

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

19 CFR Parts 201 and 210

Rules of General Application, Adjudication and Enforcement

AGENCY: International Trade Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States International Trade Commission (“Commission”) proposes to amend its Rules of Practice and Procedure concerning rules of general application, adjudication, and enforcement. The amendments are necessary to make certain technical corrections, to clarify certain provisions, to harmonize different parts of the Commission’s rules, and to address concerns that have arisen in Commission practice. The intended effect of the proposed amendments is to facilitate compliance with the Commission’s Rules and improve the administration of agency proceedings.

DATES: To be assured of consideration, written comments must be received by 5:15 p.m. within 60 days after publication of this notice of proposed rulemaking in the Federal Register.

ADDRESSES: You may submit comments, identified by docket number MISC-045, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Agency Web Site: <http://www.usitc.gov>. Follow the instructions for submitting comments on the web site at <http://www.usitc.gov/secretary/edis.htm>.
- E-mail: megan.valentine@usitc.gov. Include docket number MISC-045 in the subject line of the message.
- Mail: For paper submission. U.S. International Trade Commission, 500 E Street, S.W., Room 112, Washington, D.C. 20436.
- Hand Delivery/Courier: U.S. International Trade Commission, 500 E Street, S.W., Room 112, Washington, D.C. 20436, from the hours of 8:45 a.m. to 5:15 p.m.

Instructions: All submissions received must include the agency name and docket number (MISC-045), along with a cover letter stating the nature of the commenter’s interest in the proposed rulemaking. All comments received will be posted without change to <http://www.usitc.gov>, including any personal information provided. For paper copies, a signed original and 14 copies of each set of comments should be submitted to Lisa R. Barton, Secretary, U.S. International Trade Commission, 500 E Street, S.W., Room 112, Washington, DC 20436.

Docket: For access to the docket to read background documents or comments received, go to <http://www.usitc.gov> and/or the U.S. International Trade Commission, 500 E Street, S.W., Room 112, Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, telephone 202-708-2301, Office of the General Counsel, United States International Trade Commission. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal at 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>.

SUPPLEMENTARY INFORMATION: The preamble below is designed to assist readers in understanding these proposed amendments to the Commission Rules. This preamble provides background information, a regulatory analysis of the proposed amendments, a section-by-section explanation of the proposed amendments to parts 201 and 210, and a description of the proposed amendments to the rules. The Commission encourages members of the public to comment on whether the language of the proposed amendments is sufficiently clear for users to understand, in addition to any other comments they wish to make on the proposed amendments.

If the Commission decides to proceed with this rulemaking after reviewing the comments filed in response to this notice, the proposed rule revisions will be promulgated in accordance with the applicable requirements of the Administrative Procedure Act ("APA") (5 U.S.C. 553), and will be codified in 19 CFR Parts 201 and 210.

Background

Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) authorizes the Commission to adopt such reasonable procedures, rules, and regulations as it deems necessary to carry out its functions and duties. This rulemaking seeks to improve provisions of the Commission's existing Rules of Practice and Procedure. The Commission proposes amendments to its rules covering investigations under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), as amended ("section 337"), in order to increase the efficiency of its section 337 investigations.

This rulemaking was undertaken to make certain technical corrections, to clarify certain provisions, to harmonize different parts of the Commission's rules, and to address concerns that have arisen in Commission practice. The intended effect of the proposed amendments is to facilitate compliance with the Commission's Rules and improve the administration of agency proceedings.

On February 14, 2012, at 77 *Fed. Reg.* 8114, the Commission published a Plan for Retrospective Analysis of Existing Rules. This plan was issued in response to Executive Order 13579 of July 11, 2011, and established a process under which the Commission will periodically review its significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regulatory objectives. This process will include a general review of existing regulations in 19 CFR Parts 201, 207, and 210. The current notice of proposed rulemaking is consistent with the plan to ensure that the Commission's rules are effective.

The Commission invites the public to comment on all of these proposed rules amendments. In any comments, please consider addressing whether the language of the proposed amendments is sufficiently clear for users to understand. In addition please consider addressing how the proposed rules amendments could be improved, and offering specific constructive alternatives where appropriate.

Consistent with its ordinary practice, the Commission is issuing these proposed amendments in accordance with the applicable requirements of section 553 of the APA. This procedure entails the following steps: (1) publication of a notice of proposed rulemaking; (2) solicitation of public comments on the proposed amendments; (3) Commission review of public comments on the proposed amendments; and (4) publication of final amendments at least thirty days prior to their effective date.

Regulatory Analysis of Proposed Amendments to the Commission's Rules

The Commission has determined that the proposed rules do not meet the criteria described in section 3(f) of Executive Order 12866 (58 *Fed. Reg.* 51735, Oct. 4, 1993) and thus do not constitute a significant regulatory action for purposes of the Executive Order.

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) is inapplicable to this rulemaking because it is not one for which a notice of final rulemaking is required under 5 U.S.C. 553(b) or any other statute. Although the Commission has chosen to publish a notice of proposed rulemaking, these proposed regulations are “agency rules of procedure and practice,” and thus are exempt from the notice requirement imposed by 5 U.S.C. 553(b).

These proposed rules do not contain federalism implications warranting the preparation of a federalism summary impact statement pursuant to Executive Order 13132 (64 *Fed. Reg.* 43255, Aug. 4, 1999).

No actions are necessary under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 et seq.) because the proposed rules will not result in expenditure in the aggregate by State, local, and tribal governments, or by the private sector, of \$100,000,000 or more in any one year, and will not significantly or uniquely affect small governments, as defined in 5 U.S.C. 601(5).

The proposed rules are not major rules as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.). Moreover, they are exempt from the reporting requirements of the Contract With America Advancement Act of 1996 (Pub. L. 104-121) because they concern rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

The amendments are not subject to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3504(h)).

Part 201

Subpart B B Initiation and Conduct of Investigations

Section 201.16

Section 201.16 provides the general provisions for service of process and other documents. In particular, section 201.16(a)(1) provides that the Commission may effect service by mailing or delivering a copy of the document to be served to the person to be served or to certain persons affiliated with the organization to be served or to the person's or organization's attorney representative. Subsection 201.16(a)(4) explains that service by mail, as provided in subsection 201.16(a)(1) is complete upon mailing of the document. The Commission is currently developing the capability to perfect electronic service. The proposed rule would accordingly amend subsections 201.16(a)(1) and (4) to provide that the Commission may effect

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

In addition, subsection 201.16(f) authorizes parties to serve documents by electronic means. The proposed rule would amend subsection 201.16(f) to require parties serving documents by electronic means to ensure that any such document containing confidential business information subject to an administrative protective order be securely transmitted, in addition to being securely stored, to prevent unauthorized access and/or receipt by individuals or organizations not authorized to view the specified confidential business information.

Part 210

Subpart B—Commencement of Preinstitution Proceedings and Investigations

Section 210.10

Section 337(b)(1) states that the “Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative.” 19 U.S.C. § 1337(b)(1). Accordingly, section 210.10 provides for institution of section 337 investigations by the Commission based upon a properly filed complaint. *See* 19 C.F.R. § 210.10(a). The Commission, however, is concerned about complaints that assert multiple unrelated patents and/or multiple technologies because the resulting investigation is often unwieldy and lengthy. The proposed rule would amend section 210.10(a) to clarify that the Commission may institute multiple investigations based on a single complaint where necessary to limit the number of technologies and/or unrelated patents asserted in a single investigation.

In addition, subsection 210.10(b) provides that, when instituting an investigation, the Commission shall issue a notice defining the scope of the investigation, including whether the Commission has ordered the presiding administrative law judge to take evidence and to issue an initial determination concerning the public interest. The proposed rule would add subsection 210.10(b)(1) to provide that the notice of institution will specify in plain language the accused products that will be within the scope of the investigation in order to avoid disputes between the parties concerning the scope of the investigation at the outset. Comments regarding this proposed rule should address, in particular, whether the proposed rule would be useful in clarifying the scope of the investigation. The Commission welcomes alternate language that captures the Commission’s intent with respect to the proposed rule. New subsection 210.10(b)(2) contains the existing language in subsection 210.10(b), which provides that the Commission may order the presiding administrative law judge to take evidence concerning the public interest.

The Commission has established a “100-Day” proceeding to provide for the disposition of potentially dispositive issues within a specified time frame following institution of an investigation. The proposed rule would accordingly add subsection 210.10(b)(3) to authorize the Commission to direct the presiding administrative law judge to issue an initial determination pursuant to new subsection 210.42(a)(3), as described below, on a potentially dispositive issue as set forth in the notice of investigation. The specified time frame for issuance of the initial determination is subject to an extension of time for good cause shown. As set forth in the pilot

program, the presiding administrative law judge will have discretion to stay discovery during the pendency of the 100-Day proceeding.

