23, 80a–29, 80a–37, 80b–3, 80b–4, and 80b–11, unless otherwise noted.

* * * * *

2. By amending § 240.12f–1 by revising the section heading and introductory text of paragraph (a), redesignating paragraphs (a)(5) and (a)(6) as (a)6) and (a)(7), adding paragraph (a)(5), and revising newly designated (a)(6), to read as follows:

**§ 240.12f–1 Applications for permission to reinstate unlisted trading privileges.**

(a) An application to reinstate unlisted trading privileges may be made to the Commission by any national securities exchange for the extension of unlisted trading privileges to any security for which such unlisted trading privileges have been suspended by the Commission, pursuant to section 12(f)(2)(A). One copy of such application, executed by a duly authorized officer of the exchange, shall be filed and shall set forth:

(1) * * *

(5) The date of the Commission's suspension of unlisted trading privileges in the security on the exchange;

(6) Any other information which is deemed pertinent to the question of whether the reinstatement of unlisted trading privileges in such security is consistent with the maintenance of fair and orderly markets and the protection of investors; and

* * * * *

3. By revising § 240.12f–2 to read as follows:

**§ 240.12f–2 Extending Unlisted Trading Privileges to a Security that is the Subject of an Initial Public Offering.**

(a) *General provision*—A national securities exchange may extend unlisted trading privileges to a subject security when at least one transaction in the subject security has been effected on the national securities exchange upon which the security is listed and the transaction has been reported pursuant to an effective transaction reporting plan as defined in § 240.11Aa3–1.

(b) The extension of unlisted trading privileges pursuant to this section shall be subject to all the provisions set forth in Section 12(f) of the Act (15 U.S.C. 78l(f)), as amended, and any rule or regulation promulgated thereunder, or which may be promulgated thereunder while the extension is in effect.

(c) *Definition*. For purposes of this section, the term *subject security* shall mean a security that is the subject of an initial public offering, as that term is defined in section 12(f)(1)(G) of the Act (15 U.S.C. 78*l*(f)(1)(G)).

4. By amending § 240.12f–3 by revising paragraph (b) to read as follows:

**§ 240.12f–3 Termination or suspension of unlisted trading privileges.**

(a) * * *

(b) Unlisted trading privileges in any security on any national securities exchange may be suspended or terminated by such exchange in accordance with its rules.

5. By adding § 240.12f–5, to read as follows:

**§ 240.12f–5 Exchange Rules for Securities to which Unlisted Trading Privileges are Extended.**

A national securities exchange shall not extend unlisted trading privileges to any security unless the national securities exchange has in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends unlisted trading privileges.

**§ 240.12f–6 [Removed]**

6. By removing and reserving § 240.12f–6.

## PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

7. The authority citation for Part 249 continues to read in part as follows:

**Authority:** 15 U.S.C. 78a, *et seq.*, unless otherwise noted.

**§ 249.27 and 249.28 [Removed]**

8. By removing § 249.27 and § 249.28.

By the Commission.

Dated: February 2, 1995.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 95–3175 Filed 2–8–95; 8:45 am]

BILLING CODE 8010–01–P

## INTERNATIONAL TRADE COMMISSION

## 19 CFR Part 210

## Notice of Proposed Rulemaking Concerning Post-Investigation Retention and Use of Confidential Business Information From Investigations on Unfair Practices in Import Trade

**AGENCY:** International Trade Commission.

**ACTION:** Notice of proposed rulemaking and request for comments.

**SUMMARY:** The Commission proposes to amend two of its final rules for investigations and related proceedings under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) to codify a proposed new policy of allowing counsel who are signatories to an administrative protective order (APO) to retain certain categories of confidential business information (CBI) from an investigation for prescribed periods and to use that CBI during the retention period for certain limited purposes.[1]

The Commission hereby solicits written comments from interested persons to aid the Commission in determining whether to adopt the proposed rules set forth in this notice.

**DATES:** Comments will be considered if received on or before April 10, 1995.

**ADDRESSES:** A signed original and 18 copies of each set of comments, along with a cover letter stating the nature of the commenter's interest in the proposed rulemaking, should be submitted to Donna R. Koehnke, Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436.

**FOR FURTHER INFORMATION CONTACT:** P.N. Smithey, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202–205–3061. Hearing-impaired individuals can obtain information concerning the proposed rulemaking by contacting the Commission's TDD terminal at 202–205–1810.

