



# Supplement to the Strategic Human Capital Plan 2009-2013



January 2011

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**Commissioners:**

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## UNITED STATES INTERNATIONAL TRADE COMMISSION

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WASHINGTON, DC 20436

CO76-JJ-001  
January 18, 2011

### MEMORANDUM

**TO:** COMMISSION STAFF

**FROM:** The Chairman

**SUBJECT:** Supplement to the Commission's Strategic Human Capital Plan 2009-2013 Regarding Certain Offices (OALJ, OGC, OUII), Not Adopted in the January 29, 2010 Plan

I am pleased to present to you the Commission's supplement to the Strategic Human Capital Plan 2009-2013 (Plan), approving plans for certain offices – Office of the Administrative Law Judges (OALJ), Office of the General Counsel (OGC), and Office of Unfair Import Investigations (OUII) – not adopted in the January 29, 2010 Plan. Human capital is the Commission's most important resource, so planning for an appropriate workforce is essential to the fulfillment of the Commission's mission.

While the January 2010 Plan described proposals for offices with responsibilities for Section 337 activities, the Commission did not approve final staffing plans for the OALJ, OGC, and OUII. This was because in early 2009, in connection with its work on the five-year Plan and in recognition of both the rising caseload and the increasing commitment of agency resources to Operation No. 2 (Intellectual Property-Related Investigations), the Commission determined a more comprehensive review was necessary.<sup>1</sup>

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<sup>1</sup> Operation 2 primarily involves the efforts of Commission Administrative Law Judges (ALJ) and their law clerks, attorneys from OUII and OGC, and Commissioners and their staffs. Attorneys in the various offices that work on substantive section 337 issues have technical and intellectual property law expertise. While the Office of Docket Services also has significant involvement in Operation 2, a final staffing plan for Docket Services already was approved in the January 2010 Plan.

*The Commission's strategic goal is to conduct intellectual property-based import investigations in an expeditious, technically sound, and transparent manner, and provide for effective relief when relief is warranted, to support a rules-based international trading system.*

The section 337 caseload has grown substantially in recent years. The number of section 337 matters that were active during the course of a year and the number of new section 337 investigations have both more than doubled in the last seven fiscal years, from 41 active matters in FY2003 to 103 active matters in FY2010, and 19 new section 337 investigations in FY2003 to a record level of 51 in FY2010. This enhanced level of section 337 activity is expected to continue for at least the next several years. Indeed, the Commission has now become widely recognized as an important forum for the resolution of patent-based disputes involving imported goods, due both to the relative speed of the proceedings and the attractiveness to many prospective complainants of section 337 remedial orders. As the number and complexity of section 337 investigations has grown over the past decade, the Commission has allocated a substantially increasing share of its resources to Operation 2. Commission expenditures on Operation 2 as a share of its total expenditures have increased from about 12 percent in 2001 to 26 percent in 2010.

After conducting a thorough review of section 337 operations generally, the Commission has determined that an increase in the share of agency resources devoted to OUII is not feasible or warranted in light of government-wide budgetary limitations, and the need to adequately fund other agency operations. Achieving the Commission's goals of adjudicating section 337 matters professionally and expeditiously requires a balance of funding for all offices involved in section 337 matters including the Office of Administrative Law Judges and the Office of the General Counsel.

Therefore, the Commission has adopted the following changes:

– ***Office of the Administrative Law Judges:*** In view of the complexity of the section 337 docket, the large volumes of commerce at stake in most section 337 investigations, and the fast pace of 337 litigation, the Commission has determined to provide more support for the ALJs. The Commission will increase the number of well-qualified attorney-advisors available to its ALJs. Specifically, the Commission expects to transition to an arrangement wherein each ALJ may hire two attorney-advisors and the pool of floating attorneys is gradually phased out. To recruit and retain the most qualified attorney-advisors, the position descriptions will be revised to allow for promotion to GS-15.

Moreover, in order to address expected recruiting needs, given the number of ALJs who are retirement-eligible, the Commission will continue to seek greater flexibility in the range of the ALJ applicants it may consider when filling future positions. The Commission also will continue its pilot mediation program in an effort to facilitate the settlement of disputes and thereby reduce the number of section 337 investigations that proceed to trial.

– **Office of General Counsel:** OGC has experienced a significant overall increase in workload as the number of section 337 investigations and the resultant litigation caseload has increased. The Commission has determined to permit OGC to add two patent attorneys to its permanent staff, by converting one patent attorney over-hire FTE and adding another patent attorney FTE.

– **Office of Unfair Import Investigations:** OUII’s ability to continue to provide its expertise and make valuable contributions to the adjudicatory process is challenged by the increasing size and complexity of the section 337 caseload. The governing statutes do not prescribe the precise role or extent of involvement of investigative attorneys in section 337 proceedings (at least in contested *inter partes* investigations).<sup>2</sup> The Commission notes, however, that there are a number of situations in which participation of an OUII attorney supports our strategic goals (including expeditious adjudication of investigations). For example, in cases with significant issues peculiar to section 337 (such as domestic industry or public interest) or cases with only limited respondent participation, the participation of OUII is likely to aid the decision-making process.

Accordingly, it is now clear that OUII’s mission and staffing model must be adapted to changing circumstances, just as they were after the 1988 amendments to 19 U.S.C. § 1337.<sup>3</sup> OUII will enter a transitional period during which it will, on a trial basis, implement a number of alternative staffing approaches, the effectiveness of which will be evaluated by the Commission periodically. OUII will give the highest priority to certain functions that draw upon its particular expertise while eliminating or reducing efforts devoted to other functions. For instance, OUII will continue to review draft complaints prior to filing and advise the Commission on whether to institute investigations. Once an investigation is instituted, the Commission requests that OUII place the highest priority on issues unique to section 337 and continue its efforts: a) to ensure that the investigation record is fully developed, b) to resolve procedural disputes without the need to resort to the presiding ALJ, and c) to facilitate settlement.

In its current staffing model, an OUII attorney participates in all or nearly all of the matters/issues arising in an assigned case. OUII will continue this model for a share of its cases. However, as part of the effort to adapt staffing models to focus on priority issues, OUII will explore and implement two other staffing approaches for a share of its cases in the short-to-medium term. First, in certain investigations, OUII will participate in a selective manner on those issues on which it is able to provide the greatest added value and expertise. Second, OUII will cease to be a party altogether in a subset of section 337 cases, which are less likely to draw upon its expertise. It is important to note that the decision to refocus OUII’s priorities and functions is in no way an adverse reflection on the quality or importance of OUII’s past contributions, but rather an effort by the Commission to take a balanced approach to adequately funding the ITC’s statutory missions and meeting government-wide obligations in a prudent, fiscally responsible manner.

