VISA U.S.A. Inc.

Comment on Issues Relating to Joint Venture Project

Joint Ventures: Putting a Principle to Practice

July 31, 1997

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Introduction

On June 24, 1997, Visa Executive Vice-President and General Counsel, Paul Allen, described to the Commission Visa's long and expensive antitrust litigation history. That history spans nearly three decades and includes a trio of important circuit court opinions, Worthen 1, Nabanco2 and Dean Witter 3. As Mr. Allen explained, Visa's experience reflects in the jurisprudence a deep-seated and inexplicable distrust of joint ventures rooted in the hoary myth that cooperation between competitive entities necessarily leads to agreements to fix prices or reduce output.
The last twenty years, due in no small part to Visa's own effort and expense, has seen some of that hostility swept away or at least ameliorated. Today, as long as a joint venture involves some meaningful integration of resources or productive capacity, it will not be struck down per se. Instead, the rule of reason will apply. Although that is a welcome change, it carries with it a high level of uncertainty. The rule of reason is opaque -- a "Brandeisian swamp" in which

everything is relevant but nothing dispositive. Coupled, as it often is, with an excursion into "less restrictive alternatives", it provides little certainty to those who must counsel joint ventures.

Antitrust analysis of joint ventures is an endlessly iterative process. Joint ventures operate by rules rather than internal directives, and each rule is subject to challenge as an "agreement" for Sherman Act Section One purposes. New plaintiffs and new issues lurk around every corner. Visa's own experience is instructive. Visa has prompted antitrust litigation by, among other things, (a) refusing to share Visa property with others; (b) fixing an internal transaction fee to balance the incentives of "issuing" and "acquiring" members;4 (c) preventing a member from using its property to promote the brand of its archrival; and (d) instructing acquiring members to terminate merchants which were defrauding Visa payment cardholders.

Although Visa has been consistently successful in litigation, the uncertainty and the expense of antitrust litigation make the competitive playing field uneven. Single firms make similar decisions all the time. No one sues Visa's single firm brand competitors, American Express or Morgan Stanley, Dean Witter Discover ("Discover"), when they refuse to share their property with their competitors, adjust the price they charge merchants for using their systems, or terminate merchants for defrauding their cardholders. And no one sues McDonald's when it tells its franchisees not to promote the Whopper. Put simply, competing firms confront different risks solely because of their organizational forms.5

As Visa explained at the June 24th hearing, the problem is one of approach. Antitrust analysis of joint ventures tends to elevate form over substance. It too often gets bogged down on lining up various factors: market power, integration, resulting efficiencies, ancillary collateral agreements and the like. Antitrust analysis of joint ventures fixates on the fact of the joint venture, ignoring or saving for last what the joint venture does and how it does it.

Our purpose here, however, is not to reiterate Visa's prior oral testimony or to strip our sleeves and show our scars. Rather, we intend to translate Visa's concerns into a more coherent approach to joint ventures. This approach could serve as the basis for a statement from the Commission about the proper antitrust analysis of joint ventures or, better yet, a set of guidelines laying out in detail how joint ventures ought to be treated. Visa's experience teaches that absent definitive guidance from the Commission and the Antitrust Division of the Department of Justice (the "Agencies"), opportunistic litigation is likely.

We submit that the Agencies should adopt an approach to joint ventures that is consistent with the principles which support modern antitrust law. In other words, we suggest that the Agencies ask of a joint venture, as they ask of all others, will it or its behavior harm consumer welfare? And, if so, will it create efficiencies or offer benefits that make this a price worth paying?6

Basic Principles

At this point, almost everyone agrees that maximization of consumer welfare is the central aim of antitrust law.7 Almost every antitrust analysis begins with the question whether the challenged practice raises prices, restricts output or inhibits innovation.8 Why should analysis of joint ventures be any different?

Visa recognizes that antitrust suspicion of competitor collaboration has its place. But an ill defined hostility to horizontal price fixing should not dominate analysis of joint ventures. A product-creating joint venture -- as a form of industrial organization -- no more threatens consumer welfare than do corporations, partnerships, limited liability companies (LLCs) or sole-proprietorships that create products. In fact, very little really distinguishes a Visa-like joint venture from more traditional firms. What we describe as "firms" are collections of independent economic actors bound together by overlapping contracts.9 A joint venture may simply allow firms a more efficient way to overlap or integrate their operations and even create something new.10 Product-creating joint ventures should be no more favored or disfavored than any other form of industrial organization used to create a new product.

In a perfect world, antitrust law would distinguish actions that threaten to diminish consumer welfare from those that do not and condemn only the former. Unfortunately, the doctrines that govern analysis of joint ventures are far from perfect. Although recent cases from the lower courts provide some hope,11 the Supreme Court has followed anything but a clear path. One line of widely criticized, but still cited, cases condemns joint ventures for excluding others from their ventures.12 Another takes a "quick look" at the degree of financial integration among the participants to determine whether the venture is simply a disguised cartel.13 And yet another passes judgment after a free wheeling analysis of the venture's potential efficiencies and anti-competitive effects.14

