November 17, 2015

Via E-Mail (megan.valentine@usitc.gov)

Hon. Lisa R. Barton
Secretary
U.S. International Trade Commission
500 E Street S.W., Room 112
Washington, DC 20436


Dear Secretary Barton:

I am writing on behalf of the American Bar Association Section of Intellectual Property Law (the “Section”) in response to the invitation of the U.S. International Trade Commission (“the Commission”) for public comment on the Notice of Proposed Rulemaking, 80 Fed. Reg. 57553-64 (the “Proposed Rule”). These comments have not been approved by the American Bar Association’s House of Delegates or Board of Governors and should not be considered as views of the American Bar Association.

The members of the Section are lawyers that practice in and are interested in intellectual property law and proceedings conducted by the Commission. Many members of the Section regularly practice before the Commission and/or are clients that are involved in investigations at Commission. Therefore, the members of the Section have an interest in proposed rules of the Commission.

In general, the Section supports the Commission’s efforts to amend certain Rules to enhance the ways in which proceedings are conducted. The Section’s specific recommendations with respect to certain proposed changes are attached to this letter.

The Section is grateful to the Commission for issuing the Proposed Rule and for the opportunity to provide comments and clarifications as set forth in this submission.

Sincerely,

Theodore H. Davis Jr., Chair
American Bar Association
Section of Intellectual Property Law
Section 201.16

Section 201.16 provides the general provisions for service of process and other documents. In particular, section 201.16(a)(1) provides that the Commission may effect service by mailing or delivering a copy of the document to be served to the person to be served or to certain persons affiliated with the organization to be served or to the person’s or organization’s attorney representative. Subsection 201.16(a)(4) explains that service by mail, as provided in subsection 201.16(a)(1) is complete upon mailing of the document. The Commission is currently developing the capability to perfect electronic service. The proposed rule would accordingly amend subsections 201.16(a)(1) and (4) to provide that the Commission may effect service through electronic means. Electronic service is complete upon transmission of a notification from the Commission that the document has been placed in an appropriate secure repository for retrieval by the person, organization representative, or attorney being served, unless the Commission is notified that the notification was not received by the party served.

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

**COMMENTS:**

The ABA-IPL generally supports electronic service by the Commission, but has concerns regarding the implementation of several portions of this proposed rule. Specifically, it is unclear when the Commission would commence email service (i.e., with service of the Complaint and Notice of Investigation) and how it would go about determining and obtaining appropriate email addresses for such service. Currently, Rule 210.12 requires a Complainant to provide addresses of the proposed Respondents in the Complaint. Requiring Complainants to provide e-mail addresses could lead to significant issues including, not only locating email addresses for all proposed respondents, but also in that the e-mail addresses would need to be for the proper representatives who would need to be made aware of service. Often this information is only available after counsel have entered appearances. The Commission will also have to monitor which e-mails should no longer receive such notifications as an Investigation proceeds.

Additionally, with respect to service of confidential business information, the Commission should clarify what is meant by “securely stored and transmitted.” It is unclear whether the use of password protection of confidential documents attached to an e-mail would be sufficient or if the use of a secure repository such as an FTP site is being required.
Part 210

Subpart B—Commencement of Preinstitution Proceedings and Investigations

Section 210.10

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

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

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

COMMENTS:

210.10(a) and (b)(1)

Although the ABA-IPL believes that the Commission has the discretionary power to institute multiple investigations based on a single complaint, the ABA-IPL is concerned that the Commission may not have sufficient information before institution to make a fully informed decision on the issue of severance at the time of institution. For instance, although the asserted patents and technologies may appear unrelated from the allegations of the
complaint, the documents and witnesses (including expert witnesses) relating to those technologies, or issues such as domestic industry, may overlap such that it would be more efficient to proceed in one investigation. The Office of Unfair Import Investigations (OUII) should also advise complainants during the pre-filing informal review of complaints to file multiple investigations based on these same considerations. Thus, the ABA-IPL believes that the decision to sever an investigation into multiple proceedings is, in most cases, a decision that would be better made after some additional information is provided regarding the efficiencies or lack of efficiencies of such a severance. This, the ABA-IPL believes, could be appropriately addressed in most cases by the administrative law judge under the proposed addition to subsection 210.14(h).

