



UNITED STATES INTERNATIONAL TRADE COMMISSION

**AN INTRODUCTION TO  
ADMINISTRATIVE PROTECTIVE ORDER  
PRACTICE IN IMPORT INJURY  
INVESTIGATIONS**

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## I. GENERAL

In antidumping and countervailing duty (AD/CVD) investigations under Title VII of the Tariff Act of 1930 (19 U.S.C. Section 1671 et seq.), the Commission receives and collects significant amounts of "business proprietary information" (BPI) such as data on private companies' profits, investment, and production processes. Similarly, in safeguards investigations under sections 202 and 204(c) of the Trade Act of 1974 (19 U.S.C. Sections 2252, 2254(c)<sup>1</sup>), the Commission receives and collects "confidential business information" (CBI).<sup>2</sup> The Commission holds such BPI/CBI in strict confidence and does not publish such information in ways that would reveal the operations of individual firms without the consent of the submitter.

However, the Commission is required by statute to make available to certain representatives of certain parties to an AD/CVD or safeguards investigation the BPI/CBI gathered in that investigation. This access is permitted subject to an administrative protective order (APO) which is issued by the Secretary to the Commission (Secretary) and is designed to protect the confidentiality of the BPI/CBI.

The APO process is governed by statute<sup>3</sup> and the Commission's rules,<sup>4</sup> and this introduction should not be construed as modifying or limiting them in any way. If you intend to practice in this area, do not rely exclusively on this introduction; consult the statute and the Commission's rules. You should read the entirety of 19 CFR Parts 201, 206, and 207.

Questions regarding APO practice should be directed to the Docket Services Division (Dockets) in the Office of the Secretary, telephone (202) 205-1802.

Hearing-impaired individuals can obtain information on this matter via the Commission's TDD terminal at (202) 205-1810.

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<sup>1</sup> However, no such access is provided in proceedings under 19 U.S.C. Section 2254(a).

<sup>2</sup> The term "business proprietary information" (BPI) has the same meaning as the term "confidential business information" (CBI) as defined in section 201.6(a) of the Commission's Rules of Practice and Procedure.

<sup>3</sup> Section 777(c)(1)(A) of the Tariff Act of 1930 (19 U.S.C. Section 1677f(c)(1)(A)) provides that:

Upon receipt of an application... the Commission shall make all business proprietary information presented to, or obtained by it, during a proceeding (except privileged information, classified information, and specific information of a type for which there is a clear and compelling need to withhold from disclosure) available to interested parties who are parties to the proceeding under a protective order ...

Section 202 of the Trade Act of 1974 (19 U.S.C. Section 2252) contains a similar provision.

<sup>4</sup> The most directly applicable provisions are 19 CFR Sections 201.6, 206.8, 206.17, 207.3, and 207.7.

## **II. THE APO**

At the beginning of each antidumping, countervailing duty, and safeguards investigation (including a suspended investigation) or review of an outstanding antidumping or countervailing duty order, the Secretary signs and issues an APO applicable to the proceeding. The APO contains a list of obligations that must be assumed by a person to whom BPI/CBI is disclosed under the APO. Those obligations include such requirements as not divulging BPI/CBI to unauthorized persons, using the BPI/CBI only for the relevant investigation and certain related litigation, properly storing and transmitting BPI/CBI, and reporting possible breaches of the APO. The APO also specifies when and how BPI/CBI disclosed under the APO must be returned or destroyed, and describes the sanctions that may be imposed on a person who breaches his or her obligations under the APO.

Please note that the APO form requires safeguarding of all BPI/CBI a person receives in an investigation (other than BPI/CBI otherwise available to him/her, e.g., BPI/CBI received by an attorney from his/her client). If, for example, a person subject to the APO receives BPI/CBI that was erroneously included in the public version of a brief, the person nevertheless must protect the BPI/CBI from further disclosure, including by attempting to retrieve copies of the brief from recipients who are not under the APO.

You should note that there are two different sets of forms: one for AD/CVD (including five-year review) investigations (see Appendix A); the other for safeguards investigations (see Appendix B). The forms are labeled in the upper right-hand corner. Although the APO forms may be photocopied and downloaded from the Internet, they may not be retyped or altered in any way.

The Secretary may revise the APO at any time and may require that you re-file an APO application.

A related form is the Protective Order Application for Proprietary Information for Binational Panel Review under Article 1904 of the North American Free Trade Agreement. This form (NAFTA APO Form C) can be found in Appendix C.

Copies of the APO forms, including applications, are obtainable by visiting the USITC Web site at [http://www.usitc.gov/secretary/apo\\_forms\\_and\\_redbook.htm](http://www.usitc.gov/secretary/apo_forms_and_redbook.htm) and downloading the form.

## **III. THE APPLICATION PROCESS**

### **A. Who can apply**

Only certain persons are permitted under the statutes and legislative history to apply for disclosure of BPI/CBI under APO. The Commission's rules call these persons "authorized applicants."<sup>5</sup> To qualify as an authorized applicant, a person must meet the following criteria:

1. The person must be one of the following:

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<sup>5</sup> The term "authorized applicant" means an individual. Consequently, each attorney, consultant, or expert in a firm who seeks access to BPI/CBI must fill out a separate application. A person who obtains disclosure of BPI/CBI under APO must not discuss that information with a colleague in the same firm who has not filed an application that has been accepted by the Secretary.

