

September 17, 2012

Lisa R. Barton  
Acting Secretary  
United States International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

**RE: Comments on “Notice of Proposed Rulemaking on Rules of General Application, Adjudication, and Enforcement,” MISC-040.  
77 Fed. Reg. 41120 (July 12, 2012).**

Dear Acting Secretary Barton:

The American Intellectual Property Law Association (AIPLA) appreciates the opportunity to comment on the revisions proposed by the United States International Trade Commission (“Commission”) in the “Notice of Proposed Rulemaking on the Rules of General Application, Adjudication and Enforcement,” MISC-040, as set forth in the Federal Register (77 Fed. Reg. 41120) on July 12, 2012.

AIPLA is a national bar association with approximately 14,000 members who are primarily intellectual property lawyers in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property.

AIPLA commends the Commission for proposing these revisions in an effort to update and streamline the procedural aspects of intellectual property-based investigations under Section 337 of the Tariff Act of 1930, 19 U.S.C. §1337. While we support most of the clarifying amendments for their beneficial effect on procedure, we are concerned that some of the amendments do not adequately reflect the unique circumstances of conducting an action before the Commission.

**A. PART 201**

**1. Subpart B – Initiation and Conduct of Investigations  
Proposed Rules 201.16(a), (c), (e) and (f)**

The Commission proposes to amend Subpart B of 19 C.F.R. § 201, and specifically Rules 201.16(a), (c), (e) and (f).

Rule 201.16(a) pertains to the service of documents on parties. The proposed amendment clarifies that the rule is equally applicable to service by the Commission. Rule 201.16(c) is directed to certificates of service. The proposed amendment would reference other rules applicable to service. Rule 201.16(f) dictates the types of documents that can be electronically served with the Commission's prior consent. The proposed changes would clarify that additional time under Rule 201.16(e) does not apply when service is by electronic means.

*Comment:* AIPLA supports the Commission's proposed amendments to Rules 201.16(a), (c) and (f), as they provide needed clarity to the rules.

Rule 201.16(e) generally provides for additional days to be added to response times when service is by overnight delivery. The proposed amendment would add five calendar days to the response time when overnight delivery service is to a foreign country.

*Comment:* AIPLA also supports this proposed change to Rule 201.16(e) and believes it would provide a practical solution to the inevitable delay when serving *via* overnight delivery to foreign countries.

## **B. PART 210**

### **1. Subpart A – Rules of General Applicability Proposed Rules 210.3 – 210.8**

The Commission proposes to amend Subpart A of 19 C.F.R. § 210, in particular Rules 210.3-210.8.

Rule 210.3 provides definitions for certain terms in Part 210. For clarification purposes, the proposed change would indicate the term “ancillary proceeding” is a synonym for the defined term “related proceeding.”

*Comment:* AIPLA supports the amendment to Rule 210.3, as it provides needed clarification to what is considered a related proceeding.

Rule 210.4 pertains to the requirements for written submissions, including a list of submissions that must be filed electronically with paper copies submitted by noon the next business day. The proposed amendment would identify additional categories of submissions to be submitted this way.

*Comment:* AIPLA supports this amendment and commends the Commission's effort to increase the types of documents that can be filed electronically, thereby simplifying the filing process at the Commission.

Rule 210.5 is directed to the special treatment of confidential business information (“CBI”), including the issuance of decisions containing CBI as a public version. Currently, the time for issuing the public version varies. The proposed change would require the Commission or Administrative Law Judge (“ALJ”) to issue the public version of their decision within 30 days of issuing the confidential version.

*Comment:* AIPLA commends the Commission for recognizing the importance of timely issuing the public versions of decisions and supports its proposed amendment to Rule 210.5.

Rule 210.6 is generally directed to the computation of time in Section 337 investigations. Rule 210.7 provides guidance for the service of process and publication of notices. The proposed amendments to both Rules 210.6 and 210.7 address housekeeping matters, including amendments which ensure compatibility of all of the rules.

*Comment:* AIPLA agrees with the proposed amendments to both Rules 210.6 and 210.7.

Rule 210.8 provides guidance for the filing of the complaint and for filings by the complainant, respondents, and members of the public on public interest issues raised by the complaint. The proposed amendment would require the filing entity to submit a public version of its document simultaneously with the confidential submission.

*Comment:* Currently, many entities do not timely submit public versions of their confidential filings. Therefore, AIPLA fully supports the Commission’s effort to provide a due date in the rules for submitting public versions of filings. However, AIPLA is concerned that requiring the public version on the same day as the confidential filing places additional strain on the already tight timeline of Section 337 investigations. As such, AIPLA would propose amending Rule 210.8 to require the public version of these types of filings be submitted on the next business day.

## **2. Subpart C – Pleadings**

### **Proposed Rules 210.12(a), 210.13(b), 210.14, 210.14(b)(1) and 210.15(a)(2)**

The Commission proposes to amend Subpart C of 19 C.F.R. § 210, specifically Rules 210.12(a), 210.13(b), 210.14, 210.14(b)(1) and 210.15(a)(2).

Rule 210.12(a) provides for the requirements and content of the complaint. The proposed amendments would require the complainant to: (1) plead with particularity whether it alleges that a domestic industry exists or that a domestic industry is in the process of being established; (2) specify if it is requesting a general exclusion order (GEO), a limited exclusion order (LEO), and/or cease and desist order; and (3) identify the accused products with a clear statement in plain English.

*Comment:* AIPLA supports each of these amendments to Rule 210.12(a) and believes they will further assist in providing the Commission and the public sufficient notice of what is being alleged in the complaint. AIPLA also proposes that the Commission add an additional provision to require that the complainant to identify with particularity in the title of the investigation the alleged types of products that are involved in the investigation. AIPLA believes this would further assist putting the public on notice regarding what the investigation involves.

Rule 210.13(b) generally sets forth requirements for the contents of the response to the complaint and makes reference to Rule 201.8. However, Rule 201.8 has been amended such that it no longer applies to Section 337 investigations. The proposed amendment would eliminate reference to Rule 201.8.

*Comment:* AIPLA supports this proposed change.

Rule 210.14 provides for amendments to the pleadings and notice of investigations, including the consolidation of related investigations. The first proposed amendment would permit the ALJ to consolidate investigations in particular circumstances. The second proposed amendment would restart the normal 30-day process for determining whether to institute an investigation if substantial amendments are made to the complaint.

*Comment:* AIPLA supports the second proposed amendment but has a question regarding the first. In particular, how would the new proposed discovery limits set forth in Rules 210.28 and 210.29 be applied to consolidated investigations? AIPLA recommends that the Commission clarify how these newly proposed discovery limits would be applied to consolidated investigations. In this regard, to the extent the Commission imposes discovery limitations in Section 337 investigations, AIPLA suggests that, for the purposes of such limitations, the Commission treat consolidated investigations as multiple investigations.

Rules 210.14(b) and 210.15(a)(2) are directed to motions to amend the complaint. For clarification purposes, the proposed amendment would move the requirement for service on proposed respondents from Rule 210.15(a)(2) to Rule 210.14(b)(1). AIPLA agrees with this proposed change.

### **3. Subpart D – Motions Sections 210.16(b), 210.16(c), 210.17, 210.21**

The Commission proposes to amend Subpart D of 19 C.F.R. § 210, in particular Rules 210.16(b), 210.16(c), 210.17 and 210.21.

Rules 210.16(b), 210.16(c) and 210.17 all pertain to proceedings wherein a respondent defaults or otherwise fails to act. Each of the proposed amendments to these three rules provides clarification to these procedures.

*Comment:* AIPLA supports the proposed amendments to Rules 210.16(b), 210.16(c) and 210.17.

Rule 210.21 is directed to the termination of the investigation prior to a finding of a Section 337 violation by the withdrawal of the complaint, by settlement agreement, or by consent order. The proposed change would clarify that Rule 210.21 requires the interested parties to provide a copy of any documents referenced in the settlement agreements.

*Comment:* AIPLA generally supports the amendment but notes that in multi-respondent cases, the Commission may wish to limit access to all of the documents to only the Commission, as it may not be in the interest of the complainant and settling respondent to permit counsel for the non-settling respondents to have access to the related documents. A settling respondent that does not already have access to the related documents should not get access to them under these circumstances.

