determined by USIA's Office of Contracts (M/KG). Relevant evaluation results of previous projects are part of this assessment.

3. Project Personnel

Personnel's thematic and logistical expertise should be relevant to the proposed program. Resumes should be relevant to the specific proposal and no longer than two pages each.

4. Program Planning

Detailed agenda and relevant work plan should demonstrate substance and logistical capacity.

5. Thematic Expertise

Proposal should demonstrate expertise in the subject area.

6. Cross-Cultural Sensitivity/Area Experties

Evidence of sensitivity to historical, linguistic, and other cross-cultural factors; relevant knowledge of geographic area.

7. Ability to Achieve Program

Objectives should be reasonable, feasible, and flexible. Proposal should clearly demonstrate how the grantee institution will meet the program's objectives.

8. Multiplier Effect

Proposed programs should strengthen long-term mutual understanding, to include maximum sharing of information and establishment of long-term institutional and individual ties.

9. Cost-Effectiveness

The overhead and administrative components should be kept as low as possible. All other items should be necessary and appropriate to achieve the program's objectives.

10. Cost-Sharing

Proposals should maximize cost-sharing through other private sector support as well as institution direct funding contributions.

11. Follow-on Activities

Proposals should provide a plan for continued exchange activity (without USIA support) which ensures that USIA-supported programs are not isolated events.

12. Project Evaluation

Proposal should include a plan to evaluate the activity's success.

Notice

The terms and conditions published in this RFP are binding and may not be modified by any USIA representative. Explanatory information provided by the Agency that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. Final award cannot be made until funds have been fully appropriated by Congress, allocated and committed through internal USIA procedures.

Notification

All applicants will be notified of the results of the review process on or about April 2, 1993. Awarded grants will be subject to periodic reporting and evaluation requirements.

Dated: October 27, 1992.

Barry Fulton,

Acting Associate Director, Bureau of Educational and Cultural Affairs.

[FR Doc. 92-26671 Filed 11-4-92; 8:45 am]

BILLING CODE 8230-01-M

Public and Private Non-Profit Organizations in Support of International Educational and Cultural Activities

AGENCY: United States Information Agency.

ACTION: Notice—request for proposals.

SUMMARY: The Office of Citizen Exchanges (E/P) of the Bureau of Educational and Cultural Affairs of the United States Information Agency (USIA) announces a request for proposals from not-for-profit organizations to conduct three initiative grant exchange programs that are designed to encourage increased private sector commitment to and involvement in international exchanges involving U.S., East Asian and Pacific participants. All international participants will be nominated by USIA personnel overseas. Interested applicants are urged to read the complete Federal Register announcement before addressing inquiries to the Office or submitting their proposals.

ANNOUNCEMENT NUMBER: The announcement number is E/P-93-4. Please refer to this number in all correspondence and telephone calls to the Agency.

DATES: Deadline for Proposals: All copies must be received at the U.S. Information Agency by 5 p.m. Washington, DC time on Friday, January 15, 1993. Faxed documents will not be accepted, nor will documents postmarked January 15 but received at a later date. It is the responsibility of each grant applicant to ensure that proposals are received by the above deadline. Grants should begin after May 15, 1993.

ADDRESSES: The original and 14 copies of the completed application, including required forms, should be submitted by the deadline to:

U.S. Information Agency, REF: Citizen Exchange: Initiative Competition FY-93-4, Office of Grants Management (E/XE)/, Room 336, 301 4th Street SW., Washington, DC 20547.

FOR FURTHER INFORMATION CONTACT: Interested organizations/ institutions should contact the Office of Citizen Exchanges (E/P), room 224, USIA, Washington, DC., 20547, Telephone: (202) 619-5326, to request detailed application packets which include award criteria additional to this announcement, all necessary forms, and guidelines for preparing proposals, including specific budget preparation guidance. Please specify the name of USIA Program Officer Elroy Carlson on all inquiries and correspondence.

SUPPLEMENTARY INFORMATION: Pursuant to the Bureau's authorizing legislation, "programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social and cultural life."

Melanesian Youth Development Program

This will be a three-week program for an incoming delegation of six to eight government officials and educators responsible for the education, training, and employment of young people in Papua New Guinea, the Solomon Islands, and Vanuatu. In all three countries only a small fraction of the eligible population ever completes 12 years of schooling. A rapidly evolving economy spurred by new oil discoveries has created a host of skilled job opportunities for which few of the region's young people qualify. The purpose of this project is to expose selected officials from the region to U.S. public and private programs that prepare young people with limited education for participation in a modern work force. The visit will include an examination of U.S. public policy regarding education for disadvantaged youth, and exposure to vocational and technical school programs. Additional attention will be given to the role of voluntary youth organizations in molding character and building self-esteem.

Part one of the program involves bringing the officials to the U.S. for a three week period of visits and

discussions with appropriate government and private experts. Part two consists of a follow-on visit to the three countries by two or three American specialists several months after conclusion of the U.S. side of the program.

Intellectual Property Rights Study Group

This will be a two-week study program in the U.S. for eight to ten officials from selected East Asian countries to examine Intellectual Property Rights (IPR) issues. The rapid economic development of East Asian nations has been market and export driven. Patent, trademark, and copyright violations have accompanied this economic expansion. While some measures have been taken to correct past IPR violations regarding export products, violations associated with production of goods for internal markets continues and has led to bilateral trade frictions. During a two-week visit to the U.S., eight to ten mid-level officials from selected East Asian countries will examine IPR issues regarding print, audio, video, and film materials; computer software; pharmaceutical; and new food stuffs. In talks with trade experts in both the public and private sectors, participants will discuss economic development aspects of IPR; implications of the U.S. signing of the Berne Convention; enforcement of copyright, trademark, and patent regulations; and the process by which trade policy decisions are made in the U.S.

U.S. Congressional Staff Functions a Project for Taiwanese Legislative Staff

This will be a 21-day program in the U.S. for eight or nine assistants to members of the Taiwanese Legislative Yuan (LY) and/or members of the Legislative Research Service. As a result of recent elections and because of retirements among its more senior members, the LY is regarded as an increasingly representative body. Expectations by voters for continued reform have placed new demands on the legislators and their small support staffs, however. The purpose of this project will be to expose selected Taiwanese legislative staff members to the work of U.S. Congressional staff aides; view the range of information and research resources available to members of Congress; demonstrate how a legislator's access to information shapes policy formulation; and provide participants with an overview of the relationships among the executive, legislative, and judicial branches of the U.S. federal and state governments. The project may include a follow-up visit to Taiwan by two or three American specialists on these issues within several months after conclusion of the American side of the program.

Funding

Competition for USIA funding is keen. The selection of grantee institutions will depend on program substance, cross-cultural sensitivity, the applicant's familiarity with program themes addressed in this solicitation, and ability to carry out the programs successfully. Since USIA grant assistance constitutes only a portion of total project funding, proposals should list and provide evidence of other anticipated sources of financial and in-kind support.

A proposal's cost-effectiveness—including in-kind contributions and ability to keep administrative costs low—is a major consideration in the review process.

Funds requested from USIA cannot exceed $115,000 for support of the Melanesian Youth Development Program; $85,000 for support of the Intellectual Property Rights Program; and $85,000 for support of the Taiwanese Project. However, organizations with less than four years of successful experience in managing international exchange programs are limited to grants of $60,000 for each program.

Administrative costs. USIA-funded administrative costs are limited to twenty-two (22%) percent of the total funds requested from USIA. Administrative costs are defined as salaries, benefits, other direct and indirect costs. Important note for universities: The U.S. Information Agency's Bureau of Educational and Cultural Affairs defines American faculty salaries as an administrative expense, regardless of how the faculty time is to be used.

Application Requirements

Proposals must be structured in accordance with the instructions contained in the application package.

Review Process

USIA will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines established herein and in the application packet. Eligible proposals will be forwarded to panels of USIA officers for advisory review. Proposals are reviewed by USIS posts and by USIA's Office of East Asian and Pacific Affairs and the Office of Contracts. Proposals may also be reviewed by the Agency's Office of the General Counsel.

Funding decisions are at the discretion of the Associate Director for Educational and Cultural Affairs. Final technical authority for grant awards resides with USIA's contracting officer.

The award of any grant is subject to the availability of funds.

The Government reserves the right to reject any or all applications received. USIA will not pay for design and development costs associated with submitting a proposal. Applications are submitted at the risk of the applicant; should circumstances prevent award of a grant, all preparation and submission costs are at the applicant's expense.

USIA will not award funds for activities conducted prior to the actual grant award.

Review Criteria

USIA will consider proposals based on the following criteria:

1. *Quality of Program Idea:* Proposals should exhibit originality, substance, rigor, and relevance to Agency mission. They should demonstrate the matching of U.S. resources to a clearly defined need.

2. *Institution Reputation/Ability Evaluations:* Institutional grant recipients should demonstrate potential for program excellence and/or track record of successful programs, including responsible fiscal management and full compliance with all reporting requirements for past Agency grants as determined by USIA's office of Contracts (M/KG). Relevant evaluation results of previous projects are part of this assessment.

3. *Project Personnel:* Personnel's thematic and logistical expertise should be relevant to the proposed program. Resumes should be relevant to the specific proposal and no longer than two pages each.

4. *Program Planning:* Detailed agenda and relevant work plan should demonstrate substance and logistical capacity.

5. *Thematic Expertise:* Proposal should demonstrate expertise in the subject area.

6. *Cross-Cultural Sensitivity/Area Expertise:* Evidence of sensitivity to historical, linguistic, and other cross-cultural factors; relevant knowledge of geographic area.

7. *Ability to Achieve Program Objectives:* Objectives should be reasonable, feasible, and flexible. Proposals should clearly demonstrate how the grantee institution will meet the program's objectives.

8. *Multiplier Effect:* Proposed programs should strengthen long-term mutual understanding, to include

maximum sharing of information and establishment of long-term institutional and individual ties.

9. *Cost-Effectiveness:* The overhead and administrative components should be kept as low as possible. All other items should be necessary and appropriate to achieve the program's objectives.

10. *Cost-Sharing:* Proposals should maximize cost-sharing through other private sector support as well as institution direct funding contributions.

11. *Follow-on Activities:* Proposals should provide a plan for continued exchange activity (without USIA support) which ensures that USIA supported programs are not isolated events.

12. *Project Evaluation:* Proposals should include a plan to evaluate the activity's success.

Notice

The terms and conditions published in this RFP are binding and may not be modified by any USIA representative. Explanatory information provided by the Agency that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. Final award cannot be made until funds have been fully appropriated by Congress, allocated and committed through internal USIA procedures.

Notification

All applicants will be notified of the results of the review process on or about April 9, 1993. Awarded grants will be subject to periodic reporting and evaluation requirements.

Dated: November 2, 1992.

Barry Fulton,

Acting Associate Director, Bureau of Educational and Cultural Affairs.

[FR Doc. 92-26905 Filed 11-4-92; 8:45 am]

BILLING CODE 8230-01-M

Sunshine Act Meetings

Federal Register
Vol. 57, No. 215
Thursday, November 5, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL COMMUNICATIONS COMMISSION

Deletion of Agenda Item From November 5th Open Meeting

The following item has been deleted from the list of agenda items scheduled for consideration at the November 5, 1992, Open Meeting and previously listed in the Commission's Notice of October 29, 1992.

Item No., Bureau, and Subject

5—Private Radio—Title: Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896–901 MHz and 935–940 MHz Bands Allocated to the Specialized Mobile Radio Service (PR Docket No. 89–553, RMs–6724 and 6579). Summary: The Commission will consider adoption of a *Report and Order* concerning the licensing of the 200 channels in the 900 MHz band allocated for use in the Specialized Mobile Radio Service.

Issued: October 30, 1992.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 92–26972 Filed 11–3–92; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL ELECTION COMMISSION

DATE AND TIME: Tuesday, November 10, 1992 at 10:00 a.m.

PLACE: 999 E Street, N.W., Washington, D.C.

STATUS: This Meeting Will Be Closed to the Public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.
Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbitration
Internal personnel rules and procedures or matters affecting a particular employee

DATE AND TIME: Thursday, November 12, 1992 at 10:00 a.m.

PLACE: 999 E Street, N.W., Washington, D.C. (Ninth Floor.)

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes
Title 26 Certification Matters
Advisory Opinion 1992–38: Christine Varney on behalf of the Clinton/Gore Campaign
Administrative Matters

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Press Officer, Telephone: (202) 219–4155.

Delores Hardy,

Administrative Assistant.

[FR Doc. 92–26975 Filed 11–3–92; 10:51 am]

BILLING CODE 6715–01–M

NATIONAL CREDIT UNION ADMINISTRATION

TIME AND DATE: 4:00 P.M., THURSDAY, NOVEMBER 12, 1992.

PLACE: Sheraton Grand on Harbor Island, 1590 Harbor Island Drive, San Diego, California 92101, (619) 291–6400.

STATUS: Open.

BOARD BRIEFINGS:

1. Central Liquidity Facility Report and Report on CVLF Lending Rate.
2. Insurance Fund Report.
3. Legislative Update.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of Previous Open Meeting.
2. Final Rule: Amendment to section 701.33(b)(2)(i), NCUA's Rules and Regulations, Reimbursement, Insurance, and Indemnification of Officials and Employees.
3. Board Action on Request for Comments: Operating Fee Scale Revision.
4. Proposed Rule: Amendments to Part 705 and Section 701.32, NCUA's Rules and Regulations, Community Development Revolving Loan Program for Credit Unions.
5. Fiscal Year 1993 Operating Fee Scale.
6. Proposed Rule: Part 707, NCUA's Rules and Regulations, Truth In Savings, and Withdrawal of Proposed Rule: Section 701.35, NCUA's Rules and Regulations, Prohibition on Guaranteed Dividends.

FOR MORE INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone (202) 683–9600.

Becky Baker,

Secretary of the Board.

[FR Doc. 92–27013 Filed 11–3–92; 2:12 pm]

BILLING CODE 7535–01–M

STATE JUSTICE INSTITUTE

TIME AND DATE:

9:00 a.m. to 5:00 p.m., November 20, 1992
9:00 a.m. to 1:00 p.m., November 21, 1992

PLACE: State Justice Institute, 1650 King Street, Suite 600, Alexandria, Virginia 22314.

STATUS: The meeting will be open to the public.

MATTERS TO BE CONSIDERED: Approval of the Institute's FY 1993 operating budget; discussion of internal personnel issues; action on pending grant applications.

PORTIONS OPEN TO THE PUBLIC: Business meeting (except as noted below) and grant discussions.

PORTIONS CLOSED TO THE PUBLIC: Internal personnel discussions.

CONTACT PERSON FOR INFORMATION: David I. Tevelin, Executive Director, State Justice Institute, 1650 King Street, Suite 600, Alexandria, Virginia 22314, (703) 684–6100.

David I. Tevelin,

Executive Director.

[FR Doc. 92–26958 Filed 11–3–92; 10:42 am]

BILLING CODE 6820–SC–M

Corrections

Federal Register
Vol. 57, No. 215
Thursday, November 5, 1992

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 552 and 570

[APD 2800.12A, CHGE 41]

General Services Administration Acquisition Regulation; Real Property Leasing Clauses

Correction

In rule document 92–19796 beginning on page 37889 in the issue of Friday, August 21, 1992, make the following corrections:

552.270–10 [Corrected]

1. On page 37891, in the first column, in section 552.270–10, in the clause, in paragraph (f), in the first line, "means" should read "mean" and in the fourth line, after "limitation" the period should be a colon.

552.270–28 [Corrected]

2. On page 37893, in the first column, in section 552.270–28, in the clause, in paragraph (a), in the fifth line, "persecute" should read "prosecute".

3. On the same page, in the second column, in section 552.270–28, in the clause, in paragraph (c)(2), in the sixth and tenth lines, "Contracting Office" should read "Contracting Officer" each time it appears.

552.270–37 [Corrected]

4. On page 37894, in the third column, in section 552.270–37, in the clause, in the fourth line, "on" should read "no".

570.203 [Corrected]

5. On page 37895, in the second column, in section 570.203(a)(8)(vii), in the table, in FAR Cite 52.209–6, in the first line, "Governor's" should read "Government's"

6. On the same page, in the third column, in section 570.203(a)(9), in the second line, "it" should read "jts".

570.303 [Corrected]

7. On page 37896, in the second column, in section 570.303, in the last line, insert "a" after "during".

570.702–30 [Corrected]

8. On page 37900, in the first column, in the section heading for 570.702–30, "obligations" should read "obligation".

BILLING CODE 1505–01–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 205

RIN 0907–AA82

Aid to Families With Dependent Children; Adult Public Assistance: Revised Quality Control System

Correction

In rule document 92–24317 beginning on page 46782 in the issue of Tuesday, October 13, 1992, make the following corrections:

1. On page 46784, in the 1st column, in the 2d complete paragraph:

a. In the 1st line, delete "not" following "does".

b. In the 11th line, after "date" insert "on ".

2. On page 46791, in the first column, in the first complete paragraph, in the fifth line, "property" should read "properly".

3. On page 46792:

a. In the 1st column, in the 3d complete paragraph, in the 20th line, "that" should read "the".

b. In the 2d column, in the last paragaph, in the 18th and 19th lines, delete "Directors, branch specialists at the Regional".

c. In the 2d column, in the last paragraph, in the 24th line, after "who" insert "provides".

d. In the 3d column, in the 1st complete paragraph, in the 12th line, "procedures" should read "procedure".

4. On page 46794:

a. In the second column, in the last paragraph, in the ninth line, "recipient" should read "receipt".

b. In the third column, in the second complete paragraph, in the ninth line, after "requirement" insert "under".

5. On page 46797:

a. In the second column, in the fourth complete paragraph, in the fifth line, "The" should read "They".

b. In the third column, in the last line, "ACR" should read "ACF".

6. On page 46798, in the second column:

a. In the fourth line, "of" should read "on".

b. In the first complete paragraph, in the fourth line, the first "or" should read "of".

7. On page 46799, in the first column, in the third complete paragraph, in the third line, after "number" insert "of".

8. On page 46800:

a. In the first column, in the last paragraph, in the second line "believes" should read "believed" and in the third line, "only" should read "open".

b. In the 2d column, in the 1st paragraph, in the 10th line, "State" should read "States".

c. In the third column, in the last paragraph, in the second line, after "amount of" insert "a".

9. On page 46801, in the 1st column, in the 2d complete paragraph, in the 12th line, after "adjustment to" insert "be".

10. On page 46802, in the first column, in the second paragraph, in the eighth line, "The" should read "They".

§ 205.40 [Corrected]

11. On page 46805, in the first column, in § 205.40(b)(6), in the third line, "October 1, " should read "October 1".

§ 205.41 [Corrected]

12. On page 46806, in the third column:

a. In § 205.41(d)(3)(iv), in footnote 1, insert a comma before "where".

b. In § 205.41(d)(3)(v), in footnote 1, insert a comma before "where".

§ 205.42 [Corrected]

13. On page 46807, in the third column, in § 205.42(b)(1)(ii), in the third line, delete the word "a".

14. On page 46808, in the third column, in § 205.42(e)(1)(ii), in the third line, "case" should read "cases".

15. On the same page, in the same column, in § 205.42(f)(1), in the third line, "plans" should read "plan".

16. On page 46809, in the 3d column, in § 205.42(i)(4), in the 4th line, "panel." should read "Panel." and in the 24th line, after "by" insert "the".

17. On page 46810, in the first column, in § 205.42(i)(5), in the last line, "years." should read "year.".

§ 205.43 [Corrected]

18. On page 46810, in the first column, in § 205.43(b)(2), in the fifth line, "(b)(1)(ii)" should read "(b)(1)(i)".

19. On the same page, in the same column, in § 205.43(b)(4), in the sixth line, after "taken" insert a period and delete "by all States for the fiscal year, to the total number of negative case actions taken.".

20. On page 46811:

a. In the first column, in § 205.43(e)(4)(ii)(B), in the seventh line, "rat" should read "rate".

b. In the second column, in § 205.43(e)(5), in the second column of the table, in the last entry, "14.04%" should read "14.0%" and for clarification, the "*Calculation*" paragraphs following the table are reprinted as follows:

Calculation:

1. State adjusted overpayment rate, paragraph—
(e)(1)...8.0−{3.0−2.8}=7.8%
2. Basic disallowance amount, paragraph—
(e)(2)(i)...$5,000,000
(e)(2)(ii)...7.8−6.0=1.8%
(e)(2)(iii)...1.8/6.0=0.30
Amount=$5,000,000×1.8%×0.30=$27,000
3. Reduction for overpayment recoveries, paragraph—
(e)(3)(i)...$5,000
(e)(3)(ii)...1.8/7.8=0.231
Amount=$5,000×0.231=$1,155
4. Reduction for improvement in child support collections, paragraph—
(e)(4)(i)...$27,000−$1,155=$25,845
(e)(4)(ii)(A)...(16.0−12.0)/12.0=0.333
(e)(4)(ii)(B)...(16.0−14.0)/14.0=0.143
Since 0.333 is larger than 0.143, then the —
Amount=$25,845×0.333=$8,606
5. Final disallowance, pragraph—
(e)(5)=$27,000...($1,155+$8,606)=$17,239

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[OIS-018-N]

Medicare and Medicaid Programs; Quarterly Listing of Program Issuances and Coverage Decisions

Correction

In notice document 92-25111 beginning on page 47468 in the issue of Friday, October 16, 1992, make the following correction:

On page 47469, in the first column, in the second paragraph, in the last line, "November 18, 1992" should read "November 18, 1991".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 416

RIN 0960-AC38

Supplemental Security Income for the Aged, Blind, and Disabled; Parent-to-Child Deeming

Correction

In rule document 92-425945 beginning on page 48559 in the issue of Tuesday, October 27, 1992, make the following correction:

On the same page, in the second column, in the second line, "November 2, 1992." should read "November 1, 1992."

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY-930-03-4214-11;WYW 75480, WYW 75481, WYW 75482, WYW 75483, WYW 75484, WYW 75485]

Proposed Modification, Continuation, and Termination of Bureau of Reclamation Withdrawals, Riverton Reclamation Project; Wyoming

Correction

In notice document 92-24605 beginning on page 46595 in the issue of Friday, October 9, 1992, make the following corrections:

1. On page 46595, in the second column, under **DATES**, in the second line, "January 7, 1992" should read "January 7, 1993".

2. On the same page, in the same column, in the land description, in T. 3, N., R. 1 E., in sec. 28, "W½NE¼," should read "W½SE¼NE¼,".

3. On page 46596, in the first column, in T. 3 N., R. 3 E., in sec. 14, "N¼SW¼ SW¼," should read "N½SW¼SW¼,".

BILLING CODE 1505-01-D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 8440]

RIN 1545-AN76

Final Regulations Under Section 382 of the Internal Revenue Code of 1986; Limitations on Corporate Net Operating Loss Carryforwards

Correction

In rule document 92-23731 beginning on page 45711 in the issue of Monday, October 5, 1992, make the following corrections:

§ 1.382-1T [Added]

1. On page 45712, in the second column, the heading above Par. 4. is corrected to read as set forth above.

§ 1.382-2T [Corrected]

2. On the same page, in the same column, in Par. 6., in amendment 1. to § 1.382-2T, in the second line, "§ 1.382-(a)(3)" should read "§ 1.382-2(a)(3)".

§ 1.382-3 [Corrected]

3. On the same page, in the third column, in Par. 9., in amendment 3. to § 1.382-3, in the table:

a. In the first column (Paragraph), in the fifth line, "*2*(ii)" should read "*1*(iii)".

b. In the second column (Remove), in the second line, "(a)(3)(ii)" should read "(a)(3)(i)".

c. In the third column (Add), the fifth and sixth lines from the bottom should read "*Examples 1, 2,* and *3* of".

§ 1.382-11 Effective dates. [Reserved]

4. On page 47513, in the second column, the second section heading from the top should have read as set forth above.

BILLING CODE 1505-01-D

Federal Register

Thursday
November 5, 1992

Part II

International Trade Commission

19 CFR Parts 210 and 211

Proposed Final Rules Governing Investigations and Enforcement Procedures Pertaining to Unfair Practices in Import Trade; Proposed Rule

INTERNATIONAL TRADE COMMISSION

19 CFR Parts 210 and 211

Proposed Final Rules Governing Investigations and Enforcement Procedures Pertaining to Unfair Practices in Import Trade

AGENCY: U.S. International Trade Commission.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The Commission proposes to adopt final rules of practice and procedure relating to investigations and related proceedings under section 337 of the Tariff Act of 1930 for 19 CFR part 210. This rulemaking is being undertaken in response to: Public comments requesting changes in the interim rules; the need to revise certain interim rules to more accurately reflect actual Commission practice; and the need for Commission rules concerning matters that are not currently provided for in the interim rules. The proposed final rules will replace the interim rules that currently appear in 19 CFR parts 210 and 211. Part 211 would then be removed from title 19 of the Code of Federal Regulations.

DATES: Comments on the proposed final rules will be considered if received on or before January 4, 1993.

ADDRESSES: A signed original and 17 copies of each set of comments, along with a cover letter stating the nature of the commenter's interest in the proposed rulemaking, should be submitted to Paul R. Bardos, Acting Secretary, U.S. International Trade Commission, 500 E Street SW., room 112, Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: Questions concerning the proposed final rules may be directed to P.N. Smithey, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202–205–3061. Hearing-impaired individuals can obtain information concerning the proposed final rules by contacting the Commission's TDD terminal at 202–205–1810.

SUPPLEMENTARY INFORMATION: Like the interim rules they are expected to replace, the proposed final rules are not major rules for purposes of Executive Order 12291 of February 17, 1981. As required by the Regulatory Flexibility Act, the Commission also certifies that the proposed final rules will not have a significant adverse impact on small business entities.

Background

Part 210 currently sets forth procedures for adjudicative investigations under section 337 of the Tariff Act of 1930 (Tariff Act) (19 U.S.C. 1337). Part 211 currently establishes procedures for advisory opinions as well as the enforcement, modification, or revocation of remedial or consent orders issued under section 337.

The current rules in parts 210 and 211 were adopted on an interim basis in 1988 to implement the amendments to section 337 of the Tariff Act that were effected by the Omnibus Trade and Competitiveness Act of 1988, Public Law No. 100–418, 102 Stat. 1107 (1988) (Omnibus Trade Act).[1] Publication of this notice of proposed rulemaking is the first step toward replacing the interim rules with final rules in accordance with the Administrative Procedure Act (APA) (5 U.S.C. 551 et seq.).[2] [3]

In addition to the substantive changes described below, the proposed final versions of many part 210 rules have been renumbered and relocated from their position in the interim rules. Also, the rule provisions which currently appear in part 211 have been revised and merged into the proposed final version of part 210. To readily locate the proposed final version of a particular interim rule, consult the table located at the end of this preamble.

A section-by-section analysis of the proposed final rules is set forth below.

Subpart A—Rules of General Applicability

Section 210.1

Proposed final rule 210.1, which is derived from interim rules 210.1, 211.01, and 211.50 (a) and (b), states the applicability of and the statutory authority for the proposed final rules in part 210. Since the rule provisions that previously appeared in part 211 have been merged into part 210, proposed final rule 210.1 indicates that part 210 rules cover section 337 investigations and related proceedings. (See proposed final rule 210.3 for a definition of the term "related proceeding.")

Section 210.2

Proposed final rule 210.2 is based on interim rue 210.2, which articulates (1) the Commission's policy of conducting section 337 investigations as expeditiously as possible, and (2) the concomitant obligation of participants and the presiding administrative law judge (ALJ) to make every effort to avoid delay at each stage of the investigation. Proposed final rule 210.2 has been drafted to apply these provisions to investigations and related proceedings.

Section 210.3

Proposed final rule 210.3 provides definitions for part 210. Those definitions include the five that appear in interim rule 210.4, with minor editorial changes. The Commission also has added a sentence to the definition of the term "administrative law judge" to indicate that if the Commission so orders or a rule in part 210 so provides, an ALJ may preside during stages of a related proceeding, in addition to presiding over the taking of evidence in a section 337 investigation.

Proposed final rule 210.3 also contains definitions of the following five terms that do not appear in interim rule 210.4: "intervenor," "investigation," "proposed intervenor," "proposed respondent," and "related proceeding."

Definitions of the terms "investigation" and "related proceeding" have been added because of the expanded scope of the proposed final rules in part 210 to include investigations and related proceedings that previously were covered in part 211. The definition of "investigation" lists the kinds of postinstitution activities that constitute a section 337 investigation. It also explains that final termination of an investigation occurs when the Commission issues a nonappealable determination, order, or notice which ends the investigation,[4] or when any administrative or judicial appeal relating to the final Commission

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[1] See 53 FR 3304 (Aug. 29, 1988) and 54 FR 49118 (Dec. 6, 1988).

[2] See 5 U.S.C. 553. The Commission will issue final rules after reviewing public comments on the proposed rules. The final rules will be published in the Federal Register at least 30 days before their effective date.

[3] Interested persons should note that the Commission has abandoned the proposed final rulemaking announced at 53 FR 44900 (Nov. 7, 1988) (preinstitution duty of candor rules for section 337 complainants). In addition, the proposed changes to rules that currently appear in part 211, which were published at 53 FR 40453 (Oct. 17, 1988), have been incorporated into the proposed final rules published herein.

[4] This is based on the Commission's settlement agreement and consent order procedure. Terminations based on settlement agreements or consent orders often are effected without a determination on violation of section 337 or any Commission findings on underlying issues such as validity or infringement of a disputed intellectual property right. See 19 U.S.C. 1337(c); proposed final rules 210.21(b)(2) and (c); and interim rules 210.51(b)(2) and (c). Moreover, every consent order agreement or stipulation must contain an express waiver of each settling party's right to seek judicial review or to otherwise challenge or contest the validity of the consent order. See proposed final rule 210.21(c)(3)(i) and interim rule 211.22(a). Proposed final rule 210.21(c)(3)(i) also provides the stipulation must contain a waiver of the right to seek court-ordered limitations on the Commission's efforts to gather information in determining whether the consent order is being complied with and whether the conditions that led to issuance of the consent order have changed.

action has ended, or the time for seeking such appeals has expired.[5]

The definition of the term "related proceeding" identifies the kinds of proceedings that are covered by that term—namely, preinstitution proceedings, certain types of sanction proceedings, temporary relief bond forfeiture proceedings, proceedings to modify, revoke, or enforce a remedial or consent order issued under section 337, and advisory opinion proceedings.

The Commission has included definitions of the terms "intervenor," "proposed intervenor," and "proposed respondent" in proposed final rule 210.3 to facilitate implementation of certain other proposed final rules, such as 210.4(b), which imposes signature and certification requirements for every written submission filed by a party or proposed party to a section 337 investigation or related proceeding, and 210.19, which establishes the procedure for intervening in an investigation or a related proceeding.

Section 210.4

Proposed final rule 210.4 governs written submissions filed by parties or proposed parties in connection with a section 337 investigation or a related proceeding under part 210.

Paragraph (a). Paragraph (a) of proposed final rule 210.4 is based on paragraph (a) of interim rule 210.5, which lists the required information that generally appears in the front of written submissions filed in connection with a section 337 investigation. The key differences between the proposed final rule and the interim rule are enumerated below.

1. The requirements of paragraph (a) of the proposed final rule apply to written submissions filed prior to the institution of an investigation, as well as those filed by a party or a proposed party during an investigation or a related proceeding.

2. Paragraph (a) of the proposed final rule states that each section 337 complaint must list "all proposed respondents" instead of listing "all or the primary parties to the proceeding." This change is appropriate because the complainant is not necessarily in a position to know, when the complaint is being prepared, the names of all persons or firms that will be parties if and when an investigation is instituted in response to the complaint.[6] The complainant also may not have enough information to determine which persons or firms can be considered the "primary parties to the proceeding." [7]

3. Paragraph (a) of the proposed final rule also does not require that each response to the complaint contain a listing of "all or the primary parties to the proceeding." While there is some utility to having a roster of proposed respondents on the front of a complaint,[8] similar justification does not exist for requiring a roster of parties on the front of each response to the complaint. A response is filed after the Commission has issued a notice of investigation identifying all parties. Copies of the notice are served on all parties and are readily accessible to other interested persons and the Commission staff. Hence, there is no need for each response to the complain to provide a roster of parties.

Paragraph (b). Paragraph (b) of proposed final rule 210.4 is based on paragraph (b) of interim rule 210.5, which provides signature and certification requirements for written submissions and sanctions for filing a document that has been signed in violation of those requirements. The key provisions of the proposed final rule are discussed below.

In paragraph (b)(1) of the proposed final rule, the signature and certification requirements apply to all written submissions filed by proposed parties, as well as those filed by parties—regardless of whether the submission is addressed to the ALJ or the Commission.[9] [10]

The remaining differences between paragraph (b)(1) of the proposed final rule and paragraph (b) of the interim rule are editorial. Consistent with Rule 11 of the Federal Rules of Civil Procedure (FRCP), the certification provision in the proposed final rule refers to the signer's knowledge, information, and belief "formed" (instead of "founded") after reasonable inquiry. The proposed final rule also states that if a pleading, motion, or other paper is not signed, it should be stricken unless the omission is brought to the attention of "the submitter" (instead of "the pleader or movant").

Paragraph (b)(2) of proposed final rule 210.4 clarifies that a submission need not be frivolous in its entirety in order for the Commission or the ALJ to find that it was signed and filed in violation of the signature and certification requirements of paragraph (b)(1). This clarification is consistent with Federal court practice and Commission precedent.[11] Paragraph (b)(2) also states that in determining whether a submission was filed in violation of those requirements, the ALJ and the Commission will consider whether the submission or the disputed portion thereof was "objectively reasonable" under the circumstances.

Paragraph (b)(3) of proposed final rule 210.4 states that monetary sanctions may be imposed if a written submission is signed and filed in violation of paragraph (b)(1). As the preamble to interim rule 210.5(b) explained, the Omnibus Trade Act amendments to section 337 authorized the Commission to adopt rules imposing sanctions for abuse of process in section 337 investigations to the extent provided in

[5] This is based on Commission precedent. See, *e.g.*, Inv. No. 337-TA-322, Certain Microporous Nylon Membranes and Products Containing Same, 56 FR 13653 (Apr. 3, 1991) ("the end of an investigation occurs upon exhaustion of the appeals process").

[6] The complainant's list of proposed respondents may be shortened or expanded by the Commission as a result of the Commission's preinstitution investigatory activity under proposed final rule 210.9(b). The Commission investigative attorney, who will be a party, is not formally designated until after the Commission has issued a notice of investigation. Finally, one or more persons or firms not identified by the complainant as potential parties may seek and be granted leave to intervene.

[7] The term "primary party" is not defined in the interim rules. In some cases, the precise nature or extent of a particular respondent's involvement in the alleged unfair acts cannot be ascertained until after that respondent or others have answered the complaint or provided discovery.

[8] The Commission staff occasionally receives telephone inquiries early in the preinstitution proceedings from interested persons who want to know what firm or person filed a particular complaint or whether a certain company is listed as a proposed respondent. Most section 337 complaints are lengthy and have no table of contents. If the cover page identifies the complainant and the proposed respondents, the staff will be able more readily to answer such inquiries.

[9] The kinds of submissions that a proposed party would be likely to file and that would be subject to proposed final rule 210.4(b) include (1) a motion to intervene in an investigation or a related proceeding, and (2) a proposed respondent's answer to a motion to amend the complaint and notice of investigation to add the proposed respondent as a party to the investigation. (See proposed final rules 210.19 and 210.15(a)(2) and (c).)

[10] Shortly after interim rule 210.5(b) was adopted, the Commission considered the adoption of supplemental preinstitution duty of candor rules of complainants. See 53 FR 44900 (Nov. 7, 1988). The adoption of such rules is no longer being considered. The Commission intends for proposed final rule 210.4(b) to serve as the truth and veracity standard for all written submissions filed by a party or proposed party to an investigation or a related proceeding under part 210. This includes complaints and other submisaions that are filed before the Commission determines whether to institute an investigation on the basis of the complaint. See also proposed final rule 210.12(b), a new provision imposing a duty to supplement the complaint if a change in a pleaded material fact and law occurs after the complaint is filed and before the Commission institutes an investigation in response to the complaint.

[11] See, *e.g.*, Inv. No. 337-TA-278, Certain Concealed Cabinet Hinges and Mounting Plates, Commission Opinion (Jan. 8, 1990). (See also Opinion of Chairman Anne E. Brunsdale Concurring in Part and Dissenting in Part (Jan. 8, 1990).)

FRCP 11.[12] The Commission accordingly drafted paragraph (b) of interim rule 210.5 to correspond to the signature, the certification, and most of the sanction provisions of FRCP 11.[13] The only sanction provisions of FRCP 11 that were intentionally omitted from the interim Commission rule were those providing for the payment of another party's costs and attorney's fees as a sanction for signing a submission in violation of the certification provision. The Omnibus Trade Act amendments provided the Commission discretionary authority to impose sanctions.[14] The Commission thought it inappropriate to exercise that authority to impose the payment of costs and attorneys' fees in interim rules that were being adopted on an emergency basis without prior public comment.[15]

The **Federal Register** notice announcing interim rule 210.5(b) stated that the Commission would determine at a later date whether to publish proposed cost and fee sanction rules.[16] Interested persons responded by filing written comments urging the Commission to adopt such rules. Paragraph (b)(3) of proposed final rule 210.4 accordingly provides for the imposition of cost and attorney's fee sanctions in certain instances when a submission is found to have been signed in violation of the signature and certification requirements.[17] Paragraph (b)(3) also permits the Commission to impose fines in addition to costs and attorneys' fees in particularly egregious cases.

The sanction provisions of paragraph (b)(3) in the proposed final rule apply to the written submissions of parties or proposed parties to investigations or related proceedings, regardless of whether the submission is addressed to the ALJ or the Commission.

Sanctions for violation of the signature and certification requirements of paragraph (b)(1) are, however, not mandatory. As noted above, although FRCP 11 states that sanctions for abuse of process shall be imposed, the Commission's authority to impose sanctions to the extent authorized by FRCP 11 is discretionary. Paragraph (b)(2) of proposed final rule 210.4 thus states that an appropriate sanction may be imposed when a written submission is signed (and filed) in violation of paragraph (b)(1).[18]

Paragraph (c). Paragraph (c) of proposed final rule 210.4 is derived from paragraph (c) interim rule 210.5, which imposes specifications for written submissions in section 337 investigations by citing provisions of Commission rule 201.8.[19]

Paragraph (c)(1)(i) of the proposed final rule imposes spacing and print-size requirements for written submissions that are addressed to the Commission in a section 337 investigation or a related proceeding. The Commission believes that these requirements are necessary and appropriate to prevent evasion of the intended effect of the page limitations in proposed final rules 210.66 (c) and (e)(2) by utilizing unusually small spacing in submissions.[20] The specific requirements imposed in paragraph (c)(1)(i) of proposed rule 210.4 are identical to those applied to briefs filed in the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in appeals from Commission determinations under section 337.[21]

The specifications in paragraph (c)(1)(i) of proposed final rule 210.4 do not apply to written submissions that are addressed to an ALJ. Paragraph (c)(1)(ii) allows the ALJ to impose any specifications he deems appropriate for written submissions addressed to the ALJ.

Paragraph (c)(2) of the proposed final rule states the number of copies that must be filed along with the signed original of each submission. This paragraph does not differ from the corresponding provision of interim rule 210.5(c).

Paragraph (c)(3) of the proposed final rule provides that if certain specified types of submissions contain confidential business information, the submitter must file and serve nonconfidential copies by a specified deadline. The Commission has observed that parties in section 337 investigations and related proceedings frequently fail to file public inspection copies of their confidential submissions, unless the docket section staff in the Office of the Secretary calls to remind them or the ALJ or the Commission orders such filing. Paragraph (c)(3) of the proposed final rule accordingly provides that unless the Commission, the ALJ, or another rule in part 210 provides otherwise, any person who files a written submission of the kind specified in paragraph (c)(3) that contains confidential business information must file and serve nonconfidential treatment, the nonconfidential copies of the submission on the other parties within 10 business days after filing the confidential version. If the submitter's ability to prepare the nonconfidential copies is dependent upon receipt of a document from the Commission, the ALJ, or the Secretary indicating whether certain information is entitled to confidential treatment, the nonconfidential copies of the submission must be filed and served within 10 business days after service of that document. The ALJ or the Commission may extend or shorten the 10-day deadline, if necessary.

Paragraph (d). Paragraph (d) of proposed final rule 210.4 is based on paragraph (d) of interim rule 210.5, which was intended to provide that written submissions are to be served in the manner specified in Commission rule 201.16(b) (i.e., by mail or hand-delivery), unless the presiding ALJ, the Commission, or another rule in part 210 states otherwise.

The proposed final rule differs from the interim rule essentially in two respects. First, the erroneous reference to service in the manner specified in "§ 210.16(b) of this Chapter," which appears in paragraph (d) of interim rule 210.5, has been corrected to refer to "§ 201.16 (b) of this Chapter" in paragraph (d) of proposed final rule 210.4. Second, the service requirements of the proposed final rule are applicable to written submissions filed by proposed parties, as well as those filed by parties, to investigations or related proceedings.

Although paragraph (d) of the proposed rule provides that written submissions are to be served in the manner specified in § 201.16(b) (i.e., by mail or by delivery to the intended recipient's principal place of business or the office of his attorney (if the person is represented by counsel)), the presiding ALJ, the Commission, or another rule in part 210 may state otherwise. A presiding ALJ thus may order service of a particular submission by other means, such as by fax.

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[12] See 53 FR 33045 (Aug. 29, 1988). See also sec. 1342(a)(5)(B) of the Omnibus Trade Act; 19 U.S.C. 1337(h).

[13] See 53 FR 33045 (Aug. 29, 1988).

[14] The Commission may by rule prescribe * * * sanctions for abuse of process to the extent authorized by Rule 11 * * *." Section 1342(a)(5)(B) of the Omnibus Trade Act; 19 U.S.C. 1337(h) (emphasis added).

[15] See 53 FR 33045 (Aug. 29, 1988).

[16] *Id.*

[17] Paragraphs (b)(3) and (b)(4) of proposed final rule 210.4 impose certain limitations on the imposition of monetary sanctions.

[18] The filing and adjudication of a motion for sanctions under proposed final rule 210.4(b) is provided for in proposed final rule 210.25.

[19] Interested persons will note that the erroneous reference to "§ 210.6," which appears in the first sentence of paragraph (c) of interim rule 210.5, has been changed to "§ 201.8" in paragraph (c)(1)(i) of proposed final rule 210.4.

[20] See, *e.g.*, Inv. No. 337–TA–304, Certain Pressure Transmitters, (Commission denied motion to strike respondent's abnormally-spaced written comments on the initial determination (ID) concerning temporary relief, as the interim rules did not impose spacing requirements).

[21] See Fed. Cir. R. 32(a) (1990).

Section 210.5

Proposed final rule 210.5 is derived from interim rule 210.6 concerning confidential business information.

Paragraph (a). Paragraph (a) of interim rule 210.6 cites the rules for defining, identifying, and submitting confidential business information in a written submission filed in connection with a section 337 investigation or a related proceeding. Paragraph (a) of proposed final rule 210.5 is essentially the same as paragraph (a) of the interim rule, with two minor differences. First, the typographical errors in the interim rule which resulted in erroneous citations to "§ 210.6(a)" instead of "§ 201.6(a)" and "§ 210.6(c)" instead of "§ 201.6(c)" have been corrected in the proposed final rule. Second, paragraph (a) of the proposed final rule also indicates that confidential business information is to be submitted in accordance with § 201.6(c) in the absence of a Commission or ALJ order stating otherwise.

Paragraph (b). Paragraph (b) of proposed final rule 210.5 is based on paragraph (b) of interim rule 210.6, which imposes restrictions on the disclosure of confidential business information.

The Omnibus Trade Act amended section 337 by creating statutory restrictions on the disclosure of confidential business information without the consent of the submitter.[22] The Commission accordingly drafted paragraph (b) of interim rule 210.6 to mirror the statutory provisions.

The public comments on the interim rule focused on paragraph (b)(1)—persons granted access to confidential business information under an administration protective order issued under interim rule 210.37. Submissions filed by American Telephone & Telegraph Co. (AT&T) and by Texas Instruments Inc. (Texas Instruments) along with 10 other companies [23] commented that the Commission should adopt a rule or policy that no distinction will be drawn between in-house counsel and retained counsel in determining the propriety of disclosing confidential information under a protective order in a section 337 investigation. Texas Instruments noted that the presumption against granting in-house counsel access to confidential business information had been dropped in countervailing duty and antidumping investigations under title VII of the Tariff Act and that the 1988 interim rules governing those investigations authorized the granting of a protective order application filed by an in-house attorney who was not involved in "competitive decisionmaking," as defined in *United States Steel* v. *United States*, 730 F.2d 1465 (Fed. Cir. 1984).[24] Texas Instruments seemed to favor a similar standard in section 337 investigations, with the additional requirement that the in-house counsel applicant must not have been involved in the negotiation of patent licenses or the prosecution of applications for patents in the subject or field at issue in the investigation. AT&T suggested that protective order access determinations be made on a case-by-case basis under the same standards used by federal district courts.

The International Trade Commission Committee of the American Intellectual Property Law Association (AIPLA) also expressed an interest in the extent to which in-house counsel should routinely be granted access to confidential business information under administrative protective orders in section 337 investigations. The AIPLA did not take a position but suggested that the question of access by in-house counsel be examined.

The Commission has not drafted paragraph (b) of proposed final rule 210.5 in the manner suggested by AT&T or Texas Instruments. The Omnibus Trade Act amendments to section 337 and their legislative history do not suggest that a change in the current protective order practice for investigations and related proceedings under section 337 is necessary or appropriate.[25]

The only substantive difference between the interim rule and paragraph (b) of the proposed final rule is that the proposed final rule indicates that Commission personnel authorized to see confidential business information submitted in connection with an investigation or a related proceeding include the employees who are responsible for maintaining the record of the investigation or related proceeding.