- a) An attorney;<sup>6</sup>
  - b) A consultant or expert under the direction and control of an attorney representing an interested party which is a party to the investigation;
  - c) A consultant or expert who appears regularly before the Commission;<sup>7</sup> or
  - d) A representative of an interested party which is a party to the investigation, if such interested party is not represented by counsel.<sup>8</sup>
2. The person must represent an interested party which is a party to the relevant AD/CVD or safeguards investigation. The term “interested party” is defined by statute and regulation.<sup>9</sup>

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<sup>6</sup> An attorney must be able to show that he or she is admitted to practice before the bar of a United States state or the District of Columbia. The purpose of this requirement is to ensure that the Commission grants APO access only to persons with respect to whom the Commission can impose effective sanctions for breaches of APOs. Nevertheless, the Commission may permit an attorney not admitted to practice in the United States to gain access to BPI/CBI under the APO as a consultant or expert working under the supervision of an attorney licensed to practice in the United States. The Commission’s authority to regulate the credentials of attorneys or agents appearing before it is found in 19 CFR Section 201.15.

<sup>7</sup> The Commission has not defined the term “appears regularly before the Commission.” The Secretary determines whether a particular applicant falls into that category on a case-by-case basis, and may request additional information from an applicant to aid in this determination.

<sup>8</sup> The legislative history of the Omnibus Trade and Competitiveness Act of 1988 states that “authorized representatives include outside legal counsel for interested parties, and consultants or other experts if either (a) such individuals are under the control and advice of legal counsel and legal counsel has signed on their behalf or if (b) such individuals regularly appear before...the ITC (and the agency thus has effective sanctions to be applied against them) or (c) in other instances in which the agency has effective sanctions to be applied against the individuals.” *Conference Report on H.R. 3, Omnibus Trade and Competitiveness Act of 1988*, H. Rept. 100-576, at 623.

<sup>9</sup> See 19 U.S.C. Section 1677(9), which defines the term “interested party” in an AD/CVD investigation to mean:

- a) A foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise,
- b) The government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported,
- c) A manufacturer, producer, or wholesaler in the United States of a domestic like product,
- d) A certified union or reorganized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,
- e) A trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States,
- f) An association, a majority of whose members is composed of interested parties described in subparagraph (c), (d), or (e) with respect to a domestic like product, and

The term “party” is defined in the Commission’s rules.<sup>10</sup> In most investigations, an authorized applicant must be a representative of petitioners, of other domestic producers, or of importers (not just purchasers from importers) or foreign producers of the articles subject to investigation, or the government of the country in which the articles subject to investigation are produced.

3. The person must not be involved in competitive decision making for an interested party which is a party to the investigation.

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- g) In any investigation under this subtitle involving an industry engaged in producing a processed agricultural product, as defined in paragraph (4)(E), a coalition or trade association which is representative of either –
    - i) Processors,
    - ii) Processors and producers, or
    - iii) Processors and growers,

but this subparagraph shall cease to have effect if the United States Trade Representative notifies the administering authority and the Commission that the application of this subparagraph is inconsistent with the International [sic] obligations of the United States.

**\*\*\*Purchasers, unless they directly import the subject merchandise, are not eligible for APO access\*\*\***

19 CFR Section 206.17 contains a similar, although not identical, provision applicable to safeguards investigations.

<sup>10</sup> 19 CFR Section 201.2, Party means “any person who has filed a complaint or petition on the basis of which an investigation has been instituted, or any person whose entry of appearance has been accepted.” According to 19 CFR Section 201.11(a), “[a] [person](#) found to have a proper reason for participating in the investigation shall be permitted to appear in the investigation as a [party](#).”

The rules define “competitive decision making” by incorporating the definition used in U.S. Steel Corp. v. United States.<sup>11</sup> Accordingly, “competitive decision making” includes:

...past, present, or likely future activities, associations, and relationships with an interested party which is a party to the investigation that involve the prospective authorized applicants advise [sic] or participation in any of such party’s decisions made in light of similar or corresponding information about a competitor (pricing, product design, etc.)<sup>12</sup>

The U.S. Steel decision was interpreted in Matsushita Electric Ind. Corp. v. United States.<sup>13</sup> In that case, the court held, inter alia, that an in-house corporate counsel may not be denied disclosure of BPI under an APO on the sole ground of status as a corporate officer.<sup>14</sup>

## **B. The application**

An authorized applicant wishing to obtain disclosure of BPI/CBI under APO must file an application with the Secretary. The application must be made on a form approved by the Secretary. Although the form may be photocopied or downloaded from the Internet, it may not be retyped or altered in any way. Any such alteration will result in rejection of the application.

The application is essentially divided into three parts. First, the applicant must state under oath that he or she has authorized applicant status. Second, the applicant must request disclosure of BPI/CBI under the APO and agree to be bound by the APO. Third, the applicant must acknowledge that a breach of the APO may subject him or her to certain sanctions.

If you fall into one of two categories of authorized applicants,<sup>15</sup> you must attach to your application a written statement describing your job functions, disclosing all financial holdings you may have in the interested party you represent or its affiliates, and indicating whether you are involved in the formulation of the interested party’s pricing policies.

If you are a consultant or expert who practices regularly before the Commission, you may file an application for disclosure of BPI/CBI under APO as an authorized applicant. To assist the Secretary in deciding whether to accept your application, you must submit a listing of previous appearances before the Commission as part of the application. This listing must indicate the investigation and your role in the investigation. The Secretary may request additional clarification.

Please note that there is both a three (3) page APO Form issued by the Secretary for the investigation(s), and a two (2) page APO Application for Disclosure to be filled out and then filed by the applicant. Only the two page APO Application for Disclosure must be filed.

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<sup>11</sup> 730 F.2d 1465 (Fed. Cir. 1984).

<sup>12</sup> 19 CFR Sections 206.16(a)(3)(ii), 207.7(a)(3)(ii).

<sup>13</sup> 929 F.2d 1577 (Fed. Cir. 1991), reversing, 14 CIT 674, 746 F. Supp. 1103 (1990).

<sup>14</sup> 929 F.2d at 1580.

<sup>15</sup> (1) An in-house counsel or (2) a representative of an interested party that is not represented by counsel.

In most cases, an authorized applicant wants to give access to BPI/CBI disclosed under APO to paralegal or clerical staff such as a secretary, word processor, messenger, or other such support persons employed or supervised by the authorized applicant. Before such a person is allowed access, the person must fill out the Acknowledgment for Clerical Personnel form approved by the Secretary. This form provides for the person to agree to be bound by the APO and for the authorized applicant to sign in recognition of his or her assumption of responsibility for any breach the person might commit. The authorized applicant is responsible for the retention and accuracy of this form. When the authorized applicant files certification that to the best of his/her knowledge and belief, BPI/CBI has been returned or destroyed, and that no BPI/CBI has been made available to unauthorized persons, the Acknowledgement for Clerical Personnel forms must be filed with the Secretary.

### **C. Deadlines for applying**

Under the Commission's rules, you must file an application within certain time limits. In an original AD/CVD investigation you ordinarily must file your application within seven (7) days after the publication in the Federal Register of the notice of institution of the preliminary phase of the investigation. If you do not file an application in the preliminary phase, you may file an application in the final phase no later than 21 days prior to the hearing date indicated in the final phase notice of scheduling published in the Federal Register.

In a five-year review or a safeguard investigation, you must file an application within 21 days after the publication of the scheduling notice or notice of institution in the Federal Register. If the Commission should conduct a full review in a sunset case, there will be an additional period for filing an application which will be indicated in the notice of scheduling published in the Federal Register.

In some cases, one interested party which is a party to the investigation is represented by more than one authorized applicant, e.g., several attorneys from one or more law firms, as well as an economist from a consulting firm. So long as one authorized applicant applies within the time limit, the deadlines are extended for other authorized applicants representing the same party. One authorized applicant must file an application by the deadline and must identify herself or himself as "lead authorized applicant." Only the lead authorized applicant will receive service of BPI/CBI in the investigation. The other authorized applicants may file their applications at a later date, although no later than five (5) days prior to the deadline for filing posthearing briefs in an investigation or full five-year review, or postconference briefs in a preliminary phase investigation or submissions in a remanded investigation. However, the lead authorized applicant is not to discuss BPI/CBI disclosed under APO with another authorized applicant until the latter's application has been approved. The Office of the Secretary will notify the lead authorized applicant when the APO amendments have been approved. This notice will be by e-mail.

## **IV. OBTAINING BPI/CBI**

### **A. The APO service list**

After the deadline for filing APO applications, the Secretary will establish a list of authorized applicants whose applications have been approved. All parties must serve their BPI/CBI submissions to the Commission on the persons listed on that APO service list. If one interested



party is represented by more than one authorized applicant, the APO service list will designate one authorized applicant as the lead authorized applicant on whom service must be made.

This APO service list is not to be confused with the public service list also established by the Office of the Secretary.<sup>16</sup> Only submissions to the Commission with all BPI/CBI deleted are to be served on the persons appearing on the public service list. All applications for disclosure of BPI/CBI under APO and notifications of changes to the APO, as well as all service lists, are posted to the Commission's Electronic Document Information System (EDIS) <https://edis.usitc.gov>. Service lists are also posted to the ITC Web site at: [http://www.usitc.gov/secretary/fed\\_reg\\_notices/service\\_lists.htm](http://www.usitc.gov/secretary/fed_reg_notices/service_lists.htm).

In the period in a preliminary phase AD/CVD investigation between the filing of a petition and the issuance of the APO service list, the Secretary will notify the petitioner and applicant when application(s) for APO are approved. This notification will be made via e-mail to both applicant and petitioner. A copy of the petition, including all BPI, shall then be served by petitioner on the approved applicants within two (2) calendar days of the time notification is received from the Secretary. A similar rule applies in safeguards investigations.

In EDIS, initial applications for disclosure under APO are coded as document type "Protective Order Request"; amendments to the initial application are coded as document type "Protective Order Request Amendment".

When an application for disclosure of BPI/CBI under APO is accepted by the Secretary, a unique index control number is assigned to it. All subsequent correspondence regarding this APO account are cross-referenced in EDIS to this index control number. This index control number is in the format YY-*nnn*, where YY represents the last two numbers of the fiscal year and *nnn* is sequentially assigned a number starting with "1" each fiscal year.

Notice regarding the status of your application or request for amendment is typically provided by the Office of the Secretary within three (3) business days of receipt. Never assume that you have been authorized access because you have submitted an application. If you have not been notified within the specified period of time or if you have questions regarding either your APO application status or the APO status of a party you should contact Docket Services at 202-205-1802.

## **B. Disclosure of BPI/CBI under the APO**

Once a lead authorized applicant appears on the APO service list, the lead applicant is eligible to receive BPI/CBI under the APO. Other parties must then serve the lead applicant with their BPI/CBI. In addition, the lead applicant may obtain BPI/CBI not normally served by other parties, such as Commission reports and nonparty questionnaire responses. Docket Services personnel will contact the lead authorized applicant when there is BPI/CBI available.

