

INTERNATIONAL TRADE COMMISSION

19 CFR Parts 201 and 210

[Docket No. MISC-022]

Rules of General Application and Adjudication and Enforcement

AGENCY: International Trade Commission.

ACTION: Final rule.

SUMMARY: The United States International Trade Commission (“Commission”) amends its Rules of Practice and Procedure concerning rules of general application, adjudication, and enforcement. The amendments are necessary to make certain technical corrections, to clarify certain provisions, to harmonize different parts of the Commission’s rules, and to address concerns that have arisen in Commission practice.

DATES: This regulation is effective August 6, 2008.

FOR FURTHER INFORMATION CONTACT: James Worth, Office of the General Counsel, United States International Trade Commission, telephone 202-205-3065. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal at 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>.

SUPPLEMENTARY INFORMATION:

Background

Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) authorizes the Commission to adopt such reasonable procedures, rules, and regulations as it deems necessary to carry out its functions and duties. This rulemaking seeks to update certain outdated provisions and improve other provisions of the Commission’s existing Rules of Practice and Procedure. The Commission is amending its rules covering investigations under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) (“section 337”) in order to increase the efficiency of its section 337 investigations. The Commission published a notice of proposed rulemaking (NOPR) in the **Federal Register** at 72 FR 72280 (Dec. 20, 2007), proposing to amend the Commission’s Rules of Practice and Procedure to make certain changes to rules of general application, adjudication, and enforcement.

Although the Commission considers these rules to be procedural rules which

are excepted from notice-and-comment under 5 U.S.C. 553(b)(3)(A), the Commission invited the public to comment on all the proposed rules amendments. The NOPR requested public comment on the proposed rules within 60 days of publication of the NOPR. Subsequently, the Commission extended the deadline for submitting comments by six weeks. 73 FR 8836 (Feb. 15, 2008). Further, in response to a request from the Embassy of the People’s Republic of China, the Chairman granted an extension by letter of March 20, 2008, to the Chinese government and relative Chinese enterprises to submit comments until April 30, 2008. The Commission received a total of five sets of comments, one each from the ITC Trial Lawyer’s Association (ITCTLA), the Intellectual Property Owners Association (IPO), the American Intellectual Property Law Association (AIPLA), the law firm of Adduci, Mastriani & Schaumberg LLP (AMS), and the Ministry of Commerce of the People’s Republic of China (MOFCOM).

The Commission carefully considered all comments that it received. The Commission’s response is provided below in a section-by-section analysis. The Commission appreciates the time and effort the commentators devoted to the task.

As required by the Regulatory Flexibility Act, the Commission certifies that these regulatory amendments will not have a significant impact on small business entities.

Overview of the Amendments to the Regulations

The final regulations contain four changes from those proposed in the NOPR. These changes are summarized here.

First, with regard to § 210.11(b), relating to the service of the complaint, the Commission has substituted the word “complainant” for “party”. Second, with regard to § 210.12(a)(9)(viii), the Commission has determined to require that complainants provide claim charts with the filing of the complaint to specify the allegations of infringement with regard to each independent patent claim asserted, rather than just one exemplary claim per patent.

Third, with regard to § 210.39, the Commission adopted the commentators’ suggestion to require the parties to notify the Commission of the issuance or dissolution of a stay of a parallel district court proceeding only if the issuance or dissolution actually occurs, and to provide ten days for the parties to notify the Commission.

Fourth, the Commission has withdrawn its proposal to eliminate reference to the position of chief administrative law judge in §§ 210.15, 210.20, 210.58, and 210.75.

A comprehensive explanation of the rule changes is provided in the section-by-section analysis below. The section-by-section analysis includes a discussion of all eleven modifications suggested by the commentators. Many positive comments were received for the majority of the 50 specific proposals in the NOPR. The proposals for which only positive comments were received are unchanged.

Section-by-Section Analysis

19 CFR Part 201

Subpart B—Initiation and Conduct of Investigations

Section 201.16 (Service by Overnight Delivery)

The NOPR proposed to amend § 201.16 to allow all parties one extra day to respond to documents served by overnight delivery, and to conform § 201.16 to §§ 210.6 and 210.7. AMS supports the proposed revision. MOFCOM suggests that the Commission amend 19 CFR 201.16 to clarify whether or not all the parties should be served via the same method. MOFCOM suggests that persons located in a foreign country continue to be afforded ten additional calendar days to respond under 19 CFR 201.16, as the rule currently allows. The current rule, however, allows ten extra days to persons located in a foreign country when service is by first-class mail, and the proposed amendment does not affect this provision. Therefore, the rule is unchanged from the proposed rule.

19 CFR Part 210

Subpart A—Rules of General Applicability

Section 210.7(b)

The NOPR proposed to amend § 210.7 to require that each party designate one attorney or agent to receive service of process. The ITCTLA proposes that a party designate a single attorney to receive service from the Commission and from the Office of Unfair Import Investigations (“OUII”) of hard copies of all papers, but that the private parties also be authorized to agree to serve several co-counsel for the same parties using either electronic or hard copy means. The Commission has not adopted this proposal because the parties currently may agree to serve extra copies on each other by electronic or hard copy means; this practice would not be disturbed by the Commission

rule. MOFCOM objects to the proposed amendment on the basis that it would take extra time for the attorney or agent who is served a document to share that documents with the rest of the party's team. AMS supports the proposed revision. The Commission believes that the saving of paper, time, and labor for the Commission and the parties by designating one attorney or agent to receive service of process is beneficial and would not prejudice parties receiving documents. Therefore, the rule is unchanged from the proposed rule.

Subpart B—Commencement of Preinstitution Proceedings and Investigations

Section 210.11(b)

The NOPR proposed to amend § 210.11(b) relating to service of the complaint. The proposed amendment does not alter the existing regulatory language which describes the ability of a party to effect personal service: "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 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." The term "party" is defined in § 201.2 as "any person who has filed a complaint or petition on the basis of which an investigation has been instituted, or any person whose entry of appearance has been accepted pursuant to § 201.11(a) or (c)." Given this definition, MOFCOM states that it is unclear what "a party" refers to in § 210.11(b). In light of this comment, the word "complainant" is substituted for the term "party" in order to clarify the persons affected.

Subpart C—Pleadings

Section 210.12(a)(9)(iv), (a)(10)(i), (a)(10)(ii) (Submission of License Agreements)

The NOPR further proposed amending § 210.12 by adding new paragraphs (a)(9)(iv) and (a)(10)(i) and (a)(10)(ii) to reduce the number of copies of license agreements that complainants must file, and by amending paragraphs (c)(1), (d), (f), and (g), such that the submission of license agreements would be required only in those instances where (i) the complainant relies upon its status as a licensee for purposes of standing or (ii) the complainant relies upon the domestic activities of a licensee in support of its domestic industry

contentions, and that in these instances, the license be submitted as an exhibit to the complaint (which would ultimately be served upon the respondents), rather than as an appendix item, and that all licensees of the asserted rights would also have to be identified in the complaint. The ITCTLA states that it supports the amendment of section 210.12(c)(1); the ITCTLA did not submit any comments with regard to sections 210.12(d), (f), and (g). AMS supports the proposed revisions. MOFCOM objects to the proposed amendment, arguing that respondents will typically ask for license agreements during discovery anyway. Because the license agreements may contain business information which is not essential to the allegations made against the respondents, the Commission has determined that the balance of interests favors waiting until identified respondents designate specific representatives to sign the administrative protective order before serving license agreements which are not essential to the understanding of the allegations made against them. Because the respondents will still receive the license agreements in discovery in a timely fashion, the Commission has determined to issue the rule unchanged from the proposed rule.

