EXECUTIVE COMMITTEE MEETING TO CONSIDER

HEALTH CARE REFORM

THURSDAY, SEPTEMBER 24, 2009

U.S. Senate,
Committee on Finance,
Washington, DC.

The hearing was convened, pursuant to notice, at 9:40 a.m., in room 216, Hart Senate Office Building, Hon. Max Baucus (chairman of the committee) presiding.


Also present: Democratic Staff: Russ Sullivan, Staff Director; Bill Dauster, Deputy Staff Director and General Counsel; Liz Fowler, Senior Counsel to the Chairman and Chief Health Counsel; Cathy Koch, Chief Tax Counsel; Tiffany Smith, Professional Staff; Bridget Mallon, Detailee; Kelcy Poulson, Tax Research Assistant; Michael Smart, International Trade Counsel; Mary Baker, Detailee; Chris Dawe, Professional Staff; and David Hughes, Senior Business and Accounting Advisor.

Republican Staff: Kolan Davis, Staff Director and Chief Counsel; and Mark Hayes, Republican Health Policy Director and Chief Health Counsel.
Also present: David Schwartz, Professional Staff; Yvette Fontenot, Professional Staff; Thomas Barthold, Chief of Staff of the Joint Committee on Taxation; Josh Levasseur, Deputy Chief Clerk and Historian; Athena Schritz, Archivist; Shawn Bishop, Professional Staff; and Neleen Eisinger, Professional Staff.
OPENING STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM MONTANA, CHAIRMAN, COMMITTEE ON FINANCE

The Chairman. The Committee will come to order.

I would like to go over some of the amendments we have pending now. First, yesterday was—to sum up, we voted on only about 25 amendments, and I look forward to an even more productive day today. Let me list the amendments that are in one way or another available.

First, we have from the First Delivery Reform list—that is how it is titled here—Wyden D-2, Rockefeller D-10, Nelson D-1, Bingaman D-6, and Hatch D-3.

Then we have another category from the Second Delivery Reform list. That is Roberts D-4, Wyden D-17, Grassley C-9, Kyl D-8, Roberts D-5, and Nelson D-10. That is Medicare Advantage. I guess I should give titles.

Then from the Wednesday late night list, Cornyn D-5, Access to Medicare Data Claims; Crapo D-1, Medical Advantage Competitive Bidding; Grassley, GPCI; Wyden, Hospice; Stabenow C-5, Access to Providers and the Exchange; Stabenow C-7, Dental Plans and Exchange; Stabenow C-8, Level Playing Field for Ratings Reform; and Menendez C-9, Quality Health Care for Autism.

Okay. If we are ready, we will take amendments.
Let us get started here. Who wishes to offer an amendment?

I see here this morning--Senator Conrad is here. I do not see the Conrad Amendment. But Senator Kyl, Senator Bunning--

Senator Kyl. Mr. Chairman, I would just note one thing. As you know, Senator Roberts has got to watch his health, and so there are some times when he is not here, and the amendment that he and I have really need to go together and so on. So I think we should defer that.

The Chairman. That is not D-8, is it?

Senator Kyl. No, that is--yeah, well, mine is D-8, his is D-5, and actually there are a couple others that go with that that are not on either of these lists.

The Chairman. Senator Hatch, I see D-3, Strike DSH Provisions?

Senator Hatch. I am not quite prepared yet, Mr. Chairman.

The Chairman. Okay, you are not quite ready.

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad.

Senator Conrad. I do not have an amendment on that list, but I would like to offer an amendment that would rule out of order any amendments pending if the members are not here to actually offer them. I would be happy to
Senator Kyl.   Well, Mr. Chairman, I think we should vote on it right now without proxies.

[Laughter.]

The Chairman.   I see Senator Wyden here. Senator Wyden, you have one, two, three amendments here on three different--each amendment on a different list, three in total. One is Independence at Home. It is D-2. Then we have D-17, Medicare Advantage modified. Then I see D-16, Hospice.

Senator Wyden.   Mr. Chairman, you are being logical, and we are going to need a few minutes to work with colleagues and get back to you and Senator Grassley to see if we have a bipartisan agreement.

The Chairman.   All right.

Senator Conrad.   Mr. Chairman, while we are waiting for colleagues to come to the hearing room to present their amendments, do we have any more information overnight on CBO's scoring of amendments that are pending? Did we get any report overnight?

The Chairman.   I do not think--nothing we want to discuss publicly.

Senator Conrad.   I was afraid of that. One thing that would be, I think, very useful to disposing of as many amendments as possible today is if we could get some
scheduling of amendments, talking to staffs. We have tried to do that, the Chairman has tried to do that by laying out in order of the type of amendments to be considered at a time. But maybe it would be useful now if colleagues knew when their amendments were going to be considered, that that would help organize. We know that colleagues, in fairness to them, have other responsibilities. They have other Committee assignments. They have meetings with people from back home. But perhaps if they knew when their amendment was most likely to come up--

The Chairman. Well, that is a good point, but there is no better time than right now. Anyone could offer an amendment now. But you make a good point. Let us do that once we get started here. We are about ready.

Senator Wyden, how soon, do you think?

Senator Wyden. Mr. Chairman, again, we are going to need a few minutes on Medicare Advantage. We are going to need colleagues here. And as you know, last night you asked us to defer on the hospice amendment. So we will need a little bit more time, but that is why I am here, to try to work as expeditiously as possible.

Senator Hatch. Mr. Chairman, I am ready to offer my amendment if you want.

The Chairman. Okay. Senator Hatch? You are good
man, Senator Hatch.

Senator Hatch. Thank you. I thought I would pull you out of this lethargy you are in here.

The Chairman. Thank you.

Senator Hatch. I would call up amendment C-2 to the America's Healthy Future Act of 2009. Now, the short title of this amendment--

The Chairman. It is not on this list, but that is fine with me to offer the amendment.

Senator Hatch. It is what, now? I did not hear you.

The Chairman. C-2.

Senator Hatch. C-2. What this amendment does is it ensures Americans can keep the coverage that they have. This is one of the major points that the President has made over and over and over, and I think we ought to at least try to help live up to that if we can; that is, if you have coverage that you like, you will be able to keep it under this bill. And yet there are lots of provisions in this bill that will make it so you cannot keep your coverage.

So I have got a way, maybe, of helping us to be a little more perspicacious on this particular level in this matter.

Senator Conrad. Would the Senator yield? What was
that last word that you used?

Senator Hatch. Well, I do not know what it means either, but--

[Laughter.]

Senator Hatch. "Perspicacious." It is something I would like to see more from you.

Senator Conrad. Well, what does it mean?

Senator Hatch. I want you to look it up. You have your BlackBerry. Just get it out.

Senator Conrad. Okay.

Senator Kyl. Perspicacity.

Senator Hatch. That is right.

Senator Kyl. A capacity to see things in great dimension and time.

Senator Conrad. I see.

Senator Hatch. I knew that Senator Kyl would set us straight.

Senator Conrad. Very, very good word.

Senator Grassley. He was born in Iowa.

Senator Hatch. Well, back to the amendment. The purpose of this amendment is simple. If the Secretary of Health and Human Services certifies that more than 1 million Americans would lose the current coverage of their choice because of this bill, then this bill would not go into effect. It seems like a very, very simple
but perfect amendment for those of us who have integrity.

This amendment is simply trying to safeguard President Obama's pledge to the American people that you will get to keep what you have. And even allowing for a million people, up to a million people, 999,999. And it is a straightforward amendment that explicitly tests our Committee's commitment to the President's promise without any technical nuances.

Now, let me make this point here. Especially in the light of our Medicare Advantage debate that we had yesterday--and I have to say, I am very disappointed in this Committee for what we did on Medicare Advantage. The American people are tired, I think just tired of promises being made that are simply forsaken based on technicalities and nuances.

For example, we will not cut your Medicare benefits. That has been said over and over and over. But as we saw yesterday, that only happens unless you are one of the almost 10 million Medicare Advantage seniors whose extra benefits will be cut--the technicality here being it is not a statutory benefit; it is an extra benefit like vision or dental care.

Well, Mr. Chairman, seniors do not know the differences between statutory benefits or so-called extra benefits. They only know benefits. And I think vision
and dental benefits, even though they are being
classified as extra benefits, are real benefits for our
seniors.

So we have made this amendment very simple and
straightforward so that we can make a clear decision on
if the majority supports the President's promise of you
can keep what you have, or not, no technicalities, no
nuances, we all believe that health care reform should
not impact Americans who currently enjoy the health care
of their choice. The purpose of this legislation, as the
chairman has repeatedly indicated, is to increase our
choices, not to eliminate them. And yet yesterday we
basically eliminated the choice of 10 million Americans.

And what really got me upset is to say that because
we want to keep Medicare Advantage as it is—its works
beautifully, people have better health care outcomes, it
actually saves money in the long run, it actually helps
people, senior citizens, if you will—but it does cost a
little more. But all of those advantages more than make
up for the cost, in my opinion. And if all of us around
the table believe that in this bill delivering the
President's promise, we should have no problem supporting
this amendment. And I have even allowed a little leeway
here, although I do not even like that, but I thought I
would go that far, that if it is less than a million, you
can do what you want, but up to a million, a million or more, then they ought to be able to keep the current coverage of their choice. And these 10 million Americans, 90-some percent of them love Medicare Advantage. And the reason we did Medicare Advantage is because the senior citizens were not being helped in the rural others, among others. In some of these distinctly difficult areas of providing health care, we were not getting to them. We were not helping them. Medicare Advantage has had a tremendous advantage to them. And if there are any cuts, the $113 billion taken out of Medicare Advantage is a cut—or, should I say, a massive amount of cuts that affect 10 million people in this society, some of the most vulnerable people that I know of.

So I hope that our colleagues will consider this amendment and vote for it because we ought to be willing to do that, and I have been very generous in allowing up to a million people—or more than a million people to give some leeway to the Committee, but even that, I have got to admit, I do not like but I am willing to offer this amendment on that basis.

The Chairman. Any discussion?

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad.
Senator Conrad. Mr. Chairman, if I ever need a lawyer to represent me if I have a very bad case, I am going to try to get Senator Hatch to represent me, because he can make the best of a bad case of almost everybody I have ever seen.

Senator Hatch. You know, Senator, I feel the same about you when it comes to budgetary matters, because nobody can explain it better than you and get away with what you do from time to time.

[Laughter.]

Senator Hatch. Well, that is sort of a back-handed compliment, but I will take it this morning.

The reason I gave you the compliment I did is because--

Senator Hatch. You are very kind.

Senator Conrad. --we all know the truth. The truth is Medicare is headed for bankruptcy. We all know that Medicare Advantage is one of the key reasons that is so, because Medicare Advantage, which was sold initially on the basis that it would save money--in fact, it was capped at 97 percent of fee-for-service Medicare. We now have Medicare Advantage plans that cost 150 percent of fee-for-service Medicare, and we have a runaway train. And it is costing all of those who are in Medicare more money to float the boat for those who are
getting very advanced and enhanced benefits we simply
cannot afford.

And what Senator Hatch promoted last night, and
apparently wants to continue to promote today, is the
false sense to people who are on Medicare Advantage that
we can keep on paying for something that is clearly
unaffordable and is going to contribute to the bankruptcy
of Medicare.

Now, at some point we have to look people in the eye
and tell them the truth. The Medicare trust fund has
already gone cash negative. The trustees have told us
Medicare will go broke in 8 years. So the notion that we
do not have to change anything, just stick with the
status quo, is a prescription for a disaster—a disaster
for Medicare beneficiaries, a disaster for the Federal
Government because the biggest unfunded liability of the
United States is Medicare. The unfunded liability in
Medicare is $36 trillion.

Now, if you do not want to do anything about that,
if you just want to stay on cruise control until we go
right over the cliff, then support the Hatch amendment.

Senator Hatch. Well, Mr. Chairman, let me just
answer that. You know—

The Chairman. Anybody else seeking recognition?

Senator Hatch. I see recognition. It is my
amendment. I should be able to answer it.

The Chairman. I know, but a lot of the Senators wish to speak, too.

Senator Hatch. A point of privilege. I--

The Chairman. Okay, Senator Hatch. You can speak.

You are recognized.

Senator Hatch. Look, the distinguished Chairman of the Budget Committee has made a point, and that is, we are $38 trillion in unfunded liability in Medicare. So we are going to take $113 billion from people who benefit greatly from a program that was designed to benefit them greatly, senior citizens, 25 percent of all Medicare recipients, who love the program, have benefited greatly, it functions greatly, because they would go to a fee-for-service situation that does not function anywhere near as good. And, frankly, I do not see it. If the President meant what he said, that if you like what you have you can keep it, why would we take this away from 10 million people?

I hate to say it, but there are times when I actually believe that the only reason they want to get rid of Medicare Advantage is because they consider it a Republican program, when it is not. It was a bipartisan program. The distinguished Chairman was there in the Medicare Modernization Act work that we all did together.
I was sitting right there with him. And, frankly, we did this because it was necessary. We could not get the care to people in the rural areas in this country.

But you know what really bothers me? It looks as though the majority is willing to support the Nelson amendment when they say that, well, this is going to cost an inordinate amount of money, even though it works, that takes care of a number of States, mainly in the East, and mainly States where the costs are exorbitant compared to other States. I would like to see every State in the Union—and let me just say this, let me refocus, my dear friend from Montana—not Montana, but North Dakota, on this amendment.

The Chairman. They are all the same up there, those Northern States.

Senator Hatch. Well, I did lump you together. I do not think there is any question about that.

Now, Medicare Advantage includes--my amendment includes all Americans—all Americans with coverage of their choice, both public and private. So let us get back to my amendment which applies to all Americans.

And, look, the fact that you take care of these 10 million people, you know, it seems to me, who have benefited greatly in a system that works, that works better than the fee-for-service system that they want to
move all that $113 billion in and cut these people, one-quarter of our senior citizens in this country, and they are willing, maybe, to do it for a limited number of States, that argument that has just been made does not cut water, as far as I am concerned. They are willing to do it to a limited number of States, but they are not willing to do it to keep the President's promise.

Now, if this program was not good, if it did not work, or even if it was just modest in nature, I might feel differently. But this is a terrific program that has really helped our seniors, those who are on it, and has really helped rural America, which is often left out of some of the Federal health care approaches. And this is one thing we did to make sure they were not left out.

And it works. That is the thing that bothers me.

And then I hear this argument, well, we are $38 trillion in unfunded liability. This is a smidgeon compared to what they are willing to spend with regard to Medicare otherwise.

Now, yes, we have to do something about Medicare and its high deficits. But we should not do it on the backs of these 10 million American seniors who have, for once in their lives, had basically decent and honorable health care.

The Chairman. I would like to address the
underlying assumption of this amendment. The assumption of the amendment certainly implies that nobody is losing coverage today. It implies that anybody today could keep whatever insurance plan he or she currently has today. Whereas, under this legislation we are considering, the assumption is coverage would be lost, that is, some will not be able to keep their own plan.

That is a patently gross, inaccurate assumption. Under current law, coverage today is very much at risk. Very much at risk. Fourteen thousand people a day lose health insurance. Fourteen thousand a day due to job loss, they are losing their coverage. They cannot keep what they have. Just think of all the people who wake up and find their insurance plan has been changed. Copays are up. Deductibles are up. Less coverage. Rescission clauses added. You know, coverage limits increased. And what the company will pay is less.

Time and time and time again, people cannot rely on their current plan. They cannot keep what they have today. They can't keep what they have today. Everybody feels insecure about his or her coverage, afraid it is going to deteriorate, something is going to happen to it. You cannot keep today--today--what you might want to have.

There are lots of examples. There is one example
some of us have heard about where an individual is
diagnosed with cancer, but because she did not report
acne on her insurance application, she is denied
coverage. Just think of that. Time and time again,
insurers—what do they do? They go back and comb your
medical records to try to find some reason to deny
coverage. And they do a pretty good job at it. They
find something somewhere that you did not report,
innocuous, something small. Today, let us remind
ourselves you cannot keep what you have today, you are
very much at risk.

Most Americans do like their employer-sponsored
coverage and want to keep it, and this legislation helps
build upon that. We are allowing lower-income people,
too, some people, Medicaid expansion to get insurance
they do not now have and have a hard time getting.

Think of small businesses. Small business-provided
coverage, you cannot do it. Lots of people are losing
coverage in a small business.

The status quo today is very, very insecure
insurance coverage if you are able to get it in the first
place. And many people cannot get insurance coverage
because of some pre-existing condition. We are changing
that. We are stopping that. So let us be clear here.

The status quo, which will occur if this legislation
is not passed—and I will state it more starkly. People
who vote against this legislation are voting for the
status quo. They are voting to keep that insecurity.
They are voting to deny more people the insurance that
they may want to have because they are losing more of
their coverage every day.

A vote against this bill is a vote for continuing
insurance companies denying people coverage based on a
pre-existing condition. A vote against this bill allows
insurance companies to deny coverage based upon health
status. A vote against this bill allows excessive
rescissions. That is the status quo. That is what a
vote against this bill is all about.

So I want to make it very clear when people raise
some criticism that there may be some minor imperfection
about this bill that can be remedied, that we are working
on, that that person—I am not being personal here,
Senator Hatch, but basically any attacks against this
bill are essentially a defense of the status quo. They
are a defense of the status quo because there is not an
alternative on the other side. There is not. There is
not. All the amendments today are not a health reform
plan, but rather they are attacking this or attacking
that, something here, something there.

I do not know what the Republican alternative is.
The only thing I know a little bit about is the campaign of Senator McCain talked about his approach to health care. I do not see a massive or a big, large proposal on the other side for an alternative. I do not see one.

Now, if we could debate alternatives here, that would be interesting. But we are not debating alternatives. We are just debating amendments that want to attack this part of the mark, that part of the mark, so on and so forth.

I know I am slightly overstating the point. I grant you that. I am slightly overstating the point.

Senator Hatch. Yes, I would say slightly.

The Chairman. But not a heck of a lot overstating it. Slightly but not a heck of a lot. And I hope I am proven wrong. I want to see an honest proposal, an alternative that is comprehensive that we can look at. But so far I have not seen it.

Senator Hatch. Mr. Chairman?

Senator Bingaman. Mr. Chairman?

The Chairman. Senator Bingaman.

Senator Bingaman. Mr. Chairman, I just wanted to make the obvious point, which I think you sort of made to some degree there. I keep hearing the figure that over 14,000 people lose their coverage today, and I have not heard anyone dispute that number. Maybe there is a basis
for disputing it. But if you just multiply that out, if
that is true, if there are 14,000 people per day losing
their coverage, then every 10 days there are 140,000,
every hundred days there are 1.4 million, every year
there are over 4 million people losing their coverage.
That is the status quo.

I think the amendment the Senator is offering says
that we cannot go ahead with the Chairman's mark if a
million people might lose current coverage. They are
losing current coverage, and they are going to keep
losing current coverage unless we take some action.

Senator Hatch. Mr. Chairman, I have got to answer
that. Mr. Chairman?

The Chairman. Senator Hatch.

Senator Hatch. I think you need to look at my
amendment. I do not think any of us doubt that some
people are losing their coverage. They go in and out of
coverage every year. And some really are in dire
straits, and we should straighten that out.

As I said before, I would prefer to have the States
handle these problems in accordance with their own
demographics and have the Federal Government give the
money to the States to do it. And States like Utah are
doing a terrific job in health care, and that could be
used as an example for all the other States that are not.
There are a number of other States; Minnesota is a great example.

So there is no dispute that some people are losing their coverage, but look at this amendment. My amendment says if a million lose their coverage because of this bill--because of this bill--no other reason, just this bill. That is what the amendment says.

Now, I cite Medicare Advantage because already the way we have configured this bill, there are 10 million people who are going to lose their coverage, not just 14,000 a day or 4 million a year that go in and out of the process and some lose their coverage that we should try and take care of.

If this bill causes a million people or more to lose their coverage, it seems to me if the President's words mean anything--and I think they do to him. Do they mean anything to us as members of this Committee as we are trying to mark up a bill? He said that if you like your coverage, you are not going to lose it. Yet 10 million people, just to cite on illustration--I think we probably could give more. But since we have concentrated on Medicare Advantage, 10 million people are going to lose their coverage.

And then I hear this argument, well, we are $38 trillion in unfunded liability--yeah, we are, but these
are 10 million people, and it is a small, small percentage of that $38 trillion. And I would like to do something about that $38 trillion, but what I do not want to do is take coverage away from people who love their coverage, who would not get it otherwise, who were not treated fairly—that is why we did the Medicare Modernization Act and put Medicare Advantage to begin with, to help them to get some coverage in those rural areas and other areas where it was difficult to get coverage. And, yes, it does cost a little bit more, but it has been proven to be efficacious and better than most coverage in our society from a fee-for-service basis. And I am not criticizing that. I am just saying in this area with these 10 million senior citizens, they should not lose this $113 billion that goes to them.

I could even agree to cut that back a little bit, but what gets me is that at the same time we are arguing that 14,000 are losing their coverage, we have got an amendment from the distinguished Senator from Florida—and I do not blame him. I think he is doing a terrific job for his State, and the few States that will get some Medicare Advantage coverage or get what basically is Medicare Advantage coverage. Well, how can they justify that and take it away from others? That is the reason why this amendment—and, look, I have raised it to a
million people. That seems to me to be a reasonable number. And if this bill takes it away--and remember the key word is "If this bill causes their loss of coverage, then the amendment becomes effective."

Senator Nelson. Would the Senator yield, since he has invoked my name?

The Chairman. Senator Nelson.

Senator Nelson. If the distinguished Senator, my friend, would yield--

Senator Hatch. I do.

Senator Nelson. He just made a statement that the Senator from Florida's amendment would take it away from others. I would like to correct that--

Senator Hatch. I did not say that. I did not say that.

Senator Nelson. I thought I heard that is what you said.

Senator Hatch. My point is that--and I do not blame you for this. I commend you for it. You are trying to make sure that your people are taken care of and in a limited number of States and about 30 counties in this country--

Senator Nelson. No, no, no. No, no. No, no. The one that I am offering on grandfathering existing Medicare Advantage beneficiaries will affect almost every
State of the 50 States, and the limited amendment that I would offer will affect about half the counties in those States.

Senator Kyl. Mr. Chairman?

The Chairman. Senator Kyl, and then I would like to vote pretty quickly on this. Senator Kyl.

Senator Kyl. Thanks, Mr. Chairman. Let me try to respond to three specific points, the first by Senator Conrad, who argues that Medicare is headed for background. We all appreciate that it is financially unstable.

Secondly, his view that Medicare Advantage can be cut by over $100 billion and that will save money. Well, that would certainly save money. We can argue about whether that is a good thing to do. Those of us on this side, of course, have pointed out why it is not a good thing to do.

But whether it is or not—you can argue with the premise, but the bottom line of taking over $100 billion out of Medicare Advantage is that about a fifth of the seniors who have Medicare Advantage coverage are going to see that coverage gone. And so they do not have the option of that coverage anymore. So when the President says if you like your coverage you get to keep it, the answer is: That is not true for those people.
Secondly, it is not just people who are on Medicare. In fact, let me get to that point in just a moment and diverge to a point that the Chairman said. He said the assumption is that you get to keep your coverage today, and this is a direct quote: "That is a patently gross inaccurate assumption." A patently gross inaccurate assumption. Well, it is an assumption the President of the United States has been making for months. I do not know how many hundred times he said if you like your insurance you get to keep it.

The problem is, of course, that while it is true that an automobile company does not necessarily have to make the same care that you like to buy every year, and in that sense if you like your 1987 Grand Am, you know, in the year 2010 you may not be able to buy a 1987 Grand Am, you still have the choice to buy whatever the market offers, and the market is not constrained in what it can offer. But under this bill, the Government would define what you can buy and what you cannot buy, and what you have had will not exist anymore, at least after 5 years. And so even if you like what you have, you cannot keep it.

And that brings up the point that I started to make, which is that this does not apply only to Medicare, as Senator Hatch pointed out. It applies to everyone. And
there are two specific provisions in the bill that make
the promise that if you like what you have you get to
keep it a false promise.

The first is the rating rules that are phased in for
small-group plans and the individual market over 5 years.
After that, you are not going to be able to buy the
plans that you currently are offered or that you
currently have. There are brand-new rules that are going
to apply that are going to drastically change the kind of
insurance that is offered.

Under the exchange, basically everything will be
controlled by the Government, what you have to offer as a
minimum, what you can offer as a maximum; everybody has
to offer at least two plans, but you cannot offer any
more than four plans. They are defined in terms of the
mandated benefits, the premiums. Everything is affected
by the rules and regulations.

And that gets to the second point. No tax credits
for grandfathered plans, and the purpose, of course, is
because we want to encourage people to transition to the
plans offered in the exchange. And it is more than
encouragement. Essentially, they are not going to be
able to do business without going to those new plans.

So the reality is that all of the insurance in the
small market and in the individual market will, in fact,
be altered, and after five years it is not going to look
ing anything at all what it looks like today. So regardless
of whether you like what you have, you are not going to
be able to keep it.

Now, the third and final point. The Chairman has
made this argument before, and I have got to say that if
we continue to hear this argument, then we are going to
have to have a separate debate about just this point. He
has basically said that a vote for this amendment is a
vote for the status quo. Well, of course, it is nothing
of the kind. We have pointed out time and time again
that we believe in a lot of different kinds of reforms.
This amendment is just targeted to people who lose their
coverage as a direct result of this bill. And what
Senator Hatch is saying is if you cannot certify that a
million people are not going to lose their coverage, then
you should not go ahead with what is in this bill because
of the commitment that if you like your coverage you get
to keep it.

If we are not willing to keep that commitment, then
let us get that straight right up front. But as the
Chairman said, any attack is a support on status quo, a
vote for the status quo, a denial of an attempt to do
anything about pre-existing conditions. None of that is
true, of course. I led off my opening statement with a
series of things that Republicans wanted to do.

Now, the Chairman is correct about one thing. He has not seen a "massive GOP alternative." And there is one main reason for that. We do not believe in a massive Government takeover. That is the fundamental difference between what the mark does and what Republicans are for.

The mark says we cannot do what we want to achieve unless we basically scrap what we have and substitute a new Government takeover of how insurance is going to be offered in this country, and the net result of that is going to affect how your care is delivered in this country.

It is correct, you will not see a massive Republican bill that tries to do anything like that. As I pointed out in my opening statement, what we believe in is a targeted approach. We have a problem of too much cost? Let us target some solutions to that.

I will just note one example I gave. Insurance costs too much, health care costs too much. Let us see if we can reduce the cost. What is one of the cost drivers? Well, I pointed out a study that said that--

The Chairman. Senator, Senator--

Senator Kyl. Mr. Chairman, let me just complete my thought here.

The Chairman. You have about 1 minute to complete
your thought. Okay. We have got--

Senator Kyl. Let me complete my thought and then make another point--

The Chairman. You are delaying, Senator, and we--

Senator Kyl. Mr. Chairman, Mr. Chairman, I am not delaying. I am making an extremely important point.

The Chairman. It is a very, very important point, but you are also delaying. So let us--do other Senators have amendments they wish to offer? Go ahead, complete your thought. Then I am going to have to recognize another Senator in deference to--to be courteous to other Senators who also--

Senator Kyl. Mr. Chairman, it is courteous if you do not interrupt somebody right in the middle of a sentence of an important point they are trying to make. I have not dominated this discussion. I have not filibustered in this markup that we have been having. I think that everything I have said has been directly on point. I am responding directly to a point that you made--

The Chairman. Okay. Why don't you wrap up--

Senator Kyl. --and I will try to restate the point that I was trying to make--

The Chairman. Wrap up, please.

Senator Kyl. --which is that if our object here is
to try to reduce the cost of health care, Republicans believe we should directly target solutions to that. What is one of the big cost drivers? Malpractice. We know that, by one of the studies I cited, $100 billion--$100 billion a year--could be saved with good medical malpractice reform. Our amendments were ruled out of order trying to deal with that. And yet that is a targeted solution that would directly allow us to save money, which would, of course, make insurance less expensive and cost more affordable. So there is an example of the specific Republican alternative.

Mr. Chairman, I support the Hatch amendment. If we cannot keep the promise that if you like the insurance you have you get to keep it, then we should not be supporting the legislation that would deny that promise.

The Chairman. Okay. Senator Conrad.

Senator Conrad. First of all, maybe it would be good for all of us to take a deep breath, because this is a critically important debate. We all get heated at times, and that is understandable. I have, too, so I will put myself on notice as well.

But I would say to Senator Kyl to suggest that the Chairman's mark represents a big Government takeover, that is not true. That is not true. The Chairman's mark is the product of over a year of effort, with Republicans
and Democrats contributing.

The Chairman's mark has no public option, has no employer mandate, has the tax reform that many Republicans were advocating, including your colleague Senator McCain in the Presidential race, to reduce overutilization.

The Chairman's mark tries to make clear that people who are here illegally will not get covered; that there will not be taxpayer funding of abortion.

To assert that this in any represents some big Government takeover, that is not fair criticism, and it is not accurate criticism.

This represents building on the current employer-based system in the United States with employers contributing, with employees contributing, but with important insurance market reform to say that you cannot deny people coverage based on pre-existing condition, that you cannot impose annual limits that takes insurance away from people who have been paying their premiums when they get sick. And it says you cannot yank people's health care coverage when they have a diagnosis of cancer, and then some insurance companies—not all. Many insurance companies operate very honestly and ethically. But we know there are many abuses. I have a file folder full of them from just my home State of North Dakota.
To go directly to medical malpractice, there are many on our side who believe there do need to be reforms. Senator Kyl, when you referenced last night an idea on medical malpractice, you may recall I said to you publicly at the time my State has put in a requirement for people to have a statement that their case has merit before they are able to advance it. That is something where we may have common ground and we should pursue it.

The reason it is ruled out of order here, as the Senator knows, is this is not the Judiciary Committee. It is not in our jurisdiction. But we will have a chance on the floor to revisit that, and maybe we can work together to improve the package.

But on this amendment, in fairness, 4 million people, more than 4 million people a year are losing their coverage now. To try to determine and certify that somebody has lost coverage as a result of this legislation or the fact that millions are losing their coverage through some other way is an administrative impossibility.

The hard reality is millions of people will get coverage as a result of this legislation, and let me just conclude on this point.

The Congressional Budget Office has said we will expand coverage to 94 percent of the people are a result
of the Chairman's mark. It is not 100 percent, but it is
substantially more than have coverage now. And on this
final point, Senator Hatch, you have repeatedly said 10
million people who are on Medicare Advantage are going to
lose their coverage. That is not true.

Senator Hatch. No, that is not what I--

Senator Conrad. Well, you have said it repeatedly.

Sir, you have said it repeatedly, that 10 million people
are going to lose coverage under Medicare Advantage.

Senator Hatch. Correct, that they will lose
benefits--

Senator Conrad. I would like to ask the staff:
What has CBO told us? At the end of this period, will
there be fewer people under Medicare Advantage or more
people?

Ms. Bishop. So according to CBO, their estimate of
the competitive bidding proposal is that there will be
about 200,000 more beneficiaries in Medicare Advantage
than there are today. That is a chase from baseline, but
there will be more beneficiaries in Medicare Advantage in
2019 than there are today.

Senator Conrad. So there will be more people
covered under Medicare Advantage at the end of the day
than are covered now.

The Chairman. That is 2019.
Ms. Bishop. By 2019, there will be about 200,000 more beneficiaries.

Senator Hatch. Will the Senator yield? Under current law, isn't it true that there would have been 3.5 million who would have come in.

Ms. Bishop. That is right, so under baseline—

Senator Hatch. So you are getting 200,000 instead of 3.5 million who would qualify for these extra benefits.

Ms. Bishop. Who would choose--

Senator Hatch. And to correct the record--

Ms. Bishop. --to enroll in Medicare Advantage.

Senator Hatch. Excuse me. I did not mean to interrupt you. But to correct the record, if I misstated in some way--but I have been talking about the benefits here.

Could I ask a few questions, Mr. Chairman, since we are on that?

The Chairman. Sorry?

Senator Hatch. Could I ask a few questions?

The Chairman. A couple. But we have been on this amendment 34 minutes.

Senator Hatch. Well, it is an important amendment because it makes a point here--

The Chairman. Go ahead. Ask questions.
Senator Hatch. --that has to be made.

Let me ask Ms. Bishop--and I personally have appreciated you being on the spot all the time, but it is a tough set of issues. If the modification to grandfather Medicare Advantage benefits that we did within the last 24 hours, the distinguished Senator from Florida, and I do not blame him, so he is my friend, but it is just a factor. In other words, this Committee was willing to take that, and yet they are not willing to take what affects 10 million others.

Did the modification to grandfather Medicare Advantage benefits in certain areas cost about $10 billion?

Ms. Bishop. Yes.

Senator Hatch. Okay. So we are willing to spend $10 billion on what I would like to have for all of those who have been on Medicare Advantage.

Would almost all of this $10 billion go to pay for extra benefits in what you would consider higher-cost areas, areas where plans can bid as much as 15 percent below fee-for-service?

Ms. Bishop. Yes.

Senator Hatch. It would?

Ms. Bishop. Yes.

Senator Hatch. Okay. So this money would go to
preserve things like dental coverage--this is money that
the majority has agreed to--like dental coverage,
eyeglasses, and maybe gym club memberships.

Ms. Bishop. Yes.

Senator Hatch. And it probably would not do much
of anything to help higher quality in lower-cost areas
that have traditionally low FFS spending, places like
Iowa, Utah, Oregon, Minnesota. Is that right?

Ms. Bishop. That amendment would not have an
effect on low-cost areas.

Senator Hatch. That is right. Some members of the
Committee have spent a lot of time over the past couple
of days criticizing the amount of extra benefits that
Medicare Advantage plans offer. But the modification
that was accepted within the last 24 hours by the
majority added $10 billion to pay for these extra
benefits. Is that correct?

Ms. Bishop. To transition the amount of extra
benefits in high-cost areas to the amount of benefits
that will be available under competitive bidding.

Senator Hatch. But only in those areas that were
covered.

Ms. Bishop. Because they have a higher--they are
starting at a higher base, so the transition is just
going to--
Senator Hatch. They are high-cost areas compared to areas like Utah, for instance.

Ms. Bishop. Right.

Senator Hatch. After years of listening to some people criticize the overpayments in Medicare Advantage, can you explain the policy rationale behind spending $10 billion to subsidize places that have a record of inefficient care and the greatest amount of overpayments? Can you qualify that?

Ms. Bishop. Well, the Chairman's mark, as you know, Senator, would create a new payment system for Medicare Advantage, and the rationale for that payment system--

Senator Hatch. That system would be less than the current system, right?

Ms. Bishop. Well, the rationale is to pay plans the average costs for the Medicare benefits, their profit, and their marketing. We are going to pay them average cost. We create bonus payments on top of the competitive bid. The bonus payments are going to be replacing the rebates that are available today, and the bonus payments are going to be up to 5 percent of the national average Medicare cost available everywhere in the country.

So, to a certain extent, the policy rationale under
the mark is to provide more areas of the country with available extra benefits than are able--than exist under the current law. So the mark actually provides a lot of benefit to low-cost States. That is the whole point of the mark. But in doing that, it is going to have the greatest effect on high-cost areas, whether they had--you know, they--

Senator Hatch. I am just asking about the $10 billion to selected high-cost counties.

Ms. Bishop. Right. So I guess what I am trying to say is that the mark--the policy rationale for the mark is to provide more resources to low-cost States. It is a reward.

The amendment accepted into the mark would allow a longer transition in areas that have higher rebates, higher extra benefits today to the amount of benefits that are going to be available under competitive bidding, because as you said, today the high-cost areas have the highest level of extra benefits. So going from competitive bidding--going from that system to competitive bidding is going to take them more time.

So the mark allows for 4 years transition to competitive bidding, and this amendment would allow a longer transition in those areas. The extra benefits are going to be--
Senator Hatch. For selected, targeted counties.

Ms. Bishop. Right.

Senator Hatch. Right. Okay, well, here is the bottom line. Will the 10 million people see a loss in their extra benefits? The answer to that, of course, is yes. So their coverage is not the one that they have right now. So they are really not keeping what they have.

Ms. Bishop. Is that a question? Is that a question?

Senator Hatch. Yes.

Ms. Bishop. The effect of competitive bidding is to lower the amount of--

Senator Hatch. I just want a yes or no on that. I do not think it takes a lot of explanation.

Ms. Bishop. Well, it is--categorically there--

Senator Hatch. Take your time.

Ms. Bishop. Categorically 10 million beneficiaries are not going to be losing their extra benefits, the extra benefits that they have today. Some will be gaining, because competitive bidding is going to equalize, make consistent the amount that is available for extra benefits. So in low-cost States, low fee-for-service States today, the amount of extra benefits is very small. It is minimal.
Competitive bidding will allow good plans that coordinate care, that achieve quality rankings, to earn up to 5 percent of the national average, and that is going to bring more extra benefits to low-cost States. That is exactly--so it is not accurate, Senator, to say that all 10 million beneficiaries are going to have less extra benefits than they do today. That is not the case. It is going to be some with more, some with less.

Senator Hatch. How can you not have--let me just say the bottom line--

The Chairman. Okay, Senator, we are going to have to--we are going to vote on this--

Senator Hatch. I am going to finish--

The Chairman. We are going to vote on this amendment in about 2 or 3 minutes.

Senator Hatch. Mr. Chairman, wait just--

Senator Enzi. Mr. Chairman, I have been trying to get recognition for 15 minutes.

The Chairman. Well, that is why I am trying to get Senator Hatch to shorten--

Senator Enzi. It has not just been our side. It has not been our side. You have had more time than we have out of the 40 minutes.

The Chairman. Senator Hatch, you have got anxious people on your side, so think of them when you are
talking.

Senator Hatch. I want you to think of all of us, Mr. Chairman. This is an important set of issues, and they need to be raised even if you do not like the way I am raising them. The fact of the matter is the bottom line is there are 10 million people who are going to lose benefits, and that is what it boils down to. And yet your side is agreeing to target special benefits to about 30 counties in this country and saying that the other counties throughout the country should not have the same benefits.

The Chairman. Fifty percent of this discussion has nothing to do with the amendment. I just urge us to focus on the amendment here.

Senator Hatch. It has a lot to do with it.

The Chairman. Senator Enzi is seeking recognition.

Senator Enzi. Mr. Chairman, if a million people are not going to lose it, you ought to accept this just as easily as you have accepted ones from the other side. But I suggest that that is not the case, and yes, I am going to leave the topic slightly because you did and Senator Conrad did.

You mentioned that there were no Republican alternatives out there. That is not true. There are four Republican alternatives out there. One of them is
mine. It has been on my website for 3 years, and besides that, there is the Wyden-Bennett alternative. Why aren't we bringing those up? If we are going to get 42 minutes for an amendment, something as comprehensive as health care for every American, how are we going to do that kind of a debate?

I sat through 3 weeks of this kind of debate in the HELP Committee, and we did get to put up one amendment for an alternative. We got almost 2 hours to debate that. We are going to do this for several days. We did 3 weeks in the HELP Committee. You cannot do a complete alternative in that amount of time. Besides that, when you put up a complete alternative, all you have to do is pick out two weak issues, and then your side feels very comfortable voting against it, and it goes down.

So that is not a fair process or a fair statement. There are alternatives out there. We are trying to do it in a very precise way of bringing up amendments as amendments are appropriate for the area that we are in, and that is not a way to slow things down. That is actually a way to speed things up.

But people do not understand how comprehensive this is. You and I and the others in the Group of Six spent weeks working on this, so we have an idea of how comprehensive it is. This will affect every single
American, and we have got to take the time to get it right.

Thank you.

The Chairman. Other Senators? The vote is on the Hatch amendment C-2. Senator, do you want a roll call vote on the amendment?

Senator Hatch. Yes.

The Chairman. A roll call has been requested. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?

Senator Lincoln. No.

The Clerk. Mr. Wyden?

Senator Wyden. No.

The Clerk. Mr. Schumer?

The Chairman. No by proxy.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.
The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Clerk. Mr. Nelson?

Senator Nelson. No.

The Clerk. Mr. Menendez?

Senator Menendez. No.

The Clerk. Mr. Carper?

The Chairman. No by proxy.

The Clerk. Mr. Grassley?

Senator Grassley. Aye.

The Clerk. Mr. Hatch?

Senator Hatch. Aye.

The Clerk. Ms. Snowe?

Senator Snowe. Aye.

The Clerk. Mr. Kyl?

Senator Kyl. Aye.

The Clerk. Mr. Bunning?

Senator Bunning. Aye.

The Clerk. Mr. Crapo?

Senator Crapo. Aye.

The Clerk. Mr. Roberts?

Senator Roberts. Aye.

The Clerk. Mr. Ensign?

Senator Ensign. Aye.

The Clerk. Mr. Enzi?
Senator Enzi. Aye.

The Clerk. Mr. Cornyn?

Senator Cornyn. Aye.

The Clerk. Mr. Chairman?

The Chairman. No.

The clerk will tally the vote.

The Clerk. Mr. Chairman, the final tally is 10 ayes, 13 nays.

The Chairman. The amendment does not pass.

All right. The next amendment is—I think Senator Lincoln wishes to offer an amendment.

Senator Lincoln. Thank you, Mr. Chairman.

Mr. Chairman, I would like to call up my amendment—it is C-2, Lincoln C-2—regarding the small business tax credit.

The Chairman. All right.

Senator Lincoln. Mr. Chairman, this amendment would modify the wage threshold that determines what value of credit a business qualifies for. I am very, very pleased and grateful to you and to your staff for working with us and putting this credit in the mark. For years, along with Senator Snowe, I have advocated for a small business tax credit to help our smallest businesses which are most severely impacted by the rising cost of health insurance, and these businesses are truly the
engine of our economies.

According to NFIB, firms with one to ten employees employ nearly 13 million workers, and firms with 11 to 24 employ over 11 million workers.

You know, as Senator Snowe and I worked on our SHOP bill, along with Senator Durbin and others, we realized that of the 35 million Americans that were uninsured, we could really get a large chunk of those insured if we worked with small businesses, self-employed, independent contractors, and others to really form a pool and a group there where we could access more affordable and available health care to them with more meaningful coverage.

These businesses are least able to weather price increases as they have very little capital to combat the steep and the ever increasing rise in health care cost, and particularly in these economic times that we find ourselves, capital is not an easy thing for small businesses to be able to get to. They run very slim profit margins, and health care cost increases have a very serious impact on their ability to do business, to keep their doors open, to keep the employees that they need. It is especially true, again, in today's economic climate.

So focusing the small business tax credit on businesses with 1 to 25 employees provides immediate cost
assistance to these businesses that need help the most in terms of the rising health care costs that we have seen.

Clearly, the market reforms in the Chairman's mark and the new exchange to help these businesses to pool together will be very beneficial to them, but those changes will take some time. But a tax credit can provide immediate relief.

The credit in the mark is phased out based on the average wage of employees in a business between $20,000 to $40,000. And the average wage of businesses employing 10 or fewer employees is right around $28,000, according to the U.S. Census data.

So this really means, Mr. Chairman, that the value of the credit for most businesses that will be able to claim it is already cut in half based on the way the phase-out is set up in the Chairman's mark. And so what I am trying to do in this amendment would increase the wage threshold to qualify for the full credit up to $30,000, and so it would be from $30,000 to $40,000 that it is phased in and then out--or it is phased out from $30,000 to $40,000. And at this amount, almost all of the businesses in the one to ten employee category would actually receive the full credit that we have in the underlying bill.

I think this amendment will really ensure that we
are able to help small businesses that really need the help the most, and I want to say again thanks to the Chairman and to his staff for working with us on getting this into the mark. We are still working on the score with JCT and your staff, and I am grateful, again, for their patience in working with us. And as a result of that, Mr. Chairman, I would just request that you would continue to work with us in the days ahead on this proposal really to truly improve what we have done in this bill for small businesses and for the tax credit that I think will bring them some of the most immediate relief as we work forward with the other components of this bill which will ultimately provide them great relief in the marketplace as well, just as it will to other constituents that we serve.

So we would certainly like to ask for the Chairman's assistance and other members of the Committee to work with us on being able to phase it in over a shorter period of time and allowing, again, those businesses with a lower number of employees to be able to get that full credit at the average employee salary of $30,000 instead of $20,000 so we do not lose half of them in that smaller category.

The Chairman. Senator, you have a great amendment. As you know, we are trying to encourage more small
business people to provide coverage for employees. As you also know, we are trying to target it a little bit more toward firms that have--not low-wage--middle-wage employees, not very high-wage employees like law firms, for example, and that is why the $20,000 limit is there.

But, frankly, it has always bothered me a little bit. That seems a little low, frankly. It could be a little higher than $20,000. So your suggestion of $30,000 makes sense to me, and also changing the phase-out has an appeal.

As you said, I do not have a score, but maybe we can find some way to give more assistance to small business. There is considerable assistance in the bill, but I would like to find a little more.

Senator Lincoln. Well, and I appreciate you for that considerable assistance that is there, and I think that we can improve upon it. I again want to thank you and your staff for working with us, and certainly with your interest there, I would withdraw my amendment today and work with the staff so that we could offer it on the floor when we do have a score and an appropriate offset, and I certainly encourage my colleagues to work with me.

Senator Snowe. Mr. Chairman?

The Chairman. Senator Snowe.

Senator Snowe. I want to applaud the Senator from
Arkansas for offering this amendment because truly we have to make even a more concerted effort to maximize the benefit for the small business owners in this country. I think that truly is the heart of the problem with respect to the number of uninsured that continues to mount on a yearly basis.

In fact, the number of uninsured has increased every year since 1989, and it has been predominantly among small businesses. In just the last decade alone, small businesses have dropped their coverage by more than 10 percent. It is projected that small businesses will drop their coverage next year up to 10 percent. You know, 52 percent of the uninsured currently are in small businesses, those who have ten or fewer employees. So this really is a tremendous problem for small businesses in having access to affordable coverage.

Time and again, when I am talking to small business owners in the State of Maine, they tell me how the growth of their premiums have grown exponentially. In fact, I was talking to a small business owner recently, and he said that 5 years ago his premium costs were $250 and today they are $5,000. It has grown by more than 500 percent.