Not surprisingly, given this range of possibilities, the Agencies have not adopted a clear position on joint ventures and have changed their collective minds from time to time. The Antitrust Division's former International Guidelines came close to adopting a consumer welfare approach to joint ventures, looking first at a venture's anti-competitive effects and then analyzing whether its resulting efficiencies outweighed those anti-competitive effects.15 More recently, in the joint Health Care Guidelines, the Agencies advocated a formalistic approach suggesting that physician joint-ventures will be challenged unless they involve some degree of financial or operation integration (i.e., follow an approved form).16 Most recently, Assistant Attorney General Joel Klein floated a "guilty until proven innocent approach" excepting from condemnation only those joint ventures that demonstrate actual efficiencies.17

The problem with these approaches to joint ventures, particularly the latter two, is that they do not ask the right questions: does this joint venture appear likely to harm consumer welfare in some relevant market? And, if so, is it likely to create efficiencies or offer other benefits that make this a price worth paying? Like the case law, the Agencies' current approaches to joint ventures reflect both long-discredited populist norms and imperfectly articulated desires to promote consumer welfare. With this project, the Commission can sweep away this lingering hostility to joint ventures.

A Brief Discussion Of Joint Ventures.

Joint ventures generally can do at least three positive things: they can provide their participants with some input, help them dispose of some output, or provide an efficient device for sharing large risks. 18 Different joint ventures offer their participants advantages not found in more common organizational forms and suffer from some rather unique structural problems.

Although no one can quite agree how to define a "joint venture",19 there is a general agreement about the efficiencies and benefits they can offer. An exhaustive list of potential benefits would be exceedingly long, but a somewhat condensed list gives a sense of their utility:

Economies of Scale or Scope. Joint ventures can enable firms to achieve economies of scale in production, marketing and research and development.20 Joint ventures among firms pursuing similar research agendas can help participants minimize or eliminate duplication. They can also spread the risk inherent in the construction of large-scale production facilities, enabling smaller firms to capture economies of scale normally reserved for their larger and more established rivals.

Reduction of Transaction Costs. Joint ventures can also help firms reduce or eliminate transactions costs that might otherwise block or inhibit certain transactions.21 To take just one example, it is extremely expensive for the holder of one copyright for one musical composition to negotiate individually with the many people who might want to perform the work in public. It is also extremely expensive for one copyright holder to police the public performance of the work. But if a copyright can be neither licensed nor policed, it is useless. Copyright holders can overcome these transaction costs by licensing their copyrights to some third party. If enough copyright holders license their copyrights to the same entity, that entity will have reason both to license those copyrights to performers and to police the public performances of those compositions.

Utilization of Complementary Resources. A related benefit of joint ventures is the use of complementary resources.22 Firms, like countries, possess comparative advantages and can benefit from partially combining their resources through a collaboration. A firm with manufacturing expertise, for example, might share its expertise with a firm possessing marketing expertise to manufacture and bring a product to market.23 By combining such diverse resources as patents, know-how, production facilities and even human expertise and ingenuity, a joint venture can create a whole greater than the sum of its parts.

Overcome "Hold Out" Problems. Joint ventures can also solve "hold out" problems.24 In some fields, particularly those that involve cutting edge technology, a new product will infringe on the patents of many different firms. The producer of such a product must get permission from each patent holder to produce that product. Unfortunately, each patent holder then has the incentive to "hold out" for the biggest share of the producer's expected surplus.25 This problem impedes the development of products which make use of complementary innovations. Patent holders can overcome this holdout problem by licensing their complementary patents to a joint venture which can in turn license the entire package of complementary patents to would-be producers.26
Alleviate "Free Rider" Problems. Joint ventures can also solve "free rider" problems.27 The fruits of some labors cannot be perfectly captured. Trade secrets, for example, are often leaked, and patents can be invented around.28 Firms often refrain from research and development for fear that rivals might appropriate its benefits. Joint ventures can help solve this problem by bringing together the parties interested in a particular innovation and allowing them to share the costs of making it a reality.

Pure Risk Sharing. Joint ventures can also enable participants to reduce large risks to commercially acceptable levels: this is seen routinely in insurance and lending consortia, underwriting syndicates, and exploration joint ventures.29 All participants are doing the same thing, but at a lower level of risk in relation to any particular project. A consumer brand-creating joint venture (such as Visa) may be another example: it offers its members a chance to spread the costs of developing and launching a new branded product over a larger group rather than having it confined to a single enterprise.

Visa perfectly illustrates many of these benefits. Visa maintains a payment system network, promotes the brand name that identifies that payment system to the public, guarantees payment for properly authorized transactions, and settles all transactions daily. Like many networks, Visa's payment system benefits from network externalities, meaning that as the network grows (by adding either new merchants or cardholders) it generally becomes more useful for each member. Visa writes and enforces the rules that allow this system to function. There are thousands of Visa members that issue payment cards, which in turn are accepted at millions of merchants linked to the Visa network through thousands of acquiring Visa members. In this environment, the transactions that clear through the Visa payment system would never happen without Visa. The participating banks could never negotiate the agreements that enable the system to function on either a bank-by-bank or transaction-by-transaction basis. Visa also enables its members to combine their banking and marketing skills with the Visa payment system and brand. By doing all of this, Visa enables the smallest bank in Des Moines, Iowa or even a $5 million credit union to compete for any particular customer head-to-head with Citibank, First Chicago and Bank of America -- to say nothing of American Express and Discover. Because of Visa, payment cardholders of those institutions can use their Visa payment cards anywhere the Visa trademarks are displayed, whether around the corner or half-way around the world.

