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 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 investigations of breaches in proceedings under Title VII, section 421 of the Trade Act of 1974, as amended, and section 337 of the Tariff Act of 1930, as amended, completed during calendar year 2004. There were no completed investigations of 24-hour rule violations during that period, but there were two violations of Commission rule 210.34(d), the requirement that APO signatories inform the Commission in writing immediately upon learning that there has been a court order or discovery request for confidential business information ("CBI") that has been released to signatories under an APO. 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, section 421 of the Trade Act of 1974, and section 337 of the Tariff Act of 1930, may enter into APOs that permit them, under strict conditions, to obtain access to BPI (Title VII) or confidential business information ("CBI") (section 421, sections 201-204, and section 337) of other parties. See 19 U.S.C. 1677f; 19 C.F.R. 207.7; 19 U.S.C. 2252(i); 19 U.S.C. 2451a(b)(3); 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 2004.

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); 67 FR 39425 (June 7, 2002); 68 FR 28256 (May 23, 2003); 69 FR 29972 (May 26, 2004). 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

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 obtained 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 the 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 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 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 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 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 investigations other than those under Title VII contain similar, though not identical, provisions.

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

An important provision of the Commission's Title VII and safeguard rules relating to BPI/CBI 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.

During 2004, the Commission found two violations of another Commission rule which applies to section 337 investigations exclusively. The rule, 19 C.F.R. 210.34(d), requires APO signatories to report in writing to the Commission immediately upon learning that confidential business information disclosed to him or her pursuant to the protective order is the subject of a subpoena, court or administrative order (other than an order of a court reviewing a Commission decision), discovery request, agreement, or other written request, agreement, or other written request seeking disclosure by him or any other person, of that confidential business information to persons who are not, or may not be, permitted access to that information pursuant to either a Commission protective order or Commission rule 210.5(b).

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 possible breacher's views on whether a breach has occurred.[1] If, after

[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

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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, "[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. 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 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

[1](...continued)
Investigations. During 2004, no investigation regarding a possible violation of a protective order issued during a NAFTA panel or committee proceeding was completed under those procedures.

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 two types of breaches most frequently investigated by the Commission involve the APO's prohibition on the dissemination of BPI 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 within a specified period after the termination of the investigation or any subsequent appeals of the Commission's determination. The dissemination of BPI 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 has 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, 24,103 (June 14, 1990).

In the past several years, the Commission completed APOB investigations which involved 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 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 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, 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. The Commission notes that section 201.15 may also be available to issue sanctions to attorneys or agents in different factual circumstances where they did not technically breach the APO but where 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. In 2004 there were two investigations where the Commission considered issuing sanctions to attorneys under section 201.15, but determined that there was not good cause. In one investigation the attorney had forwarded another party's public pre-hearing brief to his clients not knowing that the brief contained CBI. The Commission considered whether to issue sanctions against him for failure to retrieve the briefs even though he was found not to have breached the APO. The Commission considered mitigating circumstances and the fact that there were no provisions in the rules or the APO that would clarify the Commission's expectations and the attorney's responsibility under those circumstances. The Commission issued a letter warning the attorney and informing him that in the future he needed to be proactive regarding the care of BPI whether he receives it under the APO or from another source during the investigation. To prevent similar future occurrences such as this, the March 2005 version of the Title VII and safeguard APOs have added the requirement that the signatory not divulge any BPI or CBI disclosed under the APO "or otherwise obtained in this investigation."

Also in recent years the Commission has found the lead attorney to be responsible for breaches where he or she failed to provide adequate supervision over the handling of BPI. 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. The Commission has found that a lead attorney did not violate the APO in cases where his delegation of authority was reasonable. A prior breach by a subordinate attorney would suggest that delegation of authority to that attorney may not be reasonable.

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. This APOB investigation involved four different law firms. The first two represented the same respondent in a Commission section 337 investigation. A third firm represented the complainant in the section 337 investigation. A fourth firm had not been involved in the Commission's section 337 investigation and none of its attorneys were signatories to the APO, but it was representing the respondent in a multi-district court litigation (MDL) and in a related matter involving the issuance of subpoenas by another government agency. The Commission found that three attorneys from the first two law firms (respondent's firms) breached the APO in a section 337 investigation when they released APO materials to non-signatories of the APO while responding to subpoenas from another government agency and that they violated Commission rule 210.34(d) because they failed to notify the Commission of the subpoenas.

