

The U.S. International Trade Commission

Section 337 Investigations



Publication No. 4105
March 2009

United States International Trade Commission
Washington, DC 20436



(2009 ed.)

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

This pamphlet contains a brief background discussion of Section 337 investigations at the United States International Trade Commission (“Commission”) followed by answers to various frequently asked questions about Commission practice and procedure. Although this pamphlet is intended to clarify Commission procedures, it is for background purposes only, and is not intended to supersede, modify, or limit the Commission's Rules of Practice and Procedure or any Ground Rule, Order, or governing precedent issued by the Commission or its Administrative Law Judges. For more complete information about Commission practice and procedure in Section 337 investigations, please refer to the governing statute, 19 U.S.C. §1337, the governing regulations, 19 C.F.R. Parts 201 and 210, and the Ground Rules and Orders in effect in a particular investigation. Links to the statute and other information pertaining to Section 337 proceedings can be found on the Section 337 Resources web page, http://www.usitc.gov/intellectual_property. Also, additional information regarding filing requirements and procedures may be found on the Docket Services web page at http://www.usitc.gov/docket_services.

Questions can also be addressed to the following staff offices that work on Section 337 investigations:

- (1) Docket Services at 202-205-1802 (for matters concerning the filing and service of documents);

(2) Office of Unfair Import Investigations at 202-205-2560 (for matters concerning the contents of a complaint, the institution of an investigation, or the status of an investigation);

(3) Office of Administrative Law Judges at 202-205-2694 (for procedural matters when an investigation is before an Administrative Law Judge, questions may be directed to the assigned Judge's attorney-advisor);

(4) Office of the General Counsel at 202-205-3061 (for procedural matters when an investigation is before the Commission or on appeal); and

(5) Trade Remedy Assistance Office at 800-343-9822 or 202-205-2200 (for assistance to small businesses regarding preparation of Section 337 complaints).

The Commission welcomes feedback and suggestions from you on ways that the Commission can improve this pamphlet or otherwise clarify its procedures. Comments can be directed to 337_email@usitc.gov via e-mail or, using the printed comment form at the end of this pamphlet, via U.S. mail to the Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436.

CONTENTS

| | |
|--|----|
| Introduction | i |
| Background on Section 337 | 1 |
| Answers to Frequently Asked Questions..... | 3 |
| • Information for prospective complainants | 3 |
| 1. <i>Where do I get information about filing a Section 337 complaint?</i> | |
| • Filing and Service of Documents..... | 5 |
| 2. <i>Where, when, and how are documents to be filed with the Commission?</i> | |
| 3. <i>Are there any special rules that apply to the filing of a complaint?</i> | |
| 4. <i>How can I protect confidential business information in a filing with the Commission?</i> | |
| 5. <i>What documents should be filed? What documents should not be filed?</i> | |
| 6. <i>What are the requirements for service of documents in a Section 337 investigation?</i> | |
| • Information about the status of investigations; researching Commission precedent | 13 |
| 7. <i>How can I obtain information about the status of an investigation?</i> | |
| 8. <i>How can I research Commission precedent?</i> | |
| • Institution of a Section 337 Investigation..... | 15 |
| 9. <i>How is an investigation instituted?</i> | |
| • Investigation Procedures..... | 17 |
| 10. <i>How are investigations conducted?</i> | |
| 11. <i>Can an investigation be settled by agreement or consent order?</i> | |

- 12. *How do I obtain a subpoena?*
- 13. *Can I intervene in a Section 337 investigation?*
- 14. *Can I participate in an investigation other than by intervention?*
- 15. *Where and when are hearings held, and are they open to the public?*
- 16. *When is the Judge's Initial Determination on the merits of a case issued?*
- 17. *Is preliminary relief available?*
- 18. *How long do Section 337 investigations last?*

- Final Determinations, Remedies, and Appeals 23

19. *Is an Administrative Law Judge's Initial Determination on the merits subject to review by the Commission?*

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

21. *When do Commission remedial orders become effective?*

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

- FAQs Comment Sheet

BACKGROUND ON SECTION 337

Under Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), the Commission conducts investigations into allegations of certain unfair practices in import trade. Section 337 declares the infringement of certain statutory intellectual property rights and other forms of unfair competition in import trade to be unlawful practices. Most Section 337 investigations involve allegations of patent or registered trademark infringement.¹ Other forms of unfair competition, such as misappropriation of trade secrets, trade dress infringement, passing off, false advertising, and violations of the antitrust laws, may also be asserted.²

Section 337 investigations are initiated by the Commission following the receipt of a properly filed complaint that complies with the Commission's Rules.³ A Commission notice announcing the institution of an investigation is published in the *Federal Register* whenever the Commission votes to institute a Section 337 investigation.

