

U.S. International Trade Commission

Evaluation of Pre-Filing and Pre-Institution of Section 337 Investigations



OIG-ER-11-13

September 12, 2011



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.

Commissioners

*Deanna Tanner Okun, Chairman
Irving A. Williamson, Vice Chairman
Charlotte R. Lane
Daniel R. Pearson
Shara L. Aranoff
Dean A. Pinkert*



UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, DC 20436

September 12, 2011

OIG-JJ-013

Chairman Okun:

This memorandum transmits the Office of Inspector General's final report, *Evaluation of Pre-Filing and Pre-Institution of Section 337 Investigations*, *OIG-ER-11-013*. A copy of your comments will be included, in their entirety, as an appendix to the final report. In finalizing the report, we analyzed management's comments on our draft report and have included those comments in their entirety as Appendix C.

This evaluation focused on the processes that take place prior to and up until a Section 337 investigation is instituted by the Commission. Specifically, the evaluation assessed the value of the pre-filing phase, where draft complaints are reviewed by the Commission before being filed. The evaluation also examined the pre-institution process where a complaint, upon being formally filed with the Commission, is checked for compliance with the rules, and a recommendation on whether an investigation should be instituted is made. This final report contains issues for the Commission to consider as they continue to review and refine the 337 investigations process.

Thank you for the courtesies extended to the evaluators during this evaluation.

Philip M. Heneghan
Inspector General

U.S. International Trade Commission
Evaluation Report

TABLE OF CONTENTS

Results of Evaluation 1

***Pre-Filing* 2**

 Description 2

 Purpose 2

 Issues 3

***Pre-Institution* 6**

 Description 6

 Purpose 7

 Issues 7

Management Comments and Our Analysis 9

Objective, Scope, and Methodology 9

Appendix A A

Appendix B B

Appendix C C

U.S. International Trade Commission
Evaluation Report

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U.S. International Trade Commission

Evaluation Report

Results of Evaluation

Section 337 of the Tariff Act of 1930, as amended, authorizes the U.S. International Trade Commission to investigate alleged unfair methods of competition and unfair acts in the importation and sale of articles in the United States. Prior to filing a complaint alleging a violation of Section 337, complainants have the option to have their draft complaint informally reviewed during the pre-filing phase. Once filed with the Commission, the complaint is assessed for compliance with the Commission's rules during the pre-institution phase. The Commissioners then vote on whether to institute an investigation.

The purpose of this evaluation was to answer the question:

Are the pre-filing and pre-institution processes for Section 337 investigations an efficient use of Commission resources?

Yes. Both the pre-filing and pre-institution processes are an efficient use of Commission resources. Given the function of these processes, discussed in detail below, and their associated costs, neither process is inefficient. We evaluated the staff costs associated with each process and determined that each draft complaint review costs the Commission approximately \$900 and the preparation of the Institution Memorandum, including reviewing the complaint for compliance with the rules and preparing the Action Jacket, costs approximately \$1200 (see Appendix A).

Through a separate initiative, the Commission has revised how the agency participates in various aspects of Section 337 investigations. The pre-filing and pre-institution processes are outside the scope of these changes. As the Commission periodically evaluates the efficacy of the new approach, issues for consideration have been flagged in both the pre-filing and pre-institution process that should also be taken into account.

U.S. International Trade Commission

Evaluation Report

Pre-Filing

Description

The pre-filing process is an informal practice whereby the Office of Unfair Import Investigations (OUII) reviews a draft complaint prior to it being filed with the Commission. The OUII estimates that 95% of complainants partake in this optional process. Complainant's counsel, one or two OUII staff and, in some cases, the complainants themselves, attend the draft review meetings. The OUII's Director or Supervisory Attorneys normally conduct the meeting, which takes anywhere from 4 to 8 hours including preparation time. The OUII staff attempt to meet with complainants approximately seven to ten days after receiving the draft complaint.

Due to the sensitive nature of the information contained in the complaint, the process is conducted entirely off the record. The comments provided to outside counsel are not recorded and the draft complaint is shredded after the meeting. At the start of the meeting, the OUII staff are instructed to recite a verbal disclaimer stating that they do not attempt to advise how the case will be decided and that they do not provide an assessment of the merits of the case. They also indicate that they could take a position opposed to the complainant if they become a party to the case.