The Commission found that a partner in the first law firm, who was also the lead attorney, breached the APO because he failed to prevent the production of certain APO documents to non-signatories by an attorney under his supervision. The Commission noted that the lead attorney was aware that the subpoenas had been issued and that they were seeking documents containing CBI obtained under the APO. In spite of this knowledge, there was no information provided in the APOB investigation suggesting that he took any action to prevent the release of the CBI or to obtain permission from all of the sources of the CBI to release the materials. Because he did not notify the Commission in writing about these subpoenas, he violated rule 210.34(d).

The second attorney in the first law firm and one attorney in the second law firm violated rule 210.34(d) by failing to notify the Commission in writing about the subpoenas and they breached the APO by releasing materials containing CBI obtained under the APO to attorneys in the fourth law firm with the knowledge that those documents would be released to the other government agency. The attorneys had argued that they did not breach the APO by releasing the CBI to the fourth law firm because attorneys in that firm could appropriately receive the information under the MDL protective order. The attorneys in the fourth law firm were representing their client in the MDL and the Commission's record had been cross designated by all the parties to the Commission's investigation. The attorneys in the first and second law firms also argued that they did not breach the Commission's APO because the court-ordered protective order was controlling and that protective order permitted release of the documents pursuant to a government issued subpoena. The Commission rejected the attorneys' arguments that the MDL protective order was controlling and determined that the Commission's APO continued to apply to the documents obtained under the APO in the Commission's section 337 investigation. Therefore, the attorneys were required to obtain permission to release the materials from all the sources of the CBI, which they did not do. In addition, the court-issued protective order required

that the person releasing the materials notify the sources of the CBI, which the attorneys also did not do.

The Commission noted that the attorneys who released the materials to the fourth law firm had breached the APO because of their understanding and intent that the information would be released by the fourth law firm to the other government agency in response to the subpoenas. Although it would have been appropriate to give the materials to the fourth law firm for use in the MDL, it was a violation of the APO to give it to the firm for the purpose of releasing it to the other government agency. The Commission noted that it retained the authority to interpret its own APO and to determine whether or not cross-designation released the CBI from the Commission's APO jurisdiction. In addition, the Commission found that it was an aggravating circumstance that the attorneys who breached had taken actions based on their own interpretation of the APO rather than seeking advice from the Commission regarding the APO's jurisdiction over cross-designated materials that were obtained under the Commission's APO.

The Commission reached the decision to sanction the attorneys who breached with a private letter of reprimand rather than a warning letter after considering the mitigating circumstance that it was their first breach of a Commission APO, but noting the aggravating circumstances that they had also violated Commission rule 210.34(d) by not informing the Commission immediately of the government subpoena; that they made independent interpretations of the Commission's APO, without seeking advice from the Commission about whether it applied to their release of the CBI obtained under the Commission's APO; and that there is a presumption that at least one non-signatory at the other government agency reviewed the CBI after it was given to the agency in response to the subpoenas.

The Commission found that two other attorneys in the first law firm also violated Commission rule 210.34(d) but, along with the remaining APO signatories at the first two firms, did not breach the APO. The two attorneys were issued warning letters for violating the rule. The Commission found that the attorneys from the third firm (complainant's law firm) did not breach the APO nor did they violate Commission rule 210.34(d). The Commission also determined to take no action against attorneys in the fourth law firm because they were not signatories to the APO and, therefore, did not breach the APO when they passed the APO documents on to the government agency. In addition, since they did not practice before the Commission, and had no present intention to do so, the Commission determined that it would not use Commission rule 19 C.F.R. § 201.15(a) to sanction them for their role in the release of the APO materials.

