



THINK FORWARD

U.S. International Trade Commission Amends Procedural Rules to Limit Discovery, Increase Transparency and Streamline Investigations

May 17, 2013

On April 19, 2013, the U.S. International Trade Commission (ITC) published Final Rules of Practice and Procedure (78 Fed. Reg. 23474-487). The final rules amend certain rules concerning general application (19 C.F.R. 201) and rules concerning adjudication and enforcement (19 C.F.R. 210). The new rules are effective on May 20, 2013. The amendments only apply to Section 337 investigations instituted on or after June 10, 2013, but Administrative Law Judges are free to adopt some or all of the new rules in their Ground Rules for pending cases and are encouraged to seek guidance from the new rules. The following is a summary of the most notable amendments.

Limiting Discovery: The Commission has amended Rules 210.28 and 210.29 to limit the number of depositions and interrogatories that parties to Section 337 investigations may take:

- **§210.28 – Depositions:** Complainants as a group may take a maximum of five (5) depositions per respondent and no more than 20 fact depositions, whichever is greater. Respondents as a group may take a maximum of 20 fact depositions total. If the Commission investigative attorney is a party, he or she may take a maximum of 10 fact depositions and is permitted to participate in all depositions taken by the parties. Each corporate deposition notice counts as one deposition, regardless of the number of corporate designees, and related respondents are treated as one respondent for purposes of this rule. The Commission clarified that the recipient of a deposition notice must make any objections within 10 days of service, but need not otherwise respond or identify corporate designees within this time frame.
- **§210.29 – Interrogatories:** Parties may serve no more than 175 interrogatories on another party, including subparts. Related respondents are treated as one entity for purposes of this rule.

Improving Public Notice: The Commission has amended Rules 210.8 and 210.12 for public notice and informational purposes, to require complainants in Section 337 investigations to provide more detailed allegations in the complaint and to impose a deadline for filing public versions of submissions regarding the public interest:

- **§210.12 – Complaint:** The complaint must include a statement as to whether an alleged domestic industry exists or is in the process of being established, and a detailed description of the relevant domestic industry (i.e. facts showing significant or substantial investment and employment, or facts showing that the complainant is actively engaged in the steps leading to the exploitation of its intellectual property right and that there is a significant likelihood that an industry will be established in the future). The complaint must also contain a statement specifying whether a limited exclusion order, general exclusion order, and/or cease and desist orders are being requested. Finally, the complaint must include a statement in “plain English” describing the type of products being accused (e.g., mobile devices, tablets or computers) for public notice and informational purposes. The Commission has clarified that the plain English statement will not be included in the notice of

investigation and the scope of the investigation will continue to be defined by the notice of investigation, not by the complaint.

- **§210.8 – Pre-institution Proceedings:** The public version of a submission regarding public interest shall be filed no later than one (1) business day after the deadline for filing the submission.

Increasing Transparency: The Commission has amended Rules 210.5 and 210.21 to require parties to justify any proposed redactions to orders or opinions, as well as to obligate parties to provide copies of any settlement or license agreements that form the basis of motions for termination:

- **§210.5 – Confidential Business Information:** The public version of a confidential order, determination or opinion by the Commission or the presiding Administrative Law Judge (ALJ) shall issue within 30 days of issuance of the confidential version. Upon request by the Commission or the ALJ, parties must provide support in the record for claims of confidentiality for any proposed redactions to a confidential order, determination or opinion.
- **§210.21 – Termination of Investigations:** Motions for termination based on withdrawal of the complaint, good cause, settlement or consent order shall contain copies of any licensing or other settlement agreement between the parties concerning the subject matter of the investigation. The ALJ may limit service of the agreements to the parties and the Commission investigative attorney for good cause shown.

Streamlining Procedures: The Commission has amended Rules 201.16, 210.14 and 210.16 to clarify that the Commission may use overnight delivery to effectuate service, to codify the deadline for institution of an investigation when a complainant files an amended complaint during the pre-institution period, and to create a new avenue for respondents to provide notice of their intent to default:

- **§201.16 – Service of Process:** Defines “service by express delivery” as a method that would provide delivery by the next business day within the U.S., or a method that would provide the equivalent service when the delivery is to a foreign location. One (1) day is added to the prescribed period for responding to a document served by “express delivery” if the service is to the U.S., and five (5) days are added when “express delivery” is to a destination outside the U.S. No additional time to respond is provided when electronic service is used.
- **§210.14 – Amendments to Pleadings:** If a complainant seeks to amend the complaint to add a respondent or assert an additional unfair act (e.g., a new patent or patent claim) during the pre-institution period, the complaint shall be treated as if had been filed on the date the amendment is filed for purposes of the 30-day period provided for the Commission to determine whether to institute an investigation.
- **§210.16 – Default:** A respondent may file a notice of intent to default, which eliminates the need for the ALJ to issue an order to show cause why the respondent should not be found in default.

Clarifying Time Limits: The Commission has amended Rules 210.42, 210.51 and 210.75 to set deadlines for ALJs to set target dates and issue initial determinations, as well as to clarify that enforcement proceedings are conducted according to the same procedures as original investigations:

- **§210.42 – Initial Determinations:** In an original investigation, the ALJ shall certify the record and file an initial determination on whether there is a violation of Section 337 no later than 4 months before the target date.
- **§210.51 – Period for Concluding Investigation:** The ALJ shall issue an order setting a target date within 45 after institution of an original investigation. For original investigations, if the target date does not exceed 16 months from the date of institution, the order of the ALJ is final. If the target date exceeds 16 months, the order is subject to interlocutory review. The same applies to enforcement proceedings depending on whether the target date exceeds 12 months from the date of institution.
- **§210.75 – Enforcement Proceedings:** Proceedings to enforce exclusion orders, cease and desist orders, consent orders and other

Commission orders are authorized as investigations on whether there is a violation of Section 337 and are conducted in accordance with the laws for original investigations. The Commission may hold a public hearing and delegate the hearing to an ALJ, who shall certify an initial determination to the Commission no later than three (3) months before the target date.

* * *

This Client Alert is intended to provide information of general interest to the public and is not intended to offer legal advice about specific situations or problems. Brinks Gilson & Lione does not intend to create an attorney-client relationship by offering this information and review of the information shall not be deemed to create such a relationship. You should consult a lawyer if you have a legal matter requiring attention. For further information, please contact a Brinks Gilson & Lione lawyer.