And so I think that we should do everything we can to devote more resources to the small business owner in
this legislation and to increase that wage threshold for
the smallest business owners.

In fact, if you look at the projections for the
future, it truly is going to be even a greater problem,
and that is really the essence of the struggle we are
having in our economy today. And small businesses
deserve to have the same access to quality, affordable
coverage as larger employers. And so we really have to
figure out a way to fine-tune the provisions in the
underlying bill.

So I applaud the Senator from Arkansas for bringing
this up.

Senator Lincoln. Well, Mr. Chairman, I want to
thank my colleague from Maine because she has just been
tireless in working--and a delight to work with as well--
in our efforts on behalf of small businesses and self-
employed individuals. The statistics she raises are not
just statistics from Maine and Arkansas. Those are
statistics nationally. Everybody has got small
businesses, whether they are in rural areas or urban
areas, and they are seeing the same problem because of
the marketplace.

So I just want to thank her so much for her hard
work and her thoroughness, and I have certainly enjoyed
working on behalf of small businesses with Senator Snowe.
So thank you, Mr. Chairman.

The Chairman. Thank you, Senator.

Okay. I have--

Senator Stabenow. Mr. Chairman, might I just--

The Chairman. Yes, sorry. Senator Stabenow.

Senator Stabenow. Thank you. I just wanted to add as well thanking Senator Lincoln for this amendment. We know that 80 percent of the people that are without insurance in this country are working, and the vast majority of them are working for small businesses. And so this is a key goal of this legislation to make sure every small business can not only buy insurance for their workers, but also for their own families. And I look forward to working with you to continue to strengthen this.

Thank you.

The Chairman. Thank you, Senator.

I have a proposed list of amendments here. I will read them to give Senators some sense of some order here. First of Senator Crapo D-1, Senator Wyden next, then I have Senator Grassley. Then I see a side-by-side; I am not quite sure what that means. Senator Cornyn, you would be next. Not right now but a little later. Then Senator Nelson. Those are the five amendments.

Senator Crapo, you are recognized.
Senator Crapo. Thank you very much, Mr. Chairman.
This is my amendment number D-1 as modified. We sent
around the modification about an hour ago.
The amendment, this is a continuation of the
discussion in a general sense of the same issue that
Senator Hatch has raised, only trying to address the
issue from a little different perspective.
Senator Hatch raised the perspective of people who
would lose their benefits. This amendment would amend
the proposed Medicare Advantage cuts in Title III of the
Chairman's mark to prohibit the implementation of the
changes to the Medicare Advantage program in any bidding
area where the proposed changes would result in decreased
choice and competition for the seniors in the Medicare
program. In other words, the cuts that we see proposed
here, I am convinced, and I think many are convinced,
will result in providers leaving the marketplace, and
this amendment simply says that if providers do leave the
marketplace, leaving our seniors with less competition
and less choice of options, then we should not implement
these proposals.

During the question-and-answer walk-through period
that we had, Director Elmendorf I think clearly gave the
answer to the issue that we have been batting back and
forth here yesterday and this morning. He made it very
clear that the proposed changes to Medicare Advantage in the mark are going to reduce the benefits provided to those who have Medicare Advantage plans by a little bit less than half of what they are today.

Now, it may be true that some will get an increase and some will get a decrease, but the next result is that the benefits to be available under Medicare Advantage will be reduced by about half. That is what the CBO analysis has provided.

I know that in the debate already this morning, Senator Conrad has indicated that Medicare Advantage is very expensive and that, in his words, we have a false sense that we can keep on paying for Medicare Advantage, that it is unaffordable, and that at some point we have to look people in the eye and tell them the truth about it.

The truth about it is that this mark does seek to take $113 billion, I think it is now, out of the Medicare Advantage program, and that is going to result in less benefit to the citizens who now have enrollment in the Medicare Advantage program.

In my home State of Idaho, there are 60,000 Medicare Advantage beneficiaries, 27 percent of the Medicare beneficiaries in my State. And that is, I think, just a couple percentage points higher than the national
average.

Since the creation of the Medicare Advantage program in 2003, the overall enrollment in private plans has been steadily increasing, and beneficiaries across the country now have more private plans to choose from than they did 10 years ago. And this increased competition is healthy. As I indicated in my discussion yesterday, about 80 to 90 percent of the people on Medicare Advantage are very happy with and satisfied with the coverage that they are getting, which is in stark contrast to the attitude that many others who are not on Medicare Advantage have with relationship to the coverage that they are receiving. According to CRS, as of January 2009, all Medicare beneficiaries had access to an MA plan along with traditional Medicare plans.

My point is that Medicare Advantage is working. It is moving much more rapidly into the marketplace because of its acceptance among those who are--our seniors who are able to make these choices. As a matter of fact, this choice is particularly crucial in rural areas. In rural areas, between 2003 and 2007 more than 600,000 beneficiaries in rural areas joined the Medicare Advantage program, which is a 426-percent increase--again, the point being that the reason that people are moving to this program is because particularly in rural
areas they have very little access and little choice, and these plans are providing them with a better set of benefits than they would otherwise have.

My amendment simply seeks to preserve that choice for America's seniors. It simply says that if the changes we are proposing in this bill today actually result in fewer providers and less choice and less competition in Medicare Advantage, then we should not implement them. We have not yet tested or seen how the proposals that are in the mark today will work, and there is a very big question as to what kind of an impact they will ultimately have.

Mr. Chairman, a lot of attack has been made on Medicare Advantage, and certainly we need to address the overall excess costs in Medicare. Republicans have proposed many alternatives and continue to proposed alternatives to deal with both the unfunded mandate in Medicare, the crisis that we expect to face in Medicaid as well in terms of funding, and in terms of overall reform of our health care system. And for anyone to say that there is no a very, very strong engagement in terms of the ideas about how we should reform our health care system is to simply misstate the truth.

The bottom line here is we know that you cannot take $113 billion out of a program after CBO has indicated
that that change will result in approximately a little less than a 50-percent reduction in the benefits available and not see a dramatic change in the availability of benefits to those who currently have these plans.

If ever the issue of whether a person who likes their health care coverage today gets to keep that health care coverage was on point, this is it. For those Americans who are on Medicare Advantage today, they will not be able to have access to that coverage, to that health care option in the future under this plan, and I simply propose that we provide that if the competitive arena changes, if the number of providers decrease and we have decreased choice and competition for seniors in the Medicare system, we should not implement the provisions of this plan.

The Chairman. Is there further debate?

Senator Nelson. Would the Senator yield for a question?

The Chairman. Senator Stabenow was just recognized.

Senator Stabenow. Thank you, Mr. Chairman.

We have had a lot of discussion in the last couple of days on Medicare Advantage, and the reality is in broad terms Medicare Advantage was an effort to allow
for-profit insurance companies to be able to come in, begin to privatize Medicare. The argument was it would bring costs down. It did not. It brought costs up.

And now I find it interesting that there is an objection to have competitive bidding, which in the broader sense we always argue that competitive bidding will actually bring costs down. We were told Medicare Advantage would provide lower costs to be able to strengthen the integrity of Medicare. Instead, the majority of seniors, 80 percent of which aren't on Medicare Advantage, go see their doctor just on traditional Medicare, are paying more—we were told yesterday I believe it was $90 a year more—in order to be able to subsidize the private for-profit insurance industry to be able to participate with our seniors through Medicare Advantage.

I believe that we have been working towards a very important way to resolve this for seniors who are currently on Medicare Advantage to be able to allow them to keep what they have. But going forward, our responsibility, it seems to me, is to all the seniors under Medicare, all 40 million that are in Medicare, those in Medicare who now pay more than they otherwise would if we did not have a program that subsidized for-profit insurance companies.
One way to address that, to begin to move this in a
direction to protect Medicare for seniors and be able to
offer the other great things in this bill on prevention,
quality initiatives, be able to do the other things, be
able to make medicine more available, affordable, closing
the doughnut hole, is to have competitive bidding.

And so from my perspective—and though we certainly
have a substantial amount of Medicare Advantage in
Michigan, and I want to make sure those who have it can
keep it. But going forward, I think it is very hard to
argue that something that was supposed to lower costs by
bringing in more competition with the private sector has
raised costs but now we are against competitive bidding
to be able to rein in costs and to be able to protect all
seniors.

Mr. Chairman, I would oppose the amendment.

Senator Crapo. Mr. Chairman, could I respond?

The Chairman. Yes, Senator Crapo.

Senator Crapo. I want to make it very clear. I am
not against competitive bidding. I like competition. In
fact, what may amendment says is that I like the fact
that we should have more competitors. My amendment
simply says that if the language in the bill or the
concept paper does not result—or if the proposal results
in fewer competitors, in other words, if we have a less
competitive environment, then we should not implement it. That is all it says.

Senator Nelson. Would the Senator yield?

Senator Crapo. Yes.

Senator Nelson. I would suggest that you are supporting the wrong amendment, that what you ought to consider is not taking the inefficiencies out of Medicare Advantage by competitive bidding, which will take the inefficiencies out. I mean, it gets a cushy 14 percent more than Medicare fee-for-service. What you are trying to do is to protect the existing seniors on Medicare Advantage, and you will have an opportunity to do that, as I bring forth an amendment that will basically grandfather out most of the seniors on Medicare Advantage.

Senator Hatch keeps referring to the Nelson amendment. What you are referring to, Senator, is what is already in the mark. This Senator has another one that is coming that is going to grandfather in most of the seniors on Medicare Advantage.

Senator Crapo. Well, to respond, first of all, I will carefully review your amendment, Senator, when you bring it. But I need to respond, and, again, to make it very clear.

I am not opposed at all to competition in the
marketplace. In fact, my amendment says that if we restrict competition in the marketplace, we should not implement the bill, the provisions that are restricting it. And when we hear the discussion about the fact that Medicare Advantage is paying 14 percent more on average than fee-for-service, let us remember fee-for-service on Medicare does not fully compensate the fees for the true services that are provided. We all have discussed the fact that it is below the true cost of the value of the medicine that is being provided.

And that 14 percent is not just going to providers. Under the Medicare Advantage system, 75 percent of that excess is returned in additional benefits to Medicare Advantage beneficiaries, which is why they like the program so much. It provides them that extra buffer, that 75 percent of the differential in additional benefits. And it is those additional benefits that are making Medicare Advantage such a popular program in our country and which we should try to salvage rather than to try to eliminate.

Senator Nelson. Which is why I want to grandfather it.

Senator Crapo. I understand.

Senator Schumer. Mr. Chairman?

The Chairman. I would like to first ask the
Senator, is there a cost to his bill?

Senator Crapo. Yes, and it is interesting. The bill, as I understand it, has been scored, my amendment, and it has been scored at something like a $130 billion price tag, which tells you that CBO thinks that virtually the entire Medicare Advantage segment of the Chairman's mark is going to be knocked out by this amendment, which means they think that most of the Medicare Advantage competition is going to be restricted.

So although there is a high price tag, Mr. Chairman, I actually think that the CBO scoring tells you something about how CBO thinks the Chairman's mark is going to impact competition in this arena.

The Chairman. So the CBO score is $130 billion?

Senator Crapo. 133.

The Chairman. $133 billion, and how do you propose to--

Senator Crapo. And my proposal is to offset that by corresponding reductions in unspent and unallocated spending from the stimulus package, the American Recovery and Reinvestment Act of 2009, although signs we see put up on the highways, we could stop spending money on the signs, and we could start putting money in here.

The Chairman. It is with some reluctance and concern and almost sadness that I must inform the Senator
that the amendment is not germane. This Committee does not have jurisdiction over appropriations, and because it is not germane, I will have to rule it out of order.

Senator Crapo. Mr. Chairman, you mean because—is there no way for this Committee to reach through its jurisdiction the unspent dollars in the ARRA?

The Chairman. This is not the Appropriations Committee. This is the Finance Committee. We do not have jurisdiction over appropriations, so it is not germane. Therefore, it is out of order.

Senator Crapo. Well, I would like to challenge that ruling and ask for a vote on it.

Senator Schumer. Mr. Chairman?

The Chairman. Senator Schumer.

Senator Schumer. I will be brief. I think now we are trying to move this along. I just want to make a point here on the substance of the amendment. It is not related to the Chairman’s point of order, which I will support, and that is this: You know, there are some of us on this side who see Medicare Advantage working in good ways. I have nonprofits who do Medicare Advantage in parts of my State that do a very good service for seniors, and I am working with Senator Nelson to try and keep those people viable.

We also know, though, that in some areas the amount
of money given to the companies, given the amount of
services that are returned, is excessive. It is just too
lucrative, almost, when we are short of health care
dollars, and we see a lot of that money not go to the
individual. And what we are trying to do is thread the
needle and garner back some of those excessive profits
without hurting the individual on Medicare Advantage who
actually gets a good plan and a good service.

And competition is--it is sort of strange here. We
have our colleagues on that side of the aisle saying
let's not have private sector competition, and we are
saying let's have it. And it is a little bit ironic
because if you believe in the free market, which we all
do, you believe in competition. You do not believe in
monopoly, you do not believe in oligopoly; you do not
believe in 94 percent of the markets being highly
concentrated, which is what the insurance markets are,
according to the Justice Department.

And so I just want to say to my colleague, to say
that competition creates less competition, which is in a
certain sense what the amendment says, it says by us
having competitive bidding, which is a competitive
process, there will be less competition, I do not quite
get it.

I would hope that we could work together. This
seems to me to be not an ideological issue. My guess is my colleagues on the other side would like to save money if it is not going to hurt services. We would like to preserve the services to senior citizens. And this one isn't a public versus private, because it is private already, and we--at least some of us--support it in that form when it does a good job.

So that is my point here, and the point of order I will support. But it would be good if we could come to some agreement here that gets rid of the excessive profits but preserves the program for seniors who need it.

Senator Crapo. Mr. Chairman, could I just--

The Chairman. Certainly. You deserve--

Senator Crapo. --defend my name in one sense?

The Chairman. You deserve a response. Go ahead.

Senator Crapo. Let me just say once again read my amendment. It does not say that competition is not going to work because of one thing or another. It simply says--and, by the way, my understanding is MedPAC has even said they are not quite sure how the provisions on Medicare Advantage are actually going to affect markets.

All my amendment says is if the impact of this language is to decrease choice and to decrease competition, then we should not implement them.
I believe since there is a serious question about whether the provisions we have proposed before us will do that or not, we simply ought to put a fail-safe in that says this. And so I just wanted to make it clear. Several have indicated now that they interpret this amendment as being against competitive bidding. I am a huge advocate for competitive bidding, and, in fact, the amendment says we want to increase--protect and assure that we do not decrease the available choice and participants in a competitive market.

The Chairman. I would like to remind my colleagues, this is an interesting discussion, but it is moot. This amendment is not germane, and I have to rule it out of order. I just urge--strike that. The amendment is out of order. Does the Senator wish a vote?

Senator Crapo. Yes, I do.

The Chairman. Okay. The clerk will call the roll on the motion to overrule the Chair.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mrs. Lincoln?

Senator Lincoln. No.

The Clerk. Mr. Schumer?
Senator Schumer. No.
The Clerk. Ms. Stabenow?
Senator Stabenow. No.
The Clerk. Mr. Nelson?
Senator Nelson. No.
The Clerk. Mr. Menendez?
Senator Menendez. No.
The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Mr. Hatch?
Senator Hatch. Aye.
The Clerk. Ms. Snowe?
Senator Snowe. No.
The Clerk. Mr. Kyl?
Senator Kyl. Aye.
The Clerk. Mr. Bunning?
Senator Bunning. Aye.
The Clerk. Mr. Crapo?
Senator Crapo. Aye.
The Clerk. Mr. Roberts?
Senator Roberts. Aye.
The Clerk. Mr. Ensign?
Senator Ensign. Aye.
The Clerk. Mr. Enzi?
Senator Enzi. Aye.
The Clerk. Mr. Cornyn?

Senator Cornyn. Aye.

The Clerk. Mr. Chairman?

The Chairman. No.

The clerk will tally the vote.

The Clerk. Mr. Chairman, the final tally is 9 ayes and 9 nays.

The Chairman. Two-thirds of those present not having voted in the affirmative, the--it will not change.

Absolutely, it will not change.

The Clerk. Mr. Ensign?

Senator Ensign. Aye.

The Chairman. Two-thirds of the Senators not having voted in the affirmative to overrule the Chair, the ruling stands.

Next on the list, Senator Cornyn.

Senator Cornyn. Thank you, Mr. Chairman.

Mr. Chairman, the two issues which I think we have in common, all of us--

The Chairman. Senator, could you maybe speak more into your microphone? You are a little faint there.

Senator Cornyn. I will do my best.

The Chairman. Thank you.

Senator Cornyn. The two issues that I think define the problem the best when it comes to health care reform
are lack of coverage and affordability, and my amendment
deals with both of those issues.

This amendment would amend Title I, Subtitle D of
the Chairman's mark and would deem any individual who is
currently enrolled in a health plan governed by the
Employee Retirement Income Security Act, or ERISA, to
have met the personal responsibility requirement.

The President has said, first, if you are among the
hundreds of millions who already have health insurance
through your job or Medicare or Medicaid or the VA,
nothing in this plan would require you or your employer
to change the coverage or doctor you have. He said:
"Let me repeat this. Nothing in our plan requires you to
change what you have."

Now, Mr. Chairman, I suggest that this amendment is
required, is a technical correction to make the mark
consistent with what the President has said for those
covered by employer-sponsored plans or ERISA plans. The
Chairman's mark includes a requirement for individuals to
have coverage, but it is not clear that the 160 million
people who are covered by employer-based plans would meet
that requirement.

We all know that 90 percent of American are happy
with the coverage they currently have, and we should give
them credit for meeting the new mandate requirement by
maintaining the coverage they have rather than making the
coverage they have more expensive. My amendment simply
clarifies that the nearly 90 percent of Americans who are
happy with that insurance will not be required to change
it.

I would suggest that although we are talking in my
amendment about ERISA plans or employer-sponsored plans,
the same argument pertains to the individual market and
the other forms of insurance. As we all know, the
Chairman's mark requires a certain minimum level of
coverage as part of the mandate, the so-called 65 percent
of actuarial value or bronze coverage requirement.

I mentioned this in my opening statement, but let me
just expand upon this briefly. That means in Arizona
that 34 percent of the people covered in Arizona do not
have compliant plans, so they are going to have to pay
more money to meet this new Government requirement.

I am sorry. That is Arkansas, 34 percent. Arizona
is actually 61 percent of people covered do not have
plans that meet this new 65 percent of actuarial value
requirement.

In Kansas, it is 76 percent do not have plans that
meet this new mandate for 65 percent of actuarial value,
so what that means is those individuals and their
employers are going to have to pay more money, not less.
In other words, we are not making health insurance more affordable. We are making it more expensive by these mandates.

In Maine, it is 87.5 percent. In Texas, as I mentioned earlier, it is 91 percent of my constituents are going to have to pay more for health coverage, even though they like what they have now because of this requirement.

In the State of Washington, it is even worse. A hundred percent of the plans in the individual market do not meet the 65 percent of actuarial value requirement. In West Virginia, it is 75 percent.

So my point is that this—if the President says if you like what you have now you can keep it, that should not include having to pay more. Hopefully we ought to be doing things working together which make insurance more affordable, not less affordable. So I would urge my colleagues to support the amendment.

The Chairman. Senator Rockefeller?

Senator Rockefeller. Thanks, Mr. Chairman. This is a very, very important amendment, and it is a very, very bad amendment. If there is anything which is clear, it is that the insurance industry is not running this markup but is running certain people in this markup.

What you have done through your amendment, Senator
Cornyn, is to take the very clear fact that those who are self-insured through their companies, that the insurance companies would be grandfathered from ever accepting any of the disciplines which we are putting on the rest of the non-self-insured population, so that what you are saying is that if almost half of all Americans, because of the grandfathering, will not get the restraints on, you know, the caps, the rescissions, and all of those things, which are standard fare for what we think over here, we think the insurance industries are the major problem. As Maria Cantwell says, this is about giving subsidies to insurance companies to do what—you know, instead of helping people. And this is the grandfather of all grandfathers.

Senator Cornyn. With all due respect, Senator, I do not know what amendment you are referring to—

Senator Rockefeller. I am referring to your amendment—

Senator Cornyn. --you are certainly not referring to my amendment—

Senator Rockefeller. I am.

Senator Cornyn. --because what you are proposing by imposing new mandates on employer-provided policies—we are not talking about insurance. We are talking about coverage that is provided by an employer that is subject
to the Employee Retirement Income Security Act. It is
not standard insurance policy. But by imposing new
Federal regulations on those, you are making it more
expensive for the worker to get coverage and for the
employer to provide coverage. And it is consistent in
the individual market mandate with providing actuarial
value of 65 percent.

In other words, if you have a health savings
account, let us say you are working at Whole Foods
grocery store in Austin, Texas, they have a health
savings account which covers catastrophic coverage, and
they have wellness accounts which the employees own, and
80 percent of the employees pay zero out-of-pocket for
their health coverage, and they love it. They vote each
year on whether to retain it or not.

What you are suggesting is the Federal Government
knows better than they do what is good for them, and we
are going to make their coverage more expensive and
eliminate the possibility that they are going to be able
to keep what they have now. And, actually, your proposal
and the proposal of increased actuarial value will make
insurance companies more money than what I am suggesting.

So I would be very careful in suggesting that one
side or the other is trying to encourage or grow the
profits of the insurance company. I suggest to you that
your proposal will make insurance companies a whole lot more money than mine, which will allow people to keep what they have and which your proposal will not.

Senator Rockefeller. First of all, I do not have my proposal yet, so it is a little difficult for you to refer to it.

My argument is that you are grandfathering in an unfairness in the insurance market where you treat 50 percent of the American people in one way, or 56 percent, 54 percent of the American people in one way and 46 percent in a very favored way without restrictions, without discipline.

Yes, there is no question. I believe that insurance companies are the major problem throughout all of this. And yes, there is no question that I think we have to impose and I will have amendments and the Chairman has already put into his mark some restrictions to prevent them from doing some of their current practices.

But we really haven’t gotten around to the self-insurance thing at all. This is I think the First Amendment. I am certainly going to have one, that deals with it. Most people do not know that they are treated so differently. Most people do not know that they do not have these restrictions on them. Most people do not know that yeah, maybe they vote to get it because there is
whatever reason, employees probably do not know that
either.

They are not under the restrictions being protected
the way other Americans are. I think that is a bad bill
and --

Senator Cornyn. I understand your position and I
would say that that is an exceedingly paternalistic view
of what the federal government role --

Senator Rockefeller. No, no, no. I do not want to
hear the federal government is better than --

Senator Cornyn. -- President’s promise, or is this
committee going to break it by not allowing people to
keep what they have. If they want to keep it, they are
going to make it more expensive, not more affordable.
That is the question.

Senator Rockefeller. Yes. But see, you always
come back to that. Everything is, not just you, but
generally with certain exceptions that the federal
government knows best. I mean, you love to say that, the
federal government knows best. We think the federal
government knows best and the heck with the individual.

In fact, it is quite the opposite. It is quite the
opposite. The point is that you are not protecting
people that need protection that have insurance.

Senator Cornyn. Against their will and against
their desires. But if they have what they like now, you
are going to protect them even though they want to be
left alone and enjoy what they currently have.

The Chairman. Let me see if I can straighten this
out a little bit. I may be wrong. Basically under the
mark if you work for a larger employer, you could keep
what you have. It doesn’t make much difference what kind
of insurance it is.

Most employers provide very good insurance for their
employees. We are talking about large group market,
ERISA self-insured large employers here. Most of them do
a good job. They provide good health insurance for their
employees.

We are saying here in the mark that if you are an
employee that works for one of those large firms, you
could keep your health insurance. There is no new
standards applied for them. You can keep what you have.
You can keep what you have.

But the mark goes to the next step and says for new
employees that work for large firms, for new coverage
that is applied, there are three basic consumer
protections. They basically are you have to have first -
- coverage for prevention, that is no deductibles for
preventive services, a second you have to have a
reasonable out of pocket cost limit and that is the HAS
limit we are talking about here, and third, you cannot have unreasonable limits on annual or lifetime coverage.

That is for new employees. That is for new coverage. Currently if you work for a firm, you can keep what you have today. So the distinction really is between current employees and new employees. New employers. Excuse me. New employers.

So again, if you work today, you keep what you have. But if your new employer then was saying okay, there is one of three basic consumer protections which I think most Americans think is more than reasonable, you know, no unreasonable limits in annual lifetime coverage and second, reasonable out of pocket loss limits, not $6,000 per individual. Also you have to have coverage for the -- services. That is all this is.

If I read your amendment, you are saying that new employers cannot have those three consumer protections.

Senator Cornyn. Mr. Chairman, I am reading on page 28 of the Chairman’s mark and it says beginning in 2013, all U.S. citizens and legal residents would be required to purchase coverage through either the individual market and other private coverage of it is a large group market that they be required --

Senator Cornyn. I am reading a mark on page 28 under the personal responsibility requirement and it says beginning in 2013, all U.S. citizens and legal residents would be required to purchase coverage through number one, the individual markets. In other words, private insurance or in the large group market the kind of plans we are talking about here covered by ERISA with the new mandated requirements which the Chairman just described.

My position is that those mandated requirements would make that coverage more expensive for the employee and the employer. If our goal is to make coverage more affordable, it kind of mandates that are both provided for ERISA plans for large group coverage as well as the mandate of a 65 percent actuarial value in the individual market will make it more expensive, not less expensive.

So the President cannot keep his promise if we pass this provision.

The Chairman. No, no, no. Under the mark, no one will lose any coverage that he or she now has. That is for new employers.

Senator Cornyn. Mr. Chairman, that is not what the language says. It says beginning in 2013, all U.S. citizens and legal residents. It does not say just for new employees.

So if it is your intention to apply it just to the
future, then the plain language is going to have to be --

The Chairman. Let us see if we can clear this up.

If I am wrong, tell me. We want the facts.

Ms. Fontenot. I just want to direct you to page 12
of the mark. That is actually the provision that the
Chairman is referring to in terms of the grandfathering
of plans. So if you look at page 12, it specifies that
individuals and groups who wish to renew coverage in an
existing policy would be permitted to do so and that that
policy would meet minimum credible coverage.

Senator Cornyn. Is not it true that after five
years even the grandfathered plans, the reforms will
apply to all plans offered in a small group employer
market, thus after five years Americans will not be able
to keep what they have now?

Ms. Fontenot. In terms of the small group market,
the rating reforms do phase in over five years. But that
does not speak to the benefits that the employee is
getting. That only speaks to the rules by which their
premium will be adjusted.

Senator Cornyn. Adjusted upward, right?

Ms. Fontenot. Upward for some, downward for others.

Senator Cornyn. Are you telling me that increased
mandates and requirements will make the coverage cheaper?

Ms. Fontenot. I am telling you that the increased
benefit mandates to the extent that there are some do not apply in terms of the rating rules.

All we are talking about phasing in over five years are the rules by which the premiums are adjusted, not these specific benefit categories.

Senator Cornyn. It sounds to me like it is the old story about the frog and the pot of water on the stove that pretty soon the heat is turned up so slowly that the frog does not know it is cooked.

I mean, what you are saying is over five years the rules are going to change which is going to mean that you cannot keep what you have now because new additional federal requirements are going to be mandated.

Ms. Fontenot. What I am saying in other words is that if you are a small employer and you are currently offering a benefit package that would say is a 60 percent -- value or lower, over five years the premium that your employees pay for that benefit package will change due to the phasing in of the reigning rules.

For some employers, those premiums will go down. For some, they will go up. Your benefit package, that 60 percent actuarial value can remain the same and still meet the personal responsibility requirement.

Senator Cornyn. Specifically to the issue of my amendment, we are talking about large employers in ERISA
plans, is not it true on page 16 of the mark that large
employers in 2017 the states must develop and submit to
the secretary a phase in schedule including applicable
rating rules for incorporating firms with 50 or more
individuals into the state exchanges.

Ms. Fontenot. Again, that speaks to the rules that
are used to set the premiums. It does not speak to
either the benefit requirements or the level of actuarial
value that they have to offer.

Senator Cornyn. If I have a business with a lot of
young employees, does that mean their premiums will go
up?

Ms. Fontenot. If you are currently a large
employer, your rates are not adjusted due to health
status. So the fact that you have younger or older
employees really doesn’t affect your premium and the new
rating rules call for the elimination of health status.

So essentially the large group is already complying
with the rating rule that we are putting into place which
is why we did not specifically apply them to the large
group.

Senator Cornyn. And how do the rating rules, could
you explain how the rating, what the rating rules
actually do? What kind of new requirement is being
imposed that is not imposed under current law?
Ms. Fontenot. Sure. So the rating rules require that insurers not consider preexisting conditions in terms of limiting policies. They cannot consider health status in terms of setting their rates and they can only consider tobacco use, family composition and age to a limited extent.

Senator Cornyn. Mr. Chairman, I appreciate the answers to the question. If the goal though is to allow people to keep what they have now, I do not really understand the disagreement with my amendment and I would urge my colleagues to support it.

The Chairman. Okay. Senator Stabenow?

Senator Stabenow. Thank you. As someone who has a large number of large employers in my state, one of the things I appreciate about the Chairman’s mark is the grandfathering provisions, the fact that the people in my state, 60 percent of whom have insurance, are going to be able to keep it.

Mr. Chairman, I appreciate that. That is a strong commitment. It is clear in the bill and it is very, very important to me that people be able to keep their insurance.

But what I am also hearing is through the discussions we are having is that things are okay the way they are overall for people, that we should just keep the
status quo over and over again, that nothing should change when in fact the evidence all around us is that costs are going up for businesses, coverage is being dropped, deductibles, copays, everything changing for people on a daily basis.

There are certain basic principles that we know that have been built into this legislation. Many of the areas and the ideas have come from large businesses. We have often heard, I know in a lot of our walk throughs we talked about Safeway and the monies that they have been able to save.

I know my friend from Nevada has often talked about that as it relates to focusing on prevention. One of the things in this bill in Senator Cornyn’s questioning is the first dollar coverage for prevention. We know that saves money. Businesses tell us it saves money. Those large employers in ERISA plans, many are doing it right now because we know it saves money. That is a change. That is a change going forward that is good for people, saves money for the government, saves money for businesses.

The kinds of rating changes that were just talked about to stop people from getting dropped or not being able to get insurance if they have a preexisting condition, that is a change. That is a change. It is a
change that helps people in this country who have been
paying for insurance to know they are going to keep it or
if somebody gets sick in their family, they are going to
be able to have insurance.

So my concern about this is that we are basically
deciding whether or not status quo works for every
American in every business. I do not see how the numbers
when we are paying twice as much as any other country and
people are being dropped and businesses are struggling
and we are losing jobs because of high cost, why that
works.

So this is not about the status quo. So if
everything is great right now, that is fine. But it is
not great. So from my perspective, Mr. Chairman, I
appreciate the strong commitment on your part and the
President to make sure that if you have your insurance,
you can keep it. That’s the bottom line for me. But
going forward, I want to make sure that we are allowing
people to be able to really get the health care they are
paying for as well and that we learn from the things that
we know from business actually save money which are in
this bill.

So I would pose undermining that which after
listening to the debate appears to be what the Cornyn
amendment does.
The Chairman. Senator Kyl?

Senator Kyl. Thank you, Mr. Chairman. I just want to correct one thing that the Senator from Michigan said. It may be counterintuitive, but it is not true that first dollar coverage for prevention saves money. Now, it may be good health policy. Obviously the more prevention we can do, the better it is for everybody. But economically it does not work that way and the reason is very simple.

If you pay for prevention for everybody, let us say that is five times as many people as are getting prevention today, you will prevent a few people from getting worse in whatever disease or condition you might discover, but you do not do it for everyone or even a majority of the people.

That is to say the condition for which you are attesting only exists in a relatively small number of people.

Senator Stabenow. Would my colleague allow me just to --

Senator Kyl. So let me just conclude this. I have seen absolutely no data and I would be interested if the Staff has any data that would back up the claim that paying first dollar coverage for prevention actually saves money.
Senator Stabenow. We have actually, I have heard testimony, we have all had discussions. Colleagues have talked about various experiences with businesses, Safeway being one over and over again where they are focusing on prevention by screenings, getting people in on the front end to focus on wellness and prevention as well as other incentives that in fact they have brought I believe Steve said their cost down by 30 percent.

Senator Ensign. If you would yield, I will clarify that because I probably had more discussions with Steve than anybody on the committee save maybe Ron Wyden. I would maybe even say I am probably up there with him as far as the number of hours I have spent studying the Safeway plan and what they have done.

He actually emphasizes very strongly, it is not prevention that saved the money. It is incentivizing healthy behavior and that is a huge difference. When you incentivize somebody to quit smoking, that is not a test that is like a colonoscopy. A colonoscopy is a prevention type of a first dollar coverage for prevention.

Incentivizing somebody with a lower health care premium to stop smoking or to lose weight or to control their cholesterol or things like that, that is incentivizing healthy behavior and it sounds, people get
those two things confused, but it is a fundamental
difference because incentivizing healthy behaviors does
save money economically and is good health policy.

Just to further clarify, hold on.

Senator Stabenow. It really is both.

Senator Ensign. Hold on. Prevent first dollar
coverage and prevention from an economic standpoint, CBO
does not even score it. That is the reason we have had
trouble over the years with CBO. Incentivizing healthy
behavior is actually what will save money. They are both
good health policy. One saves money and one does not.

Senator Stabenow. I understand having worked
extensively in this area myself, I understand exactly
what you are saying. But both of those combined are what
we are hearing from business.

The Chairman. Okay.

Senator Wyden. Mr. Chairman?

The Chairman. Senator Wyden. And then we are
going to have to vote.

Senator Wyden. Senator Cornyn in my view is
raising a very important issue because there are a lot of
very good ERISA plans, the Employee Retirement Income
Security Act plans.

But the reality is there are also some crummy ones,
of discussion. It seems to me that we need to work further to make sure that everybody has these additional choices. Nobody is going to want to wake up in a hospital emergency room or another health care facility and find out that their particular ERISA plan does not cover the services that they need the most.

The way to get the most value for Americans whether they are on ERISA plans or other kinds of plans is to empower them to have these choices that allow them to hold insurers accountable.

I just want to tell the Senator from Texas that I think where he wants to go in terms of creating a market is the right direction. When we get these additional choices, he and I are going to be together on this ERISA question and a lot of the reforms that he is interested in and we will have a chance to work on it further.

Senator Cornyn. Would the Senator yield?

Senator Wyden. I would be happy to.

Senator Cornyn. I appreciate and understand. I think what the Senator from Oregon said, I would just be curious though how the mandates in the Chairman’s mark would address the situation you just described by requiring first dollar coverage for prevention and out of pocket limits greater than those provided standards to establish for HSAs under current law.
I agree with you. People out to have catastrophic coverage which will prevent them, which will bankrupt them. But I do not understand how imposing additional regulation on plans which like Safeway’s do not require regulation to get employers to do the right thing in what makes sense, how additional regulation by the federal government is going to make the coverage either better or more affordable.

The Chairman. Senator Rockefeller?

Senator Rockefeller. I believe that Senator Wyden had the floor. He yielded for a question, Mr. Chairman.

The Chairman. Okay. Senator Wyden?

Senator Wyden. I will be very brief. Mr. Chairman, I think the Senator from Texas is raising a valid point. Everything I want to do in health care reform is to start steering clear from mandates and expanding choices. I think that is how the consumer is going to get the best deal. I think that is how the consumer is going to be able to hold the insurance industry accountable in this country.

I just want to indicate to the Senator from Texas, I am going to be working with him further and frankly for me, this is the litmus test of carrying out the President’s pledge to get real health care reform in this country. You have got to have more choice, more
competition. I think we can do it for ERISA as well and I am going to work further with the Senator from Texas.

The Chairman. Senator Rockefeller?

Senator Rockefeller. A short close to the argument, I hope. So as I understand it, self-insured plans get to keep operating without any insurance reforms. They are untouched.

The argument is that we are saving money for employers but we are not providing employees with a benefit package that protects them or gives them the coverage that they need. I think the amendment is not good.

The Chairman. Okay. Ready to vote? Request a role call vote. All those in favor of the amendment offered by the Senator from Texas, vote aye, those opposed, no.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

The Chairman. No by proxy.

The Clerk. Mrs. Lincoln?
Senator Lincoln.  No.
The Clerk.  Mr. Wyden?
Senator Wyden.  No.
The Clerk.  Mr. Schumer?
Senator Schumer.  No.
The Clerk.  Ms. Stabenow?
Senator Stabenow.  No.
The Clerk.  Ms. Cantwell?
Senator Cantwell.  No.
The Clerk.  Mr. Nelson?
The Chairman.  No by proxy.
The Clerk.  Mr. Menendez?
The Chairman.  No by proxy.
The Clerk.  Mr. Carper?
The Chairman.  No by proxy.
The Clerk.  Mr. Grassley?
Senator Grassley.  Aye.
The Clerk.  Mr. Hatch?
The Clerk.  Ms. Snowe?
Senator Snowe.  Aye.
The Clerk.  Mr. Kyl?
Senator Kyl.  Aye.
The Clerk.  Mr. Bunning?
Senator Bunning.  Aye.
The Clerk. Mr. Crapo?
Senator Crapo. Aye.
The Clerk. Mr. Roberts?
Senator Grassley. Aye by proxy.
The Clerk. Mr. Ensign?
Senator Ensign. Aye.
The Clerk. Mr. Enzi?
Senator Enzi. Aye.
The Clerk. Mr. Cornyn?
Senator Cornyn. Aye.
The Clerk. Mr. Chairman?
The Chairman. No.
Senator Grassley. I have a vote for Senator Hatch. Aye by proxy.
The Clerk. Mr. Chairman, the final tally is 10 ayes, 13 nays.
The Chairman. The amendment fails. The next amendment is offered by Senator Enzi. Mr. Enzi, you are recognized.
Senator Enzi. Thank you, Mr. Chairman. I would call up Enzi Amendment C3 as modified. What this says is prior to implementing employer assessments of fees described in Title 1, the Secretary of Labor would have to certify the implementation of such fees and assessments would not result in a reduction in worker’s
wages.

The modification that I did had two requirements. The second one was that they would have to certify that there was no increase in unemployment rates, that this deals strictly with whether it would reduce worker’s wages.

I believe employer mandates are paid on the backs of workers and they are paid in the form of lower wages. The underlying bill imposes a tax of $27 billion on employers. If this new employer tax is signed into law, it will have a serious impact on the labor market.

What happens when taxes like those proposed in this bill are piled on employers? Well, according to CBO, jobs are lost and wages are slashed. Those fortunate enough to keep their jobs will have their wages reduced to cover the increased cost imposed by the new tax on employers.

A study by Harvard Professor Kate Baker found that the low income minority workers would be the most impacted by an employer mandate. To quote Kate Baker, “Workers who would lose their jobs are disproportionately likely to be high school dropouts, minority and female.”

It is hard for me to believe that while we are facing an unemployment rate of nearly 10 percent, that anyone would consider putting the jobs of low income
minorities at risk.

I am opposed to the new $27 billion tax. It would cause workers to lose their jobs and face lower wages. My amendment simply says prior to implementing this section, the Secretary of Labor must certify that it will not cause lower wages.

Prior to implementing this new tax, I think it is important that we get a clear report from the Department of Labor that this section will not hurt workers and make a tough economic environment worse. So I would urge my colleagues to accept this amendment.

Senator Ensign. Mr. Chairman?

The Chairman. Yes? Senator Ensign?

Senator Ensign. Mr. Chairman, I think that Senator Enzi is making some very important points that need to be stressed.

Over the last many years, we have seen wages not go up nearly as quickly simply because if employers have the higher cost of health care, there is less money for them to be able to pass out as far as higher wages.

It is one of the things that I believe is making us less competitive because it is total cost. When an employer looks at how much it costs to employ somebody, they have to look at not only their hourly wage, but they have to look at the total burden.
So if they are paying into a 401(k) plan, if they are paying health care costs, whatever it is, that all has to be looked at.

I think what Senator Enzi’s amendment is talking about is that we do not want, if there is an increased cost to the employer in any way, whether it is a tax or whatever it is, that could result either in lower wages or at least not in maybe a raise that could be had by that employee.

The problem is as costs go up to an employer, that then takes away from that ability to give a raise. The worker does not really understand this fact. In other words, if your health care costs go up and you do not get a raise, you do not get any better coverage. You get the same coverage, but you do not get the raise or you do not get as big of a raise as maybe you could have gotten before.

So I think it is a very important point that he is raising here and we really need to consider what we are doing to employers out there because in the end it is the employee that is not going to get the benefit of this increased wage in the future that they would like to see. So I appreciate the amendment that Senator Enzi has brought before us.

Senator Conrad. Mr. Chairman?
The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, the mark is based on the notion of shared responsibility. If we look around the world at health care systems that are not government run, but do provide for universal coverage, do control costs effectively compared to what we are doing, and do provide high quality outcomes, those systems are based on a shared responsibility model.

Again, I want to emphasize, ones that are not government run, Germany, Japan, France, Belgium, Switzerland, all of them based on an employer-based system like we have, one of shared responsibilities where employees pay part, employers pay part, and the government role is to assist those who legitimate cannot afford coverage for themselves. They have a requirement for employees and a requirement for employers, shared responsibility.

The Chairman's mark is built on that same model, which is largely our current system. The vast majority of people in this country are covered at their place of employment. In almost all of those circumstances, employees pay something, employers pay something.

What Senator Enzi's amendment would do, as I understand it, is to strike out the employer's requirement that if their workers -- if they do not offer
insurance and if their workers wind up getting public assistance, that they have some obligation.

If you strike that out, CBO tells us that you will have many more people going onto taxpayer assistance. You will increase the cost. You will shift from an employer-based system increasingly to one where government, either through Medicaid or through assistance through the exchange foots the bill. I think that would just be a serious mistake.

Senator Kyl. Mr. Chairman?

The Chairman. Senator Kyl?

Senator Kyl. Mr. Chairman, I just want to remind my colleagues of something that Dr. Elmendorf confirmed during the walk-through. I read something that he had written previously entitled "Effects of Changes to the Health Insurance System on Labor Markets." It is exactly the issue that Senator Ensign's amendment goes to.

Here is what he said. "Supporters of such surcharges often refer to them as free rider penalties. Although the surcharges would be imposed on the firms, workers in those firms would ultimately bear the burden of those fees, just as they would with pay-or-play requirements."

Then he goes on to make an even more, I think, interesting observation here. "Employer surcharges tend
to be more targeted. Many of these workers are more
likely to have earnings at or near the minimum wage and
the size of such surcharges, if based on actual costs
imposed on the government programs, could be larger per
affected worker than the assessments being considered in
many pay-or-play requirements."
I asked him if that was still his opinion and he
confirmed that. I said, "Would free rider penalties
disproportionately affect low income workers?" And he
said yes and he said it depends on what the individuals
intend to do and whether they enroll the spouse coverage
and the like. But as a general proposition, the
phenomenon that Senator Ensign is trying to prevent is
precisely what is going to happen here.
If we want to help folks, you do not add a charge
on their employer that is going to be passed on to the
employee.
The Chairman. I might say here, and it is
underlying this mark, that is, we are all in this
together. All of America is in this together in health
care reform.
It is something I believe in very strongly and I
think it is a concept which kind of helps keep it
together. It is the whole squared and the sum of the
parts. The opposite of that is divide and conquer. But
I think we should be in a system where we are all together.

Part of that mean employees and employers both are all part of the solution. I think most of us agree that employers should continue to provide health insurance. There is no employer mandate in this bill. There is no employer mandate.

But the question is what if we set up an exchange and the exchange gives significant tax credits, reductions to people who buy insurance in the exchange. A lot of employers will say, "Gee, why do I have to provide health insurance for my employees? I will just dump them, I will dump them on the exchange."

So to prevent that, we set up a modest penalty and CBO says if there is no penalty on an employer who drops his coverage, then we are going to lose about 10 to 15 million people who currently have health insurance.

I do not think that is right. I do not think we want the system set up where 10 to 15 million employees will lose their coverage because there is no penalty. Frankly, the penalty is not that high. It is quite low in this bill and I, frankly, do not know if there is going to be much reduction. I think most employers are going to keep what they now have.

One question I do have is the author of the
amendment. I am not quite sure what he means -- I am asking a question of what he means here. It says, "Prior to implementing the employer assessments or fees described, the secretary must certify that the implementation of such fees will not result in a reduction of workers' wages."

Is that wages only of that firm? Is that the wages of industry generally? I just do not know what that refers to.

Senator Enzi. That refers to the employees. That is who the Department of Labor is supposed to take care of. You notice I did not say the CBO would say. I said the Department of Labor. This is in their job tasking and it does not strike the section for what the employers have to do.

It just requires a certification by the Department of Labor, who is supposed to watch out for employees, to make sure that we are doing here does not result in a reduction of the workers' wages.

The Chairman. Now, workers' wages, do you mean workers nation? Do you mean workers, just that one firm? I do not understand what you are talking about here. What wages, nationwide?

Senator Enzi. Yes. It would be nationwide. I am not expecting here to go to every employer and figure out
whether they are going to reduce the wages for that employer.

It ought to be a fairly simple task for the Secretary of Labor. If she does not think that it is going to affect wages, she does not have any problem doing it. He or she would not have any problem doing certification.

The Chairman. I was wondering, because it is a one-time certification. I was wondering, because wages go up, wages go down, one part of the economy versus another part of the economy.

This does not distinguish between large employers or small employers. I just think it does not really -- let me ask. Let me ask the Senator if he is open to modification.

That is, you cut the word "substantial," "does not result in substantial reduction of workers' wages and, also, in the economy generally. I think that is what the Senator said, this applies to the economy generally.

Senator Enzi. It applies to the economy generally, but it does not have anything to do with whether it is substantial or not. What would substantial be? If I am a low income worker and I get a $1 reduction, that might be substantial to me.

If I am in a higher wage category -- but I did not
try and specify that in here. I did not try and put a whole bunch of requirements on the Secretary of Labor. I just want them watching out for the employees.

The Chairman. I just do not know how this works, because some sector of the economy, wages go up; some sector, for whatever reasons, irrespective of this, they go down. It is going to be hard for the Secretary to know exactly why wages went up or down.

