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Protecting Proprietary Information
This Month: Consent and Withdrawing BPI

An important aspect of the Department of Commerce's Administrative Protective Order (APO) system is that Commerce's authority is, in large part, derived from the consent of the party submitting the information. Section 777 of the Tariff Act of 1930 (19 U.S.C. § 1677f) provides Commerce with the statutory authority to adopt an APO system to provide for the limited release of business proprietary information (BPI) submitted to it. Section 777 is an exception to the Trade Secrets Act, which makes it a crime for a U.S. Government employee to disclose "business confidential" information obtained in the course of employment. Section 777 permits disclosure under an APO, but only with "the consent of the person submitting the information."

In *Live Cattle from Canada*, Commerce recognized the importance that consent plays in its APO system:

The Department does not have subpoena power. The submission of information is voluntary. To administer the antidumping law, the Department depends heavily upon the willingness of the parties to provide extensive business proprietary information. As a result, there is a public interest in preserving the trust of companies subject to its proceedings that such information will have limited use and will remain largely within the control of the companies submitting information.

Notice of Final Determination of Sales at Less Than Fair Value: Live Cattle from Canada, 64 Fed. Reg. 56738, 56743 (October 21, 1999).

Thus, while "the submitted relinquishes some control over the information to the Department," *id.*, Commerce respects that it must maintain the trust of the interested parties. This is reflected in Commerce's APO procedures. For example, when there is a dispute over whether information submitted qualifies as BPI, Commerce's regulations provide that the information must be treated as BPI until Commerce makes a determination about the status of the information. 19 C.F.R. § 351.304(d)(2). If a party unilaterally discloses information designated as proprietary, even if it is found in the public domain, that party runs the risk that Commerce will find pursuant to this regulation that the disclosure is an APO violation. Indeed, even if Commerce ultimately determines that the information does not qualify for BPI treatment, Commerce will not disclose the information. Rather, by regulation, Commerce returns the information to the submitter, and the submitter ultimately decides whether to release the information publicly or submit some other information as a substitute. 19 C.F.R. § 351.304(d)(1).

The flip-side to consent is that the information may be withdrawn. In *Allegheny Ludlum Corp. v. United States*, 27 CIT 1461 (2003), the U.S. Court of International Trade held that it was

reasonable for Commerce to permit a party to withdraw BPI, and require that the other parties to the proceeding either return or destroy the information. The case involved the only respondent in the first administrative review of the antidumping duty order on *Stainless Steel Plate in Coils from Belgium*. Commerce argued that it had a policy of permitted a party to withdraw BPI from the record, so long as Commerce could protect the integrity of its proceedings by applying adverse facts available (AFA). Applying AFA, in most instances, would ensure that the respondent could not manipulate the proceedings to obtain a better result than if it had participated.

Commerce has a limited exception to this policy. This exception has been applied in the unique facts presented in the antidumping duty investigation of *Live Cattle from Canada*. There, Commerce found the sheer number of exporters too many to be able to investigate all of the exporters. As a result, Commerce exercised its discretion to examine only six of the largest exporters. The vast majority of the imports of cattle would be subject to the “all others” rate, calculated based on the antidumping margins of the six investigated exporters. Commerce calculated an antidumping margin for one of those exporters of 5.43% in the preliminary determination. This exporter submitted corrected information, which would have resulted in an antidumping margin of 15.69%. The party attempted to withdraw its information, but Commerce refused to allow it to do so. Commerce noted that based on the newly submitted information, the “all others” rate went from 4.73% as calculated in the preliminary determination, to 5.57%. Commerce noted that normally, applying AFA to the non-complying party, and eliminating its margin from the “all others” rate, would “be of marginal significance.” 64 Fed. Reg. at 56743. However, because “[s]ubstantially all future exports of live cattle” would be subject to the “all others” rate and “inappropriately benefit” from the one party’s withdrawal of information, Commerce had an interest in protecting the integrity of its proceeding and preventing a party from manipulating the outcome by withdrawing the information. *Id.* Thus, Commerce refused to permit the party to withdraw its information.

The court in Allegheny Ludlum distinguished the case from *Live Cattle from Canada*, noting that in an administrative review, the “all others” rate would be unaffected by the withdrawal of the information. There was no logical reason why applying AFA could not serve Commerce’s purpose. Accordingly, the court affirmed Commerce’s practice of broadly permitting a party to withdraw BPI it has submitted under and APO in an antidumping or countervailing duty proceeding.

It should be noted, however, that Commerce has the authority pursuant to the statute to share BPI it has received during the course of an antidumping or countervailing duty proceeding to Immigration and Customs Enforcement (ICE) or to Customs and Border Protection (CBP) for the purpose of a customs fraud investigation. The statute does not require the party’s consent for Commerce to do this. Therefore, withdrawing BPI from the record does not prevent Commerce from cooperating with ICE or CBP in a customs fraud investigation.

William J. Kovatch, Jr. served for four years as the APO Coordinating Attorney in the Office of Chief Counsel for Import Administration. He is available to train legal staff on the Department of Commerce’s APO system, and the protection of proprietary information.