Docket Services personnel will only give BPI/CBI to an authorized person. An authorized applicant whose name appears on the approved service list may pick up BPI/CBI, or the authorized applicant

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<sup>16</sup> The public service list is established pursuant to Commission rule 201.11(d). All parties appear on that list, and are to be served with non-BPI/CBI versions of documents filed in the investigation.

can send a member of the support staff who has signed the APO form statement. Such person must present 1) a letter of identification from the firm, on firm letterhead, signed by an authorized applicant, authorizing the release of the BPI/CBI to that person and 2) picture identification. Docket Services' personnel will not give access to BPI/CBI to any person without picture identification.

## **V. FILING BPI/CBI**

### **A. The one-day rule**

In the event a person files a brief or other submission that contains BPI/CBI with the Commission, that person must also file a public version of that submission.<sup>17</sup> If the submission is to be filed by a deadline set by the Commission, Commission rules 206.8 and 207.3 (19 CFR Sections 206.8 and 207.3) permit a submitter to file the public version no later than one (1) business day after the BPI/CBI version is due. This "one-day rule" is intended to reduce the incidence of APO breaches caused by persons failing under the pressure of deadlines to sanitize the public version of their submissions adequately.

Under the "one-day rule," (also called the 24-hour rule), the BPI/CBI version of a document is due by the deadline set by the Commission. You must file that version with all BPI/CBI enclosed in brackets but with the following warning on every page: "Bracketing of BPI not final for one business day after date of filing." In accordance with the warning, a person to whom the submission is disclosed under APO is not to disclose any information received in the document to anyone not subject to the APO until the bracketing becomes final. One business day after the deadline, submitters are to file a public version with all BPI/CBI deleted. In the event that a submitter files the confidential version, the submitter is permitted to notify the Commission no later than one (1) business day after the deadline of the necessary changes to bracketing, and must file replacement pages to correct the BPI/CBI version of the document. Such corrections will not give rise to a breach, provided that the corrections are made within the time permitted and provided that BPI/CBI has not been included in the public version.

The one-day extension is not to be used to amend the submission in any way other than bracketing and deletion of BPI/CBI. Making other changes to the submission may result in striking all or part of the document from the record. If a submitter wishes to make other changes, including errata and typographical corrections, the submitter must request leave to file such changes and clearly itemize each requested change. Unless the submitter requests leave to file the changes, they will not be accepted.

When submitting corrections to bracketing of BPI/CBI in a brief, only submit individual replacement pages itemizing each change. You are not to resubmit the entire brief as a replacement.

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<sup>17</sup> That person must also submit two (2) paper copies of the submission in which their BPI/CBI has been deleted. If the person is a party, the submission must also be served on all persons designated in the Secretary's service list.

Please take advantage of the opportunity afforded by the “one-day rule” to ensure that BPI/CBI is properly handled.

## **B. Certification of BPI/CBI filings**

A person who files with the Commission a brief or other submission that contains BPI/CBI must satisfy Commission rules pertaining both to filings of BPI/CBI and to filings of documents generally. These rules require separate certifications, and only one requires notarization. The procedure for submitting business information in confidence requires a "certification in writing under oath that substantially identical information is not available to the public."<sup>18</sup> As "under oath" suggests, this certification either must be notarized or must comply with 28 U.S.C. Section 1746 regarding unsworn declarations under penalty of perjury. The rule for service, filing, and certification of documents generally requires certification "that such information is accurate and complete to the best of the submitter's knowledge."<sup>19</sup> This certification requires no notarization.

## **C. Exemption from disclosure for certain BPI/CBI**

Under statute and regulation,<sup>20</sup> information that is privileged, classified, or "of a type for which there is a clear and compelling need to withhold from disclosure" is exempt from disclosure and service under APO. Privileged material includes information such as that covered by the attorney-client, deliberative process, or attorney work product-privileges. Classified material is covered by a national security classification such as "Secret" or "Confidential." The third category, for which there is a "clear and compelling need to withhold," is not defined in the statute. According to legislative history, the category –

is expected to be used rarely, in situations in which substantial and irreparable financial or physical harm may result from disclosure. An example of a specific type of information which may fit this definition is trade secrets, that is, a secret formula or process having a commercial value, not patented, known only to certain individuals who use it in compounding or manufacturing an article of trade.<sup>21</sup>

Commission rules 206.17(g) and 207.7(g) provide a procedure for a submitter of BPI/CBI to follow if the submitter considers that any of the information falls within the exempt categories. The submitter may request an exemption from the Secretary, who will either grant or deny the request. The Secretary will grant such requests only in rare cases, because secret formulas and other such supersensitive data are not normally involved in AD/CVD or safeguards investigations.

When requesting an exemption, a submitter is to file the request and lodge a copy of the information at issue with the Secretary, when possible two (2) days before any relevant deadline. If the Secretary grants the request, the submitter is to file three versions of the document containing the now exempt information: (1) a complete version, with the exempt information properly marked, (2) a version with the exempt information but not other BPI/CBI deleted, and (3) a public version with

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<sup>18</sup> 19 CFR Section 201.6(b)(3)(iii)

<sup>19</sup> 19 CFR Sections 206.8(a) and 207.3(a)

<sup>20</sup> 19 U.S.C. Section 1677f(c)(1)(A) and 19 CFR Section 206.17(a)(1)

<sup>21</sup> H.R. Conf. Rep. No. 576, 100<sup>th</sup> Cong., 2d Sess., at 623.

all BPI/CBI deleted. The second and third versions are to be served in accordance with normal BPI/CBI and public service rules. If the Secretary denies the exemption request, the information will be returned to the submitter.

## **VI. SANCTIONS**

The Commission makes every effort to preserve the confidentiality of BPI/CBI. Consequently, any breach of an APO is regarded as a serious matter. An authorized applicant who breaches the APO is subject to sanctions.

Commission rules 206.17(d) and 207.7(d), the APO, and the APO application list the responses the Commission may make to a breach. These are:

1. Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven (7) years following publication of a determination that the order has been breached;
2. Referral to the United States Attorney;
3. In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;
4. Such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, the offender or the party represented by the offender, denial of further access to BPI/CBI in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and
5. Such other actions, including but not limited to, a public or private warning letter, as the Commission determines to be appropriate.

The procedure for investigating alleged breaches of APOs has two parts. First, the Commission determines whether a breach has occurred and who is responsible for it. This is done after the alleged breachers have been provided an opportunity to present their views on the matter. The first phase may conclude with the issuance of a warning letter if the Commission finds a breach has occurred but no further action is warranted, or the phase may conclude when the Commission determines that no breach occurred and it issues a letter so stating. Second, if a breach is found to have occurred and the Commission determines that further action is warranted, the Commission determines what sanction, if any, to impose. The breachers are provided an opportunity to present their views on this issue.

The Commission's most common responses to breaches have been the issuance of warning letters and private letters of reprimand. A warning letter is not a sanction, and may be issued in an instance in which the Commission determines that a sanction is not appropriate. The private letter of reprimand is a sanction. It can be expunged from the recipient's record after two (2) years of good behavior, e.g., no further breaches. Where this sanction is imposed, the Commission keeps confidential the identity of the offender, although the Commission issues annually in the spring a public notice describing in general terms the private letters of reprimand and other actions it has

taken in response to breaches.<sup>22</sup>

Similarly, all correspondence between the Commission and an alleged breacher is kept confidential by the Commission. Any correspondence relating to APO breaches filed with the Secretary should be clearly marked as NOT FOR PUBLIC INSPECTION. This correspondence is not served on parties to the investigation or available for public access on EDIS.

## **VII. ANSWERS TO FREQUENTLY ASKED QUESTIONS**

Certain questions come up frequently when practitioners participate in the APO process. The following are some of those questions and their answers. If you have questions about the APO rules and procedures, you are encouraged to call the Office of the Secretary at (202) 205-2000, the Docket Services Division at (202) 205-1802, or the Office of the General Counsel at (202) 205-3061, for assistance.

### **A. Aggregated data**

#### **How does the Commission determine whether industry or aggregate business information should be treated as proprietary?**

The Commission has established criteria as to when it will treat as proprietary aggregate business information - that is, information that pertains collectively to more than one company. Aggregate business information pertaining to fewer than three companies normally is always treated as proprietary. Information pertaining to three or more companies normally is treated as publishable, unless two companies account for more than 90 percent of the data, or unless one company accounts for more than 75 percent of the data.

### **B. The APO application process and amendments**

#### **If I obtained disclosure of BPI under APO in the preliminary phase of an AD/CVD investigation, do I have to re-file an APO application in the corresponding final phase?**

You do not need to re-file an APO application to retain access to BPI in the corresponding final phase investigation.

#### **If I am participating in a final phase of an AD/CVD investigation but did not participate in the corresponding preliminary phase, can I see BPI which was disclosed under APO during the preliminary phase?**

An authorized applicant whose APO application has been granted has access to all BPI disclosed during both the preliminary phase and final phase investigations. If you represent a party already represented by a lead authorized applicant, please contact him or her for access to the BPI served by the Commission under APO prior to granting your APO access. Otherwise, the lead authorized applicant must submit a written request for the BPI to the Secretary.

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<sup>22</sup> A copy of the most recently issued notice can be found on the Commission's website at [https://www.usitc.gov/secretary/fed\\_reg\\_notices.htm](https://www.usitc.gov/secretary/fed_reg_notices.htm)

**If one attorney files his APO application on time, how much time does he or she have in an AD/CVD investigation to add other attorneys to the list of persons with access to BPI?**

In an AD/CVD investigation, the attorney who has filed a timely application can have colleagues submit APO applications at any time up until five (5) days before the posthearing briefs are due in a final phase or full five-year review (or the postconference briefs in a preliminary phase investigation). The attorney who filed on time must be designated the "lead authorized applicant," and will be the only one to receive service of BPI under the APO.

**What should be done if either the authorized applicant or a support person subject to the APO leaves the law firm before the final determination, e.g., between the preliminary and final phases, or when the authorized applicant or support person is transferred within the firm and is no longer participating in the investigation?**

Under the APO, an authorized applicant must report any changes that affect the representations made in the application for access to APO. The authorized applicant who ends participation in an investigation must notify the Commission in writing of that fact and certify that she/he no longer possesses any BPI/CBI disclosed under APO.

Similarly, if a secretary, paralegal or other support staff person is no longer participating in the investigation, the authorized applicant must annotate the Acknowledgment for Clerical Personnel form statement signed by the support person. The authorized applicant is responsible for the retention and accuracy of such form. When the authorized applicant files certification that to the best of his/her knowledge and belief BPI/CBI has been returned or destroyed, and that no BPI/CBI has been made available to unauthorized persons, these Acknowledgment for Clerical Personnel forms must be filed with the Secretary.

**If I change law firms during the investigation but continue to represent the same interested party which is a party to the investigation, must I file a new application?**

No, your initial application remains effective. However, you must inform the Secretary in writing of your new firm and address. In this letter you should provide the names of any persons transferring with you and otherwise update the Commission about any individuals terminating their access to BPI/ CBI information. You must submit a separate APO application for any new personnel. And, you should remain aware of APO amendment time limits.

**If an interested party which is a party to the investigation substitutes entirely new counsel for its prior counsel during the investigation, can the former counsel transfer its BPI/CBI disclosed under APO to the new counsel?**

Yes, if before the transfer is made the new attorney applies for and is granted disclosure of BPI/CBI under the APO by the Secretary, i.e., the authorized applicant is added to the APO service list. However, the new attorney will not receive service of new BPI/CBI, because the former counsel is still designated lead authorized applicant. In order to receive service, the new attorney must file a written request with the Secretary to change the identity of the lead authorized applicant. In most cases of a change of attorneys, the Secretary will permit the former counsel to retain BPI/CBI until the new attorney has been granted access to BPI/CBI under the APO.

## **Can an attorney from a foreign country apply for disclosure of BPI/CBI under APO?**

An attorney can apply for disclosure of BPI/CBI under APO if he/she is admitted to practice before the bar of any United States state or the District of Columbia. If the attorney is not so admitted, the Commission may permit the attorney to gain access to BPI/CBI under the APO as a consultant or expert working under the supervision of an attorney admitted to practice in a United States state or the District of Columbia.

### **What are the most common mistakes in applying for APO?**

- The most common mistake in applying for APO is use of the incorrect application form. You must submit an application for disclosure of CBI/BPI on the correct form. The form to use when applying for access to information under APO in a safeguards investigation is titled Application for Disclosure of Confidential Business Information under Administrative Protective Order; the form to use in applying for access to information under APO in AD/CVD investigation is titled Application for Disclosure of Business Proprietary Information under Administrative Protective Order. The two forms are labeled to indicate either Safeguards or AD/CVD investigations.
- The other most common mistakes in applying for APO are mechanical errors related to completing the APO application forms. These mistakes do not cause an application to be rejected but can instead slow processing of the application.
  - You must both name the interested party represented as well as provide its category (e.g., domestic producer, importer) when completing the first page of the APO Form Application for Disclosure.
  - The attorney name and signature must be provided on the first page of the APO Form Application for Disclosure when category (3) is checked.

### **Are there any additional suggested best practices?**

- Consultants who regularly appear before the ITC may want to consider applying for APO status directly by selecting category (4). By selecting category (4) only the consultant needs to sign the application. Consultants often check item (3), which requires an attorney to also sign the application. While this is also acceptable, using item (3) can lead to problems. In one investigation, a consultant worked with several law firms, each on a different part of the case, but had only one attorney sign the application. The consultant then breached the APO while working on a part of the case in which the attorney was not involved; the consultant should have had an attorney from another firm sign on his behalf for that part of the case.
- To ensure timely processing, the forms should be filed with a cover letter, clearly stating the nature of the attached forms, e.g., request for APO, amendments to APO application.
- APO applications and amendments must be filed electronically with the Commission via the Electronic Document Information System (EDIS). When electronically filing your application or amendment, you should select either document type "Protective Order Request" or "Protective Order Request Amendment," whichever is appropriate. For more information on filing procedures, please refer to the Handbook on Filing Procedures and the EDIS Coding

Manual, available on the Docket Services page of the Commission's website ([http://www.usitc.gov/docket\\_services.htm](http://www.usitc.gov/docket_services.htm)).

### **C. Service of BPI/CBI**

#### **When one party is represented by two or more law firms and an economic consulting firm, who is served with BPI/CBI under APO?**

When one interested party which is a party to the investigation is represented by several authorized applicants, the authorized applicants must agree to designate a "lead authorized applicant," who must file the application on time and will be the only one to be served with BPI/CBI under the APO.

#### **What are the service requirements prior to the issuance of the APO, particularly with respect to questionnaires?**

Parties, other than the petitioner, should not serve copies of submissions containing BPI/CBI on other parties before the issuance of the APO and the APO service list (Administrative Protective Order Certificate of Service) or before receiving notification by the Secretary that an APO application has been accepted. The petitioner in the preliminary phase of an AD/CVD investigation and in safeguards investigations must serve a BPI/CBI copy of the petition on parties whose APO applications have been approved within two (2) calendar days of notification that the Secretary has approved the applications. Within two (2) days after the issuance of the APO service list, however, all parties must serve all other submissions on the designated persons on the APO service list. The Docket Services Division will email the APO service list to all lead authorized applicants. The Docket Services Division will email lead authorized applicants amended versions of the list when any change affects service.

If circumstances warrant, the Secretary may issue an amended service list at any time. Service lists are available on EDIS (<http://edis.usitc.gov>) or on the Commission's website at [http://www.usitc.gov/secretary/fed\\_reg\\_notices/service\\_lists.htm](http://www.usitc.gov/secretary/fed_reg_notices/service_lists.htm)

Questions regarding service lists should be directed to Docket Services Division of the Office of the Secretary at (202) 205-1802.

#### **What special steps must a person take when filing or serving a submission containing BPI/CBI?**

Under the APO, paragraph B(6), a person must, *inter alia*, transmit each document containing BPI/CBI with a cover sheet identifying the document as containing BPI/CBI. The person must put the document in two (2) envelopes, the inner one sealed and marked "Business Proprietary Information- To be opened only by [name of recipient]," (the reference would be to Confidential Business Information in a safeguard proceeding) and the outer one sealed and not marked as containing BPI/CBI. The Commission recommends that the two-envelope procedure be used whenever transmitting BPI/CBI, including by a messenger subject to the APO.