Are you talking net basis? Is this a gross basis?

What is this?

Senator Enzi. Wages are based on growth. The Secretary's access to the data to do this would be approximately the same that the CBO would have. They would have to look at the amendment and the specific wording, and that is one of the difficulties of not doing specific wording, which brings us back to not having specific wording in the bill to be able to modify this with.

The Chairman. I just do not see how you implement this.

Senator Enzi. If you want to work with me to get some more specific language, I would be happy to do that.

The Chairman. I am working right now to just cut the word "substantial" and I think that solves it.

Senator Enzi. Well, that is a good question. I
did not try and put that difficult of a requirement on
the Secretary. I think you are putting a much more
difficult standard on there than what is in the
amendment.

The Chairman. I just currently think it is
unworkable. Let us try to work this out. So if you
could withdraw the amendment, let us try to find some
other language.

Senator Ensign. Mr. Chairman?

The Chairman. Senator Ensign?

Senator Ensign. I think that, first of all, there
have been a couple of statements, including Senator
Conrad and Senator Stabenow and yourself, that have made,
over the last discussion of this amendment and the last
amendment, it is basically giving us a false choice.

Nobody over here believes that the current system is
working the way it should be working. The costs are too
high. We have all talked about the costs are too high.

We do not want the status quo. It is not a question
of this bill or the status quo. That is a false choice.
There are other things that can be done. That is why we
have, myself, in particular, have talked about how do we
control costs, how would we lower costs.

We tried to offer amendments last night on medical
liability reform to get rid of junk lawsuits. I have
talked a lot about incentivizing employees with healthy choices, which I think could dramatically lower the cost of health care in this country and not do some of the things that would hurt employee wages, would hurt competitiveness.

We tried to do, a few years ago, small business health plans, allowing people to buy across state lines. I have talked about transparency on cost and quality and that is certainly a role that the government can play.

So I think that we should at least fairly characterize, when we are going forward, the debate, that we actually want comprehensive health care reform, because we believe that the system is out of control.

By the way, Senator Conrad mentioned Japan, Germany, these other countries. Their health care systems are not sustainable the way that they are going. And by the way, they control costs because the government -- it may not be a completely government-run system, but it is a government-controlled system and they control the costs.

They control how much they spend per year on that system. So they control how much of their GDP they are going to spend on the system and when you do those kinds of things, yes, you can control costs, but the quality of the outcomes in this country are the best in the world.

If you get a serious type of a cancer in the United
States versus anywhere in the world, we have the best quality of outcomes. If you have serious heart disease, we have the best quality of outcomes based on your survivability rates when you get a serious disease.

So I think we should be fair in how we are characterizing our health care system today and the type of reforms that each side -- I understand. I believe the Chairman very sincerely wants to reform a health care system in a good way. I said that in my very opening statement.

I believe both sides want to improve the health care system that we have in this country. We just have different ways of going about it and we should be fair and say that it is not just this bill or nothing or the status quo. It is this bill or there are other ideas out there that may be different than this bill.

The Chairman. I would like to turn to the amendment. Senator, I understand that you are willing to work out some language.

Senator Enzi. Mr. Chairman, I am not trying to delay things and this just does not seem that difficult. I am leaving a lot of flexibility for the Department of Labor and any changes that we would make would put a lot more requirements on the Department of Labor.

They are in charge of knowing whether workers' wages
are going to go down as a result of something that we do. I think, so we do not delay, just go ahead and vote.

The Chairman. Senator, we do not have a CBO score on this amendment. I do not know what CBO --

Senator Enzi. Well, I am not asking for the CBO. I am asking for the Secretary of Labor to make the determination.

The Chairman. But I have not seen a score on this amendment, your amendment, by cost. I just do not know. The CBO has not looked at your amendment.

Senator Enzi. Why would there be any cost? It would take a few minutes for the Secretary of Labor, I suppose, to do this and that is a cost.

The Chairman. If savings are not implemented in the bill, there would be a cost.

Senator Enzi. I do not think there would be any cost or any savings.

The Chairman. If that is the case, then the amendment is not needed.

Senator Enzi. I think that it is needed. It is needed. How can your side not say that the Secretary of Labor ought to have some kind of a voice on this?

The Chairman. It is just the implementation of something.

Senator Enzi. If it said that it was the CBO that
was having to make the decision, I can understand your unwillingness to do this. But where it is the Secretary of Labor, I think it ought to be a fairly easy determination.

The Chairman. I just urge the Senator to withdraw his amendment so we can work it out.

Senator Snowe. Mr. Chairman?

The Chairman. Senator Snowe?

Senator Snowe. I hope that we could work it out, because it is a fundamental issue and I think we have to appreciate the correlation between the provisions in this bill and what the net effect will be. Hopefully and ideally, we will create a more competitive insurance market through the exchange.

The power of a marketplace ought to produce more cost competitive plans that are going to bring down costs for small businesses, large businesses throughout this country. We have seen 131 percent increase in premiums over the last 10 years and yet, as I said yesterday, that wages have only increased -- it has been three times the size and growth in wages.

So we have a serious problem because we do not see wages growing in this country because of the impact of the growth of health insurance costs, and this legislation is designed to, obviously, convert that
through the power of a marketplace, through insurance market reforms to create more uniformity across the landscape in terms of those insurance reforms and, ultimately bringing 30 million people into the exchange that is going to lower the prices for competitive plans.

So I would hope that we could have some type of estimate of what the impact will be on businesses as a result of the free rider and the other penalties that are included in this legislation.

In fact, businesses have said that if the health insurance premiums go up, what is the impact on that increases, and their impact is that they do not have any salary increases. They do not have employee growth strategies. They do not hire individual new employees.

So I think there has got to be a way of discerning the effects that this legislation could have on not hiring individuals, but also to see the manifestation in lower salaries for employees. I think that that is information that would be very important and instructive to us to know and the correlation and the net effects between the provisions and what ultimately will affect businesses.

The Chairman. Senator, again, I urge you to withdraw it. Senator Snowe has some good points and it just needs a little work.
Senator Enzi. I do not know how I can make it any simpler than I have already made it.

The Chairman. Well, let our staffs talk and maybe we can find an answer to that question.

Senator Enzi. But I was going to vote on this later.

The Chairman. So it can be accepted.

Senator Enzi. So that I can get a vote later.

The Chairman. You will always have your right to bring it up.

Senator Enzi. All right.

The Chairman. Thank you. The amendment is withdrawn. The Senator has withdrawn his amendment.

We can go to the next amendment. I think Senator Nelson is not ready to offer his amendment. Are you ready, Senator? All right. You are on.

Senator Nelson. Mr. Chairman, this is an amendment that will produce $106 billion of revenue. It will allow us to fill the donut hole and it will have, according to CBO's numbers, $50 billion left over after we fill the donut hole.

It is to go back to the previous law, which, six years ago, allowed those who received drugs from Medicaid and had a discount offered on behalf of them by the pharmaceutical companies, that if that Medicaid-eligible
person was also a Medicare recipient, that the Federal
government would have the advantage of having those drugs
under Medicare at the same lower price because of the
rebates that they would have as being Medicaid eligible.

We got the score from CBO yesterday and, specifically, they said to us it fills the donut hole
over and above what the Chairman has already filled the
donut hole with his mark. It fills it completely and, by
the way, that affects, 17.5 million senior citizens that
get their drugs under Part D Medicare.

Because the law was changed six years ago in the
Medicare prescription drug benefit, the Federal
government cannot get those cheap drugs if the
beneficiary is getting them under Medicare as opposed to
Medicaid. That is wrong.

And we know the burden, the financial burden that is
put upon senior citizens when they have to pay the higher
prices on those drugs.

So, Mr. Chairman, we discussed it before. Now, I
know that it is going to be a very difficult and close
vote in this committee. I have counted noses and I know
that this amendment has a chance that it is not going to
prevail here.

But I also know that, as I have discussed with the
majority leader, that he will protect my right to offer
this and will support it once we come to the floor if it is not a part of this.

All of you have been talking about the desperate needs, that you are looking for revenue. Here is clearly a place. Did the pharmaceutical industry come to the table in the agreement with the White House with enough? There are a number of us who do not feel that that is the case.

So for Medicare beneficiaries, this will lower the price of drugs. Because of the revenues it will generate for the total of almost 18 million senior citizens that get their drugs through Medicare Part D, that gap between $2,600 and $5,500 called the donut hole that they do not get any support, that they will get that support under the existing law of Medicare prescription drugs, Part D. I will reserve time as we go on into this argument to rebut the arguments that the very distinguished Senator from Iowa is going to make about how he thinks this is going to raise the price of prescription drugs, and I will be happy to rebut that.

The Chairman. Senator Grassley?

Senator Grassley. Well, first of all, you ought to know pharma well enough that if they are going to be involved in the deal, they are not going to lose any money in that deal. So I am cynical about any deal that
has been made working.

And as a member of the group of six, I want to make it clear that I was not at any table when any negotiations were made with pharma. I hope you understand that.

I would also like to ask people to have a little patience with me, because I did not say much Tuesday night when this was debated and when I did say, I raised my voice. I was not mad at anybody. It is just the way I get sometimes.

But I do want to go into some detail and I would ask the Senator from Florida and the Senator from West Virginia to pay some attention to what I have to say. But I am surely glad that we are revisiting this issue, because I think some things need to be cleared up.

First, everyone should recognize that political opponents of the drug benefit have tried to tear the benefit apart since day one five or six years ago. These naysayers wanted a government-run benefit, with the federal government dictating drug prices. Thankfully, for the benefit of seniors, the naysayers have lost, but that has not stopped them from constant effort to tear apart and undermine the drug benefit that we did pass.

First, they said that there would be no prescription drug plans. Then when that did not happen, they said
that there were too many plans. Then they said that it was too confusing, that the seniors would not be able to choose a plan. But seniors have enrolled and surveys show that they are very satisfied.

The Part D program is working for seniors and, by the way, working for the federal government and it has probably helped more people in the State of Florida than anywhere else. After four years, 27 million Medicare beneficiaries have joined Medicare Part B.

This means over 90 percent of Medicare beneficiaries now have prescription drug coverage, quite a bit different from the period prior to 2004.

According to CMS, plan premiums are 36 percent lower than originally estimated and the overall cost of the program is $237 billion or 37 percent less than CBO originally thought it would be.

How many federal programs come in under what they are projected to be? Most every government program always has cost overruns, not cost under-runs. And it seems that seniors are happy. A Wall Street Journal online Harris interactive poll reported that 87 percent of Part D enrollees are satisfied.

Now, Tuesday evening, in debating this amendment, it was asserted repeatedly that the Nelson amendment would return drug coverage for the duals back to the way it was
before Part D. The implication was that some injustice was done to dual eligibles by putting their drug coverage in Part D.

My purpose, I want to set the record straight, if you do not already know, you might be wondering, how did drug coverage for the duals end up in Part D anyway. In the process of setting the record straight, this is what I would like to relate to you. It is just a little bit of history, background.

The dual eligibles, think everybody knows this, but let me repeat it for anybody listening, the dual eligibles are individuals who are dually eligible for both Medicare and Medicaid. The Medicaid covers prescription drugs and before Part D, Medicare did not.

So the duals received their drug coverage through state Medicaid programs prior to 2003. In 2003 now, the originally bipartisan Senate bill that created the new benefit was focused on providing drug coverage for people -- can you believe it -- that did not have drug coverage. That is what we ought to be doing.

Following that principal, coverage for dual eligibles was kept in Medicaid. It was kept in Medicaid under the bill that came out of this committee. That is when I was chairman.

At that time, Senator Baucus and I coauthored the
Senate bill and, of course, it passed with strong bipartisan support of 76 votes on June 27, 2003.

But during committee debate back in 2003 and, also, on the floor, the Senator from West Virginia was sharply critical of the decision to leave drug coverage for duals where it was, right there where it was in Medicaid.

He offered an amendment in committee and on the floor to move their drug coverage to Part D, but that amendment was defeated in committee by a vote of 7-14 and on the floor by a vote of 47-51.

Now, there is an important point here. In that amendment championed by the Senator from West Virginia and by so many on that side of the aisle did not call for creating a drug rebate program in Part D, not at all. That amendment called for moving dual eligibles to the Part D program and into the competitive model for drug pricing.

And ultimately, Senator Rockefeller prevailed in his argument, because in the final conference report for a Medicare Modernization Act, it included the dual eligibles in the new Medicare drug benefit. So do not give up on Senator Rockefeller. If he loses in a couple of instances ahead of time, he eventually wins out in the end.

The argument was that if Medicare did not cover dual
eligibles, then low income beneficiaries would not have
the same covered options as other beneficiaries. And the
Medicare Part D benefit is much better than what the
duals were getting in Medicaid, because -- you know why?
Many states had strict limits on the number of
prescriptions Medicaid recipients could get filled each
month.

For instance, if they needed the sixth prescription
in a state that only covered five, well, that beneficiary
was out of luck. But that is not the case in the
Medicare drug benefit.

There is no limit per month. They can pick the plan
that is best for them. And contrary to statements that
were made Tuesday night, the dual eligibles are also not
subject to the gap in the coverage. In other words, the
dual eligibles do not face a donut in their benefit.

So the idea that dual eligibles were somehow wronged
in the 2003 bill is revisionist history and it is,
ironically, humorous, as well, since it was members of
this committee that championed moving duals into Part D
in the first place.

So that is a story about the duals and I am sorry to
take up so much of the committee's time, but it is
important to set the record straight.

Now, on the gap in coverage, we could debate that
for days. I am not going to do that. I am not happy
with the fact that there is a gap in coverage. We worked
to maximize the drug benefit in the Medicare
Modernization Act so that it provided the best coverage
possible while remaining within the allotted budget of
that time.

Because the amount of funding available for drug
benefit, we were not able to provide uninterrupted
coverage for all seniors. However, we did provide
substantial targeted financial assistance to those who
need it most and we minimized the gap in coverage to the
greatest extent possible.

And most seniors are not affected by the gap in
coverage at all. That is because their drug spending
does not reach the limit or they are one of 12.5 million
people who qualify for additional assistance to low
income benefits or they might be one of eight million who
have additional coverage from retiree health plans that
were preserved under that act of 2003 or they might be
part of the six million that have coverage from another
source, like the VA or TRICARE or the Federal Employee
Health Benefit Program.

The bottom line is that 90 percent of the seniors
have some form of drug coverage today. About 27 million
are enrolled in Part D and about 3.5 million
beneficiaries reach the gap in coverage in 2007.

Now, other than the increased federal spending involved, there is nothing wrong with the goal of the Nelson amendment. But eliminating the gap in coverage by implementing government price controls, and this is disguised, I hope you understand, by the word "rebate," that will undermine the success of the Part D program and I believe that is a very wrong direction to take.

But do not take my word for it. I would ask you to listen to some experts. The Congressional Budget Office recent budget book states, quote, "A disadvantage of rebates in Part D is that, over time, manufacturers would partially offset the rebates by charging higher prices for new drugs," end of quote.

CBO also said, quote, "Another disadvantage of this option is that premiums could increase as a result of a decrease in rebates negotiated by plans," end of quote. And lastly, CBO said that this policy, quote, "might reduce the amount of funds invested in research and development of new products," end of quote.

This was all confirmed in a recent letter to CBO, to Ranking Member Camp of the Ways and Means Committee regarding the Part D changes in a House health reform bill. And I hope you understand around here that CBO is like God. Whatever they say, unless you have got 60
votes to override them, is what it is.

The letter said that closing the donut hole and instituting Part D rebates would result in a 20 percent increase in premiums. I thought that this whole debate we are having this week about health reform was that we would lower costs for people, but all we seem to be doing is raising prices through new fees, penalties and rebates.

But this is not the end of the problem that would be created by instituting a rebate program in Part D. And as I said Tuesday night, Part D beneficiaries are not the only people who will see their drug prices go up even further if a Part D rebate program is created.

Adding government price controls in Part D will drive up prices for people with private insurance, early retirees, kids, people with chronic conditions. It will drive up prices for small business. It will even drive up prescription prices for other seniors who are in retiree programs.

We had Dr. Fiona Scott Morton, a well respected Yale economist, testify before this committee January 2007 on these very issues. She made some key points that are applicable here.

She made the point that Medicare is such a large purchaser of drugs. Now, remember, Medicare is such a
large purchaser of drugs that she said, quote, "Its prices are the average prices." Her observation was, again, and I am quoting, that "if you are half the market, you cannot get below average price.

She went on to say that, quote, "Seeking low prices is a good deal. But thinking that seniors in America are going to get a discount is not just arithmetically possible," end of quote.

But here is the key point when it comes to instituting a rebate program in Part D. Dr. Morton said, quoting, "A drawback to the size of Part D is that reference pricing becomes essentially impossible." That is the end of the quote.

Let me say Part D then is such a big purchaser that a reference price scheme does not work, according to the Yale professor. She explained very clearly why this is the case. The reason is that because Part D is so big, if the government requires a fixed discount off the price everyone pays, then manufacturers would prefer to raise prices to everyone else rather than to sell Medicare at a low price, so that is what they will do. It would drive up everybody else's prices.

Now, I hope I have a reputation through my oversight of the Food and Drug Administration. You all know that I, as a result, cannot be considered a friend of the
pharmaceutical industry. You also know I have been a leading advocate for increasing oversight of drug companies.

So I am not trying to do anybody any favors here. In fact, I think what we ought to do is lay out what works -- if it ain't broke, don't fix it -- or the extent to which the Chairman and the White House has been involved in closing donut holes.

We are making rapid progress in that direction. We ought to continue down that road. I yield the floor.

Senator Nelson. Mr. Chairman, I need to respond.

The Chairman. Senator Nelson, and then I am going to -- Senator Baucus always seeks recognition, too.

Senator Nelson. And then I want to certainly hear from others. I am not sure I followed Senator Grassley's comments, because in this case, rebates in the Chairman's mark are mandated for Medicaid. Rebates from drug companies are mandated in the Chairman's mark at being increased from 15 to 23 percent.

Why there should not be that same rebate and lower the cost of drugs for Medicare recipients just simply does not make sense. Why should not a Medicare recipient get the same drug prices as a Medicaid recipient?

Now, that is the philosophical question here. And because Medicaid has had a big bulk purchasing power of
almost 49 million American citizens, now the philosophical question is do you want 44 million Medicare recipients to have that bulk purchasing power and, therefore, translated into these 23 percent rates for the drugs.

Now, let me just make clear, in case it is confusing, that these rebates, since the Nelson amendment only applies to the dual eligibles, the rebates do not go to the dual eligibles. The rebates go to Medicare and Medicare then can use that money however it wants.

I am suggesting that one way they ought to do it is to close the donut hole, which helps everybody in Medicare Part D, 17.5 million senior citizens.

The logic of this, overall, is worth $106 billion. Close the donut hole and have another $50 billion left over. Now, I am not saying what you do with this. You could take the $50 billion and lower the whole price of the bill. You could apply it to the deficit of the United States Government. You could apply it to different things that you all have talked about here that you need.

I would certainly like to see some of it applied on this amendment that I have coming, which is $26 billion, on grandfathering all of the Medicare Advantage, the Medicare HMO recipients.
So the philosophical question here is very clear. I am not here picking on pharma. I just do not think that philosophically, Medicare recipients ought to be paying more for their drugs than Medicaid recipients.

I applaud pharma. What we need is to keep encouraging their research and development. All of us are beneficiaries of these modern miracles of modern medicine.

This does not have anything to do with that. This has to do with do we treat senior citizens the same.

Thank you, Mr. Chairman.

Senator Rockefeller. Mr. Chairman?

The Chairman. Senator Rockefeller?

Senator Rockefeller. Two segments to this. First of all, I strongly support the Nelson amendment and his expression of rapture as he talks about it. It should lift us all, because the amendment is that good and the $50 billion Chuck Schumer wants to take and apply to DISH hospitals in New York City. Am I right? And elsewhere. Just a little bit. All right.

The rebates that we are talking about, and I am not going to do revisionist history, I am not good at revisionist history, were in place prior to the Part D drug benefit. Am I correct? And I did not vote for that when that came up. I did not vote for that.
But your amendment would help precisely what I was trying to do and, as the Ranking Member has so graciously pointed out, prevails in getting done. It would help our most vulnerable dual eligibles, which I have long championed and which are a much forgotten and misunderstood part of our most vulnerable population.

I have argued this, as I mentioned earlier at another day here, to President Bush when he was President, because he had promised that Southern Illinois State University or Southern Illinois University, whichever it is, to make sure that dual eligibles would be covered by prescription drugs. They were not, one of the reasons I voted against it.

What the Senator's amendment would do would be to help this most vulnerable part of our population. I have to say that the Part D program, as it is, is not working for dual eligibles, one of the reasons for the Senator's amendments is that.

I have a bill, too, that fixes that program, but we will see. The Senator, if he prevails, would make that unnecessary. It is basically kind of a sucker punch. It is a one-two punch on dual eligibles. I resent it. I do not like it. People can worry that they do not -- those people do not have their own lobbies and all the rest of it.
Now, I have a section here which I may decline to do, because the Chairman is obviously getting antsy. It is titled "Revised Talking Points in Response to Senator Grassley" and it goes on for several pages.

The Chairman. Senator, you go right ahead, you do what you want to do.

Senator Rockefeller. No. Senator Grassley is a good friend of mine. He is just on the wrong side of this issue.

The Chairman. I would like to have a vote on this before we break up for our caucus lunches. It is about 12:30 now.

Senator Ensign. Mr. Chairman, could we ask the staff or somebody? I am told that there is no donut hole for dual eligibles. I have been told that by multiple people. Can we have an expert answer that question whether dual eligibles face a donut hole?

The Chairman. Ms. Bishop?

Senator Ensign. And if they do, could you describe it?

The Chairman. All our staffs are pointing to you. You are the person.

Ms. Bishop. The way the benefit is structured is that the folks who are eligible for Medicare and Medicaid, their costs are covered in the donut hole.
They have to pay a copayment, a flat copayment of $1 for generics and $3 for brand name drugs.

Senator Ensign. So they do not face a donut hole.

Ms. Bishop. They do not effectively have a donut hole in here.

Senator Ensign. So the fact is dual eligibles do not have a donut hole.

Senator Stabenow. Would my colleague yield? Would my colleague yield on that one point?

The Chairman. Senator Ensign is still recognized.

Senator Ensign. I will yield for a question.

Senator Stabenow. Thank you. Is it not also true that those on Medicare and Medicaid, low income seniors, did not have a donut hole before? They did not have a donut hole before. This is not about whether or not they have a donut hole.

Senator Ensign. Reclaiming my time. The point that Senator Nelson was making is that dual eligibles face a donut hole.

Senator Nelson. No, no.

Senator Ensign. All right. Now we are at that point. I just wanted to make sure of that point, because maybe I misheard that. Let me make my points then. As long as we agree that dual eligibles -- the lowest income seniors do not face a donut hole. We have established
that. We all agree. Good.

Senator Nelson. The question is --

Senator Ensign. No, no. Let me make my point.

Senator Nelson. -- do you get a rebate in Medicare like you get in Medicaid.

The Chairman. Senator Ensign has the floor.

Senator Ensign. Let me make my points. My point is here -- several. One is that if you require now through Medicaid or whatever this, quote, "rebate," which is basically a tax on the pharmaceutical companies, there are a couple of things that are going to happen there.

One is they can shift costs to non-Medicare recipients, the rest of America, the younger people. By the way, the younger people today who are paying taxes are paying for the benefit, prescription drug benefit that seniors are receiving today that they never paid for. It was an additional benefit that young people are currently paying.

This was a wealth transfer payment to senior citizens. I believe we should have taken care of senior citizens, but that is a fact. We should have taken care of senior citizens, though, who only truly needed it and not done it for all seniors.

The reason I object, actually, to closing the donut hole is this is more of a wealth transfer. This is from
younger generations to older generations who will either,
one, pay higher taxes in the future because of deficits;  
two, will pay higher drug prices; or, three, not have the  
drugs available because that money has got to come from  
someplace.  

If they are going to take it out of R&D, they are  
going to transfer it in cost to younger people who have  
private plans and through higher drug costs for them or,  
three, they are going to have to pay higher taxes because  
of the fact that Medicare will have to pay more in the  
future.  

So I think it is an important point to make now that  
we have established the dual eligibles. I understand now  
what you are trying to do and I think that we at least  
need to be fair.  

If you are going to be talking about giving an extra  
benefit here by charging the drug companies, we have to  
be fair on what that extra charge is going to do.  

The Chairman. Senator Menendez?  

Senator Menendez. Thank you, Mr. Chairman. Mr.  
Chairman, I appreciate and understand what Senator Nelson  
is trying to accomplish and I do not think that any one  
of us wants a hole in the Medicare drug benefit.  

However, as has been said here, just to focus,  
because I know that while he said that is not his
purpose, there is a lot of talk and it would seem to be a
purpose. I acknowledge that, but he said it is not his
purpose.

But it is worth noting, again, that dual eligible
beneficiaries and other low income beneficiaries have no
coverage gap, no coverage gap, and very small copayments.

So in essence, what we are doing is talking about
taking that universe and particularly as it relates to
when we moved them into Part D and gave them the full
benefits so that they, in fact, have no gap, that we
moved them out of Medicaid, moved them into Medicare Part
D, gave them the full benefits so that they have no gap,
going back and saying we should also now charge the drug
companies for what was previously that Medicaid rebate
and add that to the equation -- and certainly Medicaid
has a much more strict formulary than what those are
enjoying right now under the Medicare Part D.

So this amendment, while it is well intentioned,
would do nothing to improve the drug coverage for
certainly those dual eligible Medicare beneficiaries.
They have no donut hole. It would do nothing for other
low income beneficiaries, those with incomes who are
below 150 percent of the federal poverty level. They
have no donut hole.

Yet, the amendment proposes to have the drug
companies pay rebates on sales to dual eligible beneficiaries that will not help dual eligible beneficiaries.

The companies are already paying rebates on sales to dual eligibles. The companies are already paying rebates on sales to all Medicare beneficiaries. They are paid directly to the Medicare prescription drug plans.

And under the law that created the Medicare drug benefit, these rebates can be greater than the rebate that companies pay under Medicaid and the result of that, according to CBO and CMS, these rebates have exceeded what was expected when the drug benefit was created and that is a big reason that the drug benefit has costs billions of dollars less than projected and beneficiary premiums have also been dramatically lower than expected.

So I look at the Chairman's mark and I see good progress being made on closing the donut hole. It requires, it does not ask, it requires the pharmaceutical companies to pay 50 percent of the drug costs in the donut hole.

That is not insignificant. In fact, it has more than doubled the level of the Medicaid rebates that this amendment seeks to impose. If the amendment passes, however, it would add another 23 percent or more rebates to the 50 percent that the Chairman's mark already
mandates. So we are talking about almost a 75 percent increase.

So like others, I would like to see the donut hole closed completely. However, to pile one mandatory rebate on another mandatory discount is, well, to say the least, piling on.

Finally, let me just say, under this amendment, manufacturers pay once by lowering the prices they charge to Part D insurers and twice to the federal government through a mandated Medicaid price control. And on top of that, this amendment does not strip away the significant increases to the Medicaid rebate that were included as part of the Chairman's mark.

This means manufacturers would pay billions of dollars more to the federal government for Medicaid beneficiaries who are not also in the Medicare program.

I am concerned, I think Senator Grassley may have mentioned it, but I am concerned about the letter that the CBO sent over in the House that said that another result of this is that premiums could very well increase by 20 percent or more for all Medicare Part D beneficiaries, except dual eligibles.

So at the end of the day, I think this, while well intentioned, very well may undermine the very essence of this agreement and may very well put us in a position

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that makes it very difficult to move forward.

I would love to work with the gentleman on the floor to try to achieve what he wants, but I think this is both -- the way in which he seeks to achieve his goal is not one that I certainly can support and one that I think is dangerous to the overall goals.

Senator Stabenow. Mr. Chairman?
The Chairman. Senator Stabenow?

Senator Stabenow. Mr. Chairman, we have talked both about the Senator's amendment from Florida, but also about the prescription drug program overall.

I am not going to get into the prescription drug plan overall. I think people of goodwill worked on that. I had a different perspective on the outcome of that. But I do want to talk about the Senator's amendment and also to say, from my perspective, this is not about a deal or an agreement made with the White House, because I believe this is separate from that. This is simply trying to fix a problem and address what is excessive cost, which is what we are trying to do through the whole bill.

This whole health reform is about looking at ways to be able to create more efficiencies and to be able to cut excess cost out so that we can put it towards increased services for people.
So when we look at that, people who are low income seniors, most of them in nursing homes, prior to the prescription drug bill, had prescription drug coverage under Medicaid, with no gap in service. They got the drugs that they needed. They were able to get what they needed with low co-pays or no co-pays, no gap in service. The prescription drug bill passes. They are moved over. They continue, in many cases -- some may have had some increases in co-pays, but in general, it is about the same. But one thing is different. The entire system is now paying over $100 billion, if the Senator from Florida is correct, over $100 billion more in cost.

So it is not that seniors got a better deal. Low income seniors in nursing homes went from Medicaid to Medicare. It is not that their coverage changed. It is that the cost of the taxpayer in the system changed and that is my concern.

When we look at the fact that all of the other seniors under the prescription drug bill see a gap in their coverage, for many, a tremendous concern -- we know from the Kaiser foundation about 15 percent of the people with chronic conditions stop taking their drugs completely when they are in that gap in coverage, and there are all kinds of another analyses that have been done.
But because the decision was made to pay more for folks who were getting the same coverage, the same help, all of the other seniors have to pay more, because they cannot have their medicines covered and there is a gap in coverage that we have now all called the donut hole.

That is my concern. That is fundamentally what this is about. It is not about the broader questions around Medicare prescription drugs. It is about whether or not a group of people, in my judgment, who should have been kept in their former system should go back to that because we now know it is costing more.

At a time when the Medicare trust fund has great strains on it, we have heard people talking about it going broke; at a time when we cannot provide complete coverage for people who are under the traditional Medicare prescription drug program, why in the world would we not we save the dollars when, for those seniors, it is the same? It is, in fact, the same. Now it just costs over $100 billion more.

So I think the Senator's amendment is the right one and I strongly support it.

Senator Schumer. Mr. Chairman?

The Chairman. Senator Schumer?

Senator Schumer. Thank you, Mr. Chairman. And I thank all my colleagues for the argument here, which I
think is a good argument.

Two arguments that I would like to just touch on that have been made by those on the other side. First is that the present system works, because the competitive model works. I would certainly concede it worked better than most people thought.

And the fact, as you say Senator Grassley, that it is $230 billion or whatever the number was, some large number, less than the projection shows it is working better than people thought. There is no question about it.

But there is also no question about it that it still brings in a higher price to the taxpayers, to the U.S. Government, than the proposal made by Senator Nelson, because CBO says even with the $237 billion of savings, if you did it his way, it would be $106 billion lower.

The fact of the matter is that in some drugs, the competitive model produces competition. In many drugs, it does not.

First, there are many drugs that are patented. So you have no competition, by definition. Second, for others that are not patented, they are unique usages. If it is a drug that only affects a small number of people, there are not many drugs out there, perhaps one, perhaps two. There is not much competition. The economics tell
us when there is oligopoly, one-two-three producers, you
do not get much price competition.

And, third, people have unique needs. I take
Lipitor. They put me on the generic, Zocor, my
cholesterol went up. They put me back on Lipitor, my
cholesterol went down. I am taking Lipitor, even though
it is more expensive.

So the bottom line is in lots of places, the pure
competitive model does not work in the pharmaceutical
industry. But the bottom line is very simple. We are a
purchaser, Uncle Sam. And who is Uncle Sam? The
taxpayers.

There is a chance here to save $106 billion as we
scrounge to find $0.5 billion here, $1 billion here, $2
billion here, and for some ideological reason, we are
saying no.

Now, people say, "Well, it will stop drug research,"
and that is a great thing and we should have it and we do
a good amount of it in my state.

But every dollar we save here, we do not know how
much will go to medical research. Maybe it will mostly
going to advertising. I do not know. There is no direct
link. There is no even certain link.

So I do not really buy that argument. If
competition produced lower prices, pharma would be for
changing it. Their job is to get as good a price as they can. That is how they represent their stockholders.

I do not begrudge them for it, but we do not represent their stockholders. We represent our stockholders, the taxpayers who save $106 billion here.

And if you are a fiscal conservative, what you should do is vote for this and then say we will take the 106 and put it to deficit reduction. And if you believe in a more robust bill, we could take the $106 billion and use it for affordability or donut hole.

Second argument, my good friend from New Jersey has said this does not affect the dual eligibles. Correct. It does not benefit them. It is not supposed to. The dual eligibles do fine under the Medicaid reimbursement. And by the way, we are not saying that Medicaid recipients below 65, the system is broken. That is the system that they would all go back to.

So it is not broken. It is working. The pharmaceutical industry gets paid $106 billion less to do it, but it is not depriving people of their drugs nor, I would say, is this amendment intended to deal with the dual eligibles. They are doing fine. They do very well, as they should.

But I have always believed that our politics, and particularly on the Democratic side, frankly, should not
divide the poor from the middle class. And it is the
middle class who has trouble right now. They have the
donut hole. They do not get paid all the way the way the
dual eligibles do.

So why not take this money and do that? If you do
not believe in doing that, and I think we all would like
to fill the donut hole, use something else.

So two arguments. One, this saves the government a
whole lot of money, and that is the taxpayers, by doing
it this way and if you do not do it, the benefits --
probably there are some, I would not deny that, but they
are not as direct. We do not know how much would go into
pharmaceutical research.

Second, yes, this amendment is aimed not at
benefitting the poor, the dual eligibles who have a good
program in Medicaid. It is aimed at helping middle class
seniors and then, with whatever is left over, which seems
to be growing every day, CBO estimates, we could use for
other things, as well.

So I am in strong support of the amendment. I thank
my colleague from Florida for introducing it. I hope it
will pass either here or on the floor.

The Chairman. Senator Carper?

Senator Carper. Thank you, Mr. Chairman. Let me
make three points. I believe we have had a robust debate
here and I do not want us to belabor it.

First of all, like most people on this panel, I want to close the donut hole sooner rather than later. I do not know how many of us voted for the Part D program four or five years ago. I voted for it. And as Senator Schumer suggested, I think it has exceeded its expectations.

For the most part, 85 to 90 percent of the people who participate in it like the program. It has been under budget for four years in a row. We use private providers. Competition works. We have multiple opportunities, multiple choices for prescription plans literally in every state.

I want to ask a question, if I could, of Ms. Bishop. The question is I want to come back to the issue of whether or not dual eligibles, people who are eligible for Medicaid and Medicare, did the dual eligibles see an increase in the prescription drug costs when they moved from Medicaid to the Medicare Part D plan?

Ms. Bishop. No, not generally. The Medicaid coverage that they had -- and, David, please chime in -- some states had minimal cost sharing of $1 per prescription.

When they moved to the Medicare Part D program, which has $1 for brand name and $3 for generic, it is
pretty much, on average -- their cost sharing is about
the same as what they had under Medicaid. So to them, it
was similar.

Senator Carper. Similar. Thank you. The other
point, I do not know if this has been made, Mr. Chairman,
in the discussion on this point thus far. But as I
understand it, there are, in some states, Medicaid
programs where they provide a prescription benefit for
somebody where they limit the number of prescriptions,
maybe like three, four, five prescriptions that they
could actually get.

My mom lived in Florida until shortly before her
death and I think there was a limitation there. She was
not on Medicaid, but I think the folks limited it on the
Medicaid program. They had maybe four different
prescriptions. Does that sound about right?

Ms. Bishop. That is true -- and, David, chime in
-- that before the drug benefit, there was a trend that
had started in the Medicaid program to start to limit the
number of prescriptions that those folks receive. But
David knows more about that.

Senator Carper. And I think, my colleagues, it is
not uncommon for people -- my mom died when she was in
her early 1980s. It is not uncommon for people, when
they reach those ages, they are using more than four
different prescriptions. I think my mom, in the latter years of her life, was using a dozen or so different prescriptions.

Unfortunately, some of them worked against each other. None of the doctors knew what the others were prescribing and that is something that hopefully we will address in this legislation.

But the first point, Part D works well. It works well for people who happen to be low income and, obviously, old.

The second question is sort of equity question. What is a fair contribution for the pharmaceutical industry to make to the passage of this legislation, to the enactment of this health reform legislation?

I mentioned this the other night, I just want to mention it again. As I understand, hospitals, and correct me if I am wrong, I would say to Ms. Bishop or others on the panel. My understanding is that a hospital’s costs make up roughly 30 to 40 percent of medical costs. Is that about right? Nodding of the heads.

My understanding is that pharmaceutical costs make up roughly 10 percent of medical costs, maybe even a little bit less. Is that about right? About 10 or 12, all right.
I realize that some of the hospitals are nonprofit, some of the hospitals are for profit. But if you think about hospitals comprising 30 to 40 percent of the cost of medical care in this country, pharma about 12 percent, that is a difference of about 3-to-1.

And let us just say that even if half of the hospitals were nonprofit, we will say a half are and half are not, I think that is roughly right, then it would be like -- if we were only looking at for profit hospitals, it would be 1.5-to-1, 1.5 for the hospitals and one to pharma.

The deal that the administration negotiated, the $80 billion for pharma, which is less than $150 billion for hospitals, frankly, as an equity matter, I do not think they are far off the mark.

I was not part of the negotiation, but if you actually do the math and you wanted to run out the numbers, in terms of equity to pharma, in terms of equity to the hospitals, it is not far off the mark.

Let me just talk, the last point, on unintended consequences. Some would say that this is like a balloon. If you squeeze pharmacy to get them to pay more money here, they will make up for it somewhere else. It could be retained earnings, shareholders, a variety of places. It could also be in terms of their ability to
invest in R&D, and that is what we will hear from them.

Let me just mention I think there is another unintended consequences. If this amendment is adopted, one of the unintended consequences, I think this may well undermine our ability to pass comprehensive health care reform in this Congress, through this committee and in this Congress, and at a time when there is an historic opportunity to do three things that we desperately need to do.

One, reduce the deficit; two, reduce the growth in health care costs; and, three, extend coverage to more people who do not have it. I think we undermine our ability to do that at this time and that would be a great tragedy.

Thank you.

The Chairman. We are about ready to vote. Senator Menendez?

Senator Menendez. Mr. Chairman, very briefly here. I think most of the arguments have been made. But I listen to my colleagues, whom I have a great deal of respect for, and just a couple of points.

First of all, I would like to ask the staff. My understanding, I know Senator Stabenow talked about this shift in how that created a consequence, there was no mandatory drug coverage under Medicaid. Is that correct?
Mr. Schwartz. That is correct.

Senator Menendez. So, in essence, those who were moved into Medicare Part D got a very significant benefit because there was a determined coverage.

Mr. Schwartz. Senator Menendez, prescription drug coverage is optional under Medicaid and it has been since before Part D. But every state provided drug coverage to the categorically needy, which is the bulk of these dual eligibles. So I am not sure if there was an actual net increase.

Senator Menendez. But was there not, in many cases, very restrictive formularies?

Mr. Schwartz. Yes. That varies by state. States have the ability to set their own formularies.

Senator Menendez. And, hence, when I go to Senator Schumer's comments, yes, we are the purchasers. But if we looked at the Medicaid process that we have with very restrictive formularies, in which I could list a series of states of what those were listed and the limitations in those states of what number of prescriptions you could have, it is like talking between a Porsche and a Ford, fundamentally different.

So at the end of the day, I think they are very different. We had no mandatory coverage under Medicaid and we had very prescriptive formularies, and that makes
a fundamental difference in what we are looking at here and what the Chairman is pursuing by making it very significant coverage of the gap that has existed.

The Chairman. Are we about ready to vote here?

Senator Nelson. No. I would like to --

The Chairman. Most Senators are about ready to vote. Go ahead.

Senator Nelson. Well, I agree, but you are going to let me close on my amendment, are you not, Mr. Chairman?

The Chairman. I will certainly recognizes.

Senator Grassley. Let me say something before he closes. Can I say something before he closes?

The Chairman. Senator Grassley?

Senator Grassley. First of all, for the Senator from New York, I am not a pharmacist or a doctor, but 10 years ago, they wanted me to take one of those drugs you had and I was not going to do it. And you will find out that red yeast rice and omega pills, and they are a lot cheaper, will do the same good. My cholesterol came way down. So if you want me to, I will bring the pills for you tomorrow.

Senator Nelson. Grapefruit might do the same thing for you.

[Laughter.]
The Chairman. How about a Pastrami sandwich, how would that do?

[Laughter.]

Senator Grassley. I would just say I suppose I am just pointing to Senator Schumer, but several other people have made the same point. That is, the $106 billion, I think Senators Menendez and Carper made the same view, there is $106 billion of cost shifting to small business and middle class people, Senator Schumer.

Middle class people are going to end up paying for this. If you want to save the middle class, do not load these sorts of things that are cost shifting onto them.

Then, lastly, I would ask that now that we have got dual eligibles settled, I hope that Senator Rockefeller will say that they are not getting a sucker punch anymore.

The Chairman. I think we are about ready to vote. Before I turn to Senator Nelson, let me say I want to close the donut hole just as much as everybody here, but I think that the way that it is being closed here is inappropriate and we have to find, at some other time, some other way to close the donut hole.

I, frankly, wish the Senator had not pushed this amendment, because it is not going to pass, which would give us some time to figure out a way to appropriately
close the donut hole.

I am a little concerned about some additional costs that are passed on. The White House did reach an agreement, as Senator Carper has pointed out, with a proportionate amount of that agreement.

In addition to that, the industry is required to pay 50 percent of the donut hole. That is progress. But I am going to have to not vote for this, because I think while the goal is good, that the way of closing it is inappropriate.

Ready for a vote?

Senator Nelson. May I close on my amendment?

The Chairman. Absolutely.

Senator Nelson. Well, I could rebut each one of these arguments and I will not go into with great detail. When you are comparing the profit margin of hospitals to those of pharmaceutical companies, there is no comparison. So I would say that the comparison that the good Senator from Delaware had offered is not a legitimate one.

And when you start getting into the details of the dual eligibles, I could have offered an amendment that would have come from requiring the 23 percent rebate on all Medicare Part D beneficiaries, 17.5 million. And guess what the revenue would have been from that? That
would have been well over $250 billion.

But I did not. I wanted to go with the theory that we would go back to the law that it was previously so that we are just dealing with the universe of 7.5 million dual eligibles.

And do not let that get confused about the rebates, 23 percent rebate would be symmetrical with the existing law in the Chairman's mark on the rebates for Medicaid.

Now, that is not the only place that the government gets discounts or rebates. Look at the drugs in the Veterans' Administration. Look at the drugs in the Department of Defense.

Do you not think that bulk purchasing power has something to do with this? But we precluded ourselves from that with regard to Medicare beneficiaries when it came to the passage of the prescription drug bill six years ago.

I just simply do not think that is right. I think that this is an opportunity to bring some of that revenue back to the taxpayer in the form of Medicare.

Thank you, Mr. Chairman.

The Chairman. All right. The Clerk will call the roll on the Nelson amendment.

The Clerk. Mr. Rockefeller?

The Clerk. Mr. Conrad?
The Chairman. Pass.
The Clerk. Mr. Bingaman?
Senator Bingaman. Aye.
The Clerk. Mr. Kerry?
The Chairman. Aye by proxy.
The Clerk. Mrs. Lincoln?
The Chairman. Pass.
The Clerk. Mr. Wyden?
Senator Wyden. Aye.
The Clerk. Mr. Schumer?
Senator Schumer. Aye.
The Clerk. Ms. Stabenow?
Senator Stabenow. Aye.
The Clerk. Ms. Cantwell?
Senator Cantwell. Aye.
The Clerk. Mr. Nelson?
The Clerk. Mr. Menendez?
Senator Menendez. No.
The Clerk. Mr. Carper?
Senator Carper. No.
The Clerk. Mr. Grassley?
Senator Grassley. No.
The Clerk. Mr. Hatch?
Senator Hatch. No.
The Clerk. Ms. Snowe?
Senator Snowe. No.
The Clerk. Mr. Kyl?
The Chairman. No by proxy.
The Clerk. Mr. Bunning?
Senator Bunning. No.
The Clerk. Mr. Crapo?
Senator Crapo. No.
The Clerk. Mr. Roberts?
The Chairman. No by proxy.
The Clerk. Mr. Ensign?
Senator Ensign. No.
The Clerk. Mr. Enzi?
The Chairman. No by proxy.
The Clerk. Mr. Cornyn?
Senator Cornyn. No.
The Clerk. Mr. Chairman?
The Chairman. No. Senator Lincoln?
The Clerk. Mrs. Lincoln?
Senator Lincoln. Aye.
The Chairman. I would like to vote Mr. Conrad aye by proxy.
The Clerk. Mr. Chairman, the final tally is 10 ayes, 13 nays.
The Chairman. The amendment does not pass. I have one piece of housekeeping, frankly. Last night, the committee adopted the Wyden amendment numbered D-15, subject to modification. The language of that modification was not yet available.

I understand that copies of that modification entitled "Correction" have been distributed to all Senators and I ask consent that the language distributed be considered as the text adopted by the committee.

Without objection, so ordered.

We will recess. The Committee will recess until 2:15.

[Whereupon, at 1:04 p.m., the Committee was recessed.]
AFTER RECESS

[2:40 p.m.]

The Chairman. The committee will come to order. All right. It’s my understanding the next amendment order is the amendment by the Senator from Michigan, Senator Stabenow. It’s C-7. Is that correct? Okay, C-7.

Senator Stabenow.

Senator Stabenow. Thank you very much, Mr. Chairman. Senator Lincoln and I have this amendment, and as I indicated briefly last night, this basically modifies language that was put in the modified Chairman’s mark. We had asked that dental- and vision-only insurance plans be able to participate in the exchange.

And we have two issues that came up with our language. One, there are concerns in the vision community on how to do this, and that’s not worked out. So we’re just simply removing the vision and only talking about dental.

And then we want to make it clear that dental plans can partner with insurance companies in the exchange to offer comprehensive care.

So we are not talking about any more cost. It’s a question of just providing options and choice for people within the exchange to be able to receive dental care.

