

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 investigations for the period ending December 31, 1998. There were no investigations of breaches for other Commission proceedings or for 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 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. 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 1998.

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 12335 (Apr. 9, 1992); 58 FR 21991 (Apr. 26, 1993); 59 FR 16834 (Apr. 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). This report does not provide an exclusive 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 April 1996 a revised edition of *An Introduction to Administrative Protective Order Practice in Antidumping and Countervailing Duty Investigations* (Pub. No. 2961). 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 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 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.

Commission employees are not signatories to the Commission's APOs and do not obtain access to BPI through APO procedure. 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 amendment 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 alleged breacher over the Secretary's signature to ascertain the alleged 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 or aggravating 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 has determined 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. The Commission retains sole authority to determine whether a breach has occurred and, if so, the appropriate action to be taken.

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 properly bracket BPI in proprietary documents filed with the Commission; the failure to immediately

report known violations of an APO; and the failure to adequately supervise non-legal personnel in the handling of BPI.

Sanctions for APO violations serve two basic interests: (a) Preserving the confidence of submitters of BPI in the Commission as 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 within the previous two-year period 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.

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 case 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—Counsel in an investigation notified the Commission that they were unable to locate certain documents containing BPI which were obtained under the Commission's APO. Counsel presumed that the documents had been intentionally discarded by a discharged clerical employee. Counsel instructed an office manager who was not subject to the APO to review certain APO documents in the possession of an attorney covered by the APO to identify the missing documents. The Commission determined that three attorneys breached the APO by failing to properly safeguard materials under the APO and to prevent the disclosure of BPI to unauthorized persons. The attorney who had signed the acknowledgments for clerical personnel breached the APO because, as the person responsible for ensuring that the fired employee complied with the APO, he failed to safeguard the documents. In addition, he and a second attorney breached the APO when they instructed an employee not covered by the APO to review copies of APO documents of a third attorney to determine which documents were missing. The third attorney was found to breach the APO by permitting the employee not covered by the APO to review the documents in his possession. The Commission issued private letters of reprimand to all three attorneys. Certain aggravating factors existed with regard to the breach involving the disposal of the documents. The clerical employee apparently committed an intentional breach of the APO; efforts to identify and recover the documents were not effective; a large volume of the APO information was involved; and since the fate of the materials will likely never be known, it is impossible to determine

whether they have been reviewed by any person not subject to the APO. There were also mitigating factors in that the attorney responsible for supervising the breaching clerical worker had no prior breaches; the breach was reported shortly after counsel became aware of it; and steps were taken to identify and recover the missing documents.

All three attorneys were found to have committed the second breach, *i.e.*, the direction to an individual not covered by the APO to review APO documents and the release of those APO documents to that individual. Two aggravating circumstances were that the Commission, not the attorneys, discovered the breach, and the BPI was viewed by an unauthorized person. The Commission also considered as mitigating factors that this breach was inadvertent and the attorneys involved had no prior breaches.

Case 2—Counsel in an investigation filed with the Commission a proprietary version of a submission which contained unbracketed BPI and filed the public version of the document without deleting the unbracketed BPI. Counsel became aware of the potential breach, notified the Commission and the parties to the investigation, and retrieved and destroyed all copies of the offending document. The Commission determined that three attorneys breached the APO by failing to bracket BPI in the proprietary version of the document and by failing to delete that BPI from the public version. In reaching its decision to issue warning letters, the Commission considered that this was the only breach in which these attorneys were involved in the prior two-year period generally examined by the Commission for purposes of considering sanctions, the breach was unintentional, and counsel promptly notified the Commission of the breach and took action to remedy it. There was no information in the record suggesting that any non-APO signatories had viewed the BPI. The Commission determined that two attorneys did not breach the APO because they were not responsible for drafting the section of the document containing the unbracketed BPI or for reviewing the document for BPI or proper bracketing.

Case 3—Counsel filed a public version of a document which contained unredacted BPI. The document was prepared by economists at an economic consulting firm which had an arrangement with the law firm to assure that documents they prepared would go through three levels of review for APO compliance. The consulting firm was responsible for the first two levels of review and the law firm was responsible

for the final APO review of all materials prepared by the consulting firm. Those responsible for the reviews failed to notice the offending information. The potential breach was identified by the Commission Secretary, who notified an attorney with the law firm who took immediate action to retrieve the offending documents. In response to the Commission inquiry, the law firm asserted that no breach occurred because the bracketed information which was not deleted was publicly available from other sources and was a non-numerical characterization of the prices of one producer which is generally allowed to be publicly disclosed under Commission rules. The Commission did not agree with the law firm's assertions and determined that the APO had been breached because the information was derived from a questionnaire response which is always treated as confidential in its entirety. Further, the information was not available from a public source at the time that it was revealed and was not a non-numerical characterization of aggregate trends as provided for in the Commission rules.

The Commission found that the two economists and two attorneys who were responsible for the final APO review of the submission breached the APO. In issuing warning letters to the two economists and two attorneys, the Commission considered the mitigating factors that the breach was unintentional, resulting from a collective oversight on the part of the economists and the attorneys. The law firm took prompt corrective action as soon as it learned of the breach, and all copies of the offending document were retrieved or destroyed. There was no evidence that persons not subject to the APO actually reviewed the document in question. In reaching its decision, the Commission also considered the aggravating factor that the potential breach was first identified by the Commission Secretary.