The gains from joint ventures do not come without some costs. Joint ventures are imperfect solutions to all of these problems because they suffer from two major structural flaws:30
Principal-Agent Problems. Joint ventures imperfectly align the incentives of their participants. Participants in a joint venture bear only a portion of the costs of the joint venture and gain only a portion of its benefits. As a result, participants have an incentive both to refrain from doing things that would benefit the joint venture as a whole and to put the joint venture's property to uses that benefit themselves but harm the joint venture as a whole. This is another version of the free-rider problem.31

Coordination Problems. Because participants retain their independent identities, joint ventures are also inherently more cumbersome than single firms.32 Decisions must be reached through negotiation and consensus rather than edict. Moreover, joint ventures must often coordinate the interaction of their participants.

Visa illustrates these flaws of the joint venture form, just as it illustrates the benefits. No episode better illustrates these problems than Visa's experience earlier this year with a card program announced by a Visa owner-member in partnership with American Express, the so-called "Rewards Accelerator" program. That program would have used the Visa marks to promote the American Express brand. Under its terms, Visa cardholders would have earned

American Express Membership Rewards points for using their Visa payment cards. Those points would have been redeemable only through American Express. The Rewards Accelerator program might have seemed like a good idea for the member, but it posed an obvious threat to the Visa system as whole by seriously undermining its brand identity. To add insult to injury, when Visa tried to put a halt to the program, the member responded with an antitrust suit, based on a boycott theory.33 In the end, the suit failed, albeit after millions of dollars of expense.

Principles That Should Guide Antitrust Enforcement.
That a joint venture could injure consumer welfare does not mean that it will, nor does it mean that antitrust policy should be driven by the possibility that it might. By effectively policing joint ventures under rational standards, the Agencies can ensure that the average joint venture neither creates nor facilitates anti-competitive conduct.

The Agencies, however, should be concerned about over-deterrence: effective enforcement does not mean putting a halt to joint ventures. As noted above, joint ventures can serve valuable social ends, improve efficiency and increase competition. To be considered effective, as then-Professor Easterbrook explained more than a decade ago, antitrust enforcement must minimize "the total costs of (1) anti-competitive practices that escape condemnation; (2) competitive practices that are condemned or deterred; and (3) the system itself."34 The first and second of these three costs are self-explanatory, the third is not.

To minimize the costs of practices deterred, the Agencies should articulate enforcement policies that contain practical devices to distinguish (a) joint ventures likely to harm consumer welfare from (b) joint ventures likely to enhance it. Uncertainty about whether a particular kind of joint venture will attract the Agencies' (and the antitrust courts') attention will, at the margin, lead firms away from creating what could be a more useful and productive joint venture, thus unambiguously reducing consumer welfare. 35 Rather, the Agencies should build upon the principle announced in the Health Care Guidelines and strive not to place product-creating joint ventures at a competitive disadvantage. 36 Consumers, managers and owners, not the Agencies (or the courts), should decide which product -- and hence which corporate form -- best fits a particular market.

Finally, effective enforcement requires that the Agencies minimize direct enforcement costs for (i) themselves and (ii) the joint venture participants.37 For that reason, the Agencies should adopt guidelines that include a series of filters to identity, at the lowest possible total cost, (i) joint ventures so unlikely to harm consumer welfare that they should be treated presumptively lawful under the rule of reason and (ii) particular joint venture situations that can be resolved clearly with a precise set of joint venture rules.38 Only after applying these filters should the Agencies invest their resources in full blown rule of reason analysis.

A Consumer Welfare Approach To Joint ventures.
Review of joint ventures should take place in a series of steps. Before taking the first step, however, the Agencies should first filter out cartels and horizontal price fixes hiding behind a "joint venture" label. Notwithstanding Professor Gelhorn's insightful criticism,39 the only practicable means of sifting out cartels and naked price fixes seems to be the partial integration approach. The Agencies should ask, as do the Courts, whether the participants plan to "pool

their capital and share the risks of loss as well as the opportunities for profit."40 If not, then the joint venture that sets prices or restricts output for its members should be struck down without further to do. 41 Setting naked cartels and price-fixes aside, the Agencies should analyze all other joint ventures under a structured rule of reason based upon the principle of consumer welfare.

Visa's four-step approach would have the Agencies do exactly that. In Step One, the Agencies would build a market share safe-harbor to shelter from review and frivolous litigation joint ventures that are very unlikely to harm consumer welfare. In Step Two, the Agencies would identify precisely the threat to consumer welfare posed by the joint venture. In Step Three, the Agencies would examine the structure of the joint venture to see whether the collaborators have eliminated this threat. In Step Four, which the Agencies would reach only if there were some lingering concerns about harm to consumer welfare from the joint venture itself or from some agreement between the collaborators ancillary to the joint venture, the Agencies would ask the collaborators to justify their proposed joint venture and/or their ancillary agreements. Visa would hope that, by following such an approach, the Agencies would encourage the courts to adopt a more systematic approach to the same issues in the many private joint venture cases which litter the landscape.

Step One. Review of joint ventures should include some kind of market share safe-harbor. Absent market power in some relevant market, a joint venture is very unlikely to be able to harm consumer welfare. Although even fifty percent is well below any judicially-accepted standard for inferring monopoly power from market share,42 the thirty percent threshold suggested by Professor Gelhorn seems sensible.43 Unless the aggregation of market shares relevant to the particular case exceeds thirty percent, a joint venture should not be subject to review either as to its creation or its internal rules. In the case of a product-creating joint venture (such as Visa), the relevant market share is the joint venture's product whether offered by the joint venture or its members.

