

**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 Patient 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 agenci

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.