The Commission did not find the lead attorney responsible because he had delegated the responsibility for performing the final APO review of the public version of the brief to associates who were experienced in such tasks. Thus, this does not appear to be a case of negligent supervision. In addition, the Commission did not hold responsible for the breach one economist, a legal assistant, and a secretary who were on the APO because they did not have responsibility for the preparation or review of the document.

Case 4—Counsel in an investigation distributed a document which contained unbracketed BPI. The BPI at

issue was contained in a questionnaire response. The potential breach was brought to counsel's attention by an attorney representing another party to the investigation. Counsel immediately informed the Secretary of the potential breach and supervised efforts by law firm personnel to retrieve copies of the document from those who had access to it. Many, but not all, of the copies of the document were retrieved. In responding to the Commission inquiry, counsel asserted that the information was publicly available and that the information was "innocuous" and not BPI because it revealed nothing about the substance of the questionnaire response. The Commission was not persuaded by counsel's assertions and determined that the APO had been breached because questionnaire responses are treated as confidential in their entirety unless the responses contain information that is otherwise publicly available. The Commission determined that the economist responsible for preparing the document and the attorney charged with final APO review of materials breached the APO by circulating the document which contained BPI. In issuing private letters of reprimand, the Commission considered the facts that the decision by the attorney and the economist not to bracket and delete the BPI at issue was not inadvertent, the breach was first identified by counsel for another party, and the attorney and economist were unable to account for numerous copies of the document at issue which may remain in the hands of parties not covered by the APO. In reaching its determination, the Commission also considered the mitigating factors that neither the attorney nor the economist had previously breached an APO, and the attorney reported the breach promptly after learning of it.

Case 5—Counsel in an investigation filed a public version of a document containing bracketed but unredacted BPI in footnotes. The information in question was submitted in a questionnaire response and was not publicly available at the time it was revealed in the public version of the document. The Commission Secretary discovered the possible breach and advised counsel, who took prompt measures to retrieve all copies of the relevant document. Although one party not entitled to access to BPI received a copy of the document, there is no evidence that that person actually reviewed the unredacted BPI.

The Commission determined that the attorney responsible for reviewing the document to assure APO compliance had breached the APO by failing to

redact bracketed BPI from a public submission. The lead attorney and two paralegals were not found responsible for the breach because the sole responsibility for assuring APO compliance was delegated to the non-lead attorney who was experienced in such matters. In reaching its determination to issue a warning letter, the Commission considered the mitigating factors that this was the attorney's first breach of an APO, the breach was inadvertent, and the attorney took immediate action to retrieve the document in question apparently before any non-signatory to the APO reviewed the BPI at issue. The Commission considered as an aggravating factor the fact that it was the Commission Secretary who discovered the breach.

IV. Investigation in Which No Breach Was Found

During 1998, the Commission completed one investigation in which no breach was found. An attorney attempted to discuss information protected under the APO with a person not on the APO. The Commission determined that the attorney did not breach the APO because the information revealed was inaccurate and was not the information protected under the APO. In advising the attorney that he had not breached the APO on technical grounds, the Commission urged him to exercise greater caution in the future.

Issued: April 27, 1999.

By order of the Commission.

Donna R. Koehnke,
Secretary.

[FR Doc. 99-10871 Filed 4-29-99; 8:45 am]

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DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Notice of Charter Renewal

In accordance with the provisions of the Federal Advisory Committee Act (Title 5, United States Code, Appendix 2), and Title 41, Code of Federal Regulations, Section 101-6.1015, the Director, FBI, with the concurrence of the Attorney General, has determined that the continuance of the Criminal Justice Information Services (CJIS) Advisory Policy Board (APB) is in the public interest, in connection with the performance of duties imposed upon the FBI by law, and hereby gives notice of the renewal of its charter, effective December 31, 1998.

The APB recommends to the Director, FBI, general policy with respect to the

philosophy, concept, and operational principles of the various criminal justice information systems managed by the FBI's CJIS Division.

The APB includes representatives from state and local criminal justice agencies; members of the judicial, prosecutorial, and correctional segments of the criminal justice community; a representative of federal agencies participating in the CJIS systems; and representatives of criminal justice professional associations (i.e., the International Association of Chiefs of Police, the Major Cities Chiefs, Major County Sheriffs' Association, the National Sheriffs' Association, the National District Attorneys Association, and the American Probation and Parole Association). All members of the APB are appointed by the FBI Director.

The APB functions solely as an advisory body in compliance with the provisions of the Federal Advisory Committee Act. The charter has been filed in accordance with the provisions of the Act.

Dated: April 21, 1999.

Louis J. Freeh,
Director.

[FR Doc. 99-10866 Filed 4-29-99; 8:45 am]

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DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

April 26, 1999.

The Department of Labor (DOL) has submitted the following public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. Chapter 35). A copy of each individual ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor, Acting Departmental Clearance Officer, Pauline Perrow ({202} 219-5096 ext. 165) or by E-Mail to Perrow-Pauline@dol.gov.

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for BLS, DM, ESA, ETA, MSHA, OSHA, PWBA, or VETS, Office of Management and Budget, Room 10235, Washington, DC 20503 ({202} 395-7316), on or before June 1, 1999.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary