued under new rule 210.42(a)(3) are due within five (5) business days of service of such petitions. The Commission therefore has determined not to adopt the proposed amendments to Commission rule 210.43(c), as the current rule, which states that responses to petitions for review of initial determinations other than those issued under 210.42(a)(1) are due within five(5) business days of service of such petition, is sufficient to capture this new deadline.

No comments were received regarding the proposed amendments to Commission rule 210.43(d)(1). The Commission has therefore determined to adopt proposed rule 210.43(d)(1) as stated in the NPRM.

Regarding proposed rule 210.43(d)(3), the Commission notes that this amendment is consistent with similar amendments discussed previously in this notice for which no comments were received. The Commission has consulted with the agencies in question and they have not requested that the Commission provide direct notice beyond its current practice. The Commission has therefore determined to adopt proposed rule 210.43(d)(3) as stated in the NPRM.

### **Section 210.47**

Section 210.47 provides the procedure by which a party may petition the Commission for reconsideration of a Commission determination. The NPRM proposed amending section 210.47 to make explicit the Commission's authority to reconsider a determination on its own initiative.

No comments concerning the proposed amendments to rule 210.47 were received. The Commission has therefore determined to adopt proposed rule 210.47 as stated in the NPRM.

### **Section 210.50**

Section 210.50, and in particular subsection 210.50(a)(4), requires the Commission to receive submissions from the parties to an investigation, interested persons, and other Government agencies and departments considering remedy, bonding, and the public interest. Subsection 210.50(a)(4) further requests the parties to submit comments concerning the public

interest within 30 days of issuance of the presiding administrative law judge's recommended determination. It has come to the Commission's attention that members of the public are confused as to whether subsection 210.50(a)(4) applies to them since the post-recommended determination provision is stated immediately after the provision requesting comments from "interested persons." The NPRM proposed amending subsection 210.50(a)(4) to clarify that the rule concerns post-recommended determination submissions from the parties. Given the variability of the dates for issuance of the public version of the recommended determinations and the general public's lack of familiarity with Commission rules, post-recommended determination submissions from the public are solicited via a notice published in the FEDERAL REGISTER specifying the due date for such public comments.

No comments concerning the proposed amendments to rule 210.50 were received. The Commission has therefore determined to adopt proposed rule 210.50(a)(4) as stated in the NPRM.

### **Section 210.75**

Section 210.75 provides for the enforcement of remedial orders issued by the Commission, including exclusion orders, cease and desist orders, and consent orders. Subsection 210.75(a) provides for informal enforcement proceedings, which are not subject to the adjudication procedures described in subsection 210.75(b) for formal enforcement proceedings. In *Vastfame Camera, Ltd. v. Int'l Trade Comm'n*, 386 F.3d 1108, 1113 (Fed. Cir. 2004), the Federal Circuit stated that the Commission's authority to conduct enforcement proceedings stems from its original investigative authority under subsection 337(b) and its authority to issue temporary relief arises under subsection 337(e). Both subsections require that the Commission afford the parties the "opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5." *Id.* at 1114-15. Subsection 210.75(a), which provides for informal enforcement proceedings, is therefore not in accordance with the Federal Circuit's holding in *Vastfame*. Accordingly, the NPRM proposed deleting subsection 210.75(a).

Subsection 210.75(b) currently provides that the Commission may institute a formal enforcement proceeding upon the filing of a complaint setting forth alleged violations of any exclusion order, cease and desist order, or consent order. The NPRM proposed amending subsection 210.75(b)(1), redesignated as 210.75(a)(1), to provide that the Commission shall determine whether to institute the requested enforcement proceeding within 30 days of the filing of the enforcement complaint, similar to the provisions recited in section 210.10(a), barring exceptional circumstances, a request for postponement of institution, or withdrawal of the enforcement complaint.

Moreover, when the Commission has found a violation of an exclusion order, the Commission has issued cease and desist orders as appropriate. The NPRM proposed amending subsection 210.75(b)(4), redesignated as 210.75(a)(4), to explicitly provide that the Commission may issue cease and desist orders pursuant to section 337(f) at the conclusion of a formal enforcement proceeding. The proposed rule would also amend subsection 210.75(b)(5), redesignated as 210.75(a)(5), to include issuance of new cease and desist orders pursuant to new subsection 210.75(a)(4).



## Current rule 210.75(a)

### Comments

Mr. Chubb questions the Commission's apparent reading of *Vastfame* as prohibiting the Commission from investigating potential violations of its remedial orders without engaging in full-blown due process adjudications under the Administrative Procedure Act. Mr. Chubb argues that such a reading would defy common sense and cripple the Commission's ability to carry out its functions. Mr. Chubb contends that if only formal enforcement proceedings under current Commission rule 210.75 were permitted, an unacceptably large proportion of potentially violative behavior would go unscrutinized, since formal enforcement proceedings would not be appropriate in every situation.

Mr. Chubb suggests that the Commission could remedy any concerns that use of the term "enforcement proceeding" in current rule 210.75(a) invokes *Vastfame* by using a different term such as "preliminary investigative activity." Mr. Chubb notes that the Commission is specifically authorized under Section 603 of the Trade Act of 1974, 19 U.S.C. 2482, to engage in such preliminary investigations. Mr. Chubb therefore recommends the Commission retain subsection 210.75(a) as a vehicle for informal investigative activity, but avoid any concerns about potential conflicts with *Vastfame* by adopting the following revised language:

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

(a) Informal investigative activities. Informal investigative activities may be conducted by the Commission, including through the Office of Unfair Import Investigations, with respect to any act or omission by any person in possible violation of any provision of an exclusion order, cease and desist order, or consent order. Such matters may be handled by the Commission through correspondence or conference or in any other way that the Commission deems appropriate. The Commission may issue such orders as it deems appropriate to implement and insure compliance with the terms of an exclusion order, cease and desist order, or consent order, or any part thereof. Any matter not disposed of informally may be made the subject of a formal proceeding pursuant to this subpart.

### Commission Response

Current section 210.75(a) states that the Commission may issue orders as a result of the "informal enforcement proceedings" provided for in the rule. 19 CFR 210.75(a). However, under *Vastfame*, the Commission's investigation of a violation of remedial orders must be considered the same as an investigation under subsection 337(b) of the statute. The Commission's authority to issue a remedy for violation of remedial orders cannot be altered merely by changing the verbiage used to describe the Commission's investigative activity. 19 U.S.C. 2482 confers authority for conducting preliminary investigations before determining whether to institute either an initial investigation or an enforcement proceeding. This section of the statute does not provide authority for the Commission to conduct investigations that may potentially result in the Commission issuing a remedy.

Based on the above discussion, the Commission has determined to adopt the proposed amendment indicated in the NPRM to delete current subsection 210.75(a).

Redesignated rule 210.75(a) (currently rule 210.75(b)(1))

**Comments**

Mr. Chubb notes that the NPRM proposes amending redesignated subsection 210.75(a)(1) to impose a 30-day deadline to institute formal enforcement proceedings after a complaint for enforcement is filed. Mr. Chubb questions the necessity of a rule providing a fixed deadline for instituting formal enforcement proceedings since, as he states, the Commission has its own incentives, through internal deadlines and its Strategic Plan, to expeditiously process enforcement complaints. Mr. Chubb notes that the rules do not specify requirements for enforcement complaints as comprehensively as they do for violation complaints. Accordingly, Mr. Chubb asserts, the Commission may need to conduct more of a pre-institution investigation in many cases and seek supplementation from the complainant, making a rigid 30-day period unworkable. Additionally, Mr. Chubb contends that under the proposed 30-day rule, the Commission's ability to comply will likely be heavily dependent on the Office of Unfair Import Investigations' informal review of draft complaints. Mr. Chubb cautions that it is unclear whether enforcement complainants will take advantage of the Office of Unfair Import Investigations' ability to review draft complaints.

Moreover, Mr. Chubb warns that the 30-day institution proposal for formal enforcement proceedings is unrealistic because it fails to take into account the right of an enforcement respondent to respond to an enforcement complaint within 15 days of service. Mr. Chubb notes that, in instituting violation investigations, the Commission does not have to address such responses, which is another factor to consider in setting a deadline for institution of enforcement complaints. Mr. Chubb therefore suggests that, if the Commission intends to impose a regulatory deadline for the institution of formal enforcement proceedings, it allow at least 45 or 60 days.

**Commission Response**

The Commission acknowledges Mr. Chubb's concerns regarding the Commission's ability to meet the 30-day institution goal for enforcement proceedings as indicated in proposed rule (as redesignated) 210.75(a)(1). The Commission, however, has committed itself to abide by a 30-day deadline in instituting formal enforcement investigations. Moreover, the revised rule allows for extending the deadline in the case of exceptional circumstances. The Commission also notes that the Office of Unfair Import Investigations does not review enforcement complaints. Moreover, enforcement complaints are served after institution and so the Commission does not consider responses to the complaint during the pre-institution period. 19 CFR 210.75(a)(1) formerly 19 CFR 210.75(b)(1).

No comments were received concerning proposed rules (as redesignated) 210.75(a)(4) and (5). The Commission has therefore determined to adopt proposed rule (as redesignated) 210.75(a) as stated in the NPRM.

