

## § 354.18

CFR 351.305(c), or their successor regulations.

[53 FR 47920, Nov. 28, 1988, as amended at 63 FR 24405, May 4, 1998]

### § 354.18 Public notice of sanctions.

If there is a final decision under § 354.15 to impose sanctions, or if a charging letter is settled under § 354.7(b), notice of the Secretary's decision or of the existence of a settlement will be published in the FEDERAL REGISTER. If a final decision is reached, such publication will be no sooner than 30 days after issuance of a final decision or after a motion to reconsider has been denied, if such a motion was filed. In addition, whenever the Deputy Under Secretary for International Trade subjects a charged or affected party to a sanction under § 354.3(a)(1), the Deputy Under Secretary for International Trade also will provide such information to the ethics panel or other disciplinary body of the appropriate bar associations or other professional associations and to any Federal agency likely to have an interest in the matter. The Deputy Under Secretary for International Trade will cooperate in any disciplinary actions by any association or agency. Whenever the Deputy Under Secretary for International Trade subjects a charged or affected party to a private letter of reprimand under § 354.3(a)(5), the Secretary will not make public the identity of the violator, nor will the Secretary make public the specifics of the violation in a manner that would reveal indirectly the identity of the violator.

[63 FR 24405, May 4, 1998]

### § 354.19 Sunset.

(a) If, after a period of three years from the date of issuance of a warning letter, a final decision or settlement in which sanctions were imposed, the charged or affected party has fully complied with the terms of the sanctions and has not been found to have violated another administrative protective order, the party may request in writing that the Deputy Under Secretary for International Trade rescind the charging letter. A request for rescission must include:

## 19 CFR Ch. III (4-1-03 Edition)

(1) A description of the actions taken during the preceding three years in compliance with the terms of the sanctions; and

(2) A letter certifying that: the charged or affected party complied with the terms of the sanctions; the charged or affected party has not received another administrative protective order sanction during the three-year period; and the charged or affected party is not the subject of another investigation for a possible violation of an administrative protective order.

(b) Subject to the Chief Counsel's confirmation that the charged or affected party has complied with the terms set forth in paragraph (a) of this section, the Deputy Under Secretary for International Trade will rescind the charging letter within 30 days after receiving the written request.

[63 FR 24405, May 4, 1998]

## PART 356—PROCEDURES AND RULES FOR IMPLEMENTING ARTICLE 1904 OF THE NORTH AMERICAN FREE TRADE AGREEMENT

### Subpart A—Scope and Definitions

- Sec.
- 356.1 Scope.
- 356.2 Definitions.

### Subpart B—Procedures for Commencing Review of Final Determinations

- 356.3 Notice of intent to commence judicial review.
- 356.4 Request for panel review.
- 356.5 [Reserved]
- 356.6 Receipt of notice of a scope determination by the Government of a FTA country.
- 356.7 Request to determine when the Government of a FTA country received notice of a scope determination.
- 356.8 Continued suspension of liquidation.

### Subpart C—Proprietary and Privileged Information

- 356.9 Persons authorized to receive proprietary information.
- 356.10 Procedures for obtaining access to proprietary information.
- 356.11 Procedures for obtaining access to privileged information.

**Subpart D—Violation of a Protective Order or a Disclosure Undertaking**

- 356.12 Sanctions for violation of a protective order or disclosure undertaking.
- 356.13 Suspension of rules.
- 356.14 Report of violation and investigation.
- 356.15 Initiation of proceedings.
- 356.16 Charging letter.
- 356.17 Request to charge.
- 356.18 Interim sanctions.
- 356.19 Request for a hearing.
- 356.20 Discovery.
- 356.21 Subpoenas.
- 356.22 Prehearing conference.
- 356.23 Hearing.
- 356.24 Proceeding without a hearing.
- 356.25 Witnesses.
- 356.26 Initial decision.
- 356.27 Final decision.
- 356.28 Reconsideration.
- 356.29 Confidentiality.
- 356.30 Sanctions for violations of a protective order for privileged information.

AUTHORITY: 19 U.S.C. 1516a and 1677f(f), unless otherwise noted.

SOURCE: 59 FR 229, Jan. 3, 1994, unless otherwise noted.

**Subpart A—Scope and Definitions****§ 356.1 Scope.**

This part sets forth procedures and rules for the implementation of Article 1904 of the North American Free Trade Agreement under the Tariff Act of 1930, as amended by title IV of the North American Free Trade Agreement Implementation Act of 1993 (19 U.S.C. 1516a and 1677f(f)). This part is authorized by section 402(g) of the North American Free Trade Agreement Implementation Act of 1993.

**§ 356.2 Definitions.**

For purposes of this part:

- (a) *Act* means the Tariff Act of 1930, as amended;
- (b) *Administrative law judge* means the person appointed under 5 U.S.C. 3105 who presides over the taking of evidence as provided by subpart D of this part;
- (c) *Affected party* means a person against whom sanctions have been proposed for alleged violation of a protective order or disclosure undertaking but who is not a charged party;
- (d) *Agreement* means the North American Free Trade Agreement between Canada, the United Mexican States and

the United States, signed on December 17, 1992; or, with respect to binational panel or extraordinary challenge proceedings underway as of such date, or any binational panel or extraordinary challenge proceedings that may proceed between Canada and the United States following any withdrawal from the Agreement by Canada or the United States, the United States-Canada Free Trade Agreement between Canada and the United States, which came into force on January 1, 1989;

(e) *APO Sanctions Board* means the Administrative Protective Order Sanctions Board;

(f) *Article 1904 Panel Rules* means the NAFTA Article 1904 Panel Rules, negotiated pursuant to Article 1904 of the North American Free Trade Agreement between Canada, the United Mexican States and the United States, and any subsequent amendments; or, with respect to binational panel proceedings underway as of such date, or any binational panel proceedings that may proceed between the Canada and the United States following any withdrawal from the Agreement by Canada or the United States, the *Article 1904 Panel Rules*, as amended, which came into force on January 1, 1989;

(g) *Authorized agency of a free trade area country* means:

- (1) In the case of Canada, any Canadian government agency that is authorized by Canadian law to request the Department to initiate proceedings to impose sanctions for an alleged violation of a disclosure undertaking; and
- (2) In the case of Mexico, any Mexican government agency that is authorized by Mexican law to request the Department to initiate proceedings to impose sanctions for an alleged violation of a disclosure undertaking;

(h) *Binational panel* means a binational panel established pursuant to Annex 1901.2 to Chapter Nineteen of the Agreement for the purpose of reviewing a final determination;

(i) *Charged party* means a person who is charged by the Deputy Under Secretary with violating a protective order or a disclosure undertaking;

(j) *Chief Counsel* means the Chief Counsel for Import Administration, U.S. Department of Commerce, or designee;

§ 356.2

19 CFR Ch. III (4-1-03 Edition)

(k) *Days* means calendar days, except that a deadline which falls on a weekend or holiday shall be extended to the next working day;

(l) *Department* means the U.S. Department of Commerce;

(m) *Deputy Under Secretary* means the Deputy Under Secretary for International Trade, U.S. Department of Commerce;

(n) *Director* means an Office Director under the Deputy Assistant Secretary for Investigations, U.S. Department of Commerce, or designee, if the panel review is of a final determination by the Department under section 751 of the Act, or an Office Director under the Deputy Assistant Secretary for Compliance, or designee, if the panel review is of a final determination by the Department under section 705(a) or 735(a) of the Act;

(o) *Disclosure undertaking* means:

(1) In the case of Canada, the Canadian mechanism for protecting proprietary or privileged information during proceedings pursuant to Article 1904 of the Agreement, as prescribed by subsection 77.21(2) of the Special Import Measures Act, as amended; and

(2) In the case of Mexico, the Mexican mechanism for protecting proprietary or privileged information during proceedings pursuant to Article 1904 of the Agreement, as prescribed by the Ley de Comercio Exterior and its regulations;

(p) *Extraordinary challenge committee* means the committee established pursuant to Annex 1904.13 to Chapter Nineteen of the Agreement to review decisions of a panel or conduct of a panelist;

(q) *Final determination* means “final determination” as defined by Article 1911 of the Agreement;

(r) *Free trade area country* or *FTA country* means “free trade area country” as defined by section 516A(f)(10) of the Act (19 U.S.C. 1516a(f)(10));

(s) *Investigating authority* means the competent investigating authority that issued the final determination subject to review and includes, in respect of the issuance, amendment, modification or revocation of a protective order or disclosure undertaking, any person authorized by the investigating authority;

(t) *Lesser-included sanction* means a sanction of the same type but of more limited scope than the proposed sanction for violation of a protective order or disclosure undertaking; thus, a one-year bar on representation before the Department is a lesser-included sanction of a proposed seven-year bar;

(u) *Letter of transmittal* means a document marked according to the requirements of 19 CFR 353.31(e)(2)(i)-(v) or 355.31(e)(2)(i)-(v);

(v) *Official publication* means:

(1) In the case of Canada, the *Canada Gazette*;

(2) In the case of Mexico, the *Diario Oficial de la Federacion*; and

(3) In the case of the United States, the *FEDERAL REGISTER*;

(w) *Panel review* means review of a final determination pursuant to Chapter Nineteen of the Agreement;

(x) *Party to the proceeding* means a person that would be entitled, under section 516A of the Act (19 U.S.C. 1516a), to commence proceedings for judicial review of a final determination;

(y) *Participant* means a party to the proceeding that files a Complaint or a Notice of Appearance in a panel review, and the Department;

(z) *Parties* means, in an action under subpart D of this part, the Department and the charged party or affected party;

(aa) *Person* means, an individual, partnership, corporation, association, organization, or other entity;

(bb) *Privileged information* means:

(1) With respect to a panel review of a final determination made in Canada, information of the investigating authority that is subject to the solicitor-client privilege under the laws of Canada, or that constitutes part of the deliberative process with respect to the final determination, and with respect to which the privilege has not been waived;

(2) With respect to a panel review of a final determination made in Mexico:

(i) Information of the investigating authority that is subject to attorney-client privilege under the laws of Mexico; or

(ii) Internal communications between officials of the *Secretaria de Comercio y Fomento Industrial* in

charge of antidumping and countervailing duty investigations or communications between those officials and other government officials, where those communications constitute part of the deliberative process with respect to the final determination; and

(3) With respect to a panel review of a final determination made in the United States, information of the investigating authority that is subject to the attorney-client, attorney work product or government deliberative process privilege under the laws of the United States and with respect to which the privilege has not been waived;

(cc) *Proprietary information* means:

(1) With respect to a panel review of a final determination made in Canada, information referred to in subsection 84(3) of the Special Import Measures Act, as amended, or subsection 45(3) of the Canadian International Trade Tribunal Act, as amended, with respect to which the person who designated or submitted the information has not withdrawn the person's claim as to the confidentiality of the information;

(2) With respect to a panel review of a final determination made in Mexico, *informacion confidencial*, as defined under article 80 of the Ley de Comercio Exterior and its regulations; and

(3) With respect to a panel review of a final determination made in the United States, business proprietary information under section 777(f) of the Act (19 U.S.C. 1677f(f)) and information the disclosure of which the Department has decided is limited under the procedures adopted pursuant to Article 1904.14 of the Agreement, including business or trade secrets; production costs; terms of sale; prices of individual sales, likely sales, or offers; names of customers, distributors, or suppliers; exact amounts of the subsidies received and used by a person; names of particular persons from whom proprietary information was obtained; and any other business information the release of which to the public would cause substantial harm to the competitive position of the submitter;

(dd) *Protective order* means a protective order issued by the Department under 19 CFR 356.10(c) or 356.11(c);

(ee) *Scope determination* means a determination by the Department, reviewable under section 516A(a)(2)(B)(vi) of the Act (19 U.S.C. 1516a(a)(2)(B)(vi)), as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or an antidumping or countervailing duty order covering free trade area country merchandise;

(ff) *Secretariat* means the Secretariat established pursuant to Article 2002 of the Agreement and includes the Secretariat sections located in Canada, Mexico and the United States;

(gg) *Secretary* means the Secretary of the Canadian section of the Secretariat, the Secretary of the Mexican section of the Secretariat, or the Secretary of the United States section of the Secretariat and includes any person authorized to act on behalf of the Secretary;

(hh) *Service address* means the address of the counsel of record for a person, including any facsimile number submitted with that address, or, where a person is not represented by counsel, the address set out by the person in a Request for Panel Review, Complaint or Notice of Appearance as the address at which the person may be served, including any facsimile number submitted with that address, or where a Change of Service Address has been filed by a person, the new service address set out as the service address in that form, including any facsimile number submitted with that address;

(ii) *Service list* means, with respect to a panel review of a final determination made in the United States, the list maintained by the investigating authority of persons who have been served in the proceeding leading to the final determination;

(jj) *Under Secretary* means the Under Secretary for International Trade, U.S. Department of Commerce, or designee;

(kk) *United States section of the Secretariat* means, for the purposes of filing, United States Secretary, NAFTA Secretariat, room 2061, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC 20230.

### Subpart B—Procedures for Commencing Review of Final Determinations

#### § 356.3 Notice of intent to commence judicial review.

A party to a proceeding who intends to commence judicial review of a final determination made in the United States shall file a Notice of Intent to Commence Judicial Review, which shall contain such information, and be in such form, manner, and style, including service requirements, as prescribed by the Article 1904 Panel Rules, within 20 days after:

(a) The date of publication in the FEDERAL REGISTER of the final determination; or

(b) The date on which the notice of the final determination was received by the Government of the FTA country if the final determination was not published in the FEDERAL REGISTER.

#### § 356.4 Request for panel review.

A party to a proceeding who seeks panel review of a final determination shall file a Request for Panel Review, which shall contain such information, and be in such form, manner, and style, including service requirements, as prescribed by the Article 1904 Panel Rules, within 30 days after:

(a) The date of publication in the official publication of the final determination; or

(b) The date on which the notice of the final determination was received by the United States Government or the Government of the FTA country if the final determination was not published in the official publication.

#### § 356.5 [Reserved]

#### § 356.6 Receipt of notice of a scope determination by the Government of a FTA country.

(a) Where the Department has made a scope determination, notice of such determination shall be deemed received by the Government of a FTA country when a certified copy of the determination is delivered to the chancery of the Embassy of the FTA country during its normal business hours.

(b) Where feasible, the Department, or an agent therefor, will obtain a cer-

tificate of receipt signed by a person authorized to accept delivery of documents to the Embassy of the FTA country acknowledging receipt of the scope determination. The certificate will describe briefly the document being delivered to the Embassy of the FTA country, state the date and time of receipt, and include the name and title of the person who signs the certificate. The certificate will be retained by the Department in its public files pertaining to the scope determination at issue.

#### § 356.7 Request to determine when the Government of a FTA country received notice of a scope determination.

(a) Pursuant to section 516A(g)(10) of the Act (19 U.S.C. 1516a(g)(10)), any party to the proceeding may request in writing from the Department the date on which the Government of a FTA country received notice of a scope determination made by the Department.

(b) A request shall be made by filing a written request and the correct number of copies in accordance with the requirements set forth in 19 CFR 353.31(d) and (e)(2) or 355.31(d) and (e)(2) with the Secretary of Commerce, Attention: Import Administration, Central Records Unit, room B-099, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC 20230. A letter of transmittal must be bound to the original and each copy as the first page of the request.

(c) The requesting party shall serve a copy of the Request to Determine When the Government of [insert name of applicable FTA country] Received Notice of a Scope Determination by first class mail or personal service on any interested party on the Department's service list in accordance with the service requirements listed in 19 CFR 353.31(g) or 355.31(g).

(d) The Department will respond to the request referred to in paragraph (b) of this section within five business days of receipt.

#### § 356.8 Continued suspension of liquidation.

(a) *In general.* In the case of an administrative determination specified in clause (iii) or (vi) of section

516A(a)(2)(B) of the Act (19 U.S.C. 1516a(a)(2)(B)(iii) and (vi)) and involving free trade area country merchandise, the Department shall not order liquidation of entries of merchandise covered by such a determination until the forty-first day after the date of publication of the notice described in clause (iii) or receipt of the determination described in clause (vi), as appropriate. If requested, the Department will order the continued suspension of liquidation of such entries in accordance with the terms of paragraphs (b), (c), and (d) of this section.

(b) *Eligibility to request continued suspension of liquidation.* (1) A participant in a binational panel review that was a domestic party to the proceeding, as described in section 771(9)(C), (D), (E), (F), or (G) of the Act (19 U.S.C. 1677(9)(C), (D), (E), (F) and (G)), may request continued suspension of liquidation of entries of merchandise covered by the administrative determination under review by the panel and that would be affected by the panel review.

(2) A participant in a binational panel review that was a party to the proceeding, as described in section 771(9)(A) of the Act (19 U.S.C. 1677(9)(A)), may request continued suspension of liquidation of the merchandise which it manufactured, produced, exported, or imported and which is covered by the administrative determination under review by the panel.

(c) *Request for continued suspension of liquidation.* A request for continued suspension of liquidation must include:

(1) The name of the final determination subject to binational panel review and the case number assigned by the Department;

(2) The caption of the binational panel proceeding;

(3) The name of the requesting participant;

(4) The requestor's status as a party to the proceeding and as a participant in the binational panel review; and

(5) The specific entries to be suspended by name of manufacturer, producer, exporter, or U.S. importer.

(d) *Filing and service.* (1) A request for Continued Suspension of Liquidation must be filed with the Assistant Secretary for Import Administration, room B-099, 14th and Constitution Ave-

nue, NW., Washington, DC 20230, in accordance with the requirements set forth in 19 CFR 353.31(d) and (e)(2) or 355.31(d) and (e)(2). A letter of transmittal must be bound to the original and each copy as the first page of the request. The envelope and the first page of the request must be marked: Panel Review—Request for Continued Suspension of Liquidation. The request may be made no earlier than the date on which the first request for binational panel review is filed.

(2) The requesting party shall serve a copy of the Request for Continued Suspension of Liquidation on the United States Secretary and all parties to the proceeding in accordance with the requirements of 19 CFR 353.31(g) or 19 CFR 355.31(g).

(e) *Termination of Continued Suspension.* Upon completion of the panel review, including any panel review of remand determinations and any review by an extraordinary challenge committee, the Department will order liquidation of entries, the suspension of which was continued pursuant to this section.

### Subpart C—Proprietary and Privileged Information

#### § 356.9 Persons authorized to receive proprietary information.

Persons described in paragraphs (a), (d), (e), (f) and (g) of this section shall, and persons described in paragraphs (b) and (c) of this section may, be authorized by the Department to receive access to proprietary information if they comply with this subpart and such other conditions imposed upon them by the Department:

(a) The members of, and appropriate staff of, a binational panel or extraordinary challenge committee;

(b) Counsel to participants in panel reviews and professionals retained by, or under the direction or control of such counsel, provided that the counsel or professional does not participate in competitive decision-making activity (such as advice on production, sales, operations, or investments, but not legal advice) for the participant represented or for any person who would gain competitive advantage through

**§ 356.10**

knowledge of the proprietary information sought;

(c) Other persons who are retained or employed by and under the direction or control of a counsel or professional, panelist, or committee member who has been issued a protective order, such as paralegals, law clerks, and secretaries, if such other persons are:

(1) Not involved in the competitive decision-making of a participant to the panel review or for any person who would gain competitive advantage through knowledge of the proprietary information sought; and

(2) Have agreed to be bound by the terms set forth on the application for protective order of the counsel or professional, panelist, or committee member;

(d) Each Secretary and every member of the staff of the Secretariat;

(e) Such officials of the United States Government (other than an officer or employee of the investigating authority that issued the final determination subject to review) as the United States Trade Representative informs the Department require access to proprietary information for the purpose of evaluating whether the United States should seek an extraordinary challenge committee review of a panel determination;

(f) Such officials of the Government of a FTA country as an authorized agency of the FTA country informs the Department require access to proprietary information for the purpose of evaluating whether the FTA country should seek an extraordinary challenge committee review of a panel determination; and

(g) Every court reporter, interpreter and translator employed in a panel or extraordinary challenge committee review.

**§ 356.10 Procedures for obtaining access to proprietary information.**

(a) *Persons who must file an application for disclosure under protective order.* In order to be permitted access to proprietary information in the administrative record of a final determination under review by a panel, all persons described in §§ 356.9 (a), (b), (d), (e), (f) and (g) shall file an application for a protective order. The procedures for apply-

ing for a protective order described in paragraph (b) of this section apply as well to amendments or modifications filed by persons described in § 356.9.

(b) *Procedures for applying for a protective order—(1) Contents of applications.*

(i) The Department has adopted application forms for disclosure of proprietary information which are available from the United States section of the Secretariat or the Central Records Unit, room B-099, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC 20230. The application forms may be amended from time to time.

(ii) Such forms require the applicant to submit a personal sworn statement stating, in addition to such other terms as the Department may require, that the applicant shall:

(A) Not disclose any proprietary information obtained under protective order and not otherwise available to the applicant, to any person other than:

(1) An official of the Department involved in the particular panel review in which the proprietary information is part of the administrative record;

(2) The person from whom the information was obtained;

(3) A person who has been granted access to the proprietary information at issue under § 356.9; and

(4) A person employed by and under the direction or control of a counsel or professional, panelist, or committee member who has been issued a protective order, such as a paralegal, law clerk, or secretary if such person:

(i) Is not involved in competitive decision-making for a participant in the panel review or for any person that would gain competitive advantage through knowledge of the proprietary information sought; and

(ii) Has agreed to be bound by the terms set forth in the application for protective order by the counsel, professional, panelist, or committee member;

(B) Not use any of the proprietary information not otherwise available to the applicant for purposes other than proceedings pursuant to Article 1904 of the Agreement;

(C) Upon completion of the panel review, or at such earlier date as may be determined by the Department, return

to the Department or certify to the Department the destruction of all documents released under the protective order and all other documents containing the proprietary information (such as briefs, notes, or charts based on any such information received under the protective order); and

(D) Acknowledge that breach thereof may subject the signatory to sanctions under § 356.12.

(2) *Timing of application for disclosure under protective order*—(i) *Persons described in § 356.9(a) (panelists, etc.)*. A person described in § 356.9(a) may file an application after a Notice of Request for Panel Review has been filed with the Secretariat.

(ii) *Persons described in § 356.9(b) (counsel, etc.)*. A person described in § 356.9(b) may file an application at any time but not before that person files a Complaint or a Notice of Appearance.

(iii) *Persons described in § 356.9(d) (Secretaries, etc.)*. A person described in § 356.9(d) shall file an application immediately upon assuming official responsibilities in the Secretariat.

(iv) *Persons described in § 356.9 (e), (f) or (g) (designated Government officials or court reporters, etc.)*. A person described in § 356.9 (e), (f) or (g) shall file an application before seeking or obtaining access to proprietary information.

(3) *Filing of applications*. A person described in § 356.9 (a), (b), (d), (e), (f) or (g) shall file the completed original and five copies of an application with the United States section of the Secretariat which, in turn, shall submit the original and one copy of the application to the Department. A letter of transmittal must be bound to the original and each copy as the first page of the document.

(4) *Service of applications*—(i) *Persons described in §§ 356.9(b) (counsel, etc.)*. A person described in § 356.9(b) who files an application before the expiration of the time period fixed under the Article 1904 Panel Rules for filing a Notice of Appearance in the panel review shall serve one copy of the application on each person listed on the service list in accordance with paragraphs (b)(4) (ii) and (iii) of this section. In any other case, such person shall serve one copy of the application on each participant, other than the investigating authority,

in accordance with paragraphs (b)(4) (ii) and (iii) of this section.

(ii) *Method of service*. A document may be served by:

(A) Delivering a copy of the document to the service address of the participant;

(B) Sending a copy of the document to the service address of the participant by facsimile transmission or by expedited delivery courier or expedited mail service; or

(C) Personal service on the participant.

(iii) *Proof and date of service*. A proof of service shall appear on, or be affixed to, the document. Where a document is served by expedited delivery courier or expedited mail service, the date of service set out in the affidavit of service or certificate of service shall be the day on which the document is consigned to the expedited delivery courier service or expedited mail service.

(5) *Release to employees of panelists, committee members, and counsel or professionals*. A person described in § 356.9(c), including a paralegal, law clerk, or secretary, may be permitted access to proprietary information disclosed under protective order by the counsel, professional, panelist, or extraordinary challenge committee member who retains or employs such person, if such person has agreed to the terms of the protective order issued to the counsel, professional, panelist, or extraordinary challenge committee member, by signing and dating a completed copy of the application for protective order of the representative counsel, professional, panelist or extraordinary challenge committee member in the location indicated in that application.

(6) *Counsel or professional who retains access to proprietary information under a protective order issued during the administrative proceeding*. A person described in § 356.9(b) who has been granted access to proprietary information under protective order during an administrative proceeding that resulted in a final determination that becomes the subject of panel review may, if permitted by the terms of the protective order previously issued by the Department, retain such information until the applicant receives a protective order under this part.



(c) *Issuance and service of protective orders*—(1) *Persons described in § 356.9(a) (panelists, etc.)*. (i) Upon receipt by the Department of an application from a person described in § 356.9(a), the Department will issue a protective order authorizing disclosure of proprietary information included in the administrative record of the final determination that is the subject of the panel review at issue. The Department shall transmit the original and four copies of the protective order to the United States section of the Secretariat which, in turn, shall transmit the original to the applicant and serve one copy of the order on each participant, other than the investigating authority, in accordance with paragraphs (b)(4) (ii) and (iii) of this section.

(ii) A member of a binational panel or extraordinary challenge committee proceeding initiated under the United States-Canada Free Trade Agreement to whom the Department issues a protective order must countersign the protective order and return one copy of the countersigned protective order to the United States section of the Secretariat.

(2) *Persons described in §§ 356.9 (b) or (c) (counsel, etc., or paralegals, etc.)*—(i) *Opportunity to object to disclosure*. The Department will not rule on an application filed by a person described in § 356.9(b) until at least ten days after the request is filed, unless there is compelling need to rule more expeditiously. Unless the Department has indicated otherwise, any person may file an objection to the application within seven days of filing of the application. Any such objection shall state the specific reasons in the view of such person why the application should not be granted. One copy of the objection shall be served on the applicant and on all persons who were served with the application. Service shall be made in accordance with paragraphs (b)(4) (ii) and (iii) of this section. Any reply to an objection will be considered if it is filed before the Department renders a decision.

(ii) *Timing of decisions on applications*. Normally, the Department will render a decision to approve or deny an application within 14 days. If any person files an objection, the Department will

normally render the decision within 30 days.

(iii) *Approval of applications*. If appropriate, the Department will issue a protective order permitting the release of proprietary information to the applicant.

(iv) *Denial of applications*. If the Department denies an application, it shall issue a letter notifying the applicant of its decision and the reasons therefor.

(v) *Issuance of protective orders*. If the Department issues a protective order to a person described in § 356.9(b), that person shall immediately file four copies of the protective order with the United States section of the Secretariat and shall serve one copy of the order on each participant, other than the investigating authority, in accordance with paragraphs (b)(4) (ii) and (iii) of this section.

(3) *Persons described in § 356.9 (d) or (g) (Secretaries, etc., or court reporters, etc.)*. Upon receipt by the Department of an application from a person described in § 356.9 (d) or (g), the Department will issue a protective order authorizing disclosure of proprietary information to the applicant. The Department shall transmit the original and four copies of the protective order to the United States section of the Secretariat.

(4) *Persons described in § 356.9 (e) or (f) (designated Government officials)*. (i) Upon receipt by the Department of an application from a person described in § 356.9 (e) or (f), the Department will issue a protective order authorizing disclosure of proprietary information included in the record of the panel review at issue. The Department shall transmit the original and four copies of the protective order to the United States section of the Secretariat which, in turn, shall transmit the original to the applicant and serve one copy of the document on each participant, other than the investigating authority, in accordance with paragraphs (b)(4) (ii) and (iii) of this section.

(d) *Modification or revocation of protective orders*—(1) *Notification*. If any person believes that changed conditions of fact or law, or the public interest, may require that a protective order issued pursuant to paragraph (c) of this section be modified or revoked, in whole or in part, such person may notify the

Department in writing. The notification shall state the changes desired and the changed circumstances warranting such action and shall include materials and argument in support thereof. Such notification shall be served by the person submitting it upon the person to whom the protective order was issued. Responses to the notification may be filed within 20 days after the notification is filed unless the Department indicates otherwise. The Department may also consider such action on its own initiative.

(2) *Issuance of modification or revocation.* If the Department modifies or revokes a protective order pursuant to paragraph (d) of this section, the Department shall transmit the original and four copies of the modification or Notice of Revocation to the United States section of the Secretariat which, in turn, shall transmit the original to the person to whom the protective order was issued and serve one copy on each participant, other than the investigating authority, in accordance with paragraphs (b)(4) (ii) and (iii) of this section.

**§ 356.11 Procedures for obtaining access to privileged information.**

(a) *Persons who may apply for access to privileged information under protective order and filing of applications—(1) Panelists.* (i) If a panel decides that *in camera* examination of a document containing privileged information in an administrative record is necessary in order for the panel to determine whether the document, or portions thereof, should be disclosed under a Protective Order for Privileged Information, each panelist who is to conduct the *in camera* review, pursuant to the rules of procedure adopted by the United States and the free trade area countries to implement Article 1904 of the Agreement, shall submit an application for disclosure of the privileged information under Protective Order for Privileged Information to the United States section of the Secretariat for filing with the Department; and

(ii) If a panel orders disclosure of a document containing privileged information, any panelist who has not filed an application pursuant to paragraph (a)(1)(i) of this section shall submit an

application for disclosure of the privileged information under a Protective Order for Privileged Information to the United States section of the Secretariat for filing with the Department.

(2) *Designated officials of the United States Government.* Where, in the course of a panel review, the panel has reviewed privileged information under a Protective Order for Privileged Information, and the issue to which such information pertains is relevant to the evaluation of whether the United States should request an extraordinary challenge committee, each official of the United States Government (other than an officer or employee of the investigating authority that issued the final determination subject to review) whom the United States Trade Representative informs the Department requires access for the purpose of such evaluation shall file the completed original and five copies of an application for a Protective Order for Privileged Information with the United States section of the Secretariat which, in turn, shall submit the original and one copy of the application to the Department.

(3) *Designated officials of the government of a FTA country.* Where, in the course of a panel review, the panel has reviewed privileged information under a Protective Order for Privileged Information, and the issue to which such information pertains is relevant to the evaluation of whether the Government of an involved FTA country should request an extraordinary challenge committee, each official of the Government of the involved FTA country whom an authorized agency of the involved FTA country informs the Department requires access for the purpose of such evaluation shall file the completed original and five copies of an application for a Protective Order for Privileged Information with the United States section of the Secretariat which, in turn, shall submit the original and one copy of the application to the Department.

(4) *Members of an extraordinary challenge committee.* Where an extraordinary challenge record contains privileged information and a Protective Order for Privileged Information was

issued to counsel or professionals representing participants in the panel review at issue, each member of the extraordinary challenge committee shall submit an application for a Protective Order for Privileged Information to the United States section of the Secretariat for filing with the Department.

(5) *Counsel or a professional under the direction or control of counsel.* If the panel decides, in accordance with the Article 1904 Rules, that disclosure of a document containing privileged information is appropriate, a counsel or a professional under the direction or control of counsel identified in such a decision as entitled to release of information under a Protective Order for Privileged Information shall submit an application for a Protective Order for Privileged Information. Any such person shall:

(i) File the completed original and five copies of an application with the United States section of the Secretariat which, in turn, shall submit the original and one copy of the application to the Department; and

(ii) As soon as the deadline fixed under the Article 1904 Panel Rules for filing a Notice of Appearance in the panel review has passed, shall serve a copy of the application on each participant, other than the investigating authority, in accordance with paragraphs (b)(4) (i) and (iii) of this section.

(6) *Other designated persons.* If the panel decides, in accordance with the Article 1904 Panel Rules, that disclosure of a document containing privileged information is appropriate, any person identified in such a decision as entitled to release of information under a Protective Order for Privileged Information, *e.g.*, a Secretary, Secretariat staff, court reporters, interpreters and translators, or a member of the staff of a panelist or extraordinary challenge committee member, shall submit an application for release under Protective Order for Privileged Information to the United States section of the Secretariat for filing with the Department.

(b) *Contents of applications for release under protective order for privileged information.* (1) The Department has adopted application forms for disclosure of privileged information which are avail-

able from the United States section of the Secretariat and the Central Records Unit, room B-099, U.S. Department of Commerce, 14th and Constitution Avenue NW., Washington, DC 20230. These forms may be amended from time to time.

(2) Such forms require the applicant for release of privileged information under Protective Order for Privileged Information to submit a personal sworn statement stating, in addition to such other conditions as the Department may require, that the applicant shall:

(i) Not disclose any privileged information obtained under protective order to any person other than:

(A) An official of the Department involved in the particular panel review in which the privileged information is part of the record;

(B) A person who has furnished a similar application and who has been issued a Protective Order for Privileged Information concerning the privileged information at issue; and

(C) A person retained or employed by counsel, a professional, a panelist or extraordinary challenge committee member who has been issued a Protective Order for Privileged Information, such as a paralegal, law clerk, or secretary, if such person has agreed to be bound by the terms set forth in the application for Protective Order for Privileged Information of the counsel, professional, panelist or extraordinary challenge committee member by signing and dating the completed application at the location indicated in such application;

(ii) Use such information solely for purposes of the proceedings under Article 1904 of the Agreement;

(iii) Upon completion of the panel review, or at such earlier date as may be determined by the Department, return to the Department or certify to the Department the destruction of all documents released under the Protective Order for Privileged Information and all other documents containing the privileged information (such as briefs, notes, or charts based on any such information received under the Protective Order for Privileged Information); and

(iv) Acknowledge that breach thereof may subject the signatory to sanctions under §§ 356.12 and 356.30.

(c) *Issuance of protective orders for privileged information*—(1) *Panelists, designated government officials and members of an extraordinary challenge committee.*

(i) Upon receipt of an application for protective order under this section from a panelist, designated government official or member of an extraordinary challenge committee, the Department shall issue a Protective Order for Privileged Information. The Department shall transmit the original and four copies of the protective order to the United States section of the Secretariat which, in turn, shall transmit the original to the applicant and serve one copy of the order on each participant, other than the investigating authority, in accordance with §§ 356.10(b)(4) (ii) and (iii).

(ii) If the Department issues a Protective Order for Privileged Information to a member of a binational panel or extraordinary challenge proceeding initiated under the United States-Canada Free Trade Agreement, that person must countersign the protective order and return one copy of the countersigned protective order to the United States section of the Secretariat.

(2) *Counsel or a professional under the direction or control of counsel.* Upon receipt of an application for protective order under this section from a counsel or a professional under the direction or control of counsel, the Department shall issue a Protective Order for Privileged Information. If the Department issues a protective order to such person, that person shall immediately file four copies of the protective order with the United States section of the Secretariat and shall serve one copy of the order on each participant, other than the investigating authority, in accordance with §§ 356.10(b)(4) (ii) and (iii).

(3) *Other designated persons described paragraph (a)(6) of this section.* Upon receipt of an application for protective order under this section from a designated person described in paragraph (a)(6) of this section, the Department shall issue a Protective Order for Privileged Information. The Department shall transmit the original and four

copies of the protective order to the United States section of the Secretariat.

(d) *Modification or revocation of protective order for privileged information*—(1) *Notification.* If any person believes that changed conditions of fact or law, or the public interest, may require that a Protective Order for Privileged Information be modified or revoked, in whole or in part, such person may notify the Department in writing. The notification shall state the changes desired and the changed circumstances warranting such action and shall include materials and argument in support thereof. Such notification shall be served by the person submitting it upon the person to whom the Protective Order for Privileged Information was issued. Responses to the notification may be filed within 20 days after the notification is filed unless the Department indicates otherwise. The Department may also consider such action on its own initiative.

(2) *Issuance of modification or revocation.* If the Department modifies or revokes a Protective Order for Privileged Information pursuant to paragraph (d) of this section, the Department shall transmit the original and four copies of the modification or Notice of Revocation to the United States section of the Secretariat which, in turn, shall transmit the original to the person to whom the protective order was issued and serve one copy on each participant, other than the investigating authority, in accordance with §§ 356.10(b)(4) (ii) and (iii).

#### **Subpart D—Violation of a Protective Order or a Disclosure Undertaking**

##### **§ 356.12 Sanctions for violation of a protective order or disclosure undertaking.**

(a) A person, other than a person exempted from this part by the provisions of section 777f(f)(4) of the Act (19 U.S.C. 1677f(f)(4)), determined under this part to have violated a protective order or a disclosure undertaking may be subjected to any or all or the following sanctions:

**§ 356.13**

(1) Liable to the United States for a civil penalty not to exceed \$100,000 for each violation;

(2) Barred from appearing before the Department to represent another for a designated time period from the date of publication in an official publication of a notice that a violation has been determined to exist;

(3) Denied access to proprietary information for a designated time period from the date of publication in an official publication of a notice that a violation has been determined to exist;

(4) Other appropriate administrative sanctions, including striking from the record of the panel review any information or argument submitted by, or on behalf of, the violating party or the party represented by the violating party; terminating any proceeding then in progress; or revoking any order then in effect; and

(5) Required to return material previously provided by the investigating authority, and all other materials containing the proprietary information, such as briefs, notes, or charts based on any such information received under a protective order or a disclosure undertaking.

(b)(1) The firm of which a person determined to have violated a protective order or a disclosure undertaking is a partner, associate, or employee; any partner, associate, employer, or employee of such person; and any person represented by such person may be barred from appearing before the Department for a designated time period from the date of publication in an official publication of notice that a violation has been determined to exist or may be subjected to the sanctions set forth in paragraph (a) of this section, as appropriate.

(2) Each person against whom sanctions are proposed under paragraph (b)(1) of this section is entitled to all the administrative rights set forth in this subpart separately and apart from rights provided to a person subject to sanctions under paragraph (a) of this section, including the right to a charging letter, right to representation, and right to a hearing, but subject to joinder or consolidation by the administrative law judge under § 356.23(b).

**19 CFR Ch. III (4-1-03 Edition)**

**§ 356.13 Suspension of rules.**

Upon request by the Deputy Under Secretary, a charged or affected party, or the APO Sanctions Board, the administrative law judge may modify or waive any rule in this subpart upon determining that no party will be unduly prejudiced and the ends of justice will thereby be served and upon notice to all parties.

**§ 356.14 Report of violation and investigation.**

(a) An employee of the Department or any other person who has information indicating that the terms of a protective order or a disclosure undertaking have been violated will provide the information to a Director or the Chief Counsel.

(b) Upon receiving information which indicates that a person may have violated the terms of a protective order or an undertaking, the Director will conduct an investigation concerning whether there was a violation of a protective order or a disclosure undertaking, and who was responsible for the violation, if any. For purposes of this subpart, the Director will be supervised by the Deputy Under Secretary with guidance from the Chief Counsel. The Director will conduct an investigation only if the information is received within 30 days after the alleged violation occurred or, as determined by the Director, could have been discovered through the exercise of reasonable and ordinary care.

(c) The Director will provide a report of the investigation to the Deputy Under Secretary, after review by the Chief Counsel, no later than 180 days after receiving information concerning a violation. Upon the Director's request, and if extraordinary circumstances exist, the Deputy Under Secretary may grant the Director up to an additional 180 days to conduct the investigation and submit the report.

(d) The following examples of actions that constitute violations of an administrative protective order shall serve as guidelines to each person subject to a protective order. These examples do not represent an exhaustive list. Evidence that one of the acts described in the guidelines has been committed,

however, shall be considered by the Director as reasonable cause to believe a person has violated a protective order within the meaning of § 356.15.

(1) Disclosure of proprietary information to any person not granted access to that information by protective order, including an official of the Department or member of the Secretariat staff not directly involved with the panel review pursuant to which the proprietary information was released, an employee of any other United States, foreign government or international agency, or a member of the United States Congress, the Canadian Parliament, or the Mexican Congress.

(2) Failure to follow the detailed procedures outlined in the protective order for safeguarding proprietary information, including maintaining a log showing when each proprietary document is used, and by whom, and requiring all employees who obtain access to proprietary information (under the terms of a protective order granted their employer) to sign and date a copy of that protective order.

(3) Loss of proprietary information.

(4) Failure to return or destroy all copies of the original documents and all notes, memoranda, and submissions containing proprietary information at the close of the proceeding for which the data were obtained by burning or shredding of the documents or by erasing electronic memory, computer disk, or tape memory, as set forth in the protective order.

(5) Failure to delete proprietary information from the public version of a brief or other correspondence filed with the Secretariat.

(6) Disclosure of proprietary information during a public hearing.

(e) Each day of a continuing violation shall constitute a separate violation.

#### § 356.15 Initiation of proceedings.

(a) If the Deputy Under Secretary concludes, after an investigation and report by the Director under § 356.14(c) and consultation with the Chief Counsel, that there is reasonable cause to believe that a person has violated a protective order or a disclosure undertaking and that sanctions are appropriate for the violation, the Deputy

Under Secretary will, at the Deputy Under Secretary's discretion, either initiate a proceeding under this subpart by issuing a charging letter as set forth in § 356.16 or request that the authorized agency of the involved FTA country initiate a proceeding by issuing a request to charge as set forth in § 356.17. In determining whether sanctions are appropriate and, if so, what sanctions to impose, the Deputy Under Secretary will consider the nature of the violation, the resulting harm, and other relevant circumstances of the case. The Deputy Under Secretary will decide whether to initiate a proceeding no later than 60 days after receiving a report of the investigation.

(b) If the Department receives a request to charge from an authorized agency of a FTA country, the Deputy Under Secretary will promptly initiate proceedings under this part by issuing a charging letter as set forth in § 356.16.

#### § 356.16 Charging letter.

(a) *Contents of letter.* The Deputy Under Secretary will initiate proceedings by issuing a charging letter to each charged party and affected party which includes:

(1) A statement of the allegation that a protective order or a disclosure undertaking has been violated and the basis thereof;

(2) A statement of the proposed sanctions;

(3) A statement that the charged or affected party is entitled to review the documents or other physical evidence upon which the charge is based and the method for requesting access to, or copies of, such documents;

(4) A statement that the charged or affected party is entitled to a hearing before an administrative law judge if requested within 30 days of the date of service of the charging letter and the procedure for requesting a hearing, including the name, address, and telephone number of the person to contact if there are further questions;

(5) A statement that the charged or affected party has a right, if a hearing

### § 356.17

### 19 CFR Ch. III (4-1-03 Edition)

is not requested, to submit documentary evidence to the Deputy Under Secretary and an explanation of the method for submitting evidence and the date by which it must be received; and

(6) A statement that the charged or affected party has a right to retain counsel at the party's own expense for purposes of representation.

(b) *Settlement and amendment of the charging letter.* The Deputy Under Secretary may amend, supplement, or withdraw the charging letter at any time with the approval of an administrative law judge if the interests of justice would thereby be served. If a hearing has not been requested, the Deputy Under Secretary will ask the Under Secretary to appoint an administrative law judge to make this determination. If a charging letter is withdrawn after a request for a hearing, the administrative law judge will determine whether the withdrawal will bar the Deputy Under Secretary from seeking sanctions at a later date for the same alleged violation. If there has been no request for a hearing, or if supporting information has not been submitted under § 356.28, the withdrawal will not bar future actions on the same alleged violation. The Deputy Under Secretary and a charged or affected party may settle a charge brought under this subpart by mutual agreement at any time after service of the charging letter; approval of the administrative law judge or the APO Sanctions Board is not necessary.

(c) *Service of charging letter on a resident of the United States.* (1) Service of a charging letter on a United States resident will be made by:

(i) Mailing a copy by registered or certified mail addressed to the charged or affected party at the party's last known address;

(ii) Leaving a copy with the charged or affected party or with an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service for the party; or

(iii) Leaving a copy with a person of suitable age and discretion who resides at the party's last known dwelling.

(2) Service made in the manner described in paragraph (c)(1) (ii) or (iii) of this section shall be evidenced by a

certificate of service signed by the person making such service, stating the method of service and the identity of the person with whom the charging letter was left.

(d) *Service of charging letter on a non-resident.* If applicable laws or intergovernmental agreements or understandings make the methods of service set forth in paragraph (c) of this section inappropriate or ineffective, service of the charging letter on a person who is not a resident of the United States may be made by any method that is permitted by the country in which the person resides and that, in the opinion of the Deputy Under Secretary, satisfies due process requirements under United States law with respect to notice in administrative proceedings.

### § 356.17 Request to charge.

Upon deciding to initiate a proceeding pursuant to § 356.15, the Deputy Under Secretary will request the authorized agency of the involved FTA country to initiate a proceeding for imposing sanctions for violation of a protective order or a disclosure undertaking by issuing a letter of request to charge that includes a statement of the allegation that a protective order or a disclosure undertaking has been violated and the basis thereof.

### § 356.18 Interim sanctions.

(a) If the Deputy Under Secretary concludes, after issuing a charging letter under § 356.16 and before a final decision is rendered, that interim sanctions are necessary to protect the interests of the Department, an authorized agency of the involved FTA country, or others, including the protection of proprietary information, the Deputy Under Secretary may petition an administrative law judge to impose such sanctions.

(b) The administrative law judge may impose interim sanctions against a person upon determining that:

(1) There is probable cause to believe that there was a violation of a protective order or a disclosure undertaking and the Department is likely to prevail in obtaining sanctions under this subpart;

(2) The Department, authorized agency of the involved FTA country, or others are likely to suffer irreparable harm if the interim sanctions are not imposed; and

(3) The interim sanctions are a reasonable means for protecting the rights of the Department, authorized agency of the involved FTA country, or others while preserving to the greatest extent possible the rights of the person against whom the interim sanctions are proposed.

(c) Interim sanctions which may be imposed include any sanctions that are necessary to protect the rights of the Department, authorized agency of the involved FTA country, or others, including, but not limited to:

(1) Denying a person further access to proprietary information;

(2) Barring a person from representing another person before the Department;

(3) Barring a person from appearing before the Department; and

(4) Requiring the person to return material previously provided by the Department or the investigating authority of the involved FTA country, and all other materials containing the proprietary information, such as briefs, notes, or charts based on any such information received under a protective order or disclosure undertaking.

(d) The Deputy Under Secretary will notify the person against whom interim sanctions are sought of the request for interim sanctions and provide to that person the material submitted to the administrative law judge to support the request. The notice will include a reference to the procedures of this section.

(e) A person against whom interim sanctions are proposed has a right to oppose the request through submission of material to the administrative law judge. The administrative law judge has discretion to permit oral presentations and to allow further submissions.

(f) The administrative law judge will notify the parties of the decision on interim sanctions and the basis therefor within five days of the conclusion of oral presentations or the date of final written submissions.

(g) If interim sanctions have been imposed, the investigation and any proceedings under this subpart will be conducted on an expedited basis.

(h) An order imposing interim sanctions may be revoked at any time by the administrative law judge and expires automatically upon the issuance of a final order.

(i) The administrative law judge may reconsider imposition of interim sanctions on the basis of new and material evidence or other good cause shown. The Deputy Under Secretary or a person against whom interim sanctions have been imposed may appeal a decision on interim sanctions to the APO Sanctions Board, if such an appeal is certified by the administrative law judge as necessary to prevent undue harm to the Department or authorized agency of the involved FTA country, a person against whom interim sanctions have been imposed or others, or is otherwise in the interests of justice. Interim sanctions which have been imposed remain in effect while an appeal is pending, unless the administrative law judge determines otherwise.

(j) The Deputy Under Secretary may request an administrative law judge to impose emergency interim sanctions to preserve the status quo. Emergency interim sanctions may last no longer than 48 hours, excluding weekends and holidays. The person against whom such emergency interim sanctions are proposed need not be given prior notice or an opportunity to oppose the request for sanctions. The administrative law judge may impose emergency interim sanctions upon determining that the Department or authorized agency of the involved FTA country is, or others are, likely to suffer irreparable harm if such sanctions are not imposed and that the interests of justice would thereby be served. The administrative law judge will promptly notify a person against whom emergency sanctions have been imposed of the sanctions and their duration.

(k) If a hearing has not been requested, the Deputy Under Secretary will request that the Under Secretary appoint an administrative law judge for making determinations under this section.



### § 356.19

(1) The Deputy Under Secretary will notify the Secretariat concerning the imposition or revocation of interim sanctions or emergency interim sanctions.

#### § 356.19 Request for a hearing.

(a) Any party may request a hearing by submitting a written request to the Under Secretary within 30 days after the date of service of the charging letter. However, the Deputy Under Secretary may request a hearing only if the interests of justice would thereby be served.

(b) Upon timely receipt of a request for a hearing, the Under Secretary will appoint an administrative law judge to conduct the hearing and render an initial decision.

#### § 356.20 Discovery.

(a) *Voluntary discovery.* All parties are encouraged to engage in voluntary discovery procedures regarding any matter, not privileged, which is relevant to the subject matter of the pending sanctions proceeding.

(b) *Limitations on discovery.* The administrative law judge shall place such limits upon the kind or amount of discovery to be had or the period of time during which discovery may be carried out as shall be consistent with the time limitations set forth in this Part.

(c) *Interrogatories and requests for admissions or production of documents.* A party may serve on any other party interrogatories, requests for admissions, or requests for production of documents for inspection and copying, and the party may then apply to the administrative law judge for such enforcement or protective order as that party deems warranted concerning such discovery. The party will serve a discovery request at least 20 days before the scheduled date of a hearing, if a hearing has been requested and scheduled, unless the administrative law judge specifies a shorter time period. Copies of interrogatories, requests for admissions, and requests for production of documents and responses thereto will be served on all parties. Matters of fact or law of which admission is requested will be deemed admitted unless, within a period designated in the request (at least 10 days after

### 19 CFR Ch. III (4-1-03 Edition)

the date of service of the request, or within such further time as the administrative law judge may allow), the party to whom the request is directed serves upon the requesting party a sworn statement either admitting or denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully either admit or deny such matters.

(d) *Depositions.* Upon application of a party and for good cause shown, the administrative law judge may order the taking of the testimony of any person who is a party, or under the control or authority of a party, by deposition and the production of specified documents or materials by the person at the deposition. The application shall state the purpose of the deposition and shall set forth the facts sought to be established through the deposition.

(e) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the party's response to include information thereafter acquired, except as follows:

(1) A party is under a duty to seasonably supplement the party's response with respect to any question directly addressed to:

(i) The identity and location of persons having knowledge of discoverable matters; and

(ii) The identity of each person expected to be called as an expert witness at a hearing, the subject matter on which the witness is expected to testify, and the substance of the testimony.

(2) A party is under a duty to seasonably amend a prior response if the party obtains information upon the basis of which the party:

(i) Knows the response was incorrect when made; or

(ii) Knows that the response, though correct when made, is no longer true, and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the administrative law judge, agreement of the

parties, or at any time prior to a hearing through new requests for supplementation of prior responses.

(f) *Enforcement.* The administrative law judge may order a party to answer designated questions, to produce specified documents or items, or to take any other action in response to a proper discovery request. If a party does not comply with such an order, the administrative law judge may make any determination or enter any order in the proceedings as the administrative law judge deems reasonable and appropriate. The administrative law judge may strike related charges or defenses in whole or in part, or may take particular facts relating to the discovery request to which the party failed or refused to respond as being established for purpose of the proceeding in accordance with the contentions of the party seeking discovery. In issuing a discovery order, the administrative law judge will consider the necessity to protect proprietary information and will not order the release of information in circumstances where it is reasonable to conclude that such release will lead to unauthorized dissemination of such information.

#### § 356.21 Subpoenas.

(a) *Application for issuance of a subpoena.* An application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at a hearing shall be made to the administrative law judge. An application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, at a prehearing conference, at a hearing, or under any other circumstances, shall be made in writing to the administrative law judge and shall specify the material to be produced as precisely as possible, showing the general relevancy of the material and the reasonableness of the scope of the subpoena.

(b) *Use of subpoena for discovery.* Subpoenas may be used by any party for purposes of discovery or for obtaining documents, papers, books, or other physical exhibits for use in evidence, or for both purposes. When used for dis-

covery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such person.

(c) *Application for subpoenas for nonparty department records or personnel or for records or personnel of other Government agencies.* (1) An application for issuance of a subpoena requiring the production of nonparty documents, papers, books, physical exhibits, or other material in the records of the Department, or requiring the appearance of an official or employee of the Department, or requiring the production of records or personnel of other Government agencies shall specify as precisely as possible the material to be produced, the nature of the information to be disclosed, or the expected testimony of the official or employee, and shall contain a statement showing the general relevancy of the material, information, or testimony and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony or their substantial equivalent could not be obtained without undue hardship by alternative means.

(2) Such applications shall be ruled upon by the administrative law judge. To the extent that the motion is granted, the administrative law judge shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the official or employee as may appear necessary and appropriate for the protection of the public interest.

(3) No application for a subpoena for production of documents grounded upon the Freedom of Information Act (5 U.S.C. 552) shall be entertained by the administrative law judge.

(d) *Motion to limit or quash.* Any motion to limit or quash a subpoena shall be filed within 10 days after service thereof, or within such other time as the administrative law judge may allow.

(e) *Ex parte rulings on applications for subpoenas.* Applications for the

**§ 356.22**

issuance of subpoenas pursuant to this section may be made *ex parte*, and, if so made, such applications and rulings thereon shall remain *ex parte* unless otherwise ordered by the administrative law judge.

(f) *Role of the Under Secretary.* If a hearing has not been requested, the party seeking enforcement will ask the Under Secretary to appoint an administrative law judge to rule on applications for issuance of a subpoena under this section.

**§ 356.22 Prehearing conference.**

(a)(1) If an administrative hearing has been requested, the administrative law judge will direct the parties to attend a prehearing conference to consider:

- (i) Simplification of issues;
- (ii) Obtaining stipulations of fact and of documents to avoid unnecessary proof;
- (iii) Settlement of the matter;
- (iv) Discovery; and
- (v) Such other matters as may expedite the disposition of the proceedings.

(2) Any relevant and significant stipulations or admissions will be incorporated into the initial decision.

(b) If a prehearing conference is impractical, the administrative law judge will direct the parties to correspond with each other or to confer by telephone or otherwise to achieve the purposes of such a conference.

**§ 356.23 Hearing.**

(a) *Scheduling of hearing.* The administrative law judge will schedule the hearing at a reasonable time, date, and place, which will be in Washington, DC, unless the administrative law judge determines otherwise based upon good cause shown, that another location would better serve the interests of justice. In setting the date, the administrative law judge will give due regard to the need for the parties adequately to prepare for the hearing and the importance of expeditiously resolving the matter.

(b) *Joinder or consolidation.* The administrative law judge may order joinder or consolidation if sanctions are proposed against more than one party or if violations of more than one protective order or disclosure undertaking

**19 CFR Ch. III (4-1-03 Edition)**

are alleged if to do so would expedite processing of the cases and not adversely affect the interests of the parties.

(c) *Hearing procedures.* Hearings will be conducted in a fair and impartial manner by the administrative law judge, who may limit attendance at any hearing or portion thereof if necessary or advisable in order to protect proprietary information from improper disclosure. The rules of evidence prevailing in courts of law shall not apply, and all evidentiary material the administrative law judge determines to be relevant and material to the proceeding and not unduly repetitious may be received into evidence and given appropriate weight. The administrative law judge may make such orders and determinations regarding the admissibility of evidence, conduct of examination and cross-examination, and similar matters as are necessary or appropriate to ensure orderliness in the proceedings. The administrative law judge will ensure that a record of the hearing will be taken by reporter or by electronic recording, and will order such part of the record to be sealed as is necessary to protect proprietary information.

(d) *Rights of parties.* At a hearing each party shall have the right to:

- (1) Introduce and examine witnesses and submit physical evidence;
- (2) Confront and cross-examine adverse witnesses;
- (3) Present oral argument; and
- (4) Receive a transcript or recording of the proceedings, upon request, subject to the administrative law judge's orders regarding sealing the record.

(e) *Representation.* Each charged or affected party has a right to represent himself or herself or to retain private counsel for that purpose. The Chief Counsel will represent the Department, unless the General Counsel of the Department determines otherwise. The administrative law judge may disallow a representative if such representation constitutes a conflict of interest or is otherwise not in the interests of justice and may debar a representative for contumacious conduct relating to the proceedings.

(f) *Ex parte communications.* The parties and their representatives may not

make any *ex parte* communications to the administrative law judge concerning the merits of the allegations or any matters at issue, except as provided in § 356.18(j) regarding emergency interim sanctions.

**§ 356.24 Proceeding without a hearing.**

If no party has requested a hearing, the Deputy Under Secretary, within 40 days after the date of service of a charging letter, will submit for inclusion into the record and provide each charged or affected party information supporting the allegations in the charging letter. Each charged or affected party has the right to file a written response to the information and supporting documentation within 30 days after the date of service of the information provided by the Deputy Under Secretary unless the Deputy Under Secretary alters the time period for good cause. The Deputy Under Secretary may allow the parties to submit further information and argument.

**§ 356.25 Witnesses.**

Witnesses summoned before the Department shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

**§ 356.26 Initial decision.**

(a) *Initial decision.* The administrative law judge, if a hearing was requested, or the Deputy Under Secretary will submit an initial decision to the APO Sanctions Board, providing copies to the parties. The administrative law judge or the Deputy Under Secretary will ordinarily issue the decision within 20 days of the conclusion of the hearing, if one was held, or within 15 days of the date of service of final written submissions. The initial decision will be based solely on evidence received into the record and the pleadings of the parties.

(b) *Findings and conclusions.* The initial decision will state findings and conclusions as to whether a person has violated a protective order or a disclosure undertaking; the basis for those findings and conclusions; and whether the sanctions proposed in the charging letter, or lesser included sanctions, should be imposed against the charged or affected party. The administrative

law judge or the Deputy Under Secretary may impose sanctions only upon determining that the preponderance of the evidence supports a finding of violation of a protective order or a disclosure undertaking and that the sanctions are warranted against the charged or affected party.

(c) *Finality of decision.* If the APO Sanctions Board has not issued a decision on the matter within 60 days after issuance of the initial decision, the initial decision becomes the final decision of the Department.

**§ 356.27 Final decision.**

(a) *APO Sanctions Board.* Upon request of a party, the initial decision will be reviewed by the members of the APO Sanctions Board. The Board consists of the Under Secretary for International Trade, who shall serve as Chairperson, the Under Secretary for Economic Affairs, and the General Counsel.

(b) *Comments on initial decision.* Within 30 days after issuance of the initial decision, a party may submit written comments to the APO Sanctions Board on the initial decision, which the Board will consider when reviewing the initial decision. The parties have no right to an oral presentation, although the Board may allow oral argument in its discretion.

(c) *Final decision by the APO Sanctions Board.* Within 60 days but not sooner than 30 days after issuance of an initial decision, the APO Sanctions Board may issue a final decision which adopts the initial decision in its entirety; differs in whole or in part from the initial decision, including the imposition of lesser included sanctions; or remands the matter to the administrative law judge or the Deputy Under Secretary for further consideration. The only sanctions that the Board can impose are those sanctions proposed in the charging letter or lesser included sanctions.

(d) *Content's of final decision.* If the final decision of the APO Sanctions Board does not remand the matter and differs from the initial decision, it will state findings and conclusions which differ from the initial decision, if any, the basis for those findings and conclusions, and the sanctions which are to

**§ 356.28**

be imposed, to the extent they differ from the sanctions in the initial decision.

(e) *Public notice of sanctions.* If the final decision is that there has been a violation of a protective order or a disclosure undertaking and that sanctions are to be imposed, notice of the decision will be published in the FEDERAL REGISTER and forwarded to the United States section of the Secretariat. Such publication will be no sooner than 30 days after issuance of a final decision or after a motion to reconsider has been denied, if such a motion was filed. If the final decision is made in a proceeding based upon a request to charge by an authorized agency of an FTA country, the decision will be forwarded to the Secretariat of the involved FTA country for transmittal to the authorized agency of the FTA country for publication in the official publication or other appropriate action. The Deputy Under Secretary will also provide such information to the ethics panel or other disciplinary body of the appropriate bar associations or other professional associations whenever the Deputy Under Secretary subjects a charged or affected party to a sanction under §356.12(a)(2) and to any Federal agency likely to have an interest in the matter and will cooperate in any disciplinary actions by any association or agency.

**§ 356.28 Reconsideration.**

Any party may file a motion for reconsideration with the APO Sanctions Board. The party must state with particularity the grounds for the motion, including any facts or points of law which the party claims the APO Sanctions Board has overlooked or misapplied. The party may file the motion within 30 days of the issuance of the final decision or the adoption of the initial decision as the final decision, except that if the motion is based on the discovery of new and material evidence which was not known, and could not reasonably have been discovered through due diligence prior to the close of the record, the party shall file the motion within 15 days of the discovery of the new and material evidence. The party shall provide a copy of the motion to all other parties. Opposing parties may file a response within 30 days

**19 CFR Ch. III (4-1-03 Edition)**

of the date of service of the motion. The response shall be considered as part of the record. The parties have no right to an oral presentation on a motion for reconsideration, but the Board may permit oral argument at its discretion. If the motion to reconsider is granted, the Board will review the record and affirm, modify, or reverse the original decision or remand the matter for further consideration to an administrative law judge or the Deputy Under Secretary, as warranted.

**§ 356.29 Confidentiality.**

(a) All proceedings involving allegations of a violation of a protective order or a disclosure undertaking shall be kept confidential until such time as the Department makes a final decision under these regulations, which is no longer subject to reconsideration, imposing a sanction.

(b) The charged party or counsel for the charged party will be, to the extent possible, granted access to proprietary information in these proceedings, as necessary, under administrative protective order, consistent with the provisions of §356.10.

**§ 356.30 Sanctions for violations of a protective order for privileged information.**

The provisions of this subpart shall apply to persons who are alleged to have violated a Protective Order for Privileged Information.

**PART 357—SHORT SUPPLY PROCEDURES**

- Sec.
- 357.101 Definitions.
- 357.102 Short supply allowances.
- 357.103 Petitions for short supply allowances.
- 357.104 Determination of adequacy of petition, notice of review, and opportunity for comment.
- 357.105 Questionnaires.
- 357.106 Time limits.
- 357.107 Publication of determinations and notification of foreign governments.
- 357.108 Disclosure of information.
- 357.109 Request for reconsideration.
- 357.110 Record of review.
- 357.111 Public and proprietary information.

AUTHORITY: Sec. 4(b) of the Steel Trade Liberalization Program Implementation Act, Pub. L. No. 101-221, 103 Stat. 1886 (1989).