When an investigation is instituted, the Chief Administrative Law Judge at the Commission assigns an Administrative Law Judge to preside over the proceedings and to render an initial

¹ Section 337 specifically declares the infringement of the following statutory rights to be unlawful import practices: a U.S. patent or a U.S. copyright registered under Title 17, a registered trademark, a mask work registered under chapter 9 of Title 17, or a boat hull design protected under chapter 13 of Title 17. 19 U.S.C. § 1337(a)(1)(B)-(E). In cases involving infringement of these intellectual property rights, there is no injury requirement.

² In addition to unfair practices based upon infringement of certain specified statutory intellectual property rights, Section 337 also declares unlawful unfair methods of competition and unfair acts in the importation and sale of products in the United States, *the threat or effect of which* is to destroy or substantially injure a domestic industry, prevent the establishment of such an industry, or restrain or monopolize trade and commerce in the United States. Thus, in these types of investigations, threatened or actual injury must be shown.

³ Requirements for the form and content of Section 337 complaints are set forth in 19 C.F.R. §§ 210.4, 210.8, and 210.12. *See also* 73 Fed. Reg. 38316 (Aug. 6, 2008).

decision (referred to as an “Initial Determination”) as to whether Section 337 has been violated. The Commission also assigns an investigative attorney from the Commission's Office of Unfair Import Investigations (“OUII”), who functions as an independent litigant representing the public interest in the investigation. The investigative attorney is a full party to the investigation. In the notice announcing initiation of an investigation, the Commission identifies the entities that may participate in the investigation as parties, namely, the complainant or complainants that allege a violation of Section 337, the respondent or respondents that are alleged to have violated Section 337, and the OUII staff attorney, who is formally known as the Commission Investigative Attorney.

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

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

Following a hearing on the merits of the case, the presiding Administrative Law Judge issues an Initial Determination (“ID”) that is certified to the Commission along with the evidentiary

record. The Commission may review and adopt, modify, or reverse the ID or it may decide not to review the ID. If the Commission declines to review an ID, the ID becomes the final determination of the Commission.

In the event that the Commission determines that Section 337 has been violated, the Commission may issue an exclusion order barring the products at issue from entry into the United States, as well as a “cease and desist” order directing the violating parties to cease certain actions. The Commission’s exclusion orders are enforced by U.S. Customs and Border Protection. Commission orders become effective within 60 days of issuance unless disapproved by the President for policy reasons.⁴ Appeals of Commission orders entered in Section 337 investigations are heard by the U.S. Court of Appeals for the Federal Circuit.

ANSWERS TO FREQUENTLY ASKED QUESTIONS

- **Information for prospective complainants**

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

A copy of the governing statute and the Commission’s Rules, including the rules that identify the requirements for a properly filed complaint, are among the reference materials available on the Commission’s website at www.usitc.gov/index.htm, which includes a Section 337 Resources web page that can be accessed directly at http://www.usitc.gov/intellectual_property.⁵

⁴ In 2005, the President delegated the authority to veto Commission exclusion orders to the U.S. Trade Representative. 70 Fed. Reg. 43251 (July 26, 2005).

⁵ Summary information about past and present Section 337 investigations can be found by accessing the Section 337 Investigational History through

(continued...)

Information regarding the requirements for Section 337 complainants is also available at http://www.usitc.gov/docket_services/documents/337_complaint_guidance_version_II_2008-10.pdf. Persons or companies interested in filing a Section 337 complaint may obtain additional information from the Commission's Office of Unfair Import Investigations (“OUII”), which can be reached by telephone at 202-205-2560 or by facsimile at 202-205-2158. *See* Question and Answer No. 3 for information regarding specific requirements for filing a Section 337 complaint.

The Commission also has a Trade Remedy Assistance Office (TRAO) that provides information to small businesses concerning the remedies and benefits available under U.S. trade laws and provides technical and legal assistance and advice to eligible small businesses to assist them in preparing and filing Section 337 complaints. TRAO can be reached by telephone at 800-343-9822 or 202-205-2200, or by facsimile at 202-205-2139.

