

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 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 Title VII and violations of the Commission’s rule on bracketing business proprietary information (“BPI”) (the “24-hour rule”), 19 CFR 207.3(c). This notice provides a summary of investigations of breaches in Title VII, sections 202 and 204 of the Trade Act of 1974, as amended, and section 337 of the Tariff Act of 1930, as amended, completed during calendar year 2001. There were no completed investigations of 24-hour rule violations during that period. The Commission intends that this report educate 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 Internet server (<http://www.usitc.gov>).

SUPPLEMENTARY INFORMATION: Representatives of parties to investigations conducted under Title VII of the Tariff Act of 1930, sections 202 and 204 of the Trade Act of 1974, and section 337 of the Tariff Act of 1930, as amended, may enter into APOs that permit them, under strict conditions, to obtain access to BPI of other parties. See 19 U.S.C. 1677f; 19 CFR 207.7; 19 U.S.C. 2252(i); 19 C.F.R. 206.17; 19 U.S.C. 1337(n); 19 C.F.R. 210.5, 210.34. The discussion below describes APO breach investigations that the Commission has completed, including a description of actions taken in response to breaches. The discussion covers breach investigations completed during calendar year 2001.

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

Commission's APOs. APO breach inquiries are considered on a case-by-case basis.

As part of the effort to educate practitioners about the Commission's current APO practice, the Commission Secretary issued in March 2001 a third edition of An Introduction to Administrative Protective Order Practice in Import Injury Investigations (Pub. No. 3403). This document is available upon request from the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW, Washington, DC 20436, tel. (202) 205-2000.

I. In General

The current APO form for antidumping and countervailing duty investigations, which the Commission has used since March 1995, requires the applicant to swear that he or she will:

- (1) Not divulge any of the BPI obtained under the APO and not otherwise available to him, to any person other than --
 - (i) personnel of the Commission concerned with the investigation,
 - (ii) the person or agency from whom the BPI was obtained,
 - (iii) a person whose application for disclosure of BPI under this APO has been granted by the Secretary, and
 - (iv) other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decisionmaking for the interested party which is a party to the investigation; and (d) have submitted to the Secretary a signed Acknowledgment for Clerical Personnel in the form attached hereto (the authorized applicant shall sign such acknowledgment and will be deemed responsible for such persons' compliance with the APO);
- (2) Use such BPI solely for the purposes of the Commission investigation [or for binational panel review of such Commission investigation or until superceded by a judicial protective order in a judicial review of the proceeding];
- (3) Not consult with any person not described in paragraph (1) concerning BPI disclosed under this APO without first having received the written consent of the Secretary and the party or the representative of the party from whom such BPI was obtained;
- (4) Whenever materials (e.g., documents, computer disks, etc.) containing such BPI are not being used, store such material in a locked file cabinet, vault, safe, or other suitable container (N.B.: storage of BPI on so-called hard disk computer media is to be avoided, because mere erasure of data from such media may not irrecoverably destroy the BPI and may result in violation of paragraph C of the APO);
- (5) Serve all materials containing BPI disclosed under this APO as directed by the Secretary and pursuant to section 207.7(f) of the Commission's rules;

- (6) Transmit such document containing BPI disclosed under this APO:
 - (i) with a cover sheet identifying the document as containing BPI,
 - (ii) with all BPI enclosed in brackets and each page warning that the document contains BPI,
 - (iii) if the document is to be filed by a deadline, with each page marked “Bracketing of BPI not final for one business day after date of filing,” and
 - (iv) if by mail, within two envelopes, the inner one sealed and marked “Business Proprietary Information--To be opened only by [name of recipient]”, and the outer one sealed and not marked as containing BPI;
- (7) Comply with the provision of this APO and section 207.7 of the Commission’s rules;
- (8) Make true and accurate representations in the authorized applicant’s application and promptly notify the Secretary of any changes that occur after the submission of the application and that affect the representations made in the application (e.g., change in personnel assigned to the investigation);
- (9) Report promptly and confirm in writing to the Secretary any possible breach of the APO; and
- (10) Acknowledge that breach of the APO may subject the authorized applicant and other persons to such sanctions or other actions as the Commission deems appropriate including the administrative sanctions and actions set out in this APO.

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

- (1) Disbarment from practice in any capacity before the Commission along with such person’s partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;
- (2) Referral to the United States Attorney;
- (3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;
- (4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of or striking from the record any information or briefs submitted by, or on behalf of, such person or the party he represents; denial of further access to BPI in the current or any future investigations before the Commission; and issuance of a public or private letter of reprimand; and
- (5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

Commission employees are not signatories to the Commission’s APOs and do not obtain access to BPI through APO procedures. Consequently, they are not subject to the requirements of the APO with respect to the handling of BPI. However, Commission employees are subject to strict statutory and regulatory constraints concerning BPI, and face potentially severe penalties for

noncompliance. See 18 U.S.C. 1905; Title 5, U.S. Code; and Commission personnel policies implementing the statutes. 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 rules relating to BPI is the "24-hour" rule. This rule provides that parties have one business day after the deadline for filing documents containing BPI to file a public version of the document. The rule also permits changes to the bracketing of information in the proprietary version within this one-day period. No changes --other than changes in bracketing -- may be made to the proprietary version. The rule was intended to reduce the incidence of APO breaches caused by inadequate bracketing and improper placement of BPI. The Commission urges parties to make use of the rule. If a party wishes to make changes to a document other than bracketing, such as typographical changes or other corrections, the party must ask for an extension of time to file an amended document pursuant to section 201.14(b)(2) of the Commission's rules.

II. Investigations of Alleged APO Breaches

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

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

The Commission has worked to develop consistent jurisprudence, not only in determining whether a breach has occurred, but also in selecting an appropriate response. In determining the appropriate response, the Commission generally considers mitigating factors such as the unintentional

nature of the breach, the lack of prior breaches committed by the breaching party, the corrective measures taken by the breaching party, and the promptness with which the breaching party reported the violation to the Commission. The Commission also considers aggravating circumstances, especially whether persons not under the APO actually read the BPI. The Commission considers whether there are prior breaches by the same person or persons in other investigations and multiple breaches by the same person or persons in the same investigation.

The Commission's rules permit economists or consultants to obtain access to BPI under the APO if the economist or consultant is under the direction and control of an attorney under the APO, or if the economist or consultant appears regularly before the Commission and represents an interested party who is a party to the investigation. 19 CFR 207.7(a)(3)(B) and (C). Economists and consultants who obtain access to BPI under the APO under the direction and control of an attorney nonetheless remain individually responsible for complying with the APO. In appropriate circumstances, for example, an economist under the direction and control of an attorney may be held responsible for a breach of the APO by failing to redact APO information from a document that is subsequently filed with the Commission and served as a public document. This is so even though the attorney exercising direction or control over the economist or consultant may also be held responsible for the breach of the APO.

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

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

Counsel participating in Title VII investigations have reported to the Commission potential breaches involving the electronic transmission of public versions of documents. In these cases, the document transmitted appears to be a public document with BPI omitted from brackets. However, the BPI is actually retrievable by manipulating codes in software. The Commission completed two investigations of this type of breach in 2001 (Cases 10 and 16), and in both cases the Commission found that the electronic transmission of a public document containing BPI in a recoverable form was a breach of the APO.

The Commission advised in the preamble to the notice of proposed rulemaking in 1990 that it

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

[T]he Commission suggests that certain safeguards would seem to be particularly useful. When storing business proprietary information on computer disks, for example, storage on floppy disks rather than hard disks is recommended, because deletion of information from a hard disk does not necessarily erase the information, which can often be retrieved using a utilities program. Further, use of business proprietary information on a computer with the capability to communicate with users outside the authorized applicant's office incurs the risk of unauthorized access to the information through such communication. If a computer malfunctions, all business proprietary information should be erased from the machine before it is removed from the authorized applicant's office for repair. While no safeguard program will insulate an authorized applicant from sanctions in the event of a breach of the administrative protective order, such a program may be a mitigating factor. Preamble to notice of proposed rulemaking, 55 Fed. Reg. 24,100, 21,103 (June 14, 1990).