**SUPPLEMENTARY INFORMATION:**

### Background

On August 1, 1994, the Commission published final rules for 19 CFR part 210 eventually to replace the interim rules currently found in 19 CFR parts 210 and 211.[2] The interim rules in 19 CFR parts 210 and 211 (1994) apply to all pending investigations and related proceedings that were instituted before September 1, 1994. The final rules, which went into effect on August 31, 1994, and will be codified in 19 CFR part 210 in 1995, apply to all investigations and related proceedings instituted on or after September 1, 1994.[3] On January 1, 1995, certain final rules were amended on an interim basis to implement the amendments to section 337 contained in the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994) (URAA).[4]

Neither the interim nor the final Commission rules contain provisions governing the retention of CBI by counsel who are signatories to a section 337 APO. The Commission's traditional policy, however, has been to issue

[1] Commissioners Rohr and Newquist dissent from the Commission majority's decision to consider revising the final rules as described in this notice. See *infra n.9.*

[2] See 59 FR 39020, Part II (Aug. 1, 1994).

[3] *Id.*

[4] See 59 FR 67622 (Dec. 30, 1994).

section 337 APOs which (1) order the signatories to refrain from using CBI covered by the APO for any purpose other than the investigation, and (2) require signatories to destroy all CBI or return it to the suppliers after final termination of the investigation, (i.e., exhaustion of the appellate process), absent written consent from the suppliers to allow other uses of the CBI or to retain the CBI for a longer period). More recently, the Commission has allowed its administrative law judges (ALJs) to issue, after prior input from the parties, APOs which deviated from standard Commission practice by permitting outside counsel for the parties to retain certain CBI beyond the exhaustion of any appeals.[5]

As a result of the policy issues raised by those cases, the Commission published an advance notice of proposed rulemaking for 19 CFR part 210, on December 9, 1993.[6] The notice stated that the Commission was considering revising its rules for investigations and related proceedings under section 337 to address two subjects: (1) A prescribed policy of allowing counsel who are signatories to an APO to retain CBI from a particular investigation after that investigation has been finally terminated; and (2) the possible establishment and operation of a Commission repository for CBI, which would be accessible to counsel of record who signed the APO, in lieu of or in addition to permitting post-investigation retention of CBI by such counsel.

**Comments Filed in Response to the Advance Notice of Proposed Rulemaking**

In response to the advance notice of proposed rulemaking, the Commission received comments from the following organizations: (1) The ITC Trial Lawyers Association (ITCTLA); (2) the Section on International Law and Practice of the American Bar Association (ABA/SLIP); and (3) the U.S. Patent and Trademark Office (PTO). The Commission also received a joint submission from four bar groups—(1) the International Law Section of the District of Columbia Bar, (2) the ABA/SLIP, (3) the ITCTLA, and (4) the Customs and International Trade Bar Association.

No commenters favored the establishment and operation of a Commission repository in addition to or in lieu of permitting counsel to retain CBI for a prescribed period. The comments in opposition to a repository cited such factors as the cost to the taxpayers, the administrative burden to the Commission, and the lack of corresponding benefits to parties, the Commission, or the public at large.

The bar group commenters said that the rules should establish a fixed policy on post-investigation retention of CBI. They also indicated that the Commission's policy should be to permit such retention for various periods according to the nature of the document containing the CBI and the status of the investigation (or related proceeding) to which the document pertains. The bar group commenters also expressed the view that counsel should be permitted to retain all materials containing CBI at least until the date that all appeals are exhausted, since the information might be needed during the appeals and any Commission proceedings resulting from the appeals.

The joint recommendations of the bar group commenters concerning the retention of various categories of CBI were as follows:[7]

1. *All discovery materials*—Until two years after all appeals are exhausted. Thereafter, the materials would be returned to the supplier or destroyed, with written certification to each supplier and the Commission.

2. *All CBI in the possession of expert witnesses*—Until all appeals are exhausted. Thereafter, the materials would be returned to the supplier or destroyed, with written certification to each supplier and the Commission.

3. *The evidentiary record*—Until two years after all appeals are exhausted or all remedial orders have expired, whichever is later. Thereafter, the materials are to be returned to the supplier or destroyed, with written certification to each supplier and the Commission.

4. *Pleadings*—Indefinitely.

5. *Copies of confidential notices, orders, recommendations, and opinions issued by an ALJ or the Commission*—Indefinitely.

6. *Working papers, briefs, and other documents created by counsel containing information subject to an APO*—Indefinitely.

The bar group commenters' joint recommendations on post-investigation retention of specific categories of CBI made no distinction between CBI submitted by a third party and that submitted by party to the investigation. Moreover, the ITCTLA specifically argued against such a distinction, noting that elimination of the injury requirement as an element of a section 337 violation in intellectual-property based cases has diminished the role of third-party CBI for the most part, except in cases involving motions for temporary relief. The ITCTLA also argued against the promulgation of a separate rule to cover cases in which a third party objects to counsel's post-investigation retention of the third party's CBI. In such cases, the ITCTLA argued, the third party should seek, by negotiation with the parties or through the ALJ, modification of the APO under which such retention is to be permitted.

The PTO's comments in response to the advance notice of proposed rulemaking consisted of advice concerning the length of time that CBI should be entitled to confidential treatment. Specifically, the PTO suggested that materials covered by an APO should be declassified and made available for public inspection according to a declassification schedule set forth in the Commission rules. The PTO suggested that the declassification schedule be based on the age of the CBI contained in the material, instead of how recently the material was submitted.

**The Commission's Responses**

The Commission does not agree with the PTO's comment that materials covered by an APO should be declassified and made available for public inspection according to a declassification schedule set forth in the Commission rules based on the age of the CBI contained in the material. The Commission notes that the age of CBI is a factor which may have a bearing on the continuing validity of its confidential designation. The Commission also is cognizant, however, that age may not be the only factor. Moreover, section 337(n) and its legislative history evince a clear Congressional intent that if business information is properly designated confidential by the supplier and is treated accordingly by the Commission, the Commission is not at liberty to

[5] *See, e.g.*, Inv. No. 337–TA–334, Certain Condensers, Parts Thereof, and Products Containing Same, Including Air Conditioners for Automobiles, 58 FR 47286 (Sept. 8, 1993); Inv. No. 337–TA–331, Certain Microcomputer Memory Controllers, Components Thereof, and Products Containing Same, 58 FR 47284 (Sept. 8, 1993). The Condensers APO permitted outside counsel for the complainant and the respondents to retain the evidentiary record—including materials containing CBI—until the expiration of any remedial order issued by the Commission. The Memory Controllers APO permitted counsel to retain all materials containing CBI until the expiration of any remedial order issued in that case. Both APOs also allowed counsel to retain for an indefinite period documents (including briefs and working papers) that contained CBI and were created by the Commission, the ALJ, or counsel.

[6] 58 FR 64711 (Dec. 9, 1993).

[7] The ITCTLA originally proposed shorter retention periods for certain items than the table in this memorandum indicates. The ITCTLA subsequently joined other bar groups in the filing of a joint submission explicitly advocating longer retention periods. The Commission thus assumes that the joint submission reflects the ITCTLA's current position on the issues presented.

release that information at a later date absent the submitter's consent.[8] The Commission thus believes that it would be inappropriate to make unilateral determinations on declassification of CBI without consulting the suppliers or to adopt a Commission rule that would mandate such declassification.

The Commission also has decided against the establishment and operation of a Commission repository in lieu of or in addition to allowing post-investigation retention of CBI by counsel. The Commission shares the bar group commenters' view that little would be gained from creating such a repository and that having a CBI access system based on a repository would further entangle the Commission in enforcing APOs and would increase the burdens of handling CBI.

The Commission is considering revising the final part 210 rules, as suggested by the bar group commenters, to establish a policy of permitting the post-investigation retention and use of CBI by counsel. The Commission notes, however, that for some categories of CBI, the bar group commenters suggested, without explanation, retention periods that were two years beyond exhaustion of the appeals process or expiration of the remedial orders. The Commission notes also that some of the uses which the bar group commenters have jointly or individually proposed for CBI during the prescribed retention periods encompass uses that appear to be outside of the limitations imposed by law.

