DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Parts 351, 353, 354, and 355

[Docket No. 960123011–6011–01]

RIN 0625–AA43

Antidumping and Countervailing Duty Proceedings: Administrative Protective Order Procedures; Procedures for Imposing Sanctions for Violation of a Protective Order

AGENCY: International Trade Administration, Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: The Department of Commerce (''the Department'') proposes to amend its regulations on administrative protective order (''APO'') procedures in antidumping and countervailing duty proceedings to simplify and streamline the APO administrative process and reduce the administrative burdens on the Department and trade practitioners. The Department also proposes to amend the regulations to simplify the procedures for investigating alleged violations of APOs and the imposition of sanctions. These changes are proposed in response to and in cooperation with the trade practitioners that are subject to these rules.

DATES: Written comments will be due March 11, 1996.

ADDRESSES: Address written comments (three copies) to Stephen J. Powell, Chief Counsel for Import Administration, Room B–099, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW., Washington, DC 20230. Comments should be addressed: Attention: Proposed Regulations/APO Procedures & APO Sanctions. Each person submitting a comment is requested to include his or her name and address, and the reasons for any recommendation.

FOR FURTHER INFORMATION CONTACT: Joan L. MacKenzie, Senior Attorney, Office of the Chief Counsel for Import Administration, (202) 482–1310.

SUPPLEMENTARY INFORMATION:

General Background

APO Procedures

Since the enactment of the Trade Agreements Act of 1979, the APO has been an important procedure in U.S. antidumping (''AD'') and countervailing duty (''CVD'') proceedings. By providing representatives of parties to antidumping and countervailing duty proceedings access to business proprietary information submitted to the Department by other parties, the APO has helped to make the U.S. system the most transparent in the world.

In administering its APO procedures, the Department balances two principal objectives. On the one hand, the Department has sought to ensure that information is disclosed under APO in a timely manner to permit parties to defend adequately their interests. At the same time, the Department must ensure that its procedures protect against unauthorized disclosure of business proprietary information.

Our procedures for the protection of business proprietary information were last revised in 1989. After five years experience with these procedures, and after consultation with the practitioners affected by these procedures, we determined it was time to revise the procedures.

The Department began a dialogue on APO procedures with AD/CVD practitioners, who are the ones most directly affected by these procedures. Specifically, Department staff consulted with representatives of the International Law Section of the District of Columbia Bar, the International Trade Committee of the Section of International Law and Practice of the American Bar Association, the ITC Trial Lawyers Association, and the Customs and International Trade Bar Association. The purpose of these consultations was to explore ways in which the APO process could be simplified and streamlined for all concerned, including the Department, while at the same time providing protection of business proprietary information.

Based on these discussions, the Department published Notice and Request for Comment on Proposed Changes to Administrative Protective Order (APO) Procedures in Antidumping and Countervailing Duty Proceedings, APO Application Form and APO, 59 FR 51559 (October 12, 1994) (''October Notice''). In this notice, the Department set forth its initial reform ideas regarding APO procedures, and requested further comments from the public on its ideas. In addition, the Department requested comments on APO procedures, as well as on other matters, in its Advance Notice of Proposed Rulemaking and Request for Comments (Antidumping Duties; Countervailing Duties; Article 1904 of the North American Free Trade Agreement), 60 FR 80 (Jan. 3, 1995) (''Advance Notice'').

The Department received comments in response to both the October Notice and the Advance Notice. After analyzing these comments, the Department has drafted regulations that streamline the APO process significantly and, at the same time, protect business proprietary information from unauthorized disclosure. However, as part of the ongoing dialogue with the private sector on this subject, the Department is requesting public comment on these regulations. As with the October Notice, we are also publishing for comment the APO.

APO Sanctions

The Department also proposes to amend its regulations concerning sanctions for violations of APOs. The regulations governing the imposition of sanctions for APO violations are set forth at 19 CFR part 354. In the six years since part 354 was introduced, the Department has investigated and resolved numerous allegations of violations of APOs. Most charges have been settled, and none has resulted in a hearing before a presiding official or a decision by the APO Sanctions Board. Experience also has proven that, even if an individual has technically violated the terms of an APO, it is not always appropriate to impose a sanction. Rather, a warning may be appropriate in many instances. The Department also has found that situations arise in which the investigation can be shortened without limiting procedural rights. Additionally, under current regulations, it is unduly cumbersome to withdraw charges when the Department determines that they are not warranted. Finally, the Department recognizes that an individual with prior violations deserves to have his or her record cleared after a period of time without further violations. Therefore, the Department is proposing to amend part 354 of its regulations to articulate a standard for issuance of a warning of an APO violation and to address the other situations described above.

The Department proposes to amend the regulations to simplify the procedures for investigating alleged violations and the imposition of sanctions, establish criteria for abbreviating the investigation of an alleged violation, include private letters of reprimand among the sanctions available, and set a policy for determining when the Department issues warnings instead of sanctions. Further, the Department proposes to revise the provisions dealing with settlement to make them consistent with practice. The Department also proposed to simplify the procedures for withdrawing charging letters. Finally, the proposed amendment adds a sunset provision that codifies existing practice

regarding the rescission of charging letters.

The outstanding issues concerning these regulations are described in the following analysis of the relevant sections of the proposed regulations.

Explanation of Particular Provisions

APO Procedures

The Department's AD regulations are contained in 19 CFR part 353, and its CVD regulations are contained in 19 CFR part 355. Parts 353 and 355 each contain separate provisions dealing with the treatment of business proprietary information and APO procedures. As part of a separate rulemaking, the Department intends to consolidate the AD and CVD regulations and repeal existing parts 353 and 355. We have drafted the regulations dealing with APO procedures in light of this planned consolidation. Accordingly, these regulations will be contained in 19 CFR part 351, subpart C. More specifically, with the exception of definitional provisions, the relevant regulations will be contained in 19 CFR 351.304, 305, and 306.

Definitions

Section 351.102 will be a definitional section, based on existing 19 CFR 353.2 and 355.2. It will be published separately with the proposed rules for 19 CFR part 351, subpart C. Insofar as APO procedures are concerned, two new terms will be defined, now contained in the administrative protective order.

The first term, ''applicant,'' is defined as an individual representative of an interested party that has applied for access to business proprietary information under an APO. The second term, ''authorized applicant,'' is defined as an applicant that the Secretary has authorized to receive business proprietary information under an APO, and is a term borrowed from the practice of the U.S. International Trade Commission (''ITC'').

Section 351.304 Establishing Business Proprietary Treatment of Information

Section 351.304 sets forth rules concerning the treatment of business proprietary information in general. Paragraph (a) is a general provision, paragraph (a)(1) of which provides persons with the right to request (i) that certain information be considered business proprietary; and (ii) that certain business proprietary information be exempt from disclosure under APO. Consistent with section 777(c)(1)(A) of the Tariff Act of 1930 (''the Act''), paragraph (a)(2) provides that, as a general matter, the Secretary will require that all business proprietary information be disclosed to authorized applicants, with the exception of (i) customer names in an investigation, (ii) information for which the Secretary finds there is a clear and compelling need to withhold from disclosure, and (iii) classified or privileged information.

Paragraph (b) of § 351.304 addresses the identification of business proprietary information in submissions to the Department. Paragraph (b)(1) deals with the bracketing and labeling of business proprietary information in general, and is consistent with existing practice. Paragraph (b)(1) also retains the requirements under existing practice that: (i) A person claiming business proprietary status for information must explain why the information in question is entitled to that status; and (ii) a request for business proprietary treatment must include an agreement to permit disclosure under an APO, unless the submitter claims that there is a clear and compelling need to withhold the information from disclosure under an APO. Paragraph (b)(2) is new, and provides for the double bracketing of business proprietary information that the submitting person claims should be exempt from disclosure under APO, and customer names submitted in an investigation.

Public Versions

Paragraph (c) of § 351.304 deals with the public version of a business proprietary submission. Paragraph (c)(1) follows existing practice by permitting parties to file a public version of a document containing business proprietary information one business day after the due date of the business proprietary version of the document. This practice is known as the ''one-day lag'' rule. Under current practice, submitting persons may correct the bracketing of information in the business proprietary version up to the deadline for submission of the public version (i.e., they have one day in which to correct bracketing). The Department has slightly modified the one-day lag rule to require a party to file the final business proprietary version of the document at the same time as the submitting party files the public version of the document. The specific filing requirements will be contained in § 351.303 of subpart C of the proposed regulations that the Department will publish separately. The purpose of this requirement is to ensure that the Department is reviewing the correct business proprietary version. Absent this requirement, Department analysts would have to engage in a page-by-page comparison of the original and corrected business proprietary versions, a time-consuming exercise which benefits neither the parties nor the Department.

Paragraph (c)(1) continues to permit a party to claim that summarization is not possible. However, the Secretary will vigorously enforce the requirement for public summaries, and will grant claims that summarization is impossible only in exceptional circumstances.