Case 2. The Commission found that one attorney breached an APO by failing to bracket CBI on a page of an attachment in the confidential version of the prehearing brief filed with the Commission and to delete that CBI and other CBI that was bracketed and left on another page of the attachment to the public version of the brief. The Commission issued a private letter of reprimand. The Commission determined that two other attorneys from the same firm and a secretary did not breach the APO. The two other attorneys did not have final responsibility for preparation and review of the bracketing and the secretary did not have a direct role in the circumstances contributing to a breach.

The attorney who breached the APO took immediate action to retrieve and replace copies of the page of the attachment containing unbracketed CBI but he failed to redact the bracketed

information on another page of the attachment both in his original filing and in the replacement filing. He acknowledged his breach with regard to the CBI that had not been bracketed in the confidential brief but argued that the information left in brackets on a previous page of the attachment was not CBI because it was pricing data that was not company specific. The Commission did not accept this argument, noting that the data was in numerical form and that the Commission treats all questionnaire responses as CBI in their entirety unless the information is otherwise available from a public source, or is a non-numerical characterization of aggregate trends. The attorney also argued that the data were not CBI because release of the data would not impair the Commission's functions or cause substantial harm to the competitive position of the person, firm, corporation or other organization from which the information was obtained. The Commission rejected this argument also because disclosure of the pricing data would likely harm the Commission's ability to collect critical pricing data, since firms could become wary of providing the Commission with the pricing data in future investigations that are needed for the agency to perform its statutory functions.

The Commission issued a private letter of reprimand after considering the mitigating circumstances: that this was his first breach and that the breach was inadvertent. In addition, his firm acted quickly to replace the last page of the public attachment containing the unbracketed CBI, and reeducated its personnel on APO practices and instituted new requirements to strengthen its APO procedures. The Commission noted two aggravating circumstances: (1) non-signatories had read the CBI, and (2) the attorney twice failed to redact bracketed CBI from the public version of the brief and did not take corrective action with regard to that particular CBI. He was also ordered to retrieve and destroy any copies of the page containing the bracketed CBI and certify to the Commission Secretary that he had done so within thirty days.

The Commission also found that there was not good cause for sanctioning an attorney in a different law firm for failing to retrieve from his clients the public version of the pre-hearing brief containing the bracketed and unbracketed CBI which had been served on him by the attorney in the first firm. He sent the brief to his clients, relying on the fact that the brief had been clearly marked as a public document. The Commission warned the attorney in the second firm that it would hold him accountable in the future if he failed to take a more proactive approach to protect CBI that comes under his control and he becomes aware that it is CBI.

The attorney in the second firm had argued that he had not retrieved the brief because he had not received it under the APO. He stated that the attorney in the first firm had not asked him to retrieve and destroy the pages containing CBI and the Commission had not instructed him to do so. The attorney also raised questions about when he actually knew that the unbracketed and bracketed information was indeed CBI. Initially, the Commission had determined that he had not breached the APO because he did not know the brief contained CBI when he passed it along to his clients and he had not obtained the material under the APO.

However, the Commission considered whether to sanction him under Commission rule 201.15 for his failure to safeguard the materials after he learned they contained CBI. In deciding to warn the attorney instead of sanctioning him, the Commission considered the facts that it was the first time he was subject to a possible sanction under section 201.15 and that he had never breached an APO. In addition, he took prompt action to notify the Commission about the information in the brief that he later learned to be CBI, and the instructions given to him by the attorney in the first firm were not clear regarding retrieval and destruction of the pages

containing CBI. Moreover, the Commission noted that its APO and rules did not explicitly address the need of the attorney in the second firm to take more active steps to safeguard CBI whether or not it was acquired by him through the APO directly or because of a breach committed by another party. In addition to the warning letter, the Commission ordered him to retrieve the copies of the brief and certify to the Commission that they were retrieved and destroyed. As noted earlier, the Commission has updated its rules to address this scenario.

Case 3. The Commission determined that an attorney and a secretary breached the APO for failing to redact business proprietary information from the public version of a brief. The Commission issued a private letter of reprimand to the attorney who was responsible for the preparation of the public version of the brief but who failed to follow the law firm's procedures of reviewing the brief for BPI before filing it with the Commission and sending it to other parties and to the attorney's client. The Commission issued a private letter of reprimand, even though it was the attorney's first breach, because a recipient of the brief who was not a signatory to the APO had read several pages of the brief which included BPI.

