

UNITED STATES 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 published in the Federal Register reports on the status of its practice with respect to violations of its administrative protective orders (“APOs”) 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 breach investigations (APOB investigations) completed during calendar year 2016. This summary addresses two APOB investigation related to proceedings under title VII of the Tariff Act of 1930 and seven APOB investigations related to proceedings under section 337 of the Tariff Act of 1930, two of which were combined and which were related to the same proceedings under section 337. The Commission investigated rules violations as part of two of the APOB investigations. 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: Ronald A. Traud, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone (202) 205-3427. 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 website (<https://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 or non-parties. *See, e.g.*, 19 U.S.C. 1677f; 19 CFR 207.7; 19 U.S.C. 1337(n); 19 CFR. 210.5, 210.34; 19 U.S.C. 2252(i); 19 CFR 206.17; 19 U.S.C. 1516a(g)(7)(A); and 19 CFR 207.100, *et. seq.* The discussion below describes APO breach investigations that the Commission has completed during calendar year 2016, including a description of actions taken in response to these breaches.

Since 1991, the Commission has published annually a summary of its actions in response to violations of Commission APOs and rule violations. *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); 75 FR 54071 (October 27, 2010), 76 FR 78945 (December 20, 2011), 77 FR 76518 (December 28, 2012), 78 FR 79481 (December 30, 2013), 80 FR 1664 (January 13, 2015), 81 FR 17200 (March 28, 2016), and 82 FR 29322 (June 28, 2017). 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 website at <http://www.usitc.gov>.

I. In General

A. Antidumping and Countervailing Duty Investigations

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 form for antidumping and countervailing duty investigations also provides for the return or destruction of the BPI obtained under the APO on the order of the Secretary, at the conclusion of the investigation, or at the completion of Judicial Review. The BPI disclosed to an authorized applicant under an APO during the preliminary phase of the investigation generally may remain in the applicant's possession during the final phase of the investigation.

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 safeguard investigations contain similar though not identical provisions.

B. Section 337 Investigations

The APOs in section 337 investigations differ from those in title VII investigations as there is no set form and provisions may differ depending on the investigation and the presiding administrative law judge. However, in practice, the provisions are often quite similar. All persons seeking access to CBI during a section 337 investigation (including outside counsel for parties to the investigation, secretarial and support personnel assisting such counsel, and technical experts and their staff who are employed for the purposes of the investigation) are required to read the APO, agree to its terms by letter filed with the Secretary of the Commission indicating that they agree to be bound by the terms of the Order, agree not to reveal CBI to anyone other than another person permitted access by the Order, and agree to utilize the CBI solely for the purposes

of that investigation.

In general, an APO in a section 337 investigation will define what kind of information is CBI and direct how CBI is to be designated and protected. The APO will state which persons will have access to the CBI and which of those persons must sign onto the APO. The APO will provide instructions on how CBI is to be maintained and protected by labeling documents and filing transcripts under seal. It will provide protections for the suppliers of CBI by notifying them of a Freedom of Information Act request for the CBI and providing a procedure for the supplier to take action to prevent the release of the information. There are provisions for disputing the designation of CBI and a procedure for resolving such disputes. Under the APO, suppliers of CBI are given the opportunity to object to the release of the CBI to a proposed expert. The APO requires a person who discloses CBI, other than in a manner authorized by the APO, to provide all pertinent facts to the supplier of the CBI and to the administrative law judge and to make every effort to prevent further disclosure. The APO requires all parties to the APO to either return to the suppliers or destroy the originals and all copies of the CBI obtained during the investigation.

The Commission's regulations provide for certain sanctions to be imposed if the APO is violated by a person subject to its restrictions. The names of the persons being investigated for violating an APO are kept confidential unless the sanction imposed is a public letter of reprimand. 19 CFR 210.34(c)(1). The possible sanctions are:

- (1) An official reprimand by the Commission.
- (2) Disqualification from or limitation of further participation in a pending investigation.
- (3) Temporary or permanent disqualification from practicing in any capacity before the Commission pursuant to 19 CFR 201.15(a).
- (4) Referral of the facts underlying the violation to the appropriate licensing authority in the jurisdiction in which the individual is licensed to practice.
- (5) Making adverse inferences and rulings against a party involved in the violation of the APO or such other action that may be appropriate. 19 CFR 210.34(c)(3).

Commission employees are not signatories to the Commission's APOs and do not obtain access to BPI or CBI 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.

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 facts and obtain the possible breacher’s views on whether a breach has occurred.¹ 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. However, a warning letter is considered in a subsequent APO breach investigation.

