

How Gov't Shutdown Delays ITC Section 337 Investigations

By Michael Doane

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Like many other activities, investigations at the U.S. International Trade Commission, and in particular investigations under Section 337 of the Tariff Act of 1930, ceased during the federal government shutdown. As a result, Section 337 investigations had been on hold, with new complaints pending institution, significant decisions awaiting ITC review and the usually accelerated schedules for ongoing investigations suspended.

This changed, of course, when the ITC reopened, at least temporarily, on Jan. 28. To avoid the potential rush of parties making filings in pending investigations, the ITC has posted “Information on Resumption of USITC Operations” on its website, which provides that:

As of Saturday, January 26, 2019, the Commission received funding through February 15, 2019 and the period of the shutdown has ended. The Commission will resume operations on the first business day, Monday, January 28, 2019, with the following caveats. The USITC will NOT be accepting document filings until Wednesday, January 30, 2019, as it reschedules active cases and previously scheduled deadlines affected by the shutdown. As a result, EDIS is operating in a read-only capacity. Document filing has been disabled. In general, the Commission has tolled all statutory and other investigative deadlines pending before it for up to the length of the shutdown. However, specific schedules for each investigative proceeding, including those pending before an Administrative Law Judge, will be revised and new schedules posted. We hope in a week or more for revised schedules to be finalized. While EDIS will go live on Wednesday, January 30, 2019, the Commission requests that parties in specific proceedings wait until revised deadlines are scheduled to file documents in a proceeding. We appreciate everyone’s patience as the Commission resumes operations.[1]

In light of the expedited nature of Section 337 investigations, the closure of the ITC and the resulting disruption of the schedules of the various pending investigations has obviously created substantial logistical issues for the ITC and the parties to the investigations to address as it reopens.

As to the pending investigations, prior to the shutdown, at least one administrative law judge issued a notice stating that “[a]ny deadline that occurs while the Commission is closed shall be extended to the next business day the Commission is open.”[2] The ALJ did note, however, that should the ITC remain closed beyond Jan. 7, 2019, (which it did), “the parties should await further guidance.”[3] This is



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consistent with the prior practice of other ALJs in anticipation of potential shutdowns extending beyond three business days to “reassess the situation upon the government’s reopening.”[4] In response to previous government shutdowns, to avoid the possibility of all suspended deadlines coming due the day the ITC reopens, the ITC has extended such deadlines by the number of days the government was closed.[5]

Due to the length of the shutdown and the increased number of investigations, however, it will not be possible for the ITC to follow this past precedent and simply extend schedules by a set number of days. The ALJs are working with the parties to revise the existing procedural schedules depending on the needs and circumstances of each investigation and the preferences of the ALJ. Noting a “strong preference” to maintain the current schedule, one ALJ ordered that submissions due during the government shutdown, along with proposals for necessary revisions to the schedule, be filed by Feb. 1, 2019.[6] In most investigations, revisions to the procedural schedule are, of course, inevitable and, in many investigations, hearing dates are being rescheduled.

The government shutdown also impeded final consideration of important determinations by ITC ALJs, which cannot become final until reviewed by the ITC commissioners. For example, currently before the ITC is the review of the ALJ’s final initial determination in *Certain Mobile Electronic Devices & Radio Frequency & Processing Components Thereof*, Inv. No. 337-TA-1065. This is particularly noteworthy because, although the ALJ found a violation of Section 337, he recommended “that no limited exclusion order or cease-and-desist order be issued in this investigation due to their prospective effects on competitive conditions in the United States, national security, and other public interest concerns.”[7] A complete denial of relief based on the public interest has only occurred three times and not since 1984.[8] Prior to the shutdown, briefing was set to be completed by Jan. 10 and will have to be rescheduled..[11]

Certain Mobile Electronic Devices is not the only determination the review of which is being delayed by the government shutdown. On Dec. 21, 2018, just before the shutdown, an initial determination in an enforcement proceeding[10] and an initial determination in a 100-day proceeding[11] were issued. As a result of the shutdown, the parties have been unable to petition the ITC for review of these determinations. This is particularly problematic for the 100-day proceeding in the *Certain Motorized Vehicles* investigation as such proceedings were intended to address potentially dispositive issues in an expedited manner.

