

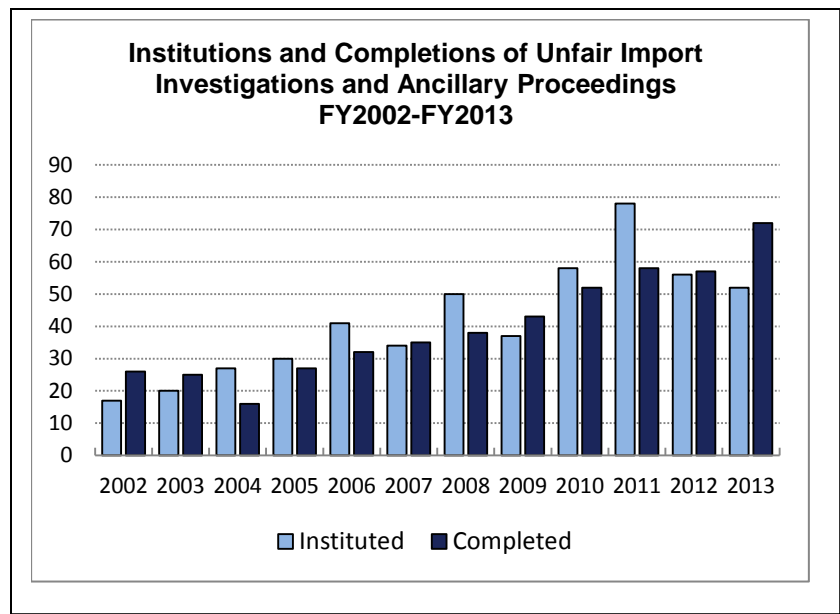
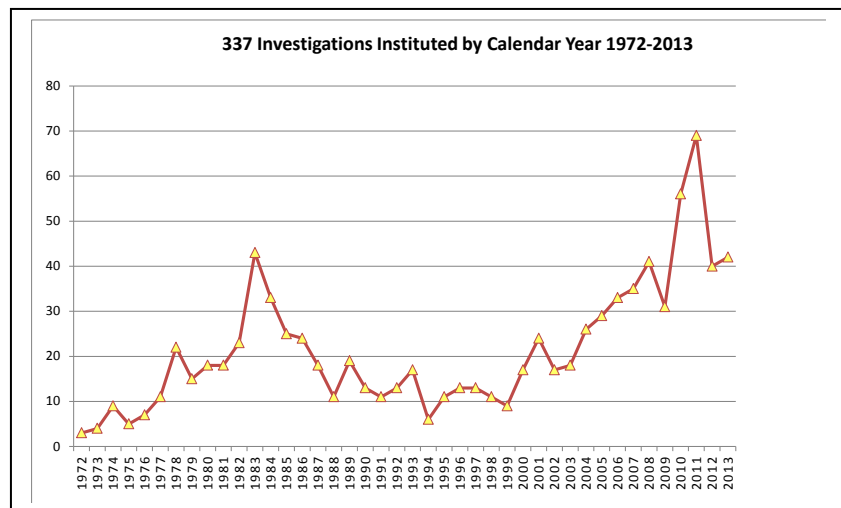
## USITC SECTION 337 INVESTIGATIONS – FACTS AND TRENDS REGARDING CASELOAD AND PARTIES

*Prepared by the U.S. International Trade Commission*

The U.S. International Trade Commission (USITC) adjudicates allegations of unfair methods of competition and unfair acts involving imported articles under Section 337 of the Tariff Act of 1930 as amended, 19 U.S.C. § 1337. Most Section 337 investigations involve allegations of infringement of patents or other intellectual property rights. Facts and trends regarding certain aspects of Section 337 proceedings are provided below.