## **Section 210.76**

Section 210.76 provides the method by which a party to a section 337 investigation may seek modification or rescission of exclusion orders, cease and desist orders, and consent orders issued by the Commission. The NPRM proposed amending section 210.76(a) to clarify that this section is in accordance with section 337(k)(1) and allows any person to request the Commission to make a determination that the conditions which led to the issuance of a remedial or consent order no longer exist. The NPRM also proposed adding subsection 210.76(a)(3) to require that, when the requested modification or rescission is due to a settlement agreement, the petition must include copies of the agreements, any supplemental agreements, any documents referenced in the petition or attached agreements, and a statement that there are no other agreements, consistent with rule 210.21(b)(1).

In addition, subsection 210.76(b) specifies that the Commission may institute such a modification or rescission proceeding by issuing a notice. The NPRM proposed amending subsection 210.76(b) to provide that the Commission shall determine whether to institute the requested modification or rescission proceeding within 30 days of receiving the request, similar to the provisions recited in section 210.10(a), barring exceptional circumstances, a request for postponement of institution, or withdrawal of the petition for modification or rescission. The proposed rule would further clarify that the notice of commencement of the modification or rescission proceeding may be amended by leave of the Commission. Under some circumstances, such as when settlement between the parties is the basis for rescission or modification of issued remedial orders, institution and disposition of the rescission or modification proceeding may be in a single notice.

## **Comments**

Mr. Chubb asserts the Commission's proposal to adopt a 30-day deadline for the institution of modification or rescission proceedings suffers from the same infirmities as the Commission's proposal to adopt a 30-day deadline for the institution of enforcement proceedings under proposed rule 210.75. Mr. Chubb suggests, consistent with his recommendations concerning proposed rule 210.75, that the Commission reject the proposed amendments to section 210.76 or, in the alternative, lengthen the proposed 30-day period to a 45 or 60-day period.

## **Commission Response**

No comments were received concerning proposed rule 210.76(a). With respect to Mr. Chubb's comment, the Commission has committed itself to abide by a 30-day deadline in instituting modification or rescission proceedings, but the revised rule allows for extending the deadline in the case of exceptional circumstances. The Commission has therefore determined to adopt proposed rule 210.76 as stated in the NPRM.

## **Section 210.77**

Section 210.77 provides for the Commission to take temporary emergency action pending a formal enforcement proceeding under subsection 210.75(b) by immediately and without

hearing or notice modify or revoke the remedial order under review and, if revoked, to replace the order with an appropriate exclusion order. As noted above, the Federal Circuit held in *Vastfame* that an enforcement proceeding requires that the parties be afforded an opportunity for a hearing. 386 F.3d at 1114-15. The procedure set forth in subsection 210.77 for temporary emergency action pending a formal enforcement proceeding, therefore, is not in accordance with the Federal Circuit's holding in *Vastfame*. The proposed rule would, accordingly, delete subsection 210.77.

No comments concerning the proposed deletion of rule 210.77 were received except for Mr. Chubb's, stating his approval of the proposal and noting that the provision for "temporary emergency action" has seldom if ever been used by the Commission and, as noted in the NPRM, is of questionable legality in view of *Vastfame*. The Commission has therefore determined to delete rule 210.77 and reserve it for future use as stated in the NPRM.

### **Section 210.79**

Section 210.79 provides that the Commission will, upon request, issue advisory opinions concerning whether any person's proposed course of action or conduct would violate a Commission remedial order, including an exclusion order, cease and desist order, or consent order. The NPRM proposed amending subsection 210.79(a) to provide that any responses to requests for advisory opinions shall be filed within 10 days of service. The NPRM also proposed amending subsection 210.79(a) to provide that the Commission shall institute the advisory proceeding by notice, which may be amended by leave of the Commission, and the Commission shall determine whether to institute an advisory opinion proceeding within 30 days of receiving the request barring exceptional circumstances, a request for postponement of institution, or withdrawal of the request for an advisory opinion.

### **Comments**

Mr. Chubb asserts the Commission's proposal to adopt a 30-day deadline for the institution of advisory opinion proceedings suffers from the same infirmities as the Commission's proposal to adopt a 30-day deadline for the institution of enforcement proceedings under proposed rule 210.75. Mr. Chubb suggests, consistent with his recommendations concerning proposed rule 210.75, that the Commission reject the proposed amendments to section 210.79 or, in the alternative, lengthen the proposed 30-day period to a 45 or 60-day **period**.

### **Commission Response**

The Commission again notes that it has committed itself to abide by a 30-day deadline in instituting advisory opinion proceedings, but the revised rule allows for extending the deadline in the case of exceptional circumstances. The Commission has therefore determined to adopt proposed rule 210.79 as stated in the NPRM.

