

# Client Alert

ITC Section 337 Practice Group

June 3, 2013

## **U.S. International Trade Commission Publishes More New Rules on General Discovery Limitations, E-Discovery Limitations, and Claiming Privilege or Work Product Immunity Effective June 20, 2013**

On May 15, 2013, the Commission published Amendments (78 Fed. Reg. 29618-24) to its Rules of Practice and Procedure concerning Adjudication and Enforcement, which become effective on June 20, 2013. The amendments provide, *inter alia*, general limitations on discovery and specific limitations on electronically stored information similar to Federal Rule of Civil Procedure 26(b) as well as procedures under which persons can make claims of privilege or work product and for addressing information that is produced in discovery but is later asserted to be privileged or protected by work product. The Amendments were made to the Commission's Rules of Practice and Procedure 19 C.F.R. Part 210 - Adjudication and Enforcement, Subpart E - Discovery and Compulsory Process §210.27 General provisions concerning discovery. Many of the final rules are identical to the correspondingly numbered proposed rules published by the Commission on October 5, 2012 (77 Fed. Reg. 60952-56). However, the final rules contain eight changes from the proposed rules after the Commission considered the public comments on the proposed rules amendments. The Commission received a total of 8 sets of comments, including from the American Bar Association, Section of Intellectual Property Law; the American Intellectual Property Lawyers Association; Aderant; Cisco; Dell; Ford Motor; Hewlett-Packard; Intel; Micron; Toyota; the Association of Corporate Counsel; and the ITC Trial Lawyers Association. A detailed summary of the amendments to 19 C.F.R. §210.27 follows. (This summary is not intended to be inclusive of all amendments set forth in the final rules.)

### **PART 210 - ADJUDICATION AND ENFORCEMENT**

#### **Subpart E - Discovery and Compulsory Process**

##### **§210.27 General provisions governing discovery.**

Subpart (b) was solely amended to include the sentence "All discovery is subject to the limitations of §210.27(d)."

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**(c) Specific Limitations on Electronically Stored Information.**

New Rule 210.27(c) states that: “A person need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost.” On motion to compel or for a protective order, the person from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If such showing is made, an Administrative Law Judge (ALJ) may order the production of such discovery upon a showing by the requesting party of good cause considering the limitations found in section (d) below. The ALJ may specify conditions for the discovery.

**(d) General Limitations on Discovery.**

New Rule 210.27(d) provides that the ALJ must limit discovery if:

- (1) The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (2) The party seeking discovery has had ample opportunity to obtain the information by discovery in the investigation;
- (3) The responding person has waived the legal position that justified the discovery or has stipulated to the particular facts pertaining to a disputed issue to which the discovery is directed; or
- (4) The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the investigation, the importance of the discovery in resolving the issues to be decided by the Commission, and matters of public concern.

**e) Claiming Privilege or Work Product Protection.**

New Rule 210.27(e)(1) specifies the requirements for logging information that is subject to a claim of privilege or attorney work product within ten (10) days of making such a claim in response to a discovery request.

New Rule 210.27(e)(2) provides a clawback procedure for inadvertently produced information subject to a claim for privilege or attorney work product. The person making the claim must provide notice including a privilege log identifying the information as defined in new Rule §210.27(e)(1) by specifying for each entry: “(A) The date the information was created or communicated; (B) The author(s) or speaker(s); (C) All recipients; (D) The employer and position for each author, speaker, or recipient, including whether that person is an attorney or patent agent; (E) The general subject matter of the information; and (F) The type of privilege or protection claimed.”

After being notified, a person that received the information must: (1) within seven (7) days return, sequester or destroy the information and any copies it has; (2) not use or disclose the information until the claim is resolved; and (3) within seven (7) days take reasonable steps to retrieve the information if disclosed to others. Within seven (7) days after the notice, the parties shall meet-and-confer in good faith to resolve the claim of privilege or work product. Within five (5) days after the meet-and-confer, a party may file a motion to compel using the information from the privilege log to

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describe the information that is the subject of the motion. The information must be preserved by the producing party until the motion is resolved.

New Rule 210.27(e)(3) permits the parties to agree to waive the requirement of logging privileged items for documents and things within a time period specified in the agreement.

New Rule 210.27(e)(4) provides that for good cause, the ALJ may order a different period of time for compliance with any requirement of this section. Parties may enter into a written agreement to set a different period of time for compliance without approval of the ALJ unless the ALJ has ordered a different period of time for compliance, in which case the parties' agreement must be approved by the ALJ.

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