

**SECTION 337 INVESTIGATIONS
AT THE U.S. INTERNATIONAL
TRADE COMMISSION:**

**ANSWERS TO FREQUENTLY
ASKED QUESTIONS**

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***SECTION 337 INVESTIGATIONS AT THE
U.S. INTERNATIONAL TRADE COMMISSION:
ANSWERS TO FREQUENTLY ASKED QUESTIONS***

This pamphlet contains a brief background discussion of Section 337 investigations at the United States International Trade Commission followed by answers to various frequently asked questions about Commission practice and procedure. Although this pamphlet is intended to clarify Commission procedures, it is for background purposes only, and is not intended to supersede, modify, or limit the Commission's Rules of Practice and Procedure or any Ground Rule, Order, or governing precedent issued by the Commission or its Administrative Law Judges. For complete information about Commission practice and procedure in Section 337 investigations, please refer to the governing statute, 19 U.S.C. §1337, the governing regulations, 19 C.F.R. Parts 201 and 210, and the Ground Rules and Orders in effect in a particular investigation. Questions can also be addressed to the following staff offices that work on Section 337 investigations:

- (1) the Office of the Secretary's Docket Branch at 202-205-1800 (on matters concerning the filing of documents),
- (2) the Office of Unfair Import Investigations at 202-205-2560 (on matters concerning the contents of a complaint, the institution of an investigation, or the status of an investigation),
- (3) the Office of Administrative Law Judges at 202-205-2692 (specifically, to the attorney-advisor of the Administrative Law Judge on procedural matters when an investigation is before an Administrative Law Judge),
- (4) the Office of the General Counsel at 202-205-3061 (concerning procedure when an investigation is before the Commission or on appeal), and

(5) the Trade Remedy Assistance Office at 202-205-2200 (for small business assistance in drafting a Section 337 Complaint).

At the end of this pamphlet is a response sheet requesting feedback and suggestions from you on ways that the Commission can improve this pamphlet or otherwise clarify its procedures.

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BACKGROUND ON SECTION 337

Under Section 337 of the Tariff Act of 1930 (19 U.S.C. §1337), the Commission conducts investigations into allegations of certain unfair practices in import trade. Most Section 337 investigations involve allegations of patent, copyright, or trademark infringement. Other investigations involve matters such as alleged misappropriation of trade secrets, violations of the antitrust laws, passing off, and false advertising.¹

Section 337 investigations are initiated by the Commission following the receipt of a properly filed complaint that states a claim under the statute and substantially complies with the Commission's Rules. An investigation officially commences upon the publication by the Commission in the *Federal Register* of a notice announcing the institution of an investigation.

When an investigation is instituted, the Commission assigns an Administrative Law Judge to preside over the proceedings and to render an initial decision on whether Section 337 has been violated. The Commission also assigns a staff investigative attorney from the Commission's Office of Unfair Import Investigations, whose role is to represent the public interest, to investigate the allegations in the complaint and to present evidence on the issue of whether Section 337 has been violated. The staff attorney is a full party to the investigation. In the notice announcing initiation of an investigation, the Commission identifies the entities that may participate in the investigation as parties, namely, the Complainant or Complainants that allege

¹ Section 337 declares unlawful unfair methods of competition and unfair acts in the importation and sale of products in the United States, the threat or effect of which is to destroy or substantially injure a domestic industry, prevent the establishment of such an industry, or restrain or monopolize trade and commerce in the United States. However, in cases of alleged infringement of a valid and enforceable U.S. patent, registered trademark, copyright, or mask work, there is no injury requirement. See 19 U.S.C. §1337(a).

a violation of Section 337, the Respondent or Respondents that are alleged to have violated Section 337, and the staff attorney, who is formally known as the Commission Investigative Attorney.

Section 337 investigations are conducted in accordance with procedural rules that are akin to the Federal Rules of Civil Procedure. These Commission procedural rules (19 C.F.R. Part 210) are typically supplemented by a set of Ground Rules issued by the presiding Administrative Law Judge. The procedural rules and Administrative Law Judge's Ground Rules provide important details regarding such matters as the taking of discovery and the handling of motions.

