

Office of  
**INSPECTOR GENERAL**

*Audit Report*

*Review of the Implementation of the  
Administrative Protective Order Provision  
in Title VII Investigations*

*Report No. IG-02-90*



*February 1990*

Date Issued





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UNITED STATES INTERNATIONAL TRADE COMMISSION

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WASHINGTON, D.C. 20436

February 9, 1990

**REVIEW OF THE IMPLEMENTATION  
OF THE ADMINISTRATIVE PROTECTIVE ORDER  
PROVISION IN TITLE VII INVESTIGATIONS**

On August 23, 1988, Congress enacted the Omnibus Trade and Competitiveness Act of 1988 (OTCA). Section 1332 of the OTCA, which amends section 777 of the Tariff Act of 1930, requires the Commission, with some limitations, to make all business proprietary information (BPI) collected in Title VII investigations available to interested parties who are parties to the proceeding under a protective order.

This review was scheduled after receiving a request from the Chairman in August 1989. The objective of the review was to obtain the views of the Commission and staff on the Administrative Protective Order (APO) provision and determine whether legislative or regulatory amendments or improvements to the Commission's procedures were needed.

Soon after the APO provision was enacted, the Commission issued interim regulations and began to release BPI. I found that the Commission has fully complied with the intent of the law in releasing BPI, and did so with adequate controls in place.

As discussed in the body of the report, I also found that:

The Commission has incurred additional costs in terms of resources although there are some offsetting factors and a possibility that significant resources could be saved in the future (pages 3-5);

Some firms have expressed concern about providing data in light of the APO provision but a significant chilling effect has not yet occurred (pages 5-6);

The industry firms are incurring at least marginal additional costs (pages 6-8);

Party representatives see definite benefits from the release of BPI while the Commission was less positive (pages 8-9);

The Commission's process for distributing BPI could be improved to reduce the time required of the lead investigators (pages 9-13);

The occurrence of suspected violations and breaches has increased and relevant policy and procedures and guidelines need to be established (pages 13-19); and

Legislative amendments may be desirable but are not essential based on the audit findings (pages 19-21).

Based on the above findings, I have made several recommendations. On page 12, I recommend that the Director of Investigations:

- establish a position for an APO coordinator to handle the routine aspects of distributing BPI and calls of an administrative nature concerning the APO process and distribution of BPI; and
- revise the standard clauses at the front of the questionnaires to state that administrative questions concerning the APO process and distribution of BPI be addressed to the APO coordinator and questions concerning the interpretation or analysis of BPI be submitted in writing.

On pages 18 and 19, I recommend that the Secretary, in coordination with the General Counsel:

- develop an agency directive that sets forth policy and procedures concerning suspected violations;
- develop a system to track suspected violations; and
- determine whether the certification or destruction of APO material is needed and, if so, develop a system to implement this requirement.

I also recommend on page 19 that the General Counsel develop some method whereby the principles surrounding a suspected violation or case are presented in a non-identifying manner to provide guidance to party representatives on what constitutes a breach.

The Chairman, General Counsel, the Secretary and the Director, Office of Investigations generally agreed with the recommendations as stated above. Their comments are discussed in more detail on pages 12 and 19. Their responses are presented in entirety as Appendices A-D to this report.

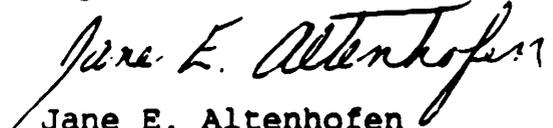
  
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Inspector General

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- 1 - Total and Routine APO Hours per Investigation
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#### Appendices

- A - Response to Draft Report on APO Procedures at the ITC from the Chairman
- B - Comments on the IG's Draft Report from the General Counsel
- C - Comments on the Draft Report from the Secretary
- D - Comments on the Draft Report from the Director, Office of Investigations

## INTRODUCTION AND SCOPE

This review was scheduled after receiving a request from the Chairman in August 1989. The Chairman requested a comprehensive, objective, and impartial report on whether the Commission is administering the release of confidential business information under Administrative Protective Order (APO) in the most efficient and effective manner possible. The objective of the review was to obtain the views of the Commission and staff on the APO provision and determine whether legislative or regulatory amendments to the Commission's procedures were needed.

The review was conducted from September through November 1989. I interviewed all six Commissioners and staff in the Offices of Investigations, Economics, General Counsel (OGC) and the Secretary. These interviews included the lead investigators and economists for most of the preliminary and final investigations instituted during the year after the APO provision was enacted, and the OGC attorneys for all actual and potential violations.

Extensive use was made of a report prepared by Commission staff on implementation of the APO provision that four Commissioners submitted to Congress on September 8, 1989, (hereafter referred to as the September 8 staff report). Data on subpoenas, violations, and the number of investigations were verified. Other statistics, such as on the number of APO parties and length of questionnaires, were not verified.

Outside of the Commission, I interviewed several attorneys and economists (hereafter referred to jointly as party representatives), who regularly appear before the Commission on behalf of both petitioners and respondents.

The review focused on investigations initiated the year after the APO provision was enacted (August 23, 1988 - August 23, 1989). During this period, 33 Title VII investigations were instituted - 15 preliminary and 18 final. Information was released under APO on all but two of these investigations. A schedule of the investigations with the estimated hours spent on APO matters and total hours worked is presented in Attachment 1.

Commissioners, staff, and party representatives expressed concern that sanctions imposed by the Commission may not be consistent with sanctions imposed by other bodies, such as the Department of Commerce and the Administrative Law Judges. Although consistency is not required by statute or regulation, a comparison may have identified areas for which it was desirable. Due to time constraints, I did not do such a comparison.

This review was performed in accordance with generally accepted government auditing standards. Accordingly, the review included an examination of internal controls and other auditing procedures that were considered necessary under the circumstances.

## BACKGROUND

On August 23, 1988, Congress enacted the Omnibus Trade and Competitiveness Act of 1988 (OTCA). Section 1332 of the OTCA, which amends section 777 of the Tariff Act of 1930, requires the Commission, with some limitations, to make all business proprietary information (BPI) collected in Title VII investigations available under a protective order to counsel, consultants or experts representing interested parties.

This provision was a significant change for the Commission. Until 1979, the Commission released very limited information. The Trade Act of 1979 amended the Tariff Act of 1930 to provide for limited disclosure of certain confidential business information under protective order. Under this law, the Commission basically released pricing and cost of production data of the petitioner and domestic producers supporting the petition to interested parties.

The Commission first promulgated interim regulations to conform to the requirements of the OCTA on August 29, 1989. The interim regulations set forth the Commission's procedures for providing access to BPI and imposing sanctions for APO violations. The interim regulations were amended on February 2, 1989, to remedy certain technical problems with the initial interim regulations. The regulations are now in the process of being finalized.

The process within the Commission for the release of BPI was developed on a cooperative basis primarily between the Offices of Investigation and the Secretary, with assistance from OGC as needed. The process has evolved over the last year to respond to various developments. A general description of the process is presented in Attachment 2.

In March 1989, the Chairman requested that the International Law Section of the D.C. Bar gather information on the experience of the Bar under the Commission's procedures for releasing confidential business information. The Bar has established a Committee to address this issue. The Committee has met and discussed that various members seem to be having problems with the APO process. They intend to address these problems at a panel presentation in early 1990.

## **FINDINGS AND RECOMMENDATIONS**

Soon after the APO provision was enacted, the Commission issued interim regulations and began to release BPI. I found that the Commission has fully complied with the intent of the law in releasing information, and did so with adequate controls in place.

As discussed in the following sections of the report, I found that the Commission and the industry firms have incurred additional costs that are offset by benefits. Opinions on the degree of the costs and the benefits vary among the parties involved in the APO process.

I found that the Commission's process for distributing BPI could be improved, and that policy and procedures need to be established to handle the increasing occurrence of suspected violations. I had no recommendations for legislative changes.

### **COST TO THE COMMISSION**

The APO process for releasing BPI is labor intensive for the Commission, but except on particularly large, complex investigations, the work can usually be absorbed into the normal operations. The overall, long-run costs to the Commission are somewhat decreased by offsetting factors. A cost that has not yet clearly materialized but is a real concern throughout the Commission is whether the APO provision may be affecting the submission of data.

### **Resources**

According to the September 8 staff report, the Commission estimated that at least 1,290 hours, or 161 staff days, have been spent implementing the APO provision. This included 899 hours spent by the Offices of Investigations and Economics on routine APO matters. These Offices spent an additional 90 hours and the OGC spent 402 hours due to non-routine matters, primarily reviewing suspected violations. The OGC also spent another 200 hours on developing regulations. The time spent by the Office of the Secretary on APO matters, which can be considerable, was not included in these estimates because their time is not recorded by investigation. No estimate of routine hours was provided for the OGC. Presumably, all of their time was classified as non-routine because they are only contacted when questions arise.

In total, the routine hours spent on APO (exclusive of OGC and the Secretary's Office) represent about 1% of the total time spent on the investigations. The APO requirements could be

absorbed fairly easily on most of the investigations. As shown on the bar charts in Attachment 3, 18 of the 33 investigations required 10 hours or less for APO matters. Another 10 investigations required between 16 and 40 hours, which could also be absorbed without too much difficulty.

