

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

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I. General

In antidumping and countervailing duty investigations (AD/CVD) under Title VII of the Tariff Act of 1930 (19 U.S.C. §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), 421(b) and 421(o) of the Trade Act of 1974 (19 U.S.C. §§2252, 2254(c), 2451(b), and 2451(o)¹), the Commission receives and collects “confidential business information”(CBI).² 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 gives certain representatives of certain parties to an AD/CVD or safeguards investigation access to 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 statute³ and the Commission’s rules,⁴ 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.

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

² 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. See Appendix B for the text of the rule.

³ Section 777(c)(1)(A) of the Tariff Act of 1930 (19 U.S.C. §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. 2252) contains a similar provision. Selected statutory provisions appear in Appendix A.

⁴ The most directly applicable provisions are 19 CFR §§201.6, 206.8, 206.17, 207.3, and 207.7. These are provided in Appendix B.

Immediately prior to the publication of the third edition, Public Law 106-286, an Act to Authorize Extension of Non Discriminatory Treatment (Normal Trade Relations Treatment) to the People's Republic of China and to Establish a Framework for Relations between the United States and the People's Republic of China, was enacted. New forms of investigation were created by this act, which authorized the grant of access to CBI under APO in certain circumstances. The Commission has issued rules regarding the APO process in such investigations (67 FR 8183 (Feb. 22, 2002)). Procedures covered by these rules are addressed in this fourth edition.

The Commission has again amended its rules (70 FR 8510 (February 22, 2005)). This fourth edition outlines revised APO procedures covered by these rule changes.

The Commission no longer requires clerical staff to file an APO application with the Commission. Instead, the authorized applicant is responsible for retention and accuracy of such forms and is deemed responsible for such persons' compliance with the administrative protective order.

In NAFTA appeals parties are now required to file new NAFTA APO applications. The completed original of the form (NAFTA APO Form C) is to be filed concurrent with the filing of a complaint or notice of appearance in the panel review.

Additionally, the standard APO forms themselves have been changed. The applicant now agrees to not divulge any of the BPI/CBI disclosed under the APO or otherwise obtained in the investigation. This requires safeguarding of all BPI/CBI he/she receives in an investigation (other than BPI/CBI otherwise available to him/her).

This edition amends the provision for a consultant or expert who appears regularly before the Commission to apply for disclosure of BPI/CBI under APO as an authorized applicant. Although we do not define the term "appears regularly before the Commission," we do provide for submission of certain information to assist the Secretary in making her determination of whether to grant an application.

We identified applying for and making amendments to requests for disclosure of BPI/CBI under APO, and certifying the destruction or return of documents disclosed under APO, as two processes that could be streamlined with the introduction of electronic filing capability as part of the Commission's Electronic Document Information System (EDIS). To make the processes user-friendly we developed distinct document type codes for these actions and included them in the drop-down list used when creating the cover sheets required when filing either paper format or electronic documents. Electronic filing procedures are addressed in this edition.

Questions regarding APO practice should be directed to the Docket Section of the Office of the Secretary, room 112A, telephone (202) 205-1802 or the Secretary on (202) 205-2000.

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

II. The APO

At the beginning of each antidumping, countervailing duty, and safeguards investigation (including a five-year review of the antidumping or countervailing duty order), the Secretary signs and issues an APO applicable to the investigation. 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 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 has been clarified to require 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 D); the other for safeguards investigations (see Appendix E). 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 F.

Copies of the APO forms, including applications, are obtainable from the Docket Section during normal business hours, 8:45 a.m. to 5:15 p.m., Eastern time, by calling the Docket Section at (202) 205-1802 and requesting that one be mailed or held for pick-up, or by visiting the USITC Web site at <http://www.usitc.gov/apo.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."⁵ To qualify as an authorized applicant, a person must meet the following criteria:

1. The person must be one of the following:
 - (a) An attorney,⁶
 - (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;⁷ or
 - (d) A representative of an interested party which is a party to the investigation, if such interested party is not represented by counsel.⁸

⁵ 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.

⁶ 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 §201.15.

⁷ 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.

⁸ 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

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.⁹

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.

⁹ 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,

(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 [sic] obligations of the United States.

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

The term "party" is defined in the Commission's rules.¹⁰ 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. The rules define "competitive decision making" by incorporating the definition used in U.S. Steel Corp. v. United States.¹¹ 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.).¹²

The U.S. Steel decision was interpreted in Matsushita Electric Ind. Corp. v. United States.¹³ 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.¹⁴

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.

¹⁰ 19 CFR §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."

¹¹ 730 F.2d 1465 (Fed. Cir. 1984).

¹² 19 CFR §§206.17(a)(3)(ii), 207.7(a)(3)(ii).

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

¹⁴ 929 F.2d at 1580.

If you fall into one of two categories of authorized applicants,¹⁵ 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 indicate 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 making her determination regarding your application, a listing of previous appearances before the Commission must be submitted 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.

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. At such time that 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, 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 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.

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

In a five-year review or a safeguard investigation,¹⁶ 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 post-hearing briefs in an investigation or full five-year review, or post-conference 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 Docket Section will notify the lead authorized applicant when the APO amendments have been approved. This notice may be either by telephone, facsimile, or e-mail.

If your APO application was approved in the preliminary phase of an original AD/CVD investigation and you intend to continue representation in the final phase, you need not file another application. However, you must notify the Secretary in writing that you will participate in the final phase. Each firm is to file a letter listing the attorneys and consultants that will participate in the final phase. Such a letter should indicate whether any persons who participated in the preliminary phase of the investigation have ended their involvement with the matter. If a new attorney or other authorized applicant is being retained, the appropriate forms must be filed.

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.

¹⁶ However, safeguard investigations under Section 421 of the Trade Act of 1974 have shorter deadlines. In these types of investigations you are required to file application within seven (7) days after the publication in the Federal Register of the notice of institution.

This APO service list is not to be confused with the public service list also established by the Secretary.¹⁷ Only submissions to the Commission with all BPI/CBI deleted are to be served on the persons appearing on the public service list. To avoid confusion, the APO service list is printed on pink paper, whereas the public service list is printed on blue paper. All applications for disclosure of BPI/CBI under APO and notification of changes to the APO, as well as all service lists, are posted to the ITC web site on the Electronic Document Information System (EDIS, <http://edis.usitc.gov>).

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. When practical, this notification will be made by facsimile or e-mail transmission to any applicant and the petitioner. A copy of the petition, including all BPI, shall then be served by petitioner on those approved applicants within two (2) calendar days of the time notification is made by 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". The Secretary's action regarding each application and request for amendment is recorded on the approval form, Request for Disclosure of BPI/CBI under Administrative Protective Order and filed on EDIS.

When an application for disclosure of BPI/CBI under APO is accepted by the Secretary, a unique control number is assigned to it. All subsequent correspondence regarding this APO account are cross-referenced to this control number. This control number is in the format YY-nnn, where YY represents the last two numbers of the fiscal year and nnn is a sequentially assigned number starting with "1" each fiscal year. The Docket staff assure correct cross-referencing and entry of this number into the Document Title field on EDIS.

Notice regarding the status of your application or request for amendment is typically made by the Secretary's Office 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 the Docket Section at (202) 205-1802 or the Secretary at (202) 205-2000.

¹⁷ 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.

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 personnel will contact the lead authorized applicant when there is BPI/CBI available.

Docket 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 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 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 submission¹⁸. If the submission is to be filed by a deadline set by the Commission, Commission rules 206.8 and 207.3 (19 CFR §§ 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 adequately sanitize the public version of their submissions.

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 after which the person may disclosure information not enclosed in the finalized bracketing. 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 on the deadline day and then finds an error in the bracketing in 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

¹⁸ If the person is a party, the submission must also be served on all persons designated in the Secretary's service list. That person must also file at least four (4) additional copies of the submission in which their BPI/CBI has been deleted.

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 paper version corrections to bracketing of BPI/CBI in a brief, do not submit an entire replacement brief; individual replacement pages are sufficient and preferable. If you choose to submit a replacement brief, you should itemize each change. If you are electronically filing 24-hour changes to a document pursuant to rule 206.8 or 207.3, you must file the entire corrected document again, not just portions of the document containing the one-day changes.

The Commission instituted the "one-day rule" to minimize the number of APO breaches. Please take advantage of the opportunity afforded by the 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."¹⁹ As "under oath" suggests, this certification either must be notarized or must comply with 28 USC §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."²⁰ This certification requires no notarization.

¹⁹ 19 CFR §201.6(b)(3)(iii).

²⁰ 19 CFR §§206.8(a) and 207.3(a).

C. Exemption from disclosure for certain BPI/CBI

Under statute and regulation,²¹ 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.²²

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 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.

²¹ 19 U.S.C. §1677f(c)(1)(A) and 19 CFR §206.17(a)(1).

²² H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess., at 623.

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 issued.²³

²³ A copy of the most recently-issued notice can be found at Appendix C.

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 CONFIDENTIAL - NOT FOR PUBLIC INSPECTION. This correspondence is not served on parties to the investigation.

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 Secretary at (202) 205-2000, the Docket Section at (202) 205-1802, or the Office of the General Counsel at (202) 205-3061, for assistance.

A. Aggregated data

1. 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.

In particular instances the Commission may need to deviate from the normal criteria. Accordingly, do not assume that you can disclose aggregate data to persons not authorized to have access to BPI/CBI unless the aggregate data appear in a public Commission document. When in doubt as to the status of aggregate information, please consult Commission staff.

B. The APO application process and amendments

1. 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. However, you must notify the Secretary in writing at the beginning of the final phase of the persons who will continue to be subject to the APO during the final phase and those persons who should be removed from the APO service list.

2. 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 of your APO access. Otherwise, the lead authorized applicant must submit a written request for the BPI to the Secretary.

3. 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 post-hearing briefs are due in a final phase or full five-year review (or the post-conference briefs in a preliminary phase). 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.

4. 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. At such time that 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.

5. 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. You must make separate APO application for any new personnel. And, you should remain aware of APO amendment time limits.

6. 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.

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

If an attorney is admitted to practice before the bar of any United States state or the District of Columbia, the attorney can apply, regardless of whether she or he is a U.S. citizen. 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.

8. What are the most common mistakes in applying for APO?

(a) 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 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 now labeled to indicate either Safeguards or AD/CVD investigations.

(b) The other most common mistakes in applying for APO are mechanical errors related to filling out the APO application forms. These mistakes do not cause an application to be rejected but can instead slow processing of the application.

(i) 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.

(ii) The attorney name and signature must be provided on the first page of the APO Form Application for Disclosure when category (3) is checked.

(c) 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.

(d) To assure 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. In completing the Cover Sheet which must accompany any filing with the ITC whether you are filing electronically or in paper format, you should select either document type "Protective Order Request" or "Protective Order Amendment," whichever is appropriate.

C. Service of BPI/CBI

1. 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.

2. 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 receipt of 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 Section will serve the APO service list on all lead authorized applicants. The Docket Section will serve amended versions of the list (1) when any change affects service, and (2) no more than once a week as other types of changes are

made to the APO. These other types of changes may include correcting the spelling of a persons name or title.

If circumstances warrant, the Secretary may issue an amended service list at any time. Service lists are available on the Internet through EDIS, <http://edis.usitc.gov>. Questions regarding service lists should be directed to the Docket Section of the Office of the Secretary at (202) 205-1802 or the Secretary at (202) 205-2000.

3. 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. If the document is to be mailed, 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]," 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

1. 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.

In some instances, one or more interested parties may seek judicial review of the Commission's determination. In view of the deadlines for seeking judicial review set out in 19 U.S.C. §1516a,

60 days should give parties enough time to determine if 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 judicial review proceedings, provided that you apply to the appropriate reviewing authority for a Judicial Protective Order or, in cases before the U.S. Court of International Trade, file a BPI certification agreed to by the Commission, within 150 days after the completion of the investigation. If you have not applied for a Judicial Protective Order or filed a BPI certification 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 F.

2. 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 paragraph 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.

3. 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.

4. If I have breached an APO by disclosing BPI/CBI to unauthorized persons, must I certify at the end of the investigation that no CPI/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.

5. If I choose to store BPI/CBI on computer disk, does the APO's warning regarding the storage of BPI/CBI require that I use removable disks rather than a hard disk?

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 storage on hard disk and of transmission of BPI/CBI. In particular, applicants should understand that information supposedly deleted from a hard disk 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 a macro to assist in preparing the public version of filings. We have found that some such macros 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.

6. 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.

7. If one party seeks judicial 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 join in a proposed Judicial Protective Order or in the case of the Court of International Trade, file a BPI certification acceptable to the Commission 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 the judicial proceeding. 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).

8. 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 need to submit a BPI certification or a motion to the Court for disclosure under a Judicial Protective Order pursuant to US CIT R.71. Normally, the new counsel should contact previous counsel for access to the BPI in the record.

²⁴ Preamble to notice of proposed rulemaking, 55 FR 24,100 (June 14, 1990).

E. One-day rule and APO notification

1. When does the one-day rule not apply?

The one-day rule (contained in 19 CFR §§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.

2. 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 Section 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

1. 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 investigations.

2. 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. Should CBI be needed in a U.S. judicial proceeding, a separate judicial protective order would likely be issued.

G. Electronic filing

1. Can I electronically file my APO applications and amendments?

Yes. The ITC now allows such documents to be filed electronically, subject to the provisions of the Handbook on Electronic Filing Procedures. Specific document types have been established for APO applications, amendments, and certifications of destruction. You should consult the Handbook on Electronic Filing Procedures for the requirements governing electronic filing and EDIS (<http://edis.usitc.gov>) for step-by-step procedures. The Handbook on Electronic Filing Procedures is available through EDIS or the Dockets subpage of the USITC web site (www.usitc.gov).

2. What do I do if I discover that I mis-coded information on the cover sheet which must accompany any filing with the ITC whether filed electronically or in paper format?

If you discover that you have created a cover sheet with incorrect information you should call either the EDIS Help Desk at (202) 205-EDIS or the Docket Section at (202) 205-1802 to report the problem. You should provide the EDIS number to the staff person and then explain the problem and how it should be corrected. In most instances the correction will be made while you are still on the telephone.

Similarly, if you find a miscoded, or apparently miscoded, document on EDIS, you should inform the Docket Section or EDIS Help Desk.

H. Additional information

(1) Guidance on the purpose and meaning of the rules may be found in the regulatory preambles that accompanied amendments to the rules. Such notices include:

- Notice of interim rulemaking, at 53 FR 33039 (Aug. 29, 1988).
- Notice of interim rulemaking, at 54 FR 5220 (Feb. 2, 1989).
- Notice of interim rulemaking, at 55 FR 24100 (June 14, 1990).
- Notice of final rulemaking, at 56 FR 11918 (Mar. 21, 1991).
- Notice of proposed rulemaking, at 58 FR 19638 (Apr. 15, 1993).
- Notice of final rulemaking, at 59 FR 66719 (Dec. 28, 1994).
- Notice of proposed rulemaking, at 60 FR 51748 (Oct. 3, 1995).
- Notice of final rulemaking, at 61 Fed. Reg 37818 (July 22, 1996).
- Notice of proposed rulemaking, at 62 FR 55185 (Oct. 23, 1997).
- Notice of final rulemaking, at 63 FR 30599 (June 5, 1998).
- Notice of interim rulemaking, at 66 FR 32217 (June 14, 2001).
- Notice of interim rulemaking, at 67 FR 8183 (February 22, 2002).
- Notice of final rulemaking, at 67 FR 68036 (November 8, 2002).

- Notice of final rulemaking, at 68 FR 32971 (June 3, 2003).
- Notice of proposed rulemaking, at 69 FR 64541 (November 5, 2004).
- Notice of final rulemaking, at 70 FR 8510 (February 22, 2005)

(2) Relevant legislative history can be found at H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess., at 622 (1998), and H.R. Conf. Rep. No. 650, 101st Cong., 2d Sess., at 121 (1990) and H.R. Rep. No. 826, 103d Cong., 2d Sess., at 129 (1994).

(3) 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 can be found at:

- Summary of Commission practice relating to administrative protective orders, at 56 FR 4846 (Feb. 6, 1991).
- Summary of Commission practice relating to administrative protective orders, at 57 FR 12335 (Apr. 9, 1992).
- Summary of Commission practice relating to administrative protective orders, at 58 FR 21991 (Apr. 8, 1993).
- Summary of Commission practice relating to administrative protective orders, at 59 FR 16834 (Apr. 8, 1994).
- Summary of Commission practice relating to administrative protective orders, at 60 FR 24880 (May 10, 1995).
- Summary of Commission practice relating to administrative protective orders, at 61 FR 21203 (May 9, 1996).
- Summary of Commission practice relating to administrative protective orders, at 62 FR 13164 (Mar. 19, 1997).
- Summary of Commission practice relating to administrative protective orders, at 63 FR 25064 (May 6, 1998).
- Summary of Commission practice relating to administrative protective orders, at 64 FR 23355 (Apr. 30, 1999).
- Summary of Commission practice relating to administrative protective orders, at 65 FR 30434 (May 11, 2000).
- Summary of Commission practice relating to administrative protective orders, at 66 FR 27685 (May 18, 2001).
- Summary of Commission practice relating to administrative protective orders, at 67 FR 39425 (June 7, 2002).
- Summary of Commission practice relating to administrative protective orders, at 68 FR 28256 (May 23, 2003).
- Summary of Commission practice relating to administrative protective orders, at 69 FR 29972 (May 26, 2004)

(4) The Commission's electronic filing capability was developed based on public comment and notice. Relevant notices in the Federal Register include:

- Notice announcing public forum, at 66 FR 28542 (May 23, 2001).

- Forum on Issues Relating to Electronic Filing and Maintenance of Documents, at 66 FR 65742 (December 20, 2001).
- Draft Handbook on Electronic Filing Procedures, at 67 FR 20822 (April 26, 2002)
- Handbook on Electronic Filing Procedures, at 67 FR 68168 (Nov. 8, 2002).
- Public Input on Improving Agency Procedures, at 68 FR 60708 (October 23, 2003).

VIII. Contacts and Addresses

Office of the Secretary, Room 112: (202) 205-2000

Docket Section, Office of the Secretary, Room 112A: (202) 205-1802

Publications Request Line: (202) 205-1809

TDD Terminal: (202) 205-1810

Office of Investigations: (202) 205-3160

Office of the General Counsel: (202) 205-3061

USITC Web site <http://www.usitc.gov>

APO Forms on the Web: <http://www.usitc.gov/apo.htm>

EDIS (the USITC's electronic docket) on the Web: <http://edis.usitc.gov>

EDIS Help Desk, Office of the Secretary: (202) 205-EDIS (3347)

APPENDIX A

SELECTED STATUTORY PROVISIONS

- A.1 19 U.S.C. §1677f. Access to information
- A.2 19 U.S.C. §2252. Investigations, determinations, and recommendations by Commission

WAIS Document RetrievalFrom the U.S. Code Online via GPO Access
[wais.access.gpo.gov]
[Laws in effect as of January 2, 2001]
[Document not affected by Public Laws enacted between
January 2, 2001 and January 28, 2002]
[CITE: 19USC1677f]

TITLE 19--CUSTOMS DUTIES

CHAPTER 4--TARIFF ACT OF 1930

SUBTITLE IV--COUNTERVAILING AND ANTIDUMPING DUTIES

Part IV--General Provisions

Sec. 1677f. Access to information

(a) Information generally made available

(1) Public information function

There shall be established a library of information relating to foreign subsidy practices and countervailing measures. Copies of material in the library shall be made available to the public upon payment of the costs of preparing such copies.

(2) Progress of investigation reports

The administering authority and the Commission shall, from time to time upon request, inform the parties to an investigation of the progress of that investigation.

(3) Ex parte meetings

The administering authority and the Commission shall maintain a record of any ex parte meeting between--

- (A) interested parties or other persons providing factual information in connection with a proceeding, and
- (B) the person charged with making the determination, or any person charged with making a final recommendation to that person, in connection with that proceeding,

if information relating to that proceeding was presented or discussed at such meeting. The record of such an ex parte meeting shall include the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the

matters discussed or submitted. The record of the ex parte meeting shall be included in the record of the proceeding.

(4) Summaries; non-proprietary submissions

The administering authority and the Commission shall disclose--

(A) any proprietary information received in the course of a proceeding if it is disclosed in a form which cannot be associated with, or otherwise be used to identify, operations of a particular person, and

(B) any information submitted in connection with a proceeding which is not designated as proprietary by the person submitting it.

(b) Proprietary information

(1) Proprietary status maintained

(A) In general

Except as provided in subsection (a)(4)(A) of this section and subsection (c) of this section, information submitted to the administering authority or the Commission which is designated as proprietary by the person submitting the information shall not be disclosed to any person without the consent of the person submitting the information, other than--

(i) to an officer or employee of the administering authority or the Commission who is directly concerned with carrying out the investigation in connection with which the information is submitted or any review under this subtitle covering the same subject merchandise, or

(ii) to an officer or employee of the United States Customs Service who is directly involved in conducting an investigation regarding fraud under this subtitle.

(B) Additional requirements

The administering authority and the Commission shall require that information for which proprietary treatment is requested be accompanied by--

(i) either--

(I) a non-proprietary summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, or

(II) a statement that the information is not susceptible to summary accompanied by a statement of the reasons in support of the contention, and

(ii) either--

(I) a statement which permits the administering authority or the Commission to release under administrative protective order, in accordance with subsection (c) of this section, the information submitted in confidence, or

(II) a statement to the administering authority or the Commission that the business proprietary information is of a type that should not be released under administrative protective order.

(2) Unwarranted designation

If the administering authority of the Commission determines, on the basis of the nature and extent of the information or its availability from public sources, that designation of any information as proprietary is unwarranted, then it shall notify the person who submitted it and ask for an explanation of the reasons for the designation. Unless that person persuades the administering authority or the Commission that the designation is warranted, or withdraws the designation, the administering authority or the Commission, as the case may be, shall return it to the party submitting it. In a case in which the administering authority or the Commission returns the information to the person submitting it, the person may thereafter submit other material concerning the subject matter of the returned information if the submission is made within the time otherwise provided for submitting such material.

(3) Section 1675 reviews

Notwithstanding the provisions of paragraph (1), information submitted to the administering authority or the Commission in connection with a review under section 1675(b) or 1675(c) of this title which is designated as proprietary by the person submitting the information may, if the review results in the revocation of an order or finding (or termination of a suspended investigation) under section 1675(d) of this title, be used by the agency to which the information was originally submitted in any investigation initiated within 2 years after the date of the revocation or termination pursuant to a petition covering the same subject merchandise.

(c) Limited disclosure of certain proprietary information under protective order

(1) Disclosure by administering authority or Commission

(A) In general

Upon receipt of an application (before or after receipt of the information requested) which describes in general terms the information requested and sets forth the reasons for the request, the administering authority or 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 described in subparagraph (B), regardless of when the information is submitted during a proceeding. Customer names obtained during any investigation which requires a determination under section 1671d(b) or 1673d(b) of this title may not be disclosed by the administering authority under protective order until either an order is published under section 1671e(a) or 1673e(a) of this title as a result of the investigation or the investigation is suspended or terminated. The Commission may delay disclosure of customer names under protective order during any such investigation until a reasonable time prior to any hearing provided under section 1677c of this title.

(B) Protective order

The protective order under which information is made available shall contain such requirements as the administering authority or the Commission may determine by regulation to be appropriate. The administering authority and the Commission shall provide by regulation for such sanctions as the administering authority and the Commission determine to be appropriate, including disbarment from practice before the agency.

(C) Time limitation on determinations

The administering authority or the Commission, as the case may be, shall determine whether to make information available under this paragraph--

(i) not later than 14 days (7 days if the submission pertains to a proceeding under section 1671b(a) or 1673b(a) of this title) after the date on which the information is submitted, or

(ii) if--

(I) the person that submitted the information raises objection to its release, or

(II) the information is unusually voluminous or complex,

not later than 30 days (10 days if the submission pertains to a proceeding under section 1671b(a) or 1673b(a) of this title) after the date on which the information is submitted.

(D) Availability after determination

If the determination under subparagraph (C) is affirmative, then--

(i) the business proprietary information submitted to the administering authority or the Commission on or before the date of the determination shall be made available, subject to the terms and conditions of the protective order, on such date; and

(ii) the business proprietary information submitted to the administering authority or the Commission after the date of the determination shall be served as required by subsection (d) of this section.

(E) Failure to disclose

If a person submitting information to the administering authority refuses to disclose business proprietary information which the administering authority determines should be released under a protective order described in subparagraph (B), the administering authority shall return the information, and any nonconfidential summary thereof, to the person submitting the information and summary and shall not consider either.

(2) Disclosure under court order

If the administering authority denies a request for information under paragraph (1), then application may be made to the United States Customs Court for an order directing the administering authority or the Commission to make the information available. After notification of all parties to the investigation and after an opportunity for a hearing on the record, the court may issue an order, under such conditions as the court deems appropriate, which shall not have the effect of stopping or suspending the investigation, directing the administering authority or the Commission to make all or a portion of the requested information described in the preceding sentence available under a protective order and setting forth sanctions for violation of such order if the court finds that, under the standards applicable in proceedings of the court, such an order is warranted, and that--

(A) the administering authority or the Commission has denied access to the information under subsection (b)(1) of this section,

(B) the person on whose behalf the information is requested is an interested party who is a party to the investigation in connection with which the information was obtained or developed, and

(C) the party which submitted the information to which the request relates has been notified, in advance of the hearing, of the request made under this section and of its right to appear and be heard.

(d) Service

Any party submitting written information, including business proprietary information, to the administering authority or the Commission during a proceeding shall, at the same time, serve the information upon all interested parties who are parties to the proceeding, if the information is covered by a protective order. The administering authority or the Commission shall not accept any such information that is not accompanied by a certificate of service and a copy of the protective order version of the document containing the information. Business proprietary information shall only be served upon interested parties who are parties to the proceeding that are subject to protective order; however, a nonconfidential summary thereof shall be served upon all other interested parties who are parties to the proceeding.

(e) Repealed. Pub. L. 103-465, title II, Sec. 231(d)(1), Dec. 8, 1994, 108 Stat. 4897

(f) Disclosure of proprietary information under protective orders issued pursuant to the North American Free Trade Agreement or the United States-Canada Agreement

(1) Issuance of protective orders

(A) In general

If binational panel review of a determination under this subtitle is requested pursuant to article 1904 of the NAFTA or the United States-Canada Agreement, or an extraordinary challenge committee is convened under Annex 1904.13 of the NAFTA or the United States-Canada Agreement, the administering authority or the Commission, as appropriate, may make available to authorized persons, under a protective order described in paragraph (2), a copy of all proprietary material in the administrative record made during the proceeding in question. If the administering authority or the Commission claims a privilege as to a document or portion of a document in the administrative

record of the proceeding in question and a binational panel or extraordinary challenge committee finds that in camera inspection or limited disclosure of that document or portion thereof is required by United States law, the administering authority or the Commission, as appropriate, may restrict access to such document or portion thereof to the authorized persons identified by the panel or committee as requiring access and may require such persons to obtain access under a protective order described in paragraph (2).

(B) Authorized persons

For purposes of this subsection, the term "authorized persons" means--

- (i) the members of, and the appropriate staff of, the binational panel or the extraordinary challenge committee, as the case may be, and the Secretariat,
- (ii) counsel for parties to such panel or committee proceeding, and employees, and persons under the direction and control, of such counsel,
- (iii) any officer or employee of the United States Government designated by the administering authority or the Commission, as appropriate, to whom disclosure is necessary in order to make recommendations to the Trade Representative regarding the convening of extraordinary challenge committees under chapter 19 of the NAFTA or the Agreement, and
- (iv) any officer or employee of the Government of a free trade area country (as defined in section 1516a(f)(10) of this title) designated by an authorized agency of such country to whom disclosure is necessary in order to make decisions regarding the convening of extraordinary challenge committees under chapter 19 of the NAFTA or the Agreement.

(C) Review

A decision concerning the disclosure or nondisclosure of material under protective order by the administering authority or the Commission shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such decision on any question of law or fact by an action in the nature of mandamus or otherwise.

(2) Contents of protective order

Each protective order issued under this subsection shall be in such form and contain such requirements as the administering

authority or the Commission may determine by regulation to be appropriate. The administering authority and the Commission shall ensure that regulations issued pursuant to this paragraph shall be designed to provide an opportunity for participation in the binational panel proceeding, including any extraordinary challenge, equivalent to that available for judicial review of determinations by the administering authority or the Commission that are not subject to review by a binational panel.

(3) Prohibited acts

It is unlawful for any person to violate, to induce the violation of, or knowingly to receive information the receipt of which constitutes a violation of, any provision of a protective order issued under this subsection or to violate, to induce the violation of, or knowingly to receive information the receipt of which constitutes a violation of, any provision of an undertaking entered into with an authorized agency of a free trade area country (as defined in section 1516a(f)(10) of this title) to protect proprietary material during binational panel or extraordinary challenge committee review pursuant to article 1904 of the NAFTA or the United States-Canada Agreement.

(4) Sanctions for violation of protective orders

Any person, except a judge appointed to a binational panel or an extraordinary challenge committee under section 3432(b) of this title, who is found by the administering authority or the Commission, as appropriate, after notice and an opportunity for a hearing in accordance with section 554 of title 5 to have committed an act prohibited by paragraph (3) shall be liable to the United States for a civil penalty and shall be subject to such other administrative sanctions, including, but not limited to, debarment from practice before the administering authority or the Commission, as the administering authority or the Commission determines to be appropriate. The amount of the civil penalty shall not exceed \$100,000 for each violation. Each day of a continuing violation shall constitute a separate violation. The amount of such civil penalty and other sanctions shall be assessed by the administering authority or the Commission by written notice, except that assessment shall be made by the administering authority for violation, inducement of a violation or receipt of information with reason to know that such information was disclosed in violation, of an undertaking entered into by any person with an authorized agency of a free trade area country (as defined in section 1516a(f)(10) of this title).

(5) Review of sanctions

Any person against whom sanctions are imposed under paragraph (4) may obtain review of such sanctions by filing a notice of appeal in the United States Court of International Trade within 30 days from the date of the order imposing the sanction and by simultaneously sending a copy of such notice by certified mail to the administering authority or the Commission, as appropriate. The administering authority or the Commission shall promptly file in such court a certified copy of the record upon which such violation was found or such sanction imposed, as provided in section 2112 of title 28. The findings and order of the administering authority or the Commission shall be set aside by the court only if the court finds that such findings and order are not supported by substantial evidence, as provided in section 706(2) of title 5.

(6) Enforcement of sanctions

If any person fails to pay an assessment of a civil penalty or to comply with other administrative sanctions after the order imposing such sanctions becomes a final and unappealable order, or after the United States Court of International Trade has entered final judgment in favor of the administering authority or the Commission, an action may be filed in such court to enforce the sanctions. In such action, the validity and appropriateness of the final order imposing the sanctions shall not be subject to review.

(7) Testimony and production of papers

(A) Authority to obtain information

For the purpose of conducting any hearing and carrying out other functions and duties under this subsection, the administering authority and the Commission, or their duly authorized agents--

(i) shall have access to and the right to copy any pertinent document, paper, or record in the possession of any individual, partnership, corporation, association, organization, or other entity,

(ii) may summon witnesses, take testimony, and administer oaths,

(iii) and may require any individual or entity to produce pertinent documents, books, or records.

Any member of the Commission, and any person so designated by the administering authority, may sign subpoenas, and members and agents of the administering authority and the Commission, when

authorized by the administering authority or the Commission, as appropriate, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.

(B) Witnesses and evidence

The attendance of witnesses who are authorized to be summoned, and the production of documentary evidence authorized to be ordered, under subparagraph (A) may be required from any place in the United States at any designated place of hearing. In the case of disobedience to a subpoena issued under subparagraph (A), an action may be filed in any district or territorial court of the United States to require the attendance and testimony of witnesses and the production of documentary evidence. Such court, within the jurisdiction of which such inquiry is carried on, may, in case of contumacy or refusal to obey a subpoena issued to any individual, partnership, corporation, association, organization or other entity, issue any order requiring such individual or entity to appear before the administering authority or the Commission, or to produce documentary evidence if so ordered or to give evidence concerning the matter in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof.

(C) Mandamus

Any court referred to in subparagraph (B) shall have jurisdiction to issue writs of mandamus commanding compliance with the provisions of this subsection or any order of the administering authority or the Commission made in pursuance thereof.

(D) Depositions

For purposes of carrying out any functions or duties under this subsection, the administering authority or the Commission may order testimony to be taken by deposition. Such deposition may be taken before any person designated by the administering authority or Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under the direction of such person, and shall then be subscribed by the deponent. Any individual, partnership, corporation, association, organization or other entity may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the

administering authority or Commission, as provided in this paragraph.

(E) Fees and mileage of witnesses

Witnesses summoned before the administering authority or the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(g) Information relating to violations of protective orders and sanctions

The administering authority and the Commission may withhold from disclosure any correspondence, private letters of reprimand, settlement agreements, and documents and files compiled in relation to investigations and actions involving a violation or possible violation of a protective order issued under subsection (c) or (d) of this section, and such information shall be treated as information described in section 552(b)(3) of title 5.

(h) Opportunity for comment by consumers and industrial users

The administering authority and the Commission shall provide an opportunity for industrial users of the subject merchandise and, if the merchandise is sold at the retail level, for representative consumer organizations, to submit relevant information to the administering authority concerning dumping or a countervailable subsidy, and to the Commission concerning material injury by reason of dumped or subsidized imports.

(i) Publication of determinations; requirements for final determinations

(1) In general

Whenever the administering authority makes a determination under section 1671a or 1673a of this title whether to initiate an investigation, or the administering authority or the Commission makes a preliminary determination under section 1671b or 1673b of this title, a final determination under section 1671d of this title or section 1673d of this title, a preliminary or final determination in a review under section 1675 of this title, a determination to suspend an investigation under this subtitle, or a determination under section 1675b of this title, the administering authority or the Commission, as the case may be, shall publish the facts and conclusions supporting that determination, and shall publish notice of that determination in the Federal Register.

(2) Contents of notice or determination

The notice or determination published under paragraph (1) shall include, to the extent applicable--

(A) in the case of a determination of the administering authority--

(i) the names of the exporters or producers of the subject merchandise or, when providing such names is impracticable, the countries exporting the subject merchandise to the United States,

(ii) a description of the subject merchandise that is sufficient to identify the subject merchandise for customs purposes,

(iii)(I) with respect to a determination in an investigation under part I of this subtitle or section 1675b of this title or in a review of a countervailing duty order, the amount of the countervailable subsidy established and a full explanation of the methodology used in establishing the amount, and

(II) with respect to a determination in an investigation under part II of this subtitle or in a review of an antidumping duty order, the weighted average dumping margins established and a full explanation of the methodology used in establishing such margins, and

(iv) the primary reasons for the determination; and

(B) in the case of a determination of the Commission--

(i) considerations relevant to the determination of injury, and

(ii) the primary reasons for the determination.

(3) Additional requirements for final determinations

In addition to the requirements set forth in paragraph (2)--

(A) the administering authority shall include in a final determination described in paragraph (1) an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation or review (as the case may be), concerning the establishment of dumping or a countervailable subsidy, or the suspension of the investigation, with respect to which the determination is made; and

(B) the Commission shall include in a final determination of injury an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation or review (as the case may be) concerning volume, price effects, and impact on the industry

of imports of the subject merchandise.

(June 17, 1930, ch. 497, title VII, Sec. 777, as added Pub. L. 96-39, title I, Sec. 101, July 26, 1979, 93 Stat. 187; amended Pub. L. 98-573, title VI, Sec. 619, Oct. 30, 1984, 98 Stat. 3038; Pub. L. 99-514, title XVIII, Secs. 1886(a)(13), 1889(8), Oct. 22, 1986, 100 Stat. 2922, 2926; Pub. L. 100-418, title I, Sec. 1332, Aug. 23, 1988, 102 Stat. 1207; Pub. L. 100-449, title IV, Sec. 403(c), Sept. 28, 1988, 102 Stat. 1884; Pub. L. 101-382, title I, Secs. 134(a)(4), 135(b), Aug. 20, 1990, 104 Stat. 650, 651; Pub. L. 103-182, title IV, Sec. 412(c), Dec. 8, 1993, 107 Stat. 2146; Pub. L. 103-465, title II, Secs. 226-228, 231(b), (d)(1), Dec. 8, 1994, 108 Stat. 4886-4888, 4896, 4897.)

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TITLE 19--CUSTOMS DUTIES

CHAPTER 12--TRADE ACT OF 1974

SUBCHAPTER II--RELIEF FROM INJURY CAUSED BY IMPORT COMPETITION

Part 1--Positive Adjustment by Industries Injured by Imports

Sec. 2252. Investigations, determinations, and recommendations
by Commission

(a) Petitions and adjustment plans

(1) A petition requesting action under this part for the purpose of facilitating positive adjustment to import competition may be filed with the Commission by an entity, including a trade association, firm, certified or recognized union, or group of workers, which is representative of an industry.

(2) A petition under paragraph (1)--

(A) shall include a statement describing the specific purposes for which action is being sought, which may include facilitating the orderly transfer of resources to more productive pursuits, enhancing competitiveness, or other means of adjustment to new conditions of competition; and

(B) may--

(i) subject to subsection (d)(1)(C)(i) of this section, request provisional relief under subsection (d)(1) of this section; or

(ii) request provisional relief under subsection (d)(2) of this section.

(3) Whenever a petition is filed under paragraph (1), the Commission shall promptly transmit copies of the petition to the Office of the United States Trade Representative and other Federal agencies directly concerned.

(4) A petitioner under paragraph (1) may submit to the Commission and the United States Trade Representative (hereafter in this part referred to as the "Trade Representative"), either with the petition, or at any time within 120 days after the date of filing of the petition, a plan to facilitate positive adjustment to import competition.