Section 210.11

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

Subpart C—Pleadings

Section 210.12

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

Section 210.14

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

The proposed rule would also add subsection 210.14(i), authorizing the administrative law judge to issue an order designating a potentially dispositive issue for an early ruling. The proposed rule would also provide authority for the presiding administrative law judge to hold expedited hearings on such dispositive issues in accordance with section 210.36.

Subpart D—Motions

Section 210.15

Section 210.15 provides the procedure and requirements for motions during the pendency of an investigation and related proceedings, whether before an administrative law judge or before the Commission. The proposed rule would amend subsection 210.15(a)(2) to clarify that this provision does not allow for motions, other than motions for temporary relief, to be filed with the Commission prior to institution of an investigation. Subsection 210.15(a)(1) is not amended because matters are not delegated to an administrative law judge until after an investigation has been instituted.

Section 210.19

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

Section 210.21

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

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

In addition, subsection 210.21(c)(3) sets out the required contents of a consent order stipulation while subsection 210.21(c)(4) sets out the required contents of the consent order. The proposed rule would amend subsection 210.21(c)(3)(ii)(A) to conform to subsection 210.21(c)(4)(x), which requires that the consent order stipulation and consent order contain a statement that a consent order shall not apply to any intellectual property right that has been held invalid or unenforceable or to any adjudicated article found not to infringe the asserted right or no longer in violation by the Commission or a court or agency of competent jurisdiction in a final, nonreviewable decision. The proposed rule would also amend subsection 210.21(c)(4)(viii) to add “any asserted patent claims,” delete “the claims of the asserted patent,” delete the second occurrence of the word “claims,” and add the word “claim” after “unfair trade practice” in the phrase “validity or enforceability of the claims of the asserted patent claims . . . unfair trade practice in any administrative or judicial proceeding to enforce the Consent Order[.]”

The proposed rule would further amend subsection 210.21(c)(4)(x) to add “asserted” before “claim of the patent . . .” and to add “claim” after “or unfair trade practice . . .” The proposed rule also would add new subsection 210.21(c)(4)(xi) to require in the consent order an admission of all jurisdictional facts, similar to the provision requiring such a statement in the consent order stipulation (210.21(c)(3)(i)(A)).

Section 210.22

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

Section 210.25

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

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

Subpart E—Discovery and Compulsory Process

Section 210.27

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

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

Section 210.28

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

Section 210.32

Section 210.32 provides for the use of subpoenas during the discovery phase of a section 337 investigation. In particular, subsection 210.32(d) provides for the filing of motions to quash a subpoena that the presiding administrative law judge has issued. The proposed rule would amend subsection 210.32(d) to clarify that a party upon which a subpoena has been served may file an objection to the subpoena within ten days of receipt of the subpoena, with the possibility of requesting an extension of time for filing objections for good cause shown. The proposed rule would also amend subsection 210.32(d) to clarify that any motion to quash must be filed within ten days of receipt of the subpoena, with the possibility of requesting an extension of time for good cause shown. The proposed amendment is intended to bring the Commission's subpoena practice into closer conformity with the Federal Rules of Civil Procedure. The Commission requests that any comments concerning this amendment address any potential conflicts that may arise from copending objections and motions to quash.

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

Section 210.34

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

Subpart G—Determinations and Actions Taken

Section 210.42

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

The proposed rule would add subsection 210.42(a)(3) authorizing the presiding administrative law judge to issue an initial determination ruling on a potentially dispositive issue in accordance with a Commission order under new subsection 210.10(b)(3) or the administrative law judge's order issued pursuant to new section 210.22. In addition, the proposed rule would require the administrative law judge to certify the record to the Commission and issue the initial determination within 100 days of when the issue is designated by the Commission pursuant to 210.10(b)(3) or by the administrative law judge pursuant to 210.14(i) or 210.22. The 100-day period for certification may be extended for good cause shown. This procedure differs from a summary determination proceeding in that the administrative law judge's ruling pursuant to this section is made following an evidentiary hearing. These changes are intended to provide a procedure for the early disposition of potentially dispositive issues identified by the Commission at institution of an investigation or by the administrative law judge early in procedural schedule for the investigation. This procedure is not intended to affect summary determination practice under section 210.18 whereby the ALJ may dispose of one or more issues in the investigation when there is no genuine issue as to material facts and the moving party is entitled to summary determination as a matter of law.

