December 4, 2015

The Honorable Lisa R. Barton
Secretary
U.S. International Trade Commission
500 E Street, SW – 112
Washington, D.C. 20436

Via email: megan.valentine@usitc.gov

Re: U.S. International Trade Commission Docket MISC-045; Comments on Proposed Rules: "Rules of General Application, Adjudication, and Enforcement" 80 Fed. Reg. 57553 (September 24, 2015)

Dear Secretary Barton:

Intellectual Property Owners Association (IPO) appreciates the opportunity to provide comments to the U.S. International Trade Commission in response to the proposed changes to 19 C.F.R. Parts 201 and 210, published in the *Federal Register* on September 24, 2015 (NOPR).

IPO is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in intellectual property rights. IPO's membership includes nearly 300 companies and more than 12,000 individuals who are involved in the association through corporate and other classes of membership.

We support the ITC's ongoing effort to propose rules and revisions to continually improve the practice before the ITC. Attached are comments organized into topical sections: (1) Electronic Service; (2) Multiple Investigations Originating From a Single Complaint; (3) Scope of the Investigation; (4) Potentially Dispositive Issues; (5) Objections to Subpoenas and Motions to Quash; and (6) Protective Order.

Thank you for considering these comments. We welcome dialogue and other opportunities to support the ITC.

Sincerely,

Philip S. Johnson
President

1501 M Street, NW, Suite 1150 • Washington, DC 20005
T: 202-507-4500 • F: 202-507-4501 • E: info@ipo.org • W: www.ipo.org

COMMENTS

1. **Electronic Service**

The NOPR sets forth proposed amendments to 19 C.F.R. §§ 201.16(a)(1), 201.16(a)(4), and 201.16(f). To prevent disputes concerning proper notice resulting from an inability to find a party's electronic address, we recommend enabling the Commission to effect service through electronic means only after a party has appeared and provided its electronic address. We suggest amending Proposed 19 C.F.R. § 201.16(a)(4) as follows: "When service is by electronic means, to a party that has appeared and provided an address for electronic service, service is complete upon. . . ."

IPO supports amending 19 C.F.R. § 201.16(f). However, we are concerned that the proposed requirement that a document containing certain information subject to a protective order "be securely stored and transmitted by the serving party in a manner that prevents unauthorized access and/or receipt by individuals or organizations not authorized to view the specified confidential business information" lacks detail sufficient to inform parties how to comply. For example, without more detail or guidance it is unclear how parties will know whether the "manner" of storage and transmission is satisfactory. The proposed rule might also be improved by clarifying whether private stipulations among parties describing a manner of service satisfactory to all parties will meet the rule's requirements.

2. **Multiple Investigations Originating From a Single Complaint**

Proposed amendments to clarify or add 19 C.F.R. §§ 210.10(a)(6), 210.14(h), and 210.42(c)(3) concern creating multiple investigations from a single complaint. IPO respectfully suggests that the proposed changes are not needed. The existing, inherent power of administrative law judges to manage their dockets limits the issues to be decided. For example, administrative law judges may require parties to present their cases within an allotted time, limit the number of pages for witness statements, and limit the amount of time allowed for live direct testimony. This power could be compromised by a requirement to split any complaint that fails to satisfy certain, currently unarticulated, criteria.

We also foresee several possible unintended consequences. One is increased motions practice; for example, the proposed rule's silence regarding whether a severed case stays with the originally assigned administrative law judge might invite motions for severance that are actually attempts at "administrative law judge shopping." Breaking a single complaint into multiple investigations could potentially create inconsistencies or conflicts between investigations. Assigning different administrative law judges with varying procedural schedules also would be confusing and inefficient to parties. Breaking up a complaint could significantly increase costs for the parties, which would disproportionately affect smaller entities. Finally, severance is a significant action that would not only require a change to the notice of investigation, but also would warrant continuing the practice of Commission review.

If the rule regarding severance is nevertheless promulgated, there are several aspects by which the negative ramifications could be diminished. First, although the NOPR notes that the ITC is "concerned about complaints that assert multiple unrelated patents and/or multiple technologies," neither the addition of section 210.10(a)(6), addressing institution by the Commission, nor the addition of section 210.14(h), addressing severance by the administrative law judge based on a motion or the judge's own initiative, lists criteria that will be used to determine when and how multiple investigations will be instituted. Different patent families or technologies might be most efficiently presented in a single investigation given commonalities that could impact investigation issues and discovery, such as common parties, defenses, or products, either accused of infringement or supporting a domestic industry. Without clear, enumerated factors for the Commission or administrative law judge to assess, the proposed rules will fail to provide adequate notice to potential parties.

Second, the rule should not tie the ability to file a motion for severance with the procedural schedule, which could delay issuance of the schedule for a considerable time while the severance motion is briefed and considered by the administrative law judge. The rule should also clarify whether severance begins with the issuance of the initial determination or only after the Commission affirms. As a house-keeping matter, it is unclear how the severed cases should be designated (e.g., with new numbers or by adding a, b, c to the end of the original investigation number).

