

# U.S. International Trade Commission

## *Management Report - Description of OUI's Participation Selection Process*



**OIG-MR-17-12**

**May 3, 2017**



Office of Inspector General

*The U.S. International Trade Commission is an independent, nonpartisan, quasi-judicial federal agency that provides trade expertise to both the legislative and executive branches of government, determines the impact of imports on U.S. industries, and directs actions against certain unfair trade practices, such as patent, trademark, and copyright infringement. USITC analysts and economists investigate and publish reports on U.S. industries and the global trends that affect them. The agency also maintains and publishes the Harmonized Tariff Schedule of the United States.*

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David S. Johanson, Vice Chairman  
Irving A. Williamson  
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F. Scott Kieff*



# UNITED STATES INTERNATIONAL TRADE COMMISSION

## OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20436

May 3, 2017

IG-PP-015  
OIG-MR-17-12

Chairman Schmidlein:

This memorandum transmits the Office of Inspector General's final report, *Description of OUII's Participation Selection Process*, OIG-MR-17-12. This report focused on the process the Office of Unfair Import Investigations uses to decide participation in section 337 investigations.

Thank you for the courtesies extended to my staff during this time.

Philip M. Heneghan  
Inspector General

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**Objective:** Describe the process the Office of Unfair Import Investigations uses to decide participation in 337 investigations.

### Background

Congress enacted 19 U.S.C. § 1337 (“section 337”), requiring that the United States International Trade Commission (“Commission”) investigate any alleged violations of unfair practices in import trade. To help investigate these alleged violations, the Commission created the Office of Unfair Import Investigations (“OUII”), to serve as an independent party representing the public interest.

OUII participates in some of the section 337 investigations brought before the Commission. This review describes the general and specific criteria OUII uses in its selection process to determine its degree of participation. It also describes the tracking process OUII uses for all section 337 investigations brought before the Commission.

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### OUII’s Role

The Administrative Procedure Act requires that the decision-making function of an agency to be separate from the investigatory function. Within the Commission, the Administrative Law Judges and Commissioners fulfill the decision-making function, while OUII carries out the investigatory function. Prior to the filing of a complaint, OUII may consult with potential complainants regarding any draft complaint. After the complaint has been filed, OUII advises the Commission about whether to institute an investigation. Once an investigation has been instituted, OUII may serve as a party charged with a duty to represent the public interest.

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### General Criteria on OUII Participation

Originally, OUII participated in all investigations brought before the Commission. However, OUII’s ability to continue to provide its expertise and make valuable contributions to the adjudicatory process is now challenged by the increasing size and complexity of the section 337 caseload. In light of these caseload changes and budgetary constraints, it was determined that OUII would conduct a pilot program of alternative staffing approaches. This program required OUII to fully or partially participate in investigations in which it could provide the greatest added value and expertise, and not participate in other section 337 cases.

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The Commission has directed that OUII should place the highest priority on investigations with issues unique to section 337 and continue its efforts:

- a) to ensure that the investigation record is fully developed,
- b) to resolve procedural disputes without the need to resort to the presiding ALJ, and
- c) to facilitate settlement.

OUII has discretion in determining its degree of participation in investigations based on these three general criteria. To further refine the general criteria, the Commission requested that the Director of OUII propose specific criteria to be used on a trial basis in its participation selection process.

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### Specific Criteria on OUII Participation

In November 2010, the Director of OUII presented proposed criteria and requested the Commission respond with further guidance. In February 2011, the Commission wrote a memorandum approving the participation selection process based on criteria outlined below.

According to the memo, once OUII has reviewed information received during the pre-institution period, it should determine whether it will participate in the investigation. When OUII is considering participation, it should examine the answers to the complaint and the Notice of Investigation in order to determine its degree of participation: full or partial.

Investigations drawing upon OUII's expertise are accorded the highest priority. The memo provides that investigations with the following criteria always warrant some degree of OUII participation:

- (1) Investigations in which the ALJ is authorized to take evidence on public interest issues;
- (2) Investigations brought by a *pro se* complainant, a small business certified by the Trade Remedy Assistance Office, or a complainant represented by counsel with limited Section 337 experience;
- (3) Investigations in which a relatively large entity sues a small entity or entities that are likely to be unrepresented or under-represented in the investigation;
- (4) Investigations in which the issuance of a general exclusion order is reasonably likely to be an issue if a violation is found;

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(5) Investigations that appear to involve significant issues particular to Section 337 proceedings and/or issues likely to have substantial precedential impact with respect to future investigations; and

(6) Investigations in which OUII identifies an issue that will likely result in the filing of a potentially dispositive motion by OUII that may lead to the early resolution of the investigation.

Although these six factors are taken into consideration, OUII is limited by the availability of OUII attorneys and competing workload demands. All relevant circumstances are taken into account on a case-by-case basis to resolve any constraints. In its February 2011 memorandum, the Commission determined that it would evaluate this new approach after OUII had employed these criteria in a sufficient number of cases. OUII tracked its participation in order to contribute to this evaluation process.