Section 210.12(a)(9)(viii)

The NOPR proposed to revise § 210.12(a) to require claim charts to be filed with the complaint to specify both allegations of infringement by any respondents and satisfaction of the domestic injury requirement by the complainant. The ITCTLA states that it supports the Commission's clarification that there should be a separate requirement for domestic industry claim charts and infringement claim charts. AMS supports the proposed revision. MOFCOM suggests that the Commission investigative attorney and the administrative law judges should "pre-review" complaints to make a "preliminary assessment of the scope of the claims" and to determine whether there is *prima facie* evidence of violation.

The Commission agrees that clarification of the scope of the claims at an early stage of the investigation will foster earlier resolution of disputes. Therefore, the Commission has determined to require a separate claim chart to demonstrate the allegations of infringement by respondents with regard to each independent claim, rather than just one exemplary claim per asserted patent. The Commission believes that the rule would not add to the burden that the complainant must already undertake in order to fulfill its

obligations to file a non-frivolous complaint under existing Commission Rules 210.4(c)–(d), 19 CFR 210.4(c)–(d), which are modeled in part on Rule 11 of the Federal Rules of Civil Procedure. *See, e.g.*, 59 FR 39023–25 (August 1, 1994). In addition, the Commission believes that this rule would help identify the issues at an early stage for all parties concerned, and foster early settlement or disposition of disputes.

Subpart D—Motions

Subpart H—Temporary Relief

Subpart I—Enforcement Procedures and Advisory Opinions

Sections 210.15, 210.20, 210.58, and 210.75 (The Position of Chief Administrative Law Judge)

The NOPR proposed to amend §§ 210.15, 210.20(a), 210.58, and 210.75(b)(3) by eliminating reference to the chief administrative law judge. AMS does not support the proposed revision. The ITCTLA notes that, although there is not at present a chief administrative law judge, there may be a need or desire to designate a chief administrative law judge as the number of administrative law judges increases, and therefore the Commission may wish to retain this reference. The AIPLA has the same concerns as AMS and the ITCTLA, and notes that, in view of the growing caseload, the Commission has advertised a position for a fifth administrative law judge. The AIPLA observes that a chief administrative law judge could coordinate a reply from the administrative law judges to any suggestion posed to them. IPO suggests that a chief administrative law judge could increase the efficiency of the Commission and could aid in the training of new administrative law judges, could aid in consistent application of the Commission's rules, and could speak on behalf of the administrative law judges on matters such as requests for resources. AMS submits that the references to a chief administrative law judge do not cause harm or confusion even though there currently is no chief administrative law judge, and suggests that the rule should be maintained in order to provide the Commission flexibility to appoint a chief administrative law judge in the future. AMS notes that the Commission might find a chief administrative law judge to be a helpful representative for the administrative law judges to speak on their behalf on particular matters, receive suggestions or concerns, and possibly coordinate responsibility for certain matters relating to administrative law judges.

The proposed amendments and revisions pertaining to eliminating the references to chief administrative law judge are withdrawn.

Subpart E—Discovery and Compulsory Process

Section 210.28

The NOPR proposed to amend § 210.28 to conform with the practice in the U.S. district courts under the Federal Rules of Civil Procedure whereby the stenographer is given the responsibility of serving copies of a deposition on all parties to the case. Under current Commission practice, the party taking the deposition is given this responsibility, and the only party currently required to be served with a copy is the Commission investigative attorney. AMS supports the proposed revision. MOFCOM comments that it is unclear under the proposed rule when a party will be notified that a transcript of a deposition is available, how a party can obtain a copy, and how much money the party should pay. No other specific comments were received. Because the rule charges the stenographic reporter with the distribution of the transcripts, and the concomitant responsibility of notifying the parties of the availability of the transcripts and their cost, the rule is unchanged.

Subpart F—Prehearing Conferences and Hearings

Section 210.39

The NOPR proposed to amend § 210.39(b) to require the filing of written notice with the Secretary whenever (1) a section 337 party/civil action litigant asks the court to issue an order staying the civil action, and (2) whenever the district court issues an order dissolving the stay and directing the Commission to transmit all or part of the record to the court. The proposed amendment requires that a party file written notice with the Commission on the same day that it asks the district court to stay the civil proceeding. The purpose of the proposed amendment is to clarify current Commission rule 210.39(b) and to make the rule more consistent with 28 U.S.C. 1659(b).

The ITCTLA agrees with clarifying § 210.39(b) and making it consistent with 28 U.S.C. 1659(b), but suggests that a party be required to notify the Commission only if the district court issues a stay of its proceedings or dissolves such a stay, stating that it would not be necessary to notify the Commission of a motion for a stay because a motion could be withdrawn or superseded by other events. The

ITCTLA suggests an amendment to require parties to notify the Commission within ten days of the issuance or dissolution of a stay by the district court. AMS supports the ITCTLA's proposed amendment.

The ITCTLA suggestion would require the parties to notify the Commission only if there were an actual change in the status of the district court proceeding, and would clarify the time for parties to notify the Commission of the imposition of the stay or dissolution of the stay. Because the Commission finds this clarification to be beneficial, the commentator's suggestion is adopted in the rule.

Sections 210.42, 210.43, and 210.51 (Setting Target Dates)

The NOPR proposed to amend § 210.42(a)(1)(i) to provide that the administrative law judge would issue his final initial determination no later than four months before the target date for completion of the investigation, regardless of whether the target date has been set at over 15 months as the current rule provides. The NOPR proposed to amend §§ 210.42(h)(2) and 210.43(d)(1) to provide that the Commission will have two months to determine whether to review a final initial determination and two months for final disposition of the investigation in all investigations. The NOPR further proposed to amend § 210.51(a) by providing that if the target date set by order of the administrative law judge does not exceed 16 months from the date of institution, the order of the administrative law judge shall be final.

The ITCTLA comments that it believes the proposed rule would create a default target date for completion of most investigations of 16 months. The ITCTLA contends that the proposed rule would be counter to the legislative history of the current statutory guidance on time for completion of investigations. The ITCTLA cites a **Federal Register** notice from twelve years ago, well before the current surge in filings, in which the Commission stated that target dates for completion of section 337 investigations should rarely exceed 15 months. 61 FR 43432 (Aug. 13, 1996). The ITCTLA comments that the role that the Commission has achieved in section 337 investigations as one of the key forums for protection of valuable U.S. intellectual property rights rests on the speed and high quality of its adjudicatory process. The ITCTLA suggests that rather than lengthening the target date for section 337 investigations, the Commission instead devote additional resources to meet the current deadlines.

IPO comments that it believes the current rules are adequate to provide efficient resolution of section 337 proceedings while at the same time allowing for extensions of time when necessary. IPO adds that its members place much value in the Commission's prompt and effective resolution of section 337 investigations "particularly when compared to the pace of typical intellectual property disputes in the U.S. District Court system." IPO comments that the proposed rule would turn the exception into the rule, contrary to the stated goal of efficiency. IPO expresses concern that the proposed rule would also open the door to further expansion of time limits in future, and hence would "proceed down a slippery slope." IPO relies on section 337 and its legislative history. IPO suggests the hiring of additional administrative law judges and supports the filling of any vacant administrative law judge positions.