Senator Kyl. Mr. Chairman, might I ask a question
of Senator Stabenow?

The Chairman. Certainly.

Senator Kyle. So this would allow dental-plans-only and/or partnering with other plans? Is that correct?

Senator Stabenow. That is correct.

Senator Kyl. Mr. President, I might just say that I think that’s a good idea. And it plays into something that I had said earlier which was to limit the plans to no more than four and in a minimum of two having to meet certain requirements precluded the kind of niche marketing, the kind of gap-filling, the kind of specific offerings to clientele that really needed a particular kind of coverage and that it would otherwise reduce the kind of competition that can make for a more healthy marketplace.

So I have always thought that the mark erred in not allowing enough flexibility. And all I would suggest is that if this is adopted we probably should look at some other opportunities that companies want to present different kinds of plans. Senator Hatch in particular had talked about some somewhat different catastrophic coverage plans that would not have been permitted under the mark.

The Chairman. Senator Grassley.
Senator Grassley. Senator, a friendly question.

Obviously you said you could not do vision plans. I just was wondering if you wanted to continue down that road to see how you can get them continued because they would have the same problems as dental plans, as an example. And let me say that I support your amendment because we have plans in Iowa that have come to me and wanted to know where they fit in.

Senator Stabenow. Good. And Mr. Chairman, if I might just say that the intent is not to exclude vision, but there are some technical questions, and at this point we’ve been asked to pull that out until they can resolve the language.

The Chairman. Thank you, Senator. As you know, we had a version of your amendment in the mark. We worked with you making this addition, this change, this improvement. And I think that’s what it is; it’s an improvement. So I’m prepared to accept it.

Senator Stabenow. Thank you.

The Chairman. Without objection, the amendment is accepted.

Senator Stabenow. Thank you.

The Chairman. Senator Grassley, are you ready for the amendment?

Senator Grassley. I hope this one doesn’t take as
long as most.

The Chairman. The last one?

Senator Grassley. Most of what I have up it seems like. This is C-15. Ever since Congress began debating health reform a year ago, I’ve had concerns about requiring people to buy insurance. And this is something that the Group of Six probably did not talk about enough because it was one of the things that was left to the tail end of our discussions in the Group of Six. And Senator Baucus had to move ahead before we got all those things resolved.

But I do want to say that it was something that was brought up, and at one point I had indicated to Senator Baucus that I wanted to discuss an alternative. And this isn’t exactly the only alternative that could have been discussed—in other words, meaning the contents of C-15.

But I just thought to give that sort of background to where we are coming from.

It happens with the individual mandate that the more details that came to light about it, especially about how it would be enforced or the levels of benefit people would be required to buy and the huge subsidies that would be necessary to make the whole thing workable, I became convinced that this was not exactly the right approach.
As I said in my opening statement Tuesday morning, the Federal mandate requires an extensive set of new enforcement tools housed at the Internal Revenue Service and backed by the full force of the Federal Government’s enforcement powers.

Prior to the August recess I was worried that this represented too much of an intrusion into private lives of our citizens. I came back from the August break convinced that Iowans don’t want the government telling them that they have to buy insurance and what that insurance has to look like.

I recognize why the Chairman included a mandate in the bill. There is of course a principle of personal responsibility that applies. We all in one way or another pay for health care for the uninsured, and a mandate helps stabilize premiums mostly by requiring younger people to buy insurance.

The Chairman’s mark creates a Federal requirement that everyone has to buy a federally mandated set of benefits. And then of course for enforcement purposes it penalizes families who don’t purchase coverage, in some instances as much as $1,900 in new taxes.

The size of the tax penalties, combined with an intrusive federal enforcement regime, is cause for serious concern. The requirement that people need to buy
coverage that covers an extensive list of benefits and meets a federally mandated actuarial value is also a worrisome aspect. And the need to subsidize families with incomes up to $88,000 just does not seem like something that we can afford when we are facing a $9 trillion deficit.

All of these concerns put together are why my amendment now, C-15, is being offered. It gives the states the opportunity to pursue alternatives to the individual mandate.

Senator Wyden had an amendment accepted in modification that would allow states to opt out of the requirements in the Chairman’s mark and pursue alternatives that would still expand coverage, at the same time improving quality and, we think, would lower costs.

My amendment would make it explicit that states could opt out of the individual mandate and choose an alternative mechanism to improve coverage. An alternative would need to be certified by the state insurance commissioner for actuarial soundness.

Instead of imposing this mandate, the states could incentivize purchasing insurance with subsidies. They could do an open enrollment period similar to Part D. They could do reinsurance, or they could do some other
policy that we haven’t thought of yet.

And I say that sincerely in the sense that a lot of things that come up here in Washington have been experimented in one way or another or found to be working or in any one of our 50 states that we consider laboratories of our political system.

So I don’t say that nonchalant, “other policy that we haven’t thought of yet.”

It’s a mistake to believe that Washington has all the answers. My amendment would give states the flexibility to innovate rather than force them to adopt a federal individual mandate with harsh penalties.

As I said before, I understand and appreciate why some support this individual mandate, and it is easy to see why the health insurer industry wants the mandate. It is going to make them a heck of a lot of money, so it doesn’t take a rocket scientist to see why the industry insists upon an individual mandate.

But as we consider all of the unintended consequences, it is important that we rethink this policy. And I’m asking you to rethink it.

Those of you that are sold very definitely upon only one Federal approach, a Federal mandate, you probably aren’t going to like my amendment. There may be people on the right that don’t want any mandate whatsoever that
might not think that this amendment is the right way to
go because there is still a mandate and there is a state
opt-out.

But I hope that you would think that this would give
a great deal of flexibility for a Nation that’s as
geographically vast as our country is and as
heterogeneous as our population is that we ought to maybe
not think in regard to an individual mandate that a mold
poured here in Washington, you know one size fits all, is
going to work in New York City like it might work in New
Hartford, Iowa.

So I offer my amendment, Mr. Chairman.

The Chairman. Good. Is there further discussion?

Let me check this side first.

Senator Bingaman.

Senator Bingaman. Mr. Chairman, I guess one part
of the amendment that I’m just not clear with—maybe
staff could help with this—it would seem to me that if
you took away the requirement of an individual mandate,
the expectation would have to be that a lot fewer people
would wind up getting coverage, I mean if you gave states
the ability to opt out of this requirement.

And that would reduce the cost of this bill rather
than add to it, as I’m thinking about it. I may be
confused, but I don’t know why you’d have to offset it.
I think that this is a gainer in the sense that a lot fewer people get coverage, there is a lot less required in the way of subsidy in states that show this option.

Maybe some staff--could I ask Ms. Fontenot to please give me her views on that? Am I confused about how this might affect things?

Ms. Fontenot. No. I think that’s exactly right. If you have a number of states who opt out of the personal responsibility requirement, you will obtain lower coverage numbers, fewer tax credits will go out the door, and the spending will decrease.

Senator Bingaman. So there really is no need to offset this. I mean, if the committee or if the Congress wanted to just say that the issue of whether to have an individual mandate is going to be left up to each state, then we wouldn’t have to change anything else in the bill, I mean in order to offset it.

Ms. Fontenot. Well, I think what we know from CBO is that if you contemplate some other structure that gets you to the same coverage levels, then there is likely to be no impact of this. If you allow every state an option to do as they choose to opt out of this requirement and maybe not replace it but not necessarily meet the coverage levels, then there would be fewer tax credits taken off because fewer people would get coverage.
I would say that the mandate is necessary for the younger. It is the young invincibles who are less likely to come in without the requirements, not older and sicker individuals. So for those who do end up coming in, the premiums will be higher for them.

Senator Bingaman. So the ultimate effect of this would be that in states that took this option you would have to expect insurance premium rates to be higher than in states that did not?

Ms. Fontenot. For those who ultimately purchase insurance in the state.

Senator Bingaman. All right.

Ms. Fontenot. But to be clear, we don’t have a score on this amendment from CBO, so.

Senator Kyl. Mr. Chairman?

The Chairman. Senator Kyl.

Senator Kyl. Mr. Chairman, I think first of all that Senator Grassley’s amendment illustrates an important principle that some of us have been trying to establish, which is that there are some very good alternative ideas on the Republican side to solve problems that we all agree exist. We all would like to get more people covered, and there are a lot of different ways to do that.

Senator Grassley has a way to do that that would
preserve a great deal of individual liberty, it would
preserve state choices, and it would probably end up in
getting most of the people covered who really need to be
covered and who want to be covered certainly, even in
Massachusetts as we know where there is a mandate for
full coverage. It is something on the order of 95
percent as I understand it. It is certainly not full
coverage.

I understand the insurance companies demand that we
impose a mandate because this helps them, but obviously
we are not here to do the bidding of the insurance
companies. In fact, I would submit that as Senator
Grassley noted in talking to his Iowa constituents, they
are more interested in their own individual freedom and
choice to do what they think is best for themselves and
their families than trying to do the bidding of the
insurance companies.

So my own view is that, while there might not be
quite as many people covered if you have a state option
with the kind of alternatives that Senator Grassley has
proposed, the net value of doing it this way is far
superior.

And the final point I would make is, as he said, you
have a very high degree of control over what people get
as soon as you have a mandate that they must purchase
insurance, because the first thing you have to do is
define what it is that they have to purchase. And as we
know from the various requirements in the mark, there are
a whole series of requirements about what you can and
cannot purchase and what the insurance companies can and
cannot provide for you, and the like.

So it seems to me that this is a very important
proposition for us to consider here as a way to
accomplish virtually all of the goal, maybe not quite,
but to do so in a way that significantly preserves both
state and individual choices.

I would also just note with respect to the last
question, it is always true that if you remove somebody
from the market that would have lower premiums, then the
people who end up getting the insurance might pay higher
premiums. The converse is also true: if you force the
younger people in, they are going to pay higher premiums
than they would have paid otherwise.

So to some extent it is a matter of who ends up
paying the higher premiums, and I think when you preserve
matters of choice you do the American families a lot more
good than if you mandate something on them.

Senator Wyden. Mr. Chairman.
The Chairman. Senator Wyden.
Senator Wyden. Thank you, Mr. Chairman. Mr.
Chairman and colleagues, the reason that I authored the Waiver Amendment that is now in the mark is to give states room to innovate--my state has a long history of innovative approaches in health reform. I wanted to give them the maximum amount of flexibility.

Now my reading of what we now have in the mark indicates that if a state can demonstrate that they can meet the stipulations of that amendment--lower health care spending growth, improve the delivery system, provide choices for their citizens--they can do it without an individual mandate. That is in the text of what we got adopted earlier.

So I want to work with the Senator from Iowa because I think he and I want to go in the same direction. I think it is absolutely key to making health care reform work to get the flexibility, the running room for the states so that what works in Iowa and what works in Oregon is tailored to the needs of our people rather than something that comes out of a Federal cookie cutter that was put together in the Beltway.

So let us review how the waiver language works now, because my reading of what we have in the bill now is, if a state can demonstrate that they can meet the criteria--particularly on cost containment, improving the delivery system--they can do it without an individual mandate.
And can I ask Counsel, is that a correct reading of the Waiver Amendment that I offered the Chairman has accepted at this point?

Ms. Fontenot. Yes.

Senator Grassley. Well, could I enter in --

The Chairman. Senator Grassley.

Senator Grassley. -- with the Senator from Oregon?

You know, if that is your intent, then there is no reason for my amendment. But I read your amendment to have the state have a complete rewrite of what the Federal law requires, a whole program; whereas, I am just going at the narrow part of the individual mandate. But if your amendment allows in the case of just the individual mandate a state to do something different, then I don’t see how I need my amendment.

But I haven’t read your approach that way.

Senator Wyden. I think that is why it is helpful that the counsel clarified it. And I just think as we get down to some of the fundamental principles of what is really going to fix American health care, one of the most obvious is that creativity in this area has consistently come from the states. We have got to give them a lot of running room, we have got to give them a lot of flexibility.

Counsel has just responded in a way that is
consistent with what I thought we had drafted. And now with that answer, that if you can achieve the stipulations of the waiver in the mark—particularly holding down spending growth, improving the delivery system—you can do it without an individual mandate.

Individual mandate has always been one of the most contentious aspects of health reform. I think every United States Senator believes that citizens should show some personal responsibility. That’s something that is widely accepted. Unfortunately, an individual mandate can mean something different, and that’s why the issue has been so contentious.

But Counsel has now indicated—and it was in line with what I thought we had drafted—if you can meet the requirements of the waiver in the mark you can do it without an individual mandate.

Senator Grassley. Let me ask Counsel. The part of his amendment that says “provide coverage to the same number of uninsured” seems to me that it does not have the flexibility to include to do what I want to do. But if it does have that sort of flexibility, then I’ll ask my staff but I don’t think my amendment is needed.

Ms. Fontenot. Senator, I believe your amendment just specifies the way in which you have to obtain that coverage level. Senator Wyden’s amendment simply
specifies that you have to get to the equal coverage level. The manner in which the state chooses to do that is not specified in the amendment. So if the state obtains the waiver, they could achieve that coverage level in whatever mechanism they want.

Senator Grassley. Well, I would like to have it be a little more specific. If that’s the Senator’s intent, I don’t have any trouble with what he’s just now said, but I don’t know whether it does that. I would like to lay this amendment aside and have our staffs talk about it, bring it up later. And if it doesn’t, if they can’t convince me, then we’ll have a vote on it.

Is that all right, Mr. Chairman?

The Chairman. Fine with me. All right. The amendment is withdrawn temporarily. Lay it aside.

Senator Grassley. Yes.

The Chairman. All right. Do we have other amendments?

Senator Grassley. Do we have amendments on our side that people are ready to bring up? Senator Kyl, do you have an amendment to bring up?

Senator Kyl. No.

Senator Grassley. Not now. Do you have one on your side?

The Chairman. I’m trying to find one.
Senator. Senator Cornyn seems to have one.

The Chairman. Senator Cornyn? All right. You are always helpful.

Senator Cornyn. Thank you, Mr. Chairman. I have my amendment to C-7.

The Chairman. C-7.

Senator Cornyn. C-7. This is an amendment that would change Title I(D) of the Chairman’s mark on required payments for employees receiving premium credits. This amendment would require the secretary of Health and Human Services to --

Senator Conrad. Senator Cornyn, could you pull one of those microphones closer to you, because over here I don’t know what it is about the acoustics but --

Senator Cornyn. It is rare for somebody to tell me they can’t hear me but let me try.

Senator Conrad. All right. Now I hear you better.

Senator Cornyn. All right, you hear me better.

This is amendment would require the Secretary of Health and Human Services to annually submit to Congress for consideration the flat dollar amount required of employers under subtitle (D).

In order to take effect, Congress must enact and the President must sign the penalty into law. If Congress fails to enact the penalty by September 30 of each
calendar year, the penalty shall not take effect January 1 of the following year.

To put this in context, the proposal before us includes required payments for employees receiving premium credits, what many have referred to as the “employer free rider” provision. This free rider has very similar effects to the employer pay or play mandate, which we all know will have a negative effect on job creation and retention and reduce wages for hard-working Americans.

The mark would require employers to pay the average tax credit in the state exchanges for every employee in the exchange or an amount equal to $400 multiplied by their total number of employees. To me that just sounds like another way to enact the pay or play employer mandate.

The CBO previously reported that employees, not employers, would actually pay the cost of this mandate, and the pay or play mandate in the House bill, whether it’s the free rider penalty or pay or play mandate.

The CBO said this. They said, “If employers who did not offer insurance were required to pay the fee, employees wages and other forms of compensation would generally decline by the amount of that fee from what they would otherwise have been, just as wages are
generally lower, all else being equal, to offset employers’ contributions toward health insurance.”

Again, because of the nature of how health care is paid for, ultimately it comes out of the hide of the worker. It is not absorbed by the employer; it is just like higher taxes are not absorbed by insurance companies, and they will be passed down to the policy holders.

The CBO also reported that the impact of the employer mandate would be “concentrated disproportionately among low-income workers,” close quote. They went on to say, “The employment loss would be concentrated disproportionately among low-income workers whose employers would be more likely to obtain subsidies from the government, for example unmarried individuals who did not receive family coverage through a spouse’s job.”

Moreover, a study by a Harvard professor, Kate Baker, who has testified as an expert before this committee on numerous occasions, found that low-income minority workers would be most impacted by a pay or play mandate.

Specifically she said, “Workers who would lose their jobs are disproportionately likely to be high school dropouts, minority and female; thus, among the insured
those with the least education face the highest risk of losing their jobs under employer mandates.”

My amendment is straightforward. It would simply have Congress vote on the amount of the tax on American businesses each year. I think this would encourage transparency and accountability and I think put the responsibility squarely where it sits, and that’s with members of Congress, as to whether we are going to impose a penalty on employers that will be passed down and disproportionately affect low-income workers.

The Chairman. Senator, I want to ask first, has CBO scored your amendment?

Senator Cornyn. We don’t have a CBO score. Mr. Chairman, I understand that’s the challenge we’ve had and that they’ve had that Dr. Elmendorf testified about.

They haven’t been able to get to all of the amendments, including this one. But I would suggest to you, it would be revenue-neutral because it doesn’t change the free rider position. All it says is that before the penalty could be imposed, Congress would have to vote on it for it to go into effect.

The Chairman. Well, I would think it would have a negative effect because it calls into doubt whether or not those penalties go into effect because it requires a vote by Congress after certification, which is a
significant impediment as to whether there would be any penalties. Clearly this does have a cost. Just the question is how much cost. Do you have a revenue offset?

Senator Cornyn. Mr. Chairman, as I said, there is no CBO score, so we have not calculated an offset. But I would suggest to you this is no different than the projected savings from dealing with the SGR fix for one year. I mean, the point I tried to make yesterday is that Congress can always come back and change policy and negate any cost savings that are projected in legislation like this. I think that’s a given.

No Congress can bind a future Congress, and so this is really no different from the provisions of the Chairman’s mark.

The Chairman. In the mark there is certainty that the penalties will be paid where the employer does not provide coverage. There is certainty. It’s in the mark.

I would suggest there is almost near certainty that it would not be paid because of the impediment that you’ve placed here by, first, certification, then a vote by Congress. My gosh, anybody could filibuster, hold it up.

It is very, very easy to prevent Congress from passing something, and therefore I logically conclude there’s going to be a significant revenue loss here even
though you don’t have a score. Until you have an offset, I’m constrained to rule this not germane and out of order.

Senator Cornyn. Well, Mr. Chairman, if I could briefly respond, what you might call an impediment I would say is, respectfully, accountability for this job-killing tax on low-income workers. And may I ask, Mr. Chairman, how can you rule it non-germane and out of order when you don’t know how much this is going to cost, and neither do I, because CBO had not given us a score?

The Chairman. The logic of your amendment irrefutably concludes that there is going to be a significant revenue loss.

Senator Cornyn. With respect, Mr. Chairman, I would not say it is irrefutable because I will refute it.

[Laughter]

I would say with just as much certainty as you are that it will result in a loss of income, that I will say that it will not.

The Chairman. I say this with tongue in cheek, but you’re not the Chairman.

Senator Cornyn. That’s true.

The Chairman. It is clear there would be a revenue loss here. It is totally clear there would be a revenue loss here, and so I’m assuming the Rules Committee, and
because it’s not germane I’ll rule the amendment out of order.

Senator Grassley. Before we vote on that, if he appeals it, there is a question on administration of this I think we ought to bring out at this point, if I could Mr. Chairman. I’d like to ask the tax people, in order to ---

The Chairman. First just vote on the amendment, and then we can always ask your question later. Let’s just vote on the -- call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Clerk. Mr. Nelson?

Senator Nelson. No.

The Clerk. Mr. Carper?

Senator Carper. No.

The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Mr. Hatch?
Senator Hatch. Aye.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.
The Clerk. Mr. Kyl?
Senator Kyl. Aye.
The Clerk. Mr. Bunning?
Senator Bunning. Aye.
The Clerk. Mr. Crapo?
Senator Crapo. Aye.
The Clerk. Mr. Ensign?
Senator Ensign. Aye.
The Clerk. Mr. Cornyn?
Senator Cornyn. Aye.
The Clerk. Mr. Chairman?
The Chairman. No.
The Clerk. Mr. Chairman, the final tally is 8 ayes
and 8 nays.
The Chairman. Two-thirds of the members present
and voting, having not voted in the affirmative, the
ruling of the chair is sustained.
Senator Grassley, you have a question.
Senator Grassley. Yes. On the administration of
this, I’d like to get ---
The Chairman. Senator Crapo votes aye and Senator Cantwell votes no. It does not change the result.

Senator Grassley. I don’t know whether this would be joint tax or just anybody on the staff that does taxes, but in order to accurately calculate and pay this penalty, it appears that an employer will have to ask each and every employee whether that employee has purchased insurance through an exchange and then separately ask whether the employee was eligible for a premium credit, and if they were eligible the amount of the credit.

Would this require the employer to collect and maintain tax information on employees?

The Chairman. Mr. Barthold.

Mr. Barthold. Well, the mark envisions information exchange between the IRS and the exchanges. The employer himself would not have to keep records related to the personal information, and would not be permitted to keep records related to the personal information of the employees. That would be run through the exchange, and the exchanges would be notifying the employers.

Mr. Grassley. All right. I accept that answer. But then that brings up another question. If the IRS is responsible for calculating the tax, would not the employer still have to collect and retain employee tax
information to verify or to challenge the IRS calculations?

And then if the IRS is involved, what privacy and safeguard requirements would apply to employers to ensure that employee tax information is protected?

Mr. Barthold. With respect to information that goes from the IRS to the exchanges for the purpose of determining whether an individual is eligible for subsidies, that remains protected tax return information.

With respect to other information that the exchanges may collect, confidentiality safeguards are provided under the mark, although it is not tax return information itself. So it is not the same as the 6103 standards.

You had a second part to your question?

Senator Grassley. Well, I think in regard to the first part that you answered about IRS and privacy and things of that nature, but would not the employer still have to collect and retain employee tax information to verify or to challenge IRS calculations?

Mr. Reeder. Can I answer part of that? The exemption, or in order for the employer to, the exemption comes from the IRS, and this person just shows a certificate to the employer. The employer doesn’t have to do the calculation.

Mr. Barthold. I think the Senator’s question was
slightly different. The exchange would say seven of your employees are buying insurance through the exchange, and you do not offer employer-provided insurance. And I think, Senator, your question was, does the employer have a way by which he can say, I don’t believe it was seven? Is that the question?

Senator Grassley. Yes.

Mr. Barthold. I believe the mark is unclear, but maybe Mr. Reeder has it different.

Senator Grassley. Well, isn’t it something that has to be made clear?

Mr. Barthold. I wouldn’t disagree with that statement, Senator.

Senator Grassley. Well, let me ask staff. What’s the intent here?

Ms. Fontenot. Well, let me just add in terms of the way the process works, we made it clear that the employee who is not being---this would only apply to employees who are not being offered affordable coverage because they are the only ones at the tax credit. So that employee would go to the exchange and seek a waiver from the exchange much in the way they would do the same thing to get out of the personal responsibility requirement assessment.

The exchange would then send to the employer, based
on the amendment that was accepted from Senator Bingaman yesterday I believe, that information; and that is what would inform the employer that that employee is actually receiving a tax credit.

So the employer would be getting that information directly from the exchange who would be administering the tax credit and would have the information in terms of how many of the employees are getting that tax credit.

Senator Grassley. Oh. Basically what you are saying is, the employer can’t ask any questions about that. They just end up paying the penalty.

Ms. Fontenot. Well, I think--I mean, we can certainly clarify that the employer has a right to appeal that credit. But I think it would be pretty clear to the exchange whether the employee got the credit or did not get the credit. I think what the employer would appeal the determination of whether the coverage they are offering is affordable or not.

The Chairman. All right. I wonder if Senator Nelson is ready to offer your amendment.

Senator Conrad. Mr. Chairman, just on this point, because I think Senator Grassley raised an interesting question here, how would an employer contest that issue?

Ms. Fontenot. Well, I think it would have to be similar to what an employee would have to do to get out
of the personal responsibility requirement. The exchange
is going to have to verify based on income that they
check with the IRS that the premium actually exceeds 10
percent of their income. So they would have to take into
the exchange the bill from what their employer sends them
in terms of what they pay for their health insurance.
And that would be compared with the verification from the
IRS of their actual income. If it exceeded 10 percent,
then they can leave and get the tax credit.

Senator Conrad. But for the employer--because
Senator Grassley as I heard him is raising the question
of whether or not an employer would be able to appeal
what could be considered to be an adverse determination.
And explain to me again, how would an employer be able
to appeal what they might see as an adverse
determination?

Ms. Fontenot. Right. And I think that’s the point
Mr. Barthold was making, that the mark is not specific in
terms of establishing an appeals process. But we can
certainly do that.

Senator Conrad. I do think Senator Grassley raised
the point there that needs to be addressed because there
will be circumstances where mistakes are made, and
people’s income is not calculated correctly. You know,
the premium cost is not calculated correctly. So there
needs to be an appeal for an employer.

The Chairman. Good point.

Senator Conrad. Mr. Chairman?

The Chairman. Yes.

Senator Ensign. On this, just for those who have--

I don't know how many folks on the committee have ever
been in the private sector and actually been in business.

Let us even say an appeals process, let us say you
set up this appeals process and you are dealing with a
government bureaucrat that is having a bad day. Talk to
real people out there that have ever dealt with the
government, whether it is local, state or federal. You
are at the mercy of a bureaucrat. If they want to turn
you down, even in an appeals process, then you've got to
put up money to be able to fight it legally and things
like that.

I just think it points out some of the further
problems that the more government gets involved, the more
burden it does put on the private sector. And when you
are out there trying to make a living and pay bills or be
innovative in your business and now you have all these
other things over here, and especially if you are not
that big of a business, you don’t have the resources to
be able to fight these kind of things and--

The Chairman. All right. This is an interesting
discussion. We are going to have to find an amendment, a way to deal with this issue. I want to tee up for an amendment before our next vote.

Senator Conrad. Mr. Chairman, should not we also indicate that if you have below 50 employees, you are exempt?

The Chairman. That is right.

Senator Conrad. Below 50 employees and you are out of this.

Senator Ensign. Well, if you have 52 employees, you are still not a big business.

Senator Conrad. No, you are not, but I do think it is important that we have people understand how this really works. And 50 and below you are exempt.

The Chairman. All right. Senator Nelson, where are you? You’re not here.

Senator Stabenow.

Senator Stabenow. Mr. Chairman, I am going to change our discussion. It is important to be talking about from business and so on on coverage, very important issues. I am going to move this around back to talking about --

The Chairman. Do you have an amendment, Senator?

Senator Stabenow. Yes. I’m sorry.

The Chairman. All right. Senator Nelson just came
back.

Senator Stabenow. It’s fine with me either way.

The Chairman. All right. Senator, I would like to tee up your amendment and get it started.

Senator Stabenow. That is fine.

The Chairman. Thank you. Thank you, Senator. I deeply appreciate it. Thank you.

This is the Medicare Advantage Amendment?

Senator Nelson. Thank you, Mr. Chairman.

The Chairman. After all this build-up.

Senator Nelson. Well, we certainly had a lot of conversation about it.

The Chairman. Yes. You are a very good marketer.

The build-up is just --

Senator Nelson. Well, everybody else has brought up the amendment except they have been talking about my amendment when they think they have been talking about their amendment. So now here we have an opportunity.

All right. This is to further grandfather Medicare advantage more--Mr. Chairman, I’m about to say some nice things about you, and I’d like you to hear it.

The Chairman. Go ahead.

Senator Nelson. I want to say some nice things about you.

The Chairman. Oh, well. I want to listen.
Senator Nelson. That is why I wanted to get your attention.

The Chairman. Thank you.

Senator Nelson. The Chairman has gone a mile. We now need to go two miles. And what he has done is, in his mark he has created a partial grandfather. And what this grandfather at the end of the day we are trying to do is Medicare Advantage, which is a program through a Medicare HMO.

A Medicare HMO is an insurance company. Under the prescription drug bill that passed six years ago Medicare Advantage was given a 14 percent bump on its reimbursement from Medicare as an inducement to go out and to give good service to senior citizens as an alternative to Medicare fee-for-service.

And what has happened in the intervening time is that where fee-for-service in an area is high these Medicare HMOs have been able to come in and bid underneath fee-for-service pursuant to the law what they bid underneath the difference. They could not keep the whole difference, but they could keep 75 percent of the difference, and 25 percent of it they had to turn back to Medicare. So 75 percent the insurance company could keep.

But that 75 percent they have turned around other
than utilizing it for their own profit. They have given
it in extra goodies to senior citizens, their
beneficiaries of the Medicare Advantage plan.

Now sometimes that is like hearing aids, sometimes
it is eyeglasses, and sometimes it is a membership in a
fitness club or it may be that they reduce the premium
for the senior citizen, or maybe that is that they don’t
pay a co-pay.

Now what I am saying is, that I support the
Chairman’s approach that we have got to squeeze the
inefficiencies out of this Medicare Advantage program
where the original idea of Medicare HMOs was that they
were going to bid lower than fee-for-service and it was
going to cost Medicare only 95 percent of fee-for-
service.

But that is not what happened in the Prescription
Drug Bill. It got reversed. Fee-for-service is here,
and they are compensated on average 14 percent more, or
114 percent of fee for service.

So what the Chairman wants to do is to squeeze that
out over time through competition. I think that is a
good thing.

But I do not think it is a good thing to go in and
to tell these senior citizens what you have now you have
got to give up. That is a nonstarter, and it is
particularly a nonstarter to any senior citizen that is having difficulty making financial ends meet.

So what I want to do is to say, “Those senior citizens that have it, you are not going to lose it.”

All right. Now that for the entire program would cost about $80 billion, and that is just not realistic to come up with $80 billion. The Chairman was gracious enough to say, “Well, we are going to get the first step,” and he put in his mark $10 billion. And that will accommodate some of the senior citizens in the areas where the differential is the greatest. And that affects a lot of our states.

What I want to do is to expand that another $26 billion so that in effect it will grandfather in all of the senior citizens on Medicare Advantage whose plan has bid at or below fee-for-service.

Now that is a technical term, but in effect what it does is it gets most of the Medicare Advantage folks. And in my state which has more Medicare Advantage folks than any other state, we have about 900,000, it would encompass about 800,000 of those 900,000.

And that replicates itself out through the other states.

My offset is a fee on health insurance companies and a fee on brand drug companies. So Mr. Chairman, I offer
Senator Bingaman. Mr. Chairman.

The Chairman. Senator Bingaman.

Senator Bingaman. Could I ask the staff? I’m not as familiar as I should be with all of the Medicare Advantage plans around the country. Senator Nelson has just said that to deal with this problem with regard to all of the folks on Medicare Advantage would cost $80 billion. I think that was what he said. And the Chairman has agreed to deal with $10 billion of that, and this amendment would deal with another $26 billion.

I would be interested to know whether the Medicare Advantage plans in New Mexico are in the $26 billion that he is dealing with, or are in the remaining $44 billion that he is not dealing with.

Could someone enlighten me about that?

Ms. Bishop. Well, in New Mexico my thinking is that the payment levels are above fee-for-service so that --

Senator Bingaman. So we would not be eligible.

Ms. Bishop. That is right. The preponderance of the plans in your states are paid above fee-for-service and this amendment would not affect --

Senator Ensign. If the Senator would yield for all of us? Is it possible that we would get a table that
would tell us which ones in the Chairman’s mark were fixed and which one in Senator Nelson’s were fixed?

Senator Nelson. I think that is a reasonable request. I can just tell you, in Nevada, Nye, Clark, Pershing, Esmeralda --

Senator Ensign. Who produced that chart you have?

Senator Nelson. The staff did.

Senator Ensign. So can we have access --

The Chairman. There is no reason that should not be amendable.

Senator Ensign. We should be able to look at the numbers. We should be able to see what percentages are fixed in what counties and all that.

Ms. Bishop. I think there is a clarification. Can you clarify? I don’t think we have produced that chart.

Senator Nelson. Where did it come from?

Ms. Bishop. We did not produce that information.

Senator Ensign. Do you have that information?

Ms. Bishop. So here is the dilemma that we faced with this, with Medicare Advantage. The bid information from the plan is considered proprietary, and that is because it really reveals sort of their competitive edge which is how, the rates with which they contract with hospitals and doctors. It would reveal the cost of providing their benefits, and it reveals their profit
levels and all that. So the bids are considered proprietary.

We do know however that the benchmark rates that are set by statute today under current law, we do know what those are because those are set by law. And we do know what those look like relative to fee-for-service because that is public information. CMS provides the benchmarks and it provides fee-for-service.

So we know where the benchmarks are in everybody’s state relative to fee-for-service. And MedPAC has provided an analysis of that in past years, and we could send that around.

What that would indicate is where the benchmarks on average by state are above fee-for-service generally speaking the plan bids will be above fee-for-service. They will be between fee-for-service and those benchmarks. The plans are bidding below fee-for-service.

Senator Ensign. Do you have that down? The amendment says “metropolitan areas.” Do you have it down as metropolitan areas?


Senator Ensign. So how would we determine? Mr. Chairman, what I do not understand then is how this -- you have ruled out of order amendments that were not workable, or whatever. How would this amendment even
apply then if we do not know, if we do not have that information? If it is proprietary information, how would you apply this? How would this ever even work?

Ms. Bishop. We do not know, we as Congress, we as part of the general public. CMS has access to the bidding information. They would, if this amendment were adopted and signed into law, look at the bids as specified in the amendments. They would take the average of the bids in each metropolitan statistical area. If the bids are below fee-for-service and efficient then they would designate that area as available for grandfathering, and they would have to do that a year or two in advance.

Senator Ensign. But the bottom line is, we will not know what the effect of this amendment is. CMS will know after this bill is put into law, but we want to know the effect of whether it is New Mexico, North Dakota, Nevada, Montana or whatever. We might guess whether it is affecting our states, but we really will not know whether it affects our states.

Ms. Bishop. We will have an informed guess, but it will not be--none of us have access to the bid information, so we will not know exactly what it is until CMS would be directed to use the bid information to identify the areas. So you are correct. We would have
an educated guess, but it would not be --

Senator Conrad. Would the Senator yield on that point? You know, I have looked at it for our state. There is no way we are going to be affected by it because we are not in that category. The states that are in that category that would be eligible I think pretty much jump out at you.

But my state is not going to get anything out of that.

Senator Ensign. I am just looking at my state, and in Clark County which is where Las Vegas is I have one zip code that will be affected, at least according to the numbers that were talked about.

Senator Schumer. Would my colleague yield?

Senator Ensign. Yes.

Senator Schumer. The numbers I have here which are not from CBO but from the plans is that Clark County 81,000 seniors would be affected. And then in Nye County.

Senator Ensign. Well, Clark County has 2 million people in it.

Senator Bingaman. Maybe the Senator could give us all copies of what the plans are saying would be affected. That would be very useful.

Senator Schumer. New Mexico does not do so well.

Senator Bingaman. That is what I thought. That is
why I asked my earlier question, Mr. Chairman.

[Laughter]

Senator Ensign. Senator Nelson, whose numbers are you using? We got some numbers from -- but who produced your numbers?

Senator Nelson. We got this information from the insurance plans. Now if your insurance plans are bidding over fee-for-service, they are not included in this amendment. If they are bidding under fee-for-service, they are. The cost of that is a total of $36 billion, which is when you take out the Chairman’s $10 billion is $26 billion net.

If you wanted to do every county including the ones that are bidding over fee-for-service, Senator Ensign, it is going to cost $80 billion.

Senator Schumer. It is 63,000 people. That is a lot.

Senator Nelson. So that is the cut-off here. I am trying to find the balance, and it will get most of the plans in the country. I cannot help it that all but six counties in Nevada including your largest county in fact would be eligible under this.

Senator Ensign. Well, parts of it. But the other point to make is, because we do not know, and we have established we do not know exactly and it will be an
educated guess on what is affected. But the other part of the amendment is, and we talked about this before, there is cost-shifting that is going to go on. Remember, not all insurance companies cover Medicare Advantage. They don’t all participate. So they are going to be, if you tax an insurance company, the people they provide coverage for, they will pass that on. And so you are going to cost-shift because of your amendment more money. That is just reality. This cost-shifting already goes on, and more cost-shifting is going to do that. So younger people, people in the private sector, are going to pay higher costs. So we do have to understand that.

By the way, this is what CBO says about the Nelson offset.

Senator Nelson. By the way, you will have 90,000 people approximately in Nevada according to this insurance plan run that are eligible under this amendment.

Senator Ensign. Right. But CBO’s general observation of the bill, when you have the fees these fees increase costs for affected firms which would be passed on to purchasers and would ultimately raise insurance premium by a corresponding amount. That is the cost shift. That is the point of taxing other people’s
plans is that you are taking money away. This is part of that cost-shifting that went on. You are even going to cost-shift more.

Senator Nelson. I can tell you this senator does not want to be in a position that I am taking away benefits from existing senior citizens.

Senator Ensign. Well, since you don’t fix them all, if you vote for this bill you are going to be taking away benefits from senior citizens because in this bill it takes away benefits from senior citizens on Medicare Advantage plans. We have established that very clearly throughout this debate.


[Laughter]

Senator Bingaman. Mr. Chairman.

The Chairman. Senator Bingaman.

Senator Bingaman. I just wanted to ask staff just to be clear in my own mind on this. The Senator’s amendment targets those areas where the Medicare Advantage is bidding less than fee-for-service. But there is no uniformity in what fee-for-service is getting paid around the country. In fact I think we have seen the charts where fee-for-service ranges from $5,000-and-some-odd-dollars per beneficiary up to $15,000 per beneficiary.
So the real determination here is that whether or not the people affected are living in areas with very high fee-for-service. And if you are living in an area with very, very high fee-for-service then you probably qualify for this $26 billion amendment.

Ms. Bishop. Correct.

Senator Bingaman. And if you live in an area that does not have that very high fee-for-service where people are getting paid less, providers are getting paid less to provide Medicare services, then your Medicare Advantage gets no benefit.

Ms. Bishop. That’s correct.

Senator Bingaman. Thank you.

Senator Nelson. Mr. Chairman, may we temporarily pass this measure and see if we can work out something?

The Chairman. Well, we have been temporarily passing so many amendments that we are going to be here a long time. I’d like to dispose of the amendments. But you want to pass this. Why do you want to pass this one?

Senator Nelson. I want to temporarily pass it so I can work out with some of my colleagues their problem.

The Chairman. All right. We will set it aside.

I want the staff to give us a list of all the amendments we have temporarily laid aside. I’d like that when we come back after the vote. There’s a bunch.
Okay, Senator Stabenow.

Senator Stabenow. I can proceed? Mr. Chairman,
this is Amendment C-6.

The Chairman. C-6.

Senator Stabenow. Yes, thank you. And moving to a
different part of coverage which is refocusing us on
children and the most vulnerable children in our system,
children in foster care, abused and neglected children
who have received help, been able to receive medical
assistance and mental health assistance through what is
called “therapeutic foster care.”

My amendment simply clarifies for the future in
health care that states will be able to continue to use
Medicaid for this purpose.

We want to create a definition making it clear that
states can continue to provide specialized and high
quality care for foster care children that are in out-of-
home placements. As I indicated, it is called
“therapeutic foster care.”

We know that children enter the foster care system
and they are extremely high risk both in terms of
physical and mental health issues because not only of
their biological factors but because of abuse and neglect
that they have received at home. And this would not be
an issue except that back in August 2007 the previous
administration did attempt to stop children in foster care from being able to receive health care services under Medicaid.

The Congress interceded, and we were able to continue to provide services to children in foster care. But I think it is appropriate to ask that a clear definition be there so that we know going forward that children in foster care are part of this health care system that we are creating.

Mr. Chairman, we have some questions. CBO is not ready to say it does not score. Technically CMS had started a rulemaking to stop this particular funding. It never completed it, and so there is some question or debate about whether or not it was in the Medicaid baseline.

Mr. Schwartz. I am sorry, Mr. Chairman, Senator Stabenow. CBO has confirmed that there is no score for this amendment.

Senator Stabenow. Thank you. That is good news. I was not aware of that, Mr. Chairman.

So given that, hopefully this is just clarifying, but we certainly do not want to, down the road, be debating whether or not foster children have the opportunity.

The Chairman. Is there further discussion on
Senator Stabenow’s amendment?

Senator, I think you have a good idea. This is an important clarification. I strongly support it. In fact, I was thinking of putting it in the mark but was waiting for a CBO score. We have it now, and I think we should accept the amendment.

Senator Stabenow. Thank you.

The Chairman. If there is no further discussion, no further debate, without objection the amendment is included.

Senator Stabenow. Thank you.

The Chairman. All right. Other amendments?

Senator Bunning has an amendment.

Senator Bunning. Thank you, Mr. Chairman. My amendment is C-3 to subtitle (D) of Title I, just in case anybody is interested.

The Chairman. Is it in legislative language?

Senator Bunning. It is. No, it is not. Thank you for bringing that up. I just wanted you to know that the House of Representatives under the leadership of Speaker Pelosi just passed what my amendment is here.

The Chairman. Hey, how about that.

[Laughter]

Senator Bunning. I just wanted you to know that. It’s kind of funny, interesting.
Let us get back to the amendment. This amendment amends the Chairman’s mark to require that any taxpayer who requests an exemption on their tax return from the personal responsibility excise tax be granted an exemption.

I have made no bones about believing the individual mandate in this bill is un-American. As Senator Hatch has pointed out, it may even be unconstitutional. For those listening or watching, the individual mandate in case they do not understand what it is, is the part of the bill that requires you to pay a tax if you do not have health care. In other words, it requires you if you don’t have health care, to pay a tax.

Some people do not like to call it an individual mandate or a tax. Instead, they say it’s your “shared responsibility.” I don’t know if it will make you feel any better when you are sending more money to Washington, but that seems to be the attempt.

Anyway, the bill will require most people to pay a tax between $750 and $1,900 a year if they do not have health insurance. The tax will be assessed through the tax code.

This means that when you do your taxes you will have to say whether you have health insurance for the past year. If not, then most people will have to add the
penalty tax between $750 and $1,900 a year to the tax bill they already are sending the IRS on April 15. As if doing your taxes was not complicated and expensive enough, and I want you to know that for the last 25 years I have sat on one committee of jurisdiction in the House and one here in the Senate, and it’s the Tax Writing Committee. And I would not dare do my own taxes.

There is only one person I know on these committees that does their own taxes, and that was Chairman Archer. And we all thought he was a little --

[Laughter]

-- brave to do it.

There will be more lines on your tax forms, and likely an extremely complicated schedule that every American will have to fill out. Under the Chairman’s mark there are some folks who will get exemption to this new tax, including and not all people without insurance for less than three months a year, native Americans, Indians, individuals below certain income levels. Exceptions will be made for religious reasons and hardships and illegal immigrants.

Some might think the IRS will not collect much through this mandate, but they are wrong. The government will confiscate $20 billion. That’s a “B.” I know we are getting used to “Ts,” but this is “B,” $20 billion
over the ten years, according to CBO and the Joint Committee on Taxation.

That is $20 billion from the pockets of hard-earned Americans.

So my amendment says just this, that “Any American who requests an exemption on their tax form will be granted an exemption for any reason.”

That means if you are filing out your tax returns and did not want to send $750 or $1,900 additional to Uncle Sam, you could check a box to request an exemption and get one. It’s that simple.

Some will likely argue that if this amendment passes it will undermine the shared responsibility section and some of the other insurance reforms as well. Well, I don’t think the Federal Government should be in the business of taxing Americans just because they are uninsured. Some will say the individual mandate is like the requirement that drivers have car insurance. Well, if you don’t want to pay car insurance, you don’t have to drive or own your own car. In fact, many Americans don’t own their own cars and don’t pay car insurance.

But you don’t have a choice under this bill. The only way to avoid being forced to buy insurance is to stop breathing. Instead of the goal of health reform, I think it should be to make more insurance more affordable
so people have it, like seriously looking at ways to help people buy insurance across state lines, reforming our medical malpractice which we have talked about numerous times here, and taking more aggressive steps to help people enroll in public programs like Medicare and CHIP if they are eligible.

This bill certainly gets people covered, but at what cost. It is an invasion by the Federal Government into another element of our private life. We already have seen so much of that this past year.

My amendment makes sense, and it is the right thing to do.

The offset in my amendment would reduce the threshold for premiums credits, but I doubt that this will be necessary. In fact, I am told that CBO told another member of this committee that the individual mandate actually adds well over $200 billion in cost to this bill, largely because of the increased premium subsidies that result from forcing Americans to buy insurance.

Therefore, I expect this amendment will actually save the government billions of dollars.

I urge my colleagues to defend their personal liberties of this Nation, which is part of, one of the main things that this Nation was founded upon, and
support my amendment.

Thank you.

Senator Kyl. Mr. Chairman, might I ask staff, whoever could answer this question, the exemptions that Senator Bunning referred to, it does not include, for example, veterans or active duty military. It does include Native Americans. I presume the reason the exemption does not include groups like veterans or active duty military is that they have separate insurance coverage and health care that qualifies under the at least minimum terms of the legislation. Is that correct?

Ms. Fontenot. That is right. They are considered already meeting the requirements.

Senator Kyl. Right. But Native Americans are specifically named as being excluded. And yet they have Indian Health Service. So why are they explicitly exempted?

Mr. Schwartz. There are two reasons for that, Senator Kyl. The first is because Indian tribes are sovereign.

Senator Kyl. Yes, but the rule, the laws of the United States of America apply to Native American communities. So I understand the aspects of Native American sovereignty, and I cannot think of a reason why it would preclude an American citizen, Native American
Navajo Indian, for example, from being exempted simply because he happens to be an enrolled member of the tribe.

Mr. Schwartz. All right, let us try the second reason.

Senator Kyl. Yes. I think maybe the second reason is the real one.

Mr. Schwartz. The Indian Health Service provides access to care but it is not health coverage. And given the lack of funding and difficulty that people who are eligible to receive services at IHS experience on a sort of yearly basis, CBO’s conclusion is that having access to IHS is actually not and should not be considered creditable coverage.

Senator Kyl. Right. Thank you. I think that is accurate, and I think the legislation is properly therefore excludes Native Americans from having to comply with the mandate.