### **D. Safeguarding, retention and/or destruction of BPI/CBI**

#### **When must I return or destroy BPI/CBI disclosed under APO?**

Pursuant to Commission rules 206.17(c) and 207.7(c), the Secretary determines when BPI/CBI is to be returned or destroyed. Each authorized applicant normally must return or destroy such BPI/CBI



within 60 days of the completion of the investigation, and file a certification that, to the best of the authorized applicant's knowledge and belief, the BPI/CBI has been returned or destroyed and that no BPI/CBI has been made available to unauthorized persons. The following are examples of when an investigation is completed:

- The date of publication in the Federal Register of the Commission's preliminary negative, final negative, or final affirmative determination in an AD/CVD investigation; or
- The date of publication in the Federal Register of a Commerce Department final negative determination or determination to terminate the investigation in an AD/CVD investigation; or
- The date of publication in the Federal Register of the Commission's determination in a safeguards investigation or AD/ CVD review.

In some instances, one or more interested parties may seek judicial or NAFTA panel review of the Commission's determination. In view of the deadlines for seeking judicial review set out in 19 U.S.C. Section 1516(a), 60 days should give parties enough time to determine if such review is being sought. If review is sought, the 60-day deadline for returning or destroying BPI is suspended. You may retain BPI disclosed to you under APO during such judicial review proceedings, provided that you obtain access to such information pursuant to U.S. Court of International Trade (CIT) Rule 73.2 and CIT Administrative Order No. 02-01, within 150 days after the completion of the investigation. Otherwise by the end of the 150 days, you must by that deadline return or destroy the BPI and promptly thereafter notify the Secretary.

If the Commission determination concerns imports from Canada or Mexico, you may retain BPI disclosed to you under APO during any binational panel review of the determination, subject to the additional terms and conditions in the then-current version of APO NAFTA Form C. A copy of APO NAFTA Form C is shown in Appendix C.

### **What are the procedures for filing APO applications in NAFTA appeals?**

Parties must file new APO applications in NAFTA appeals. Concurrent with the filing of a complaint or notice of appearance in the panel review, counsel and professionals as defined in Commission rule 207.93(b)(2) must file a completed original of NAFTA APO Form C and three (3) copies with the Commission Secretary and four (4) copies with the United States Secretary.

### **Does the Commission prefer that I destroy or return BPI/CBI disclosed under APO? To whom would I return BPI/CBI, the Commission or the submitter?**

For reasons of convenience, the Commission would in most cases prefer that an authorized applicant destroy BPI/CBI disclosed under APO and certify that the BPI/CBI has been destroyed, although returning the material to the Commission is acceptable as well. However, at any time the Secretary may require the return of BPI/CBI to the Commission or to the submitter if deemed appropriate.

### **If I have breached an APO by disclosing BPI/CBI to unauthorized persons, must I certify at the end of the investigation that no BPI/CBI has been so disclosed?**

No. You should not certify to a statement that is not true. You should contact the Secretary for guidance on how to proceed.

**If I choose to store BPI/CBI electronically, does the APO's warning regarding the storage of BPI/CBI require that I use removable computer disks or similar media rather than internal memory?**

The purpose of this warning is to caution authorized applicants that they will be held responsible for safeguarding the confidentiality of all BPI/CBI to which they are granted access, and to warn applicants about the potential hazards of electronic storage and transmission of BPI/CBI. In particular, applicants should understand that information supposedly deleted from internal memory may be retrievable using a utilities program. As the Commission stated in a 1990 regulatory preamble, however, applicants are permitted "a certain amount of discretion in choosing the most appropriate method of safeguarding the confidentiality of the information."<sup>23</sup> However, the authorized applicant is responsible if BPI/CBI is not adequately safeguarded.

A separate issue relates to redaction of BPI/CBI. You may use software to assist in preparing the public version of filings. We have found that some such methods only mask the BPI/CBI; they do not delete the information. Before transmitting any redacted documents to persons not on the APO list, or before electronically filing any redacted documents, you should check the electronic file to determine that the information has been deleted.

**What do I do if I discover BPI/CBI in a public document that I submitted?**

If you discover BPI/CBI in a public document that you have submitted, you must notify the Secretary immediately. If the BPI/CBI is your client's information, it may, depending on the circumstances, be retained in the public record. If the BPI/CBI is information received under the APO, it should be removed from the public version and be resubmitted. An APO Breach investigation will be initiated.

**If one party seeks judicial or NAFTA Panel review of a Commission AD/CVD determination, and the party I represent does not intervene immediately in the litigation, may I maintain my files in case my client wishes to intervene at a later date?**

Yes, you may retain the BPI disclosed under APO, but only for 150 days after the end of the investigation. If your client does not intervene and obtain access to such information pursuant to U.S. Court of International Trade (CIT) Rule 73.2 and CIT Administrative Order No. 02-01 or pursuant to a NAFTA Protective order, within that time, you must promptly return or destroy the BPI by the end of the 150 days.

Authorized applicants should provide the Secretary with notice of their participation in such review proceedings. During the conduct of the proceeding the authorized applicant must notify the Secretary of any changes that affect the representations made in the application (e.g., change in personnel assigned to the investigation).

**If a complaint is filed with the U.S. Court of International Trade after the end of an AD/CVD investigation and a party wishes to retain new counsel, how would the new counsel obtain access to BPI?**

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<sup>23</sup> Preamble to notice of proposed rulemaking, 55 FR 24100 (June 14, 1990).

