

## 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 under title VII and violations of the Commission’s rules including the rule on bracketing business proprietary information (“BPI”) (the “24-hour rule”), 19 CFR 207.3(c). This notice provides a summary of investigations completed during calendar year 2010 of breaches in proceedings under title VII, section 337 of the Tariff Act of 1930, and section 421 of the Trade Act of 1974. There were no rules violation investigations completed in 2010. The Commission intends that this report inform representatives of parties to Commission proceedings as to some specific types of APO breaches 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 Web site (<http://www.usitc.gov>).

SUPPLEMENTARY INFORMATION: Representatives of parties to investigations or other proceedings conducted under title VII of the Tariff Act of 1930, section 337 of the Tariff Act of 1930, the North American Free Trade Agreement (NAFTA) Article 1904.13. and safeguard-related provisions such as section 202 of the Trade Act of 1974, may enter into APOs that permit them, under strict conditions, to obtain access to BPI (title VII) and confidential business information (“CBI”) (safeguard-related provisions and section 337) of other parties. See, e.g., 19 U.S.C. 1677f; 19 C.F.R. 207.7; 19 U.S.C. 1337(n); 19 C.F.R. 210.5, 210.34; 19 U.S.C. 2252(i); 19 C.F.R. 206.17; and 19 U.S.C. 1516a(g)(7)(A); 19 C.F.R. 207.100, et seq. The discussion below describes APO breach investigations that the Commission completed during calendar year 2010, including a description of actions taken in response to these breaches and rules violations.

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 (February 6, 1991); 57

FR 12335 (April 9, 1992); 58 FR 21991 (April 26, 1993); 59 FR 16834 (April 8, 1994); 60 FR 24880 (May 10, 1995); 61 FR 21203 (May 9, 1996); 62 FR 13164 (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); 69 FR 29972 (May 26, 2004); 70 FR 42382 (July 25, 2005); 71 FR 39355 (July 12, 2006); 72 FR 50119 (August 30, 2007); 73 FR 51843 (September 5, 2008); 74 FR 54071 (October 21, 2009); and 75 FR 66127 (October 27, 2010). 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 2005 a fourth edition of An Introduction to Administrative Protective Order Practice in Import Injury Investigations (Pub. No. 3755). 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 and on the Commission's Web site at <http://www.usitc.gov>.

## **I. In General**

The current APO form for antidumping and countervailing duty investigations, which was revised in March 2005, requires the applicant to swear that he or she will:

- (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 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 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.

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 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.

APOs in investigations other than those under title VII contain similar, though not identical, provisions.

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 CBI and BPI. However, Commission employees are subject to strict statutory and regulatory constraints concerning BPI and CBI, 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. Although the Privacy Act (5 U.S.C. 552a) limits the Commission's authority to disclose any personnel action against agency employees, this should not lead the public to conclude that no such actions have been taken.

An important provision of the Commission's title VII and safeguard rules relating to BPI/CBI is the "24-hour" rule. This rule provides that parties have one business day after the deadline for filing documents containing BPI/CBI 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/CBI. 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 has commenced and that an APO breach investigation file has been opened. Upon receiving notification from the Secretary, the Office of the General Counsel ("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.<sup>1</sup> 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 finds 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/CBI that the Commission is a reliable protector of BPI/CBI; 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/CBI. The Commission considers whether there have been 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 an economist or consultant to obtain access to BPI/CBI under the APO in a title VII or safeguard investigation 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 C.F.R. 207.7(a)(3)(B) and (C); 19 C.F.R. 206.17(a)(3)(B) and (C). Economists and consultants who obtain access to BPI/CBI 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

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<sup>1</sup> Procedures for inquiries to determine whether a prohibited act such as a breach has occurred and for imposing sanctions for violation of the provisions of a protective order issued during NAFTA panel or committee proceedings are set out in 19 C.F.R. §§ 207.100 - 207.120. Those investigations are initially conducted by the Commission's Office of Unfair Import Investigations.

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, section 337 investigations, and safeguard investigations are not publicly available and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552. See 19 U.S.C. 1677f(g), 19 U.S.C. 1333(h).

The two types of breaches most frequently investigated by the Commission involve the APO's prohibition on the dissemination of BPI or CBI to unauthorized persons and the APO's requirement that the materials received under the APO be returned or destroyed and that a certificate be filed indicating which action was taken after the termination of the investigation or any subsequent appeals of the Commission's determination. The dissemination of BPI/CBI usually occurs as the result of failure to delete BPI/CBI 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/CBI in proprietary documents filed with the Commission, the failure to report immediately known violations of an APO, and the failure to adequately supervise non-lawyers in the handling of BPI/CBI.

