Model Waiver of Confidentiality
For use in civil matters involving non-U.S. competition authorities

Frequently Asked Questions

On September 25, 2013, the Federal Trade Commission and the Department of Justice jointly released a model waiver of confidentiality for use in civil matters involving non-U.S. competition authorities ["Model Waiver"]. These Frequently Asked Questions (FAQs) complement the Model Waiver and are provided to assist entities, including third parties ["Entities" or in the singular, "Entity"], and their counsel in determining whether and how to most effectively provide a waiver of confidentiality ["waiver"] to the Federal Trade Commission and the Department of Justice [the "Agencies"].

These FAQs provide a general introduction to waivers and the confidentiality rules applicable to the information provided pursuant to the Model Waiver, describe the process for submitting a waiver to the Agencies, and address specific provisions in the Model Waiver. These FAQs may be supplemented or revised in light of further questions and experience.

The information provided in the FAQs reflects the experience of the Agencies' staff in dealing with waivers, and are intended as informal guidance for Entities that are considering providing a waiver.[1]

I. General Introduction to Waivers and the Cooperation Process

When either of the Agencies and one or more non-U.S. competition authorities (together, "investigating agencies") review a case that raises possible competitive issues in multiple jurisdictions, the investigating agencies may consult with one another about the matter and may cooperate. Cooperation enables the investigating agencies to identify issues of common interest, improve their analyses, and avoid inconsistent outcomes.[2] The Agencies cooperate with non-U.S. competition authorities pursuant to formal and informal bilateral and multilateral arrangements,[3] although cooperation also takes place in their absence.

[1] These FAQs express the views of FTC staff and do not necessarily represent the views of the FTC or of any individual Commissioner.

[2] For more information about cooperation, see the U.S. submission to the OECD, Discussion on International Cooperation, *available at* http://ftc.gov/bc/international/docs/062012International_coop_U%20S.pdf.

[3] The United States has bilateral cooperation agreements with nine jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); Mexico (2000); and Chile (2011), and the Agencies entered into Memoranda of Understanding with the Russian Federal Anti-Monopoly Service (2009), the three Chinese Anti-Monopoly agencies (2011), and the Ministry of Corporate Affairs (Government of India) and the

Cooperation includes the exchange of investigative information, usually, though not exclusively, through oral communications. This may include publicly available information, as well as "agency non-public" information.[4] "Agency non-public" information is information that the Agencies are not statutorily prohibited from disclosing, but normally treat as non-public. Examples include the existence or absence of an open investigation and staff views on market definition, competitive effects, and remedies. Cooperation may occur based on sharing publicly available and "agency non-public" information alone.

Confidentiality statutes and rules generally preclude DOJ or FTC staff and the staff of non-U.S. competition authorities from discussing or otherwise exchanging an Entity's confidential information.[5] Entities may choose to waive those confidentiality protections in order to permit the Agencies and the non-U.S. competition authorities to discuss the Entity's confidential information, which, in many matters, enables more effective cooperation. When investigative information is shared, the investigating agencies will have an understanding that the agency receiving the information will protect its confidentiality in accordance with its own statutes and rules.[6]

What is a waiver and what are its benefits?

Entities involved in an investigation can choose to waive confidentiality protections by signing a waiver. A waiver provides the terms on which the Entity agrees to waive statutory confidentiality protections vis-à-vis the agency that originally received the Entity's confidential

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Competition Commission of India (2012). *See* http://www.ftc.gov/oia/agreements.shtm and http://www.justice.gov/atr/public/international/int-arrangements.htm. In addition, the United States is party to approximately 70 Mutual Legal Assistance Treaties, which are treaties of general application pursuant to which the United States and another country agree to assist one another in criminal law enforcement matters. The United States is also a party to an antitrust-specific mutual legal assistance agreement with Australia. *See* International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-12. An important informal mechanism supporting our cooperation is the Recommendation of the Organization for Economic Cooperation and Development's Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, *available at* http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=192&InstrumentPID=188&Lang=en&Book=False. The Agencies also participate in the International Competition Network's Framework for Merger Review Cooperation, *available at* http://www.internationalcompetitionnetwork.org/uploads/2011-2012/icn%20framework%20for%20merger%20review%20cooperation.pdf.

[4] The Agencies have also referred to this as "agency confidential" information.

[5] In these FAQs, the term "confidential information" refers to information that is protected from disclosure by a jurisdiction's statutes and rules. In the Model Waiver and in these FAQs, "Confidential Information" is defined with reference to U.S. statutes and rules. *See* n.13.

[6] For example, an understanding can be based on the bilateral or multilateral arrangements identified in n.3.

information. A waiver also describes an agency's policy regarding how it will treat the information it receives from another agency pursuant to a waiver, although it is not an agreement signed by the agency. It should be noted that a waiver only allows for sharing of confidential information among the investigating agencies listed by the Entity in the waiver.

