Joint Venture Antitrust Considerations

A Lexis Practice Advisor® Practice Note by
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This practice note outlines considerations for structuring a joint venture among competitors to comply with the U.S. antitrust laws. Joint ventures (or JVs) among competitors may be subject to scrutiny by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (together, the antitrust agencies), and to private lawsuits challenging their legality. This practice note provides information regarding the legal framework for analyzing joint ventures, including the applicable substantive laws and when you may need to make a Hart-Scott-Rodino (HSR) Act merger notification filing for the transaction. It also describes key considerations for joint ventures that may heighten a venture's antitrust risk and provides suggestions for minimizing that risk for your clients.

For more information on the antitrust laws applicable to mergers, including joint venture formations that require an HSR filing, please see the practice note Merger Review Antitrust Fundamentals. For more information on antitrust laws applicable to restraints agreed to by competitors, please see the practice note Horizontal Restraints.

OVERVIEW OF JOINT VENTURES

In this context, a joint venture means an arrangement among two or more companies that is short of a merger or acquisition; in other words, where the joint venture parties combine some assets, operations, or business functions but continue to operate as separate entities. Joint ventures can benefit consumers because they enable companies to do an activity more efficiently and at a lower cost than they could independently or to create a new or improved product or service that they are incapable of creating alone. At the same time, when competitors collaborate on business activities, the collaboration itself can hinder competition and result in higher prices or reduced output, quality, or innovation. A competitor collaboration can also harm competition by reducing incentives for the joint venture parties to compete or by providing an opportunity for competitors to share competitively sensitive information.

LEGAL FRAMEWORK FOR ANALYZING JOINT VENTURES

Substantive Laws Applicable to Joint Ventures

No single antitrust law applies to joint ventures. Government agencies and private parties may challenge a joint venture under a variety of antitrust statutes, including the Sherman Act, Clayton Act, and the FTC Act.

- **Sherman Act.** The Sherman Act Section 1 applies to agreements that unreasonably restrain trade. 15 U.S.C. § 1. Section 2 of the Sherman Act prohibits conspiracies to monopolize trade. 15 U.S.C. § 2. These Sherman Act provisions can apply to agreements between parties forming a joint venture and agreements relating to the joint venture's activities. Both the DOJ and private parties can use the Sherman Act to challenge joint ventures. As discussed further below, depending on the structure of the joint venture, agreements relating to the venture's activities may be immune as single-entity action under the Copperweld doctrine. In Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984), the Supreme Court held that a parent company and its wholly owned subsidiary cannot conspire with each other under Sherman Act Section 1.
- **Clayton Act.** The antitrust agencies will view a joint venture as a merger and challenge it under Section 7 of the Clayton Act when the joint venture eliminates all competition between the parties like a merger and the venture will operate for a particularly long time. The *Antitrust Guidelines for Collaborations Among Competitors* (the Competitor Collaboration Guidelines), issued by the FTC and DOJ to provide guidance regarding collaborations among competitors, including joint ventures, state that the antitrust agencies will analyze a joint venture under the *Horizontal Merger Guidelines*, rather than the *Competitor Collaboration Guidelines*, when:
    - The joint venture participants compete in the same relevant market(s)
    - The joint venture "involves an efficiency-enhancing integration of economic activity in the relevant market"
    - The joint venture "eliminates all competition among [its] participants in the relevant market" –and–
    - The joint venture by the terms of the agreement lasts a long time period, typically 10 years or more

  FTC & DOJ, Competitor Collaboration Guidelines § 1.3 & n.10 (Apr. 2000).

  Private parties can also challenge joint ventures under Clayton Act Section 7. For example, in Panache Broadcasting of Penn., Inc. v. Richardson Electronics, Ltd., 1995 U.S. Dist. LEXIS 14339 (N.D. Ill. Oct. 2, 1995), the district court held that plaintiffs adequately alleged a Section 7 claim challenging a joint venture where the joint venture parties would combine 70% of the relevant market and the venture would create barriers to entry.