Sanctions for APO violations serve three basic interests: (a) preserving the confidence of submitters of BPI/CBI that the Commission is a reliable protector of BPI/CBI; (b) disciplining breachers; and (c) 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

¹ 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 CFR 207.100-207.120. Those investigations are initially conducted by the Commission’s Office of Unfair Import Investigations.

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 CFR 207.7(a)(3)(B) and (C); 19 CFR 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 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. In section 337 investigations, technical experts and their staff who are employed for the purposes of the investigation are required to sign onto the APO and agree to comply with its provisions.

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), 19 CFR 210.34(c).

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/CBI 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 CFR 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/CBI. 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 participating in Commission 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 or CBI omitted from brackets. However, the confidential information is actually retrievable by manipulating codes in software. The Commission has found that the electronic transmission of a public document containing BPI or CBI in a recoverable form was a breach of the APO.

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.

Attorneys who are signatories to the APO representing clients in a section 337 investigation should inform the administrative law judge and the Commission's secretary if there are any changes to the information that was provided in the application for access to the CBI. This is similar to the requirement to update an applicant's information in title VII investigations.

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 APO Breach Investigations

Case 1. The Commission determined that the principal attorney representing a party in a title VII sunset review breached an APO when he (1) inadvertently retained materials containing BPI more than 60 days after the completion of a five-year review and (2) inadvertently uploaded a BPI version of a staff report from the sunset review onto the electronic filing system ("CM/ECF") of the U.S. Court of International Trade ("CIT") in an unrelated case.

The attorney represented the respondent in a sunset review. After the completion of the review, the attorney submitted a letter to the Commission certifying that all copies of materials released to him under the APO had been destroyed. Months later, the

attorney logged on to the CM/ECF system in an attempt to download a motion in an unrelated case. However, rather than downloading the intended motion, the attorney inadvertently uploaded a copy of a staff report containing BPI. The attorney immediately notified the docket clerk of the error. The clerk removed the document from public availability within approximately fifteen minutes of the upload. The clerk also contacted counsel for all parties in the unrelated case to determine whether they had viewed the BPI. One attorney had downloaded the file, but immediately closed it upon realizing that it was misfiled.

In determining the appropriate action in response to the breach, the Commission considered mitigating factors, including that (1) the breach was unintentional and inadvertent, resulting from the attorney's inadvertent failure to follow standard APO procedures and inadvertent upload of the staff report; (2) the attorney had not been found to have breached an APO over the past two years; and (3) the attorney took immediate corrective measures upon learning of the disclosure by requesting that the CIT remove the BPI version of the staff report from the CIT's CM/ECF system. The Commission also considered aggravating factors, including that (1) the attorney violated the same APO in two ways by retaining the BPI materials more than sixty days after the completion of the review and uploading those materials onto the CM/ECF system; and (2) the attorney failed to handle the APO material with due diligence and care by filing the staff report in a wholly unrelated case.

The Commission issued a private letter of reprimand to the attorney.

Case 2. The Commission determined that APO breaches occurred with respect to a law firm representing a party in a section 337 investigation. With respect to this law firm, the Commission determined that APO breaches occurred (1) when attorneys and consultants failed to sign and/or file protective order acknowledgments prior to accessing CBI and (2) when attorneys filed an unredacted appeal brief containing CBI and e-mailed that brief to in-house counsel who were not signatories of the APO.

Seven attorneys and two expert consultants hired by the law firm failed to sign and file protective order acknowledgments before accessing CBI for use in this investigation. A paralegal initially informed a first supervisory attorney that a single working attorney had premature access to CBI, and that working attorney's acknowledgment was filed that same day. A further internal investigation at the law firm discovered that four additional attorneys and an expert consultant similarly failed to file acknowledgments, and those individuals filed acknowledgments thereafter. Approximately a month later, the firm discovered that a testifying expert had also failed to file an acknowledgment prior to accessing CBI. A second supervisory attorney at the law firm informed the Commission that that expert filed an acknowledgment the same day as the discovery of the omission.

Thereafter, the second supervisory attorney informed the Commission of facts related to a second APO breach by the law firm. Two appellate attorneys at the law firm had attached as an addendum to a brief filed with a court a confidential version of the Commission's opinion, which included CBI. That brief was also e-mailed to four in-

house attorneys. Prior to filing the brief, the appellate attorneys confirmed that the text of the brief did not contain any CBI, but failed to recognize that the confidential version, rather than the public version, of the Commission Opinion was attached to the brief. The next day, one of the appellate attorneys recognized the mistake, and the clerk at the court was notified that the brief should be neither accepted nor made public. One of the appellate attorneys also contacted the in-house counsel and directed them to delete the e-mail without opening the attachment. The attorney received confirmation that the attachment had not been read by or forwarded to anyone else. That same day, one of the appellate attorneys notified counsel for the opposing party and the Commission of the breach. The law firm corrected the filing by submitting a confidential version and a public version of the brief to the court.