Some assert that "network joint ventures" are somehow special in this regard.44 They are not. That some networks might benefit from network externalities (i.e., have declining or static marginal cost functions) and tend to monopoly does not justify applying monopoly principles to network joint ventures that are not monopolies. In other words, Visa should be treated as what it is: the creator of an important card product which competes against successful products offered by a substantial joint venture (i.e., MasterCard) and at least two major public companies (i.e., American Express and Discover).45

Step Two. Here, the Agencies should identify precisely the risk of harm to consumer welfare posed by the joint venture. The Agencies should keep in mind that neither the existence of a joint venture nor the aggregation of market shares in some relevant market, even at the thirty to fifty percent levels, harms consumer welfare of itself. Harm to consumer welfare can only come from what a joint venture actually does. In the search for harm, therefore, the Agencies should treat a joint venture like a single firm, looking to see how it might affect consumer welfare. 46 Not everything a joint venture does threatens consumer welfare. Like single firms, joint ventures do a great many things that have their effects solely within the organizations themselves.

Product creating joint ventures, for example, design (and re-design) their trademarks, engage in marketing campaigns, allocate costs, and hire lawyers and lobbyists. These decisions, like similar decisions made by single firms every day, simply allow joint ventures to function. They have no meaningful effect on consumer welfare. Such decisions -- whether made by single firms or joint ventures of many thousands of single firms -- do not raise an antitrust conspiracy issue and should receive no scrutiny from the Agencies under Section One of the Sherman Act (or Section 5 of the Federal Trade Commission Act47 on "conspiracy" grounds).

Likewise a joint venture's decision to grant or limit access does not merit special antitrust attention. In the absence of a monopoly, such a decision is extremely unlikely to affect consumer welfare. 48 Over-inclusion becomes a concern only when a joint venture admits so many members that it eliminates much or all of its potential competition in a relevant market.49 Exclusion is an issue only where the joint venture controls access to a downstream market and the current collaborators have used their access to cartelize that downstream market. The existing attempted monopolization and essential facilities doctrines address these issues for single firms and joint ventures alike. The Agencies should prevent a joint venture from taking on a new member only where they would break up a single firm for attempted monopolization and force a joint venture to take on a new member only where they would compel a single firm to share its property with a competitor.

Rather than focus on the mere fact of a joint venture or the rules of access, the Agencies should identify exactly what about a joint venture threatens consumer welfare.50 To define this threat, the Agencies must discern what a joint venture does for its participants, and what it prevents its participants from doing for themselves.51 Different functions raise different issues: a joint venture that controls its participants' output can enable its participants to act as a cartel in the output market, restricting output52 or eliminating price competition53; a joint venture that provides its participants with some input can, by rationing the input, enable its participants to act as a cartel in the downstream market;54 a joint venture that gathers competitively sensitive information from its participants and then distributes that information can facilitate collusion in downstream or unrelated markets;55 and a monopoly joint venture that allows minority vetoes over expansion may facilitate supracompetitive pricing in downstream markets. Only if a potential threat to consumer welfare can be reasonably identified should the Agencies subject a joint venture to further antitrust scrutiny.

These concerns should generally evaporate, however, when the joint venture (i) creates something new and (ii) leaves its members entirely free to compete against one another in offering the joint venture product to the consuming public on whatever terms they choose. Such a product-creating joint venture (e.g., Visa) performs the same essential function as a single firm (e.g., American Express or Discover) except Visa relies on its members to enhance, distribute and price its products while American Express and Discover distribute their products themselves or employ agents to distribute their products for them. Our important and recurring point is that, although any joint venture decision on how to develop and market the product could be regarded as an "agreement" under Section One of the Sherman Act, such a "decision" should not be treated differently than if made by a product-creating single firm. This legal result could be accomplished by holding, as in Copperweld,56 that the "agreement" prohibitions of the Sherman Act do not reach the product creation and management decisions of such a joint venture; or by

saying that they apply only to the internal decisions of a product-creating joint venture when the monopolization (or attempted monopoly) prohibitions of Section Two of the Sherman Act would apply to a product-creating single firm.57

This approach to joint ventures is more streamlined than more traditional approaches.58 Traditionally, once one of the Agencies has identified a joint venture deemed to raise some competitive issues, the Agency has generally required the joint venture to justify all facets of its existence under a broad-ranging factually intensive analysis.59 Conduct that would be accepted under U.S. v. Colgate60 if done by a single firm can draw a broad and intense Section One investigation if done by a joint venture. This traditional approach simply cannot be justified and puts joint ventures at an unacceptable disadvantage as compared to their single firm competitors. Agreements, standing alone, do not raise an antitrust concern. Antitrust cares only about agreements which carry with them a possibility of harming consumer welfare. In short, the task should be first to identify the harm posed by a joint venture and then ask what the joint venture has done to deal with that harm.

