

Competition - USA

Updated model confidentiality waiver for use in cross-border investigations

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Introduction

On September 25 2013 the Federal Trade Commission (FTC) and the Department of Justice's Antitrust Division issued an updated joint model waiver of confidentiality⁽¹⁾ for use by parties in cross-border merger and civil non-merger investigations. The model waiver outlines the terms under which a party subject to a multi-jurisdictional investigation may waive its confidentiality protections in order to facilitate the sharing of confidential information between US and non-US competition authorities. In addition, the agencies released a set of frequently asked questions (FAQs)⁽²⁾ touting the benefits of signing such a waiver, outlining the process for submitting it and detailing the protections afforded to the confidential information.

With antitrust enforcement having expanded exponentially over the last two decades to more than 130 countries, the Department of Justice and the FTC increasingly seek confidentiality waivers from parties. As explained in the accompanying press release⁽³⁾ issued by the agencies, waivers generally allow for greater cooperation and coordination between competition authorities, enabling agencies "to make more informed, consistent decisions and coordinate more effectively, often expediting the review". The agencies acknowledge that providing a waiver is entirely voluntary and within the party's sole discretion, and state that "a decision not to provide a waiver will not prejudice the outcome of the DOJ's or FTC's investigation". However, the FAQs take care to note that "a decision to not grant a waiver" may have "practical effects", such as increasing the length of an investigation or causing inconsistent outcomes across competition authorities.

According to the FTC and the Department of Justice, the new model waiver "reflects both agencies' recent experience with waivers" and is intended to update and replace earlier forms.

Overview of model waiver provisions

Under the model waiver, parties involved in a merger or civil non-merger investigation voluntarily waive the statutory confidentiality protections normally covering confidential information submitted to the FTC or the Department of Justice in the ordinary course of an investigation. The agencies can then exchange the confidential information with those competition authorities specifically named in the waiver, subject to the US agencies' policy regarding the treatment of confidential information.

The model waiver is a broad waiver that applies to all confidential information provided by the party to the competition authority, whether written, electronic or oral, such as documents, data, statements, interrogatory responses, transcripts, testimony and proposed remedies. The FAQs state that the model waiver is intended to be used "in almost all civil matters", but acknowledge that in some circumstances a more limited waiver may be appropriate. In addition, the FAQs encourage parties to provide waivers at the outset or at an "early stage" of an investigation, but recognises that parties may initially decide against signing a waiver and continue to evaluate the option as the investigation progresses.

For disclosures by the FTC or the Department of Justice to a non-US competition authority, the updated model waiver provides that the confidential information is protected by the laws of the non-US authority supported by a common understanding with the US agencies, such as a bilateral or multilateral agreement. A party providing

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the model waiver to the US agencies typically submits a similar waiver to the non-US authority as well.

For disclosures to the FTC or the Department of Justice by a non-US competition authority, the updated model waiver states that the US agencies will provide the same level of protection under US laws as if the information had been directly requested and obtained by the FTC or the Department of Justice. This protection extends to the destruction or return of documents, as well as the assertion by the FTC or the Department of Justice of all exemptions from disclosure in the event of a request for disclosure under the Freedom of Information Act.

Additional privilege protection included in model waiver

A significant addition to this updated model waiver from prior models – and from the International Competition Network's model waiver cited in the FAQs – is a provision regarding the treatment of privileged information. Under the model waiver, the agencies will not seek information protected by US legal privilege from non-US competition authorities in the course of an exchange of confidential information. As different countries have different rules regarding privileges, it is not uncommon for information submitted in one jurisdiction to be privileged in another. Previously, there was much uncertainty regarding waiver provisions governing the treatment by the FTC or the Department of Justice of information privileged under US law. These provisions were individually negotiated and inconsistently incorporated into waiver agreements. Now parties have been provided with clarity around the issue. Furthermore, the new model waiver also includes a 'clawback' provision: any privileged information that the FTC or the Department of Justice does receive from a non-US competition authority will be treated as an inadvertent production, and the US agencies will return or destroy the privileged information.

Considerations before proposing a confidentiality waiver

From a practical standpoint, before signing a waiver, parties should consult with counsel both in the United States and the relevant non-US jurisdiction(s), as differences in laws may require adding or modifying provisions in the model waiver. For instance, parties should understand what protections are afforded to confidential information under the laws of the non-US jurisdiction and what rules and procedures govern that competition authority's treatment of confidential information. Similarly, parties must understand the privilege laws of the non-US jurisdiction and may need to add language strengthening privilege protection. Furthermore, parties and their counsel may believe a more limited waiver is appropriate or that delaying the decision on whether to provide a waiver may be appropriate in their particular circumstance.

With regard to the additional provisions concerning privilege, parties initially submitting documents to non-US competition authorities should follow the FTC and the Department of Justice's recommendation to mark clearly all documents that are privileged under US law. This will require coordination with US counsel to ensure a proper understanding of US privilege protections and the establishment of a procedure for identifying and labelling documents produced.

Parties should also consider potential downstream investigations by competition authorities that may benefit from the disclosure of confidential information. Unlike the EU model waiver, which limits the use of confidential information by EU and non-EU competition authorities to the investigation into the proposed transaction and "for no other purpose", no similar limitation is provided in the FTC and the Department of Justice's model waiver.

From a strategic standpoint, this latest push towards greater cooperation among competition authorities reminds parties that it is increasingly apparent that antitrust investigations are no longer regional issues to be addressed with piecemeal strategies. Parties must increasingly consider their overall global strategy early in the process and account for the fact that – waiver or no waiver – regulators are permitted to (and likely will) communicate. Parties and counsel must consider how arguments made in one jurisdiction impact those to be presented in another, and whether providing a waiver is a strategic legal decision that is highly specific to the facts. Parties and their global competition counsel must carefully weigh these considerations when assessing whether providing a waiver is in the best interests of all parties.

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Endnotes

(1) Available [here](#).

(2) Available [here](#).

(3) Available [here](#).

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