ADMINISTRATIVE PROTECTIVE ORDER HANDBOOK

UNITED STATES DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION

This handbook is intended to assist authorized representatives in protecting business proprietary information submitted in the Department's antidumping duty ("AD") and countervailing duty ("CVD") proceedings. The handbook summarizes the requirements contained in the Department's regulations (19 C.F.R. § 351.103 and 351.305-.306), and suggests procedures firms can employ internally to protect business proprietary information they receive under an administrative protective order ("APO") in the course of a proceeding. The statutory basis for these regulations is section 777(c)(1)(A) of the Tariff Act of 1930, (19 U.S.C. § 1677f(c)(1)(A)), as amended. The Department's regulations allow representatives' firms the flexibility to protect business proprietary information in a manner best suited to their practice. The suggestions in this handbook are intended to assist firms in this process. We recognize that not all of the suggestions will be applicable to all firms.

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1. Types of Information to Which APO Procedures Apply

APO procedures apply to the business proprietary information submitted to or obtained by the Department in the course of its AD and CVD proceedings from both companies and foreign governments as well as the U.S. domestic industry and other sources. Business proprietary information is defined in 19 C.F.R. § 351.104. Some examples are:

1. documents identified as business proprietary for which business proprietary treatment has been claimed by the submitter and proprietary treatment has been granted by the Department. If the status of information claimed as proprietary is in question, the information is treated as proprietary until the Department decides it is public and the submitter has had the opportunity to resubmit or withdraw it. **Failure to treat information as business proprietary information where there is a dispute over whether it is public can result in an APO violation.**

2. documents generated by the Department identified as containing business proprietary information;

3. documents generated by the recipient of APO protected information that contain business proprietary information of another party;

4. drafts of documents and working notes, charts or graphs that contain APO protected information;

5. any electronic computer media, such as tape, disk, diskette; or computer hardware, such as “zip drive”, CD-ROM drive, or “flash drives”, etc., and information resident in computer memory that contains APO-protected information;

6. oral communications that involve the discussion of APO protected information.

2. The APO

The Department may disclose business proprietary information it receives in the course of its proceedings to representatives of interested parties authorized to receive such information by the Department under the terms of an APO. The Department places an APO on the record of a segment of a proceeding as follows:

- within two business days after the day on which a petition is filed in the case of an investigation, or an investigation is self-initiated;

- within five business days after the day on which a request for a new shipper review is properly filed in accordance with 19 C.F.R. § 351.214 and § 351.303;

- within five business days after the day on which an application for a scope ruling is properly filed in accordance with 19 C.F.R. § 351.225 and § 351.303;

- within five business days after the day on which a request for a changed circumstances review is properly filed in accordance with 19 C.F.R. § 351.216 and § 351.303 or a changed circumstances review is self-initiated; or

- within five business days after initiating any other segment of a proceeding.

Anyone wanting access to business proprietary information as a representative of an interested party to the proceeding must file an APO application, Form ITA-367 (2.08) with the Department, as discussed below. No applicant should handle APO-protected business proprietary information until the Department has approved the application and placed the name of the authorized representative on the APO Service List for the specific segment of the proceeding.

By applying for APO access, applicants are agreeing to be bound by the terms of the APO. Therefore, applicants should review the Department's APO to ensure that they are familiar with the requirements for protecting and using the business proprietary information released to them under APO. While it is the intent of the Department to issue a "Standard APO" in each case, **it is possible that there may be slight variations in particular APOs**. Additionally, each APO authorizes the use of the APO information for that particular segment of the proceeding as well as in certain other segments. It is the responsibility of the applicant to be fully aware of the requirements of the APO in a segment of a proceeding.