The ABA-IPL supports the proposed addition of subsection 210.10(b)(1). First, inclusion of a plain language definition of the scope of the investigation in the notice of institution would provide appropriate notice to the general public and to all potentially interested persons: proposed respondents, other industry participants (who might be affected by the issuance of a general exclusion order), consumers or users of the targeted products, and the government agencies the Commission normally notifies of the commencement of an investigation. Second, establishing a plain language scope definition at the outset of the investigation would also aid the parties in framing and responding to discovery requests.

Under current practice, the title of the investigation, ordinarily taken verbatim from the caption used in the complaint, may provide little or no indication of the actual product categories at issue in the investigation. A complainant has an incentive to adopt a complaint caption with few, if any, limitations. A complaint caption that says no more than “Certain Electronic Devices” fails to provide adequate notice of the actual product categories that are the subject of the complaint, or any guidance regarding the scope of products subject to discovery. The cross-reference in the proposed rule to the provisions in § 210.14(b) and (c) for amending the notice of institution also appropriately confirms that the scope may be amended during the course of the investigation, as necessary, should revision to the original scope language be indicated by discovery or other developments.

210(b)(3)
The ABA-IPL generally welcomes the provision of a procedure to address discrete, potentially case-dispositive issues expeditiously, with the goal of avoiding expense and other burdens on the private parties and conserving the resources of the Commission. Accordingly, the ABA-IPL generally supports the rule amendments codifying the authority of the Commission to conduct 100-Day proceedings, and extending authority to the presiding ALJ to order such a proceeding as well. The ABA-IPL does have concerns regarding 100-day proceedings in general, as well as comments on particular aspects of the proposed rules.

1. The ABA-IPL notes that there are innumerable issues that are potentially case dispositive, ranging from the issues addressed in the two 100-day proceedings conducted to date (economic prong of domestic industry and standing) to infringement and validity of an asserted patent. The ABA-IPL also recognizes that the Commission has identified an additional example of an issue that may be amenable to expedited decision making (i.e., importation). See Commission news release, June 24, 2013. Other issues that may be suitable include licensing or patent
exhaustion defenses. While the ABA-IPL recognizes that promulgation of an exhaustive or exclusive list of appropriate case-dispositive issues may not be feasible, it encourages the Commission to provide further guidance on the types of issues it deems applicable to the 100-day procedures.

2. The ABA-IPL is concerned that there is uncertainty and potential confusion about preclusion arising from a 100-day proceeding; that is, whether a respondent asserting lack of standing, for example, who fails to prevail in the 100-day process may re-litigate the issue in further proceedings, including additional discovery and the regular evidentiary hearing. On the one hand, due process favors re-litigating the issue in further proceedings. To finish the 100-day proceeding on time, discovery during that process may be limited—for example, discovery may be limited to interrogatories only or the quantity of discovery requests may be limited. But a limitation on discovery may likewise limit the issue’s development. Therefore, fairness requires that the non-prevailing parties be allowed additional discovery on the issue—discovery that they would have been entitled to but for the 100-day proceeding—to fully develop and re-litigate the issue in subsequent proceedings based on new evidence. On the other hand, re-opening discovery on an already litigated issue and then re-adjudicating the issue will increase costs for both the Commission and the parties—which defeats the cost reduction goal of these proceedings. The ABA-IPL encourages the Commission to provide further guidance on the preclusion aspect.

Section 210.11

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

COMMENTS:

The ABA-IPL supports this proposed rule.