AMS does not support the revision, contending that it would effectively lengthen the time for completion of these investigations by one month, and AMS believes the proposed revision runs counter to the goal expressed in section 337 and its legislative history to resolve investigations "at the earliest practicable time." AMS understands that the increasing number and complexity of investigations have made it difficult to complete all investigations in 12 to 15 months but suggested that the Commission keep the current practice of granting itself additional time on a case-by-case basis. AIPLA's comments identify the same concerns as AMS, the ITCTLA, and IPO.

The Commission believes that the proposal to allow the administrative law judge to set a target date of 16 months by order rather than by initial determination would not set 16 months as the default length for every case nor change the current length of investigations, but would merely allow the administrative law judge to set 16 months as a target date by order where necessary. The Commission acknowledges that there have been certain investigations recently which have exceeded 15 months due to such factors as stays pending other proceedings and reassignment of cases due to the retirement of an administrative law judge, as well as the resource constraints relative to the recent surge in caseload. The Commission has been working to hire additional administrative law judges and staff and intends to revisit this rule after additional personnel and resources have been made available to the Office of Administrative Law Judges, including

the hiring of additional administrative law judges.

The Commission notes that historically, the statute allowed 18 months for “more complicated” cases. “More complicated” referred to investigations “of an involved nature owing to the subject matter, difficulty in obtaining information, the large number of parties involved, or other significant factors.” 19 CFR 210.59(a) (1993). Typically these were investigations that required greater discovery because they (1) included multiple patents (and claims), (2) involved complex technology, and/or (3) included multiple respondents. *See, e.g., Certain Static Random Access Memories and Integrated Circuits Devices Containing Same, Processes for Making Same, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-325, Order No. 5, 1991 WL 788641 (May 9, 1991) (“The ITC, however, must adjudicate all four patents and do so in a fraction of the time which will be available in the District Court in Texas. An additional six months is, therefore, not only advisable but clearly essential. In sum, as with other Section 337 investigations involving semiconductors which have been designated as ‘complicated’ by the Commission, this case should also be designated ‘more complicated’ in order to develop an adequate record.”), *unreviewed* by Commission Notice, 56 FR 28173 (June 19, 1991).

Historical practice shows that the “more complicated” designation was used only where necessary. *See Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Order No. 52, 1992 WL 811697 (Aug. 5, 1992) (recognizing that the Commission would not designate every case “more complicated”) (“The ‘more complicated’ designation should be used sparingly and only when clearly required.”), *unreviewed* by Commission Notice, 57 FR 40922 (Sept. 8, 1992). A majority of the cases filed today meet the criteria for “more complicated” case under former Commission rule § 210.59(a) (1993). We also note the importance of administrative judges allowing sufficient time for discovery.

The amendment to allow investigation target dates to be set at 16 months by order was proposed in view of the proposed four-month period for the Commission to complete its review. However, nothing in the proposed rule mandates a 16-month target date in every case, and the Commission does not expect the judges to set a 16-month target date in every investigation. Moreover, the administrative law judges

currently have authority to set target dates by initial determination longer than 15 months. Therefore, we do not expect that this change will increase the number of investigations with target dates longer than 15 months. The rule change, however, will streamline Commission practice by making it less likely that the Commission will need to extend its “whether to review” deadline. Moreover, the parties will have a more predictable date for responding to Commission requests for any briefing on review when the Commission deadline for determining whether to review a final ID is 60 days in every investigation. Therefore, the rule is unchanged from the proposed rule.

Section 210.43(b)(1)

The NOPR proposed to amend § 210.43(b)(1) to require that any petition for review exceeding 50 pages in length be accompanied by a summary not to exceed ten pages, that responses to petitions should similarly contain such summaries, and that there be a 100-page limit exclusive of the summaries for the length of petitions for review of final initial determinations on a matter other than temporary relief. The ITCTLA opposes the proposed rule because initial determinations and their associated findings of fact may themselves be hundreds of pages and hence would be hard to address in a 100-page petition for review. In this connection, the ITCTLA notes that the technology itself may be complex and difficult to address in 100 pages, and that under current § 210.43(b)(3), issues not addressed in a petition for review will be deemed waived. AIPLA makes similar observations and further notes that some investigations involve multiple parties, multiple patents, multiple claims and claim limitations, and contested issues of claim construction, validity, and infringement. AIPLA supports the proposal that a party must include a summary to provide an overview of longer petitions for review. AMS comments that it does not support the proposed rule because some complex investigations have initial determinations which would be too lengthy to address in a 100-page petition for review. AMS also notes that it would be necessary to address an issue to preserve it for an appeal to the Federal Circuit, as reflected in the proposed amendment to § 210.43(b)(3). MOFCOM also comments that it believes 100 pages are insufficient.

The commentators’ main concern is the need for the parties to preserve issues for appeal before the Commission and the U.S. Court of Appeals for the

Federal Circuit. Yet the Federal Rules of Appellate Procedure, which apply to the Federal Circuit, limit principal briefs to 30 pages, 14,000 words, or 1,300 lines of text if monospaced. Rule 7(A), (B). Given the court’s page limitations, the Commission believes it is reasonable to conclude that a 100-page petition for review could accommodate all issues which a party may wish to preserve for a possible appeal to the Federal Circuit. Moreover, the Commission believes that the page limits will increase the quality of analysis by encouraging the parties to focus on what they perceive to be reversible errors. Therefore, the rules are unchanged from the proposed rule.

Subpart I—Enforcement Procedures and Advisory Opinions

Section 210.71, 210.75, and 210.79

The NOPR proposed to amend § 210.71 and 210.79 and to further amend § 210.75 to clarify the procedures for the analysis of changed conditions, for the filing of enforcement proceedings, and for requests for advisory opinions. Specifically, the NOPR proposed to amend § 210.75 relating to enforcement of Commission orders to clarify that under section 337, the Commission may impose its own civil penalty which it may enforce in district court rather than having to have the district court impose the civil penalty in the first instance. MOFCOM comments that “it is confusing that the ITC, as an administrative authority, is permitted to initiate a civil action based on an administrative order.” Section 210.75 is based on the statutory authority granted by Congress to the Commission to bring civil actions in U.S. district court to enforce its orders and in aid of its jurisdiction under 19 U.S.C. 1333(c) and 1337(f)(2). The role of the courts in the enforcement of agency orders is important to agencies where necessary to ensure compliance with the administration of statutory schemes by agencies. AMS supports the revisions. No other comments were received. Therefore, the rules are unchanged.

Other Suggestions

MOFCOM also suggests that the Commission establish a procedure to suspend Commission investigations at the request of a respondent when the USPTO has instituted a reexamination proceeding of a patent at issue. MOFCOM further suggests that the Commission analyze the effect of recent jurisprudence in *eBay Inc v. MercExchange, L.L.C.* on the general exclusion order procedure. In addition, AIPLA suggests that the Commission

promulgate a rule to govern the manner in which parties serve each other with documents electronically, whereas the Commission currently allows the parties to stipulate rules for electronic service among themselves. The Commission appreciates the suggestions for further areas of rulemaking. However, because these issues were not the subject of any proposed rule, they will not be addressed in this rulemaking.

