



2. Statutory Bases for Confidential Treatment of Information

7. The HSR Act requires parties to certain acquisitions of voting securities or assets to file premerger notification with both Agencies and observe a waiting period before consummating the transaction. The HSR Act's confidentiality provision¹² provides that information submitted to the Agencies

determine whether a law has been violated is treated as confidential, and such information cannot be disclosed publicly without consent of the submitter, with limited exceptions, such as use in judicial proceedings under a protective order, discussed below.¹⁶ Any material received by the Commission in any investigation and provided either voluntarily or pursuant to compulsory process also is protected from disclosure under FOIA.¹⁷

12. Other protections apply to information submitted to the FTC that the submitter marks as confidential. FTC Rule of Practice (“FTC Rule”) 4.10¹⁸ limits disclosure of information obtained in a law enforcement investigation that the submitter marks as confidential, and specifies the exceptions where disclosure may be allowed, such as for use in judicial proceedings under a protective order, discussed below. Information that the submitter marks as confidential received in a context other than law enforcement cannot be disclosed publicly unless the FTC determines that the information is not covered by Section 6(f) and the submitter is provided with 10 days’ notice.¹⁹ The FTCA does not prevent disclosure to Congress but requires the FTC to notify the submitter of the information of a Congressional request for information.²⁰

13. The FTC has discretion to disclose information obtained pursuant to compulsory process or information submitted voluntarily that is marked as confidential in response to a written request from a federal or state law enforcement agency that requires such information for an investigation. Before the FTC considers such a request, the law enforcement agency must certify to the FTC that confidential information will be maintained in confidence and will be used only for official law enforcement purposes.²¹

14. In civil investigations, the DOJ will disclose confidential information to another federal or state law enforcement agency pursuant to waivers from the parties. In criminal cases, Federal Rule of Criminal Procedure 6(e) limits the disclosure of information obtained in grand jury proceedings.

3. Judicial Treatment of Confidential Information

15. The statutory restrictions and rules governing the treatment of confidential information continue to apply after the Agencies have filed a complaint in federal court or initiated administrative proceedings. However, the HSR Act expressly allows the Agencies, the ACPA allows DOJ, and Section 21 of the FTCA allows the FTC, to use confidential information produced by the parties and third parties in judicial or administrative proceedings. As mentioned above, parties or sources of information can request that the court grant a protective order to protect confidential information from disclosure beyond individuals identified in the order. Rule 26(c) of the Federal Rules of Civil Procedure enables parties in civil cases in federal courts to seek a judicial protective orders to limit public access to discovery materials upon a showing of “good cause,” and FTC Rule 3.31(d) allows for an administrative law judge to issue a

¹⁶ FTCA § 57b-2b(b), 15 U.S.C. § 57b-2(b).

¹⁷ FTCA § 57b-2b(f), 15 U.S.C. § 57b-2(f).

¹⁸ 16 C.F.R. Sec. 4.10.

¹⁹ FTCA § 57b-2b(c), 15 U.S.C. § 57b-2(c).

²⁰ FTCA Section 21(c) offers protections for information designated confidential by the submitter and 21(d) provides protections for trade secrets and governs disclosures to Congress, 15 U.S.C. § 57b-2(c), (d); *see also* FTC Rule 4.10, 16 C.F.R. § 4.10 (protecting specific categories of information from disclosure) and FTC Rule 4.11, 16 C.F.R. § 4.11b (governing Congressional requests for information and notice to submitters).

²¹ *See* 15 U.S.C. § 57b-2 and FTC Rule 4.10(d), 16 C.F.R. § 4.10(d); 46 FR 26284, 26291 (1981).

protective order “to protect the parties and third parties against improper use and disclosure of confidential information.”²²

16. Judicial and administrative courts have extensive experience evaluating requests for protective orders and, in determining whether to enter such orders, they take into account the nature and extent of the confidential information at issue and the potential for harm to the parties and third parties if the information is disclosed.²³

procedures described in Annex A of the Agreement.²⁶ The IAEA requires that the nature of the assistance provided generally be reciprocal, except in regard to procedures, or to a particular case. The U.S. and Australian agencies maintain the confidentiality of any information communicated to them in confidence under the Agreement.

21. For criminal matters, the United States has bilateral Mutual Legal Assistance Treaties (MLATs), Instruments, or Protocols with more than 80 countries or regional organizations, which allow information to be shared with the criminal law enforcement authorities in another jurisdiction.²⁷ The specific provisions of each agreement vary. (is45 Tm1(enf)9.1 (ace w)7 (enf)8.3 r to be shs)13.1 (isi)-2.6 sept a