Subpart C—Pleadings

Section 210.12

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

**COMMENTS:**

**The ABA-IPL supports this proposed rule.**

**Section 210.14**

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

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

**COMMENTS:**

**210.14(h)**

The ABA-IPL generally supports the proposed change to Rule 210.14(h) and believes that the administrative law judges should have the authority to sever investigations where it is shown that maintaining the investigation as one action would result in an investigation that is unwieldy and unreasonably lengthy. The ABA-IPL believes, however, that the determination to sever or not to sever the case into multiple proceedings should be made after the private parties and the OUII have an opportunity to present argument regarding the propriety of severance. For instance, although the asserted patents and technologies may appear unrelated from the allegations of the Complaint, the documents and witnesses (including expert witnesses) relating to those technologies, or issues such as domestic industry overlap, may such that it would be more efficient to proceed in one investigation despite the apparent differences in the patents and technologies. Thus, the ABA-IPL believes that the parties should be allowed to present evidence and argument on the efficiencies and/or inefficiencies of severance and that the decision to sever an investigation into multiple proceedings be made after consideration of such evidence.

With regard to whether the decision to sever be made by order or initial determination pursuant to § 210.42(c)(3), the ABA-IPL supports the currently proposed rule, where the administrative law judge shall grant the motion by issuing an initial determination or shall deny the motion by issuing an order. This procedure would limit the possibility that the denial of a motion to sever in the discretion of the administrative law judge will unduly delay the investigation. The ABA-IPL further believes that after an initial determination severing
the investigation that the severed investigations should remain with the same administrative law judge to deter “ALJ shopping” and to ensure that the proceedings advance without delay should a petition for review be filed with the Commission seeking review of the initial determination on the severance issue. Maintaining the severed investigations before the same ALJ would retain the possibility of consolidation under Rule 210.14(g) of some or all of the severed investigations, if circumstances warranted.

210(14)(i)
The ABA-IPL notes some potential inconsistency or confusion in proposed amended §§210.14(i) and 210.22. Section 210.14(i) provides the presiding ALJ with authority to issue an order designating a potentially dispositive issue for an early ruling, and requires such an order to issue within 30 days of institution. This rule is silent on such matters as whether the ALJ may act *sua sponte* (presumably yes), or whether the ALJ must or should seek the views of the parties on a possible 100-day designation.

Section 210.22, on the other hand, provides that a party may move to request an early ruling designation, and allows such a motion within 30 days of institution. A motion made on the 30th day would necessarily call for a ruling more than 30 days after institution (assuming the non-moving parties would have the standard ten days to respond to the motion), but this rule does not expressly grant the ALJ authority to issue the requested order, and §210.14(i) does not grant authority to do so later than 30 days after institution.

It appears from the reference to both §210.14(i) and §210.22 in §210.42(a)(3) that (1) the rules are intended to allow the ALJ to issue an order pursuant to §210.22, even if more than 30 days after institution; and (2) that §210.14(i) and §210.22 are distinct grants of authority to the ALJ.

The ABA-IPL suggests that the apparent separate grants of authority pursuant to §210.14(i) and §210.22 create unnecessary potential confusion, and recommends that the Commission consider combining them into a single section, presumably under §210.22. The Commission should further consider expressly stating whether the ALJ may issue an early ruling designation *sua sponte*, and whether the ALJ must give the parties an opportunity to be heard before doing so. In addition, assuming that the ALJ is intended to have the power under §210.22 to issue, following a motion, an early ruling designation more than 30 days after institution, the Commission should consider (1) setting a shorter than standard time for responses to a motion and (2) setting a deadline for the ALJ to rule on the motion. Absent such time restrictions, the early ruling 100-day proceeding could extend well into an investigation, undermining any potential efficiencies and cost-savings that the procedure might afford.

The ABA-IPL notes that the Regulatory Analysis accompanying the proposed rule amendments states that the presiding ALJ will have discretion to stay discovery during the

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1 We note that the second sentence of §210.14(i) authorizes the *presiding* ALJ to hold expedited hearings, whereas the first sentence does not specify that it is the *presiding* ALJ that may issue the designation order. We assume that in both instances it is the ALJ presiding over the particular investigation who has authority to act.

2 We note that in both §210.10(b)(3) and in §210.42(a)(3) itself, there are references to subparagraphs (i) and (ii) of §210.43(a)(3), but no such subparagraphs actually exist in newly added paragraph (a)(3) of §210.42.
pendency of a 100-day proceeding, as the pilot program specifically provided. However, the proposed rules are silent on this point, and while the ALJ does have authority to determine the scope of discovery per §210.27(b), the ABA-IPL recommends that the rules expressly provide not simply that the ALJ may stay discovery, but that the ALJ may, in his or her discretion, limit discovery to the subject matter of the 100-day proceeding and stay discovery on other issues.

