International Competition Network

WAIVERS OF CONFIDENTIALITY IN MERGER INVESTIGATIONS

I. Introduction

Pursuant to its mandate to examine procedural aspects of multijurisdictional merger review, the ICN's Notification and Procedures Subgroup has undertaken a project concerning the use of waivers of confidentiality in merger investigations.

Confidentiality waivers are related to several provisions of the ICN's Guiding Principles and Recommended Practices for merger review. The Guiding Principles provide that reviewing jurisdictions should maintain the confidentiality of information obtained in their investigations.[1] Another Guiding Principle urges jurisdictions reviewing the same transaction to "engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs."[2] A further, stated goal of coordination is consistent, or at least non-conflicting, outcomes.[3] In furtherance of that goal, the Recommended Practices provide that "competition agencies should encourage and facilitate the parties' cooperation in the merger coordination process," through, *inter alia*, the use of voluntary confidentiality waivers and the development of a basic waiver model that may be modified to suit specific circumstances.[4]

Confidentiality laws typically limit the type of information that reviewing agencies can share with one another. When a merger is subject to review by more than one agency, the merging and other interested parties may conclude that it is in their interest to waive confidentiality protections because they believe this may increase the likelihood of consistent analyses and compatible enforcement decisions. Waivers typically allow the agencies to share parties' information and to discuss the

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[1] ICN Guiding Principles For Merger Notification and Review, no. 8, http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm.

[2] ICN Guiding Principles For Merger Notification and Review, no. 6, http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm.

[3] ICN Recommended Practices for Merger Notification Procedures, X. A. Comment 2, http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf.

[4] *Id.*, X.D. *See also* The United States' International Competition Policy Advisory Committee's Final Report in 2000 that recommended, *inter alia*, that "agencies should develop standardized (but not inflexible) and transparent templates for waivers." The Report's Appendix 2-D and E contained model waivers and a framework for policy statements it recommended to be issued by antitrust enforcement agencies regarding waivers of confidentiality. http://www.usdoj.gov/atr/icpac/finalreport.htm.

information while maintaining its confidentiality with respect to other interested parties and the public.[5]

Confidentiality waivers can facilitate cooperation among the agencies and coordination of their investigations and enforcement decisions. Coordination is particularly appropriate and useful when the reviewing agencies have common enforcement interests, such as in cases in which their investigations focus on the same markets. Waivers of confidentiality enable more complete communication between the reviewing agencies and with the merging parties regarding evidence that is relevant to the investigation. Waivers, however, are not appropriate in every case subject to concurrent review. In some cases, it is clear from the outset of an investigation that the case does not raise competition issues common to each reviewing agency.

In any case, the decision whether to grant a waiver is in the sole discretion of the parties and competition agencies should not pressure parties to provide a waiver.[6]

In recent years, merging and other interested parties have been increasingly willing to grant waivers. As more jurisdictions have adopted merger review regimes and transactions increasingly cross borders, agencies have had greater opportunities to cooperate. Experience with waivers is greatest among jurisdictions that have had the most opportunities to cooperate and coordinate merger investigations, particularly Canada, the European Commission, several EU Member States, and the United States. Several of the agencies in these jurisdictions have developed "model" waiver forms that provide flexibility as to scope and conditions, reflecting the voluntary nature of the instrument.

Drawing on these agencies' experiences, this paper identifies and discusses issues underlying the rationale, content, and use of waivers, and offers several model waivers of confidentiality. These forms are provided as a reference for parties and for agencies, especially agencies with little or no experience with waivers; and they are intended to be applied to particular cases with a degree of flexibility, reflecting the voluntary nature of the instrument. Appendix A is a model waiver form developed by the ICN Notification and Procedures Subgroup. Several of the agencies with experience using waivers also have developed model waiver forms for their own use that are attached at Appendices B-E as samples that illustrate how those agencies have dealt with certain issues discussed later in this paper in Section IV.B-E.

[5] Except where explicitly stated otherwise, "sharing" means the transfer of parties' information from one competition agency to another as well as discussions between the agencies concerning that information.

[6] ICN Recommended Practices for Merger Notification Procedures, X. D. Comment 2, http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf.

II. Rationales for Waiving Confidentiality

A. To facilitate information sharing among reviewing agencies

Many cross-border mergers entail review of the same or similar competitive issues in more than one jurisdiction. Cooperation, including the sharing of information, among reviewing agencies permits more complete communication between the reviewing agencies and, where appropriate, the coordination of their respective investigations with the aim of avoiding conflicting outcomes.[7]