List of Subjects

19 CFR Part 201

Administration practice and procedure, Reporting and recordkeeping requirements.

19 CFR Part 210

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

■ For the reasons stated in the preamble, 19 CFR parts 201 and 210 are amended as set forth below:

PART 201—RULES OF GENERAL APPLICATION

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

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

■ 2. Amend § 201.16 by redesignating paragraph (e) as paragraph (f) and adding new paragraph (e) to read as follows:

§ 201.16 Service of process and other documents.

* * * * *

(e) Additional time after service by overnight delivery. Whenever a party or Federal Agency or department has the right or is required to perform some act or take some action within a prescribed period after the service of a document upon it and the document is served by overnight delivery, one (1) day shall be added to the prescribed period. "Overnight delivery" is defined as delivery by the next business day.

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PART 210—ADJUDICATION AND ENFORCEMENT

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

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

Subpart A—Rules of General Applicability

■ 2. Amend § 210.3 by adding a definition of "U.S. Customs Service" in alphabetical order to read as follows:

§ 210.3 Definitions.

* * * * *

U.S. Customs Service means U.S. Customs and Border Protection.

■ 3. Amend § 210.4 by revising paragraph (f)(1)(i) to read as follows:

§ 210.4 Written submission; representations; sanctions.

* * * * *

(f) 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, except for the provisions regarding the number of copies to be submitted. The required number of copies shall be governed by paragraph (f)(2) of this section. Written submissions may be produced by any process which produces a clear black image on white paper. Typed matter shall not exceed 6½ by 9½ inches using 11-point or larger type and shall be double-spaced between each line of text using the standard of 6 lines of type per inch. Text and footnotes shall be in the same size type. Quotations more than two lines long in the text or footnotes may be indented and single-spaced. Headings and footnotes may be single-spaced.

* * * * *

■ 4. Amend § 210.7 by:

■ a. Redesignating paragraph (b) as paragraph (c); and

■ b. Adding paragraphs (a)(3) and (b).

The additions and revisions read as follows:

§ 210.7 Service of process and other documents; publication of notices.

(a) * * *

(3) Whenever the Commission effects service of documents issued by or on behalf of the Commission or the administrative law judge upon the private parties by overnight delivery, service upon the Office of Unfair Import Investigations shall also be deemed to have occurred by overnight delivery.

(b) Designation of a single attorney or representative for service of process.

The service list prepared by the Secretary for each investigation will contain the name and address of no more than one attorney or other representative for each party to the investigation. In the event that two or more attorneys or other persons

represent one party to the investigation, the party must select one of their number to be the lead attorney or representative for service of process. The lead attorney or representative for service of process shall state, at the time of the filing of its entry of appearance with the Secretary, that it has been so designated by the party it represents. (Only those persons authorized to receive confidential business information under a protective order issued pursuant to § 210.34(a) are eligible to be included on the service list for documents containing confidential business information.)

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Subpart B—Initiation and Conduct of Investigations

■ 5. Amend § 210.8 by adding introductory text and revising paragraph (a) to read as follows:

§ 210.8 Commencement of preinstitution proceedings.

A preinstitution proceeding is commenced by filing with the Secretary a signed original complaint and the requisite number of true copies.

(a)(1) Unless complainant requests temporary relief, the complainant shall file with the Secretary:

(i) Twelve (12) copies of the nonconfidential version of the complaint along with 6 copies of the nonconfidential exhibits, and 6 copies of the confidential exhibits;

(ii) Twelve (12) copies of the confidential version of the complaint, if any;

(iii) For each proposed respondent, one copy of the nonconfidential version of the complaint and one copy of the confidential version of the complaint, if any, along with one copy of the nonconfidential exhibits and one copy of the confidential exhibits, and

(iv) For the government of the foreign country in which each proposed respondent is located as indicated in the Complaint, one copy of the nonconfidential version of the complaint.

Note to paragraph (a)(1): The same requirements apply for the filing of a supplement to the complaint.

(2) If the complainant is seeking temporary relief, the complainant shall file with the Secretary:

(i) Twelve (12) copies of the nonconfidential version of the complaint along with 6 copies of the nonconfidential exhibits, and 6 copies of the confidential exhibits;

(ii) Twelve (12) copies of the confidential version of the complaint, if any;

(iii) For each proposed respondent, one copy of the nonconfidential version of the complaint and one copy of the confidential version of the complaint, if any, along with one copy of the confidential exhibits;

(iv) Twelve (12) copies of the nonconfidential version of the motion for temporary relief along with 6 copies of any nonconfidential exhibits filed with the motion and 6 copies of the confidential exhibits, if any, filed with the motion;

(v) Twelve (12) copies of the confidential version of the motion for temporary relief, if any; and

(vi) For each proposed respondent, one copy of the confidential version of the motion along with one copy of the confidential exhibits filed with the motion.

Note to paragraph (a)(2): The same requirements apply for the filing of a supplement to the complaint or a supplement to the motion for temporary relief.

* * * * *

§ 210.10 [Amended]

■ 6. Amend § 210.10 by removing the last two sentences of paragraph (a)(5)(i).

■ 7. Revise § 210.11 to read as follows:

§ 210.11 Service of complaint and notice of investigation.

(a)(1) Unless the Commission institutes temporary relief proceedings, upon institution of an investigation, the Commission shall serve:

(i) Copies of the nonconfidential version of the complaint, the nonconfidential exhibits, and the notice of investigation upon each respondent; and

(ii) Copies of the nonconfidential version of the complaint and the notice of investigation upon the embassy in Washington, DC of the country in which each proposed respondent is located as indicated in the Complaint.

(2) If the Commission institutes temporary relief proceedings, upon institution of an investigation, the Commission shall serve:

(i) Copies of the nonconfidential version of the complaint and the notice of investigation upon each respondent; and

(ii) A copy of the notice of investigation upon the embassy in Washington, DC of the country in which each proposed respondent is located as indicated in the Complaint.

(3) All respondents named after an investigation has been instituted and the governments of the foreign countries in which they are located as indicated in the complaint shall be served as soon as possible after the respondents are named.

(4) The Commission shall serve copies of the notice of investigation upon 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.

(b) With leave from the presiding administrative law judge, a complainant 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 have been unsuccessful. If the complainant succeeds in serving the respondent by personal service, the complainant must notify the administrative law judge and file proof of such service with the Secretary.

Subpart C—Pleadings

■ 8. Amend § 210.12 by:

■ a. Republishing the introductory text of paragraph (a);

■ b. Revising paragraphs (a)(1), (a)(6)(i) introductory text, (a)(6)(i)(C), and (a)(9);

■ c. Redesignating paragraph (a)(10) as paragraph (a)(11);

■ d. Adding new paragraph (a)(10);

■ e. Revising paragraph (c);

■ f. Revising the first sentence of paragraph (d);

■ g. Revising paragraphs (f), and (g);

■ h. Redesignating existing paragraph (h) as paragraph (j); and

■ i. Adding new paragraphs (h) and (i).

