

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

Summary of Commission Practice Relating to Administrative Protective Orders

AGENCY: U.S. International Trade Commission

ACTION: Summary of Commission practice relating to administrative protective orders

SUMMARY: Since February 1991, the U.S. International Trade Commission (“Commission”) has published in the Federal Register reports on the status of its practice with respect to violations of its administrative protective orders (“APOs”) under title VII of the Tariff Act of 1930, in response to a direction contained in the Conference Report to the Customs and Trade Act of 1990. Over time, the Commission has added to its report discussions of APO breaches in Commission proceedings other than under title VII and violations of the Commission’s rules including the rule on bracketing business proprietary information (“BPI”) (the “24-hour rule”), 19 CFR 207.3(c). This notice provides a summary of breach investigations (APOB investigations) completed during calendar year 2015. This summary addresses one APOB investigation related to a proceeding under title VII of the Tariff Act of 1930 and four APOB investigations related to proceedings under section 337 of the Tariff Act of 1930, two of which were related to the same proceedings and were combined. The Commission investigated rules violations as part of one of the APOB investigations. The Commission intends that this report inform representatives of parties to Commission proceedings as to some specific types of APO breaches encountered by the Commission and the corresponding types of actions the Commission has taken.

FOR FURTHER INFORMATION CONTACT: Ron Traud, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone (202) 205-3088. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal at (202) 205-1810. General information concerning the Commission can also be obtained by accessing its website (<http://www.usitc.gov>).

SUPPLEMENTARY INFORMATION: Representatives of parties to investigations or other proceedings conducted under title VII of the Tariff Act of 1930, section 337 of the Tariff Act of 1930, the North American Free Trade Agreement (NAFTA) Article 1904.13, and safeguard-related provisions such as section 202 of the Trade Act of 1974, may enter into APOs that permit them, under strict conditions, to obtain access to BPI (title VII) and confidential business information (“CBI”) (safeguard-related provisions and section 337) of other parties or non-parties. *See, e.g.*, 19 U.S.C. 1677f; 19 C.F.R. 207.7; 19 U.S.C. 1337(n); 19 C.F.R. 210.5, 210.34; 19 U.S.C. 2252(i); 19 C.F.R. 206.17; 19 U.S.C. 1516a(g)(7)(A); and 19 C.F.R. 207.100, *et. seq.* The discussion below describes APO breach investigations that the Commission has completed during calendar year 2015, including a description of actions taken in response to these breaches.

Since 1991, the Commission has regularly published a summary of its actions in response to violations of Commission APOs and rule violations. *See* 56 FR 4846 (February 6, 1991); 57 FR 12335 (April 9, 1992); 58 FR 21991 (April 26, 1993); 59 FR 16834 (April 8, 1994); 60 FR 24880 (May 10, 1995); 61 FR 21203 (May 9, 1996); 62 FR 13164 (March 19, 1997); 63 FR 25064 (May 6, 1998); 64 FR 23355 (April 30, 1999); 65 FR 30434 (May 11, 2000); 66 FR 27685 (May 18, 2001); 67 FR 39425 (June 7, 2002); 68 FR 28256 (May 23, 2003); 69 FR 29972 (May 26, 2004); 70 FR 42382 (July 25, 2005); 71 FR 39355 (July 12, 2006); 72 FR 50119 (August 30, 2007); 73 FR 51843 (September 5, 2008); 74 FR 54071 (October 21, 2009); 75 FR 54071 (October 27, 2010), 76 FR 78945 (December 20, 2011), 77 FR 76518 (December 28, 2012), 78 FR 79481 (December 30, 2013), 80 FR 1664 (January 13, 2015) and 81 FR 17200 (March 28, 2016). This report does not provide an exhaustive list of conduct that will be deemed to be a breach of the Commission's APOs. APO breach inquiries are considered on a case-by-case basis.

As part of the effort to educate practitioners about the Commission's current APO practice, the Commission Secretary issued in March 2005 a fourth edition of An Introduction to Administrative Protective Order Practice in Import Injury Investigations (Pub. No. 3755). This document is available upon request from the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, tel. (202) 205-2000 and on the Commission's website at <http://www.usitc.gov>.