However, merger review laws typically require enforcement authorities to maintain the confidentiality of information obtained from the merging and other interested parties. Such provisions typically cover all information the merging parties submit, including their pre-merger notification form and appendices, written responses to inquiries, oral statements, documents, and voluntary submissions (such as settlement proposals). Confidentiality laws also typically protect information obtained from third parties. However, they may differ in the extent of the protection provided. For example, some laws provide more protection for business or trade secrets. Some statutes have been interpreted to require that confidentiality be maintained even as to the existence of certain information provided. Some statutes, however, also provide for disclosure of, or access to, such information in certain circumstances, such as when a reviewing agency initiates formal adjudicative or administrative proceedings;[8] for the purpose of exercising the authorities' functions;[9] or to share with other law enforcement authorities or public bodies pursuant to reciprocal arrangements or when other conditions apply.[10] This paper will refer to information protected by such rules as "confidential business information."[11]

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[7] The OECD Recommendation of 1995 and formal inter-governmental enforcement cooperation agreements exhort the parties to, as the OECD Recommendation states, "supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose," subject to the obligation to maintain the confidentiality of the information that is received. http://webdomino1.oecd.org/horizontal/oecdacts.nsf/Display/D486C0CC6E730755C1256F7F0071378A?OpenDocument.

[8] *See, e.g.*, the U.S. Hart-Scott-Rodino Act, 15 USC 18a(h); the EC Merger Regulation (ECMR), Art. 18(1) & (3).

[9] For example, section 29 of Canada's Competition Act enables its competition authority to share information, including confidential information, if this would advance its law enforcement mission. Similarly, the United Kingdom's Enterprise Act 2002, §§ 241-242, permits the U.K. authorities to disclose such information for the purpose of exercising their own functions or for the purpose of facilitating the functions of other public bodies, subject, in either instance, to considering the effect of such disclosure on the public interest, individuals, or firms.

[10] Some jurisdictions have laws that permit sharing confidential information with other law enforcement authorities, subject to reciprocity and/or other conditions; *see, e.g.*, Australia's Mutual Assistance in Business Regulation Act of 1992; the U.S. International Antitrust Enforcement Assistance Act of 1994 (IAEAA); the Netherlands' Competition Act of 1997, Article 91; France's Commercial Code of 2003, Article L462-9. This paper does not cover the circumstances under which provisions such as these might be used to share information in multijurisdictional merger investigations in the absence of a waiver.

[11] In addition to publicly-available information that the agencies are free to share, agencies possess, and develop during the investigation, relevant information that they are empowered, but not

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.

B. To expedite proceedings, avoid conflicts, and promote convergence

Sharing merging parties' information is not an end in itself, but rather part of a strategy and effort by the merging parties and the reviewing agencies to coordinate concurrent merger reviews. Sharing can enable reviewing agencies: to identify more quickly enforcement issues of mutual interest and to discard those that do not indicate a need for enforcement action; to evaluate the relative credibility of evidence relating to the principal issues in the case; to reach well-informed conclusions on the elements of the case (market definitions, assessment of competitive effects, and evaluation of other relevant factors such as efficiency claims, entry, etc.); and to aid coordination in choice of remedy as well as to avoid conflicting remedial measures. All of these factors can benefit both parties and agencies.

The free flow of relevant investigatory information among the jurisdictions considering the same merger transaction, including information provided by parties and the agencies' tentative analyses and conclusions, reduces the risk of incompatible outcomes. Conversely, the inability to discuss critical information provided by a party to one jurisdiction in confidence precludes the antitrust agency in that jurisdiction from communicating clearly and persuasively with other antitrust agencies reviewing the same transaction, which in some cases might increase the potential for incompatible analyses and, hence, results.

Experience also suggests that such waiver-facilitated coordination in individual cases builds confidence and contributes to analytical and procedural convergence not only in the particular case -- as to the agencies' respective approaches and analyses of the credibility of evidence, the definition of relevant markets, the validity of various theories of competitive harm, and the propriety and efficacy of certain remedial measures -- but also in their general merger enforcement policies. Successful coordination breeds further future cooperation and overall convergence.

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mandated (as in the case of confidential business information), to keep confidential. Such "confidential agency information" can include the fact that an investigation is taking place, the subject matter, and the agencies' analysis of the matter, including market definitions, assessments of competitive effects, and potential remedies. Agencies typically share such information while maintaining its confidentiality outside the agency-to-agency relationship.

III. Concerns Regarding Waiving Confidentiality

Merging parties and interested third parties (such as competitors, suppliers, or customers of the merging parties) may be reluctant to waive confidentiality for a variety of reasons. Their reluctance may reflect a lack of confidence in an agency's ability to maintain confidentiality.[12] In particular, they may be concerned about the potential for unauthorized disclosure, whether to the general public or to third parties such as competitors, suppliers, or customers who may be in a position to profit from such access to the information.[13] Agencies can allay these concerns by providing credibly secure physical storage for confidential information and other measures to assure the accountability of those with access to shared information.[14] Successful experience with an agency in the handling of confidential information in actual cases is probably the most effective confidence-building measure.

Other factors that parties may take into account before deciding whether to waive confidentiality protection may be based on differences in laws -- for example: (i) whether the recipient jurisdiction's confidentiality laws cover information obtained from the sending jurisdiction; (ii) differences in the scope of substantive laws, specifically where the merger law of a recipient jurisdiction contains a broader scope of potential liability than that of the sending jurisdiction; (iii) differences in the scope of information gathered -- for example, involuntary, sworn statements (depositions) that the U.S. agencies are authorized to take, but that other jurisdictions may not; (iv) differences in the scope of legal privileges, such as those that apply to in-house counsel in the United States but not in the EU and some Member States; (v) possible "downstream" use of the shared information by the recipient jurisdiction for another law enforcement purpose; and (vi) the possible disclosure and use of shared information in subsequent private litigation stemming from the transaction.

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[12] *See, e.g.*, 1998 Fordham Corp. L. Inst. (B. Hawk ed. 1999), at 295-96, 325-26 (remarks of Calvin S. Goldman), and 332 (remarks of Jacques Bourgeois).

[13] These concerns may be heightened in a case in which the enforcement authority is an agency of a government that also has ownership interests in a business in the affected market. Cf., IAEAA, 15 USC 6207(a)(3).

[14] Some statutes specifically prohibit the disclosure of information acquired during the course of an investigation; *e.g*, ECMR, Art. 17(2);, Section 10 of the U.S. Federal Trade Commission Act (15 U.S.C. §50).

IV. Nature and Terms of Confidentiality Waivers

This section addresses the substance of confidentiality waivers through discussion of a number of essential issues that have arisen through the actual use of waivers. The attached ICN model waiver form, like the sample agency forms from which it is drawn, addresses the scope of the waiver, provides assurances of confidentiality outside the specific waiver, and sets out any conditions (*e.g.*, obligations on the agencies). In addition, where it is instructive to consider how an agency has dealt with certain issues, references are made to specific provisions in the sample agency waiver forms appended hereto. As noted in the Introduction, the model waivers are intended as a reference for parties and agencies, especially those with little or no experience with confidentiality waivers.

A. Voluntary nature

A party's decision to waive its confidentiality protection is purely voluntary. Consequently competition agencies should not draw an adverse inference from a party's decision not to grant a waiver. As stated in the EC-U.S. Best Practices on Cooperation in Merger Investigations:

> [T]he . . . agencies recognize that many considerations go into confidentiality waiver and transaction timing and/or notification decisions and that these decisions are within the discretion of the merging parties. Accordingly, it should be emphasized that any party's choice not to abide by some or all of the agencies' recommendations will not in any way prejudice the conduct or outcome of the agencies' investigations.[15]

B. Scope

The scope of a waiver, *i.e.*, the information it covers, may be determined by the waiving party when the waiver is given. As the use of waivers has evolved, for example, in investigations coordinated by U.S., Canadian, and European agencies, merging parties have increasingly granted a broad waiver at the outset of the investigation. In most cases, parties have waived confidentiality as to any documents, statements, data, and information they submit to an agency in the merger investigation. The model waiver in Appendix A is of that scope.

There may be cases, however, in which parties are reluctant to grant such a broad waiver, for example, when (i) the investigation is at an early stage where specific issues have not yet been identified or (ii) there are limited issues left in the investigation. In those instances, waivers might be limited in scope to evidentiary materials pertaining to specific issues such as product market or barriers to entry; or, where the parties and agencies have entered settlement negotiations, the waiver may be limited to potential remedies including the parties' settlement proposals.

Waiving parties also have considered limiting the scope of the waiver to address concerns noted in Section III. For example, where there is an asymmetry in the information-gathering powers of coordinating agencies, some parties have

[15] U.S.-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, http://www.ftc.gov/opa/2002/10/mergerbestpractices.htm.

considered limiting the scope of their waiver to exclude information in the possession of one agency that is beyond the power of another agency to obtain. Another example is information protected by a legal privilege in one jurisdiction but not another. This issue has arisen in particular in the context of cooperation between the U.S. authorities and the European Commission, for example, because in-house counsel advice is privileged under U.S. law, but not under European Community law. Grants of waivers to the EC in cases coordinated with the U.S. agencies typically contain a specific exclusion for information that is privileged under U.S. law.[16] Appendix D (the European Commission's model waiver form), § 6.5, provides an example of language used in this situation.

C. Duration

The confidentiality waiver letters used in most cases have not included specific language defining the duration of the waiving party's grant of the waiver. Although this does not appear to have caused problems for waiving parties or the agencies, it is appropriate to note the issue to avoid misunderstanding.

Commonly used waiver forms refer to materials submitted "in connection with the merger" or "during the course of [the agency's] enquiry." It is reasonable to interpret such language to mean that the duration of the waiver is at least as long as it takes for the reviewing agency to reach an enforcement decision - whether that decision is (i) to clear, or take no action to challenge, the merger; (ii) to prohibit or take an action to challenge the merger; or (iii) to enter an agreement that is based upon a negotiated settlement between the reviewing agency and the parties. In the event of a settlement -- particularly one that involved close coordination among, and the adoption of commitments to, the agencies -- parties and agencies typically have not questioned the continued validity of a waiver during the period in which the parties fulfill the settlement conditions. In one instance in the United Kingdom, to avoid misunderstanding the parties and the agency included language to clarify the duration of the confidentiality waiver granted.

D. Maintenance of confidentiality outside the specific waiver

A party typically waives confidentiality protections only to the extent that it allows the agency possessing the party's information to share it with another agency and, therefore, not to share the information with third parties or disclose it to the public.[17]

A waiving party typically will seek assurances that the recipient agency can and will maintain the confidentiality of the information shared with respect to third

[16] The May 9, 2003, United States submission to the OECD Competition Committee's Working Party 3 (on international cooperation) concerning Information Sharing in Merger Control Procedures reported that this issue "has been discussed by EC and U.S. officials. The U.S. agencies have asked the EC not to send or discuss information that could be considered privileged under U.S. law and the U.S. agencies will refuse to consider and will return such information if it is provided inadvertently." DAFFE/COMP/WP3/WD(2003)25.

[17] See discussion in Section II.A., *supra* at notes 9 and 10 on the authority of some agencies to make certain non-public disclosure to other public bodies.

parties and the public. The agency sharing parties' information pursuant to a waiver is not in a position to guarantee that the recipient agency can and will maintain confidentiality over the information shared. Accordingly, some waivers contain language reflecting the waiving party's understanding that a recipient agency is able to, and will, protect the confidentiality of the information it receives from its counterpart agency to the extent possible under the confidentiality provisions governing the recipient agency.

Experience has demonstrated that parties and agencies have devised satisfactory means of dealing with this concern. Some waivers contemplate that the agencies sharing information will provide reciprocal letters describing the confidentiality protections provided by the agencies; see, for example, Appendix B, used by the U.S. Department of Justice. Appendices C (the U.S. Federal Trade Commission's model waiver) and Appendix D, section 6.2 (the European Commission's model waiver), address the concern by stating that the agency will treat the information as having been obtained from the waiving party under that agency's own information gathering authorities. This provision goes on to state that if it is ever determined that the information is not entitled to such protection, the agency will treat the information as if it requested the information from the waiving party and the parties produced it voluntarily. The provision then sets out the protections the FTC provides to voluntarily produced information.

The ability of agencies to maintain the confidentiality of shared materials may be questioned in those jurisdictions whose agencies are subject to government information access laws such as the U.S. Freedom of Information Act and similar laws that apply to the European Commission and to agencies in the United Kingdom. These laws typically grant the agencies authority to withhold from public disclosure information that has been obtained for law enforcement purposes. But they also give requesters certain procedural rights to pursue an access request in the courts. Although it does not appear from the collective experience of the ICN agencies that any authority has been ordered to release information shared in an investigation, some agencies have included language in the waiver addressing such a circumstance. For example the FTC's model waiver in Appendix C provides for notice to the waiving party if a third party commences any action to obtain a judicial order requiring disclosure. Parties have also sought assurances that an agency will oppose any application made by a third party for access to information obtained through a waiver.

E. Conditions

Some parties have sought to condition their waivers to impose other obligations on the reviewing agency regarding the sharing and use of information within the scope of the waiver. For example, some parties have sought to require that they be notified by the sending agency before it shares the party's information with the recipient agency. Agencies generally do not accept such a condition because it likely would interfere with the very goals of inter-agency candor and analysis that the waiver is intended to achieve. In addition, in the context of inter-agency conversations, it is unlikely that the agencies can predict exactly which information and documents they will reference, making a prior notice requirement impracticable.

Some parties might also seek to prevent the use of information shared pursuant to a waiver for purposes other than the merger review. Such a condition may be unnecessary to the extent that national law already precludes the agency either from using the information itself for other purposes or from sharing the information with other authorities for other purposes.[18] Jurisdictions with laws permitting the reviewing agency to use the information for other law enforcement purposes are reluctant to accept such a condition.

V. Conclusion

Confidentiality waivers can facilitate cooperation and coordination of multijurisdictional merger review and, thereby, compatible, non-conflicting enforcement decisions and remedies.

Recent experience has shown that parties to most mergers that raised competitive issues in more than one jurisdiction have, upon request or even of their own initiative, granted a waiver. That experience has included, in some cases, a need to address certain issues, including, *inter alia*, differences in the scope of confidentiality protections among jurisdictions and in the rules governing how agencies can use shared information delimiting the use to which information gathered by a reviewing authority may be put.

It is hoped that this paper's discussion of these issues will help both agencies and parties in considering whether and how to grant waivers of confidentiality in merger investigations.

[18] *But see* Appendix D, the EC model waiver, section 6.(4).