As discussed in the next section of this notice, the Commission has drafted proposed rule provisions that incorporate a retention schedule with shorter deadlines for certain kinds of CBI than the deadlines listed in the bar group commenters' joint submission. The Commission also has drafted proposed rule provisions that limit the uses to which CBI may be put during the prescribed retention periods. The Commission, however, specifically invites bar associations and other interested persons who favor the bar group commenters' proposed schedule to file comments with the Commission on the following issues:

1. The justification for the extended retention periods (i.e., the additional two years) on the bar group commenters' proposed schedule for certain materials containing CBI; and

2. The use(s) to which the CBI in those materials would be put during the extended periods.[9]

**Proposed Rule Changes**

To codify the retention schedule, use restrictions, and other requirements which the Commission proposes to adopt, the Commission proposes to add new provisions to final rules 210.5 and 210.34, rather than creating new rules. That approach eliminates the need to renumber the existing final rules in part 210. The new provisions which the Commission proposes to add to final rules 210.5 and 210.34 are described below.

**Final Rule 210.5**

Final rule 210.5, entitled ''Confidential business information,'' is the Commission's general rule for CBI in investigations and related proceedings under section 337. The Commission proposes to amend final rule 210.5 by adding a new paragraph (f) which states that materials containing CBI subject to an APO issued under final rule 210.34(a) shall be retained, used, expurgated, returned to the supplier, or destroyed as provided in final rule 210.34(e).

**Final Rule 210.34**

Final rule 210.34 is the general rule about APOs in section 337 investigations. The Commission proposes to amend final rule 210.34 by adding paragraph (e).

*Paragraph (e)(1).* Proposed paragraph (e)(1) of final rule 210.34 incorporates the following retention schedule:

1. *All discovery materials.* Until all appeals are exhausted and thereupon the materials would be subject to a return or destroy rule.

2. *All CBI in the possession of expert witnesses.* Same as for discovery materials.

3. *The evidentiary record.* Until all appeals are exhausted or all remedial orders have expired, whichever is later, and thereupon the materials would be subject to a return or destroy rule.

4. *Attorney work product.* Indefinitely, but see paragraph 7 below regarding third-party CBI. The Commission's APO enforcement responsibility would be subject to a five-year sunset rule, however. In general, the Commission would no longer be responsible for enforcing APOs five years after the exhaustion of all appeals or the expiration of all remedial orders, whichever is later. If certain information, such as trade secrets, is still confidential, the supplier of the information could request that the Commission continue to enforce the APO even though the five-year period has expired. Such a request would have to be made before the five-year period expires.

5. *Pleadings.* Same retention period and APO enforcement provisions as attorney work product, but see paragraph 7 below regarding third-party CBI.

6. *Orders, notices, initial determinations, recommended determinations, opinions, and other documents issued by an ALJ or the Commission containing CBI.* Same retention period and APO enforcement provisions as attorney work product and pleadings, but see paragraph 7 below regarding third-party CBI.

7. *Third-party CBI.* Until all appeals are exhausted or all remedial orders have expired, whichever is later. The third-party CBI would then be subject to a return or destroy rule, even if the information is contained in pleadings or work product, if the third-party suppliers so requested at the time that they submit the information.

Proposed paragraph (e)(1) also imposes—

1. 30-day deadlines for the return, destruction, or expurgation of CBI when the prescribed retention period expires, and

2. A requirement that written certification of such return, destruction, or expurgation shall be provided to suppliers and the Commission.

The Commission believes that these requirements (and the custodian requirement set forth in proposed paragraph (e)(3) of final rule 210.34) will help ensure that APO signatories comply promptly with their obligations to expurgate, return, or destroy CBI in accordance with proposed paragraph (e)(1).

Proposed paragraphs (e)(1)(iv)–(vi) of final rule 210.34 impose a 60-day deadline for motions to extend the

[8] *See*, e.g., H.R. Rep. No. 40, 100th Cong., 1st Sess. at 161–162 (1987); S. Rep. No. 71, 100th Cong., 1st Sess. at 133 (1987).

[9] Commissioner Rohr and Commissioner Newquist dissent from the majority's decision to consider adopting the proposed rules set forth in this notice.

Commissioner Rohr believes that the Commission should adhere to the traditional practice of issuing section 337 APOs which (1) order the signatories to refrain from using CBI covered by the APO for any purpose other than the investigation, and (2) require signatories to destroy all CBI or return it to the suppliers after final termination of the investigation, (i.e., exhaustion of the appellate process), absent written consent from the suppliers to allow other uses or a longer period). Commissioner Rohr also believes that the procedures contained in the proposed rules represent an unacceptable risk of unauthorized disclosure of the subject CBI.

In Commissioner Newquist's view, the Commission's rules should provide that post-investigation use and retention of CBI shall be determined by agreement of the parties, any non-party suppliers, and the presiding ALJ in each investigation.