Applying this analysis to the joint venture we know best -- namely Visa -- illustrates how it would work in practice. Visa operates as a not for profit membership corporation, made up of thousands of financial institutions. Visa's mission is to enable its participants to compete among themselves and with other branded payment systems. Visa provides its members with an input -- a payment system which clears transactions for payment cards bearing the Visa trademarks. Visa does not restrict competition among its members in issuing the payment cards that make use of the Visa system or in acquiring merchants to accept those cards as payment for goods and services. As virtually every American consumer can attest, Visa's members compete aggressively to issue payment cards, varying interest rates and fees and offering sundry benefits. To make this system work, Visa has adopted thousands upon thousands of rules. These rules govern, among other things, the way numbers appear on the face of cards bearing the Visa trademarks, the codes embedded in the magnetic strip on the back of those same cards, the protocols that verify, authorize and clear transactions though the Visa payment system, the way participants use the Visa trademarks, the payments that participants in the system make to one another, and access to the Visa transaction clearing and settlement system.

Visa's decisions about a great many things (e.g., the protocols that verify, authorize, clear and settle transactions, the way numbers appear on payment cards bearing the Visa trademarks, etc.) have effects almost entirely within the Visa system. They do not injure consumers; they simply provide an efficient, known and uniform basis for competition among the participants in the Visa system. Under the traditional approach to joint ventures, any of these rules might be subject to intensive antitrust inquiry and potential attack. However, when Visa's single firm competitors, American Express and Discover, make identical decisions, they do not appear on anyone's antitrust radar screen. And for good reason: when American Express changes the design of its centurion trademark and Discover alters its internal accounting procedures, the decisions do not meaningfully affect consumer welfare. When Visa makes similar decisions, they, too, should pass without concern.

Nor do Visa's rules prohibiting its product-creating competitors from joining the Visa system raise an antitrust concern. As the Tenth Circuit explained, Visa simply cannot be considered an

essential facility for companies that issue payment cards through proprietary systems.61 Visa, like a single firm in a similar circumstance, should not be forced to share its intellectual property or facilities with anyone.

This does not mean, however, that analysis of Visa should end in Step Two. Although Visa's rules do not restrict the terms on which participants issue payment cards, Visa's rules on such things as interchange fees do influence what its members charge merchants for the privilege of accepting those cards. These rules, like the rules of any input joint venture, might facilitate collusion among the participants. Moreover, Visa does require its participants to give it competitively sensitive information. Such information, if not properly controlled, could facilitate collusion among the participants in entirely unrelated markets. These aspects of the Visa joint venture should be analyzed in Step Three.

Step Three. In this step, the Agencies should examine the structure of the joint venture to see whether it attenuates any threat(s) to consumer welfare identified in Step Two.62 Structural solutions to the competitive threats posed by joint ventures might take many forms. For example, an output joint venture might permit buyers in the output market to by-pass the joint venture and negotiate with individual producers; an input joint venture might disavow any intent to control how its members make use of the input it provides; and both kinds of joint ventures might implement strict controls on the flow of information between themselves and their participants. A joint venture might also adopt certain corporate forms that make the extraction of supra-competitive profits literally impossible at the joint venture level. Only where there can be some debate about whether the steps taken by a joint venture eliminate the threat of harm to consumer welfare should the Agencies move to Step Four and the full blown rule of reason analysis.

Again applying this analysis to Visa illustrates how it would work in practice. Step Two identified two aspects of Visa that merited further analysis: its acquisition of competitively sensitive information and its interchange fee.

An examination of Visa's structure reveals that neither aspect of the Visa system threatens consumer welfare. Although Visa gathers sensitive information from its participants, Visa does not distribute member specific information to other members. Instead, Visa disseminates generalized information that individual participants can use to improve their individual competitive positions.

As for the interchange fee, from the beginning, the Visa board, following the recommendations of outside accounting experts, has set the fee based on cost calculations in order to equilibrate the costs and benefits of the issuing and acquiring sides of the payment card business. As time evolved, in order to encourage merchants to use electronic terminals, Visa has set the fee below calculated costs in many instances. But, whatever the rationale or the level of the fee, interchange simply allows Visa to acknowledge changing market conditions and to take steps to build the system and brand business with due concern for both the issuing and acquiring sides.63 (Visa's single-firm competitors accomplish the same thing by setting merchant discount fees -- of which interchange in the Visa network joint venture is only a part -- and payment card terms.) Visa's structure precludes it or its participants from using interchange to extract supracompetitive

profits from consumers. Because Visa operates on a not for profit basis, the organization itself has no incentive to use the interchange fee to extract supracompetitive profits. Moreover, if by chance Visa did set the fee "improperly high",64 members could not retain any supracompetitive profits because unrestrained competition within the Visa system among both issuers and acquirers means that, in the long run, no member can earn more than a competitive rate of return. Because Visa, the organization, operates as a not for profit (i.e., strives to earn net revenues just sufficient to cover capital adequacy, operating expense and research and development) and allows its members to compete freely, interchange is nothing more than an internal equilibrating device that does not and cannot harm consumer welfare.65

Step Four. Only in this step should the burden fall upon the would-be participants to justify their proposed joint venture and any ancillary agreements (e.g., exclusive dealing provisions, non-compete agreements, etc.)66. Here, the Agencies should employ a variant of the traditional joint venture balancing test, comparing the potential costs of a joint venture or an ancillary agreement with its possible benefits.

This step starts where the others leave off. Before assessing benefits, the Agencies must identify the threat to consumer welfare posed by a joint venture. As in the earlier steps, the Agencies should approach a product-creating joint venture as if it were a single firm and identify what about the joint venture threatens consumer welfare.