The majority of the draft complaint review is spent discussing the substance of the complaint, particularly the domestic industry allegations, evidence of importation, and infringement materials. The meeting also includes a discussion of recent commission precedent during which relevant case law that may have been overlooked by counsel is flagged. The OUII makes suggestions as to what aspects of the complaint need to be enhanced and what needs to be rephrased or shortened. The OUII will also review and comment on resubmitted drafts that embody their suggested edits if complainants so desire. If outside counsel is filing a complaint at the Commission for the first time, Section 337 procedures and remedies which make the Commission distinct from district court are also outlined.

Purpose

Through the pre-filing process, the OUII is alerted to incoming complaints early on which provides an opportunity to spot issues that will make the pre-institution process less arduous for both the Commission and external parties. The OUII maintains that on occasion, complainants have decided to name fewer respondents or claim fewer patents. While it is difficult to precisely attribute this to the draft complaint review, outside counsel indicate that the ability to bring their clients to these meetings, allowing them to hear the OUII's comments directly, can result in their willingness to narrow the

U.S. International Trade Commission

Evaluation Report

complaint. This, in turn, conserves Commission resources by simplifying the actual investigation.

The draft complaint reviews are intended to avoid the need for extensive supplementation of complaints during the deadline driven pre-institution period, although some form of supplementation during the pre-institution phase is almost always requested. Nonetheless, outside counsel is made aware of the supplementation that will be required during the pre-institution phase, lessening their burden. Outside counsel assert that the OUII's suggestions given during the pre-filing consultation are usually followed unless counsel perceives there to be strategic reasons for not doing so. The pre-filing process is also an opportunity for first-time filers at the Commission to meet with staff, obtain practice pointers specific to Section 337 investigations, and gain a solid understanding of the process, although this is not the only opportunity to do so. Both the OUII and the Trade Remedy Assistance Office regularly field calls about the Section 337 procedures and whether the Commission is an appropriate venue for their complaint.

The relatively short period of time in which institution must occur, combined with the Commission's fact pleading requirements, makes the detection of glaring insufficiencies before the complaint is formally filed highly useful. If extensive supplementation were required during the pre-institution phase, the complainant would be under significant pressure to produce the necessary materials, which could result in a request for an extension of the institution period. The OUII maintains that the rapid turnaround time required during pre-institution would be difficult to adhere to had they not conducted the pre-filing draft review.¹

Issues

1. Does the pre-filing process add significant value for experienced ITC practitioners?

Both the OUII and outside counsel view this process as akin to having a second pair of eyes review their complaint. Outside counsel see this as an opportunity to vet their arguments before the Commission in an informal environment. The process has been described as a chance to test both novel and weak legal arguments and gauge the OUII's response. In light of the multiplicity of sources which provide guidance for drafting a complaint, whether the Commission should allocate staff time to serve as the proofreader and sounding board for complainants must be questioned.

¹ The thirty-day deadline is not mandated by statute. The statute merely states the Commission shall conclude an investigation and make its determination at the earliest practicable time. 19 U.S.C. § 1337(b)(1) (2004). The Commission has interpreted this to mean institution must occur within thirty days, which has been codified in the Code of Federal Regulations, but can be changed upon the initiative of the Commission. 19 C.F.R. § 210.10(a)(1).

U.S. International Trade Commission

Evaluation Report

Detailed requirements for the form and content of Section 337 complaints are set forth in 19 C.F.R. §§ 210.4, 210.8 and 210.12. Thomson West also publishes a step-by-step manual on how to bring Section 337 actions before the Commission that is regularly updated and discusses the relevant rules and case law in great detail.² Furthermore, public versions of properly filed complaints are available on EDIS and complainants are encouraged to find a complaint corresponding to the technology which is the subject of their allegations and use it as a template. Finally, the Commission website contains a list of “FAQ’s” which contain useful information on initiating a Section 337 investigation.

While the pre-filing process is beneficial to first time filers, statistics show that the majority of the cases are brought by counsel from firms with significant ITC experience. Of the draft complaint reviews conducted from Fiscal Year 2010 to Fiscal Year 2011 (as of June 24, 2011), 74 of 113 complainants that met with the OUII were represented by counsel that had represented at least one other complainant during that period alone. This number does not capture the representation of respondents during this period, which is largely done by the same cluster of firms. *Corporate Counsel* identified the “Top ITC Firms” (see Appendix B), which it defines as those that represented clients in at least four cases during Calendar Year 2010.³ The list identifies seventeen firms which took part, either as counsel to the complainant or respondent, in the overwhelming majority of the 56 investigations that occurred during Calendar Year 2010.