Subpart D—Motions

Section 210.15

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

COMMENTS:

The ABA-IPL supports this proposed rule.

Section 210.19

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

COMMENTS:

The ABA-IPL supports this proposed rule.

Section 210.21

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

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

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

**COMMENTS:**

The ABA-IPL supports this proposed rule.

Section 210.22

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

**COMMENTS:**

The ABA-IPL reiterates its comments to rule 210.14(i). The ABA-IPL notes some potential inconsistency or confusion in proposed amended §§210.14(i) and 210.22. Section 210.14(i) provides the presiding ALJ with authority to issue an order designating a potentially dispositive issue for an early ruling, and requires such an order to issue within 30 days of institution. This rule is silent on such matters as whether the ALJ may act *sua sponte* (presumably yes), or whether the ALJ must or should seek the views of the parties on a possible 100-day designation.

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3 We note that the second sentence of §210.14(i) authorizes the *presiding* ALJ to hold expedited hearings, whereas the first sentence does not specify that it is the *presiding* ALJ that may issue the designation order. We assume that in both instances it is the ALJ presiding over the particular investigation who has authority to act.
Section 210.22, on the other hand, provides that a party may move to request an early ruling designation, and allows such a motion within 30 days of institution. A motion made on the 30th day would necessarily call for a ruling more than 30 days after institution (assuming the non-moving parties would have the standard ten days to respond to the motion), but this rule does not expressly grant the ALJ authority to issue the requested order, and §210.14(i) does not grant authority to do so later than 30 days after institution.

It appears from the reference to both §210.14(i) and §210.22 in §210.42(a)(3)\(^4\) that (1) the rules are intended to allow the ALJ to issue and order pursuant to §210.22, even if more than 30 days after institution; and (2) that §210.14(i) and §210.22 are distinct grants of authority to the ALJ.

The ABA-IPL suggests that the apparent separate grants of authority pursuant to §210.14(i) and §210.22 create unnecessary potential confusion, and recommends that the Commission consider combining them into a single section, presumably under §210.22. The Commission should further consider expressly stating whether the ALJ may issue an early ruling designation sua sponte, and whether the ALJ must give the parties an opportunity to be heard before doing so. In addition, assuming that the ALJ is intended to have the power under §210.22 to issue, following a motion, an early ruling designation more than 30 days after institution, the Commission should consider (1) setting a shorter than standard time for responses to a motion and (2) setting a deadline for the ALJ to rule on the motion. Absent such time restrictions, the early ruling 100-day proceeding could extend well into investigation, undermining any potential efficiencies and cost-savings that the procedure might afford.

The ABA-IPL notes that the Regulatory Analysis accompanying the proposed rule amendments states that the presiding ALJ will have discretion to stay discovery during the pendency of a 100-day proceeding, as the pilot program specifically provided. However, the proposed rules are silent on this point, and while the ALJ does have authority to determine the scope of discovery per §210.27(b), the ABA-IPL recommends that the rules expressly provide not simply that the ALJ may stay discovery, but that the ALJ may, in his or her discretion, limit discovery to the subject matter of the 100-day proceeding and stay discovery on other issues.

Section 210.25

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

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

\(^4\) We note that in both §210.10(b)(3) and in §210.42(a)(3) itself, there are references to subparagraphs (i) and (ii) of §210.43(a)(3), but no such subparagraphs actually exist in newly added paragraph (a)(3) of §210.42.
**COMMENTS:**

The ABA-IPL supports this proposed rule.

**Subpart E—Discovery and Compulsory Process**

Section 210.27

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

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

**COMMENTS:**

The ABA-IPL supports this proposed rule.

Section 210.28

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

**COMMENTS:**

The ABA-IPL supports this proposed rule.