But I would make the point that, and I see a couple of my colleagues nodding with me here, that this also illustrates something else. The government care for Native Americans is abominable. It is inadequate. It is to me a good example of what happens when you have the government run a health care system. And it is something that the American people, frankly, have a big trust responsibility to correct. And for years we have not
corrected it.

We got some funding that is supposed to go in a special trust account this last year from the PEPFAR funding to try to help improve their health care. We have not even been able to get from the appropriators the funding into that trust fund to accomplish this even though we got an authorization for a portion of a billion dollars.

And so the mark I think is correct in what it does, but the reason is because we are not in our government-funded health care for the Native Americans doing what we are supposed to do. And I suggest that we could have problems similar to that when we apply that to the rest of the American people.

May I ask a question?

The Chairman. Mr. Grassley.

Senator Grassley. First a statement and I have a question.

The Chairman. Sure. Senator Grassley.

Senator Grassley. I am going to vote for the Bunning Amendment. I have already expressed some strong concerns about some heavy-handedness that is connected with the enforcement of the individual mandate. And I said before, recognize the need for more people to purchase coverage, and I have an amendment pending on
that that has been deferred.

But the levels of penalties and the new IRS enforcement tools represent kind of a disconcerting intrusion into the lives of private citizens. The mark does allow for some exemptions. People would be able to apply for a hardship exemption that would be determined by the Secretary, but even with the exceptions detailed in the Chairman’s mark, and I will not go into those, I have this question for staff.

Can staff tell me if a family of four at 134 percent of poverty, and that is about $25,000 today, could still be subject to an almost $2,000 penalty?

Ms. Fontenot. The 134 percent poverty?

Senator Grassley. Yes.

Ms. Fontenot. So for those, it would be a $1,500 penalty if the premium did not exceed 10 percent of their income, or they could not get a hardship waiver.

Senator Grassley. All right. So the answer is yes. So it is a pretty heavy burden for low-income families, and I think Senator Bunning’s amendment will make the process of receiving an exception much easier for people struggling to meet the new Federal requirement.

I yield.

Senator Ensign. Mr. Chairman.
The Chairman. All right. Senator Ensign.

Senator Ensign. Mr. Chairman, thank you. The first thing I want, just for joint tax, Mr. Barthold, if you could just clarify what the penalties are if somebody decides--first of all, is it the IRS will enforce the penalties?

Mr. Barthold. These are penalties under the Internal Revenue Code is what the mark contemplates.

Senator Ensign. And if somebody doesn’t pay it, they object to it, let us say they object to it and they do not pay it, what are the penalties? Up to what?

Mr. Barthold. It would be the usual penalties for failure to meet your tax obligation.

Senator Ensign. Up to what?

Mr. Barthold. Willful. This is willful evasion, right? It could be prison. It could be willful. It could be you just were late filing and forgot.

Senator Ensign. I am saying the maximum penalty. In other words, if they are willful, is it possible that somebody could go to jail over this?

Mr. Barthold. It could be. That would be criminal. If it were considered an attempt to defraud.

Senator Ensign. What if it is just willful evasion? They do not believe in it, they are saying I don’t believe that this is right.
In other words, what I am trying to get at ---

Mr. Barthold. Generally the IRS would take you to court and undertake normal collection procedures.

Senator Ensign. So they could have their wages garnished, various other things they could do at that point.

Mr. Barthold. Yes.

Senator Ensign. Let me ask. The reason I am going down this line of questioning is, we have heard from a lot of people--and I bet your office, most of our offices have as well, Senator Hatch mentioned this--that a lot of people do not believe that this is constitutional, that this is not in the enumerated powers of the U.S. government to mandate purchase of health insurance or penalize somebody.

We have allowed exceptions for religious and various other reasons. But some people hold the Constitution pretty high in their lives, and if they believe that this thing is unconstitutional and they then say, “I choose not to have health insurance and I am not going to buy it,” we could be subjecting those very people who conscientiously because they believe in the U.S. Constitution, subjecting them to fines or the interpretation of a judge potentially all the way up even to imprisonment. That seems to me to be a problem.
I understand the idea of this shared responsibility. And the insurance companies want everybody to have this mandate. That is how they say they can get rid of preexisting conditions. I understand all of that.

But there are a lot of Americans who hold that Constitution of the United States very dearly. And if you look at the enumerated powers, I have trouble understanding how we are mandating the purchase of health insurance other than the broad interpretation of the “general welfare” clause, which by the way Madison who wrote the Constitution certainly according to the Federalist Papers Number 10 certainly did not envision that. As a matter of fact, he was a huge critic of the general expansion of the General Welfare Clause.

So I would think that we should take this thing very, very seriously and consider what we are doing to the American people who are going to be protesting. Some people may even do this just out of conscience, drop their health insurance and then want to take this thing on, because there is an outrage amongst the American people over this.

The Chairman. All right. I think we can vote.

Senator Stabenow.

Senator Stabenow. I appreciate a chance.

The Chairman. All right, go ahead. Senator
Stabenow.

Senator Stabenow. Thank you. I just think that as we hear that we should talk a little bit more about the other piece of this. And I have to say when we look at affordability I am torn, because if we cannot get this to be affordable, if we cannot address the right level of tax credits for middle class people and the hardship waiver, it becomes harder and harder then to do the requirement. And that is something I am weighing all the way through this process, frankly.

But I also think it is important to just say a word about the other side, which is the fact that the challenge for us around health insurance and health care in this country is that we are all paying for people that do not have health insurance and are using emergency rooms inappropriately every single day. There is at least a $1,000 hidden cost on every single one of us every single person in the country if you have insurance like a lot of people in my state and somebody goes in and uses the emergency room, rather than seeing a primary care doctor, all those costs get rolled on to my employers, to the workers, the people who have insurance. And they see their rates go up. It is another reason you see $800 aspirin. I mean, the reality is that we are all paying for this, and that is the real challenge of
all of this on health care is that we are all paying for this one way or the other.

And so the question is, do we pay for it through the back door and pretend it does not happen and end up paying twice as much as any other country for health care, or do we try to rationally figure out how to do this so that we are paying for it through the front door, and we are bringing down the costs over time, we are tackling tough decisions about how to do that, but we are all together trying to figure out how we make sure that we are able to have everyone have health insurance and at the same time not be paying for all of these extra costs that every single American one way or the other is paying for.

So I am sympathetic. I understand the concerns, and I appreciate all that as well, the political volatility around the question of mandating or requiring coverage. But we have a real challenge on our hands. Unless we want to do what we did with Medicare, quite frankly, where everybody is in and if a single-payer, government-run health care system which Medicare is, that makes sure everybody participates and everybody is in and chooses their own doctor and gets the health care they need--- unless we want to do that, the big question we’ve all grappled with is, how do you make sure everybody is in?
And I think that is a tough one. It is a tough one, and for me it comes down to whether or not ultimately in this bill we can say this is affordable for people, affordable for businesses and affordable for people.

And that is what I know that we are working very hard to do. But this is a broad, basic discussion that goes to the heart of what we are trying to do here. And I think it is important to talk about the fact that we are paying one way or the other for this.

And Mr. Chairman, I finally would just say that again the offset of going to middle-class people—that is what this offset is—raises great concern for me, taking away tax credits from middle income people to pay for this. And I even question, I would ask the staff whether or not the offset even pays for this because I know the Chairman has asked that things be paid for, and I question whether or not removing the middle class tax cut actually would pay for what is being done in this amendment.

I don’t know if staff might respond to that.

x. The basic question, the penalty itself raises $20 billion, so the question is whether you can raise, whether the tax reduction and tax credits are such that $20 billion ---

Mr. Barthold. Mr. Chairman, it is actually more
complicated than that because --

The Chairman. I’m sure it is.

[Laughter]

Mr. Barthold. As was pointed out in the debate, the decision to carry insurance or not to carry insurance will affect who participates in the exchanges and might be eligible for subsidies as well as sort of overall premium costs. So we can’t just look at the one as the CBO and we did in the letter that was presented said there would be this much money in terms of penalties. There are other secondary effects that go into the overall cost of the bill.

So if you were to exempt a large number of people under the amendment, it would not be as simple as just looking at the $20 billion figure on that one line. Since he is not here, I cannot speak for Doug Elmendorf, but it has been sort of a complex interaction of those different factors that I identified.

The Chairman. The basic question Senator Stabenow asked, is there enough in the tax credits to pay for the subsidies?

Mr. Barthold. Well, I was going through the complex calculations I said have begun. There is certainly a good amount of dollars under the mark in the subsidies.
The Chairman. All right. I think we should vote.

Senator Bunning. Mr. Chairman, may I just - very short.

The Chairman. Very quickly.

Senator Bunning. All right. I would like to respond to Senator Stabenow. How many of your constituents think that you do not pay for your health care? Do you have any idea from your town meetings and things like that?

Senator Stabenow. If I might just respond to my colleague. I think there is a difference between understanding when you pay a premium and understand at this point the general costs that come from emergency room care and other kinds of care, and it is not obviously I have very intelligent constituents, and so I am not suggesting people ignore it, and I am hoping you are not suggesting that people in Michigan are not intelligent.

Senator Bunning. No, I am not. I lived in Michigan 14 years. I am very familiar.

Senator Stabenow. I know. But there certainly is a difference between the awareness of paying it out-of-pocket for premium and what happens indirectly all the time.

Senator Bunning. All right. Let me just make this
point. We will still be paying for the emergency room
visits of the uninsured, Native Americans, people with
religious objections, and illegal immigrants. Why is it
okay for some and not others?

Senator Stabenow. Well, if I might, since that was
directed to me, Mr. Chairman, I would just say, you raise
very important pieces of this. This is a tough issue. I
guess the question is, if you cannot solve all of it, do
you not try to solve any of it? And that is really what
we are here all about too.

It goes back to my basic question of, is the status
quo okay? I do not think it is okay.

Senator Bunning. No, no, no. The status quo is
not what is in the mark, and that is why I was trying to
amend it. Thank you.

The Chairman. All right. I just have a couple of
comments. This is not really a killer amendment. I
would say it is a mortally wounding amendment, because it
basically says no more personal requirements, no shared
responsibility for individuals. Obviously individuals
will just opt themselves out, and that is going to
undermine this whole system here. It clearly is going to
undermine the system. The system won’t work if this
amendment passes.

Second, as Senator Stabenow is pointing out, it
makes the insurance even less affordable in the exchange, and that is not right. If we want this to work, not to make things more difficult. And I just strongly urge everyone to not support the amendment.

All those in favor of the Bunning Amendment? Roll call vote? All those in favor of the Bunning Amendment, please signify by voting. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

The Chairman. No by proxy.

The Clerk. Mr. Bingaman?

The Chairman. No by proxy.

The Clerk. Mr. Kerry?

Senator Kerry. No.

The Clerk. Mrs. Lincoln?

Senator Lincoln. No.

The Clerk. Mr. Wyden?

Senator Wyden. No.

The Clerk. Mr. Schumer?

The Chairman. No by proxy.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Ms. Cantwell?

Senator Cantwell. No.
1   The Clerk.   Mr. Nelson?
2   Senator Nelson.   No.
3   The Clerk.   Mr. Menendez?
4   The Chairman.   No by proxy.
5   The Clerk.   Mr. Carper?
6   The Chairman.   No by proxy.
7   The Clerk.   Mr. Grassley?
8   Senator Grassley.   Aye.
9   The Clerk.   Mr. Hatch?
10  Senator Grassley.   Aye by proxy.
11  The Clerk.   Ms. Snowe?
12  Senator Snowe.   No.
13  The Clerk.   Mr. Kyl?
14  Senator Kyl.   Aye.
15  The Clerk.   Mr. Bunning?
16  Senator Bunning.   Aye.
17  The Clerk.   Mr. Crapo?
18  Senator Crapo.   Aye.
19  The Clerk.   Mr. Roberts?
21  The Clerk.   Mr. Ensign?
22  Senator Ensign.   Aye.
23  The Clerk.   Mr. Enzi?
25  The Clerk.   Mr. Cornyn?

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Senator Cornyn. Aye.

The Clerk. Mr. Chairman?

The Chairman. No.

The clerk will tally the vote.

The Clerk. Mr. Chairman, the final tally is 9 ayes and 14 nays.

The Chairman. The amendment fails.

The next amendment is Senator Rockefeller.

Senator Rockefeller. Thank you, Mr. Chairman. I want to first of all thank the Chairman for working with me on this so that we could, as members will remember I made it fairly lengthy heartfelt statement yesterday about the way Medicare reimbursements are done to providers, to hospitals, etcetera, etcetera.

And I suggested it was kind of a frivolous exercise and that there were too many lobbyists involved and that it was very, very difficult if you have a lobbyist that comes in—shouldn’t be—but a lobbyist comes in and represents an industry in your state which could gain enormous advantage by having an increase in the reimbursement rates for oxygen or for something else.

I said I think the Congress has made an earnest effort to try and do Medicare reimbursement correctly, but I don’t think it’s been a successful effort in view of the overall purposes of trying to make Medicare
reimbursements done more intelligently, maybe reduce
costs by doing it more intelligently through more
accountability, through more outcomes-based research and
application, judgments made therefrom.

And I think overall these are decisions that should
be made by a professional, people who are public policy
professionals that are not lobbyists and they are not
necessarily sitting Congressmen or Senators.

My original approach I modified through working with
the Chairman of this committee. As I indicated, Senator
Carper made a large impression on me yesterday when he
said the only reason he could vote on something because
it wasn’t going to be government. Obviously on the other
side of the aisle there is a lot of talk about government
involvement.

Well, this will not be without government
involvement, but it will be—and this is where I made a
compromise and I think it is a good compromise because I
think I was wrong before and I was being in a sense too
purist about it—Congress should be involved. Congress
should be involved, and so I have made that modification
which the Chairman has graciously accepted.

And this would be the way it would be done. There
would be 11, could be 15 and that is not yet decided.
This no cost. It is budget neutral, no offset needed.
Who would be picked by the Speaker of the House and the Majority Leader of the Senate, ideas coming from all of us and from others to them. They would present those ideas; that is, the names of those people, their credentials, something about them. Obviously they would have to be carefully vetted. And they would be then put before the President of the United States. He would make a selection, and then I believe, Mr. Chairman, that they would have to be approved by the United States Senate.

The Chairman. That is true.

Senator Rockefeller. Which means by us in this committee.

The Chairman. Yes. That is correct.

Senator Rockefeller. So that is legislative involvement. I like that. Actually I feel better about doing it that way. It is a smarter way to do it, it is a better way to do it, it is a more legislative-friendly way to do it, and I think it has a better chance also of passing thereby. That thought did occur to me.

Now the purpose obviously would be to make wise decisions. As I indicated yesterday this so-called MedPAC---and we don’t even have to call it that; we can make up another name, whatever---was put before us in 1997 by the Republicans and it was accepted. And MedPAC has been dutifully putting out every year, but knowing
that they have no authority and no power to do anything about it they have been putting out suggestions about how reimbursement should work, who should get what, what geographic factors, what income factors, what urban and rural factors, what MSA factors, all of these things are involved.

It is a very difficult decision for individual Congressmen and Senators to make because it is a constant study. Nobody would be able to serve on this group who was not fully involved.

There are three ex officio positions: HHS, CMS and HRSA. They would be on that if approved by us.

But Medicare is too important to let it be done, I won’t say frivolously but in an ad hoc manner, depending upon who has a particular interest in this or that. It should be done from a distance of let us say 10,000 feet by professionals, men and women who know the business.

I put out the name of Gail Wilensky yesterday, and I have not actually heard from her. But that as an example she is a very strong Republican but she also knows health care like the back of her hand. It has been her life. I have no idea whether she would be interested or whether anybody would interested in suggesting her.

But the point is, a professional in health care public policy who knows the problems of the country, who
has been all over the country in many capacities, the study what the needs of Medicare might be for reimbursement purposes, hospitals, providers, etcetera. It’s very, very important. It’s very, very important that hospitals and doctors and nurses and other providers really feel that they are being treated fairly with an even hand.

I think this amendment, thanks to the cooperation of the Chairman of this committee, is a very fair way to do this. I think it is bipartisan, it has the Executive Branch involved. I don’t think they are going to be entirely happy with this because I think they wanted it all to be a branch of the Executive government or some agency related to that. And I do not think that is necessarily the case here.

We make the decisions on these things, and I think what the Chairman and I are suggesting is the right way to go.

I will just end by saying, it is enormously important. I cannot think of anything that is more important than what we will do for the long-term history. The Chairman was also good enough to remove the three-year or four-year or five-year sunset period so that the MedPAC or whatever we decide to call it will stop at that point. And that means that people will have confidence
in it. It is not a temporary event. It is a long-term thing they will be living with.

    That is not to say that the terms have not been fixed yet. That can be done. But they have confidence in an ongoing process.

    And then it comes, they make their decision, and then their decision come before the Congress, both houses, and the houses have a chance to review. This was already in the Chairman’s mark before. I saw this already. They have a chance to review for 30 days the product of these commissioners working long and hard for the full period of a year from year to year to each year.

    They would have a chance to review that, and that would be a 30 day period which is a good amount of time. Senators, Congressmen, their staffs could over that, and then they would have a chance if they were displeased to override the suggestions with a two-thirds vote. That provides some discipline on the legislature, but it also provides the legislature an opportunity, the Congress a chance to really make a difference.

    So I think this is a game changer. I think it is a large idea with large consequences for the future because they will not just be looking at paying people, but they will be looking at the quality of the work, accountability and outcomes and recidivism and all the
rest of it which are so, so important.

So I would put that before my colleagues with the hope that they would find it important and satisfactory. I thank you.

The Chairman. Senator, I very much thank you. You have been in the forefront, really the champion of this concept very early. You talked to many of us about it some time ago, talked to the White House about it some time ago. The President refers to this concept many times, including when he spoke to the Congress not too many weeks ago. And I think it is a great idea.

The CBO also gives it a very positive score. That is, it is going to save about $23 billion in this budget window which is not a bad thing, and even more in the subsequent 10 years. This is one of the major cost-benders we have in this legislation. We all talk about bending the cost curve, and there is a lot of talk about it, but there are not many provisions which actually do it.

There are several I can think of three or four right now, but this is one of them that definitely does bend the cost curve. And you are making, frankly, a very valuable contribution to the country with this concept, this procedure. We may not see the benefits of it for quite a few years—but as I hear little comments from the
peanut gallery, “maybe not in our lifetime”—but I do think we will see it in our lifetime. I think we will definitely see it in not too many years beneficial results here.

But thank you very much, Senator, for what you’re doing.

Senator Rockefeller. Thank you, Mr. Chairman.

The Chairman. Senator Cornyn.

Senator Cornyn. May I just ask a question? I heard the distinguished Senator from West Virginia talk about how the commissioners will be selected, but I don’t see that in the amendment itself. Maybe I missed it.

Senator Rockefeller. It is in the mark. Yes. The Chairman has predicted a lot of this, and put it in the mark.

The Chairman. This amendment is basic improvements upon the provisions that are in the mark.

Senator Snowe. I’d like to ask the sponsor a question regarding the congressional procedure. Exactly what has been removed from the Chairman’s mark? Is it the entire process where the bill is reported to the Finance Committee to be considered and voted out by April? And if not, then it would be reported to the Floor and the Senate would have the opportunity to develop an alternative plan by August 15? Is that entire
process removed from congressional oversight?

The Chairman. No. No. It is all part of it.

Senator Snowe. It is all part of it? So what has changed in terms of the congressional process?

The Chairman. Well, the only change –

Senator Rockefeller. We enlarged the role of the Congress.

Senator Snowe. In what way?

Senator Rockefeller. Well, originally the way I was thinking of it, Senator Snowe, was to have it an exercise of the Executive Branch of government. And there are still parts of me which think that makes sense, but there are more parts of me which thinks that—actually I believe this was a concern that you had—was that the legislature would be let off or kept out of the process.

And in my original proposal, the Legislature would not even get to vote on it at all. And so this gives the Congress much more power and we have the power of approving the people who are presented to us by the President after the Speaker and Majority Leader and maybe more have made their suggestions.

Senator Snowe. So it would be the same time frame by which a report would have to be approved by Congress?

Senator Rockefeller. Yes. And let me say, and the Chairman hinted at this, this will not take effect until
the year 2014. And that is important, because it will take that kind of time to prepare. They are going to need to have somewhat more staff, going to have amore resources. They have been doing this for 12 years but knowing that what they say is not necessarily going to have any effect. Now they will know that it will be more likely to have effect.

The Chairman. My understanding, Senator, is this is basically what the Group of Six was discussing and Senator Rockefeller has helped expand powers, add a few provisions to help, like the commission has to look at beneficiary quality care for example, the effects on the private sector and some other, and a GAO review, revolving door provisions, things like that.

Senator Snowe. And no sunset? Modify the Chairman’s marks, the modifications, modifies the modification?

The Chairman. My understanding is there is no sunset.

Senator Rockefeller. That is correct. But people can do that work for so long, and then they may do something else. But the point is, you put in place an institution which will be there in the future, and of high quality individuals who may change from time to time, and who will change from time to time.
Senator Kyl. Senator Rockefeller?
Senator Rockefeller. Yes.
Senator Kyl. Other than the addition of the three ex officio members, has the membership of the commission changed in any way from the mark?
The Chairman. No.
Senator Rockefeller. No. It has not. Those three named people are for --
Senator Kyl. Are added on as ex officio members.
I had forgotten. So the --
Senator Rockefeller. HRSA, CMS and HHS.
Senator Kyl. Right. And the other members are selected how again? I’ve forgotten.
Senator Rockefeller. By the Majority Leader and the Speaker, but not by them alone, I mean by them being flooded with suggestions by us and others.
The Chairman. But appointed by the President.
Senator Ensign. Mr. Chairman, may I ask a question?
The Chairman. Certainly.
Senator Ensign. I heard you describe I think when we were doing the walk-through about this commission. You compared it to the BRAC process. The BRAC process was bringing in experts, a lot of it because we did not have the political will to close bases.
The Chairman. Correct.

Senator Ensign. In the BRAC process though the commission got set up, did its work, and then was over.

The Chairman. Correct.

Senator Ensign. Why would we need in this case to continue it? Once they made the recommendations then if we either decided to vote them down why would it need--I guess I don’t understand it is not being sunsetted.

Senator Rockefeller. Senator, it is because the requirements of being able to reimburse people in a fair and proper manner based upon a whole variety of criteria continues.

Senator Ensign. No. I know.

Senator Rockefeller. But the BRAC Commission, there has always been a false comparison, and the Chairman made this point yesterday, that the BRAC Commission they have one set of bases they are going to close. It does not affect most states. Those that it does affect fight mightily against it, but then we make a vote, and that is that.

Senator Ensign: Right. The comparison I thought was a fair comparison in that it was created because the Congress did not have the political will because these were difficult political votes. And as these would be very difficult political votes, but if they came...
basically for up or down type of votes it may be easier to get a bipartisan agreement to where we say, you know what, it is for the good of the country and let us do it. The concept is --

Senator Rockefeller. That does not change.

Senator Ensign. Right. What I am saying, I guess my question about eliminating the sunset here is that in the BRAC process we had round one and we decided, you know what, we need a second round. So we passed BRAC II. Would it not be reasonable to do this, have this commission, say, “It did work.” And if it worked the first time, we decided five years from now we needed to do it again, why would you not just – instead of creating another permanent bureaucracy, why would you not do that?

Senator Rockefeller. Well, we have that bureaucracy. It is just that it has no authority.

The Chairman. I might say, you raise good questions, Senator. As I heard you, it was my impression that we did not know that we needed a second BRAC round. But we did after we had the first round. We set it up again.

Senator Ensign. Right.

The Chairman. Here we can avoid having this commission make any recommendations to the Congress, frankly, if we do our work.
Senator Ensign. I agree to that, but we know we are not going to ---

The Chairman. Well, you know, it is up to us. It is like that Pogo cartoon, look in the mirror and who do you see? So we have it within our power in Congress.

Senator Ensign. We all understand that, but the reason for the Commission is, we all understand who we are.

[Laughter]

The Chairman. I don’t want to go down that road, but I think I understand.

Senator Rockefeller. In the Saint Matthew’s Passion Jesus said, Thou sayest.

The Chairman. Right. Senator Cantwell.

Senator Cantwell. Mr. Chairman, yes. I would like to ask staff a question as it relates to the modification and the language that is in the modification on a value index so we are making a big change in Medicare in the formula process, the calculating position of payment. Is there anything in this amendment that would affect that?

Mr. Dawe. There is not, Senator. Under the Rockefeller Amendment the Commission would still have wide latitude in the types of payment reforms it could recommend to Congress. Though I think you would have little incentive to suggest a repeal of the Cantwell
Amendment because that amendment is consistent with the purposes of the Commission which is to promote high quality care and efficiency.

Senator Cantwell. So your first statement was, it has no impact?

Mr. Dawe. That is right.

Senator Cantwell. Thank you.

The Chairman. Senator Kyl.

Senator Kyl. I have a question too. The Chairman’s mark says, and I will quote it here, “The Senate Majority Leader, Speaker of the House, Senate Minority Leader and House Minority Leader would each present three recommendations for appointees to the President; however, these recommendations in no way would limit the President’s ultimate responsibility to present Congress with qualified nominees."

Does the staff read that as entitling the President to ignore the recommendations made by the members of Congress?

The Chairman. Yes. The answer is yes.

Senator Rockefeller. But he would be a fool to do so.

Senator Kyl. So the President could ignore the recommendations of the members of Congress, the leadership of Congress, and present totally different
names.

The Chairman. Let me just jump in here. This is a constitutional requirement under the charter decision. The President has to make the appointments, and we really in this committee have the authority to confirm, not confirm, what not, the appointments. But it is true, but the minority makes recommendations to the President. I don’t know very many Presidents who do not accept the recommendation. It sometimes happens, but it is very rare.

Senator Kyl. No, but let me be real clear. I do not believe the charter decision or anything else prohibits the Congress from legislating along the following lines. The XYZ Commission shall be comprised of 15 members, three members appointed by the Speaker of the House, three members appointed by the Minority Leader, two members appointed by the President of the United States, etcetera. In other words, we can create commissions with membership that we create or membership that the President creates or combinations.

That is why I asked Senator Rockefeller the question because --

The Chairman. I want to clear this point up. It is a constitutional requirement because this is an executive decision. These are executive branch cuts, and
to do that there has to be a presidential appointment. That is, your commission hypothetical is fine, except that would not be fine under CHOTA if that commission made executive decisions.

Like for example, cutting Medicare reimbursements, that is an Executive Branch decision.

Senator Kyl. Mr. Chairman, that is only true if one situation pertains, and maybe the staff can respond to this. The power of the purse is in the United States Congress, not only is it a legislative function, it is the House of Representatives that starts and then the Senate and then we pass the bill on to the President. He signs the bill, or he can veto it. But we appropriate the money. And if you are going to cut that, that is not an executive decision.

The Congress is the one that decides who much money to spend on things. We decide each year are we going to give the docs a half a percent increase or not do it or whatever. That is not an executive decision. So you don’t need to have the President appointing with an unlimited Executive power members of the commission to make recommendations about what Congress ought to legislate.

Senator Rockefeller. But it is the President making appointments subject to the advice and consent of
the Senate.

    Senator Kyl. You can do that, of course. But I
guess what I am questioning here --

    Senator Rockefeller. No, we are doing it.

    The Chairman. There is a vote on the floor.

    Senator Ensign. Yes, but this needs to be cleared
up because we have commissions. We have all kinds of
commissions where we--look at the National Gaming
Commission that was set up. I know they did not have
rescission power, but --

    The Chairman. Which has no Executive authority.

    Senator Ensign. But what he is saying is, we have
the power of the purse.

    Senator Kyl. Let me just ask this question. A
majority of this Congress can create a commission which
says that the president can individually nominate all of
the members of the commission. Yes, we can do that. And
I gather that is what Senator Rockefeller is saying we
are doing here.

    The Chairman. No.

    Senator Rockefeller. No.

    The Chairman. No. With the advice of Congress.

    Senator Kyl. Congress eventually will either
approve or disapprove the nominees, but it is the
President alone who has the authority to present the
names to Congress.

The Chairman. Correct.

Senator Ensign. By the way, it does not say advise and consent in this. Advise and consent, if we decide not to approve the Secretary of State --

The Chairman. I will underline the mark. I am sorry I am being a little quick, underline it.

Senator Ensign. I know. But if the Secretary of State, if the Congress says, We do not approve him, that person does not get approved. That is advise and consent.

In this case, the President can ignore our recommendation. It was just cleared up.

The Chairman. Still have to confirm.

Senator Rockefeller. You have the order reversed. We confirm after he appoints.

Senator Kyl. Understood. By Mr. Chairman, you were saying that the law or the CHOTA decision required us to structure it this way. I am saying that is not correct, that you --

The Chairman. No, I do not think you are accurate.

Senator Kyl. Well, are there any lawyers on the staff who can verify that this is the only way we can do it?

The Chairman. Yes. There are lawyers on the staff.
that can verify that.

Senator Kyl. Would any of them like to volunteer an answer to the question?

The Chairman. If you will just wait one minute we will get the lawyer who will verify that.

[Laughter]

Senator Rockefeller. I can read it to you.

The Chairman. All right. Mr. Dauster, can you explain the requirements under Trotta.

Mr. Dauster. In the decision of ____________ Bowsher versus Synar. I have never been on this side. In the decision of ____________ Bowsher versus Synar the Supreme Court held that the comptroller general could not make the automatic, across-the-board cuts in the Gramm-Rudman Law because Congress had the ability to remove the comptroller general from office.

This is an analogous situation because this commission will have the authority to make cuts unless Congress passes a law to stop those cuts from going into effect. So for this commission to be constitutional the President has to have the authority to appoint.

Now this mark will also involve Congress both in the suggestion of nominees to the Commission as well as in the confirmation process thereafter.

Senator Kyl. Might I just? The comptroller could
not do it because Congress could remove him?

Mr. Dauster. That is right.

Senator Kyl. All right. And so what you are saying here is that even though the individuals on this commission would be appointed by the President, how is the comptroller of the currency put into office?

Mr. Dauster. He is also appointed by the President, removable by Congress.

Senator Kyl. All right. So the difference is that he is removable by Congress; these individuals would not be?

Mr. Dauster. That is right. It is a fortiori, a lesser included case.

Senator Kyl. I know what a fortiori means. But what I don’t understand is why, whether they are removable or not that that affects whether or not the President has to appoint all members of the commission and none can be appointed by the Congress.

Mr. Dauster. The Supreme Court in Bowsher versus Synar, which followed in the wake of --

Senator Kyl. But that is not a case where the members of -- see, the Congress is not making appointments in that case.

Mr. Dauster. The objection in Bowsher versus Synar that the Supreme Court had under the Separation of Powers
doctrine was that Congress was too involved in Executive
Branch decision of how to make these across-the-board
cuts. And that is why they ruled the first Gramm-Rudman-
Hollings unconstitutional. We responded in Congress in
1987 by granting power to OMB to make those cuts, and we
have done an analogous --

The Chairman. All right. I think that clears it up.

Senator Kyl. Yes, right.

The Chairman. We are going to vote. We are going
to vote. All those in favor --

Senator Kyl. Whoa, Mr. Chairman. I had one other
thing.

The Chairman. I’m sorry, but we are going to vote.
I am going to call a vote. All those in favor --

Senator Kyl. Mr. Chairman, I object to the calling
of the vote on this.

The Chairman. All those in favor of the
modification --

Senator Kyl. Mr. Chairman, I ask for a roll call
vote.

The Chairman. Roll call vote is requested. Okay.

We’ll call the roll.

The Clerk. Mr. Rockefeller?

The Clerk. Mr. Conrad?
The Chairman. Aye by proxy.
The Clerk. Mr. Bingaman?
Senator Bingaman. Aye.
The Clerk. Mr. Kerry?
Senator Kerry. Aye.
The Clerk. Mrs. Lincoln?
The Clerk. Mr. Wyden?
Senator Wyden. Aye.
The Clerk. Mr. Schumer?
Senator Schumer. Aye.
The Clerk. Ms. Stabenow?
Senator Stabenow. Aye.
The Clerk. Ms. Cantwell?
Senator Cantwell. Aye.
The Clerk. Mr. Nelson?
The Clerk. Mr. Menendez?
The Chairman. Aye by proxy.
The Clerk. Mr. Carper?
The Chairman. Aye by proxy.
The Clerk. Mr. Grassley?
The Clerk. Mr. Hatch?
Senator Hatch.  No.
The Clerk.  Ms. Snowe?
The Chairman.  Aye by proxy.
The Clerk.  Mr. Kyl?
Senator Kyl.  Pass.
The Clerk.  Mr. Bunning?
Senator Bunning.  No.
The Clerk.  Mr. Crapo?
Senator Crapo.  Pass.
The Clerk.  Mr. Roberts?
The Clerk.  Mr. Ensign?
Senator Ensign.  Aye.
The Clerk.  Mr. Enzi?
The Clerk.  Mr. Cornyn?
Senator Cornyn.  No.
The Clerk.  Mr. Chairman?
The Chairman.  Aye.  Senator Lincoln?
Senator Lincoln.  Aye.
The Chairman.  The clerk will tally the vote.
The Clerk.  Mr. Chairman, the final tally is 15 ayes, three nays and five passes.
The Chairman.  The amendment passes.  I apologize to the committee.  Look at the clock back there.  I
thought I saw five lights. I thought they were in the middle of a vote. But we are not. The vote has not been called.

Who seeks recognition?

Senator Grassley. Do you want me to do my modification?

The Chairman. All right. Why don’t you go ahead.

Fine.

Senator Grassley. Mr. Chairman, remember last night in regard to Amendment C-9 I asked to put it off to see if we could work out something because it was creating mixed emotions on both sides of the aisle, and so I put it off with hopes that we could work out a compromise.

We have not worked out a compromise, but I am going to offer a modification of C-9. In other words, less money from people who are helped above 300 percent of poverty and then there would obviously be less resources to help in the case of pediatricians and children’s hospital, etcetera, under the program.

So I will go through and explain it. It provides the original amendment provided an additional 40 billion dollars in payments to providers. It was paid for by reducing the subsidy in the bill by a little less than 10 percent. My amendment was supported by the American
Academy of Pediatrics, the National Association of Children Hospitals, and other pediatric groups. The debate ended last night with a suggestion of working it out.

Some time after midnight I had my staff make a compromise offer with which I am modifying my amendment. We can provide $10 billion in grants to states to provide additional payments to pediatric providers and in return all we have to do is reduce subsidies to people above 300 percent of poverty. That $40 billion now becomes $10 billion and almost 10 percent, a little less than 10 percent now becomes 2 percent.

I know it is still a touch choice for some people, but this bill is of course about making tough choices. We all know there are limited resources. We have to pay for the bill. We have to bend the growth curve. When you write a bill like this the trade-offs lead to some tough choices. Our Group of Six was not able to reach an agreement on all these tough choices. And I know some of you were extremely critical of Chairman Baucus for tough choices he made in the bill up to this point. It is easy to sit outside and criticize when you do not have to make tough choices.

So this amendment gives us all an opportunity to make tough choices on the record. There are 30 million
kids who could benefit from improved Medicaid access.
There are only 1.5 million people who would benefit from subsides above 300 percent of poverty. But to remind my colleagues, that is $66,000 a year for a family of four all the way up to $88,000 a year.

So the question kind of comes that is before us with my amendment as modified. Do you vote so that kids of a single mom making minimum wage can see a doctor, or do you vote to provide subsidies to a family of four making anywhere from $66,000 to $88,000 a year?

So 30 million or more kids in poverty getting access versus 1.5 million people with income above the national median getting a subsidy.

So that is my amendment. I hoped that it would be considered a good faith effort by reducing to 25 percent what I was originally attempting to accomplish.

The Chairman. Senator Stabenow.

Senator Stabenow. Thank you, Mr. Chairman. As I indicated when the distinguished Ranking Member brought this up before, I am very sympathetic to what he is trying to do, and I am very supportive of what you are trying to do. My concern is once again we are going after middle income families that in this economy are having a hard time making it, and this takes away tax credits for middle income families.
And so I would love to work with you to find another way to be able to do this because I absolutely agree with what is being proposed and appreciate the hard work of the ranking member. But at the same time for me again we are going right to middle income families, and I think we should also be concerned about what is happening for them across the country.

And so this is not a paid-for that I can support.

The Chairman. Any further discussion?

Senator Grassley. I would ask for a roll call vote.

The Chairman. Okay. As Senator Grassley said, this is a tough choice. This is a very, very, very tough choice. I mean, do we give a little more to kids—the kids are doing pretty well—and take it away from middle income folks, middle income kids, or not? I certainly want to help kids even more than we are, but I don’t want to take it away from middle income families. So I very reluctantly have to oppose the amendment. The Senator is requesting a roll call vote. Go ahead and call the roll.

Senator Grassley. Please.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?


The Clerk. Mr. Bingaman?
Senator Bingaman. No.
The Clerk. Mr. Kerry?
Senator Kerry. No.
The Clerk. Mrs. Lincoln?
The Clerk. Mr. Wyden?
The Chairman. Pass.
The Clerk. Mr. Schumer?
Senator Schumer. No.
The Clerk. Ms. Stabenow?
Senator Stabenow. No.
The Clerk. Ms. Cantwell?
Senator Cantwell. Aye.
The Clerk. Mr. Nelson?
The Chairman. No by proxy.
The Clerk. Mr. Menendez?
The Chairman. No by proxy.
The Clerk. Mr. Carper?
The Chairman. No by proxy.
The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Mr. Hatch?
Senator Hatch. Aye.
The Clerk. Ms. Snowe?
Senator Snowe. No.
The Clerk. Mr. Kyl?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Bunning?

Senator Bunning. Aye.

The Clerk. Mr. Crapo?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Roberts?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Ensign?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Enzi?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Cornyn?

Senator Grassley. Aye by proxy.

The Clerk. Mr. Chairman?

The Chairman. No.

The Clerk. Mrs. Lincoln?

Senator Lincoln. No.

The Chairman. Senator Wyden is no by proxy.

The Clerk. Mr. Conrad?

Senator Conrad. No

The Chairman. The clerk will tally the vote.

The Clerk. Mr. Chairman, the final tally is 10 ayes and 13 nays.

The Chairman. The amendment fails.
Next amendment. Who would like to offer an amendment?

Senator Grassley. Can I ask a question of the Chairman on procedure? We have a lot of votes coming up here. I assume he wants the committee working today. Is he going to work Friday, Saturday, Sunday? Or when are we going to—I go to Iowa every weekend. If I don’t have a weekend obviously I can’t go to Iowa.

[Laughter]

Senator Stabenow. Mr. Chairman, that sounds like a country song.

[Laughter]

The Chairman. We are going to work after these votes late into the evening and tomorrow. We will recess where we are.

Senator Grassley. Well, it is pretty hard to make plane reservations if you --

The Chairman. You could make them.

[Laughter]

Senator Grassley. They have a limit of two you can make on each airline.

The Chairman. All right. Who would like to offer an amendment?

Senator Grassley. Are you leaving at 2:00 tomorrow?
[Laughter]
The Chairman. No. Reminds me of a good Russell Long story which I will not repeat.
All right. Other amendments?
Senator Kerry. Mr. Chairman, I have an amendment, but I can’t do it quite yet because I am waiting for some additional data on it. I’m happy to do it later in the evening if that is helpful to you.
The Chairman. We have two amendments, but unfortunately the sponsors are not present. Do we have others that have sponsors present? We are working on it.
Here is a good chance to --
Senator Lincoln. Mr. Chairman.
The Chairman. Yes, Senator Lincoln.
Senator Lincoln. May I ask, I guess you know that Senator Cantwell be added to my amendment C-3.
The Chairman. Without objection.
Senator Lincoln. Thank you.
Senator Kerry. How many amendments do we have left, Mr. Chairman?
The Chairman. Apparently not very many. Nobody wants to offer any.
Senator Grassley. Well, can I take it? If you are not going to offer an amendment, can I take an opportunity to ask, I’m really asking the Chairman a
question, but I don’t expect him to answer without some
clarification from staff on this. So could I proceed?

The Chairman. Sure. Why don’t you ask staff?

Senator Grassley. Well, but I would like to have
you join in this.

The Chairman. All right.

Senator Grassley. I seek a clarification with
respect to the intent of one particular portion of the
mark before us. As I understand it the bill would allow
for insurance plans called National Plans in the mark to
be established. These national plans would be insurance
plans established by private insurance companies, and
these plans would be allowed to be sold across state
lines in all 50 states. These plans would preempt state-
enacted benefit mandate laws and related consumer and
provider protections.

However, as I understand it with respect to the
minimum set of uniform benefits and services to be
included in these plans, these plans would have to meet a
new set of federal standards that would be determined by
the National Association of Insurance Commissioners.

Again as I understand it, the National Association
of Insurance Commissioners develop standards in terms of
what services and benefits are to be included in the
National Plans and are supposed to reflect whether a
particular service or benefit is available in a majority of states. Like in other words, there has to be 26 states.

In other words, if a particular provider’s service or benefit is available to consumers in 26 or more states, by virtue of some forms of state enacted mandates or consumers or provider protection, then those benefits and services are supposed to be covered and available as part of a minimum benefit package in all of the national plans established under the bill.

Is this the clear intent of the Chairman’s mark?
And let me say why I am asking, because it is a national issue. But one of these professions that some states mandate, and I think 46 states do, was started in my state and very much a concern of people in my state.

So who can answer that?
The Chairman. Yvette?
Ms. Fontenot. Yes, sir.
Senator Grassley. I hope it is as simple as yes or no.

Ms. Fontenot. Well, the marks of taking into consideration how each benefit is offered in a majority of states. So is your question whether anything mandated in more than 26 states would be mandated on the national plan?
Senator Grassley. Yes.

Ms. Fontenot. I don’t think it specifically says that it would be mandated in the national plan because it says “develop standards as to how the benefit category should be implemented, taking into consideration how each benefit is offered in a majority of states.” But it does not necessarily mandate them to include that as part of their model for benefit coverage.

Senator Grassley. Well, then are you telling me that in for instance the case of chiropractors that if they are mandated in 46 states that they are not necessarily assured of being included assuming the National Association of Insurance Commissioners include them? They would not be automatically included then in the national plans?

Ms. Fontenot. Yes. I believe that is correct. It leads to the discretion of the NAIC that definition, taking into consideration those benefit mandates that are more than 26 states. So I do not believe it would require --

Senator Grassley. So we would have to assume that if it was in that many states that it might be foremost in consideration of being mandated, but it would not have to be.

Ms. Fontenot. I assume that is right. If it was
that many states, it would more than likely be mandated.

Senator Grassley. I don’t know about, I may want, if that is true, Mr. Chairman, and you agree with what she said, then someplace along the line I think I want to clear up some of these things in regard to what is mandated.

The Chairman. What would you have in mind?

Senator Grassley. Oh, I guess I would have in mind that if— I thought the intent of it was that if a majority of the states had it, you assumed that a majority of the commissioners would recommend it be included that it would be included. That is what I had thought. I want to make it clear, that you and I have never had any discussion on this.

The Chairman. That is right.

Senator Grassley. So this may be something that we haven’t given enough consideration to.

The Chairman. Well, that is a very good point. Frankly, it is a little vague because there are views on both sides of that coin, how much to be in the national plan, how many of the state mandates be include and how many not. And we are going to have to address that somehow.

Senator Kerry?

Senator Kerry. Is he finished?
Senator Grassley. I’m done.

Senator Kerry. Well, I am prepared to call up an amendment then, Mr. Chairman. I’m not sure I want to vote on it, but I do want to call it up and have some discussion about it. It’s Amendment Number 226 C-1.

The Chairman. 226 C-1.

Senator Kerry. It is co-sponsored by Senators Bingaman and Schumer. What the amendment would do is strike the free rider provisions in the Chairman’s mark and replace it with an employer mandate. I am very confident, Mr. Chairman, that if this committee doesn’t embrace this we are going to have this debate on the floor of the Senate. This amendment is based on what was put into the HELP Committee’s final product.

I offer this amendment because I have concerns, shared by many, many people, about the free rider provision that is in the mark. And one of the things I am particularly concerned about is that the free rider provision actually winds up inadvertently discriminating against low-income workers.

And it does this because it sets up a penalty, a free rider fee as it is called. It will cause employers to consider who they are hiring and their income level.

Now the mark that you have, Mr. Chairman, appropriately I believe, includes an individual mandate.
But it does not include an employer mandate. So you have designed this free rider fee which applies to employers with more than 50 employees who do not offer health insurance. And under the mark those employers would be required to pay a fee for each employee who receives a tax credit for health insurance through the exchange.

The fee is capped at an amount equal to $400 multiplied then by the total number of employees in that firm.

What my amendment does is it strikes the free rider fee, replaces it with an employer mandate. For an employer that does not offer coverage, there would be an excise tax of $750 for each full-time employee and $375 for each part-time employee. And the first 25 employees are exempt from this provision, so we are not talking about the smallest of small businesses.

I used to chair the Small Business Committee working very closely with Senator Snowe. We worked hard for many years to try to get some kind of an expanded pool for small business to purchase health insurance.

And I am fully cognizant of the difficulties of the small business operating under a mandate obviously. But exempting small firms with less than 25 employees really works. And I will speak more about that in a moment.
The amount of the excise fee would be prorated with respect to each month that an employee is without coverage. So it is not an automatic full-fledged fee simply because we know 86 million Americans did not have coverage for a certain period of time. It is prorated according to the period of time that they would not have that coverage.

And the amount of the excise would be adjusted to the CPI beginning in 2013, so we have a fair amount of time for people to make plans before this would take effect.

Now why do this? Well, if we are requiring individuals to be covered, we also have to address the other side of the equation. And I think you have got to require employers to offer insurance.

Let me just say, we have more than 160 million Americans who currently get their health insurance from an employer. We decided during the course of our work at the Library of Congress and through the issuance of the Chairman’s white paper on health care reform, that the employer-based health insurance system in America is the cornerstone of our health care system.