Once a complaint has been filed, the public version of the complaint and any other public document filed in the matter can be accessed via the Commission’s Electronic Document Information System (“EDIS”) at <http://edis.usitc.gov>. Information regarding new complaints is also posted on the Docket Services page of the Commission’s website at http://www.usitc.gov/docket_services.

⁵ (...continued)
http://www.usitc.gov/intellectual_property.

- **Filing and Service of Documents**

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

Documents to be submitted to the Commission must be filed with Docket Services at 500 E Street, S.W., Room 112-A, Washington, D.C. 20436. As discussed below, certain public documents may be filed electronically.⁶ Documents, whether filed in person, by mail, or electronically, will be accepted for filing by the Commission only during its regular business hours: 8:45 a.m. to 5:15 p.m. Eastern Time. In the rare event that the Commission is closed, for example, as a result of inclement weather, a document due to the Commission on that day will be accepted for filing on the next business day that the Commission is open.

Documents may be hand delivered or mailed to Docket Services for filing, and will be deemed to be filed on the date of receipt by that office. Additionally, the Commission has undertaken a multi-phase implementation of electronic filing procedures consistent with the Government Paperwork Elimination Act which allows for electronic filing of certain public documents.⁷ Anyone wishing to file a document electronically should go to <http://edis.usitc.gov> and follow the instructions for submitting a document electronically to EDIS, including those pertaining to completion of the cover sheet. The instructions include the applicable hardware and software requirements for electronic filing. Under these procedures, documents eligible for electronic filing must be transmitted in portable document format (“PDF”) in accordance with

⁶ The Commission will not accept filings by facsimile.

⁷ An Electronic Filing Procedures Handbook (March 2006) can be accessed through the Commission’s Electronic Document Information System website at http://www.usitc.gov/docket_services/documents/handbook_on_electronic_filing.pdf.

the directions posted on the Commission's website. Such documents will be deemed "signed" through the use of a password-protected registration protocol. The signatory must be a registered user and such document shall be deemed "signed" when either the document is physically signed by the signatory and scanned in optical format or is signed by the use of an "e-signature."

Ordinarily, a filing in paper form requires the submission of an original and six (6) copies of a document when a case is before an Administrative Law Judge. *See* C.F.R. § 210.4(f)(2)(i). When a case is before the Commission, a filing in paper form ordinarily requires an original and twelve (12) copies. *See* 19 C.F.R. §210.4(f)(2)(ii). Documents will not be accepted for filing if an insufficient number of copies are submitted. Also note that when filing in paper form, the original signed copy of the document, as well as one additional copy, should not be stapled, bound, or hole-punched, although the document may be held together by means of a clip. The additional copies required, if filing in paper form, should be individually stapled or bound.

All documents submitted for filing must be accompanied by an EDIS cover sheet, which must be filled out online on the EDIS web page <http://edis.usitc.gov>⁸ The cover sheet contains certain information about the document, including the date of submission, the name of the signatory, and whether the document contains confidential business information. This information is used to index the documents in EDIS. Also, in our continuing effort to improve the accuracy and usability of EDIS, a Coding Manual was created to assist users with coding documents for EDIS.

⁸ *See* 19 C.F.R. § 201.8(g). The Electronic Document Information System is an electronic repository of the official record of documents filed at the Commission. Further information regarding this system is set forth below in Question and Answer No. 8.

The Coding Manual is available in PDF format and may be downloaded at http://www.usitc.gov/docket_services/documents/edis_coding_manual.pdf.

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

Persons filing a document in paper form can usually obtain a date-stamped copy of the document provided that they bring an extra copy of the document with them at the time of filing. In this regard, couriers should be advised that they may not themselves use the Commission date-stamp, but should request assistance from a Docket Services staff member at the time of filing. Persons filing by mail can also obtain a date-stamped copy of a document if they provide an extra copy of the document, a letter requesting a date-stamped copy, and an addressed return envelope with the postage prepaid. Persons electronically filing a document will receive both a printable notice of electronic receipt and a notice of electronic filing via e-mail. The notice of electronic filing will verify the effective filing date and time.