Occasionally, the Commission conducts APOB investigations that involve members of a law firm or consultants working with a firm who were granted access to APO materials by the firm although they were not APO signatories. In many of these cases, the firm and the person using the BPI mistakenly believed an APO application had been filed for that person. The Commission determined in all of these cases that the person who was a non-signatory, and therefore did not agree to be bound by the APO, could not be found to have breached the APO. Action could be taken against these persons, however, under Commission rule 201.15 (19 C.F.R. 201.15) for good cause shown. In all cases in which action was taken, the Commission decided that the non-signatory was a person who appeared regularly before the Commission and was aware of the requirements and limitations related to APO access and should have verified his or her APO status before obtaining access to and using the BPI. The Commission notes that section 201.15 may also be available to issue sanctions to attorneys or agents in different factual circumstances in which they did not technically breach the APO, but when their actions or inactions did not demonstrate diligent care of the APO materials even though they appeared regularly before the Commission and were aware of the importance the Commission placed on the care of APO materials.

Counsel have been cautioned to be certain that each authorized applicant files within 60 days of the completion of an import injury investigation or at the conclusion of judicial or binational review of the Commission's determination a certificate that to his or her knowledge and belief all copies of BPI/CBI 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. This requirement applies to each attorney, consultant, or expert in a firm who has been granted access to BPI/CBI. One firm-wide certificate is insufficient. This same information is also being added to notifications sent to new APO applicants.

In addition, attorneys who are signatories to the APO representing clients in a section 337 investigation should send a notice to the Commission if they stop participating in the investigation or the subsequent appeal of the Commission's determination. The notice should inform the Commission about the disposition of CBI obtained under the APO that was in their possession or they could be held responsible for any failure of their former firm to return or destroy the CBI in an appropriate manner.

### **III. Specific Investigations**

#### **APO Breach Investigations**

*Case 1:* The Commission determined that two associates and a partner breached the APO when the associates, under the direction of the partner, reviewed deposition transcripts that contained CBI from a section 337 investigation in connection with a parallel proceeding in the federal district court and provided, as directed by the partner, citations to those transcripts to a non-signatory of the APO. The Commission also found that the partner responsible for this first breach also committed a second breach by providing to a non-signatory a partially redacted deposition transcript that had been designated as confidential and should have been treated as confidential in its entirety pending declassification by consent of the parties or pursuant to the Commission's rules. Moreover, the record is not clear that the attorney had removed all of the CBI from the transcript before providing it to the non-signatory.

After giving consideration to the mitigating factor that the partner had not been found liable for an APO breach within the last two years, the Commission decided to sanction the partner and issue a private letter of reprimand rather than a warning because of the presence of aggravating factors. The Commission determined that both breaches were intentional. The partner deliberately released to a non-signatory a deposition transcript that should have been treated as confidential in its entirety unless the content was declassified by following the procedures in the Commission's rules for challenging the classification of documents. In addition, the partner specifically instructed his associates to review transcripts of affidavits from the section 337 investigation and to provide citations from the transcripts to a non-signatory for use in a federal district court case. In addition, the breaches were brought to the attention of the Commission by someone other than the partner's firm.

The Commission issued a warning letter to the two associates after giving due consideration to several mitigating factors and one aggravating factor. The Commission determined their breach to be unintentional because both attorneys had misgivings about reviewing the transcripts for a purpose other than for the section 337 investigation and communicated those misgivings to the partner. They only reviewed the transcripts and provided citations to the transcripts to a non-signatory for use in a federal district court case at the direction of the partner after another associate, who was also a signatory to the APO, researched the question and advised they would not violate the APO by following the partner's directions. In addition, no CBI was divulged to any person not subject to the APO as a result of their breach

and this was the only breach the two associates were involved in within the two-year period generally examined by the Commission for the purpose of determining sanctions. The only aggravating factor was that someone other than the associates' firm discovered and reported the breach.

The Commission also decided that two additional associates who were signatories to the APO, including the associate who performed the research, were not responsible for a breach of the APO.

*Case 2:* One lead attorney and a legal secretary under her supervision failed to delete fully all BPI in the public version of a post-hearing brief which was available on the Commission's Electronic Document Information System (EDIS) for five days. Additionally, the attorney failed to provide an Acknowledgement for Clerical Personnel signed by the secretary, thereby allowing the secretary, as an individual not subject to the APO, access to BPI.