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

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

Section 210.43

Section 210.43 provides for the process by which a party may request and the Commission may consider petitions for review of initial determinations on matters other than temporary relief. In particular, subsection 210.43(a)(1) specifies when parties must file petitions for review based on the nature of the initial determination, and subsection 210.43(c) specifies when parties must file responses to any petitions for review. The proposed rule would amend subsection 210.43(a)(1) to specify when parties must file petitions for review of an initial determination ruling on a potentially dispositive issue pursuant to new subsection 210.42(a)(3). The proposed rule would further amend subsection 210.43(c) to specify when the parties must file responses to any such petitions for review. Under the proposed rule, parties are required to file a petition for review within five calendar days after service of the initial determination and any responses to the petitions within three business days after service of a petition.

Subsection 210.43(d)(1) provides for the length of time the Commission has after service of an initial determination to determine whether to review the initial determination before it becomes the Commission's determination. The proposed rule would amend subsection 210.43(d)(1) to specify that the Commission determine whether to review initial determinations on early dispositive issues pursuant to new subsection 210.42(a)(3). Under the proposed rule, the Commission shall determine whether to review such initial determinations within 30 days of service of the initial determination.

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

Section 210.47

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

Section 210.50

Section 210.50, and in particular subsection 210.50(a)(4), requires the Commission to receive submissions from the parties to an investigation, interested persons, and other

Government agencies and departments considering remedy, bonding, and the public interest. Subsection 210.50(a)(4) further requests the parties to submit comments concerning the public interest within 30 days of issuance of the presiding administrative law judge's recommended determination. It has come to our attention that members of the public are confused as to whether subsection 210.50(a)(4) applies to them since the post-recommended determination provision is stated immediately after the provision requesting comments from "interested persons." The proposed rule would amend subsection 210.50(a)(4) to clarify that the rule concerns post-recommended determination submissions from the parties. Given the variability of the dates for issuance of the public version of the recommended determinations, post-recommended determination submissions from the public are solicited via a notice published in the FEDERAL REGISTER specifying the due date for such public comments.

Subpart I—Enforcement Procedures and Advisory Opinions

Section 210.75

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

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

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

Section 210.76

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

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

Section 210.77

Section 210.77 provides for the Commission to take temporary emergency action pending a formal enforcement proceeding under subsection 210.75(b) by immediately and without hearing or notice modify or revoke the remedial order under review and, if revoked, to replace the order with an appropriate exclusion order. As noted above, the Federal Circuit held in *Vastfame* that an enforcement proceeding requires that the parties be afforded an opportunity for a hearing. 386 F.3d at 1114-15. The procedure set forth in subsection 210.77 for temporary emergency action pending a formal enforcement proceeding, therefore, is not in accordance with the Federal Circuit's holding in *Vastfame*. The proposed rule would, accordingly, delete subsection 210.77.

Section 210.79

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

whether to institute within 30 days of receiving the request barring exceptional circumstances, a request for postponement of institution, or withdrawal of the request for an advisory opinion.

List of Subjects in Parts 201 and 210

19 CFR Part 201

Administration practice and procedure, Reporting and record keeping requirements.

19 CFR Part 210

Administration practice and procedure, Business and industry, Customs duties and inspection, Imports, Investigations.

For the reasons stated in the preamble, the United States International Trade Commission proposes to amend 19 CFR parts 201 and 210 as follows:

PART 201 RULES OF GENERAL APPLICATION

1. The authority citation for part 201 continues to read as follows:

Authority: Sec. 335 of the Tariff Act of 1930 (19 U.S.C. 1335), and sec. 603 of the Trade Act of 1974 (19 U.S.C. 2482), unless otherwise noted.

Subpart A B Miscellaneous

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

§ 201.16 Service of process and other documents.

(a) * * *

(1) By mailing, delivering, or serving by electronic means a copy of the document to the person to be served, to a member of the partnership to be served, to the president, secretary, other executive officer, or member of the board of directors of the corporation, association, or other organization to be served, or, if an attorney represents any of the above before the Commission, by mailing, delivering, or serving by electronic means a copy to such attorney; or * * *

(4) When service is by mail, it is complete upon mailing of the document. When service is by an express service, service is complete upon submitting the document to the express delivery service or depositing it in the appropriate container for pick-up by the express delivery service. When service is by electronic means, service is complete upon transmission of a notification that the document has been placed in an appropriate repository for retrieval by the person, organization, representative, or attorney being served, unless the Commission is notified that the notification was not received by the party served.