Nonconforming Submissions

Paragraph (d) of § 351.304 deals with nonconforming submissions, i.e., submissions that do not conform to the requirements of section 777(b) of the Act and paragraphs (a), (b), and (c) of § 351.304. Paragraph (d)(1) is generally consistent with existing 19 CFR 353.32(d) and 355.32(d), although it is more precise as to the options available to a submitting person when the Secretary returns a nonconforming submission. Paragraph (d)(2) is based on existing 19 CFR 353.32(e) and 355.32(e), and provides that the Secretary normally will determine the status of information within 30 days after the day on which the information was submitted, as provided by section 777(c)(1)(C).

Section 351.305 Access to Business Proprietary Information

Section 351.305 deals with procedures for obtaining business proprietary information under APO. These procedures are based on the ideas set forth in the October Notice, and reflect suggestions made in response to the Department's request for comments.

The Revised APO

Paragraph (a) of § 351.305 sets forth a new procedure based on the use of a single APO. Instead of issuing a separate APO to each applicant that requests disclosure, under paragraph (a) the Secretary will place a single APO on the record for each segment of an AD or CVD duty proceeding. The Secretary will place the APO on the record within one day after a petition is filed or an investigation is self-initiated, or one day after the initiation of any other segment. (''Segment of the proceeding'' will be defined in § 351.102 as a portion of the proceeding that is reviewable under section 516A of the Act.) All authorized applicants will be subject to the terms of this single APO. This new procedure, which mirrors the practice of the ITC and which is described in more detail in the October Notice, should streamline the APO process dramatically, and should expedite the issuance of APOs and the disclosure of information to authorized applicants.

Paragraph (a) also sets forth the requirements that are to be included in the single APO and to which all authorized applicants must adhere. In this regard, in response to the suggestions of practitioners, the Department proposed in its October Notice to eliminate from the APO detailed internal procedures that firms were required to follow to protect APO information from unauthorized disclosure. Instead, the Department proposed to permit each applicant to establish its own internal procedures. All commentators agreed with this proposal. Therefore, paragraph (a)(1) simply requires that the applicant establish and follow procedures to ensure that there is no unauthorized disclosure of APO information.

In its October Notice, the Department proposed to continue to place two restrictions on the use of business proprietary information contained in electronic form: (1) Such information could be resident on a computer only when the computer was being run; and (2) the information could not be accessible by a network or a modem.

The commentators differed as to whether it is appropriate to require different protection depending upon whether business proprietary information is entered into a computer for data manipulation purposes or for word-processing purposes. Four commentators opposed any specific restrictions, because they believe that there are sufficient technical protections available to protect such information from unauthorized disclosure. They asserted that attempts to prescribe specific, mandatory procedures are futile, because the handling of information on electronic media is subject to rapid technological change. Procedures may become outdated by the time they are established. On the other hand, four commentators asserted that although electronic information may be left resident in a computer subject to adequate safeguards, the Department should require that such information be used on a stand-alone computer to ensure that the information is not accessible by modem.

The Department recognizes the sensitivity of issues involving the handling of electronic information. Because there is no unanimity regarding the use of electronic information on computers that are accessible by modem, we continue to support restricting access of electronic information by modem. However, restricting access by modem does not necessarily require the physical separation of a computer and a modem. The use of technical restrictions, such as passwords or encryption, also would constitute an adequate method of protecting the information. Therefore, we are not proposing any specific technical restrictions, but instead are leaving the method to be used to the individual authorized applicant. Moreover, we are not limiting access to networks, because software is provided on many computer systems through the network. In summary, we have proposed procedures that, in our view, are sufficiently flexible so as to allow applicants to take advantage of technological advances as they occur, but that also ensure the protection of APO information.

On a different matter, five commentators suggested that the Department reconsider its requirement that support personnel be employees of the firm. They suggested that the Department permit the use of independent contractors to perform photocopying and other production tasks involving APO information, provided that: (1) The independent contractors perform their work on the premises of the authorized applicant (*e.g.,* at the firm); and (2) the independent contractors work under the supervision of an authorized applicant. The commentators stated that, for APO purposes, firms are able to exercise essentially the same oversight over subcontracted individuals as they are over their own employees.

The Department agrees that so long as support staff is operating on the premises of the authorized applicant, support staff could be either employees or independent subcontractors. In addition, the Department also will allow parties to use employees or subcontracted individuals (*e.g.,* courier services) to pick up APO information released by the Department. In order to guard against unauthorized disclosure, however, the Department will continue its current practice of releasing APO information only if the employee or subcontractor presents a picture ID and a letter of identification from the firm of the authorized applicant that authorizes the Department to release the APO information to that particular individual.

Also regarding support staff, one commentator suggested that instead of requiring support staff to sign the APO application and acknowledge the APO terms and conditions, the Department should leave this up to the authorized applicant as a matter of its internal procedures. The Department has not adopted this suggestion, because it would appear that the Department is permitting access to business proprietary information by staff that has not agreed to protect such information. Instead, we have retained the requirement in the APO that support personnel must agree to an acknowledgment of the APO terms and conditions.

Several commentators raised issues regarding the Department's current requirement that individual representatives of parties notify the Department when their status under an APO changes (*e.g.,* when they are reassigned to a different matter within a firm or leave the firm), and to certify that they have complied with the terms of the APO. Two firms commented that it is important for the Department to retain its current practice of requiring notification of any changed circumstances that may affect the participation of a representative under an APO. However, one firm requested that the Department either eliminate the requirement altogether or let the lead signatory for each firm make the necessary certification. This firm pointed out that individual certifications are not required by the U.S. Court of International Trade (''CIT'') with respect to a judicial protective order (''JPO'').

The Department has decided to retain the requirements in question. APO access is granted in response to individual requests for such access. The certification provided at the conclusion of a segment of the proceeding, upon the departure of an individual from a firm, or when an individual no longer will have access to APO information attests to the individual's compliance with the terms under which such access is granted. The Department and the persons whose business proprietary information is disclosed under APO have a legitimate need to be assured that individuals who have had access to that information have abided by the terms of the APO. Therefore, the regulations (specifically, § 351.305(a)(2)) continue to require notification and appropriate certification when changed circumstances affect the participation of a representative under an APO.

Although, as noted above, these regulations provide authorized applicants with greater flexibility regarding internal procedures, the Department proposed in its October Notice to maintain model guidelines on procedures that applicants could implement to protect APO information. Six commentators addressed this proposal. Two commentators stated that it would be useful for the Department to maintain guidelines and to hold training sessions for APO applicants. They cautioned, however, that such guidelines should represent suggestions

only, and that they should not be transformed into *de facto* requirements. Otherwise, the objective of simplifying the APO process would be defeated, and the Department once again would find itself in the position of micro-managing the internal procedures of applicants. The commentators requested that the Department clearly set forth the standards by which an applicant's internal procedures will be judged, and that it expressly acknowledge that a departure from any suggestion in the guidelines will not be regarded as a *per se* violation of an APO. The commentators also urged the Department to make any guidelines available at the time a party applies for an APO, and that the Department not implement new APO procedures until trade practitioners are provided with the opportunity to comment on the guidelines. Also, with respect to the requirement in the APO application that parties refrain from asking the Department for assistance in handling electronic submissions of another party, commentators requested that any such requests for assistance not be construed as an APO violation.

In light of these comments, the Department intends to issue APO guidelines, and expects that they will be particularly useful to firms that do not have an established practice before the Department. The Department, however, will consider the APO guidelines as just that; guidelines rather than actual terms and conditions of the APO. In addition, we will provide an opportunity to comment on such guidelines before we issue them in final form. As for APO violations, although the Department would take into account the quality of an applicant's internal procedures in considering sanctions for an APO violation, a failure to follow the guidelines certainly would not be considered an APO violation. In addition, we agree that a request for the Department's assistance in handling another party's electronic submissions would not constitute an APO violation.

One commentator suggested that payment for electronic information should be required only where requested. Apparently, a number of law firms do not charge for electronic submissions. We agree that payment for the cost of electronic submissions should be required only if payment is requested, and have incorporated the suggestion in the general regulations that will be published separately.

Certification and Destruction of Business Proprietary Information

Paragraph (a)(4) of § 351.305 requires the destruction of business proprietary information when a party is no longer entitled to it, as well as certification that destruction has been completed. As discussed below, parties now may retain business proprietary information after the completion of the segment of the proceeding in which the information was submitted. The certification requirements would then be triggered at a much later date, at the end of the last segment of the proceeding for which information may be used. Because this may vary from case to case, the specific time at which a party must destroy business proprietary information will be described in the APO.

In its October Notice, the Department addressed the present requirement that, at the end of a segment of a proceeding, an authorized applicant certify to the destruction of APO information within two business days of the expiration of the time for filing for judicial or binational panel review. Of the nine commentators that addressed this issue, all supported extending the deadline to 30 days. These commentators noted that because the CIT sends out JPOs by mail, it may take up to a week for a party to receive a copy of the JPO. Although this may no longer be an issue with respect to most segments of a proceeding, we agree that if this situation does occur, parties should be given more time in which to determine their involvement, if any, in litigation arising out of a particular segment of a proceeding. Thirty days should cover most contingencies, but the Department will be willing to grant extensions for good cause shown.

