

**SUMMARY OF REPORT ON
SURVEY OF TITLE VII AND SECTION 337
ADMINISTRATIVE PROTECTIVE ORDERS**

Numerous concerns with Administrative Protective Orders ("APO") have been raised by members of the bar, the Department of Commerce ("Commerce"), and the International Trade Commission ("Commission"). The relevant bar organizations -- the District of Columbia Bar (International Law Section), the American Bar Association (Section of International Law and Practice, International Trade Committee), the International Trade Commission Trial Lawyers Association, and the Customs and International Trade Bar Association ("the bar organizations") -- responded to these concerns by surveying their members to determine the extent of any problems. The survey covered substantive, procedural and disciplinary APO issues for Commerce and the Commission Title VII, antidumping and countervailing duty proceedings, and for the Commission Section 337, intellectual property investigations.

On the basis of a confidential draft report, a series of meetings was held with representatives from each of the four bar organizations and officials from the agencies. The purpose of these meetings was to permit the bar associations to explain their concerns in greater detail, to better understand the agencies' concerns and to provide a basis for developing recommendations.

In general, the survey respondents, including members of the bar and trade economists, agreed on the issues; there was no difference in the answers regardless of whether counsel generally represented petitioners or respondents or whether counsel had a large or small trade practice. The survey respondents overwhelmingly agreed that access to APO information had improved their ability to represent their clients. They also agreed that the requirements for handling APO data had protected the confidentiality of their client's information adequately.

The survey and meetings with the agencies involved numerous issues. The primary issues regarding Commerce centered on what members of the bar perceived as its burdensome procedures for the handling of APO materials. The primary issues regarding the Commission focused on access to the APO data and the "chilling effect" created by the Commission's administration of the process. Issues involving both agencies included sanctions of "technical" APO violations and procedures to handle alleged breaches. With respect to the intellectual property cases, the only issue concerned retention of confidential business information.

The report outlines the background of the survey, summarizes the issues that members of the bar raised in the survey, discusses the actions taken by agencies since the survey, and presents recommendations for further action.

CONFIDENTIAL DRAFT

**REPORT ON THE
SURVEY OF ADMINISTRATIVE PROTECTIVE ORDERS
UNDER TITLE VII AND SECTION 337
OF THE TARIFF ACT OF 1930 AS AMENDED**

Section of International Law and
Practice, American Bar Association

International Law Section,
District of Columbia Bar

International Trade Commission
Trial Lawyers Association

Customs and International Trade
Bar Association

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**REPORT ON THE
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I. EXECUTIVE SUMMARY

Numerous concerns have been raised by members of the bar, the Department of Commerce ("Commerce") and the International Trade Commission ("Commission") with Administrative Protective Orders ("APO"). The four relevant bar organizations -- the Section of International Law and Practice of the American Bar Association,^{1/} the District of Columbia Bar International Law Section,^{2/} the International Trade Commission Trial Lawyers Association, and the Customs and International Trade Bar Association ("the bar organizations") -- responded to these concerns by surveying their members to determine the extent of any problems. The survey was composed of tabular and narrative questions covering substantive, procedural and disciplinary APO issues for

^{1/} These views have been presented on behalf of the Section of International Law and Practice of the American Bar Association. They have not been approved by the House of Delegates of the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

^{2/} The views expressed herein represent only those of the International Law Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

Commerce and the Commission Title VII proceedings and for the Commission Section 337 investigations.

In general, the survey respondents, including members of the bar and trade economists, agreed on the issues; there was no difference in the answers regardless of whether counsel generally represented petitioners or respondents or whether counsel had a large or small trade practice. The survey respondents overwhelmingly agreed that access to APO information had improved their ability to represent their clients. They also agreed that the requirements for handling APO data had protected the confidentiality of their client's information adequately. However, the survey respondents made it clear that they had concerns about existing procedures and indicated that changes to the APO procedures should be made.

A confidential draft report summarizing the results of the survey was presented to the agencies in July 1992. On the basis of this draft report, a series of meetings was held with representatives from each of the four bar organizations ("bar representatives") and officials from the agencies. The purpose of these meetings was to permit the bar organizations to explain their concerns in greater detail, to better understand the agencies' concerns and to provide a basis for developing recommendations.

The survey and meetings with the agencies involved numerous issues, some applicable to one agency, others to both agencies. The primary issues regarding Commerce centered on what

members of the bar perceived as its burdensome procedures for the handling of APO materials. The primary issues regarding the Commission focused on access to the APO data and the "chilling effect" created by the Commission's administration of the process. Issues involving both agencies included sanctions of "technical" violations and procedures to handle alleged breaches. With respect to Section 337 cases, the only issue raised concerned the extension of the period during which law firms are permitted to retain confidential business information.

Since the survey was undertaken, both agencies have taken steps to address some of the concerns raised by the bar organizations. Commerce has modified its regulations allowing for the submission of a public version one day after the filing of the APO version and has modified its internal procedures regarding technical APO violations. Commerce currently is considering many of the other issues raised, including changes to its APO application and procedural requirements for the handling of both hard-copy and computerized APO materials. With respect to Commission procedures in Title VII cases, the Commission has modified its procedures to provide "warning letters" instead of sanctions in certain circumstances and to approve APO applications on a rolling basis. The Commission is currently considering further recommendations which, if adopted, would address almost all of the concerns raised by the bar organizations. The Commissioners, however, have given no indication that they will approve any of the recommendations, and, hence,

most of the bar organizations' concerns with the Commission Title VII process remain outstanding. With respect to Section 337 cases, the Commission is considering whether to extend the period for the retention of confidential business information beyond the term of an investigation.

The following report outlines the background of the survey, summarizes the issues that members of the bar raised in the survey, discusses the actions taken by agencies since the survey, and presents recommendations for further action.

II. BACKGROUND

The bar organizations conducted a survey of the experiences of their members with Commerce and Commission APOs -- under Title VII and under Section 337 -- in response to numerous concerns raised by the agencies and by members of the bar. This survey was conducted to determine whether the concerns expressed by members of the bar are widespread and what specific actions, if any, should be taken in response to these concerns.

The survey was composed of tabular and narrative questions covering substantive, procedural and disciplinary APO issues for Title VII and Section 337 investigations. See Attachment A. The questions were developed by the bar organizations based on the issues perceived to be of greatest concern. Prior to distribution, the draft survey was sent to each agency with a request for agency comments. Comments on the

draft survey were received from both agencies and were incorporated into the final survey.

The survey was sent to one hundred eighteen (118) law firms and economic consultants known to practice Title VII and/or Section 337 trade law. The mailing list was intended to include all trade practitioners and was developed in consultation with representatives of the bar organizations. In an attempt to obtain the most complete response, cover letters were addressed to a senior trade partner at each firm, requesting that they assume responsibility for obtaining responses from their firm. See Attachment B. Responses were expected to be from the firm as a unit or from individual attorneys or economists. The survey also was available through the respective bar organizations and at several bar programs.

One hundred and thirteen (113) responses were received. Responses came from a cross section of the bar and economic consulting firms. According to information provided by the survey respondents, responses were received from counsel representing petitioning companies and/or responding companies, D.C. attorneys, out-of-town counsel, economists, persons with limited experience under the APOs, and firms handling over fifty investigations at each of the agencies.

On February 27, 1992, an interim survey report was released to the agencies. The interim report was a statistical compilation of data from the tabular sections of the survey. See Attachment C.

Sections III through VI of this report summarize the responses to the narrative questions. To ensure that the report accurately reflects the survey responses, each of the narrative summaries was drafted by an individual from one of the bar organizations and reviewed by a second individual from another bar organization. The review included rereading the survey responses and comparing those responses with the draft to evaluate completeness and tone of the draft. The second draft of this report was reviewed and approved for confidential release by each bar organization.

A confidential draft summarizing the survey responses was presented to each agency in July 1992. The bar representatives then held a series of meetings with representatives from each agency to permit the bar organizations to explain their concerns in greater detail, to better understand the agencies' concerns, and to provide a basis for developing recommendations. On the basis of the survey and these meetings, a set of recommendations was developed and presented to the agencies and to the bar organizations for approval before this report was released.

III. SUBSTANTIVE USE OF TITLE VII APO INFORMATION

Some of the survey respondents only provided tabular responses, but more than 60 percent of the survey respondents

practicing Title VII provided narrative comments on the substantive issues. Generally, commentators agreed that:

- APO data is essential for meaningful analysis in these fact-specific investigations;
- Allowing access to APO information increases confidence in the record and in the fair and consistent application of the law; and
- Uncertainty regarding the confidentiality designation of data and a threat of sanctions have chilled substantive arguments.

Survey respondents characterized the primary benefits of release of APO data as the ability to present more focused and detailed substantive arguments, the possibility of arguing from a common data base, and confidence in the record and the fair and consistent application of the law. One commentator thought the main benefit was obvious: "allowing those who have to address the issues to know the facts." Both counsel for petitioning companies and for responding companies asserted that counsel must have access to the APO data to represent their clients.

Survey respondents noted numerous arguments made possible only through access to APO information. These arguments include the ability to (1) expose insupportable positions; (2) analyze differences between companies, thereby better understanding causation; (3) contest cost allegations; (4) check accuracy of adjustment claims; (5) underscore conflicts in the data; (6) critique accuracy and completeness of data; and (7) evaluate specific allegations.

Several survey respondents who had participated in Title VII proceedings prior to the 1988 statutory amendment requiring release of APO data remarked on their previous frustrations in arguing from public documents. These documents, such as annual reports and market studies, almost never covered the exact industry under investigation and were almost always disregarded.

In response to the question of whether the agencies appeared to find counsel's APO arguments useful, survey respondents answered in the affirmative. All commentators believed that the agencies were assisted, or at least should be, by counsel's use of APO data. One respondent particularly noted that "the language of many decisions reflects that they do [find counsel's arguments helpful.]"

Again comparing the current system with pre-1988, several survey respondents claimed that prior to release of APO data, their arguments were "almost always disregarded" and counsel "squandered much effort on dead issues." A former agency decisionmaker, now in private practice, attested to the difficulty in making decisions without comments from counsel prior to the 1988 amendments.

Release of APO data has provided greater transparency and more confidence in the process. Several respondents noted that their clients believed the process to be "fairer" when their counsel had full access to the facts. Approximately 45 percent of Title VII survey respondents indicated that as a result of

access to APO data, counsel is able to uncover problems with the information and consequently provide corrected information to the agency before the determination. Some of the problems discovered were described as inconsistencies between the APO submissions and public information; some were misinterpretations of facts.

Approximately 35 percent of Title VII survey respondents provided specific personal examples of discovery of errors in agency data, discoveries made possible because of access to APO data. Additional survey respondents stated that they were aware that errors were often uncovered by the parties, although they provided no specific information. Thirteen survey respondents, both counsel for petitioners and for respondents, who participated in multiple investigations, e.g., between 10 and 125 for one firm, claimed that errors occur regularly. The type of agency errors described by the parties generally ranged from simple clerical errors to methodological errors to omissions or misinterpretations of the data. Seven survey respondents thought that the problems with ministerial errors were less pervasive at the Commission than at Commerce, and eleven respondents stated that they were unaware of any instances in which agency errors were uncovered because of access to APO data.

Survey respondents cited three substantive problems with the APO process. The first is that uncertainty regarding what information can be discussed and the fear of sanctions has a "chilling effect" on counsel's use of APO information. Survey respondents criticized the agencies for their inconsistent

application of rules regarding use of aggregate data and trends. They also criticized the agencies' failure to provide guidance on the use of information, which while not itself APO data, is derived from such data. According to respondents, fear of sanctions has prevented counsel from raising certain arguments, even if clients have independent knowledge, parallel information is available in public reports, or the staff or opposing counsel have cited the same facts.

Second, the agencies' procedures and reaction to the APO process has limited the accessibility of APO data. Respondents felt that the agencies' perception that parties interfere in their investigations and fear of exposing agency work to external critique has resulted in what several commentators thought was an unnecessary tension between the bar and the agencies.

More importantly, respondents felt that certain procedures had been used to limit access to APO data. The comments on access were directed primarily to the Commission. As one commentator explained:

The Commissioners' failure to embrace the need for APO means that the Commission Staff has little support to make the process effective. For instance, the chief investigator may have to do all the xeroxing of APO documents. There is no APO staff to handle documents for the investigative staff. Therefore the Staff sees the process as adding an additional administrative burden. Further, the current process puts the staff on the defensive since it exposes their work to external critiques. Rather than have a process that seeks to create a mutually

agreed set of facts that all parties then argue over, the staff, in fact, has an incentive to delay disclosures and not keep external groups informed about changes in the basic database. Very often we have found that our data does not agree with staff's because of some ex parte discussion or the submission of some document that was never served.

While survey respondents did not make as extensive comments regarding Commerce, several respondents did indicate that Commerce displayed similar antagonism to the bar and the APO process.

Third, excessive characterization of data as confidential has limited the use of APO data. Survey respondents criticized both opposing counsel and the agencies for overinclusive designation of data as being APO confidential. Commentators were particularly disturbed by opponents who classified their information as confidential but then discussed it themselves at the hearing. This put counsel, who had thought the information was confidential, at a disadvantage both because they were unprepared to discuss the data and because they were unsure of what they were permitted to say. Survey respondents also held the agencies responsible for failing to limit opposing counsel's characterization of information as APO confidential to data which in fact was not otherwise available, as well as for neglecting to designate carefully their own agency data.

Closed hearings received "mixed reviews" from the approximately twelve survey respondents who had participated in such hearings. Some respondents thought that closed hearings

were beneficial because they allowed detailed focus on important issues and hence enhanced arguments. Others found the current procedures cumbersome and too limited by time constraints to make them meaningful.

Several additional concerns were raised by one or two survey respondents. First, counsel noted that use of APO data has limited a client's direct involvement in the case. One respondent felt that in some cases, this was due to the "frequently unnecessary restraints which arise out of caution." Second, two survey respondents alleged that opposing counsel had contacted purchasers whose names they received under APO. Third, two respondents noted the high expense of adequate APO procedures and expressed concern that small companies might be excluded from the process. On the other hand, another respondent thought that clients benefitted from the focused debate and therefore received "more value for their outlays." Fourth, two commentators thought that counsel should be permitted to use APO data from one investigation or review in subsequent reviews or related cases to demonstrate inconsistencies in the responses. Finally, two respondents expressed concern that the risks of improper use of APO data were greater with in-house counsel.

IV. PROCEDURAL ASPECTS OF TITLE VII APO RELEASE

Approximately one-third of the Title VII survey respondents commented on the procedural aspects of Title VII APO release. In general, the commentators:

- Believed that APO procedural requirements are unclear;
- Thought that the Commission manual should be expanded and that Commerce should develop one to clarify certain issues; and
- Supported the Commission policy of allowing an additional day to develop a public version.

Survey responses suggested that both Commerce and Commission procedures were unclear regarding what kind of information should be treated as proprietary (e.g., summaries, aggregate data, general characterizations at hearings, LTFV sales allegations). Responses also indicated uncertainty as to the proper procedure required in transmitting, storing and labeling proprietary information and handling information during court appeals. One respondent commented here, as others did in response to other questions, that the uncertainty was particularly troublesome "in light of the strict sanctions" and led to overbracketing and a less meaningful public version.

All survey respondents commenting favored agency manuals to make the procedures more explicit. A couple of respondents specifically complimented the Commission's "recently-issued helpful manual" and requested that Commerce issue a similar manual. It was suggested that the manuals include specific examples, similar to those provided in some of the more complicated Customs regulations. A third of the respondents requested another training program. Other respondents suggested public guidelines (e.g., notices in the Federal Register), an agency advisory hotline, a secretary's office with APO decision-

making authority, and more interaction with the bar organizations.

Regarding the differences between the agencies, the responses were mixed as to which agency procedures were superior. A number of responses stated that the Commission rules were generally better, especially with regard to assessing APO claims more efficiently. A number of responses claimed that Commerce procedures provided greater guidance and compelled more complete disclosure. The following specific differences between Commerce and Commission procedures also were noted: public and APO service list requirements, maintenance of a log for Commerce APO materials, mailing rules, and the classification of data as proprietary. Numerous responses suggested that both agencies' procedures need to be simplified.

Differences noted between Commerce/Commission procedures and those of other agencies or courts included the following: more intrusion, protection and micro-management at Commerce/Commission; less self-compliance and monitoring allowed at Commerce/Commission; companies, employers and experts given access to APO data at other agencies and courts; and sunset provisions for APO data absent at Commerce/Commission. In response to the inquiry of methods to improve the APO process, an overwhelming majority of responses advocated allowing an extra day to file public version briefs at Commerce. Whereas petitioners' counsel generally favored replacing company-specific APO briefs with single versions, a number of respondents'

counsel, as well as counsel representing both parties, opposed this suggestion. Additional suggestions to improve the process included: the elimination of log requirements and messenger ID requirements; streamlining of the Commerce APO application; the elimination of ranging requirements at Commerce; simplified public summaries; faster release of proprietary data; less harsh treatment of harmless inadvertent disclosures; and the protection of customer names.

On special problems relating to the use of computers, many responses stated that both agencies' procedures needed to be updated and improved. Specifically, several responses suggested that the agencies' procedural requirements were overly restrictive, particularly Commerce's requirement that a person stay in the room while the computer ran various programs. Several responses suggested that the agencies irrationally treat differently computers when performing data analysis and computers when used as word processors. Other responses suggested that the agencies have not provided adequate guidance on requirements for dealing with computer networks.

Finally, out-of-town counsel responses suggested that the agencies' procedures make it hard for them to compete with D.C. firms. Economic consultants indicated that they dislike the Commission's process of providing them APO releases one day later than counsel, as well as the requirement that attorneys vouch for the economist's compliance with the APO.

V. ADMINISTRATIVE PROTECTIVE ORDERS IN SECTION 337 CASES

Protective orders in Section 337 investigations issued by the Commission's Administrative Law Judges continue to be debated among Commission practitioners. Attorneys in private practice who responded to the survey generally reported that administrative protective orders are overly protective in their scope and counterproductive in their required destruction of information after termination of the investigation. Many survey respondents cited difficulties created by current administrative protective orders.

Most survey respondents represented both petitioners and respondents in Section 337 proceedings. A large majority of commentators also stated that the presence of the Administrative Law Judge in Section 337 investigations justifies different treatment for confidential information in these investigations than in Title VII investigations. A large majority of respondents also recommended that Administrative Law Judges issue protective orders with provisions specific to each investigation.

Respondents were evenly divided over whether foreign counsel should have access to confidential information, even if the foreign country provides both reciprocal access to U.S. counsel and imposes sanctions for violating protective orders.

Most survey respondents believed that, after an investigation had ended, they should be permitted to retain confidential information acquired during the administrative proceeding. These same respondents were less confident that

their clients would accept opposing counsels' retention of their confidential information. Respondents overwhelmingly stated their support for keeping confidential information beyond the end of the investigation, with the only opposition coming from attorneys who exclusively have represented respondents. Survey responses indicated support for keeping documents entered in the evidentiary record of the investigation, as opposed to keeping all of the underlying records of the parties. Reasons cited for retaining confidential information included further possible administrative proceedings, parallel district court lawsuits, and the risk of disclosure balanced against the burden and expense to duplicate discovery. One respondent estimated that conducting separate discovery for an investigation and for district court litigation increased the cost to his client by at least \$100,000.

Most survey respondents who commented stated that the potential for related court proceedings justifies the issuance of administrative protective orders in Section 337 proceedings that are different from those in Title VII investigations. Recommended changes for Section 337 protective orders included longer duration and greater flexibility to conform to protective orders of district courts. One respondent stated that since Section 337 investigations are more similar to district court cases than to Title VII investigations, Section 337 protective orders should be similar to those issued by the courts. Another respondent noted that with an Administrative Law Judge presiding in Section 337 cases, Section 337 protective order procedures,

provisions and sanctions should be modeled after those of intellectual property cases in the courts.

Retention of confidential information beyond the termination of Section 337 investigations was supported by nearly every survey respondent who commented. Several respondents stated that they would prefer to retain confidential information rather than to rely upon the records kept by the Commission or to seek access to the records when a future need arises. Opinions varied on the period of retention that should be permitted. Several respondents suggested a retention period of fixed duration, such as five or ten years after termination of the investigation, while others desired retention for the duration of the Commission order. Eleven percent of the survey respondents believed that economic information produced in an investigation had decreasing value with the passage of time and should not be retained, while technical information should be retained for a longer period than presently permitted by protective orders. Twenty-two percent of the respondents stated that counsel for the parties should be permitted to retain indefinitely all documents issued by the Administrative Law Judges and by the Commission.

Only one respondent identified a problem related to administration of protective orders. When disputes among opposing counsel arose over information governed by the administrative protective order in a Section 337 investigation with shortened time limits, this respondent indicated that judicial rulings were difficult to obtain on a timely basis.

Administrative protective order practice at the Commission has been changing very recently. Some protective orders have allowed attorneys to retain documents until all pending litigation has ended. The Commission, however, has perceived no reason to alter its long-standing policy that all confidential information be returned or destroyed when an investigation ends and has overruled those retention provisions. The Commission now has its policy under review. Some respondents believe the Commission should take these comments into account and expand its practice to permit retention indefinitely of "[c]opies of the pleadings and copies of confidential notices, orders, recommendations, determinations and opinions" issued by the Administrative Law Judges or the Commission as well as "[w]orking papers, briefs and other documents created by counsel. . . ." Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles, 337-TA-334, Protective Order at p. 9. Some respondents also believe that Administrative Law Judges should set and control administrative protective orders independently of the Commission since they are dealing directly with the parties and with the facts of the investigations.

VI. SANCTIONS

Approximately 45 percent of the 113 survey respondents commented on the questions regarding sanctions. Approximately 25 percent of the 113 survey respondents provided extensive

narrative comments on the sanctions questions, amplifying their answers to the tabular portion of the survey. Most commentators, both petitioners' and respondents' counsel, agreed on the following:

- The agencies need to provide clearer standards for determining a violation;
- The procedures for determining whether a violation has occurred and whether to impose sanctions must include timely notice, the right to know the charges and an opportunity to present a meaningful defense.
- The sanctions imposed should be commensurate with the violation, especially in those cases involving an inadvertent disclosure where no "harm" is caused by a "technical" violation of an APO; and
- Government employees should be held to the same standard of protecting APO data as non-government persons.

It should be noted that the narrative comments all shared a common thread, i.e., there are problems in administering APOs that need to be addressed in order to ensure that the interests of all parties involved in the APO process, including the agencies, are adequately safeguarded.

Twenty percent of the survey respondents commented that the agency standards for determining a violation were not clear or adequate; only three respondents said that they thought the standards were clear and adequate. According to several commentators, the standards were too subjective and parties were often unaware of what exactly constitutes a violation of an APO. For example, sometimes the agency allows discussions of trends,

while at other times claims such discussion is an APO violation. The agencies also have sanctioned individuals even though the information was available from a public source.

Two additional and significant concerns were raised by the survey respondents. The first relates to the actual process involved in finding a violation and imposing any sanctions. The second concern reflects the general consensus that the sanctions imposed are not commensurate with the violation.

In terms of the procedural aspects, those who supplied narrative comments noted that problems exist with the old procedures and the current revised procedures. Almost all respondents agreed that there is a need for timely notice, the right to know the charges and an opportunity to present a meaningful defense.

A serious problem, according to the commentators, has been the fact that delays in the sanction proceedings may inhibit one's defense of an alleged violation of an APO. In this regard, commentators suggested that the agency be required to notify counsel of a possible APO violation prior to the time destruction of APO materials is required; this would ensure that the information needed for one's defense is not destroyed, as has happened on at least two occasions. Further, several commentators indicated that the Commission appears to have no timetable for sanction proceedings and, accordingly, these proceedings may drag on for many months after an investigation

has concluded. A couple of commentators claimed that the proceedings had lasted from nine months to over a year.

Members of the bar also strongly criticized the absence of procedures, the lack of transparency and the fact that one office serves both as prosecutor and judge. Finally, several commentators expressed concern that once informed of a possible violation, they were only later notified if the agency actually found a violation; they were not notified if the agency found no violation. Hence, parties continue with a cloud over their heads for, in two cited cases, years.

On the other hand, those who had participated in the new Commerce proceedings felt that the pendulum has swung too far in the sanctions process, from a void of due process rights to a "full blown" proceeding. Respondents indicated that these new proceedings had become so complex in certain instances that one needed to hire outside counsel to defend one's self from allegations of a breach of an APO. The survey respondents expressed a desire for a reasonable middle ground.

Regarding the sanctions imposed, all those who supplied narrative comments shared the belief that the agencies should distinguish between a failure to adhere to the terms of the APO in all respects, i.e., "a technical breach," and an actual harmful breach of an APO which results in the release of confidential information. Many commentators asserted that there is no justification for imposing severe penalties where no harmful disclosure has occurred even though there may have been a

technical violation of an APO. Moreover, commentators felt that sanctions should be linked more closely to the harm, if any, that results from an APO violation.

With respect to the impact of private letters of reprimand, there was a general agreement among the commentators that such private letters of reprimand can affect one's professional standing or future employment. The specific comments provided are enlightening. Many respondents expressed concern that a private letter of reprimand would affect one's professional standing or future employment inasmuch as many bar and court admission forms require disclosure of such letters of reprimand and government appointments or confirmation processes require disclosure of such a letter.

Further, several respondents commented on damage to future employment possibilities. Two partners noted that they would be less likely to hire lateral applicants who had received a warning letter. An associate reported that, even though he/she was found to be innocent of wrongdoing approximately a year later, his or her "reputation and career within the firm were severely damaged," in part, because the managing partner, who did not practice trade law, perceived the letter to result from a significant violation. One commentator also indicated that potential clients could request that an individual disclose whether he or she has ever been sanctioned for violating an APO. If he or she has, the potential client may be less willing to hire them for fear that the client could lose counsel if that

individual were to violate inadvertently another APO and be barred from practicing before an agency.

In addition to the above concerns about the private letters of reprimand, a number of commentators reflected the belief that these "private" reprimands are not held in strict confidence. According to the comments, many other lawyers and agency personnel are aware of the existence of these private reprimands.

While those providing narrative responses generally had a negative attitude toward the administration of the sanction processes, more respondents were critical of the attitude of the Commission than of Commerce. Some commentators felt that Commerce generally was "fairer" and "more reasonable" in administering sanctions, although one respondent had found Commerce "vindictive." One respondent offered the view that the "Draconian" Commission approach to breaches stems "from a basic hostility by the Commissioners toward the notion that counsel should be permitted to examine information submitted." Another commentator supported this view: "[f]or the Commission, it seems the harsh treatment of violations stems from a feeling of certain Commission staff and Commissioners that outside parties should not have access to APO material."

Several commentators noted that other agencies and courts deal with similar sensitive information but other court or agency procedures cited were not comparable to those of the

Commission/Commerce. The commentators attributed the differences in procedures to the basic attitude towards the APO process:

Justice and the FTC, for example, have similar issues and seem to handle it without the nitpicking that goes on at the Commission. The difference is simple. Those agencies embrace the use of confidential information as an essential way to get at the facts of a case. The Commission, however, sees the use of APO information as impinging on its independence.

Survey respondents indicated that the result of the uncertain Commerce and Commission standards and the harmful consequences to counsel has a "chilling" effect on the use of APO data. Some commentators indicated that they tried to avoid using APO data, if at all possible. See Section III on Substantive Use of Title VII APO Information for a fuller discussion of the chilling effect.

There did not appear to be a general consensus among the survey respondents that members of the bar have intimidated opposing counsel by using alleged breaches as a means to gain a procedural advantage in a proceeding. A couple of commentators, however, indicated that opposing counsel had alleged a violation of the APO at the same time that a major submission was due. Other examples cited were more egregious, including offering to drop the APO complaint, if petitioner withdrew the case.

Over 30 percent of survey respondents commented that government employees have inadvertently released confidential information but do not appear to have been held to the same strict standards as non-government persons. According to the

respondents, if the purpose of sanctions is to make parties aware of the importance of maintaining confidentiality, some form of sanction should apply to the government employees as well as to private practitioners "to prevent a careless attitude towards APO data." As one commentator pointed out, the harm is the same regardless of who releases the information. Several respondents claimed that the most egregious violations were by agency officials.

The comments on this issue reflect frustration with what survey respondents perceive to be disparate standards for counsel and government officials: counsel's trade practice could be harmed by failure to bracket general trends seen only by APO counsel for a few hours, while government officials do not appear to be disciplined for disclosing sensitive information to the public. In fact, more respondents commented on the question regarding unequal treatment than on any other sanction issue. Some commentators noted that if the agency personnel are subject to sanctions for mishandling APO information, the agency needs to publicize that fact (but not the names of the sanctioned personnel) in order to address the perception that private practitioners are being singled out for harsher treatment than agency personnel. Another individual indicated that merely to have the agency go on record and state that APO violations by government employees will be dealt with appropriately is not an adequate response to remove the perception of unequal treatment.

There are two possible responses to ensure that agency personnel and counsel are treated equally. Agency personnel could be sanctioned more severely or counsel could be treated with what is perceived as the more reasonable approach afforded government employees. Survey respondents conveyed the hope that "if agency personnel were held to the same standards, they might be more understanding of inadvertent releases." The result would be a more rational approach, including "less threats and less time devoted to trivial matters."

In conclusion, the narrative responses shed some light on the attorneys' perceptions about the APO sanction process. While a number of "problem" areas were identified, it seems that many of the actual problems or perceived problems could be addressed through cooperative efforts by all the parties involved to improve the actual APO sanction process.

VII. FURTHER ACTION

A confidential tabulation of the survey responses was released to the agencies in February 1992, and a confidential draft report summarizing the results of the survey was presented to the agencies in July 1992. See Attachment C for the tabular responses and sections III-VI of this Final Report for the preliminary report presented to the agencies. During the past year and a half, representatives of the four bar organizations held a series of meetings with officials from Commerce and the Commission regarding the results of the survey. These meetings

provided an opportunity for the bar organizations to present their views to the agencies in greater detail, to provide a basis for developing recommendations and to better understand the agencies' concerns. The following discussion is a brief summary of the meetings, the changes in agency APO procedures since the survey, additional changes contemplated by the agencies, and the bar organizations' recommendations for further action.

In the meetings with the agencies, the bar representatives sought to create a dialogue, requesting information regarding the agencies' concerns as well as explaining the bar organizations' concerns. In response to questions from the bar representatives, Commerce requested input from the bar organizations regarding certain specific procedural requirements for safeguarding APO information, including log books and transmitting APO information by fax. The bar representatives responded to these specific questions in subsequent meetings. The Commission criticized members of the bar for excessively characterizing data as confidential, thereby handicapping the Commission in discussing the data at the hearing and in its opinion. The survey itself agrees with the Commission's concern and the bar organizations intend to respond, in part, by educating their members on the appropriate designation of confidential information at the ABA program on APO procedures to be held this Spring.

A. Commerce Title VII Proceedings

The meetings with Commerce were attended by its APO coordinators from the Office of Investigations and the Office of Compliance, as well as representatives from the Office of Policy, the Office of Chief Counsel, and the Office of the Assistant Secretary.

Given the survey results, the primary concerns expressed with Commerce's APO procedures involved: (1) burdensome procedures on the handling of APO material; (2) burdensome APO application procedures; (3) requirements for handling computerized APO material; and (4) procedures for handling violations and technical breaches of the APO procedures. In addition, several substantive APO issues were raised. The following outline summarizes the primary issues discussed with Commerce:

PROCEDURAL ISSUES

APO Applications. The bar representatives requested that applications be standardized so that lawyers/consultants receive APO information more quickly. Areas of particular concern include: (1) one-time or standard approval for computer systems; (2) faster approval of applications, (3) allowing law firms to add lawyers and support staff from the firm without prior approval after lead counsel has been approved; and (4) standardizing the option of receiving all APO information or only company-specific information.

Computers. The bar representatives further requested that computer procedures be revised to reduce unnecessary burdens on law firms. For example, the room where the computer is running could remain locked, when left unattended. Further, Commerce could perform a one-time review of an individual law firm's security system and the APO application process could be revised to require only a certification that the approved system was being used.

One day rule. The bar representatives sought a "one-day rule" parallel to the Commission procedure, i.e., Commerce

should allow the filing of public versions one day after the filing of an APO version of a document. Any special APO versions (e.g., company-specific versions) could also be subject to that rule. Further public versions filed under the one-day rule could be hand delivered where the information is substantive and timing is critical (e.g., briefs).

VIOLATIONS AND SANCTIONS

No harm, no foul rule/Two-tiered procedure. The bar representatives discussed modifications in APO procedures so that technical violations (e.g., mailing APO data to the wrong party but retrieving before opened) that do not release APO data and are not part of a pattern be handled differently than more serious violations (e.g. no hearing for minor infractions; the determining factor would probably be the seriousness of the possible penalty). In addition, members of the bar requested that the remedial classes be eliminated.

Expunging the record. Where an individual does not have any violation for a set number of years, e.g., two years, the bar representatives sought a change to parallel the Commission procedure, i.e., the record would be automatically expunged of any previous violation.

An outline of the issues discussed with Commerce officials is provided in Attachment D.

1. Modifications to Commerce Procedures

Since the survey was conducted and the issues raised with the agency, Commerce has significantly modified two of its APO procedures.

One-Day Lag Rule. On July 13, 1992, Commerce issued interim-final regulations implementing the so-called one-day lag rule for antidumping and countervailing duty investigations. 57 Fed. Reg. 30,902 (July 13, 1992). Under these regulations, the submitter of an APO document is permitted to file and serve the public version of that document one business day after the APO

document is filed. This regulation, which essentially parallels the Commission's procedure, is intended to reduce the likelihood of inadvertent disclosures and violations of the APO procedures resulting from the pressure of deadlines. Commerce has indicated that it intends to finalize this regulation.

Violations and Sanctions. Commerce also has modified its internal position regarding technical breaches of the APO procedures. Under Commerce's new policy, a technical breach exists when:

- the breach is inadvertent;
- the breach resulted in no harm to the submitter of the proprietary information; and
- the breach was committed by a first-time violator who cooperates with Commerce's investigation of the breach.

If its investigation establishes that these conditions exist, Commerce will not view the breach as a "violation" and will only issue a warning letter.

Commerce also clarified its procedure regarding expungement. Specifically, Commerce permits a prior violator to request the expungement of his or her record where another violation has not occurred for three years. Commerce also has clarified that hearings are optional at the request of the person being investigated.

While these policies have been internally adopted, Commerce hopes to codify them in its regulations in the near future.

2. Issues Under Consideration by Commerce

Although Commerce has not formally modified its procedures, it is considering the following changes.

Procedures for the Handling of APO Material. Although Commerce generally appears to agree that there are problems with its procedural requirements, it is still in the process of considering how best to modify those requirements while ensuring that APO data is adequately protected. In particular, Commerce is considering permitting law firms more discretion in the actual handling of both hard copy and computerized APO materials (e.g., the elimination of the logbook requirement and the elimination of particular computer requirements).

APO Application. Commerce is also in the process of reformulating its APO application to streamline the process for gaining access to both hard copy and computerized APO information, as well as for amending APO applications.

Other Issues. Commerce is also considering the bar organizations' proposals regarding (1) further clarifications of the one-day lag rule; (2) the extension of the APO during appeal; (3) joint bar organization/agency APO training sessions to clarify certain aspects of Commerce policy and procedure; (4) modifying its regulations and APO application to ensure that lawyers hired after the regulatory deadline will be permitted to apply and receive APO information in a fair manner; and (5) modifying its procedures to allow a nonlawyer to act as lead representative.

B. Commission Title VII Proceedings

The meetings with the Commission were attended by a representative from each of the Commissioner's offices, the Office of the Secretary, the Office of General Counsel and, at the last two meetings, the Office of Investigations.

The primary focus of the Commission meetings was on two critical issues: access to APO data and the "chilling effect" on the use of APO data created by the Commission's administration of the APO process. Because the Commission's procedures are not perceived as burdensome, there was little discussion of general procedures. The bar representatives also questioned the necessity of sanctions for "technical" violations, e.g., a misdirected envelope returned unopened, and inadequacies with the sanction procedures.

SUBSTANTIVE ISSUES

Access to APO Data

The most serious concern expressed by the bar representatives was with those instances in which the Commission failed to provide access to APO data during the investigation or provided it so late in the process that access was effectively denied.

For example, the Commission does not issue the Service List until at least a week after the Federal Register notice in a preliminary investigation, and if there is any delay in publication, as there sometime is, parties will not be served with any questionnaire data and respondents will not have access to the APO petition until shortly before the conference, and in certain cases not until afterwards. In all cases, third-party information is copied by the investigator assigned to the case and is held until there is a substantial amount of questionnaire responses "justifying the release;" therefore, significant data is often not released until shortly before the hearing and certain data is not released until after the hearing and sometimes after

the final briefs. Further, some information is amended in telephone conversations with investigators and these modifications are not released to APO recipients until after the investigation is completed.

Chilling Effect

The bar representatives discussed the "chilling effect" on the use of APO data created by the Commission's administration of the process. For example, there is confusion regarding what information is confidential, e.g., trend or aggregate data, and concerns with inconsistent administration of the process. Further, fear of sanctions too often prevented counsel from raising certain arguments, even when clients had independent knowledge, or when parallel information was available in public reports or the staff or opposing counsel had cited the same facts.

VIOLATIONS AND SANCTIONS

No harm, no foul rule/two-tiered procedure

The bar representatives discussed the potential modification of APO procedures so that technical violations (e.g., mailing APO data to the wrong party but retrieving before opened) that do not release APO data and are not part of a pattern would be handled differently than more serious violations (e.g. no hearing for minor infractions; the determining factor would probably be the seriousness of the possible penalty).

Procedures. The bar representatives raised the issue of hearing procedures for serious allegations, perhaps involving ALJ's or other third parties. They also raised concerns that the Commission sometimes had not alleged a breach until after counsel had been required to destroy the evidence needed to defend him/herself.

An outline of the issues discussed with Commission officials is provided in Attachment E.

1. Modifications to Commission Procedures

Since the survey, the Commission has made several changes in its APO procedures. On April 15, 1993, the Commission published a Federal Register "Notice of Proposed Rulemaking." 58

Fed. Reg. 19,638-41 (April 15, 1993). This notice: (1) provided specific procedures for closed APO hearings; (2) defined "competitive decisionmaking;" (3) allowed the Commission to take "other action" in addition to the sanctions already provided; (4) changed the procedure for requesting exemption from disclosure under APO; and (5) adopted new "breach procedures" allowing Commission action for up to two years after the close of an investigation and appeal and providing for "a reasonable opportunity to present . . . views." Id. at 19,639-40.

Although these regulations have not been promulgated, the Commission has changed its policy to include "warning letters" as one option against first-time APO offenders, instead of sanctions such as letters of reprimand. The Commission appears to have dealt with its backlog of alleged violations and matters are handled more promptly. The Commission also has changed its internal procedures to (1) approve APO applications on a "rolling" basis (instead of waiting until all applications are received), and (2) notify applicants of the acceptance of his/her application by telephone within approximately one day, thereby enabling more rapid access to APO data.

2. Issues Under Consideration by the Commission

On February 15, 1994, the Commission voted to take two additional actions regarding APO procedures. See Transcript of Commission Meeting, February 15, 1994. The purpose of these actions was to provide a form for "the Commission to deliberate

on these rather complicated proposals in a more traditional way." Id. at 6. First, the Commission established a committee to propose new procedures for photocopying and distribution of APO data. Among the proposals to be studied by the committee are development of a team approach or the expanded use of an outside photocopying service. This committee, comprised of senior staff, is to study the duplicating issues and present a recommendation to the Commission within two months of the February 15th meeting. Id. at 11-12.

Second, the Commission requested that the General Counsel circulate additional APO recommendations, formulated by Commissioner Brunsdale, in the form of an "Action Jacket," i.e., a usual form employed by the Commission to present issues for a vote. Id. at 5. The recommendations included in the Action Jacket are: (1) development of the Service List on a "rolling basis" and notification of that list so counsel can receive service of APO documents including the petition before the preliminary conference; (2) access between preliminary and final investigations; (3) one firmwide roster of attorneys; (4) release of third-party data from a photocopying center within a day of its filing at the Commission, well within sufficient time to allow use of the data; (5) a new definition of "confidential" to clarify what data may be used (e.g., aggregate data and trends); and (6) no sanctions for certain actions which are now sanctioned (e.g., those actions for which there has been no actual disclosure or those for which there has been no harm to the

submitter). See February 22, 1994 Memorandum for Public Inspection regarding "Proposed Revisions in APO Regulations" on file in the Office of the Secretary, U.S. International Trade Commission.

C. Commission Section 337 Proceedings

The Commission undertook interlocutory review of certain protective orders issued by Administrative Law Judges in Section 337 cases because the orders allowed parties to retain indefinitely certain confidential business information. The Commission set forth the issue it would consider in a notice of Commission hearing dated November 13, 1992. The Commission subsequently held a hearing on the two protective orders under consideration on December 17, 1992. Subsequent to the Commission's hearing, it determined not to review the Protective Orders in both pending cases. However, the Commission published a notice in the Federal Register on December 9, 1993, in which the Commission provided advance notice of proposed rulemaking. See Attachment F. In its notice, the Commission stated that it had decided that the issues raised in connection with the hearings raised policy concerns which could be addressed through rulemaking under the APA. Accordingly, the Commission solicited comments concerning whether there should be Commission rules governing the post-termination retention of confidential business information and/or the operation of a Commission repository for such information and, if so, what those rules should provide. It established February 7, 1994, as a due date for comments and

comments were filed pursuant to the Commission's notice. Because of the timing, it is unclear how the Commission will resolve this issue.

VIII. RECOMMENDATIONS

A. Commerce Title VII Proceedings

The bar organizations recognize that Commerce has taken significant positive steps with respect to the issues raised in the survey and are very hopeful that this momentum will continue. Based on the survey results and the actions taken since the survey, the bar organizations recommend:

(1) Finalize the interim-final regulation to implement the one-day lag rule.

(2) Standardize the APO application to: (a) permit one-time or standard approval for computer systems, if any approval is deemed necessary; (b) allow law firms to add lawyers and support staff from the firm without prior approval after lead counsel has been approved; only requiring notification after persons have been added; (c) ensure that lawyers hired after the current regulatory deadline will be permitted to apply and receive APO information in a fair manner; (d) standardize the option of receiving all APO information or only company-specific information; and (e) permit a non-lawyer to act as lead representative.

(3) Eliminate what are now very specific and complex APO procedures for handling of APO material to permit recipients of APO information more discretion in the details of managing internally both the hard copy and computerized APO materials.

(4) Establish a unified Commerce APO coordinator for both the Office of Investigations and Compliance.

(5) Allow additional time to submit APO information after a hearing to rebut new arguments made in a rebuttal brief or at the hearing.

(6) Extend the Commerce APO during an appeal of the agency decision or, at least, until a Judicial Protective Order is in place to ensure that there is no gap. Ensure that procedures and requirements for court APO and agency APO are uniform.

(7) Formally adopt the internal policies already instituted regarding violations and sanctions.

(8) Adopt a "no harm-no foul" rule to eliminate sanctions for certain actions for which there has been no harm to the submitter of the APO data.

(9) Provide for automatic expungement of the record if no other violations have occurred for two years.

(10) Harmonize regulations and procedures with those of the Commission, wherever possible, and publish the same in a joint APO manual.

B. Commission Title VII Proceedings

The bar associations recognize that the Commission has addressed positively two critical issues: (1) the "rolling" approval of APO applications (including notice to applicants of the acceptance of their applications by telephone within approximately one day); and (2) the use of warning letters instead of sanctions for a first offense. Based on the survey results and the actions taken since the survey, the bar organizations recommend:

(1) Develop the Service List on a "rolling basis" and notify parties of the list so that counsel can be served with APO documents, including the petition, more quickly and, notably, before the preliminary conference.

(2) Permit APO applications on a continuous basis to ensure that counsel hired after the preliminary injury determination do not have to wait until the final injury investigation is initiated.

(3) Permit use of APO information between the preliminary and final investigations.

(4) Release third-party data from a photocopying center within a day of its filing at the Commission so that it is provided within sufficient time for counsel to use the data in representing an interested party.

(5) Provide for timely access to information gathered in telephone conversations e.g., by making a written record of such information and releasing it as all other APO documents in time for parties to provide comments.

(6) Clarify the definition of "confidential" so that counsel understand which data may be used in public submissions (e.g., "increasing" or decreasing" trends or aggregate data). Publish the Commission policy on what information is considered confidential so all parties will be aware of it.

(7) Formally adopt the Commission's policy of issuing "warning letters" where appropriate, depending on the seriousness of the breach.

(8) Adopt a "no harm-no foul" rule to eliminate sanctions for certain actions for which there has been no harm to the submitter of the APO data.

(9) Apply the APO rules consistently so that counsel may know with certainty which kinds of APO data handling will result in sanctions by the Commission.

(10) Harmonize regulations and procedures with those of the Commission, wherever possible, and publish the same in a joint APO manual.

C. Commission Section 337 Proceedings

The bar organizations recommend that the Commission adopt rules on post-termination retention of APO information in section 337 cases. The rules should permit retention of this information for differing period of time based upon the type of document containing the APO information and the posture of the

investigation. The bar organizations recommend that the following positions be incorporated into the rules:

- (1) Until the date on which all appeals of the Commission's decision are exhausted all APO data can be retained.
- (2) Upon exhaustion of appeals all discovery materials containing APO data are to be returned to the supplier or destroyed with destruction certified to the supplier and the Commission in writing.
- (3) Upon exhaustion of appeals all APO data in the hands of expert witnesses is to be returned to the supplier or destroyed with destruction certified to the supplier and the Commission in writing.
- (4) Until the exhaustion of all appeals or, if a remedial order is issued, upon the expiration of the remedial order, counsel for each party may retain one copy of the confidential evidentiary record, including a specimen of each physical exhibit. Upon the exhaustion of all appeals or, if a remedial order is issued, upon the expiration of the remedial order, each party shall destroy its copy of the confidential evidentiary record and shall notify each supplier and the Commission in writing that the party's copy of the confidential evidentiary record has been destroyed.
- (5) Copies of pleadings and copies of confidential notices, orders, recommendations and opinions issued by an ALJ or by the Commission may be retained indefinitely by the Commission, the ALJ, employees of the Commission and by counsel who are subject to the Protective Order. Working papers, briefs and other documents created by counsel subject to the Protective Order may be retained indefinitely and, except for any APO data contained therein, may be used in the future.
- (6) Jurisdiction over the Protective Order remains with the ALJ until an initial determination is issued, at which time jurisdiction vests in the Commission which will decide any issues arising under the Protective Order or, if it chooses, refer them to an ALJ.