At the other end of the spectrum, at the start of the government shutdown, there were four Section 337 complaints pending review and institution by the ITC. These pending complaints were:

- *Certain Pocket Lighters*, Docket No. 3355, filed Dec. 6, 2018;
- *Certain Pickup Truck Folding Bed Covers Systems*, Docket No. 3356, filed Dec. 7, 2018;
- *Certain Dental and Orthodontic Scanners and Software*, Docket No. 3357, Filed Dec. 10, 2018; and
- *Certain Integrated Circuits and Products Containing the Same*, Docket No. 3358, Filed Dec. 19, 2018.

Once a complaint is filed, the ITC has 30 days to review it and determine whether to institute an investigation. During those 30 days, the ITC and its staff engage in a detailed review of the complaint and seek input from the proposed respondents and the public as to the potential public interest implications of the requested relief. With the government shutdown, the status of the review for these

complaints is uncertain. One investigation, Cartridges for Electronic Nicotine Delivery Systems, Inv. No. 337-TA-1141, was instituted just under the wire on Dec. 20, 2018. The shutdown has also obviously delayed the filing of new complaints. Potential complainants could start filing new complaints on Jan. 30. And, in fact, three new complaints were filed shortly after the ITC opened.

As of now, parties in pending investigations are working with and/or awaiting the guidance of the ALJs, including the issuance of new procedural schedules. The ITC, however, is open, at least until mid-February, and started accepting filings on Jan. 30, 2019.

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[1] Information on Resumption of USITC Operations, https://www.usitc.gov/press_room/featured_news/information_resumption_usitc_operations.htm

[2] Certain Microfluidic Systems & Components Thereof & Prods. Containing Same, Inv. No. 337-TA-1100, Notice Regarding Possible Closure of Commission, (Dec. 21, 2018).

[3] *Id.*

[4] Certain Magnetic Data Storage and Tapes and Cartridges Containing Same, Inv. No. 337-TA-1076, Notice to the Parties Regarding a Potential Government Shutdown (Feb. 8, 2018); see also, Certain Mobile Electronic Devices & Radio Frequency & Processing Components Thereof (II), Inv. No. 337-TA-1093, Notice Regarding Possible Government Shutdown (Feb. 8, 2018).

[5] See, Ryan Davis, Shutdown Puts ITC Patent Cases Into Deep Freeze, Law360 (Oct. 1, 2013).

[6] See, e.g., Certain Obstructive Sleep Apnea Treatment Mask Systems & Components Thereof, Inv. No. 337-TA-1136, Order No. 9 (Jan. 29, 2019).

[7] Certain Mobile Electronic Devices & Radio Frequency & Processing Components Thereof, Inv. No. 337-TA-1065, Notice of a Commission Determination To Review In Part a Final Initial Determination Finding a Violation of Section 337; Schedule For Filing Written Submissions On The Issues Under Review And On Remedy, Public Interest, And Bonding; And Extension Of The Target Date (Dec. 12, 2018).

[8] Certain Fluidized Supporting Apparatus & Components Thereof, Inv. No. 337-TA-182/188, USITC Pub. 1667 (Oct. 1984).

[9] Certain Mobile Electronic Devices & Radio Frequency & Processing Components Thereof, Inv. No. 337-TA-1065, Notice of a Commission Determination To Review In Part a Final Initial Determination

Finding a Violation of Section 337; Schedule For Filing Written Submissions On The Issues Under Review And On Remedy, Public Interest, And Bonding; And Extension Of The Target Date (Dec. 12, 2018).

[10] Certain Automated Teller Machines, ATM Modules, Components Thereof, & Prods. Containing the Same, Inv. No. 337-TA-989 (Enforcement Proceeding), Enforcement Initial Determination, (Dec. 21, 2018).

[11] Certain Motorized Vehicles & Components Thereof, Inv. No. 337-TA-1132, Initial Determination Finding Complainant FCA Is Not Contractually Barred from Enforcing Its Intellectual Property Rights Against The Named Respondents (Dec. 21, 2018).