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Donald S. Clark
Office of the Secretary
Federal Trade Commission
6th and Pennsylvania Ave., N.W.
Washington D.C. 20580

June 12, 1997

Re: Comment on Issues Relating to Joint Venture Project

Dear Mr. Clark:

I appreciate the opportunity to comment on the FTC's Joint Venture Project. I believe that the new joint venture guidelines will be well received by the business community, if they provide better guidance on the legality of such arrangements than the current approach of the courts and enforcement agencies.

I. Deficiencies in the Current Joint Venture Approach

There is currently considerable confusion in the American business community over the antitrust standards by which cooperative arrangements among competitors will be judged. The courts and enforcement agencies have used many different approaches to analyze joint ventures, including a merger-based market analysis, a cartel-based per se approach, and a rule of reason balancing of anticompetitive effects and efficiencies. As a result, business executives often cannot predict whether a particular joint venture will be upheld under the antitrust laws.

Joint ventures among competitors are particularly difficult to negotiate, plan and implement. Issues of control, funding, staffing and divisions of labor among partners often require extensive attention from the partners' senior executives. Firms will not be willing to embark upon such complex and time-consuming transactions unless they can be relatively certain that the arrangements will withstand antitrust scrutiny. Indeed, the mere threat of antitrust litigation may be sufficient to deter firms from entering into strategic alliances. Like all other corporate investments, joint ventures must meet an internal "hurdle rate" before a corporation will be willing to risk its capital in the transaction, and the direct and indirect costs of litigation (including management time as well as outside legal fees) may be decisive in a firm's decision not to proceed with a strategic alliance.

Joint ventures are a particularly efficient means of economic organization, and the current uncertainty over the legality of joint ventures is denying American consumers the benefit of such efficiencies. Joint ventures allow competitors to combine their resources to reduce risk, eliminate duplication, and access complementary assets. Indeed, in many cases, the integration that occurs in a joint venture allows its partners to produce efficiencies beyond their individual capacities. Partners' contributions of complementary technologies to a research venture, for example, may allow the creation of an entirely new product. The partners' contribution of capital and other assets to a production joint venture may enable them to produce a product which no individual partner could have afforded to manufacture on its own.

Furthermore, joint ventures generate such efficiencies without eliminating all competition among their partners. Unlike a merger, which extinguishes the parties' individual capacity to compete, a joint venture permits its partners to continue to compete against each other outside the scope of the venture. Joint ventures usually have specific objectives and are designed to last for only a limited period of time. Because of the narrow scope of the venture, the parties retain their incentive to compete in other areas of their business. General Motors and Toyota, for example, have continued to compete just as aggressively in the world-wide automobile market despite their joint venture for the production of a compact automobile. Because joint ventures can achieve efficiencies without eliminating all competition among their partners, antitrust policy should be more hospitable to joint ventures than to mergers.

Recognizing the potential efficiencies of joint ventures, the courts and enforcement agencies have been moving toward a rule of reason approach to such arrangements. The traditional rule of reason standard, however, provides little guidance to business executives attempting to plan their conduct. There has been little explanation by the courts or enforcement agencies as to how the rule of reason should be applied. Most formulations of the rule rely on a long list of factors that are supposed to indicate the potential efficiencies and anticompetitive effects of a particular transaction. However, the courts and enforcement agencies have not identified the priority or weight that should be afforded each factor. Thus the rule of reason remains vague and ambiguous. Indeed, many courts and antitrust practitioners find the outcome of the balancing test difficult to predict, and the rule is even more opaque to business executives.

Some recent attempts to reform the rule of reason have relied on market power as the decisive factor in the balancing test. Several federal courts, for example, have proposed a "market filter" which includes a threshold analysis to determine whether a defendant possesses market power. However, determination of market power can be complex and time-consuming, and the outcome of the analysis may be particularly uncertain in joint venture cases. The relevant geographic and product markets, and the market share of the joint venture partners therein, will be difficult to determine for joint ventures that cover an upstream stage of the production process, such as purchasing or research and development. The methods proposed by the enforcement agencies for analyzing market power in such areas, including the concepts of "technology" and "innovation" markets, remain too vague and undeveloped to be of much utility to business executives and their legal advisors.