Paragraphs (c) and (d). Paragraphs (c) and (d) of proposed final rule 210.5 are now provisions. Following publication of interim rule 210.6 in 1988, the ITC Trial Lawyers Association (ITCTLA) commented that the final rule should identify the final arbiter on the question of whether information designated confidential by the submitter is entitled to confidential treatment under the Commission rules. The Commission agrees. Paragraph (c) of proposed final rule 210.5 accordingly describes confidentiality determinations during the preinstitution proceedings. Paragraph (d) describes confidentiality determinations during investigations and related proceedings.

Section 210.6

Proposed final rule 210.6 is based on interim rule 210.7, which pertains to the computation of time, additional hearings, postponements, continuances, and extensions of time. The proposed final rule differs from the interim rule in two respects. First, proposed final rule 210.6 has been drafted to state that service shall be in accordance with § 201.14 of this chapter and § 201.16(d) if applicable, instead of citing § 201.14 alone.[26] Second, a sentence has been added to proposal final rule 210.6 to explain that when a deadline must be computed on the basis of the service date of a document that was served by mail, the additional time allotted under Commission rule 201.16(d) is to be added to the end of the prescribed period and not the beginning.[27] This provision codifies a longstanding Commission practice.

Interested persons should also note that proposed final rule 210.6 provides that computation of time shall be in accordance with Commission rules 201.14, and 201.16(d) if applicable—unless the presiding ALJ, the Commission, or another rule in part 210 states otherwise. Accordingly, while an investigation or a related proceeding is before the ALJ, he is free to impose his own rules for computing time to take action in response to a document, regardless of the manner in which the

[22] See sec. 1342(a)(8) of the Omnibus Trade Act; 19 U.S.C. 1337(n).

[23] Those companies are Apple Computer, Inc. Compaq Computer Corporation, Corning Glass Works, E.I. du Pont de Demours & Company, Eastman Kodak Company, Ford Motor Company, Hewlett-Packard Company, Intel Corporation, Motorola, Inc., and Xerox Corporation.

[24] See interim rule 207.7 (53 FR 33039 and 33041, Aug. 29, 1988).

[25] The legislative history indicates that the statutory provision restricted disclosure of confidential business information submitted to the Commission and exchanged among the parties in a section 337 investigation was intended to prevent Commission release of information that was initially granted confidential treatment by the Commission and is still considered confidential by the submitter, but is no longer regarded as confidential by the Commission. See S. Rep. No. 71, 100th Con., 1st Sess. at 133 (1987); H.R. Rep. No. 40, 100th Con., 1st Sess. at 162 (1987); H.R. Rep. No. 576, 100th Cong., 2d Sess. at 638 (1988).

[26] Commission rule 201.16(d) is the rule of general application that provides additional time when the computation of a deadline is measured from the date of service of a document that was served by mail.

[27] For example, when computing the deadline for responding to a motion that was served by mailing it to attorneys located in the United States, the nonmoving parties must first count the 10 days allotted under proposed final rule 210.15(c) and then add the 3 extra days allotted under Commission rule 201.16(d).

document was served. The ALJ thus may grant extra time for responding to a document that was served by hand-delivery, fax, express courier, or international express courier.

Section 210.7

Proposed final rule 210.7 is based on interim rule 210.8, which states that service of "process and other documents" shall be in accordance with Commission rule 210.16, unless the Commission, the ALJ, or another rule in part 210 states otherwise.

The ITCTLA commented that the meaning of interim rule 210.8 was unclear in light of interim rule 210.5(d), which pertains to "service of submissions." The ITCTLA suggested that if the two rules apply to different documents, that should be made clear; otherwise, rule 210.8 should be omitted from the proposal final version of part 210.

In response to the ITCTLA's concerns, the Commission has drafted proposed final rule 210.7 to expressly cover the service of (1) process all documents issued by or on behalf of the Commission or an ALJ, and (2) all documents issued by parties under the discovery and compulsory process rules (proposed final rules 210.27 through 210.34).

Subpart B—Commencement of Preinstitution Proceedings and Investigations

Section 210.8

Proposed final rule 210.8 is essentially the same as interim rule 210.10, which describes the commencement of Commission proceedings to determine whether to institute a section 337 investigation. The proposed final rule differs from the interim rule in the following respects: First, since the definitions and other provisions of the proposed final rules distinguish between investigations and related proceedings, proposed final rule 210.8 is entitled "Commencement of Preinstitution Proceedings" instead of "Commencement of Proceedings." Also, the word "preinstitution" has been inserted in front of "proceeding" in the first sentence of paragraph (a) of the proposed final rule and in the sentence constituting paragraph (b) of the proposed final rule.

Section 210.9

Proposed final rule 210.9 describes the Commission's actions upon receipt of a complaint, i.e., the preinstitution processing of a complaint. There is no substantive difference between this rule and interim rule 210.11, except for the omission of cross-references in the proposed final rule to rules governing the format, filing, and content of a section 337 complaint in the proposed final rule.

Section 210.10

Proposed final rule 210.10 is based on interim rule 210.12, which describes the time and manner in which the Commission institutes—or declines to institute—a section 337 investigation in response to a complaint. The proposed final rule reflects actual Commission practice more accurately and in greater detail than the interim rule—particularly with respect to cases in which the complaint is accompanied by a motion for temporary relief. The proposed final rule also provides that written notice will be given to all proposed respondents (as well as to the complainant) if the Commission determines not to institute an investigation in response to the complaint.

In connection with the Commission's examination of a section 337 complaint and its informal investigatory activity under proposed final rule 210.9(b), potential complainants (and any proposed respondent who files a preinstitution submission with the Commission) should note that they will be expected to provide supplemental information to the Commission, if such information is requested, prior to the Commission's decision on whether to institute an investigation in response to the complaint. Proposed final rule 210.12(h) imposes a duty to supplement the complaint under certain circumstances. The obligation of a complainant (and any proposed respondent who files a preinstitution submission) to provide supplemental preinstitution information to the Commission upon request exists even though the information requested might not fall within the limited category of mandatory supplements under proposed final rule 210.12(h).

Section 210.11

Proposed final rule 210.11 is based on interim rule 210.13, and governs service of the complaint and notice of investigation by the Commission—which is the operative service for computing the deadline for responding to the complaint and notice. The Secretary usually serves the complaint and notice of investigation on each respondent by certified mail and requests a return receipt bearing the signature of the person to whom the mailing was delivered and the date the delivery occurred. The provisions of interim rule 210.13 constitute paragraph (a) of proposed final rule 210.11.

Paragraph (b) of proposed final rule 210.11 is a new provision stating that parties may, with leave from the presiding ALJ, try to serve the complaint and notice of investigation by personal service if proof of Commission service by certified mail cannot be obtained. Personal service of the complaint and notice of investigation by a party may be necessary or desirable when a respondent whom the Commission has not been able to serve by mail is not participating in the investigation and another party wants the Commission to have personal jurisdiction over that respondent.[28]

Subpart C—Pleadings

Section 210.12

Proposed final rule 210.12 is based on interim rule 210.20, which describes the information and materials that must be provided in or with a section 337 complaint in order for it to be considered properly filed and to result in the institution of an investigation.

Paragraph (a). Paragraph (a) of proposed final rule 210.12 outlines the general requirements for all complaints as well as the specific requirements for complaints based on various specific types of unfair acts or unfair methods of competition. The differences between the interim rule and paragraph (a) of the proposed final rule are discussed below.

1. Paragraph (a) of proposed final rule 210.12 expressly requires compliance with confidentiality rule 210.5 in addition to proposed final rule 210.4 and Commission rule 201.8.

2. Paragraphs (a)(6) through (a)(9) of proposed final rule 210.12 are arranged somewhat differently from the corresponding paragraphs in interim rule 210.20 and also have been shortened to make them easier to read.

3. The domestic industry data requirements of paragraphs (a)(6) and (a)(7) of proposed final rule 210.12 have been drafted to correspond more closely to the purpose and intent of the Omnibus Trade Act amendments concerning the "domestic industry" for complaints based on infringement of a U.S. patent or a federally registered trademark, copyright, or mask work.[29]

[28] Such jurisdiction may be required to support a cease and desist order against a domestic respondent.

[29] An importation or sale involving infringement of a patent or a registered trademark, copyright, or mask work is a violation of section 337 if a domestic industry exists or is in the process of being established. See 19 U.S.C. 1337(a) (1) and (2). The Omnibus Trade Act amendments to section 337

Continued

Moreover, paragraph (a)(6)(ii) provides for complaints alleging that a domestic industry is in the process of being established, as well as complaints alleging that a domestic industry exists.[30]

The Commission received adverse comments concerning interim paragraph (a)(6) from the Ad-Hoc Association of Inventors and Licensing Companies (AAILC), a group of independent, free-lance, U.S. inventors and licensing companies, many of whose products are not being manufactured or produced in the United States. The AAILC was concerned that paragraph (a)(6)(iii) of the interim rule does not adequately reflect the Congressional intent that compliance with the "substantial investment" criterion for a domestic industry is to be based on the facts and circumstances of each case and should not be construed in a manner that precludes small businesses (like members of the AAILC) from obtaining relief solely because they are incapable of manufacture at the time the complaint is filed, have not met any requisite dollar threshold of investment, lack the resources to fund large-scale research and development facilities available to industries engaged in manufacturing, or do not have full-time laboratory personnel or patent counsel on staff.

The Commission does not consider it necessary to draft proposed final rule 210.12(a)(6) in the manner the AAILC has suggested. For the benefit of potential section 337 complainants who have not commenced manufacture of the product or use of the process relating to the intellectual property right asserted in the complaint, the preamble to the final rules will state that the substantial investment factor and other statutory factors relevant to the existence of a domestic industry will be evaluated on a case-by-case basis.

4. Paragraph (a)(9)(vii) of interim rule 210.20 requires the complainant in a patent infringement case to provide, among other things, a showing of domestic production of the patented article or domestic utilization of the patented process. The ITCTLA commented that the Commission should omit those requirements from the final rule. The ITCTLA noted that under the Omnibus Trade Act amendments to section 337, domestic production or utilization is a factor that may be proven to support a finding of domestic industry, but it is not required. The ITCTLA thus believes that interim paragraph (a)(9)(vii) is inconsistent with the statute and Congressional intent.

The ITCTLA noted also that the principal purpose of interim paragraph (a)(9) appears to be to obtain information from the complainant for use in judging the sufficiency of the allegations concerning infringement and that this can be achieved without requiring a showing of domestic production or utilization (e.g., through the claim comparison chart required by interim paragraph (a)(9)(vii)).

The Commission notes that information concerning domestic production is useful for showing the exploitation of the subject patent. The Commission has drafted paragraph (a)(9) of the proposed final rule, however, in the manner that the ITCTLA has suggested.

5. The final substantive difference between paragraph (a) of interim rule 210.20 and paragraph (a) of proposed final rule 210.12 relates to paragraph (a)(10). Paragraph (a)(10) of the interim rule states that a complainant seeking temporary relief must file a motion for such relief along with the complaint. Proposed final rule 210.53 permits a complainant to file a motion for temporary relief after a complaint is filed, however, as long as filing occurs before the Commission has determined whether to institute an investigation on the basis of the complaint. Paragraph (a)(10) of proposed final rule 210.12 accordingly states that a motion for temporary relief should accompany the complaint, as provided in proposed final rule 210.52(a), or may follow the complaint, as provided in proposed final rule 210.53(a).

Paragraph (b). Paragraph (b) of proposed final rule 210.12, which provides for the submission of samples of the domestic and imported articles at issue in a complaint as exhibits, is essentially the same as paragraph (b) of interim rule 210.20.

Paragraph (c). Paragraph (c) of proposed final rule 210.12 is based on paragraph (c) of interim rule 210.20, which describes additional material that must accompany a section 337 complaint based on alleged patent infringement. There are two minor differences between the interim rule and the proposed final rule. The first is that the term "U.S." has been inserted before "Patent and Trademark Office" in paragraph (c)(2) of the proposed final rule. And in paragraph (c)(3) of the proposed final rule, the words "file wrapper" have been deleted in favor of "prosecution history," which is the preferred term.

Paragraphs (d), (f), and (g). Paragraphs (d), (f) and (g) of interim rule 210.20 list additional material that must be provided in or with a section 337 complaint alleging infringement of a federally registered trademark, copyright, or mask work. The ITCTLA commented that, like a patent-based complaint, a complaint based on infringement of any of the aforesaid intellectual property rights should be accompanied by three copies of the federal registration, a list of all licensees, and all licensing agreements (or a representative agreement).

The Commission agrees. Three copies of such documents are needed because the original goes in the docket file in the Secretary's Office, one copy goes in the public inspection file in the Secretary's Office, one copy goes to the Office of Unfair Import Investigations (OUII), and one copy goes to Office of the General Counsel. Paragraphs (d), (f), and (g) of proposed final rule 210.12 accordingly have been drafted in the manner the ITCTLA recommended.

Paragraph (e). Paragraph (e) of the interim rule 210.20 lists additional information that must be provided with a complaint alleging infringement of a nonfederally registered trademark (i.e., a "common-law" trademark). Unlike the interim rule, paragraph (e) of proposed final rule 210.12 provides that complaints alleging infringement of a common-law trademark must contain a "detailed and specific" description of the alleged trademark. This requirement has been added because the Commission believes that there are significant public interest reasons for requiring a party to define the metes and bounds of the asserted trademark—particularly since the Commission is now authorized to grant default remedial orders under section 337 as amended by the Omnibus Trade Act.[31] For example: If the Commission determines to issue a limited exclusion order in a litigated investigation or in a default case, the order should be drafted with sufficient specificity to enable the U.S. Customs Service to enforce it without impeding legitimate trade or forcing every would-be importer to seek an advisory opinion from the

broadened the concept of "domestic industry" for such cases in order to make relief more easily obtainable by holders of the aforesaid types of intellectual property rights. The amended statute accordingly lists alternative criteria which, if satisfied, mandate a Commission finding that a domestic industry exists. Paragraphs (a)(6) and (a)(7) of interim rule 210.20 list information that must be provided concerning the domestic industry or the trade or commerce at issue. Paragraph (a)(6), in particular, was intended to be consistent with the new provisions of section 337 concerning "domestic industry" and proof that such an industry exists. See 53 FR 33047 (Aug. 29, 1988).

[30] The interim rule inadvertently failed to provide for complaints alleging that a domestic industry is in the process of being established.

[31] 19 U.S.C. 1337(g).

Commission as to whether the importation of its merchandise would violate the order. Precise delineation of the subject trademark in the remedial order also will make it easier for competitors to redesign their articles or trademarks, if necessary, to avoid infringement of the complaint's trademark and exclusion of their imported merchandise.

Paragraph (h). Paragraph (h) of proposed final rule 210.12 is a new provision which requires a complaint to bring to the Commission's attention new information that changes the accuracy of a pleaded material fact or law in the complaint after the complaint is filed or which makes some portion of the complaint misleading. The Commission believes that the ex parte nature of the proceedings that are conducted to determine whether to institute a section 337 investigation makes it incumbent upon complaints to ensure that the Commission is fully advised of material legal or factual developments that could affect its analysis of the merits of the complaint. Likewise, proposed respondents also should be made aware of new developments that could affect their approach to discovery. Suppose, for example, that after a firm files a complaint and motion for temporary relief, its board of directors votes to move some portion of the firm's production operations offshore. That development could affect the Commission's analysis of whether the complainant has sufficiently pled the existence of a domestic industry or is entitled to temporary relief. It also would provide proposed respondents notice of a potentially relevant issue to pursue in discovery.

Section 210.13

Proposed final rule 210.13 is based on interim rule 210.21, which governs the content and filing of a response to a section 337 complaint and notice of investigation. There are several differences between the interim rule and the proposed final rule. First, since proposed final rule 210.59(a) allows respondents 10 days (instead of 20 days) to file responsive pleadings in temporary relief cases that have not been declared "more complicated," paragraph (a) of proposed final rule 210.13 cites that exception to the 20-day filing deadline.[32]

Next, paragraph (b) of the proposed final rule 210.13 directs respondents who are not manufacturing their accused imports must provide the name and address of the firm that supplied their imports. Respondents who are importers must provide the Tariff Schedules of the United States item number(s) for importations of the subject articles occurring before January 1, 1989, and the Harmonized Tariff Schedule item number(s) for importations occurring on or after January 1, 1989. Paragraph (b) of proposed final rule 210.13 also authorizes the ALJ to waive any of the prescribed substantive requirements for responses to complaints and notices of investigations, or to impose additional requirements, for good cause.[33]

Paragraph (c) of proposed final rule 210.13 pertains to the submission of the involved imported articles as exhibits. It differs from the corresponding paragraph of interim rule 210.21 by not requiring respondents to submit such exhibits if the complainant has already supplied them pursuant to proposed final rule 210.12(b).

Section 210.14

Paragraphs (a)-(c). Paragraphs (a) through (c) of proposed final rule 210.14 are based on interim rule 210.22, which governs amendments to pleadings and notices of investigation.

The difference between the interim rule and the proposed final rule is that the provisions of interim paragraphs (a) and (b) have been reorganized in the corresponding paragraphs of the proposed final rule for improved clarity.[34] Paragraph (a) of the proposed final rule addresses preinstitution amendment of the complaint at the complaint's direction. Paragraph (b)(1) discusses postinstitution amendment of the complaint or the notice of investigation by leave of the Commission. Paragraph (b)(2) discusses postinstitution amendment of pleadings other than the complaint by order of the ALJ at his discretion. There is no difference between paragraph (c) of the interim rule—which pertains to conformance of the pleadings and notice of investigation to the evidence—and paragraph (c) of the proposed final rule.

Paragraph (d). Paragraph (d) of proposed final rule 210.14 is identical to interim rule 210.23, which governs the filing of supplemental submissions at the discretion of the presiding ALJ.

Subpart D—Motions

Section 210.15

Proposed final rule 210.15 contains the provisions of paragraphs (a) through (d) of interim rule 210.24, which pertain to the content, filing, responses to, and disposition of motions in section 337 investigations, modified only to provide that the proposed final rule expressly applies to motions filed in related proceedings as well as those filed in investigations.

Sections 210.16 and 210.17

Proposed final rule 210.16 and 210.17 are based on interim rule 210.25, which governs default in section 337 investigations. Proposed final rule 210.16 is limited to the forms of default provided for in sections 337(g) and (h) of the Tariff Act—i.e., (1) failure to respond or to otherwise appear to answer the complaint and notice of investigation, and (2) a finding of default as a sanction for abuse of process under proposed final rule 210.4 (the Commission analog to FRCP 11) or failure to make or cooperate in discovery under proposed final rule 210.33 (the Commission analog to FRCP 37).[35] Proposed final rule 210.17 relates to failures to act other than the statutory forms of default. It also provides that the subject failures to act can result in the ALJ or the Commission making inferences, findings of fact, conclusions of law, determinations (on violation of section 337 or other issues), and orders that are adverse to the party who failed to act. Proposed final rules 210.16 and 210.17 are responsive to comments from the ITCTLA and the International Electronics Manufacturers and Consumers of America (IEMCA) which criticized interim rule 210.25 for not distinguishing between statutory and nonstatutory default, not covering certain types of nonstatutory failures to act, and not expressly authorizing the ALJ or the Commission to draw adverse inferences in certain circumstances.

Paragraph (b) of proposed final rule 210.16 sets forth the procedure for determining statutory default. Paragraph (b)(1) provides for the filing of motions for default based on a respondent's

[32] Paragraph (a) of proposed final rule 210.13 also reflects the fact that the complaint and notice of investigation may be served by the Commission pursuant to proposed final rule 210.11(a) or by a party pursuant to proposed final rule 210.11(b).

[33] The authority to waive any of the prescribed substantive requirements for a response to a complaint and notice of investigation can be significant, considering that a finding that a respondent has failed "to respond" to the complaint and notice in the manner required by the Commission rules is an element of statutory default and can lead to the issuance of a limited remedial order directed to the respondent in question. See 19 U.S.C. 1337(g)(1) and proposed final rule 210.16(a)(1).

[34] The need for such reorganization was noted by the chief administrative law judge and the Commission in Inv. No. 337-TA-296, Certain Low Friction Drawer Supports, Components Thereof, and Products Containing Same, Initial Determination Amending the Notice of Investigation (Order No. 1) at 3 (July 5, 1989); 54 FR 32701 (Aug. 9, 1989).

[35] See 19 U.S.C. 1337(g)(1) and (h).

failure to respond to the complaint and notice of investigation in the manner required under the Commission rules or to otherwise fail to appear to answer the complaint and notice of investigation. Paragraph (b)(2) provides for the filing of motions for default based on a respondent's abuse of process or failure to make or cooperate in discovery. Paragraphs (b)(1) and (b)(2) also indicate that an ALJ's decision granting a motion for a finding of default shall be in the form of an initial determination (ID) and that a decision denying a motion for default shall be in the form of an order. Paragraph (b)(3) lists the rights that a respondent loses if it is found to be in default.

Paragraph (c)(1) of proposed final rule 210.16 permits a complainant to file a declaration seeking immediate entry of relief against the respondent in default. The rule does not specify, however, a point in time at which the Commission is required to issue a remedial order against a defaulting respondent (i.e., whether the Commission will issue such relief immediately after the respondent is found to be in default or only after the Commission has adjudicated the violation issues). The Commission believes it necessary and appropriate to retain the flexibility to issue limited remedial orders immediately or at the end of the investigation.

There may be cases in which time is of the essence and the complainant should not be forced to wait until the end of the investigation to obtain relief against defaulting respondents. There also will be cases in which the rapid issuance of limited relief is not critical and it would be more appropriate to wait until the end of the investigation. In most cases, the Commission is likely to defer decisions on issuing default relief pending the adjudication of any defenses by participating respondents that may have a bearing on the public interest factors.[36] The Commission is particularly interested, however, in receiving comment from interested parties on whether the final rules should specify the point at which a default remedy should be issued.

Paragraph (c)(2) of proposed final rule 210.16 governs the issuance of general exclusion orders in default cases.

Section 210.18

Proposed final rule 210.18 governs summary determinations and is based on interim rule 210.50, which is based on FRCP 56 entitled "Summary Judgment." The proposed final rule has been drafted to correspond more closely to FRCP 56. For example, paragraph (b) of proposed final rule 210.18 has been worded to correspond to FRCP 56(c) ("Motions and Proceedings Thereon").[37] Paragraph (c) has been worded to correspond to FRCP 56(e) ("Form of Affidavits; Further testimony; Defense Required"). Paragraph (d) has been worded to match FRCP 56(f) ("When Affidavits are Unavailable"). Finally, paragraph (e) has been worded to correspond to FRCP 56(d) ("Case Not Fully Adjudicated on Motion").

The only provision of FRCP 56 that does not appear in proposed final rule 210.18 is the text of FRCP 56(g) entitled "Affidavits Made in Bad Faith." That paragraph provides for cost and attorney's fee sanctions—and a finding that the submitter of the affidavit is in contempt of court—if the affidavit is found to have been presented in bad faith or solely for the purpose of delay. Cost and fee sanctions under FRCP 56 have not been explicitly requested by the ALJs, and are not explicitly authorized for Commission proceedings by section 337(h) of the Tariff Act.[38] Moreover, the prohibitions and cost and fee sanction provisions of proposed final rules 210.4(b) and 210.25 pertaining to abuse of process are intended to cover affidavits made in bad faith as well as other kinds of papers.

Proposed final rule 210.18 also differs from the interim rule on the issue of the timing of filing a motion for summary determination during the temporary relief phase of an investigation. The Commission noted that the last sentence of paragraph (a) in the interim rule—which states that motions for summary determinations must be filed at least 30 days before the scheduled date of the evidentiary hearing—may not be appropriate for temporary relief proceedings. For that reason, paragraph (a) in the proposed final rule provides that the 30-day deadline applies to motions for summary determinations in permanent relief proceedings and that motions for summary determination in temporary relief proceedings must be filed on or before the deadline set by the presiding ALJ.

Section 210.19

Proposed final rule 210.19 is based on interim rule 210.26 and establishes the procedure for intervening in a section 337 investigation or a related proceeding. The differences between the interim rule and proposed final rule are largely editorial. A technical error has been corrected as well. As the ITCTLA noted in its comments on the interim rule, the second sentence concerning the certificate of service that must accompany an application for intervention erroneously refers to service in accordance with "§ 210.16." The sentence in question has been corrected in the proposed final rule so that it refers to "§ 201.16(b)."

Section 210.20

Proposed final rule 210.20 is based on interim rule 210.44(e) and governs declassification of—i.e., removal of the "confidential" designation from—documents (or portions thereof) that have been designated confidential by the submitter. The only difference between the interim rule and the proposed final rule is that paragraph (b) of the proposed final rule provides that, after issuance of the public inspection version of an ID concerning violation of section 337 or termination of the investigation, a decision by the ALJ to grant a motion for declassification of information shall be in the form of an ID.

Section 210.21

Proposed final rule 210.21 is based on interim rule 210.51, which governs motions for termination of an investigation in whole or part on the basis of a settlement agreement or a consent order. Prior to passage of the Omnibus Trade Act amendments to section 337, the Commission took such action under authority derived from the APA. The Omnibus Trade Act amended section 337 to give the Commission express authority to take such actions and to do so with or without a determination on violation of section 337.[39] The Commission accordingly drafted interim rule 210.51 to correspond to relevant statutory provisions.[40]

Paragraph (a). The ITCTLA commented that interim rule 210.51 should be amended to codify existing

[36] Generally, there are sound reasons for waiting until the end of the investigation before issuing limited relief against defaulting respondents. For example, if the Commission does not wait in a contested patent-based case, it risks later having to vacate the limited remedial order if the patent in controversy is found to be invalid or unenforceable. Also, the seriatim issuance of several limited remedial orders is likely to be administratively burdensome for the President (who must review each order) and for the U.S. Customs Service (which must enforce them).

[37] Paragraph (b) of the proposed final rule has thus been drafted to state that the summary determination sought by the moving party shall be rendered if the pleadings and any depositions, answers to interrogatories, *and* admissions on file, *together with the affidavits, if any,* show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law. [Italics indicate new text.]

[38] See 19 U.S.C. 1337(h).

[39] See sec. 1342(a)(2) of the Omnibus Trade Act; 19 U.S.C. 1337(c).

[40] See 53 FR 33052, 33053, 33069, and 33070 (Aug. 29, 1988).

practice by adding other provisions by which an investigation may be terminated in whole or part, viz., termination based upon withdrawal of the complaint or withdrawal of certain allegations in the complaint. The Commission believes that the ITCTLA's suggested modification is appropriate and has drafted paragraph (a) of proposed final rule 210.21 accordingly. Current and prospective complainants should bear in mind that a motion to terminate an investigation under paragraph (a)(1) or (a)(2) of proposed final rule 210.21 will not exempt the complainant from possible sanctions under proposed final rules 210.4(b) and 210.25 if the Commission subsequently determines that the complainant or its representative have abused the section 337 process in signing and filing of the complaint or related submissions.[41]

Paragraph (b). Paragraph (b) of proposed final rule 210.21 concerns settlements based on licensing or other agreements. It is virtually identical to interim rule 210.51(b).

Paragraph (c). Paragraph (c) of proposed final rule 210.21 discusses settlement by consent order. This paragraph incorporates provisions of interim rules 211.20, 211.21, and 211.22.

Paragraph (c)(1). Paragraph (c)(1) of proposed final rule 210.21 is based on interim rule 211.20, which provides opportunities to submit proposed consent orders to the Commission. Paragraph (c)(1) of proposed final rule 210.21 essentially incorporates the revised version of interim rule 211.20 as it appeared in the October 17, 1988, notice of proposed rulemaking concerning part 211. That notice stated that the Commission was considering revision of interim rule 211.20 to provide for the submission of proposed consent orders prior to institution of an investigation under section 337 only during proceedings under section 603 of the Trade Act of 1974 (19 U.S.C. 2482). This change was proposed in order to simplify standard preinstitution procedure.

In addition, the term "presiding officer" was replaced by the more correct term "administrative law judge." The Commission also thought it appropriate to delete the word "proposed," which modified "consent order agreement," because the agreement (now called "stipulation" in the proposed final rule published in the present notice) exists before the Commission considers it. The Commission proposed to revise interim rule 211.20 further by eliminating as unnecessary the provision for issuing a **Federal Register** notice upon receipt by the Commission of an ID concerning termination of an investigation on the basis of a consent order.

Finally, interim rule 211.20 also was revised to streamline the consent order process by eliminating the requirement that the complainant and the Commission investigative attorney must participate in the filing of a motion to terminate an investigation on the basis of a consent order. The complainant and the Commission investigative attorney were, however, still permitted to file such a motion jointly with respondents.

The changes reflected in the proposed revised version of interim rule 211.20 that appeared in the October 17, 1988, notice are carried over into paragraph (c)(1) of proposed final rule 210.21 in the present notice, which also replaces the term "consent order agreement" with the more appropriate term "consent order stipulation," in view of the fact that such a document can be filed by one party.

The ITCTLA urged that denial of a motion to terminate an investigation should not be by ID, and that a respondent should not have to submit a consent order agreement along with its motion to terminate, if the respondent was not required to obtain the complainant's agreement. Paragraph (c)(1) of proposed final rule 210.21 provides that an ID will issue only upon the granting of a motion to terminate the investigation, as is the case with most rulings on motions affecting the scope or timing of an investigation. Paragraph (c)(1) does not eliminate, however, the requirement that a motion to terminate an investigation on the basis of a consent order is to contain a consent order stipulation. The participation of the complainant in the stipulation is desired, although not required, and the consent order stipulation contains important information bearing on the desirability of issuing a consent order.

Paragraph (c)(2). Paragraph (c)(2) of proposed final rule 210.21 incorporates interim rule 211.21, which establishes the procedure by which the Commission deals with requests for issuance of consent orders. The revised version of interim rule 211.21 which appeared in the October 17, 1988, notice of proposed rulemaking corrected an erroneous cross-reference and eliminated as unnecessary the requirement that the Commission give reasons for issuing a consent order. That provision was considered unnecessary because the Commission normally issues every consent order for the same reasons, i.e., the consent order complies with the Commission's rules and is not inappropriate in view of the public interest factors listed in interim rule 211.21. The phrase "reject the proposed agreement and deny the motion" was replaced by "reverse the initial determination" to conform to Commission procedure. The final two sentences of paragraph (b), which had been inadvertently deleted from interim rule 211.21, were restored in the revised version of interim rule set forth in the October 17, 1988, notice of proposed rulemaking. The changes reflected in the proposed revised version of interim rule 211.21 as it appeared in the October 17, 1988, notice are carried over into paragraph (c)(2) of proposed final rule 210.21 in the present notice.

Paragraph (c)(3). Paragraph (c)(3) of proposed final rule 210.21 incorporates the existing provisions of interim rule 211.22, which specify certain provisions that a consent order stipulation must include. The revised version of interim rule 211.22 which appeared in the October 17, 1988, notice of proposed rulemaking required each consent order agreement to specify that the agreement will not apply to intellectual property rights which have expired or been found invalid or unenforceable, if the finding has been upheld on appeal or the time for appeal has expired. The revised version of interim rule 211.22 took into account that the Commission does not order relief based on invalid or unenforceable intellectual property rights. The October 17, 1988, notice of rulemaking pointed out that the Commission considers, as part of its determination on the public interest, whether the issuance of a consent order is appropriate if a finding of noninfringement or of no violation of section 337 has been made. The revised interim rule 211.22 also was drafted to change the interim rule's reference to respondent's admission of violation of section 337 to admission that an unfair act has been committed. This change was made because the elements of violation other than the unfair act are typically matters for the Commission's decision, not respondent's admission. The second sentence of paragraph (b) of the interim rule was deemed unnecessary because the Commission construes the terms of consent orders

[41] See Inv. No. 337-TA-269, Certain Picture-in-a-Picture Video Add-On Products and Components Thereof, in which the Commission rejected a settlement agreement between the complainant and the respondents and terminated the investigation with prejudice based on stipulations. "[C]omplainants must not be permitted to make misstatements and/or omissions of material fact in their complaints and then obtain settlement agreement termination of the investigation following disclosure of their misstatements and/or omissions." Commission Action and Order (Dec. 9, 1987); 52 FR 47767 (Dec. 16, 1987).

according to general principles of contract law. The changes reflected in the proposed revised version of interim rule 211.22 as it appeared in the October 17, 1988, notice are carried over into paragraph (c)(3) of proposed final rule 210.21 in the present notice.

The IEMCA requested that in all cases consent order agreements be required to state that the consent order terminates when complainant's claim is judged invalid or unenforceable. The Commission has not drafted the proposed final rule in that manner. Paragraph (c)(3) of proposed rule 210.21 states that only for intellectual property-based investigations, because the statement in question appears to be applicable only to intellectual property-based investigations.

Paragraph (c)(3) of proposed final rule 210.21 also requires that any consent order stipulation must contain a clause in which parties agree not to seek court limitations on the Commission's efforts to gather information relating to the consent order. This is based on the Commission's recent experience in Inv. No. 337–TA–290, Certain Electrical Discharge Machining Apparatus and Components Thereof, where respondents sought and obtained court-ordered restrictions on complainants' ability to seek enforcement of a cease and desist order.

Paragraph (d). Paragraph (d) of proposed final rule 210.21 is based on the corresponding paragraph of interim rule 210.51, which states that an order of termination issued by the ALJ constitutes an ID and that an order of termination issued by the Commission is a Commission determination under interim rule 210.56(c) ("Determination on review [of an ID]"). Proposed final rule 210.21(d) does not include, however, the interim provision concerning an order of termination issued by the Commission, which now appears at proposed final rule 210.41.

Section 210.22

Proposed final rule 210.22 governing motions for a "more complicated" designation is based on interim rule 210.59. Paragraph (a) of proposed final rule 210.22 provides the definition of a "more complicated" investigation. Paragraph (b) provides that the designation may be imposed for the permanent relief phase of an investigation by order of the ALJ or the Commission.[42] Paragraph (b) also discusses the parties' right to appeal the designation when it is imposed by the ALJ.

Paragraph (c) of proposed final rule 210.22 governs the "more complicated" designation as applied to the temporary relief phase of an investigation (under proposed final rule 210.60). This paragraph is essentially the same as the corresponding provision of interim rule 210.59(b) in that paragraph (c) of the proposed final rule provides that the "more complicated" designation may be applied by order of the ALJ or the Commission. Unlike the interim rule, however, paragraph (c) of proposed final rule 210.22 does not refer to extending the time to adjudicate a motion for temporary relief "as well as the issue of bonding." The reference to the issue of bonding has been omitted from proposed final rule 210.22 as surplusage. Bonding by the complainant is a required aspect of the motion for temporary relief under the proposed final rules and, hence, need not be referred to as a separate issue.

The provisions governing computation of the extended deadline for the permanent relief or temporary relief phase of a "more complicated" investigation appear in proposed final rule 210.22. Paragraphs (b) and (c) of proposed final rule 210.22 accordingly state that the extended deadline for concluding the investigation (as to temporary relief or permanent relief) shall be computed in the manner specified in that rule.

Interested persons will note that proposed final rule 210.22 does not contain a provision similar to paragraph (c) of interim rule 210.59, which pertains to designating an investigation "complicated" (as opposed to "more complicated"). Paragraph (c) of the interim rule was adopted in response to section 1342(d)(2) of the Omnibus Trade Act, which provided that any section 337 investigation due to be completed within 180 days after the effective date of the Omnibus Trade Act amendments to section 337 could be declared "complicated," and the 12-month or 18-month statutory deadline for concluding the investigation (under section 337(b) of the Tariff Act) could be extended up to 90 days. Paragraph (c) of interim rule 210.59 established procedures for implementing that authority. The effective date of the Omnibus Trade Act was August 23, 1988, and the Commission's authority to apply the "complicated" designation to a pending investigation was limited to investigations with statutory deadlines on or before February 18, 1989. Paragraph (c) of interim rule 210.59 has therefore not been incorporated into proposed final rule 210.22.

Section 210.23

Proposed final rule 210.23 is a new rule governing motions for suspension of investigations. Interim rule 210.59 acknowledges the Commission's authority under section 337 to suspend an investigation, and interim rule 21.53(c) indicates that an ALJ's decision granting a motion for suspension should be in the form of an ID. Interim part 210, however, contained no rule specifically covering motions for suspension of section 337 investigations. Proposed final rule 210.23 now states that any party may file a motion to suspend an investigation on the basis of the pendency of proceedings in a court or agency of the United States involving questions concerning the subject matter of the investigation that are similar to those being adjudicated in the investigation.[43] The Commission or the ALJ also may raise the issue of suspension sua sponte. Proposed final rule 210.23 further provides that an ALJ's decision granting a motion for suspension shall be in the form of an ID.

Section 210.24

Proposed final rule 210.24 is based on interim rule 210.70, and pertains to interlocutory appeals to the Commission concerning an ALJ's ruling on a motion prior to the issuance of an ID on the matter to which the motion pertains (e.g., an ID on violation of section 337).

Paragraph (a). Paragraph (a) of proposed final rule 210.24 governs interlocutory appeals that may be filed without leave from the ALJ. It contains all provisions of the corresponding paragraph in interim rule 210.70. It also contains a new provision authorizing interlocutory appeals from an ALJ's order designating the permanent relief phase of an investigation "more complicated."

Paragraph (b). Paragraph (b) of proposed final rule 210.24 governs interlocutory appeals that are filed with leave from the ALJ. It contains all provisions of the corresponding paragraph in interim rule 210.70. It also includes a new paragraph (b)(2) which authorizes a presiding ALJ to permit appeals from his decision concerning the grant or denial of confidential treatment under proposed final rule 210.5(c).

[42] This is a change from the current practice under interim rule 210.59(a). The interim rule provides that the "more complicated" designation must be imposed for the permanent relief phase of investigation via the ID/discretionary review procedure under interim rules 210.53 through 210.56.

[43] Suspension of an investigation for that reason is provided for in the statute. See 19 U.S.C. 1337(b)(1).

Interested persons will note that, like the interim rule, paragraphs (a) and (b) of the proposed final rule prohibit interlocutory appeals for ALJ rulings on matters related to temporary relief. This prohibition is necessary because of the stringent statutory deadlines for completing temporary relief proceedings and the undue burden that would be imposed on the parties and the Commission if they are required to participate in an interlocutory appeal concurrently with temporary relief proceedings.

Section 210.25

Proposed final rule 210.25 is a new rule concerning the filing and adjudication of motions for sanctions for abuse of process under proposed final rule 210.4(b), abuse of discovery under proposed final rule 210.27(d), failure to make or cooperate in discovery under proposed final rule 210.33(c), or violation of a protective order under proposed final rule 210.34(c). Proposed final rule 210.25 provides several procedures for the adjudication of such motions, depending on when the motion was filed and whether it was addressed to the Commission or the ALJ.

Section 210.26

Proposed final rule 210.26 is a new rule, which deals with motions pertaining to subjects other than those covered in proposed final rules 210.16 through 210.25. This rule states that motions pertaining to discovery shall be filed in accordance with proposed final rule 210.15 and the pertinent provision(s) of subpart E of part 210 (proposed final rules 210.27 through 210.34). Proposed final rule 210.26 also provides that motions pertaining to evidentiary hearings and prehearing conferences shall be filed in accordance with proposed final rule 210.15 and the pertinent provision(s) of subpart F of part 210 (proposed final rules 210.35 through 210.40). Proposed final rule 210.25 also provides that motions for temporary relief shall be filed as provided in subpart H of part 210 (i.e., proposed final rules 210.52 through 210.57).

Subpart E—Discovery and Compulsory Process

Section 210.27

Proposed final rule 210.27 is based on interim rule 210.30, which is based on FRCP 26 and covers the permissible methods and subject matter of discovery, time constraints on discovery, and supplementation of responses to discovery requests.

Paragraphs (a) and (c). Paragraph (a) of proposed final rule 210.27 is based on paragraph (a) of interim rule 210.30 and FRCP 26(a), which outline permissible methods of discovery. Paragraph (c) of the proposed final rule 210.27 corresponds to paragraph (d) of interim rule 210.30 and FRCP 26(e) regarding the supplementation of a response to a discovery request.[44]

Paragraph (b). Paragraph (b) of the proposed final rule 210.27 is based on paragraph (b) of interim rule 210.30 and FRCP 26(b) concerning the permissible subject matter of discovery. Paragraph (b) of the proposed final rule states that the scope of discovery for the temporary relief phase of an investigation is governed by proposed final rule 210.61. Unlike paragraph (b) of interim rule 210.30, paragraph (b) of proposed final rule 210.27 also expressly allows discovery on the issues of remedy and bonding by the respondents in connection with the permanent relief phase of an investigation. The Commission believes this change is appropriate for the following reasons: First, the grounds for Commission decisions on remedy and bonding are essentially factual in most cases. Furthermore, the ALJ is required under proposed final rule 210.42(a)(1)(ii) to issue a recommended determination (RD) on the issues of remedy and bonding by the respondents. Hence, discovery on those issues in connection with the grant or denial of permanent relief could generate useful information.[45]

In determining what types of information are relevant to the issues of remedy and bonding by the respondents and, hence, are properly discoverable, the ALJ is expected to look to prior Commission opinions for guidance. E.g., Certain Airlines Paint Spray Pumps and Components Therefor, Inv. No. 337–TA–90, USITC Publication 1199 (November 1981), Commission Opinion at 18–19 (factors relevant to the issuance of a general or a limited exclusion order).

Paragraph (d). Paragraph (d) of proposed final rule 210.27 is a new provision based on FRCP 26(g). It imposes signature and certification requirements (similar to those imposed in FRCP 11 and proposed final Commission rule 210.4(b)) for discovery requests, responses, and objections. It also provides for cost and fee sanctions (like those authorized in FRCP 37 and proposed final Commission rule 210.33(c)). FRCP 26(g) is not cited in section 337(h) of the Tariff Act as one of the Federal Rules the Commission is to use as a standard for imposing cost and fee sanctions in section 337 investigations. Section 337(h) does state, however, that the Commission may by rule prescribe sanctions for abuse of discovery to the extent authorized by FRCP 37,[46] and FRCP 26(g) is derived from FRCP 37.[47] The Commission's ALJs have advised the Commission that there is a need for a Commission rule based on FRCP 26(g).[48] In that regard, the Commission notes that it has the authority under section 335 of the Tariff Act to adopt any rules it deems necessary to carry out its functions and duties.[49]

Section 210.28

Proposed final rule 210.28 is based on interim rule 210.31, which governs depositions in section 337 investigations.

[44] There is no provision in proposed final rule 210.27 that corresponds to paragraph (c) of interim rule 210.30, the interim rule governing discovery in connection with a motion temporary relief. See instead proposed final rule 210.61 on that subject.

[45] Serious questions as to whether the granting of permanent relief would have an adverse impact on the public interest arise relatively infrequently. Moreover, the scope of evidence and information that conceivably could be categorized as relating to the public interest is potentially so vast as to make discovery and findings by the ALJ concerning the public interest impracticable. For those reasons, paragraph (b) of proposed final rule 210.27 does not require ALJs to allow discovery, to take evidence, or to make findings or recommendations to the Commission concerning the public interest in connection with the grant or denial of permanent relief. The Commission remains free, however, to order an ALJ to take evidence and to make findings on the public interest in appropriate cases. See 19 CFR 201.4(b) regarding waiver of Commission rules and proposed final rule 210.50(b)(2) concerning the ALJ's ability to take evidence, hear argument, and make findings concerning the public interest in connection with settlements by agreement or consent orders.

[46] 19 U.S.C. 1337(h).

[47] The 1983 Advisory Committee comments to FRCP 26(g) state in pertinent part as follows:

Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37 * * *. The subdivision [g] provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. * * * *Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. § 1927, and the court's inherent power.* [Emphasis added.]

[48] At least one of the ALJs has pointed out that such a rule is desirable in part because, unlike proposed final rule 210.33 (the Commission analog to FRCP 37), a Commission rule based on FRCP 26(g) would not require the issuance of an order compelling discovery, before sanctions could be imposed.

[49] See 19 U.S.C. 1335.

Paragraph (a). Paragraph (a) of interim rule 210.31 provides, among other things, that a complainant must seek leave from the presiding ALJ if the complainant wishes to depose any person before expiration of the 20th day after institution of the investigation. The ITCTLA commented that forcing the complainant to wait 20 days before it can take depositions is impracticable in a temporary relief proceeding in light of the stringent administrative deadlines for concluding proceedings before the ALJ. The ITCTLA proposed that the waiting period in temporary relief cases be shortened to 10 days after Commission service of the complaint, notice, and motion for temporary relief.

The Commission has determined to delete all deadlines in the proposed final discovery rules (210.27 through 210.33). Each proposed final discovery rule states instead that the presiding ALJ in each investigation will set the necessary deadlines. Consequently, paragraph (a) of proposed final rule 210.28 has not been drafted in the manner the commenters have suggested. Paragraph (a) simply states that the period or deadlines for the taking of depositions will be determined by the presiding ALJ.[50]

Paragraph (c). Paragraph (c) of proposed final rule 210.28 is based on paragraph (c) of interim rule 210.31, which establishes the procedure for giving notice of a deposition. The interim rule states that a party desiring to depose a person is required to give 10 days notice to the other parties to the investigation if the deposition is to be taken in the United States and 15 days notice if the deposition is to be taken elsewhere. Paragraph (c) of proposed final rule 210.28 contains no deadlines and states that the presiding ALJ will determine the amount of advance notice that is required for each deposition.

Paragraphs (b), (e), (g), and (h). Paragraph (b), (e), (g), and (h) of interim rule 210.31 discuss the following subjects: Persons before whom depositions may be taken; depositions of nonparty officers or employees of the Commission or of other Government agencies; the admissibility of depositions; and the use of depositions. Paragraphs (b), (e), (g), and (h) of proposed final rule 210.28 match the corresponding paragraphs of the interim rule.