Another commentator pointed out that if the Department arranged with the CIT to have a single protective order that covered the entire duration of both the Department's and the Court's proceedings, this requirement would not be necessary. Under existing practice, parties obtain an APO for the Department's administrative proceeding, another one for the ITC proceeding, negotiate a third for a judicial proceeding, and then obtain another APO in any remand proceeding where new business proprietary information may be placed on the record. Five commentators proposed streamlining these procedures. Some suggested that the JPO cover any remand proceeding. Others suggested a protective order that covers proceedings of both the Department and the CIT. A third suggested a model JPO.

We agree that it would be beneficial for all parties to craft either an APO or JPO that would remain in effect through court appeals and remands. We believe that any simplification in this regard would result in a significant savings in time and resources to the parties and the agencies, particularly if parties retain business proprietary information for more than a single segment of proceeding. However, this will require discussions between the Department and the CIT. We will enter into discussions with the relevant entities toward this end. In the meantime, the APO will permit access to new business proprietary information submitted in the course of a remand during litigation involving the segment of the proceeding in which the initial APO was issued. Parties no longer will have to apply separately for access under an APO during a remand proceeding.

One commentator opposed having to send the Department a copy of the JPO, arguing that the Department of Justice should provide the Department with the JPO. In our view, the Department needs to know at the end of a proceeding whether an authorized applicant is or is not authorized to retain APO information of other parties, and whether the authorized applicant has taken the correct steps in this regard. Only the authorized applicant, not the Department of Justice, is in a position to know this information.

The requirements concerning an authorized applicant's responsibilities at the end of a segment of a proceeding are contained in the APO.

APO Applications

Paragraph (b) of § 351.305 deals with the APO application process itself. Paragraph (b)(1) addresses the issue of multiple authorized applicants. Under current practice, the Department generally allows only one representative of a party to have access to business proprietary information under an APO. In response to suggestions from practitioners, in its October Notice the Department proposed that two independent representatives of a party be allowed APO access, with one representative being designated as the lead representative. We also proposed granting APOs separately to non-legal representatives only if they had a significant practice before the Department. The purpose of this proposal was to ensure that effective sanctions could be imposed to deter APO violations.

Five commentators addressed this issue. One firm opposed granting APOs to independent non-legal representatives, arguing that such a practice would disperse responsibility for protecting APO information and that the sanction of disbarment from practice before the Department might be inadequate. This commentator also noted that, unlike the legal profession,

there are no independent ethical standards for the other professions typically involved in AD or CVD proceedings.

Two commentators endorsed the proposal to permit two independent representatives to apply for an APO, and another commentator supported an unlimited number. However, all of the commentators that supported giving independent APO access to multiple representatives added the caveat that one representative must not be held accountable for any APO violation of another representative operating under separate APO authorization.

Under current procedures, the Department has allowed access to non-attorney applicants for many years, both as ''other representatives'' retained by attorneys and as the sole representative of a party. We are not proposing to change this practice. Instead, we are proposing that a party be able to have two independent representatives with independent and separate access to information under the APO. Moreover, the Department's experience has demonstrated that non-lawyer applicants are no more likely to violate the terms of an APO than lawyer applicants, and that disclosure to non-lawyer applicants does not increase the risk of an APO violation. In determining whether a non-lawyer representative is a qualified applicant for APO access under § 351.305(c), the Department will consider the extent of that representative's practice before the Department.

As set forth in paragraph (b)(1), generally no more than two independent authorized applicants for one party may apply for disclosure under an APO. In addition, the party must designate a lead authorized applicant if the party has more than one independent representative. With respect to requests that more than two independent representatives be designated as authorized applicants, the Department will consider such requests on a case-by-case basis.

Application for an APO

Paragraph (b)(2) of § 351.305 establishes a ''short form'' application procedure. For some time, parties to AD or CVD proceedings have requested that they be allowed to reproduce the Department's APO application on their own word processing equipment. In the October Notice, the Department proposed two alternatives that would have permitted such reproduction, but that also would prevent the unauthorized alteration of the requirements of the APO itself. Four commentators proposed as an alternative a ''short form'' application that would contain only the information that varies from party to party and case to case. The terms and conditions for access would be in the APO placed on the record of each segment of the proceeding.

The Department agrees that the suggested ''short form'' application would address the concerns of both the Department and the applicants, and we have adopted the suggestion in paragraph (b)(2). However, an important qualification is that an applicant must acknowledge that any discrepancies between the application and the Department's APO placed on the record will be interpreted in a manner consistent with the Department's APO. With this qualification, the new procedure will enable applicants to reproduce the entire application form on their word processing equipment, thereby facilitating the application process.

In addition to the incorporation of the ''short form'' application, paragraph (b)(2) also provides that an applicant must apply to receive all business proprietary information on the record of the particular segment of the proceeding in question. A party no longer may apply to receive only selected parties' business proprietary information. The purpose of this requirement is to eliminate the need for parties to prepare separate APO versions of submissions for each of the different parties involved in a proceeding, and to reduce the number of APO violations that occur through the inadvertent service of a document containing business proprietary information to parties not authorized to receive it. However, in order to avoid forcing parties to receive a submission in which they have no interest, a party may waive service of business proprietary information it does not wish to have served on it by another party. Thus, for example, Respondent A may waive its right to be served with a copy of the business proprietary version of Respondent B's questionnaire response. Nonetheless, if Respondent A receives a copy by mistake, no APO violation will have occurred.

Deadline for Application for APO Access

Paragraph (b)(3) of § 351.305 deals with the deadline for applying for access to business proprietary information under APO. Because the Department has received and denied about six late APO applications per year, in the October Notice we requested comments on whether there might be a better procedure to ensure that parties file timely applications.

Nine commentators addressed this issue, and they unanimously pointed out that it does not always make sense to require that APO applications be submitted early in the segment of a proceeding. Requiring early applications may result in forcing parties to file protective APO applications that subsequently turn out to be unnecessary, thereby adding to the burden on the Department and the parties. In addition, the commentators also were unanimous that expert representation and access to business proprietary data are so important to the effective defense of a party's interests that the Department should provide access liberally by one means or another. With respect to specific deadlines, the commentators offered different suggestions, ranging from the status quo (with extensions available) to no deadline at all.

In dealing with the question of APO application deadlines, the Department balances the need to provide maximum access by parties to APO information with the need to minimize the burden on the Department in processing APO applications, as well as the burden on parties that have to serve late applicants with APO information placed on the record before a late APO is granted. Based on our experience, parties that retain representatives in AD or CVD proceedings typically apply for an APO early in each segment of a proceeding. In light of this fact, and in light of the new procedure for a single APO, we believe that the Department and the parties will not be unduly burdened if APO applications are received throughout the course of a segment of the proceeding. The Department will not have to issue an amended or new APO, but instead need only update the APO service list. Therefore, while paragraph (b)(3) encourages parties to submit APO applications sooner rather than later, it permits parties to submit applications up to the date on which case briefs are due. By adopting this deadline, however, the Department does not intend to allow a late APO application to serve as the basis for extending any administrative deadline, such as a briefing or hearing schedule.

We also have taken into account the burden imposed on parties by late APO applications. Under current rules, parties have only two days in which to serve late applicants with APO information that already has been placed on the record. Under the deadline set forth in paragraph (b)(3), the burden on parties may increase. In recognition of this, all commentators requested that parties have five days in which to serve late APO applicants. In

addition, one commentator suggested that late applicants be required to pay the costs associated with the additional production and service of business proprietary submissions that were served on other parties earlier in the proceeding. We agree with these suggestions, and are incorporating them into § 351.301, which will be published separately.

Approval of the APO Application and the APO Service List

Paragraph (c) of § 351.305 deals with the approval of an APO application. Under paragraph (c), the Department normally will approve an application within two days of its receipt in an Investigation and within five days in other AD and CVD proceedings, unless there is a question concerning the eligibility of an applicant to receive access under APO. In that case, the Secretary will decide whether to grant the application within 30 days of receipt of the application.

If an application is approved, the Secretary will include the name of the authorized applicant on an APO service list that the Department will maintain for each segment of a proceeding. In this regard, in the October Notice the Department raised the issue as to how the Department should provide parties with the APO service list. Several commentators suggested that the Department directly notify each party by the most expeditious means available each time the APO service list changes. One commentator suggested that the Department make the APO service list available daily through electronic means. Two commentators noted that if copies of the list were available only in the Department's Central Records Unit, this would be unduly burdensome for D.C.-based representatives and impractical for out-of-town representatives.

The Department believes that the use of an APO service list will improve and streamline the APO process only if it is readily available to all parties, and we agree that the Department must provide parties with notice as to which representatives of other parties are authorized applicants. In our view, there are three options: notification through the Internet, by direct facsimile from the computer of the Department's APO specialist, or by mail. Paragraph (c) provides that the Secretary will use the most expeditious means available to provide parties with the APO service list on the day the list is issued or amended.