In 2001, the Commission completed four investigations of instances in which members of a law firm or consultants working with a firm were granted access to APO materials by the firm although they were not APO signatories (Cases 3, 5, 7, and 11). In all 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 four 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 four cases, 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 their APO status before obtaining access to and using the BPI. In all four cases the Commission issued warning letters because it was the first time the persons in question were subject to possible sanctions under section 201.15.

Also in 2001, the Commission found the lead attorney to be responsible for breaches in at least six cases where he or she failed to provide adequate supervision over the handling of BPI. (Cases 1, 3, 6, 20, 22, and 32). Lead attorneys should be aware that their responsibilities for overall supervision of an investigation, when a breach has been caused by the actions of someone else in the investigation, may lead to a finding that the lead attorney has also violated the APO. In at least three of the investigations completed in 2001, the lead attorney was found not to have violated the APO because his delegation of authority was reasonable (Cases 8, 34, and 35).

In one investigation in 2001, a lead attorney was sanctioned with a private letter of reprimand under circumstances in which the Commission usually issues a warning letter. In that case the lead attorney made a conscious decision not to conform to the 60-day rule covering the return or destruction of BPI and certification to its destruction or return because he interpreted the APO to allow him to retain the materials for possible but not yet ripe appeals of the Commission's determination. The Commission found that this was not an inadvertent violation of the APO.

In 2001, the Commission issued two public letters of reprimand (Cases 2, 19, 20, and 21). See 66 FR 57110 (Nov. 14, 2001) and 66 FR 19516 (April 16, 2001).

III. Specific Investigations in Which Breaches Were Found.

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

Case 1: An economic consultant prepared, filed, and served a public version of a postconference brief that contained BPI. The consultant inadvertently left a page from the confidential version of the brief in the public version. The consultant filed and served the public version of the brief on all parties to the investigation, and notified the lead attorney that filing and service had been completed. All the firms on the public certificate of service that received the improperly redacted brief were also on the APO certificate of service.

A question arose as to the status of the attorney who discovered the breach because the attorney was not an original signatory to the APO, nor was he listed on the APO certificate of service. Prior to the time of discovery of the breach, however, he applied and was granted access to BPI. The Secretary determined that the attorney was a signatory to the APO because an attorney is deemed a signatory to the APO at the time of approval by the Secretary, and thus the breach was discovered by a signatory to the APO, although the attorney was not listed on the certificate of service.

Immediately after discovery of the breach, the lead attorney notified the Commission and arranged for the return or destruction of the offending page. The Commission found that the consultant breached the APO by failing to redact BPI from the public version of the brief. The Commission also found that the lead attorney breached the APO by allowing the public version of the brief containing BPI to be filed and by failing to provide adequate supervision over the handling of BPI. The Commission determined that another attorney at the law firm did not breach the APO because she was not responsible for the preparation, service, or filing of the brief, or for overseeing the acts of the consultant. As mitigating circumstances, the Commission considered the unintentional nature of the breach, the prompt measures taken to rectify the situation, the increased security measures implemented

at the firm to safeguard BPI in the future, and the discovery of the breach by a signatory to the APO. The Commission issued a private letter of reprimand to the consultant because it was his second APO breach within the time period normally considered by the Commission in determining sanctions, and issued a warning letter to the supervising partner.

Case 2: Two attorneys prepared, filed, and served a public version of a prehearing brief which on one page contained BPI, which was neither bracketed in the confidential version nor redacted from the public version. A third attorney at the law firm reviewed both versions of the brief for APO compliance prior to filing. After notification by the Commission that a breach may have occurred, the attorneys took immediate steps to effect the return or destruction of the page containing BPI.

The attorneys argued that the BPI at issue was not subject to the requirements of the APO because it could have been found in the public domain. The Commission ultimately determined that a breach occurred because the statement at issue was based in part on BPI. The Commission found that the exact statement at issue was not publicly available and the two attorneys failed to exercise due care with regard to BPI. The Commission noted that the attorneys involved, as experienced trade lawyers, should have been aware that the type of information at issue is often treated as BPI. The two attorneys who prepared the brief were issued a public letter of reprimand since it was the third breach by one attorney and the fourth breach by the other attorney within a short period of time. The Commission also found that the third attorney breached the APO because he served as APO manager for the firm and failed to discover the breach. The third attorney was issued a private letter of reprimand rather than a warning letter. He was the firm's APO compliance manager yet failed to discover the breach, he was on notice of the need to review the documents with great care because of prior APO breaches by members of his firm, and, at the time of this decision, he was under investigation for two more possible APO breaches.

Case 3: An attorney utilized BPI obtained from his law firm when drafting posthearing and prehearing briefs, based on a mistaken assumption that he was a signatory to the APO. The attorney later realized that he was not a signatory. After further review, it was discovered that the APO coordinator of the firm never included the attorney in its APO application to the Commission.

The Commission determined that two attorneys in the firm breached the APO. The lead attorney breached the APO because he failed to provide adequate supervision over the handling of BPI. The second attorney was found responsible for the breach because he was the APO compliance attorney within the firm. The Commission issued warning letters to the attorneys because the breach was unintentional, the non-signatory attorney safeguarded the BPI as if he was a signatory to the APO, immediate corrective actions were taken once the breach was discovered, and increased safeguard measures were implemented at the firm to prevent future breaches. In addition, in deciding to issue warning letters instead of private letters of reprimand, the Commission distinguished this situation from others in which BPI is mistakenly sent to other parties or is released to clients or the public, and a non-signatory subsequently reads the BPI.

Although the Commission found that the non-signatory attorney had not breached the APO because he was not a signatory, his use of the BPI was actionable under rule 201.15 for his failure to verify that he was a signatory to the APO. He was issued a warning letter. Although the attorney used the BPI on multiple occasions and was previously warned as a result of another APO breach to take

better care when handling APO matter, the Commission noted that this was the first time he was subject to a possible sanction under rule 201.15. As mitigating factors, the Commission considered the unintentional nature of the breach and the attorney's adherence to the APO as though he was a signatory.

Case 4: Counsel submitted a public version of a posthearing brief containing unredacted BPI, which was discovered by the Secretary during a routine review of the submission. The firm argued that the information was not BPI because it was public information that could be found elsewhere in the record of the investigation. While reviewing the public version of the brief as a result of the Secretary's notification, the firm discovered another possible breach on a different page of the public brief involving the failure to redact BPI. The firm retrieved a copy of the offending submission from the single non-APO signatory upon which it had been served, and provided the Commission and all signatories on the proprietary and public service lists with replacement pages.

The Commission determined that an APO breach did not occur as to the first breach because the information in question was revealed at a prior public hearing and entered into the record. The Commission determined that a breach did occur as to the failure to redact information on the other page of the brief because that information was BPI. The Commission issued warning letters to the attorney and legal assistant responsible for the preparation, filing, and service of the public version of the brief. In the case of two other attorneys whose names were on the posthearing brief, the Commission found that they did not breach the APO because they possessed no firsthand knowledge of the preparation and filing of the public version of the brief. In deciding to issue warning letters, the Commission considered the unintentional nature of the breach, the promptness with which the firm rectified the breach, the existence and subsequent reinforcement of the law firm's internal procedures to protect BPI, and the absence of any prior violations by the attorneys involved in this investigation.