The new counsel would need to seek a court order granting it access to such information pursuant to CIT Rule 73.2(c)(2) and CIT Administrative Order No. 02-01. Normally, the new counsel should contact previous counsel for access to the BPI in the record.

**May I retain BPI obtained from the Commission under an APO in a AD/CVD investigation for use in possible litigation before a World Trade Organization (WTO) panel?**

No. Under the terms of the APO, you may use information only in connection with the Commission's investigation. WTO proceedings are government-to-government and do not include non-government parties.

**E. One-day rule and APO notification**

**When does the one-day rule not apply?**

The one-day rule (contained in 19 CFR Sections 207.3(c) and 206.8(c)) applies only to filings subject to a Commission-imposed deadline. The Commission instituted the rule to minimize the number of errors parties made in bracketing BPI/CBI under the stress of trying to meet deadlines. That concern does not apply to the same extent to petitions and other filings not prepared under a Commission-imposed deadline. Any questions regarding whether the one-day rule applies should be directed to the Secretary.

**How am I notified of the status of my application for disclosure? How am I notified of the availability of documents released by the ITC under APO?**

As soon as the Secretary approves an application for disclosure of BPI/CBI under APO, the Docket Services Division will notify the requester of the Secretary's action. This notification can either be by telephone, fax, or e-mail. The lead authorized applicant should indicate telephone, e-mail, and fax contact information in the cover letter transmitting his/her application. The Secretary uses this information to notify the lead authorized applicant that BPI/CBI gathered in investigations is available under the APO.

**F. APO in safeguards investigations**

**May I use CBI obtained from the Commission under an APO in a safeguards investigation in preparing submissions or in making presentations at the United States Trade Representative (USTR) on the question of remedy?**

No. As stated in the APO that you will have signed, you may use the CBI obtained under the Commission's APO only in the Commission's investigation. Any proceedings at USTR relating to remedy either during or following completion of the Commission's investigation are not part of the Commission's investigation.

**May I retain CBI obtained from the Commission under an APO in a safeguards investigation for use in possible litigation, including litigation before a World Trade Organization (WTO) panel?**

No. Under the terms of the APO, you may use the information only in connection with the Commission's investigation. The APO establishes a deadline for returning or certifying the destruction of all APO materials, which is generally 60 days after publication of the Commission's determination in the Federal Register (generally about 60 days after the Commission sends its report

to the President). WTO proceedings are government-to-government and do not include non-government parties.

## **G. Electronic Filing**

### **Can I electronically file my APO applications and amendments?**

Pursuant to Commission rule 201.8(d) you are required to file APO applications and amendments electronically. Specific document types have been established for APO applications, amendments, and certifications of destruction. For further instruction, please refer to the Handbook on Filing Procedures accessible on the Docket Services Division page of the Commission’s website ([http://www.usitc.gov/docket\\_services.htm](http://www.usitc.gov/docket_services.htm)).

### **After electronically submitting a document, I discovered that I entered incorrect information on the EDIS submission form. What should I do?**

If, after submission, you discover you have incorrectly input information on the EDIS submission form, immediately call either the EDIS Help Desk at (202) 205-EDIS (3347) or the Docket Services Division at (202) 205-1802 to report the problem. Please provide the EDIS Document ID Number associated with the submission. In most instances, the correction may be made while you are still on the telephone.

Similarly, if you believe a document in EDIS is miscoded, please inform the EDIS Help Desk or Docket Services Division.

## **H. Additional Information**

1. Guidance on the purpose and meaning of the rules may be found in the regulatory preambles that accompany amendments to the rules. Rulemaking notices can be found on the Commission’s website at [http://www.usitc.gov/secretary/fed\\_reg\\_notices/rules.htm](http://www.usitc.gov/secretary/fed_reg_notices/rules.htm)
2. Since 1991, the Commission has published annually a summary of its actions in response to violations of Commission APOs and the 24-hour rule. These notices are titled “Summary of Commission practice relating to administrative protective orders” and can be found on the Commission’s website at [http://www.usitc.gov/secretary/fed\\_reg\\_notices.htm](http://www.usitc.gov/secretary/fed_reg_notices.htm)

## **VIII. COMMISSION RESOURCES AND CONTACT INFORMATION**

Resource	Contact Information
Office of the Secretary	Room: 112 Ph: (202) 205-2000
Docket Services Division	Room: 112-A Ph: (202) 205-1802
TDD Terminal	Ph: (202) 205-1810
Office of Investigations	Ph: (202) 205-3160

Office of the General Counsel	Ph: (202) 205-3061
EDIS Help Desk	Ph: (202) 205-3347 E-mail: edis3help@usitc.gov
USITC Website	<a href="http://www.usitc.gov">http://www.usitc.gov</a>
EDIS Website	<a href="https://edis.usitc.gov">https://edis.usitc.gov</a>
APO Forms	<a href="http://www.usitc.gov/secretary/apo_forms_and_redbook.htm">http://www.usitc.gov/secretary/apo_forms_and_redbook.htm</a>
U.S. Statute	<a href="http://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE">http://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE</a>
Commission Rules of Practice and Procedure	<a href="http://www.usitc.gov/secretary/fed_reg_notices/rules.htm">http://www.usitc.gov/secretary/fed_reg_notices/rules.htm</a>
Commission Notices	<a href="http://www.usitc.gov/secretary/fed_reg_notices.htm">http://www.usitc.gov/secretary/fed_reg_notices.htm</a>