Third, the NOPR seeks comments regarding whether an administrative law judge's decision to sever should be in the form of an initial determination pursuant to new subsection 210.42(c)(3). If the Commission implements proposed subsection 210.14(h), IPO supports having the administrative law judge issue the decision by initial determination, consistent with current practice that motions impacting the notice of investigation are rendered by initial determination pursuant to subsection 210.42(c)(1).

Finally, the proposed rules do not address whether a decision regarding multiple investigations can be appealed. This should be clarified to avoid future litigation of that issue.

3. **Scope of the Investigation**

IPO understands the Commission's motivation in proposing 19 C.F.R. § 210.10(b)(1) is to avoid disputes between parties concerning the scope of an investigation. We support the proposed new subsection to the extent it narrows the variety of products potentially falling within the caption of an investigation to more readily identifiable categories of products, including downstream products. However, the meaning of "such plain language as to make explicit what accused products will be the subject of the investigation" is unclear. We suggest replacing this phrase with language borrowed from rule subsection 210.12(a)(12) concerning the requirement that a complaint "[c]ontain a clear statement in plain English of the category of product accused" to avoid potential inconsistencies between rules.

IPO does not support interpreting the proposed "plain language" phrase as requiring model numbers. Limiting an investigation to certain model numbers would be inconsistent with the

scope of relief afforded under the trade laws and with longstanding Commission practice. Moreover, it could result in unreasonable limitations on discovery by focusing on product designations unrelated to product type, function, or design.

Discovery has not generally been limited by examples of products in the complaint. To the extent the proposed added subsection is intended to narrow the scope of the notice of investigation to narrow discovery, administrative law judges should be permitted to extend discovery beyond the scope of the notice of investigation for good cause shown. We propose amending Proposed 19 C.F.R. § 210.10(b)(1) as follows:

An investigation shall be instituted by the publication of a notice in the FEDERAL REGISTER. The notice will define the scope of the investigation in such plain language, consistent with the requirement to provide in the Complaint a clear statement in plain English of the category of products accused pursuant to 19 C.F.R. § 210.12(a)(12), as to make explicit what one or more accused categories of products will be the subject of the investigation, and may be amended as provided in § 210.14(b) and (c). Discovery beyond the scope of the investigation will be by leave of the administrative law judge for good cause shown.

4. **Potentially Dispositive Issues**

Proposed amendments to 19 C.F.R. §§ 210.10(b)(3), 210.14(i), 210.22, 210.42(a)(3), and 210.43(a)(1), (c), and (d)(1) concern changes for implementing the pilot program, commonly referred to as a "100-day proceeding," initiated in 2013 to test early disposition of certain Section 337 investigations identified by the Commission and to expand the program to grant authority to administrative law judges to similarly designate potentially dispositive issues for early rulings. IPO supports the proposed rule changes to the extent that the Commission will designate cases for potential early disposition during the institution period. We do not support limiting by example the types of issues that may be designated.

The proposed rules providing that a 100-day proceeding may be designated post-institution by motion, or sua sponte by the administrative law judge, should not be adopted. Parties and administrative law judges are unlikely to be in a better position than the Commission to make this assessment 30 days into an investigation. Further, the potential flood of unnecessary motions will take significant administrative law judge and attorney time in each case and could contribute to overall delay.

There could also be a conflict between proposed rules 210.14(i) and 210.22. The former allows an administrative law judge 30 days to designate a dispositive issue for early determination, while the latter allows parties to bring a motion for such designation within 30 days. If these rules are implemented, it would be better to state that parties may bring a motion to designate, or the judge may designate sua sponte, within 30 days, and to add a second deadline by which the judge must rule after a motion is fully briefed.

The proposed rule provides no deadline for the Commission to determine whether to review the administrative law judge's 100-day initial determination or issue its own determination on a 100-day initial determination. Moreover, the proposed rules do not state whether discovery on other issues will be stayed either during the 100-day proceeding or during review by the Commission. The NOPR states only in comments to proposed rule 210.10(b)(3) that the administrative law judge has discretion to stay discovery during the pendency of the 100-day proceeding. To meet the Commission's goal in instituting a 100-day proceeding, it is critical that the rules provide for a *mandatory* stay during the pendency of the 100-day proceeding and during Commission review of an initial determination of case-dispositive issues. Otherwise, a party subject to a 100-day procedure faces both a fast-track discovery/hearing on the 100-day issue as well as the normal demanding requirements of ITC discovery on all other issues. Without a mandatory stay, the 100-day program could increase the burden and expense of an ITC proceeding – the opposite result intended by the 100-day proceeding. We suggest amending the proposed rules and adding new provisions to 210.42 and 210.51 as follows:

Proposed 19 C.F.R. § 210.10(b)(3) –

(b) * * *
(3) The Commission may order the administrative law judge to issue an initial determination as provided in § 210.42(a)(3)(i) and (ii) ruling on a potentially dispositive issue as set forth in the notice of investigation. The presiding administrative law judge is authorized, in accordance with section 210.36, to hold expedited hearings on any such designated issue and will also have discretion to stay discovery during the pendency of the 100-day proceeding.