Case 5: A law firm provided personnel at an outside economic consulting firm, who were non-signatories to the APO, with various documents received under an APO. After discussion about the BPI contained in such documents was conducted between the law firm and consulting firm, an attorney at the law firm discovered that the personnel at the consulting firm had not signed the APO application. After confirming this fact, the law firm promptly retrieved all APO materials from the consulting firm.

The Commission determined that two attorneys at the law firm were responsible for the breach. The lead attorney breached the APO because he was responsible for the overall conduct of the case, and nonetheless disseminated and discussed BPI with non-signatories. The other attorney was found responsible because he was the firm's APO compliance attorney, and he also disseminated and discussed BPI with non-signatories. The Commission issued warning letters to the attorneys. In determining the appropriate action, the Commission considered the absence of any violations in the two years prior to the investigation, the promptness with which the attorneys remedied the problem, and the existence of internal procedures within the economic consulting firm in safeguarding BPI. Although the attorneys released BPI to non-signatories of the APO, the Commission determined that the consultants' treatment of the information as if they were under the APO was sufficient to warrant issuance of a warning letter rather than a private letter of reprimand.

The Commission found the actions of three consultants, who viewed and discussed the BPI,

actionable under rule 201.15 because the consultants regularly appeared before the Commission and were fully aware that BPI should be handled only after ensuring they were on the APO. The Commission issued a warning letter to the consultants because this was the first time their actions were actionable under rule 201.15.

Case 6: An economist at a law firm, who was a signatory to the APO, transmitted a posthearing brief containing BPI to an attorney who represented a party in the investigation but who was not a signatory to the APO. Upon receipt of the package containing the brief and without opening it, the non-signatory attorney immediately contacted the lead attorney responsible for the preparation of the brief and returned it to him. Upon notification to the Secretary, the Commission conducted an investigation and determined that both the economist and lead attorney breached the APO because the economist made BPI available to a non-signatory to the APO and the lead attorney failed to adequately supervise the economist in the use and release of BPI. The Commission issued private letters of reprimand instead of warning letters to both individuals because it was the second APO violation for each.

Case 7: An attorney provided BPI to an outside economic consultant under the mistaken belief that the consultant was a signatory to the APO. Personnel at the law firm discovered the error and informed the Secretary. After an investigation was initiated, the attorney notified the Secretary that he had also mistakenly provided BPI to his legal secretary two days before the secretary was authorized to view it under the APO. Both the consultant and legal secretary believed they were signatories to the APO at the time of breach and acted in accordance with the APO's requirements.

The Commission found that the attorney breached the APO by providing BPI to unauthorized persons. The Commission issued a warning letter to the attorney instead of a private letter of reprimand because it considered the case a single breach, although the breach involved two individuals who were non-signatories to the APO. The Commission also took into account the unintentional nature of the breach, the immediate actions taken to remedy the breach and to include on the APO the non-signatories who had prior unauthorized access to BPI, the implementation at the law firm of new procedures to avoid future breaches, and the use of the BPI by the non-signatories as though they were signatories to the APO.

The Commission issued a warning letter to the consultant pursuant to rule 201.15 because of his failure to verify whether he was a signatory to the APO. The Commission also considered as aggravating factors the full use of BPI by the consultant, and his awareness of APO obligations as a former employee of the Commission and a frequent participant in Commission proceedings. The legal secretary was not sanctioned pursuant to rule 201.15 because clerical employees do not sign individual APO applications and thus have less independent responsibility to determine their status under APOs.

Case 8: An attorney filed and served a public version of a prehearing brief that contained unredacted BPI. The attorney notified the Commission and relevant parties the next morning and retrieved each copy of the brief. Although the briefs were served on non-signatories to the APO, the briefs were not, to the best of counsel's knowledge, read by any of them. Upon investigation, the Commission determined that the attorney, as the attorney who was in charge of preparing the brief, breached the APO. The Commission issued a warning letter because the breach was unintentional and this was the first APO violation for both the attorney and firm. In addition, the firm implemented new

procedures to prevent future breaches. The lead attorney in the case was not found to have committed an APO breach because he was not involved in the preparation of the brief, and his reliance on the senior attorney who was in charge of preparing the brief was reasonable.

Case 9: Three attorneys sent a letter to the Secretary containing BPI. A public version of the letter containing BPI was subsequently filed with the Commission and served on a non-signatory to the APO. Upon discovery, the attorneys immediately retrieved the letter before it was read by the non-signatory. The Commission found that the attorney supervising the preparation of the public version of the letter breached the APO by failing to redact BPI and by making it available to a non-signatory to the APO. A warning letter was issued in light of the unintentional nature of the breach, the absence of any prior APO breaches by the attorney, the immediate notification and corrective actions taken once the breach was discovered, and the implementation at the law firm of strengthened procedures to prevent future breaches.

Case 10: An attorney authorized a legal secretary to transmit, via e-mail, a public version of a prehearing brief to an attorney who was not a signatory to the APO. The electronic version of the brief contained BPI that was masked but not deleted. As a result, the BPI could have been retrieved by someone who was able to alter the software print codes. The possible breach was discovered by the transmitting firm's APO administrator.

The Commission determined that the attorney and legal secretary breached the APO by making BPI available to a non-signatory to the APO. Warning letters were sent to both individuals. As mitigating factors, the Commission took into account the unintentional nature of the breach, the discovery of the violation by the breachers, the prompt measures taken by the breachers to remedy the breach, and the destruction of the BPI prior to being viewed by a non-signatory.

Case 11: Three attorneys at a firm, non-signatories to an APO, reviewed and utilized BPI. One of the attorneys reviewed BPI contained in documents under the APO and utilized it in the preparation of prehearing briefs. The two other attorneys reviewed BPI when they proofread the briefs at the instruction of the attorney preparing the brief.

The Commission found two other attorneys at the firm, signatories to the APO, in breach of the APO for failing to ascertain that the three non-signatory attorneys were not on the APO list. Although the Commission found that the non-signatory attorney who prepared the brief did not breach the APO because he had not signed it, his use of the BPI was actionable under rule 201.15. The Commission issued each of the three attorneys a warning letter in light of the unintentional nature of the breach, the discovery of the breach by the law firm, and the prompt action taken to remedy the breach. In the case of the non-signatory attorney who prepared the brief, the Commission considered the fact that he treated the BPI as if he was on the APO.

The two attorneys who proofread the brief were not found to have breached the APO because they were not signatories to the APO and their actions were not sufficient to demonstrate good cause for action under rule 201.15.

Case 12: Attorneys filed and served a public version of a prehearing brief that contained BPI. BPI that was bracketed in an attachment to the confidential version of the brief was not redacted in the public version. The Secretary discovered the error during a routine review of the submission and alerted the firm. The firm immediately retrieved the briefs from all parties and received confirmation

from them that the BPI was not seen by anyone not subject to the APO. One of the attorneys involved in the breach asserted that White-out tape covering the BPI at issue fell off during the photocopying process, resulting in the breach.

The Commission found that the two attorneys responsible for the preparation, filing, and service of the brief breached the APO by making BPI available to unauthorized persons, and issued warning letters to them. In deciding to issue warning letters, the Commission considered the inadvertent nature of the breach, the prompt steps taken to rectify the situation, the retrieval of the BPI prior to its review by anyone, and the absence of any prior violations by the attorneys. **Case 13:** An attorney prepared, filed, and served a prehearing brief containing BPI that was neither bracketed in the confidential version nor redacted in the public version. Before discovery of the breach, the attorney failed to serve the brief by hand or overnight delivery as required by Commission rule 207.3. After learning of the service error, the Secretary rejected the prehearing brief as improperly served. The attorney refiled the brief with the Secretary and the Commission accepted the late filing after the attorney sought leave to file the brief out of time.