With respect to the approval of APO applications, several commentators emphasized the need for expedited approval in order to ensure timely access. They suggested alternative methods, such as: (1) The creation of a pre-approved roster of members of a representative's firm, or (2) permitting a lead signatory in a firm to grant access to the other professionals within the firm. Four commentators addressed this issue. Three commentators supported the idea of a roster. However, one commentator opposed both suggestions, arguing that they would deprive parties of the opportunity to object, for good cause, to the suitability of particular applicants, and that a party never could be certain as to exactly who had access to its business proprietary information.

In the Department's view, neither of the suggested alternatives is acceptable. With respect to the pre-approved roster approach, there may be facts peculiar to a particular AD or CVD proceeding or a segment of a proceeding that render an otherwise eligible applicant ineligible, and the roster approach would preclude a party from raising legitimate objections to the approval of an APO application. Likewise, the lead signatory approach would preclude parties from exercising their right to object, for good cause, to the disclosure of APO information to a particular individual.

Section 351.306 Use of Business Proprietary Information

Section 351.306 deals with how business proprietary information may be used.

Use of Business Proprietary Information by the Secretary

Paragraph (a) deals with the use of business proprietary information by the Secretary, and is based on existing 19 CFR 353.32(f) and 355.32(f). One change is the reference in paragraph (a)(4) to the disclosure of information to the U.S. Trade Representative under 19 U.S.C. 3571(i). Section 3571(i) (section 281(i) of the URAA) deals with the enforcement of U.S. rights under the WTO Agreement on Subsidies and Countervailing Measures. Also, although the regulation itself is little changed, we note that the URAA amended section 777(b)(1)(A)(i) of the Act to clarify that the Department may use business proprietary information for the duration of an entire proceeding (from initiation to termination or revocation), as opposed to merely the particular segment of a proceeding for which information was submitted.

Use of Business Proprietary Information by Parties

Paragraph (b) of § 351.306 deals with the use of business proprietary information by parties from one segment of a proceeding to another. Paragraph (b) provides that an authorized applicant normally may retain business proprietary information obtained in one segment of a proceeding for two subsequent consecutive segments. However, paragraph (b) also provides that normally an authorized applicant may use such information only in the particular segment of the proceeding in which the information was obtained. An authorized applicant may place business proprietary information received in one segment of a proceeding on the record of either of two subsequent consecutive segments only if the information is relevant to an issue in one of the subsequent segments.

The ability to use information in different segments of a proceeding raises three related issues: (1) Whether authorized applicants should be able to retain business proprietary information after the conclusion of the particular segment in which the information is obtained, or whether they should rely on an index of business proprietary information in identifying and selecting information to be placed on the record of a subsequent segment; (2) whether there are instances other than those discussed above in which an authorized applicant should be able to use business proprietary information in a subsequent segment; and (3) whether the Secretary should reserve the authority to approve what is placed on the record from prior segments.

One commentator argued that for purposes of five-year reviews under section 751(c) of the Act, authorized applicants should be allowed to retain business proprietary information obtained under APO in the course of prior segments. This commentator argued that the information would continue to be subject to APO, and that any harm from the unauthorized disclosure of information after the conclusion of a segment of a proceeding (or the entire proceeding) would be reduced because of the passage of time. Another commentator argued that only the Department, not the parties, may have access to business proprietary information obtained in the course of a changed circumstances or five-year review that leads to revocation or termination, and that parties should not have access for purposes of preparing new petitions.

It has been suggested that certain cost data should carry over from segment to segment for the life of a proceeding by placing all relevant data from the record of one segment on the record of the next segment. Cost information thus would cumulate from one segment to the next. One commentator suggested that the

Department permit APO information from prior segments of a proceeding to be placed on the record of a subsequent segment where it is relevant or the submitted information is inconsistent. This commentator noted that because the Department does not always verify information submitted in reviews, and because the Department does not have subpoena power, the Department could use this device to ensure the accuracy of information submitted to it. Another commentator would require that authorized applicants destroy all information at the end of each segment of a proceeding, and that parties could rely on recollection where they suspect an inconsistency between segments. For this approach to work, a party would have to have access to the Department's business proprietary record from prior segments. A fourth commentator proposed to permit parties to retain all information from any segment of a proceeding for the duration of the proceeding.

As discussed above, we propose to allow authorized applicants to retain business proprietary information obtained under APO for two subsequent consecutive segments of a proceeding. Thus, authorized applicants would be able to use the information to address inconsistencies between the records for up to three different segments of a proceeding. We have limited the retention of business proprietary information to three consecutive segments, because we are concerned with the undue proliferation of sensitive proprietary data, and because, with the exception of situations such as five-year or changed circumstances reviews, data more than two years old generally is not probative. For five-year reviews, parties could rely on the index of business proprietary information for records of segments older than the ones for which they have retained information. Although authorized applicants generally will be able to retain information only for three consecutive segments, the Department will tailor APOs for subsequent segments to the particular needs of that segment. Thus, for example, an APO for a five-year review would allow parties to obtain and use business proprietary information obtained in segments earlier than the third consecutive preceding segment.

With respect to the question of the Secretary's retention of authority to approve the use of information from prior segments, there are advantages and disadvantages. The Department does not want the record of current segments to become crowded with information that is extraneous and irrelevant. Therefore, we have included a requirement that information from a prior segment must be relevant to an issue in the subsequent segment. However, we have not included a requirement that the Secretary approve parties' submissions of information on the record of a subsequent segment. Ultimately, of course, it is the Secretary who must decide the relevance and weight to be accorded to this information, at least at the administrative level. Thus, parties who place irrelevant information on the record of a subsequent segment gain no advantage, and only waste the time of the Department and other parties.

Identifying Parties Business Proprietary Information

Paragraph (c) of § 351.306 addresses identification in submissions of business proprietary information from multiple persons. The background of this issue was discussed in the October Notice. In the October Notice, the Department proposed that APO applicants be required to request access to all business proprietary information submitted in a particular segment of a proceeding, a proposal that, as discussed above, has been incorporated into these regulations. In addition, we also proposed that in the case of submissions, such as briefs, that include business proprietary information of different parties, the submission must identify each piece of business proprietary information included and the party to which the information pertains. (For example, Information Item #1 came from Respondent A, Information Item #2 came from Respondent B, etc.) The purpose of this proposal is to enable parties to submit a single APO version of a submission that may be served on all parties represented by authorized applicants, instead of forcing parties to submit and serve different APO versions for each of the parties involved in a proceeding. In the case of a submission served on a party not represented by an authorized applicant (a relatively rare event), the submitter still would have to prepare and serve a separate submission containing only that party's business proprietary information.

All commentators addressed this proposal, and, with one exception, endorsed it. The supporting commentators agreed that this proposal, if adopted, would expedite the production and service of documents, reduce the costs of participants, and would lead to a significant reduction in the number of inadvertent APO violations. These commentators also supported the Department's proposal to allow authorized applicants the choice of being served with hard copy or electronic information, as well as the ability to waive the receipt of submissions of certain parties. They also agreed that the identification of the source of business proprietary information is essential in reducing the possibility of inadvertent disclosures when a party prepares and serves submissions that contain information of multiple parties, and in preventing the possibility of one party frustrating the effective representation of an opposing party.

One commentator strongly opposed these proposals, asserting that the requirement that an applicant request access to all business proprietary information from all persons was inconsistent with the requirement in section 777 of the Act that an application describe in general terms the information requested and the reasons for the request. This commentator argued that under section 777, a party cannot be compelled to request access to information for which the party has no interest. In this commentator's view, the ability to waive service would not correct this defect, because parties still would be compelled to accept business proprietary information in which they have no interest in a submission containing business proprietary information of multiple parties. For example, Respondent A would be forced to accept a submission from Petitioner that might contain information of Respondent A, as well as of Respondents B, C, and D. This commentator believed that more, rather than fewer, APO violations would result from parties having to expurgate such submissions, and that multiple parties, rather than the original submitter, would be expurgating documents, with no party knowing whether the other parties had expurgated information correctly. This commentator also argued that the proposals would unnecessarily shift the burden of complying with APO procedures from petitioners to respondents, because respondents' representatives would be forced to expurgate multi-party documents that they did not prepare on their own word processing equipment.

Three commentators filed rebuttal comments. One argued that section 777 only requires a party to give a reason why it should have access to business proprietary information, but that it does not preclude the Department from adopting procedures that best protect the information. Another commentator stated that it is more burdensome for parties to prepare multiple party-specific submissions under a deadline

than it is for the receiving party to expurgate other party's data from a document containing multiple-party data, where there may be no deadline. A third commentator took the position that no authorized applicant should be expurgating a business proprietary document to show its client in the first place, and that this is the reason for public summaries of submissions. The client should be familiar enough with its own data to be able to discuss the case with the authorized applicant.