In determining the appropriate action in response to the breaches, the Commission considered mitigating factors, including that (1) no person who did not later file an APO acknowledgment viewed CBI in either breach; (2) both breaches were unintentional; (3) the law firm took prompt actions to correct the mistakes, inform the Commission and all parties of the mistakes, and prevent future breaches; and (4) none of the attorneys were involved in previous APO issues in the last two years. As an aggravating factor, the Commission considered that the law firm committed two breaches in the same investigation within a year.

The Commission issued warning letters to the two supervisory attorneys and the appellate attorneys. The Commission also issued a private letter of reprimand to the law firm. The Commission found that the firm's policies and procedures were inadequate in ensuring compliance with the APO, as demonstrated by the seven firm attorneys and two outside consultants who reviewed and used CBI in connection with their involvement in the investigation before signing and filing APO acknowledgments, the submission of an unredacted appeal brief containing CBI, and the transmission of the appeal brief to four non-signatory in-house counsel who were not APO signatories.

The Commission also found that good cause exists to issue sanctions under § 201.15(a) to the attorneys and consultants who used CBI in this investigation prior to filing a protective order acknowledgment. The Commission issued these attorneys a warning letter. Though these individuals were not signatories to the APO at the time they inappropriately accessed CBI, they were, or should have been, aware of the requirements and limitations related to APO access. Their failure to verify that they had applied for and been granted access to APO materials before using the materials demonstrates a disregard for the Commission's rules protecting the confidentiality of the information that is provided under the APO.

Case 3. In the same section 337 investigation referenced in Case 2 above, the Commission determined that a second law firm representing a different party breached the APO. The Commission determined that breaches occurred when attorneys failed to sign and/or file protective order acknowledgments prior to accessing CBI.

One attorney at the second law firm failed to sign and file protective order acknowledgments before accessing CBI; and three attorneys signed but failed to file

protective order acknowledgments before accessing CBI. The issue was first discovered by another party's counsel. After being notified, the second law firm conducted an internal audit and discovered the breach. The three unfiled acknowledgments had been forwarded to a paralegal, but not filed. The remaining attorney was not aware that he was required to sign an APO acknowledgment prior to accessing a hearing transcript containing CBI. That attorney signed an acknowledgment the next day, and the acknowledgment was filed approximately two weeks later. Two supervisory attorneys were APO signatories had supervised the four attorneys who had not timely filed the protective order acknowledgments.

In determining the appropriate action in response to the breach, the Commission considered mitigating factors, including that (1) the breach was unintentional; (2) the breach was promptly reported to the Commission; (3) the breaching parties took corrective measures to prevent a breach in the future; (4) none of the attorneys was involved in any previous APO breaches; and (5) the attorneys otherwise accorded the CBI the full protection of the APO at all times and the CBI was not released to any third party.

The Commission issued warning letters to the supervisory attorneys. The Commission also found that good cause existed to issue sanctions under § 201.15(a) to the attorneys who used CBI in this investigation prior to filing a protective order acknowledgment. The Commission issued these attorneys a warning letter. Though these attorneys were not signatories to the APO at the time they inappropriately accessed CBI, they were or should have been aware of the requirements and limitations related to APO access. Their failure to verify that they had applied for and been granted access to APO materials before using the materials demonstrated a disregard for the Commission's rules protecting the confidentiality of the information that is provided under the APO.

Case 4. The Commission determined that a law firm and several attorneys breached an APO in a section 337 investigation when they improperly disclosed CBI to more than 140 unauthorized persons over a fourteen-month period.

Several attorneys of a law firm representing the complainant inadvertently disclosed to unauthorized persons information designated by the respondent as CBI in this investigation and in related litigation in federal district court. A junior associate at the law firm failed to fully redact CBI from an expert report prepared for the district court action, and a partner failed to supervise that junior associate. On several occasions, the attorneys then sent the incompletely redacted expert report to unauthorized persons at the complainant (including a non-APO signatory in-house attorney) and other law and consulting firms. Several non-signatory recipients (including the in-house counsel and at least one other attorney) further disseminated the CBI to other non-signatories. In one incident, a partner at the law firm e-mailed more than ninety of the complainant's employees with instructions on how to access the incompletely redacted expert report on an FTP site. No one at the law firm notified the respondent or the Commission of the disclosure at the time. No other efforts were made to investigate whether other disclosures had been made so as to prevent further disclosures. As a result, the unauthorized disclosures continued.