The additions and revisions read as follows:

§ 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, and include a statement attesting to the representations in § 210.4(c)(1) through (3);

* * * * *

(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, mask work, or vessel hull design, under section 337(a)(1) (B), (C), (D), or (E) 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:

* * * * *

(C) Substantial investment in the exploitation of the subject patent, copyright, trademark, mask work, or vessel hull design, including engineering, research and development, or licensing; or

* * * * *

(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. patent and a certified copy thereof (a legible copy of each such patent will suffice for each required copy of the complaint);

(ii) The identification of the ownership of each involved U.S. 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. patent;

(iv) A copy of each license agreement (if any) for each involved U.S. patent that complainant relies upon to establish its standing to bring the complaint or to support its contention that a domestic industry as defined in section 337(a)(3) exists or is in the process of being established as a result of the domestic activities of one or more licensees;

(v) 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, abandoned or withdrawn corresponding to each involved U.S. patent, with an indication of the prosecution status of each such patent application;

(vi) A nontechnical description of the invention of each involved U.S. patent;

(vii) A reference to the specific claims in each involved U.S. 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;

(viii) 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. patent. The complainant shall make such showing by appropriate allegations, and when practicable, by a chart that applies each asserted independent claim of each involved U.S. patent 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;

(ix) A showing that an industry in the United States, relating to the articles protected by the patent exists or is in the process of being established. 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. patent to a representative involved domestic article or to the process under which such article was produced; and

(x) 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 1930, or of the process utilized in producing the imported article, and, when a chart is furnished under paragraphs (a)(9)(viii) and (a)(9)(ix) 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) Include, when a complaint is based upon the infringement of a federally registered copyright, trademark, mask work, or vessel hull design—

(i) The identification of each licensee under each involved copyright, trademark, mask work, and vessel hull design;

(ii) A copy of each license agreement (if any) that complainant relies upon to establish its standing to bring the complaint or to support its contention that a domestic industry as defined in section 337(a)(3) exists or is in the process of being established as a result of the domestic activities of one or more licensees.

* * * * *

(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. patent the following:

(1) One certified copy of the U.S. Patent and Trademark Office prosecution history for each involved U.S. patent, plus three additional copies thereof; and

(2) Four copies of each patent and applicable pages of each technical reference mentioned in the prosecution history of each involved U.S. 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, and one certified copy of the prosecution history for each federally registered 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 registration and three additional copies;

(g) *Additional material to accompany each registered mask work-based complaint.* There shall accompany the submission of the original of 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 registration and three additional copies;

(h) *Additional material to accompany each vessel hull design-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 vessel hull design, one certified copy of the Federal registration (including all deposited drawings, photographs, or other pictorial representations of the design), and three additional copies;

(i) *Initial disclosures.* Complainant shall serve on each respondent represented by counsel who has agreed to be bound by the terms of the protective order one copy of each document submitted with the complaint pursuant to § 210.12(c) through (h) within five days of service of a notice of appearance and agreement to be bound by the terms of the protective order; and

* * * * *

§ 210.13 [Amended]

■ 9. Amend § 210.13 by removing the words “U.S. letters patent” and adding in their place the words “U.S. patent” in the following locations:

- a. Paragraph (b) introductory text,
- b. Paragraph 210.13(b)(1) (three occurrences), and
- c. Paragraph 210.13(b)(3).

Subpart D—Motions

■ 10. Amend § 210.18 by revising paragraph (a) to read as follows:

§ 210.18 Summary determinations.

(a) *Motions for summary determinations.* Any party may move with any necessary supporting affidavits for a summary determination in its 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 60 days before the date fixed for any hearing provided for in § 210.36(a)(1). Notwithstanding any other rule, the deadline for filing summary determinations shall be computed by counting backward at least 60 days including the first calendar day prior to the date the hearing is scheduled to commence. If the end of the 60 day period falls on a weekend or holiday, the period extends until the end of the next business day. Under exceptional circumstances and upon motion, the presiding administrative law judge may determine that good cause exists to permit a summary determination motion to be filed out of time.

* * * * *

- 11. Amend § 210.21 by revising:
 - a. Paragraph (a);
 - b. The last sentence of paragraphs (b)(2), (c) introductory text, and (d);
 - c. The third sentence of paragraph (c)(2)(ii); and
 - d. Paragraph (e).

The revisions read as follows:

§ 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 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. A motion for termination of an investigation based on withdrawal of the complaint shall contain a statement that there are no agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation, or if there are any agreements concerning the subject matter of the investigation, all such agreements shall be identified, and if

written, a copy shall be filed with the Commission along with the motion. If the agreement contains confidential business information within the meaning of § 201.6(a) of this chapter, at least one copy of the agreement with such information deleted shall accompany the motion, in addition to a copy of the confidential version. 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 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, including an agreement to present the matter for arbitration, or a consent order, as provided in paragraphs (b), (c) and (d) of this section.

(b) *Termination by Settlement.* * * *

(2) * * * 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.* * * * Termination by consent order need not constitute a determination as to violation of section 337.

(2) * * *

(ii) * * * Termination by consent order need not constitute a determination as to violation of section 337. * * *

(d) *Termination based upon arbitration agreement.* * * *

Termination based on an arbitration agreement does not constitute a determination as to violation of section 337 of the Tariff Act of 1930.

(e) *Effect of termination.* Termination issued by the administrative law judge shall constitute an initial determination.

§ 210.22 [Removed and Reserved]

■ 12. Remove and reserve § 210.22.

■ 13. Amend § 210.25 by revising the second sentence of paragraph (f) to read as follows:

§ 210.25 Sanctions.

* * * * *

(f) * * * If the administrative law judge defers his adjudication in such a manner, his ruling on the motion for sanctions must be in the form of a recommended determination and shall be issued no later than 30 days after issuance of the Commission's final determination on violation of section 337 or termination of the investigation. * * *

Subpart E—Discovery and Compulsory Process

■ 14. Amend § 210.28 by revising the seventh and eighth sentences of paragraph (d), revising the first sentence of paragraph (g), and revising paragraph (i)(4) to read as follows:

§ 210.28 Depositions.

* * * * *

(d) *Taking of deposition.* * * * 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, upon payment of reasonable charges therefor, that person shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent. * * *

(g) *Admissibility of depositions.* The fact that a deposition is taken and served upon 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. * * *

* * * * *

(i) * * *

(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, served, 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.

■ 15. Amend § 210.29 by revising the fourth sentence of paragraph (b)(2) to read as follows:

§ 210.29 Interrogatories.

* * * * *

(b) * * *

(2) * * * The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, within ten days of service of the interrogatories or within the time specified by the administrative law judge. * * *

* * * * *

■ 16. Amend § 210.30 by revising the first sentence of paragraph (b)(2) to read as follows:

§ 210.30 Request for production of documents and things and entry upon land.

* * * * *

(b) * * *

(2) The party upon whom the request is served shall serve a written response within 10 days or the time specified by the administrative law judge. * * *

■ 17. Amend § 210.31 by revising the second sentence of paragraph (b) and the last sentence of paragraph (d) to read as follows:

§ 210.31 Requests for admission.

* * * * *

(b) *Answers and objections to requests for admission.* * * * The matter may be deemed admitted unless, within 10 days or 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. * * *

* * * * *

(d) *Effect of admissions; withdrawal or amendment of admission.* * * * Any admission made by a party under this section is for the purpose of the pending investigation and any related proceeding as defined in § 210.3 of this chapter.

