

From:
To: [FN-OMB-IntellectualProperty](#)
Subject: Comments to IPEC re: Joint Strategic Plan
Date: Wednesday, March 24, 2010 4:59:31 PM
Attachments: [2010-03-24 Tessera comments re Joint Strategic Plan.pdf](#)

To the Office of the Intellectual Property Enforcement Coordinator:

Attached please find comments pursuant to the IPEC's February 23, 2010 notice in the Federal Register soliciting public comment on the Joint Strategic plan. Please let me know if you have any questions.

Best regards,

Kenneth Weatherwax, Esq.
Irell & Manella LLP
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ccmailg.irell.com made the following annotations

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Ms. Victoria A. Espinel
United States Intellectual Property Enforcement Coordinator
Executive Office of the President
Office Of Management And Budget
intellectualproperty@omb.eop.gov

Subject: IPEC Request for Public Comment Regarding The Joint Strategic Plan

Dear Ms. Espinel:

Tessera, Inc. (“Tessera”) is pleased to submit comments to the Office of the Intellectual Property Enforcement Coordinator (“IPEC”) in response to your February 23, 2010 Notice requesting public comments regarding the Joint Strategic Plan being developed pursuant to the PRO IP Act to facilitate enforcement of intellectual property rights against infringement. Tessera submits these comments in its capacity as a leading innovation company that has funded its ongoing research and development in significant part through licensing and enforcement of intellectual property. Tessera thanks the IPEC for the opportunity to file comments upon this important matter, and looks forward to helping the interagency intellectual property enforcement advisory committee repair a growing gap that has become evident in the Nation’s legal barriers against the importation of infringing goods.

Tessera’s comments are confined to a single, particularly acute problem of intellectual property enforcement at the U.S. border that is generating unnecessary inefficiency, litigation, and ineffectiveness in enforcement of Congress’s statutory barriers against infringement: namely, the inability of holders of U.S. patent rights to gain adequate, symmetric access to information from United States Customs And Border Protection (“CBP”) concerning enforcement of the exclusion orders issued by the United States International Trade Commission (“ITC”) concerning their intellectual property.

Simply put, the ITC is the only agency empowered to issue exclusion orders barring the entry of infringing goods into the Nation; but CBP is the agency charged with enforcing the ITC’s exclusion orders; and CBP declines on confidentiality grounds to usefully share information concerning its enforcement of the ITC’s exclusion orders with either patentholders or the ITC—while at the same time communicating comparatively freely with the *importers* of goods concerning those orders, and even permitting the importation of apparently excludible goods based on importers’ representations in *ex parte* proceedings. And CBP, under this nondisclosure practice, does not disclose information concerning such *ex parte* contacts with importers to the ITC or the patentholder until long after it is too late to prevent irreparable harm to the rights at issue. The reason CBP gives for this asymmetric information sharing is the absence of explicit regulations permitting the sharing of such information concerning ITC exclusion orders.

As widespread recent commentary, recent litigation against CBP, and our own recent experiences all confirm, the asymmetric sharing of enforcement information by CBP has given rise to a crisis in enforcement of intellectual property at the U.S. border; are the subject of widespread and growing criticism; and finally, are susceptible to simple and speedy regulatory correction.



I. EFFECTIVE ENFORCEMENT OF U.S. INTELLECTUAL PROPERTY RIGHTS IS OF CRITICAL AND GROWING IMPORTANCE TO THE U.S. ECONOMY.

As the IPEC is surely aware, the ongoing transformation of the U.S. economy in the direction of an information-based, rather than manufacturing-based, economy has caused a dramatic increase in the importance of United States intellectual property, particularly U.S. patent rights, to the overall economy. According to international accounting firm Deloitte & Touche, U.S. licensing revenue from the licensing of intellectual property now exceeds \$500 billion per year, up more than 30 times from its 1990 level of only \$15 billion.¹ As of 2007, the most recent year for which OECD data is available, U.S. companies generated more than \$82 billion in license fees and royalties relating to intellectual property from licensing to users outside the United States.² Indeed, according to the OECD, “[n]early half of world exports of ‘royalties and license fees’ (for the use of patents, copyright, trade marks) are attributable to the United States,” and in the world economy, it is in “this service category that the United States records its greatest surplus” in trade with other nations.³ In sum, intellectual property is one of the largest areas of competitive advantage that the U.S. enjoys in the global economy.

