

STATEMENT OF COMMISSIONER J. THOMAS ROSCH ON
THE RELEASE OF THE 2010 HORIZONTAL MERGER GUIDELINES

Project No. P092900

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It would be wrong not to acknowledge that this project makes at least one monumental contribution to the guidance that the Agencies are providing to the business community,

that the market must be defined at some point in

be sure, some of the Commission attorneys responsible for reviewing mergers ex ante and/or explaining to the Commission how they planned to present and defend their challenges in court or in Part 3 were consulted in connection with the project. But the three economists initiated and largely managed this project. Second, there was indeed a series of workshops held around the country, and a number of comments were submitted respecting these Guidelines. But the participants in the workshops were mostly members of the defense bar, academics, and other kindred souls, and the comments apparently given the most serious attention by the project's architects (and incorporated in these Guidelines) largely reflected those same perspectives. Third, long before these Guidelines were finalized, representations were made to the ABA Antitrust Section about the changes in the 1992 Guidelines that were likely to occur. Indeed at least one private meeting was held with the Section's leadership regarding their desire for changes in the April 2010 draft of the Guidelines.

This process inevitably led to overemphasis on economic formulae and models based on price theory. For example, Sections 4.1.1 and 4.1.2 retain the SSNIP test, an economic test which posits that a small but significant profitable price increase over "benchmark prices" may be used to define a relevant market's structure. Section 5.3 builds on the markets defined by the SSNIP test and provides what amount to "safe harbors" for mergers that result in certain levels of market concentration.

The architects of the project included colleagues who co-authored papers and articles proposing economic models relying largely on margins (prices minus incremental costs) to determine whether a merger was likely to result in coordinated or unilateral anticompetitive effects. As a result, many of the economic theories in the revised Guidelines are based wholly or partially on margins. For example, the April 20, 2010 draft of Section of 2.2.1 treated margins as a species of empirical evidence and asserted that "if a firm sets price well above marginal cost, that normally indicates either that the firm is coordinating with its rivals or that the firm believes its

incorporate the concepts, if not the exact models, that two of the architect

Del. 2006)), or because the use of such ec