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### Investigation Tracking

OUII created a spreadsheet to track its implementation of these criteria in the participation selection process. The spreadsheet enumerated all cases brought before the Commission, the degree OUII participated, and the reasons for the level of OUII involvement.

Based on the spreadsheet, the top two reasons for OUII participation were section 337 special issues and inexperienced outside counsel. Additionally, the two most significant reasons that OUII chose not to participate in cases were that none of the previous six factors were present in the cases and that staffing constraints were a limitation.

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### Survey Responses

The Commission collected surveys for the section 337 investigations conducted between 2011 and 2014 in order to help evaluate the selection process. While data has been gathered, the decision about the permanency of this program has not been made. The Commission planned to evaluate the effectiveness of this pilot program, and provide guidance to OUII regarding future use of the participation selection process. However, as of the date of this report, the Commission has not completed this evaluation.

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### **Objective, Scope, and Methodology**

#### **Objective:**

Describe the process the Office of Unfair Import Investigations uses to decide participation in 337 investigations.

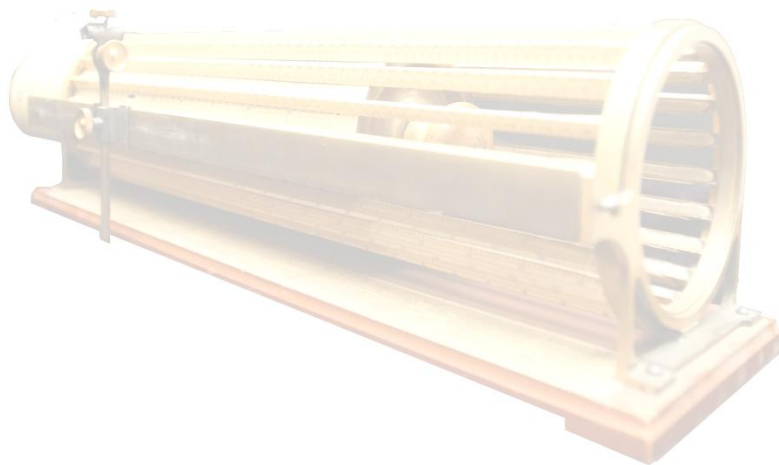
#### **Scope:**

For the six year period from January 1, 2011 to December 31, 2016.

#### **Methodology:**

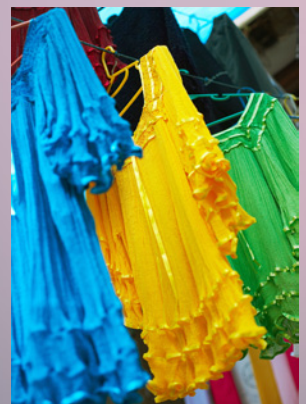
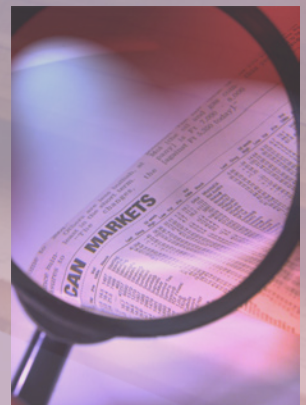
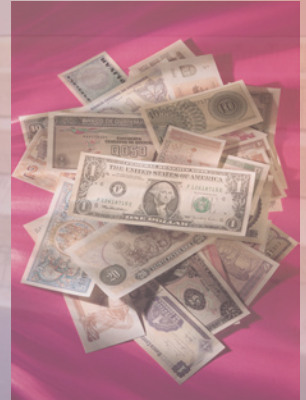
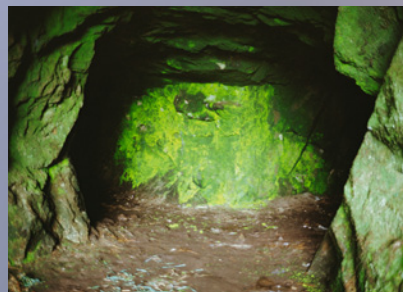
1. Review the procedures of the Office of Unfair Import Investigations.
2. Interview Commission staff.
3. Analyze Commission documentation regarding the Office of Unfair Import Investigations' process for participation in 337 investigations.
4. Analyze data compiled from survey responses.





*“Thacher’s Calculating Instrument” developed by Edwin Thacher in the late 1870s. It is a cylindrical, rotating slide rule able to quickly perform complex mathematical calculations involving roots and powers quickly. The instrument was used by architects, engineers, and actuaries as a measuring device.*

# To Promote and Preserve the Efficiency, Effectiveness, and Integrity of the U.S. International Trade Commission



U.S. International Trade Commission  
Office of Inspector General  
500 E Street, SW  
Washington, DC 20436

Office: 202-205-6542  
Fax: 202-205-1859  
Hotline: 202-205-6542  
[OIGHotline@USITC.GOV](mailto:OIGHotline@USITC.GOV)