In addition, some staffing issues a firm should consider before filing APO applications are as follows:

- who determines which professionals will apply to the Department for access to business proprietary information under APO or which support staff will be needed to handle or work with documents containing business proprietary information;

- who ensures that professional and support staff have been properly briefed on the APO requirements and the firm’s APO procedures;

- who reviews the Department's APO Service List to ensure that each of the authorized applicants are listed;

- who ensures that support staff have signed the required "Acknowledgment For Support Staff"; and

- who determines the appropriate staff member or contract employee to deliver and pick up business proprietary documents to/from the Department and serve parties subject to an APO.

3. THE LETTER OF APPEARANCE

A new provision in the regulations under 19 C.F.R. § 351.103(d)(1), requires all interested parties, with the exception of a petitioner filing a petition in an investigation, to file a formal letter of appearance in order to be placed on the Public Service List for a particular segment of a proceeding. The letter of appearance must be filed either as a separate document or it may be filed as a cover letter to an application for APO access.

4. THE APO APPLICATION - FORM ITA-367 (2.08)

The APO application may be reproduced on the applicant's word processing system. The standard form is available on Enforcement and Compliance's (formerly Import Administration) Home Page at:

http://enforcement.ita.doc.gov/apo/new/367-208-apo-app.pdf

Printed copies of the standard form, or a copy of the standard form on computer disk, may be obtained from the APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230.

Applicants must submit the **entire** APO application in accordance with the requirements set forth in 19 C.F.R .§ 351.303. The APO application also is subject to the service requirements of 19 C.F.R. § 351.303(f) and 351.305(b)(2), such that the applicant must serve an APO application on the other parties by the most expeditious manner possible at the same time that he or she files the application with the Department. Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures, 76 FR 39263, 39271 (July 6, 2011) ("Electronic Filing Final Rule").

Each applicant must *sign and date* the application in his or her own hand (i.e., physically signed by the applicant and hand-dated, not typed). Due to the Department's electronic filing requirements, applicants will no longer be required to file original signatures with the Department. Instead, an applicant must scan the pages containing signatures and append them to the electronic APO application in portable document format ("PDF").

APO applications bearing original signatures must be kept on file in the applicant's firm and made available for review as needed.

In an investigation, an application for access to business proprietary information under APO may be submitted after the filing of the petition. With respect to a request for a new shipper review, an application for a scope ruling or a request for a changed circumstances review, an APO application may be submitted after these requests are considered properly filed. In an administrative review, and other administrative proceedings, an application for APO access may be filed any time after the date of publication in the Federal Register of the notice of initiation under 19 C.F.R. § 351.221 or § 351.225.

Representatives should file an APO application as early in the proceeding as possible. Although applications for APO access may be submitted up to the date the case briefs are due, these late requests should be rare. Requests for APO access after major submissions have been filed are very burdensome on the parties, who must separately serve the newly APO-authorized representative with all business proprietary information that has been submitted to date in the proceeding. Because of this additional burden, parties filing an APO application after the first questionnaire responses have been filed by other parties are required to pay the costs associated with the additional production and service of business proprietary submissions that were served on other parties earlier in the segment of the proceeding, if payment is requested. Under 19 C.F.R. § 351.305(b)(3) of the Department's regulations, parties have two business days once an applicant is added to the APO Service List in which to serve the authorized applicant with its business proprietary submissions previously submitted to the Department. However, under § 351.305(b)(4) of the regulations, parties filing an APO application after the first questionnaire response is submitted have five business days in which to be served once the applicant is added to the APO Service List. Late APO applications should be the rare exception, not the rule. Late applicants are encouraged to use the Courtesy Page for Waiver of Service at the end of the APO application should they decide to waive service of certain documents containing business proprietary information.

Generally, requests to *amend* the APO Service List may be filed at any time throughout the life of the APO. If a party wishes to amend the APO Service List to add additional representatives or additional interested parties, or to correct a deficient application, the applicant must submit the **entire** APO application. Individual sections of the application filed separately, such as the signature page, will not be accepted.