- **FTC Act.** Section 5 of the FTC Act prevents unfair methods of competition and authorizes the FTC to investigate and bring actions enforcing this provision. 15 U.S.C. § 45. The reach of Section 5 is often co-extensive with Section 1 of the Sherman Act and Section 7 of the Clayton Act but may be broader. The FTC has brought enforcement actions against joint ventures under Section 5. For example, in In re GlaxoSmithKline, PLC and Novartis AG, Federal Trade Comm'n (File No. 1410141) (Nov. 26, 2014), the FTC required a divestiture as part of a consent order to allow the venture's formation.

When an HSR Merger Notification Filing May Be Necessary

The HSR Act, which requires parties to file a pre-merger notification depending on the size and structure of the transaction and the parties, can apply to joint ventures. When a filing is required, the parties may not proceed with joint venture until the antitrust agencies have cleared the transaction. Under the rules, the joint venture parties are deemed "acquiring persons" and the joint venture itself is deemed an "acquired person." 16 C.F.R. §§ 801.40 and 801.50. Whether a joint venture requires an HSR filing depends on the form of the transaction, the value,

ownership, size of the parties, and control, among other factors. The following sets out the basic requirements for when you would need to submit an HSR filing for a joint venture, but you should consult the HSR Act and regulations when making this determination in each case for a client. For more general guidance on whether a given transaction is reportable, see the practice note Reportability of a Merger or Acquisition under the Hart-Scott-Rodino (HSR) Act. For quick reference checklists on the reportability of the formation of corporate joint ventures and unincorporated entities, please see Hart-Scott-Rodino (HSR) Act Reportability of Formation of a Corporate Joint Venture Checklist and Hart-Scott-Rodino (HSR) Act Reportability of Formation of an Unincorporated Entity Checklist.

Any party that becomes part of a corporate joint venture may have to make an HSR filing if the “activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the activities of the joint venture or other corporation will be in or will affect commerce” and one of the following thresholds (which are adjusted annually) is met:

- **Threshold 1.** The acquiring person (joint venture party) “would hold an aggregate total amount of voting securities and assets of the acquired person” (joint venture) either:
  - In excess of $337.6 million –or–
  - Between $84.4 million and $337.6 million if:
    - The acquiring person has annual net sales or total assets of $168.8 million or more
    - The joint venture will have total assets of $16.9 million or more –and–
    - At least one other acquiring person has annual net sales or total assets of $16.9 million or more
- **Threshold 2:**
  - The acquiring person has annual net sales or total assets of $16.9 million or more
  - The joint venture will have total assets of $168.8 million or more –and–
  - At least one other acquiring person has annual net sales or total assets of $16.9 million or more

16 C.F.R. § 801.40.

The assets of the joint venture include all assets that any joint venture party or other person has agreed to transfer the venture at any time and any credit or guarantee any joint venture party has agreed to extend at any time. Id.

If the joint venture is an unincorporated entity, similar filing requirements apply but they are based on whether a joint venture party acquires control of the newly formed unincorporated entity. For unincorporated entities, control means having the right to 50% or more of the joint venture’s profits or the right to 50% or more of the joint venture’s assets upon dissolution (so up to four parties can control an unincorporated entity for HSR purposes). 16 C.F.R. § 801.1(b). A joint venture party that acquires control of an unincorporated joint venture may have to make an HSR filing if the acquiring person would hold a non-corporate interest valued above either of the following thresholds (which are adjusted annually):

- **Threshold 1:**

  - In excess of $337.6 million –or–
  - Between $84.4 million and $337.6 million if:
    - The acquiring person (joint venture party) has annual net sales or total assets of $168.8 million or more –and–
    - The newly formed entity (joint venture) has total assets of $16.9 million or more.

- **Threshold 2:**
  - The acquiring person has annual net sales or total assets of $16.9 million or more –and–
  - The newly formed entity has total assets of $168.8 million or more.