■ 18. Amend § 210.32 by revising paragraph (g) to read as follows:

§ 210.32 Subpoenas.

* * * * *

(g) *Obtaining judicial enforcement.* In order to obtain judicial enforcement of a subpoena issued under paragraphs (a)(3) or (c)(2) of this section, the administrative law judge shall certify to the Commission, on motion or 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. If the request, relevant papers, or written report contain confidential business information, the administrative law judge shall certify nonconfidential copies along with the confidential versions. 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.

■ 19. Amend § 210.34 by:

■ a. Revising the section heading of section 210.34;

■ b. Adding the designation "Note to paragraph (c):" to the undesignated text at the end of paragraph (c);

■ c. Revising the newly designated note to paragraph (c);

■ d. Revising paragraph (d); and

■ e. Adding new paragraph (e).

The additions and revisions read as follows:

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

* * * * *

- (c) * * *
- (5) * * *

Note to paragraph (c): The issue of whether sanctions should be imposed may be raised on a motion by a party, the administrative law judge's own motion, or the Commission's own initiative in accordance with § 210.25(a)(2). Parties, including the party that identifies an alleged breach or makes a motion for sanctions, and the Commission shall treat the identity of the alleged breacher as confidential business information unless the Commission issues a public sanction. The identity of the alleged breacher means the name of any individual against whom allegations are made. The Commission or 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. If before an administrative law judge, any determination on sanctions of the type enumerated in paragraphs (c)(1) through (4) of this section shall be in the form of a recommended determination. When the motion is addressed to the administrative law judge, he shall grant or deny a motion for sanctions under paragraph (c)(5) of this section by issuing an order.

(d) *Reporting requirement.* Each person who is subject to a 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:

- (1) A subpoena;
- (2) A court or an administrative order (other than an order of a court reviewing a Commission decision);
- (3) A discovery request;
- (4) An agreement; or
- (5) Any other written request, if the request or order seeks disclosure, by him or any other person, of the subject confidential business information to a person who is not, or may not be, permitted access to that information pursuant to either a Commission protective order or § 210.5(b).

Note to paragraph (d): This reporting requirement applies only to requests and orders for disclosure made for use of confidential business information in non-Commission proceedings.

(e) *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) of this section, or it may take other action.

Subpart F—Prehearing Conferences and Hearings

■ 20. Amend § 210.35 by redesignating existing paragraphs (a)(2) through (6) as (a)(3) through (7), respectively; and adding new paragraph (a)(2) to read as follows:

§ 210.35 Prehearing conferences.

(a) * * *
 (2) Negotiation, compromise, or settlement of the case, in whole or in part;

* * * * *

■ 21. Amend § 210.38 by revising paragraphs (a) and (d) to read as follows:

§ 210.38 Record.

(a) *Definition of the record.* The record shall consist of all pleadings, the notice of investigation, motions and responses, all briefs and written statements, and other documents and things properly filed with the Secretary, 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 (including physical exhibits), and any other items certified into the record by the administrative law judge or the Commission.

* * * * *

(d) *Certification of record.* The record, including all physical exhibits entered into evidence or such photographic reproductions thereof as the administrative law judge approves, 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.

■ 22. Amend § 210.39 by revising paragraph (b) to read as follows:

§ 210.39 In camera treatment of confidential information.

* * * * *

(b) *Transmission of certain Commission records to district court.* (1) In a civil action involving parties that are also parties to a proceeding before the Commission under section 337 of the Tariff Act of 1930, at the request of a party to a civil action that is also a respondent in the proceeding before the Commission, the district court may stay, until the determination of the Commission becomes final, proceedings in the civil action with respect to any claim that involves the same issues involved in the proceeding before the Commission under certain conditions. If such a stay is ordered by the district court, after the determination of the

Commission becomes final and the stay is dissolved, the Commission shall certify to the district court such portions of the record of its proceeding as the district court may request.

Notwithstanding paragraph (a) of this section, the in camera record may be transmitted to a district court and be admissible in a civil action, subject to such protective order as the district court determines necessary, pursuant to 28 U.S.C. 1659.

(2) To facilitate timely compliance with any court order requiring the Commission to transmit all or part of the record of its section 337 proceedings to the court, as described in paragraph (b)(1) of this section, a party that requests the court to issue an order staying the civil action or an order dissolving the stay and directing the Commission to transmit all or part of the record to the court must file written notice of the issuance or dissolution of a stay with the Commission Secretary within 10 days of the issuance or dissolution of a stay by the district court.

* * * * *

Subpart G—Determinations and Actions Taken

■ 23. Amend § 210.42 by revising paragraphs (a)(1)(i), (a)(2), (h)(2), (h)(3), and (i), and adding paragraph (h)(6) to read as follows:

§ 210.42 Initial determinations.

(a)(1)(i) *On issues concerning violation of section 337.* 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 no later than four (4) months before the target date set pursuant to § 210.51(a).

* * * * *

(2) *On certain motions to declassify information.* The decision of the 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).

* * * * *

(h) * * *
 (2) An initial determination under § 210.42(a)(1)(i) shall become the determination of the Commission 60 days after the date of service of the initial determination, unless the Commission within 60 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. The findings and recommendations made by the administrative law judge in the recommended determination issued 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).

(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 for in paragraph (h)(5) and paragraph (h)(6) of this section, § 210.50(d)(3), 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.

* * * * *

(6) The disposition of an initial determination filed pursuant to § 210.42(c) which grants a motion for summary determination that would terminate the investigation in its entirety if it were to become the Commission's final determination, shall become the final 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.

(i) *Notice of determination.* A notice stating that the Commission's decision on whether to review an initial determination will be issued by the Secretary and served on the parties. Notice of the Commission's decision will be published in the **Federal Register** if the decision results in termination of the investigation in its entirety, if the Commission deems publication of the notice to be appropriate under § 201.10 of subpart B of this part, or if publication of the notice is required under § 210.49(b) of this subpart or § 210.66(f) of subpart H of this part.

- 24. Amend § 210.43 by:
 - a. Revising paragraph (a)(1);
 - b. Adding the designation "Note to paragraph (b)(1):" to the undesignated text at the end of paragraph (b)(1);
 - c. Revising the newly designated note to paragraph (b)(1);
 - d. Adding a sentence to the end of paragraph (b)(3);
 - e. Adding new paragraph (b)(5); and
 - f. Revising paragraphs (c) and (d)(1).

The additions and revisions read as follows:

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

(a) *Filing of the petition.* (1) Except as provided in paragraph (a)(2) of this section, any party to an investigation may request Commission review of an initial determination issued under § 210.42(a)(1) or (c), § 210.50(d)(3) or § 210.70(c) by filing a petition with the Secretary. A petition for review of an initial determination issued under § 210.42(a)(1) must be filed within 12 days after service of the initial determination. A petition for review of an initial determination issued under § 210.42(c) that terminates the investigation in its entirety on summary determination must be filed within 10 business days after service of the initial determination. Petitions for review of all other initial determinations under § 210.42(c) must be filed within five (5) business days after service of the initial determination. A petition for review of an initial determination issued under § 210.50(d)(3) or § 210.70(c) must be filed within 10 days after service of the initial determination.