Commission's five-year APO enforcement period (after the exhaustion of all appeals or the expiration of all remedial orders, whichever is later) with respect to pleadings, documents issued by an ALJ or the Commission, and attorney work product documents containing CBI. Sixty days should be sufficient (1) to allow nonmoving parties to respond to the motion and (2) to allow the Commission to decide the motion on or before the expiration of the five-year period.

The Commission notes one potential problem with respect to applying the aforesaid sunset provisions to attorney work product. Submitters of CBI who want the Commission to extend its enforcement of the APO beyond the five-year period are not likely to know what CBI is contained in attorney work product such as a law firm's internal legal memoranda concerning the investigation. The Commission also thinks it understandable, however, that attorneys may want to retain their work product from an investigation for future reference in matters involving similar issues. The Commission therefore solicits comments on possible solutions to this potential problem.

*Paragraph (e)(2).* Proposed paragraph (e)(2) of final rule 210.34 restricts the uses to which CBI may be put during the prescribed retention periods. The bar groups who commented in response to the Commission's advance notice of proposed rulemaking (and the participants and commenters in the investigations that prompted this rulemaking) [10] urged the Commission to approve retention of CBI by counsel for one or more of the uses and purposes enumerated below:

1. To provide legal advice and other legal services to clients in connection with the following matters:

To comply with a remedial or other Commission order issued in connection with the investigation or related proceeding;

To initiate—or to defend against—administrative or judicial proceedings concerning enforcement, modification, or revocation of such orders or advisory opinion proceedings; or

To enforce or avoid infringement of an intellectual property right asserted in the investigation.

2. To reduce costs, save time, minimize duplication of effort, and facilitate participation in the following kinds of proceedings:

Commission proceedings to enforce, modify, or revoke a remedial order, a consent order, or other Commission order;

Commission advisory opinion proceedings;

U.S. Customs Service proceedings to enforce or monitor compliance with an exclusion order;

Commission or Customs proceedings for the forfeiture of a bond posted by a complainant or a respondent;

Civil actions involving some or all of the same parties and subject matter as the investigation (with a view toward asserting res judicata or collateral estoppel in some kinds of cases);

Civil actions against a section 337 complainant for the filing of unwarranted section complaint; or

Civil actions for attorney malpractice in an investigation or a related proceeding.

3. To have unrestricted use of legal research and nonconfidential information in working papers, briefs, and other documents created by counsel which contain CBI.

Although section 337(n)(1) and its 1987 legislative history explicitly discuss the ''disclosure'' or ''release'' of CBI, [11] there is an implicit restriction on the use of CBI (in the absence of consent from the submitter(s)), which appears to bar some uses that the current commenters and other interested persons have suggested—namely, use of CBI in civil actions. In the absence of consent from the submitter, section 337 (n)(1) prohibits disclosure of CBI to anyone other than (1) persons granted access under a Commission APO and (2) certain categories of Government employees listed in section 337(n)(2). The categories in section 337(n)(2) previously were limited to Commission, Customs Service, and other U.S. Government personnel who are involved in the subject investigation, Presidential review of a remedial order issued in that investigation, or the administration or enforcement of an exclusion order issued in the case.[12]

Amendments to section 337(n)(1) and title 28 of the United States Code were promulgated in the URAA. Section 337(n) was amended to broaden the categories of Government employees who may have access to CBI.[13] Title 28 of the United States Code was amended to include a new section requiring the Commission to forward the administrative records of section 337 investigations to district courts for use in some, but not all, civil actions involving the same parties and subject matter as the subject investigations.[14] The URAA amendments thus do not address most of the civil action uses of CBI advocated by the commenters and other interested persons.

Proposed paragraph (e)(2) of final rule 210.34 accordingly states that CBI which is retained pursuant to paragraph (e)(1) of final rule 210.34 shall not be used during the prescribed retention period for any purposes other than those relating to the subject investigation or a related proceeding under section 337,[15] except for additional uses that are permitted by law (e.g., the new section of title 28) or provided for in a written agreement with the supplier.

*Paragraph (e)(3).* Proposed paragraph (e)(3) of final rule 210.34 states that each law firm whose attorneys are signatories to an APO in an investigation or a related proceeding shall designate one attorney signatory from the firm as the custodian of the CBI and the person responsible for ensuring that the requirements of proposed paragraphs (e)(1)–(e)(2) of final rule 210.34 are satisfied. It is not uncommon for attorneys to change firms and for documents containing CBI to be shipped around firms. The Commission's concern is not that the documents are likely to be lost, but that the firms may lose sight of the obligations imposed by the APO. Requiring the firm to have a custodian will reduce the likelihood of that occurring.