In connection with the investigation before the Commission, a mid-level associate at the same law firm failed to redact the same CBI from an outline for a brief on remedy and the public interest. On several occasions, the firm's attorneys then sent versions of that outline and the public interest brief containing CBI to unauthorized persons at the complainant and at other law firms. A partner at the law firm discovered one such disclosure, but did not notify the respondent or the Commission at the time, asserting that he had acted promptly after the discovery to prevent unauthorized persons from viewing CBI. In another incident, an attorney sent an unredacted version of the completed brief via e-mail to the complainant's employees and an attorney at a second law firm. Another attorney informed the sending attorney of the mistake, and the sending attorney e-mailed the complainant requesting that the e-mail be deleted. Prior to its deletion, however, the e-mail had been forwarded to the complainant's employees and attorneys at other law firms.

In determining the appropriate sanction, the Commission considered mitigating factors, including that (1) the breaches were inadvertent; (2) the law firm recently implemented firm-wide policy to help prevent unauthorized disclosures; (3) the law firm worked to investigate, cure, and prevent further breaches after discovery of the breaches; and (4) a federal district court had already sanctioned the disclosures and conduct underlying the breaches relating to the expert report. The Commission also considered aggravating factors, including that (1) the CBI was viewed by unauthorized persons; (2) the breach was discovered by a third party; (3) the law firm failed and/or delayed reporting the breaches to the Commission; (4) the CBI was unprotected for a lengthy period of time; (5) there were multiple breaches by the law firm's attorneys in the same investigation; and (6) there were multiple breaches by the law firm's attorneys in a two-year period.

The Commission publicly reprimanded the law firm and issued private letters of reprimand to the six law firm attorneys responsible for the unauthorized disclosures. Although the firm had procedures to prevent unauthorized disclosures, the firm did not ensure that attorneys complied with those procedures and made unilateral decisions regarding the APO's scope and requirements. The large number and vast extent of the unauthorized disclosures show that the failure to safeguard CBI was a pervasive problem at the firm.

The Commission also found that good cause existed to issue sanctions under § 201.15(a) to the in-house counsel and an attorney at another law firm who were not signatories of the APO. Both attorneys had disclosed CBI, but were not found to be fully responsible for those disclosures. The Commission issued these attorneys a warning letter because, although the attorneys were not signatories to the APO, they had previously appeared before the Commission in section 337 investigations.

Case 5. The Commission determined that an attorney representing the respondent in a section 337 investigation breached the APO in the investigation when he filed a public brief at a court containing information designated as CBI by the complainant.

The attorney filed the public brief containing the CBI with a court. However, the court rejected the brief for failing to comply with certain technical requirements, and that rejection prevented the brief from being disclosed to the public. The complainants' counsel informed the attorney that the brief contained the CBI. The attorney agreed to, and did, promptly contact the court to remove the brief from public view. The clerk stated that the brief was not publicly available and the attorney did not disseminate the brief to anyone else.

In determining the appropriate action in response to the breach, the Commission considered mitigating factors, including that (1) the breach was unintentional; (2) the attorney had not been found in violation of an APO or other protective order in the previous two years; and (3) no party was prejudiced by the breach because no unauthorized person actually viewed the CBI. The Commission also considered that the attorney took immediate steps to mitigate any harm by contacting the court in an attempt to prevent the disclosure of the CBI to unauthorized persons.

Rather than issuing a sanction, the Commission issued a warning letter to the attorney.

Case 6. The Commission determined that an attorney representing the complainants breached an APO in a section 337 investigation when he filed a brief in a state court containing information designated as CBI by the respondents.

The attorney filed a brief under seal at a state court containing an attached exhibit including CBI. The exhibit was filed under seal and was not available to the public. The respondents' counsel informed the complainants' counsel of the APO breach and requested that complainants' counsel ask the state court to remove the exhibit from the filing. The next day, the attorney's law firm requested the removal of the exhibit. After the attorney's law firm complied with the court's rules and guidance, the court removed the exhibit from the filing. A second attorney from the attorney's law firm notified the Commission of the breach. The law firm explained that it had intended to attach a public version of the exhibit to the filing and that the breach was unintentional and inadvertent.