An attorney representing another party in the case noticed the breach upon receiving the brief by first class mail and notified the attorney and Commission. The attorney who filed the brief immediately contacted all other counsel and asked them to retrieve and return all copies of the prehearing brief. The briefs were returned, but counsel for one of the parties stated that the brief had already been forwarded to his client. Counsel for each party asserted that the brief was not reviewed by any non-signatories to the APO, including the attorney who had forwarded the brief to his client. Upon refiled and reservice, the attorney once again failed to bracket BPI that was unbracketed in the original filing. The attorney retrieved the page in question from all counsel and the Commission and provided a new page correcting the error.

The attorney argued that a breach did not occur as to two items of information because one item was publicly disclosed in a prehearing staff report and the other item could be logically inferred from numerous public statements made by the industry. The Commission agreed but found that a breach occurred as to three other items that constituted BPI. Although the attorney made immediate efforts to rectify the situation and no evidence existed that BPI was viewed by non-signatories to the APO, the Commission issued a private letter of reprimand to the attorney due to several aggravating factors. First, the Commission did not view the breach as inadvertent, as the attorney stated that he had closely reviewed the information in question and made a conscious decision not to bracket it. Second, the attorney violated the Commission's rules when he failed to serve the brief by hand or overnight delivery. Finally, the attorney failed to correct all the problematic disclosures in the brief before filing it with the Commission a second time.

Case 14: Two attorneys prepared, filed, and served a prehearing brief. One of the attorneys discovered that the public version of the brief contained BPI. He immediately notified the Secretary and retrieved the pages containing the BPI from the other parties and filed and served three replacement pages. After the replacement pages were filed and served, an attorney representing another party contacted the Secretary to inform her that there was additional BPI in the brief that had not been bracketed in the confidential version and had not been redacted from the public version of the brief. The Secretary instructed the breaching attorneys to file new amended pages for both the

confidential version and the public version of the brief.

The attorneys argued that the type of BPI discovered by the other attorney is often public and, therefore, the failure to redact was understandable. Upon investigation, the Commission found that the two attorneys responsible for the preparation and review of the brief had breached the APO. The Commission issued private letters of reprimand to the attorneys due to their filing of three defective versions of the brief (two of the public version and one of the confidential version) and their failure to exercise proper diligence to ensure that BPI was not revealed to the public. Some mitigating circumstances were present: the inadvertence of the breach involving the BPI discovered by the breacher, the prompt correction of the unauthorized disclosures, and the absence of any prior APO breaches for both attorneys.

Case 15: Two attorneys prepared, filed, and served a prehearing brief containing BPI on one page that was neither bracketed in the confidential version nor redacted in the public version. The Secretary instructed the attorneys to retrieve the page in question from the Commission and parties. After filing a replacement page, they filed a letter with the Commission stating that neither the confidential nor the public version of the original prehearing brief had been disclosed to anyone not having access to BPI. The attorney having primary responsibility for preparing the brief stated that he overlooked the BPI in question because he was under the impression that the quoted information was publicly available. The second attorney, responsible for reviewing the brief for typographical and bracketing errors, stated that he inadvertently failed to consider that the domestic producer's questionnaire response was the source of the information.

The Commission determined that both attorneys breached the APO by making BPI available to unauthorized persons. Despite the discovery of the breach by the Secretary, and not by the attorneys, Commission issued a warning letter because of the unintentional nature of the breach, the absence of any prior breaches by the attorneys, and the prompt action taken by the attorneys to mitigate the breach. A third attorney who was a signatory to the APO and signed the brief was found not to have breached the APO because he had no responsibility for the preparation or filing of the brief.

Case 16: Counsel prepared and electronically forwarded a non-confidential draft of a prehearing brief containing BPI to an attorney and an economist, both of whom were signatories to the APO. The draft was created using a software program that electronically suppressed all data within brackets. Although not visible when viewed on a computer screen or printed in hard copy, the BPI contained in the draft could have been restored by someone who was knowledgeable about the operation of the software. The attorney preparing the brief asserted that he was unaware that there was BPI in the draft at the time of transmission. At the direction of the attorney receiving the electronically transmitted brief, the draft was electronically forwarded by the economist to an official of the client corporation. Once received by the official, it was electronically forwarded to another official of the client corporation. Neither official was a signatory to the APO. At the time of receipt, neither official was aware that redacted BPI could be electronically restored in the draft brief.

In the course of editing the brief, the attorney responsible for the preparation of the brief realized that BPI still existed in recoverable form. Recognizing that a possible APO breach may have occurred, the attorney contacted the Secretary. The attorney who had received the electronically transmitted brief contacted the economist and client-officials, and requested that they destroy the

electronic version of the draft brief sent to them. A letter was filed with the Commission stating that no actual disclosure of BPI occurred.

The Commission found that the attorney in charge of the preparation of the brief breached the APO by e-mailing a draft of the public prehearing brief that contained retrievable BPI. Although he did not know that the draft contained BPI, he had the responsibility to be fully aware of how the document was prepared because a legal assistant was preparing the document and non-signatories would ultimately see the brief. The Commission issued a warning letter to the attorney in light of the unintentional nature of the breach, the fact that the attorney discovered the breach, the promptness with which the breach was rectified, the certifications by the non-signatories that the brief was not read, and the implementation of a new policy within the law firm that documents under an APO will not be electronically transmitted.

The economist and second attorney were found not to have breached the APO because they were unaware that the brief contained BPI and its preparation was not under their control or supervision. In the case of the second attorney, he took an additional precaution by visually checking the document to ensure that all BPI had been deleted before he arranged to have the document forwarded to his client.

Case 17: Counsel prepared, filed, and served a public document that contained BPI. The Secretary discovered the breach and notified the attorney. The page containing BPI was retrieved from all those on the service list except for one firm. That firm stated that it never received the document. The attorney was able to confirm that the document had not been copied or distributed by the other firms on the service list.

According to the attorneys who signed the document and were signatories to the APO, the breach occurred because the attorney preparing the document failed to have it checked by a second attorney, as required by the law firm's APO procedures. Moreover, the attorneys argued that the information at issue was not BPI because it did not contain commercial information and the information was later revealed in a publicly available Commission staff report. The Commission determined that the information at issue was BPI at the time it was released and that a breach had occurred.

The Commission held that the attorney responsible for the preparation of the brief committed a breach by allowing BPI to become publicly available. The Commission did not hold the other attorneys who signed the document responsible because, by not following the firm's APO procedures, the attorney who prepared the brief precluded another attorney from reviewing the document for potential APO violations. In addition, the attorney was a third year associate and had no prior breaches that would have alerted the other attorneys who signed the document that they needed to provide closer supervision of APO materials.

The Commission considered the fact that one of the copies of the document was never found as an aggravating circumstance. Nonetheless, the Commission issued a warning letter in light of the unintentional nature of the breach, the prompt action taken to rectify the breach, the absence of any information suggesting that any non-signatory to the APO read the BPI, the implementation at the law firm of additional safeguards to prevent future breaches, and the absence of any prior breaches by the attorney.

Case 18: Two attorneys prepared, filed, and served a public version of a posthearing brief that contained unredacted BPI. Immediately after being notified of this error by opposing counsel, the

attorneys contacted the Secretary and the other parties, requesting that they destroy the page containing BPI and replace it with a corrected version.

The attorneys, signatories to the APO, argued that because the error was corrected within the 24-hour deadline prescribed for the filing of a brief under rule 207.3(c), they did not breach the APO. However, the Commission held that rule 207.3 was not applicable because that rule applies only to bracketing changes made to confidential briefs and not to public briefs. Therefore, the Commission determined that the attorneys breached the APO by failing to redact BPI and making it available to non-signatories to the APO. The Commission issued warning letters to the attorneys because the breach was unintentional and immediately rectified. Moreover, the attorneys had no prior APO breaches.

