

The effectiveness and integrity of mediation and other ADR processes is largely dependent on the credibility and trustworthiness of neutrals. In order to safeguard the integrity of ADR programs and to eliminate the potential for eroding confidence in future ADR proceedings, neutrals should be allowed to rely on established codes of ethics and confidentiality standards to support a decision not to disclose. Citation: 5 U.S.C. 574(a) & (e).

*Example:* A neutral receives a subpoena requesting disclosure of confidential communications from a dispute resolution process. The parties do not object to the disclosure and have not offered to defend the neutral against the subpoena. The neutral may still, at his or her own expense, resist the subpoena if the neutral objects to the disclosure.

#### *Issues Related to the Freedom of Information Act (FOIA)*

23. What dispute resolution communications are protected from disclosure under FOIA?

Dispute resolution communications between a neutral and a party that may not be disclosed under the ADR Act are specifically exempted from disclosure under section 552(b)(3) of the Freedom of Information Act. This could include communications that are generated by a neutral and provided to all parties, such as an Early Neutral Evaluation. In addition, other FOIA exemptions may apply.

Since only Federal records are subject to FOIA, dispute resolution communications that are not Federal records are not subject to the disclosure requirements of FOIA. Therefore, this subsection would not apply to oral dispute resolution communications because they are not records. Citation: 5 U.S.C. 574(j).

*Example:* During mediation of a contract claim, the parties (a contractor and the agency) request a neutral to provide an evaluation of the merits of their respective cases. The neutral agrees, reviews the evidence, and presents each party separately with a written assessment of their respective cases. The contractor submits a FOIA request to obtain a copy of the neutral's written evaluation of the agency's case. The FOIA request can be denied under section 574(j) because the document is a dispute resolution communication generated by a neutral and may not be disclosed under the ADR Act.

24. If parties agree to alternative confidentiality procedures, are dispute resolution communications subject to FOIA?

Parties may agree to confidentiality procedures that differ from those otherwise provided in the Act. Parties should be aware, however, that the

FOIA exemption might not apply to all the communications that are protected under their agreement to use alternative confidentiality procedures.

If the alternative confidentiality procedures agreed to by the parties provide for less disclosure than the ADR Act permits, those dispute resolution communications that would not be protected under the ADR Act are also not protected by the FOIA exemption in section 574(j). Parties cannot contract for more FOIA protection than the ADR Act provides. Citation: 5 U.S.C. 574(d) & (j).

*Example:* Parties enter into a confidentiality agreement as part of an agreement to mediate. The parties agree to keep statements made and documents presented during joint session confidential. Documents that are made available by the parties during joint session are not protected by the FOIA exemption in 574(j), even though they are provided by contract to be kept confidential.

#### *Other Considerations*

25. Do the ADR Act's confidentiality provisions apply differently to government and private sector neutrals?

No. There are, however, certain circumstances in which the choice of neutral may affect disclosure related to ADR processes. For example, because a private neutral's records are likely not deemed "agency records," they likely will not be subject to FOIA or to record retention requirements. Additionally, the IG Act authorizes an IG to subpoena a private neutral, but not a government neutral. Finally, a private neutral is not subject to some of the statutory provisions that create a tension with the ADR Act's non-disclosure requirements (See Question 15).

#### **IV. Guidance on Confidentiality Statements for Use By Neutrals**

Neutrals should make introductory remarks at the outset of a dispute resolution process explaining applicable ADR Act confidentiality provisions. Which provisions apply will vary, depending on such things as the type of ADR used, the number of parties participating, and the issues involved. In addition, agencies may choose to highlight or supplement ADR Act provisions to meet specific programmatic needs. We provide guidelines below to assist neutrals in crafting appropriate introductory confidentiality statements.

An introductory confidentiality statement should address the following topics:

(1) Application of the ADR Act to administrative ADR processes;

(2) The intent of the ADR Act to provide confidentiality assurances for communications between the parties and the neutral occurring during an ADR proceedings;

(3) Confidentiality between and among parties, consistent with this Guidance;

(4) Exceptions to the Act's nondisclosure provisions pertinent to the particular dispute;

(5) Availability of alternative confidentiality protections through written agreement and applicable limitations; and

(6) Authorities other than the ADR Act that may also apply.

*Example:* The confidentiality provisions of the Administrative Dispute Resolution Act apply to this mediation. The Act focuses primarily on protecting private communications between parties and the mediator. Generally speaking, if you tell me something during this process, I will keep it confidential. The same is true for written documents you prepare for this process and give only to me.

There are exceptions to the confidentiality provisions in the Act. For example, statements you make with all the other parties in the room or documents you provide to them are not confidential. Also, in unusual circumstances, a judge can order disclosure of information that would prevent a manifest injustice, help establish a violation of law, or prevent harm to public health and safety.

You can agree to more confidentiality if you want to. For example, you can agree to keep statements you make or documents you share with the other parties confidential. If you want to do this, everyone will need to agree in writing. Outside parties may, however, still have access to statements or documents as provided by law.

*(This is only an example of one possible confidentiality statement. It is important that this statement be tailored to fit the needs of each particular case.)*

[FR Doc. 00-33247 Filed 12-28-00; 8:45 am]  
BILLING CODE 4410-AR-U

## **DEPARTMENT OF JUSTICE**

### **Antitrust Division**

#### **Notice Pursuant to the National Cooperative Research and Production Act of 1993—Southwest Research Institute ("SWRI"): Clean Diesel III**

Notice is hereby given that, on November 2, 2000, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Southwest Research Institute ("SwRI") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its

membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Equilon Enterprises LLC, Houston, TX has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and SwRI intends to file additional written notification disclosing all changes in membership.

On January 12, 2000, SwRI filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 26, 2000 (65 FR 39429).

The last notification was filed with the Department on June 12, 2000. A notice has not yet been published in the **Federal Register**.

**Constance K. Robinson,**

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[FR Doc. 00-33251 Filed 12-28-00; 8:45 am]

BILLING CODE 4410-11-M

## DEPARTMENT OF JUSTICE

### Antitrust Division

#### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Wireless Application Protocol Forum, LTD.

Notice is hereby given that, on October 3, 2000, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Wireless Application Protocol Forum, Ltd. ("WAP") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending

the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ActiveSky, Inc., Redwood, CA; Adam Comsof Ltd., Bombay, India; Adobe Systems Inc., San Jose, CA; Airwallet, Redwood City, CA; Alerts.com, Raleigh, NC; Apar Infotech Ltd., Maidenhead, England, United Kingdom; AsiaInfo Holdings, Inc., Santa Clara, CA; Aspective Limited, Middlesex, England, United Kingdom; Axel Digital Group Oyj, Helsinki, Finland; Belgacom Mobile, Brussels, Belgium; Bosch, Stuttgart, Germany; Cambridge Technology Partners, Inc., Cambridge, MA; CellStar, Carrollton, TX; Centerpost Corp., Chicago, IL; Clarkston Potomac Group, Durham, NC; Condat A/S, Aalborg, Denmark; CR2 Limited, Dublin, Ireland; CYBIRD Co., Ltd., Tokyo, Japan; Dimon Software, Reykjavik, Iceland; Documentum, Inc., Pleasanton, CA; eFrenzy, Inc., San Francisco, CA; Electronic Business Research Center, Hsinchu, Taiwan; Enition Incorporated, Santa Clara, CA; Europay International, Waterloo, Belgium; EZOS, Braine-L'Alleud, Belgium; FDTI, Lisboa, Portugal; Feelingk.Co., Ltd., Seoul, Republic of Korea; FolloWAP, Inc., New York, NY; Hello Asia, Redwood City, CA; HiddenMind Technology, Cary, NC; Hii Co., Ltd., Fu Shin Ten, Taipei County, Taiwan; hotpalm.com, Atlanta, GA; iDini Corporation, San Jose, CA; Impronta Comunicaciones, S.L., Madrid, Spain; Informa Telecoms Group, London, England, United Kingdom; Informal Ltd, Leominster, Herefordshire, England, United Kingdom; Isovia, Inc., Boston, MA; Jumbuck Corporation Ltd., Melbourne, Victoria, Australia; Kyocera Corporation, Kanagawa, Japan; m-iQ Ltd., London, England, United Kingdom; MediaSolv.com, Inc., San Jose, CA; Microband, Inc., New York, NY; MICROPOLE, Nanterre, France; Mobileaware Limited, Dublin, Ireland; MobileQ, Inc., Toronto, Ontario,

Canada; Mobileum, Inc., Pleasanton, CA; nCipher, Inc., Woburn, MA; Net Manage, Inc., Cupertino, CA; ome internet communication services AG, Vienna, Austria; Onscan, Inc., Fremont, CA; OverNet Data, London, England, United Kingdom; Paradigm4, Inc., Bothell, WA; PhoneDo Networks Inc., Haifa Bay, Israel; Red-M Limited, Wexham Slough Bucks, England, United Kingdom; ReefEdge, Inc., Fort Lee, NJ; ResQNet.com, Inc., New York, NY; SAS Institute Inc., Cary, NY; SeraNova, Inc., Rosemont, IL; Sierra Wireless, Richmond, British Columbia, Canada; Societe Generale, Paris La Defense, France; Spyryus, Inc., Santa Clara, CA; SurfControl plc, Congleton, Cheshire, England, United Kingdom; SurfGold.com, Singapore, SINGAPORE; ThatWEB.com Private Limited, Singapore, Singapore; UBICCO, Paris, France; Webtop DZ, Cambridge, England, United Kingdom; White.Cell, Inc., Rosh-Haayin, Israel; XYPoint Corporation, Seattle, WA; YesMobile Holdings Co., Ltd., Hong Kong, Hong Kong-China; and ZION Limited, Tokyo, Japan have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and WAP intends to file additional written notifications disclosing all changes in membership.

On March 18, 1998, WAP filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 31, 1998 (63 FR 72333).

The last notification was filed with the Department on April 3, 2000. A notice for this filing has not yet been published in the **Federal Register**.

**Constance K. Robinson,**

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## JOINT VENTURE WORKSHEET

[Supplemental Filings Only]

A. Name of venture: Wireless Application Protocol Forum, Ltd; Nature of notification: supplemental; Concise statement of purpose (if purpose has changed): Same as before—no changes.

B. For ventures involving research and development only:

Identity of parties added to venture:

1. ActiveSky, Inc., Redwood, CA
2. Adam Comsof Ltd., Bombay, INDIA
3. Adobe Systems Inc., San Jose, CA
4. Airwallet, Redwood City, CA
5. Alerts.com, Raleigh, NC
6. Apar Infotech Ltd., Maidenhead, England, UNITED KINGDOM
7. AsiaInfo Holdings, Inc., Santa Clara, CA
8. Aspective Limited, Middlesex, England, UNITED KINGDOM
9. Axel Digital Group Oyj, Helsinki, FINLAND
10. Belgacom Mobile, Brussels, BELGIUM

Identity of parties dropped from venture: