U.S. International Trade Commission

Evaluation on Controlling Confidential Business Information and Business Proprietary Information

OIG-ER-12-09

June 20, 2012

Office of Inspector General

The U.S. International Trade Commission is an independent, nonpartisan, quasi-judicial federal agency that provides trade expertise to both the legislative and executive branches of government, determines the impact of imports on U.S. industries, and directs actions against certain unfair trade practices, such as patent, trademark, and copyright infringement. USITC analysts and economists investigate and publish reports on U.S. industries and the global trends that affect them. The agency also maintains and publishes the Harmonized Tariff Schedule of the United States.

Commissioners

Shara L. Aranoff, Chairman
Deanna Tanner Okun
Daniel R. Pearson
Irving A. Williamson
Dean A. Pinkert
David S. Johanson

UNITED STATES INTERNATIONAL TRADE COMMISSION

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20436

June 20, 2012 OIG-KK-009

Chairman Aranoff:

This memorandum transmits the Office of Inspector General's final report, Evaluation on Controlling Confidential Business Information and Business Proprietary Information (CBI/BPI), OIG-ER-12-09. When finalizing the report, we considered management's comments on our draft report and have included those comments in their entirety in Appendix A. The evaluation focused on whether the Commission effectively controlled the use and retention of CBI/BPI (outside of EDIS) after official investigations have been closed.

This evaluation contains six recommendations for corrective action. In the next 30 days, please provide me with your management decisions describing the specific actions that you will take to implement each recommendation.

Thank you for the courtesies extended to the evaluators during this review.

Philip M. Heneghan

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Results of Evaluation

The objective of this evaluation was to answer the following question:

> Does the Commission effectively control the use and retention of CBI/BPI (outside of EDIS[1]) at the end of investigations and proceedings?

No. The Commission does not effectively control the use and retention of CBI/BPI (outside of EDIS) at the end of investigations and proceedings.

We evaluated the Commission's policies, procedures, and practices of controlling the use and retention of CBI/BPI at the end of investigations and proceedings and found:

- CBI/BPI was retained indefinitely as a routine practice by employees as a matter of convenience and preference;
- Current practices for the safeguarding of CBI/BPI were not consistent with Commission guidance as provided in the *Handbook for Protecting National Security Information, Confidential Business Information, and Sensitive Information;*
- Procedures regarding the retention of CBI/BPI were not consistent between Commission Offices;
- The Commission does not follow established policies regarding the retention or disposal of documents that are not official records (nonrecord materials); and
- Many employees were unaware if they ever received training on the appropriate handling, use, retention, and destruction of CBI/BPI or nonrecord information.

We identified the following two problem areas: (1) employees did not follow the Commission policies for controlling the handling of CBI/BPI within the Commission; and (2) employees did not follow the Commission's policies for controlling the handling of nonrecord information within the Commission. These problem areas and corresponding recommendations relating to the handling of CBI/BPI are described in detail below.

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[1] The Electronic Document Information System (EDIS) is the repository for all documents filed in relation to an investigation or proceeding conducted by the United States International Trade Commission (USITC).

Problem Areas and Recommendations

Problem Area 1:
Employees did not follow Commission policies for controlling the handling of CBI/BPI within the Commission.

The *USITC Handbook for Protecting National Security Information, Confidential Business Information, and Sensitive Information* (the Handbook), provides the policy and procedure for controlling the handling of CBI/BPI. The definition of CBI/BPI can be found in the Commission's regulations at 19 C.F.R. §201.6. The Commission's regulations define CBI/BPI as information which concerns or relates to the business processes and information the disclosure of which is likely to impair the Commission's ability to conduct its business or cause substantial harm to the competitive position of the organization from which the information was obtained.

