



UNITED STATES INTERNATIONAL TRADE COMMISSION

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

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I. GENERAL

The U.S. International Trade Commission (USITC or Commission) collects both public and confidential business information in the course of conducting investigations under the statutory authorities it administers. The Commission defines the term “confidential business information” (CBI) in section 201.6(a)¹ of the Commission’s Rules of Practice and Procedure (Commission’s Rules), and also states that the term CBI includes “proprietary information” within the meaning of section 777(b) of the Tariff Act of 1930 (19 U.S.C. § 1677f(b)).

In antidumping and countervailing duty (AD/CVD) investigations and reviews under Title VII of the Tariff Act of 1930 (19 U.S.C. § 1671 *et seq.*),² the Commission refers to the CBI that it collects as “business proprietary information” (BPI), such as data on private companies’ profits, investments, and production processes. Similarly, in safeguard investigations under sections 202 and 204 of the Trade Act of 1974 (19 U.S.C. §§ 2252, 2254),³ or proceedings related to a safeguard measure, and in investigations of cross-border long-haul trucking services (LHT investigations) under sections 322(e) and 322(f) of the United States-Mexico-Canada Agreement (USMCA) Implementation Act (19 U.S.C. § 4572(e)-(f)), the Commission receives and collects CBI. 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 interested parties to an AD/CVD, safeguard, or LHT investigation the BPI/CBI gathered in that investigation. This access is permitted subject to an administrative protective order (APO) issued by the Secretary to the Commission (Secretary) that is designed to protect the confidentiality of the BPI/CBI. The Secretary has the discretion to grant, deny, modify, revoke, or set specific conditions in authorizing access to the APO.

¹ 19 C.F.R. § 201.6(a).

² For ease of reference, this document uses the term “AD/CVD investigations” to refer to all types of AD/CVD investigations and reviews.

³ For ease of reference, this document uses the term “safeguard investigations” to refer to all phases of safeguard investigations and proceedings related to a safeguard measure, including safeguard extensions and safeguard monitoring.

The APO process is governed by statute⁴ and the Commission's Rules,⁵ and this introduction should not be construed as modifying or limiting those laws and regulations in any way. If you intend to practice in this area, do not rely exclusively on this introduction; consult the relevant statute(s) and the Commission's Rules. You should read the entirety of 19 C.F.R. Parts 201, 206, 207, and 208.

You should direct any questions regarding APO practice to the Docket Services Division (Dockets) in the Office of the Secretary, at (202) 205-1802 or EDIS3Help@usitc.gov.

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

⁴ For AD/CVD proceedings, § 777(c)(1)(A) of the Tariff Act of 1930 (19 U.S.C. § 1677f(c)(1)(A)) provides:

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. § 2252) and section 302(f) of the USMCA Implementation Act (19 U.S.C. § 4572(f)) contain a similar provision.

⁵ The most directly applicable provisions are 19 C.F.R. §§ 201.6, 206.8, 206.17, 207.3, 207.7, and 208.22.

II. THE APO

At the beginning of each AD/CVD, safeguard, or LHT investigation, 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 vary by statutory provision, and 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. APO signatories should carefully read the provisions of the APO's requirements and direct any questions to the Secretary.

Please note that the APO form requires safeguarding all BPI/CBI that a person receives in an investigation (other than BPI/CBI otherwise available to him/her, such as 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 three different sets of forms: (1) AD/CVD investigations; (2) safeguard investigations; and (3) LHT investigations. 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 (NAFTA) and Chapter 10 of the USMCA (NAFTA and USMCA APO Form C).

You may obtain copies of the APO forms, including applications, by visiting the USITC website at 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 to apply for disclosure of BPI/CBI under APO. The Commission's Rules call these persons "authorized applicants."⁶ To qualify as an authorized applicant to receive BPI/CBI during an investigation, a person must meet the following criteria:

⁶ The term "authorized applicant" means an individual. *See* 19 C.F.R. §§ 206.17(a)(3), 207.7(a)(3), and 208.22(a)(3). 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

The person must be one of the following:

- a) An attorney;⁷
- 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;⁸ or
- d) A representative of an interested party which is a party to the investigation, if such interested party is not represented by counsel.⁹

The person must represent an interested party who is a party to the relevant AD/CVD, safeguard, or LHT investigation. The term “interested party” is defined by statute and regulation.¹⁰

information with a colleague in the same firm who has not filed an application that has been approved by the Secretary.