Given the overwhelming support for the Department's proposals, we have incorporated them into these regulations. These proposed procedures simply formalize what has been the Department's practice since 1992. Moreover, we believe that these proposals balance the different interests of petitioners and respondents. Although there are risks of inadvertent APO violations associated with any option, we believe that the fact that all authorized applicants will have access to the business proprietary information of all parties (whether or not service is waived) should reduce significantly the number of inadvertent disclosures. In this regard, the inadvertent service on an authorized applicant of a submission containing information of a party for which the applicant has waived service would not constitute an APO violation.

Disclosures to Parties Not Authorized To Receive Business Proprietary Information

Paragraph (d) of § 351.306 clarifies that no person, including an authorized applicant, may disclose the business proprietary information of another party to any other person except another authorized applicant or a Department official described in § 351.306(a)(2). Any person who is not an authorized applicant and who is served with business proprietary information of another party must return that information immediately to the sender, without reading it if possible, and must notify the Department so that the Department can investigate the disclosure under 19 CFR part 354. The purpose of this requirement is to minimize the damage caused by the unauthorized disclosure of business proprietary information, disclosures that typically are inadvertent.

APO Sanction Procedures

Section 354.1 Scope

The proposed amendment to § 354.1 would revise cross-reference citations to take into account changes in parts 353 and 355 that have occurred since that section was promulgated in 1988.

Section 354.3 Sanctions

The proposed amendment to § 354.3 concerns the private letter of reprimand, which currently is a sanction commonly applied as part of a settlement agreement reached under § 354.7(b). The proposed amendment would allow the Department to issue a private reprimand as a sanction in the first instance, and not solely as part of a settlement of the charges. A private reprimand is a relatively mild sanction that is appropriate whenever a violation is minor and technical in nature, the person who committed the violation took prompt action to prevent harm to the submitter of the proprietary information, the violator cooperated fully with the investigation, and there is no apparent harm to the submitter of the information.

The Department proposes that the private letter of reprimand would accompany the charging letter as a statement of proposed sanction, described in § 354.7(a)(2). The charging letter would indicate that if the charged party does not take the steps described in paragraphs (a)(3)–(a)(6) within 30 days after the date of service of the charging letter, the proposed sanction (*i.e.*, the private letter of reprimand) automatically would become final. This procedure would differ from those pertaining to other proposed sanctions. Other proposed sanctions are enclosed with the charging letter unsigned and undated, and include a caption indicating that they are proposed. Only after the charged or affected party accepts the proposed sanction is it sent in final form. In contrast, if the proposed sanction is a private reprimand, it would be enclosed with the charging letter in its final form, without a caption and signed and dated by the Deputy Under Secretary. Unless contested within 30 days, it would become effective. The charging letter would clearly explain this procedure.

Section 354.5 Report of Violation and Investigation

Paragraph (c)(1) introduces an expedited investigation procedure. Frequently, an individual contacts the Department to report his or her own APO violation, and provides all or most of the relevant details over the telephone or by letter. If the violation is relatively minor and the business proprietary information clearly has not been disclosed to anyone who is not entitled to access, the investigation may be substantially abbreviated. The expedited system would apply in cases in which little further inquiry is necessary. This proposed amendment pertains only to the investigation and does not affect any sanction that might be imposed as a result of a charging letter issued on the basis of the investigation. Paragraph (c)(2) contains the text of current paragraph (c).

The amendment to paragraph (d)(2) reflects proposed changes in the terms of the APO, as discussed above. (See also the October Notice). The Department's standard forms no longer will contain detailed procedures for safeguarding business proprietary information. Instead, it will be the responsibility of the individual subject to an APO to take appropriate measures to protect business proprietary information received under an APO. Accordingly, the list of examples of APO violations simply refers to the procedures described in the APO.

Section 354.6 Initiation of Proceedings

Experience in administering APO sanctions has made it clear that there are certain circumstances that do not warrant the imposition of a sanction, even though a person subject to an APO technically has violated the terms of the APO. Consequently, the Department has developed a policy regarding the instances when it issues a warning, rather than imposing a sanction. The amendment to § 354.6(b) codifies this policy, and enunciates a four-pronged standard for issuing a warning.

The first criterion in paragraph (c)(1) is that the person has taken due care. Due care is an objective standard meaning that the person had taken all the steps that a careful individual would take to establish, maintain, and observe adequate procedures to safeguard business proprietary information. The standard recognizes that, despite appropriate precautions, errors occur. The due care requirement avoids subjective appraisal of the intent of the individual involved. Because people rarely intend to violate an APO, whether a violation was intentional or inadvertent is not a relevant inquiry.

The second prong of the warning standard, contained in paragraph (c)(2), is that the Department cannot previously have found the person to have violated an APO. The Department will not take into account any other on-going APO violation investigation involving that person, even if the other alleged violation occurred first.

Third, as reflected in the first clause of paragraph (c)(3), a warning is never appropriate if the business proprietary information actually has been disclosed to an unauthorized person. Many technical violations, such as the failure to return or destroy documents containing proprietary information at

the specified time, do not result in any disclosure. In other instances, nondisclosure is fortuitous. To cite a common example, a person subject to an APO is able to retrieve, unopened, a document containing business proprietary information that the person sent to someone who was not authorized to have access. In this situation, either the person who sent the document realized the error and immediately retrieved the document, or the recipient realized that he or she should not have the document and promptly notified the sender or the Department. Under either scenario, the nondisclosure depends on timing, and, especially in the latter case, on the good faith of the recipient in returning the document without opening, reading, copying or transmitting it. To this extent, then, whether a first-time violator receives a warning or a sanction may depend on factors not entirely within the person's control. Nondisclosure remains a valid criterion for issuing a warning, however, because disclosure markedly increases the potential for harm to the submitter of the information.

The second clause of paragraph (c)(3) takes into account the fact that sometimes the submitter claims that it has been harmed by an APO violation, but the Department determines otherwise. For example, a submitter may claim that there could be substantial harm because the public version of a document contained business proprietary information, yet the Department's investigation shows that no unauthorized person saw the public version before all copies were retrieved. Therefore, although there may have been a technical APO violation, the Department follows a limited ''no harm, no foul'' rule.

Finally, paragraph (c)(4) takes into account the cooperation, or lack thereof, of the person alleged to have committed an APO violation.

Section 354.7 Charging letter

The amendment to § 354.7(b) moves the text providing for settlement from the end to the beginning of the paragraph, because in practice charges are often settled. Charged or affected parties seeking a settlement often request a hearing, but in their requests ask that a hearing officer not be appointed while settlement talks are pending. In this way, they preserve their rights to a hearing while effectively staying the complicated hearing process and stopping the period for proceeding without a hearing, which is provided for in § 354.13. Amended paragraph (b) codifies this practice.

Less frequently, however, the Department amends, supplements, or withdraws charging letters. Revised paragraph (b) would provide alternate methods of withdrawing charges. The existing regulation requires that a presiding official be appointed to approve the withdrawal. The amendment establishes a three-tiered approach. First, under paragraph (b)(1), if no hearing has been requested (or, under the provision for proceeding without a hearing, no supporting information is presented), the Department could withdraw a charging letter without prejudice to future action based on the same violation. However, if a hearing has been requested but no presiding official has been appointed, under paragraph (b)(2) the Department could withdraw the charging letter, but the Deputy Under Secretary would be precluded from subsequently seeking sanctions for the same alleged violation. Finally, under paragraph (b)(3), where a hearing has been requested and a presiding official appointed, the presiding official would have to approve any withdrawal and also determine whether or not the withdrawal would bar the Department from taking future action based on the same violation.

Section 354.9 Request for a hearing

The amendment to § 354.9 is intended to conform with and reinforce the amendment to § 354.7 that enables a party to request a hearing to preserve its rights pending settlement discussions.

Section 354.15 Sanctions by agreement

The amendment to § 354.15 moves the substance of paragraph (e) to a new § 345.18, which deals with sanctions taken by agreement between the Deputy Under Secretary and a party, as well as sanctions imposed by a final decision under § 354.15.

Section 354.18 Public Notice of Sanctions

Section 354.18 is a new section that contains the substance of current § 354.15(e), and that pertains to publication in the Federal Register of sanctions imposed under a final decision. In addition, § 354.18 provides for the publication of notice of settlement agreements. The amendment codifies the Department's current practice of publishing notices that violations have occurred, even if the sanction is a private reprimand. The Department does not publish notices of warning letters, because no charging letter is issued and no sanctions are imposed.

Section 354.19 Sunset

For years, the Department has included in settlement agreements a sunset provision that provides for the rescission of the charging letter. New § 354.19 codifies this practice with respect to settlements, and also extends the possible availability of sunset to all cases. Expunging an individual's record after a period of time if that person has not mishandled proprietary information in the meantime is fair and reasonable.

Classification

E.O. 12866

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

Paperwork Reduction Act

This proposed rule would impose no new reporting or record keeping requirements for purposes of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that these amendments would not have a significant economic impact on a substantial number of small business entities because the rule that they would amend does not have such an impact and, furthermore, the amendments would tend to simplify the procedures pertaining to administration of APO sanctions. The Deputy Under Secretary for International Trade is responsible for regulations governing sanctions for violations of administrative protective orders. The Assistant Secretary for Import Administration is responsible for the regulations governing issuance and use of administrative protective orders.