The Handbook addresses, among other things, the storage, marking, transmission, retention, and destruction of CBI/BPI; however, the Handbook which was last updated in 2003, contained a number of outdated policies and procedures. In addition, this Handbook was primarily written to address the handling of National Security Information and CBI/BPI appears to be a later addition or after thought. The CBI/BPI policies were unclear and confusing in important places such as transmission and destruction which led to some of the findings uncovered during this evaluation.

During this evaluation, we observed many instances where employees were not following even the outdated policies as outlined in the Handbook. We found documents which contained CBI/BPI that had been reproduced but were not properly labeled with that distinction. We identified documents containing CBI/BPI that were sitting on open shelves. We also located multiple copies of documents containing CBI/BPI information for investigations and proceedings that had closed. When employees were asked about the policies controlling CBI/BPI there was confusion as to who was responsible and a variety of responses including:

- Employees were unaware of any policies regarding the destruction of CBI/BPI;
- Individual attorneys are in charge of the destruction of the CBI/BPI material with no audit or follow up; and
- Some Office Managers are in charge of the destruction of nonrecord CBI/BPI with no audit or follow up.

Additionally, when asked why copies of CBI/BPI documents were retained past the closure[2] of investigations and proceedings, a practice that violates the policies contained in the Handbook, responses included:

- Some employees always keep electronic trial exhibits until they run out of room;
- Some employees have been told that all CBI material should be destroyed at the close of investigations; and
- Some employees have never been told when it was an appropriate time to destroy CBI/BPI documents at the end of investigations.

Further, some personal offices contained nonrecord copies of CBI/BPI documents for investigations and proceedings that had concluded and some of the offices inspected did not separate the nonrecord copies of CBI/BPI documents of different investigations and proceedings, leaving documents in stacks on the floor and shelves. The employees in these offices had trouble distinguishing what CBI/BPI documents existed in their own areas.

The Handbook also states that training will be provided to each new employee within three months of their arrival date and training will be provided to all employees on an annual basis; however, during the interview process, many staff members stated they had never been trained or could not recall whether or not they ever received training. In addition, none of the employees acknowledged the existence of the Handbook.

When asked about CBI/BPI polices, responses included:

- Employees have been told to keep everything because everything is a government record and nothing should be destroyed;
- The only training that is done within offices is done yearly by the Records staff; and
- The requirement to destroy CBI is based on a lack of space within the office.

Additionally, one employee noted that an employee found a document containing CBI information that was not disposed of properly. The employee who found the document was able to locate the employee who improperly disposed of the document and, during the subsequent discussion, the employee noted that the employee responsible for the improper disposal was unaware of the proper procedures to follow.

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[2] For the purposes of this evaluation, we defined an investigation/proceeding as being closed when the statute of limitations has expired regarding possible appeals or is terminated by settlement or withdrawal of the complaint.

Because the staff were not adequately trained or provided guidance for handling CBI/BPI information, employees were left to determine on their own the best practices for how documents containing nonrecord copies of CBI/BPI should be handled or destroyed. As a result, each Office was governed by inconsistent policies.

Employees need to be trained on how to properly handle information provided to the Commission. Any staff member who is not properly handling CBI/BPI documents puts the Commission's reputation for protecting that information at risk. Any unauthorized access or loss of this data would not only be an embarrassment to the Commission, but could jeopardize the public's trust in the Commission's ability to properly safeguard confidential and proprietary business information.

Recommendation 1: That the Commission create a Commission-wide written policy that specifically addresses procedures for handling and destroying nonrecord copies of CBI/BPI documents when an investigation or proceeding is closed.

Recommendation 2: That the Commission Offices identify a lead and alternate individual who will be responsible for ensuring that nonrecord copies of documents containing CBI/BPI are destroyed when appropriate.

Recommendation 3: That the Office of the Chief Information Officer develop a procedure to periodically evaluate the effectiveness of the CBI/BPI policy.

Recommendation 4: That the Commission train employees on the policies and procedures for handling CBI/BPI during the course of an investigation and destroying CBI/BPI at the conclusion of an investigation.