(5)(A) Before submitting an adjustment plan under paragraph (4), the petitioner and other entities referred to in paragraph (1) that wish to participate may consult with the Trade Representative and the officers and employees of any Federal agency that is considered appropriate by the Trade Representative, for purposes of evaluating the adequacy of the proposals being considered for inclusion in the plan in relation to specific actions that may be taken under this part.

(B) A request for any consultation under subparagraph (A) must be made to the Trade Representative. Upon receiving such a request, the Trade Representative shall confer with the petitioner and provide such assistance, including publication of appropriate notice in the Federal Register, as may be practicable in obtaining other participants in the consultation. No consultation may occur under subparagraph (A) unless the Trade Representative, or his delegate, is in attendance.

(6)(A) In the course of any investigation under subsection (b) of this section, the Commission shall seek information (on a confidential basis, to the extent appropriate) on actions being taken, or planned to be taken, or both, by firms and workers in the industry to make a positive adjustment to import competition.

(B) Regardless whether an adjustment plan is submitted under paragraph (4) by the petitioner, if the Commission makes an affirmative determination under subsection (b) of this section, any--

- (i) firm in the domestic industry;
- (ii) certified or recognized union or group of workers in the domestic industry;
- (iii) State or local community;
- (iv) trade association representing the domestic industry; or
- (v) any other person or group of persons,

may, individually, submit to the Commission commitments regarding actions such persons and entities intend to take to facilitate positive adjustment to import competition.

(7) Nothing in paragraphs (5) and (6) may be construed to provide immunity under the antitrust laws.

(8) The procedures concerning the release of confidential business information set forth in section 332(g) of the Tariff Act of 1930 [19 U.S.C. 1332(g)] shall apply with respect to information received by the Commission in the course of investigations conducted under this part and part 1 of title III of the North American Free Trade Agreement Implementation Act [19 U.S.C. 3351 et seq.]. The Commission may request that parties providing confidential business information furnish nonconfidential summaries thereof or, if such parties indicate that the information in the submission cannot be summarized, the reasons why a summary cannot be provided. If the Commission finds that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summarized form, the Commission may disregard the

submission.

(b) Investigations and determinations by Commission

(1)(A) Upon the filing of a petition under subsection (a) of this section, the request of the President or the Trade Representative, the resolution of either the Committee on Ways and Means of the House of Representatives or the Committee on Finance of the Senate, or on its own motion, the Commission shall promptly make an investigation to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.

(B) For purposes of this section, the term "substantial cause" means a cause which is important and not less than any other cause.

(2)(A) Except as provided in subparagraph (B), the Commission shall make the determination under paragraph (1) within 120 days (180 days if the petition alleges that critical circumstances exist) after the date on which the petition is filed, the request or resolution is received, or the motion is adopted, as the case may be.

(B) If before the 100th day after a petition is filed under subsection (a)(1) of this section the Commission determines that the investigation is extraordinarily complicated, the Commission shall make the determination under paragraph (1) within 150 days (210 days if the petition alleges that critical circumstances exist) after the date referred to in subparagraph (A).

(3) The Commission shall publish notice of the commencement of any proceeding under this subsection in the Federal Register and shall, within a reasonable time thereafter, hold public hearings at which the Commission shall afford interested parties and consumers an opportunity to be present, to present evidence, to comment on the adjustment plan, if any, submitted under subsection (a) of this section, to respond to the presentations of other parties and consumers, and otherwise to be heard.

(c) Factors applied in making determinations

(1) In making determinations under subsection (b) of this section, the Commission shall take into account all economic factors which it considers relevant, including (but not limited to)--

(A) with respect to serious injury--

(i) the significant idling of productive facilities in the domestic industry,

(ii) the inability of a significant number of firms to carry out domestic production operations at a reasonable level of profit, and

(iii) significant unemployment or underemployment within the

domestic industry;

(B) with respect to threat of serious injury--

(i) a decline in sales or market share, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, productivity, or employment (or increasing underemployment) in the domestic industry,

(ii) the extent to which firms in the domestic industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research and development,

(iii) the extent to which the United States market is the focal point for the diversion of exports of the article concerned by reason of restraints on exports of such article to, or on imports of such article into, third country markets; and

(C) with respect to substantial cause, an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers.

(2) In making determinations under subsection (b) of this section, the Commission shall--

(A) consider the condition of the domestic industry over the course of the relevant business cycle, but may not aggregate the causes of declining demand associated with a recession or economic downturn in the United States economy into a single cause of serious injury or threat of injury; and

(B) examine factors other than imports which may be a cause of serious injury, or threat of serious injury, to the domestic industry.

The Commission shall include the results of its examination under subparagraph (B) in the report submitted by the Commission to the President under subsection (e) of this section.

(3) The presence or absence of any factor which the Commission is required to evaluate in subparagraphs (A) and (B) of paragraph (1) is not necessarily dispositive of whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry.

(4) For purposes of subsection (b) of this section, in determining the domestic industry producing an article like or directly competitive with an imported article, the Commission--

(A) to the extent information is available, shall, in the case

of a domestic producer which also imports, treat as part of such domestic industry only its domestic production;

(B) may, in the case of a domestic producer which produces more than one article, treat as part of such domestic industry only that portion or subdivision of the producer which produces the like or directly competitive article; and

(C) may, in the case of one or more domestic producers which produce a like or directly competitive article in a major geographic area of the United States and whose production facilities in such area for such article constitute a substantial portion of the domestic industry in the United States and primarily serve the market in such area, and where the imports are concentrated in such area, treat as such domestic industry only that segment of the production located in such area.

(5) In the course of any proceeding under this subsection, the Commission shall investigate any factor which in its judgment may be contributing to increased imports of the article under investigation. Whenever in the course of its investigation the Commission has reason to believe that the increased imports are attributable in part to circumstances which come within the purview of subtitles A and B of title VII [19 U.S.C. 1671 et seq., 1673 et seq.] or section 337 [19 U.S.C. 1337] of the Tariff Act of 1930, or other remedial provisions of law, the Commission shall promptly notify the appropriate agency so that such action may be taken as is otherwise authorized by such provisions of law.

(6) For purposes of this section:

(A)(i) The term "domestic industry" means, with respect to an article, the producers as a whole of the like or directly competitive article or those producers whose collective production of the like or directly competitive article constitutes a major proportion of the total domestic production of such article.

(ii) The term "domestic industry" includes producers located in the United States insular possessions.

(B) The term "significant idling of productive facilities" includes the closing of plants or the underutilization of production capacity.

(C) The term "serious injury" means a significant overall impairment in the position of a domestic industry.

(D) The term "threat of serious injury" means serious injury that is clearly imminent.

(d) Provisional relief

(1)(A) An entity representing a domestic industry that produces a perishable agricultural product or citrus product that is like or directly competitive with an imported perishable agricultural product or

citrus product may file a request with the Trade Representative for the monitoring of imports of that product under subparagraph (B). Within 21 days after receiving the request, the Trade Representative shall determine if--

- (i) the imported product is a perishable agricultural product or citrus product; and
- (ii) there is a reasonable indication that such product is being imported into the United States in such increased quantities as to be, or likely to be, a substantial cause of serious injury, or the threat thereof, to such domestic industry.

(B) If the determinations under subparagraph (A)(i) and (ii) are affirmative, the Trade Representative shall request, under section 332(g) of the Tariff Act of 1930 [19 U.S.C. 1332(g)], the Commission to monitor and investigate the imports concerned for a period not to exceed 2 years. The monitoring and investigation may include the collection and analysis of information that would expedite an investigation under subsection (b) of this section.

(C) If a petition filed under subsection (a) of this section--

- (i) alleges injury from imports of a perishable agricultural product or citrus product that has been, on the date the allegation is included in the petition, subject to monitoring by the Commission under subparagraph (B) for not less than 90 days; and
- (ii) requests that provisional relief be provided under this subsection with respect to such imports;

the Commission shall, not later than the 21st day after the day on which the request was filed, make a determination, on the basis of available information, whether increased imports (either actual or relative to domestic production) of the perishable agricultural product or citrus product are a substantial cause of serious injury, or the threat thereof, to the domestic industry producing a like or directly competitive perishable product or citrus product, and whether either--

- (I) the serious injury is likely to be difficult to repair by reason of perishability of the like or directly competitive agricultural product; or
- (II) the serious injury cannot be timely prevented through investigation under subsection (b) of this section and action under section 2253 of this title.

(D) At the request of the Commission, the Secretary of Agriculture shall promptly provide to the Commission any relevant information that the Department of Agriculture may have for purposes of making determinations and findings under this subsection.

(E) Whenever the Commission makes an affirmative preliminary determination under subparagraph (C), the Commission shall find the amount or extent of provisional relief that is necessary to prevent or

remedy the serious injury. In carrying out this subparagraph, the Commission shall give preference to increasing or imposing a duty on imports, if such form of relief is feasible and would prevent or remedy the serious injury.

(F) The Commission shall immediately report to the President its determination under subparagraph (C) and, if the determination is affirmative, the finding under subparagraph (E).

(G) Within 7 days after receiving a report from the Commission under subparagraph (F) containing an affirmative determination, the President, if he considers provisional relief to be warranted and after taking into account the finding of the Commission under subparagraph (E), shall proclaim such provisional relief that the President considers necessary to prevent or remedy the serious injury.

(2)(A) When a petition filed under subsection (a) of this section alleges that critical circumstances exist and requests that provisional relief be provided under this subsection with respect to imports of the article identified in the petition, the Commission shall, not later than 60 days after the petition containing the request was filed, determine, on the basis of available information, whether--

(i) there is clear evidence that increased imports (either actual or relative to domestic production) of the article are a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article; and

(ii) delay in taking action under this part would cause damage to that industry that would be difficult to repair.

(B) If the determinations under subparagraph (A)(i) and (ii) are affirmative, the Commission shall find the amount or extent of provisional relief that is necessary to prevent or remedy the serious injury. In carrying out this subparagraph, the Commission shall give preference to increasing or imposing a duty on imports, if such form of relief is feasible and would prevent or remedy the serious injury.

(C) The Commission shall immediately report to the President its determinations under subparagraph (A)(i) and (ii) and, if the determinations are affirmative, the finding under subparagraph (B).

(D) Within 30 days after receiving a report from the Commission under subparagraph (C) containing an affirmative determination under subparagraph (A)(i) and (ii), the President, if he considers provisional relief to be warranted and after taking into account the finding of the Commission under subparagraph (B), shall proclaim, for a period not to exceed 200 days, such provisional relief that the President considers necessary to prevent or remedy the serious injury. Such relief shall take the form of an increase in, or the imposition of, a duty on imports, if such form of relief is feasible and would prevent or remedy the serious injury.

(3) If provisional relief is proclaimed under paragraph (1)(G) or

(2)(D) in the form of an increase, or the imposition of, a duty, the President shall order the suspension of liquidation of all imported articles subject to the affirmative determination under paragraph (1)(C) or paragraph (2)(A), as the case may be, that are entered, or withdrawn from warehouse for consumption, on or after the date of the determination.

(4)(A) Any provisional relief implemented under this subsection with respect to an imported article shall terminate on the day on which--

(i) if such relief was proclaimed under paragraph (1)(G) or (2)(D), the Commission makes a negative determination under subsection (b) of this section regarding injury or the threat thereof by imports of such article;

(ii) action described in section 2253(a)(3)(A) or (C) of this title takes effect under section 2253 of this title with respect to such article;

(iii) a decision by the President not to take any action under section 2253(a) of this title with respect to such article becomes final; or

(iv) whenever the President determines that, because of changed circumstances, such relief is no longer warranted.

(B) Any suspension of liquidation ordered under paragraph (3) with respect to an imported article shall terminate on the day on which provisional relief is terminated under subparagraph (A) with respect to the article.

(C) If an increase in, or the imposition of, a duty that is proclaimed under section 2253 of this title on an imported article is different from a duty increase or imposition that was proclaimed for such an article under this section, then the entry of any such article for which liquidation was suspended under paragraph (3) shall be liquidated at whichever of such rates of duty is lower.

(D) If provisional relief in the form of an increase in, or the imposition of, a duty is proclaimed under this section with respect to an imported article and neither a duty increase nor a duty imposition is proclaimed under section 2253 of this title regarding such article, the entry of any such article for which liquidation was suspended under paragraph (3) may be liquidated at the rate of duty that applied before provisional relief was provided.

(5) For purposes of this subsection:

(A) The term "citrus product" means any processed oranges or grapefruit, or any orange or grapefruit juice, including concentrate.

(B) A perishable agricultural product is any agricultural article, including livestock, regarding which the Trade Representative considers action under this section to be appropriate after taking into account--

(i) whether the article has--

- (I) a short shelf life,
- (II) a short growing season, or
- (III) a short marketing period,

- (ii) whether the article is treated as a perishable product under any other Federal law or regulation; and
- (iii) any other factor considered appropriate by the Trade Representative.

The presence or absence of any factor which the Trade Representative is required to take into account under clause (i), (ii), or (iii) is not necessarily dispositive of whether an article is a perishable agricultural product.

- (C) The term "provisional relief" means--
 - (i) any increase in, or imposition of, any duty;
 - (ii) any modification or imposition of any quantitative restriction on the importation of an article into the United States; or
 - (iii) any combination of actions under clauses (i) and (ii).

(e) Commission recommendations

(1) If the Commission makes an affirmative determination under subsection (b)(1) of this section, the Commission shall also recommend the action that would address the serious injury, or threat thereof, to the domestic industry and be most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition.

- (2) The Commission is authorized to recommend under paragraph (1)--
 - (A) an increase in, or the imposition of, any duty on the imported article;
 - (B) a tariff-rate quota on the article;
 - (C) a modification or imposition of any quantitative restriction on the importation of the article into the United States;
 - (D) one or more appropriate adjustment measures, including the provision of trade adjustment assistance under part 2 of this subchapter; or
 - (E) any combination of the actions described in subparagraphs (A) through (D).

(3) The Commission shall specify the type, amount, and duration of the action recommended by it under paragraph (1). The limitations set forth in section 2253(e) of this title are applicable to the action recommended by the Commission.

- (4) In addition to the recommendation made under paragraph (1), the Commission may also recommend that the President--
 - (A) initiate international negotiations to address the

underlying cause of the increase in imports of the article or otherwise to alleviate the injury or threat; or

(B) implement any other action authorized under law that is likely to facilitate positive adjustment to import competition.

(5) For purposes of making its recommendation under this subsection, the Commission shall--

(A) after reasonable notice, hold a public hearing at which all interested parties shall be provided an opportunity to present testimony and evidence; and

(B) take into account--

(i) the form and amount of action described in paragraph (2)(A), (B), and (C) that would prevent or remedy the injury or threat thereof,

(ii) the objectives and actions specified in the adjustment plan, if any, submitted under subsection (a)(4) of this section,

(iii) any individual commitment that was submitted to the Commission under subsection (a)(6) of this section,

(iv) any information available to the Commission concerning the conditions of competition in domestic and world markets, and likely developments affecting such conditions during the period for which action is being requested, and

(v) whether international negotiations may be constructive to address the injury or threat thereof or to facilitate adjustment.

(6) Only those members of the Commission who agreed to the affirmative determination under subsection (b) of this section are eligible to vote on the recommendation required to be made under paragraph (1) or that may be made under paragraph (3). Members of the Commission who did not agree to the affirmative determination may submit, in the report required under subsection (f) of this section, separate views regarding what action, if any, should be taken under section 2253 of this title.

(f) Report by Commission

(1) The Commission shall submit to the President a report on each investigation undertaken under subsection (b) of this section. The report shall be submitted at the earliest practicable time, but not later than 180 days (240 days if the petition alleges that critical circumstances exist) after the date on which the petition is filed, the request or resolution is received, or the motion is adopted, as the case may be.

(2) The Commission shall include in the report required under paragraph (1) the following:

(A) The determination made under subsection (b) of this section

and an explanation of the basis for the determination.

(B) If the determination under subsection (b) of this section is affirmative, the recommendations for action made under subsection (e) of this section and an explanation of the basis for each recommendation.

(C) Any dissenting or separate views by members of the Commission regarding the determination and any recommendation referred to in subparagraphs (A) and (B).

(D) The findings required to be included in the report under subsection (c)(2) of this section.

(E) A copy of the adjustment plan, if any, submitted under section 2251(b)(4) of this title.

(F) Commitments submitted, and information obtained, by the Commission regarding steps that firms and workers in the domestic industry are taking, or plan to take, to facilitate positive adjustment to import competition.

(G) A description of--

(i) the short- and long-term effects that implementation of the action recommended under subsection (e) of this section is likely to have on the petitioning domestic industry, on other domestic industries, and on consumers, and

\1\ So in original. Probably should be ``subsection".

(ii) the short- and long-term effects of not taking the recommended action on the petitioning domestic industry, its workers and the communities where production facilities of such industry are located, and on other domestic industries.

(3) The Commission, after submitting a report to the President under paragraph (1), shall promptly make it available to the public (with the exception of the confidential information obtained under subsection (a)(6)(B) of this section and any other information which the Commission determines to be confidential) and cause a summary thereof to be published in the Federal Register.

(g) Expedited consideration of adjustment assistance petitions

If the Commission makes an affirmative determination under subsection (b)(1) of this section, the Commission shall promptly notify the Secretary of Labor and the Secretary of Commerce of the determination. After receiving such notification--

(1) the Secretary of Labor shall give expedited consideration to petitions by workers in the domestic industry for certification for eligibility to apply for adjustment assistance under part 2 of this subchapter; and

(2) the Secretary of Commerce shall give expedited consideration

to petitions by firms in the domestic industry for certification of eligibility to apply for adjustment assistance under part 3 of this subchapter.

(h) Limitations on investigations

(1) Except for good cause determined by the Commission to exist, no investigation for the purposes of this section shall be made with respect to the same subject matter as a previous investigation under this part, unless 1 year has elapsed since the Commission made its report to the President of the results of such previous investigation.

(2) No new investigation shall be conducted with respect to an article that is or has been the subject of an action under section 2253(a)(3)(A), (B), (C), or (E) of this title if the last day on which the President could take action under section 2253 of this title in the new investigation is a date earlier than that permitted under section 2253(e)(7) of this title.

(3)(A) Not later than the date on which the Textiles Agreement enters into force with respect to the United States, the Secretary of Commerce shall publish in the Federal Register a list of all articles that are subject to the Textiles Agreement. An investigation may be conducted under this section concerning imports of any article that is subject to the Textiles Agreement only if the United States has integrated that article into GATT 1994 pursuant to the Textiles Agreement, as set forth in notices published in the Federal Register by the Secretary of Commerce, including the notice published under section 3591 of this title.

(B) For purposes of this paragraph:

(i) The term "Textiles Agreement" means the Agreement on Textiles and Clothing referred to in section 3511(d)(4) of this title.

(ii) The term "GATT 1994" has the meaning given that term in section 3501(1)(B) of this title.

(i) Limited disclosure of confidential business information under protective order

The Commission shall promulgate regulations to provide access to confidential business information under protective order to authorized representatives of interested parties who are parties to an investigation under this section.