2. Is the Trade Remedy Assistance Office the more appropriate forum for pre-filing assistance for inexperienced filers?

The pre-filing phase is not required by statute or Commission rules. Section 339 of the Tariff Act of 1930, as amended by the Trade and Tariff Act of 1984, required that the Trade Remedy Assistance Office be created to provide information to the public concerning remedies and benefits available under the trade laws, and procedural information on obtaining such remedies.⁴ The office was also required to provide technical assistance to eligible small businesses to enable them to prepare and file non-frivolous complaints.⁵ As a result, the Commission created the Trade Remedy Assistance Center within the OUII. At the time, the OUII was named the Unfair Import Investigations Division and was a part of the Office of Investigations. With the 1984 Act, the office was cleaved from the Office of Investigations and was given its current name, the Office of Unfair Import Investigations. In response to the amendments of Section 339 of the 1930 Act by the Omnibus Trade and Competitiveness Act of 1988, which explicitly required that the trade remedy assistance functions be carried out by a “separate office,” the Commission dissolved the Trade Remedy Assistance Center within the OUII and created the Trade Remedy Assistance Office.⁶

² Donald K. Duvall et al., *Unfair Competition and the ITC* (2008).

³ Andrew Goldberg, *ITC Survey 2010: The Slugfest Continues*, *Corporate Counsel* (June 21, 2011), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202496549175&rss=cc#>.

⁴ Pub. L. No. 98-573, § 221, 90 Stat. 2989 (1984).

⁵ *Id.*

⁶ Pub. L. No. 100-418, § 1614, 102 Stat. 110 (1988); USITC Admin. Order No. 88-14 (Nov. 8, 1988).

U.S. International Trade Commission

Evaluation Report

The implications of this are two-fold. First, Congress contemplated providing technical and legal assistance to complainants bringing cases before the ITC and specifically outlined who should be eligible for such assistance. The services provided by the Trade Remedy Assistance Office were meant to be provided to eligible small businesses as well as other interested parties who might need assistance or find it challenging to seek private assistance.⁷ Complainants who are able to seek representation from highly sophisticated practitioners were likely not intended to qualify for assistance from the Commission.

Second, upon considering which office should be charged with providing such assistance, Congress specifically indicated that it should be done by a separate office, despite the fact that the OUII was in place at the time and presumably a viable candidate for the task. Arguably, if counsel that lacks ITC experience needs assistance in putting together their complaint, the Trade Remedy Assistance Office would be a more appropriate venue from which to seek it. With respect to complainants that are not eligible small businesses, the statute says that the Trade Remedy Assistance Office shall provide assistance and advice concerning the petition and application procedures.⁸ The legislative history counsels against a narrow reading of this, stating that “assistance would be provided as a priority to eligible small business but also, as appropriate, to other interested parties and petitioners who might need the assistance of the Office or find it very burdensome to seek private assistance and advice.”⁹ With respect to first time filers, the assistance provided during the pre-filing process could conceivably fall within this scope.

3. Does the current organizational structure lend itself to a potential conflict of interest?

Although some note that the pre-filing process is an excellent service provided by the Commission, others indicate that it adds little actual value but that they continue to attend regularly as a courtesy to the OUII. Because the OUII can become a party to the case, outside counsel may be reluctant not to participate in the pre-filing process as a precautionary measure so as to not develop negative rapport with staff that will then be involved in the adjudication of their case. While these concerns are likely unfounded, as the OUII is known to conduct these meetings and their interactions with counsel with the utmost professionalism, these perceptions nonetheless exist.

In fact, the legislative history surrounding the creation of the Trade Remedy Assistance Office seemed to anticipate and seek to avert this exact problem. The justification for establishing the Trade Remedy Assistance Office as a separate office was to “ensure its independence within the ITC so as to eliminate conflicts of interest.”¹⁰ Presumably this meant that Congress did not envision that the office providing technical or legal advice to

⁷ H.R. Rep. No. 100-40, pt. 1, at 172 (1987).

⁸ 19 U.S.C. § 1339(a) (2004).

⁹ H.R. Rep. No. 100-40, pt. 1, at 172 (1987).

¹⁰ *Id.*

U.S. International Trade Commission

Evaluation Report

complainants would be the same office from which individuals would later become a party to the adjudication. Given the OUII's role in advising the Commission on institution and then subsequently becoming a party to the adjudication, their role in providing feedback to outside counsel is somewhat peculiar.