#### **4. Subpart E – Discovery and Compulsory Process Rules 210.28, 210.29, 210.34(b) and (c)**

The Commission proposes to amend Subpart E of 19 C.F.R. § 210, in particular, Rules 210.28, 210.29, 210.34(b) and 210.34(c).

Rule 210.28 provides for depositions in Section 337 investigations. The proposed amendment to Rule 210.28 would limit, unless good cause is shown, the number of fact depositions as follows: (a) limit complainants as a group to a maximum of five fact depositions per respondent or to no more than 20 fact depositions total; (2) limit the respondents as a group to a maximum of 20 fact depositions total; and (3) if the Commission investigative attorney is a party, limit him or her to taking a maximum of 10 fact depositions while permitting him or her to participate in all depositions taken by any parties. The Commission relies upon the Federal Rules of Civil Procedure in support of limiting the number of depositions.

*Comment:* AIPLA cautions the Commission against applying the Federal Rules of Civil Procedure to Section 337 investigations.

First, the Commission is not an Article III court, and therefore, the Federal Rules do not apply. Second, it is not advisable to limit discovery in Section 337 investigations because it is important for the ALJs to create a complete record. Limiting discovery in this manner could have a negative impact on this collection of information and ultimately on the appropriate relief that is or is not granted. AIPLA proposes continuing with the current practice – allowing ALJs to dictate discovery limits through their Rules.

Rule 210.29 provides for interrogatories in Section 337 investigations. The proposed changes would limit the number of interrogatories each party is allowed to serve to 175 interrogatories, absent a stipulation by the parties or a grant of a written motion by the ALJ. In support, the Commission suggests the proposed amendment is in keeping with the ground rules of several of the ALJs.

*Comment:* Again, AIPLA does not support limiting discovery through amending Rule 210.29. As mentioned above with respect to the proposed amendment to limit the number of depositions, it is not advisable to limit the number of interrogatories because of the importance of a complete record in Section 337 investigations. Accordingly, AIPLA proposes continuing with the current practice – allowing ALJs to dictate discovery limits through their individual rules.

Rules 210.34(b) and 210.34(c) set forth the requirements a person must take if he finds he has made an unauthorized disclosure of information. The proposed amendment would add that the rule also encompasses loss or theft of information.

*Comment:* AIPLA supports this amendment, as the addition of “loss” and “theft” makes it clear that both unintentional and intentional unauthorized disclosures are covered by the rule. Additionally, AIPLA believes this amendment would provide added assurance to the entities submitting CBI that the recipients are under a duty to protect CBI from unintentional unauthorized disclosures.

## **5. Subpart G – Determinations and Actions Taken**

### **Rules 210.42(a) and (c), 210.43, 210.50, 210.51**

The Commission proposes to amend Subpart G of 19 C.F.R. § 210, specifically Rules 210.42(a), 210.42(c), 210.43, 210.50 and 210.51.

Rules 210.42(a) and 210.42(c) are directed to initial determinations, including target dates and motions which may be granted by initial determinations. The proposed amendments would conform Rules 210.42(a) and (c) with 210.51. Further, an additional amendment to Rule 210.42(c) would provide that decisions by an ALJ on motions for forfeiture or return of respondents’ bond, or for forfeiture or return of complainant’s temporary relief bond, shall be made as an initial determination, regardless of whether the motion is granted or denied.

*Comment:* AIPLA supports these amendments to Rules 210.42(a) and (c), as it appears the amendments would allow for a quicker resolution at the Commission-level for matters affecting bonds, which would be beneficial for the parties involved.

Rule 210.43 provides for the timing and contents of a petition for review of an initial determination. Rule 210.50 provides for the issuance of a GEO, LEO, and/or a cease and desist order, and if applicable, the posting of a bond by respondents. The proposed amendments to Rules 210.43 and 210.50 would shorten the time for petition responses. For Rule 210.43, the proposed change shortens the response time from 10 business days to 10 calendar days. In a similar manner, the proposed amendment to Rule 210.50 would shorten the response time from 5 business days to 5 calendar days.