Case 19: Two attorneys and a consultant filed a prehearing brief with the Department of Commerce containing bracketed BPI obtained under the APO in the Commission investigation. In addition, the two attorneys and their secretary sent a copy of the confidential brief to a law firm that was not a signatory to the Commission's APO and was no longer a signatory to Commerce's APO. The secretary typed the brief, made copies, and prepared envelopes for service on other parties. In determining whom to serve, she used an old certificate of service list that had not been updated, even though one of the attorneys told her that the firm had received an updated service list. The Commission found that the attorneys and the secretary breached the Commission's APO in releasing the brief to DOC personnel. The Commission determined that some of the information contained in the brief was BPI and not publicly available because it came from Commission questionnaire responses, which were provided only to the parties to the Commission investigation under its APO. The two attorneys and the secretary failed adequately to explain their contention that the information in question was independently known to industry participants. The Commission decided that the consultant did not breach the Commission's APO, as she was not involved in preparing, filing, or serving the prehearing brief and had no personal knowledge of any circumstances surrounding the possible breach.

The Commission issued a warning letter to the secretary. As mitigating factors, the Commission considered that this was the only breach in which the secretary was involved within the time period generally examined by the Commission for the purpose of determining sanctions, the breach was unintentional, prompt action was taken to minimize the effect of the breach, the non-signatory law firm did not view the BPI, and the secretary was under the direction and supervision of an attorney.

In determining the proper sanctions for the two attorneys, the Commission decided to consider the APO breaches committed by one of the attorneys in this case at the same time it considered sanctions for the breach he committed in Case 20. The Commission determined the sanctions against the second attorney in concert with consideration of the sanctions against him in two other APO violations, Cases 20 and 21.

Case 20: The lead attorney, a second attorney, and a consultant submitted a public version of their final comments to the Commission, but failed to redact BPI from two pages of the Comments. The Secretary noticed the errors a day after the comments were filed and notified one of the attorneys. That same day the attorney called all parties that had received copies of the comments and requested that they destroy the pages containing the BPI.

The Commission found that the consultant, who was not a signatory to the APO, did not breach

the APO because, although his name was on the Final Comments, he only had client contact responsibilities and never had access to the APO materials. The Commission determined that both attorneys breached the APO by failing to redact the BPI. In addition, the lead attorney also breached by failing to provide adequate supervision over the handling of BPI.

The Commission determined the sanctions for the lead attorney in connection with Case 19, discussed above. The Commission decided to publicly reprimand the lead attorney in the Federal Register. 66 Fed. Reg. 57,110 (November 14, 2001). In reaching this decision, the Commission considered the fact that the breaches committed by the attorney were his second and third breaches within a short period of time. In addition, the Commission, in the public letter, required the law firm to have at least two attorneys review all documents for future filings with the Commission to ensure APO compliance. The two-attorney review requirement is in effect for the two-year period starting with the date the public reprimand was published in the Federal Register. The Commission decided the sanctions against the second attorney in concert with Cases 19 and 21.

Case 21: Three attorneys filed and served a public version of their final comments that contained BPI. The lead attorney who had been the second attorney in Cases 19 and 20 prepared the documents and took sole responsibility for the breach. He argued that the information in question was publicly available. The Commission disagreed and found that the lead attorney breached the APO because he received the information from a Commission investigator's report that relied on data given by a domestic producer's representative. The Commission found that the two other attorneys did not breach the APO because they did not prepare the final comments.

In sanctioning the attorney who breached the APO, the Commission also considered the attorney's previous breaches in Cases 19 and 20. As an aggravating factor, the Commission found it significant that the attorney had committed four breaches within a short period of time. The Commission publicly reprimanded the attorney in the Federal Register. 66 Fed. Reg. 57,110 (November 14, 2001). The Commission also suspended the attorney's access to BPI for six months from the date the public reprimand was published in the Federal Register. Finally, as noted in Case 20, the Commission required the attorney's law firm to have at least two attorneys review all documents for future filings with the Commission to ensure APO compliance.

Case 22: An associate attorney, his secretary, and the lead attorney breached the APO by transmitting BPI to four embassy officials who were non-signatories to the APO, but were on the public service list. Over a 17-day period, BPI was sent to the same four embassies on four separate occasions. In deciding that the associate attorney, his secretary, and the lead attorney breached the APO four times, the Commission considered the lack of attention paid to the certificates of service for both confidential and public documents. The Commission determined that either none of the parties noticed that the public certificate of service had been used for both confidential and public materials or the parties lacked awareness that the two service lists were different. In addition, the Commission found that the law firm did not provide adequate safeguards or supervision to protect BPI from delivery to unauthorized persons.

The Commission sanctioned the associate attorney, his secretary, and the lead attorney by issuing private letters of reprimand to them. As mitigating factors, the Commission considered the unintentional nature of the breaches, the timely reporting of the breaches once discovered, the efforts to

mitigate any harm caused by the breaches, the lack of previous APO breaches, and efforts by the firm to prevent future breaches. As aggravating factors, the Commission considered the large number of breaches in one investigation, the large volume of APO materials involved, and the significant amount of time during which the BPI was unprotected. The Commission determined that it could not be certain that no BPI was divulged to unauthorized persons.

Case 23: A partner and an associate filed the public version of a prehearing brief, which had an annex that contained BPI. One of the law firm's clients notified the parties three days after filing of the possibility of a breach after two executives of the client corporation had read the annex containing the BPI. The associate notified the Commission the same day and both attorneys immediately contacted counsel for the other parties and provided substitute annexes.

The Commission found that both attorneys breached the APO and issued them private letters of reprimand. As mitigating factors, the Commission considered that the breach was unintentional, the attorneys took immediate action to remedy the situation by notifying the Commission, contacting counsel for the other parties, and providing substitute annexes, this was the only breach in which the attorneys had been involved during the time period normally considered by the Commission, and the BPI in question was in a cover letter to a questionnaire response that was not clearly labeled as containing BPI. The Commission issued private letters of reprimand because of the aggravating circumstances that the attorneys' client discovered the breach and that the two executives who were not signatories to the APO actually read the BPI.

Case 24: A law firm and a consulting firm failed to return or destroy BPI released under an APO and to file certificates of return or destruction within the 60-day time limit after the Commission published its final determination in the Federal Register. The Secretary noticed the breach when the lead attorney sent a certificate of return or destruction signed by an attorney who had left the firm. The Secretary's staff discovered that certificates of destruction or return had not been filed by most of the other signatories to the APO. The firm had only submitted certificates of return or destruction for people no longer with the firm.

The lead attorney admitted that the firm had not returned or destroyed the APO materials. However, he argued that it was necessary to retain APO materials because the investigations were still subject to a judicial appeal of the Commission's final affirmative determination. He noted that the Department of Commerce had entered a suspension agreement with one of the firm's clients, which was being challenged at the Court of International Trade. He stated that if the Court reversed Commerce, Commerce would issue an antidumping order, and only at that point would the Commission's final determination be ripe for appeal.

The Commission determined that the lead attorney breached the APO by failing to destroy or return BPI within 60 days after completion of the Commission investigations. In addition, the attorney failed to certify that to his knowledge and belief all copies of the BPI had been returned or destroyed and that no copies of the BPI had been made available to any person to whom disclosure was not specifically authorized. The Commission ordered the lead attorney and all other authorized applicants at the law firm and the consulting firm to comply with the APO within 14 days. The Commission did not find any other attorneys or members of the consulting firm to have breached the APO because they were complying with the lead attorney's decision to retain that APO materials.

The Commission issued a private letter of reprimand to the lead attorney. As mitigating circumstances, the Commission considered that the lead attorney had no prior breaches and that he destroyed and certified the destruction of the APO materials once he received the Commission's instruction to destroy them. Furthermore, no unauthorized person gained access to the APO materials as a result of the breach. Finally, the lead attorney's law firm instituted a policy of seeking guidance in matters that attorneys find ambiguous instead of making a potentially incorrect independent decision regarding compliance with Commission APOs. As an aggravating factor, the Commission considered that the breach was not inadvertent. It was based on the lead attorney's decision to interpret the APO and decide how it should be applied in what he considered unique circumstances, without seeking guidance from the Commission.

