McDowell Law Center
Akron, OH 44325-2901

Michael L. Doane
Assistant Professor of Law
Center for Intellectual Property Law & Technology
The University of Akron School of Law
C. Blake McDowell Law Center
302 Buchtel Common
Akron, OH 44325-2901

The Honorable Lisa R. Barton
Secretary to the Commission
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

Re: Comments on Notice of Proposed Rule Making, Docket No. MISC-051, 91 Fed. Reg. 23190 (April 30, 2026).

Dear Secretary Barton:

I appreciate the opportunity to submit the following Comments in response to the Commission's Notice of Proposed Rule Making, Docket No. MISC-051, 91 Fed. Reg. 23190 (April 30, 2026). My comments are submitted on my own behalf and do not necessarily reflect the views of any institution with which I am affiliated.

As a law professor at The University of Akron School of Law, I teach intellectual property law, including a seminar on Intellectual Property Practice at the U.S. International Trade Commission. I have written extensively on Section 337 and its importance to small innovators and startup companies and testified before Congress at a hearing entitled "IP Litigation and the U.S. International Trade Commission." Before entering academia, I was in private practice in Washington, DC specializing in Section 337 litigation, appearing in over fifty Section 337 investigations. In 2008, I served as President of the ITC Trial Lawyers Association (ITCTLA) and in 2003 coordinated the preparation of an ITCTLA Report to the Commission proposing a series of rule changes intended to make the Commission Rules of Practice and Procedure (19 C.F.R. Parts 201 and 210) more effective. Many of these proposals were subsequently considered and adopted by the Commission. I also served as General Counsel for a small technology startup addressing intellectual property enforcement.

Comments on the Commission's Proposed Rule Making

Due to its effectiveness in enforcing intellectual property rights, Section 337 is frequently the subject of ill-considered proposals to limit its availability. The current proposed disclosure rules would have a negative and burdensome impact on small innovators, startup companies and other technology-based entities not capable of self-funding a Section 337 investigation with no cognizable corresponding benefit. To the extent the Commission believes that proposed rules simply follow federal court practice, acceptance of disclosure requirements is far from universal and, in fact, some U.S. district courts have rejected disclosure requirements as providing no relevant information.[1] For the reasons set forth below, the proposed disclosure rules should not be adopted.

For a small innovator or startup company the prospect of entering into patent litigation, particularly against a large predatory infringer capable of self-financing extensive litigation, can be daunting. The American Intellectual Property Law Association (AIPLA) estimates that the median cost of Patent Litigation (All Varieties) for one patent is approximately $3.5 million with a median cost of $450,000 for cases in which less than $1 million is at risk.[2] The cost of a patent-based Section 337 investigation is generally the same or more while compressed into a shorter timeframe.[3]

Small technology-based startup companies may rightly doubt the value of obtaining patents when the companies do not have the resources to enforce those patents. Although patents provide many benefits, the ability to enforce them against infringers is paramount. This is of particular importance when faced with a predatory infringer, a large self-financed entity that chooses to infringe as it possesses the resources to engage in extended scorched-earth patent litigation. In other words, it infringes because it can. By providing effective relief in a relatively expedited timeframe, Section 337 investigations provide small innovators with the ability to protect their rights against predatory infringement.

Thus, while this cost is not a deterrent to large self-financed predatory infringers, prosecuting a Section 337 investigation can be prohibitively expensive for a small innovator. As damages are not available in Section 337 Investigations, contingency fee arrangements, which can be helpful to small innovators, are generally not an option. Third-party litigation funders are pivotal to leveling the playing field by providing the resources necessary to conduct a fair and full Section

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[1] *See, e.g.*, Second Amended Standing Order on Motions *in Limine* in Cases Involving Allegations of Patent Infringement and/or Breach of FRAND Obligations, as well as Declaratory Judgment Actions which Relate to the Same (E.D. Tex. Dec. 23, 2025); *Corrigent Corp. v. Cisco Systems Inc,* Order on Motions *in Limine*, No. 6:22-CV-00396-ADA (W.D. Tex. Apr. 26, 2023).
[2] 2025 Report of the Economic Survey, American Intellectual Property Law Association.
[3] *Id.*

337 investigation, thereby granting small innovators and startup companies full access to the legal system to enforce their intellectual property rights.