The rationale for providing investigating agencies with a waiver is set forth in the International Competition Network's report on waivers of confidentiality in merger investigations:

> A waiver of confidentiality enables an agency to share the submitter's confidential business information with another reviewing agency, facilitating joint discussion and analysis. From the agencies' perspective, sharing information can increase the quantity and quality of the information on which to base their decisions, leading to more informed decisions and effective coordination between the agencies, promoting convergence, minimizing the risk of conflicting outcomes, and expediting merger review. For the merging parties, waivers can enable each agency to benefit from the additional information and analytical insights of the other, avoid duplicative information production, and promote the adoption of efficient remedies.[7]

This rationale is generally applicable to waivers in merger and non-merger investigations and for waivers signed by third parties. A waiver also makes it easier for Entities to have joint discussions with multiple investigating agencies because the Entities and investigating agencies can freely share information. Such joint discussions may be more efficient for Entities that can avoid having the same discussions in seriatim with multiple investigating agencies.

For additional information and examples of cases outlining the benefits of cooperation pursuant to a waiver, including those related to compatible timing and remedies, *see* U.S. submission to the OECD, Discussion on International Cooperation.

Are Entities obligated to provide waivers?

No. While the Agencies may request waivers from an Entity, the decision whether to provide a waiver is at the Entity's discretion. A decision not to provide a waiver will not prejudice the outcome of the DOJ's or FTC's investigation. As mentioned above, with or without a waiver, the Agencies may cooperate with non-U.S. competition authorities based on publicly available and "agency non-public" information. However, in some cases, the absence of a waiver may limit the extent to which investigating agencies can cooperate and may have practical effects. For example, it may impact an investigation's timing and/or increase the risk of inconsistent outcomes.

[7] *See* http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf.

How will an Entity's confidential information be used if an Entity provides a waiver?

Discussions among the staff of the investigating agencies may include empirical or competitive analysis based on confidential information and/or refer to documents of potential interest. Much of the cooperation occurs through oral communication between the staffs of the investigating agencies, although in some instances agencies have provided access to physical documents during the course of their cooperation.

If an Entity provides a waiver, how will the FTC or DOJ protect confidential information that it receives from non-U.S. competition authorities?

When the Agencies receive an Entity's confidential information from non-U.S. competition authorities pursuant to a waiver in a civil matter, the Agencies will protect the information under the applicable provisions of U.S. law. The Model Waiver states that the Agencies will treat information obtained from a non-U.S. competition authority as if the FTC or DOJ "requested it directly from [entity] and obtained it under the Confidentiality Rules," collectively defined as the Hart-Scott-Rodino Act, 15 U.S.C. § 18a(h), the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*, the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 4.9 *et seq.*, the Antitrust Civil Process Act, and other applicable laws, regulations, and rules.

The FTC treats information it receives pursuant to a waiver in accordance with the Hart-Scott-Rodino Act[8] (HSR Act), the Federal Trade Commission Act,[9] and the Federal Trade Commission's Rules of Practice.[10] If the confidentiality protections in the HSR Act do not apply to information the FTC obtains pursuant to a waiver in a merger investigation, or if the FTC receives information pursuant to a waiver in a non-merger investigation, the FTC will treat such information as if it were provided to the FTC directly by the Entity voluntarily in lieu of compulsory process and as if it were designated confidential under FTC Rule of Practice 4.10(d), 16 C.F.R. § 4.10(d), which protects such designated information from public disclosure. For more information, see the FTC's Operating Manual, Chapter 15, Confidentiality and Access.

DOJ treats information it receives pursuant to a waiver in civil matters in accordance with the HSR Act,[11] the Antitrust Civil Process Act,[12] and Antitrust Division Directive 2710.4. If the confidentiality provisions of the HSR Act do not apply or if an issued CID does not cover the information to be obtained pursuant to a waiver, the DOJ may issue a CID to the Entity covering information provided by the Entity to the non-U.S. competition authority. For more information, see the DOJ's Antitrust Division Manual, Chapter 3.

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[8] 15 U.S.C. § 18a.

[9] 15 U.S.C. §§ 41 *et seq.*

[10] 16 C.F.R. §§ 4.9 *et seq*.

[11] 15 U.S.C. § 18a.

[12] 15 U.S.C. §§ 1311-14.

If an Entity provides a waiver, how will Confidential Information[13] submitted to the DOJ or FTC and provided to non-U.S. competition authorities be protected?

The Model Waiver authorizes the DOJ or FTC to provide an Entity's Confidential Information to the non-U.S. competition authorities listed in the waiver. As noted above, the Agencies and the recipient non-U.S. competition authority will have a common understanding in place, *e.g.*, through bilateral or multilateral arrangements, that the non-U.S. competition authority receiving the Confidential Information will protect its confidentiality in accordance with its own statutes and rules.[14] Generally, the Entity waiving confidentiality under the Model Waiver provided to the DOJ or FTC also will provide a separate waiver of confidentiality to the relevant non-U.S. competition authorities and will submit waivers to the investigating agencies simultaneously. The Entity should understand the non-U.S. competition authority's confidentiality protections and may wish to describe them in the waivers provided to the non-U.S. competition authorities.

