

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

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## 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 completed during calendar year 2007 of breaches in proceedings under Title VII and section 337 of the Tariff Act of 1930, the only proceedings in which investigations of breaches were completed during the year. The Commission intends that this report inform representatives of parties to Commission proceedings as to some specific types of APO breaches encountered by the Commission and the corresponding types of actions the Commission has taken.

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

#### SUPPLEMENTARY INFORMATION:

Representatives of parties to investigations or other proceedings 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, section 337 of the Tariff Act of 1930, and North American Free Trade Agreement (NAFTA) Article 1904.13, 19 U.S.C. 1516a(g)(7)(A) 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 CFR 207.7; 19 CFR 207.100, et seq.; 19 U.S.C. 2252(i); 19 U.S.C. 2451a(b)(3); 19 CFR 206.17; 19 U.S.C. 1337(n); 19 CFR 210.5, 210.34. The discussion below describes APO breach investigations that the Commission has completed during calendar year 2007, including a description of actions taken in response to these breaches.

Since 1991, the Commission has published annually a summary of its actions in response to violations of Commission APOs and the 24-hour rule. See 56 FR 4846 (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); 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); and 72 FR 50119 (August 30, 2007). 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 Web site 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 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 decisionmaking for an interested party which is a party to the investigation; and (d) have signed the acknowledgment for clerical personnel in the form attached hereto (the authorized applicant shall also sign such acknowledgment and will be deemed responsible for such persons' compliance with this APO);

(2) Use such BPI solely for the purposes of the above-captioned Commission investigation or for judicial or binational panel review of such Commission investigation;

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Disbarment from practice in any capacity before the Commission along with such person's partners, associates, employer, and employees, for up to 7 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/CBI to file a public version of the document. The rule also permits changes to the bracketing of information in the proprietary version within this 1-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/CBI. The Commission urges parties to make use of the rule. If a party wishes to make changes to a document other than bracketing, such as typographical changes or other corrections, the party must ask for an extension of time to file an amended document pursuant to section 201.14(b)(2) of the Commission's rules.

## II. Investigations of Alleged APO Breaches

Upon finding evidence of 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.<sup>1</sup> If, after reviewing the response and other relevant information, the Commission determines that a breach has occurred, the Commission often issues a second

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

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 CFR 207.7(a)(3)(B) and (C); 19 CFR 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

<sup>1</sup> 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 CFR 207.100–207.120. Those investigations are initially conducted by the Commission's Office of Unfair Import Investigations.

responsible for complying with the APO. In appropriate circumstances, for example, an economist under the direction and control of an attorney may be held responsible for a breach of the APO by failing to redact APO information from a document that is subsequently filed with the Commission and served as a public document. This is so even though the attorney exercising direction or control over the economist or consultant may also be held responsible for the breach of the APO.

The records of Commission investigations of alleged APO breaches in antidumping and countervailing duty cases are not publicly available and are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552, and section 135(b) of the Customs and Trade Act of 1990, 19 U.S.C. 1677f(g). *See also* 19 U.S.C. 1333(h).

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 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/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-legal personnel in the handling of BPI/CBI.

In the past several years, the Commission completed APOB investigations that 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 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 CFR 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. 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.

The Commission's Secretary has provided clarification to counsel representing parties in investigations relating to global safeguard actions, section 202(b) of the Trade Act of 1974, investigations for relief from market disruption, section 421(b) or (c) of the Trade Act of 1974, and investigations for action in response to trade diversion, section 422(b) of the Trade Act of 1974, and investigations concerning dumping and subsidies under section 516A and title VII of the Tariff Act of 1930 (19 U.S.C. 1303, 1516A and 1671–1677n). The clarification concerns the requirement to return or destroy CBI/BPI that was obtained under a Commission APO.

A letter was sent to all counsel on active service lists in mid-March 2007. Counsel were cautioned to be certain that each authorized applicant files within 60 days of the completion of an 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. This same information is also being added to notifications sent to new APO applicants.