Section 210.32

Section 210.32 provides for the use of subpoenas during the discovery phase of a section 337 investigation. In particular, subsection 210.32(d) provides for the filing of motions to quash a subpoena that the presiding administrative law judge has issued. The proposed rule would amend subsection 210.32(d) to clarify that a party upon which a subpoena has been served may file an objection to the subpoena within ten days of receipt of the subpoena, with the possibility of requesting an extension of time for filing objections for good cause shown. The proposed rule
would also amend subsection 210.32(d) to clarify that any motion to quash must be filed within ten
days of receipt of the subpoena, with the possibility of requesting an extension of time for good
cause shown. The proposed amendment is intended to bring the Commission’s subpoena practice
into closer conformity with the Federal Rules of Civil Procedure. The Commission requests that
any comments concerning this amendment address any potential conflicts that may arise from
copending objections and motions to quash.
In addition, subsection 210.32(f) authorizes the payment of fees to deponents or witnesses that are
subpoenaded. The proposed rule would amend subsection 210.32(f)(1) to clarify that such
deponents and witnesses are entitled to receive both fees and mileage in conformance with Federal
Rule of Civil Procedure 45(b)(1) and to correct the antecedent basis for “fees and mileage” as
recited in subsection 210.32(f)(2).

COMMENTS:
The Section generally supports the amendments to the rule regarding subpoenas, providing
for the assertion of objections and setting certain deadlines. The Section recommends,
however, that certain modifications be made to the amended rule to clarify the intent of the
amendment and to avoid ambiguity and potential disputes in subpoena practice.
The amended rule, §210.32(d), adds a provision permitting the filing of objections to a
subpoena, while maintaining the existing procedure for motions to quash. The assertion of
objections to a subpoena is a familiar practice under FRCP 45, and has often been done in
Section 337 investigations even in the absence of specific authority. In some cases, the
question has been raised whether, where a motion to quash has been denied in whole or in
part, it is permissible subsequently to lodge objections to the subpoena, or whether any such
objections are untimely or have been waived. Under the amended rule, both objections and
any motion to quash are to be filed within 10 days of receipt of the subpoena. The Section
believes that, even where a motion to quash is being filed, any additional or particularized
objections to the subpoena also should be filed within the initial ten-day period. Accordingly,
to avoid any potential dispute, the Section recommends that the amended rule be clarified to
provide that objections must be timely asserted notwithstanding the filing of a motion to
quash.

Both subparagraphs (1) and (2) of amended §210.32(d) provide for filing within ten days
after receipt of the subpoena. Although completely new for objections, this is a change for
motions to quash, where the existing rule provides for filing within the time set by the ALJ.
The use of the “time of receipt of the subpoena” as the triggering event is potentially
problematic, and is at odds with other rules that key off the date of service of a document.
See, e.g., §210.(f)(7)(ii)(B); §210.6(b), (c); §210.12(i); §210.13(a); §210.15(c); §210.18(a), (b);
§210.24(a)(2), (b)(3); §210.25(f); §210.28(c); §210.29(b)(2); §210.42(e), (h)(1), (2), (3), (6);
§210.43(a), (c); §210.47; §210.50(a)(4); §210.59(a); §210.66(d); §210.75(b)(1), (3); §210.76(a),
(c). The Commission rules also provide that service by mail is complete upon mailing, and
provide for additional time in the case of particular types and circumstances of service. See
§201.16. Use of the “time of receipt of a subpoena” introduces uncertainty about when the
period for a response begins to run because, for example, it may be difficult to ascertain
when something is delivered by the postal authorities of a foreign country.

The Section recognizes that the current ground rules of many ALJs do refer to the date of receipt of a subpoena when setting a deadline for motions to quash. However, to avoid the potential problems referenced above, and to maintain consistency with other Commission rules, the Section recommends that service, rather than receipt, be the date from which the time to respond is measured.

The Section notes that, with respect to objections to a request for the production of documents, the rules require that “the reasons for objection shall be stated” and that “[i]f objection is made to part of any item or category, the part shall be specified.” §210.30(b)(2). The Section recommends that comparable language be added to new §210.32(d)(1), or that a cross reference to the requirements of §210.30(b)(2) be included, so that the same requirements for specificity of objections apply in the case of subpoenas.