And so we want to preserve and build upon it. That is a fundamental and philosophical decision that we made approaching health care reform.
But the truth is, employer insurance is eroding. As costs increase, more employers are dropping coverage and shifting costs to workers. And so you cannot go to one of these town halls and ask your constituents, “Have you had your benefits cut or have you had your premiums go up or your co-pays go up?” without an affirmative answer to every single one of those questions.

And the average premium for job-based health insurance has more than doubled in the last decade. And everybody is feeling the pain of this—the employer, the employee, and the entire system that has to pick up those people when they get dropped.

And what happens is, that cost of picking them up when they get dropped or don’t have coverage in the first place gets distributed in a completely haphazard, unfair, cost-shifting process that takes place within the health care system. You pick up some of it in Medicare, you pick up some of it in Medicaid, you pick up some of it obviously in the private premiums that people pay in their health insurance.

And mostly companies pick it up. If you are a corporation, you wind up paying for it at the back end in a far less efficient way than if you were in fact covering people up front. The fact is that employers who cover their workers now are unfairly shouldering the
burden of higher premiums for other workers who cannot
get insurance through their jobs.

It actually adds $1,100 to the cost of premiums for
everybody else. So people who have insurance today are
paying a higher premium to the tune of $1,100 because we
don’t effectively share these costs throughout the
system.

And as we think about this, we ought to think about
it in the context of insurance. Insurance is a hedge
against something happening. That is not in effect what
we do in the health care system. We spread costs highly
inefficiently. In fact, the insurance fees that are
charged to OB-GYNs, brain surgeons, other specialists are
much higher than everybody else in the system because we
do not even spread those fees throughout the whole
system.

If you are a homeowner in America, your homeowner
fees are spread actuarially throughout the whole system,
risk against theft, risk against burning down, etcetera.
And every homeowner’s fees are basically set on that
basis. Same thing for car insurance. It is legitimate
insurance, and everybody pays the fee.

We do not do that in the health care system. It is
not really insurance in that sense.

So what our legislation says is, if you cover your
workers we want to make it more affordable for you to be able to do so. If you do not cover your workers, then you have to pay part of the cost of providing them with decent insurance.

And what we call this is “shared responsibility.” It is embraced in the concept of a free rider fee, but I think not in a way that is going to provide the kind of certainty and the breadth of coverage and the strength to the employer provided system that the country needs.

Without this requirement, I am convinced that more employers are going to end their coverage. And we are going to increase the prices of health insurance in America. With this modest requirement, $750 for a full-time worker, $375 for a part-timer, you can keep employers in the system and you can save money for everyone.

Now why do I say that? Because it is precisely what we are doing in Massachusetts today. I have a letter here from Michael Widmer, the president of the Massachusetts Taxpayers Foundation, which is an entity that has historically in Massachusetts always come down on the side of protecting against budget deficits, and against wasted money. It is the watchdog of tax expenditures. And they signed on to this.

Alan MacDonald, the executive director of the
Massachusetts Business Roundtable—representing the business interests in our state, signed on to this. Paul Guzzo, the president and CEO of the Greater Boston Chamber of Commerce, our Chamber of Commerce signed on to this. And finally, Richard Lord, the president and CEO of the Associated Industries of Massachusetts.

And here is what they say to us. “Our four groups wanted to take the opportunity to express our strong support for health reform in Massachusetts. We view the landmark legislation and its successful implementation as a competitive advantage for our state. As you know, our reform is based on the principle in reality of shared responsibility among all parties including employers, consumers and the government.

“The key to the law of success is the combination of the individual mandate and broad employer mandate as well as public subsidies for those who cannot afford coverage. In addition, in order to care for the small number of individuals who do not have health insurance, employers who do not provide a minimum level of coverage are assessed an annual fee of $295 per employee. Since reform, an additional 148,000 individuals have enrolled in employer coverage, in most cases those who had previously declined an employer offer.

“This has been an important element in achieving
near universal coverage in Massachusetts in a short period of time.”

And I would say, Mr. Chairman, the mark includes a penalty of $750 for individuals between 100 percent and 300 percent of the poverty level and $950 for individuals above 300 percent of the poverty level. So the penalty for families above 300 percent of the poverty level is $1,900. We are penalizing families, and we are not sharing the responsibility in asking employers to strengthen what has worked for 160 million Americans. I think we can do better than that. I think an employer mandate is easier to administer than a free rider approach because the free rider approach requires employers to provide state officials with a regular process of information and that is paperwork and time and cost.

I think it is far more effective to provide the insurance and strengthen the whole system.

The Chairman. Senator, there is a series of votes.

Senator Kerry. My timing is impeccable.

The Chairman. We have two minutes left on the first vote.

Senator Kerry. Well, I have spoken on my amendment, Mr. Chairman. I appreciate you listening.

The Chairman. Are you going to withdraw?
Senator Kerry. I think Senator Bingaman might want to speak to this.

The Chairman. Well, we’re not going to return until about 7:00 because we have a whole slew of votes. So we will reconvene at 7:00.

Senator Kerry. Thank you, Mr. Chairman. I appreciate it.

The Chairman. Are you intending to withdraw when we get back?

Senator Kerry. My intention is to have this debate on the floor of the Senate.

The Chairman. Okay. That is an oblique way of saying yes. All right.

You may recess until 7:00.

[Whereupon, the hearing was in recess at 5:16.]
AFTER RECESS

[7:16 p.m.]

The Chairman. The committee will come to order. The first amendment received here this evening will be that offered by Senator Nelson. I think it is regarding OIG.

Senator Nelson. Yes, sir. Thank you, Mr. Chairman.

Under Medicare Part D, the Medicare Trust Fund provides drugs of course for low income seniors. Prior to the creation of Part D, a lot of this is the same commentary that we went through earlier in me describing a previous amendment, the one on the rebates.

What I would like to do is to have the Inspector General at the Department of Health and Human Services to study how --

The Chairman. Senator, as I understand it, this is Amendment D3, is that correct?

Senator Nelson. Yes, sir.

The Chairman. For everybody’s information. Okay. Thank you.


Senator Nelson. Yes, sir. What it would be is a report by the Inspector General at the Department of
Health and Human Services to study how much Medicare and Medicaid are actually paying for the prescription drugs so we get specific data.

It will certainly help us understand the impact that the drug prices are having on both our taxpayers as well as seniors and knowing how much Medicare pays for drugs compared to Medicaid it seems to me is an important step to helping bring down unnecessarily high health care costs for seniors as well as for taxpayers. That is what it is. It is a study.

The Chairman. Is there any discussion on the amendment? Senator, as I can tell this is a study and I see no problem. I urge us to accept the amendment. Seeing no objection, the amendment is agreed to.

Okay. Other amendments. I do not see it here. The list I have here, I do not know if they want to offer them as Ed Schumer, Puerto Rican territories -- hospice provision. Also another amendment potentially offered by Senator Wyden, a Bingaman amendment -- the index, amendments, two of them -- strike state compacts. Do you want to do that now or later?

Okay. Let us do it. Strike state compacts. What number is that? Is that C1, Senator? Thank you.

Senator Nelson. Yes. It is C1. Just a second.

Okay. Now, here is aside from the issue, Mr. Chairman
and members of being able to form larger pools for the health insurance exchange.

Let us assume that a state is a small state, and of course to get the principle of insurance working for you, you want to get as many lives in the insurance pool, and so if it is a small state, you want to get several states put together to have that option. That is a good thing so that you have got millions of lives instead of a few hundred thousand that you are spreading the health risk across in order to get your greater economies of scale and to have the principle of insurance over millions of lives that will be both young and old and sick and well. You bring the cost of that insurance down.

But there is another consequence of the way the bill is written that I do not know if it is intended or not. I hope it is not intended because if it is, it is a subterfuge to get around the state insurance regulator being able to require in a particular state the things that that state requires in health insurance.

So if we had state A and B under the way the bill is written and I hope it is unintentional, if State A had lots of things that it required in its health insurance policies such as a woman could not be kicked out of the hospital earlier than 48 hours after she had given birth, if that is what State A wants, but if State B did not
have that requirement and under the way the bill is
written, if you had this compact, State B could sell the
health insurance policies in State A and State B’s
requirements would take effect.

   I do not think that is what we want to do. We do
not want to do that, for example, on a second surgical
opinion. We do not want to do that on rehabilitative
services. Mind you, there are seven states that require
rehabilitative services. There are only 16 of the 50
states that require prosthetics. What happens if that
state married up with another state that did not require
that?

   What about mastectomy minimum stay? A woman has a
mastectomy. She is in a state that requires a minimum
amount of time before she can be kicked out of the
hospital. They marry up in this consortium with another
state that does not require that but that other state
then starts selling the insurance into that state with
that required minimum stay. That lady who just had the
mastectomy is not protected as her state law would
require.

   I do not think we want to do this and I do not think
it is good policy. I think it is unintentional. I hope
it is not intentional in the way the bill is written and
that is what the amendment C1 that I have offered will
Senator Bingaman. Mr. Chairman, if I may?

The Chairman. Senator Bingaman?

Senator Bingaman. Can I just ask Staff, I do not know who the right person is to ask. But the way this is, I cannot find the language in the mark here that we are striking, but my impression was that all this did was to say that states could in their own choosing enter into compacts if they wanted to.

It was not us overriding any state law or it was not us saying that a state had to in any way defer to the law of another state. It was giving states the option to make that judgment themselves if they wanted to.

Could you explain how the underlying mark would work as we intended as the Chairman’s mark intends it?

Ms. Fontenot. Sure, Senator. It is on the bottom of page 12 of the mark. It is called interstate sale of insurance.

The expectation of the provision is that the states would have to agree to enter into a health care choice compact. Once they had agreed to do that, the insurance policies would only be subject to the laws and regulations of the state where the policy is written.

So in other words, to Senator Nelson’s point, if there is State A and State B and they have agreed to
enter into a compact, both states have agreed --

Senator Bingaman. Now, when you say both states have agreed, does that mean the legislature of the state has agreed and the Governor signed the bill?

Ms. Fontenot. We do not specify the process the state has to go through in order to enter into an agreement.

Senator Nelson. And if the Senator will yield, that is a very important point because you could have the two Governors or you could have the two insurance commissioners agree, but the law of the state passed by the legislature and signed into law says that that lady is entitled to stay 48 hours in the hospital before she is kicked out after having a child or after having a mastectomy.

Senator Bingaman. But I assume that if the state law says that, then it would be illegal for the Superintendent of Insurance to go sign an agreement saying that does not apply.

Ms. Fontenot. I think you are right. I think there would have to be some sort of action by the legislature to overturn the law to allow the state to enter into --

Senator Bingaman. The state legislature would have to pass a new law saying, not withstanding anything else that we might have passed, the Commissioner of Insurance
has the authority to sign up and have it governed by
someone else’s laws instead of our own laws which I do
not think many legislatures would do.

I do not know that, I guess my honest opinion is I
do not think that states would take advantage of this.
Or if they did, it would be because the state legislature
in its wisdom decided this made sense for the state and
the Governor agreed and signed the bill. If that is the
case, then I do not know if we should stand in the way.

Senator Nelson. Mr. Chairman, may I ask the Staff
a question?

The Chairman. Senator Nelson?

Senator Nelson. Where in the way the bill is
drafted does it give the specifics that would protect
against one state administrative apparatus agreeing with
a compact with another state and therefore there would be
no check and balance that they would have to obey law?
Where does it say that that they would have to obey the
state law?

Ms. Fontenot. Well, again, in the provisions on the
bottom of page 12 on the mark, as I said, we did not
specify the process that the state has to go through in
order for there to be assumed agreement.

I think Senator Bingaman’s point was that it seems
unlikely the first state to agree to that would be able
to agree to not abide by their own laws without action by their legislature. But it is not specified in here, you are correct.

Senator Nelson. Well, it would not be the first time that administrative executive branch of government had tried to circumvent the law. I think that this is a potential hole that you could drive a truck through and perhaps with some kind of perfecting language, Mr. Chairman, or accompanying report, something to clarify here so that we do not have an unintended consequence here.

Senator Kerry. Mr. Chairman?

The Chairman. Senator Kerry?

Senator Kerry. I just want to underscore what Senator Nelson is saying. I agree with him. Particularly in our state this would be fairly harmful because we have fairly high standards and this would allow people to opt out and get into lower standard situations.

So I think that the Senator is correct. I think that his solution may be the correct way if we could try to work through it.

The Chairman. I am not sure what solution the Senator has in mind.

Senator Nelson. Well, let me just say that you
know, a lot of these protections requirements in law take
years to put into law, and this could be eliminated in
one fell swoop by an administrative decision. I do not
think you intend to do that.

Senator Kerry. There is another possible
correction. I remember when Senator Snowe and I were
struggling as I mentioned earlier with small business
issues, we wanted to create compacts and we were looking
at the various health associations that you might be able
to create.

You get into cherry picking issues to some degree,
as part of the problem depends on different state benefit
standards. But more importantly, states like
Massachusetts can have a fairly high set of benefit
requirements to cover preventive visits such as prostate
exams or mammograms. We have pretty high standards and
we like them. Allowing states to enter into a compact
with another state that has a totally different
structure, you begin to find people migrating to the
place where, or pressured to the place of the lowest
common denominator.

So if you put in that you are going to have the
highest standard apply in the compact, that may be one of
the best ways of carrying it, I think. I see a few heads
nodding. I do not know. Do some of the experts want to
comment on this about the cherry picking and the consequences? Ms. Fontenot?

Ms. Fontenot. I think the possibility of cherry picking back when the discussion was around association health plans was higher than it is now that we have proposed federal rating rules.

So in a world where there are no federal rating rules, then I think you are absolutely right.

Senator Kerry. We have high rating bonds, too. I do not think federal reform will get as high as we are in some of those areas.

Ms. Fontenot. That is right. And there are a handful of states that are more protective than the rules we are talking about, which comes back to the state actually having to agree to not have this plan abide by those rules.

The Chairman. Just a question if I might, Senator. Would you be amenable to withdrawing your amendment and place that action, we amend the mark, sort of legislative approval is required for a state to get into a compact.

Senator Nelson. By law. Legislative approval signing into –

The Chairman. Yes.

Senator Nelson. I think that would be a reasonable fix.
The Chairman. Let me ask other Senators what they think of that.

Senator Ensign. Mr. Chairman? The only comment I would make on it, first of all if you did have that, it would be pretty unlikely Massachusetts would enter into any kind of a compact with another state.

However, just from this Senator’s perspective, I actually think an individual if they decide they want to go to a different state, they want to go to Connecticut and buy a plan because that meets their needs that they should have the freedom, let me emphasize that word, freedom to choose.

It is a conscious decision that they make as an adult citizen of the United States to choose the kind of insurance they want. If they want a series of 42 mandates in a state, they want to buy a plan that meets kind of their desires that they have that they want to take the risk in certain areas and not in other areas, it seems to me that they should have the freedom to be able to do that.

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, when I read the language of what is in the mark, here is what I see. Senator Nelson, maybe you can help me understand what is
wrong with this.

Compacts shall provide that the state where the consumer lives maintains authority to address market conduct, unfair trade practices, network adequacy and consumer protection standards including addressing disputes as to the performance of the contract.

So how would this race to the bottom that you see as being potentially there not be superseded by this language that compacts shall provide the state where the consumer lives retains authority to address market conduct, unfair trade practices, network adequacy and consumer protection standards?

Senator Nelson. Because that language refers to the benefits and the rating. It does not apply to the consumer protections.

Senator Conrad. Even though it says and consumer protection standards?

Senator Kerry. Mr. Chairman?

The Chairman. Senator Kerry?

Senator Kerry. Just to answer Senator Ensign. The problem with that, Senator, and the appeal is obvious. I think it sounds great to say you ought to have the freedom to go choose the plan somewhere else.

The problem is that the delivery of health care in America is fundamentally local. If you have a plan in
Connecticut and the person lives in Massachusetts, the health care is going to be delivered locally through that system. So how is the entity in Connecticut going to negotiate its delivery structure, its payment structure, et cetera, in a state that has high set up requirements? You cannot. So effectively --

Senator Ensign. You do that with auto insurance.
Senator Kerry. Well, that is very different.
Senator Ensign. You get a car that is broken, you get a car in an accident, the work is done locally, but it is paid for in an auto insurance company.
Senator Kerry. That is the first time I have ever heard an analogy of auto mechanics --
Senator Ensign. We are talking insurance. We are talking insurance. We are talking coverage -- not the actual quality of care. We are talking coverage of the insurance. All I am talking about is the freedom to be able to choose the kind of plan just like you choose the kind of plan that you want.
People are intelligent. They can read policies today. There is so much more information out there. Have laws to make them simple, simple language and all that, but --
Senator Kerry. A state should be able to make its own legislative decision and codify a certain standard
for which it wants that state’s health care to be at.
If another state does not meet that same standard, the
state should have the right to say they are not going to

Senator Ensign. For the plans in that state. But
we regulate interstate commerce and if we allow states,
people to be able to buy insurance across state lines --

Senator Kerry. That is precisely when you run
into the kind of problem that I described. I wish it
were otherwise.

The Chairman. I wonder if I could return to the
more narrow subject at hand and that is the amendment as
well as my suggestion if the Senator from Florida is
agreeable to it. Withdraw his amendment and insert the
word “language” which requires legislative approval for a
state to enter into a compact.

I see a nod. Is there an objection to that change
if we make that change to the mark? All right. So
ordered. Without objection, the mark is modified to make
that change. Thank you everybody. I know you have other
obligations. Thank you very much for your great
cooperation. Other amendments?

Senator Enzi. Mr. Chairman?
The Chairman. Senator Enzi?
Senator Enzi. I have that one amendment that is
left over from this morning, that’s Enzi C3 as modified. I have made an additional modification. I think that might be passed out. I added more specificity on the Secretary of Labor’s certification.

The Chairman. How is that?

Senator Enzi. I have added more specificity. That is what you had a problem with this morning.

The Chairman. That is correct.

Senator Enzi. So the Secretary of Labor would use the National Compensation Survey from the Bureau of Labor Statistics to make her determination. That gives earnings data that is available for Metropolitan and rural areas and broad geographic regions and on a national basis.

The Chairman. Not individual. I have no problem with it.

Senator Enzi. Can I have a role call?

The Chairman. Do you want to role call on this?

Sure.

Senator Enzi. Please.

The Chairman. Would you hold, please? Senator Bingaman?

Senator Bingaman. I just wondered if we are going to have a role call, could someone explain what the role call is on?
Senator Enzi. The role call would be on Enzi’s Amendment C3 as modified again.

Senator Bingaman. Okay.

Senator Enzi. This is the amendment where the -- would certify that it would not reduce worker’s wages. That would be based on the National Compensation Survey from the Bureau of Labor Statistics.

Senator Conrad. Could the Senator tell us what, just for the help and understanding, the changes that were made from the amendment that we debated this morning. What has been modified?

Senator Enzi. The modification is to come up with some specificity on what the Secretary of Labor would use to determine whether wages had been reduced. Before it was just one paragraph and now it is three paragraphs to add that specificity.

Senator Conrad. Somehow I am missing what they have handed out here. It says Enzi Amendment as modified, but there must be another modification. Further modified. Okay. All right. Now I am on. I see. I thank the Senator.

The Chairman. With that, is there any comment or discussion on the amendment? Seeing none, without objection the amendment as modified is agreed to. Would you like a role call vote?
Senator Enzi. I would like a role call vote, yes.

The Chairman. You want a role call vote? Okay.

Call the role on the Enzi amendment as modified.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. Aye.

The Clerk. Mr. Bingaman?

The Chairman. Pass.

The Clerk. Mr. Kerry?

Senator Kerry. Aye.

The Clerk. Mrs. Lincoln?


The Clerk. Mr. Wyden?

Senator Wyden. Aye.

The Clerk. Mr. Schumer?

Senator Schumer. Aye.

The Clerk. Ms. Stabenow?

Senator Stabenow. Aye.

The Clerk. Ms. Cantwell?

Senator Cantwell. Aye.

The Clerk. Mr. Nelson?


The Clerk. Mr. Menendez?

The Chairman. Aye by proxy.
1 The Clerk. Mr. Carper?
2 The Chairman. Aye by proxy.
3 The Clerk. Mr. Grassley?
4 Senator Grassley. Aye.
5 The Clerk. Mr. Hatch?
6 Senator Hatch. Aye.
7 The Clerk. Ms. Snowe?
8 Senator Snowe. Aye.
9 The Clerk. Mr. Kyl?
10 Senator Kyl. Aye.
11 The Clerk. Mr. Bunning?
12 Senator Bunning. Aye.
13 The Clerk. Mr. Crapo?
14 Senator Crapo. Aye.
15 The Clerk. Mr. Roberts?
16 Senator Grassley. Aye by proxy.
17 The Clerk. Mr. Ensign?
18 Senator Ensign. Aye.
19 The Clerk. Mr. Enzi?
21 The Clerk. Mr. Cornyn?
22 Senator Cornyn. Aye.
23 The Clerk. Mr. Chairman?
24 The Chairman. Aye.
25 Senator Rockefeller. Mr. Chairman?
The Chairman. Senator Rockefeller?

Senator Rockefeller. My main problem with this, I do not understand what it was. I do not understand the implications of it over the long term, so I voted no. Everybody else has voted aye. If you collect all the wattage around the room, I suppose I would have to give way to that and I will on this one and vote aye.

The Clerk. Mr. Rockefeller, aye.

The Chairman. Clerk, will you count the tally?

The Clerk. Mr. Chairman, there are 21 ayes, zero nays and two passes.

The Chairman. The amendment is agreed to.

Senator Enzi. Thank you, Mr. Chairman.

The Chairman. You bet. Are there any further amendments?

Senator Enzi. Mr. Chairman?

The Chairman. Senator Enzi?

Senator Enzi. I would call up Enzi Amendment C9.

The Chairman. Enzi C9.

Senator Enzi. This has to do with my concern over states being able to afford Medicaid changes that we are doing.

The Chairman. I am sorry, Senator. I could not quite hear you.

Senator Enzi. This has to do with my concern over
states being able to handle the Medicaid expansions that we are doing.

The Chairman. Okay.

Senator Enzi. So it would exempt any state whose revenues have declined for two consecutive fiscal year quarters from the mandatory Medicaid expansions.

We are expanding that Medicaid program to 133 percent of poverty and I think that will have a devastating effect. The states are required to pay a share of all Medicaid expenses. The national average is 43 percent of total costs.

I understand that we have this formula for five years that takes care of a portion of that. As a result, state budgets are sagging under the burden of Medicaid.

The Chairman. I just want order in the chamber so they can hear you.

Senator Enzi. Thank you.

The Chairman. You are welcome. Go ahead.

Senator Enzi. So Medicaid is spending now the fastest growing line item in any state’s budget. A lot of that has to do with the down turn. We do not know how long the down turn will last. We hope that it will come back which would eliminate any problem with this. But unless -- spending slowdown, Medicaid spending will double by 2017 at an average growth rate of 8 percent a
Medicaid is the fastest growing federal entitlement program that we have. So we are shifting the costs from the federal to the state governments. I know that we have some percentages in there to provide some protection, but it comes at a time when tax collections from states have dropped to their lowest levels in 46 years.

The National Conference on State Legislators reports that this year’s budget cap for all states is $121 billion. California is writing IOUs to pay its debt. So furthermore, according to the Rockefeller Institution of Government State Government and Local Government employment has declined by 33,000 jobs, that is 6/10 of a percent, and local government employment is declined by 22,000 jobs. That is 2/10 of a percent.

More than 20 states have imposed furloughs on state employees that will reduce their pay and hours worked without eliminating jobs. Recent budget actions and other indicators suggest that further cuts are on their way.

This expansion is simply unaffordable or could be. This is a way of making sure that the states will have some kind of a say and some capability, so it would exempt them from expansion if the state’s revenue has
declined for two consecutive fiscal year quarters.

The Chairman. Okay. Are you finished? Any
discussion on this amendment? Senator Stabenow?

Senator Stabenow. Mr. Chairman, I am wondering if
I might just have some clarification from the sponsor and
from the staff.

This appears that the expansion of Medicaid would
not apply to states if their revenues had declined in the
last two years. This was, as I understand it, the
Chairman’s mark worked out carefully with Governors and I
wonder if we might have an explanation of the ratio of
federal funding and state funding. What the state
obligation would be.

Mr. Schwartz. Sure, I’d be happy, Senator Stabenow.
We have done some analysis and it is preliminary but it
is based on working with outside people who crunch
numbers for a living.

The Chairman. I am sorry. There are loud noises.
Mr. Schwartz, could you speak up, please?

Mr. Schwartz. Is that better?

The Chairman. Much.

Mr. Schwartz. Okay. We had worked with outside
analysts who actually really do things like crunch
numbers for a living and we shared with all of the
offices, I believe it was yesterday or the day before
what our analyses were and the provisions in the Chairman’s mark lay out that states get an additional increase in their federal match or FMAP as we call it to cover the cost of newly eligibles.

We categorize states into expansion states or other and then we pay them differently for the first five years, and then in the sixth year which is 2019, they all get the same rate which is a 32.3 percentage point increase in FMAP and that would bring the national average which is currently 57 federal, 43 state, if you added the 32, you would end up at 89 and 11.

So for the cost of the mandated population in the Chairman’s mark, the federal government would pay 89 cents, on average, of every dollar.

Senator Enzi. Mr. Chairman, we spent several days in committee working on this particular thing. Would you care to mention how many different iterations we have of those same numbers?

Mr. Schwartz. Absolutely, Senator. We have updated them several times and again, part of that was as policies changed, the original construction of the 32.3 percent would have put certain states actually over 100, and so then we changed the policy and scaled back.

I am sure that we gave --

Senator Enzi. Even after we had arrived at the 95
percent being the maximum and everything, we still had at least three more that had different numbers without us knowing what the bases were on them. So I am not real comfortable with numbers that change on a regular basis like that.

I think Nevada comes out really terrible and Senator Reed mentioned that. I think the next iteration that went down, I am sure that wasn’t just because of Senator Reed. It was probably because of some different assumptions. I know that Texas went up dramatically in that same one.

So the Governors themselves have run these numbers and their numbers do not agree with our numbers, any of those iterations. So I want to put in some kind of a protection that if it is going to bankrupt him, that it will not do it right away.

Senator Stabenow. If I could reclaim my time, I would like to just express a concern to my friend who offered this amendment.

Coming from a state right now with the highest unemployment in the country and certainly revenues have declined for more than two consecutive years given what is happening in Michigan, the reality is that we have more and more people losing their jobs who have never needed to worry about their health care before that now
have to and are now turning to Medicaid as a safety net, which it is for families.

So for states like ours that are in the worst position, we would be saying to them this additional help, while we are paying a higher match, would not be available to those who need it the most. So I would be extremely concerned about this.

It seems to me, I am not sure that it is the Senator’s intention, but it is certainly from our perspective as a state, we have thousands, tens of thousands of people who are asking for help with their health care who are going to Medicaid and who have never done it before.

They are overwhelming the state offices. To say to them you are going to be punished because you have two or more consecutive fiscal year quarters in which your revenues have declined, it goes the opposite of what I certainly would want to see it do.

The Chairman. I might say, too, with all due respect, Senator, the result of your amendment is a little bizarre at best in my perspective. Mainly you are basically saying that during a recession poor people would not get health care.

I think during a recession poor people have health care and as Senator Stabenow says, during the recession
essentially there are more people who lose their jobs,
more people who lose their health coverage and some of
them could be eligible for Medicaid.

I just, it does not make sense to have poor people
lose their health insurance during a recession.

Senator Enzi. Mr. Chairman, this refers to the
expansion. This would be a one-time decision that would
have to be made before that expansion began, not after it
was already in effect.

It does not force the states to do that, but it
would exempt them if it is declined like that. Now, if
they are in a situation like Michigan, and I certainly
hope Michigan is in the worst shape it is ever going to
be in, they probably would not want to exempt out.

But they are the ones that kind of control a good
deal of the revenues in this thing and if they cannot
afford it, they ought to have some way of avoiding it up
until the expansion occurs.

Once the expansion occurs, then this is not optional
anymore.

The Chairman. I just think still, I misread it, I
apologize. Even if it applies only to the expansion and
not to all Medicaid, I still think that it does not make
sense for on again off again. Particularly the trigger
to drop Medicaid in the expansion population not able to
get Medicaid simply because state revenues are down.

And as has been pointed out and as you well know
working on this so many times in the group of six that
basically the additional burden on states, on Medicaid,
on the expansion is about 1 percent above states’ current
obligation. That is due to FMAP, it is due to the drug
rebate. As I recall, except maybe ones at 1.5 percent or
--

Mr. Schwartz. 1.3.

The Chairman. Excuse me?

Mr. Schwartz. 1.3.

The Chairman. 1.3 percent extra burden on the
states over the 10 year period. As I recall too during
the first three years of that period, all states get
extra money and come out ahead. I think it is not
advisable to adopt an amendment which cuts back expansion
coverage just because revenues drop in the state.

Senator Enzi. Mr. Chairman, we did not have CBO run
those numbers. Those are not CBO numbers. That is other
institutes and things that came up with these numbers.
If I had supreme confidence in them, I would have more
confidence in them if I had not seen the same numbers run
three different times and come up with three different
numbers. That does not give me a lot of confidence of
1.3 or .8 or 2.8.
The Chairman. We have discussed this many times. First of all, we both know CBO does not do statewide state analysis. So because Senators like to know the effect on their own states, we went to three different organizations to try to put this compilation together the best we can.

The first iteration as I recall is based on data. I think it was 2006 data. The numbers changed because we got updated information. Mr. Schwartz, why do not you explain that new information we have which caused them to change the numbers?

Mr. Schwartz. I would be happy to. Senator Enzi, you are right, we did have multiple versions, but always in an effort to try to provide something that we thought was accurate and consistent with CBO which provides the national number.

The Chairman is absolutely correct. The data that we accessed originally was a 2006 baseline and we were able to get more recent information. Obviously Medicaid enrollment will change, states are free to vary their programs over time and so we updated that data and then CBO twice in September has given us different numbers publicly on tables that were made public and then a third time corrected their number for state spending in an email that they sent to bipartisan committee staff.
So their bottom line of state spend was always our control because we wanted to match what the information that they were providing as the estimate of state spending as a result of the bill. So that explains why there were multiple iterations over the course, particularly of the past two to three weeks.

Senator Snowe. Mr. Chairman?

The Chairman. Senator Snowe?

Senator Snowe. I would like to pose a question on this issue since there have been several iterations of the numbers affecting each state.

Have there been ongoing conversations between the states in the committee regarding what has been incorporated in the calculations? That is what I am hearing from my governor and other governors that I have had conversations with since these discussions in the group of six and they are trying to run the numbers.

So are you getting feedback from the states once they have run the numbers and they fully understand what you are including that reaches those calculations?

Mr. Schwartz. We have not changed the elements that we are counting. Like I said, we have changed some of the years’ worth of information, but we are not taking out or putting in new concepts.

We have shared, obviously it is a little tricky to
try to deal with 50 different Governor’s offices, so we have been dealing with the NGA. They have all of the same sheets that were provided to all of the members of the committee and their staffs earlier in the week. They did actually come back to us with some questions that I have started to compile answers to but have to do on a Blackberry, so I am trying during breaks to back and compile answers so that they can understand our assumptions.

My understanding is that they are also working with an outside group to do an estimate similar I guess to the one that we did which I expect will be off slightly, but they did not seem to think that these were way off the mark. I do not know how much variation there might be.

The Chairman. I guess the question is to what degree have you talked to the Governors since we had that conference call?

Mr. Schwartz. When we sent this information earlier this week, we sent it to them that same day. So just within the past two or three days. Their list of questions came in yesterday and so I did not have a chance to speak with those staff at the NGA, but we are communicating by email.

Senator Snowe. Well, I think it is important for the committee, Mr. Chairman, to have a full understanding
of what the response is from the various Governors. I truly think that we ought to hear from all 50 for that matter because it is my understanding in the discussions that I have had is that they are concerned about what has been used in these calculations to arrive at these numbers.

They will run their numbers, but they have to obviously know what is included. I think that is very important.

Then secondly, how they all work together, even coupled with what is in their individual mandate, the maintenance of effort which is another issue that hopefully I can address later.

But I think the point is we have to have a common understanding with the Governors in the way that we arrived at this bottom line. Are all 50 states measuring the same way? We have to have the same understanding.

The Chairman. I suggest that you go back to Governors the next day and try to get a definitive answer as you can to this question. I understand that Governor Douglas just a couple of days ago publicly stated that the mark is, I do not remember the words, but on the right track or something. Do you remember the words?

Mr. Schwartz. I do not unfortunately, Mr. Chairman, but I think he was speaking at the National Press Club if
I am not mistaken and he said positive things but I do not want to misquote him.

Senator Snowe. I got, Mr. Chairman, I got a document from Governor Douglas and I spoke to him that night in which he spoke to the National Press Club and he did offer some recommendations and concerns regarding the numbers in the provisions in the legislation.

The Chairman. Could you get those recommendations?

Mr. Schwartz. I certainly will.

Senator Snowe. I will share them with you.

Mr. Schwartz. That would be great.

Senator Enzi. Mr. Chairman?

The Chairman. Senator Enzi?

Senator Enzi. When we had that conference call with the Governor, one thing they wanted was the list of assumptions that we were based on. I do not think that the outside numbers match the CBO numbers, do they? The totals? Because the total is all we get from CBO.

Mr. Schwartz. So, right. CBO’s current total of state spending which again came in a clarification email from them is in their words about $33 billion.

Our bottom line is lower than that because we include in our total calculation the increased revenue states will receive from increasing the Medicaid drug rebates.
So if you took out the rebates which are just over ten, our bottom line number is 22. If you added, well, that is rounded. If you added the ten back, you would come up to about 33, so they do match.

Senator Enzi. I do better when I look at numbers. Can you show me which table adds up to the $33 billion in new state spending?

Mr. Schwartz. Thirty-three is CBO’s number. So again, our bottom line number is not 33, it is 22 because there is one additional item added in. So I do not think we shared a table that said 33, I think we shared a table that said 22.

Senator Enzi. That is part of where my confusion comes from. I do know that in 2003 the Congressional Research Service questioned the methodology that the Urban Institute uses in coming up with their analysis. That leads me to want to come up with some way that states can say whoa, your numbers were way off and we are in a declining economy, so I would really like to do something about it. I would like to exempt out until we can come up with the right numbers. So that is the purpose of this amendment.

The Chairman. Any further discussion. If not, the vote is on the amendment. Senator Enzi?

Senator Enzi. I would like a roll call, please.
The Chairman. A roll call vote is requested. The clerk will call the roll.

The Clerk. Mr. Rockefeller?
The Chairman. No by proxy.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

The Chairman. No by proxy.

The Clerk. Mr. Kerry?

Senator Kerry. No.

The Clerk. Mrs. Lincoln?

The Chairman. No by proxy.

The Clerk. Mr. Wyden?

The Chairman. No by proxy.

The Clerk. Mr. Schumer?

Senator Schumer. No.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Ms. Cantwell?

Senator Cantwell. Pass.

The Clerk. Mr. Nelson?

The Chairman. No by proxy.

The Clerk. Mr. Menendez?

The Chairman. No by proxy.

The Clerk. Mr. Carper?
Senator Carper.   No.
The Clerk.  Mr. Grassley?
Senator Grassley.  Aye.
The Clerk.  Mr. Hatch?
Senator Hatch.  Aye.
The Clerk.  Ms. Snowe?
Senator Snowe.  Aye.
The Clerk.  Mr. Kyl?
Senator Kyl.  Aye.
The Clerk.  Mr. Bunning?
Senator Bunning.  Aye.
The Clerk.  Mr. Crapo?
Senator Crapo.  Aye.
The Clerk.  Mr. Roberts?
Senator Grassley.  Aye by proxy.
The Clerk.  Mr. Ensign?
Senator Ensign.  Aye.
The Clerk.  Mr. Enzi?
Senator Enzi.  Aye.
The Clerk.  Mr. Cornyn?
Senator Cornyn.  Aye.
The Clerk.  Mr. Chairman?
The Chairman.  No.
The Clerk.  Ms. Cantwell?
Senator Cantwell.  No.
The Clerk. Mr. Chairman, the final tally is 10 ayes and 13 nays.

The Chairman. The amendment does not pass.

Further amendments?

Senator Crapo. Mr. Chairman?

The Chairman. Senator Crapo?

Senator Crapo. Mr. Chairman, I would like to offer my Amendment Number C2 as modified.

The Chairman. C2 as modified.

Senator Crapo. This amendment is a good amendment to follow up on the one that Senator Enzi just proposed because I understand the point that was raised by Senator Stabenow and yourself, Mr. Chairman, that you had an objection to reducing Medicaid at a time when there may be difficulties in the states.

However, we cannot ignore the issue that Senator Enzi raised with his amendment which is the burden that the increased cost of the Medicaid expansion will place on the states.

I will talk about in just a minute the discussion we just had about the different numbers we had on that, but I do not think that we can ignore the fact that there will be some burden placed on the states by this legislation at a time when they cannot face it.

There is a July letter that was written by the
Chairman for the Governors, Governor Douglas and Governor Mansion. The letter states, I think we have all read it, that any unfunded expansions would be particularly troubling given that the states face budget shortfalls of over $200 billion over the next three years.

This gap they are talking about as they indicate persists even after the Recovery Act or the Stimulus Acts, temporary increases in the federal share of Medicaid. So what my amendment does is simply provides that we will not pose an unfunded mandate on the states.

I recognize that the mark has increased the federal share significantly and the Chairman has argued today and on several occasions that the gap is very small. CDO has an estimate of $33 billion. We had a discussion here just now about the fact that there are other studies that are being done that indicate that that number may be different.

I personally agree with Senator Enzi. It is a little bit difficult to accept the notion that all of a sudden since CBO’s number was not an acceptable number that we got additional studies now that seem to reduce that number.

But the bottom line is whatever the number is, we should not be imposing an unfunded mandate on the states. My legislation would compensate for the federal
government picking up the remainder of that share by a corresponding reduction in the insurance subsidies in the Chairman’s mark and as we analyze it, it would only impact those making over $80,000 for their subsidies to be reduced a small amount for us to be able to accommodate this burden on the states. So this is really an unfunded federal mandate issue.

It is another way to approach the problem that Senator Enzi has raised and one that I think addresses the issue that Senator Stabenow was concerned about that gives us the opportunity to not put another unfunded mandate on the states at a time when they cannot handle it and when they will simply have to increase taxes on their citizens at that time.

I just would like to conclude, Mr. Chairman, by indicating that I personally think that the difference is probably close to what the CDO said. I have confidence in CBO’s analysis in recognizing that CDO does not do the state by state analysis that some are trying to be engaged in now and recognizing that we do have other studies under way and we are going to hopefully hear from the Governors as to their analysis of these numbers.

The bottom line is if CDO is right, we are looking at a $33 billion hit to the states. If CDO is wrong and the numbers that the Chairman has mentioned earlier are
more accurate and that differential is very, very small, then this amendment would have a very, very small impact. So my point is what we ought to do is take a position as a committee right now that we will protect the states from yet again one more unfunded mandate and in fact one that could go and amount to be a very significant mandate at a time when the states can least afford it.

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, might I just quiz the staff on a couple of issues that have been raised by this?

The Chairman. Go ahead.

Senator Conrad. First of all, is it not true that the expansion of Medicaid does not begin until 2013?

Mr. Schwartz. It is 2014.

Senator Conrad. 2014 now. So there is no expansion, nothing asked additionally of the states until after 2014?

Mr. Schwartz. That is correct.

Senator Conrad. And is it not the case that in the first three years the states will actually get additional payments?

Mr. Schwartz. That is correct. They will get
additional revenue from the increases in the drug rebates and Medicaid.

Senator Conrad. The drug rebates from Medicaid. So not only do they not face any change in Medicaid until 2014, but in the first three years they get increases.

Number three, is it not the case that the analysis that has been done not by this staff but by outside analysts is that the impact over the ten years to the states is on average 1.3 percent?

Mr. Schwartz. That’s correct, Senator.

Senator Conrad. And is it not the case that the estimates by CBO that have been referenced, the $33 billion almost directly tracks the underlying estimates that have been provided here, the $22 billion plus the $10 billion of the drug rebate money?

Mr. Schwartz. If I could just answer that in more than yes/no just to clarify.

CBO has consistently been providing what they refer to as three different tables. A coverage table which comes in typically two pages, it shows an increased enrollment, that is where the 94 percent coverage figure comes from, and spending on Medicaid and the tax credits.

They separately do what they call a Medicaid provider table and then the third table is their Medicare table. CBO’s footnote of $33 billion is on the coverage
table. It is what they predict, it is a footnote, but it is what they predict total spending for states on Medicaid and CHIP which are combined into one line.

So that is their $33 billion. Separately on that Medicaid provider table is where the drug rebates show up because it is a programmatic change, it does not really have anything to do with coverage. So our analysis combined everything to present what we thought was an actual bottom line.

Had we done two separate tables the way that CBO did, we would have probably broken it out the same way. But we had enough difficulty producing one table. I would have been overwhelmed by a second. So bottom line, it is one answer that members and Governors and folks back in the states could see what the net impact of the Chairman’s mark would be.

Senator Conrad. And the fact is the net impact that you have is almost exactly what the net impact that CBO has. So this talk about a difference is a difference without a distinction. It is the difference between showing it in one table and showing it in two tables.

So I hope we do not get distracted by what is a difference without meaning. Beyond that, again, there is no expansion until 2014.

Mr. Schwartz. Correct.
Senator Conrad. In the first three years, would that be 2014, 15 and 16?

Mr. Schwartz. No. The first three years of the budget window because the drug rebates take effect in 2010.

Senator Conrad. So they will be getting extra money now.

Mr. Schwartz. Right away. Right away.

Senator Conrad. You know, honestly if there is to be shared responsibility in this country and it is all to be on the federal government, the state have no responsibility for anything, I mean, this expansion does not even begin until 2014 and then the estimates are it has a combined impact of 1.3 percent on average?

We are going to have a real hard time dealing with problems across the country if it is all supposed to be on the federal government, it has record deficits. The states just expect the federal government to write a check for 100 percent of everything. I do not think that is a reasonable expectation.

To be asking them to put up 1.3 percent on average over the next ten years and the expansion does not even begin until 2014, I do not know of any prognosticator who thinks the economy of the United States are going to be in recession until 2014.
I would hope that we would resist this amendment and go forward with the mark. By the way, when we had the conversation with the Governors, one after another of them thanked us for how dramatically we had improved the package from their perspective.

The Chairman. That is true. In fact, they were relieved. They felt good about it.

Senator Crapo. They thought it was going to be a bigger hit.

The Chairman. They thought they were going to get hit, to be honest. Just taking the temperatures of the Governors in the last conference call, they felt pretty good about it.

Senator Crapo. Mr. Chairman, can I just ask a question and then respond? A question to Mr. Schwartz.

Has the hospital DSH impact on the states been included in the numbers which you analyzed? My understanding is there is about a $25 billion impact there.

Has that been included in your analytical figures?

Mr. Schwartz. That is not in the tables. Everything that is in the tables is identified and DSH is not on that list.

Senator Crapo. Would not it be true though that during the same time period that we have just been
discussing the states are going to lose about $25 billion under the hospital dish provisions?

Mr. Schwartz. CBO’s total for Medicaid DSH reductions I think is $24.9 billion, so yes.

Senator Crapo. Well, Mr. Chairman, I think you see my point. What we have here is we are starting to look at income to the states to balance it off against the impact of the Medicaid expansion and argue that we have got new charts now that we can show that the impact will not be as large or it is different than what CBO estimated.

But first of all, understanding that the impact does not start until 2014 does not mean there is not going to be an impact. Secondly, if you look at the drug rebates, I think you had better also look at the hospital dish impact and start balancing all of the impacts on the state into the analysis before we make a final conclusion as to what the impact is.

Third, we have a disagreement obviously over what the charts are saying and what the impact is, whether it is a 1.3 percent impact or as CBO says, a $33 billion impact or whatever it is. My point is that Medicaid spending is now the fastest growing line item in every state in the country.

In 2006 it accounted for 23 percent on average of...
every state’s budget. To say that we need to have a
shared opportunity here to pay for health care between
the states and the federal government ignores, and to
imply that there is not already a major share of skin in
the game on the share of the states is I think a
mischaracterization.

The states right now, unless spending slows down,
will see a doubling of Medicaid spending by 2017 that an
average growth rate of what we are seeing now of 8
percent a year. Medicaid is the fastest growing federal
entitlement program.

So all that my amendment does is say that there
should not be yet another unfunded mandate on the states.
I think it is a higher unfunded mandate than apparently
you do, but whether it is 1.3 percent or not, even if it
was only 1.3 percent because that would make the impact
to my amendment very small.

But my point is one way or the other, we have got to
protect the states from the impact of this yet again one
more federal mandate at a time when the states are in as
dire a circumstance financially as the Federal Government
is.

Senator Stabenow. Mr. Chairman?
The Chairman. Senator Stabenow.
Senator Stabenow. Mr. Chairman, I just wanted to
briefly support what you had said, Mr. Chairman, and what Senator Conrad said.

And speaking again for Michigan, if there is a litmus test as to whether or not this is a burden on the states, it would be the reaction of the governor from Michigan, and the fact that the governor is supporting this and feels that the work that’s been done is reasonable and that what has happened is something that is minimal on the state.

I think, for me, reflects -- pretty heavily on the burden overall that’s being provided, or put on to the states.

And the trade-off for that is being able to take -- not only help the states, but more importantly, families who have been in very difficult times, who find themselves out of a job, who are now low-income -- families, children, seniors.

I mean, all of those who are impacted by Medicaid, there is a huge value -- huge value -- in what is being done in this mark with minimal concerns that I’m hearing from, from a state that is under more duress than any other state in the country.

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad.

Senator Conrad. Just very briefly, on the state --
on that point that Senator Crapo made -- and I have high regard for Senator Crapo. He analyzes things very thoughtfully.

On the DSH payments, the reason we’re able to make reductions in DSH payments is because there’s going to be less uncompensated care, and DSH payments are to offset uncompensated care. When you cover 30 million more people with insurance, there are then going to be much lower numbers for uncompensated care.

So if we make a -- calculation that includes all of the elements, the states are going to have significant benefits that don’t show up in any of these calculations.

