

Client Alert

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ITC Pilot Program to Expedite Rulings on Whether Exclusion Orders Cover Redesigns and New Products

By **Brian Busey, Lynn Levine, and Aaron Rauh**

On February 24, 2015, the ITC announced a new pilot program to decide whether redesigns or new products are covered by ITC exclusion orders. The announced goal of the program is to test the use of expedited procedures for the Commission to evaluate and rule on new and redesigned products in modification and advisory proceedings. Under the new program, a party to an ITC investigation that resulted in an exclusion order or an importer can file a petition to determine whether a redesigned or new product should be “carved out” of an existing exclusion order.

Under the ITC’s Rules, a petitioner can seek a modification proceeding to revise a remedy order based on “changed conditions of fact or law.” 19 CFR § 210.76. The ITC’s Rules also provide for requests for an advisory opinion that a proposed course of conduct is outside the scope of a remedy order. 19 CFR § 210.79. In order to petition for a modification proceeding, the petition “should specify that the petitioner could not have brought evidence of the redesign to the Commission during the original investigation (for example, if the redesign was not completed at the time of the original hearing).” ITC Fact Sheet at 1. Provided that a petitioner can meet this standard, a modification proceeding is in many cases strategically preferable, because the determination in such a proceeding is appealable. By contrast, an advisory opinion is not appealable.

In terms of timing for completion of proceedings under the pilot program, the ITC is offering three different timelines. For petitions involving “purely legal questions,” the petition will be assigned to the ITC General Counsel’s Office to provide a recommendation, with the Commission’s final decision normally issued within 60-90 days after institution. For petitions requiring “minimal factfinding,” the Office of Unfair Import Investigation (OUII) will be assigned to conduct the proceeding, with the Commission’s final decision normally issued within 90-180 days of institution. Finally, if the petition indicates the necessity for more extensive fact finding, the ITC will delegate the development of a record and issuance of an initial determination to an ALJ, with the Commission’s final determination normally issued within 6-9 months after institution.

Prior to the pilot program, the ITC had not linked goals for the length of modification or advisory opinion proceedings to the complexity of the issues presented. Moreover, the pilot program timelines are considerably faster than the time frames the ITC had previously established for such proceedings. In recent years, the ITC performance goal for completion of all modification proceedings was set at 6 months, and performance goals for completion of advisory opinion proceedings ranged from 9 to 12 months. For consolidated proceedings involving modification and/or advisory opinion proceedings, the previous goal was 15 months. *ITC Annual Performance Plan, FY 2015-2016 and Annual Performance Report, FY 2014*, p. 15. However, in a change in procedure that

Client Alert

may have laid some of the groundwork for the new pilot program, in the past year, the ITC referred two advisory opinion requests to OUII for issuance of reports approximately 90 days after the referral. These referrals further provided for a decision by the Commission regarding the advisory opinion approximately 45 days after issuance of OUII's report. In the first such referral, in *Certain Kinesiotherapy Devices and Components Thereof*, Inv. No. 337-TA-823, the ITC adopted OUII's report, which concluded that the requestor's products were outside the scope of the exclusion and cease-and-desist orders entered in the underlying investigation. In the second matter, *Certain Cases for Portable Electronic Devices*, Inv. Nos. 337-TA-867/861, the requestor withdrew its request for an advisory opinion shortly after the ITC referred the matter to OUII.

The ITC's announcement of its new pilot program for design arounds and new products follows recent reports that Customs and Border Protection (CBP) is planning to issue a Notice of Proposed Rulemaking (NPRM) to establish a new *inter partes* procedure under Part 177 of CBP Rules, 19 CFR § 177, for evaluating redesigns and new products under outstanding ITC exclusion orders. CBP has in the past interpreted whether redesigned or new products fall within the scope of existing ITC exclusion orders using an *ex parte* process that has been criticized for lacking transparency and fairness, because the process excludes the IP rights holder. It remains to be seen whether the ITC's new pilot program will deter or delay CBP from proceeding with the NPRM to establish a new *inter partes* proceeding. However, the CBP's existing Part 177 procedure remain an alternate avenue for entities that seek to import new or redesigned products.

It is also not clear whether the ITC's pilot program will actually result in expediting most decisions on redesigns and new products. If many of the petitions regarding redesigned and new products raise complex fact issues, then even under the new expedited procedures of the pilot program, they may take at least 6-9 months to complete. Under CBP's existing Part 177 rules, CBP has committed in the past to try to complete its rulings on redesigns and new products within approximately 90 days after the ruling request is filed (although such rulings have in past sometimes taken six months or more). Accordingly, the attractiveness of the ITC's new pilot program may turn on whether its process takes less time than the existing CBP process.

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Client Alert

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