

Commission's five-year APO enforcement period (after the exhaustion of all appeals or the expiration of all remedial orders, whichever is later) with respect to pleadings, documents issued by an ALJ or the Commission, and attorney work product documents containing CBI. Sixty days should be sufficient (1) to allow nonmoving parties to respond to the motion and (2) to allow the Commission to decide the motion on or before the expiration of the five-year period.

The Commission notes one potential problem with respect to applying the aforesaid sunset provisions to attorney work product. Submitters of CBI who want the Commission to extend its enforcement of the APO beyond the five-year period are not likely to know what CBI is contained in attorney work product such as a law firm's internal legal memoranda concerning the investigation. The Commission also thinks it understandable, however, that attorneys may want to retain their work product from an investigation for future reference in matters involving similar issues. The Commission therefore solicits comments on possible solutions to this potential problem.

Paragraph (e)(2). Proposed paragraph (e)(2) of final rule 210.34 restricts the uses to which CBI may be put during the prescribed retention periods. The bar groups who commented in response to the Commission's advance notice of proposed rulemaking (and the participants and commenters in the investigations that prompted this rulemaking)¹⁰ urged the Commission to approve retention of CBI by counsel for one or more of the uses and purposes enumerated below:

1. To provide legal advice and other legal services to clients in connection with the following matters:

To comply with a remedial or other Commission order issued in connection with the investigation or related proceeding;

To initiate—or to defend against—administrative or judicial proceedings concerning enforcement, modification, or revocation of such orders or advisory opinion proceedings; or

To enforce or avoid infringement of an intellectual property right asserted in the investigation.

2. To reduce costs, save time, minimize duplication of effort, and facilitate participation in the following kinds of proceedings:

Commission proceedings to enforce, modify, or revoke a remedial order, a

consent order, or other Commission order;

Commission advisory opinion proceedings;

U.S. Customs Service proceedings to enforce or monitor compliance with an exclusion order;

Commission or Customs proceedings for the forfeiture of a bond posted by a complainant or a respondent;

Civil actions involving some or all of the same parties and subject matter as the investigation (with a view toward asserting *res judicata* or collateral estoppel in some kinds of cases);

Civil actions against a section 337 complainant for the filing of unwarranted section complaint; or

Civil actions for attorney malpractice in an investigation or a related proceeding.

3. To have unrestricted use of legal research and nonconfidential information in working papers, briefs, and other documents created by counsel which contain CBI.

Although section 337(n)(1) and its 1987 legislative history explicitly discuss the "disclosure" or "release" of CBI,¹¹ there is an implicit restriction on the use of CBI (in the absence of consent from the submitter(s)), which appears to bar some uses that the current commenters and other interested persons have suggested—namely, use of CBI in civil actions. In the absence of consent from the submitter, section 337(n)(1) prohibits disclosure of CBI to anyone other than (1) persons granted access under a Commission APO and (2) certain categories of Government employees listed in section 337(n)(2). The categories in section 337(n)(2) previously were limited to Commission, Customs Service, and other U.S. Government personnel who are involved in the subject investigation, Presidential review of a remedial order issued in that investigation, or the administration or enforcement of an exclusion order issued in the case.¹²

Amendments to section 337(n)(1) and title 28 of the United States Code were promulgated in the URAA. Section 337(n) was amended to broaden the categories of Government employees who may have access to CBI.¹³ Title 28 of the United States Code was amended to include a new section requiring the Commission to forward the administrative records of section 337 investigations to district courts for use in some, but not all, civil actions involving the same parties and subject

matter as the subject investigations.¹⁴ The URAA amendments thus do not address most of the civil action uses of CBI advocated by the commenters and other interested persons.

Proposed paragraph (e)(2) of final rule 210.34 accordingly states that CBI which is retained pursuant to paragraph (e)(1) of final rule 210.34 shall not be used during the prescribed retention period for any purposes other than those relating to the subject investigation or a related proceeding under section 337,¹⁵ except for additional uses that are permitted by law (e.g., the new section of title 28) or provided for in a written agreement with the supplier.

Paragraph (e)(3). Proposed paragraph (e)(3) of final rule 210.34 states that each law firm whose attorneys are signatories to an APO in an investigation or a related proceeding shall designate one attorney signatory from the firm as the custodian of the CBI and the person responsible for ensuring that the requirements of proposed paragraphs (e)(1)–(e)(2) of final rule 210.34 are satisfied. It is not uncommon for attorneys to change firms and for documents containing CBI to be shipped around firms. The Commission's concern is not that the documents are likely to be lost, but that the firms may lose sight of the obligations imposed by the APO. Requiring the firm to have a custodian will reduce the likelihood of that occurring.

The Commission is cognizant that there may come a time during the prescribed retention period(s) when a law firm's custodian is no longer willing or able to serve in that capacity. If that happens, the firm always has the option of promptly returning or destroying the CBI. However, if the firm wishes to continue to retain the CBI but to change custodians, the questions are whether a change of custodianship should be permitted and, if so, how the change should be effected.

Proposed paragraph (e)(3) final rule 210.34 currently does not contain provisions governing the changing of custodians. The Commission is considering whether to revise paragraph (e)(3), however, to include such provisions. One option would be to

¹⁴ *Id.* at sec. 321(b)(1)(A) regarding the new 28 U.S.C. 1659(b).

¹⁵ As noted in final rule 210.3, the term "related proceedings" includes sanction proceedings for the possible issuance of sanctions that would not have a bearing on the adjudication of the merits of a complaint or a motion under 19 CFR part 210, bond forfeiture proceedings, proceedings to enforce, modify, or revoke a remedial or consent order, or advisory opinion proceedings. See 59 FR 39040–39041 (Aug. 1, 1994), as amended at 59 FR 67626 (Dec. 30, 1994) (to be codified at 19 CFR 210.3).

¹⁰ *Condensers and Memory Controllers* (See *supra* n.5.)

¹¹ See 19 U.S.C. 1337(n)(1) and n.8 *supra*.

¹² See 19 U.S.C. 1337(n)(2) (1988).

¹³ See sec. 321(a)(7) of the URAA.