If we were going to do a full calculation, we would need not only what’s going to happen to DSH payments, but what is also going to happen with the reduction in uncompensated care because of the increase in the number of people who are now going to have insurance coverage.

The Chairman. I might say on top of that, too, that uncompensated care today costs the average working family about $1,100 a year.

With more coverage, that uncompensated care amount that private health insurance holders pay will go down very significantly.

And one other point, too. We’re all concerned about rising Medicaid costs. We’re all very concerned about
that. I suppose governors, a little more concerned even than we.

But this -- the major aim and goal of this legislation is to start to reduce the rate of growth of health care costs in this country.

This is not just for Medicaid. It’s Medicare, it’s all of us, it’s private consumers, it’s all government budgets, it’s companies, small business especially.

And we’re trying to get the rate of growth in health care -- start to -- begin to reduce the rate of growth of health care costs in this country.

And that certainly is going to inure to the benefit of those Medicaid budgets, too, is start to get the Medicaid budgets a little bit more under control.

Senator Crapo. Mr. Chairman, just --

The Chairman. Senator Crapo?

Senator Crapo. Let me just respond briefly.

I certainly understand the point that Senator Conrad has made about the DSH payments and the question as to whether we will be reducing uncompensated care.

By all the estimates I’m aware of, we will still have about 25 million uninsured after this legislation is passed, if it is passed and implemented. So we will still have the issue of uncompensated care, and we don’t know exactly what that will be.
But again, my point is that if you are correct and the issues that we’re raising here are not as serious as I think they are, then the impact of this amendment is not that serious, either.

All it does is to say when there -- if there is an unfunded federal mandate to the state arising out of this expansion of Medicaid, that we will not put that burden on the states.

And again, if that burden is as small as you indicate, then there’s a very small fiscal impact here that is accommodated by the offset.

Then the only other point I wanted to make is I understand that a number of the governors have expressed relief.

But I think that the point is not that they were expressing relief that they were going to be able to share in this additional fiscal responsibility. I believe it was an expression of relief that it was not as bad as it appeared that it was going to be.

And again, just -- the bottom line here is, very simply, we don’t at this point in time -- we should not, at this point in time, be imposing another unfunded mandate on the states.

I hope that it is as small as you say it is. I am concerned that it might not be. But whatever it is, we
ought to be sure that we don’t impose it.

The Chairman. For me, it all comes down to a very simple point: Should there be shared responsibility here or not? Do we share it, if we’ve worked to put health-care reform together or not?

And I think that states should also share, and about a 1.3 percent, I think, is not asking too great a share. I think it’s -- it’s right.

Senator Crapo. Well, the states already share extensively in Medicaid, but I understand your point.

The Chairman. Any further discussion? Senator Snowe?

Senator Snowe. Mr. Chairman, yes, I just wanted to ask several more questions.

I noted in the chairman’s mark -- and I just want some clarification -- that effective January 2013 that states would be required to provide premium assistance to Medicaid beneficiaries that have employer-sponsored insurance plans?

The Chairman. That’s correct.

Senator Snowe. Is -- and how much would that be? What kind -- what’s the fiscal cost to the states?

Mr. Schwartz. So the way that premium assistance works is states only actually have to do it if it’s cost-effective, which means that it can’t exceed the cost of
what it would have cost the state to actually provide services directly. That’s current law.

Senator Snowe. But is that the higher -- is that, it’s 100 percent, 133 percent, or is it at their current eligibility levels? Or --

Mr. Schwartz. Well, it would include the expanded population when -- effective January 1st of 2014, when 133 percent becomes the level.

What the chairman’s mark actually does --

Senator Snowe. But not in 2013?

Mr. Schwartz. Correct.

Senator Snowe. It’d be just their current population.

Mr. Schwartz. Correct. And that was to sync it with the advent of the exchange.

Really, what this provision does is currently states have the option to offer premium assistance or not. This takes that option away and says all states have to offer that option.

It’s a way to better leverage employer-sponsored coverage. There are obviously some low-wage workers who are offered ESI but can’t afford it. And so this is a way to help them afford it.

Senator Snowe. So that’s an additional requirement on the states, though. So it changes from optional to
Mr. Schwartz. That’s correct.

Senator Snowe. So what do we estimate that to be the cost to the states? Do we have any estimate?

Mr. Schwartz. I don’t know that CBO broke that out individually. I don’t think that they attributed for us who gets in through premium assistance versus who comes in as a traditional Medicaid enrollee.

But again, the current law cost-effectiveness test, which we’re moving forward with leaving it untouched, says again that this -- the cost of providing premium assistance to beneficiary x cannot exceed the cost of beneficiary x if they were in your fee-for-service or managed care Medicaid program.

Senator Snowe. On the maintenance-of-effort requirements, which concerns me. Obviously, we have expanded; our population’s up to 206 percent.

Mr. Schwartz. Correct.

Senator Snowe. And I guess there are a few states even higher than that, but very few.

And I know that the governor of Vermont as well has expressed his concern, because they have maintenance-of-effort requirement up until 2014, when the exchange is up and running and all the other requirements kick in.

But is it fair, really, to require these states to
maintain high eligibility standards up to 2014? There’s no flexibility in the context of a very difficult economic time.

In fact, the budget deficit’s projected, I know for our state -- and the governor of Vermont indicated the same in their next budget cycle of 2011 and 2012 -- of consecutive budget deficit years. And they’re required to balance their budget.

So it offers them little flexibility, and I’m not sure I understand the fairness in those -- for those states who have gone above and beyond in making investments in health care and expanding the eligibility standards in Medicaid up to 206 percent, for example, and now they’re required to maintain that level through -- to 2014.

So those who have been leaders, it seems to me, have been penalized. There’s no flexibility, and the only choices they have, in tough budgetary times, is to cut the payments to providers or to cut the benefits.

And I think that that is sort of counter to the goals of this legislation. So I’m not sure that that is fair and equitable for those states.

And that’s another area of serious concern to states with these maintenance-of-effort requirements. They have to maintain high standards.
So you have disparate examples. Some states are at
28 percent of poverty level, and you have other states
who are 206 percent of poverty level. So those that are
at 206 percent have to stay there until 2014.
So that is putting enormous financial pressures on
in some very difficult financial times.
And I understand the concerns of what the chairman’s
saying, and I agree. We want to all achieve the shared
responsibility of including more people under the
insurance umbrella.
At the same time, I think we also have to put it in
the context of what these states are facing. And as --
know that these are going to be some very serious
budgetary constraints.
They’re going to face budget deficits after budget
deficits over the next few years, and it could well go
And as I said the other day, that there have been
some recent reports, Mr. Chairman, that demonstrates that
states’ budget levels will be at the same level as they
were in 2007, even as we emerge from this recession.
So I think we have to be circumspect about the kind
of imposition we place with these expansion of
populations and not being sensitive to the fact that they
have to accommodate a balanced budget.
Senator Kerry. Mr. Chairman?
Senator Snowe. Yes.
The Chairman. Senator Kerry?
Senator Snowe. And may I just add another point on the maintenance of effort. In the stimulus plan we did have requirements for maintenance of effort, but we also provide them some funding.

So in this instance, we’re just saying that you’re going to have to maintain the highest levels and there’s no flexibility.

And where they do have flexibility, it’s not where you want them to have it.

Mr. Schwartz. So I guess I would just respond with a couple comments.

I think everything you said is right, and those are concerns that we’ve had. And so in an effort to sort of strike a balance, the maintenance-of-effort provision ends as new sources of coverage become available under the larger-picture plan in the Chairman’s mark.

And so if -- let’s use your state, for example. If the maintenance-of-effort that all states are current under, under the Recovery Act, that ends December 31st, I guess, of next year.

So if the following day Maine decided to scale back its coverage from 206 percent to 150 percent or whatever
number it picked, the people, the adults that just became no longer eligible for Medicaid would become uninsured, because there isn’t another source for them right now.

So the Chairman’s mark has a maintenance-of-effort that, again, expires as the exchange comes on line for those that could be eligible for the tax credits, or in 2014 when the expansion of Medicaid kicks in.

And I think that stands in contrast to the provision that’s in the House bill, which is a permanent maintenance-of-effort which we have all heard that the governors really dislike, because it forever limits that flexibility.

So I think this was intended to strike a balance and not take steps backwards on the coverage side before we can get our exchange out and our increases in Medicaid eligibility.

Senator Snowe. No, I appreciate that, and I understand. It’s obviously less burdensome than what is -- than the requirements in the House.

But on the other hand, you’re putting enormous pressure on those states who have made early investments and some tough choices in becoming leaders. And that’s why we have a high number of insured in our states, in Maine and Vermont, because we have made those investments over a sustained period of time.
So in any event, I think we just have to be cognizant of that in what we’re doing here. We want to meet the bottom-line goal of increasing the number of insured, but at the same time I think we’ve got to be sensitive to the fiscal constraints on the states at this time.

The Chairman. Okay. Senator Kerry was seeking recognition.

Senator Kerry. I have an observation and a question that I want to ask of Mr. Schwartz.

It’s sort of interesting, listening to a number of the arguments as we’ve gone along here. And obviously this one is subject to a federal standard, mandate, whatever you want to call it. So I understand the tension there.

But there’s a tension all through these discussions about the impact of a reduction here or a reduction there.

On the other hand, the only two ways to bend the cost curve, as we have coined the phrase here, you either cut what we’re putting out or you find more revenue to put in to cover it. And we all understand where the politics are in terms of finding the additional revenue.

Moreover, we’re looking at Medicare, which we all understand. Now, I think under this bill, we get about
an extra four or five years, Mr. Chairman? Is that what we do?

The Chairman. Three.

Senator Conrad: Four to five.

Senator Kerry: That’s all we’re getting, folks.

Senator Conrad: CMS has just told us we get an additional four to five years.

The Chairman. For what?

Senator Conrad: Solvency --

The Chairman. Oh, the solvency. Yeah, right.

Medicare, that’s right --

Senator Kerry: I’m talking about the solvency.

The Chairman. Right.

Senator Kerry. But we’re sitting here with a much bigger problem sitting over our heads than there is a political will to address.

And we have to remember that, as we think about this and go forward, there are really only two ways to do this.

If you decide that a service is worth it or providing Medicaid assistance to the states is worth it, then you’ve got to find a way to, obviously, fund it.

Now, in this case, the decision has been made to try to reduce the DSH component. Because, as Senator Conrad said, more people are going to be covered.
My question to you is what factors have gone into arriving at that figure of the DSH reduction besides the numbers of people that Senator Conrad has spoken to, who will be covered? Is there any other calculation that you are able to make that, as a consequence of things we’re doing in this bill or as a consequence of changes in the health-care system, will reduce the negative impact on the delivery of care to those affected by the disproportionate share?

Mr. Schwartz. We did base the changes in Medicaid DSH on state rates of uninsurance. But I should add that -- and this will be, I think, of particular interest to you, Senator Kerry -- that currently there are six states that have what CMS refers to as DSH diversions, where they have gone through the process and gotten approved to use those DSH dollars to underwrite coverage of people, instead of the traditional use of DSH, which is to make payments to hospitals.

Three of those six states have diverted 100 percent of their DSH funds towards coverage. The other three have partial diversions.

Maine is actually a partial-diversion state. Massachusetts is a 100 percent-diversion.

Senator Kerry. Do we go up to 300 percent with subsidy? Three hundred percent of poverty, with subsidy?
Mr. Schwartz. Correct. Correct, and part of that is funded with DSH dollars.

Senator Kerry. Correct.

Mr. Schwartz. So the Chairman’s mark specifically exempts any DSH dollar that’s diverted to coverage from the cuts.

So under the Chairman’s mark, actually, Massachusetts’ DSH allotment would not be reduced.

And Maine’s would be reduced. I think that your diversion is 52 percent, but don’t quote me on that. So then that would mean only 48 percent of the allotment would be subject to the cuts.

And again, they’re phased in over time. They can’t happen before 2015, and it’s incremental over a period of years, based on what the state uninsurance rate is and how it compares to the rate from the year before.

Senator Kerry. Right.

The Chairman. Senator Conrad.

Senator Conrad. One last question, if I could.

As I study this chart, Mr. Schwartz, it tells me that over the next three years every single state will have less in Medicaid spending because of this mark. Is that true?

Mr. Schwartz. That’s true.

Senator Ensign. Mr. Chairman?
The Chairman. Okay, Senator Ensign.

Senator Ensign. Mr. Chairman, I’m going to have an amendment in a little bit, and I’ll make a lot more of my points when I do my own amendment.

But one thing that I wanted to point out, sometimes we talk in weird numbers around here. Senator Conrad’s been around the Budget Committee enough years; anybody who’s been around this place, some of the numbers we toss around, some of the ways that we speak the American people kind of scratch their head and they go, you know, that just doesn’t make sense.

When we say that the Medicare Trust Fund is extended out three, four, five years, whatever the number is, by this legislation, and we say it’s solvent for that years, it’s kind of like saying, you know, I have this idea that I owe my kids’ college fund x amount of dollars. And I make up a number that I’ve extended out four or five years.

But because of my rate of borrowing, or my rate of spending right now, I’m not going to have the money to pay that college fund, it really doesn’t matter.

Whatever I say is in that college fund, if the money isn’t there -- and we know that the money is not there, in the Medicare Trust Fund -- this is just an accounting gimmick that is there.
If there’s not funds, the bottom line is today -- correct me if I’m wrong on these numbers -- our deficit, our amount of money we spend on interest on the debt is around $180 billion, 170 billion dollars, somewhere in there this year.

By the time that -- this budget window is for this -- in about 10 years, our interest on the national debt is going to be somewhere around $800 billion a year. Those are accurate numbers I think everybody agrees with, okay?

When you’re paying $800 billion a year, that’s the biggest threat to Medicare. Okay? Because we’re not going to have the kind of money to be able to supplement.

And if the -- whether we owe the Medicare Trust Fund money or not, if that money is not there, we can’t pay it.

And that’s why I’m saying that spending is a big deal here, and this bill spends money.

Senator Kerry. We’re getting a little off the subject here. Let’s --

Senator Ensign. No, but you brought this subject up. You’re the one who brought this subject up about the Medicare Trust Fund. And when you guys make a point, it’s fair for us to respond to that point.

I was making the point --

Senator Kerry. Well, I think it is fair to
respond, and a fair response --

    Senator Ensign. It is, and that’s why I was
continuing.

    Senator Kerry. Well, a fair response requires an
acknowledgement that almost everything we’ve done here --
we put pay-as-you-go in. We have tried to make these
bills deficit-neutral.

The chairman has led the effort with respect to
that.

We had a balanced budget, a $5.6 trillion surplus in
2000, as you recall, and we all know what happened in the
last eight years.

So if we want to go down that road --

    Senator Ensign. I would be happy to go down that
road. I’ll compare my record against anybody on this
Committee as far as spending is concerned.

    Senator Ensign. Let me reclaim my time. Let me
reclaim my time. The bottom line is --

The Chairman. We’re time -- we have to vote pretty
soon here.

    Senator Ensign. We’re seeing appropriations bill
after appropriations bill. I just had an amendment on
the floor to recommit the bill, the Interior bill. Not a
single Democrat voted. If we did, we got one or two
Democrats to decrease the spending to last year’s level.
I did one last week, because last week’s spending bill was 23 percent higher than the year before. This week’s spending bill was 15 percent higher.

The bottom line is we’re spending money like crazy, and this bill -- you may say it’s in balance, but we established clearly, one of the reasons they say it’s in balance is because the Cadillac plans -- more and more and more of them, because they’re not indexed for medical inflation; they’re indexed for regular inflation -- are picked up in this plan. So that tax hits more and more people.

Plus the fact that we also understand that some of the revenue-raisers go into effect for the first few years before the spending.

So if you actually score the spending in a 10-year period, the estimates can be as high as $1.7 trillion in actual spending, the true cost of the bill.

The Chairman. Okay. Ready to vote.

All those in favor -- I’m sorry, what? Want a roll-call vote? Okay.

Senator Crapo requests a roll-call vote. The clerk will call the roll.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?
Senator Conrad. No.
The Clerk. Mr. Bingaman?
The Chairman. Pass.
The Clerk. Mr. Kerry?
Senator Kerry. No.
The Clerk. Mrs. Lincoln?
Senator Lincoln. No.
The Clerk. Mr. Wyden?
Senator Wyden. No.
The Clerk. Mr. Schumer?
Senator Schumer. No.
The Clerk. Ms. Stabenow?
Senator Stabenow. No.
The Clerk. Ms. Cantwell?
The Chairman. Ms. Cantwell is pass.
The Clerk. Mr. Nelson?
The Chairman. No by proxy.
The Clerk. Mr. Menendez?
The Chairman. No by proxy.
The Clerk. Mr. Carper?
The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Mr. Hatch?
Senator Hatch. Aye.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.
The Clerk. Mr. Kyl?
Senator Kyl. Aye.
The Clerk. Mr. Bunning?
Senator Bunning. Aye.
The Clerk. Mr. Crapo?
Senator Crapo. Aye.
The Clerk. Mr. Roberts?
Senator Grassley. Aye by proxy.
The Clerk. Mr. Ensign?
Senator Ensign. Aye.
The Clerk. Mr. Enzi?
Senator Enzi. Aye.
The Clerk. Mr. Cornyn?
Senator Cornyn. Aye.
The Clerk. Mr. Chairman?
The Chairman. No. Senator Bingaman is no by proxy.
The Clerk. Mr. Carper?
Senator Carper. No.
The Clerk. Ms. Cantwell?
Senator Cantwell. No.
The Chairman. Clerk will tally the vote.
The Clerk. Mr. Chairman, the final tally is 10
ayes and 13 nays.

The Chairman. The amendment fails.

I understand Senator Schumer would now like to offer an amendment.

Senator Schumer. Yes. Mr. Chairman, I’m going to offer this amendment, speak about it, and --

The Chairman. And what’s the number?

Senator Schumer. It is number C-8.

The Chairman. C-8?

Senator Schumer. Right.

The Chairman. Thank you.

Senator Schumer. And I will then -- it’s on behalf of myself, Senators Menendez and Bingaman. And we’re going to withdraw the amendment. We want to speak about it.

We don’t have a CBO score yet, so we’re not going to go forward, but we wanted to speak about it for a brief moment, let our colleagues know about it, because we will move this amendment as we go forward in the process.

What it does is it would make American citizens living in the five U.S. territories -- Puerto Rico, the Virgin Islands, Guam, Samoa, and the Northern Mariana Islands -- eligible to purchase health insurance in the exchange and receive federal subsidies like the residents of the 50 states and D.C.
Mr. Chairman, I was dismayed to find that the mark did not allow these U.S. citizens, who happen not to live in one of the 50 states, access to the reforms that are such a significant part of the bill.

There are 4.4 million residents of the five U.S. territories, 4 million from Puerto Rico. They’re American citizens; Puerto Ricans have been part of this nation for 111 years.

And the amendment simply adds these residents of the territories to also benefit from the insurance market reforms and consumer protections established by this bill. They’d be subject to the same mandates as everyone else.

The Health Committee did include Puerto Rico and the territories, and it makes sense. We want all Americans to have equal access to quality and affordable health care throughout our country.

Everyone here recognizes the contributions that residents of the territories make to our country. For instance, Puerto Rico sends a greater percentage of men and women into our armed forces than all but one state.

These citizens have bravely served our country in both Iraq and Afghanistan. They’re willing to undergo sacrifices to protect our freedoms.

The residents of the territories also pay all
federal taxes that Congress has asked them to pay, including Medicare and Social Security, so they should be able to benefit from health-care reform.

As you know, there are 4 million men and women living in the 50 states who were born in Puerto Rico or of Puerto Rican descent, 1 million in my home state of New York alone.

They take great pride in their Puerto Rican roots, follow events on the island with abiding interest, and have sons, daughters, brothers, sisters, parents, grandparents, that live in Puerto Rico still.

How can we tell these citizens their loved ones in the territories, even though they’re Americans, won’t be able to have access to the benefits that come with the insurance market reforms and participating in the exchange?

So we are offering this amendment so we don’t have to tell them that; so we can say to our neighbors, our servicemen and -women, our friends, fellow citizens, they deserve the same health-care reform that we do.

Unfortunately, as I mentioned, we haven’t received a score for this amendment, but I hope we can work with you to find a way to include the territories -- Puerto Rico and the territories -- in the exchange. It’s the right thing to do.
I believe Senator Menendez would like to speak on this amendment, and then we’ll withdraw it.

Senator?

The Chairman. Senator Menendez.

Senator Menendez. Thank you, Mr. Chairman.

Let me thank my colleague from New York for offering an amendment that I’ve co-sponsored with him.

Let me start off with that sometimes I’ve had members of Congress, when I was in the House of Representatives, ask me did they need a passport to go to Puerto Rico -- which I thought was a joke, when they asked me that. But they were serious.

Puerto Ricans are United States citizens. They are United States citizens. And the flow that goes back and forth between states like Senator Schumer and my own, which has the second-largest concentration in the nation of Americans of Puerto Rican descent, is quite big.

So if they happen to have come to New Jersey for a period of time, or maybe stayed, as many of them have -- well over a million -- they, in fact, would be eligible for what we are doing under this bill.

If they move back to Puerto Rico, they are not.

And as Senator Schumer said, there are nearly 4 million United States citizens who reside in Puerto Rico.

They pay their same Medicare taxes as any American
in any of the states.

In my book that’s coming out, I talk about the 65th Regiment Infantry Division of the Korean War -- an all-Puerto Rican division, the most highly decorated group of soldiers in the history of the United States.

If we were to take a walk to the Vietnam Wall, most of the Hispanic names you’d see, which are in great abundance, unfortunately, would be of Puerto Rican descent.

They are a critical part of the nation’s fabric and their security.

So that’s why I also feel that they, as well as all of the territories, must be part of the health-care reform. That’s why its residents, who are our fellow United States citizens, must have access to the subsidies the health care change provides for. And that’s why I’m proud to co-sponsor this with Senator Schumer.

Ironically, the bill would treat legal non-citizens in the states -- in other words, legal permanent residents of the United States -- better than American citizens living in the territories.

And that simply isn’t right.

Mr. Chairman, in the interest of time, let me just propose an amendment that I won’t offer, so that we won’t have to go through this.
But let me take this moment to say that a corollary to this is another amendment that I was going to offer on disparities in the Medicare system in Puerto Rico.

Again, Puerto Ricans pay Medicare taxes.

My amendment would have provided for Puerto Rican hospitals to be paid based on the national average standardized rate.

Right now, the formula yields payments to Puerto Rican hospitals that are considerably lower than payments made to hospitals in the states.

That is something that also --

The lone exception in this whole section, particularly persons eligible to enroll in Medicare Part B by reason of his or her entitlement to Part A, is deemed to have been enrolled in Part B. In other words, they’re automatically enrolled to Part B -- the lone exception is Puerto Rico.

So I have a real concern about fellow citizens who happen to live in Puerto Rico and, for that fact, the territories.

As a matter of fact, the Centers for Medicare and Medicaid Services report that as of December, 12.5 percent of Part B enrollees in Puerto Rico were subject to the delayed enrollment penalty, compared to 1.7 percent in the entire rest of the states.
So, Mr. Chairman, I know you have been a long supporter of the territories in terms of fairness, and I hope we can work on these issues as this process proceeds.

I know this is an issue more of cost than policy. So I look forward to working with you as we move forward.

But it is not fair. If you can serve on the front lines, if you can man a post in Afghanistan, if you can stand and be injured by an improvised explosive device in defense of the country, you should be able to have access to the exchange and its subsidies therein.

And that is, in fact, what we seek to be able to accomplish.

And I appreciate, again, Senator Schumer bringing the amendment forward.

The Chairman. Senator Bingaman.

Senator Bingaman. Yes, thank you, Mr. Chairman.

I want to just indicate my strong support for the amendment that Senator Schumer and Senator Menendez have put forward here.

I would say that Senator Menendez indicated that he’s got -- he’s received questions from members of Congress as to whether you need a passport to go to Puerto Rico.

I get those same questions about people wanting to
go to New Mexico.

(Laughter.)

It says more about --

Senator Menendez. You don’t need a passport there.

You need a visa.

Senator Bingaman. Yes.

(Laughter.)

It says more about the members of Congress than it does about the areas we’re talking about.

I do think that we did -- we tried very hard to do the right thing by the -- by Puerto Rico, by the territories, in the bill that we did in the Health Committee.

And I think it’s important that we do the same thing here. And I know that this is not going to be voted on now, but I do hope that as the bill moves forward, we can figure out a way to bring fairness to the treatment of citizens in these areas.

Senator Ensign. Mr. Chairman?

The Chairman. Senator Ensign.

Senator Ensign. Just very briefly, I think you all bring up some very, very good points. I mean, a U.S. citizen’s a U.S. citizen, regardless of where they live. And it would seem to me to be a matter of fairness. So I hope we can work this out.
Senator Schumer. Mr. Chairman, I withdraw the amendment.

The Chairman. The amendment’s withdrawn.

Senator Cornyn.

Senator Cornyn. Thank you, Mr. Chairman.

Mr. Chairman, I’d call up my amendment, C-23, as modified. It’s been distributed.

The Chairman. All right. C-23.

Senator Cornyn. Mr. Chairman, we -- I remember when the CBO director, Dr. Elmendorf, talked about the fastest safe speed at which this bill and various amendments might be scored.

I note Senator Schumer said that his amendment was not scored, nor have many amendments been scored. And I understand why, and I’m not critical of that. I just say that’s a fact that we have to deal with.

As a number of us have observed, this proposal before us overhauls one-sixth of the economy, $2.6 trillion. And I’m concerned that the process is being driven by an artificial deadline.

I would note for the record this is September the 24th, 2009. But the main spending in this proposal does not go into effect until 2013.

And, as we’ve discussed, the Medicaid expansions don’t go into effect until 2014, five years from now.
I believe it’s imperative that we get this right, and I’ve heard members on both sides of the aisle say that.

Over the break, I learned that the Congressional Budget Office made a mistake in scoring the Stabenow amendment that was accepted by voice vote today. That was Stabenow C-6.

As it turns out, it was a $600 million mistake. And because CBO, in its haste, had said it was revenue-neutral, no offset was required by the chair.

Now, I don’t blame the chair. I don’t blame CBO. Certainly I don’t blame Senator Stabenow. But I think the unrealistic timelines, which are artificial, that have been imposed on the CBO helped contribute to the $600 million mistake.

As we know, $600 million may not sound like a lot when we’re talking about trillions of dollars, but to the hard-working Americans who are struggling in a tough economy, $600 million is real money.

Senator Stabenow’s amendment has a worthwhile goal, but it also deserves to have -- we also deserve to have an informed debate and to get the details right as we’re voting on them.

So to ensure that that kind of mistake does not happen again, I would propose my amendment, C-23.
My amendment was -- is designed simply to slow us down so we can get it right -- not to slow it down for slowing it down’s sake, but so we can get it right.

My amendment would require that before the Finance Committee votes on any amendment to the America’s Healthy Future Act of 2009, the CBO and Joint Tax scoring estimates of such amendment must be publicly available and posted on their respective Web sites for at least 24 hours before a vote.

This amendment obviously doesn’t need an offset; it’s designed to actually help us save money, not spend money. And I would urge my colleagues to support it.

The Chairman. Senator Stabenow, you seem to be the subject of this amendment.

Senator Stabenow. Seem to be. And so, since my name was invoked I don’t know how many times as I came into the room, I did want to just clarify one thing.

Because the amendment that I offered today, I originally raised with the chairman that there were some debates going on with CBO whether or not it scored.

It’s a policy related to foster children. There was an attempt to change it by the previous administration, to remove access to health care services.

The rulemaking process was started and never finished. So there’s been discussions, does CBO score
that as part of the Medicaid baseline or not, back and forth.

This really had nothing to do with rushing the bill. It had nothing to do -- it has -- it’s an ongoing discussion that we’ve had now with them.

And there was a communication that, in fact, it had scored it zero. And then -- just a mistaken communication. And now -- and we’re still having that discussion.

But I think it’s -- I would not characterize it as being part of somehow rushing this process. It’s more a question of how they score, from a technical standpoint, what is happening during the rulemaking process.

And we’re still debating with them, because we believe that, in fact, there is no score. And we’re still discussing it, Mr. Chairman. We’ll continue to do that.

But this really isn’t a good example of what you’re talking about, because it was something that we’d been having discussions on for some time.

Senator Cornyn. Just so that -- Mr. Chairman, just so the distinguished senator understands, I’m not being critical of her --

Senator Stabenow. No, I appreciate that. I didn’t take it --
Senator Cornyn. -- nor the substance of the amendment.

But the fact of the matter is at least one of my amendments was ruled non-germane because there wasn’t a CBO score.

The chairman said that it was irrefutable that it was going to cost money, and so he ruled it out of order, and the appeal from the chair was unsuccessful.

Conversely, the senator from Michigan’s amendment was voiced-voted because CBO said it was revenue-neutral when, in fact, they came back and said it was a $600 million mistake.

I think that’s -- I’m not being critical of the chairman or the senator from Michigan, or the substance of the amendment.

Senator Stabenow. I appreciate that.

Senator Cornyn. I’m just saying this demonstrates how trying to move too fast before we have all the information creates serious problems for us.

Senator Stabenow. Well, if I might just speak --

Senator Cornyn. And my amendment is designed to try to fix that so that we can know what we’re voting on when we’re voting, and the chairman can make well-informed decisions about whether scores are required -- or, excuse me, the amendments are revenue-neutral or not.
Senator Stabenow. Well, if I might just respond again to my friend.

My point was simply that I believe you’re using the wrong example. Because if you’re trying to make a case for the fact that mistakes were somehow being made because of something being rushed, this was not a matter of being rushed.

This was just a disagreement as to some technical points. We all could debate, sort of, the technical parts of CBO and how they look at rulemaking and what’s in a baseline and not.

And so this was just an ongoing debate and a miscommunication. Somebody had said they thought it was all right.

And we’re clarifying it, Mr. Chairman. We’ll continue to work on that one, and --

But I certainly wouldn’t want this being used. You may want to use another example, but --

And I didn’t take it personally at all. But this is just not an example of rushing, because we’ve been spending a lot of time on this.

Senator Cornyn. To the contrary, this is a perfect example of where we are making decisions, adopting an amendment by a voice vote without accurate information.

Indeed, is -- I can’t see the signs from here, but
do we have a representative of CBO at the table? CBO’s not here. I suppose they’re back working on trying to get scores on amendments and on the modified mark and the like.

But I would say, Mr. Chairman, I know that both the chairman and the ranking member’s staff were -- and -- were notified that this was a $600 million mistake. It’s not technical unless you call $600 million a technical mistake.

It demonstrates the disparity of treatment based on whether amendments will be ruled out of order that are not scored, like mine was, when those that actually cost $600 million, have no offset, are accepted by a voice vote and not ruled out of order.

I’m not trying to criticize. I’m just saying this is a good reason why my amendment needs to be accepted, so we can make good decisions based on complete information.

And I think that’s something our constituents deserve.

Senator Stabenow. Well, just for the record, because again, more characterization --

The Chairman. Senator Stabenow’s recognized.

Senator Stabenow. Thank you, Mr. Chairman.

The Chairman. I think we should seek recognition.
Kind of -- they get things kind of out of hand here.

Senator Stabenow.

Senator Stabenow. Thank you. Thank you, Mr. Chairman.

Just for the record, this is not about costing dollars. There was never any increased dollars involved in this.

It’s how CBO chooses to characterize a rulemaking process that started and never finished. And they put some numbers into the baseline.

And it’s a question of accounting rules. So it’s not a question of technical.

It’s a lot of money -- people in my state would view that, and do believe that is a lot of money, and so do I.

But this was a debate about an accounting process that we’re involved in.

So I just -- just for the record.

Thank you, Mr. Chairman.

The Chairman. Senator, I’d just like to, if I could, understand your amendment. Let me see if I can get this straight.

Under your amendment, if an amendment is offered here, you’re saying we couldn’t consider it. We’d have to wait till it’s -- CBO scores it, it’s publicly available on the CBO or Joint Tax Web site. Only then,
and after -- 24 hours after that, could we consider it.

And then say it’s -- I don’t know how many days practically will have transpired by then. I’m guessing about a week.

So then a week later, we come back and look at that amendment. And as often is the case, that someone wants to modify that amendment, so we can’t consider that.

We’d have to send it back to CBO. It takes CBO and Joint Tax a little while to get their numbers. And it has to be on the Web site again.

So then we’re at two weeks, probably, just being practical about this -- that’s if we’re lucky -- before we could come back and consider the amendment.

You know, at that rate, we’re lucky if we get anything through the Congress in a year. When you say you’re trying to slow things down, that’s an understatement. This will really slow things down.

I don’t think that’s quite really how we -- we’ll not be able to function, frankly. This Committee will not be able to function, if that’s -- I might just tweak you or tease you a little bit.

Did you get your amendment scored by CBO? Is it on a Web site for 24 hours?

Senator Cornyn. Mr. Chairman, my amendment --

The Chairman. Well, no -- we have --
Senator Cornyn. I’m still --

The Chairman. Yeah. We just can’t function if this amendment passes --

Senator Cornyn. I’d be glad to modify it --

The Chairman. Sorry, could you --

Senator Cornyn. Before any bill is finally voted on, that all amendments need to be scored. This is before final passage. All amendments need to be scored, and the bill, obviously, as amended, would need to be scored.

And that it be an order that any amendment could be revisited. I think that would address the concerns that you --

In other words, this is -- instead of dealing with problems on the front end, this would deal with them on the back end, but would provide the kind of safety net that would keep us from making $600 million mistakes --

The Chairman. I think we’ve already voted on it. That was -- amendment a few days ago, as I recall.

Senator Cornyn. I believe it was different. Are you referring to the Bunning amendment, Mr. Chairman?

The Chairman. Yeah, the Bunning amendment.

Senator Cornyn. I believe that was a different amendment.

But again, this is -- if I can ask counsel, can you
explain how the mistake was discovered?

Mr. Schwartz. Sure, Senator, I’d be glad to.

Last night, I think it was at about 7:30, CBO sent an e-mail to bipartisan committee staff with several scores that had been shared with different sponsor -- amendment sponsor offices.

This one was listed as having no cost or savings. I said that earlier this afternoon, when Senator Stabenow offered her amendment. We learned later in another e-mail from CBO that it in fact did score $600 million over 10 years.

The confusion, as Senator Stabenow pointed out, stems from the fact that there is a proposed rule, that no action has been taken on, and that was at one time, I believe, the subject of a congressional moratorium.

And so it seemed not unreasonable, when that no cost or savings response came in last night.

The Chairman. Well -- when did we find out this error?

Mr. Schwartz. After the amendment was accepted, it was --

The Chairman. Afterwards.

Mr. Schwartz. Yes. It was about 5:30 this afternoon, I think.

The Chairman. After the fact.
Senator Cornyn. May I ask, Mr. Chairman, does the $600 million score on the Stabenow amendment still stand?

Mr. Schwartz. That is what CBO says the cost estimate is now. Yes.

Senator Ensign. Did she offset it? Is it offset now?

The Chairman. Now -- now --

Senator Ensign. Mr. Chairman? So your requirement, does she have to now come up with a $600 million offset?

The Chairman. Well, technically, because it’s already been voted on, the answer is no.

Senator Ensign. The reason I’m asking is because if you --

The Chairman. It’s already been voted on.

Senator Ensign. Yeah, but his modification, what he just said his modification would be, is at the end of the process, before we vote on final. You’ve already agreed because in your opening amendment you said that the bill would have to be scored and all the amendments would have to be scored --

What he is saying, that if any amendments come back as the wrong score, that they could be revisited before final passage.

So in other words, Senator Stabenow’s amendment
would have to then be revisited and then she would have
to come up with an offset. Or, if a different amendment
were scored. I think that’s a reasonable accommodation.

The Chairman. You know what strikes me about all
this? This is so anti-Republican philosophy.

(Laughter.)

You’re being so prescriptive, so tying everything
down so much into knots, instead of freedom.

(Laughter.)

Senator Ensign. Freedom to spend.

Mr. Chairman, we want to free the individual; we
want to tie down government. You need to remember that.

(Laughter.)

The Chairman. That’s becoming pretty clear.

Senator Conrad. Mr. Chairman? Mr. Chairman?

The Chairman. Senator Conrad.

Senator Conrad. Isn’t it the case that the
commitment that you’ve made is that before we vote --

The Chairman. Yes.

Senator Conrad. -- we’ll have scoring from CBO?

And isn’t it a further commitment that you’ve made that
the bill in its entirety, as scored by CBO, will have to
be paid for?

And isn’t it further your commitment that not only
will it have to be paid for, deficit-neutral, but also 
that it will bend the cost curve, according to CBO, over 
the second 10 years?

So in this circumstance --

The Chairman. I’d say, in answer to your question, 
all that’s true. I’ve said that many times.

Senator Cornyn. Mr. Chairman, may I ask one 
question about that? Does that include amendments that 
have been ruled out of order because they’re not germane, 
because there’s no CBO score at the time the amendment 
was taken up?

The Chairman. The amendments -- well, if there’s -
-

Senator Cornyn. The right to revisit amendments?

The Chairman. Amendments that are not germane are 
out of order, and if there’s no offset, they’re not 
germane, therefore out of order.

Senator Cornyn. With all due respect, Mr. 
Chairman, that’s a double standard. Senator Stabenow’s 
amendment did not have a --

The Chairman. I think -- you know, Senator, I 
think the best thing to do is not undo things, go 
forward. If you have an amendment, if you want to amend 
it with Senator Stabenow, do it. That’s certainly a 
prerogative.
But I just think it’s forward -- for us to keep moving forward. If you’ve got an amendment, if you want to offer an amendment that addresses the subject of the Stabenow amendment, that’s fine. But let’s not go back and kind of undo things.

Senator Cornyn. Well, I do have a pending amendment that I would like to offer -- as I said, the modification -- which I think would deal with your concerns about slowing the process down on the front end.

It would provide a safety net for us to fix mistakes on the back end and allow us the right to revisit those amendments.

I just -- I think that’s a fair outcome.

The Chairman. Yeah. Could the senator now state his amendment? I’m not quite sure what his amendment is.

Senator Cornyn. The modification would say that before the Finance Committee votes on --

The Chairman. So this is -- I’m just asking -- so this is a further modification?

Senator Cornyn. This is --

The Chairman. It’s not what you have before us.

Senator Cornyn. Once you told me that you thought that the initial proposal was unworkable, I offered to modify it. And now I’m explaining what I think that modification --
The Chairman. -- modification to the modification that’s before us?

Senator Cornyn. That’s correct, sir.

The Chairman. Okay. Thank you.

Senator Cornyn. Before the bill is voted on final passage, that all amendments need to be scored. And that any amendment that is -- has a score which -- or does not have the score which was believed to have the score -- could be revisited.

The Chairman. Frankly, I’d like to see your modification in writing first, so I know what it is. Because I -- this is getting a little loose here.

Senator Cornyn. That’s fair enough. I’ll give it to you in writing.

The Chairman. Okay. So you’re going to withdraw the current amendment?

Senator Cornyn. I’ll withdraw it and I’ll come back and we’ll -- I’ll show you it in writing.

The Chairman. Okay. Thank you.

Are there further amendments?

Senator Menendez?

Senator Menendez. Mr. Chairman, I’d like to call up my amendment, C-9, as modified.

The Chairman. C-9.

Okay, Senator.
Senator Menendez. Thank you, Mr. Chairman.

Mr. Chairman, I’m offering a modified amendment that would clarify in the mark that behavioral health treatment is part of mental health and substance abuse services.

Behavioral health treatments help to reinforce wanted behaviors and reduce unwanted behaviors, and the treatments are critical for individuals affected by autism, Down Syndrome, and a variety of other disorders.

They can help a child to communicate and care for themselves; they can help that child from -- stop him from hitting himself and those around him; they can enable a child to attend regular education classes, rather than special education classes; they can enable a child to live at home, rather than an institution.

All of these alternatives save money in the long run, and this is an effort to decrease long-term health care costs.

As modified, the amendment requires no offset, according to CBO. Very similar language has already passed in the House Energy and Commerce Committee on a bipartisan basis by voice vote.

And let me be clear: This does not expand the minimum benefits package; it merely clarifies what is already in the chairman’s mark -- clarifying that
insurance plans must provide behavioral health treatment as part of mental health and substance abuse services will ensure better quality health care.

And, like all Americans, people with autism and other behavioral health conditions should be able to live healthy lives.

And I urge the Committee’s adoption.

The Chairman. Is there further discussion?

Seeing none, I see no reason --

Yes, Senator Bingaman.

Senator Bingaman. Mr. Chairman, I hate to be the skunk at the party here --

The Chairman. That’s okay.

Senator Bingaman. But I do think it’s --

The Chairman. That’s your prerogative.

(Laughter.)

Senator Bingaman. That’s my practice.

I think it’s a mistake for us to start writing into statute the definitions that we think the secretary of Health and Human Services should put on all of these benefits.

I think it’s an endless process, and if we start down that road, there’ll be a long line of people outside the Committee room, outside each of our offices, saying we need to be clearly identified as included in this
I think that would just be a mistake and, for that reason, I’d like to be recorded against the amendment.

Senator Ensign. Mr. Chairman?

The Chairman. Senator Ensign.

Senator Ensign. You remember earlier today when we talked about this, I raised this as a point, when we talked about -- I think there was the mental health parity issue earlier today.

And my son goes to school with a lot of autistic kids. I see their parents; I see what they go through, and all of that.

But why is a kid -- why don’t we mandate the coverage of diabetes? Why don’t we mandate -- why don’t we do all of the various mandates that we think --

You’re exactly right, we are going to have a line outside with every one of the incredible special groups that are out there they represent. They’re going to ask us to put that in, if we go down this line.

And that does take away some of the flexibility that we talked about. These are all worthy-type things to do, but --

But Senator Bingaman just raised a very important point. I raised it earlier today, and this is the line we’re going to go down.
On the floor, you know, between the time we get now and to the floor, if they know we’ve done a couple of these, how are you going to say no to the next one?

Senator Bingaman. Mr. Chairman, could I just clarify my position on --

The Chairman. Sure. Yes --

Senator Bingaman. I’m not saying that these services should not be included in the coverage. I’m just saying we should not be specifying that by statute.

We should -- we have the general description in the chairman’s mark, on page 17, saying what all plans are required to cover. And we leave it up to the secretary of Health and Human Services to further define that.

I think that’s the way it ought to be, so I would prefer that we do it that way.

The Chairman. Senator Menendez.

Senator Menendez. Mr. Chairman, I would understand if we were listing the specific categories here, that maybe there is some currency to that argument.

My view is that this amendment is merely clarifying what the chairman’s mark does. It does not create a new set of benefits. The Finance bill already includes coverage for mental health and substance abuse.

All this amendment does is clarify that mental health and substance abuse services covers behavioral

And that’s why what is reflected here is what a series of states, many of the members of this Committee actually, their states have this.

In Arizona, in Florida, in Montana, in Nevada, in New Jersey, in New Mexico, in Texas, they specifically cover -- not autism or some of the other behavioral-related challenges.

They, in fact, just simply say that in fact we have the coverage that behavioral health treatment is part of that mental health. So I think that’s far different than creating categories.

And I really do believe, especially when it is budget-neutral, that -- according to the CBO -- that it’s appropriate simply to ensure that there isn’t discrimination against this universe which we intend to have, by virtue of the chairman’s mark.

Senator Kyl. Mr. Chairman, I think Senator Menendez --

The Chairman. Senator Kyl?

Senator Kyl. Just a question. So this has then been scored by CBO as budget-neutral.

Senator Menendez. It has.

Senator Kyl. Thank you.
The Chairman. All right. If there is no further debate, all those in favor, say aye.

[A Chorus of Ayes.]

The Chairman. Those opposed, no.

[A Chorus of Nays.]

The Chairman. In the opinion of the Chair, the ayes have it. The ayes do have it. The amendment is agreed to.

Further amendments?

Senator Ensign. Mr. Chairman?

The Chairman. Senator Ensign?

Senator Ensign. Mr. Chairman, Ensign amendment number C-14, as modified, has that been passed out? I will describe it as it is being passed out.

The Chairman. C-14.

Senator Ensign. C-14, protecting states from an unfunded mandate. Before I do that, I would like to ask unanimous consent to have this -- it was a note from Tom Barthold written to me in response to an earlier question that I had. We could just enter that in the record. I will just read it real quickly.

It had to do with earlier today we had the debate on the individual mandate and what penalties if somebody conscientiously, because they objected to the individual mandate, because they believe strongly in the
Constitution, so they were going to protest and say "I am not going to pay my taxes" or "I am not going to pay this mandate," they could be subject to the IRS for not paying that fine, that tax.

It says Section 7203 of the Code provides that if there is a willful failure to file, pay, maintain appropriate records and the like, that the taxpayer may be charged with a misdemeanor with a penalty of up to $25,000 and not more than one year in jail. So citizens could be subject to jail.

Further, if it is found that it is actually tax evasion, felony tax evasion provides for restitution and a fine up to $100,000 and for an individual, up to five years in jail.

So I just wanted to have that on the record so that people know, if there are Americans that are sincere about this, and I have heard from a lot of them that they believe that this is unconstitutional, the individual mandate, and they protest because they believe it is against the Constitution, that they think it is their constitutional right to not do this, then they could be facing fines and even possible jail time.

Now, to get back to my --

Senator Conrad. Would the Senator yield just on that point?
Senator Ensign. Sure.

The Chairman. First of all, without objection, it is included in the record.

Senator Ensign. Thank you.

The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, just on that point, I used to be a former tax commissioner in my state.

The Chairman. Really? Well, we forgive you.

Senator Conrad. I would just say to my colleague, at the levels that we are talking about here, if you could find anyone that has ever been jailed for a failure to pay an amount like this, I would be very surprised.

Senator Ensign. Well, my trust in the IRS maybe does not go as deep as yours. But having said that, let us go on to my next amendment.

What my amendment says, earlier today, we had an amendment that was a little different, but it had the same kind of a principle. It was dealing with the mandate to the states on Medicaid.

We understand that we are expanding new populations on Medicaid. That is part of how to get more of the uninsured in there, by increasing the level of the federal poverty level in many of the states.