(Pub. L. 93-618, title II, Sec. 202, Jan. 3, 1975, 88 Stat. 2014; Pub. L. 100-418, title I, Sec. 1401(a), Aug. 23, 1988, 102 Stat. 1225; Pub. L. 103-182, title III, Secs. 315, 317(b), Dec. 8, 1993, 107 Stat. 2107, 2108; Pub. L. 103-465, title III, Secs. 301(a)-(d)(2), (4), (e), (f), 302(b)(4)(B), 303(1)-(6), Dec. 8, 1994, 108 Stat. 4932-4934, 4936, 4937; Pub. L. 104-295, Sec. 20(c)(5), Oct. 11, 1996, 110 Stat. 3528.)

APPENDIX B

SELECTED PROVISIONS OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE

- B.1 19 CFR §201.6 Confidential business information.
- B.2 19 CFR §206.8 Service, filing and certification of documents
- B.3 19 CFR §206.17 Limited disclosure of certain confidential business information
under administrative protective order
- B.4 19 CFR §207.3 Service, filing and certification of documents
- B.5 19 CFR §207.7 Limited disclosure of certain confidential business information
under administrative protective order

THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE

These provisions of the Commission's Rules of Practice and Procedure are based on Chapter II of Title 19 of the Code of Federal Regulations (C.F.R.), but also include amendments made after publication of the most recent version of the C.F.R. Although every effort has been made to insure the accuracy of this version, it is being provided as a convenience rather than as an official version; the C.F.R. and the Federal Register remain the official source for the text of the USITC's rules.

This version differs in a number of ways from the C.F.R., resulting in part from the electronic transfer process. Thus, italics, graphics, and section symbols appearing in the hard copy of the C.F.R. are omitted from the electronic version. Section symbols are replaced by "Sec." Page numbering does not match that in the C.F.R. In addition, a small number of nonsubstantive typographical errors have been corrected.

Sec. 201.6 Confidential business information.

(a) Definitions. (1) Confidential business information is information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information. The term "confidential business information" includes "proprietary information" within the meaning of section 777(b) of the Tariff Act of 1930 (19 U. S. C. 1677f(b)). Nonnumerical characterizations of numerical confidential business information (e. g., discussion of trends) will be treated as confidential business information only at the request of the submitter for good cause shown.

(2) Nondisclosable confidential business information is privileged information, classified information, or specific information (e.g.,

trade secrets) of a type for which there is a clear and compelling need to withhold from disclosure. Special rules for the handling of such information are set out in Sec. 206.17 and Sec. 207.7 of this chapter.

(b) Procedure for submitting business information in confidence.

(1) A request for confidential treatment of business information shall be addressed to the Secretary, United States International Trade Commission, 500 E Street SW., Washington, DC 20436, and shall indicate clearly on the envelope that it is a request for confidential treatment.

(2) In the absence of good cause shown, any request relating to material to be submitted during the course of a hearing shall be submitted at least three (3) working days prior to the commencement of such hearing.

(3) With each submission of, or offer to submit, business information which a submitter desires to be treated as confidential business information, under paragraph (a) of this section, the submitter shall provide the following, which may be disclosed to the public:

(i) A written description of the nature of the subject information;

(ii) A justification for the request for its confidential treatment;

(iii) A certification in writing under oath that substantially identical information is not available to the public;

(iv) A copy of the document

(A) Clearly marked on its cover as to the pages on which confidential information can be found;

(B) With information for which confidential treatment is requested clearly identified by means of brackets; and

(C) With information for which nondisclosable confidential treatment is requested clearly identified by means of triple brackets (except when submission of such document is withheld in accord with paragraph (b)(4) of this section); and

(v) A nonconfidential copy of the documents as required by Sec. 201.8(d).

(4) The submission of the documents itemized in paragraph (b)(3) of this section will provide the basis for rulings on the confidentiality of submissions, including rulings on the confidentiality of submissions offered to the Commission which have not yet been placed under the possession, control, or custody of the Commission. The submitter has the option of providing the business information for which confidential treatment is sought at the time the documents itemized in paragraph (b)(3) of this section are provided or of withholding them until a ruling on their confidentiality has been issued.

(c) Identification of business information submitted in confidence. Business information which a submitter desires to be treated as confidential shall be clearly labeled "confidential business information" when submitted, and shall be segregated from other material being submitted.

(d) Approval or denial of requests for confidential treatment. Approval or denial of requests shall be made only by the Secretary or Acting Secretary. An approval or a denial of a request for confidential treatment shall be in writing. A denial shall specify the reason therefor, and shall advise the submitter of the right to appeal to the Commission.

(e) Appeals from denial of confidential treatment. (1) For good cause shown, the Commission may grant an appeal from a denial by the Secretary of a request for confidential treatment of a submission. Any appeal filed shall be addressed to the Chairman, United States International Trade Commission, 500 E Street SW., Washington, DC 20436, and shall clearly indicate that it is a confidential submission appeal. An appeal may be made within twenty (20) days of a denial or whenever the approval or denial has not been forthcoming within ten (10) days (excepting Saturdays, Sundays, and Federal legal holidays) of the receipt of a confidential treatment request, unless an extension notice in writing with the reasons therefor has been provided the person requesting confidential treatment.

(2) An appeal will be decided within twenty (20) days of its receipt (excepting Saturdays, Sundays, and Federal legal holidays) unless an extension notice in writing with the reasons therefor, has been provided the person making the appeal.

(3) The justification submitted to the Commission in connection with an appeal shall be limited to that presented to the Secretary with the original or amended request. When the Secretary or Acting Secretary has denied a request on the ground that the submitter failed to provide adequate justification, any such additional justification shall be submitted to the Secretary for consideration as part of an amended request. For purposes of paragraph (e)(1) of this section, the twenty (20) day period for filing an appeal shall be tolled on the filing of an amended request and a new twenty (20) day period shall begin once the Secretary or Acting Secretary has denied the amended request, or the approval or denial has not been forthcoming within ten (10) days of the filing of the amended request. A denial of a request by the Secretary on the ground of inadequate justification shall not obligate a requester to furnish additional justification and shall not preclude

a requester from filing an appeal with the Commission based on the justification earlier submitted to the Secretary.

(f) Appeals from approval of confidential treatment. (1) For good cause shown, the Commission may grant an appeal from an approval by the Secretary of a request for confidential treatment of a submission. Any appeal filed shall be addressed to the Chairman, United States International Trade Commission, 500 E Street, S. W., Washington, DC 20436, shall show that a copy thereof has been served upon the submitter, and shall clearly indicate that it is a confidential submission appeal. An appeal may be made within twenty (20) days of the approval by the Secretary of a request for confidential treatment or whenever the approval or denial has not been forthcoming within ten (10) days (excepting Saturdays, Sundays, and Federal legal holidays) of the receipt of a confidential treatment request, unless an extension notice in writing with the reasons therefor has been provided the person requesting confidential treatment.

(2) An appeal will be decided within twenty (20) days of its receipt (excepting Saturdays, Sundays, and Federal legal holidays) unless an extension notice, in writing with the reasons therefor, has been provided the person making the appeal.

(g) Granting confidential status to business information. Any business information submitted in confidence and determined to be entitled to confidential treatment shall be maintained in confidence by the Commission and not disclosed except as required by law. In the event that any business information submitted to the Commission is not entitled to confidential treatment, the submitter will be permitted to withdraw the tender within five days of its denial of confidential treatment unless it is the subject of a request under the Freedom of Information Act or of judicial discovery proceedings. After such five day period, the business information deemed not entitled to confidential treatment, and not withdrawn, will be treated as public information.

(h) Scope of provisions. The provisions of Secs. 201.6(b) and 201.6(d) through (g) shall not apply to adjudicative investigations under Subchapter C, Part 210, of the Commission's rules of practice and procedure.

Sec. 206.8 Service, filing, and certification of documents.

(a) Certification. Any person submitting factual information on behalf of the petitioner or any other interested party for the consideration of the Commission in the course of an investigation to which this part pertains, and any person submitting a response to a Commission questionnaire issued in connection with an investigation to which this part pertains, must certify that such information is accurate and complete to the best of the submitter's knowledge.

(b) Service. Any party submitting a document for the consideration of the Commission in the course of an investigation to which this part pertains shall, in addition to complying with Sec. 201.8 of this chapter, serve a copy of the public version of such document on all other parties to the investigation in the manner prescribed in Sec. 201.16 of this chapter, and, when appropriate, serve a copy of the confidential version of such document in the manner provided for in Sec. 206.17(f). The Secretary shall promptly notify a petitioner when, before the establishment of a service list under Sec. 206.17(a)(4), an application under Sec. 206.17(a) is approved. When practicable, this notification shall be made by facsimile transmission. A copy of the petition including all confidential business information shall then be served by petitioner on those approved applicants in accordance with this section within two (2) calendar days of the time notification is made by the Secretary. If a document is filed before the Secretary's issuance of the service list provided for in Sec. 201.11 of this chapter or the administrative protective order list provided for in Sec. 206.17, the document need not be accompanied by a certificate of service, but the document shall be served on all appropriate parties within two (2) days of the issuance of the service list or the administrative protective order list and a certificate of service shall then be filed. Notwithstanding Sec. 201.16 of this chapter, petitions, briefs, and testimony filed by parties shall be served by hand or, if served by mail, by overnight mail or its equivalent. Failure to comply with the requirements of this rule may result in removal from status as a party to the investigation. The Commission shall make available, upon request, to all parties to the investigation a copy of each document, except transcripts of hearings, confidential business information, privileged information, and information required to be served under this section, placed in the docket file of the investigation by the Commission.

(c) Filing. Documents to be filed with the Commission must comply with applicable rules, including Sec. 201.8 of this chapter. If the Commission establishes a deadline for the filing of a document, and the submitter includes confidential business information in the document, the submitter is to file and, if the submitter is a party, serve the

confidential version of the document on the deadline and may file and serve the nonconfidential version of the document no later than one business day after the deadline for filing the document. The confidential version shall enclose all confidential business information in brackets and have the following warning marked on every page: "Bracketing of CBI not final for one business day after date of filing." The bracketing becomes final one business day after the date of filing of the document, i. e., at the same time as the nonconfidential version of the document is due to be filed. Until the bracketing becomes final, recipients of the document may not divulge any part of the contents of the document to anyone not subject to the administrative protective order issued in the investigation. If the submitter discovers it has failed to bracket correctly, the submitter may file a corrected version or portion of the confidential document at the same time as the nonconfidential version is filed. No changes to the document other than bracketing and deletion of confidential business information are permitted after the deadline. Failure to comply with this paragraph may result in the striking of all or a portion of a submitter's document.

Sec. 206.17 Limited disclosure of certain confidential business information under administrative protective order.

(a)(1) Disclosure. Upon receipt of a timely application filed by an authorized applicant, as defined in paragraph (a)(3) of this section, which describes in general terms the information requested, and sets forth the reasons for the request (e. g., all confidential business information properly disclosed pursuant to this section for the purpose of representing an interested party in investigations pending before the Commission), the Secretary shall make available all confidential business information contained in Commission memoranda and reports and in written submissions filed with the Commission at any time during the investigation (except privileged information, classified information, and specific information of a type which there is a clear and compelling need to withhold from disclosure, e. g., trade secrets) to the authorized applicant under an administrative protective order described in paragraph (b) of this section. The term "confidential business information" is defined in Sec. 201.6 of this chapter.

(2) Application. An application under paragraph (a)(1) of this section must be made by an authorized applicant on a form adopted by the Secretary or a photocopy thereof. A signed application and five (5) copies thereof shall be filed. An application on behalf of an authorized applicant must be made no later than the time that entries of appearance are due pursuant to Sec. 201.11 of this chapter. In the event that two or more authorized applicants represent one interested party who is a party to the investigation, the authorized applicants must select one of their number to be lead authorized applicant. The lead authorized applicant's application must be filed no later than the time that entries of appearance are due. Provided that the application is accepted, the lead authorized applicant shall be served with confidential business information pursuant to paragraph (f) of this section. The other authorized applicants representing the same party may file their applications after the deadline for entries of appearance but at least five days before the deadline for filing posthearing briefs in the investigation, and shall not be served with confidential business information.

(3) Authorized applicant. (i) Only an authorized applicant may file an application under this subsection. An authorized applicant is:

- (A) An attorney for an interested party which is a party to the investigation;
- (B) A consultant or expert under the direction and control of a person under paragraph (a)(3)(i)(A) of this section;
- (C) A consultant or expert who appears regularly before the Commission and who represents an interested party which is a party to the investigation; or
- (D) A representative of an interested party which is a party to the investigation, if such interested party is not represented by counsel.

(ii) In addition, an authorized applicant must not be involved in competitive decisionmaking for an interested party which is a party to the investigation. Involvement in "competitive decisionmaking" 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.).

(iii) For purposes of this Sec. 206.17, the term interested party means:

(A) A foreign manufacturer, producer, or exporter, or the United States importer, of an article which is the subject of an investigation under this section or a trade or business association a majority of the members of which are producers, exporters, or importers of such article;

(B) The government of a country in which such article is produced or manufactured;

(C) A manufacturer, producer, or wholesaler in the United States of a like or directly competitive article;

(D) A certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale of a like or directly competitive article in the United States;

(E) A trade or business association a majority of whose members manufacture, produce, or wholesale a like or directly competitive article in the United States; and

(F) An association, a majority of whose members is composed of interested parties described in paragraphs (a)(3)(iii) (C), (D), or (E) of this section with respect to a like or directly competitive article.

(4) Forms and determinations. (i) The Secretary may adopt, from time to time, forms for submitting requests for disclosure pursuant to an administrative protective order incorporating the terms of this rule. The Secretary shall determine whether the requirements for release of information under this rule have been satisfied. This determination shall be made concerning specific confidential business information as expeditiously as possible but in no event later than fourteen (14) days from the filing of the information, except if the submitter of the information objects to its release or the information is unusually voluminous or complex, in which case the determination shall be made within thirty (30) days from the filing of the information. The Secretary shall establish a list of parties whose applications have been granted. The Secretary's determination shall be final.

(ii) Should the Secretary determine pursuant to this section that materials sought to be protected from public disclosure by a person do not constitute confidential business information or were not required to be served under paragraph (f) of this section, then the Secretary shall, upon request, issue an order on behalf of the Commission requiring the

return of all copies of such materials served in accordance with paragraph (f) of this section.

(iii) The Secretary shall release confidential business information only to an authorized applicant whose application has been accepted and who presents the application along with adequate personal identification; or a person described in paragraph (b)(1)(iv) of this section who presents a copy of the statement referred to in that paragraph along with adequate personal identification.

(b) Administrative protective order. The administrative protective order under which information is made available to the authorized applicant shall require the applicant to submit to the Secretary a personal sworn statement that, in addition to such other conditions as the Secretary may require, the applicant shall:

(1) Not divulge any of the confidential business information obtained under the administrative protective order and not otherwise available to the applicant, to any person other than

(i) Personnel of the Commission concerned with the investigation,

(ii) The person or agency from whom the confidential business information was obtained,

(iii) A person whose application for access to confidential business information under the administrative protective order has been granted by the Secretary, and

(iv) Other persons, such as paralegals and clerical staff, who are employed or supervised by an authorized applicant; who have a need thereof in connection with the investigation; who are not involved in competitive decisionmaking on behalf of an interested party which is a party to the investigation; and who have signed a statement in a form approved by the Secretary that they agree to be bound by the administrative protective order (the authorized applicant shall be responsible for retention and accuracy of such forms and shall be deemed responsible for such persons' compliance with the administrative protective order);

(2) Use such confidential business information solely for the purposes of representing an interested party in the Commission investigation then in progress;

(3) Not consult with any person not described in paragraph (b)(1) of this section concerning such confidential business information without first having received the written consent of the Secretary and the party or the attorney of the party from whom such confidential business information was obtained;

(4) Whenever materials (e. g., documents, computer disks, etc.) containing such confidential business information are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container;

(5) Serve all materials containing confidential business information as directed by the Secretary and pursuant to paragraph (f) of this

section;

- (6) Transmit all materials containing confidential business information with a cover sheet identifying the materials as containing confidential business information;
- (7) Comply with the provisions of this section;
- (8) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (e. g., change in personnel assigned to the investigation);
- (9) Report promptly and confirm in writing to the Secretary any breach of the administrative protective order; and
- (10) Acknowledge that breach of the administrative protective order may subject the authorized applicant to such sanctions or other actions as the Commission deems appropriate.

(c) Final disposition of material released under administrative protective order. At such date as the Secretary may determine appropriate for particular data, each authorized applicant shall return or destroy all copies of materials released to authorized applicants pursuant to this section and all other materials containing confidential business information, such as charts or notes based on any such information received under administrative protective order, and file with the Secretary a certificate attesting to his personal, good faith belief that all copies of such material have been returned or destroyed and no copies of such material have been made available to any person to whom disclosure was not specifically authorized.

(d) Commission responses to a breach of administrative protective order. A breach of an administrative protective order may subject an offender to:

- (1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven 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 confidential business information 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 warning letter, as the Commission determines to be appropriate.

(e) Breach investigation procedure. (1) The Commission shall determine whether any person has violated an administrative protective order, and may impose sanctions or other actions in accordance with paragraph (d) of this section. At any time within sixty (60) days of the later of

(i) The date on which the alleged violation occurred or, as determined by the Commission, could have been discovered through the exercise of reasonable and ordinary care; or

(ii) The completion of an investigation conducted under this subpart, the Commission may commence an investigation of any breach of an administrative protective order alleged to have occurred at any time during the pendency of the investigation, including all appeals, remands, and subsequent appeals. Whenever the Commission has reason to believe that a person may have breached an administrative protective order issued pursuant to this section, the Secretary shall issue a letter informing such person that the Commission has reason to believe a breach has occurred and that the person has a reasonable opportunity to present his views on whether a breach has occurred. If subsequently the Commission determines that a breach has occurred and that further investigation is warranted, then the Secretary shall issue a letter informing such person of that determination and that the person has a reasonable opportunity to present his views on whether mitigating circumstances exist and on the appropriate sanction to be imposed, but no longer on whether a breach has occurred. Once such person has been afforded a reasonable opportunity to present his views, the Commission shall determine what sanction if any to impose.

(2) Where the sanction imposed is a private letter of reprimand, the Secretary shall expunge the sanction from the recipient's record two (2) years from the date of issuance of the sanction, provided that

(i) The recipient has not received another unexpunged sanction pursuant to this section at any time prior to the end of the two year period, and

(ii) The recipient is not the subject of an investigation for possible breach of administrative protective order under this section at the end of the two year period. Upon the completion of such a pending breach investigation without the issuance of a sanction, the original sanction shall be expunged. The Secretary shall notify a sanction recipient in the event that the sanction is expunged.

(f) Service. (1) Any party filing written submissions which include confidential business information to the Commission during an investigation shall at the same time serve complete copies of such submissions upon all authorized applicants specified on the list established by the Secretary pursuant to paragraph (a)(4) of this section, and, except as provided in Sec. 206.8(c), a nonconfidential version on all other parties. All such submissions must be accompanied by a certificate attesting that complete copies of the submission have

been properly served. In the event that a submission is filed before the Secretary's list is established, the document need not be accompanied by a certificate of service, but the submission shall be served within two (2) days of the establishment of the list and a certificate of service shall then be filed.