The Section notes that the amended rule for motions to quash deletes the phrase “or limit” from the existing language of §210.32(d): “Any motion to limit or quash ….” See amended §210.32(d)(1). The Section is uncertain whether the deletion is intentional or is intended to have a substantive effect, but in any case the Section recommends that the phrase be restored to the rule. There is no reason that a motion to quash must be an “all or nothing” matter, and it should be clear that a motion to limit, i.e., to modify, a subpoena is permitted as well as a motion to quash the subpoena in its entirety.

While paragraph (e) of §210.32 is not directly affected by the pending amendments, the Section recommends that the Commission consider the following comments and suggested amendment. §210.32(e) is entitled “Ex parte ruling on applications for subpoenas,” and provides, inter alia, that applications and rulings thereon shall remain ex parte unless otherwise ordered. The rule thus authorizes a party seeking a subpoena to make submissions to the presiding ALJ about “the general relevancy of the material and the reasonableness of the scope of the subpoena,” §210.32(a)(2), and permits such communication with the ALJ to remain inaccessible to the other parties to the investigation. The Section is not aware of any justification allowing ex parte communications with the presiding ALJ to remain secret as a routine matter. Indeed, the Section notes that all but one of the current ALJs provide in their ground rules that the application for a subpoena shall be served together with the issued subpoena on all other parties by the next business day following issuance. The Section does not propose to change the ex parte application process or to turn applications for subpoenas into a litigated issue. However, especially in view of the majority practice among the current ALJs, the Section believes that §210.32(e) should be modified to provide that copies of the application for subpoena be served on all parties together with the subpoena itself.
Section 210.34

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

COMMENTS:

The ABA-IPL generally supports the proposed amendment to the rule regarding administering and investigating protective order violations and the provision of sanctions for violations of protective orders. The ABA-IPL agrees that the administrative law judges and the Commission should have more flexibility in this process, and that in many circumstances notifying all parties in an investigation of a potential breach may be inappropriate. The ABA-IPL also agrees that the Commission has an interest in preserving the confidentiality of the process. The ABA-IPL is concerned, however, that the proposed amendment could be interpreted in such a manner as to prevent the individual(s) alleged to have violated the protective order from having the opportunity to explain the circumstances of the alleged violation. Accordingly, the ABA-IPL recommends adding language to clarify that, at a minimum, the individual(s) alleged to have violated the protective order be afforded an opportunity to provide written submissions or present oral argument before a finding of violation or the imposition of sanctions.

The amended rule, § 210.34(c), provides that the “Commission and the administrative law judge may permit the parties to file written submissions or present oral argument on the issues of the alleged violation of the protective order and sanctions.” This is a departure from the current rule, which provides that 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.”

The ABA-IPL agrees that the administrative law judge and the Commission should have more flexibility in disposing of minor, technical violations of protective orders where no disclosure of confidential business information has occurred. However, the ABA-IPL is concerned that the proposed rule change would authorize the imposition of sanctions on individuals alleged to have breached the protective order without affording them an opportunity to explain the circumstances of the alleged violation. The individuals alleged to
have breached the protective order would also not have an opportunity, by right, to provide any mitigating circumstances if a violation is found. Given the highly fact-specific nature of any inquiry into whether a violation of the protective order has occurred, and the gravity of having sanctions levied against a party and/or its counsel, the Section believes that parties alleged to have violated the protective order should be guaranteed the opportunity to present evidence and argument on the issue of an alleged violation prior to the imposition of any sanctions.

The ABA-IPL recommends the addition of clarifying language or a note to paragraph (c) indicating that the individual(s) alleged to have violated the protective order are entitled to provide written submissions or present oral argument on the issues of the alleged violation of the protective order and sanctions prior to the imposition of any sanctions by the Commission or administrative law judge. The recommended language is as follows:

The alleged breacher shall have an opportunity to provide written submissions or present oral argument on the issues of the alleged violation of the protective order and sanctions prior to the imposition of any sanctions by Commission or administrative law judge.