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<sup>2</sup> Neither the Tariff Act of 1930 nor the Administrative Procedure Act (APA) generally require use of an investigative attorney to satisfy the Commission’s section 337 investigative responsibilities.

<sup>3</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342 (1988).

The Commission will allow the vacant supervisory slot to be filled, and two attorney advisors brought on pursuant to over-hire authority to remain. However, the number of attorney advisor FTEs will be allowed to fall from the current 17 (which includes the two over-hires) to 15 through attrition.

– ***Other Commission Actions:*** The Commission also plans to undertake other actions to strengthen Operation 2, including: 1) have its Chief Information Officer develop an investigative tracking system, consulting with OUII, OALJ, OGC, and Dockets; and 2) implement and expand hiring and training programs to better align staff skills with responsibilities.

# Office of Administrative Law Judges

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2010 Human Capital Plan

## Introduction

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*The Commission's strategic goal is to conduct intellectual property-based import investigations in an expeditious, technically sound, and transparent manner, and provide for effective relief when relief is warranted, to support a rules-based international trading system.*

The Commission adjudicates complaints brought under section 337 of the Tariff Act of 1930 that allege infringement of U.S. intellectual property rights and other unfair methods of competition in connection with imported goods. The Commission thereby facilitates a rules-based international trading system by providing a fair and transparent forum for the adjudication of section 337 disputes. Section 337 investigations are conducted in accordance with the Administrative Procedure Act, which affords the parties the opportunity to conduct discovery, present evidence, and make legal arguments before an Administrative Law Judge (ALJ) and ultimately the Commission. Section 337 investigations also protect the public interest and expeditiously provide the parties with determinations.

The Office of Administrative Law Judges plays an integral part in the administration of section 337 investigations (Operation 2) at the U.S. International Trade Commission. ALJs preside over section 337 investigations and issue initial determinations on issues of violation and recommended determinations on remedy, bonding, and, occasionally, the public interest. Although their determinations are subject to review by the Commission, the contribution of the Office of ALJs is indispensable to the competent and efficient administration of Operation 2.

## Challenges

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### *Increased Size and Complexity of Section 337 Caseload*

In recent years, the section 337 landscape has changed substantially. Since FY 2003 (when there were 19 new section 337 investigations), the number of new section 337 complaints has increased quite steeply – climbing to more than 30 in both FY2006 and FY2007, and still further to 43 new complaints in FY 2008. The number of new section 337 matters fell somewhat in FY 2009, but rose to a record level of 51 in FY 2010. The number of section 337 matters active during the course of a year has also increased substantially, more than doubling in the last seven fiscal years, from 41 active matters in FY 2003 to 85 active matters in FY 2009 and to 103 active matters in FY 2010. This enhanced level of section 337 activity

is expected to continue for at least the next several years. Indeed, the Commission has now become widely recognized as an important forum for the resolution of patent-based disputes involving imported goods, due both to the relative speed of the proceedings and the attractiveness to many prospective complainants of section 337 remedial orders. In recent years, the Commission's administrative law judges have presided over approximately one in seven patent trials conducted in the United States.

Many section 337 investigations focus upon complex patented technology, often involving multiple patents and many asserted claims per patent. Patents in the electronic, computer and telecommunication areas have tended to dominate the docket. Product and process patents in the chemical and medical fields, as well as patents covering a wide range of mechanical/ industrial technologies, are also commonly asserted in section 337 investigations.

A substantial portion of section 337 investigations involve multiple unrelated respondents, which also adds to the complexity of the docket because it usually requires the examination and adjudication of multiple claim constructions and infringement analyses. Also, the presence of unaffiliated respondents often translates into an extensive motions practice. Recent appellate rulings have led to both an increase in the number of respondents in certain types of cases that previously involved relatively few respondents, and to the development of more extensive evidentiary records on remedy issues. As the complexity of the section 337 docket continues to increase, the workload demands associated with that docket are expected to intensify.

## Workload

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### *Present Workload*

The section 337 caseload remains at or near an historic high. While the number of active 337 matters was 41 as recently as FY 2003, that figure was more than twice as high in FY 2008 and FY 2009, and set a new high of 103 in FY 2010. While average ALJ caseloads have historically fluctuated in the range of 8 to 14 cases per year, they exceeded 21 cases per ALJ in FY 2008. With the net addition of two ALJs in FY 2009, average caseloads fell temporarily to 14.6, but increased to 17.2 in FY 2010.

### *Future Workload*

As noted above, the ITC is now widely recognized as an important forum for the adjudication of patent-based disputes involving imported goods. A number of factors make it unclear whether OALJ's workload for the years beyond FY 2010 will rise or fall. Factors that may lead to a rise include recent appellate court decisions that may spur additional filings by non-manufacturing entities, and the increased focus on soliciting comments on public interest issues. On the other hand, the continued implementation of the Commission's

section 337 mediation program may lead to fewer section 337 matters proceeding to trial. Further uncertainty is introduced by the current economic climate, which could lead to additional filings and/or cause complainants to streamline their cases to achieve cost savings. Nevertheless, factors that have been linked to the increase in section 337 filings in recent years, including specialized expertise, relatively speedy adjudications as compared to most district courts, and exclusion orders enforced by Customs at the border, remain in place, and continued growth in the caseload is anticipated in FY 2011. Accordingly, the section 337 workload will presumably remain quite heavy for the foreseeable future and the concomitant demands upon OALJ are not likely to abate for at least the next several years.

## *Solutions to the Challenges*

In view of the complexity of the section 337 docket, the large volumes of commerce at stake in most section 337 investigations, and the fast pace of 337 litigation, the Commission's challenge has been to grow the professional staff in OALJ without diminishing the existing standard of excellence. In fact, the Commission has increased its cadre of ALJs from four in FY 2003 to six in FY 2009, as the section 337 caseload has escalated in number and complexity. As it has added ALJs, the Commission has also added attorney-advisors and administrative support personnel. To ensure the continued efficient operation of the growing office, the Commission appointed a Chief Administrative Law Judge late in FY 2008. With more ALJs and an increased section 337 docket, the Commission acquired additional office space and a third courtroom on the second floor in FY 2010.

The Commission has conducted a thorough review of section 337 operations generally, including the administration of the OALJ.<sup>1</sup> Although the Commission has taken important measures to bolster OALJ in recent years, additional challenges are expected in the near term given that several of the existing ALJs are retirement eligible, and that the Commission may need to add a seventh ALJ, if target date extensions reach unacceptable levels. The Commission will also continue to pursue legislation allowing it greater flexibility in the range of the ALJ applicants it may consider when filling future positions. The Commission will also move to increase the number of well-qualified attorney-advisors available to its ALJs. Currently, each ALJ hires a single attorney-advisor, and there is also a small pool of floating attorney-advisors available for assignment to investigations on an *ad hoc* basis. The Commission expects to transition to an arrangement wherein each ALJ may hire two attorney-advisors and the pool is gradually phased out. The Commission intends to seek authorization to classify OALJ attorney-advisor positions so that these employees serve at the will of the respective ALJs. While the agency seeks this authorization, the additional OALJ attorney-advisor positions will be hired as term limited appointments. In order to recruit and retain the most-qualified attorney-advisors, the position descriptions will be revised to allow for promotion to the GS-15 level.

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<sup>1</sup> The Commission contracted with Coray Gurnitz Consulting for an independent and objective evaluation of Operation 2. The consultant's final report was delivered on December 31, 2009. The Commission sought and received comments on the reports, recommendations from its Strategic Planning Committee, the Director of OUII, and each of the Administrative Law Judges.

In an effort to facilitate the settlement of disputes and thereby reduce the number of section 337 investigations that proceed to trial, the Commission approved a pilot mediation program in 2008. In August 2010, the Commission issued a revised Users' Manual for its mediation program and reaffirmed that, pursuant to the Administrative Procedures Act, ALJs may require attendance at a mediation settlement conference.

**Current State:**  
**Office of Administrative**  
**Law Judges**  
 22 FTEs  
 19 Permanent  
 3 Terms  
 0 Contractors

**Legend:**

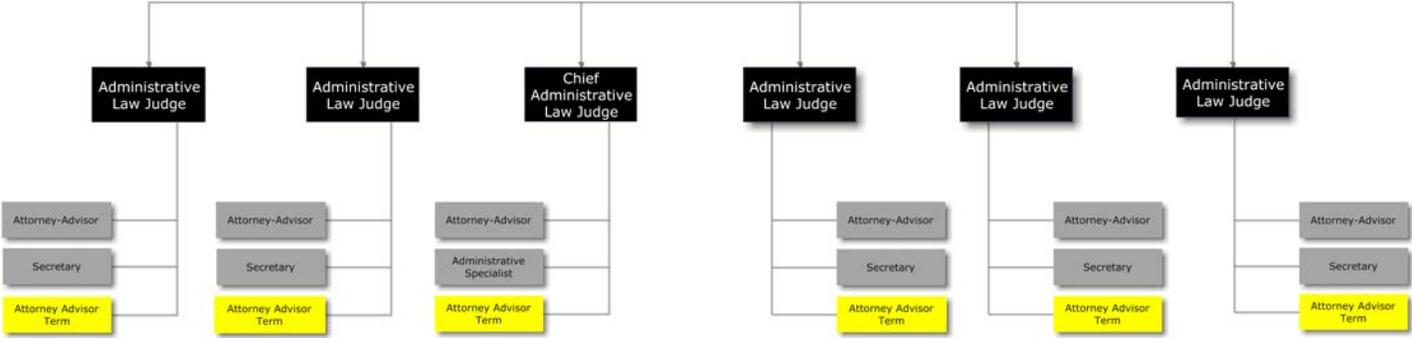
- Supervisor
- Permanent
- Term
- Contractor
- Vacancy



**Future State:  
Office of Administrative  
Law Judges**  
24 FTEs  
18 Permanent  
6 Terms  
0 Contractors

**Legend:**

- Supervisor
- Permanent
- Term
- Contractor
- Vacancy



# Office of the General Counsel

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2010 Human Capital Plan

## Introduction

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GC's mission seems unlikely to change in the foreseeable future. GC's primary work includes import injury investigations (antidumping, countervailing duty, five year sunset review, safeguards, and China safeguards), section 337 investigations, the defense of the Commission in various domestic court proceedings and in international fora, administrative law, and review of draft section 332 reports.

## Challenges

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- Maintaining at least current levels of expertise in the substantive legal areas necessary to support the Commission's mission. Particularly critical during the next five years will be succession planning associated with anticipated retirements by OGC supervisors and staff with specialized expertise.
- Ensuring staffing levels adequate to meet Commission time-lines for investigations and other work. The frequency of scheduling conflicts is increasing with more section 337 work, the increase in the number of judges, and the frequency of court challenges. The timing of judicial decisions and scheduling change requests by litigants, that are beyond GC control, can wreck havoc on staff assignments. Variability in the scheduling of oral arguments in all courts likewise is a frequent problem that has required reassignment of other staff responsibilities.
- Training and integrating newly recruited staff. GC filled a considerable number of vacant attorney positions in the last five years—a total of 17 hires (three of whom have left) or almost one-half of staff attorney positions. This has placed an additional burden on supervisory staff both in terms of training and quality control.
- Enhancing and improving overall professional performance to achieve consistently high quality work product. As in many organizations, all personnel are not performing at the same level in terms of both productivity and quality. To optimize GC's ability to meet client needs, these short-comings need to be addressed through improved training, mentoring, better alignment of skills and assignments and, when necessary, performance based personnel actions.

- Improving internal procedures and databases to enhance productivity. Short staffing for a number of years in both paralegal positions and clerical support has impeded efforts to establish internal systems and data bases that would enhance productivity as well as improve the information available to allow better informed managerial decision-making.

## Workload

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GC has experienced a significant overall increase in workload as the number of section 337 investigations has increased more than two-fold from pre-2001 levels, and litigation caseload has increased as the percentage of Commission determinations challenged also increased. On the other hand, import injury proceedings have stabilized at a mid-range level, with recurring spikes in workload associated with periodic five year reviews.

Work in other areas has been more episodic. Byrd Amendment litigation continues at a high level, but is considerably less resource intensive than other litigation because the Byrd cases involve a high volume of cases that present largely the same issues. Whether the Byrd litigation comes to a relatively quick end will depend on whether an expected petition for certiorari is granted and the outcome of any review by the Supreme Court.

WTO litigation was recently at reduced levels and WTO Doha negotiation work on rules related matters has been erratic over the last year in terms of resource requirements. We expect WTO litigation to increase substantially in the next year. The China special safeguard measure on Passenger Tires was the subject of dispute settlement in the WTO and we expect it to be brought to the Appellate Body by China later this year. In addition, the USTR has initiated consultations on one antidumping case involving China and is expected to seek consultations shortly on a second China case. We expect to be involved significantly in the injury-related aspect of those cases. We also understand that the Chinese are examining the possibility of bringing additional trade remedy disputes involving the USITC to the WTO. Rules related work would likely increase significantly, even if temporarily, in the event of a breakthrough in the overall trade negotiations and would be staffed, as in the past, by some of the most experienced attorneys in the office. A serious resumption of negotiations does not appear imminent, but is likely sometime in the next two years.