The growing economic importance of intellectual property rights, particularly including patent rights, makes it all the more critical that they be effectively enforced against misappropriation in other countries and unfair competition with United States rightsholders and their affiliates as a result of that misappropriation. One of the most important tools created by Congress for such enforcement is the power of the International Trade Commission to issue exclusion orders barring entry into the U.S. of goods that infringe U.S. patents and trademarks.

The ITC has a unique role and powers in the American system of intellectual property enforcement. U.S. patent laws generally are not extraterritorial in effect, so the relief available for patent infringement in the federal courts is generally confined to domestic acts; only the ITC, not the courts, possesses the power to issue broad exclusion orders against the entry of foreign goods that infringe those rights. Moreover, unlike for trademarks and copyrights, there are no criminal laws enforcing U.S. patent rights or ITC exclusion

¹ Adam Liberman, *Demystifying Intellectual Property And Understanding Its Relevance To Business In A Global Environment*, at 9 (May 24, 2007) (available at <http://www.abfoundation.com.au/research_knowledge/presentations/2>).

² Organisation for Economic Co-Operation and Development, OECD Stats Extracts, International Trade and Balance of Payments: Trade In Services By Category Of Services (2007) (available at <http://stats.oecd.org/Index.aspx?DataSetCode=MEI_BOP#>).

³ Isabelle Bensidoun & Deniz Ünal-Kesenci, *Globalization In Services: From Measurement To Analysis 25* (OECD Statistics Directorate, Feb. 2008) (available at <[http://www.oilis.oecd.org/oilis/2008doc.nsf/linkTo/std-doc\(2008\)3-rev1](http://www.oilis.oecd.org/oilis/2008doc.nsf/linkTo/std-doc(2008)3-rev1)>).



orders. Partly for this reason, the ITC has become an more important source of enforcement of U.S. patent rights in the last few years than ever before.⁴

Recent developments in case law that have affected the ITC's exercise of its unique power to exclude have cause the effective enforcement of its exclusion orders to become all the more critical. Until recently, the ITC interpreted its enabling statute, Section 337 of the Tariff Act of 1930, to grant the Commission a broad power to issue exclusion orders that extended not only to the goods of parties actually before it, but also to "downstream" entities who took possession of those goods later in the stream of commerce. However, the federal courts recently overruled that interpretation of Section 337, and set stronger restrictions upon the ITC's ability to issue such broad exclusion orders that apply to other entities not before the Commission.⁵ These new limitations on the scope of the ITC's exclusion orders make effective enforcement of the narrower orders that do issue all the more important to ensure that the orders are effective in protecting the rights at stake.

II. TESSERA IS A LEADER IN THE INNOVATION COMMUNITY AND, IN SEEKING TO ENFORCE ITS VALUABLE INTELLECTUAL PROPERTY, AN EXTENSIVE PARTICIPANT IN RECENT ITC EXCLUSION PROCEEDINGS.

Tessera is particularly well positioned to provide feedback about the effective enforcement of ITC orders. Tessera's long history of patenting and licensing its innovations in the semiconductor industry and related fields, and its recent extensive experience with ITC orders protecting such intellectual property and their enforcement at the CBP, give it an ability to speak from first hand knowledge of the problems created by the asymmetric information sharing at CBP concerning enforcement of the ITC's orders.