II. A Proposed Approach to Joint Venture Analysis

I urge the FTC to adopt a new approach to the analysis of joint ventures that will provide clearer guidance to business and be easier for the courts and enforcement agencies to implement. In its new guidelines, the FTC should attempt to minimize the amount of factual analysis required to confirm the legality of particular types of joint ventures. Indeed, in many cases the competitive effects of a joint venture will be obvious on its face, and the courts and enforcement agencies should be able to determine its legality under a per se approach. Per se rules have the advantages of preserving judicial and agency resources and enhancing voluntary compliance with the antitrust laws. Although the Supreme Court has limited the use of the per se rule in antitrust cases in recent years, the approach still has validity in cases where the courts and enforcement agencies can be confident of the likely competitive effects of a particular restraint. By maximizing the number of joint ventures whose legality can be determined on their face, the enforcement agencies will provide more effective guidance to business, thus deterring anticompetitive conduct and encouraging firms to form efficiency-enhancing alliances.

Under this new approach, the enforcement agencies should separate their analysis of the legality of a joint venture itself from the analysis of any ancillary restrictions on competition implemented by the joint venture partners. A cooperative arrangement may not unduly restrict competition simply by virtue of its existence. However, in connection with the arrangement, the parties may agree to certain restrictions on competition which are unreasonably broad. A research and development joint venture between two competitors, for example, may be permissible because it does not preclude its partners from competing at the downstream production and marketing stages. Nevertheless, it may not be appropriate for the partners to agree to limit the prices at which they will sell the products developed by the venture. Such a restraint may extend the anticompetitive effects of the joint venture from the research and development to the marketing stage. By separating the analysis of the joint venture itself from the analysis of such ancillary restraints, the courts and enforcement agencies can preclude the offending restriction without invalidating the entire joint venture.

A. Analyzing the Legality of Cooperative Arrangements: The Continuum of Joint Venture Analysis

In analyzing the legality of joint ventures themselves, the enforcement agencies must distinguish among the competitive effects of different types of ventures. Indeed, much of the confusion in the analysis of joint ventures to date has stemmed from the wide variety of cooperative arrangements that the courts have classified as joint ventures, without making any distinction among their competitive effects. The courts have applied the joint venture label to conduct "in an infinite variety of forms and scopes." Joint ventures can range from mere contractual agreements among competitors to arrangements that are nearly as integrated as mergers. As Chairman Pitofsky has pointed out, "[a] joint venture could involve any business enterprise in which two or more persons collaborate to achieve some commercial goal -- a definition that includes all of antitrust except, perhaps, some single firms attempts to monopolize."

The enforcement agencies should recognize that a single approach is not appropriate for the analysis of such a wide variety of arrangements. Because of their distinct competitive characteristics, the various types of cooperative arrangements require different antitrust approaches. Thus it is appropriate to use a continuum-based approach for the analysis of joint ventures. The enforcement agencies should place joint ventures on a continuum based on their likely competitive effect. The type of approach used to analyze each arrangement would depend upon its place on the continuum. Under such an approach, the FTC can insure that only the minimum necessary inquiry is undertaken to confirm the legality of a particular joint venture.

The amount of integration achieved in a joint venture provides the best basis for placing the arrangement on the continuum of joint venture analysis. Integration is a critical factor because it indicates both the degree of potential efficiencies and anticompetitive effects that can be expected from a joint venture. Integration reduces competition among joint venture partners by combining into one entity the types of resources (e.g., intellectual property, production facilities, and capital resources) which the partners could have used to compete against each other. Furthermore, to the extent they have committed substantial resources, the partners will be less inclined to compete against a joint venture. The degree of integration should also be probative of a joint venture's efficiencies. Chairman Pitofsky has pointed out that "the assumption that higher levels of integration are likely to be associated with more substantial efficiencies ... is a premise underlying all of antitrust." The pro-competitive effects of a joint venture will be maximized when the parties integrate their resources to create a new competitive entity with capabilities beyond those of the individual partners. The amount of capital, technology, or other assets contributed to a venture will demonstrate the extent of the parties' commitment to achieve efficiencies through the joint venture that they could not have achieved on their own. Conversely, when partners contribute few resources to a joint venture or assume little of the risk of a venture's success or failure, they are more likely to be acting for their own competitive benefit than to enhance economic efficiency.

The FTC's continuum for the analysis of joint ventures should therefore be based on the degree of integration achieved by the partners. The amount of factual analysis necessary to confirm the legality of a cooperative arrangement would increase along the continuum.

Completely unintegrated arrangements would occupy the beginning of the continuum. Since such arrangements are incapable of producing any efficiencies, they can be deemed illegal on their face if they restrict competition in any manner. Partially integrated joint ventures would occupy the next spot on the continuum. The legality of many such arrangements can be determined simply on the basis of the parties' objectives for the venture. If the parties entered into the venture in order to produce a new product which they could not have produced on their own, the venture should be upheld without any further analysis. Joint ventures covering markets in which the parties are current or potential competitors would require more analysis. The courts and enforcement agencies should balance the efficiencies of such ventures against their anticompetitive effects. The balancing test, however, need not be as complicated as the traditional rule of reason. The test could ascribe a decisive weight to a few factors which would be readily apparent for most joint ventures. The final spot on the joint venture continuum would be reserved for joint ventures that combine competitors' existing operations in a particular market. Such complete integrations are similar in effect to mergers. They eliminate all competition among their partners while generating substantial efficiencies. Such ventures would require the most detailed analysis, similar to the traditional rule of reason, to confirm whether their beneficial or adverse effects are predominant.

The entire continuum of joint venture analysis can be visualized as follows:

B. Analysis at the Margins: Naked Arrangements and Complete Integrations

Naked agreements to restrict competition and complete mergers of competitors' operations lie at opposite ends of the joint venture continuum. Naked agreements are the easiest cooperative arrangements to analyze because they generate no efficiencies. Completely integrated arrangements, on the other hand, require the most complex inquiry because they are equally capable of generating efficiencies and anticompetitive effects.

1. Unintegrated Arrangements

The courts and enforcement agencies need not waste their resources in a detailed inquiry into the antitrust implications of cooperative arrangements which restrict price or output but include no integration of their partners' resources. In the absence of integration, there are no economic efficiencies to balance against the restriction of competition caused by such arrangements. The mere coordination of parallel activity without any corresponding integration amounts to no more than a naked restraint of trade. Such naked restraints have no redeeming value; their only effect is to restrict competition. The outcome of the antitrust analysis of such restraints should be obvious. The courts and enforcement agencies can confirm their illegality simply on the basis of the parties' conduct. Indeed, cartel-like conduct can be deemed illegal on its face under a traditional per se approach. Naked price fixing, territorial allocations, and divisions of customers are so obviously anticompetitive and so devoid of efficiencies that they can be summarily prohibited. For example, agreements by buyers on the prices they will pay, unaccompanied by any integration of purchasing operations that will reduce the buyers' costs, create no cognizable efficiencies and should be deemed illegal without any further inquiry. Similarly, producers may organize for the simple purpose of resisting buyers' demands for discounts or other cost reduction measures. Because such arrangements are not ancillary to any productive integration, their only effects will be anticompetitive. A rule of per se illegality is appropriate to deter firms from entering into arrangements which have such an adverse effect on competition with no redeeming efficiency benefits.

No market power analysis is necessary to confirm the net anti-competitive effect of unintegrated cooperative arrangements. First of all, even firms which lack market power can adversely affect competition for a period of time. Furthermore, there is little to be gained and much to be lost by introducing the complexities of a market power test into the analysis of such inherently suspect conduct. The courts risk few mistakes by dispensing with a market power analysis of conduct which is likely to harm competition in most cases. On the other hand, requiring a market power analysis complicates antitrust trials, wastes judicial resources, allows certain anticompetitive behavior to go unremedied, and makes plaintiffs more reluctant to bring cases, thus reducing the deterrent effect of the antitrust laws.

2. Complete Integrations

The opposite end of the joint venture continuum would be occupied by ventures which are so integrated that they completely eliminate competition between the parties in the relevant market. Instead of contributing only a portion of their resources to a joint venture formed for a limited purpose, the parties may combine all of the resources which they use to operate in a particular market. Certain domestic airlines have, for example, recently formed alliances with foreign carriers which would allow the carriers to operate, in effect, as a single airline. Under these arrangements, the airlines may coordinate pricing, combine their sales forces, share information on seat availability, and share revenue. When competitors join their production and marketing operations in such a complete manner, the courts and enforcement agencies should analyze the arrangement like a merger. As in a merger, a single entity (the joint venture) takes the place of the former competitors in the relevant market. The market power analysis set forth in the Merger Guidelines is appropriate for analyzing the potential anticompetitive effects of such fully integrated joint ventures.