* * * * *

(f) *Electronic service by parties.* Parties may serve documents by electronic means in all matters before the Commission. Parties may effect such service on any party, unless that party has, upon notice to the Secretary and to all parties, stated that it does not consent to

electronic service. If electronic service is used, no additional time is added to the prescribed period. However, any dispute that arises among parties regarding electronic service must be resolved by the parties themselves, without the Commission's involvement. When a document served by electronic means contains confidential business information subject to an administrative protective order, the document must be securely stored and transmitted by the serving party in a manner that prevents unauthorized access and/or receipt by individuals or organizations not authorized to view the specified confidential business information.

PART 210BADJUDICATION AND ENFORCEMENT

3. The authority citation for part 210 continues to read as follows:

Authority: 19 U.S.C. 1333, 1335, and 1337.

Subpart B—Commencement of Preinstitution Proceedings and Investigations

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

§ 210.10 Institution of investigation.

(a) * * *

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

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

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

(3) The Commission may order the administrative law judge to issue an initial determination as provided in §210.42(a)(3)(i) and (ii) ruling on a potentially dispositive issue as set forth in the notice of investigation.

* * * * *

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

§ 210.11 Service of complaint and notice of investigation.

(a) * * *

(2) * * *

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

* * * * *

Subpart C—Pleadings

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

§ 210.12 The complaint.

(a) * * *

(9) * * *

(xi) The expiration date of each patent asserted.

* * * * *

7. Amend section 210.14 by:
a. amending the section heading;
b. adding paragraph (h); and
c. adding paragraph (i)
to read as follows:

§ 210.14 Amendments to pleadings and notice; supplemental submissions; counterclaims; consolidation of investigations; severance of investigations; designation of dispositive issue.

* * * * *

(h) *Severance of investigation.* The administrative law judge may determine to sever an investigation into two or more investigations at any time prior to or upon issuance of the procedural schedule, based upon either a motion or upon the administrative law judge’s own judgment that severance is necessary to limit the number of technologies and/or unrelated patents asserted in a single investigation. The administrative law judge’s decision will be in the form of an initial determination pursuant to section 210.42(c)(3).

(i) *Designation of dispositive issue.* Within 30 days of institution of the investigation, the administrative law judge may issue an order designating a potentially dispositive issue for an early ruling. The presiding administrative law judge is authorized, in accordance with section 210.36, to hold expedited hearings on this issue.

Subpart D—Motions

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

§ 210.15 Motions.

(a) * * *

(2) When an investigation or related proceeding, not including a preinstitution proceeding except as otherwise prescribed by §210.52, is before the Commission, all motions shall be addressed to the Chairman of the Commission. All motions shall be filed with the Secretary and shall be served upon each party.

* * * * *

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

§ 210.19 Intervention.

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

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

§ 210.21 Termination of investigations.

* * * * *

(b) * * *

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

(c) * * *

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

(3) * * *

(ii) * * *

(A) A statement that if any claim of the patent, copyright, trademark, mask work, boat hull design, or unfair trade practice claim that has expired or is held invalid or unenforceable by

a court or agency of competent jurisdiction or if any article has been found or adjudicated not to infringe the asserted right in a final decision, no longer subject to appeal, this Consent Order shall become null and void as to such expired, invalid, or unenforceable claim or as to any adjudicated article; * * *

(4) * * *

(viii) A statement that Respondent and its officers, directors, employees, agents, and any entity or individual acting on its behalf and with its authority shall not seek to challenge the validity or enforceability of any asserted patent claims, copyright, trademark, mask work, boat hull design, or unfair trade practice claim in any administrative or judicial proceeding to enforce the Consent Order; * * *

(x) A statement that if any asserted claim of the patent, copyright, trademark, mask work, boat hull design, or unfair trade practice claim is held invalid or unenforceable by a court or agency of competent jurisdiction or if any article has been found or adjudicated not to infringe the asserted right in a final decision, no longer subject to appeal, this Consent Order shall become null and void as to such invalid or unenforceable claim or adjudicated article;

(xi) An admission of all jurisdictional facts; and

(xii) A statement that the investigation is hereby terminated with respect to the respondent; provided, however, that enforcement, modification, or revocation of the Consent Order shall be carried out pursuant to Subpart I of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

* * * * *

11. Add new section 210.22 to read as follows:

§ 210.22 Designation of Dispositive Issue

Any party may move within 30 days of institution of the investigation to request that the presiding administrative law judge issue an order designating a potentially dispositive issue for an early ruling. The presiding administrative law judge is authorized, in accordance with section 210.36, to hold expedited hearings on any such designated issue.