Paragraph (d). Paragraph (d) of proposed final rule 210.28 is virtually identical to paragraph (d) of interim rule 210.31, which concerns the taking of depositions. The only difference is that paragraph (d) of proposed final rule contains a cross-reference to the new paragraph (i) of final rule 210.28, which provides that errors and irregularities in depositions are waived in the absence of a timely objection.

Paragraph (f). Paragraph (f) of proposed final rule 210.28 is a revised version of paragraph (f) of interim rule 210.31. The interim rule bears the heading "*Filing of Depositions.*" It states that the party taking a deposition shall file a copy of the deposition with the Commission investigative attorney and give prompt notice of such filing to all other parties. Paragraph (f) of the proposed final rule reflects actual Commission practice. The heading of that paragraph is "*Service of Deposition Transcripts on the Commission Staff.*" The text provides that the party taking the deposition must promptly serve a copy of the deposition transcript on the Commission investigative attorney.

Paragraph (i). Paragraph (i) of proposed final rule 210.28 is a new provision corresponding to FRCP 32(d), which pertains to the effect of errors or irregularities in depositions. Paragraph (i) provides that errors and irregularities in depositions are waived in the absence of a timely objection. Unlike FRCP 32(d), however, paragraph (i) of the proposed final Commission rule does not provide a deadline for serving objections to the form of written questions. Instead, paragraph (i) indicates that the presiding ALJ will set the deadline for such service.

Section 210.29

Proposed final rule 210.29 is based on interim rule 210.32 concerning interrogatories.

Paragraph (a). Paragraph (a) of proposed final rule 210.29 discusses the scope of interrogatories in section 337 investigations and the use of interrogatories at evidentiary hearings. It is virtually identical to the corresponding paragraph in interim rule 210.32.

Paragraph (b). Paragraph (b)(1) of proposed final rule 210.29 states that interrogatories may be served upon any other party after the publication of the Federal Register notice instituting the investigation. Paragraph (b)(1) is identical to the corresponding paragraph in interim rule 210.32.

Paragraph (b)(2) of proposed final rule 210.29 provides deadlines for the service of answers and objections to interrogatories. It matches the corresponding provision in the interim rule 210.32, except that there is no prescribed deadline for serving such answers and objections. Instead, the deadline is to be set by the presiding ALJ.

Paragraph (b)(3) of proposed final rule 210.29 discusses whether an answer to an interrogatory may be considered objectionable and need not be answered. Paragraph (b)(3) of the proposed final rule is identical to the corresponding paragraph of interim rule 210.32.

Paragraph (c). Paragraph (c) of proposed final rule 210.29 discusses the option to produce records in response to an interrogatory. Paragraph (c) is identical to the corresponding paragraph of interim rule 210.32, except for the last sentence. The last sentence in the proposed final rule has been drafted to correspond more closely to FRCP 33. The sentence reads as follows: "The specifications provided shall include sufficient detail to permit the interrogating party to *locate and to* identify, *as* readily *as can the party served,* the documents from which the answer may be ascertained." [Emphasis added to reflect new text.]

Section 210.30

Proposed final rule 210.30 is based on interim rule 210.33 concerning requests for the production of documents and things and entry upon land. Paragraph (a) of the proposed final rule discusses the permissible scope of such requests and is identical to paragraph (a) of the interim rule.

Paragraph (b) of proposed final rule 210.30 outlines the procedure for making, serving, and responding to requests for the production of documents and things and entry upon land. The only difference between it and paragraph (b) of interim rule 210.33 is that paragraph (b) of the proposed final rule does not set a deadline for responding to such requests. Paragraph (b) of the proposed final rule provides that the presiding ALJ will determine the deadline for responding.

Paragraph (c) of proposed final rule 210.30 is identical to paragraph (c) of interim rule 210.33, and states that there is no prohibition against the issuance of an order to permit entry upon land against a person who is not a party to the investigation.

Section 210.31

Proposed final 210.31 is based on interim rule 210.34 concerning requests for admission.

Paragraph (a). Paragraph (a) of proposed final rule 210.31 is virtually identical to paragraph (a) of interim rule 210.34, concerning the form, content, and service of requests for admission. The proposed final rule does not impose a

[50] Similar language appears in proposed final rule 210.61 concerning discovery related to a motion for temporary relief.

deadline, however, for serving a request for admission. The proposed final rule provides that the deadline for such service is to be set by the presiding ALJ.

Paragraph (b). Paragraph (b) of proposed final rule 210.31 discusses answers and objections to requests for admission, and is virtually identical to paragraph (b) of interim rule 210.34. The difference is that paragraph (b) in the proposed final rule does not specify a date by which a matter may be deemed admitted unless the party to whom the request for admission was directed serves a written answer or objection to the proposed admission. The proposed final rule indicates that the ALJ will determine the effective date of a proposed admission for which there has been no written response or objection.

Paragraphs (c) and (d). Paragraph (c) of proposed final rule 210.31 discusses the sufficiency of answers to requests for admission. Paragraph (d) discusses the effect of admissions and withdrawal or amendment of an admission. Paragraphs (c) and (d) of proposed final rule 210.31 are identical to paragraphs (c) and (d) of interim rule 210.34.

Section 210.32

Proposed final rule 210.32 is based on interim rule 210.35, which governs the issuance of subpoenas.

Paragraph (a). Paragraph (a) of proposed final rule 210.32 is substantially the same as the corresponding paragraph of the interim rule. The only difference is that the Commission has added a new paragraph (a)(3) to the proposed final rule, which expressly authorizes a presiding ALJ to rule upon applications for the issuance of a subpoena ad testificandum or a subpoena duces tecum and to issue such subpoenas when warranted. The Commission believes that giving its ALJs express authority to issue subpoenas in section 337 investigations is appropriate because ALJs already have such authority under the APA,[51] and the ALJs have exercised that authority in the past.[52] The Commission notes also that it has agreed to seek judicial enforcement of such subpoenas in the past and that the U.S. District Court for the District of Columbia has granted such enforcement.[53]

Paragraph (b). Paragraph (b) of proposed final rule 210.32 is the same as the corresponding paragraph of interim rule 210.35, which discusses the use of a subpoena for discovery.

Paragraph (c). Paragraph (c) of proposed final rule 210.32 is the same as the corresponding paragraph of interim rule 210.35, which deals with applications for subpoenas for nonparty Commission records or personnel, or for records and personnel of other Government agencies. The only difference is that the Commission has added a new paragraph (c)(2) to the proposed final rule, which states that the ALJ may issue such subpoenas when warranted.[54]

Paragraph (d). Paragraph (d) of proposed final rule 210.32 matches the corresponding paragraph of interim rule 210.35, and deals with motions to limit or quash subpoenas. The only difference between the two provisions is that paragraph (d) of the proposed final rule contains no prescribed deadline for filing such motions. It states instead that such motions may be filed within the period set by the ALJ.

Paragraph (e). Paragraph (e) of proposed final rule 210.32 is the same as the corresponding paragraph of interim rule 210.35, which discusses ex parte rulings on applications for subpoenas.

Paragraph (f). Paragraphs (f)(1) and (f)(2) of proposed final rule 210.32 are new provisions establishing responsibility for the payment of witness fees. They indicate that payment is to be made on or before the subpoena compliance date, by the party who subpoenaed the deponent or witness.

Paragraph (g). This paragraph of proposed final rule 210.32 is a new provision establishing the procedure for seeking to have the Commission obtain judicial enforcement of a subpoena issued by the ALJ. The procedure is as follows: (1) The ALJ shall certify, on motion or sua sponte, a request for such enforcement; (2) the order shall be accompanied by copies of relevant papers and a written report from the ALJ concerning the purpose, relevance, and reasonableness of the subpoena; and (3) the Commission will issue a notice announcing its decision on the request.

The report from the ALJ that must accompany a judicial enforcement certification order will be particularly important to the Commission in determining whether to seek judicial enforcement of the subpoena and, if so, to what extent.[55] The report will help the Commission's counsel (i.e., the Office of the General Counsel) demonstrate the relevancy and reasonableness of the subpoena to the court when judicial enforcement is sought.

Section 210.33

Proposed final rule 210.33 is based on interim rule 210.36, which provides sanctions for failure to make or cooperate in discovery.

Paragraph (a). Paragraph (a) of proposed final rule 210.33 is the same as paragraph (a) of interim rule 210.36, which governs the filing of motions for orders compelling discovery.

Paragraph (b). Paragraph (b) of proposed final rule 210.33 is based on FRCP 37 as well as paragraph (b) of interim rule 210.36, which lists various kinds of sanctions that may be imposed if a party fails to comply with a discovery order. The Omnibus Trade Act amendments to section 337 gave the Commission express authorization to impose sanctions for abuse of discovery to the extent provided in FRCP 37.[56] The interim rule matched the pre-Omnibus Trade Act rule 210.36, which provided sanctions comparable to those available under FRCP 37, except for costs and attorney's fees. The Federal Register notice announcing the Commission's adoption of interim rule 210.36 stated that the Commission would determine at a later date whether to include cost and fee sanctions provisions in the proposed final rule based on interim rule 210.36.[57]

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[51] Proceedings for temporary or permanent relief under section 337 require notice and an opportunity for a hearing in accordance with the APA. See 19 U.S.C. 1337(c). Section 556(c) of the APA provides that "[s]ubject to published rules of the agency and within its powers, employees presiding at hearings may * * * issue subpoenas authorized by law. 5 U.S.C. 556(c). See also section 333(a) of the Tariff Act, which provides in pertinent part as follows.

For the purposes of carrying out its functions and duties in connection with any investigation authorized by law, the Commission or *its duly authorized agent or agents* * * * (3) may require any person, firm, copartnership, corporation, or association to produce books or papers relating to any matter pertaining to such investigation * * * and (4) may require any person, firm, copartnership, corporation, or association to furnish in writing, in such detail and in such form as the Commission may prescribe, information in their possession pertaining to such investigation.

19 U.S.C. 1333(a) [emphasis added].

[52] See, e.g., Inv. No. 337-TA-254, Certain Flashlights and Components Thereof; Inv. No. 337-TA-237, Certain Miniature Hacksaws; Inv. No. 337-TA-169, Certain Optical Waveguide Fibers ("Optical Waveguide Fibers").

[53] Optical Waveguide Fibers, *supra*, ("permanent" order for enforcement issued by the Court on Nov. 13, 1984).

[54] Under proposed final rule 210.24(a), however, parties can seek interlocutory review of an ALJ's order granting a subpoena for nonparty Commission records or for the appearance of personnel from other Government agencies. The appeal may be sought without obtaining leave from the ALJ. The Commission can also issue an order sua sponte staying the effective date of the ALJ's order, and can place the matter on the Commission's docket for review.

[55] Since the ALJ presides over the evidentiary phase of section 337 investigations, he is closest to the issues in the case and is aware of circumstances relating to relevance and reasonableness that may not be reflected in the application for the subpoena or in any of the related documents.

[56] See sec. 1342(a)(5)(B) of Omnibus Trade Act; 19 U.S.C. 1337(h).

[57] See 53 FR 33052 (Aug. 28, 1988).

Paragraph (b) of proposed final rule 210.33, which provides for non-monetary sanction, matches FRCP 37 more closely than paragraph (b) of interim rule 210.36. The key differences between the interim rule and the proposed final rule are enumerated below.

1. The heading of paragraph (b) of the interim rule is "*Failure to comply with order compelling discovery.*" The heading of paragraph (b) of proposed final 210.33 is "*Non-monetary sanctions for failure to comply with order compelling discovery.*"

2. Paragraph (b) of the proposed final rule includes a new paragraph (b)(6) which covers "any other non-monetary sanction that would be available under Rule 37 of the Federal Rules of Civil Procedure." [58]

Paragraph (c). Paragraph (c) of proposed final rule 210.33 is a new provision with the heading "*Monetary sanctions for failure to comply with order compelling discovery.*" It contains provisions similar to the monetary sanction provisions of proposed final rule 210.4(b) concerning abuse of process. The filing and adjudication of a motion for monetary sanctions for failure to make or cooperate in discovery are governed by proposed final rule 210.25.

Section 210.34

Proposed final rule 210.34 is based on interim rule 210.37, which governs administrative protective orders in section 337 investigations.

Paragraphs (a) and (b). Paragraphs (a) and (b) of proposed final rule 210.34, match the corresponding provisions of interim rule 210.37, which provide for the issuance of section 337 protective orders and the procedure to be followed in the event that there is an unauthorized disclosure of confidential information covered by a protective order.

Paragraph (c). Paragraph (c) of proposed final rule 210.34 is similar to the corresponding paragraph of interim rule 210.37, to the extent that it enumerates the kinds of sanctions that may be imposed for violation of a section 337 protective order. Unlike the interim rule, however, paragraph (c) of the proposed final rule provides that sanction proceedings may be initiated and that a sanction may be imposed on the Commission's own initiative, as well as in response to a motion by a party or the ALJ. Paragraph (c) also states that an ALJ's ruling on a motion for sanctions during an investigation shall be in the form of an order (instead of an ID).

Paragraph (d). Paragraph (d)(1) of proposed final rule 210.34 is a new provision requiring each person subject to a section 337 protective order to report to the Commission immediately upon learning that the confidential business information disclosed to him pursuant to the protective order is the subject of a subpoena, court or administrative order (other than an order of a court reviewing a Commission decision), discovery request, or agreement requiring disclosure of that information to persons who may not be entitled to see that information under the Commission's protective order or proposed final rule 210.5(b).

The Commission believes that the reporting requirement is appropriate for several reasons. The Commission has statutory responsibility for protecting the confidentiality of confidential business information.[59] Timely notice to the Commission will enable the Commission to prevent improper disclosure of that information. The Commission also has strong institutional interests in preventing unauthorized disclosure of such information. To a great extent, the Commission relies on the voluntary submission of confidential business information in its section 337 investigations. Inadequate protection of that information would chill such cooperation.

Paragraph (d)(2) of proposed final rule 210.34 provides that failure to comply with the reporting requirement may result in a sanction or other action by the Commission.

Subpart F—Prehearing Conferences and Hearings

Section 210.35

Proposed final rule 210.35 is essentially the same as interim rule 210.40, which governs prehearing conferences. The only difference is in the last sentence of paragraph (d) of the proposed final rule, which concerns the order issued by the presiding ALJ after a prehearing conference. The last sentence in paragraph (d) of the interim rule states that the order will control the subsequent course of the hearing, "unless modified to prevent manifest injustice." In paragraph (d) of the proposed final rule, the last sentence states that the ALJ's order will control the subsequent course of the hearing "unless the administrative law judge modifies the order."

Section 210.36

Proposed final rule 210.36 is based on interim rule 210.41, which contains general provisions for evidentiary hearings before ALJs in connection with temporary or permanent relief. The differences between the interim rule and the proposed final rule are reflected in paragraphs (a) and (d) of the proposed final rule.

Paragraph (a). Paragraph (a)(1) of proposed final rule 210.36 provides that an opportunity for a hearing shall be provided in accordance with the APA. (The interim rule states that an opportunity for a hearing will be required unless the Commission orders otherwise.) Paragraph (a)(1) of the proposed final rule also indicates that an opportunity for a hearing will be provided not only for the purpose of determining whether there is a violation of section 337 but also for the purpose of facilitating the making of findings and recommendations by the ALJ relevant to the issues of remedy and bonding by the respondents.[60]

Paragraph (a)(2) of proposed final rule 210.36 states that an opportunity for a hearing will be provided in connection with every motion for temporary relief. (The interim rule states that "unless otherwise ordered by the Commission," an opportunity for a hearing will be provided, except as indicated in interim rule 210.24(e)(13)—which lists the circumstances under which a hearing would not be provided, such as the granting of a motion for summary determination in favor of the respondents or other parties opposing the motion for temporary relief. The interim rule also indicates that the hearing will cover the issue of bonding by the complainant if the complainant is seeking a temporary cease and desist order.)

Paragraph (a)(2) of proposed final rule 210.36 does not attempt to outline circumstances in which a hearing would or would not be held nor does it explicitly articulate or (indicate by referring to another rule) every issue that will be addressed at a hearing held in connection with a motion for temporary relief. Paragraph (a)(2) simply provides that an opportunity for an evidentiary hearing in accordance with the APA will be provided in connection with a motion for temporary relief.

[58] The description of possible non-monetary sanctions under the interim Commission rule does not correspond exactly to the provisions of FRCP 37. The proposed paragraph (b)(6) is appropriate in order to cover a case in which a party desires a non-monetary sanction specified in FRCP 37 that may not appear to be provided for in interim rule 210.36 as currently worded.

[59] See, *e.g.*, 19 U.S.C. § 1337(n).

[60] The ALJ is required to issue a recommended determination on those issues pursuant to proposed final rule 210.42(a)(1)(ii)).

Paragraph (d). Paragraph (d) of proposed final rule 210.36 lists the rights of parties at evidentiary hearings in section 337 investigations. Unless the corresponding paragraph of interim rule 210.41, paragraph (d) of proposed final rule 210.36 states that the hearing will be conducted in accordance with sections 554 through 556 of the APA. In addition, the listing of parties' rights in paragraph (d) of the proposed final rule indicates that every party shall have the right of "adequate notice" instead of "due notice."

Section 210.37

Proposed final rule 210.37 matches interim rule 210.42, which governs the treatment of evidence at prehearing conferences and hearings in section 337 investigations.

Section 210.38

Proposed final rule 210.38 is based on interim rule 210.43. The interim rule describes what constitutes the administrative record in a section 337 investigation. It also contains procedures for reporting and transcribing hearings, correcting hearing transcripts, and certification of the record to the Commission by the presiding ALJ in connection with the issuance of an ID. The only differences between interim rule 210.43 and proposed final rule 210.38 are reflected in paragraphs (c) and (d) of the proposed final rule.

Paragraph (c). Paragraph (c) of interim rule 210.43 states that a transcript will be corrected if an error affects the substance of the text and the ALJ orders such correction after an opportunity for a hearing or after approving a stipulation by the parties providing for the correction. Paragraph (c) of proposed final rule 210.38 states that changes in the official transcript will be made only if they involve the correction of errors affecting substance, and that a motion to correct a transcript shall be addressed to the ALJ, who may order that the transcript be changed to reflect such corrections as are warranted, after consideration of any objections that may be made.

Paragraph (d). To be consistent with the content of proposed final rule 210.65 governing certification of the record that supports a temporary relief ID, paragraph (d) of proposed final rule 210.38 does not include the interim rule provision requiring the ALJ, when possible, to certify the record of a temporary relief proceeding to the Commission prior to issuance of the temporary relief ID.

Section 210.39

Proposed final rule 210.39 contains the provisions of paragraphs (a) through (d) of interim rule 210.44, which govern in camera treatment of confidential business information in section 337 investigations.

Section 210.40

Proposed final rule 210.40 is based on interim rule 210.52, which governs the filing of proposed findings of fact, conclusions of law, and briefs from parties while an investigation is before the ALJ. There is only one difference between the interim rule and the proposed final rule. In proposed final rule 210.40, the reference to service of proposed findings, conclusions, and briefs "in accordance with [interim] § 210.8" has been changed to refer to service "in accordance with § 210.4(d)."

Subpart G—Determinations and Actions Taken

Section 210.41

Proposed final rule 210.41 is derived from interim rule 210.51(d) and states that a Commission order of termination is a Commission determination under proposed final rule 210.45(c) ("*Review of initial determinations on matters other than temporary or permanent relief*").

Rulings by an ALJ (Generally)

Persons who are not familiar with section 337 practice and procedure should be aware that a decision by an ALJ can be in one of three forms:

1. an ID that is subject to discretionary Commission review (with certain limitations on the matters that are reviewable), and that automatically becomes the Commission's determination if the Commission does not order review of the ID by a prescribed deadline;

2. an order that may not be appealed prior to the issuance of the ALJ's ID on permanent relief or termination of the investigation unless the requirements for an interlocutory appeal are satisfied; or

3. an RD, which is automatically reviewed by the Commission and does not automatically become the Commission's determination by a certain date.

The following are examples of matters as to which an ALJ's decision must be in the form of an ID:

1. the granting of a motion to amend the complaint and notice of investigation pursuant to proposed final rule 210.14(b);

2. the granting of a motion to find a respondent in default under proposed final rule 210.16 (a) or (b);

3. the granting of a motion for summary determination pursuant to proposed final rule 210.18(f);

4. the granting of a motion to intervene in an investigation under proposed final rule 210.19;

5. the granting of a motion to terminate an investigation on various grounds under proposed final rule 210.21;

6. the granting of a motion to suspend an investigation pursuant to proposed final rule 210.23;

7. the granting or denial of permanent relief pursuant to proposed final rule 210.42(a)(1)(i);

8. the granting or denial of temporary relief pursuant to proposed final rule 210.66(a);

9. a decision on whether a temporary relief bond posted by a complainant should be forfeited in whole or part under proposed final rule 210.70(b); and

10. a decision in a formal enforcement proceeding under proposed final rule 210.75—i.e., a decision on whether a consent or remedial order is being violated and, if so, what action the Commission should take (if any).

The following are examples of matters as to which an ALJ's decision must be in the form of an order:

1. the denial of a motion to amend the complaint and notice of investigation pursuant to proposed final rule 210.14(b);

2. the granting or denial of a motion to file a supplemental submission under proposed final rule 210.14(d);

3. the granting or denial of a motion for waiver of the substantive requirements for a response to a complaint and notice of investigation under proposed final rule 210.13(b);

4. the granting or denial of motions concerning computation of time, additional hearings, postponements, continuances, and extensions of time pursuant to proposed final rules 210.6 and 210.15;

5. the granting or denial of a motion for service of documents by means other than those prescribed in proposed final rules 210.4(d) or 210.7 and Commission rule 210.16;

6. the granting or denial of a motion for confidential treatment under proposed final rule 210.5 or in camera treatment under proposed final rule 210.39;

7. the denial of a motion to find a respondent in default under proposed final rule 210.16 (a) or (b);

8. the denial of a motion for summary determination under proposed final rule 210.18;

9. the denial of a motion to intervene in an investigation under proposed final rule 210.19;

10. the denial of a motion to terminate an investigation on various grounds under proposed final rule 210.21;

11. the denial of a motion to suspend an investigation pursuant to proposed final rule 210.23;

12. the granting or denial of a motion to designate the temporary relief phase or the permanent relief phase of an investigation "more complicated" under proposed final rule 210.22;

13. the granting or denial of motions for sanctions for abuse of process, failure to make or cooperate in discovery, or violation of a protective order pursuant to proposed final rule 210.25 (b) or (d);

14. the granting or denial of various discovery motions under proposed final rules 210.27 through 210.34, including a motion for certain types of subpoenas under proposed final rule 210.32 or a motion for sanctions for signing and filing a discovery request, response, or an objection in violation of proposed final rule 210.27(d)(1);

15. the granting or denial of a motion for leave to seek an interlocutory appeal under proposed final rule 210.24(b);

116. the granting or denial of a motion for adverse inferences, findings of fact, conclusions of law, determinations, or orders against a party based on its failure to act, under proposed final rule 210.17;

17. the granting or denial of a motion for leave to file a reply to responses in opposition or support of a previous motion by the movant, under proposed final rule 210.15(c);

18. the granting or denial of a motion pertaining to the conduct of—or arising during the course of—a prehearing conference or an evidentiary hearing under proposed final rule 210.35 or 210.36; and

19. the granting or denial of a motion pertaining to evidence under proposed final rule 210.37 or the record pursuant to proposed final rule 210.38.

The following are examples of matters as to which an ALJ's decision must be in the form of an RD:

1. the granting or denial of a motion for sanctions for abuse of process, failure to make or cooperate in discovery, or violation of a protective order, pursuant to proposed final rule 210.25 (c) or (f); and

2. a decision on a petition for modification or rescission of a consent or remedial order under proposed final rule 210.76(b).

Section 210.42

Proposed final rule 210.42 is based on interim rule 210.53 and is the general rule concerning IDs.

Paragraph (a). Paragraph (a) of proposed final rule 210.42 is based on paragraph (a) of interim rule 210.53, which governs the issuance of IDs. Paragraph (a) governs the issuance of an ID on permanent relief. The proposed final rule differs from the interim rule in the following manner:

1. Paragraph (a)(1)(ii) of proposed final rule 210.42 is a new provision which requires the presiding ALJ to issue, within 14 days after issuance of the ID on permanent relief, an RD on the issues of the appropriate remedy and the amount of the bond to be posted by respondents who import and sell the accused imports during the period of Presidential review of the remedial order(s) issued as a result of the investigation. The RD is to be issued even if the ALJ has determined that there is no violation of section 337.[61]

2. Paragraph (a)(2) of proposed final rule 210.42 is also new and states that certain decisions by an ALJ which grant a motion (in whole or part) to declassify confidential information shall be in the form of an ID, as provided in proposed final rule 210.20.

Paragraph (b). Paragraph (b) of proposed final rule 210.42 is based on paragraph (b) of interim rule 210.53, which concerns IDs on temporary relief, and on paragraph (j) of interim rule 210.53, which concerns IDs on the possible forfeiture of a complainant's temporary relief bond.

Paragraph (c). Paragraph (c) of proposed final rule 210.42 is based on paragraph (c) of interim rule 210.53, which provides for the issuance of IDs on matters other than permanent relief, declassification of confidential information, and temporary relief.

The ITCTLA commented that the proposed final rule which replaces paragraph (c) of interim rule 210.53 should state that an ALJ's decision granting a motion to designate permanent relief proceedings "more complicated" will be considered the final determination of the Commission and will not be subject to Commission review. The ITCTLA argued that such modification is appropriate for the same reasons that the Commission allows an ALJ's determination designating temporary relief proceedings "more complicated" to be the final determination of the Commission, viz., that allowing review of the ALJ's decision is too disruptive in view of time constraints for concluding the proceedings.

The Commission agrees with the ITCTLA. Paragraph (c) of proposed final rule 210.42 thus does not provide for the issuance of an ID when the ALJ grants a motion to designate the permanent relief phase of an investigation "more complicated." As discussed previously, proposed final rule 210.22(b) provides that an ALJ's decision granting or denying a motion of that kind is to be in the form of an order, not an ID.

The ITCTLA also commented that the proposed final rule which replaces paragraph (c) of interim rule 210.53 should require the issuance of an ID on sanctions for violation of a protective order only if the ALJ's ruling grants such sanctions. The ITCTLA explained that this change is consistent with other types of IDs and that it was not clear why an ALJ ruling denying such sanctions should be in the form of an ID.

The Commission has drafted proposed final rule 210.34(c) to provide that an ALJ's decision granting or denying sanctions for violation of a protective order shall be in the form of an order if the motion for sanctions is filed while the investigation is before the ALJ.[62]

Interested persons who are familiar with the interim rules will note that unlike paragraph (c) of interim rule 210.53, paragraph (c) of proposed final rule 210.42 does not cover IDs designating an investigation "complicated" (as opposed to "more complicated"). As this notice explains below in connection with proposed final rule 210.51, the Commission's statutory authority to apply the "complicated" designation has expired.

Paragraph (d). Paragraph (d) of proposed final rule 210.42 is identical to paragraph (c) of interim rule 210.53, which lists the required contents of an ID.

Paragraph (e). Paragraph (e) of proposed final rule 210.42 corresponds to paragraph (e) of interim rule 210.53, which discusses Commission consultation with other federal agencies prior to determining whether to review an ID.

Paragraph (f). Paragraph (f) of proposed final rule 210.42 is based on paragraph (f) of interim rule 210.53, which provides that IDs generally will

[61] The Commission may determine that section 337 has been violated even if the presiding ALJ found no violation. In such a case, the Commission would be required to decide the remedy and bonding issues under proposed final rule 210.50(a).

[62] Proposed final rules 210.25(e) and (f) provide, however, that an ALJ's ruling on such sanctions shall be in the form of an RD, if the ALJ chooses to defer his adjudication of the motion until after he has issued a final ID on violation of section 337 or termination of the investigation or if the motion for sanctions was filed with the Commission after issuance of the aforesaid ID or termination of the investigation.

be made by the ALJ who presided over the investigation. Paragraph (f) of the proposed final rule also indicates that the method of determining the appropriate ALJ to rule on a motion for declassification of information improperly designated confidential is governed by proposed final rule 210.20(a).

Paragraph (g). Paragraph (g) of proposed final rule 210.42 is identical to the corresponding paragraph of interim rule 210.53, which discusses reopening the record for the presiding ALJ to receive additional evidence prior to issuing an ID.

Paragraph (h). Paragraph (h) of proposed final rule 210.42 is based on paragraph (h) and (j) of interim rule 210.53, which list the effective dates for IDs on various matters in the absence of Commission review. There are several noteworthy differences between the interim rules and the proposed final rule.

1. Paragraph (h)(1) of proposed final rule 210.42 provides that an ID under proposed final rule 210.42(a)(2) granting a motion to declassify confidential information will become the determination of the Commission within 45 days after service of the ID unless the Commission orders a review.

2. Paragraph (h)(2) of proposed final rule 210.42 provides that the ALJ's RD concerning remedy and bonding by the respondents will be considered by the Commission in reaching a determination on the issues of remedy and bonding by the respondents. (The Commission also will solicit submissions on remedy, the public interest, and bonding from parties and non-parties in accordance with proposed final rule 210.50(a).)

3. Paragraph (h)(3) of proposed final rule 210.42 indicates that an ID with a 30-day effective date will become the Commission's determination on the 30th day after service of the ID unless the Commission orders review or extends the deadline for determining whether to order review. This codifies a longstanding Commission practice.

4. Interested persons will also note that paragraph (h)(5) of proposed final rule 210.42 makes reference to the 45-day effective date for IDs on forfeiture of a complainant's temporary relief bond under proposed final rule 210.70. (That information was previously provided in paragraph (j) of interim rule 210.53.)

Paragraph (i). Paragraph (i) of proposed final rule 210.42 is based on paragraph (i) of interim rule 210.53, which discusses notice of the Commission's determination on whether to review an ID. There is one difference between the interim rule and the proposed final rule. The interim rule states that such notice will be given "except as provided in § 210.24(e)(17) [the interim rule governing Commission action on a temporary relief ID]." Paragraph (i) of the proposed final rule reflects actual Commission practice—which is that the parties are served with copies of a Commission notice announcing the Commission's decision on whether to review a ID, regardless of whether the ID concerns temporary relief or some other subject. Section 210.43.

Proposed final rule 210.43 is based on interim rule 210.54, the general interim rule governing petitions for review of an ID. Proposed final rule 210.43 is limited, however, to petitions for review of IDs dealing with matters other than permanent or temporary relief.[63]

Paragraph (a). Paragraph (a) of proposed final rule 210.43 is based on paragraph (a)(1) of interim rule 210.54, which establishes deadlines for filing petitions for review and responses to such petitions. Paragraph (a) of the proposed final rule is similar to paragraph (a)(1) of the interim rule, except that all references to IDs on permanent or temporary relief have been left out and the deadlines for filing petitions and responses are counted from the date that the ID was issued instead of the date the ID was served.

Paragraph (b). Paragraph (b) of proposed final rule 210.43 is based on provisions of paragraph (a)(1) and (a)(2) of interim rule 210.54, which articulate (1) the standard for review and the grounds that must be asserted in the petition as justification for seeking review of specific issues, and (2) the consequence of a party's failure to petition for review of an issue decided adversely to the party.

Interested persons will note first that paragraph (b) of proposed final rule 210.43 clarifies that a party filing a petition for review must cite, for each issue as to which review is being sought, the specific grounds that warrant such review.

Paragraph (b) of the proposed final rule also states that any issue not raised in the petition for review will be deemed to have been abandoned by the party and may be disregarded by the Commission in reviewing the ID. Paragraph (b) is identical to paragraph (a)(2) of interim rule 210.54 in that respect.

The Federal Circuit has construed paragraph (a)(2) of interim rule 210.54 to mean that parties who petition the Commission for review waiver their right to raise additional or different issues in a subsequent appeal to the Federal Circuit, while parties who do not file petitions for review may raise all issues on appeal.[64] Thus, interim rule 210.54(a)(2) and proposed final rule 210.43(b) permit the parties to elect to bypass Commission review, and may thereby reduce the effectiveness of the Commission's review procedures. Indeed, some persons may feel that the interim rule and proposed final rule 210.43(b) effectively discourage the filing of petitions for review.

For those reasons, the Commission specifically requests public comment on whether it should adopt an alternative provision to that in proposed final rule 210.43(b) stating that: (1) a party is required to file a petition for review of an ID in which issues had been decided adversely to that party, in order to preserve the party's right to judicial review of any final Commission determination based on some or all of the same grounds as the ID; and (2) a party's failure to fine a petition for review would be deemed to be abandonment of all issues decided adversely to that party in the ID.

Paragraph (c). Paragraph (c) of proposed final rule 210.43 is based on paragraph (a)(3) of interim rule 210.54, which discusses responses to a petition for review. The proposed final rule does not differ substantively from the interim rule.

Paragraph (d). Paragraphs (d)(1), (d)(2), and (d)(3) of proposed final rule 210.43 are based on paragraphs (b)(1), (b)(2), and (b)(3) of interim rule 210.54, which discuss the manner in which the Commission determines whether to grant or deny a petition for review in whole or part. Paragraph (d)(2) of proposed final rule 210.43 has been drafted to codify actual Commission practice—i.e., that the Commission will grant a petition for review if it appears that an error or abuse of the type described in paragraph (b) is present or if the petition raises a policy matter connected with the ID, which the Commission thinks it necessary or appropriate to address.

Section 210.44

Proposed final rule is based on interim rule 210.55 concerning review of IDs on

[63] Petitioning for review of an ID on permanent relief is addressed in proposed final rule 210.46. The procedure for requesting modification, reversal or the setting aside of an ID on temporary relief is set forth in proposed final rule 210.66.

[64] *See Warner Brothers, Inc.* v. *U.S. International Trade Commission*, 787 F.2d 562, 564 (Fed. Cir. 1986). (The Court rejected the Commission's argument that parties waive the right to challenge Commission determinations by failing to petition for review of adversely decided IDs.) See also *Allied Corporation* v *U.S. International Trade Commission*, 850 F.2d 1573, 1580 (Fed. Cir. 1988), *cert. denied*, 109 S.Ct. 791 (1989) ("Allied abandoned review of the claim construction in the ALJ's 1984 ID by failing to raise the issue in its petition for review of the ID").

the Commission's own initiative. Like interim rule 210.55, proposed final rule 210.44 does not apply to review of IDs on temporary relief. The proposed final rule differs from the interim rule, however, by not applying to review of IDs on permanent relief. (Proposed final rule 210.46 discusses the manner in which the Commission will decide whether to review an ID on permanent relief in response to a petition or on the Commission's own initiative.)

Section 210.45

Proposed final rule 210.45 is based on interim rule 210.56, which describes (1) the procedures involved in Commission review of an ID, and (2) the action that the Commission may take upon completion of the review (i.e., that the Commission may affirm, modify, reverse, or set aside the ID in whole or part). Like interim rule 210.56, proposed final rule 210.45 does not apply to review of IDs on temporary relief. The proposed final rule also differs from the interim rule, however, by not covering review of IDs on permanent relief.

Section 210.46

Proposed final rule 210.46 is a new rule concerning petitions for and sua sponte review of IDs on permanent or temporary relief.

Paragraph (a). Paragraph (a) of proposed final rule 210.46 implements a proposed new procedure for processing IDs on permanent relief. That procedure entails the following steps:

1. any party who intends to seek review of the ID must file and serve, within 10 days after issuance of the ID, notice of an intent to seek such review;

2. petitions for review must be filed within 15 days after issuance of the ID (i.e., within 5 days after the filing of the notice of intent to seek review of the ID);

3. responses to the petitions for review must be filed within 25 days after issuance of the ID (i.e., within 10 days after the filing of the petitions for review);

4. reply submissions may be filed by the petitioners within 30 days after issuance of the ID (i.e., within 5 days after the filing of the responses to the petitions for review);

5. approximately 43 days after issuance of the ID, the Commission will issue a notice setting deadlines for written submissions from the parties, other federal agencies, and interested members of the public on the issues of remedy, the public interest, and bonding by the respondents; the notice also may require the parties to file supplemental briefs on issues selected by the Commission;

6. supplemental briefs, if requested by the Commission, must be filed within 53 days after issuance of the ID (i.e., within 10 days after issuance of the Commission notice concerning such briefs) and the submissions on remedy, the public interest, and bonding must be filed on the dates specified in the aforesaid notice; and

7. The Commission will issue a **Federal Register** notice on or before the statutory deadline for concluding the investigation announcing the Commission's decision on the ID and on the issues of violation of section 337, remedy, the public interest, and bonding.

The Commission believes that this amended and streamlined appeal procedure affords the following significant benefits to the parties: (1) Parties who petition for review will be able to file reply submissions; (2) the parties will have to make only counterarguments, not anticipate opposing parties' arguments and then make counterarguments; and (3) the Commission will have the parties' submission sooner than it does under the interim rules and, as a result, will have additional time to reach a decision on the ID and to prepare the requisite determinations, opinions, orders, **Federal Register** notice, and letters. The Commission encourages section 337 practitioners and other interested persons to comment on the advantages or disadvantages of processing permanent relief IDs in the manner discussed above and set forth in proposed final rule 210.46(a).

Paragraph (b). Paragraph (b) of proposed final rule 210.46 simply states that temporary relief IDs will be processed in the manner set forth in proposed final rule 210.66.

Sections 210.47 and 210.48

Proposed final rule 210.47 is identical to interim rule 210.60, which discusses petitions for reconsideration of a Commission determination and responses to such petitions. Proposed final rule 210.48 is identical to interim rule 210.61, which describes the action the commission may take in disposing of the petition.

Section 210.49

Proposed final rule 210.49 is based on interim rule 210.57, and describes the manner in which the Commission implements final actions (i.e., remedial or consent orders) under section 337. The differences between the interim rule and the proposed final rule are essentially editorial.

Section 210.50

Proposed final rule 210.50 is based on provisions of interim rule 210.58 that describe final Commission actions, assessment of the public interest, and bonding by respondents.

Paragraph (a). Paragraph (a) of proposed final rule 210.50 is based on paragraph (a) of interim rule 210.58, which discusses (1) the various forms of temporary and permanent relief that are available under section 337, (2) the public interest factors that may preclude such relief, (3) the computation of a respondent's bond, and (4) the filing of written submissions by the parties, other Federal agencies, and the public on the issues of remedy, the public interest, and bonding by the respondents.

Paragraph (a)(3) of proposed final rule 210.50 differs from paragraph (a)(3) of interim rule 210.58 in the following manner:

1. For the benefit of persons who are not familiar with section 337, paragraph (a)(3) of the proposed final rule indicates that the bond referred to is that posted by a respondent during the Presidential review period following issuance of temporary or permanent relief under section 337(d), (e), (f), or (g) of the Tariff Act.

2. The statement of the computation formula for respondents' bonds has been revised as well. Paragraph (a)(3) of interim rule 210.58 alludes to "persons" benefiting from importation of the articles in question, but the focus of the bond computation formula is on the respondent who will have to post the bond. Furthermore, the Commission generally requires bonds from respondents to secure cease and desist orders prohibiting U.S. sales of an imported articles—as well as requiring bonds to secure exclusion orders or cease and desist orders that prohibit importations. Paragraph (a)(3) of proposed final rule 210.50 accordingly states that in determining the amount of the bond in a given case, the Commission will consider, among other things, the amount that would offset any competitive advantage to the respondent resulting from its alleged unfair acts in the importation or sale of the article in question.

Paragraph (a)(4) of proposed final rule 210.50 differs from the corresponding paragraph of interim rule 210.58 in the following respects:

1. In the proposed final rule, the words "the public" have been deleted from the first sentence of paragraph (a)(4) as surplusage. The erroneous citation to "section 210(e)" which appears in the last sentence of paragraph (a)(4) of the

interim rule also has been omitted in the proposed final rule.

2. The provisions of paragraph (a)(4) of the interim rule, which pertain to service of submissions and requests for oral argument or hearings, have been placed beneath paragraph (a)(4) of the proposed final rule as text.

3. The new text beneath paragraph (a)(4) in the proposed final rule also indicates that when one of the matters under consideration is whether to grant permanent relief, the submissions on remedy, the public interest, and bonding by respondents must be filed on the dates specified in the Commission notice issued pursuant to proposed final rule 210.46(a)(5).

4. The new text also states that when one of the matters under consideration is whether to grant temporary relief, such submissions must be filed by the deadlines listed in proposed final rule 210.67(b) unless the Commission orders otherwise.

5. Finally, contrary to what is stated in paragraph (a)(4) of the interim rule, the new text in the proposed final rule states that the only submissions that must be served on the parties are those filed by other parties.[65]

Paragraphs (b)(1) and (b)(2). Paragraphs (b)(1) and (b)(2) of proposed final rule 210.50 are based on paragraphs (b)(1) and (b)(2) of interim rule 210.58. Paragraph (b)(1) of proposed final rule 210.50 deals with the presiding ALJ's ability to address the issues of appropriate Commission action, the public interest, and bonding by the respondents for purposes of an ID on permanent relief under proposed final rule 210.42(a)(1)(i) or an RD on remedy and bonding under proposed final rule 210.42(a)(1)(ii). Paragraph (b)(2) of proposed final rule 210.50 discusses assessment of the public interest in connection with a motion for termination under proposed final rules 210.21(b) or (c) on the basis of a settlement agreement or a consent order.

New Regulations Governing Respondents' Bonds

As a result of the Federal Circuit's ruling in connection with Inv. No. 337–TA–276, Certain Erasable Programmable Read Only Memories, Components Thereof, Products Containing Same and Processes for Making Such Memories, the Commission now prescribes and administers bonds posted by respondents pursuant to section 337(j)(3) of the Tariff Act in connection with a temporary or permanent cease and desist order prohibiting U.S. sales of the subject imported articles during the Presidential review period.[66] Because that ruling was issued in 1989, the interim rules do not contain procedures governing the administration of such bonds. In the absence of such regulations, the Commission has applied the provisions of interim rule 210.58(b) to the posting of a respondent's bond administered by the Commission, and has decided whether to permit the return of such bonds based on the facts of each case, rather than the forfeiture provisions in interim rule 210.58(c). Proposed rules governing Commission administration of respondents' bonds will be prepared and published at a later date.

Section 210.51

Proposed final rule 210.51 is derived from interim rule 210.59, which discusses (1) designating an investigation "more complicated," (2) designating an investigation "complicated," and (3) the statutory deadlines for concluding ordinary, "more complicated," and "complicated" investigations. Proposed final rule 210.51 provides deadlines for concluding the temporary and permanent relief phases of an ordinary investigation as well as one designated "more complicated."[67] There is no provision, however, in proposed final rule 210.51 for designating an investigation "complicated" in the manner described in paragraph (c) of interim rule 210.59.

Paragraph (c) of interim rule 210.59 was adopted to implement section 1342(d)(2) of the Omnibus Trade Act, which provided that any section 337 investigation due to be completed within 180 days after the effective date of the Omnibus Trade Act amendments to section 337 of the Tariff Act could be declared "complicated" and the 12-month or 18-month deadline for concluding the investigation could be extended up to 90 days.

The effective date of the Omnibus Trade Act was August 23, 1988. The Commission's authority to apply the "complicated" designation to a pending investigation was limited to investigations with deadlines on or before February 18, 1989. Proposed final rule 210.51 thus does not contain a provision based on paragraph (c) of interim rule 210.59.

Subpart H—Temporary Relief

The Omnibus Trade Act amendments governing temporary relief imposed stringent deadlines for the Commission to determine whether to grant motions for such relief.[68] The Commission also was given express authorization to take the following action: (1) require the posting of a bond by complainant as a prerequisite to the issuance of temporary relief; (2) issue temporary cease and desist (TCD) orders in addition to or in lieu of temporary exclusion orders (TEOs); and (3) grant temporary relief under section 337 to the same extent that federal courts can issue temporary restraining orders and preliminary injunctions.[69]

Proposed final rules 210.52 through 210.67 govern the content, the filing, and the adjudication of motions for temporary relief. Proposed final rules 210.68 through 210.70 govern a complainant's posting and possible forfeiture of a temporary relief bond. These procedures are intended to ensure procedural consistency in adjudicating motions for temporary relief and Commission compliance with the stringent statutory deadlines.

Section 210.52

Proposed final rule 210.52 is based on interim rule 210.24(e)(1), which governs the filing and content of motions for temporary relief.

Paragraph (a). Paragraph (a) of proposed final rule 210.52 states that a complaint requesting temporary relief must be accompanied by a motion for such relief containing information relevant to the four factors the Commission will consider in determining whether to grant temporary relief. Paragraph (a) of proposed final

[65] The Commission thinks it inappropriate to require another federal agency to service copies of its submission on the parties unless the agency also is a party of the proceeding (e.g., through intervention).

The Commission also believes that the burden of serving parties should not be imposed on members of the public. When a non-party agency or an interested person files a submission on remedy, the public interest, or bonding, it often does so at the behest of a party. In such a case, that party usually cites the non-party submission to support its position, and often attaches a copy of the non-party submission as an appendix to the party's submission on the matters in contention. Moreover, regardless of whether there is any interaction between the parties and a commenting agency or interested person, the parties can contact the Commission staff to learn whether any non-party submissions are expected or have been filed, and can readily obtain copies from the Secretary's Office.

[66] *In re Atmel Corporation*, Docket No. 89–1382, Unpublished Order dated April 27, 1989, at 3–4 (writ of mandamus (1) requiring vacatur of cease and desist order that would have prevented respondents from selling their imported merchandise during the Presidential review period, and (2) authorizing issuance of modified order permitting sales under bond). (See also 54 FR 19962 (May 9, 1989.))

[67] The definition of a "more complicated" investigation—and the procedures for obtaining and implementing that designation—are provided in proposed final rule 210.22.

[68] See 19 U.S.C. 1337(e)(2).

