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 postinvestigation 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.

⁶⁵⁸ 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.