In addition, attorneys representing clients in section 337 investigations should send a notice to the Commission if they are no longer participating in a section 337 investigation or the subsequent appeal of the Commission's determination. In Case 10 of the summaries of completed 2005 APOB investigations published in the **Federal Register** on July 12, 2006 (71 FR 39361), the Commission found that a lead attorney, who left a law firm which

represented a respondent in a Commission investigation after the investigation was completed but before the appeal of the Commission's determination had ended, breached the APO by not informing the Commission of his departure and that he should no longer be a signatory to the APO. In addition, the Commission found that he had also breached the APO by failing to ensure that his former firm complied with the APO requirements for returning and destroying the confidential materials obtained under the APO. Thus, individual counsel in section 337 investigations should take care to inform the Commission of their departure from a position for which they are a signatory to a Commission APO and to inform the Commission about their disposition of CBI obtained under the APO that is 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 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:* The Commission determined that three attorneys and two legal assistants breached an APO by failing to redact unbracketed BPI in the public version of a posthearing brief and serving it on attorneys named on the public service list. The Commission also found that two of the attorneys responsible for this first breach, along with a fourth attorney, committed a second breach by using the BPI obtained under APO on behalf of one client in a submission to a World Trade Organization (WTO) dispute resolution panel on behalf of another client.

The Commission issued a private letter of reprimand to three of the attorneys for the first breach. In reaching its decision concerning those attorneys, the Commission considered the facts that (1) the breach was discovered by the Commission Secretary; (2) a long period of time, approximately eight

months, elapsed between the filing of the brief and the discovery of the breach; (3) the firm could not provide a definitive response as to whether the brief containing BPI was read by non-signatories; and (4) while the lawyers responded quickly with regard to parties other than their clients, they delayed contacting their own clients until two days after notification of the breach. The Commission did note that mitigating circumstances existed because the breach was inadvertent, the attorneys had no prior APO breaches within the two-year period normally considered by the Commission for sanctions purposes, the firm took immediate steps to correct the breach, and the firm strengthened its internal procedures to require that a third attorney review the public version of documents to ensure that all redactions have been implemented. The Commission issued a warning letter to the legal assistants finding that they were acting under the supervision of the attorneys at the time of the breach.

With respect to the second breach, the Commission considered the mitigating circumstance that, although the submissions to the WTO dispute resolution panel contained statements that could not have been made without knowledge of the confidential record, no BPI was disclosed to unauthorized persons. As was stated above, two of the attorneys responsible for this second breach were issued private letters of reprimand which included the Commission's consideration of this second breach. The third attorney who was responsible for only the second breach was issued a warning letter. The Commission decided to issue a warning letter because, although the breach was not discovered by his firm, no BPI was disclosed to unauthorized persons, he had not breached an APO in the past two years, and the breach was unintentional.

*Case 2:* The Commission determined that several attorneys and one paralegal breached an APO by failing to return or destroy certain materials at the conclusion of a Commission section 337 investigation. The Commission also found that one of the attorneys and the paralegal committed a second breach by permitting the disclosure of CBI subject to an APO to unauthorized persons at their firm.

Upon conclusion of this section 337 investigation, the parties to the investigation agreed that, notwithstanding the APO, they would retain an archival copy of certain documents produced by each other. However, documents not subject to that separate agreement and any CBI produced by third parties were to be

returned or destroyed. The attorneys and the paralegal failed to return or destroy all of the materials containing CBI that were not covered by the agreement.

The Commission issued warning letters to ten attorneys for the first breach. These attorneys had no prior APO breaches within the two-year period normally considered by the Commission for sanctions purposes, and the breach was unintentional.

The Commission issued private letters of reprimand to the attorney and paralegal who had committed both the first and second breaches. In reaching its decision, the Commission considered the facts that (1) there were two breaches, (2) the CBI appeared to have been viewed by at least some unauthorized firm personnel before the CBI was discovered and secured, and (3) there was a significant delay in notifying the Commission of the second breach. The Commission did note that mitigating circumstances existed because both of the breaches appeared to have been inadvertent, neither the attorney nor the paralegal had committed breaches prior to the breaches in this instance, and the attorney was cooperative and took steps to protect the CBI and inform the Commission of the second breach.

The Commission also found that four other attorneys and two paralegals did not breach the APO. These individuals were not in a position to arrange for the return or destruction of the CBI at issue.

The Commission also considered whether there was a violation of 19 CFR 210.34(d) by two attorneys for failing to report to the Commission immediately upon learning that CBI disclosed to them pursuant to the protective order was the subject of a discovery request. The Commission decided that there was no violation because the attorneys fulfilled their obligation by reporting to the Commission within four days of the discovery request.

*Case 3:* The Commission determined that three attorneys breached an APO by their failure to redact certain BPI in the public version of a prehearing brief. In the brief, the attorneys provided import data from multiple countries for the subject merchandise. The text indicated that data from one named importer was not included. On the next page the brief contained a chart with import data that included the previously excluded importer, although that fact was not stated.

The Commission found the lawyers' argument that the information in the chart did not contain BPI was unpersuasive. The amount in the chart was larger than what had been

discussed on the previous page where the one importer's data was excluded. In addition, the data in the chart corresponded closely to BPI in the prehearing staff report. Although the lawyers had argued that the information was publicly available, the Commission noted that the submissions regarding this matter identified no public source for the information.

The Commission issued warning letters to the three attorneys for this breach. The Commission noted that mitigating circumstances existed because the breach was inadvertent, the attorneys had no prior APO breaches, they took immediate steps to correct the breach, they promptly reported the breach to the Commission's Secretary, and there was no evidence that any unauthorized individual viewed the BPI.

*Case 4:* The Commission found that a lead attorney breached an APO by forwarding an e-mail from the Commission with an attachment containing BPI to executives of a client who were not subject to the APO.

The attachment was a copy of the Commission's confidential staff report sent by a Commission staff member. Although the e-mail did not identify the attachment as containing BPI, the name of the attachment ended in "BPI," and, once opened, each of its pages were identified as confidential.

The attorney forwarded the e-mail to three executives at his client's firm without opening the attachment or realizing that it contained BPI. After forwarding the e-mail the attorney opened the attachment and immediately contacted the recipients and instructed them to delete the attachment without reading it. The attorney then informed the Commission of the breach.

In his affidavit the attorney indicated that all recipients deleted the attachment without opening it. The attorney also stated that in his experience Commission staff did not distribute BPI material by e-mail.

The Commission has consistently held that an APO breach occurs when a document containing BPI is distributed to unauthorized persons even if they do not view the BPI. Accordingly the Commission found that a breach occurred in this case. Further, the Commission found that a cursory inspection of the attachment would have indicated that it contained BPI, which suggests the attorney bore some responsibility for the breach.

The Commission issued a warning letter rather than a private letter of reprimand because the breach was unintentional, the attorney had not committed a breach within the most

recent two-year period normally considered by the Commission for sanctions purposes, the attorney acted promptly to mitigate the breach by instructing the recipients of the e-mail to delete the attachment, and it appeared that BPI was not viewed by any unauthorized persons.

*Case 5:* The Commission found that an attorney breached the APO by sending an e-mail with an attachment containing BPI to two employees of his client who were non-signatories to the APO.

The Commission issued a warning letter to the attorney because there were several mitigating circumstances and no aggravating circumstances. The breach was unintentional and the attorney discovered the breach promptly. The attorney immediately notified the client's employees not to read the attachment and to delete the e-mail with its attachment. Thus, it appeared that neither of the client's employees viewed the attachment. In addition, this was the attorney's only breach in which he had been involved in the previous two years.

*Case 6:* The Commission found that an associate attorney breached an APO when he failed to redact BPI from the public version of a post-hearing brief. The Commission found that the lead attorney did not breach the APO because he did not participate in finalizing the brief and he reasonably relied on the associate attorney.

The Commission notified the associate attorney that the public version of his firm's brief contained BPI. The BPI was contained in an exhibit that escaped the firm's review procedure because of a last-minute change. Upon being notified of the breach, the associate attorney asked each party on a public service list to confirm that the BPI was either not received by any unauthorized party or was recalled from any unauthorized party and destroyed. According to his affidavit, the associate attorney believed that no unauthorized party received the BPI.

Because BPI was made available to unauthorized parties, the Commission found that the associate attorney breached the APO. The Commission issued a warning letter rather than a private letter of reprimand to the associate attorney even though the Commission rather than the associate attorney's firm discovered the breach. The mitigating circumstances the Commission considered were that the breach was unintentional, the associate attorney acted immediately to cure the breach, no person involved in the investigation had committed previous violations of an APO, and the firm's

submissions supported a finding that no unauthorized parties viewed the BPI.

*Case 7:* A law firm was involved in two breaches of an APO. Both breaches involved service on other law firms that were no longer on the confidential service lists. The Commission found that the first breach was the responsibility of a paralegal. She had been charged with preparing the confidential version of a document containing expert testimony for filing and service. Although it was office procedure to check the certificate of service against the Commission's Web site, she failed to do so. As a result of this error and her use of an outdated service list, a law firm that was not entitled to receive BPI was served with the confidential version of the expert testimony. This first breach was not discovered until after discovery of the second breach.

The second breach occurred two weeks later when two attorneys, a partner who was the lead attorney and an associate, finalized the firm's posthearing brief for filing and service. They had been provided with the same outdated service list by the paralegal, who then left the office on a medical emergency; the two attorneys failed to check whether the certificate of service was current. As a result of the attorneys' use of the outdated service list, two firms that were not entitled to receive BPI were served with the confidential version of the posthearing brief.

The lead attorney discovered the second breach on the first business day after the filing of the posthearing brief and immediately contacted the non-signatory recipients of the posthearing brief. Both firms indicated that the packages had not been opened and returned them with the seals on the internal envelopes intact. The first breach was then discovered when one of the firms receiving the posthearing brief also returned the confidential expert testimony and informed the associate attorney that the document had been stored for safekeeping and never examined.

The Commission found the paralegal responsible for the first breach because she failed to check the certificate of service against the latest APO service list. She was issued a warning letter and was not sanctioned because she had not breached an APO within the previous two years, the breach was unintentional, no non-signatory read the BPI, prompt action was taken by the firm to remedy the breach, and the firm had taken measures to assure that this type of error would not occur in the future.

The Commission found the partner and the associate responsible for the

second breach. The partner received a warning letter, and the associate a private letter of reprimand. The Commission considered the mitigating circumstances that the breach was unintentional, the unauthorized recipients did not read the BPI, the breach was discovered promptly and immediate action was taken to remedy the breach, and, solely with regard to the partner, he had not breached an APO within the previous two years. The associate received a private letter of reprimand because he had been found liable for a breach of another APO within the previous two years.

*Case 8:* The Commission found a lead attorney, an associate attorney, and a paralegal liable for the breach of an APO for failing to delete all of the bracketed information from the public version of a brief filed by their law firm.

The associate attorney instructed the paralegal to prepare an initial public version of the brief by running a computer macro on the electronic document and manually redacting non-electronic portions. The associate attorney reviewed the brief and tabbed a number of bracketing revisions. A second attorney, not found liable for the breach, reviewed the tabbed revisions and suggested more changes. The associate attorney then told the paralegal to make the changes. However, the associate attorney later found a new issue regarding conformity of the BPI and public versions that required a new public version. Citing time constraints and a busy filing day, the associate attorney chose to perform the final check of the brief himself instead of following firm procedure of asking a third attorney to review the public version. The revised BPI and public versions were then filed with the Commission. Later the same day, the second attorney called the associate attorney at home to say that the paralegal, while preparing service copies of the brief, had found text in the public version that was bracketed but not deleted. The associate attorney contacted the paralegal and told her not to serve the public versions of the brief that night because it was late and he needed to review the correction. The next morning, the associate attorney telephoned the Secretary's Office to report the issue, and the paralegal arrived with replacement pages for the Commission copies. As the Commission copies had not been distributed, the paralegal was able to replace the pages and shred the incorrect pages. The paralegal then distributed the service copies to the parties.

The Commission found the paralegal responsible for the breach because the

paralegal had the responsibility to run the computer macro on the brief to redact the bracketed information. However, the Commission determined that there were several mitigating factors because she discovered the breach herself, immediately reported the information to others in the firm, moved promptly to mitigate the effects of the breach, and had not been found to have violated the APO in the last two years; in addition, no unauthorized persons viewed the unredacted BPI.

Consequently, the Commission decided to issue a warning letter to the paralegal.

The Commission found the lead attorney responsible for the breach because he had failed to provide adequate supervision over the associate attorney in this matter although he had reason to know that the associate attorney had previously breached the APO in a separate and unrelated proceeding. The Commission decided to issue a warning letter to the lead attorney because the breach was unintentional, no unauthorized persons actually saw the unredacted BPI, the breach was discovered promptly and remedied expeditiously, and this was the only breach in which the lead attorney had been involved in the past two years.

The Commission found the associate attorney responsible because he had final responsibility for reviewing the document and authorized the filing of the document. The Commission considered the mitigating factor that the attorney acted quickly to remedy the situation. Technically the attorney's decision to delay serving the public version on the parties violated the Commission's twenty-four hour rule, but the Commission determined that the violation of the rule did not lead to any prejudicial effect because hand delivering the brief the next day ensured the parties received the brief at the same time they would have received it via overnight mail. Because of the lack of prejudicial effect, the attorney's method of mitigating the breach was not determined to be an aggravating factor.