The Commission thus far has largely resisted ongoing pressure to limit access to Section 337 via proposed limitations on the domestic industry, and it should do the same with the proposed disclosure rules. To its credit, the Commission has recognized that efforts to place such restrictions on potential complainants are unwarranted. As the Commission's own statistics demonstrate, allegations of abuse of Section 337 by certain small entities known as patent assertion entities are a false narrative and at best overblown. The proposal to impose litigation funding disclosure requirements on Section 337 investigations is likewise a further effort to burden small innovators and limit access to Section 337 while providing little or no relevant information.

The proposed disclosure rules require disclosure of information wholly irrelevant to the prosecution or defense of a Section 337 investigation. To successfully litigate a Section 337 investigation, a complainant must establish an unfair act, importation of the accused product, a domestic industry and, in some cases, injury. The identity of a litigation funder, or even the disclosure of their existence, is irrelevant to any of the issues. Some U.S. district courts have found this information potentially relevant to the issue of damages, but damages are not available in Section 337 investigations. In short, the proposed disclosure rules add nothing relevant for resolving the ultimate issues in a Section 337 investigation.

The cited reason for these proposed disclosure rules is to provide transparency and facilitate evaluation of conflicts. These concerns are adequately addressed by the current Commission Rules that require identification of the ownership of any asserted intellectual property right and any licensees, thus providing clarity as to the entities whose rights are at issue.[4] A potential financial interest in the outcome of a Section 337 investigation does not equate to ownership of the asserted intellectual property right nor does it provide standing to bring a Section 337 investigation independent from the intellectual property owner.[5] Moreover, to date, there does not appear to have been any reported instances of conflicts of interest at the Commission arising out of litigation funding agreements. So, the proposed disclosure requirements seem to be a solution in search of a problem.

To the extent such information allegedly will aid preparation for settlement negotiations, it should be noted that the Commission has consistently rejected efforts to provide parties with information about a party's settlement requirements. For example, when serving a motion to terminate an investigation as to certain respondents based on a settlement agreement, complainants are regularly permitted to serve only redacted versions of the settlement agreements on any remaining active respondents to avoid disclosure of settlement terms. The only information regarding settlement that potentially would be provided by the proposed litigation funding disclosure is how long a well-financed infringer must resist before the patent owner no longer has resources to litigate.

The proposed disclosure requirements unnecessarily burden small innovators and startup companies seeking to enforce their rights at the Commission with no corresponding benefits. Third

[4] 19 C.F.R. § 210.12(a)(9)(ii)-(iii).
[5] 19 C.F.R. § 210.12(a)(7)

party litigation funding is simply a necessary tool to give small innovators the benefit of the technology they create and the intellectual property they obtain by providing access to the legal system. Efforts to restrict access to litigation funding or to deter litigation funders from supporting intellectual property enforcement efforts, including Section 337 investigations, should be rejected. Accordingly, the proposed disclosure rules should not be adopted.

Responses to Commission Questions

The Commission suggested that commenters address certain aspects of proposed § 210.14a, including the following:

(1) Whether proposed § 210.14a(a)(1) should require disclosure of entities owning a party's stock only after a particular percentage of ownership is reached;

Response: No disclosure should be required. Such disclosure is entirely irrelevant to any issue in a Section 337 investigation. If disclosure is required there should be no percentage limitation for "any entity, not including natural person(s), owning its stock" as that would only exempt large companies from disclosure. Furthermore, if disclosure is required, § 210.14a(a)(1) should require disclosure of "natural persons owning its stock" who own or control via proxy 10% or more of the company stock.

(2) Whether proposed § 210.14a(a)(2) should apply to respondents and intervenors or just to complainants and whether there is enough clarity about entities that have a legal right to bring a section 337 investigation particularly for claims under section 337(a)(1)(A) to be able to comply;

Response: If the true purpose of the proposed rules is to provide transparency and facilitate evaluation of conflicts, the disclosure rules should apply to all parties, including respondents and intervenors. Further, any required disclosure should be limited to the Commission, the Administrative Law Judges and the Office of Unfair Import Investigations solely for the purpose of addressing potential conflicts. No disclosure should be made to the other parties.