On five large investigations, the routine APO work was extensive, but still only increased to 3% of the total hours. Three of these investigations were transition cases which contributed to some increase in the APO work. Apart from that, these were large, complex cases exclusive of the APO provision. There appears to be a direct correlation of the APO work to the case complexity.

A particular concern has been expressed about the amount of time required for APO matters on preliminary investigations. I found only a slight difference exists between the time required on preliminaries and finals, with less time being spent on preliminaries. The time spent on preliminaries averaged slightly less than 1% while the time spent on finals averaged nearly 1.5%. Furthermore, only one of the five investigations with the largest APO workloads was a preliminary.

Less time is required on preliminaries, at least partially, because only producer and importer questionnaires are issued. These questionnaires are likely to be served by the interested parties rather than by the Commission. In the final investigations, the purchaser questionnaires are virtually all served by the Commission creating more work.

While the APO provision has caused an increased workload, there are two factors that offset some of the costs to the Commission. Prior to OTCA, the Commission was expending resources on releasing BPI under the prior APO provisions and appeals as discussed below.

Prior APO releases. The Commission released data on pricing and cost-of-production. Even though only limited information was released, the process was more involved because the lead investigator had to review the documents closely to ensure only appropriate data was released. This frequently required making a sanitized version of the questionnaire using cutouts or white-out. The process required more review than simply copying the questionnaires and was more subject to error. Parties requested that information be released under APO 53 times in the first nine months of fiscal year 1988 (the pre-OTCA period).

Appeals. When parties appealed negative preliminary determinations or final decisions, the Commission would usually have to provide information not previously provided, which is basically the data now released under APO, under a

judicial protective order. Now, parties can only get information under the judicial protective order that was not released under APO. Over the nine years prior to 1989, the Commission averaged a 58% appeal rate (the figures on the 1989 appeal rate were not available).

It was not possible to quantify the resources that the Commission was spending to provide BPI under the prior APO process and judicial protective order, (the General Counsel stated that the time for appeals was minimal) but these areas do represent an offset to the time now being spent.

I believe the benefits of a learning curve are already starting to be seen. Some staff have noticed a reduction in resources being required as they and the party representatives become more familiar with the APO process and the unique problems related to transition cases no longer occur.

Significant Commission resources will be saved if the APO process results in fewer appeals being filed, which is a possibility indicated by several party representatives. On the 33 investigations in this review, appeals could have been filed on 20 but only 5 were. I did not have access to why appeals were not filed nor whether this represents a decrease from prior year statistics, but it remains a potential benefit.

### **Chilling Effect**

Another cost to the Commission involves the quantity and quality of data submitted by firms. The Commission has been very concerned that the APO provision, particularly the release to in-house counsel, would result in firms either refusing to submit data or adjusting their data, commonly referred to as a chilling effect. It is difficult to assess whether there has been a chilling effect because the APO provision is not isolated from other factors, such as an increase in the size of the questionnaires. Two firms did refuse to provide data until subpoenaed, but the majority of firms have provided data voluntarily. There is still considerable concern throughout the Commission that a chilling effect could happen in the future.

Several examples were cited in the September 8 staff report involving difficulty in getting data outside the subpoena process. The examples cited primarily involved investigations in which the preliminary case was not subject to the APO provision, but the final investigation was (these are commonly referred to as transition cases).

The September 8 staff report also cited the number of subpoenas issued as an indication of the chilling effect. In the year after the APO provision was passed, 13 subpoenas on 5 final investigations were issued (subpoenas are rarely issued on

preliminary investigations). These subpoenas represent a very small portion of the firms involved. Over 500 producers and importers submitted questionnaires on the 18 final investigations.

The number of subpoenas did increase. Only 6 subpoenas had been issued the year before OTCA, compared to 13 the year after. However, only 2 of the 13 firms that received subpoenas cited the potential release of data as the reason for refusing to provide information. The others stated that they were willing to provide the information except that it was difficult to gather.

At least one other firm refused to provide data until a subpoena was issued, at which time the data was readily provided. OGC attributes this type of scenario to that counsel is unable to convince their clients who are concerned about release of BPI, that data should be submitted in the absence of a subpoena.

Several Commission staff acknowledged that there were questions about the release of data, but these have decreased as attorneys become more familiar with the APO provision and can advise their clients about the process. Most of the staff interviewed said they thought their answers to these questions had provided adequate assurance to the parties and they had not noticed a chilling effect.

The party representatives stated that their clients were aware of the APO provision and somewhat concerned, but not to the point that data is withheld or adjusted. On the contrary, they said that firms have to be more accurate about the data submitted since it is subject to scrutiny.

## **COST TO INDUSTRY**

The release of BPI has also resulted in increased costs for the firms involved, although party representatives think the increase is marginal and definitely worth it for the improved quality.

Several Commissioners have repeatedly expressed concern about the added costs to parties that the new APO provision entails. In the September 8 staff report, the Commissioners expressed a belief that these increased costs fell disproportionately on small parties and particularly discriminated against unrepresented petitioners and respondents.

The party representatives stated that the increased cost to the parties due to the APO provision has been marginal. Several commented that industry firms commonly establish a budget for these proceedings based on what they estimate the case is worth. The firms have not increased their budgets to allow for analysis of APO data. Parties were increasingly using economists, so this is not an extra cost that can be attributed to the APO provision.

Furthermore, some of the firms were distributing data among themselves before the APO provision was passed and so the distribution of data is not necessarily an increased burden.

All of the party representatives said that seldom is more work being done, rather it is just work of a different type. Before the APO provision, the representatives spent a considerable amount of time researching public data, and developing hypothetical data based on various assertions. Now, their time is spent on analyzing actual figures. Therefore, even if the fees are higher, the parties are getting better quality work for their money.

Several party representatives said that the current provision could even be seen as less expensive. Prior to OTCA, arguments based on hours of work and analysis were rejected out of hand by the Commission because of facts they had that the party representatives did not have. This effectively was a total waste of money for the firms.

Several Commissioners and party representatives opined that the provision may result in some firms not filing petitions. The representatives said this could also be viewed as a cost savings. Now that they have access to the APO data and can analyze the reasons for Commission decisions, the representatives can better advise the firms whether their petition or response has a chance of winning. When the prospects are not good, the firms save the cost of the case. (The General Counsel disagreed with this idea because the information released and the industries are not similar). Similarly, before OTCA, it was hard to accept a negative decision when they did not understand the Commission's rationale. Now firms may be saved the cost of an appeal.

The Secretary stated that the party representatives interviewed possibly had a biased position. He said the number of submissions has been increased due to the APO provision and there has been a significant increase in the number of economic submissions, which must result in increased costs to the firms. He said some firms have expressed strong feelings about the cost of an investigation, and specifically the costs due to the APO provision. The Director of Investigations also said the owners and managers of the firms might have a different opinion about the cost to the industry than that expressed by the party representatives.

I did not contact any firms about whether the APO provision resulted in increased costs. Very few firms would have been involved in investigations before and after the APO provision was enacted. Moreover, I did not think the firms were in a position to attribute any cost increases to factors such as inflation, complexity, or the APO provision as accurately as the party representatives.

The ability of small firms to file a petition and the viability of pro-se cases has been a long-standing issue at the Commission. While the APO provision is definitely another disadvantage in these situations, we do not believe it to be an overriding factor. Even with counsel, some parties have chosen not to obtain the APO data. The Commission staff in all cases has access to the data and is presenting it to the Commission, as well as rebutting any irrelevant or misleading arguments put forth by party representatives. Maintaining the quality of the staff reports is probably the best assistance the Commission can provide to small firms.

### **BENEFITS**

Opinions on the benefits of the APO process varied greatly. The party representatives were greatly enthusiastic. The Commissioners, as a minimum, acknowledged the benefit of working from a common data base and some thought the arguments were definitely more focused. The rest of the Commission staff were fairly evenly divided on seeing marginal or no benefits versus seeing some definite benefits.

The September 8 staff report on the APO provision stated that the release of BPI had no noticeable benefits in the preliminary investigations due to a lack of time to analyze the data; but in the final investigations the submissions have been more focused in their discussion of the facts, making analysis of issues more meaningful and relevant. The report also acknowledged the benefit to the parties and the Commission in having everyone working with the same data base.

Three of the four Commissioners that signed the September 8 staff report had no further comments on quality or other benefits. One Commissioner concurred with the statements in the report and added that he thought a lot of non-pertinent points are now raised by the party representatives since they have access to the APO data.

The Chairman and the Vice-Chairman thought that having the same data base was a significant benefit that resulted in definite improvements in party submissions and arguments. They said less time was spent arguing about where numbers come from and on assertions based on facts/assumptions different than those before the Commission. Specifically, the economic submissions are much better and all facts have a higher degree of accuracy.

On the whole, personnel in the Offices of Investigations and Economics were not enthusiastic about the benefits derived, although some agreed benefits had occurred. Benefits were more frequently cited when the cases involved an industry for which information was not publicly available or the party representatives had more industry expertise than the Commission.

Benefits cited included the use of novel arguments, the ability to discuss BPI with party representatives, a good check on data, and more relevant and focused arguments.

Other personnel stated that the benefits were marginal at best. They stated that submissions were not better in cases when data was publicly available, that errors identified by the party representatives would have been found by them, and arguments were not more relevant and sometimes focused on the wrong facts.