APPENDIX A

ICN Model Waiver Form

[DATE]

[CONTACT NAME AT AGENCY A]
[ADDRESS]

Re: [CASE REFERENCE]

Dear -----:

On behalf of COMPANY A, I confirm that COMPANY A, subject to the conditions and limitations set forth herein, agrees to waive the confidentiality restrictions under [RELEVANT STATUTORY OR REGULATORY AUTHORITY] and other applicable laws and rules (collectively the "Confidentiality Obligations") that prevent AGENCY X from disclosing to FOREIGN AGENCY Y confidential information obtained from COMPANY A in connection with its proposed transaction with COMPANY B. Specifically, COMPANY A agrees that AGENCY X staff may share with FOREIGN AGENCY Y [any of COMPANY A's documents, statements, data and information, as well as AGENCY A's own internal analyses that contain or refer to COMPANY A's materials that would otherwise be foreclosed by the confidentiality Obligations].[18]

This waiver is granted only with respect to disclosures to FOREIGN AGENCY Y and only on the condition that FOREIGN AGENCY Y will treat as confidential information it obtains from AGENCY X in accordance with the terms of the attached letter from [CONTACT NAME] of FOREIGN AGENCY Y.[19] This agreement does not constitute a waiver by COMPANY A of its rights under the Confidentiality Obligations with respect to the protection afforded to COMPANY A

[18] NOTE: This model language is intended for those situations where a waiver with respect to any and all documents and information provided to Agency X is contemplated. There may be instances where such a broad waiver is not desired. In those cases, the parties may opt for a waiver limited in scope, such as to allow the agencies to discuss potential remedies that each is considering and the reasons for such remedies, or to discuss specific limited issues such as product market definition or barriers to entry. Parties and agency staff should consider the scope of the waiver that is desired to assist them in their investigation so as to not unnecessarily burden parties or other competition agencies.

[19] NOTE: "Foreign Agency Y" should provide a letter describing the confidentiality protections provided by that country. (In some cases, the parties and Agency X staff may be satisfied if that letter is directed to that contact person by representatives of the parties, with a written confirmation that Foreign Agency Y agrees to the terms of that letter.) Attached to this model form at Appendix [D] are sample confidentiality letters.

against the direct or indirect disclosures of information to any third-party other than FOREIGN AGENCY Y.

COMPANY A submits this waiver under the condition and understanding that, with respect to information that AGENCY X obtains from COMPANY A and provides to the FOREIGN AGENCY Y pursuant to this waiver, AGENCY X should continue to protect the confidentiality of such information with respect to other outside parties in accordance with the Confidentiality Obligations.

A copy of this letter is being sent to [CONTACT PERSON AT FOREIGN AGENCY Y].

Sincerely,

[ATTORNEY FOR COMPANY A]

cc: [CONTACT FOR FOREIGN AGENCY Y]

APPENDIX B

U.S. Department of Justice
Antitrust Division
Model Waiver Form

[DATE]

BY FACSIMILE

[CONTACT NAME]
[ADDRESS]

Re: [CASE REFERENCE]

Dear [CONTACT]:

As we have discussed, the U.S. Department of Justice would like to discuss information with officials of [FOREIGN AGENCY NAME] to facilitate our review of the proposed transaction. Therefore, we request that [NAME OF MERGING PARTY] waive the confidentiality restrictions that prohibit the U.S. Department of Justice's Antitrust Division from sharing confidential information obtained from [NAME OF MERGING PARTY] in the course of our investigation.

The following language is modeled on waivers used in prior investigations:

On behalf of [NAME OF MERGING PARTY ("COMPANY")], including its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents and representatives of the foregoing, Company hereby agrees to waive the confidentiality restrictions that govern the U.S. Department of Justice's investigation of the proposed transaction [DEFINE] under the Hart-Scott-Rodino Act, the Antitrust Civil Process Act, and other applicable laws and regulations (collectively, "the Confidentiality Rules") to the extent set forth in this letter. Specifically, Company agrees that the U.S. Department of Justice may disclose to individuals investigating the proposed transaction on behalf of the [FOREIGN AGENCY NAME] written and oral information provided by Company, including Company's documents, data, graphics, statements, testimony, and oral communications, and the Department's own internal analyses that contain or refer to Company's materials (collectively, the "information"), that otherwise would be foreclosed by the Confidentiality Rules. This agreement is conditioned on the understanding that 1) the U.S. Department of Justice will obtain the written agreement of the [FOREIGN AGENCY NAME] to protect the confidentiality of the information to the extent possible under confidentiality provisions governing that agency, and 2) the U.S. Department of Justice will continue to protect the confidentiality of the information in accordance with its normal practices and the Confidentiality Rules.

When you have reviewed the proposed waiver language, please contact me at [TEL NO.].