In addition to concentrating market power, however, fully integrated ventures also generate substantial efficiencies. If the parties to a joint venture do not have significant market power, such efficiencies may outweigh the anticompetitive effects of the venture. Thus the enforcement agencies should establish a market share threshold for the legality of fully integrated joint ventures. Such a "safe harbor" approach would simplify market power analysis and give better guidance on the legality of fully integrated joint ventures. In the area of vertical restraints, the courts appear to be converging on a market share safe harbor of twenty to twenty-five percent. Fully integrated joint ventures among competitors which collectively do not possess more than such a share of the relevant market pose little, if any, competitive risk while producing substantial efficiencies, and therefore should be permitted.

When the partners to a fully integrated joint venture have market shares that are above the safe harbor threshold, the courts and enforcement agencies should balance the efficiencies of the venture against its potential anticompetitive effects. The venture's adverse effects will be evident from the partners' collective market power. Relevant efficiencies should include factors such as cost savings, risk reduction, and synergies from the combination of complementary assets which will make the integrated entity a more effective long-term competitor than any of its partners could have been on their own.

C. Partially Integrated Joint Ventures

Partially integrated cooperative arrangements should be located at the midpoint of the continuum between naked agreements among competitors and complete integrations of competitors' operations. Such ventures require a more detailed analysis than cartels but less analysis than complete integrations. Partial integrations are unlike naked arrangements because the parties have an efficiency objective beyond the mere enhancement of their short-term profits. They are distinguished from complete integrations by the parties' ability to continue their separate operations outside the limited bounds of their venture. Because such partial integrations promote efficiency, they should not be precluded summarily in the manner of cartels. However, because they permit continued competition between their partners, they also do not require a full-blown market power analysis.

The legality of partially integrated joint ventures should be determined on the basis of the parties' competitive purpose, rather than by a market-based analysis. A market power approach is unlikely to reveal the actual competitive effects of a partial integration. Such an analysis assumes that the parties have completely fused their market power, as in a merger. However, such a fusion does not occur in most partial integrations, because the parties remain free to compete with each other outside the limited bounds of the venture. If a market power analysis had been used for the GM-Toyota joint venture, for example, this cooperative arrangement between the first and third largest automobile companies in the world certainly would have been prohibited. The joint venture demonstrates, however, that competition in the relevant market is not always substantially precluded by partial integrations among firms with large market shares.

A market power approach is also inappropriate for partial integrations because it is backward looking. Market power analysis measures the parties' historical shares of the relevant market, but it reveals nothing about new market conditions that may exist during and after the term of a joint venture. Because partially integrated joint ventures promote long term efficiencies, their impact on the relevant market will not be determinable until some time in the future. Indeed, certain joint ventures may substantially alter the contours of the market, for they may make possible the introduction of entirely new products and services.

(1). Joint Ventures Facilitating New Entry

Partially integrated joint ventures which enable their partners to produce new products or enter new markets are so beneficial that they should be upheld on their face. If a firm cannot participate in a market or produce a product other than through a joint venture, the venture will have an obvious beneficial effect. Such arrangements promote competition by permitting "the introduction of a new competitor that otherwise might never have come into being." These ventures provide a vehicle for firms to share technology, capital or certain unique assets necessary for the production or development of a new product. Because these ventures cover areas in which their partners could not have competed in the absence of the venture, they also do not eliminate competition that otherwise would exist among their partners. The only effects of such arrangements are beneficial, and they should be upheld without any detailed balancing of efficiencies against anticompetitive effects. Indeed, such ventures should be deemed per se legal. The only inquiry of the courts and enforcement agencies need be whether the parties' purpose for the joint venture was to develop a new product or enter a new market from which they were individually foreclosed. Such an approach would give businesses assurance that they will not be subject to antitrust liability when they enter into such pro-competitive arrangements.