* * * * *

(b) * * *

Note to paragraph (b)(1): 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. If a petition filed under this paragraph exceeds 50 pages in length, it must be accompanied by a summary of the petition not to exceed ten pages. Petitions for review may not exceed 100 pages in length, exclusive of the summary and any exhibits.

* * * * *

(3) * * * In order to preserve an issue for review by the Commission or the U.S. Court of Appeals for the Federal Circuit that was decided adversely to a party, the issue must be raised in a petition for review, whether or not the Commission's determination on the ultimate issue, such as a violation of section 337, was decided adversely to the party.

* * * * *

(5) *Service of petition.* All petitions for review of an initial determination shall be served on the other parties by messenger, overnight delivery, or equivalent means.

(c) *Responses to the petition.* Any party may file a response within eight (8) days after service of a petition of a final initial determination under § 210.42(a)(1), and within five (5) business days after service of all other types of petitions, except that a party who has been found to be in default

may not file a response to any issue as to which the party has defaulted. If a response to a petition for review filed under this paragraph exceeds 50 pages in length, it must be accompanied by a summary of the response not to exceed ten pages. Responses to petitions for review may not exceed 100 pages in length, exclusive of the summary and any exhibits.

(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 § 210.42(a)(1) within 60 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 of an initial determination filed pursuant to § 210.42(a)(2) or § 210.42(c), which grants a motion for summary determination that would terminate the investigation in its entirety if it becomes the final determination of the Commission, § 210.50(d)(3), or § 210.70(c) within 45 days after the service of the initial determination on the parties, or by such other time as the Commission may order. The Commission shall decide whether to grant, in whole or in part, a petition for review of an initial determination filed pursuant to § 210.42(c), except as noted above, within 30 days after the service of the initial determination on the parties, or by such other time as the Commission may order.

* * * * *

- 25. Amend § 210.45 by revising paragraph (c) to read as follows:

§ 210.45 Review of initial determinations on matters other than temporary relief.

* * * * *

(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. In addition, the Commission may take no position on specific issues or portions of the initial determination of the administrative law judge. The Commission also may make any findings or conclusions that in its judgment are proper based on the record in the proceeding. If the Commission's determination on review terminates the investigation in its entirety, a notice will be published in the **Federal Register**.

- 26. Amend § 210.49 by revising paragraph (b) to read as follows:

§ 210.49 Implementation of Commission action.

* * * * *

(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 a violation, together with the action taken relative to such determination under § 210.50(a) or § 210.50(d) of this part, or the modification or rescission in whole or in part of an action taken under § 210.50(a), shall promptly be published in the **Federal Register**. It shall also be promptly transmitted to the President or an officer assigned the functions of the President under 19 U.S.C. 1337(j)(1)(B), 1337(j)(2), and 1337(j)(4), together with the record upon which the determination and the action are based.

* * * * *

- 27. Amend § 210.50 by revising paragraph (d)(1) to read as follows:

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

* * * * *

(d) *Forfeiture or return of respondents' bonds.* (1)(i) If one or more respondents posts a bond pursuant to 19 U.S.C. 1337(e)(1) or 1337(j)(3), proceedings to determine whether a respondent's bond should be forfeited to a complainant in whole or part may be initiated upon the filing of a motion, addressed to the administrative law judge who last presided over the investigation, by a complainant within 90 days after the expiration of the period of Presidential review under 19 U.S.C. 1337(j). If that administrative law judge is no longer employed by the Commission, the motion shall be addressed to the Commission.

(ii) A respondent may file a motion addressed to the administrative law judge who last presided over the investigation for the return of its bond within 90 days after the expiration of the Presidential review period under 19 U.S.C. 1337(j). If that administrative law judge is no longer employed by the Commission, the motion shall be addressed to the Commission.

* * * * *

§ 210.51 [Amended]

- 28. Amend § 210.51(a) to remove all occurrences of the number "15" and add in its place the number "16".

Subpart H—Temporary Relief

- 29. Revise § 210.54 to read as follows:

§ 210.54 Service of motion by the complainant.

Notwithstanding the provisions of § 210.11 regarding service of the complaint by the Commission upon institution of an investigation, on the day the complainant files a complaint with the Commission (see § 210.8(a)(1) and § 210.8(a)(2) of subpart B of this part), the complainant must serve non-confidential copies of both documents (as well as non-confidential copies of all materials or documents attached thereto) on all proposed respondents and on the embassy in Washington, DC of the country in which each proposed respondent is located as indicated in the Complaint. If a complainant files any supplemental information with the Commission prior to institution, nonconfidential copies of that supplemental information must be served on all proposed respondents and on the embassy in Washington, DC of the country in which each proposed respondent is located as indicated in the complaint. The complaint, motion, and supplemental information, if any, shall be served by messenger, overnight delivery, 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, messenger, 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.

- 30. Amend § 210.55 by revising paragraph (b) to read as follows:

§ 210.55 Content of service copies.

* * * * *

(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 § 201.6(a) of this chapter, the Commission may require the complainant to file and serve new non-confidential versions of the aforesaid submissions in accordance with § 210.54 and may determine that the 35-

day period under § 210.58 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 non-confidential versions are filed with the Commission and served on the proposed respondents in accordance with § 210.54.

- 31. Amend § 210.56 by:
 - a. Revising the first paragraph and the first and second sentences of the fourth paragraph of the sample notice of paragraph (a); and
 - b. Revising the second sentence of paragraph (b) to read as follows:

§ 210.56 Notice accompanying service copies.

(a) * * *

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 _____, 20___. 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.

* * * * *

If the Commission determines to conduct an investigation of the complaint and 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(b). If an investigation is instituted, copies of the complaint, the notice of investigation, 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). * * *

* * * * *

(b) * * * The supplementary notice shall be served by messenger, overnight delivery, or equivalent means. * * *

- 32. Amend § 210.66 by revising the eighth sentence of paragraph (c) to read as follows:

§ 210.66 Initial determination concerning temporary relief; Commission action thereon.

* * * * *

(c) * * * The parties shall serve their comments on other parties by messenger, overnight delivery, or equivalent means.

* * * * *

- 33. Amend § 210.67 by revising:
 - a. The section heading; and
 - b. Paragraph (a) to read as follows:

§ 210.67 Remedy, the public interest, and bonding.

* * * * *

(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 (as provided in § 210.61). The administrative law judge also is authorized to make findings pertaining to the public interest, as provided in § 210.66(a). Such findings may be superseded, however, by Commission findings on that issue as provided in paragraph (c) of this section.

* * * * *

Subpart I—Enforcement Procedures and Advisory Opinions

§ 210.70 [Transferred]

- 34. Transfer § 210.70 from subpart I to subpart H.
- 35. Amend § 210.71 by revising paragraph (a)(1) to read as follows:

§ 210.71 Information gathering.

(a) *Power to require information.* (1) Whenever the Commission issues an exclusion order, the Commission may require any person to report facts available to that person that will help the Commission assist the U.S. Customs Service in determining whether and to what extent there is compliance with the order. Similarly, whenever the Commission issues a cease and desist order or a 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.

