§ 210.26 Other motions.

Motions pertaining to discovery shall be filed in accordance with § 210.15 and the pertinent provisions of subpart E of this part (§§ 210.27 through 210.34). Motions pertaining to evidentiary hearings and prehearing conferences shall be filed in accordance with § 210.15 and the pertinent provisions of subpart F of this part (§§ 210.35 through 210.40). Motions for temporary relief shall be filed as provided in subpart H of this part (see §§ 210.52 through 210.57).

Subpart E—Discovery and Compulsory Process

§ 210.27 General provisions governing discovery.

(a) *Discovery methods*. The parties to an investigation may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection or other purposes; and requests for admissions.

(b) *Scope of discovery*. Regarding the scope of discovery for the temporary relief phase of an investigation, see § 210.61. For the permanent relief phase of an investigation, unless otherwise ordered by the administrative law judge, a party may obtain discovery regarding any matter, not privileged, that is relevant to the following:

(1) The claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things;

(2) The identity and location of persons having knowledge of any discoverable matter;

(3) The appropriate remedy for a violation of section 337 of the Tariff Act of 1930 (see § 210.42(a)(1)(ii)(A)); or

(4) The appropriate bond for the respondents, under section 337(j)(3) of the Tariff Act of 1930, during Presidential review of the remedial order (if any) issued by the Commission (see § 210.42(a)(1)(ii)(B)).

It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations of paragraph (d) of this section.

(c) *Specific limitations on electronically stored information*. 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. The party seeking the discovery may file a motion to compel discovery pursuant to § 210.33(a). In response to the motion to compel discovery, or in a motion for a protective order filed pursuant to § 210.34, the person from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the administrative law judge may order discovery from such sources if the requesting party shows good cause, considering the limitations found in paragraph (d) of this section. The administrative law judge may specify conditions for the discovery.

(d) *General limitations on discovery*. In response to a motion made pursuant to §§ 210.33(a) or 210.34 or *sua sponte*, the administrative law judge must limit by order the frequency or extent of discovery otherwise allowed in this subpart if the administrative law judge determines that:

(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.* (1) When, in response to a discovery request made under this subpart, a person withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as attorney work product, the person must:

(i) Expressly make the claim when responding to a relevant question or request; and

(ii) Within 10 days of making the claim produce to the requester a privilege log that describes the nature of the information not produced or disclosed, in a manner that will enable the requester to assess the claim without revealing the information at issue. The privilege log must separately identify each withheld document, communication, or item, and to the extent possible must specify the following 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.

(2) If a document produced in discovery is subject to a claim of privilege or of protection as attorney work product, the person making the claim may notify any person that received the document of the claim and the basis for it.

(i) The notice shall identify the information in the document subject to the claim, preferably using a privilege log as defined under paragraph (e)(1) of this section. After being notified, a person that received the document must do the following:

(A) Within 7 days of service of the notice return, sequester, or destroy the specified document and any copies it has;

(B) Not use or disclose the document until the claim is resolved; and

(C) Within 7 days of service of the notice take reasonable steps to retrieve the document if the person disclosed it to others before being notified.

(ii) Within 7 days of service of the notice, the claimant and the parties shall meet and confer in good faith to resolve the claim of privilege or protection. Within 5 days after the conference, a party may file a motion to compel the production of the document and may, in the motion to compel, use a description of the document from the notice produced under this paragraph. In connection with the motion to compel, the party may submit the document *in camera* for consideration by the administrative law judge. The person that produced the document must preserve the document until the claim of privilege or protection is resolved.

(3) Parties may enter into a written agreement to waive compliance with paragraph (e)(1) of this section for documents, communications, and items created or communicated within a time period specified in the agreement. The administrative law judge may decline to entertain any motion based on information claimed to be subject to the agreement. If information claimed to be subject to the agreement is produced in discovery then the administrative law judge may determine that the produced information is not entitled to privilege or protection.

(4) For good cause, the administrative law judge 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 with any requirement of this section without approval by the administrative law judge unless the administrative law judge has ordered a different period of time for compliance, in which case the parties' agreement must be approved by the administrative law judge.

(5)(i) The provisions of § 210.27(e)(1) through (4) protect drafts of expert reports, regardless of the form in which the draft is recorded.