⁷ 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 Commission’s authority to regulate the credentials of attorneys or agents appearing before it is found in 19 C.F.R. § 201.15. 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.

⁸ 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 the Secretary may request additional information from an applicant to aid in this determination.

⁹ The Conference Report on H.R. 3, Omnibus Trade and Competitiveness Act of 1988 states:

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.

H. Rept. 100-576, at 623 (1988).

¹⁰ See 19 U.S.C. § 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 recognized 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,

The term “party” is defined in the Commission’s Rules.¹¹ In most investigations, an authorized applicant must be a representative of an interested party, including petitioners, other domestic producers, importers (purchasers from importers do not meet the definition of an interested party), foreign producers of the articles subject to investigation, or the government of the country in which the articles subject to investigation are produced.

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

(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
(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 obligations of the United States.

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

In addition, 19 C.F.R. § 206.17 contains a similar, although not identical, provision applicable to safeguard investigations. Further, 19 C.F.R. § 208.2(i) contains the definition of “interested party” applicable to LHT investigations.

Subpart G of Part 207 of the Commission’s Rules contains specific rules governing APOs during binational panel reviews of Commission AD/CVD determinations under Article 1904 of the NAFTA or Chapter 10 of the USMCA. Commission Rule 207.93(b) defines the persons who are authorized to receive BPI for purposes of those matters.

¹¹ Under 19 C.F.R. § 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.” Under 19 C.F.R. § 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 Commission's Rules define "competitive decision making" by incorporating the definition used in *U.S. Steel Corp. v. United States*.¹² 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 applicant's advice or participation in any of such party's decisions made in light of similar or corresponding information about a competitor (pricing, product design, etc.)¹³

The *U.S. Steel* decision was interpreted in *Matsushita Electric Industrial Co., Ltd. v. United States*.¹⁴ 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.¹⁵

In addition, 19 C.F.R. § 208.22(a)(3) provides a similar, though not identical definition for LHT investigations.

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 are in-house counsel or a representative of an interested party that is not represented by counsel, 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 approve 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 an APO Form issued by the Secretary for the investigation(s), and an

¹² *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984).

¹³ 19 C.F.R. §§ 206.17(a)(3)(ii), 207.7(a)(3)(ii).

¹⁴ *Matsushita Elec. Indus. Co., Ltd. v. United States*, 929 F.2d 1577 (Fed. Cir. 1991), *rev'g*, 746 F. Supp. 1103 (Ct. Int'l Trade 1990).

¹⁵ *Matsushita*, 929 F.2d at 1580.

APO Application for Disclosure to be filled out and then filed by the applicant. You must file only the APO Application for Disclosure.

An authorized applicant may want to be able 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 authorized applicant must file the completed Acknowledgement for Clerical Personnel forms 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, safeguard or an LHT 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 conducts a full review in a five-year review, there will be an additional period for filing an application that will be indicated in the notice of scheduling for the full review published in the *Federal Register*.

In some cases, an interested party that 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 themselves 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.

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.¹⁶ 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 USITC website at: 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 the applicant when application(s) for APO are approved. The petitioner must then serve a copy of the petition, including all BPI, on the approved applicants within two (2) calendar days of the time notification is received from the Secretary. A similar rule applies in safeguard and LHT 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 approved by the Secretary, a unique index control number is assigned to it. All subsequent correspondence regarding this APO account is 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.

The Office of the Secretary typically provides notice regarding the status of your application or request for amendment within three (3) business days of receipt. You should never assume that you have been authorized access just because you have submitted an application. If you have not received notification 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 or EDIS3Help@usitc.gov.

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,

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

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 give BPI/CBI only to an authorized person. If delivered electronically, Docket Services will provide secure electronic access only to the lead applicant. An authorized applicant whose name appears on the APO service list may also pick up BPI/CBI in person at the Docket Services desk, or the authorized applicant 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) photo identification. Docket Services personnel will not give access to BPI/CBI to any person without photo 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.¹⁷ If the submission is to be filed by a deadline set by the Commission, Commission Rules 206.8, 207.3, and 208.20 (19 C.F.R. §§ 206.8, 207.3, and 208.20) 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. Within one business day after the deadline, submitters must 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 the submitter 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 the public version did not include BPI/CBI.