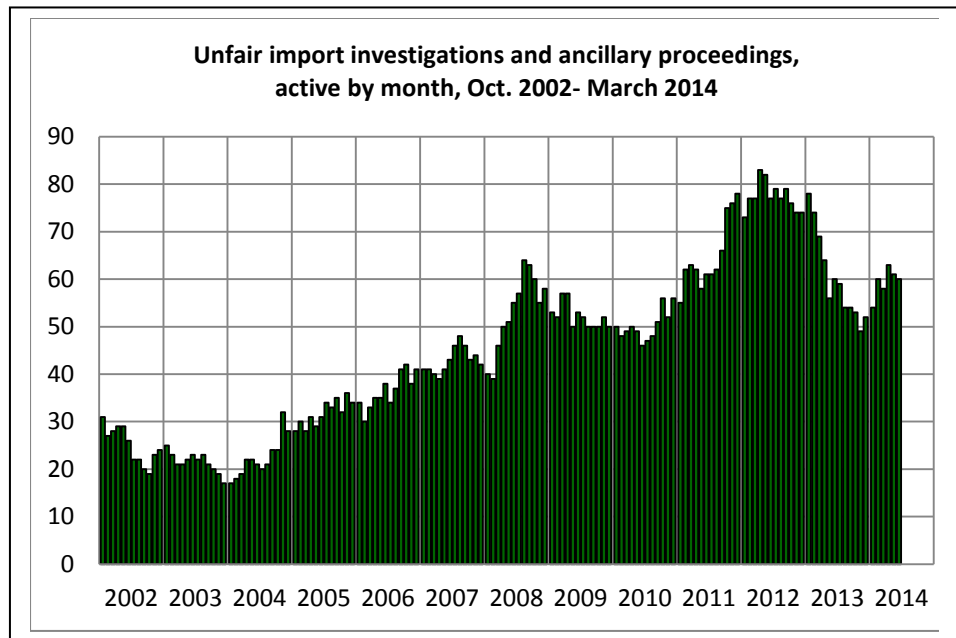
### 1. Caseload

The number of new Section 337 investigations instituted by the Commission has remained at elevated levels over the past several years. New investigations peaked in calendar year 2011 at 69 investigations. In 2013, 42 new investigations were instituted. In the first quarter of 2014, the Commission instituted eight new investigations.

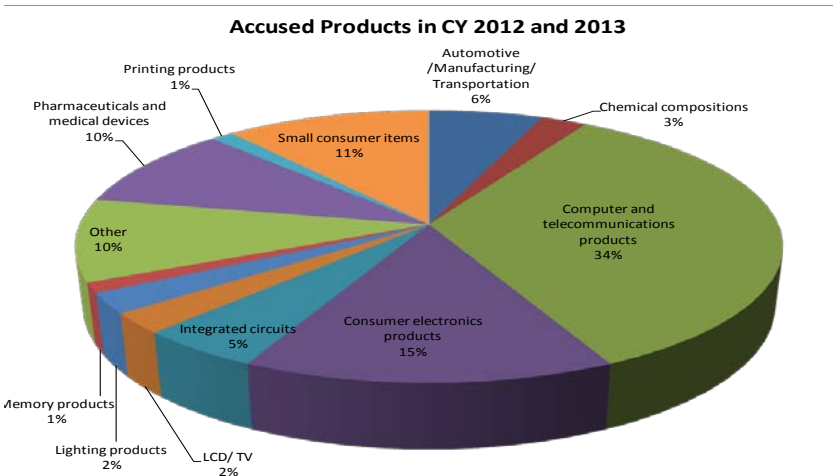


The number of ancillary proceedings has been increasing in recent years. Considered on a fiscal year basis, the total number of investigations (new plus ancillaries) instituted in FY 2013 remained high relative to historical caseloads: 39 new investigations and 13 new ancillary proceedings were instituted. Seventy-two investigations were completed during FY 2013, the highest level ever.

During FY 2013, there were 124 active investigations and ancillary proceedings, as compared to 103 in FY 2010. The number of active proceedings per month has nearly tripled since FY 2004 with an average of 60 per month in FY 2013 and YTD 2014 as compared to an average of 22 active per month in 2004.



A substantial number of Section 337 investigations involve IP-based matters regarding high tech products. For investigations instituted in calendar years 2012 and 2013, for example, computer and telecommunications products accounted for about 30 percent of new investigations in 2012 and about 38 percent in 2013;



and telecommunications products accounted for about 30 percent of new investigations in 2012 and about 38 percent in 2013; other consumer electronic products accounted for about 23 percent of new investigations in 2012 and about 7 percent of new investigations in 2013. However, Section 337 investigations also involved a wide range of other types of products. For example, small consumer items

accounted for about 10 percent of new investigations in 2012 and about 12 percent in 2013; and pharmaceuticals and medical devices accounted for about 5 percent of new investigations in 2012 and about 14 percent in 2013.

