

# REPORT

## USITC AMENDS DISCOVERY RULES

June 5, 2013

On May 20, the United States International Trade Commission (ITC) announced amendments to its Rules of Practice and Procedure. These rules previously contained no provisions specifically directed to limitations on discovery of electronic documents ("e-discovery"). However, the ITC and United States federal courts have increased efforts to minimize e-discovery, curtail wasteful discovery practices, and reduce the overall cost of discovery. The amendments to the ITC's rules are therefore designed to do so. The amendments fall into three general categories:

1. Limitations on e-discovery;
2. General limitations on discovery; and
3. Procedures for claims of privilege and work product protection.

The amended rules are applicable to Section 337 investigations instituted after June 20, 2013.

While the rule changes do not address this fact, litigants in the United States have an obligation to retain and preserve any information that may be relevant to issues as to which litigation is reasonably foreseeable. The penalties for failing to preserve potentially relevant information are severe – even when the failure to preserve was wholly accidental. Thus, regardless of the following limitations on e-discovery, all such information should be carefully preserved when litigation begins or appears likely.

### I. Limitations on E-Discovery

The amendments to the ITC's rules provide specific limitations on the discovery of electronically stored information (ESI). Under the amended rule, a producing party need not produce ESI from sources "not reasonably accessible because of undue burden or cost," similar to the procedure under the Federal Rules of Civil Procedure applicable in U.S. District Court cases.

In its rulemaking comments, the ITC noted that a party objecting to a request that it produce ESI should provide the party seeking discovery enough information to evaluate the burdens and costs of producing the requested ESI, as well as the likelihood of finding responsive information. If the party seeking discovery moves to compel production of the requested ESI, the burden is on the other party to show that "the information is not reasonably accessible because of undue burden or cost." The ITC Administrative Law Judge ("ALJ") may order production of ESI in spite of such burden or cost if the requesting party shows good cause, and may also specify conditions for the discovery. For example, the ALJ could order the requesting party to bear all or a portion of the costs of discovery from sources that are not reasonably accessible.

### II. General Limitations on Discovery

Under the amended rules, the ALJ must limit the frequency or extent of discovery if the

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ALJ determines, in response to a motion or *sua sponte*, that any of the following circumstances exists:

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 already 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 ITC, and matters of public concern.

Apart from the third circumstance listed above, the limitations on discovery in the ITC's amended rules are generally modeled after the Federal Rules of Civil Procedure. The ITC has noted that Federal case law interpreting Rule 26 may be relevant to interpretation and application of the amended rules. Commentators have also noted that the compressed schedule and speed of Section 337 investigations make it unlikely that the second circumstance, i.e., that the party seeking discovery already had ample opportunity to obtain the information, would occur.

The third circumstance is unique to ITC practice in that it allows a responding party to avoid discovery on "particular facts" relevant to a disputed issue by waiving its legal position related to that issue or stipulating to specific facts. However, the ITC clarified in its comments that this circumstance would not restrict "discovery as

to other facts pertaining to the disputed issue," or facts relevant to a different issue.

### III. Claims of Privilege and Work Product Protection

The amended rules also provide procedures relating to attorney-client privilege and work product protected information. The rules require a party to produce a privilege log within ten days of asserting privilege or work product protection, and to specify the necessary contents of the privilege log. According to the ITC's comments, the ten-day deadline for producing a privilege log requires early identification of privilege and work product issues, which should improve discovery efficiency.

Unlike the ITC's previous rules, the amended rules set forth a procedure for dealing with the inadvertent disclosure of privileged documents. Under this procedure, the producing party may give notice to any person that received the inadvertently disclosed document(s), and the basis for privilege or work product protection, preferably using a privilege log. A person receiving the notice must, within seven days of receipt thereof:

1. return, sequester, or destroy all copies of each specified document;
2. refrain from using or disclosing each document until the claim is resolved; and
3. take "reasonable steps" to retrieve each document from any persons to whom the receiving party disclosed the document(s).

The parties must also meet and confer within seven days of the notice to try to resolve any dispute relating to the inadvertent disclosure. If the parties are unable to resolve the dispute, a party may file a motion to compel production of the specified document(s) within five days after the parties' conference, and have the ALJ resolve the dispute.

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The amended rules also permit the parties to agree in writing to waive the privilege log requirement as to documents created after a specified time, such as after the filing of the complaint or after the commencement of the investigation. Typically, the privilege is clear for documents generated after commencement of the investigation. Moreover, parties are obligated to supplement document production to include, *inter alia*, later-generated, responsive, non-privileged documents. Thus, such agreements can reduce the burden and cost of discovery without hindering a party's opportunity to discover relevant and admissible information. Under the amended rules, the ALJ has the discretion to decline to hear motions relating to the production of documents subject to any such agreement.

Finally, the amended rules allow the parties to agree in writing to a different period of time to comply with any requirements of the ITC's discovery rules. The ALJ must approve any such agreement if the ALJ already issued an order setting different periods for compliance.

#### IV. Recommendations

Section 337 investigations are fast-paced and highly complex. Litigants before the ITC must remain attentive of the many deadlines imposed by the rules, while balancing the cost of discovery with the need and value of the information sought. We have the following general recommendations in view of the amendments to the ITC's discovery rules.

1. When a company knows of an ITC investigation or potential investigation, or any lawsuit, it should take immediate steps to avoid any destruction of documents or ESI that could be needed for discovery.
2. Initially assess potentially relevant documents to evaluate the burden and cost for accessing each ESI source. At a minimum, the evaluation should include, for

each source, the degree of difficulty of accessing the source, an estimate of the time and expense needed to search for and extract relevant ESI from the source, the potential probative value of ESI stored at the source, and alternative locations of duplicative or similar information.

3. Make an early evaluation of which ESI sources are "not reasonably accessible because of undue burden or cost." Forming an early understanding of the cost and complexity associated with ESI sources also places the party in a better position to assess the value of waiving certain legal positions or stipulating to certain facts.
4. Try to reach an agreement with the opposing party limiting the time periods for documents that must be identified in a privilege log.
5. Given the very short deadlines with respect to claims to privilege and work product protection, we recommend performing a thorough privilege review and generating a privilege log early in the document collection phase.

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