16 C.F.R. § 801.50.

If you determine that the joint venture formation fits the criteria for filing, you should also check whether any exemptions to filing apply. See 16 C.F.R. pt. 802. The transaction may be exempt based on the type of assets or securities being acquired (e.g., real property, foreign assets, convertible voting securities) or the type of entities involved (e.g., financial institutions whose transactions are reviewed by a bank regulatory agency). For a quick reference checklist of common exemptions, please see the Hart-Scott-Rodino (HSR) Act Exemptions by Topic Checklist.

In addition, if in forming the joint venture, a joint venture party must make an HSR filing under 16 C.F.R. § 801.40 or § 801.50, the newly created entity need not make an HSR filing. 16 C.F.R. § 802.41.

Regulatory Safe Harbors

The *Competitor Collaboration Guidelines* set out two safe harbors, referred to as safety zones, for joint ventures that the FTC and DOJ would not challenge "[a]bsent extraordinary circumstances." Competitor Collaboration Guidelines §§ 4.2–4.3. The safe harbors are:

- Joint ventures where the combined market share of the joint venture and the joint venture parties does not exceed 20% of each relevant market, whether upstream or downstream, in which the venture may affect competition.
- Joint ventures in innovation markets where there are, in addition to the joint venture, three or more "independently controlled research efforts" that "possess the required specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration."

These safe harbors, however, do not apply to "agreements that are per se illegal, or that would be challenged without a detailed market analysis, or to competitor collaborations to which a merger analysis is applied." Competitor Collaboration Guidelines §§ 4.2–4.3. They also do not apply in cases brought by private parties, although courts may look to the *Guidelines* in deciding whether a joint venture is likely to harm competition.

To determine whether your client could avail itself of a safe harbor, you will need first to inquire about the nature and purpose of the joint venture to understand whether the joint venture parties have an anticompetitive intent or whether the venture on its face is likely to harm competition. If so, it is unlikely that a safe harbor would apply. Second, you will need to analyze the potential relevant product and geographic markets and to calculate the

market shares of the joint venture and the joint venture parties. For joint ventures involving innovation markets—markets for “research and development directed to particular new or improved goods or processes”—you will need to analyze the market structure and number of other companies that are engaged in or likely to engage in research and development efforts that have the same or similar goal as the joint venture’s efforts. Competitor Collaboration Guidelines § 3.32(c).

Analytical Framework

For joint ventures that do not fit the criteria for a merger analysis, the antitrust agencies and/or the courts will evaluate the venture as they would any other agreement among competitors. The first question is whether the joint venture is subject to a per se or rule of reason analysis. The rule of reason applies to the formation of a joint venture and whether the venture itself is lawful. As the Supreme Court noted in Texaco Inc. v. Dagher, 547 U.S. 1, 6 n.1 (2006), if plaintiffs had challenged the formation of the joint venture, they would have been required to show it was anticompetitive under the rule of reason. Per se treatment, however, may apply to activities of the joint venture that restrain competition. As a general matter, per se treatment will apply when the restraint on competition is one that typically is per se unlawful (such as price fixing), is not central to any procompetitive purpose of the joint venture and is not reasonably necessary to achieve any procompetitive purpose of the joint venture. The rule of reason will apply when the restraint is central to the procompetitive purpose of the joint venture and reasonably necessary to achieve that purpose. It is also possible that a quick look analysis will apply where the anticompetitive effect of the conduct is apparent, but the parties also proffer procompetitive justifications. For more background on when courts will apply per se treatment or the rule of reason, please see the practice note Standards to Assess the Legality of Conduct in Antitrust Cases.

Where the rule of reason applies, the antitrust agency or a court would first determine whether the restraint on competition—either the formation of the joint venture or its activities—is likely to cause or has caused anticompetitive harm. If there has been no harm or such harm is unlikely to occur, then the antitrust agency would not challenge and a court would uphold the legality of the joint venture restraint. If, however, anticompetitive harm has occurred or is likely to occur, the agency or court would then evaluate whether the joint venture restraint offers procompetitive benefits and whether those benefits outweigh the anticompetitive harm. If the harm outweighs the benefits, then the agency will challenge the joint venture restraint and a court is likely to find it unlawful. Conversely, if the benefits outweigh the harms, then the joint venture restraint should withstand scrutiny. Competitor Collaboration Guidelines § 3.3.

