Statement of J. Thomas Rosch Respecting
Proposed Regulations Implementing the Affordable Care Act.

The Centers for Medicare & Medicaid Services (CMS) is expected to issue momentarily proposed regulations implementing certain aspects of the Patent Protection and Affordable Care Act of 2010 (the Act). As they should, all thoughtful members of Congress will want to review these proposed regulations carefully, and Congressional hearings respecting them will probably be held. That review should consider at least two issues.

First, the proposed regulations reportedly omit assignment of responsibility for antitrust review and enforcement of Accountable Care Organizations (ACOs) as between the Federal Trade Commission (FTC) and the Antitrust Division of the Justice Department (the Division), the two agencies primarily responsible for public law enforcement at the federal level. This omission would go well beyond inviting a "turf war" between the two antitrust agencies. It would also result in sub-optimal enforcement because it is imperative that CMS' proposed regulations provide that antitrust review and enforcement be carried out by the agency that is most qualified to discharge that responsibility.

Insofar as the CMS regulations fail to assign that responsibility, that appears to be a reaction to a February 14 letter from nine Democratic senators who supported enactment of the Act. That letter urged CMS (and the antitrust agencies) to divide responsibility for review and enforcement of the antitrust laws respecting ACOs equally between the FTC and the Division. The letter claimed that this division of labor tracked how enforcement responsibility had historically been divided between the agencies.

That assertion was disingenuous. Although it is correct that responsibility for enforcing the antitrust laws has historically been allocated to these two agencies, it is incorrect to say that antitrust responsibility for a *particular matter* has historically been divided between the two agencies. To the contrary, responsibility for a *particular matter* has historically been allocated to the agency with superior expertise and experience relevant to that matter. In this case, that agency is unquestionably the FTC.

ACOs are a type of "clinically integrated" health care provider. For the last decade, the FTC has not only taken the lead in reviewing and enforcing the antitrust laws respecting clinically-integrated health care providers, but has done so nearly exclusively. Likewise, the FTC has investigated nearly all of the mergers and acquisitions involving competing physician groups and hospitals over the last decade. The Division's only notable recent experience in the health care sector has respected payers, and the FTC regularly consults with payers in the course of antitrust enforcement of competing health care providers.

Beyond that, the FTC is an independent agency rather than an Executive Branch agency like the Division. As such, it is less susceptible to agency capture by the

Executive Branch and those lobbying that Branch. The letter from the nine senators is consistent with the views of the American Hospital Association (AHA). For many years, the AHA has lobbied vigorously against the FTC's antitrust review and enforcement respecting clinically-integrated providers, including hospitals. Indeed, the AHA's former lobbyists include members of the Division's top management and their prior law firm.

Second, the proposed regulations must provide an adequate mechanism for determining whether and to what extent ACOs are achieving net cost-containment objectives. This omission would be surprising because proponents of the Act, like the nine Senators who authored the letter, promised that ACOs would yield substantial cost savings while delivering superior health outcomes. Yet the letter did not suggest, much less insist, that the proposed regulations ensure that those promises be fulfilled.

To be sure, the proposed regulations may provide benchmarks for determining whether ACOs achieve cost-containment goals under Medicare's Shared Savings (MSS) program. But that will do nothing to benchmark the performance of ACOs in providing services to many millions of patients who will be covered by private insurance programs. The savings accruing to the MSS program may come at the expense of private payers or their patients. Thus, the proposed regulations should enable one to determine whether ACOs are simply "robbing Peter" (private insurers and their insureds) "to pay Paul" (MSS).

These views are my own and do not reflect the views of the Commission or any other Commissioner.