

## A Domestic Industry in Flux: The Economic Domestic Industry Reporting Requirement

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The economic shocks of the pandemic, Russia's invasion of Ukraine, which have resulted in supply chain disruptions, a transition to work-from-home, and rapidly increasing inflation, are likely to affect litigants before the U.S. International Trade Commission (Commission or ITC). The consequences of these events may increase the number of respondents requesting that the Commission implement a rarely used mechanism: the reporting requirement.

### The §337 Domestic Industry Requirement

The ITC provides an increasingly popular forum for patent infringement litigation because it provides quick and effective remedies against patent infringers that import their products into the United States. These remedies include exclusion orders and other remedial orders that bar importation of infringing products.

To obtain relief in a §337 action, a complainant must establish that a domestic industry for articles protected by the asserted patent(s)

exists or is in the process of being established. 19 U.S.C. §1337(a)(2). The domestic industry requirement has two prongs: a technical prong and an economic prong. A complainant satisfies the economic prong by showing threshold domestic investments in the product or patent, typically through evidence related to recent investments and historical trends. Where a domestic industry is in flux, a respondent may seek a reporting requirement under Commission Rule §210.71(a), under which the complainant must provide periodic reports about its on-going investments in the domestic industry to show a continuing need for an exclusion order. Compiling the information for the reports can be burdensome.

### Turbulent Economic Market

The recent economic turmoil may give rise to uncertainty regarding the complainant's domestic investments, providing an opportunity for a respondent to request a reporting requirement, and necessitating that a complainant be prepared to respond. It is important for parties to understand the Commission's prior guidance on the reporting requirement, which serves to ensure that there is a continuing need for a remedial order.



U.S. International Trade Commission building.

Occasionally, the Commission will find that the economic prong has been satisfied even where there is evidence that the complainant's domestic industry is in flux, i.e., in the process of being established or eliminated. See, e.g., *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, Comm'n Op., 1996 WL 1056209, at \*10-11 (Sept. 23, 1996) (*Wind Turbines*).

In those circumstances, respondents may request that the Commission subject a complainant to a reporting requirement. Rule 210.71(a) ("the Commission ... may require any person to report facts available to that person that will aid the Commission in determining whether and to what extent there is compliance with the order or whether and to

what extent the conditions that led to the order are changed”).

Although the Commission has infrequently addressed the reporting requirement, over the years, it has provided guidance on the proper application of this remedy and its potential utility. In general, a reporting requirement is applied at the remedial stage of an investigation to ensure that the complainant’s domestic activities are ongoing, such that the remedial orders still serve the purposes of §337. See, e.g., *Certain Caulking Guns*, Inv. No. 337-TA-139, Comm’n Op., 1984 WL 273565, at \*2 (Feb. 8, 1984); *Certain Elec. Devices, Including Mobile Phones, Portable Music Players, and Computers*, Inv. No. 337-TA-701, Summary Determination, 2010 WL 5621540, at \*4 (Nov. 18, 2010).

A respondent seeking a reporting requirement bears the burden to prove that the complainant’s ongoing domestic industry is in such a state of uncertainty that the “unusual and burdensome” step of applying a reporting requirement is warranted. See, e.g., *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same*, Inv. 337-TA-372, Comm’n Op., 1997 WL 857227, at \*27-28 (Nov. 1, 1997) (*Boron Magnets*).

The hurdle to impose a reporting requirement is a high one. Historically, the Commission has applied reporting requirements in only the most extreme and marginal circumstances, refusing to do so despite evidence of change in the complainant’s domestic industry. *Certain Beverage Dispensing Sys. and Components Thereof*, Inv. No. 337-TA-1130, Initial Determination, at 7 (Sept. 19, 2019);

*Certain Non-Volatile Memory Devices*, Inv. No. 337-TA-1046, Comm’n Op., 2018 WL 6012622, at \*30-31 (Oct. 26, 2018); *Certain Digital Video Receivers, Broadband Gateways, and Related Hardware and Software Components*, Inv. No. 337-TA-1158, Initial Determination (July 28, 2020).

Circumstances warranting a reporting requirement include events that have already occurred, such as a bankruptcy or the near complete cessation of domestic industry activity, but not that are speculative or distantly possible events. See, e.g., *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Initial Determination, 2011 WL 7628059, at \*304 (Sept. 23, 2010) (imposing reporting requirement where complainant ceased domestic sales of the product).

For an existing industry, the Commission’s rulings make clear that such circumstances exist only when there is evidence that the complainant’s domestic industry is in such a state of decline that the effectiveness of an exclusion order would be undermined. *Boron Magnets* at 27-28.

For an industry in the process of being established, the Commission has imposed a reporting requirement where a complainant’s domestic industry has not yet been established and future developments may render the utility of an exclusion order uncertain. See, e.g., *Certain Wire Elec. Discharge Machining Apparatus and Components Thereof*, Inv. No. 337-TA-290; *Certain Caulking Guns*, Inv. No. 337-TA-139, 1984 WL 273565 (Feb. 8, 1984); *Certain Strontium-Rubidium Radioisotope Infusion Sys. and Components Thereof Including Generators*, Inv. No. 337-TA-1110, Initial

Determination, at \*149, 172-73 (Aug. 1, 2019).

While the appropriateness of a reporting requirement will turn on the facts of the specific complainant’s business investments, the recent economic disruptions may give rise to an increasing number of circumstances where the evidentiary record would warrant a reporting requirement, and the parties should be prepared to address the issue.

### Ramifications

The rapidly changing global economy, increasing inflation, supply chain disruptions, the transition to work-from-home, and ongoing public health crisis, present business challenges that may impair or change the domestic industries at issue before the Commission. Because a changing domestic industry may complicate establishing a domestic industry, prior Commission rulings, though limited, provide helpful guidance on what parties can anticipate when litigating a reporting requirement.

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