IDENTIFYING AND MITIGATING ANTITRUST RISKS OF JOINT VENTURES

Whether a joint venture raises anticompetitive concerns—and whether those concerns are insurmountable to withstanding an antitrust challenge—depend on many factors with no bright line rules. And as with any antitrust analysis, it is highly fact specific. To help you with this analysis, this section provides more detail on particular aspects of joint ventures to consider when trying to structure a joint venture to mitigate antitrust risk.

General Considerations

Purpose

The joint venture parties must intend to undertake some activity that provides benefits to consumers through efficiencies that result in lower prices or providing new or improved goods and services. If the parties intend to collaborate simply to reduce competition or make competing easier, defending the joint venture will be very difficult. When drafting the joint venture documents, you should ensure that the parties refer to the legitimate, efficiency-enhancing rationale for the venture.

Competition among the Parties and the Joint Venture

To understand the potential competitive impact of a joint venture, you must know the lines of business of the joint venture parties, what lines of business the joint venture will undertake, and any interactions among the venture's and the parties' lines of business. For example, will the joint venture undertake the same activity that the parties today do separately and in competition with each other? If so, will the joint venture parties continue operating in those overlapping lines of business and compete against each other and the joint venture? Or, is the joint venture providing an input to downstream operations of the joint venture parties, or instead offering a downstream service for the parties?

Joint Ventures That Eliminate All Competition between the Parties

If the joint venture eliminates all competition between the joint venture parties, the antitrust risk of the joint venture formation may be higher. The antitrust agencies would likely analyze a joint venture that eliminates all competition between the parties as a horizontal merger. Whether the joint venture would likely prevail against a challenge in such circumstances could depend greatly on the purpose of the venture, the number of other competitors in the marketplace, and other structural factors such as barriers to entry.

Joint Ventures in which the Parties Compete with Each Other and/or with the Joint Venture

A joint venture that does not eliminate all competition between the parties is likely to pose less antitrust risk in the formation, but the venture itself could create risks in its ongoing operations. For example, the joint venture could provide an incentive to reduce competition among joint venture parties both in matters that are the subject of the joint venture and in matters outside the joint venture. The joint venture also provides a forum through which the parties could share competitively sensitive information or otherwise collude on matters both inside and outside the venture.

Where the parties will continue to compete with each other and/or the joint venture itself, ask your client how it sees incentives to compete realistically once the venture is in place. Also, explore ways to structure the joint venture's operation to preserve incentives to compete, including matters such as decision-making authority for pricing, marketing, output, and R&D, as relevant. In all cases, work with your client to establish firewalls so that none of the joint venture parties or the venture itself can access or share competitively sensitive information for any lines of business where they compete.

In creating firewalls, have the relevant employees sign confidentiality agreements and define what is meant by confidential information as well as the limits of distributing and using confidential information. As further protection, place both physical and technological restrictions on access to confidential information to prevent inappropriate personnel from accessing it. In addition, conduct regular trainings to inform employees of their obligations and conduct audits to ensure employees are adhering to confidentiality requirements.

For additional considerations that pertain to control and governance of the joint venture when the parties will continue to compete with each other and/or with the joint venture, see the discussion below of "Governance of the Joint Venture."

Market Shares and Market Concentration

If the joint venture parties or the joint venture itself has high market shares in the products or services at issue, that may indicate that the parties and/or the venture will have market power—the ability to raise price, restrict output, or reduce quality or innovation. While market shares alone do not determine market power, high market shares could result in greater scrutiny of the joint venture.

Along with market shares, market concentration can impact significantly whether a joint venture receives and can withstand scrutiny. If the market has numerous participants and the joint venture does not materially alter market concentration, the joint venture is unlikely to cause anticompetitive harm. If, however, the market is highly concentrated and the venture increases concentration, it could be a problem. The ultimate question is whether the because of the parties' share of the market and the market structure, creating the joint venture will give either the venture or the joint venture parties market power.

Duration

There is no rule that a joint venture with a longer duration is inherently riskier than one with a shorter duration. The *Competitor Collaboration Guidelines*, however, seem to take the position that a shorter duration is better because "the shorter the duration, the more likely participants are to compete against each other and their collaboration." Competitor Collaboration Guidelines § 3.34(f). But, a short duration may not be sufficient to provide the benefits intended from the venture. Accordingly, any restraints on competition that the joint venture creates should last no longer than necessary to achieve the joint venture's procompetitive objectives.

Level of Contribution by the Joint Venture Parents

To be considered an efficiency-enhancing integration, the parties to the joint venture must each have a stake in the venture and share in its profits and losses. Otherwise, the venture may be indistinguishable from a simple agreement between competitors to reduce competition. While it is important that the joint venture parties both have a stake in the venture, the significance of the assets that each party contributes to the venture and the degree of the parties' financial interests in the venture, particularly when compared with their own independent businesses, can negatively impact the incentive to compete. Competitor Collaboration Guidelines § 3.34(b), (c).

For example, if one of the joint venture parties contributed all its production assets to the joint venture, that party would be unable itself to continue producing goods to sell in competition with the other joint venture parties or the venture itself (absent investment to purchase or build new production assets). Similarly, if the joint venture will sell a product that competes with products of the joint venture parties, depending on the respective interests in the joint venture and the margins on the competing products, both the joint venture parties and the venture may have an incentive to increase product prices to the detriment of consumers. Whether these situations would be problematic, however, depends upon additional factors, including the parties' market shares and market concentration.

Governance of the Joint Venture

In determining the ownership structure, governance rights, and day-to-day management of a joint venture, you must understand whether the joint venture parties (1) compete with each other and/or (2) intend to compete with the joint venture.

- Parties compete with each other but not the joint venture. If the joint venture parties compete with each other but will not compete with the joint venture, the key issue will be ensuring that the parties do not use the joint venture as a conduit to share information outside the scope of the joint venture either accidentally or on purpose. You can accomplish this by setting up information firewalls to ensure that the joint venture parties cannot share competitively sensitive information with each other. As an additional precaution, the joint venture parties can exclude individuals in sales, marketing, pricing, R&D, or other competitively sensitive roles at their own companies from being involved in the venture's activities or governance.
- Parties intend to compete with the joint venture. Certain joint venture parties may be able to take advantage of *Copperweld* single-entity immunity, and therefore eliminate or mitigate risks that would otherwise exist

> from competing with a joint venture that they control, including managing the day-to-day operations of and exchanging competitively sensitive information with the joint venture. While some courts have extended the reasoning of Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984), to immunize from antitrust claims the activities of entities beyond a parent and its wholly owned subsidiary—the facts in *Copperweld*—the precise boundaries of *Copperweld* immunity remain unsettled. The inquiry is fact specific, but "[w]here there is substantial common ownership, a fiduciary obligation to act for another entity's economic benefit or an agreement to divide profits and losses, individual firms function as an economic unit and are generally treated as a single entity." Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1148 (9th Cir. 2003).

If there is sufficient uncertainty about whether *Copperweld* would apply to any of the joint venture parties, you should advise your client of the risks of those parties being involved in governance, day-to-day management of, or receiving competitively sensitive information from the joint venture. To mitigate those risks, parties that cannot avail themselves of *Copperweld* should explore the feasibility of vesting governance and day-to-day management of the joint venture with an independent third party or with the party that does have *Copperweld* immunity. Any joint venture parties that lack general governance and day-to-day management responsibilities, however, may still exercise certain governance rights, such as veto rights over certain decisions that are not competitively sensitive such as the ownership structure of the joint venture, the term of the joint venture, capital expenditures, and taking on debt.

Activities of the Joint Venture

Where a joint venture involving competitors seeks to coordinate on prices, output, or customers, antitrust risk may be high. It is important to understand whether or not the coordinated activity is reasonably necessary to achieve the joint venture's legitimate procompetitive goals. If it is necessary, it is also important to ensure that any restriction on competition resulting from the coordination is limited to that which is reasonably necessary.

For instance, in New York v. St. Francis Hosp., 94 F. Supp. 2d 399 (S.D.N.Y. 2000), two hospitals applied for New York State Department of Health approval to offer three new services jointly and to create a joint venture to operate and manage those services. The hospitals went further, however, and divided specialties between them and agreed not to compete against each other or their joint venture. The hospitals also insisted that third-party payors negotiate rates with the hospitals jointly. 94 F. Supp. at 404–07. In a challenge to the joint venture's activities, the district court held that the hospitals' conduct was per se unlawful under Section 1 of the Sherman Act. It declined to apply the rule of reason because it found that the restrictions on competition did not relate to the efficiencies to be achieved by the joint venture. 94 F. Supp. at 404–07, 414, 418, 422.

In contrast, in Augusta News Co. v. Hudson News Co., 269 F.3d 41 (1st Cir. 2001), the First Circuit Court of Appeals rejected a per se claim against wholesale magazine and news distributors that formed a joint venture to bid on retail accounts on a regional basis. The venture would bid for accounts, and if won, determine which of its wholesale distributor members would service the account. The venture, through its members, also agreed on up-front fees to pay retailers to win their business. The court held that activities of the joint venture were not per se unlawful because the members combined to offer a regional service that none could provide on their own, with "lower prices, centralized billing, and improved service." 269 F.3d at 42–43, 48. The court also noted that "a joint venture often entails setting a single price for the joint offering." 269 F.3d at 48. The court, however, left open the possibility that the plaintiff could make a claim under the rule of reason, but noted that the plaintiff failed to develop such a claim. 269 F.3d at 49.

Considerations Specific to Production Joint Ventures

A production joint venture involves two or more companies combining existing production facilities or creating new facilities jointly to make an existing product more efficiently or a new product altogether. The parties may want to produce a product that they each use internally as an input for further production or produce a product that would be sold to third parties, whether as an input or finished good. Antitrust risk is likely to be low where the parties are producing a product jointly for their internal use. That is because the parties could likely achieve efficiencies by producing the product jointly rather than purchasing from a third party, including elimination of the third-party markup, thereby resulting in lower prices to the end customer (i.e., elimination of double marginalization). Where the joint venture will produce a product that the joint venture sells to customers, antitrust risk is heightened because of potential coordination on output and pricing to third parties.

For production joint ventures, as with any joint venture, the extent and significance of the production assets that the joint venture parties contribute will impact how the transaction is analyzed and whether it could harm competition. Competitor Collaboration Guidelines § 3.31(a). Where parties are combining all or most of their production assets, the antitrust agencies will likely analyze the transaction under the *Horizontal Merger Guidelines*. If, however, the parties retain some independent production capabilities or together construct a new production facility, the antitrust agencies may analyze the venture as a competitor collaboration and find the likely harm to competition low, depending on other aspects of the venture.

In addition, a procompetitive production joint venture will either cause no reduction in production or actually increase production. If the parties intend to consolidate production assets and that results in reduced production, the venture may be suspect. In addition, if any joint venture party would benefit from the joint venture limiting production, that party should have no involvement in the venture's output decisions. The safest course is for the joint venture to determine its production independently.

The parties also will need to manage any pricing decisions carefully. Any joint venture parties that compete with the joint venture should have no involvement in the joint venture's pricing decisions. Where the parties compete with each other but not the venture, they may have a say in the joint venture's pricing as long as the venture is not selling to their competitors. In that case, the joint venture parties may have an incentive to raise their competitors' costs and so they should be insulated from the venture's pricing decisions. If the joint venture parties are purchasing the venture's products to sell separately to third parties, the joint venture parties must ensure that they make pricing decisions independently.

Considerations Specific to R&D Joint Ventures

R&D joint ventures involve the cooperation of parties in developing new products, processes, or services, and occur in many sectors, including pharmaceuticals, technology, and manufacturing. A joint venture that allows companies to combine complementary assets or know-how may benefit consumers by increasing the amount and success of R&D efforts, thereby shortening the time to market for new, beneficial products and services. R&D joint ventures, however, also risk reducing R&D and innovation by combining into one the efforts of multiple companies that could be pursuing R&D separately, or by limiting independent control of important assets. Competitor Collaboration Guidelines § 3.31(a).

As noted above, where there are three or more independent R&D efforts in addition to the joint venture, the venture may fall under the FTC's and DOJ's safety zone. Where, however, there are fewer R&D efforts, and the joint venture parties have special assets that others lack, there are regulatory barriers to entry, or one or more of the joint venture parties already has market power in products that the R&D effort would compete with, antitrust risk is likely high. Id. The extent that the joint venture parties can continue to use independently any assets or know-how they contribute to the venture and how the parties allocate sales, marketing, and pricing responsibilities for any fruits of the venture's R&D efforts will also be important to determining risk.

In addition, parties to an R&D joint venture may be able to avail themselves of the National Cooperative Research and Production Act (NCRPA), which provides limited protections to certain R&D joint ventures where the parties notify the Attorney General and FTC of the venture. 15 U.S.C. § 4301(a)(6), (b). The NCRPA benefits joint venture parties in litigation in the following ways:

- Any joint activities that were included in the notification are subject to the rule of reason.
- Damages, if any, are limited to actual damages rather than treble damages.
- Any party in the litigation, not just the plaintiff, can recover attorney's fees if they prevail.

15 U.S.C. §§ 4302–4304.

The NCRPA, however, does not protect the joint venture parties from the possibility of an antitrust suit or antitrust liability, and the protections apply only to the extent of the joint venture activities that are disclosed. To obtain the benefits of the NCRPA, the parties must file a notification with the Attorney General and the FTC within 90 days of executing the joint venture agreement that identifies the parties to the joint venture, the nature and objectives of the venture, and in certain circumstances, the nationality of any person who is a party to the venture or controls any party to the venture. 15 U.S.C. § 4305. Thirty days after receiving the notification, the Attorney General or FTC must file notice of the venture in the Federal Register, and as of that time, the joint venture receives the protections of the act. Id.

Considerations Specific to Sales and Marketing Joint Ventures

Sales and marketing joint ventures between competitors are typically the riskiest of all competitor collaborations because they may involve customer-facing activities, including sales and pricing. While these joint ventures may help companies increase sales or reach the marketplace more quickly, they typically restrict independent decision-making and competition on pricing and output and may reduce incentives for comparative advertising. Competitor Collaborations Guidelines 3.31(a). They could also facilitate coordination on products or services outside of the joint venture.

If the parties want to enter a sales and marketing joint venture, they will need to substantiate procompetitive benefits that will result from the collaboration. They further should restrict any collaboration to what is truly necessary to achieve those benefits. For example, if the collaboration can distribute goods more efficiently to some types of customers or to a particular region, the venture should not extend beyond that. The joint venture parties should also restrict the flow of competitively sensitive information from the joint venture to the joint venture parties or between the joint venture parties. Finally, the parties should ensure that they act independently on matters outside of the joint venture and not let the venture's activities influence their sales, pricing, and output decisions on those matters.

For example, in Polygram Holding Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005), the Court of Appeals for the District of Columbia upheld the FTC's ruling that an agreement between Polygram Holding Inc. (Polygram) and Warner Communications, Inc. (Warner) to restrict advertising and discounting of "The Three Tenors" albums they each separately distributed to help sales of a new album the parties would jointly distribute violated Section 5 of the FTC Act. The D.C. Circuit rejected Polygram's argument that the restriction was necessary to prevent it and Warner to free ride on promotional efforts of the new album to sell their older albums. It held that a concern about free riding was not a sufficient procompetitive justification for restricting competition on matters outside of the joint venture. 416 F.3d at 32.

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