A formal evidentiary hearing on the merits of a Section 337 case is conducted by the presiding Administrative Law Judge in conformity with the adjudicative provisions of the Administrative Procedure Act (5 U.S.C. §§ 551 *et seq.*). Hence, parties have the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and other rights essential to a fair hearing.

Following a hearing on the merits of the case, the presiding Administrative Law Judge issues an Initial Determination that is certified to the Commission along with the evidentiary record. Parties may petition the Commission to review the Initial Determination and to reverse or modify it; the Commission may also review the Initial Determination on its own initiative. If the Commission declines to review an Initial Determination, the Initial Determination becomes the final determination of the Commission.

In the event that the Commission determines that Section 337 has been violated, the Commission may issue orders excluding the products at issue from entry into the United

States, directing the violating parties to cease and desist from certain actions, or both.

Commission orders become effective unless disapproved by the President for policy reasons within 60 days of issuance. Appeals of Commission orders entered in Section 337 investigations are heard by the U.S. Court of Appeals for the Federal Circuit.

ANSWERS TO FREQUENTLY ASKED QUESTIONS

- **Information for prospective complainants**

- 1. Where do I get information about filing a Section 337 complaint?*

Persons or companies interested in filing a Section 337 complaint may obtain information concerning the form of a complaint from the Commission's Office of Unfair Import Investigations (OUII). Upon request, OUII will provide a sample complaint and general information regarding Commission pleading rules and procedures. OUII can be reached by telephone at 202-205-2560 or by facsimile at 202-205-2158.

The Commission also has a Trade Remedy Assistance Office (TRAO) that provides technical assistance and advice, including informal legal advice, to eligible small businesses to enable them to file complaints and seek relief under Section 337. TRAO can be reached by telephone at 800-343-9822 or 202-205-2200, or by facsimile at 202-205-2139.

- **Filing and Service of Documents**

2. Where, when, and how are documents to be filed with the Commission?

Documents to be submitted to the Commission must be filed with the Commission's Office of the Secretary, Dockets Branch, at 500 E Street, S.W., Room 112, Washington, D.C.

20436. Documents may be filed at that address during the Commission's regular business hours: 8:45 a.m. to 5:15 p.m. In the rare event that the Commission is closed earlier than normal, for example, as a result of inclement weather, a document due to the Commission on that day will be accepted for filing on the next business day that the Commission is open.

Documents must be hand delivered or mailed to the Office of the Secretary for filing, and will be deemed to be filed on the date of receipt by the Commission. Documents received by facsimile will neither be filed in the Commission's docket nor returned to the sender.

Ordinarily, a filing requires the submission of an original and six (6) copies of a document when a case is before an Administrative Law Judge. When a case is before the Commission, a filing ordinarily requires an original and fourteen (14) copies.² See Commission Rule 210.4(f)(2), 19 C.F.R. §210.4(f)(2). Documents will not be accepted for filing if there is an insufficient number of copies of the document. Also note that the original signed copy of the document should not be stapled, bound, or hole-punched.³ The required additional copies should be individually stapled.

² Extra copies are required for the filing of a complaint and/or a motion for temporary relief. See Rule 210.8(a), 19 C.F.R. §210.8(a).

³ Note further that when a hardback publication is submitted for filing, the original versions should have the hard cover and hardback removed.

A document submitted for filing should also be accompanied by a form cover sheet that recites certain information about the document, including the date of submission, the name of the signatory, and whether the document contains confidential business information. These cover sheets are used for purposes of indexing the document in the Commission's Electronic Document Imaging System.⁴ Copies of the form are available from the Office of the Secretary, Dockets Branch, and from the Commission's Internet web site at <http://www.usitc.gov> or <ftp://ftp.usitc.gov>.