3. Are there any special rules that apply to the filing of a complaint?

The requirements for the contents of a Section 337 complaint are set forth at 19 C.F.R. §§ 210.4, 210.8, and 210.12. Prospective complainants are encouraged to contact the Office of Unfair Import Investigations at 202-205-2560 to discuss procedural requirements in advance of filing a complaint. Information and instructions regarding the number of copies to be filed and other requirements for Section 337 complaints can also be accessed at http://www.usitc.gov/docket_services/documents/337_complaint_guidance_version_II_2008-10.pdf.⁹ There are substantial additional requirements for complaints that include a request for temporary relief. *See* 19 C.F.R. §§ 210.8(a)(2), and 210.52-210.56. Information regarding the requirements for these complaints can be accessed at http://www.usitc.gov/docket_services/documents/337_complaint_and_motion_for_temp_relief_guidance_version_II_2008-08.pdf.

When a complaint is based upon the alleged infringement of certain intellectual property rights, the Commission's Rules require that the complaint be accompanied by specified background materials relating to the rights asserted. *See* Rule 210.12(c)-(g), 19 C.F.R. § 210.12(c)-(g). For example, in patent-based cases, the Rules require that the complaint be accompanied by a certified prosecution history for each asserted patent, and copies of the

⁹ As noted in these instructions, any complainant who requests confidential treatment for the contents of a complaint must also file the requisite number of copies of a public version of the complaint for use by the proposed respondents and the Commission. The government of a foreign proposed respondent will receive only the public version of the complaint. To avoid unnecessary copying costs, complainants are encouraged to prepare, where possible, a single public version of the complaint and place all confidential information in the accompanying exhibits rather than in the text of the complaint.

technical references cited in the prosecution histories of each asserted patent.¹⁰ Additionally, the complainant must submit copies of license agreements if the complaint relies on license agreements to establish standing, or the complaint relies on license agreements to support contentions that a domestic injury as defined in Section 337(a)(3) exists, or is in the process of being established as the result of domestic activities of one or more licensees. *See* Rule 210.12(a)(9)(iv), 19 C.F.R. § 210.12(a)(9)(iv). After institution of an investigation, the complainant has the obligation to serve each Respondent represented by counsel with materials covered in 19 C.F.R. § 210.12(c)-(h), such as the prosecution history for each asserted patent, that were not included as exhibits to the complaint but were filed with the complaint, within five (5) days of service of notice of appearance and an agreement to be bound by the protective order.

Specified background materials must also be filed with complaints that assert registered trademarks, copyrights, mask works, or vessel hull designs. *See* Rule 210.12(d)-(h). Claim charts purporting to show infringement of each asserted independent claim of the patents at issue are also required. 19 C.F.R. § 210.12(a)(9)(vii).

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

Confidential business information is protected in Section 337 investigations by a Protective Order issued by the Administrative Law Judge shortly after the commencement of an investigation.¹¹ These Protective Orders typically describe in detail how documents containing

¹⁰ 19 C.F.R. § 210.12(c).

¹¹ As noted earlier, the Commission has undertaken a multi-phase implementation of electronic filing procedures, which began in 2003. Documents containing confidential business
(continued...)

confidential information are to be marked and how and by whom they are to be handled.

Although these orders permit a party's outside counsel to have access to confidential business information produced during an investigation, the orders typically do not permit a party's in-house counsel to have access to such confidential business information.

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

Prior to the issuance of a Protective Order, documents submitted to the Commission may be treated as confidential if they are designated as confidential, accompanied by a request for confidential treatment, and deemed by the Secretary to the Commission to indeed contain confidential business information as described in the rules governing the submission and definition of confidential business information, Rules 210.5 and 201.6, 19 C.F.R. §§ 210.5 and 201.6. All documents containing or attaching confidential business information should be clearly marked on their face as containing or attaching confidential business information.

¹¹ (...continued)

information currently are not eligible for electronic filing. It is anticipated that the Commission will permit the electronic filing of confidential information in the future. In the meantime, confidential documents must be filed in paper form over-the-counter at Docket Services with an EDIS cover sheet as noted above.

5. What documents should be filed? What documents should not be filed?

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

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

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

The general rule on service is that all documents filed with the Commission must be served on all other parties to the investigation.¹² However, a complaint should not be served on any other entity unless the complaint is accompanied by a motion for temporary relief. If the

¹² The Commission Rules require that each party designate a single attorney or representative for service of process for the service list maintained by the Office of the Secretary in each investigation. 19 C.F.R. § 210.7(b).