### **List of Subjects in parts 201 and 210**

#### **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, the United States International Trade Commission amends 19 CFR parts 201 and 210 as follows:

**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 A—Miscellaneous**

2. Amend section 201.16 by revising paragraphs (a)(1), (a)(4), and (f) to read as follows:

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

(a) \* \* \*

(1) By mailing, delivering, or serving by electronic means a copy of the document to the person to be served, to a member of the partnership to be served, to 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 before the Commission, by mailing, delivering, or serving by electronic means a copy to such attorney; or

\* \* \*

(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. When service is by electronic means, service is complete upon transmission of a notification that the document has been placed in an appropriate repository for retrieval by the person, organization, representative, or attorney being served, unless the Commission is notified that the notification was not received by the party served.

\* \* \* \* \*

(f) *Electronic service by parties.* Parties may serve documents by electronic means in all matters before the Commission. Parties may effect such service on any party, unless that party has, upon notice to the Secretary and to all parties, stated that it does not consent to electronic service. If electronic service is used, no additional time is added to the prescribed period. However, any dispute that arises among parties regarding electronic service must be resolved by the parties themselves, without the Commission's involvement. When a document served by electronic means contains confidential business information or business proprietary information subject to an administrative

protective order, the document must be securely stored and transmitted by the serving party in a manner, including by means ordered by the presiding administrative law judge, that prevents unauthorized access and/or receipt by individuals or organizations not authorized to view the specified confidential business information.

**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 B—Commencement of Preinstitution Proceedings and Investigations**

4. Amend section 210.10 by:  
a. adding a paragraph (a)(6);  
b. revising paragraph (b) to include subparagraphs (b)(1) and (b)(2); and  
c. adding subparagraph (b)(3)  
to read as follows:

**210.10 Institution of investigation.**

(a) \* \* \*

(6) The Commission may determine to institute multiple investigations based on a single complaint where necessary to allow efficient adjudication.

(b)(1) An investigation shall be instituted by the publication of a notice in the FEDERAL REGISTER . The notice will define the scope of the investigation in such plain language as to make explicit what accused products or category of accused products provided in accordance with 210.12(a)(12) will be the subject of the investigation, and may be amended as provided in 210.14(b) and (c).

(2) The Commission may order the administrative law judge to take evidence and to issue a recommended determination on the public interest based generally on the submissions of the parties and the public under 210.8(b) and (c). If the Commission orders the administrative law judge to take evidence with respect to the public interest, the administrative law judge will limit public interest discovery appropriately, with particular consideration for third parties, and will ensure that such discovery will not delay the investigation or be used improperly. Public interest issues will not be within the scope of discovery unless the administrative law judge is specifically ordered by the Commission to take evidence on these issues.

(3) The Commission may order the administrative law judge to issue an initial determination within 100 days of institution of an investigation as provided in 210.42(a)(3) ruling on a potentially dispositive issue as set forth in the notice of investigation. The presiding administrative law judge is authorized, in accordance with 210.36, to hold expedited hearings on any such designated issue and also has discretion to stay discovery of any remaining issues during the pendency of the 100-day proceeding.

\* \* \* \* \*

5. Amend section 210.11 by revising paragraph (a)(2)(i) to read as follows:

**210.11 Service of complaint and notice of investigation.**

- (a) \* \* \*
- (2) \* \* \*
- (i) Copies of the nonconfidential version of the motion for temporary relief, the nonconfidential version of the complaint, and the notice of investigation upon each respondent; and

\* \* \* \* \*

Subpart C—Pleadings

6. Amend section 210.12 by adding a paragraph (a)(9)(xi) such that the revision reads as follows:

210.12 The complaint.

- (a) \* \* \*
- (9) \* \* \*
- (xi) The expiration date of each patent asserted.

\* \* \* \* \*

7. Amend section 210.14 by adding paragraph (h) to read as follows:

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

\* \* \* \* \*

(h) *Severance of investigation.* The administrative law judge may determine to sever an investigation into two or more investigations at any time prior to or upon thirty days from institution, based upon either a motion by any party or upon the administrative law judge’s own judgment that severance is necessary to allow efficient adjudication. The administrative law judge’s decision will be in the form of an order. The newly severed investigation(s) shall remain with the same presiding administrative law judge unless reassigned at the discretion of the chief administrative law judge. The severed investigation(s) will be designated with new investigation numbers.

Subpart D—Motions

8. Amend section 210.15 by revising paragraph (a)(2) to read as follows:

210.15 Motions.

- (a) \* \* \*
- (2) When an investigation or related proceeding is before the Commission, all motions shall be addressed to the Chairman of the Commission. All such motions shall be filed with the Secretary and shall be served upon each party. Motions may not be filed with the Commission during preinstitution proceedings except for motions for temporary relief pursuant to 210.53.