The party representatives (who fairly evenly represented respondents and petitioners) overwhelmingly said that having access to the data was a great improvement. (Several Commissioners noted that this response should be expected because the attorneys and economists have a self-interest in the APO provision in that they have been able to increase their fees). Most of them talked about the frustration before the APO provision of trying to develop and present arguments. One described their prior efforts as a guessing game. The representatives said they now have a basis for their arguments, and believe they are now more focused and cogent.

Another benefit the party representatives cited is an ability to correct inaccuracies. The party representatives had a high regard for the Commission staff, but said that errors are inevitable both in the data submitted and in the analysis done. They believe these errors are now more likely to be detected, which was a view shared by some Commission staff.

### **EFFICIENCY OF PROCESS**

After reviewing the Commission's process for releasing BPI, we believe improvements could be made. The process currently places an undue burden on the lead investigators and the Secretary's staff that could be alleviated by having APO-related responsibilities consolidated into one position.

The current process was developed on a cooperative basis among the offices involved to share the burden. While the burden is thus shared by Offices, within the Office of the Secretary the burden has been primarily on two staff members in the Docket Section and in the Office of Investigations, the burden has fallen on the lead investigators.

An observation in the September 8 staff report was that the time investigators spend complying with APO activities, at least to some extent, detracts from the time they should be analyzing data and preparing the staff report. I concur with this observation and believe the effect can be alleviated.

## **Establish an APO Coordinator**

Investigators are currently handling APO responsibilities of two types, as discussed below, that we believe could be better handled by a position in the Office of Investigations.

1. Investigators have been determining whether a document needs to be released, making the copies themselves, frequently by themselves, and delivering the documents to the Secretary's Office, sometimes with a cover letter. They expressed a reluctance to use Office or Commission support staff because of the sensitivity of the data, the complexity of the questionnaires, and sometimes lack of availability.

I believe an APO coordinator would recognize the importance of BPI and handle it accordingly.

2. The investigators also spent time answering questions on the APO process or concerning data. These questions ranged from wanting to know when data was going to be released to whether a statement needed to be protected. Commonly, these questions had to be referred to OGC or the Secretary.

I believe that investigative staff should not be answering questions on the APO process. In addition to being time consuming, it exposes the investigator to a certain risk. One investigator has already been cited in a party representative's response to a suspected violation as having given wrong information. To ensure consistency and accuracy, one person should be answering these questions as much as possible. This is not to imply that the APO coordinator will be answering all questions. On the contrary, I think another advantage will be that the coordinator will recognize when it is necessary to consult with the Secretary, OGC, and the lead investigator. This arrangement would have the additional benefit of a learning curve for repetitious questions.

An APO coordinator could also relieve some of the burden in the Secretary's Office by packing and calling party representatives to pick-up the BPI material.

This would also provide some flexibility that the investigators and the party representatives thought was needed. The Secretary has requested that APO distributions not be made on Mondays or Fridays, or anytime other than during normal business hours. The party representatives were particularly upset that they could not get releases on a Friday so that they could work over the weekend. Lead investigators were also concerned, particularly

since on one case some deadlines had to be changed due to the delayed release of materials. Ideally, the APO coordinator would be able to react to special circumstances more easily.

The Director of Investigations acknowledged that the Chairman offered to provide staff if it was needed to implement the APO provision. He has been reluctant to establish an APO position because the workload was variable. I think that if the current duties were consolidated as discussed above, a full-time position would be justified.

In the short-term, I think the APO coordinator position should be established using one of the unfilled positions in the Office of Investigations (the Office has had at least three vacancies throughout fiscal year 1989). If the Commission's workload increases to where all the positions are needed, the experience of using the APO coordinator would be a basis for justifying an additional position, which would either be transferred from another office or an increase in the Commission's staffing level.

### **Responding to Questions**

The lead investigators also spent a significant amount of time answering questions about the interpretation or analysis of BPI. This responsibility does have to be handled by the investigator. However, it does not have to be done over the telephone. In actuality, Commission policy states that BPI should not be discussed over the telephone due to the difficulty in verifying the identity of the caller.

Some lead investigators already required that all questions concerning the interpretation or analysis of BPI be put in writing. I believe this is a good policy for all investigations. This practice would be consistent with contracting procedures in which all questions are presented and answered in writing. This would also enable the information to be released to all APO parties.

Some investigators commented that an informal policy is to follow up on any question received for fear that the case could be jeopardized. We believe that it is acceptable and appropriate to respond to a question by explaining why it is not pertinent to the investigation. This could save time and may have the added benefit of decreasing irrelevant arguments in submissions.

The General Counsel commented that she believed submitting all questions in writing would inhibit the investigator's ability to respond to necessary questions within the short deadlines of Title VII investigations. She suggested that rather than requiring all questions in writing, the Commission require confirmation in writing of all information received in telephone conversations on which a party intends to rely.

The purpose of releasing BPI is for all parties to be working with the same information. If information is given over the telephone, it is not available to all parties. I do not think it is an undue hardship to have questions submitted in writing. This option must be feasible as it has already been followed on at least one large investigation.

### **Recommendations**

I recommend that the Director of the Office of Investigations:

1. Establish a position for an APO coordinator to:
  - handle routine aspects of distributing BPI, including making copies, packaging and calling party representatives; and
  - be the focal point for calls of an administrative nature concerning the APO process and distribution of BPI.
2. Revise the standard clauses at the front of the questionnaires to state that:
  - administrative questions concerning the APO process and distribution of BPI be addressed to the APO coordinator; and
  - questions concerning the interpretation or analysis of BPI must be submitted in writing.

### **Commission Comments**

Commission staff expressed several concerns with the recommendation in the draft report to hire a paralegal as an APO coordinator. These concerns were that a clear line be drawn between those tasks that are appropriate for an APO coordinator and those that should be handled by an attorney or investigator; whether the workload was sufficient to support a full-time employee with no collateral duties; and whether the position might be more appropriately placed in the Secretary's office.

After reviewing a list of tasks associated with the APO procedures, the Chairman concluded that a vast majority of the tasks could be performed by an employee other than an attorney or investigator with minimal supervision by the professional staff.

In light of the staff's remaining concerns, the Commission's declining caseload, and the experimental nature of the project, the Chairman proposed to initiate a temporary program. As an alternative to hiring a para-legal, the Chairman has requested

that the Director of Investigations designate a junior investigator to be the APO coordinator and have non-investigatory collateral duties. The Director has agreed to identify and appoint someone to this position. At the end of six months, the Commission will evaluate whether to continue the position and in what fashion.

I concur with this alternative as I think it will provide valuable information on clarifying the duties involved and the extent of time involved.

The Director of Investigations agreed to revise the questionnaire as recommended. In addition, the Chairman agreed to instruct the Secretary to inform parties to new Title VII investigations of the APO coordinator's function and responsibilities.

### **SUSPECTED VIOLATIONS AND BREACHES**

There is a pervasive belief throughout the Commission that there has been a significant increase in the number of APO breaches since OTCA. There definitely has been an increase in the number of suspected violations and breaches, but the statistics generally discussed give the impression that this is a more severe problem than it really is.

Between the time OTCA was enacted and the time of this review, 25 suspected violations cases had been identified (two applying to final investigations instituted pre-OTCA). Of the six cases that have been closed, four resulted in sanctions. If the rates of discovery and substantiation continued at the same level, this would truly be cause for alarm.

However, I found that fewer suspected violations are being reported and many of the cases on the list are not being actively reviewed. Except for one case concerning return of documents, all of the suspected violations and breaches were identified before August 1989. Of the 19 pending cases, 11 appear to be inactive as explained below:

- **The status on five cases was given as being under review by OGC. No letters had been sent on these cases. The case attorneys had either never heard of the suspected violation or were vaguely aware of the incident but said there was no basis for a violation.**
- **On six suspected violations, a letter had been sent to the APO party, and based on their response, the attorneys believe no violation has occurred. These**

cases included an individual who was not an APO signatory, a request to certify that documents were destroyed, and releases of data that was publicly available.

The remaining eight cases have some potential to be substantiated as breaches. While I concur that even one breach is undesirable, I believe the impression of breaches far exceeds the actual occurrence and needs to be considered in relationship to the extent of data that has been released under APO.

### **Tracking System**

I believe part of the problem contributing to the inflated notion of breaches is the lack of an agency policy and an adequate tracking system for suspected violations.

The Commission has not issued any type of guidance on how suspected violations should be reported or reviewed. The only system for tracking suspected violations is maintained by the Secretary, although the OGC has primary responsibility for reviewing violations.

It is commendable that the Secretary took the initiative to maintain a list of suspected violations and breaches, but this is not an adequate system as discussed below:

1. There are no guidelines for reporting a suspected violation or standards for putting a suspected violation on the list. When a potential violation is observed, the individual brings it to the Secretary's attention, directly or through OGC, either orally or in writing. The Secretary decides whether to put it on the list without an evaluation of the possible outcome of the case.

I believe all potential violations should be reported to the General Counsel in writing. The memoranda would then be used as a basis for recording a suspected violation.

2. The decision to issue a charging letter<sup>1/</sup> is taking an excessive amount of time. Upon staff recommendation, a suspected APO breacher is sent a charging letter that

<sup>1/</sup> I have used the term 'charging letter' as this was established in Action Request Doc. APO J1, PRB, GC-89-055. A more appropriate term may be 'letter of inquiry' as this is an initial contact to start the investigative process to determine whether a violation has occurred. The term 'charging letter' connotes that, based on an investigation, a determination has been made that a violation has occurred, which is the definition used by the Department of Commerce.

requests information about the breach and views on possible sanctions. The Secretary was given authority to sign charging letters in April 1989 to streamline the process. However, the charging letters, were still not being sent for two to four months after the Commission had learned of the suspected violation.