Documents presented for filing must conform with the Commission's Rules on document specifications. With regard to document specifications, please refer to Commission Rules 210.4 and 201.8, 19 C.F.R. §§210.4 and 201.8. These rules set forth specifications for documents such as the requirement that each document be captioned with information about the pertinent proceeding, that each document have a certain standard type-face, and that each document be accompanied by a certificate of service. These rules also set forth a signature requirement similar to that of Rule 11 of the Federal Rules of Civil Procedure, whereby a signature on a document is deemed to constitute a certification as to the propriety of filing the document and the veracity of the contents of the document. *See* Rule 210.4(b)-(d), 19 C.F.R. §210.4(b)-(d).

Persons filing a document can usually obtain a date-stamped copy of the document providing that they bring an extra copy of the document with them at the time of filing. In

⁴ The Electronic Document Imaging System is an electronic repository of the official record of documents filed at the Commission. Further information regarding this system is set forth below in Question and Answer No. 8.

this regard, couriers should be advised that they may not themselves use the Commission date-stamp, but should request assistance from a Dockets Branch staff member at the time of filing. Persons filing by mail can also obtain a date-stamped copy of a document if they provide an extra copy of the document, a letter requesting a date-stamped copy, and an addressed return envelope with the postage prepaid.

3. What documents should be filed; what documents should not be filed?

All pleadings, motions, responses to motions, briefs, and petitions for review of an Initial Determination and responses thereto should be filed with the Commission's Docket Branch. Discovery documents, however, should not be filed, except when the discovery documents are attached as an exhibit to a motion or other pleading. Discovery documents that should not be filed include deposition notices, requests for the production of documents, and interrogatories.

Practitioners are further advised to check the Administrative Law Judge's Ground Rules in effect in a particular investigation to determine whether other categories of documents should or should not be filed. For example, a Ground Rule may specify that documents such as proposed procedural schedules or copies of evidentiary exhibits should not be filed with the Docket Branch, but rather, should be presented directly to the Administrative Law Judge. The Ground Rules also typically provide that applications for subpoenas, discussed below in Question No. 12, should be presented only to the Administrative Law Judge rather than to the Docket Branch.

4. *How many copies of the prosecution history and license agreements are required when filing a patent-based complaint?*

When an intellectual property-based complaint is filed at the Commission, the Commission's Rules require that the complaint be accompanied with certain background materials relating to the intellectual property right asserted. *See* Rule 210.12(c)-(g), 19 C.F.R. §210.12(c)-(g). For example, in patent-based cases, the Rules require that the complaint be accompanied by copies of license agreements pertaining to each patent asserted, copies of the prosecution history for each asserted patent, and copies of the technical references cited in the prosecution histories of each asserted patent. 19 C.F.R. §210.12(c). If any of these materials are submitted as an exhibit to the complaint (or as an exhibit to a motion for temporary relief), the Complainant must file as many copies as required for filing a complaint, *i.e.*, an original plus fourteen (14) copies plus additional copies for each entity named as a proposed respondent and the foreign governments of the proposed respondents. However, if these additional materials are not offered as an exhibit to the complaint, the Complainant need only submit three copies of each license agreement pertaining to each patent asserted, one certified copy and three additional copies of the prosecution history for each asserted patent, and four copies of each technical reference cited in the prosecution history of each asserted patent. *See* Rule 210.12(c), 19 C.F.R. §210.12(c). The same general principle applies to the number of copies of background materials that must be filed in registered trademark, copyright, or mask work-based cases. *See* Rule 210.12(d) - (g).

5. How can I protect confidential business information in a filing with the Commission?

Confidential business information is protected in Section 337 investigations by a Protective Order issued by the Administrative Law Judge shortly after the commencement of an investigation. These Protective Orders typically describe in detail how documents containing confidential information are to be marked and by whom and how they are to be handled.

Although these orders permit a party's outside counsel to have access to confidential business information produced during the investigation, the orders typically do not permit a party's in-house counsel to have access to such confidential business information. However, if the parties wish to afford each other's in-house counsel access to their respective confidential business information, they may request that the Administrative Law Judge include such a provision in the Protective Order in a particular case.