The associate's prior breach, however, was found to be an aggravating circumstance. Although the breach occurred more than two years previously, the Commission issued a sanction for the prior breach within the two year period. An additional aggravating factor was that the internal firm procedure that the associate attorney overrode, by not having a third attorney review the brief, was the procedure established in response to the attorney's first breach.

Because the attorney had already received a private letter of reprimand for

the first breach, the Commission in this case issued a private letter of reprimand containing an additional condition. The associate attorney was prohibited from being the final decision-maker at his law firm on any APO issues for a period of twelve months. For example, he cannot be the final decision-maker at his firm as to whether certain information is BPI, and he cannot be the final person to review the public version of a document before it is filed with the Commission or served on the relevant parties.

*Case 9:* A law firm filed a public version of its final comments that contained unbracketed BPI. The Commission found that the two associate attorneys who were responsible for preparing the public version of the comments breached the APO.

Shortly after the law firm submitted the public version to the Commission, counsel for one of the companies involved in the investigation contacted the law firm to request the bracketing of additional information in the law firm's final comments. One of the attorneys of the filing firm promptly notified the Commission Secretary's office, stopped service of the first public version of the final comments on the parties, and ensured that the Secretary did not place the first public version on the record. When the law firm submitted a revised public version of its final comments, counsel for the same company again contacted the law firm to request the bracketing of more information. That same day, the law firm prepared a second revised public version of the final comments, filed that version with the Commission, and served it on the parties. The law firm also contacted the parties who received the first revised version. One of the parties confirmed that the first revised version was destroyed unopened, while the other parties confirmed only destruction.

The law firm argued that the information in question was not BPI because the type of information in question was general and normally not treated as BPI. However, the Commission found that the information was BPI and that it had been consistently bracketed by the Commission and other parties to protect the confidential information contained in the staff report and other briefs. The associate attorneys requested that the Commission reconsider its finding that a breach occurred on the basis that the information at issue was not BPI. The Commission denied their request because they did not provide any new arguments or evidence in support of a change in the finding about whether the information was BPI.

The Commission determined that the lead attorney for the law firm was not responsible for the breach because his reliance on the associates for preparing the public version of his firm's final comments was reasonable. The two associates had substantial experience preparing public versions of briefs and, at the time of his delegation to them, had no record of violating another APO within the previous two years.

One of the associate attorneys received a warning letter for his breach. The Commission considered the mitigating circumstances that the breach was inadvertent and that the attorneys took immediate steps to notify the Commission, retrieve the offending documents, and prepare corrected copies of the final comments. The attorney receiving the warning letter had committed no APO breaches in the previous two years. Although there was an aggravating circumstance—the likelihood that unauthorized persons had viewed the BPI—the Commission chose not to sanction the attorney in light of the mitigating circumstance that the nature of the BPI and the attorney's contact with the submitter of the information may have left him uncertain as to the status of the information. The Commission did advise the attorney, however, that, in the future, he should consult with Commission staff if he is uncertain about whether particular information is BPI.

The second associate attorney received a private letter of reprimand for his breach. The Commission considered all of the same mitigating circumstances for this attorney except with respect to prior breaches. After the Commission determined that the attorney had breached the APO in this investigation, he was found to have breached the APO in another investigation that occurred prior to the breach in this investigation. Therefore, the Commission found an additional aggravating circumstance that warranted a private letter of reprimand.

*Case 10:* The Commission found that a lead attorney and her legal secretary breached the APO by serving the confidential version of the final comments prepared by their firm on a law firm that had been removed from the APO service list.

The attorney's legal secretary used an outdated version of the APO service list to serve the final comments. The law firm's APO procedures required the legal secretary to consult the updated APO service list maintained on the ITC Web site, but the legal secretary neglected to follow this procedure. Although the attorney reviewed the submission, she did not notice the mistake because the service list was the

same as previous service lists. The attorney noticed the mistake when she reviewed the service lists of the other parties. She immediately telephoned the firm that mistakenly received the final comments to ask that they return or destroy the brief, then followed up to confirm that the firm had destroyed the brief before any unauthorized person reviewed it.

