

Seven Months In: The U.S. Antitrust Agencies' Joint Model Waiver of Confidentiality

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On September 25, 2013, the U.S. Department of Justice Antitrust Division and U.S. Federal Trade Commission (the U.S. antitrust agencies) issued a joint model waiver of confidentiality for entities to use in merger and civil non-merger matters involving concurrent review by a U.S. antitrust agency and competition authorities in other countries (joint model waiver).¹ At the same time, the U.S. antitrust agencies released a “Frequently Asked Questions” document to explain the cooperative process and the role of waivers.² In the seven months since the agencies released these documents, the joint model waiver has been widely used. The joint model waiver is regarded as fulfilling its intended goals of streamlining the process of providing waivers and reducing time and resources spent negotiating waivers.

Why Provide a Waiver?

As more U.S. companies and consumers do business overseas, and as more jurisdictions review merger transactions and conduct antitrust investigations, the U.S. antitrust agencies' cooperate more frequently with competition authorities in other jurisdictions. Confidentiality waivers, granted either by parties or third parties to an investigation, can facilitate this cooperation. Confidentiality waivers enable the U.S. antitrust agencies to discuss with non-U.S. competition authorities confidential information provided by the waiving party or third party. Without a waiver, confidentiality provisions in the laws, regulations, and rules governing an agency's practices generally preclude sharing confidential information between or among competition authorities.³

Confidentiality waivers facilitate free and open discussion between competition authorities, allowing them to identify issues of common interest, improve their analyses, avoid inconsistent outcomes and remedies, and often expedite review. In some cases, waivers also may help to streamline investigations by assisting staff in identifying relevant product and geographic markets, or eliminating theories of harm that have been thoroughly assessed, developed, and explained by the other jurisdiction.

Typically, confidentiality waivers are provided simultaneously to the cooperating agencies in the U.S. and abroad, and there has been a steep increase in the use of waivers to facilitate cooperation in the past decade. In 2003, an OECD report found that most jurisdictions had

no experience with waivers in merger transactions.⁴ By 2013, at least sixteen competition agencies reported use of waivers, and many countries “having no or limited experience in 2003” reported in 2013 that they were “using waivers as ‘a routine practice.’”⁵ At least thirty-five jurisdictions accept waivers and can use waivers as a legal basis for cooperation.⁶

The Need for a Joint Model Waiver and Guidance from the U.S. Antitrust Agencies

Prior to the release of the joint model waiver, FTC and DOJ had separate model waivers that did not explicitly address certain issues, including the treatment of privileged information. Significant agency and entity time and resources often were spent negotiating waiver language to address privilege and other issues. Based on the U.S. antitrust agencies' experience and feedback from entities and their counsel, the agencies created the joint model waiver and FAQ. These documents were intended to significantly reduce transaction costs and harmonize the practices of the two U.S. antitrust agencies.

The joint model waiver and FAQ promote greater transparency and better understanding of the agencies' policies and practices related to waivers. The FAQ provides introductory information on waivers and on the confidentiality rules applicable to the information provided under the joint model waiver, describes the process for providing a waiver to either agency, and explains specific provisions of the joint model waiver.⁷

It is important to note that the joint model waiver does not change the protections that are provided to entities that chose to waive confidentiality to permit cooperation based on confidential information; the joint model waiver simply puts them in writing in a single place. Importantly, the joint model waiver minimizes the need for protracted negotiations over the contents of the waiver.

U.S. antitrust agency practice reflected in the joint model waiver includes:

1. *Limitations of the waiver* – the joint model waiver makes explicit that the party granting the waiver does not waive its rights to protection from disclosure to any third party other than the non-U.S. competition authority named in the waiver. It also makes explicit that the waiver is limited to

confidential information obtained in the course of the investigation named in the waiver.

2. *Treatment of privileged information* – the joint model waiver includes provisions addressing the U.S. antitrust agencies’ treatment of privileged information. Those provisions provide that: (1) the U.S. antitrust agencies will not seek from non-U.S. competition authorities information that is protected by U.S. legal privilege; and (2) the U.S. agencies will treat the receipt of any information that is claimed as privileged as inadvertently produced privileged information.⁸ To help ensure that information privileged in the United States is not produced to a U.S. antitrust agency by a non-U.S. competition authority pursuant to a waiver, the joint model waiver instructs that entities should, to the extent possible, clearly identify any documents that are privileged under U.S. law that are provided to non-U.S. competition authorities.
3. *Treatment of information received from another competition authority* – the joint model waiver makes clear that the U.S. antitrust agencies will afford materials received from a non-U.S. competition authority pursuant to a waiver the same protections under the laws, regulations, and rules that govern information provided directly to the U.S. antitrust agencies. This includes the return or destruction at the end of an investigation and treatment under the Freedom of Information Act.

Use of the Joint Model Waiver

Since the adoption of the model waiver, entities providing waivers have relied on the joint model waiver without making changes, and in the seven months since its issuance, the document has been praised for its ease of use. Parties and third parties have raised fewer questions about providing waivers, and the additions to the waiver have eliminated the most common reasons for negotiating

the content of waivers. Counsel for entities and staff at the U.S. antitrust agencies have found that using the joint model waiver increases efficiency and reduces transaction costs.

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¹ Model Waiver of Confidentiality, available at www.ftc.gov/sites/default/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/model_waiver.pdf and www.justice.gov/atr/public/international/docs/300917.pdf. See also DOJ Press Release, available at www.justice.gov/atr/public/press_releases/2013/300932.htm and FTC Press Release, available at www.ftc.gov/news-events/press-releases/2013/09/federal-trade-commission-and-justice-department-issue-updated.

² “Model Waiver of Confidentiality For use in civil matters involving non-U.S. competition authorities, Frequently Asked Questions,” (FAQ), available at www.justice.gov/atr/public/international/docs/300916.pdf and www.ftc.gov/sites/default/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/waivers_faq.pdf.

³ *Id.*

⁴ See OECD, “Report by the Competition Committee on Country Experiences with the 2005 Recommendation of the Council on Merger Review, p.29, available at www.oecd.org/daf/competition/ReportonExperienceswithMergerReviewRecommendation.pdf (citing Information Exchanges in International Co-operation in Merger Investigations, DAF/COMP/WP3(2003)3). The report was based on the questionnaire responses of thirty-three participating jurisdictions.

⁵ *Id.*

⁶ OECD, “Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation,” 2013 at 20 and 54, available at www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf. The report and figures were based on the responses of 55 competition agencies that completed The OECD/ICN Survey on International Enforcement Co-operation – Status Quo and Areas for Improvement.

⁷ See FAQ, *supra* at n. 2.

⁸ Model Waiver of Confidentiality, *supra* at n. 1.