Tessera is a publicly trade U.S.-based corporation, headquartered in San Jose, California. Tessera's core business is innovation in the semiconductor realm. Its engineers have enabled a broad array of smaller, faster, more reliable, and more feature-rich electronics that impact millions of lives every day. Tessera invests vast amounts of revenue into research and development, including \$71 million in 2009 alone, and 270 of its over 400 employees are directly involved in R&D and engineering.

Tessera recaptures its investment in these beneficial inventions primarily by licensing the resulting intellectual property, which includes approximately 2,000 patents that Tessera has obtained throughout the world. Tessera relies on licensing revenues from its patents to finance its ongoing research and development, and its highly successful licensing program currently licenses its technologies to over 70 companies, including nine of the ten largest semiconductor product manufacturers in the world, many of them U.S. companies.

Tessera's business has mirrored the trend of the overall U.S. economy from competitive advantage in manufacturing toward competitive advantage in innovation. Tessera began in 1990 as a developer and later

⁴ See, e.g., Bryan Schwartz, "Where The Patent Trials Are: How the U.S. International Trade Commission Hit The Big Time As A Patent Litigation Forum," 20 Intellectual Property Law Newsletter, No. 2, at 1 (Winter 2002).

⁵ *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340 (Fed. Cir. 2008).



manufacturer of foundational semiconductor packaging technology. At the same time, Tessera began to license its existing intellectual property to other manufacturers such as Intel, who took advantage of Tessera's innovations to improve their products and increase the impact of those innovations on the U.S. economy. However, Tessera faced a dilemma: by continuing to manufacture its own products, it found itself in competition with the companies that were licensing and using its technology. Eventually, Tessera made a business decision to resolve this dilemma by focusing its efforts where its best competitive advantage lay: in the continued development and licensing of its innovations to its technology customers, and assisting those customers in transitioning those new technologies into commercial manufacturing operations for creating products to sell to the public, rather than in manufacturing products in high volumes itself.

Tessera has benefited considerably from the authority and protection of the ITC. Almost a decade ago, the ITC recognized that Tessera's core patents represented a "paradigm shift" in semiconductor technology and found that the unauthorized practice of that technology by foreign manufacturers violated Section 337.⁶ Since then, in addition to enforcing its patents in the federal courts, Tessera has returned to the Commission to seek enforcement of its intellectual property against additional foreign entities, and recently obtained the issuance of a limited exclusion order, and multiple associated cease and desist orders which took effect against numerous large semiconductor companies in July of 2009.⁷

Tessera has engaged in ongoing contacts with CBP in an effort to determine whether the ITC's exclusion order concerning Tessera's patent rights was being enforced against infringing goods, in light of indications known to Tessera that not all excludible goods under the order were, in fact, being excluded from entry. Like many other patentholders in recent years that have attempted to obtain information about CBP's actions regarding ITC exclusions orders, however, Tessera's efforts to learn about CBP's enforcement determinations concerning the order were largely unsuccessful.

Because patentholders seeking relief from the ITC must have adequate access to information concerning the enforcement of their orders by the CBP in order to prevent importers from exploiting their greater access to such information to frustrate enforcement of the ITC's orders, Tessera respectfully submits that the Joint Strategic Plan should include policy and/or regulatory changes to alleviate this asymmetry of information and facilitate enforcement efforts for ITC exclusion orders on a leveled playing field that allows equitable information sharing with holders of patent rights.

⁶ *Certain Semiconductor Chips With Minimized Package Size And Products Containing Same (I)*, No. 337-TA-432, Initial Determination, 2001 ITC LEXIS 788, at *189 (Sept. 25, 2001), *affirmed as Final Determination*, 66 Fed. Reg. 58524 (Nov. 21, 2001).

⁷ *Certain Semiconductor Chips With Minimized Package Size And Products Containing Same (II)*, Inv. No. 337-TA-605, Final Determination (Jun. 4, 2009) (pub. ver.).



III. PATENTHOLDERS MUST HAVE THE RIGHT TO ADEQUATELY MONITOR THE EFFECTIVENESS OF THE EXCLUSION ORDERS THAT THE ITC ISSUES TO ENFORCE THEIR INTELLECTUAL PROPERTY.