(2) A party may seek an exemption from the service requirement of paragraph (f)(1) of this section for particular confidential business information by filing a request for exemption from disclosure in accordance with paragraph (g) of this section. The Secretary shall promptly respond to the request. If a request is granted, the Secretary shall accept the information. The party shall file three versions of the submission containing the information in accordance with paragraph (g) of this section, and serve the submission in accordance with the requirements of Sec. 206.8(b) and paragraph (f)(1) of this section, with the specific information as to which exemption from disclosure under administrative protective order has been granted redacted from the copies served. If a request is denied, the copy of the information lodged with the Secretary shall promptly be returned to the requester.

(3) The Secretary shall not accept for filing into the record of an investigation submissions filed without a proper certificate of service. Failure to comply with paragraph (f) of this section may result in denial of party status and such sanctions as the Commission deems appropriate. Confidential business information in submissions must be clearly marked as such when submitted, and must be segregated from other material being submitted.

(g) Exemption from disclosure--(1) In general. Any person may request exemption from the disclosure of confidential business information under administrative protective order, whether the person desires to include such information in a petition filed under this Subpart B, or any other submission to the Commission during the course of an investigation. Such a request shall only be granted if the Secretary finds that such information is nondisclosable confidential business information. As defined in Sec. 201.6(a)(2) of this chapter, nondisclosable confidential business information is privileged information, classified information, or specific information (e.g., trade secrets) of a type for which there is a clear and compelling need to withhold from disclosure.

(2) Request for exemption. A request for exemption from disclosure must be filed with the Secretary in writing with the reasons therefor. At the same time as the request is filed, one copy of the confidential business information in question must be lodged with the Secretary solely for the purpose of obtaining a determination as to the request. The confidential business information for which exemption from disclosure is sought shall remain the property of the requester, and shall not become or be incorporated into any agency record until such time as the request is granted. A request should, when possible, be

filed two business days prior to the deadline, if any, for filing the document in which the information for which exemption from disclosure is sought is proposed to be included. The Secretary shall promptly notify the requester as to whether the request has been approved or denied.

(3) Procedure if request is approved. If the request is approved, the person shall file three versions of the submission containing the nondisclosable confidential business information in question. One version shall contain all confidential business information, bracketed in accordance with Sec. 201.6 of this chapter and Sec. 206.8(c), with the specific information as to which exemption from disclosure was granted enclosed in triple brackets. This version shall have the following warning marked on every page: ``CBI exempted from disclosure under APO enclosed in triple brackets." The other two versions shall conform to and be filed in accordance with the requirements of Sec. 201.6 of this chapter and Sec. 206.8(c), except that the specific information as to which exemption from disclosure was granted shall be redacted from those versions of the submission.

(4) Procedure if request is denied. If the request is denied, the copy of the information lodged with the Secretary shall promptly be returned to the requester.

Sec. 207.3 Service, filing, and certification of documents.

(a) Certification. Any person submitting factual information on behalf of the petitioner or any other interested party for inclusion in the record, and any person submitting a response to a Commission questionnaire, must certify that such information is accurate and complete to the best of the submitter's knowledge.

(b) Service. Any party submitting a document for inclusion in the record of the investigation shall, in addition to complying with Sec. 201.8 of this chapter, serve a copy of each such document on all other parties to the investigation in the manner prescribed in Sec. 201.16 of this chapter. If a document is filed before the Secretary's issuance of the service list provided for in Sec. 201.11 of this chapter or the administrative protective order list provided for in Sec. 207.7, the document need not be accompanied by a certificate of service, but the document shall be served on all appropriate parties within two (2) days of the issuance of the service list or the administrative protective order list and a certificate of service shall then be filed.

Notwithstanding Sec. 201.16 of this chapter, petitions, briefs, requests to close a portion of the hearing, comments on requests to close a portion of the hearing, and testimony filed by parties pursuant to Sec. Sec. 207.10, 207.15, 207.23, 207.24, 207.25, 207.65, 207.66, and 207.67, shall be served by hand or, if served by mail, by overnight mail or its equivalent. Failure to comply with the requirements of this rule may result in removal from status as a party to the investigation. The Commission shall make available to all parties to the investigation a copy of each document, except transcripts of conferences and hearings, business proprietary information, privileged information, and information required to be served under this section, placed in the record of the investigation by the Commission.

(c) Filing. Documents to be filed with the Commission must comply with applicable rules, including Sec. 201.8 of this chapter. If the Commission establishes a deadline for the filing of a document, and the submitter includes business proprietary information in the document, the submitter is to file and, if the submitter is a party, serve the business proprietary version of the document on the deadline and may file and serve the nonbusiness proprietary version of the document no later than one business day after the deadline for filing the document. The business proprietary version shall enclose all business proprietary information in brackets and have the following warning marked on every page: "Bracketing of BPI not final for one business day after date of filing." The bracketing becomes final one business day after the date of filing of the document, i. e., at the same time as the nonbusiness proprietary version of the document is due to be filed. Until the bracketing becomes final, recipients of the document may not divulge any

part of the contents of the document to anyone not subject to the administrative protective order issued in the investigation. If the submitter discovers it has failed to bracket correctly, the submitter may file a corrected version or portion of the business proprietary document at the same time as the nonbusiness proprietary version is filed. No changes, including typographical changes, to the document other than bracketing and deletion of business proprietary information are permitted after the deadline unless an extension of time is granted to file an amended document pursuant to Sec. 201.14(b)(2) of this chapter. Failure to comply with this paragraph may result in the striking from the record of all or a portion of a submitter's document.

Sec. 207.7 Limited disclosure of certain business proprietary information under administrative protective order.

(a)(1) Disclosure. Upon receipt of a timely application filed by an authorized applicant, as defined in paragraph (a)(3) of this section, which describes in general terms the information requested, and sets forth the reasons for the request (e. g., all business proprietary information properly disclosed pursuant to this section for the purpose of representing an interested party in investigations pending before the Commission), the Secretary shall make available all business proprietary information contained in Commission memoranda and reports and in written submissions filed with the Commission at any time during the investigation (except nondisclosable confidential business information) to the authorized applicant under an administrative protective order described in paragraph (b) of this section. The term "business proprietary information" has the same meaning as the term "confidential business information" as defined in Sec. 201.6 of this chapter.

(2) Application. An application under paragraph (a)(1) of this section must be made by an authorized applicant on a form adopted by the Secretary or a photocopy thereof. A signed application and five (5) copies thereof shall be filed. An application on behalf of a petitioner, a respondent, or another party must be made no later than the time that entries of appearance are due pursuant to Sec. 201.11 of this chapter. In the event that two or more authorized applicants represent one interested party who is a party to the investigation, the authorized applicants must select one of their number to be lead authorized applicant. The lead authorized applicant's application must be filed no later than the time that entries of appearance are due. Provided that the application is accepted, the lead authorized applicant shall be served with business proprietary information pursuant to paragraph (f) of this section. The other authorized applicants representing the same party may file their applications after the deadline for entries of appearance but at least five days before the deadline for filing posthearing briefs in the investigation, or the deadline for filing briefs in the preliminary phase of an investigation, or the deadline for filing submissions in a remanded investigation, and shall not be served with business proprietary information.

(3) Authorized applicant. (i) Only an authorized applicant may file an application under this subsection. An authorized applicant is:

- (A) An attorney for an interested party which is a party to the investigation;
- (B) A consultant or expert under the direction and control of a person under paragraph (a)(3)(i)(A) of this section;
- (C) A consultant or expert who appears regularly before the Commission and who represents an interested party which is a party to the investigation; or

(D) A representative of an interested party which is a party to the investigation, if such interested party is not represented by counsel.

(ii) In addition, an authorized applicant must not be involved in competitive decisionmaking for an interested party which is a party to the investigation. Involvement in "competitive decisionmaking" 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.).

(4) Forms and determinations. (i) The Secretary may adopt, from time to time, forms for submitting requests for disclosure pursuant to an administrative protective order incorporating the terms of this rule. The Secretary shall determine whether the requirements for release of information under this rule have been satisfied. This determination shall be made concerning specific business proprietary information as expeditiously as possible but in no event later than fourteen (14) days from the filing of the information, or seven (7) days in the preliminary phase of an investigation, except if the submitter of the information objects to its release or the information is unusually voluminous or complex, in which case the determination shall be made within thirty (30) days from the filing of the information, or ten (10) days in the preliminary phase of an investigation. The Secretary shall establish a list of parties whose applications have been granted. The Secretary's determination shall be final for purposes of review by the U. S. Court of International Trade under section 777(c)(2) of the Act.

(ii) Should the Secretary determine pursuant to this section that materials sought to be protected from public disclosure by a person do not constitute business proprietary information or were not required to be served under paragraph (f) of this section, then the Secretary shall, upon request, issue an order on behalf of the Commission requiring the return of all copies of such materials served in accordance with paragraph (f) of this section.

(iii) The Secretary shall release business proprietary information only to an authorized applicant whose application has been accepted and who presents the application along with adequate personal identification; or a person described in paragraph (b)(1)(iv) of this section who presents a copy of the statement referred to in that paragraph along with adequate personal identification.

(iv) An authorized applicant granted access to business proprietary information in the preliminary phase of an investigation may, subject to paragraph (c) of this section, retain such business proprietary information during any final phase of that investigation, provided that the authorized applicant has not lost his authorized applicant status (e. g., by terminating his representation of an interested party who is a party). When retaining business proprietary information pursuant to this

paragraph, the authorized applicant need not file a new application in the final phase of the investigation.

(b) Administrative protective order. The administrative protective order under which information is made available to the authorized applicant shall require the applicant to submit to the Secretary a personal sworn statement that, in addition to such other conditions as the Secretary may require, the applicant shall:

- (1) Not divulge any of the business proprietary information obtained under the administrative protective order and not otherwise available to the applicant, to any person other than
 - (i) Personnel of the Commission concerned with the investigation,
 - (ii) The person or agency from whom the business proprietary information was obtained,
 - (iii) A person whose application for access to business proprietary information under the administrative protective order has been granted by the Secretary, and
 - (iv) Other persons, such as paralegals and clerical staff, who are employed or supervised by the authorized applicant; who have a need thereof in connection with the investigation; who are not involved in competitive decision making for an interested party which is a party to the investigation; and who have signed a statement in a form approved by the Secretary that they agree to be bound by the administrative protective order (the authorized applicant shall be responsible for retention and accuracy of such forms and shall be deemed responsible for such persons' compliance with the administrative protective order);
- (2) Use such business proprietary information solely for the purposes of representing an interested party in the Commission investigation then in progress or during judicial or other review of such Commission investigation;
- (3) Not consult with any person not described in paragraph (b)(1) of this section concerning such business proprietary information without first having received the written consent of the Secretary and the party or the attorney of the party from whom such business proprietary information was obtained;
- (4) Whenever materials (e. g., documents, computer disks, etc.) containing such business proprietary information are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container;
- (5) Serve all materials containing business proprietary information as directed by the Secretary and pursuant to paragraph (f) of this section;
- (6) Transmit all materials containing business proprietary information with a cover sheet identifying the materials as containing business proprietary information;
- (7) Comply with the provisions of this section;
- (8) Make true and accurate representations in the authorized

applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (e. g., change in personnel assigned to the investigation);

(9) Report promptly and confirm in writing to the Secretary any breach of the administrative protective order; and

(10) Acknowledge that breach of the administrative protective order may subject the authorized applicant to such sanctions or other actions as the Commission deems appropriate.

(c) Final disposition of material released under administrative protective order. At such date as the Secretary may determine appropriate for particular data, each authorized applicant shall return or destroy all copies of materials released to authorized applicants pursuant to this section and all other materials containing business proprietary information, such as charts or notes based on any such information received under administrative protective order, and file with the Secretary a certificate attesting to his personal, good faith belief that all copies of such material have been returned or destroyed and no copies of such material have been made available to any person to whom disclosure was not specifically authorized.

(d) Commission responses to a breach of administrative protective order. A breach of an administrative protective order may subject an offender to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven 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 business proprietary information 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 warning letter, as the Commission determines to be appropriate.

(e) Breach investigation procedure. (1) The Commission shall determine whether any person has violated an administrative protective order, and may impose sanctions or other actions in accordance with paragraph (d) of this section. At any time within sixty (60) days of the

later of the date on which the alleged violation occurred or, as determined by the Commission, could have been discovered through the exercise of reasonable and ordinary care, or the completion of an investigation conducted under subpart B or C of this part, the Commission may commence an investigation of any breach of an administrative protective order alleged to have occurred at any time during the pendency of the investigation, including all appeals, remands, and subsequent appeals. Whenever the Commission has reason to believe that a person may have breached an administrative protective order issued pursuant to this section, the Secretary shall issue a letter informing such person that the Commission has reason to believe a breach has occurred and that the person has a reasonable opportunity to present his views on whether a breach has occurred. If subsequently the Commission determines that a breach has occurred and that further investigation is warranted, the Secretary shall issue a letter informing such person of that determination and that the person has a reasonable opportunity to present his views on whether mitigating circumstances exist and on the appropriate sanction to be imposed, but no longer on whether a breach has occurred. Once such person has been afforded a reasonable opportunity to present his views, the Commission shall determine what sanction if any to impose.

(2) Where the sanction imposed is a private letter of reprimand, the Secretary shall expunge the sanction from the recipient's record two (2) years from the date of issuance of the sanction, provided that

(i) The recipient has not received another unexpunged sanction pursuant to this section at any time prior to the end of the two year period, and

(ii) The recipient is not the subject of an investigation for possible breach of administrative protective order under this section at the end of the two year period. Upon the completion of such a pending breach investigation without the issuance of a sanction, the original sanction shall be expunged. The Secretary shall notify a sanction recipient in the event that the sanction is expunged.

(f) Service. (1) Any party filing written submissions which include business proprietary information to the Commission during an investigation shall at the same time serve complete copies of such submissions upon all authorized applicants specified on the list established by the Secretary pursuant to paragraph (a)(4) of this section, and, except as provided in Sec. 207.3, a nonbusiness proprietary version on all other parties. All such submissions must be accompanied by a certificate attesting that complete copies of the submission have been properly served. In the event that a submission is filed before the Secretary's list is established, the document need not be accompanied by a certificate of service, but the submission shall be served within two (2) days of the establishment of the list and a certificate of service shall then be filed.

(2) If a party's request under paragraph (g) of this section is granted, the Secretary shall accept the nondisclosable confidential business information into the record. The party shall serve the submission containing such information in accordance with the requirements of Sec. 207.3(b) and paragraph (f)(1) of this section, with the information redacted from the copies served.

(3) The Secretary shall not accept for filing into the record of an investigation submissions filed without a proper certificate of service. Failure to comply with paragraph (f) of this section may result in denial of party status and such sanctions as the Commission deems appropriate. Business proprietary information in submissions must be dealt with as required by Sec. 207.3(c).

(g) Exemption from disclosure--(1) In general. Any person may request exemption from the disclosure of business proprietary information under administrative protective order, whether the person desires to include such information in a petition filed under Sec. 207.10, or any other submission to the Commission during the course of an investigation. Such a request shall only be granted if the Secretary finds that such information is nondisclosable confidential business information. As defined in Sec. 201.6(a)(2) of this chapter, nondisclosable confidential business information is privileged information, classified information, or specific information (e.g., trade secrets) of a type for which there is a clear and compelling need to withhold from disclosure. The request will be granted or denied not later than thirty (30) days (ten (10) days in a preliminary phase investigation) after the date on which the request is filed.

(2) Request for exemption. A request for exemption from disclosure must be filed with the Secretary in writing with the reasons therefor. At the same time as the request is filed, one copy of the business proprietary information in question must be lodged with the Secretary solely for the purpose of obtaining a determination as to the request. The business proprietary information for which exemption from disclosure is sought shall remain the property of the requester, and shall not become or be incorporated into any agency record until such time as the request is granted. A request should, when possible, be filed two business days prior to the deadline, if any, for filing the document in which the information for which exemption from disclosure is sought is proposed to be included. If the request is denied, the copy of the information lodged with the Secretary shall promptly be returned to the requester. Such a request shall only be granted if the Secretary finds that such information is privileged information, classified information, or specific information of a type for which there is a clear and compelling need to withhold from disclosure. The Secretary shall promptly notify the requester as to whether the request has been approved or denied.

(3) Procedure if request is approved. If the request is approved,

the person shall file three versions of the submission containing the nondisclosable confidential business information in question. One version shall contain all business proprietary information, bracketed in accordance with Sec. 201.6 of this chapter and Sec. 207.3. The other two versions shall conform to and be filed in accordance with the requirements of Sec. 201.6 of this chapter and Sec. 207.3, except that the specific information as to which exemption from disclosure was granted shall be redacted from the submission.

(4) Procedure if request is denied. If the request is denied, the copy of the information lodged with the Secretary shall promptly be returned to the requester. The requester may file the submission in question without that information, in accordance with the requirements of Sec. 207.3.

APPENDIX C
SANCTIONS NOTICE

[Federal Register: May 26, 2004 (Volume 69, Number 102)]
[Notices]
[Page 29972-29978]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr26my04-91]

INTERNATIONAL TRADE COMMISSION

Summary of Commission Practice Relating to Administrative Protective Orders

AGENCY: U.S. International Trade Commission.

ACTION: Summary of Commission practice relating to administrative protective orders.

SUMMARY: Since February 1991, the U.S. International Trade Commission ("Commission") has issued an annual report on the status of its practice with respect to violations of its administrative protective orders ("APOs") in investigations under Title VII of the Tariff Act of 1930 in response to a direction contained in the Conference Report to the Customs and Trade Act of 1990. Over time, the Commission has added to its report discussions of APO breaches in Commission proceedings other than those under Title VII and violations of the Commission's rule on bracketing business proprietary information ("BPI") (the "24-hour rule"), 19 CFR 207.3(c). This notice provides a summary of investigations of breaches in proceedings under Title VII, sections 202 and 204 of the Trade Act of 1974, as amended, section 421 of the Trade Agreements Act of 1974, as amended, and section 337 of the Tariff Act of 1930, as amended, completed during calendar year 2003. There was one completed investigation of a 24-hour rule violation during that period. The Commission intends that this report educate representatives of parties to Commission proceedings as to some specific types of APO breaches
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encountered by the Commission and the corresponding types of actions the Commission has taken.

FOR FURTHER INFORMATION CONTACT: Carol McCue Verratti, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone (202) 205-3088. Hearing impaired individuals are advised that

information on this matter can be obtained by contacting the Commission's TDD terminal at (202) 205-1810. General information concerning the Commission can also be obtained by accessing its Internet server (<http://frwebgate.access.gpo.gov/cgi-bin/leaving.cgi?from=leavingFR.html&log=linklog&to=http://www.usitc.gov>). SUPPLEMENTARY INFORMATION: Representatives of parties to investigations conducted under Title VII of the Tariff Act of 1930, sections 202 and 204 of the Trade Act of 1974, as amended, section 421 of the Trade Agreements Act of 1974, as amended, and section 337 of the Tariff Act of 1930, as amended, may enter into APOs that permit them, under strict conditions, to obtain access to BPI (Title VII) or confidential business information ("CBI") (sections 201-204, section 421 and section 337) of other parties. See 19 U.S.C. 1677f; 19 CFR 207.7; 19 U.S.C. 2252(i); 19 CFR 206.17; 19 U.S.C. 1337(n); 19 CFR 210.5, 210.34. The discussion below describes APO breach investigations that the Commission has completed, including a description of actions taken in response to breaches. The discussion covers breach investigations completed during calendar year 2003.