Commission determines to institute an investigation, the Commission itself serves the complaint and notice of investigation on the entities that it names as respondents to the investigation, as well as the embassy of each foreign proposed respondent. In the case of a complaint accompanied by a motion for temporary relief, the Commission not only serves the complaint and motion on the respondents when it institutes the investigation, but it also requires the entity filing the complaint and motion to serve an advance copy of these items by messenger, courier, express mail, or other equivalent means on the entities that are proposed as respondents in the complaint, and on the embassy in Washington, D.C. of the country in which the foreign respondents are located.¹³

With regard to service of documents other than complaints, the practitioner is advised to consult the Ground Rules in effect in a particular investigation. The Ground Rules usually require that the parties serve on the presiding Administrative Law Judge two copies of each document filed at the Commission. The Ground Rules also typically specify the mode of service between the parties (*e.g.*, overnight courier) and typically include instructions not to serve the Administrative Law Judge by facsimile in the absence of prior permission to do so.

¹³ The general Rules on service are located at 19 C.F.R. §§ 210.7 and 201.16. The Rules concerning service of a complaint that is accompanied by a motion for temporary relief are located at 19 C.F.R. §§ 210.54 and 210.55; *see also* 19 C.F.R. § 210.56 regarding the notice that must accompany service copies of a complaint and motion for temporary relief.

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

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

Interested persons can view certain information about newly filed complaints at the Docket Services page of the Commission's website at <http://info.usitc.gov/sec/dockets.nsf/337?OpenView>. This website, which contains information identifying the name of the party filing the complaint and the subject matter of the complaint, is usually updated within 30 minutes of the filing of a new complaint.

Commission notices concerning matters such as initiation and termination of an investigation are published in the *Federal Register*. These notices, as well as Commission press releases, are also posted on the Commission's website, usually within a few days after issuance, and can be accessed at http://www.usitc.gov/secretary/fed_reg_notices.

All documents filed in an investigation, except for those containing confidential information, can be accessed on the Commission's website at <http://edis.usitc.gov>. These documents are also available for inspection during official business hours (8:45 a.m. to 5:15 p.m. Eastern Time) in the Commission's Docket Services office at 500 E Street, S.W., Room 112-A, Washington, D.C. 20436, telephone 202-205-1802. Hearing-impaired individuals are advised that information about documents filed with the Office of the Secretary can be obtained by contacting the Commission's TDD terminal at 202-205-1810.

Other questions about the status of an investigation can be addressed to the Commission Investigative Attorney assigned to the case from the Office of Unfair Import Investigations, whose name and telephone number are listed in the notice of investigation. Journalists and

market analysts should direct inquiries to the Commission's Office of External Relations at 202-205-1819.

8. How can I research Commission precedent?

All orders and decisions issued by the Administrative Law Judges and the Commission, except those containing confidential business information, are available for inspection at the Commission's Docket Services office at 500 E Street, S.W., Room 112-A. Public orders and decisions of the Administrative Law Judges and the Commission in investigations instituted after January 1, 1996, as well as other documents in the Commission's public docket file, may also be searched and retrieved using EDIS at <http://edis.usitc.gov>. Researchers can browse an electronic file room or conduct full-text, keyword searches for documents. Please contact the EDIS help desk at (202) 205-EDIS (3347) or send an email request to EDIS3Help@usitc.gov for assistance with using EDIS. To schedule individual or group EDIS training, contact Docket Services at 202-205-1802.

The EDIS system includes search capabilities and procedures to facilitate downloading of Commission documents. Updates to the EDIS system will be implemented in the near future to improve searching capabilities and other functions to facilitate user-friendly access for internal and external parties. Persons interested in obtaining copies of orders, decisions, or other documents that are available on EDIS may print the documents from the Internet. In addition, Commission publications containing decisions in many Section 337 investigations can be downloaded from the Commission's website at http://www.usitc.gov/intellectual_property/int_prop_publications.htm. Orders and decisions in

Section 337 investigations can also be researched on Westlaw™ and LEXIS™.¹⁴ (Materials from the Commission are available in the FINT-ITC database on Westlaw™ and the ITC file of the ITRADE library on LEXIS™.) Some decisions are also published in the United States Patent Quarterly.

Summary information concerning pending and completed investigations can be found on the 337 Investigational History page which is accessible from the Commission's website at http://www.usitc.gov/intellectual_property/inv_his.htm. Interested persons can search or browse the Investigational History page for information such as the names of the parties involved, the presiding Administrative Law Judge, the types of unfair acts at issue, the identity of the intellectual property rights asserted, and scheduling information, including the target date for completion of the investigation.