Protective Orders not only contain provisions to protect the confidential business information of the parties to the investigation, these Orders also contain provisions to protect the confidential business information of non-party entities that supply confidential information pursuant to a Commission subpoena. In this regard, if a party seeks confidential business information from a non-party, the party requesting the information should provide a copy of the Protective Order to the non-party supplier of information. In the event that the non-party does not receive a copy of the Protective Order when served with a Commission subpoena, the non-party should request a copy from the party that served the subpoena.

Prior to the issuance of a Protective Order, documents submitted to the Commission may be treated as confidential if they are designated as confidential, are accompanied by a request for

confidential treatment, and are deemed by the Commission Secretary to indeed contain confidential business information, as described in the rules governing the submission and definition of confidential business information, Rules 210.5 and 201.6, 19 C.F.R. §§210.5 and 201.6.

6. What are the requirements for service of documents in a Section 337 investigation?

The general rule on service is that all documents filed with the Commission must be served on all other parties to the investigation. However, a complaint should not be served on any other entity unless the complaint is accompanied by a motion for temporary relief. If the Commission determines to institute an investigation, the Commission itself serves complaints on the entities that it names as respondents to the investigation. In the case of a complaint accompanied by a motion for temporary relief, the Commission not only serves those documents on the respondents when it institutes the investigation, but it also requires the entity filing the complaint and motion to serve an advance copy by messenger, courier, express mail, or other equivalent means on the firms that are proposed as respondents in the complaint, and on the embassy in Washington, D.C. of each country from which the allegedly unfair imports come.⁵

With regard to service of documents other than complaints, the practitioner is advised to consult the Ground Rules in effect in a particular investigation. The Ground Rules usually require that the parties serve on the presiding Administrative Law Judge two copies of each document filed at the Commission. The Ground Rules also typically specify the mode of service between the

⁵ The general Rules on service are located at 19 C.F.R. §§210.7 and 201.16. The Rules concerning service of a complaint accompanied by a motion for temporary relief are located at 19 C.F.R. §§210.54 and 210.55; *see also* 19 C.F.R. §210.56 regarding the notice that must accompany service copies of a complaint and motion for temporary relief.

parties (e.g., overnight courier), and typically include instructions not to serve the Administrative Law Judge by facsimile in the absence of prior permission to do so.⁶

- **Information about the status of investigations; researching Commission precedent**

7. How can I get information about the status of an investigation?

Interested persons can get certain information about the filing of a new complaint by calling the Commission's complaint hotline at 202-205-2196. This hotline, which contains a recorded message identifying the name of the party filing the complaint and the subject matter of the complaint, is usually updated within one to two hours after the Commission receives a new complaint. Information about new complaints is also available at the Commission's Internet web site at <http://www.usitc.gov> or <ftp://ftp.usitc.gov>.

Commission notices on matters such as initiation and termination of an investigation are published in the *Federal Register*. These notices, as well as Commission press releases, are also posted on the Commission's Internet web site, usually within a few days after issuance. Commission notices and press releases can also be obtained 24 hours a day, seven days a week, by calling the Commission's automated Fax-on-Demand system at 202-205-2023.⁷

⁶ In the event the parties are requested to serve the Administrative Law Judge with an electronic copy of a document, parties should submit a 3.5 inch diskette in WordPerfect™ format, preferably WordPerfect™ 6.1 format.

⁷ To obtain a facsimile of a document, call the Fax-on-Demand system and request an Index of Available Documents. The Index, which will be sent to you by facsimile immediately, lists and describes all posted documents, and is arranged by category in reverse-chronological order. After reviewing the list and selecting the document you want, call the system and

(continued...)

All documents filed in an investigation, except for those containing confidential information, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Commission's Docket Branch at 500 E Street, S.W., Room 112, Washington, D.C. 20436, telephone 202-205-1802.⁸ Hearing-impaired individuals are advised that information about filings in the Office of the Secretary can be obtained by contacting the Commission's TDD terminal at 202-205-1810.

Other questions about the status of the investigation can be addressed to the Commission Investigative Attorney assigned to the case from the Office of Unfair Import Investigations, whose name and telephone number are listed in the notice of investigation. Journalists are encouraged to direct inquiries to the Commission's Office of External Relations at 202-205-1819.

8. How can I research Commission precedent?

All orders and decisions issued by the Administrative Law Judges and the Commission, except those containing confidential business information, are available for inspection at the Commission's Docket Branch at 500 E Street, S.W., Room 112. Orders and decisions of the

⁷ (...continued)

request the document. *Note, though, that you must place your call to the Fax-on-Demand system from the handset on your fax machine.* If you encounter any technical problems, please leave a message in the voice-mail box on the system. Other comments concerning the system can be directed to the Commission's Office of External Relations (202-205-1819) or to the Office of the Secretary (202-205-2000).

⁸ Documents that do not contain confidential business information can be accessed at the Commission by searching the Commission's Electronic Document Imaging System. Information about accessing documents in this system is set forth below in Question and Answer No. 8.

Administrative Law Judges and the Commission, as well as all other documents in the Commission's public docket file, may be searched and retrieved using the Commission's Electronic Document Imaging System ("EDIS").⁹ Researchers can browse an electronic file room or conduct full-text, key word searches for documents. Assistance with searches is available from the staff of the Office of the Secretary, Docket Branch. To schedule individual or group training, contact the Commission Secretary, Donna R. Koehnke, at 202-205-2000.

Persons interested in obtaining copies of orders, decisions, or other documents in the Commission's public docket file should identify the documents and fill out a form requesting copying. An on-site copying contractor will copy the identified documents either immediately or for later delivery to your office. Information about copying and delivery charges can be obtained from the copying contractor, Waugh Enterprises, Inc., at 202-479-2589.

Documents that are more than one year old may only be available on microfiche, in which case the documents may be copied at the Commission free of charge. However, because the Commission does not supply paper for copying microfiche documents, persons doing research should bring their own standard 8.5 x 11 inch photocopy paper.

Orders and decisions in Section 337 investigations can also be researched on WestlawTM and LexisTM. (In WestlawTM, materials from the Commission are available in the FINT-ITC database). Some decisions are also published in the United States Patent Quarterly.

⁹ All documents filed in investigations instituted after January 1, 1996, are now available on EDIS.

- **Institution of a Section 337 Investigation**

9. How does an investigation get instituted?

After a complaint is filed with the Commission, the Office of Unfair Import Investigations (OUII) examines the complaint for sufficiency and compliance with the applicable rules, and makes a recommendation to the Commission regarding institution of the requested investigation. OUII's examination of the complaint may result in a request for supplementation or amendment of the complaint prior to the Commission determination of whether to institute an investigation.

The Commission will normally vote on whether to institute an investigation based upon the complaint within 30 calendar days after the filing of the complaint. If a complaint is accompanied by a motion for temporary relief, the Commission will make its determination of whether to institute an investigation (and provisionally accept the motion for temporary relief) within 35 calendar days after the filing of the complaint and motion.

In the event that the Commission votes to institute an investigation, a notice of investigation defining the scope of the investigation is published in the *Federal Register*. These notices typically appear in the *Federal Register* on the Wednesday following the last day of the 30- or 35-day period for determining whether to institute an investigation. In addition to publishing a notice in the *Federal Register*, the Commission serves a copy of the complaint and notice of investigation on all of the Respondents named in the investigation.

In the event that the Commission determines not to institute an investigation based upon a complaint, the complaint is dismissed, and the Complainant and all the firms named as proposed Respondents in the complaint will receive a written notice of the Commission's action.

- **Investigation Procedures**

10. How are investigations conducted?

Investigations are conducted in conformity with the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, and pursuant to Commission Rules published at 19 C.F.R. Part 210, which are akin to the Federal Rules of Civil Procedure. In addition to these rules, the presiding Administrative Law Judge typically issues a set of Ground Rules for the conduct of the investigation. These Ground Rules provide detailed instructions on matters such as the time for responding to a motion, the method for asserting a privilege, the number of copies required of evidentiary exhibits, the use of translators, and the procedure for arranging a telephone conference between the parties and the Administrative Law Judge.

11. Can an investigation be settled by agreement or consent order?

Yes. The Commission Rules provide that a party may move to terminate an investigation as to one or more of the Respondents on the basis of a licensing or other settlement agreement, including an agreement to present the matter for arbitration. See Commission Rule 210.21(a), (b), and (d), 19 C.F.R. §210.21(a), (b), and (d). Thus, for example, a Complainant in a

patent-based investigation may enter into a license agreement with one of the Respondents and file a motion to terminate the investigation as to that Respondent.

The Commission Rules also provide that an investigation may be terminated as to one or more Respondents on the basis of a Consent Order. *See* Commission Rule 210.21(c).

Consent Orders are typically entered upon the joint request of the Complainant and a Respondent in the form of a motion which contains the parties' joint proposed Consent Order.

12. How do I get a subpoena?

During the time that an investigation is before an Administrative Law Judge, he can issue a subpoena. The procedures involved in the issuance of subpoenas at the Commission differ from the current practice of most courts. The Commission Rule concerning subpoenas, including motions to quash, is found at Rule 210.32, 19 C.F.R. § 210.32. Note that an application for issuance of a subpoena, as well as the requested subpoena itself, must be submitted to the Administrative Law Judge.

Additional instructions concerning subpoenas may be given by the presiding Administrative Law Judge in a particular investigation (*e.g.*, in the Ground Rules issued in a particular investigation). Furthermore, sample subpoena forms may be obtained from the presiding Administrative Law Judge. Subpoenas are enforced, if necessary, by the Commission in federal court.

13. Can I intervene in a Section 337 case?

Commission Rule 210.19, 19 C.F.R. §210.19, provides that any person desiring to intervene may request leave to intervene by filing a written motion. Persons seeking to

intervene are urged to consult the Administrative Law Judge's Ground Rules on matters such as service and filing of motions.

14. Can I participate in an investigation other than by intervention?

Commission Rule 210.50, 19 C.F.R. §210.50, provides for the Commission to receive submissions from the public on issues concerning the effect of any remedial order(s) on the public interest, namely, the effect of such an order on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive products, and United States consumers. *See* 19 U.S.C. §1337(d)-(g). For details on the deadlines for submitting comments on such matters, see Rule 210.50(a), 19 C.F.R. §210.50(a), and notices issued in particular investigations.

15. Where and when are hearings held, and are they open to the public?

Hearings are held by the Administrative Law Judges in hearing rooms located in the USITC's building in Washington, D.C. As a general rule, hearings on the merits of a case occur about six months after the institution of an investigation. (The exact date is typically set forth in a procedural schedule issued early in the investigation.)

Hearings are generally open to the public, except those portions which involve confidential business information as defined in the Commission's Rules. During those portions of a hearing, members of the general public and others who are not allowed access to confidential information are requested to step outside the hearing room while such information is presented or discussed. The amount of confidential information varies from investigation to investigation.

16. When is a determination made on the merits of a case?

Approximately nine months after institution of an investigation (or longer in more complex cases), the Administrative Law Judge issues a decision on the merits of the case, called an "Initial Determination," which contains findings of fact, an opinion, and conclusions of law. The due date for this decision is typically listed in an order issued early in the investigation that sets forth a target date for completion of the investigation. Journalists and other non-parties to an investigation should note that the Administrative Law Judges' decisions typically contain confidential business information, and thus are not available for public inspection on the date filed. Public versions of these decisions (with the confidential information redacted) are usually available for inspection about ten days after the date that the original, confidential version is filed.