The Commission issued a private letter of reprimand to the attorney. In reaching this decision, the Commission considered as mitigating circumstances that the breach was unintentional and the attorney had no prior violations of an APO within the past two years, the period normally considered by the Commission in sanctions determinations. The Commission disagreed with the attorney's argument that the stressful state of her office, in which there were multiple filings scheduled for that same day, should be considered a mitigating circumstance, noting that the attorney is a partner in the law firm and, therefore, had some responsibility for the stressful state of her office. The Commission also considered three aggravating circumstances. First, since there was no signed Acknowledgement for Clerical Personnel, the legal secretary was a non-signatory to the APO who had full access to the document containing the BPI. In addition, the Commission assumed that non-signatories other than the legal secretary had access to and read BPI because the attorney on several occasions failed to answer directly the question whether anyone, other than a signatory to the APO, had access to the APO; the BPI was publicly available on EDIS for five days; and the document containing BPI had been served on an attorney who was on the public service list but not the APO service list. Second, the Commission found that the attorney's failure to comply with the APO by making sure that all clerical personnel who were given access to the BPI signed an Acknowledgement for Clerical Personnel was a separate aggravating circumstance. Third, the fact that the breach was discovered by Commission staff rather than the attorney's firm was also an aggravating circumstance.

The Commission issued a warning letter to the legal secretary. The Commission found that he did not breach the APO because he had not signed an Acknowledgement for Clerical Personnel but that there was good cause to issue the warning letter, pursuant to Commission rule 201.15(a), (19 C.F.R. § 201.15(a)), for his failure to redact the BPI from the law firm's brief. In deciding to issue a warning letter rather than a sanction, the Commission considered mitigating circumstances such as that the breach was unintentional; the secretary had no APO breaches in the last two years; he was under the direction and control of the attorney; and he had been overloaded with work on the day of the breach which had contributed to his failure to remove all the BPI from the public version of the brief.

*Case 3:* Attorneys for a party in a section 337 investigation that had already been terminated filed a complaint in a district court alleging that attorneys from another firm disclosed confidential business information (CBI) to unauthorized persons in breach of the Commission's APO. The complaint named specific attorneys alleged to have disclosed the CBI. Although the filing attorneys subsequently moved to place the complaint under seal, the complaint had been disseminated on the internet and reported in the legal press before the court could rule on the motion.

The Commission found that the attorneys breached the APO by publicly disclosing the identity of the alleged breachers in their complaint, and it issued private letters of reprimand to them. In reaching this conclusion, the Commission considered certain mitigating circumstances such as the unintentional nature of the breach, the fact that this was the attorneys' first breach of a Commission APO, and the fact that the attorneys took corrective action as soon as they discovered the breach. There is one aggravating circumstance, however, which caused the Commission to issue a private letter of reprimand instead of a warning letter. Although the attorneys took the corrective action to place the complaint under seal, that did not prevent the release of the complaint to the public. The Commission presumed that the complaint was reviewed by at least one unauthorized person.

The Commission also considered whether to sanction under Commission rule 19 C.F.R. 201.15 another attorney who was in-house counsel for the party filing the complaint and, therefore, was not a signatory to the APO. Although the attorney participated in the drafting and filing of the complaint, he was not subject to the APO and he did not practice regularly before the Commission. The Commission noted that once the attorney became aware of the Commission rule treating the names of alleged breachers as CBI and prohibiting release of those names, he promptly attempted to mitigate disclosure of the CBI. The Commission decided to issue a cautionary letter to the attorney advising him that he was not found to have violated the APO but, if he intended to practice before the Commission in the future, he needed to keep abreast of the Commission's rules.

### **APO Breach Investigation in Which No Breach Was Found**

*Case 1:* In the public version of final comments, several attorneys in a law firm were responsible for failing to bracket information identified by the Commission as CBI. The information was from a Commission staff member's telephone notes and included the identity of a source. The notes had been released under the APO. Although the Commission normally considers telephones notes of conversations and the identities of persons contacted by the Commission staff to be CBI, the Commission determined that disclosure of this information in the public version of the final comments did not breach the APO. The attorneys were able to demonstrate that the information and the identity of the source were publicly available at the time the public version of the final comments were filed. The Commission cautioned the attorneys to take care in the future when citing to any information released by the Commission under APO.

By order of the Commission.

/s/  
James R. Holbein  
Secretary to the Commission

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