The Commission found that the secretary, who had forgotten to run a computer program that would delete BPI from brackets in the brief, prepared the public version of the brief for filing with the Commission, yet failed to ensure that BPI had been completely deleted from the brackets. In reaching its decision on the appropriate sanction, the Commission considered the facts that (1) the BPI had been read by a non-signatory and (2) the secretary had previously breached an APO within the period generally examined by the Commission for purposes of determining sanctions. The Commission issued a private letter of reprimand with an additional requirement that the secretary, for one year, must certify with respect to any public version of a brief that he helped prepare, that he had inspected every page to ensure that all bracketed material had been removed.

Case 4. The Commission determined that an attorney in one law firm had breached the APO by failing to destroy or return APO materials after the Commission's Section 337 investigation was terminated. In addition, the Commission found that the same attorney failed to comply with Commission rule 210.34(d)(1) by failing to notify the Commission immediately upon learning that requests for production of CBI obtained under the APO were made in a parallel district court litigation. The Commission issued a warning letter for the breach and for the rule violation.

The Commission also determined that attorneys from a second law firm, representing the same client in the Commission investigation, did not breach the APO even though they did not return or destroy certain material obtained under the APO which contained a third party's CBI. The attorneys had entered into an agreement with the third party which allowed the attorneys to retain the material under the APO. They also retained material from another third party pending a response about whether to return or destroy the information. In response to a Commission inquiry about those documents, the attorneys responded that the third party had not marked any of those documents as containing CBI and there has been no further indication from the submitter that those documents contain CBI. The attorneys from this second law firm also indicated that they were not a part of the parallel litigation and, therefore, were not subject to any requests to produce CBI from the Commission investigation.

In determining that the attorney from the first law firm did breach the APO for failure to

return or destroy the APO materials, the Commission considered his argument that discovery requests in a parallel litigation barred his compliance with his APO obligations. The Commission found the argument not persuasive because APO obligations are mandatory – not conditioned by other court proceedings. In addition, the district court judge ultimately ruled on the discovery request and allowed production but with the CBI redacted. Therefore, continued retention of the CBI materials was not necessary for discovery purposes. The Commission also did not find compelling the argument that destruction of the documents could lead the factfinder in the parallel litigation to take a negative inference against the party destroying the documents. The Commission found that the fact finder may reject any adverse inference if the documents were destroyed for an "innocent reason," and that the mandatory obligation to "return or destroy" in the Commission's APO establishes an "innocent reason." Finally, in determining whether or not there was a breach, the Commission found unpersuasive the attorney's concern that APO compliance could lead to a violation under his state's rules of professional conduct.

During the sanctions phase of the investigation, the Commission determined not to sanction the attorney but to issue him a warning letter for the breach and for the violation of Commission rule 210.34(d). In reaching this conclusion, the Commission considered several mitigating circumstances including that CBI was not disclosed to any unauthorized persons and that the attorney had not previously breached a Commission APO. In addition, the Commission determined that, although it seemed unlikely that the attorney would be disciplined under his state's rules of professional conduct for an unlawful destruction of documents relevant to the court proceeding, there is no authority addressing the issue in a definitive manner. Therefore, the Commission decided to acknowledge that a legitimate doubt remained for the attorney and treated his concern about his state's Bar rules as a mitigating factor.

The Commission also considered several aggravating circumstances, including the long duration of the breach, the fact that the documents were not destroyed until the opposing counsel in the parallel litigation agreed, the fact that the attorney did not consider returning the documents to the source of the CBI rather than destroying the documents to avoid possible concerns about his state Bar rules, and the attorney's failure to seek Commission guidance and clarification of his ethical or discovery obligations from the district court.

Case 5. The Commission found that one lead attorney breached the APO by failing to redact bracketed BPI from the public version of his firm's final comments in a Commission Title VII investigation. The Commission issued him a private letter of reprimand. The Commission found that none of the other attorneys or staff at the law firm breached the APO as none of them was involved in the incident or neglected any supervisory responsibilities leading to the breach.

