CLIENT ALERT

ITC Publishes Proposed Rules to Limit E-Discovery and Address Privilege Issues

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On October 5, 2012, the U.S. International Trade Commission (ITC) published proposed amendments to its rules of procedure that would limit e-discovery and provide guidance regarding the assertion of privilege claims in Section 337 proceedings. The goal of the proposed amendments "is to reduce expensive, inefficient, unjustified, or unnecessary discovery practices in agency proceedings while preserving the opportunity for fair and efficient discovery for all parties." Based largely upon Rule 26 of the Federal Rules of Civil Procedure, the proposed amendments (1) provide specific limitations on the discovery of electronically stored information that is not reasonably accessible due to undue burden or cost, is duplicative or can be obtained from a less burdensome source, or where the burden of discovery outweighs its likely benefits; and (2) require the production of a privilege log with specified categories of information, set forth a procedure for promptly resolving privilege disputes, and allow parties to enter into agreements regarding the inadvertent production of privileged information.

The ITC is proposing changes to Section 210.27 of its rules of procedure (19 CFR Part 210) to address concerns regarding the large volumes of electronically stored information (ESI) often produced in Section 337 proceedings. In July 2011, The George Washington University Law School held a conference on this issue, and many participants expressed frustration that parties in Section 337 matters often have to search and produce vast amounts of ESI, particularly email, but that only a tiny fraction of that volume will ever be admitted into the record. The potential for "gaming" the process whereby the costs of unnecessarily broad discovery either discourage parties from bringing complaints or disproportionately influence settlement decisions was identified as a major concern. The Commission also focused on the increased risk of inadvertent disclosure of attorney-client privileged information or attorney work product due to the inherent nature of ESI and the modern technologies and methods used to process and produce such information in discovery.

The Commission indicated that it considered a variety of proposals, pilot programs and model orders in crafting the rule changes, however the proposed amendments closely follow Rule 26 of the Federal Rules of Civil Procedure (FRCP) – with several notable exceptions and additions. The ITC has indicated that the proposed rules are part of a broader initiative, which includes establishing a case-management pilot program, creating an ITC model protective order, including a source code provision, and encouraging administrative law judges to set up ground rules for handling metadata during discovery. USITC, E-Discovery—Commission Takes a Step Forward.

Limits on the Scope of Discovery

The Commission proposes to amend Section 210.27 to add new subsections (c) and (d) to limit the scope of discovery generally, and discovery of ESI specifically. Recognizing that some sources of electronically stored information can be accessed only with substantial burden and cost, proposed subsection (c) relieves parties of the obligation to produce information that is "not reasonably accessible" due to undue burden or cost. Similar to FRCP 26(b)(2)(B), the proposed subsection (c) provides a mechanism for a motion to compel or motion for protective order relating to such information, whereupon the party claiming undue burden must "show that the information is not reasonably accessible because of undue burden or cost." Thereafter, the

administrative law judge may order discovery for "good cause," and may "specify conditions" for such discovery, including cost shifting. The Commission's Analysis notes that "case law developed under FRCP 26(b)(2)(B) would provide guidance for application of proposed subsection (c)."

Proposed subsection (d) provides further guidance on when discovery should be limited, and is modeled on FRCP 26(b)(2)(C). Subsection (d) requires an administrative law judge to limit discover if the judge determines that:

- the discovery sought is duplicative or can be obtained from a less burdensome source;
- the party seeking discovery has had ample opportunity to obtain the information; or
- the burden of the proposed discovery outweighs its likely benefit.

However, subsection (d) departs from FRCP 26(b)(2)(C) by adding a provision that the judge must limit discovery where the person from whom discovery is sought has waived the legal position that justified the discovery or has stipulated to the facts pertaining to the discovery.

In addition, in considering whether the burden of the proposed discovery outweighs its likely benefit, judges are directed to consider "the needs of the investigation, the importance of the discovery in resolving the issues to be decided by the Commission, and the public interest." This is a slightly different set of factors than those set forth in FRCP 26(b)(2)(C), which also allows consideration of the parties' resources and the importance of issues at stake in the action, but does not identify "public interest" as a factor.