Despite the relatively rapid increase in workload since 2001, GC's authorized staffing level has remained largely unchanged at approximately 42-44 permanent FTE positions.<sup>1</sup> The increase in section 337 work was met by a shift in attorney resources within the office—as vacancies opened, they were filled with few exceptions with applicants with Intellectual Property (IP) backgrounds. As recently as 2002, GC dedicated only five attorneys (or approximately 14% of GC attorney positions) to section 337 matters. Twelve attorneys, or approximately 33% of GC attorneys are now working on section 337 proceedings on a full-time basis. There

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<sup>1</sup> The Human Capital Plan (June 2004) envisioned GC having a total of 44 FTEs within 3-5 years, which included the General Counsel, five other supervisory attorneys, 28 staff attorneys, six paralegals, two librarians, a staff assistant, and a legal assistant.

has been a commensurate decline in the number of attorneys available to work on other matters, especially on antidumping and countervailing duty cases. The personnel available for non-section 337 work appears adequate, if sometimes stretched during those periods when five year reviews are active. However, the situation can become challenging when more than one GC attorney is on detail for a lengthy period to one or more Commissioners' offices. The recent spate of labor related matters during the last two years also has placed demands on non-section 337 attorneys as labor matters generally have been staffed from among lawyers otherwise doing Title VII work. At this time, the Commission has determined to continue to use contracted labor counsel as needed and not to hire a full-time labor lawyer. The Commission will reconsider this decision in a future plan.

Work is expected to remain at the currently high level for the foreseeable future as there is little indication of any abatement in section 337 or litigation activity. Given the expected workload, the hiring of additional personnel is necessary both to ensure that GC can deliver its work product to the Commission and other ITC clients on a timely basis and so that it can avoid overtaxing its personnel to the degree that GC becomes an unattractive place to work. GC has been able to attract talented personnel based on the nature of the work (particularly opportunity to litigate) and a better quality of life compared to that offered to those in private practice from where GC most often recruits.

## Solutions to the Challenges

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### *Increased Personnel*

The future permanent staffing level should increase modestly, and is projected to occur almost exclusively in connection with Operation 2. GC will be permitted to add two patent attorneys to its staff (converting one patent attorney over-hire FTE and adding another patent attorney FTE to its permanent staff). How quickly the additional staff is needed will depend on the level of investigative activity generally and on whether the increase in the number of administrative law judges leads to a substantial increase in the number of final Initial Determinations issued concurrently. Because the number of ongoing section 337 investigations has just recently reached its unprecedented level, GC does not yet have enough experience to fully gauge the staffing level that will be required to handle the new level of activity. Whether mediation will lessen workloads is also an open question. GC projections of attorney needs therefore may prove to be conservative. Of course, if workload diminishes in volume or complexity, staffing levels can be adjusted accordingly. Since GC expects some retirements from GC during the next few years as well as a normal rate of attrition, such adjustments would not be difficult.

Two other factors suggest that the increase in IP lawyers may be necessary sooner rather than later. First, the concurrent issuance of more Initial Determinations is likely to place additional pressure on supervisory resources in GC for section 337. The two full-time GC section 337 supervisory attorneys have been able to meet deadlines only by working a considerable number of extra hours. Both section 337 supervisors had restored leave balances coming into FY 2008 and sought restoration of approximately 200 additional hours each at the end of CY 2008. One of them continued to require restoration of leave into FY 2009 and 2010. Those types of supervisory workloads cannot be maintained indefinitely. To reduce this burden, GC has tasked one of its more senior staff attorneys with purely supervisory work for the last year (since August 2009). This may be only a temporary solution, however, and GC may need a third full-time supervisor for section 337 matters.

Taking this approach is necessitated by a second factor, succession planning. GC expects to experience the onset of retirements among supervisory personnel in the next one to four years. Five of the seven attorney supervisors are either retirement eligible or soon will be and some of them have indicated plans to leave the agency within the aforementioned period.<sup>2</sup>

GC also will be allowed to add a term attorney position to alleviate staffing pressures resulting from long-term details of GC staff to Commissioners' offices.

## *Training/Professional Development*

As indicated above, approximately one-half of all staff attorneys (a higher percentage in the section 337 area) were hired in the last five years. Training has by and large consisted of on the job training with some supplementation, but relatively limited, coming from attendance at conferences and programs made available by outside sources. In most cases, this approach has proven satisfactory, particularly with staff who are self-motivated and conscientious. With a few notable exceptions it has been inadequate and GC will be adopting a combination of more rigorous supervisory oversight together with additional mentoring, even for staff with many years in their current positions, in an effort to improve overall performance and make it more consistent across the office. The problem is almost totally confined to non-section 337 areas of responsibility and, accordingly, those areas will receive the most focused attention.

GC requested in its future plan a position for an attorney trained in labor law on the basis that a position with such expertise is justified given the frequency of labor issues, including the resumption of collective bargaining with the union that is likely to require the dedication of substantial time by at least one attorney. GC, however, recognized that there may not be sufficient work in labor matters on a regular basis to fully occupy all of an attorney's time and thus proposed that the individual would also be conversant in other administrative law matters freeing up other attorneys to work on Title VII and other matters. At this time, the Commission has determined not to authorize a labor attorney position, but will reconsider this position in a future plan.

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<sup>2</sup> There are only a small number of retirement eligible staff attorneys and none have indicated an approaching exit. Staff retention, otherwise, has been good with attrition rates remaining at approximately one to two staff attorneys per year. Both librarians are retirement eligible, as is the office's staff assistant.

## ***Possible Personnel Changes/Realignment of Responsibilities***

The Staffing Plan would ensure that GC continues to have a modestly flexible workforce. The staff attorneys are split among (1) those who work on import injury investigations and related litigation, (2) those devoted to section 337 proceedings and related litigation, and (3) those dedicated to working on administrative law issues (relatively few attorneys are in this last category). Due to the technical nature of the section 337 subject matter, the number of section 337 cases, and scheduling conflicts with deadlines in the Title VII area, there is little latitude to shift section 337 attorneys to work for any substantial period of time on non-337 matters. This situation is unlikely to change. For similar reasons, there is little opportunity to move the line attorneys who generally are devoted to handling injury investigations to all but the least technically complex section 337 work. However, some non-337 staff attorneys have expanded their areas of practice by working on section 337 cases for a substantial proportion of their time.

The preparation of court records and appendices should eventually become more automated when the Docket Services Division, with the assistance of an upgraded EDIS, takes on more responsibilities in this area. This will mean that a higher proportion of GC paralegal time can be devoted to higher skilled functions such as research, the checking of briefs for accuracy and legal citation, and the preparation of basic legal documents. However, GC already has achieved higher efficiency levels in the paralegal group, operating with five positions compared to as many as eight paralegals 10 years ago. Consideration also is being given to the identification of areas of responsibility that might be shifted from the attorneys to paralegals, such as more basic APO breach inquiries, so that attorney time can be devoted to assignments where their competencies are better utilized, and higher skilled paralegals are given opportunities for more interesting work.

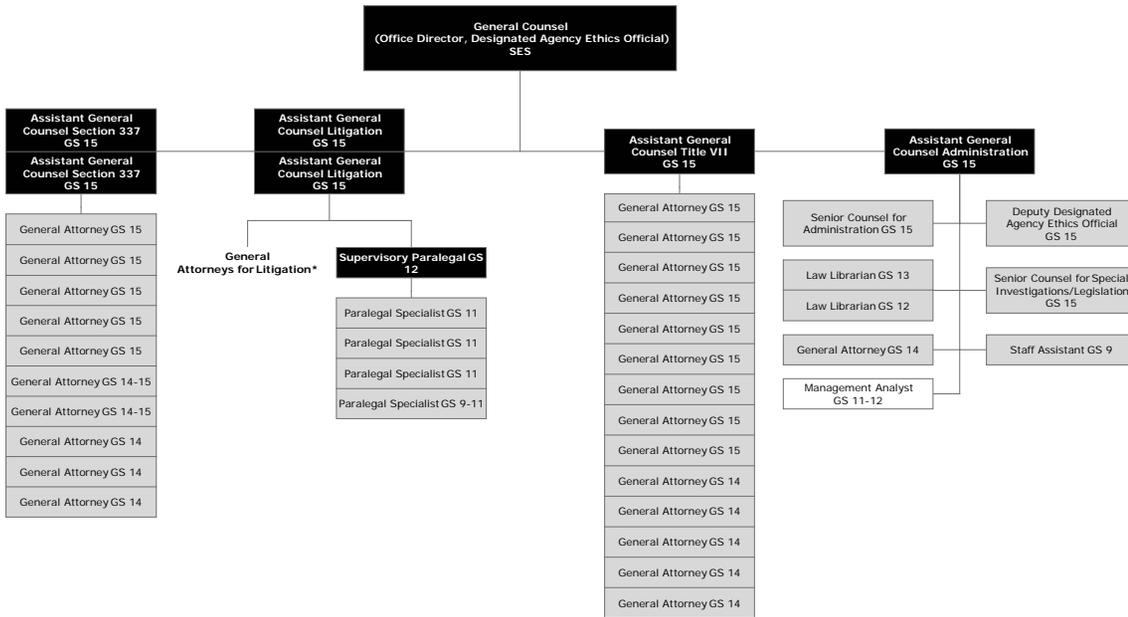
Both the law librarians are also retirement eligible and might retire in the next two to three years. It is envisioned that only one of those positions would likely be filled with a FTE; the other position more than likely would be converted to a part-time position.

Additionally, to enhance the productivity of the General Counsel, and the office more generally, approval was obtained in CY2008 for the establishment of an office administrator position (on a two-year term basis) in lieu of the existing lower graded legal assistant. Recruitment to fill that position is ongoing and responsibilities would be those of an executive assistant, including the maintenance of office records and schedules, including budget, leave, work schedules and other administrative files, which the General Counsel has been compelled to maintain himself for the last few years. Consideration is also being given to whether the restoration of the Deputy General Counsel position is advisable. However, delegation of the responsibilities among first line GC supervisors has worked reasonably well and allowed for significant flexibilities.

## *Improvement in Databases and Other Capabilities*

Increased reliance on electronic documents and storage also seems to be the only long-term solution for the organization of both files relating to ongoing matters as well as those that are archived. Time is regularly lost by all personnel working with voluminous hard copy documents by virtue of the need for individuals to organize their own personal copies of files. Much of this redundant activity would be reduced if the agency can create a dependable electronic system that is both accurate and comprehensive.

GC also will be evaluating whether EDIS 3 provides a suitable replacement for the document archival/retrieval system that GC has maintained separately relating to its memoranda and briefs. GC is also exploring other areas where the creation/refinement of databases, such as those relating to judicial decisions and the views of individual judges, may enhance the representation of the Commission and/or assist improvements in productivity.



## Current State: Office of the General Counsel

43 FTEs  
 44 Permanent (including 1 attorney over-hire)  
 0 Terms  
 0 Contractors

\* The General Attorneys working on the underlying substantive issues also generally are responsible for the pertinent litigation.

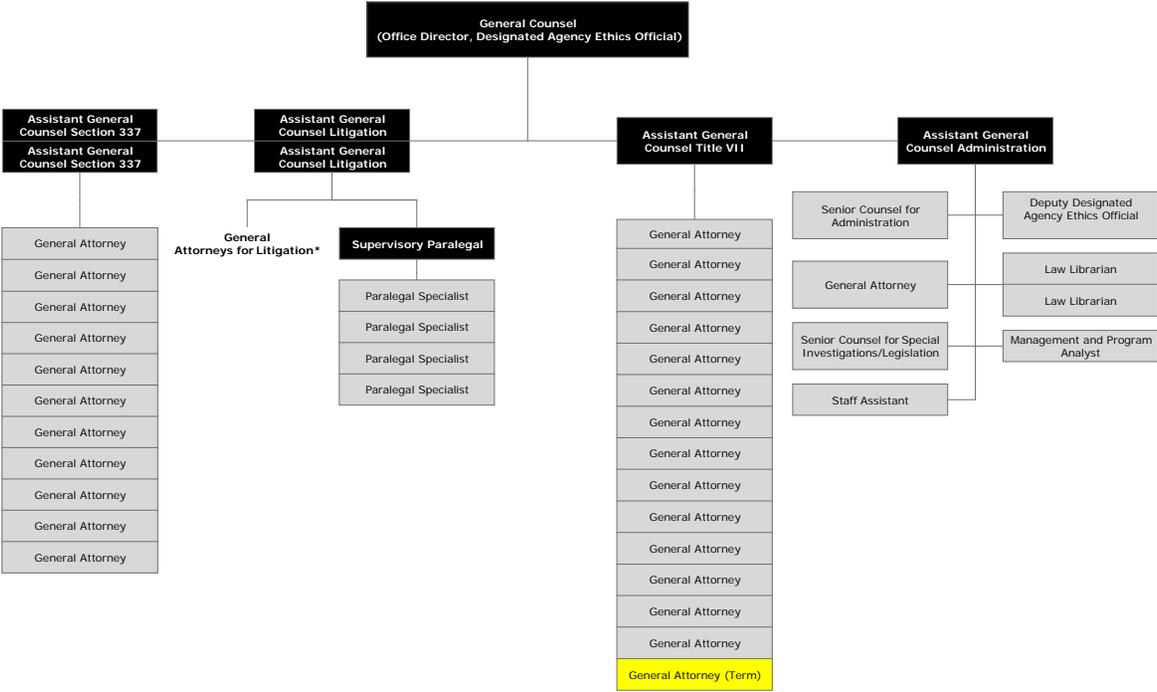
Legend:

- Supervisor
- Permanent
- Term
- Contractor
- Vacancy

# Future State: Office of the General Counsel

46 FTEs  
45 Permanent  
1 Term  
0 Contractors

\* The General Attorneys working on the underlying substantive issues also generally are responsible for the pertinent litigation.