(2). Joint Ventures that Restrict Current or Potential Competition

A more detailed analysis will be necessary to confirm the legality of partially integrated joint ventures whose purpose is to enhance their partners' efficiencies in markets in which they are already competing. Such ventures create economic efficiencies by reducing their partners' risk (and thus encouraging beneficial capital investment), creating economies of scale, reducing the costs of duplicate facilities and personnel, and giving firms access to complementary resources held by their competitors. However, joint ventures in existing markets restrict competition as well as enhance efficiency. Such ventures reduce the number of current competitors in the market because the partners will refrain, in the natural course, from competing with their own affiliate. The joint venture, in effect, will take the place of its partners within the scope of its operations. Whether or not the parties expressly agree not to compete with the joint venture, they usually will avoid competition that could harm the venture. At the research and development stage, for example, a joint venture deters the participating firms from pursuing parallel paths to develop a new technology. Such a venture "conceivably could substitute a large and leisurely project for a number of smaller, more energetic ones." At downstream production and marketing stages, competitors' collaboration can have even more serious anticompetitive effects. Downstream ventures eliminate competition in the critical areas of pricing and output, which directly affect consumer welfare. The production and marketing segments are also likely to have fewer competitors than upstream research markets. Thus partners' natural disinclination to compete with their own downstream joint ventures will have a greater adverse effect on competition in the relevant market.

For joint ventures covering markets in which their partners are currently competing, a simple consideration of the parties' competitive purpose is not sufficient; in addition, the courts and enforcement agencies must balance "the tradeoff between efficiency gains ... and the potential anticompetitive losses." Such a balancing approach is also appropriate when a joint venture's partners are potential, rather than current, competitors. Firms may form joint ventures for the purpose of enhancing their efficiency in a new market which one or more of the partners could have entered on their own. Unlike joint ventures which permit their partners to access markets which otherwise would have been closed to them, joint ventures among potential competitors have significant anticompetitive effects. Such ventures foreclose the partners' individual entry into the joint venture market. By virtue of the partners' participation in the joint venture, other competitors will no longer perceive them as potential entrants into the market. In making their decisions on pricing and output, the incumbent competitors will not feel constrained by the threat of individual entry by the joint venture partners. Therefore, the courts and enforcement agencies should balance the efficiencies and anticompetitive effects of joint ventures that cover areas in which their partners currently compete or, but for the joint venture, would have competed.

The balancing test for such joint ventures, however, can be undertaken rather simply and need not be as complicated as the traditional rule of reason. The net balance of efficiencies and anticompetitive effects will be evident from extrinsic evidence. The degree of integration achieved in the venture will reveal the amount of efficiencies which the arrangement can generate. The potential adverse effects will be evident from the scope and duration of the venture and its relationship to the parties' downstream production and marketing operations.

Antitrust practitioners and the enforcement agencies have found it difficult to assess the merits of efficiency claims. Indeed, this difficulty has been one of the primary reasons for the courts' failure to adopt a balancing approach for partially integrated joint ventures. By using integration as a proxy for efficiency, the courts can avoid this impediment to the adoption of a balancing analysis.

A cooperative arrangement must be at least partially integrated in order to qualify for a balancing approach under the continuum of joint venture analysis (As discussed above, unintegrated arrangements would be precluded on their face, while fully integrated ventures would be analyzed under a merger-based market power approach.). A broad range of conduct, however, can be classified as a partial integration, ranging from mere agreements by competitors to pool their market power to substantial commitments by rivals to invest their resources in new enterprises. The specific degree of integration agreed to by the parties should be a reliable indicator of the potential efficiencies that can be achieved by the venture.

The anticompetitive effects of a joint venture among actual or potential competitors should be evident from the duration and scope of the venture and its relationship to the marketing phase of its partners' operations. The primary purpose of the Sherman Act is to prevent conspiracies that raise prices or restrict output. The potential for such conspiracies "grows as a company moves closer to the marketplace." Thus, the potential anticompetitive effects of strategic alliances can be judged according to their distance from the production and marketing stage. Joint ventures designed for research and development, joint purchasing, and other "inputs" into the production process have less of an anticompetitive potential than downstream production or marketing ventures.