In the view of CBP, there are no regulatory provisions authorizing CBP to disclose any information to patentholders concerning the enforcement of ITC exclusion orders relating to their intellectual property.⁸ As a result, CBP declines to notify such patentholders when goods subject to the exclusion order are detained, excluded, or seized.

This lack of information shared with patentholders is made all the more damaging to enforcement by CBP's concomitant, asymmetric, practice of willingly communicating with *importers* concerning exclusion orders that potentially render the importer's products excludible—and even permitting the importers to make *ex parte* submissions to CBP Headquarters to claim that particular goods should be deemed to be outside the scope of the ITC's orders, without any disclosure to either the patentholder or the ITC until weeks or months later, and no opportunity for any party to oppose or counter the importers' submissions until long after the goods have already entered the country.⁹

The informational asymmetry between patentholders and importers in the enforcement process for ITC exclusion orders has been strongly and correctly criticized, for numerous reasons.¹⁰ Among the more important problems caused by this asymmetry are the following:

- The ITC only issues exclusion orders after it has already determined that the respondents in its investigation are violating the intellectual property rights at issue. Yet under the CBP's procedures, the adjudicated violators of those rights have *full* information about the order and the rights at issue, but patentholders are given *no* information about violative shipments – an informational asymmetry that unfairly favors the importers.
- In addition to the extensive critical commentary that has arisen concerning the CBP's information policy, patentholders attempting to find out whether their rights are being enforced via the ITC's exclusion orders create massive inefficiencies that negatively effect both the patentholders and CBP, and benefit only importers seeking to evade exclusion orders. Such patentholders often bombard the CBP with repeated, and repeatedly unsuccessful, requests for information, both

⁸ The current regulations concerning CBP procedures on detention of articles subject to restriction are found at 19 C.F.R. § 12.39 (2008).

⁹ See, e.g., *id.* §§ 12.39(b), 177.2, 177.4, 177.8; see also, e.g., Merritt Blakeslee & Christopher V. Meservy, "Seeking Adjudication Of A Design-Around In Section 337 Patent Infringement Investigations: Procedural Context And Strategic Considerations," 35 AIPLA Quarterly Journal 385, 412-13 (Fall 2007).

¹⁰ See, e.g., Debra D. Peterson, "The Knowledge To Act: Border Enforcement Of Section 337 Exclusion Orders And The Need For Exclusion Order Disclosure Regulations," 17 Federal Circuit Bar Journal 607 (2008).

informally and via the “lengthy and cumbersome Freedom Of Information Act (FOIA) process,”¹¹ burdening both the patentholders and CBP with extensive additional work with little or no result or closure. Some patentholders have even resorted to filing litigation against CBP, causing the government to have to defend the CBP in federal court, but once again leading to no change in the CBP’s no-information policy.¹²

- Although patentholders have the right to ask the ITC itself to correct or change the exclusion order if they perceive that the order is being evaded, that option—even if it succeeds—is not able to prevent importers’ evasive maneuvers at the CBP level from causing irreparable harm to the patentholder and thus to enforcement. An ITC exclusion order under Section 337 is very different in this respect from an injunction issued by a federal court. If a court’s injunction is violated, it is possible that the court will be able to award relief to the rightsholder at the expense of the violator and thus to vindicate the rights at stake. In sharp contrast, the ITC statute offers *no* remedy to the patentholder for past violations of exclusion orders. Any lapse in enforcement of an ITC exclusion order is essentially irremediable; and even a later order that renders future enforcement more effective can provide no remedy for the period prior to that time during which enforcement failed.
- The rising difficulty in identifying violative products, and the rise in certification provisions in exclusion orders, make the information asymmetry described above all the more detrimental. Many ITC exclusion orders involve tiny, sophisticated devices such as semiconductor chips or electronics, where detailed investigation is required to ascertain whether they lie within the scope of the order, making it easier for importers to raise doubts in *ex parte* communications concerning whether the goods fall under the scope of the exclusion order. Relatedly, it has become increasingly popular for exclusion orders to employ certification provisions, under which an importer may certify to CBP upon entry that a shipment of goods is not subject to the order, to allay the problems that would arise if CBP had to personally inspect each and every shipment of goods to determine whether they are excludible. However, if patentholders are given no access to such certifications and no information concerning whether they are even taking place, let alone which goods are being certified as not subject to exclusion, this otherwise salutary “honor system,” intended to prevent needless work for enforcers, may instead become a vehicle for making enforcement a practical nullity.