[69] See 19 U.S.C. 1337(e)(2), (e)(3), and (f).

rule 210.52 explains that in determining whether to grant temporary relief, the Commission will apply the standards the U.S. Court of Appeals for the Federal Circuit uses in determining whether to affirm lower court decisions granting preliminary injunctions and that the motion for temporary relief must contain a detailed statement of specific facts bearing on the factors the Federal Circuit would consider.

The relevant factors are not listed, however, in paragraph (a) of proposed final rule 210.52. The Commission's current articulation of those factors is set forth below. The factors are:

1. whether there is reason to believe that section 337 has been violated and the complainant's likelihood of success on the merits [or the complaint];

2. whether there will be immediate and substantial harm to the domestic industry in the absence of [temporary] relief;

3. The harm, if any, to the respondents if temporary relief is granted; [70] and

4. The effect, if any, that the issuance of temporary relief would have on the public interest.[71] [72]

The Commission applies these standards because (1) the Omnibus Trade Act amendments and legislative history provide that in determining whether to grant temporary relief under section 337, the Commission is to apply the same standards that federal courts apply in determining whether to grant preliminary injunctions,[73] and (2) the Federal Circuit is the court of review for Commission determinations under section 337.[74]

The Commission considered articulating the four factors in paragraph (a) of proposed final rule 210.52, but decided not to do so because subsequent judicial decisions that reverse or modify any of the four factors would create a concomitant need for revision of the commission rule.

The IEMCA commented that the final rule which replaces interim rule 210.24(e)(1)(i) should state that the complainant has the burden of proof on each factor the Commission considers in determining whether to grant temporary relief and that such relief will not be granted unless the complainant satisfies that burden. The IEMCA based this argument on a colloquy in the Congressional Record that was incorporated into the Conference Committee Report accompanying the Omnibus Trade Act amendments to section 337.[75]

There is no question that Congress intended for the Commission follow federal court practice in the adjudication of motions for temporary relief under section 337. Although the aforesaid colloquy states that the plaintiff must prove that its injury outweighs any injury to the defendant that would be caused by the issuance of temporary relief, subsequent to the publication of that colloquy, the Federal Circuit explicitly stated that such a showing by the plaintiff is not necessary. See *Hybritech Inc.* v. *Abbott Laboratories*, 849 F.2d 1446, 1457 (Fed. Cir. 1988). The Commission thus has not drafted paragraph (a) of proposed final rule 210.52 in the manner the IEMCA recommended.

Paragraph (b). Paragraph (b) of proposed final rule 210.52 is similar to interim rule 210.24(e)(1)(ii), which lists the bonding issues that must be addressed in a motion for temporary relief. The interim rule indicates that the specified issues should be addressed if the complainant is seeking a TEO. Paragraph (b) of proposed final rule 210.52 requires the complainant to address those issues regardless of whether the complainant is seeking a TEO or a TCD order.[76]

Paragraph (c). Paragraph (c) of proposed final rule 210.52 is based on interim rule 210.24(e)(1)(iii) and states the Commission policy favoring the posting of a bond by a complainant as a prerequisite to the issuance of temporary relief.[77] Paragraph (c) also lists the factors the Commission will consider in determining whether to require a bond. The legislative history of the statutory provision upon which proposed final rule 210.52 is based (19 U.S.C. 1337(e)(2)) indicates that the purposes of requiring a bond are to deter frivolous requests for temporary relief and use of the temporary relief process to harass respondents or to accomplish some other improper objective.[78] The Commission's authority to require a bond also is intended to be a means of overcoming Commission hesitancy to grant temporary relief.[79]

Many of the public comments on the interim rule upon which paragraph (c) of proposed final rule 210.52 is based focused on the Commission's policy of favoring a bond in every case. For example: The IEMCA, whose membership includes more potential section 337 respondents than potential complainants, strongly endorsed the policy of favoring a bond in every case. The AIPLA argued, on the other hand, that the presumption of a need for a bond in every case, coupled with the "potentially exorbitant" amount of the bond as prescribed by the interim rules, is not in proportion to any perceived need to deter frivolous or improperly motivated motions for temporary relief

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[70] The Commission's actual practice is to balance the harm to the parties. See Certain Pressure Transmitters (Pressure Transmitters), Inv. No. 337-TA-304 (Temporary Relief Proceedings), USITC Publication 2392 (June 1991), Commission Opinion at 16 (April 2, 1990), *aff'd sub. nom. Rosemount, Inc.* v. *United States International Trade Commission*, 910 F.2d 819 (Fed. Cir. 1990).

[71] The Commission explained that it assesses the public interest in temporary relief cases in essentially the same manner that it does in determining whether to grant "permanent" relief—i.e., by viewing the public interest as an overriding consideration and determining whether it precludes a remedy. Pressure Transmitters, *id.* at 16-17 and 39-40.

[72] Interested persons who were critical of the wording of the relevant factors in interim rule 210.24(e)(1)(i) will note that the above recitation differs somewhat from the interim wording. The Commission revised the wording of the factors in Pressure Transmitters, *supra* at 11-16. The revisions and clarifications that were made in the wording of the relevant factors were deemed necessary to reflect actual Commission practice or to bring that practice into greater conformity with federal court practice.

[73] See 19 U.S.C. 1337(e)(3); H.R. Rep. No. 40 at 156; S. Rep. No. 71 at 131; 133 Cong. Rec. S10365 (July 21, 1987) (Statement of Sen. Lautenberg).

[74] See 19 U.S.C. 1337(c).

[75] 134 Cong. Rec. S10365 (July 21, 1987) (Statement of Sen. Lautenberg).

[76] The Commission believes that a bond may be required as a prerequisite to issuance of a TCD order as well as a TEO. Section 337(e)(3) of the Tariff Act provides that the Commission may grant TCD orders "to the same extent as preliminary injunctions and temporary restraining orders may be granted under the Federal Rules of Civil Procedure." 19 U.S.C. 1337(e)(3). FRCP 65(c) requires the posting of security (e.g., a bond) as a prerequisite to the issuance of a preliminary injunction or a restraining order. The rationale for requiring a bond or other security in a district court action and the computation of the amount of the bond or other security differ from the rationale for and computation of a temporary relief bond in a section 337 investigation. The Commission believes nevertheless that the existence of the bond requirement in FRCP 65 is a reasonable basis for the Commission rules to provide for the posting of a bond in connection with the issuance of a TCD order as well as a TEO. The Commission notes further that while the authority to require a bond for a TCD order is not articulated in the statute or its legislative history, neither authority prohibits such bonds or otherwise indicates that Congress intended to restrict the Commission's bonding authority to TEOs.

[77] The proposed final rule differs from the interim rule in that the interim rule articulates that policy only in connection with the issuance of a TEO.

[78] See 134 Cong. Rec. H1863 and H2044 (Apr. 20, 1988); H.R. Rep. No. 576 at 635-636 (1988); 133 Cong Rec. S10364-S10365 (July 21, 1987) (Statement of Sen. Lautenberg).

[79] 134 Cong. Rec. H2044 (April 20, 1988); 133 Cong Rec. S10365 (July 21, 1987); H.R. Rep. No. 576 at 635. Although the foregoing authorities refer solely to the overcoming hesitancy in granting a TEO, the Commission is of the view that this reasoning also applies in determining whether to issue a TCD order.

and will deter the filing of meritorious motions. The AIPLA argued further that if a presumption in favor of a bond is to be retained in the final rules, the presumption should be in favor of a small bond unless the specific circumstances in a particular investigation lead the Commission to conclude that a more substantial bond is necessary.

The Commission does not think it necessary to dispense with the presumption in favor of a bond for the proposed final rulemaking. As the preamble to the interim rules explained, that policy is consistent with the stated purposes of the statutory bonding provision,[80] which are to deter frivolous motions for temporary relief or use of the temporary relief process to harass respondents or to accomplish some other improper purpose. The question of whether posting a bond would impose an undue hardship on the complainant is one of the factors the Commission considers in determining whether to require a bond.[81] The strength of complainant's case also is considered,[82] and has resulted in Commission determinations to require a bond that was half the minimum amount prescribed in the rules or to dispense with the bond altogether. For those reasons, the Commission believes that retention of the presumption in favor of a bond in proposed final rule 210.52 should not result in deterring meritorious motions for temporary relief by complainants whose financial resources are limited.

Paragraph (d). Paragraph (d) of proposed final rule 210.52 is based on interim rule 210.24(e)(1)(iv) and lists specific types of documents and information a complainant must provide in or with a motion for temporary relief. There are no substantive differences between the interim rule and paragraph (d) of the proposed final rule.

Paragraph (e). Paragraph (e) of proposed final rule 210.52 is based on interim rule 210.24(e)(1)(v) and describes how the Commission is likely to compute the amount of the complainant's bond (if one is required as a prerequisite to the issuance of a TEO or a TCD order).[83] Paragraph (e) also describes the specific information that should be provided by the complainant to aid the Commission in computing the amount of the bond.

The preamble to interim rule 210.24(e)(1)(v) explained that the Commission's goal in computing the amount of the bond is to select an amount that will be sufficient to deter the complainant in question from misusing the temporary relief process or the temporary remedial order. Since the legislative history contains no practical guidelines for computing the amount of temporary relief bonds, the Commission decided to try using, on an interim basis, a specific formula that would accomplish the following objectives: (1) Make the computation relatively easy; (2) ensure that the bonding provision is applied in a reasonably consistent fashion; and (3) give potential complainants some idea of the bond amount that could be required if they were to seek and be granted a temporary remedial order.[84]

Interim rule 210.24(e)(1)(v) provides that in cases where a domestic industry exists and domestic sales have commenced and have not been de minimis, the Commission will generally require a bond in an amount ranging from 10 to 100 percent of sales revenues and licensing royalties from the domestic product at issue, as reported in the complainant's audited annual financial statements for the most recently completed fiscal year. In cases where the prescribed formula could not or should not be applied for some reason, interim rule 210.24(e)(1)(v) permits the Commission to use instead a formula or criteria that are appropriate under the circumstances. The complainant is required to take the initiative on that issue, however, by (1) demonstrating in its motion for temporary relief that the prescribed bond computation formula is inappropriate, and (2) providing an alternative formula or criteria for computing the amount of the bond.

The public comments on the interim bond computation formula were mixed, but for the most part were negative. The AIPLA seemed to approve of the fact that interim provisions offer some flexibility as to whether a bond should be required in a given case and in computing the amount of the bond. The IEMCA and the ITCTLA argued, however, that the interim provisions are too complex and provide parties with too little guidance or certainty as to the amount of the bond. The IEMCA also complained that the prescribed formula does not adequately protect respondents because it relies on past rather than future sales levels. The AIPLA and the ITCTLA asserted that the formula is adverse to complainants because it is likely to result in a bond amount that would be prohibitive to most businesses and would force them to forgo temporary relief (either by choosing not to seek it or by deciding not to accept the temporary remedial order after the Commission has agreed to issue one, because the bond is beyond the complainant's means).

All commenters suggested alternative bond computation formulas for incorporation into the final rules. The IEMCA suggested that the Commission calculate bond amounts by estimating the likely economic and competitive benefits the complainant accrues from the temporary relief. Such benefits would be measured by (1) the complainant's allegation of irreparable injury (which is a required element of every motion for temporary relief), or (2) economic projections of prospective sales (if the irreparable injury allegation provides inadequate or unsuitable for the purpose of computing the temporary relief bond), or (3) the competitive harm a respondency incurs as a consequence of the temporary relief (as a proxy for the benefit to the complainant).[85]

The AIPLA appeared to favor computing the amount of the bond on the basis of a percentage of complainant's annual profits from the product at issue—i.e., a bond amounting to no more than 10 percent of such profits, unless there are indicia or a substantial likelihood that the complainant in question may be abusing the temporary relief process (or is likely to abuse the temporary remedial order).

The ITCTLA recommended using a tiered schedule in which the amount of the bond is determined by the complainant's sales for the product at issue during the 12-month period immediately preceding the filing of the complaint. The ITCTLA acknowledged the wisdom, however, of having the Commission retain flexibility to adjust the scheduled bond amount in particular cases, provided that such adjustments

[80] 53 FR 49121 (Dec. 6, 1988).

[81] See interim rule 210.24(e)(1)(iii) and paragraph (c) of proposed final section 210.52.

[82] *Id.*

[83] Paragraph (e) of proposed final rule 210.52 differs from interim rule 210.24(e)(1)(v) by applying to the computation of bonds for TEOs and TCD orders.

[84] See 53 FR 49122 (Dec. 6, 1988).

[85] The third approach was considered by the Commission prior to adoption of the interim rules and was found to have some merit. It was not incorporated into the interim rules, however, because the Commission believed that it would be too speculative and difficult to apply within the very limited time available for determining whether to grant a motion for temporary relief. See 53 FR 49122 (Dec. 6, 1988). The IEMCA commented in response that the Commission should try that approach before adopting final rules so that the Commission can determine whether that approach is really as impracticable as the Commission believed it to be.

occurred rarely and were clearly warranted in each case.

The ITCTLA also offered the following additional alternative bond computation formulas which had been suggested by various ITCTLA members or the organization's economic consultant: (1) A flat percentage of the amount of sales rather than utilizing an arbitrary schedule of increasing steps; (2) the value of the competing goods that are to be excluded under the TEO since this is the quantitative effect of the harm felt by the public, i.e., the consumer; or (3) the amount of profit realized during the preceding year for the product at issue.

In considering the propriety of changing the interim bond computation formula, the Commission noted that in the temporary relief cases conducted to date, neither the presiding ALJ nor the Commission found it appropriate for the Commission to require a bond in an amount within 10 to 100 percent range of the complainant's sales and licensing royalties.[86]

In light of the adverse public comments criticizing the 10-to-100-percent-of-sales-and-royalties formula and the actual bond determinations that have been made to date, the Commission has decided to abandon the interim formula for the proposed final rulemaking and to utilize a tiered schedule vary similar to that proposed by the ITCTLA. The Commission believes that a tiered bond schedule will come closer to achieving the results the Commission hoped for when it adopted the 10-to-100-percent-of-sales-and-royalties formula on an interim basis in 1988. For example: The bond amounts imposed pursuant to the schedule will be sufficiently high to deter most complaints from filing a frivolous motion for temporary relief, but not so high that meritorious motions will be forgone because the complainant cannot afford the costs of litigating the bond issues, posting the bond, and possibly forfeiting it.[87] The schedule also will provide greater certainty than the 10-to-100 percent formula did, and will enable prospective complainants contemplating temporary relief to better assess the costs and risks before proceeding. Finally, use of the schedule in appropriate cases will ultimately benefit the parties, the presiding ALJ, and the Commission by reducing the issues, the costs, and the time that must be spent on bonding in an already compressed period of intense activity.

The bond computation schedule incorporated into the proposed final rule differs from the ITCTLA's proposal in two respects. First, in the schedule in the proposed final rule, the bond amount is linked to sales of the product at issue and licensing royalties from the asserted intellectual property right instead of sales alone. Second, the schedule in the proposed final rule does not mandate adherence to the schedule in cases in which the schedule would not be appropriate.[88] The proposed final rule provides that the appropriate bond in those cases will be determined on a case-by-case basis. The proposed rule also provides that the Commission will retain the option to require bonds in higher or lower amounts than prescribed under the schedule in exceptional cases where the criteria for the schedule are satisfied—that is, domestic sales have commenced and have not been de minimis, but the bond amount that would be required under the schedule is clearly inadequate for some reason.[89]

Paragraph (f). Paragraph (f) of proposed final rule 210.52 is based on interim rule 210.24(e)(1)(vi), and directs the parties to adhere to the rules governing identification and submission of confidential business information if the motion for temporary relief contains such information. There is no difference between the interim rule and paragraph (f) of the proposed final rule.

Section 210.53

Proposed final rule 210.53 is based on interim rules 210.24(e)(2) and (e)(3). Paragraph (a) of proposed final rule 210.53 is identical to interim rule 210.24(e)(2) and discusses the procedure for filing a motion for temporary relief after the complaint has been filed, but before the Commission has determined whether to institute an investigation in response to the compliant. Paragraph (b) of proposed final rule 210.53 is identical to interim rule 210.24(e)(3) and prohibits the filing of a motion for temporary relief after an investigation has been instituted.

As stated previously, the Omnibus Trade Act amendments to section 337 created stringent statutory deadlines for the Commission to determine whether to grant a motion for temporary relief, i.e., 90 days after institution in an ordinary investigation and 150 days after institution in a "more complicated" investigation.[90] Because of the short time allotted and the fact that the deadlines are measured from the date an investigation is instituted, interim rule 210.24(e)(1)(i) provides that a motion for temporary relief must be filed with the complaint. Interim rule 210.24(e)(2) permits the filing of a motion for temporary relief after the filing of a complaint only if certain conditions are met and the motion is filed before the Commission has determined whether to

[86] *See, e.g.*, Pressure Transmitters, 55 FR 11451 (Mar. 28, 1990); USITC Publication 2392, Commission Opinion (Apr. 2, 1990) (the ALJ recommended a bond of 5 percent for the reasons stated by OUII; the Commission imposed no bond because it denied the motion for temporary relief).

In Inv. No. 337-TA-297, *Cellular Radiotelephones and Subassemblies*, the ALJ recommended a bond of 5 percent, noting that a higher bond would have been an undue and unnecessary burden on the complainant in light of the magnitude of its revenues and the strength of its case. The Commission required a bond of 5 percent, as it did not review the temporary relief ID. *See* Order No. 21: [ID] Granting Motion for Temporary Relief (Aug. 9, 1989) at 149–150; 54 FR 37160 (Sept. 7 1989).

In Inv. No. 337-TA-293, *Crystalline Cefadroxil Monohydrate*, the ALJ recommended no bond on the ground that the public interest—i.e., that the bond costs would be passed on to consumers—outweighed the deterrent effect of the bond. The ALJ also noted that the motion for temporary relief was not frivolous. The Commission imposed no bond, as it denied the motion for temporary relief. *See* 54 FR 26114 (June 21, 1989); USITC Pub. 2240 at 50–51 (Nov. 1989).

In Inv. No. 337-TA-293, *Crystalline Cefadroxil Monohydrate* (on remand), the Commission imposed no bond. It noted that the motion for temporary relief was not frivolous and that the Federal Circuit had reversed the Commission's earlier findings and found reason to believe there was a violation of section 337. *See* Commission Opinion (Jan. 9, 1990) at 8–10; 55 FR 10512 (Mar. 21, 1990)

[87] The bond amounts imposed under the proposed schedule are substantially smaller in most cases than the bond amounts computed by the 10-to-100-percent-of-sales-and-royalties formula. The Commission does not believe, however, that this will increase the likelihood that complainants with vast financial resources will abuse the temporary relief process or a temporary relief order. As several commenters have noted, the Commission's adoption of cost and fee sanctions for abuse of process or abuse of discovery in section 337 proceedings, the cost of a reasonable temporary relief bond, the possibility of forfeiture, and possible civil actions by aggrieved respondents collectively provide a strong economic deterrent to such abuses—even by complainants with vast financial resources.

[88] Unlike the interim rule 210.24(e)(1)(v), paragraph (e) of proposed final rule 210.52 does not cite examples of cases in which computation of the bond on the basis of the new schedule would not be appropriate.

[89] An example of such a case would be one in which the following circumstances existed: (1) The complainant is a giant multinational firm with vast financial resources; (2) the complainant's licensing royalties and sales of the product at issue during the 12-month period preceding the filing of the complaint amounted to $999,999; (3) the motion for temporary relief does not appear to be frivolous, but the compliant's case is not particularly strong either; (4) the respondents are relatively small businesses with limited financial resources; and (5) the respondents expect to lose—and the complainant expects to gain—$400,000 in sales if a TEO or TCD order is issued and remains in effect during the pendency of the investigation. In such a case, the $10,000 bond prescribed by the schedule would seem to be inadequate. The Commission thus would be justified, under the legislative history of the bonding provision, in requiring a more substantial bond in order to overcome in hesitation to grant temporary relief.

[90] 19 U.S.C. 1337(e)(2).

institute an investigation in response to the complaint. Interim rule 210.24(e)(2) also provides that filing a motion for temporary relief after the filing of the complaint restarts the clock for computing the Commission's administrative deadline for determining whether to institute an investigation on the basis of the complaint. Finally, interim rule 210.24(e)(3) flatly prohibits the filing of a motion for temporary relief after an investigation has begun.

The ITCTLA objected to the aforesaid interim rules because they effectively require a complainant who did not seek temporary relief when the complaint was filed but decided after institution that there was a need for such relief to withdraw and re-file the complaint in order to file a motion for temporary relief. The ITCTLA believes that this constitutes too extreme a procedure and that there may be instances in which a complainant should be permitted to file a postinstitution motion for temporary relief because of extraordinary circumstances. The ITCTLA commented that a better balance of the interests of the parties and the Commission could be achieved by adopting the following procedure: (1) Requiring a showing of extraordinary changed circumstances and due diligence by the complainant as a precondition to the filing of a postinstitution motion for temporary relief; (2) requiring that the complainant waive the benefit of the 90-day or 150-day statutory deadline for the Commission to determine whether to grant the motion to the extent that the postinstitution filing of the motion would mean that the motion would have to be decided in less than 90 days in an ordinary investigation or less than 150 days in a "more complicated" investigation; (3) authorizing the presiding ALJ to suspend the running of the clock on the deadline for the Commission's final determination on violation while the temporary relief issues are being adjudicated; and (4) requiring the complainant to waive any objection to that suspension.

The Commission has not incorporated the ITCTLA's proposal in proposed final rule 210.53. As the Commission explained in the preamble to the interim rules, the prohibition of postinstitution motions for temporary relief was adopted because a reduction of time for adjudicating the motion resulting from the complainant's delay in seeking temporary relief would be prejudicial to the rights of the other parties (regardless of the reason for the delay) and could jeopardize the Commission's ability to adjudicate the motion in a timely fashion.[91]

The Commission lacks authority to suspend the statutory deadlines, and if the Commission were to permit postinstitution motions for temporary relief, it would be difficult for the Commission to carry out the procedures listed in the interim rule and still meet the statutory deadline. The Commission would have to review the motion to determine whether it was properly filed. Because the respondents could be prejudiced, fairness would require that the respondents be permitted to file their arguments on whether the motion should be accepted despite the late filing. If the motion was accepted, the respondents would then need time to file their responses to the motion. The Commission does not see how it can carry out those steps, conduct an inter partes hearing on the merits of the motion, and render a final decision on the motion by the statutory deadline. The Commission notes also that it lacks the power to extend a temporary relief proceeding beyond the statutory deadline for deciding the motion for temporary relief, even if the complainant does not object. For those reasons, the Commission has not modified the proposed final rules to incorporate the procedure outlined by the ITCTLA.

Section 210.54

Proposed final rule 210.54 is based on interim rule 210.24(e)(4), which requires a complainant seeking temporary relief to serve nonconfidential copies of the complaint and motion for temporary relief on each proposed respondent before filing them with the Commission and to provide a certificate confirming the prefiling service. The preamble to the interim rule explained that this practice is necessary and appropriate because the time for responding to a motion for temporary relief is very short, and having advance notice of the allegations against them would enable the proposed respondents to consult an attorney prior to expiration of the period for filing responsive pleadings after institution. The Commission also expressed the hope that prefiling service of the complaint and motion would reduce the number of requests for additional time to respond to the motion.[92]

The IEMCA commented that a complainant should be required to provide proof of actual service of the prefiling service copies of the complaint and motion for temporary relief. The IEMCA asserted that unless each proposed respondent has the benefit of 35 days to review the motion prior to institution of an investigation, they will be deprived of due process—and the ensuing temporary relief proceedings will be unconstitutional—because of the 10-day deadline for responding to the complaint and motion after institution. The IEMCA added that the 10-day deadline is particularly unfair for foreign respondents who may have to translate the complaint and motion for temporary relief in addition to retaining U.S. counsel.

The IEMCA requested that the proposed final rule require complainants to provide proof, when the complaint and motion are filed, that the respondents have actually received the prefiling service copies of the complaint and motion, instead of requiring certification that service had been initiated (e.g., that copies had been put in the mail). The IEMCA also suggested that if a complainant is unable (after due diligence) to have the prefiling service copies delivered to the respondents before filing the complaint and motion for temporary relief with the Commission, the Commission should extend the deadline for filing a response to the complaint and motion.

The short statutory deadline for the Commission to decide whether to grant a motion for temporary relief benefits the complainant and imposes a heavy burden on the respondents. For that reason, the Commission agrees with the IEMCA that the complainant should be required to ensure that copies of the complaint and motion for temporary relief are served on the proposed respondents and the appropriate embassies as soon as possible. The certificate of service that must be filed with the motion for temporary relief should describe the manner in which service has been initiated. In addition, proposed final rule 210.54 requires the complainant to file, within 10 calendar days after filing the complaint and motion for temporary relief, actual proof of service—or a serious attempt to make service—of the complaint and motion on each proposed respondent and embassy. If the requirements of proposed final rule 210.54 are not satisfied, the Commission may extend its 35-day deadline for determining whether to institute an investigation and provisionally accept the motion for temporary relief. Thus, if a proposed respondent notifies the Commission that it did not receive the complaint and motion for temporary relief and the Commission subsequently determines that the complainant did not make a

[91] 53 FR 33048 (Aug. 29, 1988).

[92] See 53 FR 33049 (Aug. 29, 1988).

serious attempt to serve the proposed respondent, the Commission may order the complainant to serve the proposed respondent and may restart, as of the date of such service, the 35-day period for determining whether to institute an investigation and provisionally accept the motion for temporary relief.

Section 210.55

Proposed final rule 210.55 is based on interim rule 210.24(e)(5), which discusses redaction of confidential business information from the service copies of the complaint and motion for temporary relief. To deter and remedy abuse of the confidential designation by complainants in the preparation of the nonconfidential service copies of the complaint and motion for temporary relief, the proposed final rule contains a new paragraph (b). That paragraph provides for the filing and service of new nonconfidential copies of the complaint and motion and for restarting the 35-day period for determining whether to institute an investigation and provisionally accept the motion for temporary relief, when the redactions of allegedly confidential information are excessive.

Potential complainants should note also that abuse of the confidential designation and the consequent over-redaction of confidential information from the service copies of a complaint and motion for temporary relief may be sanctionable under interim rule 210.5(b) and proposed final rule 210.4(b) depending on the facts.

Section 210.56

Proposed final rule 210.56 is based on interim rule 210.24(e)(6), and provides that each prefiling service copy of the complaint and motion for temporary relief shall be accompanied by a notice that which states the date the complaint and motion will be filed with the Commission and describes the process by which the Commission will determine whether to provisionally accept the motion and institute an investigation on the basis of the complaint.

The proposed final rule differs from the interim rule in several respects. The rule has been divided into two paragraphs. Paragraph (a) sets forth the required content of the notice. Paragraph (b) discusses the filing and service of a supplementary notice in the event that the complaint and motion for temporary relief are filed after the date specified in the original notice.

In paragraph (b) concerning the required text of the original notice, the Commission has updated the telephone numbers that are listed for the Secretary and OUII. Also, every reference to parts 210 and 211 of the Commission's rules which appeared in the interim rule has been replaced with a reference to part 210, since the proposed final versions of interim rules in part 211 have been merged into the proposed final version of part 210.[93] Finally, the fact that various proposed final rules provide exceptions to the Commission's 35-day deadline for determining whether to institute an investigation and provisionally accept a motion for temporary relief is noted in the text set forth in proposed final rule 210.56.

Section 210.57

Proposed final rule 210.57 is based on interim rule 210.24(e)(7), which governs amendment of a motion for temporary relief before and after the Commission's determination on whether to institute an investigation based on the complaint and provisionally accept the temporary relief motion for further processing.

Interim rule 210.24(e)(7) provides, among other things, that an amendment to a motion for temporary relief that expands the scope of the motion or changes the complainant's assertions on whether it should be required to post a bond must be served on the embassy in Washington, DC, of each foreign respondent. The ITCTLA commented that serving an embassy with a copy of an amendment to the motion for temporary relief should be required only if the amendment adds a new respondent who is represented by the embassy in question.

The Commission does not agree. The Commission's practice of serving embassies with copies of section 337 complaints and motions for temporary relief was adopted partly because some foreign governments requested it. A foreign government with an interest in a particular section 337 investigation should have a complete copy of the complaint and the motion for temporary relief that form the basis for the preinstitution proceedings and any resulting investigation. The Commission sees no reason to adopt a final rule restricting service of an amendment to a motion for a temporary relief based on a complainant's or the Commission's perception of what would or would not be of interest to a particular foreign government.

Interim rule 210.24(e)(7) also provides that the 35-day period for the Commission to determine whether to institute an investigation and provisionally accept the motion for temporary relief begins to run anew from the date the complainant files an amendment to the motion, if the amendment expands the scope of the motion or changes the complainant's assertions on bonding. The ITCTLA commented that the proposed final rule should indicate who determines whether the scope of a motion for temporary relief has been expanded by an amendment to the motion in a way that warrants restarting the clock on the Commission's 35-day period.

The Commission agrees. In the temporary relief cases conducted to date, the Commission has not had occasion to invoke that provision of interim rule 210.24(e)(7). Proposed final rule 210.57, however, states that the determination as to whether a particular amendment should restart the administrative clock will be made by the Commission.

Interim rule 210.24(e)(7) prohibits amendment of a motion for temporary relief after an investigation has been instituted. This rule also generated adverse comment. The AIPLA commented that the prohibition on postinstitution amendments is unrealistic, because discovery or a response to the complaint may disclose information pertinent to the issue of temporary relief or bonding by the complainant. For that reason, the AIPLA suggested that postinstitution amendments to motions for temporary relief should not be flatly prohibited, but should be allowed or disallowed on a case-by-case basis after Commission consideration of such factors as (1) the ability of the complainant to have ascertained the information contained in the proposed amendment prior to filing the motion for temporary relief, (2) whether there was any concealment of information by the respondent(s), (3) the possibility of undue prejudice to the parties, and (4) the effect of the new matter (in the proposed amendment) on the ALJ's ability to dispose of the issues on the merits within the time provided under the rules.

The Commission's view is that any substantive postinstitution amendment that would expand the scope of the temporary relief inquiry cannot be accommodated, because there is not enough time to do so. Although the approach suggested by the AIPLA seems reasonable, it will take time for the Commission to make the prescribed determination. It cannot properly be made solely on the basis of the assertions in the complainant's motion to amend; the opposing parties must be given an opportunity to present their arguments, particularly on the issues of undue prejudice and possible

[93] See, *e.g.*, proposed final rules 210.21(c) and 210.71 through 210.79.

concealment of information. If leave to file the amendment is granted, the respondents will have to be given an opportunity to file a response to the amendment. Given that the Commission's statutory deadline for determining whether to grant a motion for temporary relief is computed from the date the investigation is instituted, the additional activities involved in determining whether to allow a postinstitution amendment to the motion and in processing the amendment if it is permitted are almost certain to hinder the Commission's ability to comply with the statutory deadline. The Commission notes also that even if the complainant agreed to waive the deadline, the Commission could not do so without a change in the statute.

Proposed final rule 210.57 accordingly retains the prohibition on postinstitution amendments to a motion for temporary relief. The rule clarifies that this prohibition applies to amendments that would expand the scope of a temporary relief inquiry, not those that would reduce the number of issues to be adjudicated.

Section 210.58

Proposed final rule 210.58 is based on interim rule 210.24(e)(8), which describes the manner in which the Commission will determine whether to provisionally accept a motion for temporary relief for further processing, and on interim rule 210.24(e)(10), which states that a provisionally accepted motion for temporary relief will be assigned to an ALJ for issuance of an ID.

There are two minor differences between the interim rule and the proposed final rule. The first difference is that the statement in interim rule 210.24(e)(8) that the Commission's determination on whether to provisionally accept a motion for temporary relief and institute an investigation in response to the complaint will be made in 35 days has been changed in the proposed final rule to indicate that the 35-day deadline applies unless the clock is restarted pursuant to specified proposed final rules or "exceptional circumstances" preclude adherence to the deadline, as provided in proposed final rule 210.10. The second change pertains to the sentence concerning referral of the motion to an ALJ for an ID. As the ITCTLA pointed out in its comments, the customary practice is for a complaint and motion for temporary relief to be forwarded to the chief ALJ for assignment to a presiding ALJ. Proposed final rule 210.58 has been drafted to reflect that fact.

Section 210.59

Proposed final rule 210.59 is based on interim rule 210.24(e)(9), which lists the format, mandatory content, and deadline for filing a response to a motion for temporary relief. The proposed final rule differs from the interim rule in the manner described below.

1. Since this rule is rather long, the Commission has divided it into three paragraphs. Paragraph (a) provides deadlines for responding to a motion for temporary relief in an ordinary investigation and in a "more complicated" investigation. Paragraph (b) outlines the required content of the response. Paragraph (c) provides that each response to the motion for temporary relief must be accompanied by a response to the complaint and notice of investigation.

2. Since interim rule 210.24(e)(9) contains no reference to the possible inclusion of confidential business information in a response to a motion for temporary relief, the first sentence in paragraph (b) contains a citation to proposed final rule 210.5 to remind complainants that if a response to a motion for temporary relief or a response to the complaint and notice of investigation contains confidential business information, that information should be identified and submitted in accordance with proposed final rule 210.5(a), Commission rules 201.6 (a) and (c), and any protective order issued by the presiding ALJ.

3. The next-to-the-last sentence in paragraph (b) requires each response to address to the extent possible, the complainant's assertions on bonding as a prerequisite to temporary relief and the amount of the bond.

4. Since the Commission has omitted from proposed final rule 210.52 a recitation of the four factors the Commission considers in determining whether to grant a motion for temporary relief, item (2) in paragraph (b) of proposed final rule 210.59 is written in a corresponding manner.

5. In item (3) of paragraph (b) of the proposed final rule, the interim rule requirement that the respondent provide a memorandum of points and authorities in opposition to the motion for temporary relief has been changed in the proposed final rule to require the filing of a memorandum in support of the respondent's response to the motion. A respondent may not wish to oppose every aspect of the motion, and there may even be cases in which a respondent chooses not to oppose the granting of temporary relief (e.g., for financial reasons).

Interim rule 210.24(e)(11) and proposed final rule 210.60 allow the Commission or the presiding ALJ to designate an investigation "more complicated" because of complexities arising in the adjudication of a motion for temporary relief. The IEMCA commented that in cases where an investigation is designated "more complicated" after the 10-day deadline for filing a response to a motion for temporary relief, the respondents should be permitted as a matter of right to file a supplemental response to the motion within two weeks after the date of designation, in order to ensure that respondent have additional time to investigate the complainant's allegations and to prepare any additional affirmative defenses. The IEMCA added that any new information developed during the additional time could be used to amend the respondent's earlier pleading. The Commission has not drafted proposed final rule 210.59 to give respondents the right to file supplemental responses in the manner proposed by the IEMCA. Furthermore, the grant or denial of leave to file a supplemental submission while the investigation is before the ALJ is a matter of discretion for the ALJ under interim rule 210.23 and proposed final rule 210.14(d).

The Commission thinks that it should be left to the discretion of the presiding ALJ to decide whether a respondent should be permitted to file supplemental pleadings if an investigation is designated "more complicated" after the 10-day deadline for respondents to respond to the complaint and motion for temporary relief. The Commission also thinks, however, that it may be appropriate for the rules to allow respondents more than 10 days to respond to the complaint and motion for temporary relief if the investigation is designated "more complicated" by the Commission when it provisionally accepts the motion or by the presiding ALJ prior to expiration of the customary 10-day period for responding to the complaint and motion for temporary relief. For that reason, the Commission has drafted proposed final rule 210.59(a) to provide that, unless otherwise ordered by the presiding ALJ, a response to a motion for temporary relief in an ordinary investigation is due 10 days after service of the motion by the Commission pursuant to proposed final rule 210.11, and in a "more complicated" investigation the response shall be due within 20 days after service.

Section 210.60

Proposed final rule 210.60 is based on interim rule 210.24(e)(11), which permits the Commission or the ALJ (on behalf of the Commission) to designate the temporary relief phase of an investigation "more complicated" based on the complexity of the issues and the need for additional time to adjudicate a motion for temporary relief.

The IEMCA suggested that, in cases in which the Commission does not designate an investigation "more complicated" when it determines to provisionally accept a motion for temporary relief, the ALJ be required to determine as soon as possible—preferably before the investigation is instituted—whether that designation is warranted for adjudication of the motion for temporary relief.

The Commission thinks it would be inappropriate to add such requirements to proposed final rule 210.60. The Chief ALJ designates a presiding ALJ only after an investigation has been instituted. Furthermore, there may be instances in which the presiding ALJ may wish to see the responses to the motions for temporary relief before making a determination on whether the temporary relief proceedings should be declared "more complicated."

Although the Commission does not favor adoption of the provision suggested by the IEMCA, interested persons should be aware that the fact that the Commission does not designate an investigation "more complicated" when it determines to provisionally accept the motion for temporary relief should not inhibit the presiding ALJ from doing so where such a designation is appropriate in his or her opinion. The propriety of ordering the designation should be considered by the ALJ as early as possible in the proceeding.

The IEMCA's second suggestion was that the proposed final rule should specify a standard for designation the temporary relief proceedings of an investigation as "more complicated." The IEMCA noted that the legislative history of the statutory provisions governing motions for temporary relief offers specific guidelines for determining which cases should receive that designation, and that the Commission should use those guidelines as examples—in the proposed final rule—of cases for which a "more complicated" designation would clearly be appropriate.[94]

The Commission does not agree with the IEMCA's recommendation that the standard for designating a temporary relief proceeding "more complicated" should incorporate the "necessary to assure adequate presentation of evidence by all the parties" standard. It is likely that some respondents are of the opinion that 90 days is never long enough to "assure adequate presentation of the evidence." Incorporating that standard will thus create a bias and rationale for declaring almost all cases "more complicated."

The Commission also does not think it appropriate to adopt a rule articulating the presumptions proposed by the IEMCA. The question of whether a particular type of intellectual property right is "complex" or "relatively straight-forward" is often a difficult one, and articulating an objective standard that can be codified in a Commission rule and applied by all parties would not be easy. Furthermore, there may be cases involving unquestionably complex patent claims that can be adjudicated in 90 days—particularly if unusually able counsel are involved or adjudication of the motion for temporary relief involves substantially fewer patent claims, respondents, or affirmative defenses than the complaint. Conversely, there also may be instances in which a seemingly "straightforward" patent or copyright cases "blows up" and is designated "more complicated" because of unforeseen procedural problems or novel issues of law or policy. For those reasons, the Commission thinks that the appropriateness of applying the "more complicated" designation to temporary relief proceedings should be made on a case-by-case basis.

Accordingly, the only difference between the interim rule and proposed final rule 210.60 is that the last two sentences of the proposed final rule indicate that a "more complicated" designation may be conferred by the Commission or the presiding ALJ on the basis of the complexity of the issues raised in the motion for temporary relief or the responses thereto—or for other good cause.

Section 210.61

Proposed final rule 210.61 is based on interim rule 210.24(e)(12) and addresses discovery and compulsory process in temporary relief proceedings.

The IEMCA voiced three criticisms of the interim rule: (1) It can be interpreted as permitting the ALJ to restrict the subject matter of discovery because of time constraints for concluding the temporary relief proceeding; (2) it also appears improperly to limit the ALJ's authority to compel discovery to specific issues rather than all issues that Congress intended for the Commission to consider in determining whether to grant temporary relief; and (3) such restrictions are inconsistent with federal court practice (which is to serve as a model for the Commission's temporary relief adjudications under section 337) and with the Commission's interim rule 210.36(b) governing discovery in section 337 investigations.

The Commission finds merit in the IEMCA's concerns about possible misinterpretations of interim rule 210.24(e)(12) because of its ambiguous wording. In drafting the interim rule, the Commission's intent was expressly to authorize a presiding ALJ to limit the timing and circumstances of discovery because of the stringent administrative and statutory deadlines for determining whether to grant a motion for temporary relief. The Commission did not intend to create the impression that the specific subject matter of temporary relief discovery should be limited because of time constraints, nor did the Commission mean to limit the matters about which the ALJ is authorized to compel discovery.

Proposed final rule 210.61 states that the presiding ALJ shall have the authority to compel discovery with respect to any matter relevant to the motion for temporary relief and the responses thereto, including the issues of appropriate remedy, the public interest, and bonding by the respondents. Proposed final rule 210.61 also states that the presiding ALJ will set all deadlines for discovery.

Section 210.62

Proposed final rule 210.62 is derived from interim rule 210.24(e)(13) and pertains to the evidentiary hearing that may be conducted in connection with a motion for temporary relief.

Some of the public comments focused on this rule's identification of the circumstances in which an evidentiary hearing would or would not be required for adjudicating a motion for temporary relief. The ITCTLA, for example, had

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[94] The relevant text appears in Senator Lautenberg's colloquy from the Congressional Record, which reads in pertinent part as follows:

I recognize that the new [90-day] deadline [for determining whether to grant a motion for temporary relief] is a tight one and that the issue of infringement of intellectual property rights can be a complicated matter. I want to make it clear [that] the ITC can utilize the 60 day extension in complicated cases when necessary to assure adequate presentation of evidence by all parties on whether a TEO should or should not be issued.

While I can imagine patent or other intellectual property cases that would warrant the extra 60 days, I am aware of cases that would not, such as a case involving the piracy of a copyrighted character depiction like Gremlins or Mickey Mouse or a relatively straight-forward patent case.

134 Cong. Rec. S10364 (July 21, 1987) Statement of Sen. Lavtenberg.

problems with the interim rule's identification of the circumstances in which a hearing would not be required. The ITCTLA commented that the implication that a summary determination granted in favor of a respondent necessitates denial of complainant's motion for temporary relief is inappropriate because it introduces the standard of the existence of a genuine issue of material fact, which may not be necessarily be the standard for ruling on a motion for temporary relief.[95] The ITCTLA also criticized interim rule 210.24(e)(13) because it does not acknowledge that a motion for temporary relief may be granted without a hearing when the respondent against whom such relief is requested has defaulted and the complainant wishes to waive the hearing.

In view of these perceived deficiencies, the ITCTLA suggested that the question of whether a hearing is necessary for the adjudication of a motion for temporary relief in a particular case should be left to the presiding ALJ and that the proposed final rule should provide that a motion for temporary relief may be ruled upon without a hearing by the ALJ.

The IEMCA was critical of interim rule 210.24(e)(13) because it enumerates circumstances in which a hearing is not required, but does not explicitly state that a hearing is required in all other circumstances. To avoid any uncertainty about whether a hearing is necessary in a given case and to be consistent with Congressional intent, the IEMCA requested that the Commission draft the proposed final rule to state that no motion for temporary relief may be granted without an inter partes hearing in accordance with the procedures established in the APA.

The Commission thinks that the criticisms of interim rule 210.24(e)(13) have some merit.[96] Instead of drafting proposed final rule 210.62 in the ways suggested by the ITCTLA or the IEMCA, however, the Commission has decided not to attempt to delineate the circumstances in which an evidentiary hearing would or would not be required. Proposed final rule 210.62 simply states that an opportunity for an evidentiary hearing will be provided in every temporary relief proceeding. This language corresponds to the language of section 337 regarding APA notice and hearing requirements for TEO determinations.[97] This language also will give the parties the discretion to waive a hearing if the circumstances in a particular case make a hearing unnecessary.

The second aspect of interim rule 210.24(e)(13) that generated adverse public comment concerns the procedures to be followed at an evidentiary hearing on temporary relief. Interim rule 210.24(e)(13) does not discuss specific procedures; it states that "[i]f a hearing is conducted, the precise form and scope of the hearing are left to the discretion of the administrative law judge." The IEMCA commented that the hearing procedures should not be left completely to the presiding ALJ's discretion. The IEMCA pointed out that the legislative history of the Omnibus Trade Act specifically states that the Commission must hold "an inter partes hearing as required by the [APA]," and that the APA describes specific procedures to be applied in evidentiary hearings.[98] For those reasons, the IEMCA urged the Commission to draft the proposed final rule to include a provision on procedures that corresponds to the APA.

The Commission does not find it necessary to refer to APA hearing procedures in proposed final rule 210.62, because the Commission already has a rule that refers to such procedures, viz., interim rule 210.41(d). ("*General provisions for hearings*" and proposed final rule 210.36(d). The Commission believes that the results desired by the IEMCA have been achieved by the Commission's drafting of proposed final rule 210.62 to indicate that, if a hearing is conducted on a motion for temporary relief, the relevant provisions of proposed final rule 210.36 will apply.

The final aspect of interim rule 210.24(e)(13) that generated adverse public comment is the recitation of issues to be addressed at an evidentiary hearing on temporary relief. The IEMCA commented that the recitation is incomplete and confusing because it does not correspond to the list of factors that the motion and the responses thereto are required to address pursuant to interim rules 210.24(e)(1) and 210.24(e)(9).

The IEMCA also objected to the current provision of interim rule 210.24(e)(13) which gives the presiding ALJ the option, but does not require him, to take evidence and to make findings on the issues of remedy, the public interest, and bonding by the respondents under sections 337 (e)(1), (f)(1), and (j)(3) of the Tariff Act. The IEMCA argued that since the resolution of those issues is a prerequisite to the issuance of temporary relief, proposed final rule 210.62(b), which replaces interim rule 210.24(e)(13), should permit the parties to address those issues at the evidentiary hearing on temporary relief.

The Commission concurs with the IEMCA's assessment of the current description in interim rule 210.24(e)(13) of the issues that must be addressed at an evidentiary hearing on temporary relief. Proposed final rule 210.62 therefore does not contain similar provisions. Since proposed final rule 210.62 provides that an opportunity for an evidentiary hearing will be provided with respect to "every motion for temporary relief," the Commission does not think it necessary to outline the mandatory issues involved. The Commission does not agree, however, with the IEMCA's position that the ALJ should be required to address the issues of remedy, the public interest, and bonding by the respondents at the hearing.