The anticompetitive effects of joint ventures also depend upon their scope and duration. Strategic alliances which last for only a short period of time or cover a small portion of their partners' operations have a minimal anticompetitive potential. Ventures of such small scope give the parties a broad latitude to continue to compete with each other. As long as production joint ventures do not extend into the marketing phase, for example, the partners will retain their incentive to compete with each other on pricing. If the venture covers only one part of a broad product line, the parties may even use knowledge gained from the joint venture to compete more aggressively in other lines. Joint ventures of short duration have a minimal anticompetitive effect because their partners are likely to be acutely aware that their self-interest lies in maintaining their ability to compete effectively after the venture terminates. The partners in such ventures tend to be concerned not with limiting competition among themselves but with securing a reasonable return on their investment by making the venture as efficient as possible. If, on the other hand, a joint venture extends for an unlimited period, the partners will share a long-term mutuality of interests. They are likely to be less concerned about competing with each other and more inclined to consider explicit or tacit limitations on their competition.

The use of proxies for both efficiencies and anticompetitive effects will simplify the balancing approach for partially integrated joint ventures among current or potential competitors. In most cases, the outcome of the balancing analysis should be readily apparent from the degree of integration achieved by the parties, the scope and duration of the joint venture, and its downstream or upstream nature.

D. Ancillary Restraints

Once a court or enforcement agency determines the legality of a joint venture, it should consider the appropriateness of any ancillary restrictions on competition agreed to by the parties. Judge Taft's 1898 decision in United States v. Addyston Pipe & Steel Co., which has been characterized as "one of the greatest, if not the greatest, antitrust opinions in the history of the law," sets forth an effective test for the legality of ancillary restraints. Under Judge Taft's approach, the parties' purpose for a joint venture would determine whether a particular ancillary restraint on competition is permitted. Judge Taft concluded that a restraint of trade should be permissible when its was "ancillary to the main purpose of a [lawful] contract [and] was reasonably adapted and limited to the necessary protection of a party in the carrying out of such purpose." Thus restrictions reasonably necessary to accomplish the legitimate purposes of a cooperative arrangement would be allowed; however, restraints broader than required to effectuate such purposes would be void.

(1). Membership Rules

Membership rules may limit competition by denying particular firms access to a joint venture that could enhance their efficiency in the relevant market. Such rules, however, usually should be upheld as ancillary to a joint venture, Most cooperative arrangements among competitors could not operate effectively without membership restrictions. A joint venture could become unwieldy if open access by all interested parties was required. Joint venture partners also have a reasonable interest in insuring that all participants can make a meaningful contribution to the venture. Rules setting forth minimum financial capabilities, technical qualifications, or academic or professional certifications for joint venture partners therefore should be upheld.

In certain cases, membership restrictions for joint ventures actually may promote competiton in the relevant market. If a joint venture is not all-inclusive, the firms denied membership will be more likely to pursue an independent course in competition with the venture. Firms that cannot access a research and development venture, for example, may form competing ventures of their own, or they may decide to pursue development of the new technology independently.

Courts should not allow membership limitations, however, when a joint venture controls an "essential facility" to which access is necessary in order to compete effectively in the relevant market. Firms may not be able to manufacture or market a particular product or service without access to certain raw materials, information, technology, or means of production, and in order to compete in a particular industry, firms may need to become members of standards-setting organizations (such as stock exchanges, sports leagues or professional associations) which establish the rules of conduct for that industry. Joint ventures which control electronic networks in the credit card, ATM, securities, banking and real estate industries are particularly likely to constitute essential facilities to which all competitors must have access. When a joint venture controls such critical assets or services, its partners should not be allowed to preclude participation by third parties arbitrarily. Denial of a competitor's access to the joint venture in these circumstances would have the same effect as excluding it from the relevant market.

(2). Restraints Affecting Competition Among Joint Venture Partners

Overly broad ancillary restraints can destroy a joint venture's most beneficial characteristic: its ability to promote efficiency while allowing its partners to continue to compete in other areas. Certain restraints ancillary to a joint venture may unduly restrict competition among the partners. "Spill-over" effects in areas outside a joint venture's scope may result from partners' agreements to exchange competitive information, to fix the prices at which they can sell the products of a joint venture, or to establish the customers or territories to which particular partners can sell.

