

Client Alert

International Trade & Litigation Practice Group

November 10, 2011

International Trade Commission Issues Final Rule Related to the Public Interest in Section 337 Investigations

The United States International Trade Commission (the ITC) recently published new Final Rules in the *Federal Register* relating to public interest determinations in investigations under Section 337 of the Tariff Act of 1930 ("Section 337"). The new Final Rules go into effect on November 18, 2011. The new Final Rules make several key amendments to the ITC's Rules of Practice and Procedure at 19 C.F.R. Part 210.

For more information, contact:

Holmes J. Hawkins, III
+1 404 572 2443
hhawkins@kslaw.com

Gilbert B. Kaplan
+1 202 661 7981
gkaplan@kslaw.com

Jeffrey M. Telep
+1 202 626 2390
jtelep@kslaw.com

King & Spalding
Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600
Fax: +1 404 572 5100

Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737

www.kslaw.com

- Complainants are now required to file a separate statement concurrently with the complaint to address how the issuance of the requested exclusion order would affect the public interest. 19 C.F.R. § 210.8(b). The submission should:
 - Explain how the articles potentially subject to the requested remedial orders are used in the United States;
 - Identify any public health, safety, or welfare concerns relating to the requested remedial orders;
 - Identify like or directly competitive articles that complainant, its licensees, or third parties make which could replace the subject articles if they were to be excluded;
 - Indicate whether the complainant, its licensees, and/or third parties have the capacity to replace the volume of articles subject to the requested remedial orders in a commercially reasonable time in the United States; and
 - State how the requested remedial orders would impact consumers.
- The new rules require the Commission to publish a notice of each new complaint under Section 337. 19 C.F.R. § 210.8(c)(1). Proposed respondents and the public then have eight calendar days to respond to the public interest impact identified by the complainant. Comments must be limited to the separate statement of public interest and may not substantively address allegations made in the complaint.

Client Alert

International Trade & Litigation Practice Group

- Complainants may file a reply to submissions by the public and proposed respondents on the public interest within three calendar days. 19 C.F.R. § 210.8(c)(2).
- The Rules now authorize the Commission to instruct the administrative law judge (ALJ) to take evidence on the public interest and to address the public interest in its initial determination on violation and recommended determination on remedy (ID/RD).
 - The Commission will decide whether to delegate the public interest issue to the ALJ based on the pre-institution comments received under Rule 210.8. 19 C.F.R. § 210.10(b).
 - Public interest issues cannot be included in discovery unless the Commission specifically orders the ALJ to take evidence on the issue. Rule 210.10(b) instructs the ALJ to limit public interest discovery appropriately, with particular consideration for third parties, and to ensure that such discovery will not delay the investigation or be used improperly.
 - The ALJ should only include public interest in the ID/RD when instructed to do so by the Commission. 19 C.F.R. § 210.42(c).
- If the Commission has delegated the matter of public interest to the ALJ, the respondents must submit a separate mandatory statement concerning the public interest. 19 C.F.R. § 210.14(f). The statement should be filed concurrently with the response to the complaint.
- The parties are requested to submit any information relating to the public interest to the Commission within 30 days from service of the ID/RD. 19 C.F.R. § 210.50(a)(4). This submission should include any updates to public interest information filed under Rules 210.8 and 210.14. Comments under this Rule may be submitted even when the Commission has not delegated the public interest issue to the ALJ.

These Final Rules reflect changes to the Notice of Proposed Rulemaking (NPRM) published in the *Federal Register* on October 1, 2010. The most significant change is that the NPRM required the public interest impact statement to be included in the complaint and the responses to the complaint. Under the Final Rules, a separate but concurrently filed submission addresses the public interest impact. Additionally, the Final Rules place clearer limitations on the ALJ's authority to take discovery and to include the public interest issue in the ID/RD.

If you have any questions about the public interest test under Section 337, please contact us.

Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at www.kslaw.com.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.