\* \* \* \* \*

9. Amend section 210.19 by revising the first sentence to read as follows:

210.19 Intervention.

Any person desiring to intervene in an investigation or a related proceeding under this part shall make a written motion after institution of the investigation or related proceeding. \* \* \*

- 10. Amend section 210.21 by
  - a. revising paragraph (b)(2);
  - b. removing subparagraph (c)(2)(i);
  - c. redesignating subparagraph (c)(2)(ii) as paragraph (c)(2);
  - d. amending subparagraph (c)(3)(ii)(A);
  - e. amending subparagraph (c)(4)(viii);
  - f. amending subparagraph (c)(4)(x)
  - g. adding subparagraph (c)(4)(xi); and
  - h. redesignating current subparagraph (c)(4)(xi) as (c)(4)(xii)
 to read as follows:

210.21 Termination of investigations.

\* \* \* \* \*

(b) \* \* \*

(2) The motion and agreement(s) shall be certified by the administrative law judge to the Commission with an initial determination if the motion for termination is granted. If the licensing or other agreement or the initial determination contains confidential business information, copies of the agreement and initial determination with confidential business information deleted shall be certified to the Commission simultaneously with the confidential versions of such documents. If the Commission’s final disposition of the initial determination results in termination of the investigation in its entirety, a notice will be published in the FEDERAL REGISTER. Termination by settlement need not constitute a determination as to violation of section 337 of the Tariff Act of 1930.

(c) \* \* \*

(2) *Commission disposition of consent order.* The Commission, after considering the effect of the settlement by consent order upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, shall dispose of the initial determination according to the procedures of 210.42 through 210.45. If the Commission’s final disposition of the initial determination results in termination of the investigation in its entirety, a notice will be published in the FEDERAL REGISTER. Termination by consent order need not constitute a determination as to violation of section 337. Should the Commission reverse the initial determination, the parties are in no way bound by their proposal in later actions before the Commission.

(3) \* \* \*

(ii) \* \* \*

(A) A statement that if any asserted patent claim, copyright, trademark, mask work, boat hull design, or unfair trade practice claim has expired or is held invalid or unenforceable by a court or agency of competent jurisdiction or if any article 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 expired, invalid, or unenforceable claim or as to any adjudicated article;

\* \* \* \* \*

(4) \* \* \*

(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 any asserted patent claims, copyright, trademark, mask work, boat hull design, or unfair trade practice claim in any administrative or judicial proceeding to enforce the Consent Order; \* \* \*

(x) A statement that if any asserted patent claim, copyright, trademark, mask work, boat hull design, or unfair trade practice claim is held invalid or unenforceable by a court or agency of competent jurisdiction or if any article 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 or adjudicated article;

(xi) An admission of all jurisdictional facts; and

(xii) 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.

\* \* \* \* \*

11. Amend section 210.25 by revising paragraphs (a)(1) and (2) to read as follows:

210.25 Sanctions.

(a)(1) Any party may file a motion for sanctions for abuse of process under 210.4(d)(1), abuse of discovery under 210.27(g)(3), failure to make or cooperate in discovery under 210.33 (b) or (c), or violation of a protective order under 210.34(c). \* \* \*

(2) The administrative law judge (when the investigation or related proceeding is before the administrative law judge) or the Commission (when the investigation or related proceeding is before it) also may raise the sanctions issue sua sponte. (See also 210.4(d)(1)(ii), 210.27(g)(3), 210.33(c), and 210.34(c).)

\* \* \* \* \*

Subpart E—Discovery and Compulsory Process

12. Amend section 210.27 by adding paragraph (e)(5) and revising paragraph (g)(3) to read as follows:

210.27 General provisions governing discovery.

\* \* \* \* \*

(e) \* \* \*

(5)(i) The provisions of 210.27(e)(1)-(4) protect drafts of expert reports, regardless of the form in which the draft is recorded.