In addition to the asymmetry of information, the CBP’s current process for enforcing ITC orders creates related unjustified, unnecessary impediments to effective enforcement, as a result of procedural flaws that can mostly be remedied easily. These additional impediments include the following:

- While the ITC can, following *inter partes* adjudication, issue supervisory orders modifying its exclusion orders, or instructing the CBP concerning how they should be enforced against products, it literally takes months (at best) for requests for such a ruling to bear fruit. In the meantime, the

¹¹ CBP, Copyright/Trademark/Trade Name Protection: Disclosure Of Information (proposed regulations), 60 Fed. Reg. 36, 249, 36,250 (July 14, 1995).

¹² *Funai Elec. Co., Ltd. v. United States & U.S. CBP*, No. 09-00374 (Court of Int’l Trade Oct. 6, 2009) (dismissing complaint for lack of jurisdiction).

ITC cannot enforce its own orders, for that authority is held only by CBP, and any lapse of enforcement at the CBP level cannot be remedied at the ITC. Thus, any supervisory orders by the ITC are far too slow to prevent evasive maneuvering by enforcement lapses caused by the actions of importers at the CBP level.

- The CBP's disclosure regulations inexplicably discriminate against the holders of patent rights in particular. CBP has regulations permitting disclosure of enforcement information to holders of trademarks, trade names, and copyrights, but *not* holders of patent rights.¹³ If patentholders simply had disclosure rights similar to those of other rightsholders, much of the problems described above would be ameliorated.
- The ITC's exclusion orders and the patents they address are obviously public, not confidential, documents. In contrast, it is claimed that information concerning importers' attempted shipments into the country is confidential, even though regulations exist that explicitly authorize the sharing of shipment information with rightsholders in the areas of trademark, trade dress and copyright. The result is that CBP interprets its regulations to expansively permit it to share information with importers even where the regulations are ambiguous about such information sharing, but declines to disclose enforcement information to patentholders even when the regulations are silent on the basis that explicit regulatory authorization to share information is lacking.
- Currently, when CBP makes its Headquarters Rulings on importers' requests to determine whether particular goods are subject to the exclusion order, CBP considers, and sometimes adopts, importers' *ex parte* noninfringement arguments. Yet CBP's nondisclosure practice does not permit the patentholders any useful knowledge of, let alone a right to timely respond to, the importers' representations. Indeed, the patentholder is normally kept in the dark so that it is impossible to respond to the importers' representations until it is far too late for the response to have practical effect.
- Importers appear to be becoming increasingly sophisticated at taking advantage of the *ex parte* process to obtain CBP Headquarters Rulings that effectively overrule, at least temporarily, the ITC's determinations. The growing clamor over this problem, and the recent litigation against CBP concerning this asymmetric process, shows that matters are becoming worse rather than better.

III. THE ENFORCEMENT PROCESS FOR ITC ORDERS SHOULD BE REVISED SO THAT IT DOES NOT UNFAIRLY FAVOR IMPORTERS OVER RIGHTSHOLDERS.

The CBP's nondisclosure of information concerning its ITC exclusion order enforcement to patentholders should be easy to remedy.

¹³ 19 C.F.R. §§ 133.21 (trademark and trade names), 133.25(c) (same), 133.42 (copyrights), 133.43 (same) (2008).