- **Institution of a Section 337 Investigation**

9. How is an investigation instituted?

After a complaint is filed with the Commission, OUII examines the complaint for sufficiency and compliance with the applicable rules, and makes a recommendation to the Commission regarding institution of the requested investigation. OUII's examination of the complaint may result in a request for supplementation or amendment of the complaint prior to the Commission's determination regarding whether to institute an investigation.¹⁵

¹⁴ However, not all Section 337 orders and decisions are published by Westlaw™ and LEXIS™.

¹⁵ See Question and Answer 6 for further information about the service of complaints and (continued...)

The Commission will normally determine whether to institute a Section 337 investigation within 30 calendar days after the filing of a complaint. If a complaint is accompanied by a motion for temporary relief, the Commission will normally make its determination regarding institution of an investigation and provisional acceptance of the motion for temporary relief within 35 calendar days after the filing of the complaint and motion.

In the event that the Commission determines to institute a Section 337 investigation, a notice of investigation defining the scope of the investigation is published in the *Federal Register*. These notices typically appear in the *Federal Register* the week following the last day of the 30- or 35-day period for determining whether to institute an investigation. In addition to publishing a notice in the *Federal Register*, the Commission serves a copy of the complaint and notice of investigation on all of the respondents named in the investigation as well as on the U.S. embassy for the country in which they are located.

In the event that the Commission determines not to institute an investigation based upon a complaint, the complainant and all the entities named as proposed respondents in the complaint will receive written notice of the Commission's action. Decisions not to institute an investigation are rare.

¹⁵ (...continued)
notices of investigation by the Commission.

- **Investigation Procedures**

10. How are investigations conducted?

Section 337 investigations are conducted in conformity with the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, and pursuant to Commission Rules published at 19 C.F.R. Part 210, which are similar in many respects to the Federal Rules of Civil Procedure. In addition to these rules, the presiding Administrative Law Judge typically issues a set of Ground Rules for the conduct of the investigation. These Ground Rules provide detailed instructions on matters such as the time for responding to motions, the method for asserting privilege, the number of copies required of evidentiary exhibits, the use of translators, and the procedure for arranging a telephone conference between the parties and the Administrative Law Judge.

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

Yes. The Commission Rules provide that a party may move to terminate an investigation as to one or more of the respondents on the basis of a licensing or other settlement agreement, including an agreement to present the matter for arbitration. *See* Commission Rule 210.21(a)(2), (b), and (d), 19 C.F.R. § 210.21(a)(2), (b), and (d). Thus, for example, a complainant in a patent-based investigation may enter into a license agreement with one of the respondents and file a motion to terminate the investigation as to that respondent. Assuming the judge and ultimately the Commission conclude that the agreement is not contrary to the public interest, the investigation may be terminated, in whole or in part, on the basis of such a motion.

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

Orders are typically entered upon the joint request of the complainant and a respondent in the form of a motion which contains the parties' joint proposed Consent Order, but such proposed orders can be proffered by a respondent alone.

Additionally, the Commission has approved the initiation of a voluntary pilot mediation program for Section 337 investigations. This program is aimed at facilitating the settlement of disputes and to evaluate the possible implementation of a permanent mediation program. All Section 337 investigations are eligible for participation in the program. An Administrative Law Judge may nominate a particular 337 investigation for inclusion in the program or a party may individually or jointly request to participate as well. The administrative management of the program is coordinated by the Supervisory Attorney in Docket Services, supervised by the Office of the Chairman. Further information about the program may be found on the Commission's website at http://www.usitc.gov/intellectual_property/pilot_mediation.htm.

12. How do I obtain a subpoena?

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

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

13. Can I intervene in a Section 337 investigation?

Commission Rule 210.19, 19 C.F.R. § 210.19, provides that any person desiring to intervene may request leave to intervene by filing a written motion. Such persons may be allowed to intervene as interveners or respondents at the Commission's discretion. Persons seeking to intervene are urged to consult the Administrative Law Judge's Ground Rules on matters such as service and filing of motions.

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

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

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

Evidentiary hearings are held by the Administrative Law Judges in hearing rooms located in the Commission's building in Washington, D.C. The dates of such hearings are usually set forth in a procedural schedule issued by the Judge early in the investigation, and if a hearing is rescheduled, the Judge will normally issue an order with the new dates. While the length and timing of hearings varies from case to case, in an investigation scheduled to be completed in

twelve months, for example, the evidentiary hearing would likely occur about five or six months after institution of the investigation.