5. The APO Service List

Once a firm has filed an APO application, the Department must add the applicants to the APO Service List for the segment of the proceeding within five days, unless there is an objection from another interested party to the proceeding. The Department must resolve

objections within 30 days. The APO Service List is available on Enforcement and Compliance's home page as soon as it is approved and is emailed to each interested party listed on the Department's APO and Public Service List each time an initial APO Service List is created and when there is an amendment to the APO Service List.

Applicants should review the APO Service List to ensure that all individuals who applied for APO access in an application are individually named on the APO Service List. An applicant should never assume that he or she has been authorized access by the Department because he or she has submitted an application. Individuals are not authorized applicants until their names are included on the APO Service List. Disclosing APO protected information to an applicant before the applicant is approved is a violation of the APO, and such violations, however inadvertent, have occurred. In some instances, a representative handed business proprietary information to a colleague in the same firm who had applied but not been approved for APO access. In other instances, a representative has served an applicant from another firm before the applicant had been approved. The burden is on the person disclosing APO protected information to ensure that an applicant has been approved.

It may be helpful for authorized applicants to maintain an updated personal copy of the Department's APO Service List and APO for each case in which they are involved.

6. Firm Procedures For Protecting Business Proprietary Information Subject to APO

Section 351.305(a) of the Department's regulations requires an authorized applicant to establish and follow procedures to ensure the protection of business proprietary information that is subject to an APO. The main requirement is that no employee of the authorized applicant's firm may release business proprietary information received under an APO to any person other than the submitting party, an authorized applicant, or the appropriate Department official directly involved in the proceeding. The Department allows the firms to decide what internal procedures are best for them to ensure that this requirement is met.

The following are issues a firm should consider in adopting internal procedures for protecting business proprietary information. The ideas presented in this Handbook are intended to assist trade practitioners in establishing their own internal procedures to protect business proprietary information. They are suggestions only and should not be interpreted as requirements. Nevertheless, if a firm is alleged to have violated an APO the Department may look at a firm's internal procedures to determine whether the firm has adequate measures in place.

7. Written Procedures

The Department urges all firms to establish written APO procedures that are suitable to the operations of the firm. We recommend that all employees of the firm who may have access to business proprietary information released under APO in an AD or CVD proceeding, have personal copies of the firm's APO procedures for periodic review. Firms may also wish to brief orally all employees who are assigned to work with information subject to an APO on the firm's APO procedures to ensure that the procedures are understood. Periodic APO training covering topics of concern might also be helpful for all employees working with business proprietary information.

To the extent possible, the firm's APO procedures should always be followed. Deviation from the procedures increases the risk of an APO violation.

8. Receiving Business Proprietary Information Subject to APO

Protection of business proprietary information subject to APO should begin the minute the firm receives it. It is essential to have procedures to mark, track and store APO information to ensure it is not lost or inadvertently served on a person not authorized to receive such information. Procedures should be adopted to ensure that when business proprietary information subject to APO is first received an authorized applicant will be assigned to mark and distribute it in accordance with the terms of the APO.

Under 19 C.F.R. § 351.306(d) of the Department's regulations, any person that is not an authorized applicant and that is served with APO information must return it to the submitter immediately, to the extent possible without reading it, and must notify the Department. An allegation of an unauthorized disclosure will subject the person that made the alleged unauthorized disclosure to an investigation and possible sanctions under 19 C.F.R. part 354.

9. Tracking Business Proprietary Material Subject to APO

In order to maintain control of business proprietary information subject to APO in a segment of a proceeding, firms should establish a tracking system, so that a document received under an APO can be located at any time.

One system that has been effective for many firms is to establish an APO file for each segment of a proceeding in which APO access has been granted on behalf of a firm's client. Firms commonly create an index or log system prior to the receipt of APO

information. While an APO log is no longer a requirement of the Department's APO, an index or log system has been proven to be a useful internal tool in tracking APO information.