If circumstances indicate a violation has occurred, I believe a charging letter should be issued as soon as possible after receiving the notice. The quick time frame is needed for several reasons. If the Commission is truly concerned about the occurrence of breaches and expects the APO parties to take this process seriously, this needs to be shown by a quick response by the Commission to suspected violations. Furthermore, when a charging letter is issued, everyone on the APO list from the firm suspected of committing the breach is requested to submit an affidavit of what has occurred. A delay of several months makes it more difficult to remember what happened and some people may even be gone.

Additionally, while a suspected violation is being reviewed, the individual still has access to BPI. If a breach has occurred that warrants restricting access to APO material, this needs to be done quickly. On one confirmed breach that took six months to decide, the individual appealed the sanction restricting access to BPI because she was heavily involved in another case involving BPI. Several party representatives expressed concern about the length of time to reach a decision on a potential violation and the risk to the firm of having to replace someone in the middle of an investigation.

The General Counsel concurred that charging letters need to be sent out in a timely manner, but it may not be possible or desirable in all cases to do this within two weeks. For example, if a charging letter were issued shortly before a brief was due, preparing the response could detract from the brief. Furthermore, if a charging letter were issued early in an investigation, OGC's analysis of the response may not be addressed until the investigation was completed so the review time could be quite lengthy.

I concur that different circumstances may require different responses. If an adequate tracking system is established that identifies the age and status of the cases, I believe a policy that suspected violations will be resolved as soon as possible, within some general time frames as goals, is sufficient.

3. **The list of suspected violations does not provide adequate information.** A very brief description and status is provided. The Secretary periodically updates the list and distributes it to the Commission and the General Counsel. However, basic data was missing which made it difficult to make any assessment of the list. For example, for the most part, dates on when the potential violation occurred, was discovered, the charging letter sent, or the response received, or the last action taken were not provided.

Some of the suspected violations are quite old. Charging letters were issued on eight suspected violations that will appear to have a basis for sanctions. The replies to the charging letters were received up to five months ago: one in May, two in June, three in July, and two in October.

The OGC said time frames should not be established for resolving these suspected violations because the Office needed flexibility to respond to ongoing investigations. I concur that time frames are not mandatory, although I do think goals would be a good alternative. I do believe that in the absence of time frames, the list of suspected violations should provide adequate information so that those receiving the list can evaluate whether an excessive amount of time has passed.

4. **A policy has not been established on how to close suspected violations.** Action jackets were prepared for the cases whenever sanctions were recommended, but not on the two cases when a sanction was not recommended. Similarly, the parties involved were formally notified when sanctions were imposed, but not always when the violation was not substantiated.

Several party representatives complained that they were subjects of a suspected violation, but have never heard anything after their response. One likened this to walking around with a cloud over your head. They said the suspected violations are generally discussed in the community and are known to the clients and therefore they should be informed as to the outcome. (The Secretary noted that suspected violations only become known if the party representatives discuss the case).

I believe the decision to not impose sanctions is as significant as the decision to impose sanctions and should have the concurrence of the Commission. I believe that action jackets with letters to the parties involved need to be prepared to close all cases of suspected violations on which a charging letter was

issued. If a charging letter was not issued, I think it is sufficient to so indicate on the tracking system so the Commissioners will be informed and can ask for additional information if they so choose.

Currently, the Office of Investigations has minimal input in the process to review suspected violations and does not even hear of the outcome. This directly contributes to the common belief that multiple breaches have occurred much more than is supported by the facts. It is important that investigators have an accurate understanding of the violations and breaches since they must assure the questionnaire recipients that the APO process is working. Although they do not have to be involved in the actual review, we believe they should be included on the action jacket and given the opportunity to state their reasons for disagreement if necessary.

5. The system does not adequately control the destruction and/or return of BPI. Party representatives are to return BPI or certify that it has been destroyed 30 days after the proceedings are over. It is difficult to identify the date when APO material should be returned because of the appeals process and the role of the Department of Commerce.

Currently, the Office of the Secretary maintains a list that indicates whether the data has been returned, but due to time constraints, does not keep track of when the data should be returned. One investigator noticed that the return of data was several months overdue and notified OGC. The OGC sent a letter of inquiry asking for the return or certification, which was provided.

I believe the Commission should evaluate the requirement for party representatives to certify that APO material has been destroyed or to return it. A substantial effort will be required to determine the submission dates. As in the previous case, the party representatives will probably comply with the provision when reminded and late compliance will not be viewed as a breach.

The Commission does not intend to verify that the party representatives have actually destroyed or returned all copies of APO material. If a breach occurred after the material should have been destroyed, this would be another factor in determining the sanctions.

I believe the Commission should assess whether having a requirement for destruction of APO material is sufficient. If certification or return of material is deemed necessary, then a system to enforce this requirement is also needed.

### **Guidance Concerning Breaches**

The definition of a breach is the release of APO material to an unauthorized person. Commissioners, staff, and party representatives have expressed a desire for clearer guidance on a whole range of circumstances that are not so clear on whether they constitute a breach. These circumstances include:

- conclusions based upon BPI;
- contact with firms identified in APO material;
- BPI that is openly discussed by the proprietary party in the Commission hearings; and
- data that is classified as BPI in the APO material but is publicly available.

The General Counsel stated that general guidance is difficult to develop and is sometimes used as a defense. She believes the appropriate way to provide general guidance is through actual case results. I concur with this, except that the specifics of suspected violations and breaches are not released to party representatives unless there is a public reprimand, so an alternative method will have to be developed if the Commission intends to use prior cases as guidance.

### **Recommendations**

I recommend that the Secretary, in coordination with the General Counsel:

1. Develop an agency directive that sets forth policy and procedures concerning suspected violations, including:
  - that suspected violations should be reported in writing;
  - if circumstances indicate a violation has occurred, a charging letter will be sent in a timely fashion; and
  - that an action jacket, that includes the Office of Investigations, will be prepared for final action on all suspected violations.
2. Develop a system to track suspected violations that contains data needed to assess the age, progress, and status of the case;

3. Determine whether the certification or destruction of APO material is needed and, if so, develop a system to implement this requirement.

I also recommend that the General Counsel develop some method whereby the principles surrounding a suspected violation or case are presented in a non-identifying manner to provide guidance to party representatives on what constitutes a breach.

#### **Commission Comments**

The Secretary, with the Chairman's concurrence, agreed with the three recommendations addressed to him and has begun to draft the USITC Directive and expand the tracking system. After consulting with the General Counsel, the Secretary believes certification or destruction of APO material is needed. This duty may be assumed by the APO coordinator, in which case the Secretary will need to coordinate implementation of this recommendation with the Director of Investigations.

The General Counsel agreed there is a need to give public guidance on the nature of breaches and sanctions in the case of private reprimands, but the Freedom of Information Act (FOIA) complicates this effort. The General Counsel has drafted language to exempt documents relating to suspected or actual breaches from FOIA, and after this step is completed will develop a method to publish this information.

I believe the questions expressed by the Commission personnel as well as party representatives indicate a clear need for guidance, whether it be of a generic sort or based on a review of suspected violations. Guidelines are an accepted government practice and that they are subject to abuse is not sufficient justification for not developing guidelines.

#### **LEGISLATIVE RECOMMENDATIONS**

One objective of this review was to determine whether any legislative amendments were needed, which is different than whether legislative changes are desirable which is a policy decision. The results of this review did not indicate any legislative changes were needed to correct deficiencies in the APO process.

I would like to comment on why the three recommendations for regulatory reform that were included in the September 8 staff report may be appropriate policy changes, but were not necessary to correct internal control weaknesses. The recommendations were that Congress amend section 777 of the Tariff Act of 1930 to:

1. Provide discretion in releasing BPI under APO in preliminary Title VII investigations.
2. Limit disclosure of BPI under APO to include only party briefs and confidential staff reports.
3. Eliminate the provision that potentially enables employees of any interested party to obtain BPI under APO.

The first recommendation was made on the basis that the APO provision is a particular burden to the staff during preliminary investigations, and the tight time frames tend to result in more breaches. As discussed on page 4 of this report, I did not find the burden was more in preliminary investigations than in final, and the use of an APO coordinator will reduce the existing work requirements for investigators.

As yet, there is no basis for the concern that violations occur more frequently on preliminary investigations due to the time constraints. The suspected violations have primarily occurred on final rather than preliminary investigations. Only 3 cases have been reported on preliminary investigations versus 19 on finals.

The first and second recommendations reflect the Commission's belief that the data is not very useful, particularly in preliminary investigations, because the party representatives do not have time for analysis and the staff reports provide adequate data. I found that party representatives wanted access to all information, as soon as possible, so that they could choose to review the Commission's calculations and findings in detail.

The Commission and party representatives shared a concern about the provision giving access to in-house counsel. I explored whether the Commission had any leeway in implementing this provision. The intent of Congress was clearly to uphold the Court's decision that in-house counsel can have access to BPI. In the absence of abuses, such as an inordinate rate of breaches by in-house counsel which the Commission has not experienced, we had no basis for recommending changes.