The comparison of costs and benefits requires some degree of flexibility. Although the fact of the joint venture is irrelevant to the analysis of the harm posed, it is quite relevant to the assessment of its potential benefits because joint-ventures face problems that single-firms simply do not face. This does not mean that joint-ventures should receive special antitrust treatment, simply that the benefits of any particular rule must be assessed by looking at the effect of the rule on the joint venture.67 This tension makes application of any "one-size fits all approach" to joint ventures -- like the Copperweld solution to the intra-corporate conspiracy problem -- impossible. Each joint venture must be assessed on its facts.

In assessing the benefits of a joint venture, the Agencies should be sensitive to the structural problems inherent in joint ventures. For example, an agreement not to compete, standing alone, raises obvious antitrust issues. But when that agreement is joined to a joint venture and simply prevents the participants from competing with the joint venture, the analysis changes. Such an agreement likely just prevents individual participants from appropriating for themselves the property of the joint venture. Such an agreement should, absent evidence suggesting a grievous impact on consumer welfare, be permitted. More generally, the Agencies should, as Chang et al. suggest,68 temper their scrutiny of joint ventures by keeping in mind the collective decision making, coordination and principle-agent problems which plague them.69

The Agencies should also allow the inquiry in this final stage to range beyond traditional economic "efficiencies". Joint ventures offer a number of benefits, only some of which can be classified as efficiencies. In addition to traditional efficiencies like economies of scale and better utilization of complementary resources, joint ventures solve certain market failures. The Agencies should consider these benefits as well.

As Professor Gelhorn suggested during his testimony, the Agencies should not permit this rule of reason inquiry to trail off into a discussion of less restrictive alternatives.70 Less restrictive alternatives are seductive but elusive. Alternative solutions might alleviate a joint venture's direct effects on consumer welfare but have unintended consequences. As the Agencies themselves have recognized, less restrictive alternatives might also be "fools gold", workable in theory but commercially impossible.71 Finally, as many have suggested, the Agencies (and antitrust courts) simply do not have the specific business expertise to judge which of many competing business solutions to a particular problem is the "best".72

In the end, the Agencies should apply the full blown rule of reason by following the same principle that has structured the inquiry up to this point: consumer welfare. They should withhold approval or condition their approval on the elimination of an ancillary agreement, only if they are convinced that the threat to consumer welfare posed by the joint venture or the agreement outweighs its benefits.

Conclusion

The joint venture project presents the Commission with the opportunity to rethink its approach to joint ventures. The Commission should not, however, simply rehash the approaches that have been put forth in the past. It should fundamentally rethink the relationship between antitrust and joint ventures. Visa believes, and respectfully submits, that the Commission should use the principle of consumer welfare to design a new approach to joint ventures. They should ask of joint ventures and any ancillary agreements, do they pose a threat to consumer welfare, and if so, under the circumstances is this a price worth paying.

Even if the Commission rejects this approach, Visa believes it should offer some guidance on joint ventures. Joint ventures are the wave of the present, if not the future. New joint ventures are announced virtually every day. Most of these joint ventures will not have a lasting effect on anything, least of all consumer welfare. But, if history is any guide, a handful will prove quite successful and provide lasting benefits to consumers.

At this point, these joint ventures, the winners and the losers, are forming in the dark. There is no coherent framework for Agencies, courts, would-be collaborators or their competitors to evaluate the costs and benefits of a given joint venture. Joint ventures are subject to the constant threat of litigation by their competitors and review by the Agencies. This status quo is unacceptable. The Commission should say what it thinks about joint ventures. If nothing else, a statement from the Commission would prompt debate within the bench and bar about joint ventures and put us on the road to developing a coherent approach to them.

1 Worthen Bank and Trust Co. v. National BankAmericard, Inc., 485 F.2d 119 (8th Cir. 1973).
2 National Bancard Corp v. Visa U.S.A. Inc., 779 F.2d 592 (11th Cir. 1986).
3 SCFC ILC, Inc. v. Visa U.S.A. Inc., 36 F.3d 958 (10th Cir. 1994), cert. denied, 115 S. Ct. 2600 (1995).

4 Issuing members issue payment cards to consumers. Acquiring members acquire merchants to accept payment cards as payment for goods and services. Most Visa members, in fact, both issue payment cards and acquire merchants.
5 Philip E. Areeda, et al., Antitrust Law ╢ 947, at 170.
6 As a general disclaimer, this submission is interested only in the problems that joint ventures face under Section One of the Sherman Act. This submission has nothing to say about joint ventures that raise issues under Section Two of the Sherman Act.
7 See, e.g., Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice º5.6, at 233 (1994); Stephen Breyer, The Cutting Edge of Antitrust: Lessons from Deregulation, 57 Antitrust L.J. 771 (1989). But see Harry S. Gerla, Restoring Rivalry As a Central Concept in Antitrust Law, 75 Neb. L. Rev. 209 (1996).
8 See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. 509 U.S. 209, 224-26 (1993); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 758 n. 14 (1984); Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 49-50 (1977); Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 488 (1977).
9 Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 2 (1984). See R.H. Coase, The Nature of the Firm, reprinted in The Firm, the Market and the Law 33-55 (1988).
10 Areeda, supra note 5, ╢ 703c, 149; Hovenkamp, supra note 7, º 5.2c, at 195.
11 See, e.g., Chicago Professional Sports Limited Partnership v. National Basketball Association, 95 F.3d 593 (7th Cir. 1996) (Easterbrook, J.) ("Bulls II"); Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995) (Posner, J.); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.).
12 Associated Press v. United States, 326 U.S. 1 (1945); United States v. Sealy, Inc., 388 U.S. 350(1967); United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).
13 FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).
14 Broadcast Music Inc. v. CBS, 441 U.S. 1 (1979) ("BMI"); NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984).
15 Justice Department, International Operations Antitrust Enforcement Policy 42 (Nov. 10, 1988), reprinted in Trade Reports (CCH), 913,109 (1988) ("International Guidelines").
16 FTC and Justice Department, Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust 71-79 (1996) ("Health Care Guidelines").
17 Assistant Attorney General Joel L. Klein, A Stepwise Approach To Antitrust Review of Horizontal Agreements (November 7, 1996) (speech before the American Bar Association's Antitrust Section Semi-Annual Fall Policy Program). Chang, Evans and Schmalensee in Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures (forthcoming) criticize Klein's approach at length. As they explain, Klein's approach puts the cart before the horse, requiring joint ventures to justify their existence before there is any reason to conclude that its operations pose a meaningful threat to consumer welfare. Id.
18 Professors Carlton and Salop hint at this general distinction among types of joint ventures in You Keep on Knocking But You Can't Come In: Evaluating Restrictions on Access to Joint Ventures, 9 Harv. J. of L. and Tech. 319 (1996). Some joint ventures perform all of these functions for their participants. See Chicago Professional Sports Limited Partnership v. National Basketball Association, 95 F.3d 593 (7th Cir. 1996).
19 See, e.g., Stephen V. Bomse, Joint Ventures Practices in Search of Principles, 915 PLI/Corp 784, 786-87 (1995); Joseph Kattan, Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation, 61 Antitrust L.J. 937 (1993); Robert Pitofsky, A

Framework for Antitrust Analysis of Joint Ventures, 74 Geo. L. J. 1605, 1606 (1986); Joseph Brodley, Joint ventures and Antitrust Policy, 95 Harv. L. Rev. 1521 (1982).
20 E.g., Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); see Kattan, supra note 19, at 939; Pitofsky, supra note 19, at 1619-20.
21 E.g., BMI, 441 U.S. at 8-12; Chicago Board of Trade v. United States, 246 U.S. 231, 235-39 (1918); Hovenkamp, supra note 7, º 5.2, 192.
22 Bomse, supra note 19, at 788-89; Pitofsky, supra note 19, at 1617-18. See also Thomas Piraino, Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures, 35 Wm. & Mary L. Rev. 871, 887-89 (1994); Jorde A. Teece, Innovation and Cooperation: Implications for Competition and Antitrust, 4 J. Econ. Persp. 75, 78 (1990);
23 General Motors Corp., 103 F.T.C. 374 (1984) (ratifying the proposed production joint venture between General Motors and Toyota).
24 FTC and Department of Justice, Antitrust Guidelines for the Licensing of Intellectual Property, ("IP Guidelines"), º5.5.
25 Id.
26 Id. See also, Assistant Attorney General Joel L. Klein, Letter to Gerrard R. Beeney Regarding the Proposed MPEG II Patent Pool, 9-10 (June 26, 1997).
27 Bomse, supra note 19, at 790-91; Kattan, supra note 19, at 942.
28 For a discussion of the public good aspects of innovation and its implications for investment in innovation see Gary S. Becker, Economic Theory 129-134 (1971). See also Bomse, supra note 19, at 790 n. 23.
29 See U.S. v. Morgan, 118 F. Supp. 621, 689-691, 733-739 (S.D.N.Y. 1953) (upholding securities underwriting syndicates).
30 Chang, Evans and Schmalensee, supra note 17, discuss these problems at somewhat greater length. See also Bomse, supra note 19, at 795; Brodley, supra note 19, at 1529.
31 See Rothery, 792 F.2d at 212-13 (discussing this problem and explaining that joint ventures should be afforded some flexibility in overcoming it).
32 Bomse, supra note 19, at 795; Brodley, supra note 19, at 1529.
33 See Complaint in Advanta Corp. v. Visa U.S.A., Inc., Civil Action No. 96-CV-7940 (E.D. Pa. November 25, 1996).
34 Easterbrook, supra note 9, at 16. See also Hovenkamp, supra note 7, º 5.1, at 185 (discussing antitrust's response to joint ventures and suggesting a similar approach).
35 See Areeda, supra note 5, ╢ 947, at 170. See generally Milton Handler, et al., Trade Regulation 577-78 (4th ed. 1997) (discussing the antitrust "tax" and explaining that the founders of Major League Soccer adopted a "single-firm" ownership model, at least in part, to avoid it);
36 Health Care Guidelines, supra note 16, at 17 ("The Agencies emphasize that it is not their intent ... to favor any particular procompetitive organization or structure of health care delivery over other forms that consumers may desire.").
37 Complexity and expense for the Agencies is a source of concern for joint ventures because these factors seem likely to lead to slower and more uneven law enforcement.
38 Most of the latter would occur in monopoly situations. It is here that rules concerning access (on the Terminal RR Association model) might be relevant.
39 Ernest Gelhorn, Testimony Before the Commission, at 8-9 (June 30, 1997).
40 Arizona v. Maricopa County Medical Society, 457 U.S. 332, 356 (1982).
41 No one -- not even the more ardent defenders of the Chicago School -- has proposed doing away with the per se rule or the partial integration approach. See, e.g., Robert H. Bork, The