Generally, additional copies of documents subject to an APO should not be made unless the copies are absolutely necessary. If additional copies are made, the number of copies should be noted or recorded somewhere, perhaps in an APO index or log if one is maintained. This will enable the firm to better track all documents subject to APO and to ensure that all such documents are destroyed in a timely fashion.

In addition to the business proprietary information itself, the case specific APO file might include the following:

- an "APO Application" file folder in which to keep a copy of the applications signed by the attorney or non-attorney applicants;

- an "Acknowledgment For Support Staff" file folder (sample "Acknowledgment" attached); and

- a file folder for the Department's APO issued in the segment of the proceeding.

10. Storage of Business Proprietary Information Subject to APO

Internal procedures should account for the following issues:

- Where will the APO information be stored?

- Is it necessary to control physical access to the room and/or containers in which APO information is kept?

- What are the systems for storing, labeling, and securing the APO information, and for segregating APO materials in different segments of different AD/CVD proceedings?

11. Labeling Business Proprietary Information

Proper labeling of business proprietary information is crucial to avoid APO violations. Some of the issues a firm should consider in adopting procedures to protect business proprietary information subject to an APO include:

- how is information subject to APO marked, bracketed, and deleted to create proper business proprietary, public, and APO versions of internally generated

documents (based on past experience, it appears that electronically deleting proprietary information from APO and public versions of proprietary documents is more effective than using magic-marker, white-out or tape);

- what the firm procedures are for reviewing internally generated documents to ensure they comply with APO requirements;

- what the firm procedures are for coordinating the copying of documents containing information subject to APO;

- how will the firm account for all copies of proprietary documents containing APO information and the destruction of any extra copies of those documents;

- what procedures will the firm use to review the various versions of internally generated documents to ensure that they are correct prior to filing with the Department; and

- how will the firm ensure that only public documents or documents containing the client's own business proprietary information are transmitted to the client.

Following is a summary of some regulatory requirements, and suggestions for procedures that have been found helpful in the past.

All business proprietary documents served on a firm subject to an APO or internally generated documents containing business proprietary information should be clearly marked with the notation "Business Proprietary Treatment Requested." Historically, this notation has been in red on the cover page and any pages on which business proprietary information appeared. Marking the notation in red is no longer a requirement; however, it may assist parties in identifying documents containing business proprietary information. Working notes or drafts of documents should also be properly marked as containing business proprietary information. Obsolete drafts should be quickly destroyed.

When referring to business proprietary information subject to APO in writing, we strongly urge you to bracket all business proprietary information (i.e., text, charts, etc.) AS YOU WORK. Do not wait until the document is in final form. If you are unsure of the proprietary nature of certain information, either **[**bracket it**]** or don't use the questionable information. Waiting until the document is in final form significantly increases the risk of failing to identify information subject to APO. Failure to adequately bracket APO information in proprietary submissions or to delete APO information in public documents is the number one cause of APO violations.

The regulations require the identification of the source of the business proprietary information in submissions containing APO information from multiple persons for the purpose of avoiding APO violations. Section 351.306(c) requires that in the case of

submissions, such as briefs, that include APO information of different parties, the submitting party must identify, contiguously with each piece of business proprietary information included, the person that originally submitted the item. For example, Information Item #1 came from Respondent A, Information Item #2 came from Respondent B, etc., or a party could use footnotes to identify the source of the information. The Department does not require that multiple source data be identified in any particular manner. We suggest however, that parties avoid the use of multiple brackets, such as triple "[[[ ]]]" or quadruple "[[[[ ]]]]" bracketing systems, as this type of marking could cause confusion and perhaps lead to an APO violation. Paragraph (b) of § 351.304 specifically provides for the use of single brackets to identify business proprietary information and double brackets to identify business proprietary customer names in an investigation and other information for which the submitting person claims that there is a clear and compelling need to withhold from disclosure under APO.

Avoid the use of business proprietary information in footnotes if at all possible. Business proprietary information in footnotes may often be overlooked in preparing APO and/or public versions of a submission, even when doing so electronically.