List of Subjects in 19 CFR Parts 351, 353, 354, and 355

Business and industry, Foreign trade, Imports, Trade practices.

Dated: January 20, 1996.

Timothy J. Hauser,

Deputy Under Secretary for International Trade.

Dated: December 15, 1995.

Susan G. Esserman,

Assistant Secretary for Import Administrations.

For the reasons stated, it is proposed that 19 CFR Ch. III be amended as follows:

1. Part 351 is added to read as follows:

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

Subpart A—[Reserved]

Subpart B—[Reserved]

Subpart C—Information and Argument

Authority: 5 U.S.C. 301 and 19 U.S.C. 1667f.

Subpart A—[Reserved]

Subpart B—[Reserved]

Subpart C—[Information and Argument]

§ 351.304 Establishing business proprietary treatment of information.

(a) *Claim for business proprietary treatment.* (1) Any person that submits factual information to the Secretary in connection with a proceeding may:

(i) Request that the Secretary treat any part of the submission as business proprietary information that is subject to disclosure only under an administrative protective order,

(ii) Claim that there is a clear and compelling need to withhold certain business proprietary information from disclosure under an administrative protective order, or

(iii) In an investigation, identify customer names that are exempt from disclosure under administrative protective order under section 777(c)(1)(A) of the Act.

(2) The Secretary will require that all business proprietary information presented to, or obtained or generated by, the Secretary during a segment of a proceeding be disclosed to authorized applicants, except for:

(i) Customer names submitted in an investigation,

(ii) Information for which the Secretary finds that there is a clear and compelling need to withhold from disclosure, and

(iii) Privileged or classified information.

(b) *Identification of business proprietary information*—(1) *In general.* A person submitting information must identify the information for which it claims business proprietary treatment by enclosing the information within single brackets. The submitting person must provide with the information an explanation of why each item of bracketed information is entitled to business proprietary treatment. All persons submitting a request for business proprietary treatment also must include an agreement to permit disclosure under an administrative protective order, unless the submitting party claims that there is a clear and compelling need to withhold the information from disclosure under an administrative protective order.

(2) *Information claimed to be exempt from disclosure under administrative protective order.* (i) If the submitting person claims that there is a clear and compelling need to withhold certain information from disclosure under an administrative protective order (see paragraph (a)(1)(ii) of this section), the submitting person must identify the information by enclosing the information within double brackets, and must include a full explanation of the reasons for the claim.

(ii) In an investigation, the submitting person may enclose non-public customer names within double brackets (see paragraph (a)(1)(iii) of this section).

(iii) The submitting person may exclude the information in double brackets from the business proprietary information version of the submission served on authorized applicants. See § 351.303 for filing and service requirements.

(c) *Public version.* (1) A person filing a submission that contains information for which business proprietary treatment is claimed must file a public version of the submission. The public version must be filed on the first business day after the filing deadline for the business proprietary version of the submission (see § 351.303(b)). The public version must contain a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information. If the submitting person claims that summarization is not possible, the claim must be accompanied by a full explanation of the reasons supporting that claim.

(2) If a submitting party discovers that it has failed to bracket information correctly, the submitter may file a complete, corrected business proprietary version of the submission along with the public version (see § 351.303(b)). However, at the close of business on the day on which the public version of a submission is due under paragraph (c)(1) of this section, the bracketing of business proprietary information will become final. Once bracketing has become final, the Secretary will not accept any further corrections to the bracketing of information in a submission, and the Secretary will treat non-bracketed information as public information.

(d) *Nonconforming submissions*—(1) *In general.* The Secretary will return a submission that does not meet the requirements of section 777(b) of the Act and this section with a written explanation. The submitting person may take any of the following actions within two business days after receiving the Secretary's explanation:

(i) Correct the problems and resubmit the information;

(ii) if the Secretary denied a request for business proprietary treatment, agree to have the information in question treated as public information;

(iii) if the Secretary granted business proprietary treatment but denied a claim that there was a clear and compelling need to withhold information under an administrative protective order, agree to the disclosure of the information in question under an administrative protective order; or

(iv) submit other material concerning the subject matter of the returned information. If the submitting person does not take any of these actions, the Secretary will not consider the returned submission.

(2) *Timing.* The Secretary normally will determine the status of information within 30 days after the day on which the information was submitted. If the business proprietary status of information is in dispute, the Secretary will treat the relevant portion of the submission as business proprietary information until the Secretary decides the matter.

§ 351.305 Access to business proprietary information.

(a) *The administrative protective order.* The Secretary will place an administrative protective order on the record within one day after the day on which a petition is filed or an investigation is self-initiated, or one day after initiating any other segment of a proceeding. The administrative protective order will require the authorized applicant to:

(1) Establish and follow procedures to ensure that no employee of the authorized applicant's firm releases business proprietary information to any person other than the submitting party, an authorized applicant, or an appropriate Department official identified in section 777(b) of the Act.

(2) Notify the Secretary of any changes in the facts asserted by the authorized applicant in its administrative protective order application;

(3) Take the necessary steps to protect business proprietary information during judicial proceedings or binational panel

proceedings under section 516A of the Act.

(4) Destroy business proprietary information by the time required under the terms of the administrative protective order;

(5) Immediately report to the Secretary any apparent violation of the administrative protective order; and

(6) Acknowledge that any unauthorized disclosure may subject the authorized applicant, a partner, associate, or employee, and any partner, associate, employer, or employee of the authorized applicant's firm to sanctions listed in part 354 of this chapter (19 CFR part 354).

(b) *Application for access under administrative protective order.* (1) Generally, no more than two independent representatives of a party to the proceeding may have access to business proprietary information under an administrative protective order. A party must designate a lead firm if the party has more than one independent authorized applicant firm.

(2) A representative of a party to the proceeding may apply for access to business proprietary information under the administrative protective order by submitting Form ITA–367 to the Secretary. Form ITA–367 must identify the segment of the proceeding involved, the identity and eligibility for disclosure of the applicant, and the agreement of the applicant to be bound by the administrative protective order. Form ITA–367 may be prepared on the applicant's own word processing system, accompanied by a certification that the application is consistent with Form ITA–367 and an acknowledgment that any discrepancies will be interpreted in a manner consistent with Form ITA–367. An applicant must apply to receive all business proprietary information on the record of the segment of a proceeding in question, but may waive service of business proprietary information it does not wish to have served on it by other parties to the proceeding.

(3) To minimize the disruption caused by late applications, an application should be filed before the first questionnaire response has been submitted. Where justified, however, applications may be filed up to the date on which the case briefs are due, but any applicant filing after the first questionnaire response is submitted will be liable for costs associated with the additional production and service of business proprietary information already on the record.

(c) *Approval of access under administrative protective order; administrative protective order service list.* The Secretary will grant access to a qualified applicant by including the name of the applicant on an administrative protective order service list. Access normally will be granted within two days of receipt of the application in an Investigation and within five days in other AD and CVD proceedings unless there is a question regarding the eligibility of the applicant to receive access. In that case, the Secretary will decide whether to grant the applicant access within 30 days of receipt of the application. The Secretary will provide by the most expeditious means available the administrative protective order service list to parties to the proceeding on the day the service list is issued or amended.

§ 351.306 Use of business proprietary information.

(a) *By the Secretary.* The Secretary may disclose business proprietary information submitted to the Secretary only to:

(1) An authorized applicant;

(2) An employee of the Department of Commerce or the International Trade Commission directly involved in the proceeding in which the information is submitted;

(3) An employee of the Customs Service directly involved in conducting a fraud investigation relating to an antidumping or countervailing duty proceeding;

(4) The U.S. Trade Representative as provided by 19 U.S.C. 3571(i);

(5) Any person to whom the submitting person specifically authorizes disclosure in writing; and

(6) A charged party or counsel for the charged party under 19 CFR part 354.

(b) *By an authorized applicant.* An authorized applicant may retain business proprietary information for the time authorized by the terms of the administrative protective order, which normally will permit an authorized applicant to retain business proprietary information obtained in one segment of a proceeding for two subsequent consecutive segments. Normally, an authorized applicant may use business proprietary information only for purposes of the segment of a proceeding in which the information was submitted. If business proprietary information that was submitted in an earlier segment of the proceeding is relevant to an issue in either of two subsequent consecutive segments of a proceeding, or in any scope or anticircumvention inquiry, an authorized applicant may place such information on the record of the subsequent segment or scope or circumvention inquiry.

(c) *Source of business proprietary information.* (1) If a party submits a document containing business proprietary information, the submitting party must identify contiguously with each item of business proprietary information the interested party that originally submitted the item (*e.g.*, Petitioner, Respondent A, Respondent B).

(2) If a party to a proceeding is not represented by an authorized applicant, a party submitting a document containing business proprietary information must serve the unrepresented party with a version of the document that contains only the unrepresented party's business proprietary information, but not the business proprietary information of other parties.