[DOJ ATTORNEY SIGNATURE]

APPENDIX C

U.S. Federal Trade Commission
Model Waiver Form

MODEL WAIVER OF CONFIDENTIALITY (as to European Commission)

Merging Company Alpha, Inc. (A) and To Be Merged Company Beta (B) agree to waive the confidentiality restrictions under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, the Hart-Scott-Rodino Act, 15 U.S.C. § 1 8a, and other applicable laws and rules (collectively, "Confidentiality Rules"), to the extent necessary to permit the Federal Trade Commission ("FTC") to disclose to the European Commission ("EC") confidential documents and information obtained from A and B in connection with the merger of A and B. Specifically, A and B agree that FTC staff may share with the EC any of A's and B's documents, statements, data, and information, as well as the FTC's own internal analyses that contain or refer to A's or B's materials, that would otherwise be foreclosed by the Confidentiality Rules. This letter does not constitute a waiver by A or B of their rights under the Confidentiality Rules with respect to the protection afforded to A and B against the direct or indirect disclosure of information to any third party other than the EC.

Additionally, with respect to any documents or information that the EC obtains from A or B and provides to the FTC pursuant to a waiver of EC confidentiality protections, it is understood that the FTC shall treat such documents as having been obtained from A or B pursuant to the Hart-Scott-Rodino Act. It is also understood that, in the event it is ever determined that any such documents or information are not entitled to confidentiality protection under the Hart-Scott-Rodino Act, the FTC has requested these documents and information from A and B and that the following protections shall apply: (1) such documents and information shall be treated as provided by A and B to the FTC voluntarily in place of compulsory process; (2) such documents and information are designated confidential under Section 4.10(d) of the FTC's Rules of Practice, 16 C.F.R. § 4.10(d); (3) to the extent and at such times as such documents become subject to the FTC rule requiring the return of documents, 16 C.F.R. § 4.12, the FTC shall destroy such documents or, at A's or B's request, return them to the EC; and (4) the FTC shall notify A and B within 10 days if a requester under the Freedom of Information Act commences litigation to obtain these documents.

A copy of this letter is being sent to the Directorate General for Competition of the European Commission (DG-COMP).

FTC MODEL WAIVER OF CONFIDENTIALITY (as to European Commission)
Non-HSR-reportable merger

Merging Company Alpha, Inc. (A) and To Be Merged Company Beta (B) agree to waive the confidentiality restrictions under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and other applicable laws and rules (collectively, "Confidentiality Rules"), to the extent necessary to permit the Federal Trade Commission ("FTC") to disclose to the European Commission ("EC") confidential documents and information obtained from A and B in connection with the merger of A and B. Specifically, A and B agree that FTC staff may share with the EC any of A's and B's documents, statements, data, and information, as well as the FTC's own internal analyses that contain or refer to A's or B's materials, that would otherwise be foreclosed by the Confidentiality Rules. This letter does not constitute a waiver by A or B of their rights under the Confidentiality Rules with respect to the protection afforded to A and B against the direct or indirect disclosure of information to any third party other than the EC.

Additionally, with respect to any documents or information that the EC obtains from A or B and provides to the FTC pursuant to a waiver of EC confidentiality protections, it is understood that the FTC has requested these documents and information from A and B and that the following protections shall apply: (1) such documents and information shall be treated as provided by A and B to the FTC voluntarily in place of compulsory process; (2) such documents and information are designated confidential under Section 4.10(d) of the FTC's Rules of Practice, 16 C.F.R. § 4.10(d); (3) to the extent and at such times as such documents become subject to the FTC rule requiring the return of documents, 16 C.F.R. § 4.12, the FTC shall destroy such documents or, at A's or B's request, return them to the EC; and (4) the FTC shall notify A and B within 10 days if a requester under the Freedom of Information Act commences litigation to obtain these documents.

A copy of this letter is being sent to the Directorate General for Competition of the European Commission (DG-COMP).

The following provision has been used in certain waivers provided to the U.S. Federal Trade Commission in circumstances where Agency X receives information from Foreign Agency Y that may not be subject to the confidentiality protections under the laws or rules of Agency X: *For example, a foreign jurisdiction's laws or regulations may extend confidentiality protections to documents or information that would not be given the same amount of protection under the laws or regulations governing Agency X. In those circumstances, the merging parties may be unwilling to waive confidentiality unless Agency X agrees to treat such materials or information as confidential under its own laws or regulations. In those situations, the parties may wish to include a provision similar to that set forth below:*

With respect to the information that FOREIGN AGENCY Y obtains from COMPANY A and provides to AGENCY X pursuant to the attached waiver, it is understood that AGENCY X shall treat such information as having been obtained from COMPANY A pursuant to [THE MERGER REVIEW STATUTE OR RULE]. It is also understood that, in the event it is ever determined that any such information is not entitled to confidentiality protection under [THE MERGER REVIEW STATUTE OR RULE], AGENCY X will treat the information received as if it has requested such information from COMPANY A directly and AGENCY X agrees that the following protections shall apply to all such information received from FOREIGN AGENCY Y: (1) such information shall be treated as if provided by COMPANY A to AGENCY X voluntarily in place of compulsory process; (2) AGENCY X shall notify COMPANY A within 10 days if a requestor under [ANY APPLICABLE DISCLOSURE STATUTE OR RULE] commences any action to obtain a judicial order requiring the disclosure of such information; (3) such information shall be treated as having been designated as confidential under [AGENCY X's] rules; and (4) to the extent and at such times as such information becomes subject to the regulation requiring the return of documents, AGENCY X shall destroy such information or, at COMPANY A's request, return it to FOREIGN AGENCY Y.