Two additional issues have recently developed that may merit legislative amendments.

1. The Commission has received a FOIA request for all documents pertaining to suspected violations and breaches. Although this request was initially rejected, some data on the breaches may have to be released on appeal. Releasing this information could have a significant impact on cooperation in future reviews. In order to not release this data, the legislation would have to provide a FOIA Section 3 exemption for these files.

2. The release of customer lists has been a concern since the APO provision was enacted, but an unexpected use of this data has occurred. Party representatives have contacted customers and apparently attempted to influence their input to the Commission. These contacts do not constitute a breach of the APO, so the Commission has no effective way to stop them. If this occurrence becomes common or significant enough that the Commission believes it is an interference with investigations, the Commission may want to request an exemption for releasing this data.

TOTAL AND ROUTINE APO  
HOURS PER INVESTIGATION

<u>Preliminary investigations (15):</u>		** Total Hours	Routine APO Hours
Steel rails/Canada	701-TA-297 & 731-TA-422	1,866	40
Cephalexin/Canada	731-TA-423	2,891	35
Martial arts uniforms/Taiwan	731-TA-424	1,703	0
Hydro. transmissions/Japan	731-TA-425	1,004	3
Telephones/Japan, Korea & Taiwan	731-TA-426-428	2,249	65
Pork/Canada	701-TA-298	2,674	20
Transfer presses/Japan	731-TA-429	1,041	3
Aluminum sulfate/Sweden	731-TA-430	1,228	1
Aluminum sulfate/Venezuela	701-TA-299 & 731-TA-431	1,091	1
Drafting machines/Japan	731-TA-432	1,435	2
Door locks/Taiwan	731-TA-433	1,865	5
Motorcycle batteries/Korea	731-TA-434	1,169	5
Steel pails/Mexico	731-TA-435	1,071	10
Cephalexin/Israel & Portugal	731-TA-436,437	366	5
Limos/Canada	731-TA-438	<u>1,141</u>	<u>5</u>
Subtotal		22,794	200
 <u>Final investigations (18):</u>			
ATV's/Japan	731-TA-388	2,830	30
DRO's/Japan	731-TA-390	2,744	18
Appliance plugs/Canada, Japan Japan, Malaysia, Taiwan	701-TA-292 & 731-TA-400, 402-404	2,398	3
3.5" Microdisks/Japan	731-TA-389	4,183	110
Steel wheels/Brazil	701-TA-296	2,811	25
Headwear/PRC	731-TA-405	3,056	40
AFB's/9 countries	731-TA-391-399	5,024	200
EMD/Greece & Japan	731-TA-406-408	2,117	16
LWR Pipe & Tube/Argentina & Taiwan	731-TA-409-410	1,944	4
Proppants/Australia	731-TA-411	1,667	0
Belts/8 countries	701-TA-293-295 & 731-TA-412-419	3,756	76
Steel rails/Canada	731-TA-422 & 701-TA-297	3,259	40
Cephalexin/Canada	731-TA-423	2,686	27
Motorcycle batteries/Taiwan	731-TA-238	1,892	4
Martial arts uniforms/Taiwan	731-TA-424	1,178	0
Pork/Canada	701-TA-298	2,741	5
* Telephones/Japan, Korea & Taiwan	731-TA-426-428	1,627	100
* Aluminum Sulfate/Venezuela	731-TA-431 & 701-TA-299	<u>399</u>	<u>1</u>
Subtotal		46,312	699
Grand Total		69,106	899

\* Not completed as of time of review

\*\* Total Hours through 9/30/89 per Activities Reporting System

**Process for Releasing Business  
Proprietary Information Under APO**

After an investigation is instituted, party representatives must file an application with the Secretary for access to BPI. The applications must be filed within a set number of days after the initiation of the investigation is published in the Federal Register, 7 days in a preliminary investigation and 21 days in a final investigation.

An application can be filed by five types of representatives for interested parties:

- attorney, excepting in-house corporate counsel,
- in-house corporate attorney (with limitations),
- consultant or expert for attorney of an interested party,
- consultant or expert (with limitations), or
- other representative (with limitations).

Usually, the representative filing the application is an economics or law firm. Each attorney, consultant, or expert must actually sign an application. The firm can submit a letter identifying the support staff that will handle the data and stating that they have full control over the staff. Each staff person identified must sign the letter.

The applicant must identify the interested party they are representing, the data being requested and a justification, which is very general. Each application is assigned a number. If multiple firms are representing the same interested party, they may be listed under the same number.

The Secretary approves each application. If there are any questions about the application, the Secretary confers with the OGC and the Office of Investigations. An applicant that is denied access is so notified and has the right to appeal to the District Court.

The Secretary develops an APO Certificate of Service for each investigation, which is colored pink to differentiate it from the Public Certificate of Service which is printed on blue paper. The Certificates identify by number the party representatives and individuals that have been granted access to BPI. Maintaining the list by number is significant in that the parties and the Commission are required to distribute one copy of APO data to only the first representative listed by number on the Certificate rather than each representative for an interested party.

A copy of the APO Certificate is sent to each party representative and appropriate Commission staff two to three days after the filing deadline. Representatives can submit new names until five days before the post-hearing brief is due. When this occurs, the Certificates must be revised and redistributed.

If the Department of Commerce terminates a final investigation after 20 days, no distribution of BPI is made.

The interested parties are responsible for serving all BPI generated to all other party representatives on the APO Certificate of Service. This includes the petition, the questionnaires, and the briefs.

Within the Commission, the lead investigator has primary responsibility for release of BPI. The initial releases are of the questionnaires. Most commonly, the lead investigator receives the questionnaires, determines whether the questionnaire needs to be released, ensures the necessary number of copies are made, and delivers the documents to the Secretary's Office. Sometimes, the purchaser questionnaires are given directly to the economist on the investigation who would give the lead investigator either one copy or the required number of copies for the release. Lead investigators were most frequently making copies themselves. Sometimes, the economist, an investigator not working on a case, Office of Investigations support staff, or the graphic division helped to make copies.

The general practice for releasing documents was once a week unless there was sufficient material that justified more frequent releases. The lead investigators delivered the documents to the Office of the Secretary, sometimes using a cover letter, on Tuesday, Wednesday, or Thursday.

The Secretary's Office would double wrap the documents and then call the APO party representatives that the material could be picked up. In rare cases, the material would be mailed. The individual who picks up the material must sign for it.

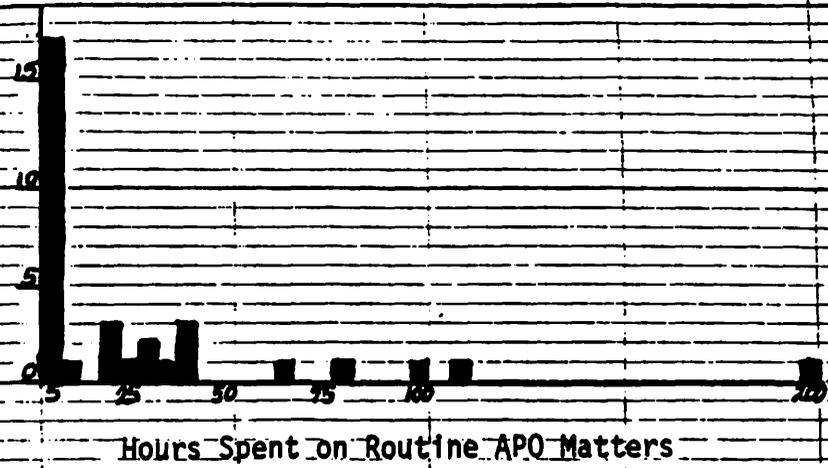
On a preliminary investigation, a final release is made that includes the confidential version of the staff report, the economic memoranda, and any questionnaires that had been received late or revised in any way. On a final investigation, the pre-hearing report is also released.

The parties have three days after the conference in a preliminary investigation and approximately a week after the hearing in a final investigation to file a brief. They have another three days from the date the brief is submitted to comment on BPI.

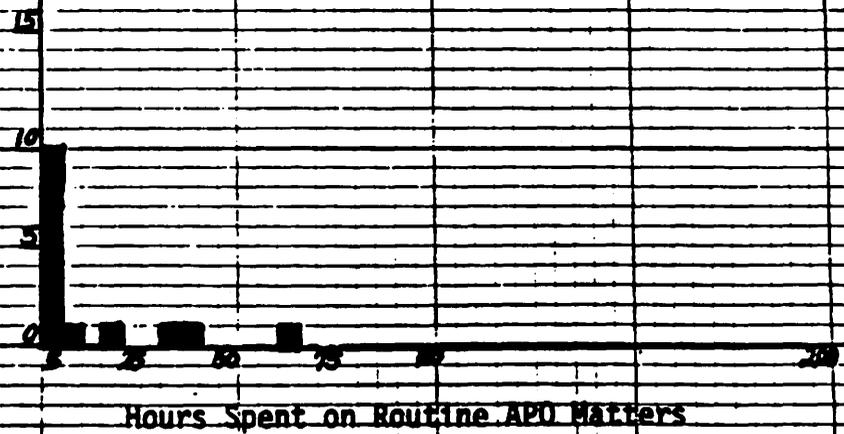
After an investigation is completed, which is through the appeals process, the APO party representatives are to certify that they have destroyed the BPI documents or return them to the Secretary for destruction.