(ii) The provisions of § 210.27(e)(1) through (4) protect communications

between the party's attorney and expert witnesses concerning trial preparation, regardless of the form of the communications, except to the extent that the communications:

(A) Relate to compensation for the expert's study or testimony;

(B) Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(f) *Supplementation of responses.* (1) A party who has responded to a request for discovery with a response is under a duty to supplement or correct the response to include information thereafter acquired if ordered by the administrative law judge or the Commission or in the following circumstances: A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) A duty to supplement responses also may be imposed by agreement of the parties, or at any time prior to a hearing through new requests for supplementation of prior responses.

(g) *Signing of discovery requests, responses, and objections.* (1) The front page of every request for discovery or response or objection thereto shall contain a caption setting forth the name of the Commission, the title of the investigation or related proceeding, and the docket number or investigation number, if any, assigned to the investigation or related proceeding.

(2) Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and shall state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, the request, objection, or response is:

(i) Consistent with § 210.5(a) (if applicable) and other relevant provisions of this chapter, and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(ii) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(iii) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a request, response, or objection is certified in violation of paragraph (g)(2) of this section, the administrative law judge or the Commission, upon motion or sua sponte under § 210.25 of this part, may impose an appropriate sanction upon the person who made the certification, the party on whose behalf the request, response, or objection was made, or both.

(4) An appropriate sanction may include an order to pay to the other parties the amount of reasonable expenses incurred because of the violation, including a reasonable attorney's fee, to the extent authorized by Rule 26(g) of the Federal Rules of Civil Procedure. Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

(5) Monetary sanctions may be imposed under this section to reimburse the Commission for expenses incurred by a Commission investigative attorney or the Commission's Office of Unfair Import Investigations. Monetary sanctions will not be imposed under

this section to reimburse the Commission for attorney's fees.

[59 FR 39039, Aug. 1, 1994, as amended at 78 FR 29623, May 21, 2013; 83 FR 21161, May 8, 2018]

§ 210.28 Depositions.

(a) *When depositions may be taken.* Following publication in the FEDERAL REGISTER of a Commission notice instituting the investigation, any party may take the testimony of any person, including a party, by deposition upon oral examination or written questions. The presiding administrative law judge will determine the permissible dates or deadlines for taking such depositions. Without stipulation of the parties, the complainants as a group may take a maximum of five fact depositions per respondent or no more than 20 fact depositions whichever is greater, the respondents as a group may take a maximum of 20 fact depositions total, and if the Commission investigative attorney is a party, he or she may take a maximum of 10 fact depositions and is permitted to participate in all depositions taken by any parties in the investigation. Each notice for a corporation to designate deponents only counts as one deposition and includes all corporate representatives so designated to respond, and related respondents are treated as one respondent for purposes of determining the number of depositions. The presiding administrative law judge may increase the number of depositions on written motion for good cause shown.

(b) *Persons before whom depositions may be taken.* Depositions may be taken before a person having power to administer oaths by the laws of the United States or of the place where the examination is held.

(c) *Notice of examination.* A party desiring to take the deposition of a person shall give notice in writing to every other party to the investigation. The administrative law judge shall determine the appropriate period for providing such notice. A party upon whom a notice of deposition is served may make objections to a notice of deposition and state the reasons therefor within ten days of service of the notice of deposition. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. A notice may provide for the taking of testimony by telephone, but the administrative law judge may, on motion of any party, require that the deposition be taken in the presence of the deponent. The parties may stipulate in writing, or the administrative law judge may upon motion order, that the testimony at a deposition be recorded by other than stenographic means. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(d) *Taking of deposition.* Each deponent shall be duly sworn, and any adverse party shall have the right to cross-examine. Objections to questions or documents shall be in short form, stating the grounds of objections relied upon. Evidence objected to shall be taken subject to the objections, except that privileged communications and subject matter need not be disclosed. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, after which the deposition shall be subscribed by the deponent (unless the parties by stipulation waive signing or the deponent is ill or cannot be found or refuses to sign) and certified by the person before whom the deposition was taken. If the deposition is not subscribed by the deponent, the person administering the oath shall state on the record such fact and the reason therefor. When a deposition is recorded by stenographic means, the stenographer shall certify on the transcript that the witness was sworn in the stenographer's presence and that the transcript is a true record of the testimony of the witness. When a deposition is recorded by other than stenographic means and is thereafter transcribed, the person transcribing it shall certify that the person heard the witness sworn on the recording and that the transcript is a correct writing of the recording. Thereafter, upon payment of

reasonable charges therefor, that person shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent. See paragraph (i) of this section concerning the effect of errors and irregularities in depositions.

