



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”) 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 completed during calendar year 2014. This summary addresses one proceeding under title VII of the Tariff Act of 1930 and four proceedings under section 337 of the Tariff Act of 1930. There were no rules violation investigations completed in 2014. 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 website (<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 sections 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 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; 19 U.S.C. 1516a(g)(7)(A); and 19 C.F.R. 207.100, *et. seq.* The discussion below describes APO breach investigations that the Commission has completed during calendar year 2014, 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 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); 75 FR 54071 (October 27, 2010), 76 FR 78945 (December 20, 2011), 77 FR 76518 (December 28, 2012), 78 FR 79481

(December 30, 2013) and 80 FR 1664 (January 13, 2015). 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 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. Any person 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 is required to read the APO, agree to its terms by letter filed with the Secretary of the Commission indicating that he agrees 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 what 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 C.F.R. 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 C.F.R. 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 C.F.R. 210.34(c)(3).

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.

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

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 C.F.R. 207.100 - 207.120. Those investigations are initially conducted by the Commission’s Office of Unfair Import Investigations.

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 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 C.F.R. 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 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/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. A law firm filed a public response to a petition for review of a final determination in a section 337 investigation. Although CBI was visibly redacted in the response, the CBI could be accessed by electronically manipulating the document. A paralegal in the firm maintained two versions of the document, one with the recoverable CBI and one without. When he filed the response with the Commission he mistakenly filed the version that contained the redacted CBI. The Commission found that the paralegal and an attorney who was responsible for reviewing the document before it was filed violated the APO. The Commission decided not to sanction them and issued warning letters.

Although the filing of the improperly redacted document made CBI available to unauthorized persons, the Commission decided to issue warning letters because of several mitigating circumstances. There was no proof that an unauthorized person had viewed the CBI. Initially, the Commission's staff notified the law firm's lead attorney that another law firm and a research firm had accessed the document through EDIS. The lead attorney immediately contacted these firms, asked that they destroy the document, and learned that no unauthorized person had read the document. Almost a year later the Commission's staff notified the lead attorney that another research firm had accessed the document at the time the breach occurred. The lead attorney immediately contacted the second research firm. He learned that the firm had gone out of business and had destroyed any information that could show whether or not an unauthorized person had read the document. Although the Commission has a practice of assuming that an unauthorized person had read CBI if a document containing CBI is made available for a

significant period of time, in this case there was no evidence that an unauthorized person had read the document and the law firm was unable to confirm this because of the lag in the notification about the second research firm. Thus, the Commission did not find this to be an aggravating circumstance.

The Commission also noted that neither the attorney nor the paralegal had ever been found in violation of an APO. In addition, they quickly discovered the error and acted promptly to remedy the unintentional disclosure, contacted superiors in their firm who then notified the Commission of the breach, took the necessary steps to have the document removed from public EDIS, and insured that the document was not viewed by unauthorized persons. The Commission also noted that the attorney and the paralegal generally followed the procedures established by their firm for creating redacted versions of documents containing CBI. The Commission noted that the firm has established revised procedures that are meant to verify that public documents have been properly redacted before filing.

Case 2. The Commission determined that three attorneys breached an APO when their firm retained a file copy of documents containing CBI beyond the termination of a Commission section 337 investigation. As required under the APO, upon termination of the investigation, the firm certified that CBI belonging to respondents had been destroyed or returned. However, files containing CBI were inadvertently sent to an off-site storage facility.

The Commission became aware of the breach when it received a letter from an attorney with the firm who had discovered the files when he responded to a district court discovery order compelling the firm's client to produce discovery related to ITC

proceedings. The attorney was unable to explain why the files were retained and not destroyed since nearly all of the attorneys and support staff who worked on the investigation had left the firm. The lawyer was able to determine that no one accessed the CBI files while they were in off-site storage.

Warning letters were issued to the three remaining attorneys at the firm who had been subject to the APO in the section 337 investigation. The Commission considered the mitigating circumstances that the breach was unintentional, the CBI was not read by any person not subject to the APO, that the firm discovered and reported the breach, and that this is the only breach in which the attorneys were involved in the two-year period generally examined by the Commission for the purpose of determining sanctions. The attorneys were also instructed to destroy the CBI and certify that destruction had been completed.