I. In General

A. Antidumping and Countervailing Duty Investigations

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

- (1) Not divulge any of the BPI disclosed under this APO or otherwise obtained in this investigation and not otherwise available to him or her, to any person other than --
 - (i) Personnel of the Commission concerned with the investigation,
 - (ii) The person or agency from whom the BPI was obtained,
 - (iii) A person whose application for disclosure of BPI under this APO has been granted by the Secretary, and
 - (iv) Other persons, such as paralegals and clerical staff, who (a) are employed or supervised by and under the direction and control of the authorized applicant or another authorized applicant in the same firm whose application has been granted; (b) have a need thereof in connection with the investigation; (c) are not involved in competitive decision making for an interested party which is a party to the investigation; and (d) have signed the acknowledgment for clerical personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with this APO);
- (2) Use such BPI solely for the purposes of the above-captioned

Commission investigation or for judicial or binational panel review of such Commission investigation;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to seven years following publication of a determination that the order has been breached;

(2) Referral to the United States Attorney;

(3) In the case of an attorney, accountant, or other professional, referral to the ethics panel of the appropriate professional association;

(4) Such other administrative sanctions as the Commission determines to be appropriate, including public release of, or striking from the record any information or briefs submitted by, or on behalf of, such person or the party he represents; denial of further access to business proprietary information in the current or any future investigations before the Commission, and issuance of a public or private letter of reprimand; and

(5) Such other actions, including but not limited to, a warning letter, as the Commission determines to be appropriate.

APOs in safeguard investigations contain similar though not identical provisions.

B. Section 337 Investigations

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

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

and to make every effort to prevent further disclosure. The APO requires all parties to the APO to either return to the suppliers or destroy the originals and all copies of the CBI obtained during the investigation.

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

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

Commission employees are not signatories to the Commission's APOs and do not obtain access to BPI or CBI through APO procedures. Consequently, they are not subject to the requirements of the APO with respect to the handling of CBI and BPI. However, Commission employees are subject to strict statutory and regulatory constraints concerning BPI and CBI, and face potentially severe penalties for noncompliance. *See* 18 U.S.C. 1905; title 5, U.S. Code; and Commission personnel policies implementing the statutes. Although the Privacy Act (5 U.S.C. 552a) limits the Commission's authority to disclose any personnel action against agency employees, this should not lead the public to conclude that no such actions have been taken.

II. Investigations of Alleged APO Breaches

Upon finding evidence of an APO breach or receiving information that there is a reason to believe one has occurred, the Commission Secretary notifies relevant offices in the agency that an APO breach investigation has commenced and that an APO breach investigation file has been opened. Upon receiving notification from the Secretary, the Office of the General Counsel ("OGC") prepares a letter of inquiry to be sent to the possible breacher over the Secretary's signature to ascertain the facts and obtain the possible breacher's views on whether a breach has occurred.¹ If, after reviewing the response and other relevant information, the Commission determines that a breach has occurred, the Commission often issues a second letter asking the breacher to address the

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

questions of mitigating circumstances and possible sanctions or other actions. The Commission then determines what action to take in response to the breach. In some cases, the Commission determines that, although a breach has occurred, sanctions are not warranted, and therefore finds it unnecessary to issue a second letter concerning what sanctions might be appropriate. Instead, it issues a warning letter to the individual. A warning letter is not considered to be a sanction. However, a warning letter is considered in a subsequent APO breach investigation.