HOURS PER INVESTIGATION  
SPENT ON ROUTINE APO MATTERS

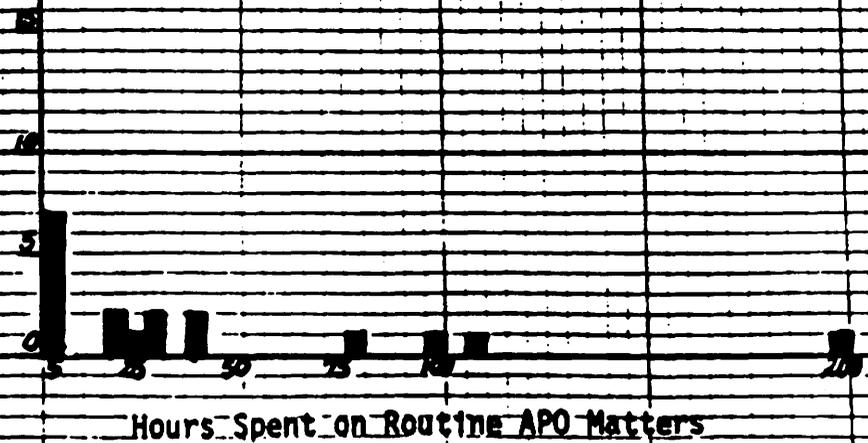
Number of Investigations



Number of Preliminary Investigations



Number of Final Investigations





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**UNITED STATES INTERNATIONAL TRADE COMMISSION**

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February 2, 1990

WASHINGTON, D.C. 20436

**MEMORANDUM**

**TO:** The Inspector General

**FROM:** Chairman Anne E. Brundsdale *Anne Brundsdale*

**RE:** Response to Draft Report on  
Administrative Protective Order  
Procedures at the ITC

.....

**Background and General Comments**

This memorandum is in response to your November 22, 1989, draft report, "Review of Implementation of Administrative Protective Order Provision," concerning procedures relating to administrative protective orders (APOs) at the U.S. International Trade Commission (ITC or Commission). I have received written comments on the draft report from the Director of Investigations (through the Director of Operations), the General Counsel, and the Secretary. Their comments are transmitted herewith.\* My staff also consulted with the Director of Investigations, the General Counsel, and the Secretary to discuss with them more fully your recommendations and their comments.

The draft report resolves many issues that were of initial concern to the Commission. Thus, I am pleased to note your conclusion that, after only one full year of operation, the Commission's procedures for releasing business proprietary information under APOs are handled, on the whole, smoothly and competently. Furthermore, the burdens on the Commission staff and private parties, particularly when compared to the benefits perceived by members of the bar and by several of the Commissioners, appear to be minimal. Finally, as discussed below, I believe that all of your recommended modifications to the Commission's APO procedures can be achieved within existing resources.

\* The comments have been deleted from this memorandum and are presented as Appendices B, C, and D.

Before I address the specific recommendations in the draft report, I would note that several of the attached comments dispute some of the factual conclusions in your report, particularly with regard to the alleged chilling effect of the APO procedures on parties before the Commission. I am in no position to resolve such factual disputes. I would note, however, that your investigation appears to have been thorough and comprehensive while the remarks of others appear to have been based on scant anecdotal evidence or generalized impressions. Your investigation, I believe, would have revealed any additional problems with the program not already noted in the draft report.

Finally, with regard to several of the factual conclusions contained in the draft report, Commission staff noted that any conclusions based on the first year of APO operations might be misleading if based on the year as a whole. Many of the problems associated with the release of business proprietary information under APO were resolved in the course of the first few investigations of the year. While resolution of these problems was time consuming and burdensome, they are generally non-recurring. APO operations in more recent investigations, by which time both Commission staff and members of the trade bar had developed experience with the new provisions, have proved much less burdensome than earlier experience might have suggested. According to Commission staff in comments to my staff, APO procedures are now regarded as little more than a minor chore during the course of an average investigation. This, I believe, confirms your overall observations with, however, the caveat that, if anything, your conclusions overstate the ongoing burdens associated with release of business proprietary information under APO.

Your recommendations concerning ways to make the Commission's APO procedures more efficient generated the most discussion in both the written comments on the draft report and in the subsequent discussions between Commission staff and my staff. I will address the recommendations in the order of presentation in the draft report.

### Recommendations

Use of a paralegal to coordinate APO management. You recommend that the Commission hire a paralegal within the Office of Investigations to handle routine tasks involving APO matters. You point out that routine tasks like photocopying and responding to routine inquiries are now handled by professional staff; not only do these tasks have the potential to disrupt the efficiency of an investigation,

but also they could be accomplished by employees at lower grades of pay.

Commission staff has expressed several concerns with this proposal. First, a clear line should be drawn between those tasks that are appropriate for an APO coordinator and those that should be handled by a professional -- either an attorney or the investigator assigned to the case. Second, staff questioned whether the workload involved in coordinating APO matters would be enough to support a full-time employee with no collateral duties and, indeed, whether the job may be too narrowly focused to attract a competent employee. Third, the Secretary suggested that the position might be more appropriately placed in his office.

In response to Commission staff's concerns that the job would be too narrowly focused and that certain tasks must remain the responsibility of the professional staff, I asked staff to prepare a list of tasks associated with the APO procedures and designate those that could be performed by a non-professional employee. The response is attached hereto. From their response, I conclude that a vast majority of the tasks could be performed by a competent non-professional employee with minimal supervision by the professional staff.

In light of the staff's remaining concerns, the Commission's declining caseload, and the experimental nature of the project, I will initiate a temporary program to implement your suggestions. I will ask the Director of Investigations to designate for six months one of his more junior investigators to be the APO coordinator. This person will have the skills needed to implement your recommendation in a responsible fashion. At the end of six months, we will evaluate whether to continue the program and, if so, whether to hire another person to continue the program (initially under the supervision of the investigator with experience in the role) and whether to retain the function in the Office of Investigations.

As far as collateral responsibilities for the APO coordinator are concerned, underutilized investigators are currently assisting other offices in section 332 investigations or performing special projects. The APO coordinator could also engage in these activities. One special task that might be appropriate at this time is the preparation of an APO handbook for use by parties, counsel, and new Commission employees outlining the basic information necessary to understand and follow Commission APO procedures.

Once the coordinator is designated, I will instruct the Secretary to inform parties to new Title VII investigations of the new APO coordinator's function and responsibilities.

Directives on APO Procedures. In the draft report, you recommend that the Secretary, in coordination with the General Counsel, develop an agency directive setting forth policy and procedures concerning suspected APO violations, develop a system better to track suspected violations, and formulate a position on the return or destruction of APO materials. From my staff's conversations with the Secretary and the General Counsel, I understand that the development of the necessary directives and procedures has already begun in response to the suggestions in your draft report. By a copy of this memorandum, I am instructing the Secretary to provide me by April 1, 1990, with a set of directives and procedures implementing your recommendations. I am also instructing the General Counsel to submit proposals for Commission action that may be necessary to implement the Secretary's directives and procedures.

Legislative changes. You recommend two changes to the statute authorizing the release of business proprietary information under APO. The first would exempt documents relating to suspected or actual breaches from the Freedom of Information Act. The second would exempt customer lists from the category of business proprietary information that must be released under APO. The General Counsel has distributed proposed language implementing these recommendations to the Commissioners for their comments. These recommendations will be passed along to the proper congressional committees within the next two weeks.

### Conclusions

I found your draft report enlightening and useful. In the first respect, it serves to dispel many of the myths that surfaced over the past year regarding the impact of the Commission's APO procedures. Indeed, it confirms Congress' judgment that the release of business proprietary information under APO would benefit the Commission, the parties to the cases, and the parties' representatives, while imposing a minimal burden on the Commission staff. Finally, it confirms my view that the Commission staff has done a commendable job of establishing procedures implementing the APO requirements that are, on the whole, both efficient and suited to the task.

In the second respect, regarding the utility of the draft report, your report points out areas in which Commission procedures could be more efficient. As I mentioned in my comments, several of the recommendations already have been undertaken by the staff as a result of the circulation of the draft. The remaining recommendations will be implemented, as

outlined above, in a manner that I believe is consistent with the Commission's current workload and staffing level.

cc: The Commission  
The General Counsel  
Director of Operations  
Director of Investigations  
The Secretary

**APO processing**

<b>Activity</b>	<b>Presently done by</b>	<b>Assignable to a "paralegal"?</b>
<b>Application:</b>		
1. Receive, process	SE	Yes
2. Approve/disapprove	SE/GC/INV	No
3. Put on service list	SE	Yes
4. Add names	SE	Partly
5. Process objections	SE/GC/INV	No
<b>APO information:</b>		
6. Select	INV	No
7. Copy	INV	Yes
8. Package	INV/SE	Yes
9. Letter of transmittal	SE	Yes
10. Notify parties for pickup	SE/INV	Yes
11. Make distribution	SE	Yes
12. Maintain docket files	SE	Temporarily
<b>Breaches:</b>		
13. Discover and report	INV/SE/GC/Other	No
14. Track	SE	Yes
15. Investigate	GC	No
16. Prepare action jacket	GC	No
17. Maintain breach files	GC	No
<b>Return/destruction of APO materials:</b>		
18. Track	SE (if done)	Yes
19. Follow up on lapses	GC (if done)	Partly
<b>Assistance to parties/the public:</b>		
20. Providing substantive information	GC/INV/SE	No
21. Serve as clearing house for inquiries	none	Yes

GC-N-009-A  
2-5-90MEMORANDUM

TO: The Inspector General

FROM: The General Counsel *LMS*

SUBJECT: Comments on the Inspector General's Draft Report, Review of Implementation of Administrative Protective Order Provision

Thank you for the opportunity to comment on your draft report on the implementation of the Administrative Protective Order provisions in Commission title VII investigations. In general the report is well done and correctly identifies weakness in the system.