First, regulations should be adopted as necessary to explicitly authorize and require disclosure to patentholders of enforcement data, including seizures, certifications, and Headquarters rulings pursuant to ITC exclusion orders, at least comparable to the access currently enjoyed by the holders of trademarks, trade names, and copyrights with respect to similar seizures and detentions.¹⁴

Second, CBP procedures should be modified so that Headquarters rulings concerning whether particular goods are subject to exclusion orders are decided by a fair *inter partes* process with timely input permitted from the patentholder, rather than *ex parte* without the patentholder's knowledge or involvement. The CBP has already conducted a pilot program in which such rulings were decided on an adversary basis.¹⁵ Such a procedure should become the norm.

These changes would help not only patentholders, and the U.S. economy, by facilitating the effective and efficient enforcement of U.S. patent rights. They would also help CBP do its job more efficiently and avoid unnecessary work, for at least the following reasons.

- The disclosure of this information to patentholders will create only minimal procedural work for CBP. Indeed, CBP already reports data concerning enforcement to its Headquarters under its current procedures. Thus, the sharing of such information should not create significant additional burdens. Indeed, the reduction in workload caused by the reduction in contacts from patentholders repeatedly seeking information, and the reduction in FOIA requests would probably more than offset any burden from responding to requests for information that is already collected.
- U.S. policy already gives strong support for public/private partnerships between CBP and holders of intellectual property rights other than patents. In 2006, CBP stated in a press release that "To effectively enforce intellectual property rights, Customs and Border Protection (CBP) relies heavily on the cooperation of the owners of those rights. . . . It has long been Customs['] experience that industrial intelligence gathered by parties-in-interest is a powerful tool in aiding us to detect and deter a violative importation. To merely rely on the fact of recordation or the existence of the exclusion order is not enough."¹⁶ There is no reason why this recognition should not extend equally to holders of patent rights that are the subject of an ITC exclusion order.
- Just as CBP has acknowledged in the past, improved communications with rightsholders will allow CBP to maximize its limited resources by better targeting and identification of violative shipments. The patentholder often has greater knowledge and resources, and its incentives will be aligned with effective enforcement of the exclusion order. It makes little or no sense for CBP to treat patentholders as quasi-adversaries, as occurs under the current system. The current policy of making the enforcement process an open book to importers, but a black box to the patentholder, is

¹⁴ A sample proposed regulation is attached to the end of this letter.

¹⁵ George McCray, Supervisory Attorney-Advisor/Chief, Intellectual Prop. Rights Branch, CBP, Address at the Annual meeting of the International Trade Commission Trial Lawyers Association (Nov. 9, 2006).

¹⁶ Peterson, *supra* note 10, at 636 & n.175.

highly inefficient for both the patentholder and the CBP.

- If patentholders, like other rightsholders, are allowed access to CBP enforcement decisions and participation in CBP's deliberations over Headquarters rulings, importers' knowledge of that access and participation are almost certain to improve voluntary compliance with exclusion orders. If an importer knows that its representations to CBP will be subject to rebuttal, it is likely that those representations will become more, rather than less, accurate—making everyone's job easier, including that of CBP.

CONCLUSION

Tessera is eager to work with the IPEC and the interagency committee to advance its laudable objective of improving enforcement of intellectual property. We are confident that the recommendations of the Joint Strategic Plan could make a difference in ending the unnecessary and avoidable problems that have arisen in the effective enforcement of the International Trade Commission's exclusion orders, and strike a much-needed balance between confidentiality and enforcement that will reduce the inefficiency currently experienced by all sides.

However, time is of the essence. As already explained above, for Tessera and other rightsholders who already face the prospect of ineffective enforcement of exclusion orders involving their patent rights, the lapse in effective enforcement is continuing, every day, to cause growing irreparable harm.