The Commission determined that both the lead attorney and her legal secretary violated the terms of the APO because disclosure of BPI to unauthorized persons, regardless of whether those persons viewed the BPI, constitutes an APO breach. However, the Commission determined not to initiate the second phase of the APO breach investigation because of a variety of mitigating circumstances that made issuing a warning letter the most appropriate response to the breach. These mitigating circumstances included the attorney's prompt remedial action, her curing of the breach before unauthorized persons viewed the BPI, and her prompt report of the incident to the Commission. Furthermore, the attorney's breach was unintentional and was her first breach within the past two years. Finally, the firm adopted a new procedure where the lead attorney personally checks the service list against the most current service list on the Commission's Web site to ensure that a similar breach does not occur in the future.

There were three investigations in which no breach was found:

**Case 1:** The Commission determined that two attorneys and an economic consultant did not breach the APO when, in their final comments, they failed to bracket certain information that had been identified by the Office of the Secretary as BPI. The Commission also found that the same individuals did not breach the APO when they failed to redact certain information contained in brackets in the public version of the final comments filed with the Commission.

The Commission found that the two sets of information in question were publicly available and the failure to bracket and to redact did not constitute breaches. The information that was contained in brackets but was not redacted in the public version of the final comments was information that was derived from a subscription service report that was maintained as confidential in the Commission's staff report. In this case, however, prior to the issuance of the staff report, the law firm in question and another party had filed the same subscription service report with the Commission. Thus, the

information was publicly available and independently available to the law firm in question, and the information that was not bracketed in the confidential version of the final comments was made publicly available in the Commission's final staff report.

**Case 2:** The Commission determined that three attorneys did not breach the APO because unbracketed information in a prehearing brief, identified by Commission staff as confidential, was not BPI.

The information in the prehearing brief that initially appeared to be BPI were two unbracketed unit values. The unbracketed information provided percentage changes in average unit values as opposed to actual unit values, which were not disclosed. The Commission determined that disclosure of the unbracketed numbers did not reveal the BPI of any specific company. The bracketed average unit values were calculated using the BPI for more than three companies, and the identity of specific respondents was not disclosed publicly. Furthermore, it was unclear precisely what data were used to calculate the unit values. Therefore, it was impossible to back out the actual numbers or information of any individual company.

**Case 3:** The Commission determined that attorneys did not breach the APO by inadvertently serving a confidential version of a motion on counsel for a law firm not included in the APO.

Although the motion was designated "Confidential," the motion did not contain CBI. The purportedly confidential material in the motion consisted of a series of quotes from the confidential version of the Commission opinion. At the time of the motion's filing, no public version of the opinion was available, which led attorneys at the firm in question to designate the motion as "Confidential" out of an abundance of caution. However, a review of the confidential and public versions of the Commission opinion revealed that although the confidential version of the opinion did contain CBI, the material quoted in the motion did not include confidential information. The law firm in question also took prompt remedial measures to request the destruction of all copies of the motion and modified their policies for service in the investigation to ensure APO compliance.

As no CBI was disclosed, the Commission found no breach of the APO, but did caution the attorneys involved to be more careful in handling material designated as confidential.

By order of the Commission.

Issued: August 29, 2008.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

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## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

Notice is hereby given that on August 21, 2008, a Complaint was filed and a proposed Consent Decree was lodged with the United States District Court for the District of New Jersey in *United States of America v. Air Products and Chemicals, Inc.*, Civil Action No. 2:08-cv-04216.

In this action the United States seeks reimbursement of response costs incurred by EPA for response actions at the Chemsol, Inc. Superfund Site ("Site") in Piscataway Township, Middlesex County, New Jersey, and performance of studies and response work at the Site consistent with the National Contingency Plan, 40 CFR Part 300, pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9606 and 9607 ("CERCLA"). The Consent Decree provides that the new settlers will financially contribute to and perform work at the Site together with a group of potentially responsible parties that resolved their liability to the United States in 2000 in a Consent Decree. The value of this settlement is estimated at approximately \$3.1 million, of which \$380,170.83 will be paid to EPA for unreimbursed response costs, and \$95,747.14 will be paid to the State of New Jersey for the State's Natural Resource Damages caused by the release of hazardous substances at the Site.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to [pubcomment-ees.enrd@usdoj.gov](mailto:pubcomment-ees.enrd@usdoj.gov) or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to *United States v. Air Products and Chemicals, et al.*, D.J. Ref. 90-11-3-06104/3.

The Consent Decree may be examined at the Office of the United States Attorney, Federal Building, 7th Floor, 970 Broad Street, Newark, New Jersey,