Legend:

- Supervisor
- Permanent
- Term
- Contractor
- Vacancy

# Office of Unfair Import Investigations

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2010 Human Capital Plan

## Introduction

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*The Commission's strategic goal is to conduct intellectual property-based import investigations in an expeditious, technically sound, and transparent manner, and provide for effective relief when relief is warranted, to support a rules-based international trading system.*

The Commission adjudicates complaints brought under section 337 of the Tariff Act of 1930 that allege infringement of U.S. intellectual property rights and other unfair methods of competition in connection with imported goods. The Commission thereby facilitates a rules-based international trading system by providing a fair and transparent forum for the adjudication of section 337 disputes. Section 337 investigations are conducted in accordance with the Administrative Procedures Act (APA), which affords the parties the opportunity to conduct discovery, present evidence, and make legal arguments before an Administrative Law Judge (ALJ) and ultimately the Commission. Section 337 investigations also protect the public interest and expeditiously provide the parties with determinations.

The Office of Unfair Import Investigations (OUII) supports the Commission's section 337 operation (Operation 2). OUII plays an important role in pre-institution proceedings, both in educating potential complainants as to the nature and requirements of a section 337 investigation and, once a complaint is filed, in advising the Commission whether to institute an investigation. Although the statute does not require that the Commission maintain an independent office, the APA requires that the prosecutorial/investigative functions, such as the pre-institution work, and presenting arguments and evidence before an ALJ, be separated from the Commission decision-making. OUII attorneys perform the pre-institution review function. After institution, OUII assigns an investigative attorney (also known as a "Staff Attorney") to act as a party to the litigation with no commercial interest in the outcome.

Prior to statutory amendments enacted in 1988, OUII's participation in section 337 investigations focused largely on whether the articles at issue had the threat or effect of injuring an industry in the United States. After the 1988 amendments eliminated the injury requirement for most section 337 investigations, OUII's mission changed. The vast majority of section 337 investigations assert patent infringement, and OUII now devotes substantial efforts to the complex factual and legal issues often arising in that area of the law. Although OUII offers the useful perspective of a party without commercial interests, its relative contribution on patent infringement issues may be constrained by the fact that in the typical investigation the private parties are able to deploy substantially more resources than OUII, which is represented by one attorney. OUII also must expend significant effort on issues that

do not arise in patent litigation in district courts, such as the domestic industry requirement, (section 337) remedy, bonding, public interest, and various policy issues. On these latter types of issues, OUII has developed particular expertise and institutional knowledge.

Over the past decade, the number of section 337 cases has increased and the number of parties in the average case has grown. This growth in the number and complexity of section 337 investigations has led the Commission to devote a substantially increasing share of its resources to Operation 2. OUII continues to assign only one attorney to each case no matter how complex; these attorneys have performed admirably. However, the growing workload challenges the ability of OUII to continue to provide its expertise and make valuable contributions to the adjudicative process in section 337 investigations. A continued increase in the share of agency resources devoted to OUII is not feasible or warranted in light of government-wide budgetary limitations, and the need to adequately fund other agency operations. Achieving the Commission's goals of adjudicating section 337 matters professionally and expeditiously requires a balance of funding for all offices involved in section 337 matters including the Office of Administrative Law Judges and the Office of the General Counsel.

Accordingly, it is now clear that OUII's mission and staffing model must be adapted to changing circumstances, just as they were after the 1988 amendments. OUII will enter a transitional period during which it will, on a trial basis, implement a number of alternative staffing approaches, the effectiveness of which will be evaluated by the Commission periodically. In light of resource constraints, the goal of this process will be to ensure that OUII efficiently continues to add significant value to the section 337 adjudication process, by focusing on its most important contributions. It is important to note that the decision to refocus OUII's priorities and functions is in no way an adverse reflection on the quality or importance of OUII's past contributions, but rather an effort by the Commission to take a balanced approach to adequately funding the ITC's statutory missions and meeting government-wide obligations.

## Challenges

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### *Increased Size and Complexity of Section 337 Caseload*

In recent years, the section 337 landscape has changed substantially. Since FY 2003 (when there were 19 new section 337 investigations), the number of new section 337 complaints has increased quite steeply – climbing to more than 30 in both FY2006 and FY2007, and still further to 43 new complaints in FY 2008. The number of new section 337 matters fell somewhat in FY 2009, but rose to a record level of 51 in FY 2010. The number of section 337 matters active during the course of a year has also increased substantially, more than doubling in the last six fiscal years, from 41 active matters in FY 2003 to 85 active matters in FY 2009 and to 103 active matters in FY 2010. This enhanced level of section 337 activity is expected to continue for at least the next several years. Indeed, the Commission has

now become widely recognized as an important forum for the resolution of patent-based disputes involving imported goods, due both to the relative speed of the proceedings and the attractiveness to many prospective complainants of section 337 remedial orders.

Many section 337 investigations focus upon complex patented technology, often involving multiple patents and many asserted claims per patent. Patents in the electronic, computer and telecommunication areas have tended to dominate the docket. Product and process patents in the chemical and medical fields, as well as patents covering a wide range of mechanical/ industrial technologies, are also commonly asserted in section 337 investigations.

A substantial portion of section 337 investigations involve multiple unrelated respondents, which also adds to the complexity of the docket because it usually requires the examination and adjudication of multiple claim constructions and infringement analyses. Also, the presence of unaffiliated respondents often translates into an extensive motions practice. Recent appellate rulings have led to both an increase in the number of respondents in certain types of cases that previously involved relatively few respondents, and to the development of more extensive evidentiary records on remedy issues. As the complexity of the section 337 docket continues to increase, the workload demands associated with that docket are expected to intensify.

## *Effects on OUII*

The changing nature of the Commission's section 337 caseload has presented numerous challenges to OUII's allocation of its resources, especially assignment of its attorneys to investigations. In particular, because of the intense demands of late stage pre-trial discovery and motions practice and of pre- and post-trial briefing, an investigative attorney generally is unable to handle more than one trial in any three to four month period. Therefore, as the size and complexity of the section 337 docket has grown, the number of investigations to be covered by OUII attorneys, and the amount of work to be done in an average investigation, have increased. Due to the continuing responsibilities on pending matters, the frequency with which investigative attorneys become available for assignment to new section 337 matters has declined in the last two years. The increased workload has also placed great strains on OUII's supervisory and support personnel.