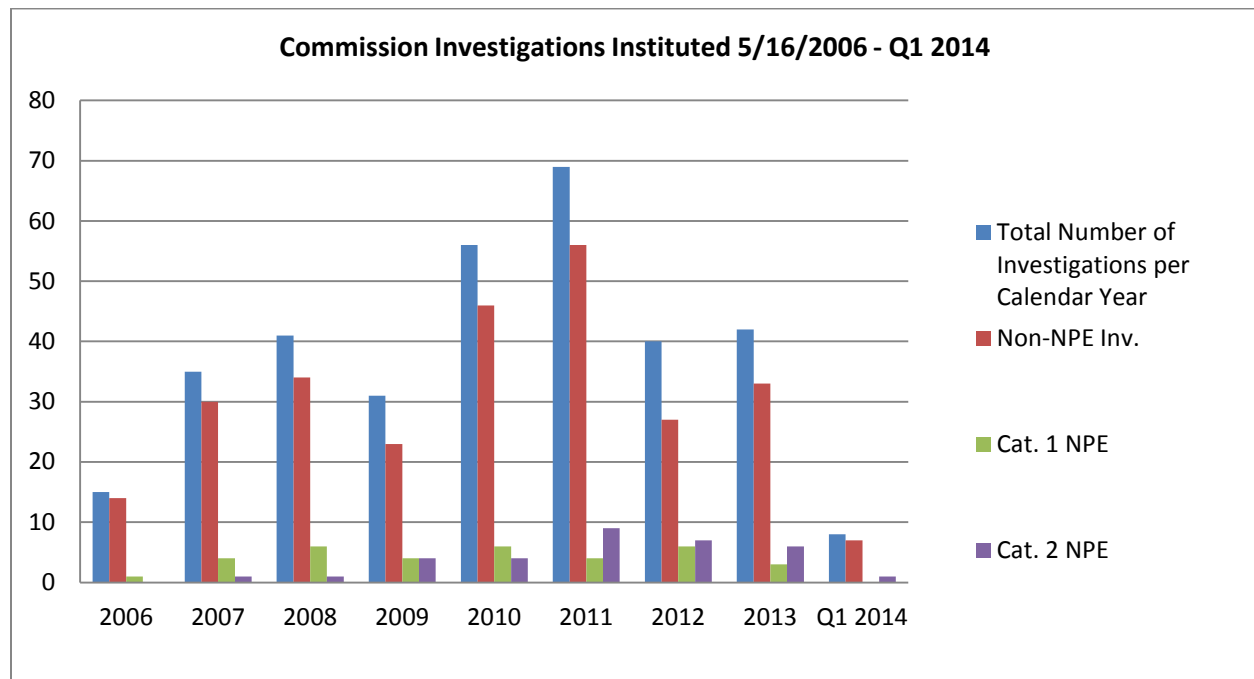
## 2. Domestic Industry Requirements & Non-Practicing Entities

An essential element of a Section 337 violation is the domestic industry requirement. The complainant must show that it has made sufficient investments in the United States with respect to articles protected by the IP right concerned. The statute was amended in 1988 to allow IP rights-holders that do not manufacture products (*i.e.*, non-practicing entities or NPEs) to obtain remedies at the USITC. Congress made note in amending the statute that inventors, universities, start-ups, and other entities that conduct research and development, engineering, or licensing activities are equally entitled to Section 337 relief as are manufacturing industries. Complainants must also show that there is an article that practices the IP right concerned.

An issue receiving some attention is whether certain NPEs should be permitted to obtain relief against infringing imports at the USITC. No commonly understood definition of an NPE exists. For analytical purposes, the Commission used the following categories:

- Category 2 NPEs. Entities that do not manufacture products that practice the asserted patents and whose business model primarily focuses on purchasing and asserting patents.
- Category 1 NPEs. All other entities that do not manufacture products that practice the asserted patents, including inventors who may have done R&D or built prototypes but do not make a product covered by the asserted patents and therefore rely on licensing to meet the domestic industry requirement; research institutions, such as universities and laboratories, that do not make products covered by the patents, and therefore rely on licensing to meet the domestic industry requirement; start-ups that possess IP rights but do not yet manufacture products that practice the patent; and manufacturers whose own products do not practice the asserted patents.