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

§ 210.25 Sanctions.

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

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

* * * * *

Subpart E—Discovery and Compulsory Process

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

§ 210.27 General provisions governing discovery.

* * * * *

(e) * * *

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

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

(A) relate to compensation for the expert's study or testimony;

(B) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. * * *

(g) * * *

(3) If without substantial justification a request, response, or objection is certified in violation of paragraph (g)(2) of this section, * * *

* * * * *

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

§ 210.28 Depositions.

* * * * *

(h) * * *

(3) * * *

(v) Upon application and notice, that such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the oral testimony of witnesses at a hearing, to allow the deposition to be used; or

(vi) Upon agreement of the parties and within the administrative law judge's discretion, the use of designated deposition testimony in lieu of live witness testimony absent the circumstances otherwise enumerated in this paragraph is permitted.

* * * * *

15. Amend section 210.32 by:

- a. Revising the title of paragraph (d);
- b. adding paragraph (d)(1);
- c. redesignating paragraph (d) as paragraph (d)(2);
- d. revising new paragraph (d)(2); and
- e. revising paragraph (f)(1)

to read as follows:

§ 210.32 Subpoenas.

* * * * *

(d) *Objections and motions to quash.*

(1) Any objection to a subpoena shall be served in writing on the party or attorney designated in the subpoena within 10 days after receipt of the subpoena. The administrative law judge may, for good cause shown, extend the time in which objections may be filed.

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

(f) * * *

(1) *Deponents and witnesses.* Any person compelled to appear in person to depose or testify in response to a subpoena shall be paid the same fees and mileage as are paid witnesses with respect to proceedings in the courts of the United States; * * *

* * * * *

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

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

* * * * *

(c) *Violation of protective order.* (1) The issue of whether sanctions should be imposed may be raised on a motion by a party, the administrative law judge's own motion, or the Commission's own initiative in accordance with §210.25(a)(2). Parties, including the party that identifies an alleged breach or makes a motion for sanctions, and the Commission shall treat the identity of the alleged breacher as confidential business information unless the Commission issues a public sanction. The identity of the alleged breacher means the name of any individual against whom allegations are made. The Commission and the administrative law judge may permit the parties to file written submissions or present oral argument on the issues of the alleged violation of the protective order and sanctions.

* * * * *

Subpart G—Determinations and Actions Taken

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

§ 210.42 Initial Determinations.

(a) * * *

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

(c) * * *

(3) A determination pursuant to §210.14(h) severing an investigation into two or more investigation shall be in the form of an initial determination.* * *

(e) *Notice to and advice from other departments and agencies.* Notice of such initial determinations as the Commission may order shall be provided to the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs and Border Protection, and such other departments and agencies as the Commission deems appropriate by posting of such notice on the Commission's website. * * *

* * * * *

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

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

(a) * * *

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

(c) *Responses to the petition.* Any party may file a response within eight (8) days after service of a petition for review of a final initial determination under §210.42(a)(1), within three (3) business days after service of a petition for review of an initial determination under §210.42(a)(3), and within five (5) business days after service of all other types of petitions, except that a party who has been found to be in default may not file a response to any issue as to which the party has defaulted. * * *

(d) * * *

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

* * *

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

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

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

§ 210.47 Petitions for reconsideration.

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

20. Amend section 210.50 by:

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

to read as follows:

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

* * * * *

(a) * * *

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

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

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

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

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

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

* * * * *

Subpart I—Enforcement Procedures and Advisory Opinions

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

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

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

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

to read as follows:

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

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

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

(3) If the petition requests modification or rescission of an order issued pursuant to section 337 (d), (e), (f), (g), or (i) of the Tariff Act of 1930 on the basis of a licensing or other settlement agreement, the petition shall contain copies of the licensing or other settlement agreements, any supplemental agreements, any documents referenced in the petition or attached agreements, and a statement that there are no other agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation. If the licensing or other settlement agreement contains confidential business information within the meaning of §201.6(a) of this chapter, a copy of the agreement with such information deleted shall accompany the motion. On motion for good cause shown, the administrative law judge or the Commission may limit the service of the agreements to the settling parties and the Commission investigative attorney.

(b) * * *

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

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

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

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

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

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

* * * * *

23. Remove and reserve section 210.77.

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

§ 210.79 Advisory opinions.

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

* * *

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

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

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

(iii) The petitioner withdraws the request.

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

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

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

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

* * * * *

By order of the Commission.



Lisa R. Barton
Secretary to the Commission.

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