APPENDIX D

EUROPEAN COMMISSION
CONFIDENTIALITY WAIVER

WAIVER

1. On behalf of Company X and Company Y we confirm that each of X and Y agree to waive the confidentiality restrictions which govern the European Commission under EC Council Regulation 139/04 and other applicable laws (hereinafter referred to as "the confidentiality rules") to the extent necessary to permit the European Commission to disclose, for the purpose of its enquiries and analysis into the proposed merger/acquisition between X and Y (hereinafter referred to as the "proposed transaction"), to [*competition authority B*] any information obtained from Company X and/or Y during the course of its enquiry into the proposed transaction.

2. A corresponding waiver has or will be submitted to [*competition authority B*], enabling that authority to share information, obtained from Company X or Y during the course of its enquiry into the proposed transaction and which would otherwise be subject to the confidentiality rules of that jurisdiction, with the European Commission.

3. Specifically Company X and Y agree that the staff of the European Commission may share with [*competition authority B*] any documents, statements, data and information, supplied by Company X and /or Y, as well as the Commission's own internal analysis that contain or refer to X and Y's materials that would otherwise be prevented by the confidentiality rules.

CAVEAT

4. This letter does not constitute a waiver by X or Y of their rights under the confidentiality rules with respect to the protection afforded to X or Y against the direct or indirect disclosure of information to any third party other than [*competition authority B*]. This waiver is limited to information obtained by the Commission in relation to its review of the proposed transaction and does not apply to information obtained in the course of any other review of any case either now or in the future.

CONDITIONS

- *Use of Information by Receiving Jurisdiction ("Competition Authority B")*

5. For the avoidance of doubt information transmitted pursuant to this waiver may be used by [*competition authority B*] only for the purposes of conducting its enquiry into the proposed transaction and for no other purpose. Disclosure is made openly on the basis and subject to the express condition that such information remains confidential to [*competition authority B*] and may not be

disclosed to any third party. It is understood and agreed that failure by [*competition authority B*] to comply with the foregoing does not engender any liability on the part of the European Commission

- *Use of Information by Sending Jurisdiction ("Competition Authority A")*

6. The waiver referred to in the first paragraph of this letter is subject to the following conditions:

(1) that the European Commission shall itself maintain the confidentiality of the information and/or documentation provided to [*competition authority B*] by X and/or Y and which is subsequently obtained from [*competition authority B*] and shall treat such information as if it had been obtained directly from X and /or Y;

(2) that the European Commission shall consider all information and/or documentation obtained from [*competition authority B*] pursuant to this waiver as confidential information or business secrets unless it is clearly identified as having been obtained from a publicly accessible source;

(3) that the European Commission shall not make any information and/or documentation obtained from [*competition authority B*] available to any third party including competitors, customers and suppliers of X and Y;

(4) that the information and/or documentation obtained from [*competition authority B*] shall be used only for the purposes of the European Commission's review of the proposed transaction under Council Regulation 139/04 and for no other purpose; and

(5) that the European Commission shall not disclose to [*competition authority B*] any information or documentation obtained from X and /or Y in relation to which either X or Y has asserted a claim of legal privilege in [*the jurisdiction in competition authority B*] and that is clearly identified as being subject to such client/attorney privilege. It is understood and agreed that Company X or Y is responsible for informing the Commission of the existence of such privileged information.

Each of Company X or Y has obtained the consent of its affiliates to the sharing of their documents and information produced by each of Company X or Y respectively on the same conditions as outlined above.

If you wish to discuss any matter arising form this waiver, please contact [name of responsible representative(s)]. A copy of this letter has been sent to the [competition authority B].

(Signed by the duly authorised representative of)

(Signatures)

Company X Company Y

APPENDIX E

From time to time the U.S. Department of Justice has provided letters to the parties describing the confidentiality protections provided by US laws and regulations. Examples of such letters are included below.

Sample DOJ Letter Regarding Confidentiality of CID Documents

Dear Mr./Ms. Lawyer:

In your letter of [Date] you requested additional assurances of confidentiality beyond those provided in the Civil Investigative Demand ("CID") statute, 15 U.S.C. §§ 1311-1314, and the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, for documents called for by the CID recently served upon [Company Name].

I cannot promise to notify you in advance if a document [Company Name] provided will be used in a CID deposition of a witness not affiliated with your client. The Division is authorized to use CID material without the consent of the producing party in "connection with the taking of oral testimony." It is, however, rare that we disclose a document in such a manner. Although it is occasionally useful to use CID materials in a deposition of a third party where the third party has already seen the materials, or is at least generally aware of their substance, it is rarely necessary to use CID materials in connection with a deposition of a third party that is unfamiliar with the contents of those materials. Moreover, the Division has an interest in seeing that competitors do not receive access to each other's confidential information, is sensitive to confidentiality concerns, and does not unnecessarily reveal such information.