Since 1991, the Commission has published annually a summary of its actions in response to violations of Commission APOs and the 24-hour rule. See 56 FR 4846 (Feb. 6, 1991); 57 FR 12,335 (Apr. 9, 1992); 58 FR 21,991 (Apr. 26, 1993); 59 FR 16,834 (Apr. 8, 1994); 60 FR 24,880 (May 10, 1995); 61 FR 21,203 (May 9, 1996); 62 FR 13,164 (March 19, 1997); 63 FR 25064 (May 6, 1998); 64 FR 23355 (April 30, 1999); 65 FR 30434 (May 11, 2000); 66 FR 27685 (May 18, 2001); 67 FR 39425 (June 7, 2002); 68 FR 28256 (May 23, 2003). This report does not provide an exhaustive list of conduct that will be deemed to be a breach of the Commission's APOs. APO breach inquiries are considered on a case-by-case basis.

As part of the effort to educate practitioners about the Commission's current APO practice, the Commission Secretary issued in March 2001 a third edition of *An Introduction to Administrative Protective Order Practice in Import Injury Investigations* (Pub. L. 3403). This document is available upon request from the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, tel. (202) 205-2000.

I. In General

The current APO form for antidumping and countervailing duty investigations, which the Commission has used since March 2001, requires the applicant to swear that he or she will:

- (1) Not divulge any of the BPI obtained under the APO and not otherwise available to him, to any person other than--
 - (i) personnel of the Commission concerned with the investigation,
 - (ii) the person or agency from whom the BPI was obtained,
 - (iii) a person whose application for disclosure of BPI under this APO has been granted by the Secretary, and

(iv) other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decisionmaking for an interested party which is a party to the investigation; and (d) have submitted to the Secretary a signed Acknowledgment for Clerical Personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with the APO);

(2) Use such BPI solely for the purposes of the Commission investigation or for judicial or binational panel review of such Commission investigation;

(3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under this APO without first having received the written consent of the Secretary and the party or the representative of the party from whom such BPI was obtained;

(4) Whenever materials (e.g., documents, computer disks, etc.) containing such BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: storage of BPI on so-called hard disk computer media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of the APO);

(5) Serve all materials containing BPI disclosed under this APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

(6) Transmit each document containing BPI disclosed under this APO:

(i) with a cover sheet identifying the document as containing BPI,

(ii) with all BPI enclosed in brackets and each page warning that the document contains BPI,

(iii) if the document is to be filed by a deadline, with each page marked "Bracketing of BPI not final for one business day after date of filing," and

(iv) if by mail, within two envelopes, the inner one sealed and marked "Business Proprietary Information--To be opened only by [name of recipient]", and the outer one sealed and not marked as containing BPI;

(7) Comply with the provision of this APO and section 207.7 of the Commission's rules;

(8) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (e.g., change in personnel assigned to the investigation);

(9) Report promptly and confirm in writing to the Secretary any possible breach of the APO; and

(10) Acknowledge that breach of the APO may subject the authorized

applicant and other persons to such sanctions or other actions as the Commission deems appropriate including the administrative sanctions and actions set out in this APO.

The APO further provides that breach of an APO may subject an applicant to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven 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, such person or the party he represents; denial of further access to BPI 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 warning letter, as the

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Commission determines to be appropriate.

Commission employees are not signatories to the Commission's APOs and do not obtain access to BPI through APO procedures. Consequently, they are not subject to the requirements of the APO with respect to the handling of BPI. However, Commission employees are subject to strict statutory and regulatory constraints concerning BPI, and face potentially severe penalties for noncompliance. See 18 U.S.C. 1905; Title 5, U.S. Code; and Commission personnel policies implementing the statutes.

An important provision of the Commission's rules relating to BPI is the "24-hour" rule. This rule provides that parties have one business day after the deadline for filing documents containing BPI to file a public version of the document. The rule also permits changes to the bracketing of information in the proprietary version within this one-day period. No changes --other than changes in bracketing--may be made to the proprietary version. The rule was intended to reduce the incidence of APO breaches caused by inadequate bracketing and improper placement of BPI. The Commission urges parties to make use of the rule. If a party wishes to make changes to a document other than bracketing, such as typographical changes or other corrections, the party must ask for an extension of time to file an amended document pursuant to section 201.14(b)(2) of the Commission's rules.

II. Investigations of Alleged APO Breaches

Upon finding evidence of an APO breach or receiving information that there is a reason to believe one has occurred, the Commission Secretary notifies relevant offices in the agency that an APO breach investigation file has been opened. Upon receiving notification from the Secretary, the Office of General Counsel (OGC) begins to investigate the matter. The OGC prepares a letter of inquiry to be sent to the possible breacher over the Secretary's signature to ascertain the possible breacher's views on whether a breach has occurred. If, after reviewing the response and other relevant information, the Commission determines that a breach has occurred, the Commission often issues a second letter asking the breacher to address the questions of mitigating circumstances and possible sanctions or other actions. The Commission then determines what action to take in response to the breach. In some cases, the Commission determines that although a breach has occurred, sanctions are not warranted, and therefore has found it unnecessary to issue a second letter concerning what sanctions might be appropriate. Instead, it issues a warning letter to the individual. A warning letter is not considered to be a sanction.

Sanctions for APO violations serve two basic interests: (a) preserving the confidence of submitters of BPI that the Commission is a reliable protector of BPI; and (b) disciplining breachers and deterring future violations. As the Conference Report to the Omnibus Trade and Competitiveness Act of 1988 observed, "[T]he effective enforcement of limited disclosure under administrative protective order depends in part on the extent to which private parties have confidence that there are effective sanctions against violation." H.R. Conf. Rep. No. 576, 100th Cong., 1st Sess. 623 (1988).

The Commission has worked to develop consistent jurisprudence, not only in determining whether a breach has occurred, but also in selecting an appropriate response. In determining the appropriate response, the Commission generally considers mitigating factors such as the unintentional nature of the breach, the lack of prior breaches committed by the breaching party, the corrective measures taken by the breaching party, and the promptness with which the breaching party reported the violation to the Commission. The Commission also considers aggravating circumstances, especially whether persons not under the APO actually read the BPI. The Commission considers whether there are prior breaches by the same person or persons in other investigations and multiple breaches by the same person or persons in the same investigation.

The Commission's rules permit economists or consultants to obtain access to BPI under the APO if the economist or consultant is under the direction and control of an attorney under the APO, or if the economist or consultant appears regularly before the Commission and represents an interested party who is a party to the investigation. 19 CFR 207.7(a)(3) (B) and (C). Economists and consultants who obtain access to BPI under the APO under the direction and control of an attorney

nonetheless remain individually responsible for complying with the APO. In appropriate circumstances, for example, an economist under the direction and control of an attorney may be held responsible for a breach of the APO by failing to redact APO information from a document that is subsequently filed with the Commission and served as a public document. This is so even though the attorney exercising direction or control over the economist or consultant may also be held responsible for the breach of the APO.

The records of Commission investigations of alleged APO breaches in antidumping and countervailing duty cases are not publicly available and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, section 135(b) of the Customs and Trade Act of 1990, and 19 U.S.C. 1677f(g).

The breach most frequently investigated by the Commission involves the APO's prohibition on the dissemination of BPI to unauthorized persons. Such dissemination usually occurs as the result of failure to delete BPI from public versions of documents filed with the Commission or transmission of proprietary versions of documents to unauthorized recipients. Other breaches have included: the failure to bracket properly BPI in proprietary documents filed with the Commission; the failure to report immediately known violations of an APO; and the failure to supervise adequately non-legal personnel in the handling of BPI.

Counsel participating in Title VII investigations have reported to the Commission potential breaches involving the electronic transmission of public versions of documents. In these cases, the document transmitted appears to be a public document with BPI omitted from brackets. However, the BPI is actually retrievable by manipulating codes in software. The Commission has found that the electronic transmission of a public document containing BPI in a recoverable form was a breach of the APO.

The Commission advised in the preamble to the notice of proposed rulemaking in 1990 that it will permit authorized applicants a certain amount of discretion in choosing the most appropriate method of safeguarding the confidentiality of the BPI. However, the Commission cautioned authorized applicants that they would be held responsible for safeguarding the confidentiality of all BPI to which they are granted access and warned applicants about the potential hazards of storage on hard disk. The caution in that preamble is restated here:

[T]he Commission suggests that certain safeguards would seem to be particularly useful. When storing business proprietary information on computer disks, for example, storage on floppy disks rather than hard disks is recommended, because deletion of information from a hard disk does not necessarily erase the information, which can

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often be retrieved using a utilities program. Further, use of business proprietary information on a computer with the capability to communicate with users outside the authorized applicant's office incurs the risk of unauthorized access to the information through such communication. If a computer malfunctions, all business proprietary information should be erased from the machine before it is removed from the authorized applicant's office for repair. While no safeguard program will insulate an authorized applicant from sanctions in the event of a breach of the administrative protective order, such a program may be a mitigating factor.

Preamble to notice of proposed rulemaking, 55 FR 24100, 24103 (June 14, 1990).

The Commission has recently disposed of an APOB investigation concerning a section 337 investigation. In that case, to be summarized with other cases completed in 2004, attorneys failed to notify the Commission about their receipt of a subpoena from another government agency that would require the disclosure of BPI obtained under the APO. Counsel in section 337 investigations are reminded that Commission rule 210.34(d)(1) requires that the Commission be notified in writing immediately by anyone receiving such a subpoena or court or administrative order, discovery request, agreement, or other written request seeking disclosure to persons who are not permitted access to the information under either a Commission protective order or Commission rule 210.5(b). Commission rule 210.34(d)(2) provides that the Commission may impose sanctions upon any person who willfully fails to comply with section 210.34(d)(1). Failure to comply with that rule may also be considered an aggravating circumstance in determining an appropriate sanction for a breach connected with compliance with the subpoena or order.

III. Specific Investigations in Which Breaches Were Found

The Commission presents the following case studies to educate users about the types of APO breaches found by the Commission. The studies provide the factual background, the actions taken by the Commission, and the factors considered by the Commission in determining the appropriate actions. The Commission has not included some of the specific facts in the descriptions of investigations where disclosure of such facts could reveal the identity of a particular breacher. Thus, in some cases, apparent inconsistencies in the facts set forth in this notice result from the Commission's inability to disclose particular facts more fully.

Case 1: The Commission determined that two attorneys breached the APO when one of the attorneys failed to delete BPI from the public version of a prehearing brief. The attorney who was responsible for preparing the public version of the brief and who failed to delete the

BPI was the lead attorney and the firm's APO Compliance Officer. However, this was his first title VII investigation before the Commission. The second attorney, a name partner and more senior attorney in the firm, participated substantially in the investigation and participated in the drafting of the confidential version of the brief. The Commission found that the senior attorney had also breached the APO because, despite the more junior attorney's inexperience and the lengthy series of APO breaches that had been caused by various members of his firm, he did not participate in the preparation of the public brief and/or supervise the junior attorney more closely to prevent a new breach.

Because he was the lead attorney and the firm's APO Compliance Officer, the Commission determined that the junior attorney would receive a private letter of reprimand, even though it was his first breach, no non-signatories had read the BPI, he took immediate corrective measures to cure the breach, and his firm changed its APO procedures to avoid future breaches of this type. Although the attorney claimed that his inexperience with bracketing BPI may have played a part in the errors, the Commission determined that he should be held to a higher standard of care because the purpose of his position as APO Compliance Officer was to prevent breaches like the one he failed to prevent in this matter. The Commission also considered the fact that the attorney took the APO Compliance position with the knowledge that several members of his firm had been investigated over a relatively short period of time for prior APO breaches, and that aggressive review of his firm's submissions was therefore necessary.

The Commission determined to sanction the senior attorney by publishing in the Federal Register a public letter of reprimand and to suspend him for a period of six months from access to APO information in any Commission investigation. In addition, the Commission ordered that at least two attorneys review all documents to be filed with the Commission by his law firm for APO compliance for a period of five years from the date of publication of the sanction in the Federal Register. The Commission decided to issue the public letter of reprimand and suspend the attorney because this was his fourth breach within a relatively short period of time. In addition, the attorney had been publicly sanctioned within the past two years, but not suspended. The Commission found that although none of the attorney's prior breaches was egregious enough to warrant a public reprimand when considered separately, the public reprimand was warranted for the series of breaches that demonstrated a disturbing and unacceptable pattern of overall failure to safeguard information released under APO.

Case 2: The Commission issued a private letter of reprimand to an attorney for failing to redact CBI from the public version of a prehearing brief. The brief was a joint brief with another law firm, but the Commission found that the attorney from the other law firm and a consultant and a second attorney from the breaching attorney's law

firm were not responsible for the final review of the brief. A private letter of reprimand was issued even though this was the attorney's first breach of a Commission APO, the breach was inadvertent, the attorney's firm changed its APO procedures to avoid future breaches of this type, and the attorney took immediate corrective measures to cure the breach once he was informed that there was a possible breach. The Commission decided to issue a private letter of reprimand because the Commission received no assurance from the attorney that non-signatories had not read the CBI. The Commission sent the attorney two letters of inquiry and a letter seeking his comments on possible sanctions and mitigating circumstances. All of the letters asked for his comments on whether a non-signatory had read the CBI. The attorney did not address the question in the first or third letters; in the second letter he merely stated that he could not confirm with the recipients of the CBI that only APO signatories had viewed the CBI. The attorney never explained why he could not confirm the facts. The Commission noted that more than one firm which was a recipient of the brief were non-signatories of the APO. Thus, without sufficient followup or explanation from the attorney and because CBI was made available to several non-signatories, the Commission presumed that the CBI was viewed by a non-signatory of the APO.

Case 3: An economic consultant prepared and distributed an exhibit at a Commission hearing. The exhibit contained CBI that was taken from tables that were bracketed as confidential APO information in the Prehearing Staff Report. During the hearing, the consultant was informed of the possible breach and he took immediate steps to retrieve the exhibit.

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All but one or two copies were retrieved. The consultant had argued that the information was not CBI because later in the investigation it was determined that the data itself was erroneous and corrected data was included in the Posthearing Staff Report. The Commission determined that the information was CBI since it was taken from a Commission document that was clearly marked as containing CBI. The Commission sanctioned the consultant with a private letter of reprimand because the breach was intentional; the Commission presumed that a non-signatory reviewed the CBI since one or two of the exhibits were not retrieved and non-signatories attended the hearing; and the consultant had previously been found to have breached an APO and was issued a warning letter within a reasonably short period before the occurrence of this breach. The Commission took into consideration the consultant's immediate attempts to retrieve the exhibit and the fact that his consulting firm modified its procedures to avoid similar breaches in the future.

The Commission also investigated whether attorneys in two law firms had breached the APO in this matter. One of the law firms had included the consultant on its APO application and the lead attorney for that

firm had agreed to exercise direction and control over the consultant's handling of the APO materials. Another law firm also had hired the consultant to assist in the same investigation, but on a different product than that of the first law firm. That second firm gave the consultant the information on this second product and it was for this product that the exhibit had been prepared and concerning which the Commission hearing was held. The consultant was not included on the APO application of the second law firm, but was entitled to have the information on any product in this multiproduct investigation as long as he was included on one APO application. The Commission found that none of the attorneys in the second firm breached the APO because none was responsible for preparation of the exhibit and they had not signed an APO application agreeing to exercise direction and control over the consultant's handling of APO materials. The Commission issued a no violation breach to the lead attorney in the second firm, but admonished him to be more attentive in preventing breaches in the future.

The Commission determined that the lead attorney in the first law firm breached the APO by failing to provide adequate supervision over the handling of CBI and by permitting the release of CBI by an economic consultant under the attorney's direction and control, especially in light of the fact that the consultant in question previously had breached an APO in a prior case that also had involved the lead attorney and his firm. The Commission determined to issue the lead attorney in the first firm a warning letter, in spite of the aggravating circumstances that existed in this case, because of the unusual circumstances of the APO in this multiproduct investigation which permitted the consultant to receive CBI from another attorney and work separately from the attorneys in the first law firm.

Case 4: The Commission determined that two attorneys breached the APO by failing to return or destroy all copies of the CBI disclosed under the APO within 60 days of completion of the Commission's investigation and by using the retained documents for a purpose other than the Commission's investigation.

The attorneys represented a party in a section 201 investigation. They argued that the failure to return or destroy the documents on a timely basis was inadvertent as they were not sure when the Commission investigation had ended. They also argued that the documents, although retained by them, were not used for any other purpose than the Commission investigation.

The Commission found conflicting statements in the submissions from the attorneys. Relying primarily on the initial statements regarding the breaches, the Commission found that the breach was not inadvertent, and that the attorneys had retained the documents so they could review them in preparing their client's product exclusion submission to USTR. In reaching its decision, the Commission did not equate mere retention with use, but found that something more had occurred.

The Commission denied the attorneys' request for reconsideration of the finding that the documents were used for something other than the Commission's investigation because the arguments were made during the breach phase of the Commission's investigation or they could have been made.

There were several mitigating circumstances in this matter, including the facts that it was the first APO breach for both attorneys, there was no evidence that unauthorized persons gained access to the CBI, and the attorneys' law firm has instituted a written policy of checking the Federal Register on a daily basis for Commission notices. There were also aggravating circumstances that led the Commission to issue a private letter of reprimand to both attorneys. The breach was not inadvertent; the attorneys interpreted the APO, without seeking Commission guidance, to allow them to retain APO documents beyond the date set by the APO for return or destruction of APO documents; and the attorneys committed a second breach in their use of the APO documents for a purpose other than the Commission's investigation.

Case 5: The Commission found that an attorney and a legal assistant breached the APO by serving a document containing BPI upon individuals not authorized to view BPI. The Commission issued private letters of reprimand to both individuals.

The document had been prepared for filing and service by the legal assistant and signed by the attorney. The legal assistant mistakenly used the public service list instead of the APO service list to serve the document. Consequently, two law firms ineligible to receive BPI were served with the document. A lawyer in one of those firms opened the envelope and read the document long enough to determine that it contained BPI that he was ineligible to receive. At that point, the lawyer stopped reading and notified the attorney who signed the document about the possible breach. Once notified, the attorney was able to retrieve the document from both ineligible law firms, including from the second ineligible law firm which had not opened the sealed envelope.

The mitigating circumstances in this case included the fact that the breach was inadvertent, neither the attorney nor the legal assistant had any prior breaches within the recent past, they made prompt efforts to limit the possibility of disclosure to persons not on the APO, and they took steps to prevent breaches in the future. The aggravating circumstances that supported the issuance of private letters of reprimand were the facts that a person not subject to the APO viewed the BPI and that the breach was discovered by someone other than the attorney or legal assistant.