(ii) The provisions of 210.27(e)(1)-(4) protect communications between the party’s attorney and expert witnesses concerning trial preparation, regardless of the form of the communications, except to the extent that the communications:

- (A) relate to compensation for the expert's study or testimony;
  - (B) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
  - (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. \* \* \*
  - (g) \* \* \*
  - (3) If without substantial justification a request, response, or objection is certified in violation of paragraph (g)(2) of this section, \* \* \*
- \* \* \* \* \*

13. Amend section 210.28 by revising paragraph (h)(3)(v) and adding paragraph (h)(3)(vi) to read as follows:

210.28 Depositions.

- \* \* \* \* \*
- (h) \* \* \*
  - (3) \* \* \*
  - (v) Upon application and notice, that such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the oral testimony of witnesses at a hearing, to allow the deposition to be used; or
  - (vi) Upon agreement of the parties and within the administrative law judge's discretion, the use of designated deposition testimony in lieu of live witness testimony absent the circumstances otherwise enumerated in this paragraph is permitted.
- \* \* \* \* \*

14. Amend section 210.32 by:
- a. Revising the title of paragraph (d);
  - b. adding paragraph (d)(1);
  - c. redesignating paragraph (d) as paragraph (d)(2);
  - d. revising new paragraph (d)(2); and
  - e. revising paragraph (f)(1)
- to read as follows:

210.32 Subpoenas.

- \* \* \* \* \*
- (d) *Objections and motions to quash.*
  - (1) Any objection to a subpoena shall be served in writing on the party or attorney designated in the subpoena within the later of 10 days after receipt of the subpoena or within such time as the administrative law judge may allow. If an objection is made, the party that requested the subpoena may move for a request for judicial enforcement upon reasonable notice to other parties or as otherwise provided by the administrative law judge who issued the subpoena.
  - (2) Any motion to quash a subpoena shall be filed within the later of 10 days after receipt of the subpoena or within such time as the administrative law judge may allow.
- \* \* \*
- (f) \* \* \*

(1) *Deponents and witnesses.* Any person compelled to appear in person to depose or testify in response to a subpoena shall be paid the same fees and mileage as are paid to witnesses with respect to proceedings in the courts of the United States; provided, that salaried employees of the United States summoned to depose or testify as to matters related to their public employment, irrespective of the party at whose instance they are summoned, shall be paid in accordance with the applicable Federal regulations.

\* \* \* \* \*

15. Amend section 210.34 by revising paragraph (c)(1) to read as follows:

210.34 Protective orders; reporting requirement; sanctions and other actions.

\* \* \* \* \*

(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 and the administrative law judge may permit the parties to file written submissions or present oral argument on the issues of the alleged violation of the protective order and sanctions.

\* \* \* \* \*

Subpart G—Determinations and Actions Taken

16. Amend section 210.42 by:  
a. adding paragraphs (a)(3);  
b. revising paragraph (e); and  
c. adding paragraph (h)(7)  
to read as follows:

210.42 Initial Determinations.

(a) \* \* \*

(3) *On potentially dispositive issues.* The administrative law judge shall issue an initial determination ruling on a potentially dispositive issue in accordance with a Commission order pursuant to 210.10(b)(3). The administrative law judge shall certify the record to the Commission and shall file an initial determination ruling on the potentially dispositive issue designated pursuant to 210.10(b)(3) within 100 days of institution, or as extended for good cause shown. \* \* \*

(e) *Notice to and advice from other departments and agencies.* Notice of such initial determinations as the Commission may order shall be provided to the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, U.S. Customs and Border Protection, and such other departments and agencies as the Commission deems appropriate by posting of such notice on the Commission's website. The Commission shall consider comments, limited to issues raised by the record, the initial determination, and the petitions for review, received from

such agencies when deciding whether to initiate review or the scope of review. The Commission shall allow such agencies 10 days after the posting of such notice of an initial determination on the Commission's website to submit their comments.\* \* \*

(h) *Effect.* \*\*\*

(7) An initial determination filed pursuant to 210.42(a)(3) shall become the determination of the Commission 30 days after the date of service of the initial determination, unless the Commission has ordered review of the initial determination or certain issues therein, or by order has changed the effective date of the initial determination.

\* \* \* \* \*

17. Amend section 210.43 by:
- a. revising paragraph (a)(1);
  - b. revising paragraph (d)(1); and
  - c. revising paragraph (d)(3)
- to read as follows:

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

(a) \* \* \*

(1) \* \* \* A petition for review of an initial determination issued under 210.42(a)(1) must be filed within 12 days after service of the initial determination. A petition for review of an initial determination issued under 210.42(a)(3) must be filed within five (5) business days after service of the initial determination. 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. Petitions for review of all other initial determinations under 210.42(c) must be filed within five (5) business days after service of the initial determination. A petition for review of an initial determination issued under 210.50(d)(3) or 210.70(c) must be filed within 10 days after service of the initial determination. \* \* \*