(e) *Depositions of nonparty officers or employees of the Commission or of other Government agencies.* A party desiring to take the deposition of an officer or employee of the Commission other than the Commission investigative attorney, or of an officer or employee of another Government agency, or to obtain documents or other physical exhibits in the custody, control, and possession of such officer or employee, shall proceed by written motion to the administrative law judge for leave to apply for a subpoena under § 210.32(c). Such a motion shall be granted only upon a showing that the information expected to be obtained thereby is within the scope of discovery permitted by § 210.27(b) or § 210.61 and cannot be obtained without undue hardship by alternative means.

(f) *Service of deposition transcripts on the Commission staff.* The party taking the deposition shall promptly serve one copy of the deposition transcript on the Commission investigative attorney.

(g) *Admissibility of depositions.* The fact that a deposition is taken and served upon the Commission investigative attorney as provided in this section does not constitute a determination that it is admissible in evidence or that it may be used in the investigation. Only such part of a deposition as is received in evidence at a hearing shall constitute a part of the record in such investigation upon which a determination may be based. Objections may be made at the hearing to receiving in evidence any deposition or part thereof for any reason that would require exclusion of the evidence if the witness were then present and testifying.

(h) *Use of depositions.* A deposition may be used as evidence against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness;

(2) The deposition of a party may be used by an adverse party for any purpose;

(3) The deposition of a witness, whether or not a party, may be used by any party for any purposes if the administrative law judge finds—

(i) That the witness is dead; or

(ii) That the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon application and notice, that such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the oral testimony of witnesses at a hearing, to allow the deposition to be used; or

(vi) Upon agreement of the parties and within the administrative law judge's discretion, the use of designated deposition testimony in lieu of live witness testimony absent the circumstances otherwise enumerated in this paragraph is permitted.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part that ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(i) *Effect of errors and irregularities in depositions*—(1) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving notice.

(2) *As to disqualification of person before whom the deposition is to be taken.* Objection to taking a deposition because of disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known

or could be discovered with reasonable diligence.

(3) *As to taking of depositions.* (i) Objections to the competency of a witness or the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(ii) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(iii) Objections to the form of written questions submitted under this section are waived unless served in writing upon the party propounding them. The presiding administrative law judge shall set the deadline for service of such objections.

(4) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, served, or otherwise dealt with by the person before whom it is taken are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

[59 FR 39039, Aug. 1, 1994, as amended at 73 FR 38323, July 7, 2008; 78 FR 23483, Apr. 19, 2013; 83 FR 21161, May 8, 2018]

§ 210.29 Interrogatories.

(a) *Scope; use at hearing.* Any party may serve upon any other party written interrogatories to be answered by the party served. Interrogatories may relate to any matters that can be inquired into under § 210.27(b) or § 210.61, and the answers may be used to the extent permitted by the rules of evidence. Absent stipulation of the parties, any party may serve upon any other party written interrogatories not exceeding 175 in number including all discrete subparts. Related respondents are treated as one entity. The presiding administrative law judge may increase the number of interrogatories on written motion for good cause shown.

(b) *Procedure.* (1) Interrogatories may be served upon any party after the date of publication in the FEDERAL REGISTER of the notice of investigation.

(2) Parties answering interrogatories shall repeat the interrogatories being answered immediately preceding the answers. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, within ten days of service of the interrogatories or within the time specified by the administrative law judge. The party submitting the interrogatories may move for an order under § 210.33(a) with respect to any objection to or other failure to answer an interrogatory.

(3) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or a later time.

(c) *Option to produce records.* When the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records

and to make copies, compilations, abstracts, or summaries. The specifications provided shall include sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the documents from which the answer may be ascertained.

[59 FR 39039, Aug. 1, 1994, as amended at 73 FR 38323, July 7, 2008; 78 FR 23484, Apr. 19, 2013]

§ 210.30 Requests for production of documents and things and entry upon land.

(a) *Scope.* Any party may serve on any other party a request:

(1) To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained), or to inspect and copy, test, or sample any tangible things that are in the possession, custody, or control of the party upon whom the request is served; or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 210.27(b).

(b) *Procedure.* (1) The request may be served upon any party after the date of publication in the FEDERAL REGISTER of the notice of investigation. The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(2) The party upon whom the request is served shall serve a written response within 10 days or the time specified by the administrative law judge. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of any item or category, the part shall be specified. The party submitting the request may move for an order under § 210.33(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request.

(c) *Persons not parties.* This section does not preclude issuance of an order against a person not a party to permit entry upon land.