The attorney had argued that the unredacted information was not BPI because it involved data for more than three foreign producers, no one of whom accounted for more than 90 percent of the inventory ratio applicable to total cumulated shipments. The Commission found the data to be BPI because although similar data were treated as public in the preliminary staff report, the data had changed in such a way that certain foreign producers would be able to ascertain information about other producers using the earlier data that had been treated as public.

The Commission reached its decision to issue a private letter of reprimand after consideration of the mitigating factors that the attorney's failure to redact the information was unintentional; that he had not been involved in any breaches in the two years preceding the

breach; and that his firm had implemented new procedures in order to ensure that redacted documents would be reviewed by at least two separate individuals, including the senior attorney responsible for the submission. The Commission also considered aggravating factors that made the private letter of reprimand rather than a warning letter the more appropriate action. The Commission noted the attorney's acknowledgment that the unredacted information was made available to the public; his failure to take corrective measures, other than filing and serving a revised page, to limit the dissemination of BPI to non-signatories and to ascertain whether the BPI had been read by non-signatories; his conscious decision to waive internal firm procedures and forego review of the public version of the document by a second person; and the fact that the Secretary's Office and not anyone at his firm discovered the error.

Case 6. The Commission found that one attorney and a legal assistant in one law firm and a legal assistant in another law firm breached the APO by failing to redact CBI from the public version of the administrative law judge's initial determination (ID) from a Commission 337 investigation which was attached to a claim construction brief in district court patent litigation. The Commission issued warning letters to all three after considering that none of them had breached an APO in the two-year period usually considered by the Commission in determining sanctions; the breach was unintentional; prompt action was taken to remedy the breach; and copies of the brief sent to three non-signatories were retrieved and the non-signatories stated that they did not review the CBI. There was one aggravating circumstance. The brief was available in the district court public file for a significant amount of time - one month - but based on the attorney's inquiries with the court, it appears that no unauthorized person actually viewed the CBI. The Commission determined that an attorney in the second law firm did not breach the APO as he was not involved in the preparation, filing, or distribution of the brief in court.

Case 7. The Commission found that three attorneys breached an APO by filing a "non-confidential" version of their client's brief in the U.S. Court of Appeals for the Federal Circuit which contained CBI covered by the APO issued in a Commission section 337 investigation. One other attorney was found not to have breached because he did not help prepare the non-confidential brief but, instead, took actions to prevent disclosure of the CBI to non-signatories.

The Commission issued warning letters to the three attorneys. The circumstances of the breach were mitigated by the facts that none of the attorneys had breached an APO within the previous period typically considered by the Commission for the determination of sanctions, the breach was unintentional, the attorneys took prompt action to remedy the breach, and no non-signatory actually read the CBI.

Case 8. The Commission found that one attorney and one paralegal breached the APO in a Commission title VII investigation by failing to redact BPI from the public version of a pre-hearing brief. The Commission issued warning letters to the attorney and paralegal. The circumstances of the breach were mitigated by the fact that this was the only breach in which either the attorney or paralegal was involved in the two-year period generally examined by the Commission for the purpose of determining sanctions; the breach was unintentional; prompt action was taken to remedy the breach; and actions were taken by the firm to improve APO compliance procedures. The lead attorney was found not to have breached because he was out of

the country and did not participate in the preparation of the prehearing briefs and because he had reasonably delegated the responsibility to another attorney who had no prior breaches. The Commission did not consider as a mitigating circumstance the attorney's argument that the unredacted BPI was not highly sensitive proprietary information.

Rule Violations - In two section 337 investigations, the Commission found that attorneys had failed to notify the Commission in writing immediately upon learning that CBI disclosed to the attorney pursuant to an APO was the subject of a "subpoena, court or administrative order (other than an order of a court reviewing a Commission decision), discovery request, agreement, or other written request seeking disclosure, by him or any other person, of that CBI to persons who are not, or may not be, permitted access to that information pursuant to either a Commission protective order or [19 C.F.R.] § 210.5(b)." In both cases the Commission issued warnings to the attorneys. Discussions of these rule violations can be found in the summaries of Cases 1 and 4 above.

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

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