(d) *Disclosure to parties not authorized to receive business proprietary information.* No person, including an authorized applicant, may disclose the business proprietary information of another person to any other person except another authorized applicant or a Department official described in paragraph (a)(2) of this section. Any person that is not an authorized applicant and that is served with business proprietary information must return it to the sender immediately, without reading it to the extent possible, and must notify the Department. An allegation of an unauthorized disclosure will subject the person that made the alleged unauthorized disclosure to an investigation and possible sanctions under 19 CFR part 354.

PART 353—[AMENDED]

2. The authority citation for part 353 continues to read as follows:

Authority: 5 U.S.C. 301 and 19 U.S.C. 1677f.

3. Part 353 is proposed to be amended by removing §§ 353.32 through 355.34, and redesignating §§ 353.35 through 353.38 as 353.32 through 353.35 respectively.

PART 354—[AMENDED]

4–5. The authority citation for part 354 is revised to read as follows:

Authority: 5 U.S.C. 301, and 19 U.S.C. 1677.

6. Section 354.1 is revised to read as follows:

§ 354.1 Scope.

This part sets forth the procedures for imposing sanctions for violation of an administrative protective order issued under 19 CFR 353.34 or 355.34, or

successor regulations, as authorized by 19 U.S.C. 1677f(c).

7. Section 354.3 is amended by revising paragraph (a)(3) and (a)(4), and by adding a new paragraph (a)(5), as follows:

§ 354.3 Sanctions

(a) * * *

(3) Other appropriate administrative sanctions, including striking from the record 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;

(4) Requiring the person to return material previously provided by the Department and all other materials containing the business proprietary information, such as briefs, notes, or charts based on any such information received under an administrative protective order; and

(5) Issuing a private letter of reprimand.

* * * * *

8. Section 354.5 is amended by revising paragraphs (c) and (d)(2), as follows:

§ 354.5 Report of violation and investigation.

* * * * *

(c)(1) The appropriate Director will provide a report of the investigation to the Deputy Under Secretary, after review by the Chief Counsel, no later than 90 days after receiving information concerning a violation if:

(i) The person alleged to have violated a protective order personally notified the Department and reported the particulars surrounding the incident; and

(ii) the alleged violation did not result in any actual disclosure of business proprietary information. Upon the appropriate Director's request, and if extraordinary circumstances exist, the Deputy Under Secretary may grant the appropriate Director up to an additional 90 days to conduct the investigation and submit the report.

(2) In all other cases, the appropriate 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 appropriate Director's request, and if extraordinary circumstances exist, the Deputy Under Secretary may grant the appropriate Director up to an additional 180 days to conduct the investigation and submit the report.

(d) * * *

(2) Failure to follow the procedures outlined in the protective order for safeguarding proprietary information.

* * * * *

9. Section 354.6 is revised as follows:

§ 354.6 Initiation of proceedings.

(a) *In general.* After an investigation and report by the appropriate Director under § 354.5(c) and consultation with the Chief Counsel, the Deputy Under Secretary will determine whether there is reasonable cause to believe that a person has violated a protective order. If the Deputy Under Secretary determines that there is reasonable cause, the Deputy Under Secretary also will determine whether sanctions or a warning is appropriate for the violation.

(b) *Sanctions.* In determining under paragraph (a) of this section 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. If the Deputy Under Secretary determines that sanctions are appropriate, the Deputy Under Secretary will initiate a proceeding under this part by issuing a charging letter under § 354.7. The Deputy Under Secretary will determine whether to initiate a proceeding no later than 60 days after receiving a report of the investigation.

(c) *Warning.* If the Deputy Under Secretary determines under paragraph (a) of this section that a warning is appropriate, the Deputy Under Secretary will issue a warning letter to the person believed to have violated a protective order. Sanctions are not appropriate and a warning is appropriate if:

(1) The person took due care;

(2) The Department has not previously found the person to have violated a protective order;

(3) The violation did not result in any disclosure of the business proprietary information or the Department is otherwise able to determine that the violation caused no harm to the submitter of the information; and

(4) The person cooperated fully in the investigation.

10. Section 354.7 is amended by revising paragraph (b), as follows:

§ 354.7 Charging letter.

* * * * *

(b) Settlement and amending the charging letter. The Deputy Under Secretary and a charged or affected party may settle a charge brought under this part by mutual agreement at any time after service of the charging letter; approval of the presiding official or the administrative protective order Sanctions Board is not necessary. The charged or affected party may request a hearing but at the same time request that a presiding official not be appointed pending settlement discussions. Settlement agreements may include sanctions for purposes of § 354.18. The Deputy Under Secretary may amend, supplement, or withdraw the charging letter as follows:

(1) If there has been no request for a hearing, or if supporting information has not been submitted under § 354.13, the withdrawal will not preclude future actions on the same alleged violation.

(2) If a hearing has been requested but no presiding official has been appointed, withdrawal of the charging letter will preclude the Deputy Under Secretary from seeking sanctions at a later date for the same alleged violation.

(3) The Deputy Under Secretary may amend, supplement or withdraw the charging letter at any time after the appointment of a presiding official, if the presiding official determines that the interests of justice would thereby be served. If the presiding official so determines, the presiding official will also determine whether the withdrawal will preclude the Deputy Under Secretary from seeking sanctions at a later date for the same alleged violation.

* * * * *

11. Section 354.9 is amended by revising paragraph (b), as follows:

§ 354.9 Request for a hearing.

(a) * * *

(b) Upon timely receipt of a request for a hearing, and unless the party requesting a hearing requests that the Under Secretary not appoint a presiding official, the Under Secretary will appoint a presiding official to conduct the hearing and render an initial decision.

§ 354.15 [Amended]

12. Section 354.15 is amended by removing paragraph (e).

§ 354.17 [Amended]

13. Section 354.17(b) is amended to change the citation of 19 CFR 353.30 and § 355.20 to 19 CFR 351.205.

14. Section 354.18 is added to part 354, to read as follows:

§ 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 Department'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 subjects a charged or affected party to a sanction under § 354.3(a)(1), the Deputy Under Secretary 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 will cooperate in any disciplinary actions by any association or agency. Whenever the Deputy Under Secretary subjects a charged or affected party to a private letter of reprimand under § 354.3(a)(5), the Department will not make public the identity of the violator, nor will the Department make public the specifics of the violation in a manner that would reveal indirectly the identity of the violator.

15. Section 354.19 is added to part 354, to read as follows:

§ 354.19 Sunset.

(a) If, after a period of three years from the date of 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 protective order, the party may request in writing that the Deputy Under Secretary rescind the charging letter. A request for rescission must include:

(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 a 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 will rescind the charging letter within 30 days after receiving the written request.

PART 355—[AMENDED]

16. The authority citation for part 355 continues to read as follows:

Authority: 5 U.S.C. 301 and 19 U.S.C. 1677f.

17. Part 355 is amended by removing §§ 355.32 through 355.34, and redesignating §§ 355.35 through 355.39 as 355.32 through 353.36 respectively.

* * * * *

Note: The following appendix will not appear in the Code of Federal Regulations: Appendix to 19 CFR Part 351, Subpart C—Application for Administrative Protective Order in Antidumping or Countervailing Duty Proceeding, and Administrative Protective Order.

BILLING CODE 3510–DS–P

Case Number
_____
Number of pages
_____
Proceeding
Public Document

United States Department of Commerce
International Trade Administration

APPLICATION FOR ADMINISTRATIVE PROTECTIVE ORDER
in
ANTIDUMPING OR COUNTERVAILING DUTY PROCEEDING

The Matter of the **Antidumping/Countervailing Duty (indicate one)** Proceeding on _____ _____ from _____ _____ (Country) _____ (Product)	ACCEPTED_____ REJECTED_____ DATE_____

This application covers business proprietary information in the following segment of the proceeding:

[ ] Investigation - petition filed on : _____

[ ] Administrative Review initiated on : _____ (___FR_____)

for period : _____to_____

[ ] Other _____ : _____(___FR_____)

_____
(specify)

This application is:

[ ] the initial application of the firm to be placed on the APO service list; or

[ ] a request by the firm to amend the APO service list.

FORM ITA-367 (X.96)

REPRESENTATION

1. I am an applicant for: _____
who is an interested party/parties as follows:

[ ] petitioner; [ ] respondent; [ ] other interested party,

as defined in 19 C.F.R. § _____ of the

Department's regulations.

2. If the interested party/parties I represent have another

authorized applicant or representative, _____

_____

is the lead firm.

REQUEST FOR INFORMATION

3. I request disclosure of all business proprietary information under administrative protective order ("APO") which will be or has been placed on the record of this segment of this proceeding that is releasable under 19 C.F.R. § 351.203 for the purpose of fully representing the interests of my client:

[ ] all business proprietary information, including hard copy and electronic data; or

[ ] all business proprietary information in hard copy form only.

INDIVIDUAL STATEMENTS

4. TO BE COMPLETED BY ATTORNEY APPLICANTS

A. I **am/am not (indicate one)** an officer of the interested party or parties listed in paragraph 1, or of other competitors of the person submitting the business proprietary information requested in this application.