It is not prudent to summarize another party's business proprietary information in a public document, as the summarization may inadvertently divulge the other party's business proprietary information. Section 351.304(c)(1) of the APO regulations states that a submitter should not create a public summary of business proprietary information of another person.

Before filing and before serving any party on the service list, have a team review all versions of a document (proprietary, public, and APO versions). We recommend the team:

- include the lead attorney subject to the APO;
- double-check their service list against the most recent APO Service List on the Web;
- double-check the versions being served on parties on the APO Service List;
- double-check the versions being served on parties on the most recent Public Service List on the Web; and
- triple check the version being sent to the client.

12 The One-Day Lag Rule

Many parties rely on the one-day lag rule under 19 C.F.R. § 351.303(c)(2) as a major tool to assist them in protecting not only their own business proprietary information but also business proprietary information that is served on them subject to APO. The regulation requires a submitting party to file the business proprietary document on the date it is due. The submitting party may make corrections to the bracketing and resubmit the final business proprietary document by close of business on the next business day, along with the public version of the document. The one-day lag rule time allowance is provided to the submitter as an additional safeguard in order for the submitter to review its bracketing to ensure that a party's own information and the APO protected information of another party is not inadvertently disclosed.

Under 19 C.F.R. § 351.304(c)(2), if a submitting party discovers it has failed to bracket information correctly, the submitter may file the complete, corrected business proprietary submission along with the public version. Once the bracketing has become final, the Department will not accept any further corrections to the bracketing of information of the submitter in a document, and the Department will treat non-bracketed information of the submitter as public information. If a submitting party failed to properly protect the APO information of another party in its submission, the Department will of course take immediate action to protect that information.

In conjunction with the electronic filing regulations, the Department revised the service requirement for documents containing bracketing corrections. The Department now requires the submitter to also serve APO authorized persons with a complete copy of the revised final proprietary document to ensure that APO authorized persons have the correct version of the document. Service of only those pages containing bracketing corrections is no longer permitted.

Please note that the one-day lag rule does not apply to a petition, amendments to a petition, or any other submission filed prior to the initiation of an investigation. See Electronic Filing Final Rule, 76 FR at 39268.

13. Who May Pick Up APO Information Released by The Department

Support staff, who have signed the required "Acknowledgment for Support Staff," including subcontracted individuals (e.g., courier services) employed by the firm, are allowed to pick up APO information released by the Department. The Department requires the firm employee/subcontracted individual to present:

(1) a letter of identification from the firm, on firm letterhead, authorizing the Department to release the business proprietary information to that individual; and

2) a picture ID.

The Department will not release APO information to the representative of an authorized applicant without the required identification.

An acknowledgment for support staff is a requirement of item 2 of the Department's standard APO. The Department considers support staff to include paralegals, law clerks, and secretaries, or other support staff employed by or on behalf of the applicant's firm and operating with the confines of the firm. These individuals do NOT apply separately for APO access, but are permitted access through the individually named authorized applicants, but they are required to sign the acknowledgment maintained by the firm. Failure by a firm to maintain an acknowledgment for support staff for each segment of each proceeding when APO access has been granted would constitute an APO violation.

14. Electronic Business Proprietary Information

In order to control access to electronic business proprietary information, firms may wish to ensure that their computer system restricts access to all computer files containing information released under APO by:

- limiting access to APO-authorized personnel through the use of individual usernames and passwords and any other appropriate security group designations; and

- restricting access to the storage devices for computer files containing APO information to APO-authorized personnel.

Firms must be aware of all locations where documents containing BPI released under APO are electronically stored. This is especially important for those documents which are viewed in IA ACCESS because most commonly used browsers download viewed files to a temporary location on the user's personal computer. The Department recommends saving the APO documents and data files to the desired location and opening the file from the saved location instead of viewing it directly in IA ACCESS. It is also recommended that IA ACCESS users clear or delete the internet browsing data or history frequently.