My only serious concern is with the recommendation that a paralegal be hired and assigned to either Investigations or the Secretary to handle routine aspects of APO matters. The remainder of my comments are more or less related to minor technical issues or questions concerning the draft report.

Recommendation that the Director of the Office of Investigations hire a paralegal to handle routine aspects of APO matters. Page 11.

You state, at page 19, that I agreed, with some reservations, to the proposal that a paralegal be hired to handle routine APO matters. I continue to have reservations about whether hiring a paralegal would be the best solution to the problems identified in the current process.

I am concerned that a paralegal will not be able to, and indeed should not, make the necessary intensely factual or quasi-legal judgments necessary in advising the bar on what information is to be deemed BPI and thus subject to release. In making such judgments, the investigators rely on their experience and the guidelines established by the Commission and their very detailed familiarity with the record, and often consult with the attorney assigned to a case in unclear situations. A paralegal attempting to fulfill this function would be working under two supervisors, the investigator and the attorney, and would be in a difficult position if their judgments differed in a particular instance. Similarly, in fielding telephone inquiries from parties and their representative, a paralegal could often be called upon to make legal decisions involving legal issues for which he or she may not have sufficient background and authority.

If the paralegal did not make such judgments, then the job of copying, packaging, and distributing BPI to party representatives is essentially clerical, and may not merit the additional resources necessary to hire a competent, trained paralegal. I also note, from our own experience, the difficulties of attracting competent, trained paralegals to work for the Commission.

In addition, a paralegal or other person assigned solely to APO matters would be doing a job currently done by several people in one investigation, and might be required to work on several investigations simultaneously. Consequently, there is a real potential for overload, which would have to be handled by the same persons, primarily the investigator, currently dealing with such matters.

Technical comments

1. At page 1, and throughout the draft report, you refer to the "report" submitted to Congress by four Commissioners on September 8, 1989. I would note that the document in question was a letter to Congress, signed by four of the six Commissioners, and should not be referred to in a manner which suggests that it was a report of or adopted by the Commission.
2. At page 2, in discussing the routine hours spent on APO, you exclude OGC time. It is not clear why this is so, and I believe that OGC time spent on routine APO matters during the course of an investigation, as well as time spent on matters having to do with breaches, both during an investigation and subsequently, should be properly included in any discussion of the resources expended by Commission staff on APO matters. In this regard, I would note that OGC time sheets report time spent on APO matters separately from time spent on the investigation in general. Also, it is unclear whether the remainder of the numbers in the draft report concerning time spent on APO matters includes or excluded OGC time. This should be clarified.
3. At page 4, you suggest that the APO process has simply shifted Commission resources from appeals to processing APO matters during an investigation. This statement is true only to the extent that appeals might have been filed in the past solely to obtain access to the complete record in an investigation, where such access is now available under APO during the investigation itself. Moreover, the time spent in preparing a record for transmission to the Court is primarily OGC paralegal time, and must be spent in any case in which an appeal is filed, whether or not parties or their representatives had access to the record under APO.

Furthermore, the Commission does not "release" any information under a judicial protective order in an appeal, and neither does the Court. Under a judicial protective order in an appeal, parties are allowed access to the record, and make their own copies. Thus, any saving in Commission resources from fewer appeals being filed is likely to be very minor, and involve only the saving of OGC paralegal time not spent in compiling the record for transmission to the Court.

4. At page 5, where you discuss the potential chilling effect of the Commission's APO procedures, I believe you should mention the potential for domestic industries to forego filing petitions under title VII in order to avoid the APO process. There is obviously no way to measure or calculate this effect, but it has been mentioned in the past.

5. At pages 6 and 7, in discussing costs to industry, you suggest that parties have successfully presented their cases without access to APO information. While parties, and their representatives, have appeared in title VII investigations without access to APO information, whether their appearance was "successful" is a matter of definition. We are aware of no such instance since the APO provisions were put into effect in which the primary representative for the "winning" side did not have access to APO information. In addition, you suggest that parties and their representatives have a better ability to judge the "prospects" of a case with the release of APO information, and save the expense of pursuing a case where the prospects are not good. I would note that since APO information is only released after a party has gone to the expense of preparing and filing a petition, such a saving is illusory. APO information released in one case cannot be used to advise other parties as to whether to file a petition, even assuming such information were somehow useful, which is unlikely given the differences in industries contemplating title VII petitions. Furthermore, we are aware of no case in which a petition was withdrawn or an investigation terminated at a party's request following release of APO information.

6. At page 8, referring to benefits from the APO process, you state that errors in staff reports are more likely to be caught by industry experts. I am unclear who you are characterizing as industry experts. Most consultants in title VII investigations are economists whose expertise is in economic analysis, not the particular industry in question. The most likely experts are the parties themselves, who are generally not entitled to access to APO information.

7. At page 11, you recommend that all questions concerning interpretation or analysis of BPI must be submitted in writing. I believe this would inhibit the investigator's ability to respond to necessary questions within the short deadlines of title VII investigations. I would suggest that rather than requiring all questions in writing, the Commission require confirmation in writing of all information received in phone conversations on which a party intends to rely. In rare instances, this might result in a party sending a written confirmation which differs in substance from the information actually received over the telephone, but I do not believe this would be a significant problem.

8. At page 12, you describe the various suspected violations which are in various stages of the investigative process within the Commission. I would suggest that the description not contain any judgments as to the nature or quality of any suspected violations, i.e. that no judgment be made as to whether a suspected breach is intentional or not. In the same vein, potential or suspected breaches are put on lists for various reasons, and no judgment should be made as to whether such lists describe violations of APOs until the Commission has acted with respect to a particular incident.

9. At page 13, you discuss the process of deciding whether to issue and issuing "charging letters." The term charging letter does not appear in the Commission's rules, and I urge references be to a "letter of inquiry." The letter sent by the Commission starts the investigative process to determine whether a violation of the APO has occurred. We do not want them confused with charging letters, such as those sent by the Commerce Department when an investigation has already taken place, and a determination made that a violation has occurred. In addition, you state that "for suspected violations with merit, everyone on the APO list is requested to submit an affidavit of what has occurred." I would note that there is really no such thing as a "suspected violation with merit" - if a violation is suspected, a letter of inquiry is sent, and all persons at the firm suspected of violation are required to submit affidavits, not all persons on the APO list.

At page 1, you state that concerns have been expressed that sanctions imposed by the Commission may not be consistent with sanctions imposed by other bodies such as the Commerce Department and the Administrative Law Judges, but that a lack of time prevented you from conducting a comparative analysis. I would simply note that consistency with the practice of the Commerce Department is not necessarily a desirable goal, nor is it required by statute or regulation. Moreover, it is entirely unclear how Commerce's procedures for investigating and imposing sanctions for breaches of protective orders operate, but it appears they are significantly different from the Commission's.

10. At page 17, you recommend that the Commission institute a policy of sending letters of inquiry in a "timely fashion," if possible within two weeks, after an initial determination of the "worth" of the potential violation. The notion that there is an initial determination of "worth" troubling. In general, either circumstances indicate that a violation may have occurred, or they do not. This office does not make judgments as to the relative "badness" of a suspected violation. I agree that delays of time make it more difficult to remember events and get accurate affidavits.

There are serious problems with requiring letters of inquiry to be sent within two weeks of a report of a suspected violation. These reports are often made during the busiest time of an investigation for the attorney, during the legal issues memorandum/opinion phase of the proceedings. In addition, an attorney or other party representative receiving a letter of inquiry while still preparing submissions to the Commission on a client's behalf is subjected to a conflict situation if he or she is required to defend him/herself at the same time. Thus, OGC's practice has been to defer sending letters of inquiry until after the completion of the investigative phase unless it appears that a breach was intentional or that no attempt was made to mitigate the effects of a breach.

To the extent party representatives are troubled by the "cloud over their heads" caused by a letter of inquiry, the time such a pall would last is longer the sooner such a letter is sent, and particularly if no

investigation or resolution can be reached until after the investigation is completed.

11. At pages 16 and 17, you discuss the definition of a breach, and suggest that I develop some method to provide guidance on what constitutes a breach. The definition of a breach is relatively clear from the protective orders themselves. In reality, what appears to be party representatives' concern is learning the standards by which the Commission judges various breaches in imposing sanctions. It might be possible to make public some guidelines as to what the Commission considers confidential and what constitutes breaches, but such an action could encourage attempts at circumvention. Moreover, the guidelines for determining what is confidential applied by the Commission staff are not rules, but might be interpreted as such by party representatives, with potential for protracted litigation over the Commission's decisions in a given case where the guidelines were not strictly applied. I agree that there is a need to give public guidance on the nature of breaches and sanctions in the case of private reprimands, but the Freedom of Information Act complicates any effort to do so. A legislative exemption from the Act might help resolve this problem.