Section 210.63

Proposed final rule 210.63 is based on interim rule 210.24(e)(14), which provides that the ALJ shall determine whether and, if so, to what extent the parties will be permitted to submit briefs and proposed findings of fact and conclusions of law to the ALJ in connection with the adjudication of a motion for temporary relief. There are editorial changes but no substantive differences between proposed final rule 210.63 and the interim rule.

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[95] The ITCTLA noted also that the summary determination provision of interim rule 210.24(e)(13) can be interpreted as permitting the ALJ to grant a respondent's motion for summary determination without a hearing, but not permitting the ALJ to dispose of a complainant's motion for summary determination in the same fashion.

[96] For example, the standard for granting a motion for summary determination (in a respondent's favor or in the complainant's favor) may dispose of questions of law related to the issue of likelihood of success on the merits and whether there is reason to believe that section 337 has been violated, but would not be the proper standard for disposing of the issue of the effect that granting the motion for temporary relief would have on the public interest. There also may be cases in which a respondent's default obviates the need for an evidentiary hearing on temporary relief as to that respondent.

[97] The statutory language concerning APA notice and hearing requirements expressly covers determinations under section 337(e), but does not mention determinations under section 337(f). See 19 U.S.C. 1337(c). The omission of any reference to section 337(f) may be an oversight, however, because the statute provides that all legal and equitable defenses may be presented in all cases, and an evidentiary hearing would be an important method of doing this in a case involving a request for a TCD order, as well as one in which the complainant is seeking a TEO.

[98] See 5 U.S.C. 556(d), which reads as follows:

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts.

Section 210.64

Proposed final rule 210.64 is based on interim rule 210.24(e)(15), which provides that there will be no interlocutory appeals of an ALJ's ruling on any matter related to the grant or denial of a motion for temporary relief. Interim rule 210.24(e)(15) also states that the right of Commission review of such matters after issuance of a temporary relief ID is limited to the issues outlined elsewhere in the interim rules governing temporary relief.

The ITCTLA questioned the appropriateness of precluding all interlocutory appeals of matters connected with the ALJ's adjudication of a motion for temporary relief, as certain matters decided in connection with temporary relief may affect the subsequent proceedings on permanent relief. The ITCTLA went on to say that it was unclear what prejudice would result from an interlocutory appeal filed during the temporary relief proceedings since the pendency of such an appeal would not stay the investigation.

The Commission believes that the prohibition on interlocutory appeals from temporary relief proceedings should be retained. Congressionally mandated procedural requirements (i.e., an opportunity for an inter partes hearing prior to the issuance of a TEO) and the stringent statutory deadlines for determining whether to grant a motion for temporary relief make it impracticable for the parties and the Commission and its staff to be involved in an interlocutory appeal concurrently with temporary relief proceedings. The Commission notes also that any issue decided by an ALJ which is has an impact on the permanent relief proceedings may be the basis for an interlocutory appeal during the permanent relief proceedings or may provide grounds for Commission review of the permanent relief ID under interim rule 210.54(a)(1)(ii). (See also proposed final rule 210.24 concerning interlocutory appeals and proposed final rule 210.46 concerning petitions for review of IDs on permanent relief).

The only difference between interim rule 210.24(e)(15) and proposed final rule 210.64 is that the Commission has omitted any discussion of restrictions on Commission review of issues decided in a temporary relief ID from the proposed final rule. The Commission believes this omission is appropriate because that information appears elsewhere (in the provisions concerning Commission action on a temporary relief ID) and is not relevant to the matter of interlocutory appeals.

Section 210.65

Proposed final rule 210.65 is based on interim rule 210.24(e)(16) and discusses the point at which an ALJ is to certify the record of a temporary relief proceeding to the Commission. The interim rule indicates that the ALJ should certify the record to the Commission before issuing the temporary relief ID, if feasible.

The ITCTLA commented that it is inappropriate for the interim rule to require or even to suggest that the ALJ certify the evidentiary record to the Commission before issuance of the temporary relief ID. In the ITCTLA's opinion, Commission receipt of the record without the ID undermines the role and authority of the ALJ and creates ambiguity with respect to the identity of the decision-maker and the basis for the decision. Furthermore, because interim rule 210.24(e)(17) currently provides that the Commission will not review and modify or vacate a temporary relief ID solely on the basis of errors of fact, the ITCTLA questioned why the Commission should receive the record before the ID.

The Commission notes that the advance certification provision was proposed as one means of commencing temporary relief decisionmaking at the Commission level prior to the issuance of the ID. Such a headstart was thought to be necessary because of the short amount of time allotted for the Commission to decide whether to adopt the ID prior to the statutory deadline for issuing a final determination on the motion for temporary relief. The plan was that the Commission could start reviewing the evidence and considering the issues before the start of the 20-day or 30-day period for disposing of the temporary relief ID.

Since the ALJ has very little time to write the ID and must include specific citations to the record pursuant to interim rule 210.53(d) (and proposed final rule 210.42(d)), the Commission now questions whether it will ever be feasible for the ALJs to send the record up to the Commission before issuing the ID. The Commission notes also that under interim rule 210.53(g) (and proposed final rule 210.42(g)), the ALJ may reopen the record to receive additional evidence at any time prior filing the ID. The Commission thus has not included the advance certification requirement in proposed final rule 210.65.

Section 210.66

Proposed final rule 210.66 is based on interim rule 210.24(e)(17), which governs on temporary relief and Commission action thereon.

Paragraph (a). Paragraph (a) of proposed final rule 210.66 is based on interim rule 210.24(e)(17)(i), which lists the deadlines for issuance of a temporary relief ID, as well as the mandatory and optional contents of such an ID.

Paragraph (a) of proposed final rule 210.66 differs from the interim rule in the following manner:

1. Paragraph (a) of the proposed final rule states that the temporary relief ID will be issued "on or before" (instead of "on") the 70th day after publication of the notice of investigation in an ordinary investigation or "on or before" the 120th day after such publication in a "more complicated" investigation.

2. Paragraph (a) of the proposed final rule also indicates that if the 70th or 120th day is a Saturday, Sunday, or Federal holiday, the temporary relief ID must be filed by 12 noon on the next business day. This filing deadline increases the likelihood that the Docket staff may be able to process the ID, distribute to it to the appropriate Commission offices, and make it available to the parties by the close of business on filing day.

3. The interim rule's list of mandatory issues to be addressed in the ID is not included in paragraph (a) of the proposed final rule. The proposed final rule simply states that the ID must address the issues listed in proposed final rules 210.61 and 210.62.

Paragraph (b). Paragraph (b) of proposed final rule 210.66 is derived from interim rule 210.24(e)(17)(ii), which imposes deadlines for the processing of a temporary relief ID. The differences between the interim rule and the proposed final rule are enumerated below.

1. In paragraph (b) of proposed final rule 210.66, the Commission has corrected the statement of the effective date of an ID on temporary relief. Contrary to what the interim rule indicates, every ID on temporary relief does not become the Commission's determination within 30 days if no review is ordered. The 30-day deadline applies only in a "more complicated" case. In an ordinary investigation, the effective date of the ID is the 20th day after issuance.

2. Paragraph (b) of proposed final rule 210.66 also provides that if the 20-day or 30-day deadline for final Commission action on the temporary relief ID falls on a Saturday, Sunday, or Federal holiday, the effective date of the ID will be extended to the next business day. Paragraph (b) also states, however, that

if a temporary relief ID is issued before the 70-day or 120-day deadline, the Commission will not be held to a 20-day or 30-day deadline for determining what action to take on the ID., i.e., the Commission will be able to take the remainder of the statutory period for determining whether to grant temporary relief.

3. The final difference between interim rule 210.24(e)(17)(ii) and paragraph (b) of proposed final rule 210.66 is that paragraph (b) refers to the possible modification, reversal, or setting aside of the ID in whole or in part (instead of the possible modification or vacation of the ID).

Paragraphs (c) and (e). Paragraph (c) of proposed final rule 210.66 is based on interim rule 210.24(e)(17)(iii), which discusses the subject matter, the page limits, and the filing deadlines for the parties' written comments concerning the temporary relief ID. Paragraph (e) of proposed final rule 210.66 is based on interim rule 210.24(e)(17)(v), which sets the page limits and filing deadlines for replies to written comments concerning the temporary relief ID. That interim rule also sets expedited service requirements for parties' original comments to facilitate timely filing of replies.

Interim rule 210.24(e)(17)(iii) permits parties to file comments concerning, inter alia, the absence of errors in a temporary relief ID. Given the short time available for parties to respond to other parties' comments, it is likely that the party who prevailed in the ID will want to devote its full time and attention to anticipating the adverse comments of the losing parties and formulating suitable responses. Paragraph (c) of proposed final rule 210.66 therefore does not provide for initial comments concerning the absence of errors in the ID.

Paragraph (e)(1) of proposed final rule 210.66 gives parties the right to reply to each other's comments on a temporary relief ID. Unlike the interim rule, however, paragraph (e)(1) has been worded to clarify that each party to the investigation may file a reply to each set of comments on a temporary relief ID that were filed by other parties. Paragraph (e)(1) also states that in no case shall a party have less than two calendar days to file its reply comments.

Another noteworthy difference between the interim rules and proposed final rule 210.66 is the prescribed page limits for parties' comments on the temporary relief ID. Interim rules 210.24(e)(17)(iii) and (v) impose the same page limits for all comments, regardless of whether the temporary relief phase of the investigation has or has not been declared "more complicated." The Commission thinks that a greater number of pages should be permitted for initial and reply comments in "more complicated" investigations. Paragraph (c) of proposed final rule 210.66 accordingly states that the limit for initial comments in "more complicated" investigations is 35 pages in an ordinary investigation and 45 pages in a "more complicated" investigation. Paragraph (e)(2) states that the page limit for reply comments is 20 pages in an ordinary investigation and 30 pages in a "more complicated" one.

Another difference between the interim rules and proposed final rule 210.66 pertains to the service of parties' initial comments on a temporary relief ID. Interim rule 210.24(e)(17)(v) refers to service of parties' initial comments by "the fastest means available." Paragraph (c) of the proposed final rule requires that service be effected "by messenger, courier, express mail, or equivalent means."

The IEMCA commented that the time allotted for parties to file comments on the ID and responses to each other's comments is too short, and is particularly unfair to respondents located outside the United States. The Commission is not unsympathetic to respondents' plight, but believes that the deadlines cannot be extended unless the Commission reduces the period for the presiding ALJ to issue a temporary relief ID or eliminates responses to the initial comments. The Commission believes that neither of these options is practicable or appropriate.

Paragraph (e)(1) of proposed final rule 210.66 corrects an inconsistency between interim rules 210.24(e)(17)(iii) and (v) which affects the deadlines for filing reply comments. Interim rule 210.24(e)(17) (iii) provides that the deadline for filing comments on the temporary relief ID is measured from the date of service of the ID, while interim rule 210.24(e)(17)(v) provides that the deadline for reply comments is to be measured from the date of issuance of the ID. To resolve that inconsistency, paragraphs (c) and (e)(1) of proposed final rule 210.66 state that the deadlines for filing comments and reply comments are to be measured from the date of issuance of the ID. Saturdays, Sundays, and Federal holidays are to be included in the computation of filing periods—except that when the ID is issued on Friday, the filing deadlines are to be measured from the following Monday or from the first business day after such service if Monday is a Federal holiday. Also, if the last day of the filing period is a Saturday, Sunday, or Federal holiday, the filing deadline shall be extended to the next business day. Paragraph (e)(1) of proposed final rule 210.66 also provides, however, that in no case shall a party have less than two calendar days to file its reply comments.

The Commission also has changed the substantive standards for parties' comments and Commission action on a temporary relief ID (i.e., modification, reversal, or setting aside of the ID). One of the most controversial aspects of interim rules 210.24(e)(17) (ii) and (iii) is that they do not provide for the submission of comments requesting modification or reversal of an ID based on an alleged error of fact. In fact, interim rule 210.24(e)(17)(ii) states that "[n]o review of a [temporary relief ID] will be ordered on the basis of alleged errors of fact." The Commission adopted this restriction as a means of meeting the statutory deadlines for determining whether to grant a motion for temporary relief by reducing the number of requests by parties for modification or revocation of temporary relief IDs. Prior to the adoption of the interim rules, the IEMCA argued that the Commission's decision to adopt a rule that would disallow revocation or modification of a temporary relief ID solely on the basis of alleged errors of fact would constitute an unlawful delegation of factfinding responsibility to the ALJ and would effectively preclude any review of bonding and public interest matters. The Commission rejected that argument, noting among other things that the stringent statutory deadlines and the requirement of an inter parties hearing on a motion for temporary relief made it necessary for the commission to impose limits on the availability of Commission review of a temporary relief ID. The Commission also attempted, however, to draft interim rule 210.24(e)(17)(iii) in a manner that would permit review of the largely factual bonding and public interest matters.[99] Following publication of interim rules, the IEMCA reasserted its previous objections.

After further consideration of the propriety of restricting adverse Commission action on temporary relief IDs due to errors of law and policy matters, the Commission has not drafted paragraph (c) of proposed final rule 210.66 to prohibit modification or reversal of a temporary relief ID on the basis of alleged errors of fact. Paragraph (c) indicates that the Commission may modify, reverse, or set aside a temporary relief ID if the Commission finds that a statement of material fact is clearly erroneous (or that the ID contains an error of law, or that there is

[99] See 53 FR 49125–26 (Dec. 6, 1990).

a policy matter warranting discussion by the Commission). The Commission drafted the proposed final rule in this matter for the following reasons: Some questions of law that may be decided in a temporary relief ID in connection with likelihood of success on the merits and whether there is reason to believe that section 337 has been violated are questions of law to be determined on the facts.[100] Interim rules 210.24(e)(17) (ii) and (iii) as currently written would preclude review of such issues. Other aspects of the Commission's temporary relief analysis are purely factual and cannot properly be considered matters of policy that would be reviewable under the interim rules.[101] Paragraph (c) of proposed final rule 210.66 accordingly provides that Commission modification, reversal, or setting aside of a temporary relief ID in whole or part may be ordered if there is a material fact is clearly erroneous, the ID contains an error of law, or the ID involves a matter of Commission policy which the Commission feels it necessary or appropriate to address.

Paragraph (d). Paragraph (d) of proposed final rule 210.66 is based on interim rule 210.24(e)(17)(iv), which states that other agencies will be served with copies of the temporary relief ID and will have 10 days to file comments on the ID. The differences between the interim rule and the proposed final rule are essentially editorial. Among other things, the proposed final rule clarifies that the term "other agencies" means those listed in proposed final rule 210.50(a)(2).

Following publication of the interim rule, the ITCTLA commented that a 10-day deadline for agency comments may not be feasible in most cases for a number of reasons. The ITCTLA noted that (1) the Commission only has 20 days to act in an ordinary case, (2) the nonconfidential version of the ID cannot be prepared without input from the parties, and (3) input from the parties on the issue of confidentiality may be delayed to a certain extent because the parties' time and attention will be consumed by the preparation of comments concerning the ID that must be filed within a very short time.

The Commission acknowledges that a 10-day filing deadline for agency comments may be problematic for the reasons stated by the ITCTLA. The Commission does not think it necessary to change the prescribed deadline, however. Comments from other agencies concerning IDs in section 337 investigations are very rare.

Morever, if another agency has an interest in a particular investigation, that agency is likely to formally intervene or to participate like a party at various stages of the proceeding.[102] If a nonparty agency wishes to comment on a temporary relief ID but cannot comply with the 10-day deadline, the Commissoin can waive or extend the deadline, extend its own deadline for determining whether to adopt the ID, or designate the investigation "more complicated" (depending on the circumstances).

Paragraph (f). Paragraph (f) of proposed final rule 210.66 is based on interim rule 210.24(e)(17)) (vi), and discusses final Commission action on a temporary relief ID. Unlike the interim rule, paragraph (f) of the proposed final rule states that the Commission will issue **Federal Register** notice announcing whether it has adopted the ID. Paragraph (f) also uses slightly different terminology to describe possible adverse Commission action on the ID—i.e., the words "modify, reverse, or set aside" are used in place of "modify or vacate." The changed terminology makes paragraph (f) consistent with other proposed rules on that subject. The final difference between interim rule 210.24(e)(17)(vi) and paragraph (f) of the proposed final rule is that paragraph (f) refers to the possibility that a bond may be required as a prerequisite to the issuance of "temporary relief" instead of "a temporary exclusion order."

Section 210.67

Proposed final rule 210.67 is based on interim rule 210.24(e)(18), which describes the manner in which the issues of remedy, the public interest, and bonding by the respondents will be decided pursuant to sections 337 (e), (f), and (j) of the Tarriff Act. The only differences between interim rule 210.24(e)(18) and proposed final rule 210.67 pertain to paragraph (b) of the proposed final rule. Specifically:

1. The first sentence in interim rule 210.24(e)(18)(ii) provides that the parties may file written comments on the issues of remedy, the public interest, and bonding. Paragraph (b) of proposed the final rule indicates that parties shall file such submissions.

2. Paragraph (b) of the proposed final rule provides that parties to an investigation must file their written submissions on the issues of remedy, the public interest, and bonding by respondents on the 65th (instead of the 60th) day after institution of the investigation in an ordinary case. It also states that such submissions are due on the 110th (instead of the 105th) day after institution of the investigation in a "more complicated" investigation.

3. Paragraph (b) of proposed final rule 210.67 also states that interested persons may file comments on those issues on the same date as the parties.

Section 210.68

Proposed final rule 210.68 is based on interim rules 210.58(b)(3) through (b)(6), which govern the form and content of a complainant's temporary relief bond. There are only a few differnce between the interim provisions and proposed final rule 210.68. Paragraph (a) of the proposed final rule discusses the kinds of bonds that are acceptable for the complainant to post in order to obtain temporary relief, while the corresponding interim rule (210.58(b)(3)) indicates that the complainant is only required to post a bond as a prerequisite to the issuance of a TEO. Item (2) of paragraph (a) indicates that the complainant may submit "[t]he surety bond of an individual, a trust, an estate, a partnership, or a corporation. (A typographical error resulted in omission of the reference to a corporation in item (ii) of interim rule 210.58(b)(3).) Finally, paragraph (b) of the proposed final rule indicates that if the complainant fails to submit a bond within the prescribed period by the Commission, "temporary relief" will not be issued. (The interim rule indicated that a TEO would not be granted.)

Section 210.69

Proposed final rule 210.69 is based on interim rules 210.58(b) (7) and (8), which describe the process by which the Commission approves (or disapproves) a temporary relief bond posted by a complainant. The only difference between the interim rules and the proposed final rule is that the proposed final rule refers to bonds that are

[100] E.g., the question of whether a particular patent claim is invalid for obviousness under 35 U.S.C. 103. See *Akzo N.V.* v. *United States International Trade Commission*, 808 F.2d 1471, 1472, and 1480 (Fed. Cir. 1986).

[101] Such matters would include the questions of whether the respondents or the public interest would be harmed if the motion for temporary relief were granted and any findings of fact by the ALJ on the issues of remedy, the public interest, and bonding by the respondents under sections 337(e)(1), (f)(1), and (j)(3).

[102] See *e.g.*, Inv. No. 337–TA–82, Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper, and Components Thereof (the U.S. Department of Justice filed written submission and appeared at Commission hearing to argue that no domestic industry had been injured and no remedy should be issued). See *also* Inv. No. 337–TA–143, Certain Amorphous Metal Alloys and Amorphous Metal Articles (the U.S. Customs Service participated in stages of exclusion order modification proceeding).

submitted as a prerequisite to temporary relief, whereas the interim provisions refer to bonds posted to obtain a TEO. Paragraph (a) of the proposed final rule accordingly states that, if the bond submitted by the complainant is not approved by the Commission, "temporary relief" will not be issued. Item (2) in paragraph (d) of proposed final rule 210.69 states that the Commission may revoke or vacate the aforesaid "temporary relief" on public interest grounds or for other reasons.

Section 210.70

Proposed final rule 210.70 is based on interim rule 210.58(c), which governs the possible forfeiture of a complainant's temporary relief bond.

The legislative history of the Omnibus Trade Act amendments to section 337 authorizing the Commission to require a complainant to post a bond as a prerequisite to the issuance of a TEO states that the Commission may require forfeiture of the bond to the U.S. Treasury if the Commission determines, after issuing a TEO conditioned on a bond, that the respondents have not violated section 337.[103] The aforesaid legislative history also indicates that the forfeiture is to be effected in the same way that respondents' section 337 bonds "revert" to the U.S. Treasury when the Commission determines that imported articles permitted to enter the United States under a bond violated section 337.[104]

Interim rule 210.58(c) concerning forfeiture of temporary relief bonds posted by complainants is modeled largely on Custom's regulations and procedures. In drafting the aforesaid interim rule, the Commission decided to adopt a policy of neither favoring nor disfavoring forfeitures. The preamble to this rule accordingly stated that forfeiture decisions would be made on a case-by-case basis.[105]

Paragraphs (a) and (b). Paragraphs (a) and (b) of proposed final rule 210.70 are based on interim rules 210.58(c)(1) and (2). Interim rule 210.58(c)(1) describes the manner in which forfeiture inquiries begin and the issues the complainant must address in its written submission on whether forfeiture should be ordered. Interim rule 210.58(c)(2) provides for responses to the complainant's submission.

The IEMCA objected to the fact that there is no presumption in favor of forfeiture embodied in the aforesaid interim rules. The IEMCA argued that the final rules should provide at least a rebuttable presumption of forfeiture in order to increase the deterrent value of the bond.

The IEMCA commented further that a presumption in favor of forfeiture also is necessary in order for the rules to allocate properly the burdens of proof and persuasion in a bond forfeiture proceeding. In the IEMCA's opinion, the fact that the Commission adopted an interim policy and rules that neither favor nor disfavor forfeiture means that the Commission has opted, in effect, for no rule at all, since there are no guidelines to help the parties or the Commission in particular cases and no standards to confine the Commission's otherwise "unlimited and unguided" discretion.

The AIPLA and the ITCTLA also found the interim rules objectionable, but for different reasons. The AIPLA and the ITCTLA were dissatisfied because the rules provide for an automatic forfeiture inquiry in every case regardless of the facts, and because the complainant must show cause, in effect, why forfeiture should not be ordered. The commenters went on to say that abuse or improper motivation on the part of the complainant may not always merit Commission consideration in every case. And when there is no question in the minds of the respondents or the Commission investigative attorney of any abuse or improper motivation by the complainant, an automatic forfeiture inquiry is a waste of the parties' and the Commission's time and resources.

The AIPLA noted also that the interim rule's requirement of an automatic forfeiture inquiry in every case regardless of the facts, provides an additional deterrent to the filing of good faith motions for TEOs.

The AIPLA and the ITCTLA commented that a better approach would be for the rules to provide that forfeiture proceedings will be initiated only upon the filing of a motion by the Commission investigative attorney or a respondent. The ITCTLA suggested a filing deadline of 10 days after the effective date of the final Commission determination of no violation.

The Commission notes that the possibility that improper motivation by the complainant might not be an issue in every forfeiture case is one reason that the interim rule does not contain a presumption in favor of forfeiture. The Commission notes also that the need for a rule requiring automatic forfeiture proceedings as a deterrent to abuse of the temporary relief process will be less compelling if the Commission ultimately adopts proposed final rule 210.4(b) authorizing monetary sanctions for abuse of process.

The next issue that generated adverse public comment relevant to interim rule 210.58(c)(1) was the recitation of factors the Commission will consider in determining whether to order forfeiture. The IEMCA commented generally that these factors lack specificity, are unusable, and are of little real help in deciding forfeiture questions. At the very least, the IEMCA argued, the final rules should provide examples of circumstances in which forfeiture is or is not likely to be required. The IEMCA went on to say, however, that the Commission should adopt a rule stating that in any case in which a complainant obtains a TEO, benefits from it, and ultimately loses its case on the merits, forfeiture will be required in the absence of extenuating circumstances (such as the change in a material legal precedent).

The AIPLA and the ITCTLA also were dissatisfied with the forfeiture analysis prescribed in the interim rules. But unlike the IEMCA, which found the interim forfeiture considerations unsatisfactory in their entirety, the ITCTLA, and the AIPLA apparently had problems with only factor (ii), i.e., whether the complainant's assertions with respect to the violation alleged as the basis for obtaining a TEO were substantially justified, taking into account the record of the investigation as a whole. As the preamble to interim rule 210.58(c) acknowledged, the wording of factor (ii) was borrowed from the language (but not the purpose, intent, or application) of the Equal Access to Justice Act. The AIPLA and the ITCTLA argued that instead of using the language of an inapposite statute for factor (ii), the Commission should use the standard of conduct articulated in interim rule 210.5(b) in determining whether a complainant's TEO bond should be forfeited. The arguments the AIPLA and the ITCTLA cited in favor of incorporating a rule 210.5(b) standard into the bond forfeiture analysis under rule 210.58 were the following:

(1) Adoption of a single standard of conduct would eliminate the need to rationalize the differences between the two rules.

(2) Since interim rule 210.5 is based on FRCP 11 and the legal standard of FRCP 11 has been discussed and litigated extensively in the federal courts, a well-developed body of law already exists to which the parties and the Commission can look for guidance.

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[103] See H.R. Rep. No. 576 at 635; 134 Cong. Rec. H2044 (Apr. 20, 1988); 133 Cong. Rec. S10365 (July 21, 1987).

[104] See 134 Cong. Rec. H2044; 133 Cong. Rec. S10365.

[105] See 53 FR 49127 (Dec. 6, 1988).

(3) Finally, by including forfeiture of complainant's bond among the sanctions for violating rule 210.5(b), the Commission would eliminate the need for potentially duplicative proceedings concerning bond forfeiture on the one hand and abuse of process sanction issues on the other.

The Commission agrees with the commenters' recommendations in part and disagrees in part. The Commission does not agree with the IEMCA's position that the current list of forfeiture considerations is useless in its entirety. Factors (i) and (iii)—i.e., the extent to which the Commission has determined that section 337 has not been violated, and whether forfeiture would be consistent with the legislative intent of the forfeiture authority (which is to provide a "disincentive" to the abuse of temporary relief by complainants) "—are based on the legislative history of the Omnibus Trade Act authorizing the Commission to require TEO bond forfeitures by complainants. Factor (iv)—i.e., whether forfeiture would be in the public interest—is appropriate because of Congressional intent that the public interest be paramount in the administration of section 337. Factor (v)—i.e., any other legal, equitable, or policy considerations that are relevant to the issue of forfeiture—is appropriate because the Commission has had no experience with TEO bond forfeitures and there may be facts and circumstances in a particular case that would have a bearing on the propriety of ordering (or declining to order) forfeiture in that case.

As for factor (ii)—i.e., whether the complainant's assertions with respect to the violation alleged as the basis for obtaining a TEO were substantially justified, taking into account the record of the investigation as a whole—the Commission agrees with the AIPLA and the ITCTLA that the use of the standard specified in interim rule 210.5(b) is preferable to the current language borrowed from the Equal Access to Justice Act, for the reasons the commenters cited.

The key similarities and differences between the proposed final rule 210.70 and interim rules 210.58(c) (1) and (2) are the following:

1. Since the Commission expects to adopt monetary sanctions rules for abuse of process (proposed final rule 210.4(b)), the Commission is maintaining the current policy of neither favoring nor disfavoring bond forfeitures by complainants.

2. Unlike interim rule 210.58(c)(1), paragraph (a) of proposed final rule 210.70 indicates that forfeiture proceedings will be initiated in response to a motion by the respondents or the Commission investigative attorney. The Commission is not foreclosed, however, from self-initiating such proceedings in an appropriate case. Paragraph (a) provides that forfeiture proceedings may be initiated by the Commission sua sponte, in a manner analogous to the initiation of monetary sanction proceedings under proposed final rules 210.4(b) and 210.25.

3. Unlike factor (ii) of the Commission's forfeiture analysis under interim rule 210.58(c) (1), item (2) in paragraph (c) of proposed final rule 210.70 incorporates the standard of conduct articulated in proposed final rule 210.4(b).

Interim rule 210.58(c)(5) provides that forfeiture proceedings will not be stayed pending judicial review of the Commission determination of no violation that is the basis for such proceedings. That interim rule also discusses how a complainant can obtain a refund of the forfeited bond amount if the Commission's determination of no violation is overturned on judicial review. The preamble to the interim rules explained that the "no stay" provision was included in interim rule 210.58(c)(5) for two reasons: (1) The Customs procedures for obtaining payment on a respondent's bond contain a similar provision;[106] and (2) a "no stay" policy is consistent with and advances the deterrent effect Congress intended for the bond forfeiture authority to have.

There is no difference between paragraph (d) of proposed final rule 210.70 and interim rule 210.58(c)(5). The Commission is particularly interested in receiving public comments on the proposed final rule, however.

Interim rule 210.58(c)(3) states the Commission policy on forfeiture in settlement cases. The preamble to this rule explained that the legislative history authorizing the Commission to order forfeiture of the bond only provides for forfeiture after the Commission has determined that there is no violation of section 337 and, for that reason, the Commission believed that it could not properly order forfeiture in a case that was settled and terminated without such a determination.[107]

The IEMCA commented that the Commission may have been reading the legislative history too narrowly, but did not explain that comment or request that the "no determination/no forfeiture" policy be changed. The IEMCA went on to note its appreciation of the Commission warning in the preamble to the interim rules that complainants who abuse the temporary relief process and then decide not to continue the investigation may face certain consequences.[108] The IEMCA requested that similar provisions be incorporated in the final rules. The IEMCA also requested that the final rules confirm that section 337 does not preempt state unfair competition laws, which ordinarily would be available to a party whose competitors may have abused judicial or administrative processes (including section 337 process) for anticompetitive reasons.

The Commission finds nothing ambiguous or equivocal in the relevant legislative history concerning the conditions under which the Commission may order forfeiture of a complainant's temporary relief bond; forfeiture may be ordered if there is a final determination of no violation.[109] The Commission also did not find it necessary to draft proposal final rule 210.70 to note that the aforesaid policy on forfeiture sanctions would not preclude monetary sanctions under proposed final rule 210.4(b) in an appropriate case, as discussed in the preamble to the interim rules.

Finally, the Commission does not believe that the final rule should include a provision concerning the availability of additional relief under state unfair competition laws, as the IEMCA has recommended. State courts and state legislatures, not the Commission, are the arbiters of whether a person is or is not precluded from obtaining relief under state laws in addition to Commission remedial actions under section 337.

For the foregoing reasons, there is no difference between interim rule 210.58 (c)(3) and paragraph (e)(3) of proposed final rule 210.70.

Subpart I—Enforcement Procedures and Advisory Opinions

Section 210.71

Proposed final rule 210.71 is based on interim rule 211.51 and concerns the gathering of information relevant to the enforcement of Commission orders. The October 17, 1988, notice of proposed rulemaking indicated that the Commission intended to delete, as unnecessary, the second sentence of paragraph (b) and the last sentence of paragraph (c) of the interim rule. In addition, the beginning of paragraph (d) was reworded to eliminate the reference

[106] See 53 FR 49127, n.13 (Dec. 6, 1988).

[107] See 53 FR 49127 (Dec. 6, 1988).

[108] See 53 FR 49127, n.14 (Dec. 6, 1988).

[109] See H.R. Rep. No. 576 at 635; 135 Cong. Rec. H2044 (Apr. 20, 1988); 133 Cong. Rec. S10365 (July 21, 1987).

to Commission approval of consent orders, since the Commission does not approve consent orders, but rather agrees to issue them. The changes proposed in the October 17, 1988, notice are implemented in proposed final rule 210.71.

Section 210.72

Proposed final rule 210.72 is based on interim rule 211.52 and specifies that confidential information will be protected. The interim rule is essentially the same as the preexisting rule. The October 17, 1988, notice of proposed rulemaking indicated that the Commission intended to revise the interim rule to clarify the procedure for requesting confidential treatment, by cross-referencing Commission rule 201.6. The changes proposed in the October 17, 1988, notice are implemented in proposed final rule 210.72.

Texas Instruments, Apple, Compaq, Corning, DuPont, Kodak, Ford, Hewlett-Packard, Intel, Motorola, and Xerox submitted a comment requesting that interim rule 211.52 not distinguish between in-house and outside counsel on access to confidential business information. Proposed final rule 210.72 as presently worded does not make a distinction between in-house and outside counsel. Consequently no amendment to the rule is required. On the larger question of access by in-house counsel to confidential business information in section 337 investigations, the Commission does not deem it appropriate to change its present policy of denying access to in-house counsel absent either the consent of all parties or a strong showing of need.

Section 210.73

Proposed final rule 210.73 is based on interim rule 211.53 and concerns the review of reports relating to compliance with Commission orders. The interim rule replaced references to the "Unfair Import Investigations Division" with references to the "Office of Unfair Import Investigations." In the October 17, 1988, notice of proposed rulemaking, the Commission stated its intention to revise interim rule 211.53 by clarifying paragraph (b) and deleting the last clause of paragraph (a) as unnecessary. The changes proposed in the October 17, 1988, notice are implemented in proposed final rule 210.73.

Section 210.74

Proposed final rule 210.74 is based on interim rule 211.55 and concerns the modification of reporting requirements. The interim rule is essentially the same as the preexisting rule. In the October 17, 1988, notice of proposed rulemaking, the Commission stated its intention to renumber interim rule 211.55 as 211.54, because existing interim rule 211.54 would be relocated to its own subpart. The Commission also stated that it planned to retitle the new interim rule 211.54 as "Modification of reporting requirements," and to extend its coverage to exclusion orders in order to cover the eventuality that information requirements are imposed in exclusion orders. In addition, the phrase, "proposed modified" was deleted as incorrect, since the reference should be to the original consent order. The proposed changes announced in the October 17, 1988, notice (except for designating the revised interim rule 211.55 as 211.54) have been in implemented in proposed final rule 210.74.

Section 210.75

Proposed final rule 210.75 is based on interim rule 211.56, and sets out the procedure to be used in proceedings to enforce exclusion orders, cease and desist orders, and consent orders. The interim rule differed from the previous rule by adding a provision covering the issuance of seizure and forfeiture orders, in order to implement section 1342(a)(5)(B) of the Omnibus Trade Act. The interim rule also replaced a reference to the Unfair Import Investigation Division with a reference to OUII.

In the October 17, 1988, notice of proposed rulemaking, the Commission stated its intention to renumber interim rule 211.56 as 211.55 and to rearrange its paragraphs in a more logical order, starting with informal proceedings (current paragraph (a)), followed by formal proceedings (current paragraph (c)), and ending with court proceedings (current paragraph (b)).

The Commission stated that it also planned to revise the paragraph concerning formal proceedings to permit the institution of an enforcement proceeding after the filing of a complaint by the complainant in the original investigation or by the Commission on its own initiative. In light of that change, a notice of institution, rather than the entire complaint, would be published in the Federal Register. In addition, respondents would have 15 days from service of the complaint to answer, rather than the existing 15 days from receipt.

The Commission stated its intention to revise interim rule 211.56 further to eliminate the overly restrictive qualification "mandatory" before "injunction," to delete as redundant the phrase "of any kind" in paragraph (b) and the phrase "or charges" in paragraph (c), and to correct typographical errors. The last phrase in the first subparagraph of paragraph (c) was deleted on the ground that the phrase is incompatible with standard adjudicatory procedure.

The changes proposed for interim rule 211.56 in the October 17, 1988, notice are carried over into proposed final rule 210.75. A further change has been made to clarify that the Commission has the authority to seek judicial enforcement of sanctions orders, and that the Commission need not give notice to any person when it seeks judicial enforcement of an exclusion order, cease and desist order, consent order, or sanctions order.

The ITCTLA recommended that, in interim rule 211.55 (as renumbered), as well as in renumbered interim rule 211.56 (which concerns modification of orders), RDs should be IDs and should be governed by the procedures set forth in part 210.

In proposed final rule 210.75, the Commission has replaced RDs with IDs in enforcement proceedings, and provided a 90-day deadline for the Commission's decision to review. RDs will not be replaced, however, with IDs in proceedings concerning modification of orders. Such proceedings involve relatively unusual subject matter and are likely to involve Commission review in the bulk of cases, at least until considerably more experience under the rules has been obtained. Consequently the Commission believes that it would be inappropriate to impose time limits applicable to IDs on such proceedings.

The IEMCA urged the Commission to return to prior practice and give 15 days from receipt of process to answer a complaint; 15 days from service was considered too short. Moreover, the IEMCA recommended requiring proof of receipt of service.

Under proposed final rule 210.75, respondents are given 15 days from service of a complaint to answer a complaint. This accords with the Commission's normal practice. In any event, the difference in time between the date of service and the date of receipt is normally only a day or two. Proof of receipt of service would consequently not be required.

With respect to seizure and forfeiture the IEMCA sought to have the Commission specify that seizure applies only to "identical or substantially identical" goods to those involved in the previous violation. The IEMCA also urged the Commission to ensure that adequate notice has been given that a second importation may result in

seizure, by requiring Treasury to publish in the Federal Register and notify importers by mail with return receipt requested. The IEMCA also sought expedited relief in cases of improper seizure.

The Commission has not followed the IEMCA's recommendation that the seizure and forfeiture provision should apply only to "identical or substantially identical" goods. The Commission believes that the IEMCA's proposed language does not accord with the language of the statute.[110] The Commission also has not adopted the IEMCA's recommendation concerning the manner in which notice of possible seizure and forfeiture should be made. Such notice is a matter for the U.S. Customs Service to decide. The Commission also is of the opinion that there is no need for the Commission rules to provide for expedited relief in case of improper seizure. Such a circumstance is likely to be rare, and is largely a matter for the Customs Service.

The law firm of Adduci, Mastriani, Meeks & Schill recommended that the seizure and forfeiture procedure of interim rule 211.55 be accelerated to prevent repeated illegal importations. The proposal would have the Commission include in each exclusion order a stipulation that upon first refusal of entry Customs would notify the Commission of the attempted entry at the same time Customs notified the importer that a second importation attempt at another port might result in seizure and forfeiture

The Commission is of the opinion that this stipulation is unnecessary. Under current Customs procedure, attempted entries are already reported promptly to the Commission

Proposed final rule 210.75(b) provides that complaints may also be filed by OUII, not just by complainant. Proposed final rule 210.75(b)(4) also makes clear that the Commission may modify or revoke more than one type of order at the same time.

Section 210.76

Proposed final rule 210.76 is based on interim rule 211.57, and governs proceedings for the modification or rescission of exclusion orders, cease and desist orders, and consent orders. The interim rule differed from the previous rule by renumbering paragraphs, changing references to "dissolution" of Commission orders to "rescission" of such orders, and changing references to "petition" to "motion," to implement section 1342(a)(6)(B) of the Omnibus Trade Act.

In the October 17, 1988, notice of proposed rulemaking, the Commission stated its intention to renumber interim rule 211.57 as 211.56.

The Commission also proposed to revise interim rule 211.57 to require that petitions be served on all parties to the original investigation, to provide for the filing of oppositions to petitions, to streamline procedure by replacing the existing system of provisional acceptance with an institution procedure similar to that used for the institution of section 337 investigations, and to delete as unnecessary the penultimate sentence of paragraph (b). The Commission noted that it prefers to issue an advisory opinion rather than to modify or dissolve an order, if the issuance of an advisory opinion can resolve the question raised by the person requesting modification or dissolution of an order.

The changes proposed for interim rule 211.57 in the October 17, 1988, notice are carried over into proposed final rule 210.76.

Section 210.77

Proposed final rule 210.77 is based on interim rule 211.58, and provides for temporary emergency action. The interim rule differed from the previous rule by adding a provision for issuing temporary seizure and forfeiture orders pending the institution of formal enforcement proceedings. In the October 17, 1988, notice of proposed rulemaking, the Commission proposed to renumber interim rule 211.58 and 211.57.

The IEMCA argued that the Commission should replace the "substantial harm" standard with an "irreparable injury" standard, as in the case of TEOs. The IEMCA also argued that complainant should be required to post a bond in a temporary seizure and forfeiture situation.

Proposed final rule 210.77 does not contain the provision for issuing temporary seizure and forfeiture orders, because nothing in the statute or its legislative history suggests that the Commission must conduct adversary proceedings as a condition precedent to the issuance of such orders. The Commission currently issues seizure and forfeiture orders in a ministerial fashion. Even if the Commission were to decide that adversary seizure and forfeiture proceedings were necessary or appropriate in a given case, the Commission would lack authority to require the complainant to post a bond as a condition precedent to the granting of any form of temporary relief other than a TEO issued in accordance with section 337(e) of the Tariff Act.

Section 210.78

Proposed final rule 210.78 is based on interim rule 211.59, and provides for giving notice of enforcement actions to other Government agencies. The interim rule differed from the previous rule by adding a reference to seizure and forfeiture to harmonize with other rules. In the October 17, 1988, notice of proposed rulemaking, the Commission stated its intention to renumber interim rule 211.59 as 211.58. The changes proposed for interim rule 211.59 in the October 17, 1988, notice are carried over into proposed final rule 210.78.

Section 210.79

Proposed final rule 210.79 is based on interim rule 211.54, and governs advisory opinions. The interim rule did not differ significantly from the previous rule. In the October 17, 1988, notice of proposed rulemaking, the Commission stated its intention to create a new subpart C to comprise new interim rule 211.59, which was identical to the old interim rule 211.54, except for the old paragraph (a), which the Commission proposed to delete on the grounds that the Commission does not in practice give the subject advice.

The Commission also proposed additional changes to bring interim rule 211.54 into line with Commission practice. For example, the Commission proposed to eliminate the restriction that only respondents can request an advisory opinion. The Commission also proposed to delete, as unnecessary, the word "new" in the first sentence of paragraph (b) and the words "rescind" and "rescission" in paragraph (c).

The Commission proposed to eliminate the phrase "or section 337" from the first sentence of paragraph (b) to preserve the limited scope of advisory opinions which have, in practice, addressed the coverage of orders rather than issues concerning violation, such as patent validity or injury to domestic industries.

The proposed revisions also added to the end of paragraph (b) the first two duties imposed by the Commission on requesters of advisory opinions in Inv. No. 337-TA-68, Certain Surveying Devices. As to the third criterion of Surveying Devices, the Commission noted that it continues to require that the requester of an advisory opinion fully state its request in its first submission to the Commission, since the Commission does not wish to issue seriatim advisory opinions to the same requester on the same subject.

[110] See 19 U.S.C. 1337(i), which refers only the "article" imported.

The proposed revisions also included the addition of a statement that advisory opinion proceedings are not subject to specified sections of the APA. This last change was proposed to stress that advisory opinion proceedings (1) may be less formal than full investigations under section 337, (2) are limited in scope to advice concerning existing Commission orders, and (3) do not result in a determination of violation of section 337.

The changes proposed in the October 17, 1988, notice are carried over into proposed final rule 210.79.

The ITCTLA argued that advisory opinion proceedings should be delegable to an ALJ, should be subject to the APA, and should be appealable to a court. The Commission believes that neither the interim rules as presently constituted, nor the corresponding proposed final rules, prohibit the Commission from delegating an advisory opinion proceeding to an ALJ. In fact, the Commission has made such a delegation in several cases.

The Commission also has determined that advisory opinion proceedings will not be subject to APA strictures because there is a need to retain flexibility as to how such proceedings are conducted. The Commission notes also that advisory opinions have been held by Federal Circuit to be nonappealable. *Allied Corp.* v. *U.S. Intern. Trade Comm'n*, 850 F.2d 1573, 7 USPQ2d 1303 (Fed. Cir. 1988), *cert. denied*, 109 S.Ct. 791 (1989).

The IEMCA requested that the Commission limit advisory opinion requests to those that are not "presenting general questions of interpretation, or posing hypothetical situations, or regarding the activity or conduct of adverse or third parties." The requester should only be able to request an advisory opinion as to its own conduct, in the IEMCA's opinion. The IEMCA also believes that advisory opinion proceedings should be subject to APA procedures "when appropriate." The IEMCA also requested the rules provide for the publication of advance notice of a forthcoming advisory opinion, in order to give interested persons an opportunity to comment.

The Commission did not find it necessary to add additional criteria to the list in proposed final rule 210.79 on advisory opinions. In particular, the criteria provide for the issuance of an advisory opinion only where a requester has a compelling business need for the advice. When appropriate, the Commission may subject advisory opinion proceedings to APA procedures without a rule that so specifies. Also when appropriate, the Commission publishes notice in the **Federal Register** of the institution of an advisory opinion proceeding, and sees no need to provide for such notice by rule.[111]

Derivation Table

To readily locate the proposed final version of an interim rule, consult the following table.

