release that information at a later date absent the submitter's consent.⁸ The Commission thus believes that it would be inappropriate to make unilateral determinations on declassification of CBI without consulting the suppliers or to adopt a Commission rule that would mandate such declassification.

The Commission also has decided against the establishment and operation of a Commission repository in lieu of or in addition to allowing post-investigation retention of CBI by counsel. The Commission shares the bar group commenters' view that little would be gained from creating such a repository and that having a CBI access system based on a repository would further entangle the Commission in enforcing APOs and would increase the burdens of handling CBI.

The Commission is considering revising the final part 210 rules, as suggested by the bar group commenters, to establish a policy of permitting the post-investigation retention and use of CBI by counsel. The Commission notes, however, that for some categories of CBI, the bar group commenters suggested, without explanation, retention periods that were two years beyond exhaustion of the appeals process or expiration of the remedial orders. The Commission notes also that some of the uses which the bar group commenters have jointly or individually proposed for CBI during the prescribed retention periods encompass uses that appear to be outside of the limitations imposed by law.

As discussed in the next section of this notice, the Commission has drafted proposed rule provisions that incorporate a retention schedule with shorter deadlines for certain kinds of CBI than the deadlines listed in the bar group commenters' joint submission. The Commission also has drafted proposed rule provisions that limit the uses to which CBI may be put during the prescribed retention periods. The Commission, however, specifically invites bar associations and other interested persons who favor the bar group commenters' proposed schedule to file comments with the Commission on the following issues:

1. The justification for the extended retention periods (i.e., the additional two years) on the bar group commenters' proposed schedule for certain materials containing CBI; and

2. The use(s) to which the CBI in those materials would be put during the extended periods.⁹

Proposed Rule Changes

To codify the retention schedule, use restrictions, and other requirements which the Commission proposes to adopt, the Commission proposes to add new provisions to final rules 210.5 and 210.34, rather than creating new rules. That approach eliminates the need to renumber the existing final rules in part 210. The new provisions which the Commission proposes to add to final rules 210.5 and 210.34 are described below.

Final Rule 210.5

Final rule 210.5, entitled "Confidential business information," is the Commission's general rule for CBI in investigations and related proceedings under section 337. The Commission proposes to amend final rule 210.5 by adding a new paragraph (f) which states that materials containing CBI subject to an APO issued under final rule 210.34(a) shall be retained, used, expurgated, returned to the supplier, or destroyed as provided in final rule 210.34(e).

Final Rule 210.34

Final rule 210.34 is the general rule about APOs in section 337 investigations. The Commission proposes to amend final rule 210.34 by adding paragraph (e).

Paragraph (e)(1). Proposed paragraph (e)(1) of final rule 210.34 incorporates the following retention schedule:

- 1. All discovery materials. Until all appeals are exhausted and thereupon the materials would be subject to a return or destroy rule.
- 2. All CBI in the possession of expert witnesses. Same as for discovery materials.

Commissioner Rohr believes that the Commission should adhere to the traditional practice of issuing 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 or a longer period). Commissioner Rohr also believes that the procedures contained in the proposed rules represent an unacceptable risk of unauthorized disclosure of the subject CBI.

In Commissioner Newquist's view, the Commission's rules should provide that post-investigation use and retention of CBI shall be determined by agreement of the parties, any non-party suppliers, and the presiding ALJ in each investigation.

3. The evidentiary record. Until all appeals are exhausted or all remedial orders have expired, whichever is later, and thereupon the materials would be subject to a return or destroy rule.

4. Attorney work product. Indefinitely, but see paragraph 7 below regarding third-party CBI. The Commission's APO enforcement responsibility would be subject to a fiveyear sunset rule, however. In general, the Commission would no longer be responsible for enforcing APOs five years after the exhaustion of all appeals or the expiration of all remedial orders, whichever is later. If certain information, such as trade secrets, is still confidential, the supplier of the information could request that the Commission continue to enforce the APO even though the five-year period has expired. Such a request would have to be made before the five-year period

5. *Pleadings*. Same retention period and APO enforcement provisions as attorney work product, but see paragraph 7 below regarding third-party CBI.

6. Orders, notices, initial determinations, recommended determinations, opinions, and other documents issued by an ALJ or the Commission containing CBI. Same retention period and APO enforcement provisions as attorney work product and pleadings, but see paragraph 7 below regarding third-party CBI.

7. Third-party CBI. Until all appeals are exhausted or all remedial orders have expired, whichever is later. The third-party CBI would then be subject to a return or destroy rule, even if the information is contained in pleadings or work product, if the third-party suppliers so requested at the time that they submit the information.

Proposed paragraph (e)(1) also imposes—

1. 30-day deadlines for the return, destruction, or expurgation of CBI when the prescribed retention period expires, and

2. A requirement that written certification of such return, destruction, or expurgation shall be provided to suppliers and the Commission.

The Commission believes that these requirements (and the custodian requirement set forth in proposed paragraph (e)(3) of final rule 210.34) will help ensure that APO signatories comply promptly with their obligations to expurgate, return, or destroy CBI in accordance with proposed paragraph (e)(1).

Proposed paragraphs (e)(1)(iv)–(vi) of final rule 210.34 impose a 60-day deadline for motions to extend the

⁸ See, e.g., H.R. Rep. No. 40, 100th Cong., 1st Sess. at 161–162 (1987); S. Rep. No. 71, 100th Cong., 1st Sess. at 133 (1987).

⁹ Commissioner Rohr and Commissioner Newquist dissent from the majority's decision to consider adopting the proposed rules set forth in this notice.