*Comment:* AIPLA suggests keeping the response times indicated in Rules 210.43 and 210.50 as they are currently written. Further shortening the response times in practice would be difficult, given the reality of working with foreign entities, particularly around multi-cultural holidays.

The proposed amendment to Rule 210.43 would restrict the number of pages for petitions for review. In support, the Commission refers to the Federal Circuit Rules.

*Comment:* Again, as with the Federal Rules of Civil Procedure, the Federal Circuit Rules should not apply to Commission proceedings. Moreover, given the fact that all of a party's arguments must be contained within the brief or they are considered waived, it seems against the interest of the investigation to limit the pages. Or, if the Commission believes this page limit is necessary, AIPLA suggests adding a provision that would allow parties to petition the Commission for additional pages.

Rule 210.51 is directed to the target date for completion of the investigation. One of the proposed amendments separates initial determinations issuing from original investigations from those issuing from formal enforcement proceedings. Another proposed amendment is directed to formal enforcement proceedings, and would provide that the ALJ may set a target date of 12 months or less by order, and a target date greater than 12 months for completion of a formal enforcement proceeding by initial determination.

*Comment:* AIPLA supports this amendment in that it furthers the Commission's efforts for a speedy resolution of investigations and enforcement proceedings.

**6. Subpart H – Temporary Relief**  
**Rules 210.54, 210.56(a), 210.58, 210.59(b)-(c), 210.60**

The Commission proposes to amend Subpart H of 19 C.F.R. § 210, in particular Rules 210.54, 210.56(a), 210.58, 210.59(b)-(c) and 210.60.

Each of these Rules pertains to the procedure for obtaining temporary relief. The proposed amendments to Rules 210.54, 210.56(a), 210.58, 210.59(b)-(c) and 210.60, correct miscellaneous housekeeping issues which do not procedurally impact Section 337 practice.

*Comment:* AIPLA supports these amendments.

**7. Subpart I – Enforcement Proceedings and Advisory Opinions  
Rules 210.75(b) and 210.76**

The Commission proposes to amend Subpart G of 19 C.F.R. § 210, specifically Rules 210.75(b) and 210.76.

Rules 210.75(b) and 210.76 are directed towards the formal enforcement proceedings. The proposed changes to 210.75(b) clarify that the enforcement proceedings are subject to the Administrative Procedures Act, which is consistent with current Commission practice. The proposed changes would also require a final initial determination in an enforcement proceeding at least three months prior to the target date, shortening the time for the Commission to determine whether to review the initial determination from 90 days to 45 days.

*Comment:* AIPLA supports these proposed changes as they will speed up the issuance of a final Commission determination.

The proposed changes to Rule 210.76 set deadlines for the parties to comment on the ALJ's recommended determination on remedy and bonding. The deadlines for such comments should be the same as the deadlines for petitions from initial determinations and responses thereto. The deadlines proposed for Rule 210.76 are 10 days for initial comments and 5 business days for responses to the initial comments.

*Comment:* AIPLA proposes that the deadline for initial comments be 10 business days and the deadline for responses be 5 business days. See comments above on proposed revisions to Rule 210.43.

**8. Appendix A to Part 210 – Adjudication and Enforcement**

The Commission proposes to add an Appendix A to 19 C.F.R. § 210, summarizing the due dates of petitions of review of various types of initial determinations.

*Comment:* AIPLA supports the addition of Appendix A as it provides a helpful summary of the timeline for the procedures involved in varying types of petitions for review.



**9. Appendix B to Part 210 – Adjudication and Enforcement**

The Commission proposes to add an Appendix B to 19 C.F.R. § 210, setting forth the timeline for modification or rescission of initial determinations.

*Comment:* AIPLA also supports the addition of Appendix B, and believes it provides helpful clarification in modification and rescission proceedings.

We appreciate the opportunity to provide these comments on the proposed changes to the Rules of General Application, Adjudication, and Enforcement. We would be happy to answer any questions that our comments may raise. We look forward to participating in the continuing development of these rules and procedures.

Sincerely,

A handwritten signature in black ink that reads "William G. Barber". The signature is written in a cursive style with a long, sweeping underline.

William G. Barber

President

American Intellectual Property Law Association