## *Workload*

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### *Present Workload*

The section 337 caseload remains at or near an historic high. While the number of active 337 matters was 41 as recently as FY 2003, that figure was more than twice as high in FY 2008 and FY 2009, and set a new high in FY 2010.

## ***Future Workload***

As noted above, the ITC is now widely recognized as an important forum for the adjudication of patent-based disputes involving imported goods. A number of factors make it unclear whether OUII's workload for the years beyond FY 2010 will rise or fall. Factors that may lead to a rise include the recent increase in the number of ALJs, recent appellate court decisions that may spur additional filings by non-manufacturing entities, and the increased focus on soliciting comments on public interest issues. On the other hand, the continued implementation of the Commission's section 337 mediation program may lead to fewer section 337 matters proceeding to trial. Further uncertainty is introduced by the current economic climate, which could lead to additional filings and/or cause complainants to streamline their cases to achieve cost savings. Nevertheless, factors that have been linked to the increase in section 337 filings in recent years, including specialized expertise, relatively speedy adjudications as compared to most district courts, and exclusion orders enforced by Customs at the border, remain in place, and continued growth in the caseload is anticipated in FY 2011. Accordingly, the section 337 workload will presumably remain quite heavy for the foreseeable future and the concomitant demands upon OUII are not likely to abate for at least the next several years.

## ***Workforce Skill Set Requirements to Meet Anticipated Workload***

In view of the complexity of the section 337 docket, the large volumes of commerce at stake in most section 337 investigations, the fast pace of section 337 litigation, and the assignment of only one OUII Staff Attorney to an investigation, OUII has worked hard to assemble a corps of highly qualified intellectual property litigators. To ensure that OUII can continue to add value to the section 337 decisionmaking process by, inter alia, making substantial contributions to the development of the record, formulating well considered positions on substantive and procedural legal issues, and otherwise facilitating the section 337 process, OUII will need to continue to retain experienced litigators who are both knowledgeable about intellectual property law and able to master complex technical subject matter relatively quickly. To this end, OUII will seek to retain and recruit attorneys for its Staff Attorney positions that have at least several years of intellectual property and litigation experience, and education or experience in technical areas such as engineering, computer science, and chemistry. With regard to Supervisory Attorneys, OUII will seek to retain and attract attorneys to oversee and support the work of OUII's Staff Attorneys who not only have substantial section 337 litigation experience, but who also possess, inter alia, strong editing, interpersonal, and problem solving skills. With regard to clerical and paralegal staff, OUII will seek to retain and recruit staff who possess, inter alia, the analytical, problem solving, and time management skills necessary to provide administrative and clerical support to OUII's attorneys for a wide range of tasks. These staff members will be expected to meet the operational requirements of a legal office engaged in litigation, and continuously update their skills in areas such as word processing, information collection and reporting, document and database management, and the use of relevant research tools.

## *Solutions to the Challenges*

In the last few years, as the section 337 caseload has continued to climb and the workload associated with that caseload has escalated, OUII has added Staff Attorney positions so that the office could continue to participate in every aspect of instituted section 337 investigations. With the addition of two Staff Attorneys in FY 2009, OUII now has 17 Staff Attorneys on board.<sup>1</sup> Even so, OUII's Staff Attorneys are still stretched thin and many of these attorneys routinely work extra hours to master the issues in their investigations and meet the filing deadlines and other commitments in their cases.

Until recently, OUII proposed to respond to the heavy caseload by adding a fourth supervisory attorney, a group of junior attorneys, and clerical personnel. Although OUII did not seek to add more Staff Attorney positions in the near term, its proposal to add personnel was a continuation of the existing approach in response to a rising workload. After conducting a thorough review of section 337 operations generally,<sup>2</sup> and of the role of OUII in particular, the Commission has determined that the continued addition of substantially more resources to OUII is no longer sustainable or warranted, as discussed in the Introduction. While OUII will be permitted to fill a recent vacancy in its supervisory ranks, and two attorney advisors brought on pursuant to overhire authority will remain, the number of attorney advisor FTEs will be allowed to fall from the current 17 (which includes the two overhires) to 15 FTEs through attrition.

OUII's ability to continue to provide its expertise and make valuable contributions to the adjudicatory process is challenged by the increasing size and complexity of the section 337 caseload. As a result, what is now required is an examination of new approaches that will enable OUII to continue to provide its core contributions to the section 337 adjudicatory process with the resources presently at hand. Therefore, OUII will implement on a trial basis new staffing approaches designed to allow it to continue to add value to the adjudicatory process within existing resource constraints.

As it enters this transitional phase, OUII will give the highest priority to certain functions that draw upon its particular expertise. For instance, OUII will continue to review draft complaints prior to filing and advise the Commission on whether to institute investigations. Once an investigation is instituted, OUII will place the highest priority on issues unique to section 337, including the domestic industry requirement, remedy, the public interest, and bonding, as well as any other issues uniquely affecting Commission policy. OUII will also continue its efforts: a) to ensure that the investigation record is fully developed, b) to resolve procedural disputes between the other parties without the need to resort to the presiding

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<sup>1</sup> The FY 2008 approved Staffing Plan for OUII includes 15 Staff Attorney positions. The hiring of two additional Staff Attorneys in early FY 2009 was approved to ensure continued coverage of on-going section 337 investigations.

<sup>2</sup> The Commission contracted with Coray Gurnitz Consulting for an independent and objective evaluation of Operation 2. The consultant's final report was delivered on December 31, 2009. The Commission sought and received comments on the report's recommendations from its Strategic Planning Committee, the Director of OUII, and each of the Administrative Law Judges.