Please let us know if you have any questions or concerns about our submitted comments, or about any other aspect of Tessera's intellectual property or enforcement efforts. We would welcome the opportunity to visit with you in person to demonstrate and share our concerns with these critically important issues of U.S. intellectual property enforcement.

Respectfully submitted,



Barney Cassidy
Senior Vice President and General Counsel
Tessera, Inc.

Attachment



ATTACHMENT

Proposed Draft Regulation For Information Access For Patentholders

§ 12.39(f) – *Disclosure of information and samples available to exclusion order complainant*

- (1) *Disclosure before and during detention.* From the time goods are presented for CBP examination until the time the goods are released, excluded or seized, CBP may disclose to the complainant any of the following information in order to obtain assistance in determining whether the goods are subject to an exclusion order:
 - (i) The date of importation;
 - (ii) The port of entry;
 - (iii) A description of the goods;
 - (iv) The quantity involved; and
 - (v) The country of origin of the goods.
- (2) *Disclosure of requests for Headquarters Rulings.* When an importer requests a Headquarters ruling concerning whether goods are subject to exclusion or seizure under an exclusion order, CBP shall within 5 days disclose to complainant the request and any information submitted with the request. Complainant shall have 10 days to provide a response to the request before the ruling is rendered.
- (3) *Disclosure after exclusion or seizure.* When goods are excluded or seized under this section, CBP shall disclose to the complainant the following information, if available, within 10 days upon request, and within 30 days in any other event, excluding weekends and holidays, of the date of the notice of exclusion or seizure:
 - (i) The date of importation;
 - (ii) The date of denial of entry or seizure;
 - (iii) The port of entry;
 - (iv) A description of the goods;
 - (v) The quantity of goods involved;
 - (vi) The name and address of the manufacturer;



- (vii) The country of origin of the merchandise;
- (viii) The name and address of the exporter;
- (ix) The name and address of the importer; and
- (x) Information from available shipping documents (such as manifests, air waybills, and bills of lading), including mode or method of shipping (such as airline carrier and flight number) and the intended final destination of the merchandise.

(3) *Samples available to exclusion order complainant.*

- (i) At any time following presentation of the goods for CBP examination but prior to exclusion or seizure, CBP may, and upon the request of the complainant shall, provide a sample of the suspect goods to the complainant for examination or testing to assist in determining whether the imported goods are subject to an exclusion order. To obtain a sample under this section, the complainant must furnish CBP with a bond in the form and amount specified by the port director, conditioned to hold the United States, its officers and employees, and the importer or owner of the imported goods harmless from any loss or damage resulting from the furnishing of the sample by CBP to the complainant. The complainant must return the sample to CBP upon demand or at the conclusion of the examination or testing. In the event the sample is damaged, destroyed, or lost while in the possession of the complainant, the complainant shall, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR § 12.39(f)(3)(i) was [damaged/destroyed/lost] during examination or testing to determine whether the goods were subject to the exclusion order.”
- (ii) At any time following exclusion or seizure of the goods, CBP may, and upon the request of the complainant shall, provide a sample of the suspect goods to the complainant for examination or testing or other use in pursuit of a related private civil remedy for infringement of the exclusion order. To obtain a sample under this section, the complainant must furnish CBP with a bond in the form and amount specified by the port director, conditioned to hold the United States, its officers and employees, and the importer or owner of the imported goods harmless from any loss or damage resulting from the furnishing of the sample by CBP to the complainant. The complainant must return the sample to CBP upon demand or at the conclusion of the examination or testing. In the event the sample is damaged, destroyed, or lost while in the possession of the complainant, the complainant shall, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR § 12.39(f)(3) (ii) was [damaged/destroyed/lost] during examination or testing or other use.”

Note: This draft regulation is adapted from one that originally appeared in Debra D. Peterson, “The Knowledge To Act: Border Enforcement Of Section 337 Exclusion Orders And The Need For Exclusion Order Disclosure Regulations,” 17 Federal Circuit Bar Journal 607 (2008).