Problem Area 2:
Employees did not follow the Commission's policies for controlling the handling of nonrecord information within the Commission.

The National Archives and Records Administration (NARA) requires agencies to incorporate the management of nonrecord materials into their Records Management Program.[3] The definition of nonrecord material can be found at 36 CFR 1222.14. Nonrecord materials are U.S. Government-owned documentary materials that do not

[3] See 37 CFR 1222.14, http://www.archives.gov/about/regulations/part-1222.html ("An agency's records management program also needs to include managing nonrecord materials.")

meet the conditions of records status or that are specifically excluded from the statutory definition of records. Some examples of nonrecord materials that may be applicable to the Commission are publications, library materials preserved for reference, and extra copies of documents used for convenience or reference. The disposition of nonrecord material is supposed to be determined by the Commission and does not require NARA approval; however, one of the guidelines provided by NARA includes requiring nonrecords to be purged when they are no longer needed for reference.[4]

Throughout our evaluation, we found nonrecord CBI/BPI documents from investigations and proceedings that have concluded. The hard copy documents remain on shelves or in electronic files long after they should have been disposed of according to Commission record keeping policies.

Commission staff stated that, in order to do their jobs effectively, it was necessary to keep hard copy and electronic versions of documents containing CBI/BPI readily available, despite having access to these documents through EDIS. The main explanation for why documents are kept after the close of investigations and proceedings was that employees preferred the "accessibility" of the hard copy or the electronic version retained on their local directory. Based on this practice, physical and electronic copies of documents are retained for potential use and remain on shelves and in personal network folders long past the close of investigations.

We observed one Office which had CBI/BPI hard copy documents filed on shelves identified by the employee who was responsible for them; however, the documents themselves were disorganized and not clearly labeled, and some shelves contained nonrecord copies of CBI/BPI documents from former employees that were never removed at the end of their employment. Further, some personal offices contained nonrecord copies of CBI/BPI documents for investigations and proceedings that had concluded and some of the offices inspected did not separate the nonrecord copies of CBI/BPI documents of different investigations and proceedings, leaving documents in stacks on the floor and shelves. The employees in these offices had trouble distinguishing what CBI/BPI documents existed in their own areas.

Employees are also maintaining electronic documents of CBI/BPI on the Commission's network for indeterminate periods of time. Some documents are deleted when there is a lack of server space; however, the majority of the electronic documents that contain CBI/BPI for closed investigations and proceedings are never deleted.

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[4] See 36 CFR 1222.16, http://www.archives.gov/about/regulations/part-1222.html ("Nonrecord materials should be purged when no longer needed for reference. NARA's approval is not required to destroy such materials.")

When asked why electronic documents are kept after the close of investigations and proceedings, responses included:

- It would take too much time to delete the material exchanged by the parties and only keep the documents authored;
- A reason for not relying on EDIS (besides historical problems) is that the documents are in PDF format and the argument sections cannot be easily copied;
- "Form files" are used as a research tool in order to prevent "reinventing the wheel;"
- Some of the documents could be scrubbed, but others contain an analysis that requires looking at specific information for comparison. In those cases, the CBI information is what makes the document(s) useful;
- Employees were unable to find official record of investigator notes on EDIS that should have been part of official record so they are forced to rely on their own copies; and
- Some documents on EDIS are not searchable.

Each time an employee maintains a nonrecord document outside of EDIS that contains CBI/BPI, the risk of unauthorized access to the Commission's information increases. In addition, maintaining large amounts of unnecessary records reduces resources available for other Commission requirements and could result in increased costs for additional servers and storage capacity at secondary data centers.

Recommendation 5: That the Commission evaluate the legality and the risk of preserving nonrecord copies of documents after the close of investigations and proceedings.

Recommendation 6: That the Commission up-date policies and procedures for managing nonrecord material, both in electronic and hard copy formats.

Management Comments and Our Analysis

On June 15, 2012, Chairman Deanna Tanner Okun provided management comments on the draft evaluation report. The Chairman agreed with our assessment that there are two problem areas related to the use and retention of CBI/BPI and concurred with our conclusions. The Chairman's response is provided in its entirety as Appendix A.

Objective, Scope, and Methodology

Objective:

Does the Commission effectively control the use and retention of CBI/BPI (outside of EDIS) at the end of investigations and proceedings?

Scope:

The scope of this evaluation included closed out investigations.

For the purposes of this evaluation, we defined an investigation/proceeding as being closed when the statute of limitations has expired regarding possible appeals or is terminated by settlement or withdrawal of the complaint.

We examined the OUII 337 investigation history reports to determine the responsible internal employees for closed proceedings.

The term "business proprietary information" (BPI) or "confidential business information" (CBI) is defined in the Commission's regulations at 19 C.F.R. §201.6. The regulations define confidential business information as information which concerns or relates to the trade secrets, processes, operations, style of works or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information.

The term "confidential business information" has the same meaning as "business proprietary information" as defined in the Commission's regulations at 19 C.F.R. §201.6.

Methodology:

We reviewed of all statutes, regulations, policies, and procedures applicable to the USITC regarding the destruction or preservation of documents.

We conducted interviews, and reviewed document storage areas containing CBI/BPI, including both physical and electronic storage facilities.

The methodology used during this inspection included in-person interviews and physical inspections of offices, storage areas, and shared drives.

We interviewed employees in the followings Offices:

- Office of Operations
- Office of Investigations
- Office of Unfair Import Investigations
- Office of the Administrative Law Judges
- Office of the General Counsel
- Office of Docket Services

We reviewed the onsite storage areas of CBI/BPI material for the following Offices:

- Office of Operations
- Office of Investigations
- Office of Unfair Import Investigations
- Office of the Administrative Law Judges
- Office of the General Counsel
- Office of Docket Services

We analyzed the results of our interviews and the results of our physical review of the document storage areas containing CBI/BPI.

Appendix A: Management Comments on Draft Report

Chairman

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, DC 20436

CO76-KK-023

June 15, 2012

MEMORANDUM

TO: Philip M. Heneghan, Inspector General

FROM: Deanna Tanner Okun, Chairman

SUBJECT: Management Response to the Inspector General's Draft Report, "Evaluation on Controlling Confidential Business Information and Business Proprietary Information (CBI/BPI)"

I am in receipt of the Inspector General's draft report, *Evaluation on Controlling Confidential Business Information and Business Proprietary Information (CBI/BPI)*, dated May 21, 2012. I appreciate the opportunity to review the draft report and to provide comments.

The Inspector General's draft report found that the Commission does not effectively control the use and retention of CBI/BPI (outside of EDIS) at the end of investigations and proceedings. The report identified two problem areas: (1) employees did not follow the Commission policies for controlling the handling of CBI/BPI within the Commission; and (2) employees did not follow the Commission's policies for controlling the handling of non-record information within the Commission.

We agree with the findings. The Commission is dedicated to effectively controlling the use and retention of CBI/BPI. The protection of such information is critical to our investigatory process. While we have policies and procedures in place to control the internal use and retention of such information, we need to ensure that employees adhere to those policies. Thank you for reviewing the Commission's procedures and making the recommendations to improve their effectiveness.

"Thacher's Calculating Instrument" developed by Edwin Thacher in the late 1870's. It is a cylindrical, rotating slide rule able to perform complex mathematical calculations involving roots and powers quickly. The instrument was used by architects, engineers, and actuaries as a measuring device.

To Promote and Preserve the Efficiency, Effectiveness, and Integrity of the U.S. International Trade Commission

U.S. International Trade Commission
Office of Inspector General
500 E Street, SW
Washington, DC 20436

Office: 202-205-6542
Fax: 202-205-1859
Hotline: 202-205-6542
OIGHotline@USITC.gov