Case 25: A lead attorney filed a letter with the Commission Secretary challenging certain information contained in a respondent's revised questionnaire response and in the cover letter that accompanied the revised response. The respondent's cover letter was marked "PROPRIETARY DOCUMENT" and in this letter the respondent's attorney requested proprietary treatment for that information and for the revised questionnaire response. No material in the respondent's cover letter or the response was bracketed. When the lead attorney filed his response, he sent a confidential version of the letter to the Secretary and filed a public version. He also had the public version served on two non-signatories to the APO. One day after the lead attorney filed his letter, he realized that it might contain BPI. He notified the Secretary and filed and served revised copies of his letter.

The Commission found that the lead attorney breached the APO because the "public" version of his letter contained BPI, he served the letter on two people who were not signatories to the APO, and he failed to bracket the same BPI in the confidential version of his letter. The Commission did not agree with his argument that if unbracketed BPI had appeared in his letter, it was the fault of the respondent and its attorneys because they did not bracket or otherwise identify the BPI in their cover letter and revised response. The Commission noted that a questionnaire response is not filed with the Secretary subject to requirements of rules 201.6(b)(3) and 207.3(c), which require among other things that BPI be bracketed. Furthermore, the instructions for responding to the questionnaire indicated that each response would be automatically treated as confidential, except to the extent that data in the response are publicly available or must be disclosed by law. The lead attorney did not establish the applicability of either of the exceptions. Therefore, the respondent was under no obligation specifically to mark or bracket BPI in the revised questionnaire response.

The Commission issued a warning letter to the lead attorney. As mitigating factors, the Commission considered that the attorney did not act in bad faith, that this was the only breach in which he was involved within a period of time generally examined by the Commission for the purposes of determining sanctions, and that he took prompt action to correct the breach.

Case 26: Three attorneys, a secretary, and a paralegal prepared a postconference brief on behalf of the petitioner. One day after the attorneys filed the confidential version of the brief, they filed replacement pages for the confidential brief, and pursuant to the 24-hour rule, they filed the public version of the brief. The following workday, the Commission's Secretary notified the attorneys' law firm by telephone that several appendices in the public version of its brief contained unredacted BPI in brackets. The Secretary also noted that brackets had been removed from some of the petitioner's

information in the replacement pages of the confidential brief, which was previously bracketed in the original pages of the confidential version of the brief and had been redacted from the public version of the brief.

After the law firm received the Secretary's telephone call, it determined that some of the information that it failed to bracket in the replacement pages to the confidential brief belonged to its own client and could therefore be released as public information. The law firm also made revisions to the relevant pages of the public version of its brief and re-filed and re-served the revised pages. The law firm took several more steps to avoid dissemination of the unredacted information in the public version of the brief. It contacted lead counsel for each party to the investigation by telephone on the same day the Secretary called and requested that counsel retrieve the copies of the petitioner's postconference submissions. It prepared replacement pages that included additional bracketing on one page of its confidential brief, removed brackets from certain of its client's information in the confidential brief, and redacted bracketed information from the public version of its brief. The law firm also contacted the parties on the public service list to retrieve the pages that had contained unredacted BPI. The public service list in effect in these investigations at the time included only law firms that were approved for access to BPI under the APO. However, one of the law firms made copies of the public version of the brief and forwarded one copy to its client who was not a signatory to the APO. The information was not opened by the non-signatory and was returned to the law firm. The offending exhibit pages that were distributed to the other parties on the public service list were also returned to the law firm. The firm received assurances from the lead counsel of all of the parties on the public service list that no non-signatory had reviewed the BPI.

The Commission found that, in two sections of the brief, the attorneys, the secretary, and the paralegal did not breach the APO in failing to bracket or redact BPI because the information at issue belonged to the parties that disclosed it. However, in another section, the Commission determined that the three attorneys breached the APO by failing to redact BPI from the public version that was filed with the Commission and served on parties on the public service list.

The Commission issued warning letters to the three attorneys. As mitigating circumstances, the Commission considered that this was the only breach committed by the attorneys within the time period generally examined by the Commission for purposes of determining sanctions, that the breach was unintentional, that prompt action was taken to remedy the breach, and that the clients who were given the brief containing the BPI neither read nor made any copies of the BPI.

The Commission decided to take no further action against the secretary or paralegal because they were responsible to and under the supervision of attorneys at all times.

Case 27: One attorney and three legal assistants served a copy of corrections to a Commission staff report containing BPI as well as a prehearing brief containing BPI, on a law firm that had been removed from the APO service list. An attorney from another law firm who was a signatory to the APO notified the attorney serving the documents that one of the firms on the certificate of service attached to the prehearing brief had withdrawn from the APO. The next day, the attorney serving the documents contacted the law firm that was no longer on the APO list and retrieved the unopened pre-hearing brief. Later that day, the attorney noticed that the corrections, which were sent six days before the brief, had also been served to the law firm that had withdrawn from the APO. The attorney contacted the firm and

learned that the corrections to the preliminary staff report had already been shredded without being opened. The attorney alerted the Secretary that day to what had transpired.

One of the legal assistants prepared the service list that incorrectly included the law firm no longer on the APO service list for the corrections to the preliminary staff report. The legal assistant used the same service list for the prehearing brief. Both times he failed to check his list against the updated list available through the Commission's website. The same legal assistant arranged for the filing of the document with the Commission and for delivery of the service copies. The other two legal assistants simply served the documents on the recipients as instructed.

The Commission issued a warning letter to the attorney for breaching the APO. The Commission has consistently taken the position that a breach of the APO occurs when BPI is made available to unauthorized persons, and that it is not necessary that those persons actually view the information. Specifically, the attorney breached the APO by providing a person whose law firm had been removed from the APO service list with copies of corrections to a Commission staff report containing BPI and with a pre-hearing brief containing BPI. The Commission also noted that the attorney was responsible for supervising the activities of the legal assistants who prepared and delivered the briefs because she signed the APO acknowledgment for clerical personnel, which she filed with the Commission. As mitigating circumstances, the Commission considered that this was the only breach for the attorney within the period generally examined by the Commission, that the breach was unintentional, that prompt action was taken to remedy the breach, and that no unauthorized person opened the packages containing the BPI.

The Commission determined that the legal assistant who prepared the erroneous service list had breached the APO and issued a warning letter to him. As mitigating circumstances, the Commission considered that this was the only breach for the legal assistant within the period generally examined by the Commission, that the breach was unintentional, that prompt action was taken to remedy the breach, and that no unauthorized person opened the packages containing the BPI.

The Commission found that the two legal assistants who served the documents did not breach the APO.

Case 28: Four attorneys filed the public version of a posthearing brief, which included an exhibit that contained BPI. The Commission found that one of the attorneys and her secretary breached the APO by failing to redact the BPI. The secretary "whited-out" the BPI electronically on her computer. She then reviewed the exhibits, both on the computer screen and as printed pages, to make sure she had redacted all BPI. Another attorney then reviewed the brief before the attorney who breached the APO made a final review and found all BPI had been redacted. Eleven days later one of the attorneys discovered the un-redacted BPI in the exhibit and notified the Commission Secretary. The attorney then redacted the BPI from the exhibit and served a replacement page on all relevant parties.

The Commission found that three of the attorneys did not breach the APO because they did not participate in the preparation or review of the exhibits in the public version of the brief. However, it initiated an additional investigation, which was still pending when this case was decided, after it discovered that another attorney who was not a signatory to the APO helped in the preparation and filing of the brief.

The Commission issued a private letter of reprimand to one of the attorneys. As mitigating

circumstances, the Commission considered that this was her first breach of an APO, that the breach was inadvertent, and that once she became aware of the breach she took prompt action to retrieve the pages containing the BPI. In deciding to issue a private letter of reprimand instead of a warning letter the Commission considered the aggravating circumstance that the non-redacted BPI was in the possession of a non-signatory for eleven days. Without evidence to the contrary, the Commission assumed that a non-signatory had reviewed the BPI because of the length of time it was in the non-signatory's possession.

The Commission issued a warning letter to the secretary. As mitigating circumstances, the Commission considered that this was the only breach of an APO in which she was involved within the period generally examined by the Commission, that the breach was unintentional, and that once her firm became aware of the breach it took prompt action to retrieve the pages containing the BPI. Although the Commission concluded that a non-signatory had reviewed the BPI, it recognized that she was under the direction and supervision of an attorney.

Case 29: Three attorneys filed the public version of a postconference brief that contained bracketed but un-redacted BPI. A secretary assisted in the brief's preparation. The Secretary noticed the breach five days after it was filed and notified the firm. The firm took steps to retrieve the copies of the public version of the brief that it had served and distributed. The attorneys also filed a replacement page that no longer contained BPI. The Commission found that the attorney who had the primary responsibility for preparing the brief and the attorney who signed the brief breached the APO. The two attorneys reviewed the brief, but failed to redact the bracketed BPI. The Commission also determined that the secretary breached the APO because she failed to run properly the law firm's computer program that redacts bracketed information from a submission after the attorneys instructed her to redact the information. The Commission found that the third attorney did not breach the APO. She was not in the office on the day that the public version of the brief was filed, and she appeared to play no role in the preparation of the brief.

The Commission issued warning letters to both attorneys. As mitigating factors, the Commission considered that the attorneys had no breaches within the time period generally examined by the Commission for the purpose of determining sanctions, that the breach was unintentional, that prompt action was taken to remedy the breach, and that no non-signatory of the APO actually read the document.

The Commission issued a warning letter to the secretary who assisted in the brief's preparation at the instruction of her supervising attorneys. As mitigating factors, the Commission considered that the secretary had no prior breaches, that the breach was unintentional, that prompt action was taken to remedy the breach, and that no non-signatory of the APO actually read the document.

Case 30: An economist, while under the supervision of an attorney, faxed the confidential version of a prehearing brief containing BPI to a client-association who was not a signatory to the APO. The client-association subsequently faxed the confidential version to its 66 members, who were also non-signatories, the following day. Two days after the fax was sent to the client, the attorney notified the Secretary and reported that he had contacted each of the persons to whom the brief had been distributed, informed them of the seriousness of the situation, and instructed them to destroy the brief. However, the attorney and economist did not account for several of the faxed copies.

The Commission determined that both the attorney and the economist breached the APO by allowing unauthorized persons to view the BPI. The Commission sanctioned the attorney and the economist by issuing private letters of reprimand to both. As mitigating circumstances, the Commission considered that the breach was reported promptly after the attorney was advised that it had occurred, that prompt efforts were made to prevent further dissemination and to recall or destroy existing copies, that procedures were strengthened at the law firm to safeguard against future breaches, and that the attorney and the economist had no record of prior breaches. However, as aggravating circumstances the Commission considered that persons who were non-signatories to the APO actually read the BPI and that the attorney and economist did not account for all copies of the BPI that were sent by the client to its members.

Case 31: Three attorneys failed to destroy BPI within the required 60 days after the Commission made a final APO release. The lead attorney changed law firms and had the BPI covered under the APO transferred to his new law firm. The lead attorney's old law firm sent a letter to the Commission stating that they no longer represented the client, that the lead attorney continued to represent the client, and that the APO material would remain with the lead attorney. Once at his new law firm, two other attorneys also signed the APO. Ten months after the Commission made a final APO release, the lead attorney stated that he learned that he should no longer possess the BPI after he spoke with an employee of the Commission about another matter. His client was appealing Department of Commerce findings and the lead attorney asserted that he believed that he was entitled to retain the BPI until the proceedings on the DOC appeal were completed. The other two attorneys never accessed the materials that had been released under the APO, but one of them reviewed a document drafted by the lead attorney, which contained BPI.

The Commission determined that the three attorneys breached the APO by failing to destroy all copies of BPI disclosed under the APO within 60 days of the completion of the Commission's investigation. The attorneys also failed to file a certificate attesting that to their knowledge and belief all copies of the BPI had been returned or destroyed, and that no copies of the BPI had been made available to any person to whom disclosure was not specifically authorized at the time they were required to return or destroy the BPI.

The Commission issued warning letters to the three attorneys. As mitigating circumstances, the Commission considered that this was the only breach in which any of the attorneys had been involved within the period generally examined by the Commission for purposes of determining sanctions, that the breach was unintentional, and that prompt action was taken to remedy the breach once the Secretary advised them of a potential breach.

Case 32: The Commission was notified by a lead attorney that an associate at his law firm had discovered the BPI version of a prehearing brief in a file not designated for APO materials and which was accessible by non-APO signatories. A second attorney at the law firm admitted to taking two copies of the prehearing brief, which contained BPI, into his possession, but could only account for having properly returned one of the copies to the law firm's APO filing room. No one at the firm knew how or when the document was placed in the non-APO file or whether anyone not on the APO reviewed it. Immediately after the document was discovered, the attorneys had it numbered, stamped, and filed in the appropriate APO filing room.

The Commission determined that both attorneys breached the APO. The Commission held the lead attorney responsible because he had the ultimate responsibility for the safe keeping of the APO materials entrusted to him. Despite that responsibility, he allowed a document containing BPI to be placed in a file accessible to persons not covered by the APO. The Commission also held the second attorney responsible because he lost track of a document containing BPI and possibly caused it to be placed in a file accessible to non-signatories of the APO.

The Commission issued warning letters to both attorneys. As mitigating circumstances, it considered that both attorneys had no prior breaches in the period generally examined by the Commission for purposes of determining sanctions, that the breach was unintentional, and that prompt action was taken to remedy the breach in that the law firm changed its APO procedures and held a mandatory seminar for all personnel regarding APO materials. The Commission noted that, although it issued warning letters, issuance of a private letter of reprimand was possible if a non-signatory had actually read the BPI. However, the Commission considered it significant that the non-signatories that had access to the BPI were employees of the law firm and likely did not divulge the information to anyone outside the firm.

Case 33: An attorney filed the public version of an opposition to a motion for modification of stay orders and a motion for sanctions with the U.S. Court of Appeals for the Federal Circuit (“CAFC”). The document contained confidential business information (“CBI”) obtained pursuant to a Commission APO. Seven days after the attorney filed the document, opposing counsel sent a letter to the attorney and other interested counsel informing them of the potential breach. The attorney immediately asked the CAFC to place the original opposition under seal and filed a revised public version of his opposition four days after the date of opposing counsel’s notification letter. The Commission determined that the information in question was not publicly available, as argued by the attorney, and that the attorney had breached the APO.

The Commission issued a warning letter to the attorney. As mitigating factors, the Commission considered that he had no prior APO breaches, that the breach was unintentional, that prompt action was taken to remedy the breach, and that no non-signatory to the APO actually read the document.

Case 34: A law firm served the first-day BPI version of its post-conference brief on another law firm that was not a signatory to the Commission’s APO. The same day an attorney at the non-signatory firm called the law firm and stated that he had been improperly served with the BPI version of the brief. This attorney did not view the BPI and the first law firm retrieved the brief later in the day. Two days later the first law firm sent a letter to the Commission regarding the incident.