Interim rule	Proposed final rule
210.1	210.1.
210.2	210.2.
210.4	210.3.
210.5(a)	210.4(a).
210.5(b)	210.4(b) (see also 210.25).
210.5(c)	210.4(c).
210.5(d)	210.4(d).
210.6(a)	210.5(a).
210.6(b)	210.5(b).
	210.5(c).
	210.5(d).
210.7	210.6.
210.8	210.7
210.10	210.8.
210.11	210.9.
210.12	210.10.
210.13	210.11.
210.20	210.12(a)–(g).
	210.12(h).
210.21	210.13.
210.22	210.14(a)–(c).
210.23	210.14(d).
210.24(a)–(d)	210.15.
210.24(e)(1)	210.52.
210.24(e)(2)	210.53(a).
210.24(e)(3)	210.53(b).
210.24(e)(4)	210.54.
210.24(e)(5)	210.55.
210.24(e)(6)	210.56.
210.24(e)(7)	210.57.
210.24(e)(8)	210.58.
210.24(e)(9)	210.59.
210.24(e)(10)	— (see 210.58).
210.24(e)(11)	210.60.
210.24(e)(12)	210.61.
210.24(e)(13)	210.62.
210.24(e)(14)	210.63.
210.24(e)(15)	210.64.
210.24(e)(16)	210.65.
210.24(e)(17)	210.66.
210.24(e)(18)	210.67.
210.25	210.16 and 210.17.
210.26	210.19.
210.30(a), (b), and (d)	210.27(a), (b), and (c).
210.30(d)	— (see 210.61).
	210.27(d) (see also 210.25).
210.31	210.28(a)–(h).
	210.28(i).
210.32	210.29.
210.33	210.30.
210.34	210.31.
210.35	210.32(a)–(e)
	210.32(f)
	210.32(g).
210.36	210.33(a)–(b).
	210.33(c) (see also 210.25).
210.37(a)–(c)	210.34(a)–(c) (see also 210.25)
	210.34(d)
210.40	210.35.
210.41	210.36
210.42	210.37.
210.43	210.38
210.44(a)–(d)	210.39
210.44(e)	210.20
210.50	210.18
210.51(a)–(c)	210.21(a)–(c)
210.51(d)	210.21(d) and 210.4
210.52	210.40.
210.53	210.42.
210.54	210.43 and 210.46(a)
210.55	210.44 and 210.46(a)(5) and (6).
210.56	210.45 and 210.46(a)(5) and (7).
210.57	210.49.
210.58(a)(1)–(4)	210.50(a)(1)–(4)
210.58(b)(1) and (2)	210.50(b)(1) and (2)
210.58(b)(3)	210.68(a).
210.58(b)(4)	210.68(b)
210.58(b)(5)	210.68(c).
210.58(b)(6)	210.68(d).
210.58(b)(7)	210.69(a)–(c)
210.58(b)(8)	210.69(d).
210.58(c)(1)	210.70(a) and (c)
210.58(c)(2)	210.70(b)
210.58(c)(3)	210.70(e)
210.58(c)(4)	210.70(c)
210.58(c)(5)	210.70(d)
210.59(a)	210.22(a) and (b). 210.23, and 210.51(a) and (c).
210.59(b)	210.22(c), 210.23, and 210.51(b) and (c)
210.60	210.47
210.61	210.48
210.70	210.24
210.71	
211.01	210.1
211.10	
211.20	210.21(c)(1)
211.21	210.21(c)(2)
211.22	210.21(c)(3)
211.50(a) and (b)	210.1.
211.50(c)	
211.51	210.71.
211.52	210.72.
211.53	210.73.
211.54	210.79.
211.55	211.74.
211.56	210.75.
211.57	210.76.
211.58	210.77.
211.59	210.78.

[111] Section 337 practitioners may have noticed that there is no proposed final rule based on interim rule 211.10, which deals with informal disposition of possible violations of Commission orders through voluntary compliance. The interim rule corrected certain cross-references which had appeared in the previous rule. In the October 17, 1988, notice of proposed rulemaking, the Commission stated that it intended to delete interim rule 211.10 on the grounds that it was (1) vague in its description of the procedure contemplated, and (2) unnecessary in view of the fact that it has never been used. The Commission decided not to include a proposed final rule based on interim rule 211.10 for the same reasons.

List of Subjects

19 CFR Part 210

Administrative practice and procedure, Advisory opinions, Business and industry, Customs duties and inspection, imports, and investigations, Enforcement, modification, or revocation of exclusion orders, cease and desist orders, or consent orders, Investigations of unfair acts and unfair

methods of competition in U.S. import trade.

19 CFR Part 211

Administrative practice and procedure, Enforcement.

For the reasons set forth in the preamble, the U.S. International Trade Commission proposes to remove part 211 and to revise part 210 of title 19 of the Code of Federal Regulations to read as follows:

SUBCHAPTER C—INVESTIGATIONS OF UNFAIR PRACTICES IN IMPORT TRADE

PART 210—ADJUDICATION AND ENFORCEMENT

Subpart A—Rules of General Applicability

Sec.

Subpart B—Commencement of Preinstitution Proceedings and Investigations

Subpart C—Pleading

Subpart D—Motions

Subpart E—Discovery and Compulsory Process

Subpart F—Prehearing Conferences and Hearings

Subpart G—Determinations and Actions Taken

Subpart H—Temporary Relief

Subpart I—Enforcement Procedures and Advisory Opinions

Authority: 19 U.S.C. 1333, 1335, and 1337, and sections 2 and 1342(d)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107 (1988).

Subpart A—Rules of General Applicability

§ 210.1 Applicability of part.

The rules in this part apply to investigations under section 337 of the Tariff Act of 1930 and related proceedings. These rules are authorized by sections 333, 335, or 337 of the Tariff Act of 1930 (19 U.S.C. 1333, 1335, and 1337) and sections 2 and 1342(d)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988, Public Law No. 100–418, 102 Stat. 1107 (1988).

§ 210.2 General policy.

It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, all investigations and related proceedings under this part shall be conducted expeditiously. The parties, their attorneys or other representatives, and the presiding administrative law judge shall make every effort at each stage of the investigation or related proceeding to avoid delay.

§ 210.3 Definitions.

As used in this part—

Administrative law judge means the person appointed under section 3105 of Title 5 of the United States Code who presides over the taking of evidence in an investigation under this part. If the Commission so orders or a section of this part so provides, an administrative law judge also may preside over stages of a related proceeding under this part.

Commission investigative attorney means a Commission attorney designated to engage in investigatory activities in an investigation or a related proceeding under this part.

Complainant means a person who has filed a complaint with the Commission under this part alleging a violation of section 337 of the Tariff Act of 1930.

Intervenor means a person who has been granted leave by the Commission

to intervene as a party to an investigation or a related proceeding under this part.

Investigation means the stages of a formal Commission inquiry instituted to determine whether there is a violation of section 337 of the Tariff Act of 1930. An investigation is instituted upon publication of a notice in the **Federal Register**. The investigation entails the postinstitution adjudication of the complaint. An investigation can also involve the processing of one or more of the following: A motion to amend the complaint and notice of investigation; a motion for temporary relief; a motion to designate "more complicated" the temporary or the permanent relief stage of the investigation; an interlocutory appeal of an administrative law judge's decision on a particular matter; a motion for sanctions for abuse of process, abuse of discovery, or failure to make or cooperate in discovery that would have an impact on the adjudication of the merits of the complaint; a petition for reconsideration of a final Commission determination; a motion for termination of the investigation in whole or part; and procedures undertaken in response to a judgment or judicial order issued in an appeal of a Commission determination or remedial order issued under section 337. Final termination of an investigation occurs when the Commission issues a nonappealable determination, order, or notice that ends the investigation, when any administrative or judicial review relating to the final Commission action has ended, or when the time for seeking such review has expired.

Party means each complainant, respondent, intervenor, or Commission investigative attorney.

Proposed intervenor means any person who has filed a motion to intervene in an investigation or a related proceeding under this part.

Proposed respondent means any person named in a complaint filed under this part as allegedly violating section 337 of the Tariff Act of 1930.

Related proceeding means preinstitution proceedings, sanction proceedings (for the possible issuance of sanctions that would not have a bearing on the adjudication of the merits of a complaint or a motion under this part), bond forfeiture proceedings, proceedings to enforce, modify, or revoke a remedial or consent order, or advisory opinion proceedings.

Respondent means any person named in a notice of investigation issued under this part as allegedly violating section 337 of the Tariff Act of 1930.

§ 210.4 Written submissions.

(a) *Caption; names of parties.* The front page of every written submission filed by a party or a proposed party to an investigation or a related proceeding under this part shall contain a caption setting forth the name of the Commission, the title of the investigation or related proceeding, the docket number or investigation number, if any, assigned to the investigation or related proceeding, and in the case of a complaint, the names of all proposed respondents.

(b) *Signing of pleadings, motions, and other papers; sanctions.* (1) Every pleading, motion, and other paper of a party or proposed party who is represented by an attorney in an investigation or a related proceeding under this part shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party or proposed party who is not represented by an attorney shall sign, or his duly authorized officer or agent shall sign, the pleading, motion, or other paper, and shall state the address of the party or proposed party on whose behalf the document has been signed. Pleadings, motions, and other papers need not be under oath or accompanied by an affidavit, except as provided in §§ 210.12(a)(1), 210.13(b), 210.18, 210.52(d), 210.59(b), or another section of this part or an order of the administrative law judge or the Commission. The signature of an attorney, or a party or proposed party, or the party's or proposed party's duly authorized officer or agent constitutes certification by the signer that:

(i) He is duly authorized to sign the pleading, motion, or other paper;

(ii) He has read the document;

(iii) To the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(iv) The document is not being filed in whole or in part for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the investigation or related proceeding. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the submitter.

(2) If a pleading, motion, or other written submission is signed in violation of paragraph (b)(1) of this section, the administrative law judge or the Commission, upon motion or sua sponte under § 210.25 of this part, may impose an appropriate sanction upon the person who signed the document, the party or proposed party represented, or both. A written submission need not be frivolous in its entirety in order for the administrative law judge or the Commission to determine that it was signed and filed in violation of paragraph (b)(1) of this section. If any portion of a submission is found to be false, frivolous, misleading, or otherwise in violation of paragraph (b)(1), a sanction may be imposed. In determining whether a submission or a portion thereof was signed and filed in violation of paragraph (b)(1), the administrative law judge or the Commission will consider whether the submission or disputed portion thereof was objectively reasonable under the circumstances.

(3) An appropriate sanction may include an order to pay to the other parties or proposed parties the amount of reasonable expenses incurred, including a reasonable attorney's fee, or a fine in addition to attorneys' fees, to the extent authorized by Rule 11 of the Federal Rules of Civil Procedure. Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

(4) Monetary sanctions imposed to compensate the Commission for expenses incurred by a Commission investigative attorney or the Commission's Office of Unfair Import Investigations will include reimbursement for costs but not attorneys' fees.

(c) *Specifications; filing of documents.* (1)(i) Written submissions that are addressed to the Commission during an investigation or a related proceeding shall comply with § 201.8 of this chapter. The number of copies of the submission that are required to be submitted shall be governed by paragraph (c)(2) of this section. Written submissions may be produced by standard typographic printing or by a duplicating or copying process which produces a clear black image on white paper. If the submission is produced by other than the standard typographical process used by commercial printers, type matter shall not exceed 6 and ½ by 9 and ½ inches using 10-pitch (pica) or larger pitch type or 5 and ½ by 8 and ½ inches using 11-point or larger proportional spacing type, and shall be double-spaced between each line of text using the standard of 6 lines of type per inch. Quotations more than two lines long in the text or footnotes may be indented

and single-spaced. Headings and footnotes may be single-spaced.

(ii) The administrative law judge may impose any specifications he deems appropriate for submissions that are addressed to the administrative law judge.

(2) Unless the Commission or another section of this part specifically states otherwise, the original and 6 true copies of each submission shall be filed while an investigation or a related proceeding is before an administrative law judge, and the original and 14 true copies of each submission shall be filed if the investigation or related proceeding is before the Commission.

(3) Persons who file the following submissions that contain confidential business information covered by an administrative protective order, or that are the subject of a request for confidential treatment, must file nonconfidential copies of such submissions and serve them on the other parties to the investigation or related proceeding within 10 business days after the filing of the confidential version with the Commission:

(i) A complaint and all supplements and exhibits thereto;

(ii) A response to a complaint and all supplements and exhibits thereto;

(iii) All submissions relating to a motion to amend the complaint or notice of investigation;

(iv) The evidentiary record, i.e., the exhibits offered by a party or a proposed party that are accepted as evidence of record; and

(v) All submissions addressed to the Commission. Other sections of this part may require, or the Commission or the administrative law judge may order, the filing and service of nonconfidential copies of other types of confidential submissions as well. If the submitter's ability to prepare a nonconfidential copy is dependent upon receipt of the nonconfidential version of an initial determination, or a Commission order or opinion, or a ruling by the administrative law judge or the Commission as to whether some or all of the information at issue is entitled to confidential treatment, the nonconfidential copies of the submission must be filed within 10 business days after service of the Commission or administrative law judge document in question. The time periods for filing specified in this paragraph apply unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise.

(d) *Service.* Unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise, every written submission filed by a party or proposed party shall be served on all other parties in the manner specified in § 201.16(b) of this chapter.

§ 210.5 Confidential business information.

(a) *Definition and submission.* Confidential business information shall be defined and identified in accordance with § 201.6 (a) and (c) of this chapter. Unless otherwise ordered by the Commission or the administrative law judge, confidential business information shall be submitted in accordance with § 201.6(c) of this chapter.

(b) *Restrictions on disclosure.* Information submitted to the Commission or exchanged among the parties in connection with an investigation or a related proceeding under this part, which is properly designated confidential under paragraph (a) of this section and § 201.6(a) of this chapter, may not be disclosed to anyone other than the following persons without the consent of the submitter:

(1) Persons who are granted access to confidential information under § 201.39(a) or a protective order issued pursuant to § 201.34(a) of this part;

(2) An officer or employee of the Commission who is directly concerned with carrying out or maintaining the records of the investigation or related proceeding for which the information was submitted;

(3) An officer or employee of the United States Government who is directly involved in a review conducted pursuant to section 337(j) of the Tariff Act of 1930; or

(4) An officer or employee of the United States Customs Service who is directly involved in administering an exclusion from entry under section 337(d) or 337(g) of the Tariff Act or an entry under bond under section 337(e) of the Tariff Act resulting from the investigation for which the information was submitted.

(c) *Confidentiality determinations in preinstitution proceedings.* After a complaint is filed under section 337 of the Tariff Act of 1930 and before an investigation is instituted by the Commission, confidential business information designated confidential by the supplier shall be submitted in accordance with § 201.6(b) of this chapter. The Secretary shall decide, in accordance with § 201.6(d), whether the information is entitled to confidential treatment. Appeals from the ruling of the Secretary shall be made to the Commission as set forth in § 201.6 (e) and (f).

(d) *Confidentiality determinations in investigations and other related proceedings.* (1) If an investigation is instituted or if a related proceeding is assigned to an administrative law judge, the administrative law judge shall set the ground rules for the designation, submission, and handling of information designated confidential by the submitter. When requested to do so, the administrative law judge shall decide whether information in a document addressed to the administrative law judge, or to be exchanged among the parties while the administrative law judge is presiding, is entitled to confidential treatment. The administrative law judge shall also decide, with respect to all orders, initial determinations, or other documents issued by the administrative law judge, whether information designated confidential by the supplier is entitled to confidential treatment. The supplier of the information or the person seeking the information may, with leave of the administrative law judge, request an appeal to the Commission of the administrative law judge's unfavorable ruling on this issue, under § 210.21(b)(2).

(2) The Commission may continue protective orders issued by the administrative law judge, amend or revoke those orders, or issue new ones. All submissions addressed to the Commission that contain information covered by an existing protective order will be given confidential treatment. (See also § 210.72 of this part.) New information that is submitted to the Commission, designated confidential by the supplier, and not covered by an existing protective order must be submitted to the Secretary with a request for confidential treatment in accordance with § 201.6(b) and (c). The Secretary shall decide, in accordance with § 201.6(d), whether the information is entitled to confidential treatment. Appeals from the ruling of the Secretary shall be made to the Commission as provided in § 201.6(e) and (f). The Commission shall decide, with respect to all orders, notices, opinions, and other documents issued by or on behalf of the Commission, whether information designated confidential by the supplier is entitled to confidential treatment.

§ 210.6 Computation of time, additional hearings, postponements, continuances, and extensions of time.

Unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise, the computation of time and the granting of additional hearings, postponements, continuances, and extensions of time shall be in accordance with §§ 201.14 and 201.16(d)

of this chapter. Whenever a party has the right or is required to perform some act or to take some action within a prescribed period after service of a document upon it, and the document was served by mail, the deadline shall be computed by adding to the end of the prescribed period the additional time allotted under § 201.16(d), unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise.

§ 210.7 Service of process and other documents.

The service of process and all documents issued by or on behalf of the Commission or the administrative law judge—and the service of all documents issued by parties under §§ 210.27 through 210.34 of this part—shall be in accordance with § 201.16 of this chapter, unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise.

Subpart B—Commencement of Preinstitution Proceedings and Investigations

§ 210.8 Commencement of preinstitution proceedings.

(a) *Upon receipt of complaint.* A preinstitution proceeding is commenced by filing with the Secretary the original and 14 true copies of a complaint, plus one copy for each person named in the complaint as violating section 337 of the Tariff Act of 1930 and one copy for the government of each foreign country of any person or persons so named. If the complainant is seeking temporary relief, one additional copy of the motion for such relief also must be filed for each proposed respondent and for the government of the foreign country of the proposed respondent. The additional copies of the complaint and motion for temporary relief for each proposed respondent and the appropriate foreign government are to be provided notwithstanding the procedures applicable to a motion for temporary relief, which require service of the complaint and motion for temporary relief by the complainant.

(b) *Upon the initiative of the Commission.* The Commission may upon its initiative commence a preinstitution proceeding based upon any alleged violation of section 337 of the Tariff Act of 1930.

§ 210.9 Action of Commission upon receipt of complaint.

Upon receipt of a complaint alleging violation of section 337 of the Tariff Act of 1930, the Commission shall take the following actions:

(a) *Examination of complaint.* The Commission shall examine the complaint for sufficiency and compliance with the applicable sections of this chapter.

(b) *Informal investigatory activity.* The Commission shall identify sources of relevant information, assure itself of the availability thereof, and, if deemed necessary, prepare subpoenas therefore, and give attention to other preliminary matters.

§ 210.10 Institution of investigation.

(a)(1) The Commission shall determine whether the complaint is properly filed and whether an investigation should be instituted on the basis of the complaint. That determination shall be made within 30 days after the complaint is filed, unless—

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

(ii) Additional time is allotted under other sections of this part in connection with the preinstitution processing of a motion by the complainant for temporary relief;

(iii) The complainant requests that the Commission postpone the determination on whether to institute an investigation; or

(iv) The complainant withdraws the complaint.

(2) 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.

(3) If additional time is allotted in connection with the preinstitution processing of a motion by the complainant for temporary relief, the Commission will determine whether to institute an investigation and provisionally accept the motion within 35 days after the filing of the complaint or by a subsequent deadline computed in accordance with § 210.53(a), § 210.54, § 210.55(b), § 210.57, or § 210.58 of this part as applicable.

(4) If the complainant desires to have the Commission postpone making a determination on whether to institute an investigation in response to the complaint, the complainant 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.

(5) The complainant may withdraw the complaint as a matter of right at any time before the Commission votes on whether to institute an investigation. To effect such withdrawal, the complainant must file a written notice with the Commission. If a motion for temporary relief was filed in addition to the complaint, the motion must be withdrawn along with the complaint, and the complainant must serve copies of the notice of withdrawal on all proposed respondents and the embassies that were served with copies of the complaint and motion pursuant to § 210.54 of this part.

(b) An investigation shall be instituted by the publication of a notice in the **Federal Register**. The notice will define the scope of the investigation and may be amended as provided in § 210.14(b) and (c) of this part.

(c) If the Commission determines not to institute an investigation on the basis of the complaint, the complaint shall be dismissed, and the complainant and all proposed respondents will receive written notice of the Commission's action and the reason(s) therefor.

§ 210.11 Service of complaint and notice of investigation.

(a) Notwithstanding the provisions of § 210.54 requiring service of the complaint by the complainant, the Commission, upon institution of an investigation, shall serve copies of the complaint and the notice of investigation (and any accompanying motion for temporary relief) upon the following:

(1) Each respondent;

(2) The U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other agencies and departments as the Commission considers appropriate; and

(3) The U.S. embassy in Washington, DC of the government of each foreign country represented by each respondent.

All respondents named after an investigation has been instituted and the governments of the foreign countries they represent shall be served as soon as possible after the respondents are named.

(b) With leave from the presiding administrative law judge, a party may attempt to effect personal service of the complaint and notice of investigation upon a respondent, if the Secretary's efforts to serve the respondent by certified mail have been unsuccessful. If the party succeeds in serving the respondent by personal service, the party must notify the administrative law judge and file proof of such service with the Secretary.

Subpart C—Pleadings

§ 210.12 The complaint.

(a) *Contents of the complaint.* In addition to conforming with the requirements of § 201.8 of this chapter and §§ 210.4 and 210.5 of this part, the complaint shall—

(1) Be under oath and signed by the complainant or his duly authorized officer, attorney, or agent, with the name, address, and telephone number of the complainant and any such officer, attorney, or agent given on the first page of the complaint;

(2) Include a statement of the facts constituting the alleged unfair methods of competition and unfair acts;

(3) Describe specific instances of alleged unlawful importations or sales, and shall provide the Tariff Schedules of the United States item number(s) for importations occurring prior to January 1, 1989, and the Harmonized Tariff Schedule of the United States item number(s) for importations occurring on or after January 1, 1989;

(4) State the name, address, and nature of the business (when such nature is known) of each person alleged to be violating section 337 of the Tariff Act of 1930;

(5) Include a statement as to whether the alleged unfair methods of competition and unfair acts, or the subject matter thereof, are or have been the subject of any court or agency litigation, and, if so, include a brief summary of such litigation;

(6) (i) If the complaint alleges a violation of section 337 based on infringement of a U.S. patent, or a Federally registered copyright, trademark, or mask work under section 337(a)(1) (B), (C), or (D) of the Tariff Act of 1930, include a description of the relevant domestic industry as defined in section 337(a)(3) that allegedly exists or is in the process of being established, including the relevant operations of any licensees. Relevant information includes but is not limited to:

(A) Significant investment in plant and equipment;

(B) Significant employment of labor or capital; or

(C) Substantial investment in the exploitation of the subject patent, copyright, trademark, or mask work, including engineering, research and development, or licensing; or

(ii) If the complaint alleges a violation of section 337 of the Tariff Act of 1930 based on unfair methods of competition or unfair acts that have the threat or effect of destroying or substantially injuring an industry in the United States or preventing the establishment of such an industry under section 337(a)(1)(A) (i) or (ii), include a description of the domestic industry affected, including the relevant operations of any licensees; or

(iii) If the complaint alleges a violation of section 337 of the Tariff Act of 1930 based on unfair methods of competition or unfair acts that have the threat or effect of restraining or monopolizing trade and commerce in the United States under section 337(a)(1)(A)(iii), include a description of the trade and commerce affected.

(7) Include a description of the complainant's business and its interests in the relevant domestic industry or the trade and commerce described above in paragraph (a)(6) of this section. For every intellectual property based complaint (regardless of the type of intellectual property right involved), include a showing that at least one complainant is the owner or exclusive licensee of the subject property; and

(8) If the alleged violation involves an unfair method of competition or an unfair act other than those listed in paragraph (a)(6)(i) of this section, state a specific theory and provide corroborating data to support the allegation(s) in the complaint concerning the existence of a threat or effect to destroy or substantially injure a domestic industry, to prevent the establishment of a domestic industry, or to restrain or monopolize trade and commerce in the United States. The information that should ordinarily be provided includes the volume and trend of production, sales, and inventories of the involved domestic articles; a description of the facilities and number and type of workers employed in the production of the involved domestic article; profit-and-loss information covering overall operations and operations concerning the involved domestic article; pricing information with respect to the involved domestic article; when available, volume and sales of imports; and other pertinent data.

(9) Include, when a complaint is based upon the infringement of a valid and enforceable U.S. patent—

(i) The identification of each U.S. letters patent and a certified copy thereof (a legible copy of each such patent will suffice for each required copy of the complainant);

(ii) The identification of the ownership of each involved U.S. letters patent and a certified copy of each assignment of each such patent (a legible copy thereof will suffice for each required copy of the complaint);

(iii) The identification of each licensee under each involved U.S. letters patent;

(iv) When known, a list of each foreign patent, each foreign patent application (not already issued as a patent), and each foreign patent application that has been denied corresponding to each involved U.S. letters patent, with an indication of the prosecution status of each such foreign patent application;

(v) A nontechnical description of the invention of each involved U.S. letters patent;

(vi) A reference to the specific claims in each involved U.S. letters patent that allegedly cover the article imported or sold by each person named as violating section 337 of the Tariff Act of 1930, or the process under which such article was produced;

(vii) A showing that each person named as violating section 337 of the Tariff Act of 1930 is importing or selling the article covered by, or produced under, the involved process covered by, the above specific claims of each involved U.S. letters patent. The complainant shall make such showing by appropriate allegations, and when practicable, by a chart that applies an exemplary claim of each involved U.S. letters patent to a representative involved domestic article or process and to a representative involved article of each person named as violating section 337 of the Tariff Act or to the process under which such article was produced; and

(viii) Drawings, photographs, or other visual representations of both the involved domestic article or process and the involved article of each person named as violating section 337 of the Tariff Act of the Tariff Act of 1930, or of the process utilized in producing the imported article, and, when a chart is furnished under paragraph (a)(9)(vii) of this section, the parts of such drawings, photographs, or other visual representations should be labeled so that they can be read in conjunction with such chart; and

(10) Contain a request for relief, and if temporary relief is requested under sections 337(e) or (f) of the Tariff Act of 1930, a motion for such relief shall accompany the complaint as provided in § 210.52(a) or may follow the complaint as provided in § 210.53(a).

(b) *Submissions of articles as exhibits.* At the time the complaint is filed, if practicable, the complainant shall submit both the domestic article and all imported articles that are the subject of the complaint.

(c) *Additional material to accompany each patent-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by, or

produced under a process covered by, the claims of a valid U.S. letters patent the following:

(1) Three copies of each license agreement arising out of each involved U.S. letters patent, except that, to the extent that a standard license agreement is used, three copies of the standard license agreement and a list of the licensees operating under such agreement will suffice;

(2) One certified copy of the U.S. Patent and Trademark Office prosecution history for each involved U.S. letters patent, plus three additional copies thereof; and

(3) Four copies of each patent and applicable pages of each technical reference mentioned in the prosecution history of each involved U.S. letters patent.

(d) *Additional material to accompany each registered trademark-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a Federally registered trademark, one certified copy of the Federal registration and three additional copies, three copies of each license agreement (if any) concerning use of the trademark, except that if a standard license agreement is used, three copies of that agreement and a list of the licensees operating under it will suffice;

(e) *Additional material to accompany each complaint based on a non-Federally registered trademark.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a non-Federally registered trademark the following:

(1) A detailed and specific description of the alleged trademark;

(2) Information concerning prior attempts to register the alleged trademark; and

(3) Information on the status of current attempts to register the alleged trademark.

(f) *Additional material to accompany each copyright-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a copyright one certified copy of the Federal Register and three additional copies, three copies of each license agreement (if any) concerning use of the copyright, except that if a standard license agreement is used, three copies of that agreement and a list of the licensees operating under it will suffice;

(g) *Additional material to accompany each registered mask work-based complaint.* There shall accompany the submission of the original or each complaint based upon the alleged unauthorized importation or sale of a semiconductor chip in a manner that constitutes infringement of a Federally registered mask work, one certified copy of the Federal Register and three additional copies, three copies of each license agreement (if any) concerning use of the mask work, except that if a standard license agreement is used, three copies of that agreement and a list of the licensees operating under it will suffice;

(h) *Duty to supplement complaint.* Complainant shall supplement the complaint prior to institution of an investigation if complainant obtains information upon the basis of which he knows or reasonably should know that a material legal or factual assertion in the complaint is false or misleading.

§ 210.13 The response.

(a) *Time for response.* Except as provided in § 210.59(a) and unless otherwise ordered in the notice of investigation or by the administrative law judge, respondents shall have 20 days from the date of service of the complaint and notice of investigation by the Commission under § 210.11(a) or by a party under § 210.11(b) within which to file a written response to the complaint and the notice of investigation. When the investigation involves a motion for temporary relief and has not been declared "more complicated," the response to the complaint and notice of investigation must be filed along with the response to the motion for temporary relief—i.e., within 10 days after service of the complaint, notice of investigation, and the motion for temporary relief by the Commission under § 210.11(a) or by a party under § 210.11(b). (See § 210.59.)

(b) *Content of the response.* In addition to conforming to the requirements of § 201.8 of this chapter and §§ 210.4 and 210.5 of this part, each response shall be under oath and signed by respondent or his duly authorized officer, attorney, or agent with the name, address, and telephone number of the respondent and any such officer, attorney, or agent given on the first page of the response. Each respondent shall respond to each allegation in the complaint and in the notice of investigation, and shall set forth a concise statement of the facts constituting each ground of defense. There shall be a specific admission, denial, or explanation of each fact alleged in the complaint and notice, or if the respondent is without knowledge of any such fact, a statement to that effect. Allegations of a complaint and notice not thus answered may be deemed to have been admitted. Each response shall include, when available, statistical data on the quantity and value of imports of the involved article. Respondents who are importers must also provide the Harmonized Tariff Schedule item number(s) for importations of the accused imports occurring on or after January 1, 1989, and the Tariff Schedules of the United States item number(s) for importations occurring before January 1, 1989. Each response shall also include a statement concerning the respondent's capacity to produce the subject article and the relative significance of the United States market to its operations. Respondents who are not manufacturing their accused imports shall state the name and address of the supplier(s) of those imports. Affirmative defenses shall be pleaded with as much specificity as possible in the response. When the alleged unfair methods of competition and unfair acts are based upon the claims of a valid U.S. letters patent, the respondent is encouraged to make the following showing when appropriate:

(1) If it is asserted in defense that the article imported or sold by respondents is not covered by, or produced under a process covered by, the claims of each involved U.S. letters patent, a showing of such noncoverage for each involved claim in each U.S. letters patent in question shall be made, which showing may be made appropriate allegations and, when practicable, by a chart that applies that involved claims of each U.S. letters patent in question to a representative involved imported article of the respondent or to the process under which such article was produced;

(2) Drawings, photographs, or other visual representations of the involved imported article of respondent or the process utilized in producing such article, and, when a chart is furnished under paragraph (b)(1) of this section, the parts of such drawings, photographs, or other visual representations, should be labeled so that they can be read in conjunction with such chart; and

(3) If the claims of any involved U.S. letters patent are asserted to be invalid or unenforceable, the basis for such assertion, including, when prior art is relied on, a showing of how the prior art renders each claim invalid or unenforceable and a copy of such prior art. For good cause, the presiding administrative law judge may waive any of the substantive requirements imposed under this paragraph or may impose additional requirements.

(c) *Submission of article as exhibit.* At the time the response is filed, if practicable, the respondent shall submit the accused article imported or sold by that respondent, unless the article has already been submitted by the complainant.

§ 210.14 Amendments to pleadings and notice; supplemental submissions.

(a) *Preinstitution amendments.* The complaint may be amended at any time prior to the institution of the investigation.

(b) *Postinstitution amendments generally.* (1) After an investigation has been instituted, the complaint or notice of investigation may be amended only by leave of the Commission for good cause shown and upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation. A motion for amendment must be made to the presiding administrative law judge. If the proposed amendment of the complaint would require amending the notice of investigation, the presiding administrative law judge may grant the motion only by filing with the Commission an initial determination. All other dispositions of such motions shall be by order.

(2) If disposition of the issues in an investigation on the merits will be facilitated, or for other good cause shown, the presiding administrative law judge may allow appropriate amendments to pleadings other than complaints upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation.

(c) *Postinstitution amendments to conform to evidence.* When issues not raised by the pleadings or notice of investigation, but reasonably within the scope of the pleadings and notice, are considered during the taking of evidence by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings and notice. Such amendments of the pleadings and notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time, and shall be effective with respect to all parties who have expressly or impliedly consented.

(d) *Supplemental submissions.* The administrative law judge may, upon reasonable notice and on such terms as are just, permit service of a supplemental submission setting forth transactions, occurrences, or events that have taken place since the date of the submission sought to be supplemented and that are relevant to any of the issues involved.

Subpart D—Motions

§ 210.15 Motions.

(a) *Presentation and disposition.* (1) During the period between the institution of an investigation and the assignment of the investigation to a presiding administrative law judge, all motions shall be addressed to the chief administrative law judge. During the time that an investigation or related proceeding is before an administrative law judge, all motions therein shall be addressed to the administrative law judge.

(2) When an investigation or related proceeding is before the Commission, all motions shall be addressed to the Chairman of the Commission. A motion to amend the compliant and notice of investigation to name an additional respondent after institution shall be served on the proposed respondent. All motions shall be filed with the Secretary and shall be served upon each party.

(b) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds therefor.

(c) *Responses to motions.* Within 10 days after the service of any written motions, or within such longer or shorter time as may be designated by the administrative law judge or the Commission, a nonmoving party, or in the instance of a motion to amend the compliant or notice of investigation to name an additional respondent after institution, the proposed respondent, shall respond or he may be deemed to have consented to the granting of the relief asked for in the motion. The moving party shall have no right to reply, except as permitted by the administrative law judge or the Commission.

(d) *Motions for extensions.* As a matter of discretion, the administrative law judge or the Commission may waive the requirements of this section as to motions for extension of time, and any rule upon such motions ex parte.

§ 210.16 Default.

(a) *Definition of default.* (1) A party shall be found in default if it fails to respond to the compliant and notice of investigation in the manner prescribed in §§ 210.13 or 210.59(c), or otherwise fails to answer the complaint and notice, and fails to show cause why it should not be found in default.

(2) A party may be found in default as a sanction for abuse of process under § 210.4.9(b) or failure to make or cooperate in discovery under § 210.33(b).

(b) *Procedure for determining default.* (1) If a respondent has failed to respond or appear in the manner described in paragraph (a) of this section, a party may file a motion for, or the administrative law judge may issue upon his own initiative, an order directing that respondent to show cause why it should not be found in default. If the respondent fails to make the necessary showing, the administrative law judge shall issue an initial determination finding the respondent in default an administrative law judge's decision denying a motion for a finding of default under paragraph (a)(1) of this section shall be in the form of an order.

(2) Any party may file a motion for issuance of, or the administrative law judge may issue on his own initiative, an initial determination finding a party in default for abuse of process under § 210.4(b) or failure to make or cooperate in discovery under § 210.33(b). A motion for a finding of default as a sanction for abuse of process or failure to make or cooperate in discovery shall be granted by initial determination or denied by order.

(3) A party found in default shall be deemed to have waived its right to appear, to be served with documents, and to contest the allegations at issue in the investigation.

(c) *Relief against a respondent in default.* (1) After a respondent has been found in default by the Commission, the complainant may file with the Commission a declaration that it is seeking immediate entry of relief against the respondent in default. The facts alleged in the compliant will be presumed to be true with respect to the defaulting respondent. The Commission may issue an exclusion order, a cease and desist order, or both, affecting the defaulting respondent only after considering the effect of such order(s) 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, and concluding that the order(s) should still be issued in light of the aforementioned public interest factors.

(2) In any motion requesting the entry of default or the termination of the investigation with respect to the last remaining respondent in the investigation, the complainant shall declare whether or not it is seeking a general exclusion order. The Commission may issue a general exclusion order pursuant to section 337(g)(2) of the Tariff Act of 1930, regardless of the source or importer of the articles concerned, provided that a

violation of section 337 of the Tariff Act is established by substantial, reliable, and probative evidence, and only after considering the aforementioned public interest factors.

§ 210.17 Failures to act other than the statutory forms of default.

Failures to act other than the defaults listed in § 210.16 of this part may provide a basis for the presiding administrative law judge or the Commission to draw adverse inferences and to issue findings of fact, conclusions of law, determinations (including a determination on violation of section 337 of the Tariff Act of 1930), and orders that are adverse to the party who fails to act. Such failures include, but are not limited to:

(a) Failure to respond to a motion that materially alters the scope of the investigation or a related proceeding;

(b) Failure to respond to a motion for temporary relief pursuant to § 210.59;

(c) Failure to respond to a motion for summary determination under § 210.18;

(d) Failure to appear at a hearing before the administrative law judge after filing a written response to the complaint or motion for temporary relief—or failure to appear at a hearing before the Commission;

(e) Failure to file a brief or other written submission requested by the administrative law judge or the Commission during an investigation or a related proceeding;

(f) Failure to respond to a petition for review of an initial determination, a petition for reconsideration of an initial determination, or an application for interlocutory review of an administrative law judge's order;

(g) Failure to file a brief or other written submission requested by the administrative law judge or the Commission; and

(h) Failure to participate in temporary relief bond forfeiture proceedings under § 210.70.

The presiding administrative law judge or the Commission may take action under this rule sua sponte or in response to the motion of a party.

§ 210.18 Summary determinations.

(a) *Motions for summary determinations.* Any party may move with any necessary supporting affidavits for a summary determination in his favor upon all or any part of the issues to be determined in the investigation. Counsel or other representatives in support of the complaint may so move at any time after 20 days following the date of service of the complaint and notice instituting the investigation. Any other party or a respondent may so move at any time after the date of publication of the notice of investigation in the **Federal Register**. Any such motion by any party in connection with the issue of permanent relief, however, must be filed at least 30 days before the date fixed for any hearing provided for in § 210.36(a)(1). Any motion for summary determination filed in connection with the temporary relief phase of an investigation must be filed on or before the deadline set by the presiding administrative law judge.

(b) *Opposing affidavits; oral argument; time and basis for determination.* Any nonmoving party may file opposing affidavits within 10 days after service of the motion for summary determination. The administrative law judge may, in his discretion or at the request of any party, set the matter for oral argument and call for the submission of briefs or memoranda. The determination sought by the moving party shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.

(c) *Affidavits.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The administrative law judge may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary determination is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of the opposing party's pleading, but the opposing party's response, by affidavits, answers to interrogatories, or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue of fact for the evidentiary hearing under § 210.36(a)(1) or (2). If the opposing party does not so respond, a summary determination, if appropriate, shall be rendered against the opposing party.

(d) *Refusal of application for summary determination; continuances and other orders.* Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the administrative law judge may refuse the application for summary determination, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is appropriate, and a ruling to that effect shall be made a matter of record.

(e) *Order establishing facts.* If on motion under this section a summary determination is not rendered upon the whole case or for all the relief asked and a hearing is necessary, the administrative law judge, by examining the pleadings and the evidence and by interrogating counsel if necessary, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The administrative law judge shall thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the investigations as are warranted. The facts so specified shall be deemed established.

(f) *Order of summary determination.* An order of summary determination shall constitute an initial determination of the administrative law judge.

§ 210.19 Intervention.

Any person desiring to intervene in an investigation or a related proceeding under this part shall make a written motion. The motion shall have attached to it a certificate showing that the motion has been served upon each party to the investigation or related proceeding in the manner described in § 201.16(b) of this chapter. Any party may file a response to the motion in accordance with § 210.15(c), provided that the response is accompanied by a certificate confirming that the response was served on the proposed intervenor and all other parties. The Commission, or the administrative law judge by initial determination, may grant the motion to the extent and upon such terms as may be proper under the circumstances.

§ 210.20 Declassification of confidential information.

(a) Any party may move to declassify documents (or portions thereof) that have been designated confidential by the submitter but that do not satisfy the confidentiality criteria set forth in § 201.6(a). All such motions, whether brought at any time during the investigation or after conclusion of the investigation shall be addressed to and ruled upon by the presiding administrative law judge, or if the

investigation is not before a presiding administrative law judge, by the chief administrative law judge or such administrative law judge as he may designate.

(b) Following issuance of a public version of the initial determination on whether there is a violation of section 337 of the Tariff Act of 1930 or an initial determination that would otherwise terminate the investigation (if adopted by the Commission), the granting of a motion, in whole or part, to declassify information designated confidential shall constitute an initial determination, except as to that information for which no submissions in opposition to declassification have been filed.

§ 210.21 Termination of investigations.

(a) *Motions for termination.* (1) Any party may move at any time prior to the issuance of an initial determination on violation of section 337 of the Tariff Act of 1930 for an order to terminate an investigation in whole or in part as to any or all respondents, on the basis of withdrawal of the complaint or certain allegations contained therein, or for good cause other than the grounds listed in paragraph (a)(2) of this section. The presiding administrative law judge may grant the motion in an initial determination upon such terms and conditions as he deems proper.

(2) Any party may move at any time for an order to terminate an investigation in whole or in part as to any or all respondents on the basis of a settlement, a licensing or other agreement, or a consent order, as provided in paragraphs (b) and (c) of this section.

(b) *Termination by Settlement.* (1) An investigation before the Commission may be terminated as to one or more respondents as provided in paragraph (a)(2) of this section and pursuant to section 337(c) of the Tariff Act of 1930 on the basis of a licensing or other settlement agreement. A motion for termination by settlement shall contain copies of the licensing or other settlement agreement, any supplemental 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.

(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. The Commission shall promptly publish a notice in the **Federal Register** stating that an initial determination has been received, that nonconfidential versions of the initial determination and the agreement are available for inspection in the Office of the Secretary, and that interested persons may submit written comments concerning termination of the respondents in question within 10 days of the date of publication of the notice in the **Federal Register**. An order of termination by settlement need not constitute a determination as to violation of section 337 of the Tariff Act of 1930.

(c) *Termination by entry of consent order.* An investigation before the Commission may be terminated as provided in paragraph (a)(2) of this section and pursuant to section 337(c) of the Tariff Act of 1930 on the basis of a consent order. An order of termination by consent order need not constitute a determination as to violation of section 337.

(1) *Opportunity to submit proposed consent order.* (i) *Prior to institution of an investigation.* Where time, the nature of the proceeding, and the public interest permit, any person being investigated pursuant to section 603 of the Trade Act of 1974 (19 U.S.C. 2482) shall be afforded the opportunity to submit to the Commission a proposal for disposition of the matter under investigation in the form of a consent order stipulation that incorporates a proposed consent order executed by or on behalf of such person and that complies with the requirements of paragraph (c)(3) of this section.

(ii) *Subsequent to institution of an investigation.* In investigations under section 337 of the Tariff Act of 1930, a proposal to terminate by consent order shall be submitted as a motion to the administrative law judge with a stipulation that incorporates a proposed consent order. If the stipulation contains confidential business information within the meaning of § 201.6(a) of this chapter, a copy of the stipulation with such information deleted shall accompany the motion. The stipulation shall comply with the requirements of paragraph (c)(3) of this section. At any time prior to commencement of the hearing, the motion may be filed by one or more respondents, and may be filed jointly with other parties to the investigation. Upon request and for good cause shown, the administrative law judge may consider such a motion during or after a hearing. The filing of the motion shall not stay proceedings before the administrative law judge unless the administrative law judge so orders. The administrative law judge shall promptly file with the Commission an initial determination regarding the motion for termination if the motion is granted. If the initial determination contains confidential business information, a copy of the initial determination with such information deleted shall be filed with the Commission simultaneously with the filing of the confidential version of the initial determination. Pending disposition by the Commission of a consent order stipulation, a party may not, absent good cause shown, withdraw from the stipulation once it has been submitted pursuant to this section.

(2) *Commission disposition of consent order.* (i) If an initial determination granting the motion for termination based on a consent order stipulation is filed with the Commission, the Commission shall promptly serve copies of the nonconfidential version of the initial determination and the consent order stipulation on the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other departments and agencies as the Commission deems appropriate.

(ii) 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 in the manner provided by § 210.50(a)(2) and (4), shall dispose of the initial determination according to the procedures of §§ 210.42 through 210.45. An order of termination by consent order need not constitute a determination as to violation of section 337. The Commission shall publish in the **Federal Register** and serve on all parties notice of its action. Should the Commission reverse the initial determination, the parties are in no way bound by their proposal in later actions before the Commission.

(3) *Contents of consent order stipulation.* (i) *Contents.* (A) Every consent order stipulation shall contain, in addition to the proposed consent order, the following:

(*1*) An admission of all jurisdictional facts;

(2) An express waiver of all rights to seek judicial review or otherwise challenge or contest the validity of the consent order;

(3) A statement that the signatories to the consent order stipulation will cooperate with and will not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of part 210; and

(4) A statement that the enforcement, modification, and revocation of the consent order will be carried out pursuant to subpart I of part 210, incorporating by reference the Commission's Rules of Practice and Procedure.

(B) In the case of an intellectual property-based investigation, the consent order stipulation shall also contain a statement that the consent order shall not apply with respect to any claim by any intellectual property right that has expired or been found or adjudicated invalid or unenforceable by the Commission or a court or agency of competent jurisdiction, provided that such finding or judgment has become final and nonreviewable.

(C) The consent order stipulation may contain a statement that the signing thereof is for settlement purposes only and does not constitute admission by any respondent that an unfair act has been committed.

(ii) *Effect, interpretation, and reporting.* The consent order shall have the same force and effect and may be enforced, modified, or revoked in the same manner as is provided in section 337 of the Tariff Act of 1930 and this part for other Commission actions. The Commission may require periodic compliance reports pursuant to subpart I of this part to be submitted by the person entering into the consent order stipulation.

(d) *Effect of termination.* An order of termination issued by the administrative law judge shall constitute an initial determination.

§ 210.22 Designating an investigation "more complicated".

(a) *Definition.* A "more complicated" investigation is an investigation that is of an involved nature owing to the subject matter, difficulty in obtaining information, the large number of parties involved, or other significant factors.

(b) *Permanent Relief.* Upon motion or sua sponte, the administrative law judge or the Commission may issue an order designating an investigation "more complicated" in order to have up to six months of additional time to adjudicate a complainant's request for permanent relief under section 337 of the Tariff Act of 1930. See § 210.51(a) of this part. The administrative law judge or the Commission shall publish a notice in the **Federal Register** announcing the designation and the reasons for it. If the designation is imposed by the administrative law judge prior to issuance of an initial determination on violation of section 337 of the Tariff Act, any party aggrieved by the designation may file any application for interlocutory review under § 210.24(a)(2) of this part. If the designation is imposed by the administrative law judge in an order issued concurrently with the initial determination on permanent relief, any party may contest the designation in a petition for review, as if the order were an initial determination issued under § 210.42(c) of this part. The extended deadline for concluding the permanent relief phase of an investigation that has been designated "more complicated" under this paragraph shall be computed in the manner specified in § 210.51(c) of this part.

(c) *Temporary relief.* The Commission or the presiding administrative law judge, pursuant to § 210.60 of this part, may declare an investigation "more complicated" in order to have up to 60 days of additional time to adjudicate a motion for temporary relief. See also § 210.51(b). The Commission's or the administrative law judge's reasons for designating the investigation "more complicated" for that purpose shall be published in the **Federal Register.** The extended deadline for concluding an investigation that has been designated "more complicated" under this paragraph shall be computed in the manner specified in § 210.51(c) of this part.