Privilege Claims

Proposed subsection (e) addresses claims relating to information protected from disclosure by attorney-client privilege and as attorney work product. Referencing the Advisory Committee Notes regarding Federal Rule of Evidence 502, the Commission's Analysis notes that "litigation costs necessary to protect against waiver of attorney-client privilege or attorney work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery."

Current ITC rules do not require the production of a privilege log providing details regarding information withheld from production based on privilege or work product claims, although administrative law judges may order the production of privilege logs in their ground rules. The proposed subsection (e)(1) provides a uniform set of procedures by requiring a producing party claiming privilege or attorney work product to (i) expressly make the claim when responding, and (ii) within 10 days of making the claim, produce a privilege log with certain specified categories of information designed to enable the requester to assess the claim without revealing the information at issue. By setting a deadline and identifying the specific information required in the privilege log, the proposed subsection (e)(1) goes further than the general guidance in FRCP 26(b)(5)(A).

Further, subsection (e)(2) goes beyond FRCP 26(b)(5)(B) in setting forth a mechanism for resolving disputes over inadvertently produced privileged or work product information. Proposed subsection (e)(2) allows a party to make a claim after production by notifying the receiving party of the claim and the basis for it by producing a privilege log. The receiving party then (i) must within 5 days return, sequester, or destroy the specified information; (ii) must not use or disclose the information until the claim is resolved; and (iii) must within 5 days take reasonable steps to retrieve the information if it was disclosed to others. In addition,

within 5 days after the notice, the parties must meet and confer to try to resolve any disputes regarding the privilege claims. If that fails, within 5 days of the meet and confer any party may file a motion to compel the information claimed to be privileged or work product protected.

Finally, in an effort to address the trend toward the use of "clawback" agreements regarding inadvertently produced privileged information, proposed subsection (e)(3) allows the parties to enter into a written agreement to "waive compliance" with subsection (e)(1) which requires privilege claims to be made at the time of production. The administrative law judge "may" deny any motion to compel information subject to such agreement, and "may" determine that inadvertently produced privileged information subject to such agreement is not entitled to privileged protection. This is a potentially significant departure from Federal Rule of Evidence 502, which allows parties to enter into agreements regarding the clawback of inadvertently produced privileged information which, if entered as an order of the court, are entitled to full force and effect in all state and federal proceedings. Those agreements and orders often provide for the return and non-waiver of inadvertently produced privileged information without any showing that "reasonable steps" were taken to protect the privilege. The Commission's Analysis indicates that under the proposed rules, such a showing might be required:

> "Proposed subsection (e) is not a categorical 'claw-back' rule. Proposed subsection (e) would not supplant any applicable waiver doctrine. If proposed subsection (e) were adopted, the Commission would expect administrative law judges to apply federal and common law when determining the consequences of any allegedly inadvertent disclosure. That law would include consideration of whether the holder of the privilege or protection took reasonable steps to prevent disclosure of the information and other considerations found in Federal Rule of Evidence 502."

It is unclear how proposed subsection (e)(3) will be interpreted in light of Federal Rule of Evidence 502's express provisions superseding federal law regarding waiver, and allowing for agreements and orders to eliminate the need for any showing regarding "reasonable steps" to avoid disclosure. Rule 502 was adopted to reduce the need for expensive and burdensome privilege review of ESI based on parties' fear that inadvertent production could result in waiver of the privilege. Proposed subsection (e)(3) does not adopt the same protections of Rule 502, and thus parties likely will not realize significant benefits in terms of the burden of privilege review and logging.

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The proposed amendments to the ITC's procedural rules are a significant step toward reducing the burden of costly and unnecessary discovery in Section 337 proceedings. If administrative law judges are vigilant in interpreting the proposed rules limiting discovery, it is far more likely that Section 337 matters will be focused on the merits of the dispute rather than the costs and burdens of electronic discovery.

Public comments on the proposed rule amendments may be submitted by December 4, 2012.

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