(3) Whether definitions of certain terms would be useful and any proposals for such definitions;

Response: No disclosure should be required. Such disclosure is entirely irrelevant to any issue in a Section 337 investigation. If disclosure is required, § 210.14a(a)(3)(ii) must apply to all parties. § 210.14a(a)(3)(ii) should be clarified to indicate that the identification of those "whose approval is necessary for litigation decisions or settlement decisions in the section 337 Investigation, and state the nature of the terms and conditions relating to that approval" includes, particularly in the case of large self-financed entities, internal personnel, shareholders or members of the board of directors who must approve settlement.

(4) Whether the disclosures required should differ for investigations under section 337(a)(1)(A) as opposed to 337(a)(l)(B)-(E);

Response: No disclosure should be required. Such disclosure is entirely irrelevant to any issue in a Section 337 investigation.

(5) Whether disclosure of funding or necessary approval in related litigation is relevant and should be included in the disclosures required under proposed paragraphs (a)(3)(i) and (ii) of this section; and

Response: No disclosure should be required. Such disclosure is entirely irrelevant to any issue in a Section 337 investigation and, furthermore, related litigation may be in a jurisdiction that does not require disclosure.

(6) Whether there are other possible financial interests in section 337 investigations that are not required to be disclosed under proposed § 210.14(a)(1) through (3) that should also be subject to disclosure, and if so, details regarding the nature of such interests and how to define both the nature and holders of such interests.

Response: In a hearing on July 23, 2024, before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Courts, Intellectual Property and the Internet on the topic of "IP Litigation and the U.S. International Trade Commission," many members expressed concern that foreign state-owned entities, particularly those from China, or those owned or controlled by such entities. might take advantage of Section 337. If the Commission decides to require disclosure of ownership interests and third party litigation funding, it should require an affirmative statement/disclosure as to whether the party/intervenor or its suppliers of either the accused product or the domestic industry product are foreign state-owned entities or are owned or controlled by foreign state-owned entities. The disclosure should include the name and address of each such foreign state-owned entity. Such a requirement would not impose a significant additional burden as respondents who do not manufacture their accused products are required to "state the name and address of the supplier(s) of those imports."[6]

Section-by-Section Comments

Sections 210.13, 210.19. 210.75, 210.76 and 210.79

No disclosure should be required. Such disclosure is entirely irrelevant to any issue in a Section 337 investigation. Should disclosure be required, it should apply to all parties and intervenors. Further, any required disclosure should be limited to the Commission, the Administrative Law Judges and the Office of Unfair Import Investigations solely for the purpose of addressing potential conflicts. No disclosure should be made to the other parties.

Section 210.14a

No disclosure should be required. Such disclosure is entirely irrelevant to any issue in a Section 337 investigation. Should disclosure be required, the disclosure rules should apply to all parties, including respondents and intervenors. Further, any required disclosure should be limited to the Commission, the Administrative Law Judge and the Office of Unfair Import Investigations

[6] 19 C.F.R. § 210.13(b).

solely for the purpose of addressing potential conflicts. No disclosure should be made to the other parties.

If disclosure is required, § 210.14a(a)(1) should require disclosure of "natural persons owning its stock" who own or control via proxy 10% or more of the company stock.

If disclosure is required, § 210.14a(a)(3)(ii) should be clarified to indicate that the identification of those "whose approval is necessary for litigation decisions or settlement decisions in the section 337 Investigation, and state the nature of the terms and conditions relating to that approval" includes, in the case of large self-funded entities, internal personnel, shareholders or members of the board of directors who must approve settlement.

If disclosure is required, § 210.14a should be amended to require an affirmative statement/disclosure as to whether the party/intervenor or its suppliers of either the accused product or the domestic industry products are foreign state-owned entities or owned or controlled by foreign state-owned entities. The disclosure should include the name and address of each such foreign state-owned entity.

For these reasons, I recommend that the Commission do not adopt the proposed disclosure rules.

Sincerely,

/s/ Michael L. Doane

Michael L. Doane
Assistant Professor of Law
Center for Intellectual Property Law & Technology
The University of Akron School of Law
t: 330.972.4314 | e: mdoane@uakron.edu