Pre-Institution

Description

Upon the filing of a complaint, the Commission must decide whether an investigation should be instituted within thirty days.¹¹ Since the Federal Circuit has interpreted 19 U.S.C. § 1337(b)(1) to mean that the Commission must investigate alleged violations of Section 337,¹² institution of an investigation turns on whether the complaint sufficiently complies with the relevant rules set forth in the Code of Federal Regulations.¹³

Compliance with the rules, in addition to sufficiency of the complaint and the need for supplementation, is primarily determined by the OUII. An Institution Memorandum is drafted recommending whether an investigation should be instituted and the Commissioners subsequently vote on it.

The Federal Circuit's decision in *Amgen* set a relatively low standard for institution of Section 337 investigations. Once a complaint is filed, absent clear failure to follow the Commission's pleading requirements, an investigation must be instituted. Upon the filing of a complaint, staff responsible for the initial drafting of the Institution Memorandum are required to cross reference the complaint against a checklist of the Commission's rules of practice and procedures. Approximately half of the Institution Memorandum's are drafted by a Section 337 case manager from Docket Services and are then reviewed by Docket Service's Quality Assurance Attorney. The other half are drafted by the OUII's paralegal or law clerks. In some instances, the OUII Supervisory Attorneys or Investigative Attorneys will draft the Institution Memorandum if it involves unusual legal issues. Regardless of who drafts the Institution Memorandum, it is always reviewed and significantly embellished by the OUII's Director or Supervisory Attorneys who refine the domestic industry analysis and address any legal nuances. If appropriate, they also add public interest factors to be considered by the Administrative Law Judge. The OUII also obtains any necessary supplementation from the complainant during this period in order to ensure compliance with the rules. The Institution Memorandum is sent to General Counsel for concurrence and then to the Commissioners. In order to comply with the thirty day deadline, requests for supplementation and the drafting of the Institution Memorandum must occur in less than three weeks as each Commissioner receives one day to review it (six business days in total) before voting on institution.

¹¹ 19 C.F.R. § 210.10(a)(1) (2010).

¹² *Amgen, Inc. v. U.S.I.T.C.*, 902 F.2d (Fed. Cir. 1990).

¹³ 19 C.F.R. § 210.10(a)(1) (2010).

U.S. International Trade Commission

Evaluation Report

Purpose

Checking the complaint for sufficiency and compliance with the rules is a highly involved process which takes a considerable amount of staff time. The process ensures that the complaint adheres to the Commission's rigorous pleading standards in order to make sure that only properly pled complaints are instituted. Section 337 investigations require parties to dedicate a significant amount of resources to their defense, and, as such, it is particularly important to ensure that investigations instituted by the Commission are not frivolous. Furthermore, there is a need to ensure that all complaints are held to the same standard and contain allegations sufficiently supported by fact. Outside counsel confirm that they monitor public versions of instituted complaints on EDIS in order to see where the Commission has not been stringent in holding complainants to the rules. Finally, in most cases, the Institution Memorandum is the document primarily relied upon by the Commission in determining whether or not to institute an investigation.

Issues

1. Can the Institution Memorandum be further streamlined in cases which do not involve any peculiarities?

In the majority of cases, the Institution Memorandum is largely a boilerplate document which summarizes the allegations set forth in the complaint. On occasions where compliance with the rules has been questioned or when the Institution Memorandum recommends that the Commission only institute against certain respondents or consolidate portions of the case with another investigation, the lengthy Institution Memorandum proves to be of value. Thus, the real utility of the Institution Memorandum is apparent when institution turns on more novel or complicated legal issues, particularly regarding matters specific to Section 337 investigations. In these instances, Commissioners' staff have expressed that they would greatly appreciate the OUII's legal analysis and insight but that these difficult legal issues are often too superficially addressed and could benefit from a more in depth analysis.

While the process of checking the complaint for sufficient compliance with the rules is extremely important, in most cases, this could be adequately accomplished by completion of the checklist, the action jacket, and a one to two page memorandum outlining the allegations of importation and sale, domestic industry, and public interest considerations. While the Institution Memorandum has recently been shortened, the process could potentially stand to benefit from an even more condensed version. In more challenging cases, a memorandum much like the one currently in place, but with an enhanced legal analysis, would be appropriate.

U.S. International Trade Commission

Evaluation Report

2. Does the informal communication that occurs between the OUII and potential parties to the investigation bring into question the transparency of the institution process?