Antitrust Paradox 267-270 (Rev. ed. 1993); Richard A. Posner, Antitrust Law 76 (1976) . If nothing else, this approach gives rivalry some place in the antitrust pantheon.
42 E.g., Marshfield Clinic, 65 F.3d at 1411; United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (L. Hand, J.).
43 See Gelhorn, supra note 39, at 9-10. The market-share screen proposed by Chang, et al., is equally sensible, albeit less forgiving. See Chang, Evans and Schmalensee, supra note 17.
44 See Harvey N. Bock, Testimony Before the Commission, at 1-2 (June 30, 1997). See also William H. Pratt, et al., Refusals to Deal in the Context of Network Joint Ventures, 52 Bus. Law. 531 (1997).
45 Of course, any market power screen based on market share begs the question of which market is relevant.
46 The Agencies seemingly apply a similar analysis in the business review process. See, e.g., Letter to Beeney, supra note 26.
47 15 U.S.C. º 45.
48 See Donald I. Baker, Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette? 1993 Utah L. Rev. 999..
49 The danger of overinclusiveness is, as the Agencies have noted, apparent with research and development joint ventures. See IP Guidelines, supra note 24, at ºº 3.2.3, 5.5. See also United States v. Columbia Pictures Industries, Inc., 507 F. Supp. 412 (S.D.N.Y. 1980), aff'd without opinion, 659 F.2d 1063 (2d Cir. 1981) (striking down joint venture among various production companies to market films cable TV systems largely out of concern that the venture was overinclusive).
50 See, e.g., Pitofsky, supra note 19, at 1608; Hovenkamp, supra note 7, º 5.6c, at 232-33.
51 See, e.g., General Motors Corp., supra note 23; Competitive Impact Statement in United States v. Electronic Payment Services, Inc., 876 PLI/Corp. 439 (January 1995).
52 E.g., Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 496-97 (1988); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 658-59 (1961).
53 BMI, 441 U.S. at 8-12.
54 Hartford Fire Insurance Co. v. California, 509 U.S. 764, 774-77 (1993).
55 Yamaha Motor Co., Ltd. v. FTC, 657 F.2d 971, 973-75 (8th Cir. 1981).
56 467 U.S. at 777.
57See United States v. Morgan, 118 F. Supp. 621, 689-691 (S.D.N.Y. 1953) ("Those who participate as underwriters or dealers are in no sense competitors .... The necessary relation that each bears to the issuer makes it clear that they do not and cannot enter the syndicate as competitors .... [T]he significant fact vis-a-vis the Sherman Act is that they are acting together in a single, integrated, unitary cooperative enterprise, the purpose of which is ... solely the distribution of a new security issue in an orderly manner.")
58 This approach is different from the approach adopted by the Commission in Mass Board, 110 FTC 599 (1990), which required a quick-look, a demonstration of efficiencies, an inquiry into less restrictive alternatives and a full blown rule of reason. Id. at 603. At the same time, by structuring the analysis with a view towards harm to consumer welfare, it avoids the unbounded inquiry into costs, benefits and market power viewed as necessary by the Commission in California Dental Association, 1996 FTC Lexis 88 (1996).
59 See, e.g., General Motors, supra note 23.
60 250 U.S. 300 (1919).

61 Dean Witter, 36 F.3d at 971. Although the Tenth Circuit adopted Visa's suggestion of a market power screen, it did not follow the structured rule of reason suggested here. Instead, the court move directly to full blown rule of reason, borrowing liberally from the essential facilities doctrine. Id. at 966-72.
62 This is not a radical suggestion by any means. The old International Guidelines suggested that structural solutions could cure the anticompetitive effects of joint ventures. See id. at 20,601.
63 See William F. Baxter, Bank Interchange of Transactional Paper: Legal and Economic Perspectives, 26 J. Law & Econ. 233, 572-582 (1983).
64 Since the system as a whole must cover costs, an interchange fee favorable to merchants would be viewed as "too high" for consumers, and vice versa.
65 This point could be generalized to a create a strong presumption of legality -- or shallow safe-harbor -- for any input collaboration that operates as a not for profit and does not restrain competition among its participants in the downstream market. If the FTC decides not to adopt Visa's entire approach to joint ventures, it could (and should) insert this presumption into an entirely different approach.
66 Visa's own exclusive dealing provision, Rule 2.10e, which prohibits members from issuing the payment cards of Visa's single firm competitors, American Express and Dean Witter, would fall into this category.
67 See Pitofsky, supra note 19, at 1620-21.
68 See Chang, Evans and Schmalensee, supra note , at 17.
69 The Agencies most certainly should not, as Assistant Attorney General Klein has suggested, presume joint ventures guilty until proven innocent. See discussion supra in note 17.
70 See Gelhorn, supra note 39, at 12-13.
71 See Health Care Guidelines, supra note 16, at 19
72 See, e.g., Gelhorn, supra note 39, at 16-17; Easterbrook, supra note 9, at 10-14.