

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

Frequently Asked Questions

On September 25, 2016, 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 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 waiver¹.

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, 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 https://www.ftc.gov/sites/default/files/attachments/us_submissions_oecd_and_other_international_competition_fora/062012International_coop_U%20S.pdf

³ The United States has bilateral cooperation agreements with jurisdictions: Germany (1976); Australia (1982); the European Communities (1991); Canada (1995); Brazil, Israel, and Japan (1999); Mexico (2000); Chile (2011), and Colombia (2014), and the Agencies entered into Memoranda of Understanding with the Russian Federal Anti

Cooperation includes the exchange of investigative information, usually, though not exclusively, through oral communications. This may include publicly available information, as well as “agency nonpublic” information.⁴ “Agency nonpublic” information is information that the Agencies are not statutorily prohibited from disclosing, but that they treat as nonpublic. 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 nonpublic” 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

Chinese Anti-Monopoly agencies (2011), the Ministry of Corporate Affairs (Government of India), and the Competition Commission of India (2012). See <https://www.ftc.gov/policy/international/international-cooperation-agreements> and <http://www.justice.gov/atr/public/international/arrangements.html> 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 concerning International Cooperation on Competition Investigations and Proceedings, available at <http://www.oecd.org/daf/competition/2014-international-coop-competition.pdf> 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.

Updated

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 U.S.-foreign competition authorities, the Agencies will protect the information in accordance with the agencies' policies and procedures regarding the protection of confidential information. The Agencies will ensure that the information is not disclosed to any other person, including the public, without the Entity's consent. The Agencies will also ensure that the information is not used for any purpose other than the investigation of the competition law violation.

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.

U.S. competition authority when the authority requests confidential treatment or precludes disclosure

Additional information regarding FOIA and exemptions can be found in Department of Justice Guide to the Freedom of Information Act