(a). Information Exchange

Exchanges of confidential technical, production, and marketing information between the partners of a joint venture are often necessary for the effective operation of the venture. Research and development joint ventures could not operate without a free flow of technical information between partners. Production joint ventures may require data from their partners on manufacturing methods, raw material costs, capacity, and production schedules. Joint sales organizations necessitate the exchange of pricing and marketing information.

The courts and enforcement agencies, however, should prohibit the exchange of sensitive competitive information with uses beyond the specific objectives of a joint venture. It would be inappropriate, for example, for the partners in research and development or production joint ventures to disclose marketing information to each other. Such information could be used by the parties improperly to coordinate their decisions on pricing and output. In order to avoid inappropriate exchanges of information, sales or marketing personnel of the partners should be excluded from participating in research and development or production joint ventures. Even in a joint marketing organization, exchanges of pricing information should be limited to the specific products covered by the joint venture.

(b). Price Fixing

The legality of a price-fixing agreement among joint venture partners depends upon how integral the arrangement is to the operation of the venture. In Broadcast Music, Inc. v. CBS, for example, the Supreme Court refused to apply the per se rule to a price fixing arrangement among muscial composers because it was an essential element of their blanket licensing arrangement for their compositions. Indeed, without a uniform price, the product could not have been offered at all. The establishment of uniform fees for the physicians who are members of a health maintenance organization may be no less critical to such an organization's ability to market its health care services to cost-conscious consumers. However, price fixing arrangements that are not necessary for the attainment of the legitimate objectives of a joint venture should be struck down on their face. Agreements by the members of a production joint venture on the prices at which the products of the venture are to be marketed, for example, exceed the legitimate scope of the venture and should be summarily condemned.

(c). Territorial or Customer Restraints

Restrictions on the territories in which joint venture partners may market a product or the customers to whom they may sell are even more anticompetitive than price-fixing agreements. Such territorial and customer restraints often amount to agreements by the partners to avoid all competition with each other. When the partners to a joint venture agree to market a product at a particular price, they can at least continue to compete with each other in non-price areas such as customer service. When joint venture partners agree to sell only in different territories or to separate customers, however, all competition between the parties, whether price or non-price, will be eliminated.

In one circumstance, however, territorial or customer restrictions do not have such a severe adverse effect: that is, when they limit competition that exists only as a consequence of a joint venture. Such restrictions have no incremental adverse effect in the case of a joint venture that makes possible the production of a new product or entry into a new market. Territorial and customer restrictions may be necessary to induce firms to invest in such risky ventures. For example, firms may not be willing to paticipate in a research and development joint venture without being guaranteed an exclusive license of joint venture technology in a particular territory. Partners in marketing joint ventures for new products may require a guarantee of an exclusive right to sell the products in a particular territory or to certain customers. Under such circumstances, noncompetition agreements among partners have no real anticompetitive effect because, in their absence, the relevant product would not have been available in any event.

(3). Agreements not to Compete with the Joint Venture Itself

Joint venture partners have a legitimate interest in insuring that all parties refrain from harming the venture by competing within its scope of operations. Unlike participating firms' agreements not to compete with each other, partners' agreements not to compete with the joint venture itself have few anticompetitive effects and usually should be upheld. Agreements by partners not to compete with each other are horizontal combinations which eliminate all actual or potential competition among the participants in the relevant market. Agreements by parties not to compete with their own joint venture, however, are vertical and only limit competition within the venture's sphere of activities. Furthermore, such agreements do not limit any competition that otherwise would exist. The elimination of competition between a joint venture and its partners is a natural consequence of a joint venture's formation. Direct competition with a joint venture is contrary to the partners' interests because it reduces the profits of their own affiliate. Regardless of whether they have entered into an express noncompetition agreement, the partners to a joint venture will avoid competing with their own joint venture because it is in their interest to do so. Noncompetition agreements between partners and their own joint venture therefore should be upheld because they do not extend competitive restrictions beyond the natural scope of the venture.

I hope that some of the comments in this letter will be helpful to the FTC in developing its new joint venture guidelines. I look forward to reading the guidelines after they are published, and I am confident that the enforcement agencies will be able to bring greater clarity and certainty to an antitrust area greatly in need of improvement.

Sincerely,

Thomas A. Piraino, Jr.