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

A verbatim transcript of all hearings is taken. Copies of the public portions of these transcripts are available for inspection in the Office of the Secretary of the Commission, and are available for purchase from the official reporter.

16. When is the Judge's Initial Determination on the merits of a case issued?

Within 45 days after publication of a notice of investigation, the presiding Administrative Law Judge sets a target date for completion of the investigation.¹⁶ The Judge issues a decision on the merits of the case, called an "Initial Determination," no later than four (4) months prior to the target date.¹⁷ Journalists and other non-parties to an investigation should note that the Administrative Law Judges' decisions typically contain confidential business information, and thus are not available for public inspection on the date filed. Public versions of these decisions

¹⁶ Target dates of 16 months or less are set by the Judge's order. If the Judge seeks to establish a longer target date, the Judge must issue an Initial Determination that is subject to review by the Commission.

¹⁷ Initial Determinations regarding violation of Section 337 typically contain an opinion, findings of fact, and conclusions of law.

(with the confidential information redacted) are available for inspection at Docket Services and via the Commission's website shortly after the date that the original confidential version is filed.

The Administrative Law Judge's Initial Determination is subject to review by the Commission, as discussed below in Question and Answer No. 19.

17. Is preliminary relief available?

Yes. A complainant may request at the time it files a complaint that the Commission conduct expedited temporary relief proceedings and issue a temporary exclusion order and/or a temporary cease and desist order during the course of the investigation.¹⁸ *See* 19 C.F.R. Subpart H. However, as indicated below, there are substantial additional pleading and proof requirements when expedited temporary relief is requested. In determining whether to grant a request for temporary relief, the Commission applies the standard employed by the U.S. Court of Appeals for the Federal Circuit in reviewing lower court decisions granting preliminary injunctions.¹⁹ This determination will be made by the Commission no later than the 90th day after the date on which an investigation involving a temporary relief request is instituted, or, if the case is deemed to be complex, no later than the 150th day after institution of the investigation. *See* 19 U.S.C. § 1337(e).

The Commission Rules require that requests for temporary relief must be made in a motion that is accompanied by a memorandum supporting the request. Significantly, the motion must

¹⁸ General information about exclusion orders and cease and desist orders is discussed below in Question and Answer No. 19.

¹⁹ In general, this standard involves a consideration of complainant's likelihood of success on the merits of the case, harm to the domestic industry in the absence of temporary relief, harm to respondents, and the public interest.

also be accompanied by affidavits that support the factual assertions made in the motion, as well as by all evidence in the complainant's possession at the time of filing that the complainant intends to rely upon in support of the motion. Information concerning the form of a temporary relief motion, required supporting materials, and special service rules relating to such motions may be obtained from the Office of Unfair Import Investigations at 202-205-2560. Also, information regarding requirements for complaints that include temporary relief requests can be found at

http://www.usitc.gov/docket_services/documents/337_complaint_and_motion_for_temp_relief_guidance_version_II_2008-08.pdf.

Following the receipt of a motion for temporary relief, the Commission will determine whether to institute "temporary exclusion order" proceedings (informally referred to as "TEO" proceedings) to adjudicate the motion. In the event the Commission institutes TEO proceedings, the motion for temporary relief will be forwarded to an Administrative Law Judge for adjudication. In a typical TEO proceeding, the parties conduct a few weeks of discovery on the issues presented by the motion, and thereafter the Administrative Law Judge holds an evidentiary hearing on the merits of the motion, receives briefs from the parties on the evidence and the law, and issues a determination on the merits of the temporary relief motion by the 70th day of the investigation (or by the 120th day in a complex case). If the Administrative Law Judge determines to grant the motion, the Judge will issue an Initial Determination that is subject to review by the Commission. By the 90th day after institution of an investigation (or the 150th day in more complex cases), the Commission will determine whether to accept the Administrative Law Judge's Initial Determination and whether to grant temporary relief.

18. How long do Section 337 investigations last?

By statute, Section 337 investigations must be completed “at the earliest practicable time.” Accordingly, the Commission places great emphasis on the expeditious adjudication of Section 337 investigations. Historically, the Commission has strived to complete most investigations in less than 15 months. However, factors such as the complexity of the subject matter and number of unfair acts at issue, as well as the workloads of the Judges during particular periods, have resulted in longer target dates in a substantial number of investigations in recent years.