§ 210.23 Suspension of investigation.

Any party may move to suspend an investigation under this part, because of the pendency of proceedings in a court or agency of the United States involving questions concerning the subject matter of the investigation that are similar to the questions being adjudicated by the Commission. The administrative law judge or the Commission also may raise the issue sua sponte. An administrative law judge's decision granting a motion for suspension shall be in the form of an initial determination.

§ 210.24 Interlocutory appeals.

Rulings by the administrative law judge on motions may not be appealed to the Commission prior to the administrative law judge's issuance of an initial determination, except in the following circumstances:

(a) *Appeals without leave of the administrative law judge.* The Commission may in its discretion entertain interlocutory appeals, except as provided in § 210.64, when a ruling of the administrative law judge:

(1) Requires the disclosure of Commission records or requires the appearance of Government officials pursuant to § 210.32(c)(2);

(2) Designates the permanent relief phase of an investigation "more complicated" pursuant to § 210.22(b); or

(3) Denies an application for intervention pursuant to § 210.19.

Appeals from such rulings may be sought by filing an application for review, not to exceed 15 pages, with the Commission within five days after service of the administrative law judge's ruling. An answer to the application for review may be filed within five days after service of the application. The application for review should specify the person or party taking the appeal, designate the ruling or part thereof from which appeal is being taken, and specify the reasons and present arguments as to why review is being sought. The Commission may, upon its own motion, enter an order staying the return date of an order issued by the administrative law judge pursuant to § 210.32(c)(2) or may enter an order placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues that will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

(b) *Appeals with leave of the administrative law judge.*

(1) Except as otherwise provided in paragraph (a) of this section, § 210.64 of this part, and paragraph (b)(2) of this section, applications for review of a ruling by an administrative law judge may be allowed only upon request made to the administrative law judge and upon determination by the administrative law judge in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion, and that either an immediate appeal from the ruling may materially advance the ultimate completion of the investigation or subsequent review will be an inadequate remedy.

(2) Applications for review of a ruling by an administrative law judge under § 210.5(d)(1) of this part as to whether information designated confidential by the supplier is entitled to confidential treatment under § 210.5(b) may be allowed only upon request made to the administrative law judge and upon determination by the administrative law

judge in writing, with justification in support thereof.

(3) Written applications for review under paragraphs (b)(1) or (b)(2) above shall not exceed 15 pages and may be filed within five days after service of the administrative law judge's determination. An answer to the application for review may be filed within five days after service of the application for review. Thereupon, the Commission may, in its discretion, permit an appeal. Unless otherwise ordered by the Commission, Commission review, if permitted, shall be confined to the application for review and answer thereto, without oral argument or further briefs.

(c) *Investigation not stayed.* Application for review under this section shall not stay the investigation before the administrative law judge unless the administrative law judge or the Commission shall so order.

§ 210.25 Sanctions.

(a) Any party may file a motion for sanctions for abuse of process under § 210.4(b), abuse of discovery under § 210.27(d), failure to make or cooperate in discovery under § 210.33(c), or violation of a protective order under § 210.34(c) of this part. The motion should be filed promptly after the allegedly sanctionable conduct is discovered. The presiding administrative law judge (when the case is before him) or the Commission (when the case is before it) also may raise the sanction issue sua sponte.

(b) The motion shall be addressed to the presiding administrative law judge, if the allegedly sanctionable conduct occurred or is discovered while the administrative law judge is presiding. The administrative law judge's ruling on the motion shall be in the form of an order, if it is issued before or concurrently with the initial determination concerning violation of section 337 of the Tariff Act of 1930 or termination of the investigation.

(c) If the motion of sanctions is filed after the administrative law judge has issued an initial determination concerning violation of section 337 of the Tariff Act of 1930 or termination of the investigation—or if the motion is filed after the investigation has been terminated by the Commission—the motion shall be addressed to the Commission. The Commission may assign the motion to an administrative law judge for a recommended determination. The deadlines and procedures that will be followed in processing the recommended determination will be set forth in the Commission order assigning the motion to the administrative law judge.

(d) If an administrative law judge's order concerning sanctions is issued before the initial determination concerning violation of section 337 of the Tariff Act of 1930 or termination of the investigation, it may be appealed under § 210.24(b)(1) of this part with leave from the administrative law judge, if the requirements of that section are satisfied. If the order is issued concurrently with the initial determination, the order may be appealed by filing a petition meeting the requirements of § 210.43(b) of this part. The periods for filing such petitions and responding to the petitions will be specified in the Commission notice issued pursuant to § 210.42(i), if the initial determination has granted a motion for termination of the investigation, or in the Commission notice issued pursuant to § 210.46(a)(5), if initial determination concerns violation of section 337. The Commission will determine whether to adopt the order, after disposition of the initial determination concerning violation of section 337 or termination of the investigation.

(e) If the administrative law judge's ruling on the motion for sanctions is in the form of a recommended determination pursuant to paragraph (c) of this section, the deadlines and procedures for parties to contest the recommended determination will be set forth in the Commission order assigning the motion to the administrative law judge.

(f) If a motion for sanctions is filed with the administrative law judge, he may defer his adjudication of the motion until after he has issued a final initial determination concerning violation of section 337 of the Tariff Act of 1930 or termination of investigation. His ruling on the motion for sanctions must be in the form of a recommended determination and shall be issued no later than 90 days after the issuance of the aforesaid initial determination on violation of section 337 or termination of the investigation. To aid the Commission in determining whether to adopt a recommended determination granting or denying cost or attorney's fee sanctions, any party may file written comments with the Commission 14 days after service of the recommended determination. Replies to such comments may be filed within seven days after service of the comments. The Commission will determine whether to adopt the recommended determination after reviewing the parties' arguments and taking any other steps the Commission deems appropriate.

§ 210.26 Other motions.

Motions pertaining to discovery shall be filed in accordance with § 210.15 and the pertinent provisions of subpart E of this chapter (§§ 210.27 through 210.34). Motions pertaining to evidentiary hearings and prehearing conferences shall be filed in accordance with § 210.15 and the pertinent provisions of subpart F of this chapter (§§ 210.35 through 210.40). Motions for temporary relief shall be filed as provided in subpart H of this chapter (i.e., §§ 210.52 through 210.57).

Subpart E—Discovery and Compulsory Process

§ 210.27 General provisions governing discovery.

(a) *Discovery methods.* The parties to an investigation may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection or other purposes; and requests for admissions.

(b) *Scope of discovery.* Regarding the scope of discovery for the temporary relief phase of an investigation, see § 210.61 of this part. For the permanent relief phase of an investigation, unless otherwise ordered by the administrative law judge, a party may obtain discovery regarding any matter, not privileged, that is relevant to the following:

(1) The claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things;

(2) The identity and location of persons having knowledge of any discoverable matter;

(3) The appropriate remedy for a violation of section 337 of the Tariff Act of 1930 (see § 210.42(a)(1)(ii)(A) of this part); or

(4) The appropriate bond for the respondents, under section 337(j) of the Tariff Act of 1930, during Presidential review of the remedial order (if any) issued by the Commission (see § 210.42(a)(1)(ii)(B) of this part). It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include

information thereafter acquired, except under the following circumstances:

(1) A party is under a duty to seasonably supplement his response with respect to any question directly addressed to—

(i) The identity and location of persons having knowledge of discoverable matters; and

(ii) The identity of each person expected to be called as an expert witness at a hearing, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty to seasonably amend a prior response if he obtains information upon the basis of which—

(i) The party knows that the response was incorrect when made; or

(ii) The party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the administrative law judge, agreement of the parties, or at any time prior to a hearing through new requests for supplemention of prior responses.

(d) *Signing of Discovery Requests, Responses, and Objections.* (1) Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and shall state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, the request, objection, or response is

(i) Consistent with §§ 201.8, 210.4, 210.5, and other relevant provisions of this chapter and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(ii) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(iii) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the submitter, and a party shall not be obligated to take any action with respect to the request, response, or objection until it is signed.

(2) If a request, response, or objection is certified in violation of paragraph (d)(1) of this section, the administrative law judge or the Commission, upon motion or sua sponte under § 210.25 of this party, may impose an appropriate sanction upon the person who made the certification, the party on whose behalf the request, response, or objection was made, or both. A request, response, or objection need not be frivolous in its entirety in order for the administrative law judge or the Commission to determine that it was certified in violation of paragraph (d)(1). If any portion of the document is found to be false, frivolous, misleading, or otherwise in violation of paragraph (d)(1), a sanction may be imposed. In determining whether a request, objection, response, or a portion thereof was certified in violation of this paragraph, the administrative law judge or the Commission will consider whether the document or disputed portion was objectively reasonable under the circumstances.

(3) An appropriate sanction may include an order to pay to the other parties or proposed parties the amount of reasonable expenses incurred because of the violation, including a reasonable attorney's fee, or a fine in addition to attorneys' fees, to the extent authorized by Rule 26(g) of the Federal Rules of Civil Procedure. Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

(4) Monetary sanctions imposed to compensate the Commission for expenses incurred by a Commission investigative attorney or the Commission's Office of Unfair Import Investigations will include reimbursement for costs but not attorneys' fees.

§ 210.28 Depositions.

(a) *When depositions may be taken.* Following publication in the Federal Register of a Commission notice instituting the investigation, any party may take the testimony of any person, including a party, by deposition upon oral examination or written questions. The presiding administrative law judge will determine the permissible dates or deadlines for taking such depositions.

(b) *Persons before whom depositions may be taken.* Depositions may be taken before a person having power to administer oaths by the laws of the United States or of the place where the examination is held.

(c) *Notice of examination.* A party desiring to take the deposition of a person shall give notice in writing to every other party to the investigation. The administrative law judge shall determine the appropriate period for providing such notice. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. A notice may provide for the taking of testimony by telephone, but the administrative law judge may, on motion of any party, require that the deposition be taken in the presence of the deponent. The parties may stipulate in writing, or the administrative law judge may upon motion order, that the testimony at a deposition be recorded by other than stenographic means. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(d) *Taking of deposition.* Each deponent shall be duly sworn, and any adverse party shall have the right to cross-examine. Objections to questions or documents shall be in short form, stating the grounds of objections relied upon. Evidence objected to shall be taken subject to the objections, except that privileged communications and subject matter need not be disclosed. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, after which the deposition shall be subscribed by the deponent (unless the parties by stipulation waive signing on the deponent is ill or cannot be found or refuses to sign) and certified by the person before whom the deposition was taken. If the deposition is not subscribed by the deponent, the person administering the oath shall state on the record such fact and the reason therefor. When a deposition is recorded by stenographic means, the stenographer shall certify on the transcript that the witness was sworn in the stenographer's presence and that the transcript is a true record of the testimony of the witness. When a deposition is recorded by other than stenographic means and is thereafter transcribed, the person transcribing it shall certify that the person heard the witness sworn on the recording and that the transcript is a correct writing of the recording.

Thereafter, that person shall forward one copy to each party who was present or represented at the taking of the deposition. See paragraph (i) of this section concerning the effect of errors and irregularities in depositions.

(e) *Depositions of nonparty officers or employees of the Commission or of other Government agencies.* A party desiring to take the deposition of an officer or employee of the Commission other than the Commission investigative attorney, or of an officer or employee of another Government agency, or to obtain documents or other physical exhibits in the custody, control, and possession of such officer or employee, shall proceed by written motion to the administrative law judge for leave to apply for a subpoena under § 210.32(c). Such a motion shall be granted only upon a showing that the information expected to be obtained thereby is within the scope of discovery permitted by § 210.27(b) or § 210.61 and cannot be obtained without undue hardship by alternative means.

(f) *Service of deposition transcripts on the Commission staff.* The party taking the deposition shall promptly serve one copy of the deposition transcript on the Commission investigative attorney.

(g) *Admissibility of depositions.* The fact that a deposition is taken and filed with the Commission investigative attorney as provided in this section does not constitute a determination that it is admissible in evidence or that it may be used in the investigation. Only such part of a deposition as is received in evidence at a hearing shall constitute a part of the record in such investigation upon which a determination may be based. Objections may be made at the hearing to receiving in evidence any deposition or part thereof for any reason that would require exclusion of the evidence if the witness were then present and testifying.

(h) *Use of depositions.* A deposition may be used as evidence against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness;

(2) The deposition of a party may be used by an adverse party for any purpose;

(3) The deposition of a witness, whether or not a party, may be used by any party for any purposes if the administrative law judge finds—

(i) That the witness is dead; or

(ii) That the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(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.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part that ought in fairness to be considered with the party introduced, and any party may introduce any other parts.

(i) *Effect of errors and irregularities in depositions.*

(1) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving notice.

(2) *As to disqualification of person before whom the deposition is to be taken.* Objection to taking a deposition because of disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to taking of depositions.* (i) Objections to the competency of a witness or the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(ii) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(iii) Objections to the form of written questions submitted under this section are waived unless served in writing upon the party propounding them. The presiding administrative law judge shall set the deadline for service of such objections.

(4) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the person before whom it is taken are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

§ 210.29 Interrogatories.

(a) *Scope; use at hearing.* Any party may serve upon any other party written interrogatories to be answered by the party served. Interrogatories may relate to any matters that can be inquired into under § 210.27(b) or § 210.61, and the answers may be used to the extent permitted by the rules of evidence.

(b) *Procedure.* (1) Interrogatories may be served upon any party after the date of publication in the **Federal Register** of the notice of investigation.

(2) Parties answering interrogatories shall repeat the interrogatories being answered immediately preceding the answers. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within the time specified by the administrative law judge. The party submitting the interrogatories may move for an order under § 210.33(a) with respect to any objection to or other failure to answer an interrogatory.

(3) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or a later time.

(c) *Option to produce records.* When the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it

is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. The specifications provided shall include sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the documents from which the answer may be ascertained.

§ 210.30 Requests for production of documents and things and entry upon land.

(a) *Scope.* Any party may serve on any other party a request: (1) To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained), or to inspect and copy, test, or sample any tangible things that are in the possession, custody, or control of the party upon whom the request is served; or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 210.27(b).

(b) *Procedure.* (1) The request may be served upon any party after the date of publication in the Federal Register of the notice of investigation. The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(2) The party upon whom the request is served shall serve a written response within the time specified by the administrative law judge. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of any item or category, the part shall be specified. The party submitting the request may move for an order under § 210.33(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request.

(c) *Persons not parties.* This section does not preclude issuance of an order against a person not a party to permit entry upon land.

§ 210.31 Requests for admission.

(a) *Form, content, and service of request for admission.* Any party may serve on any other party a written request for admission of the truth of any matters relevant to the investigation and set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been otherwise furnished or are known to be, and in the request are stated as being, in the possession of the other party. Each matter as to which an admission is requested shall be separately set forth. The request may be served upon a party whose complaint is the basis for the investigation after the date of publication in the Federal Register of the notice of investigation. The administrative law judge will determine the period within which a party may serve a request upon other parties.

(b) *Answers and objections to request for admission.* A party answering a request for admission shall repeat the request for admission immediately preceding his answer. The matter may be deemed admitted unless, within the period specified by the administrative law judge, the party to whom the request is directed serves upon the party requesting the admission a sworn written answer or objection addressed to the matter. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter as to which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known to or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter as to which an admission has been requested presents a genuine issue for a hearing may not object to the request on that ground alone; he may deny the matter or set forth reasons why he cannot admit or deny it.

(c) *Sufficiency of answers.* The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of this section, he may order either that the matter is admitted or that an amended answer be served. The administrative law judge may, in lieu of these orders, determine that final disposition of the request be made at a prehearing conference or at a designated time prior to a hearing under this part.

(d) *Effect of admissions; withdrawal or amendment of admission.* Any matter admitted under this section may be conclusively established unless the administrative law judge on motion permits withdrawal or "amendment" of the admission. The administrative law judge may permit withdrawal or amendment when the presentation of the issues of the investigation will be subserved thereby and the party who obtained the admission fails to satisfy the administrative law judge that withdrawal or amendment will prejudice him in maintaining his position on the issue of the investigation. Any admission made by a party under this section is for the purpose of the pending investigation only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding.

§ 210.32 Subpoenas.

(a) *Application for issuance of a subpoena.* (1) *Subpoena ad testificandum.* An application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at a hearing shall be made to the administrative law judge.

(2) *Subpoena duces tecum.* An application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, at a prehearing conference, at a hearing, or under any other circumstances, shall be made in writing to the administrative law judge and shall specify the material to be produced as precisely as possible, showing the general relevancy of the material and

the reasonableness of the scope of the subpoena.

(3) The administrative law judge shall rule on all applications filed under paragraph (a)(1) or (a)(2) of this section and may issue subpoenas when warranted.

(b) *Use of subpoena for discovery.* Subpoenas may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits that constitute or contain evidence relevant to the subject matter involved and that are in the possession, custody, or control of such person.

(c) *Application for subpoenas for nonparty Commission records or personnel or for records and personnel of other Government agencies.*

(1) *Procedure.* An application for issuance of a subpoena requiring the production of nonparty documents, papers, books, physical exhibits, or other material in the records of the Commission, or requiring the production of records or personnel of other Government agencies shall specify as precisely as possible the material to be produced, the nature of the information to be disclosed, or the expected testimony of the official or employee, and shall contain a statement showing the general relevancy of the material, information, or testimony and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony or their substantial equivalent could not be obtained without undue hardship or by alternative means.

(2) *Ruling.* Such applications shall be ruled upon by the administrative law judge, and he may issue such subpoenas when warranted. To the extent that the motion is granted, the administrative law judge shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the official or employee as may appear necessary and appropriate for the protection of the public interest.

(3) *Application for subpoena grounded upon the Freedom of Information Act.* No application for a subpoena for production of documents grounded upon the Freedom of Information Act (5 U.S.C. 552) shall be entertained by the administrative law judge.

(d) *Motion to limit or quash.* Any motion to limit or quash a subpoena shall be filed within such time as the administrative law judge may allow.

(e) *Ex parte rulings on applications for subpoenas.* Applications for the issuance of the subpoenas pursuant to the provisions of this section may be made ex parte, and, if so made, such applications and rulings thereon shall remain ex parte unless otherwise ordered by the administrative law judge.

(f) *Witness Fees.* (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 mileage as are paid witnesses with respect to proceedings in the courts of the United States; provided, that salaried employees of the United States summoned to depose or testify as to matters related to their public employment, irrespective of the party at whose instance they are summoned, shall be paid in accordance with the applicable Federal regulations.

(2) *Responsibility.* The fees and mileage referred to in paragraph (f)(1) of this section shall be paid by the party at whose instance deponents or witnesses appear. Fees due under this paragraph shall be tendered no later than the date for compliance with the subpoena issued under this section. Failure to timely tender fees under this paragraph shall not invalidate any subpoena issued under this section.

(g) *Obtaining judicial enforcement.* In order to obtain judicial enforcement of a subpoena issued under paragraphs (a)(1), (a)(2), or (c)(2) of this section, the administrative law judge shall certify to the Commission, on motion of sua sponte, a request for such enforcement. The request shall be accompanied by copies of relevant papers and a written report from the administrative law judge concerning the purpose, relevance, and reasonableness of the subpoena. The Commission will subsequently issue a notice stating whether it has granted the request and authorized its Office of the General Counsel to seek such enforcement.

§ 210.33 Failure to make or cooperate in discovery; sanctions.

(a) *Motion for order compelling discovery.* A party may apply to the administrative law judge for an order compelling discovery upon reasonable notice to other parties and all persons affected thereby.

(b) *Non-monetary sanctions for failure to comply with an order compelling discovery.* If a party or an officer or agent of a party fails to comply with an order including, but not limited to, an order for the taking of a deposition or the production of documents, an order to answer interrogatories, an order issued pursuant to a request for admissions, or an order to comply with a subpoena, the administrative law judge, for the purpose of permitting resolution of relevant issues and disposition of the investigation without unnecessary delay despite the failure to comply, may take such action in regard thereto as is just, including, but not limited to the following:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely upon testimony by the party, officer, or agent, or documents, or other material in support of his position in the investigation;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken or rule by initial determination that a determination in the investigation be rendered against the party, or both; or

(6) Order any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure.

Any such action may be taken by written or oral order issued in the course of the investigation or by inclusion in the initial determination of the administration law judge. It shall be the duty of the parties to seek, and that of the administrative law judge to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony, documents, or other evidence. If, in the administrative law judge's opinion such relief would not be sufficient, the administrative law judge shall certify to the Commission a request that court enforcement of the subpoena or other discovery order be sought.

(c) *Monetary sanctions for failure to make or cooperate in discovery.* (1) In lieu of or in addition to taking action listed in paragraph (b) of this section, the administrative law judge or the Commission, upon motion or sua sponte under § 210.25 of this part, may impose an appropriate monetary sanction upon a party who fails to make or cooperate with discovery in any manner described

in paragraph (b) of this section or in Rule 37 of the Federal Rules of Civil Procedure, the party's attorney, or both. An appropriate monetary sanction may include an order to pay to the other parties the amount of reasonable expenses incurred, including a reasonable attorney's fee, or a fine in addition to attorneys' fees, to the extent authorized by Rule 37 of the Federal Rules of Civil Procedure. Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

(2) Monetary sanctions imposed to compensate the Commission for expenses incurred by a Commission investigative attorney or the Commission's Office of Unfair Import Investigations will include reimbursement for costs but not attorneys' fees.

§ 210.34 Protective orders.

(a) *Issuance of protective order.* Upon motion by a party or by the person from whom discovery is sought or by the administrative law judge on his own initiative, and for good cause shown, the administrative law judge may make any order that may appear necessary and appropriate for the protection of the public interest or that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the administrative law judge;

(6) That a deposition, after being sealed, be opened only by order of the Commission or the administrative law judge;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Commission or the administrative law judge. If the motion for a protective order is denied, in whole or in part, the Commission or the administrative law judge may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The Commission also may, upon motion or sua sponte, issue protective orders or may continue or amend a protective order issued by the administrative law judge.

(b) *Unauthorized disclosure of information.* If confidential business information submitted in accordance with the terms of a protective order is disclosed to any person other than in a manner authorized by the protective order, the party responsible for the disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of the submitter of the information and the administrative law judge or the Commission, and, without prejudice to other rights and remedies of the submitter of the information, make every effort to prevent further disclosure of such information by the party or the recipient of such information.

(c) *Violation of protective order.* Any individual who has agreed to be bound by the terms of a protective order issued pursuant to paragraph (a) of this section, and who is determined to have violated the terms of the protective order, may be subject to one or more of the following:

(1) An official reprimand by the Commission;

(2) Disqualification from or limitation of further participation in a pending investigation;

(3) Temporary or permanent disqualification from practicing in any capacity before the Commission pursuant to § 201.15(a) of this chapter;

(4) Referral of the facts underlying the violation to the appropriate licensing authority in the jurisdiction in which the individual is licensed to practice;

(5) Sanctions as enumerated in § 210.33(b), or such other action as may be appropriate.

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. The Commission or the administrative law judge shall allow the parties to make written submissions and, if warranted, to present oral argument bearing on the issues of violation of a protective order and sanctions therefor. When the motion is addressed to the administrative law judge, he shall grant or deny a motion for sanctions by issuing an order.

(d) *Reporting requests for confidential business information.* (1) *Reporting Requirement.* Each person subject to protective order issued pursuant to paragraph (a) of this section shall report in writing to the Commission immediately upon learning that confidential business information disclosed to him or her pursuant to the protective order is the subject of a subpoena, court or administrative order (other than an order of a court reviewing a Commission decision), discovery request, agreement, or other written request seeking disclosure, by him or any other person, of that confidential business information to persons who are not, or may not be, permitted access to that information pursuant to either a Commission protective order or § 210.5(b) of this part.

(2) *Sanctions and other actions.* After providing notice and an opportunity to comment, the Commission may impose a sanction upon any person who willfully fails to comply with paragraph (d)(1) of this section, or it may take other action.

Subpart F—Prehearing Conferences and Hearings

§ 210.35 Prehearing conferences.

(a) *When appropriate.* The administrative law judge in any investigation may direct counsel or other representatives for all parties to meet with him for one or more conferences to consider any or all of the following:

(1) Simplification and clarification of the issues;

(2) Scope of the hearing;

(3) Necessity or desirability of amendments to pleadings subject, however, to the provisions of § 210.14;

(4) Stipulations and admissions of either fact or the content and authenticity of documents;

(5) Expedition in the discovery and presentation of evidence including, but not limited to, restriction of the number of expert, economic, or technical witnesses; and

(6) Such other matters as may aid in the orderly and expeditious disposition of the investigation including disclosure of the names of witnesses and the exchange of documents or other physical exhibits that will be introduced in evidence in the course of the hearing.

(b) *Subpoenas.* Prehearing conferences may be convened for the purpose of accepting returns on subpoenas duces tecum issued pursuant to the provisions of § 210.32(a)(2).

(c) *Reporting.* In the discretion of the administrative law judge, prehearing conferences may or may not be stenographically reported and may or may not be public.

(d) *Order.* The administrative law judge may enter in the record an order

that recites the results of the conference. Such order shall include the administrative law judge's rulings upon matters considered at the conference, together with appropriate direction to the parties. The administrative law judge's order shall control the subsequent course of the hearing, unless the administrative law judge modifies the order.

§ 210.36 General provisions for hearings.

(a) *Purpose of hearings.* (1) An opportunity for a hearing shall be provided in each investigation under this part, in accordance with the Administrative Procedure Act. At the hearing, the presiding administrative law judge will take evidence and hear argument for the purpose of determining whether there is a violation of section 337 of the Tariff Act of 1930, and for the purpose of making findings and recommendations, as described in § 210.42(a)(1)(ii), concerning the appropriate remedy and the amount of the bond to be posted by respondents during Presidential review of the Commission's action, under section 337(j) of the Tariff Act.

(2) An opportunity for a hearing in accordance with the Administrative Procedure Act shall also be provided in connection with every motion for temporary relief filed under this part.

(b) *Public hearings.* All hearings in investigations under this part shall be public unless otherwise ordered by the administrative law judge.

(c) *Expedition.* Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place, continuing until completed unless otherwise ordered by the administrative law judge.

(d) *Rights of the parties.* Every hearing under this section shall be conducted in accordance with sections 554 through 556 of the Administrative Procedure Act (5 U.S.C. 554 through 556). Hence, every party shall have the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

(e) *Presiding official.* An administrative law judge shall preside over each hearing unless the Commission shall otherwise order.

§ 210.37 Evidence.

(a) *Burden of Proof.* The proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

(b) *Admissibility.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded as far as practicable.

(c) *Information obtained in investigations.* Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by the Commission investigative attorney when necessary in connection with investigations and may be offered in evidence by the Commission investigative attorney.

(d) *Official notice.* When any decision of the administrative law judge rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

(e) *Objections.* Objections to evidence shall be made in timely fashion and shall briefly state the grounds relied upon. Rulings on all objections shall appear on the record.

(f) *Exceptions.* Formal exception to an adverse ruling is not required.

(g) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the examining party may make a specific offer of what he expects to prove by the answer of the witness, or the administrative law judge may in his discretion receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained with the record so as to be available for consideration by any reviewing authority.

§ 210.38 Record.

(a) *Definition of the record.* The record shall consist of all pleadings, the notice of investigation, motions and responses, and other documents and things properly filed with the Secretary in accordance with § 210.4(b), in addition to all orders, notices, and initial determinations of the administrative law judge, orders and notices of the Commission, hearing and conference transcripts, evidence admitted into the record, and any other items certified into the record by the administrative law judge or the Commission.

(b) *Reporting and transcription.* Hearings shall be reported and transcribed by the official reporter of the Commission under the supervision of the administrative law judge, and the transcript shall be a part of the record.

(c) *Corrections.* Changes in the official transcript may be made only when they involve errors affecting substance. A motion to correct a transcript shall be addressed to the administrative law judge, who may order that the transcript be changed to reflect such corrections as are warranted, after consideration of any objections that may be made. Such corrections shall be made by the official reporter by furnishing substitute typed pages, under the usual certificate of the reporter, for insertion in the transcript. The original uncorrected pages shall be retained in the files of the Commission.

(d) *Certification of record.* The record shall be certified to the Commission by the administrative law judge upon his filing of an initial determination or at such earlier time as the Commission may order.

§ 210.39 In camera treatment of confidential information.

(a) *Definition.* Except as hereinafter provided and consistent with §§ 210.5 and 210.34, confidential documents and testimony made subject to protective orders or orders granting in camera treatment are not made part of the public order and are kept confidential in an in camera record. Only the persons identified in a protective order, persons identified in § 210.5(b), and court personnel concerned with judicial review shall have access to confidential information in the in camera record. The right of the administrative law judge and the Commission to disclose confidential data under a protective order (pursuant to § 210.34) to the extent necessary for the proper disposition of each proceeding is specifically reserved.

(b) *In camera treatment of documents and testimony.* The administrative law judge shall have authority to order documents or oral testimony offered in evidence, whether admitted or rejected, to be placed in camera.

(c) *Part of confidential record.* In camera documents and testimony shall constitute a part of the confidential record of the Commission.

(d) *References to in camera information.* In submitting proposed findings, briefs, or other papers, counsel for all parties shall make an attempt in good faith to refrain from disclosing the specific details of in camera documents and testimony. This shall not preclude references in such proposed findings, briefs, or other papers to such documents or testimony including generalized statements based on their contents. To the extent that counsel consider it necessary to include specific details of in camera data in their presentations, such data shall be incorporated in separate proposed findings, briefs, or other papers marked "Business Confidential," which shall be placed in camera and become a part of the confidential record.

§ 210.40 Proposed findings and conclusions.

At the time a motion for summary determination under § 210.18(a) or a motion for termination under § 210.21(a) is made, or when it is found that a party is in default under § 210.16 (a) or (b), or at the close of the reception of evidence in any hearing held pursuant to this part (except as provided in § 210.63), or within a reasonable time thereafter fixed by the administrative law judge, any party may file proposed findings of fact and conclusions of law, together with reasons therefor. When appropriate, briefs in support of the proposed findings of fact and conclusions of law may be filed with the administrative law judge for his consideration. Such proposals and briefs shall be in writing, shall be served upon all parties in accordance with § 210.4(d), and shall contain adequate references to the record and the authorities on which the submitter is relying.

Subpart G—Determinations and Actions Taken

§ 210.41 Termination of investigation.

Except as provided in § 210.21 (b)(2) and (c) of this part, an order of termination issued by the Commission shall constitute a determination of the Commission under § 210.45(c).

§ 210.42 Initial determinations.

(a)(1) *On issues concerning permanent relief.* (i) Unless otherwise ordered by the Commission, the administrative law judge shall certify the record to the Commission and shall file an initial determination on whether there is a violation of section 337 of the Tariff Act of 1930 within nine months after publication of the notice of investigation in an ordinary case or within 14 months after such publication in a "more complicated" case.

(ii) Unless the Commission orders otherwise, within 14 days after issuance of the initial determination on permanent relief, the administrative law judge shall issue a recommended determination containing findings of fact and recommendations concerning—

(A) The appropriate remedy for any violation that has been found, and

(B) The amount of the bond to be posted by the respondents during Presidential review of Commission action under section 337(j) of the Tariff Act of 1930.

(2) *On certain motions to declassify information.* Following issuance of the public version of an initial determination under paragraph (a)(1)(i) of this section, the decision of an administrative law judge granting a motion to declassify information, in whole or in part, shall be in the form of an initial determination as provided in § 210.20(b) of this part.

(b) *On issues concerning temporary relief or forfeiture of temporary relief bonds.* Certification of the record and the disposition of an initial determination concerning a motion for temporary relief are governed by §§ 210.65 and 210.66 of this part. The disposition of an initial determination concerning possible forfeiture of a complainant's temporary relief bond, in whole or in part, is governed by § 210.70 and paragraph (c) below.

(c) *On other matters.* The administrative law judge shall grant by the following types of motions by issuing an initial determination or shall deny them by issuing an order: a motion to amend the complaint or notice of investigation pursuant to § 210.14(b); a motion for a finding of default pursuant to § 210.16 (a) or (b); a motion for summary determination pursuant to § 210.18(a); a motion for intervention pursuant to § 210.19; a motion for termination pursuant to § 210.21; a motion to suspend an investigation pursuant to § 210.23; or a motion for forfeiture of a complainant's temporary relief bond pursuant to § 210.70.

(d) *Contents.* The initial determination shall include: an opinion stating findings (with specific page references to principal supporting items of evidence in the record) and conclusions and the reasons or bases therefor necessary for the disposition of all material issues of fact, law, or discretion presented in the record; and a statement that, pursuant to § 210.42(h), the initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to § 210.43(a) or § 210.46(a) or the Commission, pursuant to § 210.44 or § 210.46(a)(6), orders on its own motion a review of the initial determination or certain issues therein.

(e) *Notice to and advice from other departments and agencies.* The U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other departments and agencies as the Commission deems appropriate shall be served with a copy of the initial determination. The Commission shall consider comments, limited to issues raised by the record, the initial determination, and the petitions for review, received from such agencies when deciding whether to initiate review or the scope of review. The Commission shall allow such agencies 20 days after the service of an initial determination filed pursuant to § 210.42(a)(1)(i) or 10 days after the service of an initial determination filed pursuant to § 210.42(c) or § 210.66 to submit their comments.

(f) *Initial determination made by the administrative law judge.* An initial determination under this section shall be made and filed by the administrative law judge who presided over the investigation, except when that person is unavailable to the Commission and except as provided in § 210.20(a).

(g) *Reopening of proceedings by the administrative law judge.* At any time prior to the filing of the initial determination, the administrative law judge may reopen the proceedings for the reception of additional evidence.

(h) *Effect.* (1) An initial determination filed pursuant to § 210.42(a)(2) shall become the determination of the Commission 45 days after the date of service of the initial determination, unless the Commission has ordered review of the initial determination or certain issues therein, or by order has changed the effective date of the initial determination.

(2) An initial determination under § 210.42(a)(1)(i) shall be processed in the manner described in § 210.46 of this part. The findings and recommendations made by the administrative law judge pursuant to § 210.42(a)(1)(ii) will be considered by the Commission in reaching determinations on remedy and bonding by the respondents pursuant to § 210.50(a) (1) and (3).

(3) An initial determination filed pursuant to § 210.42(c) shall become the determination of the Commission 30 days after the date of service of the initial determination, except as provided in paragraph (h)(5) of this section and § 210.70(c), unless the Commission, within 30 days after the date of such service shall have ordered review of the initial determination or certain issues therein or by order has changed the effective date of the initial determination.

(4) The disposition of an initial determination granting or denying a motion for temporary relief is governed by the provisions of § 210.66.

(5) The disposition of an initial determination concerning possible forfeiture of a complainant's temporary relief is governed by § 210.70.

(i) *Notice of determination.* A notice stating the Commission's decision on whether to review an initial determination will be issued by the Secretary, served on the parties, and published in the **Federal Register.**

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

(a) *Filing of the petition.* Except as provided elsewhere in this paragraph, any party to an investigation may request Commission review of an initial determination issued under § 210.42(c) or § 210.70(c) by filing a petition with the Secretary. A petition for review of an initial determination issued under § 210.42(c) must be filed within five business days after issuance of the initial determination. A petition for review of an initial determination issued under § 210.70(c) must be filed within 10 days after issuance of the initial determination. A party may not petition for review, however, of any issue as to which the party has been found to be in default. Similarly, a party or proposed respondent who did not file a response to the motion addressed in the initial determination may be deemed to have consented to the relief requested and may not petition for review of the issues raised in the motion.

(b) *Content of the petition.* A petition for review filed under this section shall identify the party seeking review and shall specify the issues upon which review of the initial determination is sought, and shall, with respect to each such issue, specify one or more of the following grounds upon which review is sought:

(1) That a finding or conclusion of material fact is clearly erroneous;

(2) That a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or

(3) That the determination is one affecting Commission policy.

The petition for review must set forth a concise statement of the facts material to the consideration of the stated issues, and must present a concise argument providing the reasons that review by the Commission is necessary or appropriate to resolve an important issue of fact, law, or policy. Any issue not raised in the petition for review will be deemed to have been abandoned and may be disregarded by the Commission in reviewing an initial determination.

(c) *Responses to the petition.* Any party may file a response to a petition for review within five business days after service of the petition—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) *Grant or denial of review.* (1) The Commission shall decide whether to grant, in whole or in part, a petition for review of an initial determination filed pursuant to § 210.70 within 45 days of 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 filed pursuant to § 210.42(c) within 30 days of the service of the initial determination on the parties, or by such other time as the Commission may order.

(2) The Commission shall decide whether to grant a petition for review, based upon the petition and response thereto, without oral argument or further written submissions unless the Commission shall order otherwise. A petition will be granted and review will be ordered if it appears that an error or abuse of the type described in paragraph (b) of this section is present or if the petition raises a policy matter connected with the initial determination, which the Commission thinks is necessary or appropriate to address.

(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. The notice that the Commission has granted the petition for review shall be served by the Secretary 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, and such other departments and agencies as the Commission deems appropriate.

§ 210.44 Commission review on its own motion of initial determinations on matters other than permanent or temporary relief.

Within the time provided in § 210.42(d), the Commission on its own initiative may order review of an initial determination—or certain issues in the initial determination—when at least one of the participating Commissioners votes for ordering review. A self-initiated Commission review of an initial determination will be ordered if it appears that an error or abuse of the kind described in § 210.43(b) is present or the initial determination raises a policy matter which the Commission thinks is necessary or appropriate to address.

§ 210.45 Review of initial determinations on matters other than temporary or permanent relief.

(a) *Briefs and oral argument.* In the event the Commission orders review of an initial determination pertaining to issues other than temporary or permanent relief, the parties may be requested to file briefs on the issues under review at a time and of a size and nature specified in the notice of review. The parties, within the time provided for filing the review briefs, may submit a written request for a hearing to present oral argument before the Commission, which the Commission in its discretion may grant or deny. The Commission shall grant the request when at least one of the participating Commissioners votes in favor of granting the request.

(b) *Scope of review.* Only the issues set forth in the notice of review, and all subsidiary issues therein, will be considered by the Commission.

(c) *Determination on review.* On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge. The Commission may also make any findings or conclusions that in its judgment are proper based on the record in the proceeding.

§ 210.46 Petitions for and sua sponte review of initial determinations and permanent or temporary relief.

(a) *Permanent relief.* Except as provided elsewhere in this section, any party to an investigation may request Commission review of an initial determination issued under § 210.42(a)(1)(i) by filing a petition with the Secretary subject to the following conditions:

(1) *Notice requirement.* A party who intends to seek review of the initial determination must file with the Secretary and serve on all other parties, within 10 days after issuance of the initial determination, notice of the party's intent to seek such review. The issues as to which the party intends to seek review must be articulated in the notice with specificity. The notice also must cite the specific grounds upon which review of each issue is sought, in accordance with § 210.43(b). Only parties who file notices of intent to seek review are permitted to file petitions for review. The petitions of those parties may not include any issue that was not articulated with specificity in the party's notice of intent to seek review. A party also may not petition for review of any issue as to which the party has been found to be in default.

(2) *The petition.* The petition for review must be filed within 15 days after issuance of the initial determination and must comply with the standards articulated in § 210.43(b). Any issue not raised in the petition for

review will be deemed to have been abandoned and may be disregarded by the Commission in reviewing an initial determination.

(3) *Responses to the petition.* Each party may file a response to a petition for review under this section within 25 days after issuance of the initial determination—except that a party who has been found to be default may not file a response to any issue as to which the party has defaulted.

(4) *Reply submissions.* Each party that filed a petition for review under this section may file a reply to each other party's response to the petition, within 30 days after issuance of the initial determination.

(5) *Additional submissions.* After the reply submissions have been filed pursuant to paragraph (a)(4) of this section, the Commission will issue a notice setting deadlines for written submissions from the parties, other federal agencies, and interested members of the public on the issues of remedy, the public interest, and bonding by the respondents. The notice also may require the parties to file briefs on issues chosen by the Commission.

(6) *Sua sponte review.* The Commission shall order review on its own initiative when at least one of the participating Commissioners votes in favor of doing so.

(7) *Commission action on the initial determination.* On or before the deadline prescribed in § 210.51(a) of this part for concluding the investigation, the Commission will issue a notice stating whether the Commission has affirmed, modified, reversed, or set aside the initial determination in whole or in part. The notice will also state the Commission's determinations on the issues of remedy, the public interest, and bonding.

(8) *Service.* The notice, petition for review, responses, reply submissions, and any supplemental briefs filed under this section by a party must be served on the other parties by hand-delivery within standard business hours, if the party being served is represented by local counsel, or by overnight delivery, if the party being served is not represented by local counsel.

(b) *Temporary relief.* Commission action on an initial determination concerning temporary relief is governed by the provisions of § 210.66.

§ 210.47 Petitions for reconsideration.

Within 14 days after service of a Commission determination, any party may file with the Commission a petition for reconsideration of such determination or any action ordered to be taken thereunder, setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the determination or action ordered to be taken thereunder and upon which the petitioner had no opportunity to submit arguments. 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 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.

§ 210.48 Disposition of petitions for reconsideration.

The Commission may affirm, set aside, or modify its determination, including any action ordered by it to be taken thereunder. When appropriate, the Commission may order the administrative law judge to take additional evidence.

§ 210.49 Implementation of Commission action.

(a) *Service of Commission determination upon the parties.* A Commission determination pursuant to § 210.45(c) or a termination on the basis of a licensing or other agreement or a consent order pursuant to § 210.21 (b) or (c), respectively, shall be served upon each party to the investigation.

(b) *Publication and transmittal to the President.* A Commission determination that there is a violation of section 337 of the Tariff Act of 1930 or that there is reason to believe that there is such a violation, together with the action taken relative to such determination, or Commission action taken pursuant to subpart I of this chapter, shall promptly be published in the Federal Register and transmitted to the President, together with the record upon which the determination and the action are based.

(c) *Enforceability of Commission action.* Unless otherwise specified, any Commission action other than an exclusion order or an order directing seizure and forfeiture of articles imported in violation of an outstanding exclusion order shall be enforceable upon receipt by the affected party of notice of such action. Exclusion orders and seizure and forfeiture orders shall be enforceable upon receipt of notice thereof by the Secretary of the Treasury.

(d) *Finality of affirmative Commission action.* If the President does not disapprove the Commission's action within a 60-day period beginning the day after a copy of the Commission's action is delivered to the President, or if the President notifies the Commission before the close of the 60-day period that he approves the Commission's action, such action shall become final the day after the close of the 60-day period or the day the President notifies the Commission of his approval, as the case may be.

(e) *Duration.* Final Commission action shall remain in effect as provided in subpart I of this part.

§ 210.50 Commission action, public interest, and bonding.

(a) During the course of each investigation under this part, the Commission shall—(1) Consider what action (general or limited exclusion of articles from entry or a cease and desist order, or exclusion of articles from entry under bond or a temporary cease and desist order), if any, it should take, and, when appropriate, take such action;

(2) Consult with and seek advice and information from the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other departments and agencies as it considers appropriate, concerning the subject matter of the complaint and the effect its actions (general or limited exclusion of articles from entry or a cease and desist order, or exclusion of articles from entry under bond or a temporary cease and desist order) under section 337 of the Tariff Act of 1930 shall have 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;

(3) Determine the amount of the bond to be posted by a respondent pursuant to section 337(j) of the Tariff Act of 1930 following the issuance of temporary or permanent relief under section 337 (d), (e), (f), or (g), of the Tariff Act taking into account, among other things, the amount that would offset any competitive advantage to the respondent resulting from its alleged unfair methods of competition and unfair acts in the importation or sale of the articles in question.

(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.

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

described in paragraph (a)(4) of this section shall be filed by the deadlines specified in the Commission notice issued pursuant to § 210.46(a)(5) of this part. When the matter under consideration is whether to grant some form of temporary relief, such submissions shall be filed by the deadlines specified in § 210.67(b), unless the Commission orders otherwise. Any submission from a party shall be served upon the other parties in accordance with § 210.4(d). The parties' submissions, as well as any filed by interested persons or other agencies shall be available for public inspection in the Office of the Secretary. The Commission will consider motions for oral argument or, when necessary, a hearing with respect to the subject matter of this section, except that no hearing or oral argument will be permitted in connection with a motion for temporary relief.

(b)(1) With respect to an administrative law judge's ability to take evidence or other information and to hear arguments from the parties and other interested persons on the issues of appropriate Commission action, the public interest, and bonding by the respondents for purposes of an initial determination on temporary relief, see §§ 210.61, 210.62, and 210.66(a) of this part. For purposes of the recommended determination required by § 210.42(a)(1)(ii), an administrative law judge shall take evidence or other information and hear arguments from the parties and other interested persons on the issues of appropriate Commission action and bonding by the respondents. Unless the Commission orders otherwise, and except as provided in paragraph (b)(2) below, an administrative law judge shall not address the issue of the public interest for purposes of an initial determination on permanent relief under § 210.42(a)(1)(i).

(2) Regarding settlements by agreement or consent order under § 210.21 (b) or (c), the parties may file statements regarding the impact of the proposed settlement on the public interest, and the administrative law judge may hear argument, although no discovery may be compelled with respect to issues relating solely to the public interest. Thereafter, the administrative law judge shall consider and make appropriate findings in the initial determination regarding the effect of the proposed settlement on 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.

§ 210.51 Period for concluding an investigation.

(a) *Permanent relief.* The permanent relief phase of each investigation instituted under this part shall be concluded and a final order issued no later than 12 months after the date of publication in the **Federal Register** of the notice instituting the investigation, unless the investigation has been designated "more complicated" pursuant to § 210.22(b) of this part. If that designation has been made, the deadline for concluding the investigation is 18 months after the publication of the notice of investigation.