A firm must be able to identify all storage locations and permanently delete all electronic copies of APO documents in order to comply with the destruction requirements specified in the APO of each case segment. As such, we suggest that firms become familiar with their local and/or network systems where APO documents are stored.

If the firm routinely backs up documents stored on its computers, the firm must ensure that the backup media are recycled so that files that are deleted from the user's personal computer or network location are not permanently retained as a backup copy. If a firm's backup procedures require backup copies to be permanently retained, the party must store the files in a location that is not subject to permanent storage on backup devices.

In order to prevent disclosure to persons not subject to an APO, no business proprietary information in electronic format may be accessible to parties not authorized to receive access to APO information. See paragraph 3 of the Standard APO.

15. Facsimile Transmission

The Department does not prohibit facsimile transmission of APO information to APO authorized individuals. APO authorized representatives should be present at both the point of transmission and the point of reception to avoid unauthorized disclosure. It may also be helpful to send a test page and obtain confirmation from the receiving point to guard against mis-dialing. Additional safeguards may be appropriate for the operations of individual firms.

16. Procedures to Minimize APO Violations

History tells us that most APO violations are inadvertent. Any potential damage from inadvertent disclosure can be minimized if a firm has procedures in place to immediately take action where such a violation has occurred. This includes assigning responsibility for notifying the Department's APO office and other parties, retrieving improperly served business proprietary information, determining how the violation occurred and taking steps to prevent a recurrence.

17. Certification Requirements and Destruction of Business Proprietary Information

The APO requires the authorized applicant to destroy business proprietary information received under APO within 30 days at the end of the time authorized by the APO. The deadline is intended to not only allow for use of the business proprietary information in additional segments of the proceeding, but to give the parties the opportunity to file for judicial protective order access or for access under a protective order in a binational panel review under Article 1904 of the North American Free Trade Agreement ("NAFTA") if a party is going to initiate litigation or participate in binational panel review. It may be

many years before the business proprietary information is required to be destroyed at the end of multiple layers of litigation or appeal.

For example, the language of the Department's standard investigation APO permits an authorized applicant to retain APO information released in the investigation segment of the proceeding for two consecutive subsequent administrative review segments. At the conclusion of the second consecutive subsequent administrative review, the APO information from the initial investigation must be destroyed. It is the Department's practice to consider both the opportunity for review to count as an administrative review segment, and a rescission or termination of an administrative review to also count as an administrative review segment for the purpose of determining the time frame in which to destroy APO material and provide the certification of destruction to the Department. **If no APO materials were provided to a party subject to the APO, the authorized applicant must so certify in order to close out the person's APO responsibilities.**

Following are issues firms should address:

- what are the procedures for ensuring that all copies of documents and electronic media containing information subject to APO are destroyed at the end of the period allowed for access, and that the appropriate certification is filed with the Department;

- what are the procedures for ensuring that the appropriate notification is filed with the Department if changed circumstances affect an authorized applicant's representation of an interested party (i.e., reassignment, departure from firm); and

- what are the procedures for ensuring that a copy of either the judicial protective order issued by the court, or a protective order in a binational panel proceeding is provided to the Department if there is a challenge to the Department's determination in a segment of a proceeding.

18. Acknowledgment For Support Staff (Sample Format)

In the Matter of the Antidumping/Countervailing Duty (indicate one) Proceeding on _____ _____ from (Country)	)))))

ACKNOWLEDGMENT FOR SUPPORT STAFF

I have read the administrative protective order ("APO") issued by Enforcement and Compliance in the above captioned segment of the proceeding, and the application for APO filed by the lead signatory of this firm. I agree to be bound by the terms and conditions stated in the APO and application for APO, and to maintain the proprietary status of the information as provided for under 19 C.F.R. § 351.305 or 19 C.F.R. Part 354.

Name	Signature	Title	Date