The Commission is cognizant that there may come a time during the prescribed retention period(s) when a law firm's custodian is no longer willing or able to serve in that capacity. If that happens, the firm always has the option of promptly returning or destroying the CBI. However, if the firm wishes to continue to retain the CBI but to change custodians, the questions are whether a change of custodianship should be permitted and, if so, how the change should be effected.

Proposed paragraph (e)(3) final rule 210.34 currently does not contain provisions governing the changing of custodians. The Commission is considering whether to revise paragraph (e)(3), however, to include such provisions. One option would be to

[10] *Condensers* and Memory Controllers (See *supra* n.5.)

[11] *See* 19 U.S.C. 1337(n)(1) and n.8 *supra*.

[12] *See* 19 U.S.C. 1337(n)(2) (1988).

[13] *See* sec. 321(a)(7) of the URAA.

[14] *Id.* at sec. 321(b)(1)(A) regarding the new 28 U.S.C. 1659(b).

[15] As noted in final rule 210.3, the term ''related proceedings'' includes sanction proceedings for the possible issuance of sanctions that would not have a bearing on the adjudication of the merits of a complaint or a motion under 19 CFR part 210, bond forfeiture proceedings, proceedings to enforce, modify, or revoke a remedial or consent order, or advisory opinion proceedings. *See* 59 FR 39040–39041 (Aug. 1, 1994), as amended at 59 FR 67626 (Dec. 30, 1994) (to be codified at 19 CFR 210.3).

revise paragraph (e)(3) to provide as follows:

1. If the firm wishes to continue to retain the CBI but to change custodians, the proposed new custodian must be a attorney in the firm who is already a signatory to the APO. The change is to be effected by serving a notice on the parties, the appropriate third-party suppliers (if any), and the Secretary.

2. If there are no lawyers left in the firm who are signatories to the APO and the firm wishes to continue to retain the CBI but to change custodians, the firm must file a motion with the Commission and serve copies on the parties and third-party suppliers. The motion must request APO signatory status for the proposed new custodian as well as leave to designate that attorney as the firm's new custodian. The motion will not be granted unless information contained in the materials held by the firm is still entitled to confidential treatment and the Commission still has a duty to enforce the governing APO with respect to that information.

The Commission is particularly interested in receiving comments on (1) whether it should revise paragraph (e)(3) of final rule 210.34 to codify a procedure for changing custodians, and, (2) if so, whether that procedure should consist of the steps enumerated above or should entail different steps.

*Paragraph (e)(4).* Although proposed paragraph (e)(1) establishes prescribed periods for post-investigation retention of CBI, the Commission believes that parties and third-party suppliers should not be precluded from negotiating time limits or other conditions that are more strict than the maximums set by the Commission. The Commission also believes, however, that the proposed rules should avoid imposing unnecessary burdens on the Commission for monitoring APO compliance.

Proposed paragraph (e)(4) of final rule 210.34 accordingly states that parties and third-party suppliers may agree to retention periods, uses, custodial arrangements, or other conditions which differ from those imposed by proposed paragraphs (e)(1)–(e)(3). Paragraph (e)(4) goes on to say, however, that the Commission will not be responsible for policing the retention, uses, custodial arrangements, and other conditions relating to the subject CBI in accordance with such an agreement. That policy is consistent with Commission precedent.[16]

[16] *See, e.g.,* Inv. No. 337–TA–265, Certain Dental Prophylaxis Methods, Equipment, and Components Thereof, Initial Determination at 5–6 (Jan. 22, 1988), unreviewed by the Commission, 53 FR 6709 (Mar. 2, 1988); Certain Doxorubicin and Preparations Containing Same, Inv. No. 337–TA–300, Commission Memorandum Opinion at 7–8, (May 31, 1991); Electric Power Tools, Battery Cartridges, and Battery Chargers, Commission Memorandum Opinion (July 2, 1991) at 3–4.