(b) *Temporary relief.* The temporary relief phase of an investigation shall be concluded and a final order issued no later than 90 days after publication of the notice of investigation in the **Federal Register**, unless the investigation has been designated "more complicated" by the Commission or the presiding administrative law judge pursuant to §§ 210.22(c) or 210.60. If that designation has been made, the temporary relief phase of the investigation shall be concluded and a final order issued no later than 150 days after publication of the notice of investigation in the **Federal Register**.

(c) *Computation of time.* In computing the deadlines imposed in paragraphs (a) and (b) of this section, there shall be excluded any period during which the investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

Subpart H—Temporary Relief

§ 210.52 Motion for temporary relief.

Requests for temporary relief under section 337(e) or (f) of the Tariff Act of 1930 shall be made through a motion filed in accordance with the following provisions.

(a) A complaint requesting temporary relief shall be accompanied by a motion setting forth the complainant's request for such relief. In determining whether to grant temporary relief, the Commission will apply the standards the U.S. Court of Appeals for the Federal Circuit uses in determining whether to affirm lower court decisions granting preliminary injunctions. The motion for temporary relief accordingly must contain a detailed statement of specific facts bearing on the factors the Federal Circuit would consider.

(b) The motion must also contain a detailed statement of facts bearing on:

(1) Whether the complainant should be required to post a bond as a prerequisite to the issuance of temporary relief; and

(2) The appropriate amount of the bond, if the Commission determines that a bond will be required.

(c) The factors the Commission will consider in determining whether to require a bond as a prerequisite to the issuance of temporary relief include the following:

(1) The strength of the complainant's case;

(2) Whether posting a bond would impose an undue hardship on the complainant;

(3) Whether the respondent has responded to the motion for temporary relief (in the time and manner specified in § 210.59 of this part or by order of the Commission or the administrative law judge);

(4) Whether the respondent will be harmed by issuance of the temporary relief sought by the complainant;

(5) Any other legal, equitable, or public interest consideration that is relevant to whether the complainant should be required to post a bond as a condition precedent to obtaining temporary relief, including whether the complainant is likely to use the temporary relief proceedings or the temporary relief order to harass the respondents or form some other improper purpose.

No single factor will be determinative. The Commission's general policy is to favor the posting of a bond in every case. Therefore, a complainant who believes that a bond should not be required has the burden of persuading the Commission.

(d) The following documents and information also shall be filed along with the motion for temporary relief:

(1) A memorandum of points and authorities in support of the motion;

(2) Affidavits executed by persons with knowledge of the facts asserted in the motion; and

(3) All documents, information, and other evidence in complainant's possession that complainant intends to submit in support of the motion.

(e) The complainant must also provide information and documents that will assist the presiding administrative law judge and the Commission in computing the amount of the bond, if a bond is to be required. (A complainant also may file, if it chooses, a draft of the bond it expects to submit if a bond is to be required.) In cases where a domestic industry exists and domestic sales of the product in question have commenced

and have not been de minimus, the amount of the bond is likely to be the amount indicated on the following schedule based on the sales revenues from the domestic product at issue—and, if applicable, licensing royalties from the intellectual property right at issue—as reflected in the complainant's audited annual financial statements for the most recent fiscal year:

Complainant's sales and licensing royalties	Bond amount
Less than $1 million	$10,000
Greater than $1 million but not more than $10 million	$100,000
Greater than $10 million but not more than $50 million	$250,000
Greater than $50 million but not more than $100 million	$500,000
Greater than $100 million	$1,000,000

In cases in which the above schedule applies, the complainant must provide the following documents:

(1) The audited financial statements (or the equivalent thereof, if audited statements do not exist) for the most recently completed fiscal year;

(2) The back-up income statements, work sheets, or other documents showing revenues for the domestic product at issue in the investigation, which are tied to the aggregate revenue listed on the financial statements; and

(3) A certification under oath by the complainant's chief financial officer indicating that the detail provided in the work sheets or other documents tied to the audited financial statements is correct.

The Commission retains the option to require bonds in higher or lower amounts than prescribed under the aforesaid schedule in exceptional cases. In cases in which the aforesaid schedule would not be appropriate, the amount of the bond will be determined on a case-by-case basis. In such cases, the motion for temporary relief should state why the prescribed schedule is not appropriate (with supporting documentation where appropriate). The motion should also state the theory the complainant believes is appropriate for computing the amount of the bond (if the Commission determines to require a bond) and should provide supporting financial and economic data with certification under oath executed by the complainant's chief financial officer attesting to the veracity of the data provided. All complainants who are seeking temporary relief (including complainants who have provided the audited financial statements and back up data listed above in paragraphs (e)(1) and (2) of this section) must be prepared to provide upon short notice any additional financial or economic data requested by the presiding administrative law judge in connection with the issue of bonding and the certification under oath by the complainant's chief financial officer that the information submitted is correct.

(f) If the complaint, the motion for temporary relief, and the supporting documentation contain confidential business information as defined in § 201.6 (a) of this chapter, the complainant must follow the procedure outlined in §§ 210.5(a), 201.6 (a) and (c), and 210.55.

§ 210.53 Motions filed after complaint.

(a) A motion for temporary relief may be filed after the complaint, but must be filed prior to the Commission determination under § 210.10 on whether to institute an investigation. A motion filed after the complaint shall contain the information, documents, and evidence described in § 210.52 of this part and must also make a showing that extraordinary circumstances exist that warrant temporary relief and that the moving party was not aware, and with due diligence could not have been aware, of those circumstances at the time the complaint was filed. When a motion for temporary relief is filed after the complaint but before the Commission has determined whether to institute an investigation based on the complaint, the 35-day period allotted for review of the complaint and informal investigatory activity pursuant to § 210.58 of this part will begin to run anew from the date on which the motion was filed.

(b) A motion for temporary relief may not be filed after an investigation has been instituted.

§ 210.54 Service of the motion by complainant.

Notwithstanding the provisions of § 210.11 regarding service of the complaint and motion for temporary relief by the Commission upon institution of an investigation, on the day the complainant files a complaint and motion for temporary relief with the Commission (see § 201.8(a)), the complainant must serve nonconfidential copies of both documents (as well as nonconfidential copies of all materials or documents attached thereto) on all proposed respondents and on the U.S. embassy in Washington, DC of the countries from which the allegedly unfair imports come. The complaint and motion shall be served by messenger, courier, express mail, or equivalent means. A signed certificate of service must accompany the complaint and motion for temporary relief. If the certificate does not accompany the complaint and the motion, the Secretary shall not accept the complaint or the motion and shall promptly notify the submitter. Actual proof of service on each respondent and embassy (e.g., certified mail return receipts, courier or overnight delivery receipts, or other proof of delivery)—or proof of a serious but unsuccessful effort to make such service—must be filed within 10 days after the filing of the complaint and motion. If the requirements of this section are not satisfied, the Commission may extend its 35-day deadline under § 210.58 for determining whether to provisionally accept the motion for temporary relief and institute an investigation on the basis of the complaint.

§ 210.55 Content of the service copies.

(a) Any purported confidential business information that is deleted from the nonconfidential service copies of the complaint and motion for temporary relief must satisfy the requirements of § 201.6(a) (which defines confidential information for purposes of Commission proceedings). For attachments to the complaint or motion that are confidential in their entirety, the complainant must provide a nonconfidential summary of what each attachment contains. Despite the redaction of confidential material from the complaint and motion for temporary relief, the nonconfidential service copies must contain enough factual information about each element of the violation alleged in the complaint and the motion to enable each proposed respondent to comprehend the allegations against it.

(b) If the Commission determines that the complaint, motion for temporary relief, or any exhibits or attachments thereto contain excessive designations of confidentiality that are not warranted under §§ 210.5(a) and 201.6(a) of this chapter, the Commission may require the complainant to file and serve new nonconfidential versions of the aforesaid submissions and may determine that the 35-day period under § 210.58 of this part for deciding whether to institute an investigation and to provisionally accept the motion for temporary relief for further processing shall begin to run anew from the date the new nonconfidential versions are filed with the Commission and served on the proposed respondents.

§ 210.56 Notice accompanying the service copies.

(a) Each service copy of the complaint and motion for temporary relief shall be

accompanied by a notice containing the following text:

Notice is hereby given that the attached complaint and motion for temporary relief will be filed with the U.S. International Trade Commission in Washington, DC on _____, 19____. The filing of the complaint and motion will not institute an investigation on that date, however, nor will it begin the period for filing responses to the complaint and motion pursuant to 19 CFR 210.13 and 210.59.

Upon receipt of the complaint, the Commission will examine the complaint for sufficiency and compliance with 19 CFR 201.8, 210.4, 210.8, and 210.12. The Commission's Office of Unfair Import Investigations will conduct informal investigatory activity pursuant to 19 CFR 210.9 to identify sources of relevant information and to assure itself of the availability thereof. The motion for temporary relief will be examined for sufficiency and compliance with 19 CFR 201.8, 210.5, 210.52, 210.53(a) (if applicable), 210.54, 210.55, and 210.56, and will be subject to the same type of preliminary investigative activity as the complaint.

The Commission generally will determine whether to institute an investigation on the basis of the complaint and to provisionally accept the motion for temporary relief within 35 days after the complaint and motion are filed or, if the motion is filed after the complaint, within 35 days after the motion is filed—unless the 35-day deadline is extended pursuant to 19 CFR 210.54, 210.55(b), 210.57, or 210.58. If the Commission determines to institute an investigation and provisionally accept the motion, the motion will be assigned to a Commission administrative law judge for issuance of an initial determination in accordance with 19 CFR 210.58 and 210.66. See 19 CFR 210.10, 210.52, and 210.58.

If the Commission determines to conduct an investigation of the complaint and the motion for temporary relief, the investigation will be formally instituted on the date the Commission publishes a notice of investigation in the **Federal Register** pursuant to 19 CFR 210.10. If an investigation is instituted, copies of the complaint, the notice of investigation, the motion for temporary relief, and the Commission's Rules of Practice and Procedure (19 CFR part 210) will be served on each respondent by the Commission pursuant to 19 CFR 210.11(a). Responses to the complaint, the notice of investigation, and the motion for temporary relief must be filed within 10 days after Commission service thereof, in accordance with 19 CFR 201.8, 210.4, 210.13, and 210.59. See also 19 CFR 201.14 and 210.6 regarding computation of the 10-day response period.

If, after reviewing the complaint and motion for temporary relief, the Commission determines not to institute an investigation, the complaint and motion will be dismissed and the Commission will provide written notice of that decision and the reasons therefore to the complainant and all proposed respondents pursuant to 19 CFR 210.10.

For information concerning the filing and processing of the complaint and its treatment, and to ask general questions concerning section 337 practice and procedure, contact the Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., room 401, Washington, DC 20436, telephone 202–205–2558. Such inquiries will be referred to the Commission investigative attorney assigned to the complaint. (See also the Commission's Rules of Practice and Procedure set forth in 19 CFR part 210.)

To learn the date that the Commission will vote on whether to institute an investigation and the publication date of the notice of investigation (if the Commission decides to institute an investigation), contact the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., room 112, Washington, DC 20436, telephone 202–205–2000.

This notice is being provided pursuant to 19 CFR 210.56.

(b) In the event that the complaint and motion for temporary relief are filed after the date specified in the above notice, the complainant must serve a supplementary notice to all proposed respondents and embassies stating the correct filing date. The supplementary notice shall be served by messenger, courier, express mail, or equivalent means. The complainant shall file a certificate of service and a copy of the supplementary notice with the Commission.

§ 210.57 Amendment of the motion.

A motion for temporary relief may be amended at any time prior to the institution of an investigation. All material filed to amend the motion (or the complaint) must be served on all proposed respondents and on the embassies in Washington, DC, of the foreign governments that they represent, in accordance with § 210.54 of this part. If the amendment expands the scope of the motion or changes the complainant's assertions on the issue of whether a bond is to be required as a prerequisite to the issuance of temporary relief or the appropriate amount of the bond, the 35-day period under § 210.58 of this part for determining whether to institute an investigation and provisionally accept the motion for temporary relief shall begin to run anew from the date the amendment is filed with the Commission. A motion for temporary relief may not be amended to expand the scope of the temporary relief inquiry after an investigation is instituted.

§ 210.58 Provisional acceptance of the motion.

The Commission shall determine whether to accept a motion for temporary relief at the same time it determines whether to institute an investigation on the basis of the complaint. That determination shall be made within 35 days after the complaint and motion for temporary relief are filed, unless the 35-day period is restarted pursuant to § 210.54, 210.55, or § 210.57 or exceptional circumstances exist which preclude adherence to the prescribed deadline. (See § 210.10 of this part.) Before the Commission determines whether to provisionally accept a motion for temporary relief, the motion will be examined for sufficiency and compliance with §§ 210.52, 210.53(a) (if applicable), 210.54, 210.55, and 210.56 of this part, as well as §§ 210.8, 210.4. The motion will be subject to the same type of preliminary investigatory activity as the complaint. (See § 210.9(b)). Acceptance of a motion pursuant to this paragraph constitutes provisional acceptance for referral of the motion to the chief administrative law judge, who will assign the motion to a presiding administrative law judge for issuance of an initial determination under § 210.66 of this part. Commission rejection of an insufficient or improperly filed complaint will preclude acceptance of a motion for temporary relief. Commission rejection of a motion for temporary relief will not preclude institution of an investigation of the complaint.

§ 210.59 Responses to the motion and the complaint.

(a) Any party may file a response to a motion for temporary relief. Unless otherwise ordered by the administrative law judge, a response to a motion for temporary relief in an ordinary investigation must be filed not later than 10 days after service of the motion by the Commission. In a "more complicated" investigation, the response shall be due within 20 days after such service, unless otherwise ordered by the presiding administrative law judge.

(b) The response must comply with the requirements of § 210.8 of this chapter, as well as §§ 210.4 and 210.5 of this part, and shall contain the following information:

(1) A statement that sets forth with particularity any objection to the motion for temporary relief;

(2) A statement of specific facts concerning the factors the U.S. Court of Appeals for the Federal Circuit would consider in determining whether to affirm lower court decisions granting or denying preliminary injunctions;

(3) A memorandum of points and authorities in support of the respondent's to the motion;

(4) Affidavits, where possible, executed by persons with knowledge of the facts specified in the response. Each response to the motion must address, to the extent possible, the complainant's assertions regarding whether a bond should be required and the appropriate amount of the bond. Responses to the

motion for temporary relief also may contain counter-proposals concerning the amount of the bond or the manner in which the bond amount should be calculated.

(c) Each response to the motion for temporary relief must also be accompanied by a response to the complaint and notice of investigation. Responses to the complaint and notice of investigation must comply with § 201.8 of this chapter and §§ 210.4, 210.5, and any protective order issued by the administrative law judge under § 210.34.

§ 210.60 Designating an investigation "more complicated" for the purpose of adjudicating a motion for temporary relief.

At the time the Commission determines to institute an investigation and provisionally accepts a motion for temporary relief pursuant to § 210.58 of this part, the Commission may designate the investigation "more complicated" pursuant to § 210.22(c) for the purpose of obtaining up to 60 additional days to adjudicate the motion for temporary relief. In the alternative, after the motion for temporary relief is referred to the administrative law judge for an initial determination under §§ 210.58 and 210.66 of this part, the administrative law judge may issue an order, sua sponte or on motion, designating the investigation "more complicated" for the purpose of obtaining additional time to adjudicate the motion for temporary relief. Such order shall constitute a final determination of the Commission, and notice of the order shall be published in the **Federal Register**. The "more complicated" designation may be conferred by the Commission or the presiding administrative law judge pursuant to this paragraph on the basis of the complexity of the issues raised in the motion for temporary relief or the responses thereto, or for other good cause shown.

§ 210.61 Discovery and compulsory process.

The presiding administrative law judge shall set all discovery deadlines. The administrative law judge's authority to compel discovery includes discovery relating to the following issues:

(a) Any matter relevant to the motion for temporary relief and the responses thereto, including the issues of bonding by the complainant; and

(b) The issues the Commission considers pursuant to sections 337(e)(1), (f)(1), and (j)(3) of the Tariff Act of 1930, *viz.*,

(1) The appropriate form of relief (notwithstanding the form requested in the motion for temporary relief),

(2) Whether the public interest precludes that form of relief, and

(3) The amount of the bond to be posted by the respondents to secure importations or sales of the subject imported merchandise while the temporary relief order is in effect. The administrative law judge may, but is not required to, make findings on the issues specified in sections 337(e)(1), (f)(1), or (j)(3) of the Tariff Act of 1930. Evidence and information obtained through discovery on those issues will be used by the parties and considered by the Commission in the context of the parties' written submissions on remedy, the public interest, and bonding by respondents, which are filed with the Commission pursuant to § 210.67 of this part.

§ 210.62 Evidentiary hearing.

An opportunity for a hearing in accordance with the Administrative Procedure Act and § 210.36 of this part will be provided in connection with every motion for temporary relief. If a hearing is conducted, the presiding administrative law judge may, but is not required to, take evidence concerning the issues of remedy, the public interest, and bonding by respondents under section 337(e)(1), (f)(1), and (j)(3) of the Tariff Act of 1930.

§ 210.63 Proposed findings and conclusions and briefs.

The administrative law judge shall determine whether and, if so, to what extent the parties shall be permitted to file proposed findings of fact, proposed conclusions of law, or briefs under § 210.40 concerning the issues involved in adjudication of the motion for temporary relief.

§ 210.64 Interlocutory appeals.

There will be no interlocutory appeals to the Commission (under § 210.24 of this part) on any matter connected with a motion for temporary relief that is decided by an administrative law judge prior to the issuance of the initial determination on the motion for temporary relief.

§ 210.65 Certification of the record.

When the administrative law judge issues an initial determination concerning temporary relief pursuant to § 210.66, he shall also certify to the Commission the record upon which the initial determination is based.

§ 210.66 Initial determination concerning temporary relief and Commission action thereon.

(a) On or before the 70th day after publication of the notice of investigation in an ordinary investigation, or on or before the 120th day after such publication in a "more complication" investigation, the administrative law judge will issue an initial determination concerning the issues listed in §§ 210.52 and 210.59 of this part. If the 70th day or the 120th day is a Saturday, Sunday, or Federal holiday, the initial determination must be received in the Office of the Secretary no later than 12:00 noon on the first business day after the 70-day or 120-day deadline. The initial determination may, but is not required to, address the issues of remedy, the public interest, and bonding by the respondents pursuant under sections 337 (e)(2), (f)(2), and (j)(3) of the Tariff Act of 1930 and § 210.50(a) (1) through (3) of this part.

(b) If the initial determination on temporary relief is issued on the 70-day or 120-day deadline imposed in paragraph (a) of this section, the initial determination will become the Commission's determination 20 calendar days after issuance thereof in an ordinary case, and 30 calendar days after issuance in a "more complicated" investigation, unless the Commission modifies, reverses, or sets aside the initial determination in whole or part within that period. But if the initial determination on temporary relief is issued before the 70-day or 120-day deadline imposed in paragraph (a) of this section, the Commission will add the extra time to the 20-day or 30-day deadline to which it would otherwise have been held. In computing the deadlines imposed by this paragraph, intermediary Saturdays, Sundays, and Federal holidays shall be included. If the last day of the period is a Saturday, Sunday, or Federal holiday as defined in § 201.14(a) of this chapter, the effective date of the initial determination shall be extended to the next business day.

(c) The Commission will not modify, reverse, or set aside an initial determination concerning temporary relief unless the Commission finds that a finding of material fact is clearly erroneous, that the initial determination contains an error of law, or that there is a policy matter warranting discussion by the Commission. All parties may file written comments concerning any clear error of material fact, error of law, or policy matter warranting such action by the Commission. Such comments must be limited to 35 pages in an ordinary investigation and 45 pages in a "more complicated" investigation. The comments must be filed no later than seven calendar days after issuance of the initial determination in an ordinary case and 10 calendar days after issuance of the initial determination in a

"more complicated" investigation. In computing the aforesaid 7-day and 10-day deadlines, intermediary Saturdays, Sundays, and Federal holidays shall be included. If the initial determination is issued on a Friday, however, the filing deadline for comments shall be measured from the first business day after issuance. If the last day of the filing period is a Saturday, Sunday, or Federal holiday as defined in § 201.14(a) of this chapter, the filing deadline shall be extended to the next business day. The parties shall serve their comments on other parties by messenger, courier, express mail, or equivalent means.

(d) Nonconfidential copies of the initial determination also will be served on other agencies listed in § 210.50(a)(2) of this part. Those agencies will be given 10 calendar days to file comments on the initial determination.

(e)(1) Each party may file a response to each set of comments filed by another party. All such reply comments must be filed within 10 calendar days after issuance of the initial determination in an ordinary case and with in 14 calendar days after issuance of the initial determination in an ordinary case and within 14 calendar days after issuance of an initial determination in a "more complicated" investigation. The deadlines for filing reply comments shall be computed in the manner described in paragraph (c) of this section, except that in no case shall a party have less than two calendar days to file reply comments.

(2) Each set of reply comments will be limited to 20 pages in an ordinary investigation and 30 pages in a "more complicated" case.

(f) If the Commission determines to modify, reverse, or set aside the initial determination, the Commission will issue a notice and, if appropriate, a Commission opinion. If the Commission does not modify, reverse, or set aside the administrative law judge's initial determination within the time provided under paragraph (b) of this section, the initial determination will automatically become the determination of the Commission. Notice of the Commission's determination concerning the initial determination will be issued on the statutory deadline for determining whether to grant temporary relief or as soon as possible thereafter, will be published in the **Federal Register**, and will be served on the parties. If the Commission determines (either by reversing or modifying the administrative law judge's initial determination, or by adopting the initial determination) that the complainant must post a bond as a prerequisite to the issuance of temporary relief, the Commission may issue a supplemental notice setting forth conditions for the bond if any (in addition to those outlined in the initial determination) and the deadline for filing the bond with the Commission.

§ 210.67 Remedy, the public interest, and bonding by respondents.

The procedure for arriving at the Commission's determination of the issues of the appropriate form of temporary relief, whether the public interest factors enumerated in the statute preclude such relief, and the amount of the bond under which respondents' merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission, is as follows:

(a) While the motion for temporary relief is before the administrative law judge, he may compel discovery on matters relating to remedy, the public interest, and bonding by respondents (as provided in § 210.61 of this part). The administrative law judge also is authorized to make findings pertaining to the public interest, as provided in § 210.66 of this part. Such findings may be superseded, however, by Commission findings on that issue as provided in paragraph (c) of this section.

(b) On the 65th day after institution in an ordinary case or on the 110th day after institution in a "more complicated" investigation, all parties shall file written submissions with the Commission addressing those issues. The submissions shall refer to information and evidence already on the record, but additional information and evidence germane to the issues of appropriate relief, the statutory public interest factors, and bonding by respondents may be provided along with the parties' submissions. Pursuant to § 210.50(a)(4) of this part, interested persons may also file written comments, on the aforesaid dates, concerning the issues of remedy, the public interest, and bonding by the respondents.

(c) On or before the 90-day or 150-day statutory deadline for determining whether to order temporary relief under section 337(b) of the Tariff Act of 1930, the Commission will determine what relief is appropriate in light of any violation that appears to exist, whether the public interest factors enumerated in the statute preclude the issuance of such relief, and the amount of the bond under which the respondents' merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission. In the event that Commission's findings on the public interest pursuant to this paragraph are inconsistent with findings made by the administrative law judge in the initial determination pursuant to § 210.66 of this part, the Commission's findings are controlling.

§ 210.68 Complainant's temporary relief bond.

(a) In every investigation under this part involving a motion for temporary relief, the question of whether the complainant shall be required to post a bond as a prerequisite to the issuance of such relief shall be addressed by the presiding administrative law judge and the Commission in the manner described in §§ 210.52, 210.59, 210.61, 210.62, and 210.66. If the Commission determines that a bond should be required, the bond may consist of one or more of the following:

(1) The surety bond of a surety or guarantee corporation that is licensed to do business with the United States in accordance with 31 U.S.C. 9304–9306 and 31 CFR parts 223 and 224;

(2) The surety bond of an individual, a trust, an estate, or a partnership, or a corporation pursuant to 31 U.S.C. 9301 and 9303(c), whose solvency and financial responsibility will be investigated and verified by the Commission; or

(3) A certified check, a bank draft, a post office money order, cash, a United States bond, a Treasury note, or other Government obligation within the meaning of 31 U.S.C. 9301 and 31 CFR part 225, which are owned by the complainant and tendered in lieu of a surety bond, pursuant to 31 U.S.C. 9303(c) and 31 CFR part 225.

The same restrictions and requirements applicable to individual and corporate sureties on Customs bonds, which are set forth in 19 CFR part 113, shall apply with respect to sureties on bonds filed with the Commission by complainants as a prerequisite to a temporary relief under section 337 of the Tariff Act of 1930. If the surety is an individual, the individual must file an affidavit of the type shown in Appendix A to § 210.68. Unless otherwise ordered by the Commission, while the bond of the individual surety is in effect, an updated affidavit must be filed every four months (computed from the date on which the bond was approved by the Secretary or the Commission).

(b) The bond and accompanying documentation must be submitted to the Commission within the time specified in the Commission notice, order, determination, or opinion requiring the posting of a bond, or within such other time as the Commission may order. If

the bond is not submitted within the specified period (and an extension of time has not been granted), temporary relief will not be issued.

(c) The corporate or individual surety on a bond or the person posting a certified check, a bank draft, a post office money order, cash, a United States bond, a Treasury note, or other Government obligation in lieu of a surety bond must provide the following information on the face of the bond or in the instrument authorizing the Government to collect or sell the bond, certified check, bank draft, post office money order, cash, United States bond, Treasury note, or other Government obligation in response to a Commission order requiring forfeiture of the bond pursuant to paragraph (c) of this section:

(1) The investigation caption and docket number;

(2) The names, addresses, and seals (if appropriate) of the principal, the surety, the obligee, as well as the "attorney in fact" and the registered process agent (if applicable) (see Customs Service regulations 19 CFR part 113 and Treasury Department regulations in 31 CFR parts 223, 224, and 225);

(3) The terms and conditions of the bond obligation, including the reason the bond is being posted, the amount of the bond, the effective date and duration of the bond (as prescribed by the Commission order, notice, determination, or opinion requiring the complainant to post a bond); and

(4) A section at the bottom of the bond or other instrument for the date and authorized signature of the Secretary to reflect Commission approval of the bond.

(d) Complainants who wish to post a certified check, a bank draft, a post office money order, cash, a United States bond, a Treasury note, or other Government obligation in lieu of a surety bond must notify the Commission in writing immediately upon receipt of the Commission document requiring the posting of a bond, and must contact the Secretary to make arrangements for Commission receipt, handling, management, and deposit of the certified check, bank draft, post office money order, or cash in accordance with 31 U.S.C. 9303, 31 CFR parts 202, 206, 225, and 240 and other governing Treasury regulations and circular(s). If required by the governing Treasury regulations and circular, a certified check, a bank draft, a post office money order, cash, a United States bond, a Treasury note, or other government obligation tendered in lieu of a surety bond may have to be collateralized. See, e.g., 31 CFR 202.6 and the appropriate Treasury Circular.

Appendix A to § 210.68 Affidavit by Individual Surety

United States International Trade Commission Affidavit by Individual Surety 19 CFR 210.68

State of _____

County _____

SS: _____

I, the undersigned, being duly sworn, depose and say that I am a citizen of the United States, and of full age and legally competent; that I am not a partner in any business of the principal on the bond or bonds on which I appear as surety; that the information herein below furnished is true and complete to the best of my knowledge. This affidavit is made to induce the United States International Trade Commission to accept me as surety on the bond(s) filed or to be filed with the United States International Trade Commission pursuant to 19 CFR 210.58. I agree to notify the Commission of any transfer or change in any of the assets herein enumerated.

1. NAME (First, Middle, Last)

2. Home Address

3. Type and Duration of Occupation

4. Name of Employer (If Self-Employed, So State)

5. Business Address

7. Telephone No.

Home _____

Business _____

7. The following is a true representation of my assets, liabilities, and net worth and does not include any financial interest I have in the assets of the principal on the bond[s] on which I appear as surety.

a. Fair value of solely owned real estate*	$
b. All mortgages or other encumbrances on the real estate included in Line a	
c. Real estate equity (subtract line b from Line a)	
d. Fair value of all solely owned property other than real estate	
e. Total of the amounts on lines c and d	
f. All other liabilities owing or incurred not included in Line b	
g. Net worth (subtract Line f from Line e)	

*Do not include property exempt from execution and sale for any reason. Surety's interest in community property may be included if not so exempt.

8. Location and Description of Real Estate of Which I am Sole Owner, the Value of Which is Included in Line (a), Item 7 Above [1]

Amount of assessed value of above real estate for taxation purposes:

9. Description of Property Included in Line (d), Item 7 Above (List the value of each category of property separately) [2]

10. All Other Bonds on Which I am Surety (State character and amount of each bond; if none, so state) [3]

11. Signature

12. Bond and Commission Investigation to Which This Affidavit Relates

Subscribed and Sworn to Before me as Follows:

Date Oath Administered

Month _____

Day _____

Year _____

City State (Or Other Jurisdiction)

Name & Title of Official Administering Oath

Signature

My Commission Expires

Instructions

1. Here describe the property by giving the number of the lot and square or block, and addition or subdivision, if in a city, and, if in the country after showing state, county, and township, locate the property by metes and bounds, or by part of section, township, and range, so that it may be identified.

2. Here describe the property by name so that it can be identified—for example "Fifteen shares of the stock of the National Metropolitan Bank, New York City," or "Am. T. & T. s. f. 5's 60".

3. Here state what other bonds the affiant has already signed as surety, giving the name and address of the principal, the date, and the amount and character of the bond.

§ 210.69 Approval of complainant's temporary relief bond.

(a) In accordance with 31 U.S.C. 9304(b), all bonds posted by complainants must be approved by the Commission before the temporary relief sought by the complainant will be issued. See 31 U.S.C. 9303(a) and 9304(b) and 31 CFR 225.1 and 225.20. The Commission's "bond approval officer" within the meaning of 31 CFR 225.1 and 225.20 shall be the Secretary.

(b) The bond approval process will entail investigation by the Secretary or the Commission's Office of Investigations to determine the veracity of all factual information set forth in the bond and the accompanying documentation (e.g., powers of attorney), as well as any additional verification required by 31 CFR parts 223, 224, or 225. The Secretary may reject a bond on one or more of the following grounds:

(1) Failure to comply with the instructions in the Commission determination, order, or notice directing the complainant to post a bond;

(2) Failure of the surety or the bond to provide information or supporting documentation required by the Commission, the Secretary, § 210.68 (c) or (d) of this part, 31 U.S.C. 9304, 31 CFR parts 223 or 224, or governing Treasury circulars or because of a limitation prescribed in a governing statute, regulation, or circular;

(3) Failure of an individual surety to execute and file with the bond, an affidavit of the type shown in Appendix A to § 210.68, which corresponds to Customs Form 3579 (19 CFR 113.35) and sets forth information about the surety's assets, liabilities, net worth, real estate and other property of which the initial surety is the sole owner, other bonds on which the individual surety is a surety (and which must be updated at 4-month intervals while the bond is in effect, measured from the date on which the bond is approved by the Secretary on behalf of the Commission or by the Commission);

(4) Any question about the solvency or financial responsibility of the surety, or any question of fraud, misrepresentation, or perjury which comes to light as a result of the verification inquiry during the bond approval process; and

(5) Any other reason deemed appropriate by the Secretary.

(c) If the complainant believes that the Secretary's rejection of the bond was erroneous as a matter of law, the complainant may appeal the Secretary's rejection of the bond by filing a petition with the Commission in the form of a letter to the Chairman, within 10 days after service of the rejection letter.

(d) After the bond is approved and temporary relief is issued, if any question concerning the continued solvency of the individual or the legality or enforceability of the bond or undertaking develops, the Commission may take the following action(s), sua sponte or on motion:

(1) Revoke the Commission approval of the bond and require complainant to post a new bond; or

(2) Revoke or vacate the temporary remedial order for public interest reasons or changed conditions of law or fact (criteria that are the basis for modification or rescission of final Commission action pursuant to § 210.76(a)(1) of this chapter); or

(3) Notify the Treasury Department if the problem involves a corporate surety licensed to do business with the United States under 31 U.S.C. 9303–9306 and 31 CFR parts 223 and 224; or

(4) Refer the matter to the U.S. Department of Justice if there is a suggestion of fraud, perjury, or related conduct.

§ 210.70 Forfeiture of complainant's temporary relief bond.

(a) If the Commission determines that one or more of the respondents whose merchandise was covered by the temporary relief order has not violated section 337 of the Tariff Act of 1930 to the extent alleged in the motion for temporary relief and provided for in the temporary relief order, proceedings to determine whether the complainant's bond should be forfeited in whole or part may be initiated upon the filing of a motion by a respondent or the Commission investigative attorney. Alternatively, such proceedings may be initiated by the Commission on its own initiative. A motion by a respondent or the Commission investigative attorney should be filed within 30 days after the service of the aforesaid Commission determination on violation.

(b) The complainant and any nonmoving party may file a response to the motion within 15 days after service of the motion, unless otherwise ordered by the presiding administrative law judge.

(c) A motion for forfeiture of a complainant's temporary relief bond in whole or part will be adjudicated by the administrative law judge in an initial determination with a 45-day effective date, which shall be subject to review under the provisions of §§ 210.42 through 210.45 of this part. In determining whether to grant the motion, the administrative law judge and the Commission will consider the following factors:

(1) The extent to which the Commission has determined that section 337 of the Tariff Act of 1930 has not been violated;

(2) Whether the complainant's filing of the motion for temporary relief (or the portions thereof corresponding to the portions of the complaint that failed on the merits) was justified under the standard of conduct articulated in § 210.4(b) of this part;

(3) Whether forfeiture would be consistent with the legislative intent of the forfeiture authority (which is to provide a "disincentive" to the abuse of temporary relief by complainants);

(4) Whether forfeiture would be in the public interest; and

(5) Any other legal, equitable, or policy considerations that are relevant to the issue of forfeiture.

(d) Motions to stay forfeiture proceedings or the effective date of a forfeiture order pending the outcome of judicial review of the violation determination will not be granted. If the negative violation determination supporting the forfeiture order is reversed on judicial review, the complainant may file, within 60 days after the judgment or judicial order becomes final, a petition with the Commission requesting a refund of the amount of the bond forfeited to the U.S. Treasury (if any). The other parties to the investigation may file responses to the forfeiture refund petition within 10 days after service of the petition. If the Commission determines in response to the complainant's petition or sua sponte that the bond amount forfeited to the Treasury should be refunded in whole or in part, the Commission shall issue an order directing that the appropriate sum be refunded as expeditiously as possible in accordance with the governing Treasury procedures and regulations.

(e) If the investigation is terminated on the basis of a settlement agreement or a consent order with no concurrent determination concerning the violation of section 337 of the Tariff Act of 1930, forfeiture of the complainant's bond will not be ordered.

Subpart I—Enforcement Procedures and Advisory Opinions

§ 210.71 Information gathering.

(a) *Power to require information.* Whenever the Commission issues an exclusion order, cease and desist order, or consent order, it may require any person to report facts available to that person that will aid the Commission in determining whether and to what extent there is compliance with the order or whether and to what extent the conditions that led to the order are changed. The Commission may also include provisions that exercise any other information-gathering power available to it by law. The Commission may at any time request the cooperation of any person or agency in supplying it with information that will aid it in these determinations.

(b) *Form and detail of reports.* Reports under paragraph (a) of this section are

to be in writing, under oath, and in such detail and in such form as the Commission prescribes.

(c) *Power to enforce informational requirements.* Terms and conditions of exclusion orders, cease and desist orders, and consent orders for reporting and information gathering shall be enforceable by the Commission by a civil action under 19 U.S.C. 1333, or, at the Commission's discretion, in the same manner as any other provision of the exclusion order, cease and desist order, or consent order is enforced.

(d) *Term of reporting requirement.* An exclusion order, cease and desist order, or consent order may provide for the frequency of reporting or information gathering and the date on which these activities are to terminate. If no date for termination is provided, reporting and information gathering shall terminate when the exclusion order, cease and desist order, or consent order or any amendment to it expires by its own terms or is terminated.

§ 210.72 Confidentiality of information.

Confidential information (as defined in § 201.6 of this chapter) that is provided to the Commission pursuant to exclusion order, cease and desist order, or consent order will be received by the Commission in confidence. Requests for confidential treatment shall comply with § 201.6 of this chapter. The restrictions on disclosure and the procedures for handling such information (which are set out in §§ 210.5 and 210.39 of this chapter) shall apply and, in a proceeding under §§ 210.75 or 210.76, the Commission or the presiding administrative law judge may, upon motion or sua sponte, issue or continue appropriate protective orders.

§ 210.73 Review of reports.

(a) *Review to insure compliance.* The Commission, through the Office of Unfair Import Investigations, will review reports submitted pursuant to any exclusion order, cease and desist order, or consent order and conduct such further investigation as it deems necessary to insure compliance with its orders.

(b) *Extension of time.* The Director of the Office of Unfair Import Investigations may, for good cause shown, extend the time in which reports required by exclusion orders, cease and desist orders, and consent orders may be filed. An extension of time within which a report may be filed, or the filing of a report that does not evidence full compliance with the order, does not in any circumstances suspend or relieve a respondent from its obligation under the law with respect to compliance with such order.

§ 210.74 Modification of reporting requirements.

(a) *Exclusion and cease and desist orders.* The Commission may modify reporting requirements of exclusion and cease and desist orders as necessary:

(1) To assure compliance with an outstanding exclusion order or cease and desist order;

(2) To take account of changed circumstances; or

(3) To minimize the burden of reporting or informational access.

An order to modify reporting requirements shall identify the reports involved and state the reason or reasons for modification. No reporting requirement will be suspended during the pendency of such a modification unless the Commission so orders. The Commission may, if the public interest warrants, announce that a modification of reporting is under consideration and ask for comment, but it may also modify any reporting requirement at any time without notice, consistent with the standards of this section.

(b) *Consent orders.* Consistent with the standards set forth in paragraph (a) of this section, the Commission may modify reporting requirements of consent orders. The Commission shall publish a notice of any proposed change in the Federal Register, together with the reporting requirements to be modified and the reasons therefor, and serve notice on each party subject to the consent order. Such parties shall be given the opportunity to submit briefs to the Commission, and the Commission may hold a hearing on the matter.

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

(a) *Informal enforcement proceedings.* Informal enforcement proceedings may be conducted by the Commission, through the Office of Unfair Import Investigations, with respect to any act or omission by any person in possible violation of any provision of an exclusion order, cease and desist order, or consent order. Such matters may be handled by the Commission through correspondence or conference or in any other way that the Commission deems appropriate. The Commission may issue such orders as it deems appropriate to implement and insure compliance with the terms of an exclusion order, cease and desist order, or consent order, or any part thereof. Any matter not disposed of informally may be made the subject of a formal proceeding pursuant to this subpart.

(b) *Formal enforcement proceedings.* (1) The Commission may institute an enforcement proceeding at the Commission level upon the filing by the complainant in the original investigation or his successor in interest, by the Office of Unfair Import Investigations, or by the Commission of a complaint setting forth alleged violations of any exclusion order, cease and desist order, or consent order. If a proceeding is instituted, the complaint shall be served upon the alleged violator and a notice of institution published in the Federal Register. Within 15 days after the date of service of such a complaint, the named respondent shall file a response to it. Responses shall fully advise the Commission as to the nature of any defense and shall admit or deny each allegation of the complaint specifically and in detail unless the respondent is without knowledge, in which case its answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted may be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered.

(2) Upon the failure of a respondent to file and serve a response within the time and in the manner prescribed herein the Commission, in its discretion, may find the facts alleged in the complaint to be true and take such action as may be appropriate without notice or hearing, or, in its discretion, proceed without notice to take evidence on the allegations set forth in the complaint, provided that the Commission (or administrative law judge, if one is appointed) may permit late filings of an answer for good cause shown.

(3) The Commission, in the course of a formal enforcement proceeding under paragraph (b) of this section may hold a public hearing and afford the parties to the enforcement proceeding the opportunity to appear and be heard. The hearing provided for under paragraph (b) of this section is not subject to sections 554, 555, 556, 557, and 702 of title 5 of the United States Code. The Commission may delegate any hearing under paragraph (b) of this section to the chief administrative law judge for designation of a presiding administrative law judge, who shall certify an initial determination to the Commission. That initial determination shall become the determination of the Commission 90 days after the date of service of the initial determination, unless the Commission, within 90 days after the date of such service shall have ordered review of the initial determination on certain issues therein, or by order shall have changed the

effective date of the initial determination.

(4) Upon conclusion of an enforcement proceeding under paragraph (b) of this section, the Commission may:

(i) Modify a cease and desist order, consent order, and/or exclusion order in any manner necessary to prevent the unfair practices that were originally the basis for issuing such order;

(ii) Bring civil actions in a United States district court pursuant to paragraph (c) of this section (and section 337(f) of the Tariff Act of 1930) requesting the imposition of a civil penalty or the issuance of injunctions incorporating the relief sought by the Commission; or

(iii) Revoke the cease and desist order or consent order and direct that the articles concerned be excluded from entry into the United States.

(5) Prior to effecting any modification, revocation, or exclusion under paragraph (b) of 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.

(6) In lieu of or in addition to taking the action provided for in paragraph (b)(1) of this section, the Commission may issue, pursuant to section 337(i) of the Tariff Act of 1930 an order providing that any article imported in violation of the provisions of section 337 of the Tariff Act of 1930 and an outstanding final exclusion order issued pursuant to section 337(d) of the Tariff Act of 1930 be seized and forfeited to the United States, if the following conditions are satisfied:

(i) The owner, importer, or consignee of the article (or the agent of such person) previously attempted to import the article into the United States;

(ii) The article previously was denied entry into the United States by reason of a final exclusion order; and

(iii) Upon such previous denial of entry, the Secretary of the Treasury provided the owner, importer, or consignee of the article (or the agent of such person) with written notice of the aforesaid exclusion order and the fact that seizure and forfeiture would result from any further attempt to import the article into the United States.

(c) *Court enforcement.* To enforce an exclusion order, cease and desist order, consent order, or sanctions order, the Commission may, without prior notice to any person or any other type of proceeding otherwise available under the section, initiate a civil action in the U.S. district court pursuant to section 337(f) of the Tariff Act of 1930, requesting the imposition of such civil penalty or the issuance of such injunctions as the Commission deems necessary to enforce its orders and protect the public interest.

§ 210.76 Modification or rescission of exclusion orders, cease and desist orders, and consent 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 file with the Commission a petition requesting such relief. The Commission may also on its own initiative consider such action. The petition shall state the changes desired and the changed circumstances 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.

(2) If the petitioner previously has been found by the Commission to be in violation of section 337 of the Tariff Act of 1930 and if his petition requests a Commission determination that the petitioner is no longer in violation of that section or petition requests modification or rescission of an order issued pursuant to sections 337 (d), (e), (f), (g), or (i) of the Tariff Act of the Tariff Act of 1930, the burden of proof in any proceeding initiated in response to the petition pursuant to paragraph (b) of this section shall be on the petitioner. In accordance with section 337(k) of the Tariff Act, relief may be granted by the Commission with respect to such petition on the basis of new evidence or evidence that could not have been presented at the prior proceeding or on grounds that would permit relief from a judgment or order under the Federal Rules of Civil Procedure.

(b) *Commission action upon receipt of petition.* The Commission may thereafter institute a proceeding to modify or rescind the exclusion order, cease and desist order, or consent order by publishing a notice of the proceeding in the **Federal Register**. The Commission may hold a public hearing and afford interested persons the opportunity to appear and be heard. After consideration of the petition, any responses thereto, and any information placed on the record at a public hearing or otherwise, the Commission shall take such action as it deems appropriate. The Commission may delegate any hearing under this section to the chief administrative law judge for designation of a presiding administrative law judge, who shall certify a recommended determination to the Commission.

§ 210.77 Temporary emergency action.

(a) Whenever the Commission determines, pending a formal enforcement proceeding under § 210.75(b), that without immediate action a violation of an exclusion order, cease and desist order, or consent order will occur and that subsequent action by the Commission would not adequately repair substantial harm caused by such violation, the Commission may immediately and without hearing or notice modify or revoke such order and, if it is revoked, replace the order with an appropriate exclusion order.

(b) Prior to taking any action 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. The Commission shall, if it has not already done so, institute a formal enforcement proceeding under § 210.75 at the time of taking action under this section or as soon as possible thereafter, in order to give the alleged violator and other interested parties a full opportunity to present information and views regarding the continuation, modification, or revocation of Commission action taken under this section.

§ 210.78 Notice of enforcement action to Government agencies.

(a) *Consultation.* The Commission may consult with or seek information from any Government agency when taking any action under this subpart.

(b) *Notification of Treasury.* The Commission shall notify the Secretary of the Treasury of any action under this subpart that results in a permanent or temporary exclusion of articles from entry, or the revocation of an order to such effect, or the issuance of an order compelling seizure and forfeiture of imported articles.

§ 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 the person's proposed course of action or conduct would violate a Commission exclusion order, cease and desist order, or consent order. 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, would be in the public interest, and would benefit consumers and competitive conditions in the United States, and whether the person has a compelling business need for the advice and has framed his request as fully and accurately as possible. Advisory opinion proceedings are not subject to sections 554, 555, 556, 557, and 702 of title 5 of the United States Code.

(b) *Revocation.* The Commission may at any time reconsider any advice given under this section and, where the public interest requires, revoke its prior advice. In such event the person will be given notice of the Commission's intent to revoke as well as an opportunity to submit its views to the Commission. The Commission will not proceed against a person for violation of an exclusion order, cease and desist order, or consent order with respect to any action that was taken in good faith reliance upon the Commission's advice under this section, if all relevant facts were accurately presented to the Commission and such action was promptly discontinued upon notification of revocation of the Commission's advice.

PART 211—[REMOVED]

By Order of the Commission.

Issued: October 28, 1992.

Paul R. Bardos,

Acting Secretary.

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