Both the OUII and outside counsel maintain that phone calls between them are common practice up until institution. Because counsel to the complainants are aware that the OUII drafts the Institution Memorandum, and therefore has an important role in whether a case get instituted, they regularly communicate with the OUII via telephone to voice their concerns and request the OUII's support. In fact, complainants dealing with new or unsettled legal issues are permitted to submit letters or informally consult with the OUII regarding their position at any time prior to institution.¹⁴ After a complaint has been filed, the opportunity is available to respondents as well. Legal arguments made during this period do not become part of the record. In reality, the standard for institution is low enough that these communications are unlikely to have any effect on the OUII's analysis. Nonetheless, the mere opportunity to informally contact staff may lead to questions about the transparency of the process.

3. Is the work required during the pre-institution process properly distributed among various offices?

In 2007 Docket Services was reorganized and hired attorneys into newly designed case manager positions. The initial plan was to have one case manager per Administrative Law Judge, who would work exclusively on Section 337 cases. Currently, there are five case managers, and a sixth is not being sought. With one exception, all of the Section 337 case managers are attorneys, who undoubtedly have the capacity to handle some of the legal work that goes into the pre-institution phase. With additional training, and with the hiring of a sixth case manager, Docket Services would likely be able to take on some of the OUII's workload during the pre-institution phase in order to help them cope with the increasing Section 337 case load.

¹⁴ Duvall et al., *supra* note 2, at 73.

U.S. International Trade Commission

Evaluation Report

Management Comments and Our Analysis

On September 1, 2011, Chairman Deanna Tanner Okun provided management comments to the draft evaluation report. The Chairman agreed with our conclusion that the 337 pre-filing and pre-institution processes were an efficient use of Commission resources and noted that the Commission will take into consideration the issues presented in this report when the recent changes made to the other steps of the 337 process are re-evaluated. The Chairman's response is provided in its entirety as Appendix C.

Objective, Scope, and Methodology

- Objectives:** Are the pre-filing and pre-institution processes for Section 337 investigations an efficient use of Commission resources?
- Scope:** The pre-filing phase is when the draft complaint review is conducted, prior to the formal filing of a complaint. The pre-institution phase is the thirty-day period from when the complaint is formally filed with the Commission to the institution of a Section 337 investigation.
- Methodology:** This evaluation was planned and performed to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on our objectives. The legal authority for these processes was assessed by consulting the relevant statutes and the Code of Federal Regulations. A step by step analysis of both procedures was conducted by interviewing ITC staff from the OUII, General Counsel, Docket Services, the Trade Remedy Assistance Office and the Commissioner's office. In addition, outside counsel was interviewed and relevant documentation surrounding each process was reviewed.
- Definitions:** Efficient—process is conducted with low cost and minimal waste.

U.S. International Trade Commission

Appendix

Appendix A

The following is an estimate of the cost of each draft complaint review conducted and Institution Memorandum drafted from Fiscal Year 2010, based on the average time expended as reported by relevant staff.

Cost of Draft Complaint Reviews Conducted in FY 2010¹⁵						
Staff	Grade/Step	Hourly Rate ¹⁶	Hours	Cost	Staff ¹⁷	Draft Reviews
OUII Supervisory Attorneys	15/5	\$103.96	6	\$623.76	86	59
Total Cost for Draft Reviews Conducted in 2010						\$53,643.36
Cost per Draft Review						\$909.21

Costs of Institution Memorandum Drafted in FY 2010 by Office				
Memorandum Drafted by OUII (18)				
Staff	Grade/Step	Hourly Rate	Hours ¹⁸	Cost
OUII Paralegal ¹⁹	9/5	\$43.37	6.5	\$281.91
OUII Supervisory Attorneys	15/5	\$103.96	5.25	\$545.79
Subtotal for Memorandum Drafted By OUII FY 2010				\$14,898.60
Memoranda drafted by Docket Services (33)				
Staff	Grade/Step	Hourly Rate	Hours	Cost
OUII Supervisory Attorneys	15/5	\$103.96	5.25	\$545.80
DS Case Manager	11/5	\$52.24	10.5	\$548.52
DS Quality Assurance Attorney	13/5	\$74.79	3.5	\$261.77
Subtotal for Memorandum Drafted by Docket Services FY 2010				\$44,750.97
Total Costs Institution Memorandum FY2010				
Total Cost for Memorandum Drafted in FY 2010				\$59,649.57
Number of Memorandum Completed in FY2010				51
Cost per Memorandum FY2010				\$1,169.60

¹⁵ Reviews of resubmitted drafts are not reflected in these costs.