[59 FR 39039, Aug. 1, 1994, as amended at 73 FR 38323, July 7, 2008]

§ 210.31 Requests for admission.

(a) *Form, content, and service of request for admission.* Any party may serve on any other party a written request for admission of the truth of any matters relevant to the investigation and set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been otherwise furnished or are known to be, and in the request are stated as being, in the possession of the other party. Each matter as to which an admission is requested shall be separately set forth. The request may be served upon a party whose complaint is the basis for the investigation after the date of publication in the FEDERAL REGISTER of the notice of investigation. The administrative law judge will determine the period within which a party may serve a request upon other parties.

(b) *Answers and objections to requests for admissions.* A party answering a request for admission shall repeat the request for admission immediately preceding his answer. The matter may be deemed admitted unless, within 10 days or the period specified by the administrative law judge, the party to whom the request is directed serves upon the party requesting the admission a sworn written answer or objection addressed to the matter. If objection is made, the

reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter as to which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known to or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter as to which an admission has been requested presents a genuine issue for a hearing may not object to the request on that ground alone; he may deny the matter or set forth reasons why he cannot admit or deny it.

(c) *Sufficiency of answers.* The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of this section, he may order either that the matter is admitted or that an amended answer be served. The administrative law judge may, in lieu of these orders, determine that final disposition of the request be made at a prehearing conference or at a designated time prior to a hearing under this part.

(d) *Effect of admissions; withdrawal or amendment of admission.* Any matter admitted under this section may be conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission. The administrative law judge may permit withdrawal or amendment when the presentation of the issues of the investigation will be subserved thereby and the party who obtained the admission fails to satisfy the administrative law judge that withdrawal or amendment will prejudice him in maintaining his position on the issue of the investigation. Any admission made by a party under this section is for the purpose of the pending investigation and any related proceeding as defined in § 210.3 of this chapter.

[59 FR 39039, Aug. 1, 1994, as amended at 73 FR 38323, July 7, 2008]

§ 210.32 Subpoenas.

(a) *Application for issuance of a subpoena*—(1) *Subpoena ad testificandum.* An application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at a hearing shall be made to the administrative law judge.

(2) *Subpoena duces tecum.* An application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, at a prehearing conference, at a hearing, or under any other circumstances, shall be made in writing to the administrative law judge and shall specify the material to be produced as precisely as possible, showing the general relevancy of the material and the reasonableness of the scope of the subpoena.

(3) The administrative law judge shall rule on all applications filed under paragraph (a)(1) or (a)(2) of this section and may issue subpoenas when warranted.

(b) *Use of subpoena for discovery.* Subpoenas may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits that constitute or contain evidence relevant to the subject matter involved and that are in the possession, custody, or control of such person.

(c) *Application for subpoenas for nonparty Commission records or personnel or for records and personnel of other Government agencies*—(1) *Procedure.* An application for issuance of a subpoena requiring the production of nonparty

documents, papers, books, physical exhibits, or other material in the records of the Commission, or requiring the production of records or personnel of other Government agencies shall specify as precisely as possible the material to be produced, the nature of the information to be disclosed, or the expected testimony of the official or employee, and shall contain a statement showing the general relevancy of the material, information, or testimony and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony or their substantial equivalent could not be obtained without undue hardship or by alternative means.

(2) *Ruling.* Such applications shall be ruled upon by the administrative law judge, and he may issue such subpoenas when warranted. To the extent that the motion is granted, the administrative law judge shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the official or employee as may appear necessary and appropriate for the protection of the public interest.

(3) *Application for subpoena grounded upon the Freedom of Information Act.* No application for a subpoena for production of documents grounded upon the Freedom of Information Act (5 U.S.C. § 552) shall be entertained by the administrative law judge.

(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 time as the administrative law judge may allow. If an objection is made, the party that requested the subpoena may move for a request for judicial enforcement upon reasonable notice to other parties or as otherwise provided by the administrative law judge who issued the subpoena.

(2) Any motion to quash a subpoena shall be filed within the later of 10 days after receipt of the subpoena or within such time as the administrative law judge may allow.

(e) *Ex parte rulings on applications for subpoenas.* Applications for the issuance of the subpoenas pursuant to the provisions of this section may be made ex parte, and, if so made, such applications and rulings thereon shall remain ex parte unless otherwise ordered by the administrative law judge.

(f) *Witness fees*—(1) *Deponents and witnesses.* Any person compelled to appear in person to depose or testify in response to a subpoena shall be paid the same fees and mileage as are paid to witnesses with respect to proceedings in the courts of the United States; provided, that salaried employees of the United States summoned to depose or testify as to matters related to their public employment, irrespective of the party at whose instance they are summoned, shall be paid in accordance with the applicable Federal regulations.

(2) *Responsibility.* The fees and mileage referred to in paragraph (f)(1) of this section shall be paid by the party at whose instance deponents or witnesses appear. Fees due under this paragraph shall be tendered no later than the date for compliance with the subpoena issued under this section. Failure to timely tender fees under this paragraph shall not invalidate any subpoena issued under this section.

(g) *Obtaining judicial enforcement.* In order to obtain judicial enforcement of a subpoena issued under paragraphs (a)(3) or (c)(2) of this section, the administrative law judge shall certify to the Commission, on motion or sua sponte, a request for such enforcement. The request shall be accompanied by copies of relevant papers and a written report from the administrative law judge concerning the purpose, relevance, and reasonableness of the subpoena. If the request, relevant papers, or written report contain confidential business information, the administrative law judge shall certify nonconfidential copies along with the confidential versions. The Commission will subsequently issue a notice stating whether it has granted the request and authorized its Office of the General Counsel to seek such enforcement.

[59 FR 39039, Aug. 1, 1994, as amended at 73 FR 38233, July 7, 2008; 83 FR 21161, May 8, 2018]

§ 210.33 Failure to make or cooperate in discovery; sanctions.

(a) *Motion for order compelling discovery*. A party may apply to the administrative law judge for an order compelling discovery upon reasonable notice to other parties and all persons affected thereby.

(b) *Non-monetary sanctions for failure to comply with an order compelling discovery*. If a party or an officer or agent of a party fails to comply with an order including, but not limited to, an order for the taking of a deposition or the production of documents, an order to answer interrogatories, an order issued pursuant to a request for admissions, or an order to comply with a subpoena, the administrative law judge, for the purpose of permitting resolution of relevant issues and disposition of the investigation without unnecessary delay despite the failure to comply, may take such action in regard thereto as is just, including, but not limited to the following:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely upon testimony by the party, officer, or agent, or documents, or other material in support of his position in the investigation;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken or rule by initial determination that a determination in the investigation be rendered against the party, or both; or

(6) Order any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure. Any such action may be taken by written or oral order issued in the course of the investigation or by inclusion in the initial determination of the administrative law judge. It shall be the duty of the parties to seek, and that of the administrative law judge to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony, documents, or other evidence. If, in the administrative law judge's opinion such relief would not be sufficient, the administrative law judge shall certify to the Commission a request that court enforcement of the subpoena or other discovery order be sought.

(c) *Monetary sanctions for failure to make or cooperate in discovery*. (1) If a party or an officer, director, or managing agent of the party or person designated to testify on behalf of a party fails to obey an order to provide or permit discovery, the administrative law judge or the Commission may make such orders in regard to the failure as are just. In lieu of or in addition to taking action listed in paragraph (b) of this section and to the extent provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, the administrative law judge or the Commission, upon motion or sua sponte under § 210.25, may require the party failing to obey the order or the attorney advising that party or both to pay reasonable expenses, including attorney's fees, caused by the failure, unless the administrative law judge or the Commission finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

(2) Monetary sanctions may be imposed under this section to reimburse the Commission for expenses incurred by a Commission investigative attorney or the Commission's Office of Unfair Import Investigations. Monetary sanctions will not be imposed under this section to reimburse the Commission for attorney's fees.

§ 210.34 Protective orders; reporting requirement; sanctions and other actions.

(a) *Issuance of protective order*. Upon motion by a party or by the person from whom discovery is sought or by

the administrative law judge on his own initiative, and for good cause shown, the administrative law judge may make any order that may appear necessary and appropriate for the protection of the public interest or that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the administrative law judge;

(6) That a deposition, after being sealed, be opened only by order of the Commission or the administrative law judge;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Commission or the administrative law judge. If the motion for a protective order is denied, in whole or in part, the Commission or the administrative law judge may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The Commission also may, upon motion or sua sponte, issue protective orders or may continue or amend a protective order issued by the administrative law judge.

(b) *Unauthorized disclosure, loss, or theft of information.* If confidential business information submitted in accordance with the terms of a protective order is disclosed to any person other than in a manner authorized by the protective order, lost, or stolen, the party responsible for the disclosure, or subject to the loss or theft, must immediately bring all pertinent facts relating to such incident to the attention of the submitter of the information and the administrative law judge or the Commission, and, without prejudice to other rights and remedies of the submitter of the information, make every effort to prevent further mishandling of such information by the party or the recipient of such information.