SE-N-008  
January 12, 1990

To: Inspector General  
From: The Secretary   
Subject: Comments on Draft Report "Review of Implementation of Administrative Protective Order Provision" (IG-M-066)

In accordance with paragraph 11c of ITC Directive 1701 I am submitting the following comments regarding your draft report. In general I believe you have become generally familiar with the APO process at the ITC, especially as it has evolved over the last year.

Costs to the Commission and industry (pgs. 3-7).

Measuring costs associated with the APO provision is most difficult. From my perspective it is quite clear that there have been significant costs associated with administering the process. I also have an unmeasurable perception that, for the parties, there have been increased costs. Specifically, the amount of information which must be protected has increased dramatically. Previously, requests to protect information under 19 C.F.R. 201.6 were fewer and more limited in scope than they are now. In some investigations under the new provision, almost all data are sensitive and must be handled separately.

Efficiency of process (pg. 9-12).

I agree with you that we have an opportunity to improve the efficiency with which we deal with our workload in the APO area. For several reasons I disagree with the remedy you propose.

1. Having a designated person to "do APOs" does have advantages, as described in your proposal. A paralegal would not, however, be able to handle, unassisted, the duties described for our large-volume cases (e.g. telephone systems, bearings, industrial belts). Further, the paralegal would not be able to handle the load of several cases coming due simultaneously. A paralegal would likely be on some kind of leave about 15 percent of the time. Thus, additional help -- to supplement or substitute for the paralegal would be needed.

2. Much of the work earmarked for the paralegal does not require the specialized training a paralegal must have.

3. Because of the erratic work flow in the APO area, a paralegal hired for the purpose would have large blocks of idle time. Undoubtedly,

other work could be assigned -- for example, by detail to the Office of General Counsel.

As an alternative I propose the following:

A position now in the Secretary's office be converted from that of microfilm custodian (full time) to that of APO expeditor. When not working on APO matters this person could still manage the microfilm collection. (Work presently being done by this person in the area of quality - checking newly received film would be done under an existing contract we have for the overflow of such activity; additional funds would have to be reprogrammed into that contract.)

By assigning the APO work to a position in the Dockets Branch, other personnel in that branch could fill in during absences and in peak periods.

Whether or not a paralegal in Investigations is assigned to APO work, many of the inquires regarding APOs will still have to be referred to the staff team, the Assistant General Counsel or the Secretary. Similarly, decisions as to what information is to be made subject to APO must be made by the staff team, not a paralegal.

In consultation with the Office of General Counsel and Office of Investigations we have identified several other changes that can be made which will improve efficiency:

permit parties an extra day to file public versions of briefs. (A change in 19 C.F.R. 201.6 will be needed). This will allow parties to do a better job in ensuring that APO is not inadvertently disclosed.

require service of other parties by hand, next-day-mail, or overnight courier

set brief dates on days other than Fridays. In conjunction with the proposal above, this will ensure that parties will have approximately approximately the same amount of time to review each others briefs

Preparation of a proposal to change the rules will take approximately two months, I estimate. Reassignment of one position within the Office of the Secretary can take place instantaneously upon approval of the proposal by the Chairman.

#### Suspected Violations and Breaches (pgs 12-17).

The draft ITC Directive is being completed. Such a directive would cover the prints raised in your draft report. Approved is estimated to take through the month of February.

The tracking system is being expanded. Together with procedures being incorporated into the ITC Directive, there should be no difficulty in tracing a suspected breach.

With regard to whether destruction of APO need be certified, the General Counsel feels such a requirement fills a need of the agency. If the APO manager is someone within the Office of the Secretary I feel we can keep track of such certifications if the agency APO form is modified slightly and we receive the cooperation of the attorneys in Office of General Counsel assigned to the cases. If the APO manager is assigned to the Office of the Secretary, we can begin to track such certifications within one week.

Legislative Recommendations (pgs. 17-19)

While I have no strong views on any of the three original proposals, one statement in the analysis is a bit misleading. The draft report reads, in part "...we did not find the burden was more in preliminary investigations than in final ..." Apart from the uncertainty of who, in addition to IG constitutes the "we", the statement is not necessarily correct for the Office of the Secretary. It is during the preliminary investigation that the process of receiving and reviewing applications, and establishing and revising service lists of those with APO status can be most hectic.



UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

INV-N-016

February 5, 1990

MEMORANDUM

TO: Inspector General

THROUGH: Director, Office of Operations *Shaker Evin*

FROM: Director, Office of Investigations

SUBJECT: Comments on Your Draft Report Entitled "Review of Implementation of Administrative Protective Order Provision" <sup>1</sup>

Thank you for the opportunity to comment on your draft report on the implementation of the Commission's Title VII Administrative Protective Order (APO) provisions. I found the report to be well done and to present a good summary of our experience with the new APO provisions to date. I don't really disagree with anything in the report, and generally support your recommendations. Specific comments follow:

Cost to the Commission: Resources, pp. 4-5

I agree with your findings that the resource requirements for administering the APO provisions can be (and are being) met by the assigned staff, with assistance as necessary from other Commission offices. I have never raised staff burden as an objection to the new procedures, but appreciate the acknowledgement that they at least occasionally require a substantial staff effort.

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<sup>1</sup> These comments were circulated to the Commission on Dec. 4, 1989, for review. I received no comments other than those contained in the Chairman's memorandum to you dated Feb. 2, 1990.

Cost to the Commission: Chilling Effect. pp. 5-6

I generally agree with your findings, although we have had at least some indications of a chilling effect. For example, several firms concerned about disclosure (and possibly other issues as well) either refused to provide business proprietary information (BPI) to the Commission at all or did so only after being issued a subpoena in the final investigations on cephalixin, 3.5-inch microdisks, and antifriction bearings. We also believe that concern about disclosure was at least partially responsible for the low questionnaire response rate in the recent preliminary investigation on sweaters. We will know more on this matter when/if the Commission institutes a final investigation next year.

As discussed further below, I note that questions about any "chilling effect" were not raised with owners or managers of firms involved in Commission investigations.

Cost to Industry. pp. 6-7

I don't necessarily disagree with the findings expressed in this section, but note that the sources you relied on were party "representatives" (attorneys and other consultants), not parties themselves. I believe there might well be a somewhat different response from owners and managers of the firms involved on the effect on them of the requirement to produce BPI for representatives of their competitors under the safeguards of the Commission's APO system.

Benefits. pp. 7-9

I agree with your findings, with the same caveat expressed above with respect to comments received from party representatives. I am concerned about the comment on page 9 that "Four cited cases that included wrong capacity or lost sales figures or addition errors. . ." Any such errors in staff reports should be brought to the Commission's attention as soon as they are discovered, even after the Commissioners vote, as the material could always be reexamined. I also hope the "four" gave specifics (case number, data in error, etc.) during the interview, not just assertions.

Efficiency of Process. pp. 9-11

I agree with your findings throughout this section. With respect to your recommendation that I hire a para-legal to "handle routine aspects of distributing BPI, including making copies, packaging and calling party representatives; and be the focal point for all calls concerning the APO process and distribution of BPI," I continue to have the concern you referenced on page 10 (i.e.,

variable workload), but concur that this concern would be mostly alleviated if the para-legal also handled work currently being done in the Secretary's office. On that issue, I also would have no objections if the para-legal were actually assigned to the Secretary's office. There is some logic in such an assignment as the Secretary is currently the "focal point" for APO inquiries and distributions. If the para-legal position is approved for the Office of Investigations, I could have a draft position description prepared for recruitment within no more than two weeks. I would also be happy to assist the Secretary in developing a para-legal position for his office if that option is selected.

If the para-legal is hired, I concur with your recommendation to "revise the standard clauses at the front of questionnaires to state that all questions concerning the APO process and distribution of BPI be addressed to the para-legal." This could be accomplished in less than a day.

Finally, I also concur with your recommendation that "all questions concerning the interpretation or analysis of BPI must be submitted in writing," with the understanding that this requirement would not apply to administrative or procedural questions directed to the para-legal (or to responses to such inquiries). This policy could be implemented at any time.

#### Suspected Violations and Breaches. pp. 12-17

I concur with all findings and recommendations. I believe that it is particularly important that the Office of Investigations be involved in the disposition of suspected violations (part 3 of your 1st recommendation) and suggest that we should be equally involved in the "initial determination of worth" (part 2 of your 1st recommendation). This involvement should be in the form of a sign-off on all dismissals of possible violations, as well as all recommendations for sanctions made to the Commission.

#### Legislative Recommendations. pp. 17-19

I don't disagree with your findings in this section, but I also support the three possible legislative changes discussed at the bottom of page 17 (provide discretion to the Commission in releasing BPI under APO in preliminary investigations; limit disclosure under APO to party briefs and staff reports; and bar employees of interested parties from access to BPI under APO). I especially disagree with the current procedure that merely requires in-house APO applicants to certify that they meet the criteria set forth in the USX court decision for access to be granted. As a minimum, I believe such applicants should be required to provide sufficient information for the Commission to

make an informed judgment as to their role in the company (I would suggest such disclosures as the amount of any ownership in the company, any family relationships with other company employees, and a description of specific work done for the company, not just "Legal Department" or "Market Research").

I would also support the two additional possible legislative changes you mention at the bottom of page 18, namely a FOIA Section 3 exemption concerning release of internal documents pertaining to suspected violations and an exemption from release for customer lists.

  
Lynn Featherstone

