

**COMMENTS ON PROPOSED CHANGES TO
ADMINISTRATIVE PROTECTIVE ORDER PROCEDURES
(59 Fed. Reg. 51559, Oct. 12, 1994)**

The following comments are submitted on behalf of the International Law Section of the District of Columbia Bar.

General Comments

Commerce proposes several changes to streamline the APO process, including adoption of a single revised application, the use of a standard APO, and the reduction of perceived micromanagement. These changes were in response to the concerns and requests of the trade bar associations and address many of the issues raised by the bar. In general, these proposed changes constitute a significant improvement in the APO procedures. We appreciate the work and cooperation between the bar associations and Commerce that underlies these proposed changes. The following comments are offered as a continuation of that cooperative process.

Request for Information

Commerce proposes that certain applicants chose to receive all APO information (including electronic data) or only hard copy data. (59 Fed. Reg. 51561 and Proposed APO Application, Paragraph 10). We suggest that the Federal Register notice clarify that all parties, not just respondents, be allowed to waive receipt of APO data in which they have no interest. Because of the grave responsibility and the significant managerial burdens associated with the maintenance and the return/destruction of APO documents, it is important to minimize unnecessary multiplication and distribution of APO documents.

Multiple Briefs

Commerce proposes to not require that petitioner file multiple briefs but instead to require, by future regulation, that the data be marked

to identify multiple respondents' data clearly. (59 Fed. Reg. 51561). We suggest that such regulation be issued shortly and that the required markings be clear. If it is not, APO data may be put at risk and/or counsel for respondents will be unable to consult the client regarding its own data.

Duplication of APO Application

Commerce proposes that applicants either be permitted to reproduce Page 1 and Items 29 and 30 on a word processing system or that the applicant certify that the document is identical. (59 Fed. Reg. 51560). We suggest that Commerce also permit Items 27 and 28 and the certificate of service to be reproduced on a firm's word processing system. The purpose of allowing an attorney/firm to reproduce the particular pages would be to facilitate typing. The additional items would require as much typing as the items permitted to be reproduced and hence allowing them would be consistent with Commerce's proposed policy.

Timing of APO Application

Commerce proposes that an application be filed within strict deadlines. (59 Fed. Reg. 51560-1). We suggest that all parties be encouraged to file their APO application with the notice of appearance or as soon as possible. However, we believe there should be no set deadline, after which one cannot file. Counsel may not know that the other side will be offering significant APO data until that data is filed late in the case; counsel should not be precluded from receiving such data just because it did not wish to receive the less relevant data filed earlier. To ensure that this later-filed APO application does not place an undue burden on petitioner, who would then be expected to serve all APO data within three days, the regulation should be amended to allow a more lenient time for serving the earlier filings to any counsel who filed an APO application after the notice of appearance deadline.

Support Staff

Commerce proposes that support staff "sign and date a completed copy of this application in the space below at the time [the authorized applicant] permit[s] them access to any information subject to administrative protective order." (emphasis in original)(Proposed APO Application, Paragraph 28). This language could be interpreted as requiring support staff to sign and date the application each time they are permitted access to the APO data. This is contrary to current practice and inconsistent with the clear implication of the headers above the signature spaces. We suggest that the language be amended to clarify that Commerce only intends for support staff to sign the application before the first time it uses the data by inserting the word "first" before "access".

Subcontractors

Commerce proposes that only "staff" who are "employed by the firm or corporate office" are entitled to sign the acknowledgement and receive APO information. (Proposed APO Application, Paragraph 28). In an effort to reduce overhead costs, many firms have begun "contracting out" particular support services such as duplicating and messenger/mail delivery operations. In many instances, this results in the same individuals performing the same services within the confines of the law offices; however, that individual is technically the employee of an outside vendor rather than the law firm in which the service is provided. Commerce's application could be read to exclude the use of such subcontractors by law firms. We suggest that the term "staff" be clarified to include staff "employed by or on behalf of" the firm or corporate office. We do not believe this would compromise the data in any way because the attorney/other representative would remain responsible for the compliance of the "staff" with the terms of the APO. This modification, however, would reflect the realities of the changes in law practice.

APO Service List

Commerce proposes to maintain an APO service list, designating all parties authorized to receive APO information, available to parties through the Central Records Unit, in Room B-099 of the main Commerce building. (59 Fed. Reg. 51563). We suggest that this list be made more readily available to all parties by faxing to counsel participating in the case, as is the practice of the International Trade Commission. In addition, we suggest that the list indicate whether the parties have requested access to all information or only hard copy data.

Advice Regarding Use of APO Data

Commerce proposes that the APO applicant be prohibited from "ask[ing] or contact[ing Commerce] for assistance in handling or processing of any electronic data/medium" from another party in the review or investigation. (Proposed APO Application, Paragraph 14). While Commerce's desire to avoid continuous computer questions from participants in investigations or reviews is understandable, this requirement raises two concerns. First, any question regarding the data would now become an APO violation. We suggest that instead any prohibition against seeking additional information should be part of the general regulations and not the APO application. Second, the prohibition against asking Commerce for assistance in how to handle the information suggests that a party may not ask Commerce for information on how to protect BPI contained in the electronic data. We suggest that Commerce always should be available to answer questions on protection of data and that the prohibition be reworded to clarify that Commerce does not prohibit such questions.

Use of Computers/Networks

Commerce proposes several changes regarding the requirements for computers, including removing the necessity for a separate APO application, specific computer approval, and an individual to constantly monitor the running of a program. (59 Fed. Reg. 51562). Commerce proposed changes significantly improve practice before the agency. We

suggest, however, that the requirements still do not entirely clarify the process and contain unnecessary restrictions. We suggest that the purpose of the APO, protecting the data, can be served by paralleling the requirements for hard copy data. That is, the APO applicant is responsible for protecting the data during the segment of the investigation and for destroying/returning it afterwards. To accommodate the individual computer systems and ongoing changes in technology, we suggest that Commerce simply require that an APO applicant take the "reasonable precautions" that it does to protect hard copies, without setting forth particular restrictions.

Commerce's proposal that "the computer on which any proprietary information subject to the administrative protective order is entered will not be accessible via modem or network," for example, would prohibit the use of APO data on almost all law firms word processing systems since they are almost all accessible by modem. We suggest that this restriction is more protective than that of hard copies and may be unnecessary. Hard copy proprietary information must be kept locked in a file cabinet or other suitable container when it is not in use. In general, this means that the information has two levels of protection: (1) the file cabinet is in a limited access area within the law office, which is not open to the general public, and (2) access to the cabinet itself is limited to APO authorized personnel. Computerized documents contained in a computer system, however, can provide three levels of protection: (1) access to the computer system/network requires a user name-password combination which restricts access to the general public; (2) within the computer system, restricted directories can be established, access to which is limited to APO authorized personnel storage (similar to a file cabinet); and (3) within the APO-restricted directory, each individual document can be encrypted to further protect it from disclosure. Consequently, such data would be well protected and the prohibition against word processing systems that are "accessible by modem" appears overly restrictive.

Commerce Guidelines and Violations

Commerce proposes to take "the quality of a party's internal procedures . . . into consideration . . . in an APO violation investigation."

(59 Fed. Reg. 51561). We suggest that an internal manual, as well as training sessions and examples, may be helpful, particularly for new attorneys or firms setting up a trade practice. However, we are concerned that the use of "guidelines" not become so rigid that it merely becomes a disguised manner for "micromanaging" law firms.

Expiration of Time for Filing for JPO

Commerce proposes that interested parties be required to return or destroy protected information within ten business days after the time to appeal the determination has expired. (Proposed APO Application, Paragraph 18). The current provision is for two days. (Current APO Application, Paragraph 19d). We suggest that the timeframe should be changed to 30 days. This would allow for actual notice by mail and would promote careful disposal of protected materials. Summonses are typically filed and served by mail, thus delaying actual notice to a party holding APO information as to whether an appeal was filed. (USCIT Rules 3(e) and 5(f)). Because mail may be delayed 10 days or more, parties holding the APO information may not receive actual notice of the filing of an appeal until the time period for disposing of the data is already expired. Moreover, the date that triggers the period for appeal may not be clear. We further suggest that in setting the deadline, as well as in other procedures, Commerce coordinate with the International Trade Commission ("Commission").

Transfer from Commerce APO to JPO

Commerce proposes to require a Judicial Protective Order (JPO) recipient to provide a copy of the JPO to the appropriate person at Commerce within 48 hours of the time the JPO is granted. (Proposed APO Application, Paragraph 19). We suggest that the time for delivery of a copy of the JPO be extended to 30 days and conform to the other deadlines at Commerce and at the Commission. The 48 hours from time the JPO is granted is an insufficient time because the counsel his/herself may not even know of the court's ruling by that time. Further, the short timeframe

will not protect the data better or provide better administration at Commerce.

Remand Proceeding

Commerce proposes that new APO applications be filed for each segment of the proceeding. (59 Fed. Reg. 51562 and Proposed APO Application, Paragraph 12). While we do not disagree that using the information before the Commission should not be permitted, we suggest that a separate application may not be needed for remand proceedings for parties that were subject to the original APO and the current JPO.