Case 6: The Commission determined that one attorney breached the APO by failing to ensure, as lead counsel in a Commission investigation, that all of the law firm personnel who would be working with BPI contained in documents received under APO were signatories to

the APO. One other attorney in the firm had access to and used BPI under the APO notwithstanding that he was not a signatory to the APO.

The Commission

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found that this attorney had violated 19 CFR 201.15.

An attorney in the law firm discovered that one of the attorneys working on the investigation in the law firm was not on the APO service list after the investigation had been completed. He notified the Commission immediately about the possible breach. In determining that the lead attorney should receive a private letter of reprimand, the Commission considered the mitigating circumstances that the firm discovered the breach and notified the Commission immediately, the lead attorney voluntarily conducted classes for his firm concerning the handling of BPI, the breach was inadvertent, and the non-signatory attorney handled the APO materials as if he were a signatory. However, the Commission also considered the aggravating circumstance that the lead attorney had received a warning letter in a previous breach investigation within the recent past.

In determining to issue a warning letter to the non-signatory attorney, the Commission stated that it considers ``good cause" for imposition of a warning letter pursuant to 19 CFR 201.15 to be the equivalent of a breach of an APO. However, it decided not to issue any sanction for the attorney's conduct because this was the only breach-equivalent action in which he had been involved within the two-year period generally examined by the Commission for purposes of determining sanctions, his action was not willful, he treated BPI as if he had signed the APO, and he reported and remedied the objectionable conduct shortly after he had learned of it.

Case 7: The Commission issued a warning letter to an economist after finding he breached the APO by transmitting exhibits containing BPI to a non-signatory copy vendor. The economist had substantial experience handling APO material in Commission title VII investigations. He was working on the investigation under the direction and control of an attorney in a law firm. Prior to the economist taking the exhibits to the copy vendor, the attorney supervising him had reviewed the documents to be sure there was no BPI in them. After the attorney's review, the economist decided to add another document to the exhibits that included BPI. Although from earlier discussions with the attorney the economist had reason to question whether the vendor was a signatory to the APO, he handed the documents directly to the copy vendor without determining whether the vendor was a signatory to the APO.

The Commission considered whether the economist, the attorney, and the lead attorney on the investigation breached the APO. The Commission determined that the attorney did not breach the APO. Although he was, in general, responsible for the economist's actions, he could not reasonably have foreseen that the economist would have inserted an APO

document into the exhibits. The attorney had approved the exhibits and did not anticipate any additions to them. The Commission determined that the lead attorney had not breached the APO because he had reasonably delegated his supervisory responsibilities over the economist to the attorney and that attorney was experienced and had no prior breaches that would have put the lead attorney on notice that more supervision was necessary.

The law firm and the economist had argued that a breach did not occur because there was no BPI in the exhibits. They argued that the information that was considered BPI was publicly available. The Commission found that, although a small part of the BPI had been made public during the preliminary phase of the investigation, the remainder was BPI and included questionnaire responses or clarification to questionnaire responses.

The Commission determined to issue a warning letter to the economist because the breach was unintentional, this was his first breach, and the copy vendor merely copied the documents and did not review the BPI. In addition, once the economist realized that a breach might have occurred, he immediately notified the attorney, who took prompt and effective action to stop any further dissemination of the BPI. The Commission noted in its letters to the economist and attorney that the Commission was not notified of the possible breach for 30 days after it was discovered. The Commission stated that it will expect more prompt notification by them with regard to any possible APO breaches in the future, in compliance with the APO which requires signatories to "[r]eport promptly * * * any possible breach."

Case 8: The Commission issued warning letters to three attorneys and two international trade analysts in one firm for permitting a legal secretary to have access to CBI even though he had not signed the APO Acknowledgment for Clerical Personnel and, therefore, his name was not included on the Secretary's confidential certificate of service. The attorneys and international trade analysts were all signatories to the APO and had worked on the Commission's investigation. The Commission decided to issue a warning letter instead of sanctions because the breach was inadvertent, it was the attorneys' and analysts' first breach, they reported the breach promptly to the Commission, and they took corrective measures to prevent similar breaches in the future.

The Commission did not issue a warning letter to the legal secretary, but cautioned him to ensure in future investigations that he has signed the Acknowledgement before accessing CBI.

Case 9: The Commission found that an attorney breached the APO by electronically transmitting a prehearing brief that contained both masked and not redacted BPI and BPI that had been neither masked nor redacted to two non-signatories of the APO. The Commission issued a private letter of reprimand because at least one of the non-signatories read the BPI that had neither been masked nor redacted and there was a delay in the attorney's notification of the Commission about the

possible breach. In reaching this decision, the Commission considered the mitigating circumstances that the attorney had no prior breaches, he notified the Commission of the breach, and he immediately took appropriate corrective measures.

During the breach phase of the investigation, the attorney argued that the electronic "whiting-out" of the BPI was sufficient to protect it. In response, the Commission noted that it has consistently found that it is a breach of the APO to send an electronic document to persons not on the APO in which the BPI had been electronically masked or "whited-out" since the BPI can be retrieved by altering the software print codes. The Commission also dismissed the attorney's arguments that the BPI that had neither been masked nor redacted was not BPI. The Commission found that most of the data in question had been questionnaire responses that were bracketed as BPI in the prehearing report. Questionnaire responses are treated by the Commission as BPI in their entirety, unless the information is otherwise available from a public source, or is a non-numerical characterization of aggregate trends. The Commission considered certain public sources that the attorney claimed revealed the information, but found that the exact information was not publicly available.

Case 10: The Commission determined that an attorney breached the APO in a section 337 investigation by transmitting a confidential version of a brief filed in the appeal of the Commission investigation to persons who were not signatories to the APO. The Commission stated in the warning letter to the attorney that this finding

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was consistent with prior determinations when the Commission determined that making CBI available to unauthorized persons constitutes a breach of the APO, regardless of whether the unauthorized persons actually viewed the CBI.

The Commission determined to issue the warning letter to the attorney instead of a sanction because the breach was unintentional, he had no prior warnings or sanctions regarding APO breaches within the recent past, he took prompt action to remedy the breach, and no non-signatory to the APO actually read the electronically transmitted brief.

Rule Violation: The Commission issued a warning letter to an attorney for violating the Commission's 24-hour rule, 19 CFR 207.3. On the day following the filing of a confidential prehearing brief in a Commission investigation, the attorney filed a public version of the brief and a revised confidential version. Both versions contained additions to and deletions of text on several pages and there were several pages missing from an exhibit. The Commission found that this violated the 24-hour rule because that rule specifically precludes changes other than bracketing changes and the deletion of confidential information during the 24-hour period after the original filing. The Commission noted that the rule allowed attorneys to seek leave to make

other changes but, in this case, the attorney did not.

The Commission issued a warning letter instead of a sanction because the changes appeared to be inadvertent and the attorney had no record of a rule violation or APO breach within the recent past.

IV. Investigations in Which No Breach Was Found

There were two APOB investigations in which the Commission determined that the APO had not been breached. One involved testimony at a hearing that might have disclosed BPI. Through its investigation the Commission determined that the information disclosed was not BPI because it was publicly available. In the other investigation, the Commission's staff determined that no BPI was served on a party that was not on the APO service list because the data belonged to the attorney's own client and was not other company data received under the APO.

By order of the Commission.

Issued: May 20, 2004.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04-11862 Filed 5-25-04; 8:45 am]

BILLING CODE 7020-02-P

APPENDIX D

ADMINISTRATIVE PROTECTIVE ORDER FORMS AD/CVD INVESTIGATIONS

- D.1 Administrative Protective Order in AD/CVD Investigations
- D.2 Application for Disclosure of Business Proprietary Information in AD/CVD Investigations
- D.3 Acknowledgment Form for Clerical Personnel in AD/CVD Investigations



*AD/CVD APO Form
Revised March 2005*

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436**

ADMINISTRATIVE PROTECTIVE ORDER

Inv. No(s). _____

(Name of Investigation(s))

A. Application

(1) To obtain disclosure of business proprietary information (BPI) under this Administrative Protective Order (APO), an authorized applicant, as defined in section 207.7(a)(3) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 207.7(a)(3), as amended), must comply with the terms of this APO.

(2) An application for disclosure must be made by an authorized applicant in the form attached hereto. The authorized applicant shall file an application with the Secretary to the Commission (the Secretary) within the deadlines provided in section 207.7(a)(2) of the Commission's rules. An authorized applicant need file only one application in order to obtain BPI in both the preliminary and the final phases of an investigation.

(3) In order to obtain disclosure of BPI under this APO from Commission personnel, an authorized applicant must present a copy of his application and personal identification satisfactory to the Secretary. If the authorized applicant wishes a person described in paragraph B(1)(iv) of this APO to act for him in obtaining disclosure, the person must present a copy of his or her, Acknowledgment for Clerical Personnel form and personal identification satisfactory to the Secretary.

B. Obligations of the authorized applicant

By filing an application, the authorized applicant shall agree to:

(1) Not divulge any of the BPI disclosed under this APO or otherwise obtained in this investigation and not otherwise available to him or her, to any person other than

(i) Personnel of the Commission concerned with the investigation,

(ii) The person or agency from whom the BPI was obtained,

(iii) A person whose application for disclosure of BPI under this APO has been granted by the Secretary, and

(iv) Other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decision making for an interested party which is a party to the investigation; and (d) have signed the acknowledgment for clerical personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with this APO);

(2) Use such BPI solely for the purposes of the above-captioned Commission investigation or for judicial or binational panel review of such Commission investigation;

(3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under this APO or otherwise obtained in this investigation without first having received the written consent of the Secretary and the party or the representative of the party from whom such BPI was obtained;

(4) Whenever materials (e.g. documents, computer disks, etc.) containing such BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: storage of BPI on so-called hard disk computer media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of this APO);

(5) Serve all materials containing BPI disclosed under this APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

(6) Transmit each document containing BPI disclosed under this APO:

(i) with a cover sheet identifying the document as containing BPI,

(ii) with all BPI enclosed in brackets and each page warning that the document contains BPI,

(iii) if the document is to be filed by a deadline, with each page marked "Bracketing of BPI not final for one business day after date of filing," and

(iv) if by mail, within two envelopes, the inner one sealed and marked "Business Proprietary Information--To be opened only by [name of recipient]", and the outer one sealed and not marked as containing BPI;

(7) Comply with the provisions of this APO and section 207.7 of the Commission's rules;

(8) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (e.g., change in personnel assigned to the investigation);

(9) Report promptly and confirm in writing to the Secretary any possible breach of this APO; and

(10) Acknowledge that breach of this APO may subject the authorized applicant and other persons to such sanctions or other actions as the Commission deems appropriate, including the administrative sanctions and actions set out in this APO.

C. Return or destruction of BPI

(1) At any time, the Secretary may order the return, destruction, or transfer of any BPI disclosed under this APO, in which case the authorized applicant shall promptly return such BPI to the Secretary or to the submitter of the BPI or destroy the BPI or transfer the BPI to another authorized applicant, as the Secretary may direct. Unless otherwise directed, an authorized applicant to whom BPI was disclosed under this APO during the preliminary phase of the above-captioned investigation may retain possession of such BPI during the final phase of the investigation.

(2) Subject to paragraphs C(3) and C(4) below, within sixty (60) days after the completion of this investigation (e.g., after the publication in the *Federal Register* of a Commission preliminary negative determination, a Commerce Department final negative determination, a Commission final determination, or other final termination of this investigation), or at such other time as the Secretary may direct, the authorized applicant shall return or destroy all copies of BPI disclosed under this APO and all other materials containing such BPI, such as charts or notes based on such BPI. Whenever the authorized applicant returns or destroys BPI pursuant to this paragraph, he shall file a certificate attesting that to the applicant's knowledge and belief all copies of such BPI have been returned or destroyed and no copies of such BPI have been made available to any person to whom disclosure was not specifically authorized and a copy of the signed and dated acknowledgment for clerical personnel forms maintained during the course of the investigation(s).

(3) In the event that judicial review of the Commission's determination in the above-captioned investigation is sought, the authorized applicant shall not be required to comply with paragraph C(2) above, provided that the authorized applicant applies to the appropriate reviewing authority for a protective order agreed to by the Commission within 150 days after the completion of the investigation or, in cases before the U.S. Court of International Trade, files a BPI certification agreed to by the Commission, within 150 days. If by such date a protective order has not been applied for, or a BPI certification has not been filed, the authorized applicant shall then promptly comply with paragraph C(2) above.

(4) Special rule applicable only to investigations involving imports from Canada or Mexico:

(i) An authorized applicant may retain BPI disclosed under this APO during any binational panel review of the Commission's determination in the above-captioned investigation, subject to the additional terms and conditions set forth in the current version of APO NAFTA Form C. By filing an application for disclosure of BPI under this APO, and by failing to return or destroy all copies of BPI disclosed under this APO on or before the fifteenth (15) day after a First Request for Panel Review has been filed with the NAFTA Secretariat, the authorized applicant agrees to be bound as of that date by the terms and conditions set forth in APO NAFTA Form C, and by the provisions in that form regarding sanctions for violations of those terms and conditions.

(ii) Persons described in paragraph B(1)(iv) of this APO who have filed a statement described in that paragraph shall become subject to the terms and conditions of APO NAFTA Form C on the same date as the authorized applicant, or as soon thereafter as they file a statement described in paragraph B(1)(iv).

D. Sanctions and other actions for breach of this APO.

The authorized applicant shall in the application acknowledge that, pursuant to section 207.7(d) of the Commission's rules, breach of this Administrative Protective Order may subject an offender to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven 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, such person or the party he represent, denial of further access to business proprietary information 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 warning letter, as the Commission determines to be appropriate.

By order of the Commission.

Marilyn R. Abbott
Secretary

Issued:

Attachments:

1. Form Application for Disclosure of Business Proprietary Information under Administrative Protective Order
2. Form Administrative Protective Order Acknowledgment for Clerical Personnel



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

APPLICATION FOR DISCLOSURE OF
BUSINESS PROPRIETARY INFORMATION
UNDER ADMINISTRATIVE PROTECTIVE ORDER

Inv. No(s) _____

(Name of Investigation(s))

I. Authorized applicant status

I, the undersigned, am an authorized applicant, as defined in section 207.7(a)(3) of the Commission's Rules of Practice and Procedure (19 C.F.R. §207.7(a)(3), as amended), for the disclosure of business proprietary information (BPI) under the administrative protective order (APO) issued in the above-captioned investigation. I represent the following interested party, as defined in 19 U.S.C. §1677(9), which is a party to the investigation:

(State the name of the interested party and its category, e.g., domestic producer, importer, etc.).

I am (check one):

(1) An attorney, excepting in-house corporate counsel.

(2) An in-house corporate attorney. I am not involved in competitive decisionmaking for the interested party I represent. I have attached a written statement describing my job functions, disclosing all financial holdings I may have in my employer or its affiliates, and indicating whether I am involved in the formulation of my employer's pricing policies.

(3) A consultant or expert under the direction and control of an attorney under paragraph (1) or (2) above. That attorney has also signed this application to indicate that the attorney is held responsible for my compliance with the APO:

(Name of Attorney--Please Print)

(Signature of Attorney)

(4) A consultant or expert who appears regularly before the Commission and is not involved in competitive decisionmaking for the interested party I represent. I have attached a written statement listing my appearances before the Commission in the past three (3) years.

(5) A representative of an interested party that is not represented by counsel. I am not involved in competitive decisionmaking for that interested party. I have attached a written statement describing my job functions, disclosing all financial holdings I may have in the interested party I represent or its affiliates, and indicating whether I am involved in the formulation of the interested party's pricing policies.

Competitive decisionmaking: As defined in section 207.7 of the Commission's rules, involvement in "competitive decisionmaking" 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.).

II. Request for information

I hereby apply for disclosure to me, subject to the APO issued in the above-captioned investigation, all BPI properly disclosed pursuant to section 207.7 of the Commission's rules, for the purpose of representing an interested party in the investigation and filing comments on the BPI so disclosed. I agree to be bound by the provisions of the APO and section 207.7.

III. Sanctions and other actions for breach of the APO

I acknowledge that, pursuant to section 207.7(d) of the Commission's rules, breach of the APO may subject me to:

(1) Disbarment from practice in any capacity before the Commission along with my partners, associates, employer, and employees, for up to seven years following publication of a determination that the other 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, me or the party I represent, denial of further access to business proprietary information 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 warning letter, as the Commission determines to be appropriate.

IV. Oath

I declare under penalty of perjury that the foregoing is true and correct. Executed on this

_____ day of _____, _____, in _____.
(month) (year) (city, state)

(Signature)

(Name--Please Print)

(Title--Please Print)

(Firm--Please Print)



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

ADMINISTRATIVE PROTECTIVE ORDER
ACKNOWLEDGMENT FOR CLERICAL PERSONNEL

Inv. No(s). _____

(Name of Investigation(s))

We, the undersigned, are persons described in paragraph B(1)(iv) of the Administrative Protective Order (APO) issued in the subject investigation. We hereby agree to be bound by the provisions of the APO. We acknowledge that we may be subject to the sanctions described in paragraph D of the APO. The authorized applicant exercising direction and control over us in the investigation has also signed this acknowledgment to indicate that the applicant is responsible for our compliance with the APO.

We declare under penalty of perjury that the foregoing is true and correct. Executed on the dates indicated.

(Name--Please Print) (Title) (Signature) (Date)

(Date Access Terminated)(Authorized Applicant's Initials)

(Name--Please Print) (Title) (Signature) (Date)

(Date Access Terminated)(Authorized Applicant's Initials)

(Name--Please Print) (Title) (Signature) (Date)

(Date Access Terminated)(Authorized Applicant's Initials)

PERSON EXERCISING DIRECTION AND CONTROL:

(Signature)

(Name--Please Print)

(Date)

APPENDIX E

ADMINISTRATIVE PROTECTIVE ORDER FORMS SAFEGUARDS INVESTIGATIONS

- E.1 Administrative Protective Order in Safeguards Investigations
- E.2 Application for Disclosure of Confidential Business Information in Safeguards Investigations
- E.3 Acknowledgment Form for Clerical Personnel in Safeguards Investigations



*Safeguards
APO Form
Revised March 2005*

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436**

ADMINISTRATIVE PROTECTIVE ORDER

Inv. No. TA-_____

(Name of Investigation)

A. Application

(1) To obtain disclosure of confidential business information (CBI) under this Administrative Protective Order (APO), an authorized applicant, as defined in section 206.17(a)(3) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 206.17(a)(3), as amended), must comply with the terms of this APO.

(2) An application for disclosure must be made by an authorized applicant in the form attached hereto. The authorized applicant shall file an application with the Secretary to the Commission (the Secretary) within the deadlines provided in section 206.17(a)(2) of the Commission's rules. An authorized applicant need file only one application in order to obtain CBI in both the preliminary and the final phases of an investigation.

(3) In order to obtain disclosure of CBI under this APO from Commission personnel, an authorized applicant must present a copy of his application and personal identification satisfactory to the Secretary. If the authorized applicant wishes a person described in paragraph B(1)(iv) of this APO to act for him in obtaining disclosure, the person must present a copy of his or her, Acknowledgment for Clerical Personnel form and personal identification satisfactory to the Secretary.