Subpart G—Determinations and Actions Taken

Section 210.42

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

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

The proposed rule would also add subsection 210.42(c)(3), authorizing the presiding administrative law judge to issue an initial determination severing an investigation into two or more investigations pursuant to new subsection 210.14(h).
In addition, subsection 210.42(e) provides that the Commission shall notify certain agencies of each initial determination granting a motion for termination of an investigation in whole or part on the basis of a consent order or settlement, licensing, or other agreement pursuant to section 210.21, and notice of such other initial determinations as the Commission may order. Those agencies include the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service (now U.S. Customs and Border Protection), and such other departments and agencies as the Commission deems appropriate. The rule further states that the indicated agencies have 10 days after service of any such initial determinations to submit comments. Currently, the Commission effects such notice through various electronic means, including posting a public version of the initial determination on its website so that paper service is unnecessary. The proposed rule would amend section 210.42(e) to remove the explicit requirement that the Commission provide any specific notice of or directly serve any initial determinations concerning terminations under section 210.21 on the listed agencies. This change is intended to conserve Commission resources and does not relieve the Commission of its obligation under section 337(b)(2) to consult with and seek advice and information from the indicated agencies as the Commission considers appropriate during the course of a section 337 investigation.

**COMMENTS:**

The ABA-IPL notes that in its 2013 announcement of the 100-day pilot program, the Commission provided that, if the ALJ determined that the complainant had not satisfied the economic prong of domestic industry, then the ALJ will stay the proceeding pending Commission review of the ID. The proposed rule amendments are silent on whether the ALJ has the authority to stay further proceedings in an investigation following issuance of an ID pursuant to §210.42(a)(3) that would dispose of the investigation once it is final. The ABA-IPL believes that, in order to achieve the efficiency and cost-savings goals of the 100-day procedure, the presiding ALJ should have explicit authority to stay an investigation upon issuance of an ID that would result in termination of the investigation.

**Section 210.43**

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

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

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

**COMMENTS:**

Proposed amended §210.43(a)(1) provides that a petition for review of an ID issued in a 100-day proceeding must be filed within five calendar days of service. The ABA-IPL notes initially a potential ambiguity in the rule’s use of the term “calendar days.” Other portions of §210.43(a)(1) provide for periods measured in “days” without the “calendar” modifier. Moreover, §210.43(c) provides that responses to a petition for review in a 100-day proceeding must be filed within three “business days” of service. Commission rule §201.14(a) provides generally that if a time period is “less than 7 days,” then weekends and holidays are not counted. It is unclear whether the use of the term “calendar days” in §210.43(a)(1) is intended to override §201.14(a) such that holidays and weekend days would count toward the five-day deadline.

Recognizing the tight deadlines that govern every aspect of every Section 337 investigation, the ABA-IPL nevertheless believes that five calendar days is too short. Counsel for a party contemplating a petition to review must obtain and study the ID, consult with their client (who may be overseas) about the decision and determine whether to seek review, and draft a petition in a very compressed time period. The ABA-IPL believes that the rule should be clarified to confirm that the counting rules of §201.14(a) do apply, so that at least a full calendar week is afforded to a party petitioning for review.

Section 210.47

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

The ABA-IPL supports this proposed rule.

Section 210.50

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

COMMENTS:

The ABA-IPL supports this proposed rule.

Subpart I—Enforcement Procedures and Advisory Opinions

Section 210.75

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

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

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

**COMMENTS:**

The ABA-IPL supports this proposed rule.

**Section 210.76**

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

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

**COMMENTS:**

The ABA-IPL supports this proposed rule.

**Section 210.77**

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

**COMMENTS:**

The ABA-IPL supports this proposed rule.

Section 210.79

Section 210.79 provides that the Commission will, upon request, issue advisory opinions concerning whether any person’s proposed course of action or conduct would violate a Commission remedial order, including an exclusion order, cease and desist order, or consent order. The proposed rule would amend subsection 210.79(a) to provide that any responses to requests for advisory opinions shall be filed within 10 days of service. The proposed rule would also amend subsection 210.79(a) to provide that the Commission shall institute the advisory proceeding by notice, which may be amended by leave of the Commission, and shall determine whether to institute within 30 days of receiving the request barring exceptional circumstances, a request for postponement of institution, or withdrawal of the request for an advisory opinion.

**COMMENTS:**

The ABA-IPL supports this proposed rule.