Several attorneys and consultants were involved in preparation of the post-conference brief, but not all of them had direct involvement in filing and serving the brief. Five project assistants were responsible for the filing and service of the brief.

The Commission determined that the APO had been breached because BPI was provided to unauthorized persons. The Commission found that all five project assistants, the attorney in charge of supervising the project assistants, and a consultant who signed the certificate of service breached the APO, but that the lead attorney did not breach the APO.

The Commission found that the project assistants breached the APO because they improperly labeled one of the post-conference briefs, which was sent to a non-signatory of the APO. The attorney

in charge of the project assistants breached the APO because he undertook in the APO application to supervise clerical employees, which he failed to do and this failure resulted in the service of BPI on a non-signatory to the APO. The consultant who signed the certificate of service breached the APO because, although the certificate he signed included only those firms that were entitled to receive BPI under the APO, he should have ensured that the copies to be served were labeled properly. Finally, the Commission found that the lead attorney did not breach the APO because in the APO application he delegated the responsibility of supervising clerical employees to another attorney, and the Commission found that this delegation was reasonable in light of the supervising attorney's regular practice before the Commission.

The Commission issued warning letters to the five project assistants, the attorney in charge of supervising clerical personnel, and the consultant who signed the certificate of service. As mitigating circumstances the Commission considered that the breach was unintentional, that prompt action was taken to remedy the breach, that the non-signatory who received the brief containing BPI did not view the document, that there were no prior breaches within the period generally examined by the Commission for purposes of determining sanctions, and that the law firm revised its procedures regarding APOs in light of the breaches.

Case 35: Three attorneys and a legal assistant were involved in the preparation of the public version of a prehearing brief. Twelve days after the public version of the brief was filed and served, the Secretary notified the law firm that it had failed to redact one item of bracketed BPI from a footnote in one of the exhibits. The public version of the brief, which contained unredacted BPI, was served on and possibly viewed by several non-signatories to the APO. The law firm immediately contacted all parties who had received the public version of the brief to arrange for the destruction or return of the offending page. Two days later the law firm filed a replacement page.

The Commission found that two of the attorneys (one of counsel and the other an associate) breached the APO because the lead attorney had delegated the responsibility of preparing the brief, properly bracketing BPI, and redacting BPI from the public version to the two attorneys. The Commission found that the lead attorney did not breach the APO because she reasonably delegated the responsibility of preparing and reviewing the public version of the brief to not one, but two, experienced attorneys. Furthermore, it was reasonable for the lead attorney to rely on their representations that the brief was ready for dissemination to the public when she signed the public version and had additional copies disseminated to other non-signatories. The Commission also found that the legal assistant did not breach the APO because at all times she acted under the direction and supervision of the two attorneys responsible for the brief.

The Commission sanctioned both the associate and of counsel attorneys with a private letter of reprimand. As mitigating factors, it considered that the breach was unintentional, that corrective measures were taken immediately, that the law firm followed its internal APO procedures that were in place before the breach, that these procedures were further strengthened after the breach, and that both attorneys voluntarily led a training session on the revised procedures for other attorneys and staff. The of counsel attorney also had no prior breaches in the period generally considered significant by the Commission for the purposes of determining sanctions. As aggravating circumstances, the Commission considered the fact that the Secretary and not the law firm found the unredacted BPI in the public

version of the brief, that it appeared that the BPI was viewed by the non-signatories who received it, that the unredacted BPI revealed involved information from one of two importers when the Commission's staff report did not even reveal aggregate quantities for such importers because only two parties' information was involved. The associate attorney had one prior breach in the period generally examined by the Commission for the purposes of determining sanctions, which served as another aggravating factor for him. When the Commission sanctions someone in the associate's situation, it normally issues a private letter of reprimand, usually including additional requirements or prohibitions. However, the Commission issued only a private letter of reprimand to the associate because he voluntarily conducted a training session on the firm's APO procedures for other attorneys and staff.

Case 36: A law firm prepared the APO version of a prehearing brief containing BPI to be filed and served, but in the process of serving the brief, one copy was lost for 11 days. The law firm waited seven days before notifying the Commission of the missing brief. On the day the brief was lost, an associate with the firm went through several steps to make sure that all 14 copies of the brief were properly labeled for service. After she completed this process with the assistance of others, she arranged for a clerical worker and a legal assistant, who were both signatories to the APO, to hand carry the briefs to the Commission together to ensure that they were properly filed before the clerical worker delivered the service copies. The two employees took a taxi cab to the Commission. After they filed the appropriate number of copies with the Commission, the legal assistant noticed that one of the copies was missing. The two employees presumed that they left the missing copy in the taxicab, but after contacting the cab company, the D.C. Cab Commission, and offering a \$500 reward, the missing brief did not reappear. Eleven days after the two employees lost the envelope, it arrived at the law firm specified on its address label. The envelope was unopened.

The Commission determined that the clerical worker and the legal assistant breached the APO because the service copy of the APO version of the prehearing brief was missing for 11 days and was only eventually delivered to the correct APO recipient by an unknown person, possibly the cab driver who was a non-signatory to the APO. The Commission has consistently taken the position that it is a breach of an APO to make BPI available to an unauthorized person, and that it is not necessary for the non-signatory to view the BPI for a breach to occur. Generally, the Commission does not hold support staff responsible for breaches if they are under the direct supervision and control of another, but it found that the circumstances surrounding this incident warranted such a determination. The service copy was under their control when it disappeared, and the disappearance was directly related to their failure to safeguard all copies of the brief at all times.

The Commission determined that the lead attorney in the investigations did not breach the APO. It found that he reasonably delegated the responsibility of filing and serving the APO version of the brief to the associate who had worked in the firm's international trade practice for approximately two years, who had no prior APO breaches, and who took a number of steps to ensure that the document containing BPI received under the APO was properly served.

The Commission found that the associate did not breach the APO, notwithstanding the fact that she had been delegated the responsibility of filing and serving the APO version of the brief in compliance with the APO requirements. The associate was very involved in the preparation of the brief for filing and service and appeared to have been very diligent in checking and double-checking the number of copies,

the packaging of the copies, and the potential recipients to ensure proper delivery and compliance with the APO. The associate arranged for two people to hand deliver the filings to the Commission, both of whom had made similar filings on many prior occasions and neither of whom had previously breached an APO. The Commission therefore found that the associate reasonably delegated the responsibility for physically delivering the filing and service copies. The Commission noted that the only way the associate might have prevented this breach would have been to deliver the filing and service copies herself, which would be unreasonable. The Commission added that in rare circumstances such as these, this incident should not be included in the associate's file or be held against her in any future cases.

The Commission decided to issue warning letters to the clerical worker and the legal assistant. As mitigating factors, it considered that this was the only breach the two had committed within the period generally examined by the Commission for purposes of determining sanctions, that the breach was unintentional, that prompt action was taken to remedy the breach, and that the unknown person who eventually delivered the service copy did not open the envelope and read the BPI. One aggravating factor was that the missing service copy was not reported to the Commission until seven days after it was missing.

IV. Investigations in Which No Breach Was Found

During 2001, the Commission completed six additional investigations in which no breach was found. One investigation was not completed, but was withdrawn by the Office of General Counsel, because the revealed information was not treated as BPI by the Commission. The reasons for a finding by the Commission of no breach included:

- (1) The information disclosed at the hearing was sufficiently changed to make it no longer confidential;
- (2) The information revealed was publicly available;
- (3) The suppliers of the BPI had consented to the use of the information in U.S. District Court litigation and, therefore, providing BPI to the district court judge for *in camera* inspection was not a breach;
- (4) The information was not BPI because it was a general description of the channels of distribution;
- (5) The information revealed was hypothetical and therefore not BPI; and
- (6) The Commission did not treat the information as BPI in its staff report.

By order of the Commission.

Marilyn R. Abbott
Secretary

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