B. I **do/do not (indicate one)** participate in the competitive decision-making activity of the interested party or parties listed in paragraph 1, or of other competitors of the person submitting the business proprietary information requested in this application. I understand that competitive decision-making activity includes advice on production, sales, operations, or investments, but does not include legal advice.

C. I **do/do not (indicate one)** have an official position or other business relationship other than providing advice for the purpose of this segment of the proceeding with the interested party or parties listed in paragraph 1, or with other competitors of the person submitting the business proprietary information requested in this application.

D. I **do/do not (indicate one)** currently intend within 12 months after the date upon which the final determination/results is(are) published to enter into any of the relationships described in paragraphs 4A B and C.

E. Explain for each applicant any affirmative response to paragraph 4A, B, C or D: _____

_____.

5. TO BE COMPLETED BY NON-ATTORNEY APPLICANTS

A. I **am/am not (indicate one) employed by/retained by (indicate one)** a law firm representing the interested party or parties listed in paragraph 1.

B. If I am retained by an attorney, the name of the lawyer and law firm are:

_____

_____.

C. Where not an employee of a law firm and if I have not been retained by the attorney for the interested party or parties listed in paragraph 1, in a separate attachment to this application I am providing information concerning my practice before the International Trade Administration ("ITA").

D. I **am/am not (indicate one)** an officer or employee of a interested party or parties listed in paragraph 1, or of other competitors of the submitter of the business proprietary information requested in this application.

E. I **do/do not (indicate one)** participate in the competitive decision-making activity of the interested party or parties listed in paragraph 1, or of other competitors of the person submitting the business proprietary information requested in this application. I understand that competitive decision-making activity includes advice on production, sales, operations, or investments, but does not include legal advice.

F. I **do/do not (indicate one)** have an official position or other business relationship other than providing advice for the purpose of this segment of the proceeding with the interested party or parties listed in paragraph 1, or with other competitors of the person submitting the business proprietary information requested in this application.

G. I **do/do not (indicate one)** currently intend within 12 months after the date upon which the final determination/results is(are) published to enter into any of the relationships described in paragraphs 5D, E and F.

I. Explain for each applicant any affirmative response to paragraph 5D, E, F or G: _____

_____.

AGREEMENT TO BE BOUND

6. Recognizing the penalties for perjury under the laws of the United States, I affirm that all statements in this application are true, accurate, and complete to the best of my knowledge. I agree, individually and on behalf of my law firm, corporate law office, or company, if any, to be bound by the terms stated in the administrative protective order issued in this segment of the proceeding.

7. I certify that this application is a true and accurate copy of the Department's "Application for Administrative Protective Order", FORM ITA-367 (X.96). If there are any discrepancies, I agree to be bound by the Department's standard form.

INDIVIDUAL SIGNATORIES

8. ATTORNEY APPLICANTS (*SAMPLE FORMAT*)

Individual applicants:

(1) _____, _____, _____
(name of applicant) (signature) (date)

of _____
(name and address of law firm)

_____

I am admitted to practice in the following jurisdiction(s) and before the following court(s):

_____.

9. NON-ATTORNEY APPLICANTS (*SAMPLE FORMAT*)

Individual applicants:

(1) _____, _____, _____
(name of applicant) (signature) (date)

of _____
(name and address of firm)

_____

I am a member of the following professional association(s):

_____.

COURTESY PAGE
FOR
WAIVER OF SERVICE

If my application for administrative protective order ("APO") in this proceeding is granted, I waive service of the following business proprietary information that I would be authorized to receive under the APO:

o

o

o

o

Inadvertent service of a document containing business proprietary information on a party that has been granted APO access and has waived service IS NOT A VIOLATION OF THE APO.

A/C-___-___
(Segment of Proceeding)
(Period of Review)
Public Document

In the Matter of the Antidumping/Countervailing Duty (Segment of Proceeding) of [redacted] from [redacted] (A/C-[redacted])

ADMINISTRATIVE PROTECTIVE ORDER

IT IS HEREBY ORDERED THAT:

All business proprietary information submitted in the above-referenced segment of the proceeding, including new information submitted in a remand during litigation on this segment of the proceeding, which the submitting party agrees to release or the Department of Commerce ("the Department") determines to release, will be released to the authorized applicants on the administrative protective order (APO) service list for this proceeding, except the following:

- customer names in an investigation;
- privileged and classified information; and
- specific information of a type for which the Department determines there is a clear and compelling need to withhold from disclosure.

USE OF BUSINESS PROPRIETARY INFORMATION UNDER THIS APO

Business proprietary information subject to this APO may be used by an authorized applicant in this segment of the proceeding and in the following other segments or proceedings:

[This section will authorize use of business proprietary information in other segments of the same proceeding, or in other proceedings, consistent with the Tariff Act and the regulations. The terms in this section will vary, depending on what segment of the proceeding this APO covers. This section will also establish the deadline for destruction of business proprietary information in each set of circumstances.]

REQUIREMENTS FOR AUTHORIZED APPLICANTS

All applicants authorized to have access to business proprietary information under this APO are subject to the following terms:

1. The authorized applicant must establish and follow procedures to ensure that no employee of the authorized applicant's firm releases business proprietary information to any person other than the submitting party, an authorized applicant, or the appropriate Department official identified in section 351.204(a) of the regulations. No person in the authorized applicant's firm may release business proprietary information received under this APO to any person other than those described in this paragraph.

2. The authorized applicant may allow APO access to one or more paralegals, law clerks, secretaries, or other support staff employed by or on behalf of the applicant's firm and operating within the confines of the firm. The authorized applicant may also use the services of subcontracted individuals to pick up APO information released by the Department. All support staff must sign and date an acknowledgement that they will abide by the terms and conditions of the APO at the time they are first permitted access to any information subject to APO.

3. The authorized applicant must ensure that the computer on which electronic business proprietary information is entered for non-word processing purposes will not be accessible by modem.

4. An applicant who files for APO access after the first questionnaire response is filed in this segment of the proceeding and is approved by the Department for access under APO, must pay all reasonable costs associated with the additional production and service of previously-filed business proprietary submissions, if payment is requested.

5. The authorized applicant must pay all reasonable costs incurred by the submitter of the electronic business proprietary information for the copying of its electronic information released to the authorized applicant, if payment is requested. Reasonable costs include the cost of the electronic medium and the cost of copying the complete proprietary version of the electronic information/medium submitted to the Department in APO releasable form, but not costs borne by the submitter of the electronic data in the creation of the electronic data/medium submitted to the Department.

CERTIFICATION REQUIREMENTS

6. If changed circumstances affect the authorized applicant's representation of an interested party at any time authorized under this APO (i.e., reassignment, departure from firm), the authorized applicant must submit to the Department a certification attesting to his/her personal compliance with the terms of the APO, and that no copies of the materials released subject to the APO have been retained by the

authorized applicant or made available to the interested party/parties the applicant represents, or any other person to whom disclosure was not specifically authorized.

7. At the expiration of the time specified in this APO, the authorized applicant must destroy all business proprietary information and must submit to the Department a certification attesting to his/her personal compliance with the terms of the APO, and that no copies of the materials released subject to the APO have been retained by the authorized applicant or made available to the interested party/parties the authorized applicant represents, or any other person to whom disclosure was not specifically authorized, or provide to the Department official responsible for the administration of the APO in this segment of the proceeding, a protective order issued by a court or binational panel proceeding.

SANCTIONS FOR BREACH OF THIS APO

8. The authorized applicant will be subject to any or all of the sanctions described in 19 C.F.R. Part 354 if there is a violation of this APO by the authorized applicant or any of the persons identified in item 9 of this APO.

9. The authorized applicant will accept full responsibility, individually and on behalf of the authorized applicant's firm or corporate office, for violation of this APO by any employee of the firm or corporate office, or support staff retained by the firm or corporate office, who is permitted access to APO information.

10. The authorized applicant will promptly report and confirm in writing any possible violation of this APO to the Department.

DEFINITIONS

For purposes of this APO, the following definitions apply:

"Representative" is an individual person acting on behalf of an interested party.

"Applicant" is a representative of an interested party who has applied for access to business proprietary information under this APO.

"Authorized applicant" is an applicant that the Secretary has authorized to receive business proprietary information under this APO.

"Lead firm" is the firm that will be the primary contact with the Department and that will accept service of all documents for the party it represents where two firms independently have access under APO.

"Support staff" includes paralegals, law clerks, secretaries and other support staff that are employed by or on behalf of the applicant's firm and operating within the premises of the firm, as well as subcontractors of the firm providing similar support staff functions.

"Electronic data" includes (1) data submitted by a party, generated by the Department, or entered by the recipient on computer tape, disk, diskette, or any other electronic computer medium; and (2) all electronic work products resulting from manipulation of this data, as transferred in any form onto any other electronic computer medium, such as tape, disk, diskette, Bernoulli cartridge, removable disk pack, etc.

_____

(Signature of Department Official)
Typed Name
Title
Import Administration

_____

(date)

[FR Doc. 96–2697 Filed 2–7–96; 8:45 am]
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