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

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

The Commission’s rules permit an economist or consultant to obtain access to BPI/CBI under the APO in a title VII or safeguard investigation if the economist or consultant is under the direction and control of an attorney under the APO, or if the economist or consultant appears regularly before the Commission and represents an interested party who is a party to the investigation. 19 C.F.R. 207.7(a)(3)(B) and (C); 19 C.F.R. 206.17(a)(3)(B) and (C). Economists and consultants who obtain access to BPI/CBI under the APO under the direction and control of an attorney nonetheless remain individually responsible for complying with the APO. In appropriate circumstances, for example, an economist under the direction and control of an attorney may be held responsible for a breach of the APO by failing to redact APO information from a document that is subsequently filed with the Commission and served as a public document. This is so even though the attorney exercising direction or control over the economist or consultant may also be held responsible for the breach of the APO. In section 337 investigations, technical experts and their staff who are employed for the purposes of the investigation are required to sign onto the APO and agree to comply with its provisions.

The records of Commission investigations of alleged APO breaches in antidumping and countervailing duty cases, section 337 investigations, and safeguard investigations are not publicly available and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552. *See* 19 U.S.C. 1677f(g), 19 U.S.C. 1333(h), 19 C.F.R. 210.34(c).

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

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

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

Counsel have been cautioned to be certain that each authorized applicant files within 60 days of the completion of an import injury investigation or at the conclusion of

judicial or binational review of the Commission's determination a certificate that to his or her knowledge and belief all copies of BPI/CBI have been returned or destroyed and no copies of such material have been made available to any person to whom disclosure was not specifically authorized. This requirement applies to each attorney, consultant, or expert in a firm who has been granted access to BPI/CBI. One firm-wide certificate is insufficient.

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

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

III. Specific APO Breach Investigations

Case 1. A lead attorney and the attorney's partner, both subject to the APO, directed their executive assistant, also subject to the APO, to electronically file the public version of their clients' post-conference brief in a Title VII investigation. Although BPI had been redacted from the brief, the BPI could be restored in the electronic version of the brief. The brief was filed with the Commission and was placed on the Commission's Electronic Document Information System ("EDIS") as a public document. The lead attorney then e-mailed electronic copies of the brief to his clients and a trade publication, which posted a downloadable copy of the brief on its website. None of these recipients were authorized to access the BPI.

Five days after the brief was filed with the Commission, an attorney in the law firm, who was subject to the APO, discovered the breach and brought it to the attention of another attorney who was also subject to the APO. That attorney immediately telephoned the Commission and the trade publication to ask that the brief be removed from public view. The executive assistant then refiled a corrected version of the brief with the Commission and e-mailed the corrected version to the trade publication. At the same time, the lead attorney e-mailed each of his clients asking them to delete his previous e-mail, and subsequently asked them to execute a certification that all copies of the brief had been destroyed and that no BPI had been viewed. Less than a week later, the lead attorney filed a letter with the Commission detailing the circumstances of the possible APO breach and the remedial steps taken.

The Commission determined to sanction the lead attorney, the partner, and the executive assistant, by issuing private letters of reprimand. The Commission considered

the mitigating factors that the breach was unintentional, no employee of the law firm in question has been found to have breached an APO in the past two years, the law firm took immediate corrective measures upon learning of the potential breach, and immediately reported the potential breach to the Commission. Additionally, the law firm has adopted new APO procedures intended to prevent the recurrence of a similar breach in the future. The Commission also considered the aggravating factors that BPI may have been viewed by unauthorized persons, as the document containing retrievable BPI was available to unauthorized persons for five days on EDIS and for up to two days on the trade publication's website, and was e-mailed or forwarded to 37 clients and witnesses, none of whom were on the APO.

Case 2. The Commission determined that two attorneys breached an APO in an earlier section 337 investigation when they attached two documents containing CBI, but labelled public, to the complaint in a new section 337 investigation. In addition, the same materials were sent to the Patent and Trademark Office (PTO), along with additional CBI produced by two other respondents in the earlier investigation, as part of the prosecution history in the reexamination of a patent at issue in both the earlier and current section 337 investigations.

These materials were made available to and were accessed by persons not subject to the APO in the earlier investigation. Access by non-signatories of the APO was confirmed by the audit trail for EDIS. In addition, the CBI was available on the PTO's public record for a short period of time.