Case 3. The Commission determined that a law firm breached an APO in a section 337 investigation when it retained three boxes of documents containing CBI that should have been returned or destroyed upon termination of an investigation. The firm also violated the APO by keeping an electronic copy of its work product files which contained CBI.

For two years the three boxes along with other boxes of the case files from the investigation had been transferred to another firm (the second firm) which was representing the same client in other proceedings. The attorneys in that firm were not signatories to the APO. The boxes were returned to the original law firm because attorneys at the second firm became aware that there may be documents in the case file that should have been returned or destroyed at the end of the investigation. Attorneys at the second firm informed the first firm that no one had reviewed the documents within

the boxes. The first firm did not immediately review the contents of the case file upon its return.

A year later the firm investigated the case file after it received a subpoena in a new Commission investigation seeking to compel production of portions of the same case file. In response to a request from the ALJ, the firm investigated the case file. It found three boxes with third party production documents containing CBI that should have been destroyed.

Also in response to the subpoena, the firm disclosed that it possessed a computer file created as part of its litigation efforts which contained opposing party documents containing CBI and which was work product material. Although this computer file was not subject to discovery, it should have been destroyed pursuant to the APO. A copy made by the second firm was removed from the server and returned to the first firm. Again, the second firm indicated that no one had read the information from the file.

The Commission determined to send a warning letter to the one attorney who had been involved in the original Commission investigation and who was receiving the letter on behalf of the law firm. The Commission considered the mitigating factors that the breach was unintentional, the attorney and other attorneys at the firm had not breached an APO within the last two years, and a partner in the firm alerted the Commission as soon as the potential breach involving the three boxes was discovered. The Commission noted the firm's delay in ascertaining what confidential materials improperly remained at the firm, but also noted that the firm was able to demonstrate that no unauthorized person had accessed the CBI at issue.

Although the three boxes of files had been destroyed shortly after the investigation into the APO breach had begun, the letter directed the attorney to retrieve and destroy the work product computer file. The attorney was further directed to send an affidavit certifying the destruction within 60 days of the receipt of the warning letter.

Case 4. A lead attorney and an associate were employed by a law firm representing a party in a title VII investigation. The lead attorney was the signatory to the APO. During the investigation he filed a motion to amend the APO and add the associate to it. The application was filed late under the Commission's rules and was subsequently rejected by the Commission Secretary. In the meantime, the lead attorney had directed the associate to review the confidential version of the post hearing brief which contained BPI from the confidential staff report and other parties to the investigation.

The Commission found that the lead attorney had violated the APO. It determined that the associate did not breach the APO nor was there good cause to sanction him under Commission rule 201.15. The Commission determined to issue a warning letter to the lead attorney and a letter to the associate indicating that he would not be sanctioned under rule 201.15.

For the associate, the Commission considered the facts that he was not subject to the APO, that he reasonably did not know that he was not permitted to view BPI, and that he acted entirely under the direction of the lead attorney. The letter to the associate did caution him to ensure independently in future investigations that he is properly subject to the APO before accessing BPI obtained under that APO.

The Commission determined not to sanction the lead attorney. In reaching this decision the Commission considered several mitigating circumstances. The lead attorney had no prior breaches within the two-year period generally examined by the Commission for purposes of determining sanctions; the breach was unintentional; and the person who viewed the BPI acted as if bound by the APO. The Commission also considered the aggravating circumstance that the law firm failed to notice the breach until agency staff contacted the lead attorney almost two months after the breach occurred.

Case 5. A law firm filed a public version of its complaint containing CBI in a section 337 investigation. The Commission found that the law firm did not violate the APO since the CBI that was disclosed and made publicly accessible was not obtained under an APO related to a Commission investigation. In addition, the disclosure of the CBI occurred before an APO was issued in the Commission investigation. The letter to the firm advised it to practice better procedures in the future to ensure that no CBI is disclosed.

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: March 22, 2016

[FR Doc. 2016-06875 Filed: 3/25/2016 8:45 am; Publication Date: 3/28/2016]