The submitter must not use the one-day extension to amend the submission in any way other than to finalize bracketing of BPI/CBI to make a public version. 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, the Office of the Secretary will not accept them.

¹⁷ If the person is a party, the submission must also be served on all persons designated in the Secretary’s public service list.

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

Please take advantage of the opportunity afforded by the “one-day rule” to ensure the proper handling of BPI/CBI.

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.”¹⁸ As “under oath” suggests, this certification either must be notarized or must comply with 28 U.S.C. § 1746 regarding unsworn declarations under penalty of perjury. The Commission 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.”¹⁹ This certification does not require notarization.

C. Exemption from disclosure for certain BPI/CBI

Under statute and regulation,²⁰ 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.²¹

Commission Rules 206.17(g), 207.7(g), and 208.22(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, safeguard, or LHT

¹⁸ 19 C.F.R. § 201.6(b)(3)(iii).

¹⁹ 19 C.F.R. §§ 206.8(a), 207.3(a), 208.20(a).

²⁰ 19 U.S.C. § 1677f(c)(1)(A); 19 C.F.R. §§ 206.17(a)(1), 207.7(a)(1), and 208.22(a)(1).

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

investigations.

When requesting an exemption, a submitter should 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 must 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 all BPI/CBI (and exempt information?) deleted. The submitter should serve the second and third versions in accordance with normal BPI/CBI and public service rules. If the Secretary denies the exemption request, the Office of the Secretary will return the information to the submitter.

D. Return or destruction of BPI/CBI

Under Commission Rules 206.17(c), 207.7(c), and 208.22(c), the Secretary determines when BPI/CBI must be returned or destroyed. Generally, 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.

In some instances, one or more interested parties may seek judicial, or NAFTA or USMCA panel review of the Commission's determination. In view of the deadlines for seeking judicial review set out in 19 U.S.C. § 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-day deadline, you must return or destroy the BPI and promptly 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 and USMCA Form C.

VI. SANCTIONS

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

Commission Rules 206.17(d), 207.7(d), and 208.22(d); the APO; and the APO application list the responses that the Commission may take upon a finding of 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; or
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 typically has two steps. First, the Commission determines whether a breach has occurred and who is responsible for it. This is done after the alleged breaching parties have been provided an opportunity to present their views on the matter. The breach investigation may conclude after the first step with the issuance of a warning letter if the Commission finds that there has been a breach, but no further action is warranted, or if the Commission determines that no breach occurred, and it issues a letter so stating. Second, if the Commission determines that a breach occurred and that further action is warranted, the Commission will then determine what sanction, if any, to impose. The breaching parties are provided an opportunity to present their views on the appropriate sanction.

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; the Commission may issue it when the Commission determines that a sanction is not appropriate. A private letter of reprimand is a sanction. The Secretary expunges it from the recipient's record after two (2) years, provided that the recipient has not received another unexpunged sanction during the two (2) year period, and that the recipient is not the subject of another APO breach investigation at the end of the two (2) year period.²² Where this sanction is imposed, the Commission keeps confidential the identity of the breaching party, although the Commission typically issues an annual public notice in the *Federal Register* describing in general terms the actions that it has taken in response to breaches.²³

Similarly, the Commission keeps all correspondence between the Commission and an alleged breaching party confidential. 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, we encourage you to email EDIS3Help@usitc.gov. Alternatively, you may 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.

²² See 19 C.F.R. § 207.7(e)(2).

²³ You can find a copy of the most recently issued notice on the Commission's website at https://www.usitc.gov/secretary/fed_reg_notices.htm

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 generally is treated as proprietary. Information pertaining to three or more companies generally 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 that 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 of the AD/CVD investigation. If you represent a party already represented by a lead authorized applicant, please contact the lead authorized applicant 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.

If one attorney files an APO application on time, how much time does that attorney 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 of the investigation). The attorney who filed on time must be designated the “lead authorized applicant,” and that attorney will be the only one to receive service of BPI under the APO.

What should I do 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 of the AD/CVD investigation, 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. Authorized applicants who end participation in an

investigation (or similarly in a full five-year review) must notify the Commission in writing of that fact and certify that they no longer possess 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 or full five-year review, 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 that is a party to the investigation substitutes entirely new counsel for its prior counsel during the investigation or full five-year review, 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. 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 or 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 BPI/CBI on the correct form. The form to use when applying for access to information under APO in a safeguard or LHT 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 forms are labeled to indicate whether it is for a safeguard, LHT, or AD/CVD investigation.

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 name the interested party represented *and* provide its category (e.g., domestic producer, importer) when completing the first page of the APO Form Application for Disclosure.
- The attorney’s 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 Commission 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. To comply with the requirements, an attorney who worked on the relevant part of that case should have signed on the consultant’s behalf; this complication could be avoided by selecting category (4).

To ensure timely processing, you should file the forms with a cover letter, clearly stating the nature of the attached forms, e.g., request for APO, amendments to APO application.

You must file APO applications and amendments electronically with the Commission via the Electronic Document Information System (EDIS). Please note that these applications and amendments are separate filings from the Entry of Appearance documents. 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).

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 that 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 or before receiving notification by the Secretary that an APO application has been approved. The petitioner in the preliminary phase of an AD/CVD investigation, a safeguard investigation, or an LHT investigation 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 provide the APO service list to all lead authorized applicants. The Docket Services Division will also provide 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

You should direct questions regarding service lists to the 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, a person must, *inter alia*, transmit each document containing BPI/CBI via secure electronic means, as authorized by the Secretary or in the following manner in hard copy:

- with a cover sheet identifying the document as containing BPI/CBI;
- with all BPI/CBI enclosed in brackets and each page warning that the document contains BPI/CBI;
- within two envelopes, the inner one sealed and marked “Proprietary Information – To be opened only by ‘Name of Recipient’”, and the outer one sealed and not marked as containing proprietary information.

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

How do I ascertain when the investigation is complete for purposes of returning or destroying BPI/CBI disclosed under APO?

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 determination in an AD/CVD review;
- 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 safeguard or LHT investigation.

For APO materials retained during litigation, BPI/CBI must be returned or destroyed after the final judgment is issued, in accordance with the terms of the APO and CIT Administrative Order No. 02-01.

What are the procedures for filing APO applications in NAFTA and USMCA appeals?

Parties must file new APO applications in NAFTA and USMCA 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 and USMCA 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. 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. 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."²⁴ 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?

²⁴ Preamble to Notice of proposed rulemaking and request for comments, 55 Fed. Reg. 24100, 24103 (June 14, 1990).

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, you must remove it from the public version and resubmit it. The Commission will initiate an APO Breach investigation.

If one party seeks judicial or NAFTA or USMCA 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 CIT Rule 73.2 and CIT Administrative Order No. 02-01 or pursuant to a NAFTA or USMCA 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 judicial or panel 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?

The new counsel would first need to comply with the procedures set forth in CIT Rule 73.2(c)(2) and any other applicable CIT procedures, including the filing of CIT Form 17. Counsel should then provide the Commission Secretary with the CIT order granting access to the BPI and sign a Commission APO form. 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 an 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 C.F.R. §§ 207.3(c), 206.8(c), and 208.20(d)) applies only to filings subject to a Commission-imposed EDIS submission 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 safeguard investigations

May I use CBI obtained from the Commission under an APO in a safeguard 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 safeguard investigation for use in possible litigation, including litigation before a 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?

Under Commission Rule 201.8(d), you must file APO applications and amendments electronically. There are also specific documents 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).

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 that you have incorrectly input information on the EDIS submission form, immediately email EDIS3Help@usitc.gov or 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. You can find guidance on the purpose and meaning of the Commission’s Rules in the regulatory preambles that accompany amendments to the rules. You can find rulemaking notices on the Commission’s website at http://www.usitc.gov/secretary/fed_reg_notices/rules.htm
2. Since 1991, the Commission has published annual summaries 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 you can find them on the Commission’s website at 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	http://www.usitc.gov
EDIS Website	https://edis.usitc.gov
APO Forms	http://www.usitc.gov/secretary/apo_forms_and_redbook.htm
U.S. Statute	http://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE
Commission Rules of Practice and Procedure	http://www.usitc.gov/secretary/fed_reg_notices/rules.htm
Commission Notices	http://www.usitc.gov/secretary/fed_reg_notices.htm