The Commission determined to sanction the two attorneys who breached the APO by issuing private letters of reprimand. The Commission considered the mitigating factors that the breach was unintentional, the two attorneys had not breached an APO within the last two years, the breach was properly reported to the Commission, and detailed protocols for handling CBI have since been implemented at the firm where the breach originated. The two attorneys also kept the Commission promptly informed of the status of their continuing efforts to mitigate the breach, including expunging the documents containing CBI that were released to the PTO, and securing confirmation from those who received the documents that their copies had been destroyed.

The Commission also considered the significant aggravating circumstances that the CBI was seen by non-signatories to the APO, and the breaches resulted in two disclosures, through EDIS and the PTO. Additionally, the law firm where the breaches originated did not discover the breaches, but rather was informed by an attorney for a respondent in the earlier section 337 investigation about the CBI labeled as public attached to the complaint in the new investigation.

Case 3. The Commission determined that an attorney at a law firm breached the APO issued in a section 337 investigation when the attorney inadvertently submitted to the U.S. Court of Appeals for the Federal Circuit ("CAFC") a Commission opinion containing CBI. The opinion was attached to the filing of a non-confidential version of a motion. The Federal Circuit uploaded the document to the court's electronic filing

system, and the CBI was publicly available for approximately thirteen weeks before the attorney discovered the disclosure. The attorney immediately reported the disclosure to the Commission and took steps to remedy the breach.

The Commission determined to issue the attorney a private letter of reprimand for breaching the APO. The Commission considered the mitigating factors that the breach was unintentional and that it was discovered by the breaching party. In addition, the attorney promptly notified opposing counsel, the Commission, and the Court regarding the breach and immediately undertook steps to remedy the breach. Finally, the Commission had not found the attorney to be in breach of a Commission APO within the previous two years. The Commission also considered the aggravating factor that the CBI in question was publicly available on the Court's electronic filing system for an extended period of time and therefore was presumably viewed by unauthorized persons.

Case 4. Two law firms in a section 337 investigation were responsible for three breaches of the APO. One firm self-reported that seven of its attorneys and two outside consultants had accessed CBI prior to filing protective order acknowledgements. Shortly thereafter another firm involved in the investigation self-reported that four of its attorneys had accessed CBI prior to filing protective order acknowledgements. The Commission determined to send warning letters to these attorneys and consultants pursuant to Commission rule 201.15(a), 19 C.F.R. § 201.15(a), due to their use of CBI in the investigation prior to filing a protective order acknowledgement.

The Commission determined that the supervisory attorneys responsible for this section 337 investigation in the two firms violated the APO by failing to adequately supervise access to and the handling of CBI by firm attorneys and outside consultants, thereby contributing to or directly disclosing CBI to unauthorized persons. The Commission issued warning letters to the supervisory attorneys in both firms.

The first of the two law firms also self-reported that it had filed a public brief with an attachment containing CBI with the CAFC. This APO violation was initially given a separate APOB investigation number and subsequently combined with the other breaches for the purposes of investigation. The brief was not made available to the public and was replaced with a version in which the CBI was removed. This brief had been transmitted to four clients of the firm who were not subject to the APO. They were contacted and were able to delete the email transmitting the document before they had read the document with the CBI. For this breach the Commission issued warning letters to the two attorneys responsible for filing and transmitting the brief with the attachment containing CBI.

The Commission issued a private letter of reprimand to the law firm. The Commission considered certain mitigating circumstances. These included that the breaches were unintentional, the breaching parties had no prior breaches within the previous two years, the breaching parties took corrective measures to prevent a breach in the future, and the breaches were promptly self-reported to the Commission. With regard to the private letter of reprimand sent to the law firm, the Commission considered the

aggravating circumstance that the firm was involved in two violations of the APO issued in the same section 337 investigation. The Commission found that the firm failed to adequately control access to CBI in the investigation and the appeal of the investigation to the CAFC.

Case 5. This APOB investigation was instituted regarding the filing at the CAFC of a public brief with CBI contained in an attachment. That investigation was combined with *Case 4* and is discussed above.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', with a stylized flourish at the end.

Lisa R. Barton
Secretary to the Commission

Issued: June 22, 2017