(c) *Violation of protective order.* (1) The issue of whether sanctions should be imposed may be raised on a motion by a party, the administrative law judge's own motion, or the Commission's own initiative in accordance with § 210.25(a)(2). Parties, including the party that identifies an alleged breach or makes a motion for sanctions, and the Commission shall treat the identity of the alleged breacher as confidential business information unless the Commission issues a public sanction. The identity of the alleged breacher means the name of any individual against whom allegations are made. 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.

(2) If the breach occurs while the investigation is before an administrative law judge, any determination on sanctions of the type enumerated in paragraphs (c)(3)(i) through (iv) of this section shall be in the form of a recommended determination. The Commission may then consider both the recommended determination and any related orders in making a determination on sanctions. When the motion is addressed to the administrative law judge for sanctions of the type enumerated in paragraph (c)(3)(v) of this section, he shall grant or deny a motion by issuing an order.

(3) Any individual who has agreed to be bound by the terms of a protective order issued pursuant to paragraph (a) of this section, and who is determined to have violated the terms of the protective order, may be subject to one or more of the following:

(i) An official reprimand by the Commission;

(ii) Disqualification from or limitation of further participation in a pending investigation;

(iii) Temporary or permanent disqualification from practicing in any capacity before the Commission pursuant to § 201.15(a) of this chapter;

(iv) Referral of the facts underlying the violation to the appropriate licensing authority in the jurisdiction in which the individual is licensed to practice;

(v) Sanctions of the sort enumerated in § 210.33(b), or such other action as may be appropriate.

(d) *Reporting requirement.* Each person who is subject to a protective order issued pursuant to paragraph (a) of this section shall report in writing to the Commission immediately upon learning that confidential business information disclosed to him or her pursuant to the protective order is the subject of:

(1) A subpoena;

(2) A court or an administrative order (other than an order of a court reviewing a Commission decision);

(3) A discovery request;

(4) An agreement; or

(5) Any other written request, if the request or order seeks disclosure, by him or any other person, of the subject confidential business information to a person who is not, or may not be, permitted access to that information pursuant to either a Commission protective order or § 210.5(b).

NOTE TO PARAGRAPH (d): This reporting requirement applies only to requests and orders for disclosure made for use of confidential business information in non-Commission proceedings.

(e) *Sanctions and other actions.* After providing notice and an opportunity to comment, the Commission may impose a sanction upon any person who willfully fails to comply with paragraph (d) of this section, or it may take other action.

[59 FR 39039, Aug. 1, 1994, as amended at 73 FR 38323, July 7, 2008; 78 FR 23484, Apr. 19, 2013; 83 FR 21161, May 8, 2018]

Subpart F—Prehearing Conferences and Hearings

§ 210.35 Prehearing conferences.

(a) *When appropriate.* The administrative law judge in any investigation may direct counsel or other representatives for all parties to meet with him for one or more conferences to consider any or all of the following:

(1) Simplification and clarification of the issues;

(2) Negotiation, compromise, or settlement of the case, in whole or in part;

(3) Scope of the hearing;

(4) Necessity or desirability of amendments to pleadings subject, however, to the provisions of § 210.14 (b) and (c);

(5) Stipulations and admissions of either fact or the content and authenticity of documents;

(6) Expedition in the discovery and presentation of evidence including, but not limited to, restriction of the number of expert, economic, or technical witnesses; and

(7) Such other matters as may aid in the orderly and expeditious disposition of the investigation including disclosure of the names of witnesses and the exchange of documents or other physical exhibits that will be introduced in evidence in the course of the hearing.

(b) *Subpoenas.* Prehearing conferences may be convened for the purpose of accepting returns on subpoenas duces tecum issued pursuant to § 210.32(a)(3).

(c) *Reporting.* In the discretion of the administrative law judge, prehearing conferences may or may not be stenographically reported and may or may not be public.

(d) *Order.* The administrative law judge may enter in the record an order that recites the results of the conference. Such order shall include the administrative law judge's rulings upon matters considered at the conference, together with appropriate direction to the parties. The administrative law judge's order shall control the subsequent course of the hearing, unless the administrative law judge modifies the order.

[59 FR 39039, Aug. 1, 1994, as amended at 73 FR 38324, July 7, 2008]