B. Obligations of the authorized applicant

By filing an application, the authorized applicant shall agree to:

(1) Not divulge any of the CBI disclosed under this APO or otherwise obtained in this investigation and not otherwise available to him or her, to any person other than

(i) Personnel of the Commission concerned with the investigation,

(ii) The person or agency from whom the CBI was obtained,

(iii) A person whose application for disclosure of CBI under this APO has been granted by the Secretary, and

(iv) Other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decision making for an interested party which is a party to the investigation; and (d) have signed the Acknowledgment for Clerical Personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with this APO);

(2) Use such CBI solely for the purposes of the above-captioned Commission investigation;

(3) Not consult with any person not described in paragraph (1) concerning CBI disclosed under this APO or otherwise obtained in this investigation without first having received the written consent of the Secretary and the party or the representative of the party from whom such CBI was obtained;

(4) Whenever materials (e.g. documents, computer disks, etc.) containing such CBI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: storage of CBI on so-called hard disk computer media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the CBI and may result in violation of paragraph C of this APO);

(5) Serve all materials containing CBI disclosed under this APO as directed by the Secretary and pursuant to section 206.17(f) of the Commission's rules;

(6) Transmit each document containing CBI disclosed under this APO:

(i) with a cover sheet identifying the document as containing CBI,

(ii) with all CBI enclosed in brackets and each page warning that the document contains CBI,

(iii) if the document is to be filed by a deadline, with each page marked "Bracketing of CBI not final for one business day after date of filing," and

(iv) if by mail, within two envelopes, the inner one sealed and marked "Confidential Business Information --To be opened only by [name of recipient]", and the outer one sealed and not marked as containing CBI;

(7) Comply with the provisions of this APO and section 206.17 of the Commission's rules;

(8) Make true and accurate representations in the authorized applicant's application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (e.g., change in personnel assigned to the investigation);

(9) Report promptly and confirm in writing to the Secretary any possible breach of this APO; and

(10) Acknowledge that breach of this APO may subject the authorized applicant and other persons to such sanctions or other actions as the Commission deems appropriate, including the administrative sanctions and actions set out in this APO.

C. Return or destruction of CBI

(1) At any time, the Secretary may order the return, destruction, or transfer of any CBI disclosed under this APO, in which case the authorized applicant shall promptly return such CBI to the Secretary or to the submitter of the CBI or destroy the CBI or transfer the CBI to another authorized applicant, as the Secretary may direct.

(2) Within sixty (60) days after the completion of this investigation (e.g., after the publication in the *Federal Register* of a Commission determination), or at such other time as the Secretary may direct, the authorized applicant shall return or destroy all copies of CBI disclosed under this APO and all other materials containing such CBI, such as charts or notes based on such CBI. Whenever the authorized applicant returns or destroys CBI pursuant to this paragraph, he shall file a certificate attesting that to the applicant's knowledge and belief all copies of such CBI have been returned or destroyed and no copies of such CBI have been made available to any person to whom disclosure was not specifically authorized and a copy of the signed and dated acknowledgment for clerical personnel forms maintained during the course of the investigation.

D. Sanctions and other actions for breach of this APO.

The authorized applicant shall in the application acknowledge that, pursuant to section 206.17 of the Commission's rules, breach of this Administrative Protective Order may subject an offender to:

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven 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, such person or the party he represent, denial of further access to confidential business information 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 warning letter, as the Commission determines to be appropriate.

By order of the Commission.

Marilyn R. Abbott
Secretary

Issued:

Attachments:

1. Form Application for Disclosure of Confidential Business Information under Administrative Protective Order
2. Form Administrative Protective Order Acknowledgment for Clerical Personnel



*Safeguards
APO Application
Revised March 2005*

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436**

**APPLICATION FOR DISCLOSURE OF
CONFIDENTIAL BUSINESS INFORMATION
UNDER ADMINISTRATIVE PROTECTIVE ORDER**

Inv. No. TA- _____

(Name of Investigation)

I. Authorized applicant status

I, the undersigned, am an authorized applicant, as defined in section 206.17(a)(3) of the Commission's Rules of Practice and Procedure (19 C.F.R. §206.17(a)(3), as amended), for the disclosure of confidential business information (CBI) under the administrative protective order (APO) issued in the above-captioned investigation. I represent the following interested party, as defined in 19 CFR §206(a)(3)(iii), which is a party to the investigation:

(State the name of the interested party and its category, e.g., domestic producer, importer, etc.).

I am (check one):

(1) An attorney, excepting in-house corporate counsel.

(2) An in-house corporate attorney. I am not involved in competitive decisionmaking for the interested party I represent. I have attached a written statement describing my job functions, disclosing all financial holdings I may have in my employer or its affiliates, and indicating whether I am involved in the formulation of my employer's pricing policies.

(3) A consultant or expert under the direction and control of an attorney under paragraph (1) or (2) above. That attorney has also signed this application to indicate that the attorney is held responsible for my compliance with the APO:

(Name of Attorney--Please Print)

(Signature of Attorney)

(4) A consultant or expert who appears regularly before the Commission and is not involved in competitive decisionmaking for the interested party I represent. I have attached a written statement listing my appearances before the Commission in the past three (3) years.

(5) A representative of an interested party that is not represented by counsel. I am not involved in competitive decisionmaking for that interested party. I have attached a written statement describing my job functions, disclosing all financial holdings I may have in the interested party I represent or its affiliates, and indicating whether I am involved in the formulation of the interested party's pricing policies.

Competitive decisionmaking: As defined in section 206.17 of the Commission's rules, involvement in "competitive decisionmaking" 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.).

II. Request for information

I hereby apply for disclosure to me, subject to the APO issued in the above-captioned investigation, all CBI properly disclosed pursuant to section 206.17 of the Commission's rules, for the purpose of representing an interested party in the investigation and filing comments on the CBI so disclosed. I agree to be bound by the provisions of the APO and section 206.17 of the Commission's Rules of Practice and Procedure.

III. Sanctions and other actions for breach of the APO

I acknowledge that, pursuant to section 206.17(d) of the Commission's rules, breach of the APO may subject me to:

(1) Disbarment from practice in any capacity before the Commission along with my partners, associates, employer, and employees, for up to seven years following publication of a determination that the other 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, me or the party I represent, denial of further access to confidential business information 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 warning letter, as the Commission determines to be appropriate.

IV. Oath

I declare under penalty of perjury that the foregoing is true and correct. Executed on this

_____ day of _____, _____, in _____.
(month) (year) (city, state)

(Signature)

(Name--Please Print)

(Title--Please Print)

(Firm--Please Print)

APPENDIX F

APO NAFTA FORM C

- F.1 NAFTA APO Form C for Counsel and Professionals
- F.2 NAFTA APO Form C Acknowledgment for Clerical Personnel

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

FOR COUNSEL AND PROFESSIONALS

PROTECTIVE ORDER APPLICATION FOR PROPRIETARY INFORMATION
FOR BINATIONAL PANEL REVIEW UNDER ARTICLE 1904 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT

Panel Review No. _____

(Panel Caption)

Date of First Request
for Panel Review

A. Instructions

An authorized applicant defined in 19 C.F.R. §207.93(b)(2) requesting release of proprietary information, as defined in paragraph C(2) below, pursuant to protective order must complete and submit this application. Applicants may attach additional pages to this form if necessary. This application for release of proprietary information may be filed after a Notice of Request for Panel Review or a Notice of Request for Extraordinary Challenge Committee, if any, concerning a final determination of the United States International Trade Commission (USITC) has been filed with the Secretariat.

The applicant shall file and serve copies of this application in accordance with Rules of Procedure for NAFTA Article 1904 Panel Reviews (Art. 1904 Rules), and The Rules of Practice and Procedure of the U.S. International Trade Commission, (USITC Rules)(19 C.F.R. Part 207 subpart G). A copy of the completed application must be retained by the applicant in order that clerical persons (as defined in paragraph C(3)(d) below) may sign onto it in accordance with paragraph F below.

Additional information about release of proprietary information and definitions of terms not defined in this application are contained in the USITC Rules.

B. Authorized Applicant

To obtain access to proprietary information contained in the administrative record of the determination by the USITC which is the subject of the above-referenced binational panel (panel) review, or subsequent extraordinary challenge committee (committee) proceeding, if any I, the Undersigned,

(Insert Name)

submit this application for disclosure of proprietary information, but not including any information as to which privilege has been claimed, in the administrative record of the USITC Investigation No.

_____ pursuant to a protective order.

I represent _____
(state the name of the individual or entity) and I certify that I am (check one):

() (1) An attorney, but not an in-house corporate counsel, for an individual or an entity which is a participant or plans to become a participant in the above-referenced panel review, or subsequent committee proceeding, if any, and that I do not participate in any competitive decision-making activity of the participant or the future participant or of any other individual or entity which would gain competitive advantage through knowledge of the proprietary information sought in this application. List the jurisdictions in which you are admitted and are in good standing to practice: _____.

() (2) An in-house corporate counsel for a participant or a future participant in the above-referenced panel review, or subsequent committee proceeding, if any, but I do not participate in any competitive decision-making activity of the participant or future participant or of any individual or entity which would gain competitive advantage through knowledge of the proprietary information sought in this application. I have attached a written justification for the statement that I am not involved in competitive decision-making. List the jurisdictions in which you are admitted to practice: _____.

() (3) A professional retained by, or under the control or direction of, a counsel of record for a participant in the above-referenced panel review, or subsequent committee proceeding, if any, and do not participate in any competitive decision-making activity of the participant represented or of any individual or entity which would gain competitive advantage through knowledge of the proprietary information sought in this application. This attorney has also signed this application to indicate that the attorney is held responsible for my compliance with the administrative protective order (APO). Provide signature of counsel of record exercising direction and control and confirming position: _____.

C. Obligations of the Applicant

As a condition for access to the requested proprietary information, I agree that, upon issuance of the protective order granting this application (hereinafter, requested protective order), I shall:

(1) Be bound by the applicable provisions of the Art. 1904 Rules, Rules of Procedure for Article 1904 Extraordinary Challenge Committees (ECC Rules), the North American Free Trade Agreement Implementation Act (Pub. L. 103-182) (the Act), USITC Rules and any additional terms and conditions included in the requested protective order;

(2) Treat all information which is

- (a) defined by the USITC to be proprietary information,
- (b) contained in the administrative record of the USITC determination which is the subject of the above-referenced panel review and,
- (c) obtained pursuant to the requested protective order (hereinafter, proprietary information) as confidential;

(3) Not disclose any proprietary information, not otherwise available, to any person other than:

- (a) personnel of the USITC participating in the above-referenced panel review, or subsequent committee proceeding, if any, in which the proprietary information is part of the record,
- (b) the person from whom the information was obtained,
- (c) a person who, pursuant to a Commission protective order, is also authorized to have access to the same proprietary information in the record of the panel review, or
- (d) a clerical person retained or employed by and under the direction and control of a person described in (3)(c) (hereinafter, clerical persons) if such clerical person has signed and dated a statement that he or she

- (i) will comply with the terms and conditions of the requested protective order issued granting the application of the person who employs or retains him or her, and
- (ii) does not participate in, or provide clerical support to anyone who participates in the competitive decision-making activity of any participant in the above-referenced panel review, or committee proceeding, or any individual or entity that would gain competitive advantage through knowledge of the proprietary information released pursuant to the protective order issued to the person who employs or retains him or her;

NOTE: The examination of documents in transit between Canada or Mexico and the United States by customs authorities will not be considered to be a protective order violation.

(4) Not use any of the proprietary information for purposes other than the above-referenced panel review, or subsequent committee proceeding, if any;

(5) Not copy or otherwise reproduce any proprietary information obtained hereunder except in accordance with the terms of the requested protective order;

(6) Not consult with any person not described in paragraph C(3) of this application concerning proprietary information disclosed under the requested protective order without first having received the written consent of the USITC Secretary and the party or the attorney of the party from whom such proprietary information was obtained;

(7) Transmit each document containing proprietary information disclosed under the requested protective order:

- (a) with a cover sheet identifying the document as containing proprietary information;
- (b) with all proprietary information enclosed in brackets and each page warning that the document contains proprietary information;
- (c) if by mail, 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;

(8) Whenever documents and materials (e.g., word processing or computer diskettes) containing such proprietary information are not being used, store such material in a locked file cabinet, vault, safe or other suitable container;

(9) Not enter proprietary information onto a word-processing system or other computer device unless access to the database is restricted to persons authorized to receive the proprietary information (N.B.: storage of proprietary information on so-called hard disk computer media is to be avoided because mere erasure of data from such media may not irrecoverably destroy the proprietary information and may result in a prohibited act;

(10) Comply with the provisions of the requested protective order and with all pertinent Commission Rules;

(11) Make true and accurate representations in the authorized applicant's application and promptly notify the USITC Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (e.g., change in personnel assigned to the investigation;

(12) Report promptly to the USITC any possible prohibited act as defined in 19 U.S.C. §1677f(f) (3) or 19 C.F.R. §207.91.

D. Return of Materials

Following the issuance of the requested protective order and (a) within ten (10) days of the effective date of the Notice of the Completion of Panel Review, as defined in Part VIII of the Art. 1904 Rules, (b) within ten (10) days of my resignation or removal from the position described above, or (c) pursuant to an order from the USITC instructing me to return or destroy all such documents, I shall:

(1) return to the USITC under seal all documents containing proprietary information and any copies made of such documents including all materials created by or for me using the proprietary information, such as charts and notes, and any proprietary information that has been entered onto a data processing system,

(2) destroy such documents, or

(3) if I have resigned or been removed from my position described above, entrust such documents to the person who is replacing me in the panel review or committee proceedings and who is authorized to receive the proprietary information, if any.

At such time as I return or destroy the documents containing proprietary information pursuant to this paragraph, or entrust them to a person authorized to receive proprietary information, I shall file a statement with the Secretary to the USITC attesting that to the best of my knowledge and belief all such documents have been returned, destroyed, or entrusted pursuant to the terms of this application and that no copies of such documents have been made available to any person to whom disclosure was not specifically authorized under paragraph C(3) above. I shall also include a copy of the Acknowledgement for Clerical Personnel form signed by the clerical persons permitted access to proprietary information pursuant to paragraph F below.

E. Sanctions for Breach of the Protective Order

I acknowledge that if I commit a prohibited act as defined in 19 U.S.C. §1677f(f)(3) or 19 C.F.R. §207.91, I may be subject to sanctions under 19 U.S.C. §1677f(f), 19 C.F.R. §207.100, as well as sanctions established under applicable Canadian or Mexican law. I further acknowledge that my partners, associates, employers, or employees may be disbarred from practicing before the Commission if I commit a prohibited act.

I acknowledge that I will be responsible for assuring compliance with the terms of the requested protective order by any persons retained or employed by me and under my direction and control who have signed onto this application for protective order.

F. Access by Clerical Persons

I understand that I may permit access by my clerical persons, as defined in paragraph C(3)(d) above, to documents containing proprietary information if such access is necessary and if such clerical persons comply with the requirements set forth below and the limitations, either express or incorporated by reference, in this application. Such clerical persons need not apply separately for access but must sign and date an Acknowledgment for Clerical Personnel form before being given access to any proprietary information.

I acknowledge that, upon the filing of this application, I must retain a current list of those of my clerical persons who will have access to proprietary information. If, at a future date, other clerical persons require access, I shall amend the list. In addition, I acknowledge that I must return a copy of this application containing the signed and dated final list of all those granted access under this section when I certify to the USITC that I have returned, destroyed, or entrusted all documents containing the proprietary information pursuant to the terms of the requested protective order.

I further acknowledge that I will be responsible for ensuring that all copies of proprietary information and any documents or materials containing such information in the possession of my clerical persons are destroyed, returned or entrusted pursuant to the terms of this application.

I understand that I am chargeable with the actions of each of my clerical persons who has signed and dated the Acknowledgment for Clerical Personnel form.

Any clerical person who signs the Acknowledgment for Clerical Personnel form acknowledges that a breach of any provision of a protective order may subject him or her to sanctions under 19 U.S.C. §1677f (f), 19 C.F.R. §207.100, as well as sanctions established under applicable Canadian or Mexican law.

G. Modification and Revocation

I acknowledge that the requested protective order may be modified or revoked in accordance with the provisions set forth in 19 U.S.C. §1677f(f), 19 C.F.R. §207.93(g), and 19 C.F.R. § 207.100(a)(3).

Oath

I declare under penalty of perjury under the laws of the United States of America, Canada, and Mexico, as applicable, that the foregoing is true and correct.

Executed on this ____ day of _____, _____ in _____
(month) (year) (city, state)

(Print or type full name)

(Signature)*

(Title)

***NOTICE:** 18 U.S.C. §1001 and other laws of the United States provide severe penalties for the submission of false, fictitious, or fraudulent statements on this form. Similar provisions may also be applicable under Canadian or Mexican law.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

Panel Review No. _____

(Panel Caption)

PROTECTIVE ORDER FOR RELEASE OF
PROPRIETARY INFORMATION TO COUNSEL AND PROFESSIONALS
FOR USE IN NAFTA PANEL AND COMMITTEE PROCEEDINGS

A. Subject to (1) the terms and conditions in the foregoing application for protective order filed by _____ on _____, and (2) any additional terms and conditions listed in Part B below, the U.S. International Trade Commission (USITC) hereby issues a protective order to said applicant permitting access to proprietary information in the administrative record of the USITC Investigation No(s).:

B. Additional terms and conditions on release of information:

This order may be modified or revoked by the USITC in accordance with 19 U.S.C. § 1677f(f) and Part 207, subpart G of the USITC's Rules of Practice and Procedure (19 C.F.R. Part 207, subpart G).

By order of the USITC:

Marilyn R. Abbott
Secretary

Issued:



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

FOR CLERICAL PERSONNEL

PROTECTIVE ORDER ACKNOWLEDGMENT FOR PROPRIETARY INFORMATION
FOR BINATIONAL PANEL REVIEW UNDER ARTICLE 1904 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT

Panel Review No. _____

(Panel Caption)

We, the undersigned, are persons described in paragraph F of the NAFTA Administrative Protective Order (APO) Form C issued in the subject proceeding. We hereby agree to be bound by the provisions of the APO. We acknowledge that we may be subject to the sanctions described in paragraph E of the NAFTA APO Form C. The authorized applicant exercising direction and control over us in the investigation has also signed this acknowledgment to indicate that the applicant is responsible for our compliance with the APO.

We declare under penalty of perjury that the foregoing is true and correct. Executed on the dates indicated.

(Name--Please Print) (Title) (Signature) (Date)

(Date Access Terminated) (Authorized Applicant's Initials)

(Name--Please Print) (Title) (Signature) (Date)

(Date Access Terminated) (Authorized Applicant's Initials)

(Name--Please Print) (Title) (Signature) (Date)

(Date Access Terminated) (Authorized Applicant's Initials)

PERSON EXERCISING DIRECTION AND CONTROL:

(Signature)

(Name--Please Print)

(Date Signed)