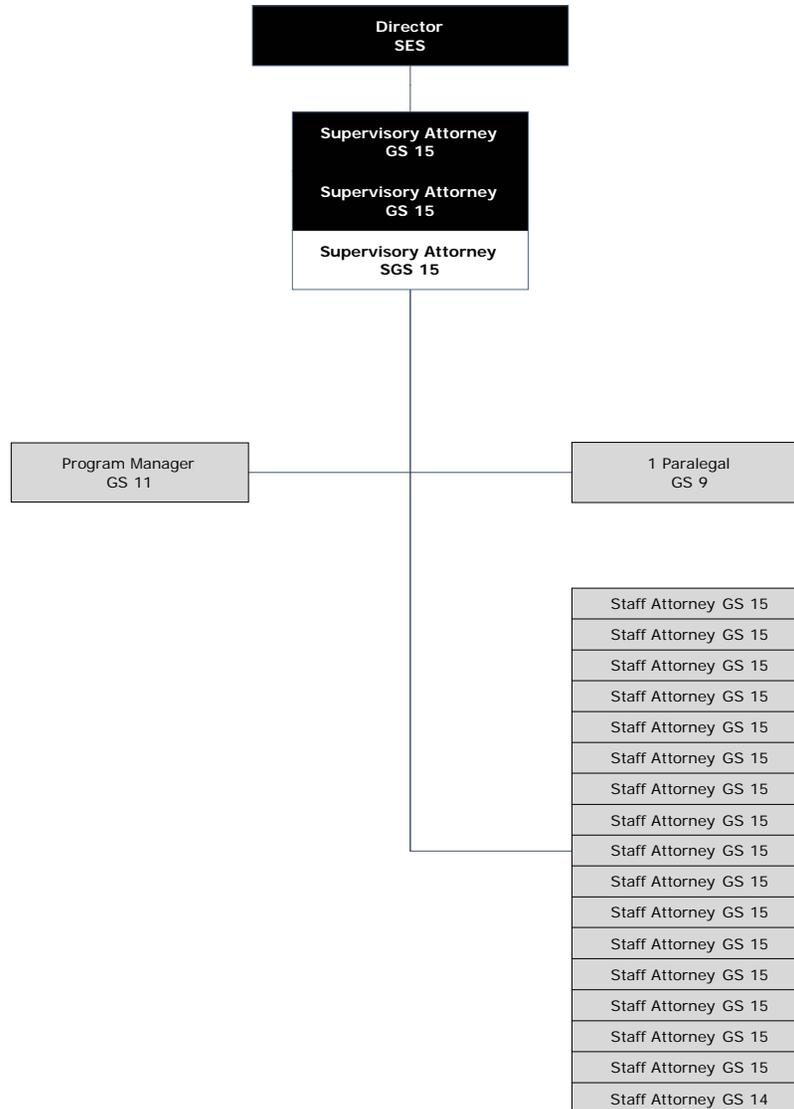
administrative law judge, and 3) to facilitate settlement. OUII will also ensure that it allocates staff resources to investigations in which a substantial share of the respondents have defaulted or are likely to default.

OUII has traditionally assigned an investigative attorney to each section 337 investigation and those investigative attorneys have generally attempted to participate in all or nearly all of the matters and issues arising in their assigned cases. While OUII will continue that staffing model for a share of its cases in the short-to-medium term, it will implement two other staffing approaches in other cases. First, in certain investigations, OUII will participate in a selective manner. Through this process of selective participation, OUII will concentrate its efforts on those issues on which it is able to provide the greatest added value and expertise, including but not necessarily limited to the issues identified above. Second, OUII will cease to be a party altogether in a subset of section 337 cases. OUII will both discontinue its participation in some cases that are still at an early stage of the proceedings and decline to participate from the outset in others. While OUII may in its discretion decline to participate in certain ancillary and advisory proceedings, it will also refrain from participating in a substantial number of regular investigations as well. In terms of selecting investigations in which not to participate, OUII will attempt to identify those in which it is less likely to draw upon its expertise and add value to the adjudication process, and it will report to the Commission the criteria it uses to perform that identification. OUII may also try other alternative staffing models as well.

OUII will employ the new approaches to a number of cases sufficient to allow an evaluation by the Commission. The Commission will evaluate the effectiveness of the new staffing models on a periodic basis. As it evaluates the effectiveness of the new approaches, the Commission will provide additional guidance to OUII.

# Current State: Office of Unfair Import Investigations

21 FTEs  
 23 Permanent (2 over-hires)  
 0 Terms  
 0 Contractors



Legend:

Supervisor

Permanent

Term

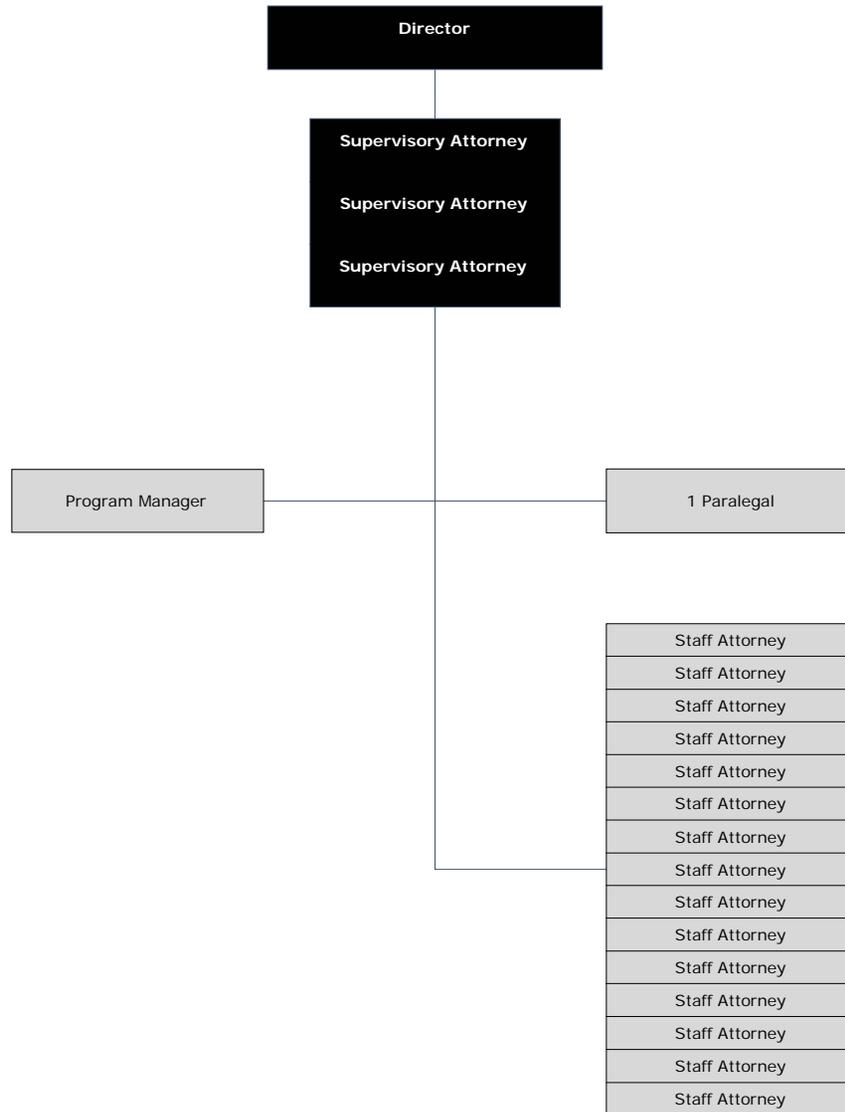
Contractor

Vacancy

"Current State" organization charts for each office reflect the Commission Staffing Plan on March 15, 2009.

# Future: Office of Unfair Import Investigations

21 FTEs  
21 Permanent  
0 Terms  
0 Contractors



Legend:

Supervisor

Permanent

Term

Contractor

Vacancy