¹⁶ All hourly rates calculated by dividing OPM annual salary by average annual direct hours (1700) and multiplying by 1.26 to reflect overhead costs.

¹⁷ Draft complaint reviews were occasionally conducted by two staffers.

¹⁸ This includes the time spent drafting or reviewing the memorandum and completing the checklist.

¹⁹ Not all Institution Memoranda were initially drafted by the paralegal. Some were drafted by the law clerks and others were drafted by the Supervisory or Investigative Attorneys.

U.S. International Trade Commission

Appendix

Appendix B

Top ITC Firms			
Firm	Complainant	Respondent	Total
Adduci, Mastriani & Schaumberg	6	15	21
Alston & Bird	5	8	13
Finnegan, Henderson, Farabow, Garrett & Dunner	3	5	8
Fish & Richardson	5	3	8
Sidley Austin	2	6	8
Kirkland & Ellis	4	3	7
Weil, Gotshal & Manges	2	4	6
Jones Day	2	3	5
McDermott Will & Emery	3	2	5
Steptoe & Johnson	2	3	5
Arent Fox	0	4	4
Bridges & Mavrakakis	2	2	4
Covington & Burling	0	4	4
K&L Gates	1	3	4
Mayer Brown	0	4	4
Miller and Chevalier	0	4	4
Morrison & Foerster	2	2	4

Multiple law firms may be involved in each case.²⁰

²⁰ Andrew Goldberg, *ITC Survey 2010: The Slugfest Continues*, Corporate Counsel (June 21, 2011), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202496549175&rss=cc#>.

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Appendix

Appendix C

Chairman




UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, DC 20436

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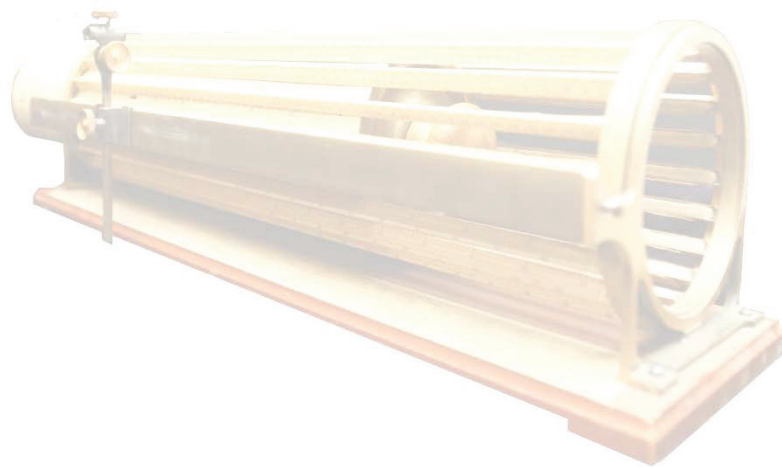
September 1, 2011

MEMORANDUM

TO: Philip M. Heneghan, Inspector General
FROM: Deanna Tanner Okun, Chairman 
SUBJECT: Management Comments on the Inspector General's Draft Evaluation Report,
"Evaluation of Pre-Filing and Pre-Institution of Section 337 Investigations"

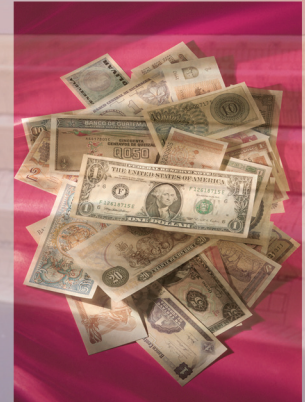
I appreciate the opportunity to review the Inspector General's draft report, *Evaluation of Pre-Filing and Pre-Institution of Section 337 Investigations*, dated August 4, 2011, and to provide comments.

Thank you for reviewing the processes that take place prior to and up until a Section 337 investigation is instituted by the Commission. The Inspector General's draft report found that the pre-filing and pre-institution processes for Section 337 investigations are an efficient use of Commission resources. These were the only two areas that were not changed when we recently revised our procedures for the rest of the 337 process. After the Commission has had sufficient time to evaluate the recent changes, we will consider the issues presented in this report as part of that re-evaluation.



“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: 877-358-8530
OIGHotline@USITC.gov