* * * * *

- 36. Amend § 210.75 by revising paragraphs (b)(4)(ii), and (c) to read as follows:

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

* * * * *

(b) * * *

(4) * * *

(ii) Bring civil actions in a United States district court pursuant to paragraph (c) of this section (and section 337(f)(2) of the Tariff Act of 1930) to recover for the United States the civil penalty accruing to the United States under that section for the breach of a cease and desist order or a consent order, and to obtain a mandatory injunction incorporating the relief the Commission deems appropriate for enforcement of the cease and desist order or consent order; or

* * * * *

(c) *Court enforcement.* To obtain judicial enforcement of an exclusion order, a cease and desist order, a consent order, or a sanctions order, the Commission may initiate a civil action in the U.S. district court. In a civil action under section 337(f)(2) of the Tariff Act of 1930, the Commission may seek to recover for the United States the civil penalty accruing to the United States under that section for the breach of a cease and desist order or a consent order, and may ask the court to issue a mandatory injunction incorporating the relief the Commission deems

appropriate for enforcement of the cease and desist order or consent order. The Commission may initiate a proceeding to obtain judicial enforcement without any other type of proceeding otherwise available under section 337 or this subpart or without prior notice to any person, except as required by the court in which the civil action is initiated.

- 37. Amend § 210.79 by revising paragraph (a) to read as follows:

§ 210.79 Advisory opinions.

(a) *Advisory opinions.* Upon request of any person, the Commission may, upon such investigation as it deems necessary, issue an advisory opinion as to whether any person's proposed course of action or conduct would violate a Commission exclusion order, cease and desist order, or consent order. 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.

* * * * *

- 38. Amend part 210 by adding Appendix A at the end of the part as follows:

Appendix A to Part 210—Adjudication and Enforcement

Initial determination concerning:	Petitions for review due:	Response to petitions due:	Commission deadline for determining whether to review the initial determination:
1. Violation § 210.42(a)(1)	12 days from service of the initial determination.	8 days from service of any petition.	60 days from service of the initial determination.
2. Forfeiture of respondent's bond § 210.50(d)(3).	10 days from service of the initial determination.	5 business days from service of any petition.	45 days from service of the initial determination.
3. Forfeiture of complainant's temporary relief bond § 210.70(c).	10 days from service of the initial determination.	5 business days from service of any petition.	45 days from service of the initial determination.
4. Summary initial determination that would terminate the investigation if it became the Commission's final determination § 210.42(c).	10 days from service of the initial determination.	5 business days from service of any petition.	45 days from service of the initial determination.
5. Other matters § 210.42(c)	5 business days from service of the initial determination.	5 business days from service of any petition.	30 days from service of the initial determination on private parties.
6. Formal enforcement proceedings § 210.75(b).	By order of the Commission	By order of the Commission	90 days from service of the initial determination on private parties.

By order of the Commission.

Issued: June 26, 2008.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8-14872 Filed 7-3-08; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2007-0183; FRL-8575-3]

Approval and Promulgation of Air Quality Implementation Plans; Illinois; Revisions to Emission Reduction Market System

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In 1997, Illinois adopted and submitted rules establishing a cap and trade program regulating emissions of volatile organic compounds (VOC). The program, known as the Emission Reduction Market System (ERMS), was designed to address VOC sources in the Chicago area with potential to emit at least 25 tons per year. Then, in 2004, the Chicago ozone nonattainment area was in effect reclassified from severe to moderate, which according to EPA guidance revised the applicable definition of major sources from 25 tons per year to 100 tons per year. This "reclassification" could have resulted in the program no longer including sources with potential to emit more than 25 but less than 100 tons per year. Instead, Illinois adopted rule revisions, submitted to EPA on January 10, 2007, which required that these sources remain part of the program. Illinois' rule revisions also addressed other potential ramifications of the "reclassification." EPA is approving these rule revisions.

DATES: This final rule is effective August 6, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2007-0183. All documents in the docket are listed on the www.regulations.gov Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard

copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone John Summerhays, Environmental Scientist, at (312) 886-6067 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: John Summerhays, Environmental Scientist, Criteria Pollutant Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-6067, summerhays.john@epa.gov.

SUPPLEMENTARY INFORMATION: This supplementary information section is arranged as follows:

- I. Description and Review of Illinois' Submittal
- II. What Action Is EPA Taking?
- III. Statutory and Executive Order Reviews

I. Description and Review of Illinois' Submittal

On January 10, 2007, Illinois submitted revisions to Part 205 of Title 35 of the Illinois Administrative Code, entitled "Emissions Reduction Market System" (ERMS). ERMS is a cap and trade program addressing VOC emissions in the Chicago area. Under ERMS, Illinois issues allowances equivalent to 12 percent less than baseline VOC emission levels, and requires affected sources to hold allowances equivalent to their VOC emissions during the ozone season. The program thereby requires overall VOC emission levels to be reduced to 12 percent below baseline levels. Illinois adopted the original rules for this program on November 20, 1997, and submitted the rules to EPA on December 16, 1997. EPA approved those rules on October 15, 2001, at 66 FR 52359.

Part 205 requires participation of all major VOC sources in the Chicago area. More specifically, the version of Section 205.200 that Illinois adopted in 1997 stated that "The requirements of this Part shall apply to any source * * * located in the Chicago ozone nonattainment area that is required to obtain a [Title V permit], and [has VOC emissions during the ozone season of at least 10 tons]." The requirement for a Title V operating permit applies to major sources. Since the Chicago area at that time was classified as a severe ozone nonattainment area, major sources were defined to include sources with the potential to emit 25 tons per year or more of VOC.

In 2004, EPA classified the Chicago ozone nonattainment area as moderate for the 8-hour ozone standard, and effective in 2005 rescinded the severe classification for the 1-hour ozone standard. The definition of major sources for moderate ozone nonattainment areas includes sources with the potential to emit 100 tons per year or more of VOC. According to EPA guidance (see 69 FR 23951, April 30, 2004), the replacement of the prior classification of severe with a classification of moderate thus meant that sources with potential to emit at least 25 tons per year but less than 100 tons per year of VOC would no longer be major sources and would no longer be required to have Title V operating permits. As a result, the sources in the Chicago area in this size range would no longer be subject to the ERMS requirements, given the applicability criteria in section 205.200 as quoted above.

Illinois estimated that the loss of these intermediate sized sources from ERMS would result in a loss of 330 tons of VOC emission reduction per ozone season associated with these sources. Illinois sought to avoid this loss of sources from the program. Consequently, Illinois revised section 205.200 to redefine applicability to include sources with potential to emit at least 25 tons of VOC (and sources otherwise required to have a Title V permit) and at least 10 tons of VOC emissions during the ozone season. By this means, Illinois revised its applicability provisions to include the same set of sources as were included in 1997, notwithstanding the change in the classification of the Chicago ozone nonattainment area.

Under the 1997 rules, since by definition all the affected sources had a Title V permit, Illinois used the Title V permits to establish several elements of the ERMS program. Most notably, Illinois used the source's Title V permit to specify the number of allowances to be issued to the source (Cf. section 205.315) and the source-specific VOC monitoring methods (Cf. section 205.330).

Since (under EPA's guidance) sources with potential emissions between 25 and 100 tons per year were no longer subject to a requirement for a Title V permit, the State needed an alternative means of specifying source-specific ERMS provisions. Illinois therefore adopted section 205.316, to provide that sources included in ERMS but not required to obtain a Title V permit were required either to request a Title V permit anyway or to apply for a federally enforceable state operating