Proposed 19 C.F.R. § 210.14(i) –

~~(i) *Designation of dispositive issue*. Within 30 days of institution of the investigation, the administrative law judge may issue an order designating a potentially dispositive issue for an early ruling. The presiding administrative law judge is authorized, in accordance with section 210.36, to hold expedited hearings on this issue.~~

Proposed 19 C.F.R. § 210.22 ~~(Designation of Dispositive Issue)~~[Reserved] –

~~Any party may move within 30 days of institution of the investigation to request that the presiding administrative law judge issue an order designating a potentially dispositive issue for an early ruling. The presiding administrative law judge is authorized, in accordance with section 210.36, to hold expedited hearings on any such designated issue.~~

Proposed 19 C.F.R. § 210.42(a)(3) –

(a) * * *
(3) *On potentially dispositive issues*. The administrative law judge shall issue an initial determination ruling on a potentially dispositive issue in accordance with a Commission order pursuant to section § 210.10(b)(3) ~~or an administrative law judge's order issued~~

~~pursuant to section §210.14(i) or section §210.22~~. The administrative law judge shall certify the record to the Commission and shall file an initial determination ruling on the potentially dispositive issue designated pursuant to § 210.42(a)(3)(i) within 100 days, or as extended for good cause shown, 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~~. * * *
(h) *Effect*. * * *
(7) An initial determination filed pursuant to § 210.42(a)(3) shall become the determination of the Commission 30 days after the date of service of the initial determination , unless the Commission has ordered review of the initial determination or certain issues therein, or by order has changed the effective date of the initial determination.

19 C.F.R. § 210.51 (Period for concluding investigation)

(c) *100-Day Proceeding.* The 100-day proceeding phase of an investigation shall be concluded and a final order issued no later than 160 days after an issue is designated by the Commission pursuant to § 210.10(b)(3).
~~(c)~~(d) * * *

5. Objections to Subpoenas and Motions to Quash

We appreciate the Commission's efforts to clarify the subpoena process. Commission subpoenas impose a heavy burden on third parties to act quickly to move to quash to avoid prejudice, often without adequate time to review the subpoena or develop insights into the issues in the investigation. Moreover, subpoena targets can be unfamiliar with the Commission's rules.

IPO supports the proposed amendment to 19 C.F.R. § 210.32(d) permitting service of objections to subpoenas. The NOPR requests comments addressing "any potential conflicts that may arise from copending objections and motions to quash," suggesting that the filing of objections will not toll the time within which a motion to quash may be filed. Having objections and motions to quash due within the same short time period does not provide adequate opportunity to negotiate subpoena-related issues before a motion to quash must be filed. Accordingly, we suggest that the rules provide allowing 20 days to move to quash, which would permit parties some time to meet and confer regarding subpoena objections and might help avoid motions practice without unduly delaying the investigation. In addition, it is unclear whether the removal of "motion to limit" from the current rule is intentional, and is intended to be subsumed into the new objections process, or is simply an oversight that was not intended to change current practice as no explanation or opportunity for discussion was provided.

Finally, the requirement to show good cause for an extension of time beyond ten days to serve objections or to file a motion to quash unduly restricts an administrative law judge's ability to allow parties additional time or to permit parties to jointly agree on extensions. We propose amending the proposed rule as follows:

(d) *Objections and motions to quash*.
(1) Any objection to a subpoena shall be served in writing on the party or attorney designated in the subpoena within the later of 10 days after receipt of the subpoena or within such other time as the administrative law judge may allow or the party serving the subpoena may permit. ~~The administrative law judge may, for good cause shown, extend the time in which objections may be filed.~~
(2) Any motion to quash a subpoena shall be filed within ~~10~~ the later of 20 days after receipt of the subpoena or within such other time as the administrative law judge may allow. ~~The administrative law judge may, for good cause shown, extend the time in which motions to quash may be filed.~~ * * *

6. Protective Order

The proposed changes to 19 C.F.R. § 210.34(c)(1) give the Commission and administrative law judge discretion in permitting parties "to make written submissions or present oral arguments bearing on the issue of violation of a protective order and the appropriate sanctions therefor." IPO supports the Commission and administrative law judge having this discretion. However, it is unclear whether the proposed changes will affect the notice of an alleged or actual breach provided under current 19 C.F.R. § 210.34. Accordingly, IPO supports leaving current 19 C.F.R. § 210.34(c)(1) unchanged.