(d) \* \* \*

(1) \* \* \* The Commission shall decide whether to grant, in whole or in part, a petition for review of an initial determination filed pursuant to 210.42(a)(2) or 210.42(c), which grants a motion for summary determination that would terminate the investigation in its entirety if it becomes the final determination of the Commission, 210.50(d)(3), or 210.70(c) within 45 days after the service of the initial determination on the parties, or by such other time as the Commission may order. The Commission shall decide whether to grant, in whole or in part, a petition for review of an initial determination filed pursuant to 210.42(a)(3) within 30 days after the service of the initial determination on the parties, or by such other time as the Commission may order. The Commission shall decide whether to grant, in whole or in part, a petition for review of an initial determination filed pursuant to 210.42(c), except as noted above, within 30 days after the service of the initial determination on the parties, or by such other time as the Commission may order. \* \* \*

(3) The Commission shall grant a petition for review and order review of an initial determination or certain issues therein when at least one of the participating

Commissioners votes for ordering review. In its notice, the Commission shall establish the scope of the review and the issues that will be considered and make provisions for filing of briefs and oral argument if deemed appropriate by the Commission.

18. Amend section 210.47 by adding a sentence after the third sentence and by revising the existing fourth sentence, such that the revisions read as follows:

210.47 Petitions for reconsideration.

\* \* \* Any party desiring to oppose such a petition shall file an answer thereto within five days after service of the petition upon such party. The Commission on its own initiative may order reconsideration of a Commission determination or any action ordered to be taken thereunder. The filing of a petition for reconsideration shall not stay the effective date of the determination or action ordered to be taken thereunder or toll the running of any statutory time period affecting such determination or action ordered to be taken thereunder unless specifically so ordered by the Commission.

19. Amend section 210.50 by:

- a. revising paragraph (a)(4);
  - b. redesignating paragraphs (a)(4)(i-iv) as paragraphs (a)(4)(ii-v); and
  - c. adding new paragraph (a)(4)(i)
- to read as follows:

210. 50 Commission action, the public interest, and bonding by respondents.

\* \* \* \* \*

(a) \* \* \*

(4) Receive submissions from the parties, interested persons, and other Government agencies and departments with respect to the subject matter of paragraphs (a)(1), (a)(2), and (a)(3) of this section.

(i) After a recommended determination on remedy is issued by the presiding administrative law judge, the parties may submit to the Commission, within 30 days from service of the recommended determination, information relating to the public interest, including any updates to the information supplied under 210.8(b) and (c) and 210.14(f). Submissions by the parties in response to the recommended determination are limited to 5 pages, inclusive of attachments. This provision does not apply to the public. Dates for submissions from the public are announced in the FEDERAL REGISTER.

(ii) When the matter under consideration pursuant to paragraph (a)(1) of this section is whether to grant some form of permanent relief, \* \* \*

(iii) When the matter under consideration is whether to grant some form of temporary relief, \* \* \*

(iv) Any submission from a party shall be served upon the other parties in accordance with 210.4(g). \* \* \*

(v) The Commission will consider motions for oral argument or, when necessary, a hearing with respect to the subject matter of this section, \* \* \*

\* \* \* \* \*

Subpart I—Enforcement Procedures and Advisory Opinions

20. Amend section 210.75 by:
- a. removing paragraph (a); and
  - b. redesignating paragraph (b) as paragraph (a), including all subparagraphs;
  - c. adding new paragraphs (a)(1)(i)–(iv);
  - d. adding new paragraph (a)(4)(iv);
  - e. revising new paragraph (a)(5); and
  - f. redesignating paragraph (c) as paragraph (b)
- to read as follows:

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

- (a) *Formal enforcement proceedings.*
- (1) The Commission may institute an enforcement proceeding \* \* \*
- (i) The determination of whether to institute shall be made within 30 days after the complaint is filed, unless—
  - (A) Exceptional circumstances preclude adherence to a 30-day deadline;
  - (B) The filing party requests that the Commission postpone the determination on whether to institute an investigation; or
  - (C) The filing party withdraws the complaint.
- (ii) If exceptional circumstances preclude Commission adherence to the 30-day deadline for determining whether to institute an investigation on the basis of the complaint, the determination will be made as soon after that deadline as possible.
- (iii) If the filing party desires to have the Commission postpone making a determination on whether to institute an investigation in response to the complaint, the filing party must file a written request with the Secretary. If the request is granted, the determination will be rescheduled for whatever date is appropriate in light of the facts.
- (iv) The filing party may withdraw the complaint as a matter of right at any time before the Commission votes on whether to institute an enforcement proceeding. To effect such withdrawal, the filing party must file a written notice with the Commission. \*
- \* \*
- (4) \* \* \*
- (iv) Issue a new cease and desist order as necessary to prevent the unfair practices that were the basis for originally issuing the cease and desist order, consent order, and/or exclusion order subject to the enforcement proceeding.
- (5) Prior to effecting any issuance, modification, revocation, or exclusion under this section, the Commission shall consider the effect of such action upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. \* \* \*
- (b) *Court enforcement.* \* \* \*
- \* \* \* \* \*

21. Amend section 210.76 by:
- a. revising the caption;
  - b. revising paragraph (a)(1);
  - c. adding paragraph (a)(3); and
  - d. adding new paragraph (b)(1)–(5)

to read as follows:

210.76 Modification or rescission of exclusion orders, cease and desist orders, consent orders, and seizure and forfeiture orders.