Paragraph (e)(4) further provides that when agreements are entered to retention periods, uses, custodial arrangements, or other conditions which differ from those imposed by proposed paragraphs (e)(1)–(e)(3), a copy of the agreement must be filed with the Commission or with the presiding ALJ (as the case may be). One purpose of this filing requirement is to give the Commission or the ALJ notice as to which of the APO provisions have been superceded by the agreement. Another purpose is to avoid placing the Commission or the ALJ in the position of having to adjudicate whether in fact an agreement was entered, if a dispute over that issue should arise at a later date.

## PART 210—ADJUDICATIVE PROCEDURES

1. The authority citation for part 210 will continue to read as follows:

**Authority:** 19 U.S.C. 1333, 1335, and 1337.

2. For the reasons set forth in the preamble, the Commission proposes to amend § 210.5 by adding a new paragraph (f) which reads as follows:

### § 210.5 Confidential business information.

* * * * *

(f) *Disposition of confidential business information.* Materials containing confidential business information that are subject to a protective order issued under § 210.34(a) of this part shall be retained, used, expurgated, returned to the supplier, or destroyed as provided in § 210.34(e).

3. For the reasons set forth in the preamble, the Commission proposes to amend § 210.34 by adding paragraph (e) which reads as follows:

### § 210.34 Protective orders.

* * * * *

(e) *Disposition of confidential information.* (1) Unless the Commission or an administrative law judge orders or a written agreement between parties and suppliers states otherwise, confidential information acquired pursuant to a protective order issued under paragraph (a) of this section shall be expurgated, returned to the supplier, or destroyed as provided below.

(i) All discovery materials containing confidential information may be retained until all appeals are exhausted. Within 30 days thereafter, the materials shall be returned to the supplier or destroyed and written certification of such return or destruction shall be provided to each supplier and the Commission.

(ii) All materials in the possession of expert witnesses that contain confidential information may be retained until all appeals are exhausted. Within 30 days thereafter, the materials shall be returned to the supplier or destroyed and written certification of such return or destruction shall be provided to the supplier and the Commission.

(iii) All materials on the evidentiary record that contain confidential information may be retained until all appeals are exhausted or all remedial orders issued in the investigation or a related proceeding have expired, whichever is later. Within 30 days thereafter, the materials shall be returned to the supplier or destroyed and written certification of such return or destruction shall be provided to each supplier and the Commission.

(iv) Except as provided in paragraph (e)(1)(viii) of this section, all pleadings containing confidential information may be retained indefinitely. Notwithstanding such retention, the Commission shall not be responsible for enforcing the governing protective order with respect to the pleadings for more than five years after the exhaustion of all appeals or the expiration of all remedial orders, whichever is later. If information in the pleadings will still be confidential after the five-year period has expired, the supplier of the information may file a motion to have the Commission extend its enforcement of the protective order with respect to the pleadings beyond the prescribed five-year period. Such motions must be filed at least 60 days before the five-year period expires.

(v) Except as provided in paragraph (e)(1)(viii) of this section, all notices, orders, initial determinations, recommended determinations, opinions, and other documents issued by an administrative law judge or the Commission that contain confidential information may be retained indefinitely. Notwithstanding such retention, the Commission shall not be responsible for enforcing the governing protective order with respect to the aforesaid materials for more than five years after the exhaustion of all appeals or the expiration of all remedial orders, whichever is later. If information in the materials will still be confidential after the five-year period has expired, the supplier of the information may file a motion to have the Commission extend its enforcement of the protective order with respect to the materials beyond the prescribed five-year period. Such

motions must be filed at least 60 days before the five-year period expires.

(vi) Except as provided in paragraph (e)(1)(viii) of this section, all attorney work product containing confidential information may be retained indefinitely. Notwithstanding such retention, the Commission shall not be responsible for enforcing the governing protective order with respect to the work product for more than five years after the exhaustion of all appeals or the expiration of all remedial orders, whichever is later. If information that may be contained in the work product will still be confidential after the five-year period has expired, the supplier of the information may file a motion to have the Commission extend its enforcement of the protective order with respect to the work product beyond the prescribed five-year period. Such motions must be filed at least 60 days before the five-year period expires.

(vii) All confidential information supplied by third parties may be retained until all appeals are exhausted or all remedial orders have expired, whichever is later. If the third party's information appears in a document other than a pleading, a document issued by an administrative law judge or the Commission, or a document constituting attorney work product, the document shall be returned to the supplier or destroyed, and written certification of such return or destruction shall be provided to each supplier and the Commission within 30 days after all appeals are exhausted or all remedial orders have expired, whichever is later. If the third party's information appears in a pleading, a document issued by an administrative law judge or the Commission, or a document constituting attorney work product, the document may be retained indefinitely in accordance with paragraph (e)(1)(iv), (e)(1)(v), or (e)(1)(vi) of this section. However, the third party may request that its information be expurgated from the document pursuant to paragraph (e)(1)(viii).

(viii) If the third-party supplier so requests at the time that its confidential information is supplied and if the third-party supplier's confidential information is contained in pleadings, documents issued by an administrative law judge or the Commission, or attorney work product, within 30 days after all appeals are exhausted or all remedial orders have expired, whichever is later, any law firm in possession of such pleadings, documents, or work product shall expurgate the third-party supplier's confidential information from the pleadings, documents, or work product and provide written certification of the expurgation to the third-party supplier and the Commission.

(2) Except as required by law or as provided in a written agreement with the supplier, the confidential information contained in the materials enumerated in paragraph (e)(1) of this section shall not be used during the retention periods specified in paragraph (e)(1) of this section for any purposes other than those relating to the subject investigation or a related proceeding under this part.

(3) On or before the commencement of the retention periods specified in paragraph (e)(1) of this section, each law firm whose attorneys are signatories to a protective order in an investigation or a related proceeding under this part shall designate one attorney signatory from the firm as the custodian of the information and the person responsible for ensuring that the requirements of paragraphs (e)(1)–(e)(2) of this section are satisfied. Notice of the designation shall be served on the parties, the appropriate third-party suppliers (if any) and the Secretary.

(4) Parties and suppliers may agree to retention time limits, uses, custodial arrangements, or other conditions that differ from those set forth in paragraphs (e)(1)–(e)(3) of this section. When such an agreement is reached, a copy must be filed with the Commission or the presiding administrative law judge (as the case may be). Neither the Commission nor the administrative law judge shall be responsible, however, for policing the retention, uses, custodial arrangements, and other conditions relating to the subject confidential information in accordance with the agreement.

Issued: February 3, 1995.

By Order of the Commission.

**Donna R. Koehnke,**

*Secretary.*

[FR Doc. 95–3140 Filed 2–8–95; 8:45 am]

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## RAILROAD RETIREMENT BOARD

### 20 CFR Part 217

**RIN 3220–AB08**

### Application for Annuity or Lump Sum

**AGENCY:** Railroad Retirement Board.

**ACTION:** Proposed rule.

**SUMMARY:** The Railroad Retirement Board (Board) proposes to amend its regulations to enable the Board to pay the following benefits without requiring additional applications therefor: (1) An accrued annuity due at the death of a spouse or former spouse to a railroad employee receiving an annuity based on the same earnings record; and (2) a full-time student's annuity if the student was entitled to a child's annuity in the month before the month the child attained age 18.

**DATES:** Comment shall be submitted on or before March 13, 1995.

**ADDRESSES:** Secretary to the Board, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

**FOR FURTHER INFORMATION CONTACT:** Michael C. Litt, Bureau of Law, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611, (312) 751–4929, TDD (312) 751–4701.

**SUPPLEMENTARY INFORMATION:** Section 217.8 of the Board's regulations specifies a list of benefits paid by the Board which may be paid based on a previously-filed application (*i.e.,* where a new application is not required). The proposed rule would add to that list the cases where an accrued annuity is due at the death of a spouse or former spouse to a railroad employee receiving an annuity based on the same earnings record as the spouse or former spouse and where a full-time student's annuity is payable if the student was entitled to a child's annuity in the month before the month the child attained age 18. In those cases there is no additional information contained in the applications and there is no utility to the Board in requiring additional applications. Using the earlier application reduces paperwork and the burden on persons claiming benefits.

The Board, in conjunction with the Office of Management and Budget, has determined that this is not a significant regulatory action for purposes of Executive Order 12866. Therefore, no regulatory impact analysis is required. There are no information collections associated with this rule.

**List of Subjects in 20 CFR Part 217**

Railroad employees, Railroad retirement.

For the reasons set out in the preamble, title 20, chapter II, part 217 of the Code of Federal Regulations is proposed to be amended as follows:

## PART 217—APPLICATION FOR ANNUITY OR LUMP SUM

1. The authority citation for part 217 continues to read as follows:

**Authority:** 45 U.S.C. 231d and 45 U.S.C. 231f.