In determining the appropriate action in response to the breach, the Commission considered mitigating factors, including that (1) the breach was unintentional; (2) the attorney had not been found in violation of an APO or other protective order in the previous two years; (3) the breach was promptly reported to the Commission; and (4) the law firm took active steps to remedy the breach by withdrawing the offending exhibit from the filing. The Commission further considered that the brief was filed under seal. The Commission also considered aggravating factors, including that (1) local counsel for both the complainants and the respondents who were not APO signatories had access to the document and respondents' counsel viewed the documents; and (2) the attorney's law firm did not discover the breach, but rather was informed of the breach by respondents' counsel.

Rather than issuing a sanction, the Commission issued a warning letter to the attorney.

Case 7. The Commission determined that an attorney at a law firm and a staff economist at a consulting firm breached an APO in a title VII investigation when a public version of a prehearing brief prepared on behalf of a respondent, which contained certain unredacted BPI, was filed, served, and made available to the public on the Commission's website.

The economist mistakenly informed the attorney that the public version of a staff report included with a brief did not contain BPI. When the attorney told the economist that certain information in the staff report was of a type generally considered to be BPI in Commission investigations, the economist again affirmed his prior incorrect statement that the information was not BPI. On that basis, brackets identifying the information as BPI were removed from certain portions of the brief and the information was not deleted from the public version of the brief when it was filed and served. Thereafter, counsel for petitioners informed the attorney that the public version of the brief included BPI. The attorney then called the only person upon whom a paper copy of the public version had been served (a non-signatory to the APO), who reported that he had not read or distributed the brief and agreed to destroy it. The attorney and his staff then immediately contacted the Commission to remove the public version of the document from the Commission's website and then filed revised pages to the brief which redacted the BPI. An audit of the document available on the Commission's website indicated that the document was viewed by five individuals, one of whom was not authorized to view BPI.

In determining the appropriate sanction in response to the breach, the Commission considered mitigating factors, including that (1) the breach was unintentional and inadvertent; (2) neither the attorney nor the economist had been found in violation of an APO or other protective order in the previous two years; and (3) once informed of the breach, the attorney and economist took immediate action to cure the breach. The Commission also considered aggravating factors, including that (1) the attorney and the economist did not discover the breach themselves, but were instead informed of the breach by counsel for petitioners; and (2) the brief was publicly available on the Commission's website for two days and was accessed by at least one individual who was not authorized to view the BPI.

The Commission issued private letters of reprimand to the attorney and the economist.

Case 8. The Commission determined that two attorneys representing the complainant breached an APO in a section 337 investigation when they sent an e-mail attachment containing information that had been designated as CBI by the respondent to the complainant's employees.

In this case, an attorney representing the complainant sent to the complainant's employees an e-mail that appended portions of the complainant's draft pre-hearing brief which included CBI, asking them to read it and provide comments. A second attorney of the same law firm, who was responsible for the day-to-day management of this investigation for the complainant, was copied on the e-mail. One of the complainant's employees then transmitted the document in question to the complainant's directors and

other of the complainant's employees. The attorneys' law firm learned of the disclosure on a phone call with the complainant's employees. The law firm's counsel then spoke to the respondent's counsel and alerted the administrative law judge of the breach. Thereafter, the administrative law judge conducted a telephone conference with the parties and ordered, *inter alia*, that the complainant retain an independent forensic expert to produce a record of the scope and timing of the disclosure of the CBI to the complainant's employees. At the completion of the report, all CBI in the complainant's possession was to be destroyed.

In determining the appropriate action in response to the breach, the Commission considered mitigating factors, including that (1) the breach was inadvertent; (2) complainant's counsel self-reported the breach and took prompt action to destroy all copies of the disclosed document and prevent further dissemination; (3) respondent was not seeking further sanctions; and (4) neither attorney had previously been found in violation of an APO. The Commission also considered aggravating factors, including that (1) the confidential material was reviewed by several individuals at the complainant who were not authorized to view the CBI; and (2) that weeks had passed before the breach was discovered.

The Commission issued a private letter of reprimand to the attorney who first sent the offending e-mail to the complainant's employees. The Commission also issued a warning letter to the second attorney, who exercised inadequate oversight over the CBI in question (including a failure to observe that the attachment sent to the complainant was replete with respondent's CBI).

Case 9. The Commission determined that a law firm representing the complainant did not breach an APO in a section 337 investigation. Respondent's counsel alleged that the law firm used CBI without authorization to prepare and file a new complaint at the Commission. However, for each alleged instance of an improper disclosure of CBI, the law firm was able to show that the information alleged to be CBI was available in the public record.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

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