For information about treatment of privileged information, see *How will the Agencies treat privileged information?*.

II. Providing a Waiver

When does an Entity provide a waiver?

The waiver process begins when an Entity offers a waiver to an agency or when an agency asks an Entity to provide a waiver. The value of providing waivers is maximized when they are provided at an early stage of the investigation. Waivers, especially when provided near the outset of an investigation, allow the investigating staff of the FTC or DOJ and one or more non-U.S. competition authorities to explore jointly possible theories of competitive harm as well as to discuss what remedies, if any, may resolve each agency's concerns in a coordinated manner. Waivers provided later in an investigation are still useful, however, and Entities that decide not to provide waivers near the outset of an investigation are well advised to continue to evaluate whether to provide waivers as the investigation progresses.

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[13] "Confidential Information" is defined in the Model Waiver and in these FAQs as "written, electronic, and oral information including, but not limited to, Entity's documents, data, statements, interrogatory responses, transcripts, oral communications, testimony, and remedial proposals, either in original form, as copies, or as incorporated or reflected in FTC or DOJ internal analyses, that the Confidentiality Rules would prohibit from disclosure." "Confidentiality Rules" are defined as the Hart-Scott-Rodino Act, 15 U.S.C. § 18a(h), the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*, the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 4.9 *et seq.*, the Antitrust Civil Process Act, and other applicable laws, regulations, and rules. *See also* n.5.

[14] *See* n.6 and accompanying text.

Are there circumstances when a more limited waiver is appropriate?

Using the Model Waiver will significantly reduce the time that Entities and the Agencies spend negotiating individual waivers, and the Model Waiver is intended to be used in almost all civil matters.

In certain instances, a more limited waiver may be appropriate, but will be possible only after review by DOJ or FTC management. This process allows the Agencies to ensure that any deviations from the Model Waiver are made in appropriate circumstances and consistently.

III. Specific Provisions of the Model Waiver

The Model Waiver states that the Agencies' rules and practices governing the destruction or return of documents apply. What are these?

At both Agencies, documents are, subject to discrete exceptions, returned upon request or destroyed when an investigation is closed.

FTC Rule of Practice 4.12, 16 C.F.R. § 4.12, governs document retention at the FTC.

At the DOJ, document retention is subject to Antitrust Division Directives 2710.1 and 2710.4.

The Model Waiver provides that the Agencies will assert all applicable exemptions in response to a request for disclosure of Confidential Information[15] pursuant to the Freedom of Information Act. What are these exemptions and how are they applied?

Because the Agencies will treat Confidential Information obtained from a non-U.S. competition authority as if it was "requested … directly from [entity] and obtained …under the Confidentiality Rules," the Agencies will follow the same Freedom of Information Act ("FOIA") procedures and apply the same exemptions to information obtained pursuant to the Model Waiver as they do for information obtained directly from the Entity.

Certain categories of documents may be withheld from requesters based on applicable exemptions under FOIA, including materials exempted by other statutes, such as the HSR Act, the Antitrust Civil Process Act, and the FTC Act. For example, the FOIA exemption for "commercial or financial information obtained from a person [that is] privileged or confidential"[16] may apply to information obtained pursuant to a waiver, and section 21(f) of the FTC Act[17] exempts from mandatory FOIA disclosure any materials the FTC receives pursuant to compulsory process or voluntarily in lieu of process in an investigation.

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[15] For definition, *see* n.13.

[16] 5 U.S.C. § 552(b)(4).

[17] 15 U.S.C. § 57b-2(f).

Additional information regarding FOIA and exemptions can be found in the "Department of Justice Guide to the Freedom of Information Act," the Antitrust Division Manual, Chapter VII, and the FTC's Freedom of Information Act & Privacy Handbook.

How will the Agencies treat privileged information?

As stated in the Model Waiver, the Agencies will not seek information that is privileged under U.S. law from non-U.S. competition authorities through their cooperative activities. To allow non-U.S. competition authorities to more easily identify information protected by U.S. legal privilege, the Entities should, to the extent possible, clearly identify any documents that are privileged under U.S. law, *e.g.*, information subject to the attorney-client privilege, that are provided to non-U.S. competition authorities. Entities also often include provisions addressing the treatment of privileged information in the waivers provided to non-U.S. competition authorities.

In the unlikely event that one of the Agencies receives privileged documents from a non-U.S. competition authority pursuant to a waiver, the Agencies will treat any such privileged information received as inadvertently produced, and return, sequester, or destroy the privileged information, treating it consistently with Federal Rule of Evidence 502(b) and Federal Rule of Civil Procedure 26(b)(5)(B).[18]

[18] *See also* http://www.justice.gov/atr/public/electronic_discovery/ and FTC Rule of Practice 3.31(g), 16 C.F.R. § 3.31(g).