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

19. Is an Administrative Law Judge's Initial Determination on the merits subject to review by the Commission?

Under the Commission’s Rules, parties may petition for Commission review of an Administrative Law Judge's Initial Determination (ID) if they believe that it (i) contains a clearly erroneous finding of material fact, (ii) contains an erroneous legal conclusion, or (iii) affects Commission policy. Parties may file responses to any petition for review. Within 60 calendar days after service of the ID on the parties, the Commission decides, either on the basis of a petition for review or on its own initiative, whether to review some or the entire ID. Those portions of the ID that are not reviewed by the Commission become the Commission’s determination. If the Commission decides to review some or all of an ID, it may affirm, set aside, or modify the portions of the ID under review. *See generally*, Rules 210.43-210.45, 19 C.F.R. §§ 210.43-210.45.

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

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

An exclusion order directs the U.S. Customs and Border Protection to exclude articles from entry into the United States. There are two types of exclusion orders -- general exclusion orders and limited exclusion orders. A general exclusion order directs the U.S. Customs and Border Protection to exclude all infringing articles, without regard to source. In contrast, a limited exclusion order directs U.S. Customs and Border Protection to exclude infringing articles that originate from a specified firm that was a respondent in the Commission investigation. If an entity has previously attempted to import an excluded article into the United States and the article was previously denied entry by the U.S. Customs and Border Protection, the Commission may order the seizure and forfeiture of subsequent shipments of the article. *See* 19 U.S.C. § 1337(i).²⁰

A cease and desist order directs a respondent in the Commission investigation to cease its unfair acts, including selling infringing imported articles out of U.S. inventory. Unlike exclusion orders, cease and desist orders are enforced by the Commission, not by U.S. Customs and Border

²⁰ U.S. Customs and Border Protection procedures for implementing Commission exclusion orders and Commission seizure orders are set forth at 19 C.F.R. § 12.39.

Protection.²¹ See 19 U.S.C. § 1337(f)(2) (which provides for civil penalties for violation of cease and desist orders).

21. When do Commission remedial orders become effective?

Upon issuance, Commission remedial orders are sent to the President who may then, within 60 days, disapprove them for policy reasons.²² Such disapprovals are rare. During this period, called the “Presidential review period,” infringing articles may enter the United States provided the importer posts a bond with U.S. Customs and Border Protection in an amount determined by the Commission. Similarly, activities prohibited by a Commission cease and desist order may continue during the Presidential review period provided the respondent posts a bond with the Commission. If the President does not disapprove the Commission's remedial orders within the 60 day review period, at the conclusion of that period, infringing imports may no longer be imported and the complainant may seek to have previously posted bonds forfeited to it.

²¹ Questions about the administration of exclusion orders should be addressed to the Intellectual Property Rights and Restricted Merchandise Branch of the U.S. Customs and Border Protection at 202-325-0020. Although Customs administers exclusion orders, the Commission’s Assistant General Counsel for Section 337 Investigations, who can be reached at 202-205-3061, may also be able to respond to questions regarding exclusion orders, as well as to questions regarding Commission cease and desist orders.

²² As noted earlier, in 2005, the President delegated the authority to veto Commission exclusion orders to the U.S. Trade Representative. 70 Fed. Reg. 43251 (July 26, 2005).

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

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

FAQS COMMENT FORM

If you have found this pamphlet to be helpful or if you have suggestions for ways to improve this pamphlet, please let us know by filling out this form.

1. Do you have any suggestions regarding ways to improve this pamphlet?

2. (For statistical purposes) Describe your previous degree of experience with Section 337.
 No Experience Some Experience Considerable Experience

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

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

| | |
|--|---|
| <input type="checkbox"/> Outside counsel for complainant (or prospective complainant) | <input type="checkbox"/> In-house counsel for complainant (or prospective complainant) |
| <input type="checkbox"/> Outside counsel for respondent | <input type="checkbox"/> In-house counsel for respondent |
| <input type="checkbox"/> In-house representative of a complainant | <input type="checkbox"/> In-house representative of a respondent |
| <input type="checkbox"/> Outside counsel for a subpoenaed company | <input type="checkbox"/> In-house counsel for a subpoenaed company |
| <input type="checkbox"/> Counsel for a small company | <input type="checkbox"/> Journalist |
| <input type="checkbox"/> Academician or student | <input type="checkbox"/> Other (_____) |

Please return this Comment Form to:

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

name (optional)

company/firm (optional)

Alternatively, you may cut and paste this form and e-mail your response to 337_email@usitc.gov.