The Administrative Law Judge's Initial Determination is subject to review by the Commission, as discussed below in Question and Answer No. 18.

17. Is preliminary relief available?

Yes. The Complainant may request at the time it files its Complaint that the Commission conduct expedited temporary relief proceedings and issue a temporary exclusion order and/or a temporary cease and desist order during the course of the investigation.¹⁰ See 19 C.F.R. Subpart H. In determining whether to grant a request for temporary relief, the Commission

¹⁰ General information about exclusion orders and cease and desist orders is discussed below in Question and Answer No. 19.

applies the standard for the grant of preliminary injunctions by the federal district courts.¹¹

This determination will be made by the Commission no later than the 90th day after the date on which the investigation is instituted, or, if the case is deemed to be complex, by the 150th day after initiation of the investigation. *See* 19 U.S.C. §1337(e).

The Commission Rules require that requests for temporary relief must be made in a motion that is accompanied by a memorandum supporting the request. Significantly, the motion must also be accompanied by affidavits that support the factual assertions made in the motion, and must also be accompanied by all evidence in the Complainant's possession at the time of filing that the Complainant intends to rely upon in support of the motion. Information concerning the form of the motion and the required supporting materials may be obtained from the Commission's Office of Unfair Import Investigations (OUII) at 202-205-2560. Sample motions for temporary relief, as well as assistance concerning the special service rules relating to such motions, are also available from OUII.

Following the receipt of a motion for temporary relief, the Commission will determine whether to institute proceedings to adjudicate the motion (which proceedings are sometimes informally referred to as "TEO" or "temporary exclusion order" proceedings). In the event the Commission institutes TEO proceedings, the motion for temporary relief is forwarded to an Administrative Law Judge for adjudication. In a typical TEO proceeding, the parties

¹¹ In particular, the Commission applies the standard of the U.S. Court of Appeals for the Federal Circuit in affirming lower court decisions granting preliminary injunctions. In general, that standard involves a consideration of Complainant's likelihood of success on the merits of the case, harm to the domestic industry in the absence of temporary relief, harm to Respondents, and the public interest.

conduct a few weeks of discovery on the issues presented by the motion, and thereafter the Administrative Law Judge holds an evidentiary hearing on the merits of the motion, receives briefs from the parties on the evidence and the law, and issues a determination on the merits of the motion by the 70th day of the investigation (or by the 120th day in a complex case). In the event the Administrative Law Judge determines to grant the motion, he will do so in the form of an Initial Determination that is subject to review by the Commission. By the 90th day after institution of an investigation (or the 150th day in more complex cases), the Commission will determine whether to accept the Administrative Law Judge's Initial Determination and whether to grant temporary relief.

- **Final Determinations, Remedies, and Appeals**

18. What happens to an Administrative Law Judge's Initial Determination on the merits after it is issued?

Under the Rules, parties may petition for Commission review of an Administrative Law Judge's Initial Determination (ID) if they believe that it (i) contains a clearly erroneous finding of material fact, (ii) contains an erroneous legal conclusion, or (iii) affects Commission policy. The other parties may file responses to any petition for review. Within 45 calendar days after service of the ID, the Commission decides, either on the basis of a petition for review or on its own initiative, whether to review some or all of the ID. If the Commission decides not to review some or all of an ID, those unreviewed portions of the ID become the Commission's determinations. If the Commission decides to review some or all of an ID, it may affirm, set

aside, or modify the portions of the ID under review. *See generally*, Rules 210.43 - 210.45, 19 C.F.R. §§210.43 - 210.45.

19. If the Commission finds a violation of Section 337, what remedies are available?

The Commission is authorized under Section 337 to issue two types of remedial orders - - exclusion orders and cease and desist orders. Both types of orders may be issued in the same case. An award of money damages is not available as a remedy for violation of Section 337.