Some commentators have suggested that NPE filings, particularly Category 2 NPE filings, in the wake of the U.S. Supreme Court's decision in *eBay, Inc. v. MercExchange, LLC* (which made injunctions more difficult to obtain in district courts) account for the increased caseload at the USITC, but the data concerning NPE filings show the following:



- Since the *eBay* decision on May 15, 2006, the USITC instituted a total of 337 Section 337 investigations through the first quarter of 2014. Of these, Category 1 NPEs accounted for 34 (or 10 percent). Category 2 NPEs accounted for 33 (or 10 percent).
- Since the *eBay* decision issued, only four NPEs were successful in obtaining exclusion orders: two Category 1 NPEs and two Category 2 NPEs. In each of these four investigations, the involved NPE or its subsidiary developed the technology at issue in the investigation.

### 3. Settlements

Public policy favors settlement of disputes. The USITC offers a mediation program that is modeled on the U.S. Court of Appeals for the Federal Circuit’s mediation program and is available to all parties in Section 337 investigations. To date in FY 2014, 91 parties in 20 investigations have sought mediation through this program.

Nearly half of all investigations instituted at the USITC ultimately terminate based on settlements or consent orders as the data below indicate. Due to the relatively small number of NPE investigations, data breaking out settlements by complainant category appear inconclusive, but the data do not show a higher settlement rate for NPE investigations compared to non-NPE investigations.

<b>Settlements (5/16/2006 to Q1 2014)</b>			
	<b>Number of Completed Inv.</b>	<b>Number of Settled Inv.</b>	<b>Settlement Rates</b>
<b>Total Inv.</b>	306	142	46.4%
<b>Cat. 1 NPEs</b>	33	10	30.3%
<b>Cat. 2 NPEs</b>	28	14	50.0%
<b>All NPEs</b>	61	24	39.3%
<b>All Other</b>	245	118	48.2%

4. Number of Respondents

USITC jurisdiction and remedies are *in rem*, directed to the imported articles in issue. In 2008, the U.S. Court of Appeals for the Federal Circuit, in *Kyocera v. Int'l Trade Comm'n*, rejected the USITC's long-standing practice of including within the scope of its remedial orders not only infringing components but also downstream products containing such components that were manufactured by non-parties who were not named respondents in its investigations. As a result of this decision, commentators have observed increased numbers of named respondents because complainants cannot rely on the pre-*Kyocera* USITC practice to reach non-party downstream products containing accused components.

Data concerning named respondents show great variability across all investigations. The table below shows the range of numbers of named respondents in USITC investigations. These data include all named respondents regardless of whether the named entities are related. In 2013, for example, investigations instituted based on complaints filed by Category 1 NPEs ranged from 3 to 15 respondents; Category 2 NPE investigations ranged from 2 to 21 respondents; and all other investigations ranged from 1 to 24 respondents.

<b>Range of Number of Respondents Investigations Instituted 5/16/2006 - Q1 2014</b>			
<b>YEAR</b>	<b>Category 1 NPEs</b>	<b>Category 2 NPEs</b>	<b>All Other</b>
<b>2006</b>	4	0	1-21
<b>2007</b>	2-7	1	1-46
<b>2008</b>	4-40	17	1-36
<b>2009</b>	3-6	3-17	1-22
<b>2010</b>	1-20	2-11	1-32
<b>2011</b>	4-50	4-35	1-30
<b>2012</b>	2-35	2-45	1-35
<b>2013</b>	3-15	2-21	1-24
<b>Q1 2014</b>	0	10	1-11

The average number of respondents over all investigations instituted from May 16, 2006 through the first quarter of 2014 is 7.5 respondents per investigation. The average number of respondents by complainant category during this period is: Category 1 NPE -- 10.1 respondents; Category 2 NPE -- 14.1 respondents; and All Others -- 6.4 respondents. Due to the relatively small number of NPE investigations, data for average numbers of respondents per investigation by complainant category appear inconclusive. Data concerning the total number of named respondents likewise indicate that the number of named respondents varies substantially from year to year across all complainant categories as shown below.