It establishes a new 133 percent federal poverty level as a new mandatory minimum. Well, my state, for
non-pregnant adults, non-elderly, non-pregnant adults, we have up to 25 percent. So this is a huge increase in my state.

I realize that the Chairman took care of my state for the first several years, not of my asking, by the way, but realized that that is something that was done in the mark.

My concern and the amendment says that states would be able to opt out if this increases their costs by more than 1 percent. The average in the bill, I think, is 1.3 percent based on one table. Other tables, the Urban Institute, not exactly a rightwing think tank, has estimated the average is somewhere around 2.7 percent.

So we can debate numbers, but the bottom line is we know there is going to be an increased cost due to expansion of Medicaid eligibility to the states.

Now, my home State of Nevada is in dire straits right now as far as the budget. Many of your states are, as well. The Senator from Michigan said that her state is the worst of any state. I am not sure that her state budget is any worse than our state budget.

We literally have had to slash education spending in our state. Folks are talking about now laying off police officers. In many states, they are talking about releasing prisoners, because they cannot afford to keep
them in jail.

The bottom line is the states are in dire, dire need and they just do not have the revenues. We do not know.

There seems to be a structural problem now. We have looked at our state's budgets for the out-years and even when this thing starts taking effect, people say, well, the economy will be better and everything, nobody really knows whether or not, because of these new baselines.

They are not starting from up here anymore. They are starting from way down here. So their budgets may not be able to afford when they have to start paying.

The estimates, even by the Democrat staff here, from what I understand, you are estimating an increased cost to the states of 1.3 percent over the 10 years.

But when this thing fully goes into effect, correct me if I am wrong, the states actually have to pick up almost 18 percent, after the strongest federal subsidies. In the out-years, they have to pick up a full 18 percent. Is that correct or not correct?

Staff Member. No. After the phase-down of the enhanced FMAP, the average state obligation for newly eligibles would be about 11 percent.

Senator Ensign. I thought the Federal Government's share went down to 82.3 percent at that point.

Staff Member. Eighty-nine percent is the average.
Senator Ensign. Well, either way, it is much higher than the current over that 10-year period, because I realize some of this frontloaded from the states to make it look attractive. But in the out-years, it is higher and higher.

Now, I would argue if the governors came to us and said "We like this program," would say the federal share is too low, if this is a program they actually wanted. But since we are forcing this program, this is an unfunded mandate.

And we have heard how many times from local government officials, state government officials, on and on and on, "Don't put anymore unfunded mandates on us. We can't handle anymore unfunded mandates. You guys pass the bills up there, pass the laws up there, and then you expect us to pay for them back here in our states."

One of the things we passed back in 1995 was this law about we are not going to have anymore unfunded mandates. Mr. President, this seems to be a big unfunded mandate.

If we remember the argument on No Child Left Behind, we heard from states this is an unfunded mandate. We even put legislation in No Child Left Behind that says if this turns out to be an unfunded mandate, you do not have to pay for it.
Well, what my amendment says, simply, is if it turns out to raise the cost for the states by more than 1 percent, the state can opt out. So if the State of Massachusetts, State of West Virginia, you want to stay in it, even though it raises your cost higher, you can do that. Your governor, your state legislature, you can do that.

Do we think that we care more about our people than our state governors, our state legislatures? The state legislatures are closest to the people and it would seem to me that we should put our trust in our state elected officials. They are accountable. They are closer to the people. They are very accountable to the people.

The saying is that government closest to the people is best. Well, let us put our trust them. Let us say that if it raises by more than 1 percent cost to the states, let us go ahead and trust those state elected officials, our governors and state legislatures, to say, "You know what? We want to suspend the program. We appreciate that, but that is just not something we can afford. So we are going to opt out. We care about our people and we are going to figure out a different way to do it than what you guys said and we are going to opt out of this program."

Let us give the states the flexibility to do that.
Support my amendment and you will be giving the states the flexibility to do just that.

Senator Conrad?

The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, could I, by unanimous consent, just ask that the speech that I gave one hour ago on this same subject, on an amendment that was virtually identical, just to appear on the record once again.

The Chairman. I was going to incorporate all discussion by reference.

Senator Cornyn. Mr. Chairman, I would object. I would like for him to repeat it.

Senator Conrad. Senator Cornyn, who is a very dear friend and very kind, would like me to give the speech all over again. I will send you a tape of it tomorrow morning.

[Laughter.]

The Chairman. Any discussion on the amendment?

Senator Grassley. Yes, Mr. Chairman.

The Chairman. Senator Grassley?

Senator Grassley. This amendment is a good place for me to bring up a question that I have about the modification. Yesterday, the Committee distributed a table entitled "State Medicaid Spending 2010 to 2019."
So focus on that a few minutes.

There is a version that was distributed yesterday and, also, you remember the table that was distributed on September 14. Last week, your table showed that Iowa would save money under the bill.

This week, Iowa will spend money, spend more money, and, of course, I think my feelings ought to be hurt as a result of that. In fact, it appears that 38 states appear to have seen their spending go up since last week.

I also cannot help but notice that the State of Nevada improved considerably since last week. Last week, Nevada was looking at a 5 percent increase. This week, Nevada is down to 1.6 percent increase and it is the only state that has seen such an improvement of that magnitude.

I do not know whether this is some shameless attempt to get Senator Ensign's vote or what.

[Laughter.]

Senator Ensign. You figured it out. You figured it out.

Senator Grassley. But we need to protect state budgets from this sort of an expansion and I favor the Ensign amendment.

The Chairman. Any further debate?

If not, all those in favor of the Ensign amendment,
vote aye -- that is, by recorded vote.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. I vote no.

The Clerk. Mr. Conrad?

The Chairman. Pass.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

Senator Kerry. No.

The Clerk. Mrs. Lincoln?

Senator Lincoln. No.

The Clerk. Mr. Wyden?

The Chairman. Pass.

The Clerk. Mr. Schumer?

Senator Schumer. No.

The Clerk. Ms. Stabenow?

Senator Stabenow. No.

The Clerk. Ms. Cantwell?

Senator Cantwell. No.

The Clerk. Mr. Nelson?

The Chairman. Pass.

The Clerk. Mr. Menendez?

Senator Menendez. No.

The Clerk. Mr. Carper?

Senator Carper. No.
The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Mr. Hatch?
Senator Hatch. Aye.
The Clerk. Ms. Snowe?
Senator Snowe. Aye.
The Clerk. Mr. Kyl?
Senator Kyl. Aye.
The Clerk. Mr. Bunning?
Senator Bunning. Aye.
The Clerk. Mr. Crapo?
Senator Crapo. Aye.
Senator Grassley. Aye by proxy.
The Clerk. Mr. Roberts?
Senator Grassley. Aye by proxy.
The Clerk. Mr. Ensign?
Senator Ensign. Aye.
The Clerk. Mr. Enzi?
Senator Enzi. Aye.
The Clerk. Mr. Cornyn?
Senator Cornyn. Aye.
The Clerk. Mr. Chairman?
The Chairman. No.
The Clerk. Mr. Conrad?
Senator Conrad. The same vote as an hour ago on
the same amendment, no.

The Clerk. Mr. Wyden?

Senator Wyden. No.

The Chairman. Senator Nelson is no by proxy. The Clerk will tally the vote.

The Clerk. Mr. Chairman, the final tally is 10 ayes and 13 nays.

The Chairman. The amendment fails. Do you want to do this again?

Senator Ensign. We might win it next time.

The Chairman. Does anyone seek recognition to offer an amendment?

Senator Enzi. Mr. Chairman?

The Chairman. Senator Enzi?

Senator Enzi. Since I am one and one, I want to see if I can break the tie here. I would call up Enzi amendment C-6. There is no modification to it. So it is in your regular packet.

What this amendment does is requires that before the Finance Committee votes on any -- let me get the right amendment here.

The amendment would allow individuals who would otherwise be enrolled in Medicaid through the expansion in this bill the right to choose to be covered by Medicaid or a qualified private health plan offered
through the state exchange.

The reason I am doing this is we are about to shove 11 million more people onto Medicaid and Medicaid has got some problems already. It is not the best base to build on, because it is an inadequate program at the moment.

According to a 2007 Wall Street Journal article, Medicaid beneficiaries have poor health than their peers with private insurance. Additionally, many Medicaid patients cannot find doctors, and we have talked about this before. So they are not getting the care they need.

In California, 49 percent of family physicians do not participate in Medicaid. In Michigan, the numbers of doctors who do not see Medicaid patients has risen from 12 percent in 1999 to 36 percent in 2005.

The 2002 MedPAC report stated, and I have quoted this a number of times, that is 2002 report, "Forty percent of physicians restricted access for Medicaid patients because of concerns about reimbursement and billing paperwork."

A 2009 Health Affairs report indicates that Medicaid physicians' fees increased by 15.1 percent, on average, between 2003 and 2008 and that is below the general rate of inflation, not the medical rate of inflation, the general rate of inflation at 20.3 percent. So it results in a real reduction in real fees.
Even Montana Governor Brian Schweitzer, who is a Democrat, believes that this is a bad idea and unaffordable. To quote him, "One of the least effective programs in terms of health care in the history of this country is something called Medicaid. Now, Medicaid is a system that isn't working, almost everyone agrees. But what Congress intends to do is increase the number of people on Medicaid so they could do it for the cheap. It's not working for anybody."

So I am saying if we promise someone coverage and they cannot see a doctor, it really is not health care. Every American should be able to choose to enroll in private insurance. These are the choices that Senator Wyden and I have been talking about for a long time.

Medicaid and its unique benefit package provide necessary services and supports for many people with disabilities and special needs, but it does not mean it should be the only choice of 11 million additional low income Americans.

Senators and their staffs all have the ability to choose between competing plans, competing private plans, and I believe we should give that same type of choice to low income Americans. The bill prevents 11 million low income Americans from enrolling in -- requiring that they enroll in Medicaid and, therefore, become a part of this
lack of doctors.

My amendment fixes this problem.

Senator Conrad. Mr. Chairman, might I ask Senator Enzi?

The Chairman. Senator Conrad?

Senator Conrad. I thank the Chairman. Senator, if I could inquire. Is there a score to this? Is there a cost?

Senator Enzi. I am sure there is a cost and I have an offset listed and that is to reduce the exchange subsidies as much as is necessary to make the amendment budget-neutral, starting with the subsidies awarded to individuals earning 400 percent of poverty. For a family, that is $90,100 worth the income and they get about $2,000 as a subsidy.

Senator Conrad. I think there is a kernel of a good idea here. There is actually work being done on another amendment and requests in for CBO scores on a series of options.

It is not quite like this, but it has some of the same elements, the idea of a basic plan that people would have available to them. As I hear, Senator Enzi, what you are describing is an option for people, if they are in the expansion population, to go into Medicaid or, at their choice, to go into another plan, a private plan.
It would seem to me there would be a way of constructing that in a way that would not have a cost. I do not know if the Senator would be open to exploring that potential, but I am attracted to the notion -- and there have been a lot of discussions on our side, as well, about this about this very point -- an alternative, some kind of basic plan that was not Medicaid, that would be available.

It is not clear whether it would be done instead of Medicaid entirely or is an option. But I do know if the Senator really wants to push this to a vote tonight, in which case I would probably be constrained to oppose it, because I would hope we could do this in a way that did not cost money.

But I do think there is a kernel of a good idea here that should not be just dropped without further exploration.

Senator Schumer. Mr. Chairman?

The Chairman. Senator Schumer?

Senator Schumer. I would like to speak, but I am going to defer to Senator Wyden first.

Senator Wyden. I thank my colleague. I am going to vote for this amendment. It seems to me that this amendment at least starts the debate, in a serious way, about additional choices for individuals who are now part
of a dysfunctional system, a health system that is broken, that, in effect, puts the poorest and most vulnerable people in our society through every manner of bureaucratic red tape anytime their status changes. This is a program that does not work for poor people, it does not work for taxpayers, and we ought to be pushing to come up with additional choices. As the Senator from Wyoming knows, my first choice for the poorest among us to have choices like members of Congress.

Many of you have heard me say that the gorgeous Wyden twins, almost two, pictures available on my iPhone at any point, I do not think that they should have a right with their health plan to always get better coverage because they are the offspring of a member of Congress and not the poorest among us.

Now, as Senator Conrad indicated, and I think he is correct, this is going to need a significant amount of work. But what Senator Enzi is doing tonight is at least starting in a serious -- and I want it to be bipartisan, which is why I intend to vote for it -- effort to come up with these additional choices.

We can debate the details. For example, as I understand it, under the legislation, nobody who earns over 400 percent level of poverty would even be eligible
for subsidies. So this involves people earning right at the 400 percent of poverty. We can work on those kinds of details.

The Chairman. I must say that this is a very bad amendment. It would cost about $50 billion. That is an unofficial CBO score, $50 billion. And how is it paid for? It is paid for by starting at 400 percent and going down.

There are some on this Committee that are concerned about affordability. If you are concerned about affordability, you will reject this amendment out right immediately.

For example, in the first category, 400 to 300 percent of poverty is going to cost about $20 billion. That is 20 out of the 50 right there. So you go down below, you are going to eat up the 30, down 300 to 200 percent of poverty.

This amendment, if you are concerned about affordability, and I think most members of this Committee are, this one just blows affordability out the window. We cannot accept this amendment.

Now, I understand what some of the earlier discussion has been, trying to find some other option, and somebody said this amendment needs a little work. Well, it needs so much work that it has got to be
rejected so we can come out with something that maybe does make some sense.

But I have got to tell you, if you are worried about affordability, I cannot understand how anybody would vote for this amendment.

Senator Schumer. Mr. Chairman?
The Chairman. The Senator from New York.

Senator Schumer. I think both Senator Wyden, Senator Conrad and you, Mr. Chairman, even though you have come out on different places, have some truth here, as does Senator Enzi's amendment.

We do want to provide choice. There is no question about it. It is a good thing. It is part of the American way. We give people choice.

But the problem is this. Until we get the insurance industry to provide choice at reasonable prices, it is just extremely expense. Hence, Senator Baucus says $50 billion, I would not vote for it because of where it would take it from. People who are 300 and 400 percent of the poverty level are not rich. They are struggling.

You take away their subsidy, they cannot afford insurance. They just cannot afford insurance. Neither can poor people afford insurance. And one of the reasons is the lack of competition in the industry, the fact that our system, while providing good care, is less efficient
than any other.

So to simply say let people get out of Medicaid, which is cheaper, considerably cheaper, and go to the exchange, it is going to create havoc unless you reform the system, which leads me to two other points.

Senator Enzi said -- and he is a good man, you are and I like you very much, but you said we are shoving people into Medicaid. These are not people sitting by some pool with their feet up in a lounge chair being forced to go into Medicaid.

If you give them the choice of what they have now or Medicaid, they are grabbing Medicaid, because they do not have health insurance. Most of the uncovered people are people right above the 100 percent or 133 percent of poverty.

So Medicaid has its problems, no question about it, and we ought to fix it, but it is a lot better than having nothing and they are not being shoved anywhere. We are trying to help them in this bill and ask them, not us. I guarantee you 99.9 percent of people would say "I would rather be in Medicaid than have no health insurance" when you are at that poverty level and cannot afford any health care yourself.

I will never forget this scene. There is a movie about James J. Braddock during the Depression. His
children got very sick, but he had no money for heat. It was during the Depression. There was a very touching scene where he had to go to his old buddies and beg money so he could just pay for heat, because he could not afford a doctor and he had to take them over there.

It is a horrible thing not to have health care, horrible. You love your children, you love your spouse. So they are not being shoved anywhere. That is not fair to the Medicaid program, to the good intentions of this country when it passed it, and it is not saying we should be complacent.

I would just make one other point and that is this. I like choice and that is why the thrust of this amendment is good, even though -- so my first point was let us have choice, but let us reform the insurance industry so we can afford the choice.

I think Senator Cantwell is working on an amendment that does just that and we ought to pay careful attention to it. But the second thing I would say is we are always for choice when the existing program is a government program. Get them out of Medicaid.

Why should we not be choice when the existing program is private insurance? If you are at this 400 percent level and your amendment passes, you have no subsidy, why should we not give them a public choice, a
public option?

      Choice is great just one way, but not the other way?
No one should be forced to take one plan or another.
But many, many people in this country are forced to take
a private insurance plan, where there is very little
competition, because 94 percent of the markets are
concentrated, according to the Justice Department.

      We will debate public option tomorrow, but I wanted
to make sure that the issue of choice goes two ways.

      Senator Grassley. Mr. Chairman?

      The Chairman. Senator Grassley, you have been
seeking recognition.

      Senator Grassley. Yes. Well, listen, this whole
issue ought to be about choice and people in Medicaid do
not have choice and you have quite an ironic situation in
this legislation.

      You can have a person with an income below 100
percent of poverty -- a person with an income below 100
percent of poverty can buy insurance in the exchange. A
person that gets a tax credit to purchase insurance
through the exchange, you cannot get that sort of -- that
same person cannot get a tax credit to purchase insurance
through the exchange.

      A person with an income below 100 percent of poverty
cannot buy health insurance through an agent or health
plan without using the exchange and a person cannot get a tax credit if they buy directly from an exchange or health plan, but do not use the exchange.

So a person with an income below 100 percent and a person with an income of 101 percent can buy private insurance, but the person with the higher income gets the tax credit.

So you have got all this irony in this situation now. And why is this the case? If a person below 100 percent of poverty cannot get a tax credit, they cannot purchase health insurance in the exchange and the bill effectively discriminates against poor people and forcing them into Medicaid.

There is no good answer why that situation comes out, but that is the situation. So Senator Enzi's amendment provides all Americans a real choice and that is what we ought to be doing as much as possible as we can in this legislation.

The Chairman. I wonder if I could ask, Mr. Schwartz, at what levels of poverty do people have choice in health insurance?

Mr. Schwartz. Absolutely, Mr. Chairman. The Chairman's mark provides what has sort of become referred to as the bridge. If you picture a bridge, on one side is Medicaid, on the other side is the exchange.
The Chairman's mark provides that individuals with incomes between 100 and 133 --

The Chairman. Start below 100 percent. What choice?

Mr. Schwartz. Senator Grassley was right on that part. Those individuals below 100 percent of poverty are Medicaid eligible and, therefore, ineligible for a tax credit in the exchange.

The Chairman. What is the benefits package?

Mr. Schwartz. The benefit package under the Chairman's mark for parents and childless adults --

The Chairman. I am talking about 100 percent, at 100 percent.

Mr. Schwartz. At 100 percent or below is what we call the 1937 benchmark benefit package that exists in Medicaid today. The Chairman's mark spells out that that is the benefit package that newly eligible adults in Medicaid would get.

The Chairman. What choice at different levels?

Mr. Schwartz. So then starting at 100 and going up to the 133, the maximum new mandatory eligibility level, those individuals, again, parents and childless adults, would be able to choose between Medicaid on one side of the bridge or the exchange.

The Chairman's mark makes clear that those
individuals are eligible for tax credits to purchase through the exchange. Obviously, at those levels of income, they would get pretty significant credits, and it requires that the states make a contribution equal to the amount that they otherwise would have made had that individual chosen the Medicaid side of the bridge.

This amendment, I think, is, in theory, expanding that, so that it goes all the way down to zero, although it does not make clear that the individuals are eligible or tax credits.

Senator Enzi. Mr. Chairman?

The Chairman. Senator Enzi?

Senator Enzi. Of course, they would be eligible for tax credits. You cannot give them something much less than you are giving the other people.

This is not a new request. At the 61 meetings our group of six had, I do not know how many times I have raised the idea that people under Medicaid ought to have these other choices just as well.

In some instances, we are going to be moving people from private insurance into Medicaid. Why does it cost? It costs because the people get real access to real doctors, Medicaid people.

My argument has been all along that Medicaid people do not have insurance, because they cannot see a doctor.
That is a basic criteria. And we are saying, no, if you are 100 percent of poverty or less, we do not care if you do not get to see a doctor, and that is wrong. That is completely wrong.

So we have got to do something to change that and one easy way to do to change it is to say, yes, we will pay a little bit more so that you can have access. I think that is really fair.

The original score I saw on this had about $50 billion extra and that is what you say this would cost. That would be fair to the Medicaid people. That would be fair.

But I am saying that there are some other ways of doing the same fairness and my amendment does not use up your $50 billion that way. Instead, it takes the upper people that probably could afford to go into the regular insurance market and eliminates their subsidy, those that are at 400 percent of poverty.

Senator Kerry. Mr. Chairman?

The Chairman. Senator Kerry?

Senator Kerry. Mr. Chairman, I would just like to inquire. Senator Enzi works awfully hard on this stuff and he has put a lot of time into it on two committees, this and the HELP Committee. So I appreciate his thoughtfulness about it all.
But I am trying to understand a couple of things here. First of all, it is my understanding that this amendment increases the overall cost of the Chairman's mark, unless there is an offset.

Mr. Schwartz. That is correct.

Senator Kerry. And the offset that Senator Enzi has chosen is a reduction in the subsidies that we have chosen to give people to buy into the exchange.

Mr. Schwartz. That is correct.

Senator Kerry. So we are kind of robbing Peter to pay Paul, in effect. We will have some people be able to go from Medicaid into an exchange, but at the expense of losing people who get a subsidy and buy into the exchange.

Mr. Schwartz. That is correct.

Senator Kerry. That is one downside. Second issue, Medicaid provides, does it not, some of the best and most cost-efficient protection to the lowest income Americans who have a special health need of one kind or another?

Mr. Schwartz. That is correct.

Senator Kerry. If you have a disability, people who are newly eligible for Medicaid are more likely, are they not, to have a chronic condition, serious illness, special needs that a private insurance plan, particularly
an exchange plan, may not be equipped to address?

Mr. Schwartz. That is correct and, in fact, the inclusion of a significant number of low income individuals into the exchange will have an effect on the risk pool for everyone in the exchange and I think that this population, the population below 133 percent of poverty, is roughly 1.3 or 1.5 percent sicker, if you will, than the higher income population.

Senator Kerry. Now, is it not also true that in some instances, not across the board, but in some instances, under Medicare Advantage and in the Part D program for drugs, we have had some instances where companies, in bad faith, have made proffers to seniors, proffers to people, brought them in and they do not get what the offer said. Is that not accurate?

Mr. Schwartz. That is correct.

Senator Kerry. We have had some bad abuses in that effect.

Mr. Schwartz. That is correct.

Senator Kerry. So what I fear is that we create an exchange and we put a vulnerable population into the exchange that already has great difficulties navigating the health care system. I think everybody would agree that the private plan networks are less likely to include the kinds of safety net providers that you have in
Medicaid.

Mr. Schwartz. That is also correct.

Senator Kerry. So I think each of those realities builds a very powerful case for why this does not make sense. The idea of choice sounds good, but in the practical application to the world of Medicaid and the type of folks who are enrolled in it, unless you have some massive oversight system that I do not see here to guarantee delivery or quality of service, I think we are buying into a lot more problems.

Mr. Schwartz. If I could just chime in on one thing, Senator Kerry.

Senator Kerry. Would you, please, Mr. Schwartz?

Mr. Schwartz. I think we think of Medicaid as sort of this program that exists as a public program, but a significant percentage of the beneficiaries actually receive their care through Medicaid managed care, which is private plans, some for profit, some not for profit, that contract with the states to provide services. I think that there is a special recognition in the Medicaid statute where there are additional protections imposed in an effort to protect the beneficiaries.

There are additional requirements imposed on the plans that can participate in Medicaid and they are more stringent than those that exist out in the commercial
market and it is exactly for the reasons that you enumerated.

The Chairman. Thank you very much. I appreciate that. Senator Schumer?

Senator Schumer. I would just like to follow-up on Senator Kerry's line of questioning, because, again, this is very expensive to do and we are not sure it would give better care.

So let us just take the example of the bridge which was talked about a minute ago and we said that people from 100 percent to 133 or 135 --

Mr. Schwartz. One thirty-three, that is correct.

Senator Schumer. -- 133 would be allowed to leave Medicaid and go to private insurance.

Mr. Schwartz. That is correct.

Senator Schumer. How much did CBO estimate that costs?

Mr. Schwartz. That costs the Federal Government about an extra $20 billion.

Senator Schumer. $20 billion. And how many people did CBO estimate would join that program?

Mr. Schwartz. About three-quarters of a million.

Senator Schumer. Why so few, by the way?

Mr. Schwartz. Well, I think for the best answer, you would probably have to ask CBO. But I think that
their underlying assumptions were that the sickest and
highest need individuals were not likely to go and --

Senator Schumer. Because the insurance would not
take them.

Mr. Schwartz. Because the benefits are better
under Medicaid.

Senator Schumer. Medicaid, the benefits are
better. Now, let me ask you this. Just do the math for
us. So three-quarters of a million --

Mr. Schwartz. I am not good at math, Senator
Schumer.

Senator Schumer. Do we have anyone at the table
who is? You are good at almost everything else, Mr.
Schwartz.

Mr. Schwartz. Thank you very much.

Senator Schumer. But if we took three-quarters of
a million by $20 billion.

Mr. Schwartz. I am waiting for some counsel.

Senator Schumer. You want to play some background
music?

Senator Enzi. The answer is $50 billion, not the
kind of math you are doing. I think the CBO number came
to $50 billion, not three-quarters of a million times --

Senator Schumer. But we are saying three-quarters
of a million. The numbers are square with -- CBO said
just this for the bridge, not for your amendment, but it
is analogous, that three-quarters of a million people
would go from Medicaid to the exchange and it would cost
$20 billion.

I am just asking the cost per person, which we can
just figure. If it is a million, let us figure it out.

Senator Enzi. The cost does not go quite that way.
Otherwise, CBO would not have come up with the other
number that they came up with. The two numbers do not
jive.

Senator Schumer. Just on average.

Senator Enzi. The two numbers do not jive.

Senator Schumer. Why not?

Senator Enzi. That is the problem we have got with
numbers around here.

The Chairman. I wonder if Senators should be
displaying their math prowess or lack of prowess publicly
like this.

Senator Schumer. I am just judging average cost
per person.

Senator Schumer has the floor.

Senator Schumer. Let me just finish here. It ends
up costing a lot of money a person. If it was a million
people and $20 billion, it would be $20,000 a person.
Right?
Mr. Schwartz. I think that is right.

Senator Schumer. So this is more. This is about $23,000 or $24,000 a person.

Mr. Schwartz. Senator, that is a multiyear figure I believe you were quoted. So you would have to divide it by the number of years. If it were 10 years, it would divide out to --

Senator Schumer. Well, let us ask. How many years did they estimate per person would be on there?

Mr. Schwartz. That was the total budgetary cost.

Senator Schumer. So it ends up being about $2,300 per year per person.

Mr. Schwartz. I think that is right.

Senator Schumer. And the bridge does not start until 2014. Let me make my point without specific numbers. It is very expensive.

Mr. Schwartz. I appreciate that.

Senator Schumer. It is very expensive. If we were, for instance, to, in the abstract, put all Medicaid people onto an exchange, it would be hugely expensive, probably not for better care. They would be better off going to community health centers, rural health centers, places that are within Medicaid, but, by all acclamation, give excellent care.

And it gets to a bottom line here that we can do all
the exchanging around we want. Moving from both the
public system and the private system, are expensive and
getting more expensive. We had better get at the costs
and getting the costs down, because if we do not, all the
exchanging in the world will not make a difference. We
are not going to be able to afford health care either for
the poor or lower middle class with subsidies or for
average middle class people just on their own.

So to me, this argument, which is better public-
private, private-public, I do not have a dog in that
fight. I think both have shown to give good care for a
lot of money and the reason is our delivery systems. The
reason is the kinds of inefficiencies. The reason is the
lack of prevention.

This amendment, I believe, will cost a lot of money,
maybe $50 billion, the Chairman estimated. It is good to
be the Chairman. You can just throw out a number and it
is accepted as dogma. But a lot of money and not really
improve health care at all, although it will benefit the
people who are getting the money, ultimately, the
insurance companies and the providers, and we ought to be
reforming the system in terms of cost rather than arguing
about public versus private at the time.

The Chairman. How about voting on the amendment?

Senator Wyden. Mr. Chairman?
The Chairman. Senator Wyden?

Senator Wyden. I would just like to ask Senator Enzi a question. I am not even going to begin to get into the math here.

Senator Enzi, is it not your desire to address the affordability issue without tethering people to a program that desperately needs reform? Is that not the purpose of what we are trying to do here? Because I think if it is, we are going to be able to get back into the details of exactly how the subsidies would work.

You and I have talked about it. I envisioned the subsidy levels as being at 400 percent of poverty. But to me, I think what is important now, as we go to the vote, is establishing the principle, because as I understand it, you want to address affordability without, in effect, tying people for the indefinite future to a program that very much needs reform. Is that your intent?

Senator Enzi. That is absolutely the case.

The Chairman. Senator Kyl was seeking recognition.

Senator Kyl. Mr. Chairman, I will just be very brief. There is kind of a hybrid of this in Arizona, because from the very beginning, Arizona has had a waiver from regular Medicaid. It is called the AHCCCS program and it is essentially HMOs.
The cost would probably be somewhere in between.

But to Senator Kerry's point, there is a lot more integrated and coordinated care, which is what HMOs do. I am not sure, therefore, that in terms of the quality of care, that it would necessarily -- in fact, I think the quality of care would actually be better, not worse.

I think, to Senator Wyden's point, having some options here does make some sense. So I hope that colleagues would support this, as Senator Wyden said, as the beginning of a debate about some other alternatives. Thank you.

The Chairman. Any further debate? Senator Lincoln?

Senator Lincoln. Can I just ask a question of Mr. Schwartz? Can states get waivers to provide premium assistance to Medicaid patients to go into the marketplace?

Mr. Schwartz. That is absolutely right, Senator, and Senator Kyl just made that point that Arizona has a longstanding waiver.

Senator Lincoln. And some of that can be done now. The point is that it is expensive in the marketplace and I would imagine not many people do it.

Mr. Schwartz. I think it is difficult for states
to do that, but they certainly have that option.

Senator Conrad. Mr. Chairman?

The Chairman. Senator Conrad?

Senator Conrad. Mr. Chairman, just very briefly.

I agree with the Chairman that this pay-for is a problem, certainly with respect to affordability. We wrote a whole series of changes in the group of six before we broke up to improve affordability and this would undermine some of those changes. I think that would be unfortunate.

At the same time, I personally believe Senator Enzi has opened up a discussion that really does merit more attention. That is, in the Medicaid population and certainly when you expand it, there are those who benefit greatly from the more extensive array of services that are provided there.

I talked about some of that in the gang of six. A gentleman that I have seen who has to be helped out of bed in the morning, he is paraplegic, has to be helped into bed at night and if he did not have that kind of service that is not available in the typical health insurance plan, he would not be a productive citizen.

This is somebody who goes to work and works eight hour a day, is a taxpaying citizen, is low income. But the only way he is able to function is people help him
get out of bed in the morning and get to bed at night. But there are others who have a different circumstance who going to be in the Medicaid expansion population who might be better off with an alternative choice, a more basic plan, one that would be less expensive.

And before we throw the baby out with the bathwater, I cannot vote for your amendment as is, Senator Enzi, because of the pay-for, but I do think you have opened up a discussion that merits more attention.

Senator Cantwell. Mr. Chairman?

The Chairman. Senator Cantwell is seeking recognition.

Senator Cantwell. Thank you, Mr. Chairman. Actually, I have a question for Senator Enzi on what income level a population are you considering. Are you talking at 133?

Senator Enzi. We are talking about the zero to 100 population that has no choice now because the 101 to 133 have a choice.

Senator Cantwell. So how would they get private coverage?

Senator Enzi. By having a choice with the subsidy.

Senator Cantwell. With the subsidy.

Senator Enzi. Yes.
Senator Cantwell. Mr. Chairman, I think, to me, this is a very important discussion and it is a very important discussion from my perspective. I have been kind of quiet here for the last 24 hours, but working hard on something that I think is very important.

First of all, it is interesting that the other side of the aisle has offered so many amendments to cut the subsidy and do various things for the lower income population with the reductions in that subsidy.

If you are serious about that, I think that is very good news for America. I say that because this is about driving down the cost of health care and many Americans are asking if you just subsidize expensive insurance, how are you really going to drive down the price and cost and competition.

So if you really do believe that, then there is, as Senator Conrad is saying, a world of opportunity to discuss exactly how we are more cost-effective with federal dollars and providing better coverage.

I truly believe, from the experiences in Washington State, that you can provide coverage for the same population that you are providing the tax incentives for for 25 percent less. That means instead of giving subsidies that are just going to prop up the price of insurance, we instead could create a market that would
drive down the cost and provide less of a burden to the taxpayer.

But there is an additional benefit. By creating those markets, we also show efficiency and the more efficiency we can show in the market of delivering health care services, the more we all win. Everybody who gets the benefits wins. The competition is there for there for the marketplace.

With Senator Conrad, I have a concern about how you are paying for this. I wonder if the Senator would consider, since I have an amendment that is addressing the population up to 200 percent of poverty and saying that we could provide cheaper care, if the Senator would withhold his amendment for now so we can compare notes and look at the cost of how we do this.

The reason I am asking this is because this is -- Senator Wyden is bringing up choice. But this is about whether we are going to provide enough competition in driving down the price.

I think there is a way here in which states can play a role in helping to negotiate for private coverage and get us better coverage instead of us giving someone a tax subsidy at 200 percent of poverty so that they can go buy $6,500 insurance and their contribution is somewhere around $1,900.
We in the State of Washington have shown that you can have a basic health plan and the costs are probably half of that and the individual contributions are definitely half of that cost.

So I think this is very much worth exploring. I think the way the amendment is currently drafted, though, is problematic. So I would ask Senator Enzi if he would consider engaging -- and I can understand if you have been part of the gang of six for whatever it has been, six months, that must be a challenging discussion, but there are some of us who believe that this may be an important compromise that we could work through.

The Chairman. Senator Enzi?

Senator Enzi. Well, I appreciate the offer to withhold and look at something new. I am not going to do that. I am going to ask for a vote at this time. I will be happy to continue to work with you on any ideas.

This is something that I have been bringing up for months, that we are not being fair to Medicaid people and we need to be fair to Medicaid people and I have suggested one way of doing it. Others might suggest some other ways of doing it.

But right now, the way that we are handling costs in this government program is to cut back on what doctors get and, as a result, the doctors will not take the
Medicaid patients. It is not fair to the Medicaid patients. If you cannot see a doctor, you do not have insurance.

Not only that. There is a stigma to having Medicaid. Part of that stigma, though, is because the doctors will not take you. But there are people who will not take that government handout that way because they know that that is what it means to their neighbors and their friends. I would like to finish my statement. I have been patient through all of these others.

You can save money if you cut back on the doctors. That is what CBO has told us before. But it means that Medicaid patients will not be able to see the doctor.

There are a number of different ways of doing the pay-for on this. I did one of the easier ones, because I do not have a score and I know tough it would be to get a score. But it would be easier for others to get a score. Just a slight decrease in some other subsidies would pay for this one.

But one of the things I want to emphasize right here is that this shows how big the problem is that we are trying to work on. We have never had a bill, I will bet, in the history of the United States that has encompassed absolutely everybody in the country, every single individual, every single business, every single provider.
We are doing that and we are doing it in one heck of a hurry and that is why I guess we have not had time to talk about this Medicaid option, where people could have a choice if they are under Medicaid.

I know we are going to have a chance to talk about that tomorrow, but I am willing to bet that that is going to be a bigger topic than we cover in one hour or two hours or however long the Chair will allocate to it, because any one of these things could be a week's topic, we know from our group before. There are just so many questions that need to get answered and if we do not answer them correctly, America winds up in a real hole and we do not want that to happen.

So I want to emphasize this problem that we have of forcing people into Medicaid and not giving them the same kind of a deal that we are talking about giving everybody else in America.

So I would like to vote on my amendment.
The Clerk. Mr. Kerry?
Senator Kerry. No.
The Clerk. Mrs. Lincoln?
Senator Lincoln. No.
The Clerk. Mr. Wyden?
Senator Wyden. Aye.
The Clerk. Mr. Schumer?
Senator Schumer. No.
The Clerk. Ms. Stabenow?
Senator Stabenow. No.
The Clerk. Ms. Cantwell?
Senator Cantwell. No.
The Clerk. Mr. Nelson?
The Chairman. No by proxy.
The Clerk. Mr. Menendez?
Senator Menendez. No.
The Clerk. Mr. Carper?
The Chairman. No by proxy.
The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Mr. Hatch?
Senator Grassley. Aye by proxy.
The Clerk. Ms. Snowe?
Senator Snowe. No.
The Clerk. Mr. Kyl?
Senator Kyl.   Aye.

The Clerk.   Mr. Bunning?

Senator Bunning.   Aye.

The Clerk.   Mr. Crapo?

Senator Crapo.   Aye.

The Clerk.   Mr. Roberts.

The Clerk.   Mr. Roberts?

Senator Grassley.   Aye by proxy.

The Clerk.   Mr. Ensign?

Senator Ensign.   Aye.

The Clerk.   Mr. Enzi?

Senator Enzi.   Aye.

The Clerk.   Mr. Cornyn?

Senator Cornyn.   Aye.

The Clerk.   Mr. Chairman?

The Chairman.   No.

The Clerk.   Mr. Chairman, the final tally is 10 ayes and 13 nays.

The Chairman.   The amendment fails. I understand that Senator Menendez has an amendment now.

Senator Menendez.   Thank you, Mr. Chairman. Mr. Chairman, I would like to call up C-4 as modified. Mr. Chairman, it is not an explosive amendment. It is a rather simple amendment.

Mr. Chairman, this amendment is rather simple and it
is also -- I believe it has just one slight modification to it.

Senator Menendez. Mr. Chairman, this amendment is rather simple and it is also, according to CBT, budget-neutral. It provides for a child-only health insurance option in the exchange and it allows children to qualify for coverage in health insurance exchange and ensures access to any subsidies for which they may be eligible.

Now, one might ask why is this important and I would just simply urge my colleagues to think of a family whose parents are exempted from coverage because it is unaffordable, what would happen to those children?

Unless there were insurance plans in the exchange just for children, these parents would have to sign them for adult coverage, which would be much more expensive, or for gold coverage for their children all together.

I know that all of us, as parents, who are parents, know we would do anything to protect our children and keep them healthy, even if we could not do the same for ourselves.

The amendment is essential to ensure that all children eligible for coverage continue to have access to affordable health coverage and this is particularly important, because under the Chairman's mark, in order for children to receive CHIP benefits, they need to first
obtain private coverage.

Again, if one would think about a child aging out of foster care or consider children with parents whose employers do not offer dependent coverage or, for instance, a child living with a grandparent. In this instance, the grandparent probably gets his or her health coverage through Medicare. So it would be much more affordable for them to purchase a child only plan.

Maybe the grandparent does not have income outside of Social Security, so they do not file a tax form. How would they get the tax credit if the child qualifies for a subsidy?

There are similarly unique and complex circumstances that we may not even have thought of yet. So we need a place for them to be able to go and that is what this amendment does.

As the legislation is currently written, tax credit and subsidy determinations are made using taxpayer information. Under this provision, even if a child could access a child-only policy in the exchange, it is unclear how children would qualify for the tax credit, since they do not file income tax returns.

The amendment would address this issue by directing the HHS Secretary to determine whether alternative means, such as direct subsidies to the exchanges, are necessary.
to provide support for the purchase of such coverage for qualified children.

It is essential to ensure that eligible children who do not have access to family coverage do not slip through the cracks and that is simply what we are trying to do in this amendment, Mr. Chairman.

The Chairman. Thank you, Senator. Ms. Fontenot, how would this affect the exchange structure that we have set up in the bill?

Ms. Fontenot. The difference would be that a child-only policy, for example, would require that one of the benefit categories that is covered is preventive care services. There are different preventive care services that are recommended for children versus adults.

So an insurer would make a child-only policy available. That policy would likely be cheaper, because kids are cheaper to cover, and it would give the parents, as Senator Menendez mentioned, the option to buy just coverage for their children as opposed to a family policy.

The Chairman. It sounds good on the surface. Any considerations here that we should address?

Ms. Fontenot. We checked with CBO just to make sure. It sounds from them as if they have already assumed that there would be child-only policies.
Insurers have these plans today. So they did not think there was any effect.

The Chairman. Any further discussion?

[No response.]

The Chairman. Seeing none, let us voice vote this. All those in favor, say aye.

[A Chorus of Ayes.]

The Chairman. Those opposed, no.

[A Chorus of Nays.]

The Chairman. The ayes appear to have it. The ayes have it. The amendment is agreed to.

Now, I understand Senator Cornyn has an amendment.

Senator Cornyn. Yes, Mr. Chairman. Mr. Chairman, I would like to call up my amendment C-24. We know that there has been a lot of discussion about choice and competition during this health care debate and, certainly, I agree those ought to be two attributes of whatever it is we ultimately embrace.

I would note, as Senator Enzi and others have noted, that the only place we currently do not have competition are the 58 million Americans who are trapped in a broken Medicaid program that fails to provide them access to quality care.

The proposed Chairman's mark is set to lock 11 million more Americans in this broken Medicaid program,
including 2.5 million more Texans. I do not support the
Medicaid expansions in this bill, because Medicaid is not
working for the present population, much less the
expanded population that would be called for in this
legislation.

According to the 2002 MedPAC report, 40 percent of
physicians restricted access for Medicaid patients
because of concerns about reimbursement and billing
paperwork.

Since Medicaid patients cannot find doctors, they
are not getting the care that they need in large numbers.
For example, in California, only 51 percent of family
physicians participate in Medicaid, while in Michigan,
the number of doctors who will see Medicaid has fallen
from a high of 88 percent in 1999 to 64 percent in 2005.

According to the Journal of Health Affairs this
summer, physicians typically have been less willing to
take on new Medicaid patients than patients covered by
other types of health insurance. Medicaid fees reimburse
at a national average of 72 percent of Medicare.

In real terms, Medicaid physician fees, on average,
were declining about 1 percent annually relative to
general inflation over the last five years, and, of
course, this has a direct impact on patients.

Numerous studies have documented the poor patient
outcomes of the Medicaid program relative to patients in private plans. The *Journal of the American College of Cardiology* in 2005 found that Medicaid patients were almost 50 percent more likely to die after coronary bypass surgery than patients with private coverage.

According to a recent Merritt-Hawkins survey, there is an acute lack of access to medical specialists for Medicaid patients. The Chairman's mark may provide Medicaid coverage to up to 133 percent of poverty, but it does not give patients the access they deserve. Again, I do not support the Medicaid expansions in the bill because I do not believe the program works as is and why would you expand a broken program rather than fix it. But if this bill passes and the majority of the members of Congress actually believe Medicaid is a worthy program that provides access to quality of care, then we should lead by example and be willing to enroll ourselves and our families in the same plans.

As public servants, we do not deserve to get health care benefits and choices that are unavailable to the rest of the people that we serve.

So this amendment would require all members of Congress to enroll in the Medicaid program in our home states. And I can guarantee you one thing, Mr. Chairman. If this amendment passes and is incorporated in the final
legislation, Medicaid will get fixed, that is for sure.

The Chairman. All right. It is getting to be 10:30 with this amendment. Any comment? Any debate?

Mr. Bingaman. Mr. Chairman, I think we do some of our worst work around here during these late hours and this is a good example.

The Chairman. That was my point. That was exactly my point.

Senator Cornyn. I will second the motion to adjourn.

The Chairman. This is getting to be silly season. Any further debate?

Senator Cornyn. I would like a roll call vote, Mr. Chairman.

The Chairman. The Clerk will call the roll on the current amendment.

The Clerk. Mr. Rockefeller?

Senator Rockefeller. No.

The Clerk. Mr. Conrad?

Senator Conrad. No.

The Clerk. Mr. Bingaman?

Senator Bingaman. No.

The Clerk. Mr. Kerry?

The Chairman. Pass.

The Clerk. Mrs. Lincoln?
Senator Lincoln. No.
The Clerk. Mr. Wyden?
Senator Wyden. No.
The Clerk. Mr. Schumer?
Senator Schumer. No.
The Clerk. Ms. Stabenow?
Senator Stabenow. No.
The Clerk. Ms. Cantwell?
Senator Cantwell. No.
The Clerk. Mr. Nelson?
The Chairman. No by proxy.
The Clerk. Mr. Menendez?
Senator Menendez. No.
The Clerk. Mr. Carper?
The Chairman. No by proxy.
The Clerk. Mr. Grassley?
Senator Grassley. Aye.
The Clerk. Mr. Hatch?
Senator Grassley. Aye by proxy.
The Clerk. Ms. Snowe?
Senator Snowe. No.
The Clerk. Mr. Kyl?
Senator Kyl. No.
The Clerk. Mr. Bunning?
Senator Bunning. No.
The Clerk. Mr. Crapo?
Senator Crapo. Aye.
The Clerk. Mr. Roberts?
Senator Grassley. Aye by proxy.
The Clerk. Mr. Ensign?
Senator Grassley. Aye by proxy.
The Clerk. Mr. Enzi?
Senator Enzi. Aye.
The Clerk. Mr. Cornyn?
Senator Cornyn. Aye.
The Clerk. Mr. Chairman?
The Chairman. No. Senator Kerry votes no by proxy. I have got a vote change.
Senator Grassley. Ensign, pass by proxy.
The Clerk. Mr. Chairman, the final tally is six ayes, 16 nays, and one pass.
The Chairman. The amendment is not agreed to. I would like to now take a temporary recess, about 15 minutes. So the Committee stands in recess now for 15 minutes.
[Whereupon, at 10:29 p.m., the Committee was recessed.]
AFTER RECESS

[11:10 p.m.]

The Chairman. The Committee will come to order. For the information of all who are interested, the Committee will recess until tomorrow at 9:30 and at 9:30, we will have two votes. The first will be on the Grassley GPCI amendment and the second will be on an alternative. It will be a side-by-side on the same subject.

Those will be the first order of business tomorrow at 9:30. Then we will continue our work after that. The Committee is in recess until 9:30.

[Whereupon, at 11:10 p.m., the Committee was adjourned, to reconvene Friday, September 25, 2009, at 9:30 a.m.]
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STATEMENT OF:

THE HONORABLE MAX BAUCUS
A United States Senator
from the State of Montana 3