New Antitrust Confidentiality Waiver: Proceed With Caution

*Law360, New York (October 25, 2013, 4:33 PM ET)* -- In response to the steady expansion of global civil investigations, the Federal Trade Commission and U.S. Department of Justice recently signaled an increasing willingness to disclose confidential information across borders to other enforcement agencies. To facilitate more open information sharing with international agencies, the FTC and DOJ jointly released a revised model confidentiality waiver last month for use in merger and nonmerger civil investigations that involve concurrent review by U.S. antitrust enforcers and non-U.S. competition authorities. Accompanying agency guidance was also released.

When information is provided to U.S. antitrust agencies during a civil investigation, that information is generally safeguarded from third parties by strict confidentiality statutes (information disclosed in response to a criminal investigation is subject to stricter confidentiality protections, which are not affected by the model waiver). Yet when a matter raises common competitive issues in multiple jurisdictions, investigating agencies increasingly request the ability to cooperate with their international counterparts to discuss relevant issues and to expedite the investigatory process.

The model waiver was released as a standard agreement that provides the terms by which a party under investigation partially waives the protection of U.S. confidentiality statutes so that information may be shared with non-U.S. competition authorities. Most significantly, the waiver includes provisions on how the agencies will treat confidential information, including privileged information.

**Multijurisdictional Cooperation**

Since 1990, the number of international competition authorities has multiplied from a handful to nearly 130 agencies. At the same time, there has been a substantial increase in multijurisdictional investigations of merger, cartel and unilateral conduct matters. A 2013 OECD/ICN Survey on International Competition Enforcement Cooperation indicated an estimated 35 percent increase in multijurisdictional cooperation in merger reviews over the last five years. In 2011, U.S. antitrust agencies substantively cooperated with non-U.S. competition authorities on 37 merger investigations.

Cooperation between the U.S. and non-U.S. authorities frequently occurs under formal bilateral and multilateral agreements. While confidential information cannot be divulged absent a waiver, agencies are not prohibited from discussing public information and some nonpublic information, including the existence of an open investigation and staff thoughts on market definition, competitive effects and remedies. Although some cooperation may occur without a confidentiality waiver, the DOJ and FTC believe that "a waiver enables agencies to make more informed, consistent decisions and coordinate more effectively, often expediting review."

In fact, the agencies' release of the model waiver may be a reflection of what has become the
cooperative landscape in multijurisdictional antitrust investigations. For example, during a recent panel discussion, Rachel Brandenburger, former special adviser at the Federal Trade Commission, described that the agency was moving toward "pick-up-the-phone" relationships with an increasing number of agencies around the world. According to the 2012 U.S. submission on international cooperation to the Organization for Economic Cooperation and Development, numerous significant merger investigations which occurred in 2010 and 2011 involved a confidentiality waiver.

Despite this momentum, a party under investigation should carefully consider whether to grant a waiver of confidentiality. While the U.S. agencies have provided that entry into the waiver is optional and a lack of waiver will not prejudice the agencies against the party under investigation, guidance also notes that a lack of waiver "may impact an investigation's timing and/or increase the risk of inconsistent outcomes."

**Overview of the Model Waiver of Confidentiality**

The model waiver provides that the party granting the waiver only does so with respect to the non-U.S. competition authorities that are specifically identified. The model waiver also specifically describes how information is safeguarded in the following three situations:

- When a U.S. antitrust agency discloses confidential information to a non-U.S. authority: When a U.S. agency discloses confidential information to a non-U.S. competition authority, the non-U.S. authority will maintain the confidentiality of the information consistent with the jurisdictional laws of the non-U.S. authority.

- When a U.S. antitrust agency receives confidential information from a non-U.S. agency: The U.S. agency will treat information received as if the U.S. agency received it directly from the party granting the waiver and will protect this information under the provided confidentiality statutes. If the agency receives a request for disclosure under the Freedom of Information Act, the agency will assert all applicable exemptions and will notify the party in writing if a requester files suit to obtain the confidential information.

- When disclosed information is privileged: U.S. agencies will not seek privileged information from a non-U.S. competition authority. If the U.S. agency receives information that is privileged, the agency will treat the information as inadvertently produced. The party under investigation should identify to the non-U.S. competition authority information that may be subject to U.S. legal privilege.

**Benefit to Entities**

The waivers do not just benefit antitrust and competition enforcement agencies. There are also some benefits for entities who agree to the waiver. A frequently recurring problem in cross-border investigations has been the treatment of privileged information. The United States has an expansive view of attorney-client privilege, which protects many materials that would otherwise be subject to disclosure in jurisdictions outside of the United States. It was often the case that non-U.S. authorities would share information protected by U.S. legal privilege with U.S. authorities, which created uncertainty about the preservation of privilege in the United States. Under the model waiver, however, U.S. agencies will destroy any information received from a non-U.S. competition authority that would be protected by U.S. legal privilege, thereby increasing the certainty that the privilege has been preserved.
A waiver may also expedite the investigation process, as the party under investigation may avoid having the same discussions and producing the same information to multiple investigative agencies. Furthermore, an entity may benefit when agencies have access to an increased quantity and quality of information, including other agencies' analytical insights. Ideally, this flow of information will result in more efficient remedies.

**Key Considerations Prior to Granting a Waiver**

Still a party under investigation should nonetheless proceed with caution. The model waiver only outlines the U.S. statutory safeguards for confidential information. A party under investigation must also determine whether the confidentiality protections of the non-U.S. jurisdiction cover the information that will be provided. Waivers to non-U.S. jurisdictions are generally provided by parties under investigation at the same time as the waivers are provided to the U.S. agencies.

Furthermore, a party under investigation should analyze the substantive law of the non-U.S. jurisdiction. If the non-U.S. jurisdiction has a broader scope of liability than that of the U.S. law, it may not be to the party's benefit to waive confidentiality.

Parties may also consider scope of information they must provide to the U.S. agency. For example, if a party grants a waiver, a deposition taken by a U.S. agency would be shared information, despite the fact that the non-U.S. authority would not otherwise receive this information. Finally, parties should seek counsel to determine whether the model confidentiality waiver should be modified to limit the scope of waiver or the duration of the waiver.

--By Eliot Turner, Layne E. Kruse and Pamela Jones Harbour, Norton Rose Fulbright

*Eliot Turner is a senior associate in Norton Rose Fulbright’s Houston office. Layne Kruse is head of the firm’s U.S. antitrust and competition practice in Houston. Pamela Jones Harbour is a partner in the firm’s Washington, D.C., and New York offices.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

All Content © 2003-2013, Portfolio Media, Inc.