You have also represented that [Company Name] considers certain information requested in the CID to be proprietary and confidential. It is the Department's policy to treat confidential business information that is produced as set forth below. "Confidential business information" means trade secrets or other commercial or financial information (a) in which (the company) has a proprietary interest, and (b) which (the company) in good faith designates as commercially or financially sensitive.

It is the Department's policy not to use confidential business information in complaints and accompanying court papers unnecessarily. The Department, however, cannot provide assurance that confidential business information will not be used in such papers, and cannot assure [Company Name] of advance notification of the filing of a complaint or its contents.

If a complaint is filed, it is the Department's policy to notify [Company Name] as soon as is reasonably practicable should it become necessary to use confidential business information for the purpose of seeking preliminary relief. It is also the Department's policy to file under seal any confidential business information used for such purpose, advise the court that [Company Name] has designated the information as confidential, and make reasonable efforts to limit disclosure of the information to

the court and outside counsel for the other parties until [Company Name] has had a reasonable opportunity to appear and seek protection for the information.

It is the Department's further policy to notify [Company Name] at the close of the investigation and give it the option of requesting that original documents, if produced, be returned. If copies were produced they will be destroyed unless: (1) they are exhibits; (2) they are relevant to a current or actively contemplated Department investigation or to a pending Freedom of Information Act request; (3) a formal request has been made by a state attorney general to inspect and copy them pursuant to Section 4F of the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 15; or, (4) they will be of substantial assistance in the Department's continuing law enforcement responsibilities.

Sincerely,

Pat Attorney

Sample DOJ Letter Regarding Confidentiality of Voluntarily Produced Documents

Dear Mr./Ms. Lawyer:

You have requested a statement regarding the United States Department of Justice's ("Department") treatment of sensitive information which it may receive from your client in response to our request for the voluntary production of information, including information provided in an interview and/or memorialized in voluntarily produced documents. It is in the Department's interest to protect the confidentiality of sensitive information provided by its sources, and to prevent competitively sensitive information from being shared among competitors. Accordingly, sensitive information will only be used by the Department for a legitimate law enforcement purpose, and it is the Department's policy not to disclose such information unless it is required by law or necessary to further a legitimate law enforcement purpose. In the Department's experience, the need to disclose sensitive material occurs rarely.

Sensitive information includes "confidential business information" which means trade secrets or other commercial or financial information (a) in which the company has a proprietary interest or which the company received from another entity under an obligation to maintain the confidentiality of such information, and (b) which the company has in good faith designated as confidential. The Department's policy with regard to confidential business information is to treat it, for ten years, in the manner set forth in this letter.

In the event of a request by a third party for disclosure of confidential business information under the Freedom of Information Act, the Department will act in accordance with its stated policy see 28 CFR § 16.8, a copy of which is enclosed) and will assert all applicable exemptions from disclosure, including those exemptions set forth in 5 U.S.C. §§ 552(b)(4), (b)(7)(A) and (b)(7)(D) (to the extent applicable). See also Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 880 (D.C. Cir.1992) (voluntarily submitted financial or commercial information not customarily released to the public is protected), cert denied, 507 U.S. 984 (1993).

In the event of a request by a third party for disclosure of any appropriately designated confidential business information under any provision of law other than the Freedom of Information Act, it is the Department's policy to assert all applicable exemptions from disclosure permitted by law. In addition, the Department's policy is to use its best efforts to provide the company such notice as is practicable prior to disclosure of any confidential business information to a third party who requests it under any provision of law other than the Freedom of Information Act.

Although it is the Department's policy not unnecessarily to use sensitive information in complaints or court papers accompanying a complaint, which are publicly available documents, the Department cannot provide an absolute assurance that sensitive information will not be included in such documents. If a complaint is filed, it is the Department's policy to notify your client as soon as is reasonably practicable of any decision by the Department to use confidential

business information for the purpose of seeking preliminary relief. Our policy is generally to file under seal any confidential business information used for such purpose and advise the court that your client has designated the information as confidential. Moreover it is the Department's policy to make reasonable efforts to limit disclosure of the information to the court and outside counsel for the other parties to the litigation until your client has had a reasonable opportunity to appear before the court and, if your client appears, until the court has ruled on its application. To that end, it is the Department's policy not to oppose a court appearance by your client for the purpose of seeking protection for the confidential business information used, or to be used, during the preliminary relief proceedings.

If confidential business information becomes the subject of discovery in any litigation to which the Department is a party, it is the Department's policy to use its best efforts to assure that a protective order applicable to the information is entered in the litigation. In addition, our policy is to not voluntarily produce the confidential business information until your client has had a reasonable opportunity to review and comment on the protective order and to apply to the court for further protection. It is the Department's policy not to oppose a court appearance by your client for this purpose.

Please do not hesitate to call me at (zzz) xxx-yyyy if you have any questions.

Sincerely yours,

Pat Attorney