

Concurring and Dissenting Statement of Commissioner J. Thomas Rosch
Regarding Proposed Revisions to the Part 2 Rules and Rule 4.1(e)

January 13, 2012

The Commission announced today that it will publish a notice in the Federal Register proposing revisions to the FTC's Rules of Practice. I support the Commission's efforts to modernize our operating rules and generally agree with the changes proposed today. I nevertheless dissent from the proposed rule changes insofar as they omit two important reforms: mandatory compulsory process in all full-phase investigations and regular reports on the status of pending investigations to all Commissioners.

A thorough investigation requires the use of compulsory process. This is particularly true for investigations involving competition concerns. Targets cannot be expected to provide incriminatory information in response to access letters, which are not judicially enforceable. Likewise, third parties cannot be expected to provide candid information unless they are given the "cover" from a target's retaliation that compulsory process provides. Only through the use of mandatory compulsory process at the outset of all full-phase competition investigations can the Commission be assured of having a thorough and complete record when making enforcement decisions.

Another needed reform to our Rules of Practice is requiring regular reports on the status of pending investigations to all Commissioners, not just the Chairman. Notwithstanding the laudable efforts of our current Chairman, the Commission has not always been kept apprised of the status of pending investigations, particularly those languishing for a lengthy period of time. The current Chairman will not be in his position forever so leaving the decision up to whoever is the Chairman about whether and when to brief other Commissioners does not solve the problem. Requiring regular reports to all Commissioners for investigations lasting longer than six months will inspire public confidence and help avoid undue delays in completing investigations.