An exclusion order directs the U.S. Customs Service to exclude articles from entry into the United States. There are two types of exclusion orders: general exclusion orders and limited exclusion orders. A general exclusion order directs the U.S. Customs Service to exclude from entry into the United States all infringing articles, without regard to source. A limited exclusion order directs the Customs Service to exclude from entry all infringing articles that originate from a specified firm that was a respondent in the Commission investigation. Although the U.S. Customs Service enforces Commission exclusion orders by denying articles entry into the United States at each of the ports of entry, the Commission may become involved in enforcement of exclusion orders by ordering the seizure and forfeiture of any article subject to the terms of an exclusion order in circumstances where the owner or importer of the article previously attempted to import the article into the United States and the article was previously denied entry by the U.S. Customs Service. See 19 U.S.C. §1337(i).¹²

¹² The procedures of the U.S. Customs Service for implementing Commission exclusion
(continued...)

A cease and desist order directs a respondent in the Commission investigation to cease its unfair acts, including selling infringing imported articles out of U.S. inventory. Unlike exclusion orders, cease and desist orders are enforced by the Commission, not by the Customs Service. See 19 U.S.C. §1337(f)(2) (civil penalties for violation of orders).

20. When do Commission remedial orders become effective?

Commission remedial orders are sent, upon issuance, to the President who may then, within 60 days, disapprove them for policy reasons. Such disapprovals are rare. During this period, called the Presidential review period, infringing articles may enter the United States provided the importer posts a bond with the Customs Service in an amount determined by the Commission. Similarly, activities prohibited by a Commission cease and desist order may continue during the Presidential review period provided the respondent posts a bond with the Commission.

21. How long do Section 337 investigations last?

By statute, Section 337 investigations must be completed at the earliest practicable time. Target dates for the completion of the investigation are set by the Administrative Law Judge early in the investigation. These target dates typically call for completion of the investigation in one year, although some unusually complex investigations may take about eighteen months to complete.

¹² (...continued)

orders and Commission seizure orders are set forth at 19 C.F.R. §12.39.

22. Are Commission decisions in Section 337 investigations appealable to a court?

Yes. Any person adversely affected by a Commission decision under Section 337 may appeal the decision to the U.S. Court of Appeals for the Federal Circuit. Any such appeal must be filed within 60 calendar days of the date that the Commission decision became final. The party that prevailed at the Commission may intervene in the appeal in defense of the Commission decision. Commission decisions that find no violation of Section 337 are final when issued. Commission decisions that find a violation of Section 337 and issue remedial orders become final at the conclusion of Presidential review.

RESPONSE FORM

This pamphlet is intended to help clarify Commission procedures and practice in Section 337 investigations. If you have found this pamphlet to be helpful or if you have suggestions for ways to improve this pamphlet or otherwise clarify the Commission's Section 337 procedures, please let us know by filing out this form.

1. Do you have any suggestions regarding ways to improve this pamphlet or otherwise clarify Commission procedures?

2. (For statistical purposes) Describe your previous degree of experience with Section 337?

☐ No Experience ☐ Some Experience ☐ Considerable Experience

3. (For statistical purposes) Have you ever been a party to, or represented a party in, a Section 337 investigation? ☐ Yes ☐ No

4. (For statistical purposes) Describe your interest in information about Section 337 by checking the box or boxes that apply to you.

☐ Outside counsel for complainant
(or prospective complainant)
☐ Outside counsel for respondent
☐ In-house representative of a complainant
☐ Outside counsel for a subpoenaed company
☐ Counsel for a small company
☐ Academician
☐ Person with a general interest
in intellectual property protection

☐ In-house counsel for complainant
(or prospective complainant)
☐ In-house counsel for respondent
☐ In-house representative of a respondent
☐ In-house counsel for a subpoenaed company
☐ Journalist
☐ Person with a general interest in
Commission practice

Please return this Response Form to:

Lynn I. Levine, Director
Office of Unfair Import Investigations
U.S. International Trade Commission
500 E Street, S.W., Suite 401
Washington, D.C. 20436
Facsimile: 202-205-2158

name (optional)

company/firm (optional)