(a) *Petitions for modification or rescission of exclusion orders, cease and desist orders, and consent orders.*

(1) Whenever any person believes that changed conditions of fact or law, or the public interest, require that an exclusion order, cease and desist order, or consent order be modified or set aside, in whole or in part, such person may request, pursuant to section 337(k)(1), that the Commission make a determination that the conditions which led to the issuance of an exclusion order, cease and desist order, or consent order no longer exist. The Commission may also on its own initiative consider such action. The request shall state the changes desired and the changed circumstances or public interest warranting such action, shall include materials and argument in support thereof, and shall be served on all parties to the investigation in which the exclusion order, cease and desist order, or consent order was issued. Any person may file an opposition to the petition within 10 days of service of the petition. If the Commission makes such a determination, it shall notify the Secretary of the Treasury and U.S. Custom and Border Protection. \* \* \*

(3) If the petition requests modification or rescission of an order issued pursuant to section 337 (d), (e), (f), (g), or (i) of the Tariff Act of 1930 on the basis of a licensing or other settlement agreement, the petition shall contain copies of the licensing or other settlement agreements, any supplemental agreements, any documents referenced in the petition 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. 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 or the Commission may limit the service of the agreements to the settling parties and the Commission investigative attorney.

(b) \* \* \*

(1) The determination of whether to institute shall be made within 30 days after the petition is filed, unless—

- (i) Exceptional circumstances preclude adherence to a 30-day deadline;
- (ii) The petitioner requests that the Commission postpone the determination on whether to institute a modification or rescission proceeding; or
- (iii) The petitioner withdraws the petition.

(2) If exceptional circumstances preclude Commission adherence to the 30-day deadline for determining whether to institute a modification or rescission proceeding on the basis of the petition, the determination will be made as soon after that deadline as possible.

(3) If the petitioner desires to have the Commission postpone making a determination on whether to institute a modification or rescission proceeding in response to the petition, the petitioner must file a written request with the Secretary. If the request is granted, the determination will be rescheduled for a date that is appropriate in light of the facts.

(4) The petitioner may withdraw the complaint as a matter of right at any time before the Commission votes on whether to institute a modification or rescission proceeding. To effect such withdrawal, the petitioner must file a written notice with the Commission.

(5) The Commission shall institute a modification or rescission proceeding by publication of a notice in the FEDERAL REGISTER. The notice will define the scope of the modification or rescission proceeding and may be amended by leave of the Commission.

\* \* \* \* \*

22. Remove and reserve section 210.77.

23. Amend section 210.79 by revising paragraph (a) and adding paragraphs (a)(1)-(5) to read as follows:

210.79 Advisory opinions.

(a) *Advisory opinions.* Upon request of any person, the Commission may, upon such investigation as it deems necessary, issue an advisory opinion as to whether any person's proposed course of action or conduct would violate a Commission exclusion order, cease and desist order, or consent order. Any responses to a request for an advisory opinion shall be filed within 10 days of service of the request. The Commission will consider whether the issuance of such an advisory opinion would facilitate the enforcement of section 337 of the Tariff Act of 1930,

\* \* \*

(1) The determination of whether to issue an advisory opinion shall be made within 30 days after the petition is filed, unless—

(i) Exceptional circumstances preclude adherence to a 30-day deadline;

(ii) The requester asks the Commission to postpone the determination on whether to institute an advisory proceeding; or

(iii) The petitioner withdraws the request.

(2) If exceptional circumstances preclude Commission adherence to the 30-day deadline for determining whether to institute an advisory proceeding on the basis of the request, the determination will be made as soon after that deadline as possible.

(3) If the requester desires that the Commission postpone making a determination on whether to institute an advisory proceeding in response to its request, the requester must file a written request with the Secretary. If the request is granted, the determination will be rescheduled for whatever date is appropriate in light of the facts.

(4) The requester may withdraw the request as a matter of right at any time before the Commission votes on whether to institute an advisory proceeding. To effect such withdrawal, the requester must file a written notice with the Commission.

(5) The Commission shall institute an advisory proceeding by publication of a notice in the FEDERAL REGISTER. The notice will define the scope of the advisory opinion and may be amended by leave of the Commission.

\* \* \* \* \*



By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton  
Secretary to the Commission

Issued: April 26, 2018